openreach

Openreach response to Ofcom consultation: "*Openreach Proposed FTTP Offer starting 1 April 2023 – Equinox 2*"

NON-CONFIDENTIAL VERSION

Contents

1. Executive Summary

*We support Ofcom's provisional finding that the Equinox 2 supplemental offer (**Equinox 2**) will not have a material adverse impact on competition and that, therefore, no action should be taken to prevent the Equinox 2 terms taking effect from 1 April 2023.*

1.1. This response is provided by Openreach Limited (**Openreach**).[1]

The Equinox 2 offer

1.2. Openreach's Equinox 1 offer (**Equinox 1**) took effect on 1 October 2021. Put simply, Equinox 1 makes available certain rental and connection discounts for FTTP lines, subject to Communications Providers (**CPs**) placing a target proportion of their total Openreach broadband orders on Openreach FTTP when choosing to use the Openreach network (the **Order Mix**).[2] The focus of Equinox 1 was to incentivise FTTP take-up when placing orders for new end customers. Ofcom reviewed the terms of Equinox 1 under the established 90-day notification process and concluded that they raised no competition concerns, a finding that was upheld by the Competition Appeal Tribunal (**CAT**) in 2022 following an unsuccessful challenge by CityFibre.

1.3. Equinox 2 is a supplementary overlay to Equinox 1. It extends the offer by introducing certain changes in the level of rental and discounts available in order to encourage CPs to migrate their existing bases of end customers to FTTP when choosing to use the Openreach network. The Order Mix Targets (**OMTs**) are unchanged. There are no volume targets or exclusivity requirements in either Equinox 1 or Equinox 2. Although Openreach does not believe that there is any plausible risk of the OMTs having the effect of distorting incentives to use alternative network suppliers (**Altnets**) in areas where CPs have a choice between Openreach FTTP and other potential network suppliers, Equinox 2 also makes a new Failsafe Mechanism available which allows CPs, if needed, to exclude orders placed in areas that overlap with the Openreach FTTP network when calculating OMTs. The Failsafe Mechanism is designed to eliminate any theoretical possibility of Equinox 2 disincentivising CPs from using Altnets.

1.4. We fully support Ofcom's provisional conclusion that Equinox 2 raises no competition concerns. The terms on which CPs receive discounts under Equinox 2 are not loyalty-inducing and do not act as a barrier to Altnet entry and expansion. Further, there is no basis on which to believe that efficient Altnets would be unable to compete with the new proposed pricing levels.

[1] Openreach Limited is a wholly owned subsidiary of BT Group plc.

[2] Under the terms of the Equinox 1 contract, CPs achieve full rental discounts if the "Fibre Only Threshold" of 80% is reached. Full connection discounts are achieved if the "Fibre Only Target" of 90% is achieved (if Fibre Only performance is between 80% and 90%, CPs qualify for a proportion of the total connection discount available). Ofcom uses the term "Order Mix" to describe these thresholds and we adopt this terminology in this response.

Ofcom's regulatory framework

1.5. Ofcom's review of Equinox 2 is triggered by a requirement introduced in Ofcom's 2021 Wholesale Fixed Telecoms Market Review (**WFTMR**). Overall, the WFTMR established a regulatory framework that was designed to drive competition and investment in FTTP across the UK, including by introducing rules aimed at promoting entry and investment by Altnets. Amongst other measures, these rules established a process for reviewing the terms of any offers that made the terms of supply of network access conditional on the volume and/or range of services purchased, before such terms took effect. The aim of this review was to ensure that such terms were carefully scrutinised in a 90-day notification window, giving Ofcom the ability to take action in advance in the event that it identifies competition concerns.

1.6. Ofcom's approach to promoting entry and expansion by Altnets in the WFTMR framework was, however, carefully balanced. In particular, consistent with the statutory framework, Ofcom was clear that it wanted UK consumers to benefit from the dynamic effects of competition in the supply of network access services as it emerged in terms of innovation, service and prices. However, consumers will only obtain such benefits where there is competition on the merits, not where Openreach is unduly and inefficiently restricted from competing fairly.

1.7. The 90-day notification process was established to go beyond *ex post* competition law in order to promote network deployment. However, at the time of the WFTMR, Ofcom rejected demands to go further and did not, for instance, prohibit Openreach from introducing conditional pricing offers altogether or set a price floor for Openreach FTTP services: "*we also consider that allowing Openreach some flexibility on commercial terms may have benefits, and a ban may deter Openreach from bringing forward commercial terms that ultimately benefit consumers*".[3] This is also why the regulatory framework allows Openreach broader commercial freedom in how it structures FTTP prices across different bandwidths, with price caps only targeted at anchor legacy copper services (and the 40/10Mb FTTP service where these are not available).

UK network investment

1.8. Looked at objectively, Ofcom's regulatory framework is proving successful. For example, Ofcom's Connected Nations reports now show that FTTP availability across the UK increased from 18% to 42% between December 2020 and December 2022, despite the impact of the COVID-19 pandemic. That figure is now likely to be around 50%.[4]

1.9. This expansion of the national FTTP network has been achieved through investment by both Openreach and Altnets, meeting the WFTMR's objective of promoting competition in the provision of FTTP services. Ofcom has reported that Altnets have doubled their collective footprint each year and are expected to reach 11.5 million premises by the end of 2023, funded by approximately £17 billion of investment.[5] At the same time, Openreach has significantly

[3] See, for example, paragraphs 7.152 and 7.177 of the WFTMR Statement.

[4] Connected Nations 2022 - Ofcom. Updated figures set out in Full fibre to reach half of homes, as competition drives better broadband - Ofcom.

[5] Full fibre to reach half of homes, as competition drives better broadband - Ofcom

increased its own investment as it works towards its coverage target of 25 million premises by December 2026, including 6 million premises in hard-to-reach areas, via a build programme requiring total investment of up to £15 billion. There are real societal benefits from the transition to full fibre.[6]

1.10. There is therefore not only no basis for Ofcom to block or seek amendments to Equinox 2 given the absence of any competition concerns (as outlined in more detail below), but also no wider basis for Ofcom to depart from or amend the regulatory framework to provide support for Altnets.

Equinox 2 does not give rise to any plausible risk of barriers to Altnet entry and expansion

1.11. In introducing the Equinox 2 Offer, Openreach is competing fairly on the merits, a view supported by Ofcom's provisional findings, and consistent with its earlier findings on Equinox 1. Indeed, the changes introduced by Equinox 2 were driven by Openreach's own CP customers, who requested more favourable commercial terms in order to drive further FTTP take-up by increasing the pace at which they could upgrade their end customers from copper-based legacy services to ultrafast-capable FTTP connections.

1.12. In its provisional assessment, Ofcom correctly notes that Equinox 2 does not contain any volume or exclusivity requirements that could act as a direct constraint on CPs using Altnets. Nevertheless, Ofcom states that it "*cannot rule out the possibility*" of future scenarios arising that could result in CPs being indirectly disincentivised from using Altnets.

1.13. Ofcom's analysis highlights in particular that any theoretical risk of disincentive effects arising would not materialise if CPs were supporting less than 5% of end customer orders using Openreach legacy copper-based network access in the Openreach FTTP footprint in any given measurement period. There is strong evidence – as set out in Section 3 below – to show that CPs can and will reduce legacy orders to this level and that CPs, supported by regulatory stop-sell rules and the terms of the existing Equinox 1 offer, are on a clear path to eliminating legacy orders for all end customers other than in exceptional cases. In this case, the terms of Equinox 2 would not create any plausible risk of CPs being disincentivised from using Altnets in order to meet the OMTs.

1.14. But, in any event and as Ofcom notes, the introduction of the Failsafe Mechanism eliminates even a theoretical risk of disincentive effects arising, by providing CPs with an effective and practical route to ensure that any decision to use an Altnet could not have an effect on the level of discounts received under Equinox 2.

1.15. Overall, we therefore agree with Ofcom's provisional conclusion that it should not take any action to prevent Equinox 2 from being introduced.

[6] See, e.g., research from the Cebr, which estimates a boost to labour productivity from full fibre of nearly £59 billion by 2025: Full fibre delivering for the UK | Openreach.

No wider competition concerns arise

1.16. In its consultation document, Ofcom also considers two other points raised by stakeholders. Neither of these alleged issues give rise to any plausible competition concerns:

i. First, there is no basis on which to claim that the reduction of some FTTP prices as a result of Equinox 2 could act as a barrier to Altnet entry or expansion. As it notes, average prices will remain above the upper bound of Ofcom's modelled cost range for efficient Altnets as set out in the WFTMR.

ii. Second, there is no basis to allege that Equinox 2 is part of a practice of Openreach repeatedly amending its FTTP prices in a manner that could act as an unfair barrier to Altnet entry and expansion:

a) the process of negotiating prices and responding to customer demands is a clear example of competition on the merits and is to be expected as competition further develops in network access markets and should be seen as the very dynamic effect of competition that Ofcom was looking to create in the WFTMR, acting to the benefit of UK consumers;

b) Openreach's close engagement with its CP customers not only reflects legitimate commercial relationships that are beneficial to both CP customers and UK consumers, but is also a fundamental requirement of both the Commitments agreed with Ofcom and SMP regulation;

c) the process of negotiating prices and making special offers is a common commercial practice across a wide range of industries – customers (particularly sophisticated CPs) are experienced in assessing offers and deciding whether to participate in them; and

d) the characterisation of Openreach amending its pricing offers as "*repeated*" is in any event not supported by the facts.

1.17. In raising concerns over the price levels proposed under Equinox 2, the perceived frequency of pricing changes and/or the nature of Openreach's CP customer engagement, stakeholders appear to be challenging the very suitability of Ofcom's WFTMR framework and the balanced approach it takes. Restricting Openreach's ability to compete fairly on the merits by introducing higher prices, or restrictions on when and how prices are changed, would clearly benefit Altnets in the short term. However, this would be at the clear cost of the longer-term benefits for UK consumers that result from dynamic efficiency.

1.18. As Ofcom concluded when assessing Equinox 1 (and has provisionally found in relation to Equinox 2), Openreach is complying with the rules that were set under the balanced *ex ante* framework introduced under the WFTMR. Ofcom should resist demands effectively to reopen that framework and adjust its well-established rules.

2. The role of the 90-day notification requirement for certain offers within the WFTMR

2.1. Ofcom's review of Equinox 2 has been triggered by the process set out by Ofcom in the WFTMR, which was based around notification requirements set out in SMP Condition 8.6. This condition requires Openreach to provide a minimum of 90 days' notice of any amendments to charges, terms and conditions where the price or other contractual conditions are conditional on the volume and/or range of services purchased from Openreach. Ofcom's objectives in introducing this new SMP condition and the process it would then follow in assessing any offers to supply network access in this way were clearly set out in the WFTMR:

i. Ofcom was seeking to promote investment by Openreach and by Altnets in gigabit-capable networks. It identified a concern that investment could be undermined, for example, by commercial terms which discouraged CPs from switching some of their demand for network access services to Altnets where and when they had deployed network.[7]

ii. Ofcom therefore expressed concerns about the risk of Openreach proposing commercial terms which potentially create a barrier to CPs using Altnets. It distinguished between geographic discounts (which it prohibited subject to a consent mechanism)[8] and other commercial terms, identifying loyalty discounts or pricing contingent on large volume commitments in particular as potential concerns.[9]

iii. Ofcom observed that CPs would need to purchase at least some network access services from Openreach and concluded that Openreach could potentially design terms that would disadvantage CP customers who choose to split their supply between Openreach and Altnets. Ofcom decided that offering network access with certain commercial terms should be carefully assessed before they took effect.[10]

iv. Ofcom therefore introduced a 90-day notification period for any new or amended terms of supply including, but not limited to, price levels that were made conditional on the overall volume and/or range of services purchased from Openreach. This notification window would then provide an opportunity for Ofcom to assess the detail and potential impact of these commercial terms on a case-by-case basis.[11]

v. Ofcom was clear that not all forms of conditionality would be problematic: calls to prohibit the introduction of any offers at all were rejected and Ofcom acknowledged that the scale of impact of some conditional terms on Altnets could be immaterial and offset by clear and demonstrable benefits.[12]

7 WFTMR Statement, Volume 3, paragraph 7.159.
8 WFTMR Statement, Volume 3, paragraphs 7.3 and 7.4.
9 WFTMR Statement, Volume 3, paragraphs 7.160, 7.165-7.172.
10 WFTMR Statement, Volume 3, paragraphs 7.30-7.32.
11 WFTMR Statement, Volume 3, paragraph 7.148.
12 WFTMR Statement, Volume 3, para 7.154.

vi. The focus of any Ofcom assessment would therefore be on the scale of any potential impact on Altnets. Ofcom would aim to conduct and conclude assessments of relevant offers within the 90-day timeframe and decide whether to take action or allow the proposed terms to take effect as notified.[13]

2.2. The 90-day notification requirement set out in SMP Condition 8.6 is effectively a trigger for Ofcom to conduct an expedited review of certain offers. Ofcom was clear that it should scrutinise such offers under an *ex ante* analytical framework rather than solely rely on *ex post* competition law. However, Ofcom was also clear that not all forms of conditionality would be problematic and some could, in fact, drive benefits in supporting take-up of services and improved consumer outcomes.

2.3. Ofcom's approach to considering conditional terms formed part of a wider and carefully balanced overall regulatory framework. Ofcom made clear that its approach to supporting investment in gigabit-capable networks was focused on encouraging competition between different networks where viable, providing high quality services, choice and affordable broadband for consumers throughout the UK. This is consistent with the statutory framework under the Communications Act. In doing so, Ofcom recognised that significant investment would be required to upgrade the UK's networks, and that its decisions were designed to incentivise that investment by giving regulatory certainty and allowing companies to make a fair return on the one hand, whilst ensuring consumers continue to have access to affordable broadband as new networks are rolled out on the other.[14]

[13] WFTMR Statement, Volume 3, paragraph 7.148. The factors that Ofcom would need to take into account when issuing a direction are set out in section 49(2) of the Communications Act 2003, as well as its general duties and the UK Government's Statement of Strategic Priorities. Ofcom must be satisfied that a direction is objectively justifiable, non-discriminatory, proportionate and transparent. Further, under section 6(1), Ofcom must keep the carrying out of its functions under review with a view to securing that regulation by Ofcom does not involve: (a) the imposition of burdens which have become unnecessary; or (b) the maintenance of burdens which have become unnecessary. In light of this, it is clear that the threshold for intervention and imposing a direction to prohibit pricing offers with direct benefits for customers is not low: Ofcom must have good, evidence-based reasons to make such an intervention.

[14] WFTMR Statement, Volume 1.

3. Do the Order Mix targets create barriers to Altnet entry and expansion?

Introduction

3.1. Equinox 2 is a simple overlay to Equinox 1 that provides additional commercial incentives for CPs to accelerate their adoption of FTTP by migrating their existing copper end customers to FTTP. Under Equinox 2, the receipt of discounts on FTTP connection and rental prices is conditional on a CP's Order Mix in a 3-month measurement period – i.e., the percentage of total orders placed with Openreach within the Openreach FTTP footprint that are for Openreach FTTP services. This element remains unchanged from Equinox 1 and the OMTs remain the same.[15]

3.2. The Equinox 1 offer and the OMTs were assessed by Ofcom in detail between July and September 2021 under the 90-day notification framework. Following that detailed assessment, Ofcom concluded that the OMTs would not deter the use of Altnets and therefore would not impact Altnet entry and expansion plans. On that basis, Ofcom did not issue a direction to block or amend the terms of Equinox 1. CityFibre also failed in its appeal of Ofcom's Equinox 1 decision to the CAT. Nevertheless, given that it remains the case that discounts under Equinox 2 are conditional on the range of services purchased, a further review is triggered under SMP Condition 8.6.

3.3. As set out in the remainder of this section, it is clear that by applying the analytical framework in a way that is consistent with the approach set out in the 2021 WFTMR, the Equinox 2 overlay does not give rise to any plausible risk of the OMTs creating barriers to Altnet entry and expansion. In summary:

i. Ofcom correctly focusses its analysis on a theoretical risk that CPs may miss Openreach OMTs, and therefore lose some of the available discounts on Openreach FTTP services, if some of their demand for network access services in a measurement period is switched to an Altnet. Ofcom's modelling indicates the hypothetical conditions under which such a theoretical risk may arise. This shows that even on high end assumptions of a CP's potential use of Altnets (reflecting their assumed level of overlap with the Openreach FTTP footprint), a theoretical risk will not arise if CPs are able to reduce Openreach legacy orders beneath 5% of total end customer orders.

ii. Even before the 90% OMT within Equinox becomes effective (currently full discounts are paid at 80% Order Mix performance), we see clear evidence that CPs can reduce their share of Openreach legacy orders below 5% (see further discussion in Annex 1). We also see no evidence that CPs will face a fixed and rigid "captive group" of end customers who will continue to demand broadband provided using Openreach legacy network access services such that they would continue to place more than 5% of orders using these

[15] Essentially, a CP will receive full discounts on FTTP rental prices if it achieves more than 80% Order Mix performance in a period. From 1 July 2023, connection discounts would be reduced if Order Mix performance is beneath 90% but above 80%. Beneath 80%, no discounts will be received, although CPs have the ability to catch-up performance in subsequent measurement periods.

inputs. We believe that the clear direction of travel is towards all CPs only using Openreach legacy services where FTTP/ultrafast is available in exceptional circumstances.

iii. This direction of travel is the central objective of the Equinox offer: CPs signing up to the offer have committed to a technology switch where they will acquire and upgrade end customers using the Openreach FTTP network where it is available rather than the Openreach legacy network. The Equinox offer effectively requires CPs to bring forward regulatory stop-sell on legacy services, which currently prevents CPs from placing Openreach legacy orders within around 30-35% of the total Openreach FTTP footprint falling within notified stop-sell exchanges. Every CP will have Order Mix performance close to 100% where stop-sell is active and over time it will make decreasing sense for any CP to look to acquire even a small percentage of end customers using Openreach legacy copper services elsewhere in the footprint. The Order Mix performance trend over time will, therefore, clearly be towards 100%. On this basis, there is no plausible risk of the potentially problematic scenarios modelled by Ofcom arising.

iv. In any event, the Failsafe Mechanism (detailed below) removes even a theoretical risk that the OMTs could create a barrier to Altnet use as the Order Mix performance can be assessed only in those areas where the CP does not use an Altnet. If a CP were to seek to use the Failsafe Mechanism, there is a clear process in place, operated by an experienced and respected Independent Verifier (who already successfully operates the safe haven mechanism in the GEA Volume Offer). There is no cost to CPs of using the Failsafe Mechanism and although some data will need to be provided to CPs, these requirements are not onerous (particularly in light of the readily available nature of the information required to be provided and the fact that CPs are sophisticated entities themselves). CPs can therefore be assured that any decision to use an Altnet cannot impact the Order Mix performance used to calculate Openreach discounts.

Ofcom's analytical framework

3.4. Ofcom's analytical framework for considering the conditionality within Equinox 2 takes account of comments made by the CAT in relation to Ground 2 of CityFibre's unsuccessful appeal of the Equinox 1 decision. We agree that Ofcom's starting point should remain as set out in "Question 1" of the September 2021 Equinox 1 assessment: i.e., asking whether the conditionality within Equinox 2 could potentially create a barrier to using Altnets. It is also agreed that Ofcom should consider whether any potential for the conditionality to create barriers is plausible and not merely theoretical.

3.5. FTTP discounts within both Equinox 1 and Equinox 2 are conditional on Order Mix performance, which relates to a CP's volume of Openreach FTTP orders as a proportion of its total orders placed with Openreach. This means that discounts are not conditional on the volume of orders placed or lines retained with Openreach – there are no volume commitments or any other terms that directly restrict a CP's use of Altnets. The focus is therefore on whether the need for a CP to achieve a particular level of Order Mix performance in a given 3-month measurement period could have an indirect effect on a CP's decisions about placing orders with Altnets where

available. Ofcom considers a theoretical risk that could arise if using an Altnet resulted in the CP's Order Mix performance reducing such that discounts were lost. In such cases, the CP could be deterred from using an Altnet to the full extent that it may otherwise have done and this could act as a barrier to Altnet entry and expansion. But a specific set of conditions need to arise for this theoretical risk to materialise. Ofcom's analytical framework first identifies those conditions and then assesses whether they might plausibly arise.

The conditions under which a theoretical risk could arise

3.6. Decisions to use Altnets outside of the Openreach FTTP footprint will not have any impact on a CP's Order Mix performance. As a result, any potential indirect impacts could only ever arise in an "overlap area" where a CP has the choice of using one or more Altnets to support the provision of end customer orders within the Openreach FTTP footprint.

3.7. Ofcom considers a hypothetical scenario where a CP has some customers in an overlap area that "…*prefer legacy broadband products*" and it is assumed that – despite the availability of Altnets – the CP will choose to continue to serve these end customers by placing legacy copper-based network access orders with Openreach. If that CP then serves other end customers in the overlap area by using Altnets, the CP's Order Mix performance will reduce relative to a counterfactual in which the CP uses Openreach for all orders across the entire Openreach FTTP footprint.

3.8. Tables A8.1 and A8.2 of the consultation document illustrate the extent to which a CP's Order Mix performance with Openreach could reduce if they chose to use an Altnet for a certain percentage of their orders. Ofcom's analysis shows that a CP with a baseline Order Mix performance of 92% under the modelled scenarios would see that performance drop below 90% if orders were placed with an Altnet at certain levels, resulting in a loss of some of the discounts that would otherwise have been earned.[16] If, however, a CP had a baseline Order Mix performance of 95% under those same scenarios, the use of an Altnet would still reduce Order Mix performance, but not below 90%. As a result, the CP would continue to receive full discounts.

3.9. The illustrative scenarios used by Ofcom for the purpose of its analysis reflect the highly static assumption that, independent of choices made about network access suppliers, CPs would have a fixed mix of technology demand for network access services to support end customer orders between:

i. end customer orders that can only be delivered by the CP using legacy copper-based network access services (which are then assumed to only be met via the CP placing orders for legacy copper-based services with Openreach); and

[16] Full rental discounts would be achieved if Order Mix performance remained above 80%.

ii. end customer orders that can be delivered by the CP using ultrafast-capable network access services (which the CP can deliver by placing network access orders for Openreach FTTP or with one or more Altnets).

3.10. Put another way, under Ofcom's modelled approach, a decision to use an Altnet is assumed not to alter the volume of orders a CP places on Openreach legacy copper-based network access services in that period relative to the volume they are assumed to place under the counterfactual where all orders are placed with Openreach. As such, only orders assumed to be placed with Openreach FTTP under the counterfactual are considered to be "*available*" to switch to an Altnet under the scenarios presented.

3.11. Ofcom's modelling is framed around a theoretical risk arising where a certain percentage of end customers placing orders in a particular period may have a "preference" for legacy services. However, the entire point of the Equinox offer, including the Equinox 2 overlay, is to support CPs in their efforts to shift technology where they decide to use Openreach by acquiring and upgrading end customers using FTTP where it is available, rather than Openreach legacy services. The relative pricing of FTTP services compared to existing legacy copper services is designed to support CPs in this shift, including by changing end customer preferences.

3.12. In our view, the key question in considering whether conditions that drive the theoretical risk are plausible is to what extent there may be a rigid and fixed "captive group" of customers representing a percentage of a CP's flow of end customer orders who are resistant to using FTTP or other ultrafast connections – whether provided by Openreach, Altnets or VMO2 – such that the CP may continue to choose to supply this group using only Openreach legacy services. In effect, the modelling Ofcom has undertaken treats the baseline volume of orders served by Openreach legacy services as such a captive group in that the assumed percentage of Openreach legacy orders (reflecting the assumed baseline Order Mix performance) does not change when the CP decides to use an Altnet.

3.13. In Table A8.1, the modelling assumption is effectively that this captive group constitutes 8% of a CP's end customer orders. As the size of the captive group then defines the minimum volume of Openreach legacy orders that will be placed by the CP in the model, the CP then needs a minimum volume of Openreach FTTP orders to achieve the 90% OMT and receive all available discounts. Switching some of the assumed baseline Openreach FTTP orders to an Altnet will therefore reduce Openreach Order Mix performance below 90% in some of the modelled Altnet use scenarios. Table A8.2 effectively assumes the captive group constitutes 5% of a CP's end customer orders. In this case the CP's Order Mix performance does not fall beneath 90% in any of the modelled Altnet use scenarios. The plausibility of the theoretical risk arising is, therefore, closely linked to the plausible size of the captive group across the period of the Equinox offer.

There is no plausible risk of the OMTs creating barriers to Altnet entry and expansion

3.14. Ofcom's commentary on potential future overlap in Annex 7 of the consultation document suggests that the Altnet use scenarios outlined in Tables A8.1 and A8.2 are built around what it sees as plausible scenarios of future overlap and potential usage of Altnets by CPs within the Openreach FTTP footprint. Specifically:

i. Ofcom considers that the overall overlap area, where both Openreach and Altnets such as CityFibre are offering wholesale access, is currently c. 10% rising to c. 15% in the next 12 months and c. 25% in the next 3-5 years.

ii. Ofcom also notes the potential for VMO2/nexfibre to begin wholesaling at some point in the future, which would result in an overlap of c. 60%. In such a scenario, CPs may look to switch some orders previously placed with Openreach.

3.15. Predicting future overlap and/or the extent of CPs' use of Altnets is obviously uncertain. However, for the purposes of considering the overall plausibility of a theoretical risk arising, the use of Ofcom's Altnet use scenarios is not unreasonable.

3.16. If we assume the overlap/take-up assumptions in the scenarios presented are plausible, then it is clear that the theoretical risk that CPs could lose discounts as a result of using Altnets would not arise under any of the modelled scenarios if baseline Order Mix performance was 95% or higher (i.e., the Order Mix performance would not drop below 90% under any scenario). Ofcom's modelling does suggest that a risk could arise under some scenarios if the baseline Order Mix performance was assumed to be 92% or lower.

3.17. In practical terms, the plausibility question can, therefore, aim on whether the size of the captive group is less than 5% or closer to 8%. On this basis, it makes sense to focus on the evidence around the level of any captive group of end customers with a preference for legacy products.

3.18. Observing CPs' Order Mix performance under the Equinox offer to date is a helpful reference point for considering this. We provide an overview of historic performance of the four largest CPs (BT, Sky, TalkTalk and Vodafone) at confidential **Annex 1** and set out our assessment of what this implies for the likely size of the captive group through the period of the Equinox offer. In summary:

i. Even before the 90% OMT within Equinox becomes effective (currently full discounts are paid at 80% OMT) we see that some CPs have reduced their share of Openreach legacy orders below 10% and that the best performing CP has reduced legacy orders beneath 5%. This strongly suggests that the size of any fixed and rigid captive group is not higher than 5%.

ii. Recent data and analysis suggests that the CP with the lowest historical Order Mix performance has addressed issues that were limiting that performance and will move

above 90% before July 2023 when that becomes the target level for achieving full connection discounts.

iii. We see no evidence that there is a rigid captive group of at least 5% of end customers looking to purchase or regrade broadband who CPs will need to serve using Openreach legacy copper services and who are resistant to using FTTP. As such, we see a clear direction of travel, consistent with regulatory stop-sell and the technology shift principle underpinning the Equinox offer, for all CPs to move towards 100% FTTP/ultrafast sales – whether via Openreach or Altnets – using Openreach legacy services only by exception in the short- to medium-term before services are fully withdrawn.

3.19. On this basis, there can be no plausible risk of the potentially problematic scenarios modelled by Ofcom arising and of Equinox 2 creating potential barriers to Altnet entry and expansion. We note Ofcom's overall conclusion is only that it "…*cannot rule out the possibility*" that CPs' Order Mix performance may be at levels that could deter the use of Altnets, noting the "*inherent uncertainty*" of assessing risks that may arise in relation to an offer that runs until 2031. However, for the reasons set out above, we consider this approach to be too conservative and see no plausible scenarios in which the theoretical risk identified would arise.

The Failsafe Mechanism

3.20. The Failsafe Mechanism allows CPs to exclude all Openreach orders placed in a defined "Overbuild Area" where it is able to place orders with an Altnet from the calculation of Order Mix performance for any measurement period, if required to improve Order Mix performance as otherwise calculated and, therefore, the level of discounts received. This means that any decision by a CP to use an Altnet for any number of orders within the Overbuild Area cannot have any impact on the level of discounts the CP receives on Openreach FTTP services. The Failsafe Mechanism therefore removes even any theoretical risk that the OMTs could create a barrier to Altnet use.

3.21. Put another way, if a CP places orders (for whatever reason) on Openreach legacy copper products in an Overbuild Area, those orders can be excluded from the calculation of Order Mix performance if required. For example, if a CP was, in theory, faced with challenges in reducing down the overall mix of copper-based orders to below 8% (i.e., baseline 92% Order Mix performance) and chose to use an Altnet for the "available" FTTP orders in 25% of the Openreach FTTP footprint (the Overbuild Area as defined), by making use of the Failsafe Mechanism, discounts would not be calculated on the basis of overall Order Mix performance that would drop below 90% (per Ofcom's analysis in Table A8.1), but rather on the Order Mix performance in only the non-Overbuild Area which would be unaffected by the decision to use the Altnet. The expectation would be that the CP could achieve the baseline Order Mix performance in at least that reduced part of the Openreach FTTP footprint and therefore qualify for full discounts.

3.22. The Failsafe Mechanism therefore addresses the theoretical risk that the OMTs could create a barrier to Altnet use and would only be used if requested by a CP. If, as expected, CPs in any

event achieve a sufficient level of Order Mix performance to qualify for connection and rental discounts irrespective of their use of Altnets (as set out in more detail above), the Failsafe Mechanism will not be used.

3.23. Virgin Media, INCA and Zzoomm appear to question whether the design of the Failsafe Mechanism is appropriate for all circumstances. This challenge appears to be based on a scenario where a CP's relative demand for FTTP orders compared to Openreach legacy orders is higher within the Overbuild Area than outside the Overbuild Area. We have not seen the detail of this scenario but, if we have understood the summary description correctly, it would appear to rely on the following assumptions:

i. that a CP's baseline Order Mix performance outside the Overbuild Area is below target; and

ii. that a CP's baseline Order Mix performance in the Overbuild Area is higher than outside the Overbuild Area such that the baseline total Order Mix performance (as measured prior to the Failsafe Mechanism being used) is higher than the Order Mix performance in the non-Overbuild Area.

3.24. As shown by Ofcom's modelled scenarios, using an Altnet in an Overbuild Area would reduce the baseline total Order Mix performance relative to using Openreach only (though noting that this outcome is driven by the assumption that the CP's total order volume and the share of Openreach legacy orders remains unchanged when using an Altnet). Using the Failsafe Mechanism would always improve Order Mix performance following the use of an Altnet in these circumstances. However, under the assumptions in this alternative scenario, the CP would be left exposed to the impact of the Order Mix performance outside the Overbuild Area being below target (resulting in a loss of discount even after the application of the Failsafe Mechanism).

3.25. We have considered the circumstances under which such a scenario could arise. As a starting point, the table below uses the Ofcom overlap/take-up scenario whereby a CP switches 25% of Openreach FTTP orders to an Altnet. We assume that the CP has 10,000 end customer orders to serve in the measurement period and that these are split proportionally between the 25% Overbuild Area and 75% non-Overbuild Area. To create a theoretical risk under this new scenario, we then have to assume that Order Mix performance is below 90% in the non-Overbuild Area. To test this new scenario, we have selected a figure of 89%. For the CP to achieve an Order Mix performance of at least 90% on a nationwide basis, the Order Mix performance in the Overbuild Area would then need to be at least 93% as shown:

Test case: Overbuild Area in line with Ofcom "scenario (b)"; assume Non-Overbuild Area Order Mix less than 90%			
	Non-Overbuild Area	**Overbuild Area**	**Total**
	75%	**25%**	**100%**
Assumed Total order volume	7,500	2,500	10,000
Baseline Order Mix performance	89.00%	93.00%	90.00%
Baseline case: CP uses OR everywhere			
Baseline Openreach copper volumes	825	175	1,000
Baseline Openreach FTTP volumes	6,675	2,325	9,000
Test case: CP switches all Openreach FTTP volumes to Altnet in Overbuild Area			
Volumes switched to Altnet		2,325	2,325
Remaining Openreach FTTP volumes	6,675	-	6,675
Remaining Openreach copper volumes	825	175	1,000
New Order Mix performance	89.00%	n/a	86.97%
Baseline Order Mix performance	90.00%		
Test case Order Mix performance if Failsafe A	89.00%		
ppt change	-1.00%		
ppt beneath 90% target	-1.00%		
% loss of connection discount vs start point	-10.00%		

3.26. Under this test scenario, the CP could move from a position from which using Openreach for all 10,000 orders results in it exactly hitting the 90% OMT to a position where using the Altnet for these orders means that its Order Mix performance following use of the Failsafe Mechanism is 89%.

3.27. This modelling provides an insight into the level of differential there would need to be between Order Mix performance in the two areas for a problem to arise. It also shows the magnitude of that loss of discount if this scenario were to materialise. An assumed 4 percentage point difference in Order Mix Performance between the two areas would reduce the applicable Order Mix performance figure by 1 percentage point, which would have a maximum impact on connection discounts of 10%.[17] The CP would still receive 90% of the connection discounts and 100% of rental discounts.

3.28. This new theoretical risk is not plausible:

i. First, there is no suggestion that CPs are seeing any material differences in Order Mix performance in different geographic areas or that any differences are likely to mean that a CP's Order Mix performance will be higher in the Overbuild Area. There is therefore no evidence to suggest a differential of 4 percentage points or higher would materialise in practice.

[17] No theoretical risk arises if baseline Order Mix performance was 94% in the Overbuild Area and 90% in the non-Overbuild Area.

ii. Second, the test modelling outlined above showing the theoretical "problem" that could arise is, again, dependent on the assumption that CPs face a sizeable captive group that they need to serve using Openreach legacy services. But in this case that captive group is much larger in the non-overbuild area and would need to account for over 10% of the orders placed with the CP in that period for the scenario to emerge. In the above example, the assumption is that 11% of the CP's orders in that area would need to be served by Openreach legacy products. Given the position summarised above and the analysis set out in Annex 1, an assumed captive group of 10% or higher is clearly not plausible.

3.29. Finally, we would note that even on the restrictive and unrealistic assumptions used in the test modelling above, the financial risk and exposure for the CP is low. No rental discounts would be lost at all and these account for at least 75% of a CP's total maximum discounts available under the Equinox 1 offer at the current time.

Practicality and usability of the Failsafe Mechanism

3.30. Certain stakeholders, although notably not those who would actually be potentially using the Failsafe Mechanism (i.e., CPs using the Openreach FTTP network), have raised concerns over the practicality of the Failsafe Mechanism alleging, for example, that it is complex, that the Independent Verifier may not be independent and that the proposed Legacy Cross-Check[18] allows Openreach to disapply the Failsafe Mechanism. It has also been suggested that the operation of the Failsafe Mechanism would provide Openreach with commercially sensitive information on Altnets' build. These concerns are unfounded for a variety of reasons, as set out below.

3.31. First, the terms of both the Equinox 2 supplemental agreement and the contract with the Independent Verifier, Berkeley Research Group (**BRG**), ensure the independence of the Independent Verifier and that no commercially sensitive information will be shared by the Independent Verifier with Openreach. In particular, the Equinox 2 supplemental agreement makes clear that the Independent Verifier is an independent third party and that it shall treat CPs' information in confidence, disclosing to Openreach only the re-calculation of Order Mix performance and the calculation of legacy services for the purpose of the Legacy Cross-Check.[19] The Independent Verifier will also enter into non-disclosure agreements with CPs on mutually agreeable terms, if requested by CPs. These terms are replicated in the services agreement signed by BRG itself.

3.32. BRG is a respected, sophisticated and global external consultancy firm that provides services to a range of organisations across different sectors and disciplines.[20] BRG is also already known to and trusted by CPs given the role it has played in operating the safe haven mechanism under the GEA Volume offer. This has provided BRG with both experience of running an independent

[18] The Legacy Cross-Check allows Openreach to review and amend the Failsafe Mechanism if its use results in CPs placing a disproportionate level of orders on legacy copper-based services in an Overbuild Area (see below).

[19] Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.9(b).

[20] Further information regarding BRG is available at: https://www.thinkbrg.com/about/.

verification process in similar circumstances, and an understanding of the CPs who may, in theory, seek to make use of the proposed Failsafe Mechanism. The safe haven mechanism under the GEA Volume offer has been operated successfully by BRG since its inception, with different CPs making use of the safe haven without issue. Both the Equinox 2 supplemental agreement and the agreement signed by BRG also make clear that it must take all due care to ensure it undertakes the verification process accurately, fairly and to the best of its abilities.[21]

3.33. In terms of process, the structure of the Failsafe Mechanism is simple and straightforward for the Independent Verifier to operate. Openreach and BRG also intend to undertake a "dry run" of the process with at least one CP in advance of the conclusion of the first measurement period for which the Failsafe Mechanism can be used (i.e., April to June 2023, with measurement taking place in July). The purpose of this dry run is to ensure that the Failsafe Mechanism can be operated as smoothly as possible in the event that a CP were to wish to make use of it. The proposed process can be summarised as follows:[22]

i. **Step 1**: CP Order Mix performance is calculated following the conclusion of a measurement period, as is already the case under the Equinox 1 offer.

ii. **Step 2**: Openreach informs CPs whether they have met the OMTs in that measurement period. Any discounts that the CP already qualifies for on the basis of unadjusted Order Mix performance are paid according to the usual timescales – if a CP already qualifies for a partial discount (e.g., if Order Mix performance is between 80% and 90%), payment is not delayed by the subsequent operation of the Failsafe Mechanism.[23]

iii. **Step 3**: within 30 calendar days of step 2, a CP may notify Openreach and the Independent Verifier in writing that it wishes to make use of the Failsafe Mechanism for the relevant measurement period. This notification is made in the format of a simple "Relief Application Notice".[24]

iv. **Step 4**: the CP and Openreach separately provide to the Independent Verifier the necessary information required to allow it to apply the Failsafe Mechanism (see below).[25] The Independent Verifier may also use information from public sources, if required.[26]

v. **Step 5**: the Independent Verifier calculates the adjusted Order Mix performance figure for the non-Overbuild Area on the basis of the information provided and communicates this to Openreach.[27] For the purpose of the Legacy Cross-Check, the Independent Verifier will also provide to Openreach the number of orders of legacy copper services per premise: (i) in the Overbuild Area; and (ii) outside the Overbuild Area.[28] The Independent

21 Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.9(a).
22 This process is clearly set out at Appendix 4 of the Equinox 2 Supplemental Agreement.
23 Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.5.
24 Equinox 2 Supplemental Agreement, Appendix 4, paragraph 1.
25 Equinox 2 Supplemental Agreement, Appendix 4, paragraph 2.
26 Equinox 2 Supplemental Agreement, Appendix 4, paragraph 4.
27 Equinox 2 Supplemental Agreement, Appendix 4, paragraphs 3-6
28 Equinox 2 Supplemental Agreement, Appendix 4, paragraphs 9-11.

Verifier may ask additional questions to Openreach and/or the relevant CP if required to assist in these calculations.

vi. **Step 6**: upon conclusion of the verification process and receipt of the adjusted Order Mix performance figure, Openreach will notify the relevant CP of its adjusted Order Mix performance and any additional payment due within 10 working days. Any further payment due is to be made as soon as reasonably practicable.[29]

3.34. From a CP's perspective, the data they would need to supply to the Independent Verifier for the purpose of the Failsafe Mechanism would be data they necessarily hold to support their use of one or more Altnets – we do not believe that it should be necessary to provide any information that is not already readily available in CPs' internal systems. That is, where a CP has reached an agreement to place all or some of their orders with an Altnet in that Altnet's FTTP footprint, they will need to have UPRN address details for the premises at which those orders could be placed and the date from which it was possible to place an order for FTTP to that UPRN. It will also be necessary to demonstrate that the CP has the necessary IT systems and sufficient infrastructure (including proof of interconnection and handover points) for it to be able to order and consume FTTP at a particular UPRN. By providing UPRN address details to the Independent Verifier, these can then be mapped by the Independent Verifier to the Openreach FTTP footprint to establish the Overbuild Area.[30]

3.35. From Openreach's perspective, it will be necessary to provide the Independent Verifier with information regarding its FTTP footprint as available to order at the beginning of the relevant measurement period, together with the CP's order information as used in the calculation of Order Mix performance. Again, this information is readily available and can be provided to the Independent Verifier in a timely fashion.

3.36. In relation to the Legacy Copper-Cross check, this has been introduced to prevent the possibility of CPs using the flexibility provided by the Failsafe Mechanism to shift the volume of sales activity back towards lines supplied over the Openreach copper access network. The Legacy Cross-Check therefore allows Openreach to monitor the extent to which any CPs using the Failsafe Mechanism may be placing a disproportionately high volume of orders for legacy copper products at the addresses falling within an Overbuild Area. Where the data shows that the rate of copper orders in the Overbuild Area is more than 50% of the rate of copper orders outside that area (the Legacy Differential), Openreach may review the future operation of the Failsafe Mechanism for the purpose of limiting such orders. In this regard, it is important to note the following:

i. The operation of the Legacy Cross-Check does not "disapply" the operation of the Failsafe Mechanism – even if a review is triggered, that has no immediate impact on any additional discounts being paid on the basis of adjusted Order Mix performance.

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29 Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.6.

30 The Independent Verifier may also request any other such information as may reasonably be required from time-to-time to ensure that accuracy and veracity of the data.

ii. Any proposed amendments to the Failsafe Mechanism as a result of the Legacy Cross-Check will be notified in advance to CPs and Ofcom at 90-days' notice. Any such amendment would apply to all CPs equally, although would only have an effect to the extent that the Legacy Differential is exceeded. For CPs remaining below the 50% Legacy Differential, the Failsafe Mechanism would continue to operate as currently envisaged.[31]

3.37. Finally, it is noted that there is no cost to CPs of using the Failsafe Mechanism – Openreach is responsible for all costs and charges associated with the Independent Verifier provided that the process is reasonably followed.[32][33]

3.38. Notwithstanding the above, as stated in the initial notification of Equinox 2 and explained in further detail above, it remains the case that we do not believe that there is any possibility of the OMTs having the effect of distorting incentives to use Altnets. The Failsafe Mechanism has therefore been introduced with the aim of eliminating even a theoretical possibility of such a distortion.

3.39. Nevertheless, in the event that a CP were to seek to use the Failsafe Mechanism, as demonstrated above, there is a clear process in place, which will be operated by an experienced and respected Independent Verifier. Further, although CPs will of course need to provide some data to the Independent Verifier in order to make use of the Failsafe Mechanism, these requirements are not considered to be onerous, particularly in light of the fact that CPs are sophisticated entities themselves. Robust safeguards are also in place to ensure that any competitively sensitive information shared by CPs with the Independent Verifier is not provided to Openreach. Finally, the proposed Legacy Cross-Check is limited in scope and, in the event that a review of the Failsafe Mechanism were triggered, any amendments would not take effect until the conclusion of a further 90-day notification process. In the meantime, CPs would continue to be able to make use of the unamended Failsafe Mechanism.

The "Future Overlap Scenario" is not valid and does not give rise to any concerns

3.40. In establishing theoretical risks for consideration, we note that VMO2 raises a different theoretical risk about the proposed conditionality in Equinox 2, referred to by Ofcom as the "Future Overlap Scenario". As we understand it, VMO2 is claiming that the OMTs mean that Altnets could be placed at a competitive disadvantage in areas within the Openreach FTTP footprint where they have not yet built, but may do so in the future. The logic here seems to be that CPs are incentivised to acquire and/or migrate end customer lines to Openreach FTTP in order to achieve the OMTs as a result of Equinox 2. If Altnets then subsequently build FTTP in the same area, these end customers (and their CPs) will be less likely to migrate services to an Altnet.

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31 Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.10.

32 For completeness, it is noted that a CP must pay the costs and charges of the Independent Verifier associated with operating the Failsafe Mechanism if it unreasonably fails to comply with the process or any reasonable timescales set by the Independent Verifier, provided that the CP has received reasonable advanced notice.

33 Equinox 2 Supplemental Agreement, Appendix 1, paragraph 9.8.

3.41. We agree with Ofcom's assessment of this alleged theoretical impact and its conclusion that it does not give rise to any concerns:

i. Equinox 2 contains no restrictions on Openreach FTTP lines or any other Openreach lines being moved to an Altnet in the event that the Future Overlap Scenario plays out. For example, there are no requirements to retain lines on the Openreach network for a period of time, such that a CP would risk losing Openreach FTTP discounts if lines were moved to the Altnet once they had network available.

ii. VMO2 is therefore left claiming that the fact that Openreach is incentivising CPs to adopt its FTTP as it becomes available to order is itself anti-competitive and harmful. It is not clear what VMO2 is seeking by raising this issue. Nevertheless, we note the following:

a) There will be areas in the UK where Altnets have FTTP/ultrafast capable connections available to order but where Openreach does not. The first to build will have the initial opportunity to upgrade end customers to faster and more reliable products, and would be expected to look to acquire early adopters/pent-up demand for the additional bandwidth whether through direct retail offers or by working with wholesale customers.

b) Nevertheless, this is not a one-shot game and as other networks are built – whether by Openreach or Altnets – and there are larger overlap areas, there will be competition both to drive further copper to ultrafast upgrades and switching of existing FTTP/ultrafast lines between network providers whether driven by retail or wholesale level competition. This dynamic is clearly procompetitive and would be expected to drive efficient and beneficial consumer outcomes.

c) Further we agree with Ofcom's observations that *"[t]his 'race to invest' is an important part of the competitive dynamic in the package of remedies that we imposed in the WFTMR Statement and that was designed to support investment by Openreach and other companies. The Equinox 2 Offer does not tilt the playing field between Openreach and altnets in an anti-competitive manner.*[34]

3.42. In summary, the fact that the OMTs within Equinox 2 reward CPs for using the Openreach FTTP network as it becomes available cannot be considered potentially problematic outside the overlap areas where the theoretical risk cannot materialise and the Future Overlap Scenario does not, therefore, give rise to any plausible concerns.

Forecasting

3.43. For completeness, and contrary to representations that appear to have been made to Ofcom, the revised forecasting requirements within Equinox 2 could not act as a barrier to Altnet entry and expansion. These simply build on the existing forecasting requirements in the Equinox 1 offer, in relation to which Ofcom clearly concluded that no potential barriers to using Altnets

[34] Paragraph 3.44 (c) of Ofcom's Equinox 2 Consultation.

were created.[35] Forecasting requirements are a necessity in the context of the scale of Openreach's FTTP build given the careful resource planning that this is needed to ensure efficient service delivery.

3.44. In Openreach's experience, improvements to forecasting lead to greater efficiencies to the benefit of Openreach, CPs and end customers. Forecasting requirements are a common feature of the telecoms industry, and Openreach anticipates that other network providers are likely to have forecasting requirements in one form or another.

[35] Ofcom Statement, *Openreach Proposed FTTP Offer starting 1 October 2021* (30 September 2021), paragraph 3.96.

4. Do lower Openreach FTTP prices act as a barrier to Altnet entry and expansion?

4.1. There is no basis for concerns that the proposed price levels under Equinox 2 could prevent material and sustainable competition to Openreach. Our observations on the claims outlined in the consultation document are set out in this section. In summary:

i. There appear to be allegations that Equinox 2 will result in Openreach's FTTP prices being at a level which acts as a barrier to Altnet entry and expansion. Any such allegations are without basis – Openreach has seen no evidence that its prices would prevent Altnets recovering their efficiently incurred costs.

ii. The allegations appear to focus on the fact that the discounted 80/20Mb FTTP price would be beneath the regulated 40/10Mb FTTP anchor price ceiling after 1 April 2023. However, such allegations ignore the fact that Ofcom did not introduce a regulatory price floor on any FTTP services, in order to ensure that end customers were not denied the benefits of emerging competition. In setting the level of the price ceiling for the 40/10Mb FTTP anchor product, Ofcom concluded that constraining Openreach's prices to the ceiling would not undermine its objective of promoting efficient entry, but it did not suggest that pricing FTTP services beneath that ceiling would create a barrier to entry.

iii. It is economically efficient to supply FTTP services with a bandwidth gradient that reflects the higher value that end customers attach to higher capacity lines. With end customers buying a mix of bandwidths, it is right for Ofcom to focus on the average revenue Openreach will generate from its chosen bandwidth gradient and pricing structure. Ofcom has identified that the average revenue that Openreach would earn is above the top end of its wide estimated range of entrant unit costs.

iv. Calls to change the entrant cost modelling underpinning Ofcom's approach are effectively calls to re-open the basis on which Ofcom took policy decisions in the WFTMR and should be rejected. We also note that Ofcom consulted on its modelling approach ahead of the 2021 WFTMR decision and calibrated its outputs to Altnet business cases.

v. Ofcom's objective in the WFTMR framework was to promote competition in Area 2. Calls by stakeholders effectively to introduce new restrictions on Openreach's pricing in Area 3 to promote entry are not justified and would fundamentally change the policy position reached in the WFTMR, which reflected Ofcom's balanced assessment of economic efficiency arguments. Openreach has not seen any evidence that would justify a different approach.

vi. The revisions to Openreach's FTTP prices were made following discussions which were instigated by its CP customers. This process reflects normal competition on the merits.

The apparent allegations

4.2. Although much of the detail of the issues raised and/or any evidence submitted in support of stakeholder claims is redacted or not directly referenced in Ofcom's document, the common theme that appears to emerge is a suggestion that the proposed reduction in FTTP prices from 1 April 2023 may reduce prices to a level at which entrants – and possibly Openreach – would not be able to recover their efficiently incurred costs. The evidence relied on to make this claim appears to include:

i. that discounted prices for some FTTP bandwidths would fall below what stakeholders position as the "benchmark" price for 40/10Mb FTTP that allows Altnets to recover efficiently incurred costs;

ii. that Equinox 2 would reduce prices in the short-run but increase them over time; and

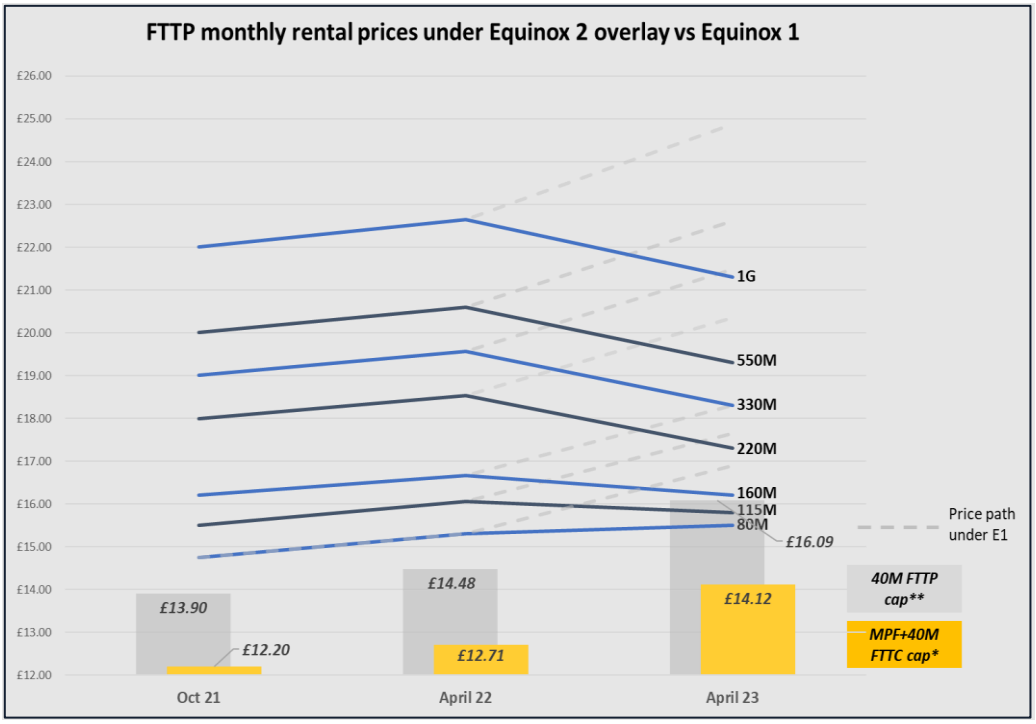
iii. that prices for higher bandwidth FTTP services would increase by less than CPI over time.

4.3. INCA and Zzoomm also argue that Equinox 2 pricing is likely to harm competition in Area 3 and that this should be considered separately.

The key changes in Equinox 2 as compared to Equinox 1

4.4. The Equinox 2 overlay, which largely follows the same structure and form of the existing Equinox 1 offer, makes three main changes to FTTP pricing levels: (i) changes in connection discounts (e.g., in relation to upgrades of existing Openreach copper-based access lines to FTTP); (ii) reductions in FTTP rental prices from current levels and from the levels that will otherwise apply from 1 April 2023 under the terms of Equinox 1; and (iii) an amendment to the level at which the share of Average Revenue Per User (**ARPU**) applies.

4.5. The chart below shows how the rental prices that will apply under Equinox 2 from 1 April 2023 (by bandwidth) compare to the rental prices that applied under Equinox 1 on 1 October 2021 and 1 April 2022, after the permitted application of indexation. The monthly rental prices by bandwidth are, for reference, overlaid with the anchor price caps for 40/10Mb FTTC (including MPF) and 40/10Mb FTTP (solid bars) and with the Equinox 1 prices that would have otherwise applied from 1 April 2023 following the application of indexation as envisaged under the Equinox 1 contract (dotted lines).



4.6. The proposed pricing structure under Equinox 2 therefore continues to offer FTTP lines at a premium to FTTC lines, albeit at a reduced level relative to Equinox 1 as shown in the table below:

	Today		From 1 April 2023 (on launch of Equinox 2)	
	Premium over 40/10Mb FTTC	**Premium over 80/20Mb FTTC**	**Premium over 40/10Mb FTTC**	**Premium over 80/20Mb FTTC**
40Mb	£1.77	£0.77	£1.97	£0.97
80Mb	£2.59	£1.59	£1.38	£0.38
115Mb	£3.34	£2.34	£1.68	£0.68
160Mb	£3.96	£2.96	£2.08	£1.08
220Mb	£5.82	£4.82	£3.18	£2.18
330Mb	£6.85	£5.85	£4.18	£3.18
550Mb	£7.88	£6.88	£5.18	£4.18
1Gb	£9.93	£8.93	£7.18	£6.18
1.2Gb			£8.18	£7.18
1.8Gb			£15.18	£14.18

4.7. In this regard, we note the following:

i. The proposed changes to discounted price levels make 80/20Mb FTTP the lowest priced FTTP service and we logically expect volumes on 40/10Mb to move to 80/20Mb and any future volumes that would have been placed on 40/10Mb to instead be placed on 80/20Mb or higher bandwidths.

ii. Rental prices for 80/20Mb FTTP will increase by 1.3% on 1 April 2023 from current levels and will be c. 5% higher than the prices that applied under the Equinox 1 offer from 1 October 2021.

iii. Whereas 40/10Mb FTTP is currently priced at a premium of c. £1.80 to 40/10Mb FTTC+MPF, 80/20Mb FTTP is now priced at a lower premium of c. £1.40 above 40/10Mb FTTC+MPF and about £0.40 above 80/20Mb FTTP+MPF.

iv. Rental prices for 115/20Mb and 160/30Mb will reduce by c. 1.5-2% on 1 April 2023, taking these prices broadly back to where they were set at the start of Equinox 1.

v. This structure therefore provides more attractive migration paths for our CP customers to upsell FTTP to their current base of end customers taking superfast FTTC connections. For example, under Equinox 2, CPs supplying end customers with a superfast broadband service using 40/10Mb FTTC+MPF could switch to supplying them with 80/20Mb FTTP at a lower premium than they would pay today to switch to 40/10Mb FTTP, or even switch to offering a higher speed 115/20Mb FTTP or 160/30Mb FTTP service at similar levels of premium as they would pay today if migrating those end customers to a 40/10Mb FTTP service. The new structure therefore gives options for our CP customers to design migration offers for their end customers and acquisition offers for new end customers to drive take-up.

vi. Larger price reductions apply at higher bandwidths, with prices at speeds of 220/30Mb above reducing by between c. 6-7%. These reductions, along with the ARPU share mechanism, are aimed at incentivising and supporting the sale of ultrafast speeds which utilise the full capability of the FTTP network that we have deployed.

vii. We are also introducing higher bandwidth variants at 1.2Gb and 1.8Gb at additional premia subject to completion of a pilot that is currently underway for these variants, which require the installation of a higher-capacity ONT in end customer premises.

4.8. As set out in Section 5 below, these changes were made following discussions with our CP customers to understand their needs in driving greater adoption of FTTP – including by upgrading existing end customers as well as through new end customer acquisitions – and selling the full capabilities of FTTP to their end customers by providing higher bandwidth lines. These discussions were instigated by our CP customers – as the market continued to develop following the launch of the Equinox 1 offer, CPs sought pricing that was more competitive, provided greater long-term pricing certainty and assisted them in migrating their existing end customer bases to FTTP.

Stakeholder concerns about cost recovery are not valid

4.9. It appears that, in their submissions to date, stakeholders have placed significant weight on the regulated ceiling for the 40/10Mb FTTP anchor price acting as a benchmark for whether Altnets

can recover efficiently incurred costs. As shown above, the Equinox 2 discounts would provide 80/20Mb, 115/20Mb and 160/30Mb FTTP lines at prices below the regulated 40/10Mb FTTP anchor ceiling in effect from 1 April 2023. We agree with Ofcom that this is not the right benchmark.

4.10. It is important to recognise that the 40/10Mb FTTP anchor price was introduced as a price ceiling not a price floor. In fact, as Ofcom notes, demands to set a price floor on Openreach FTTP services were rejected on the basis that this would deny consumers the benefits of emerging competition. Indeed, the Communications Act 2003 specifically puts in place significant hurdles when applying conditions about network access pricing, reflecting the fact that price controls may have distortive effects and result in a loss of dynamic price competition, which would be harmful to UK consumers.[36]

4.11. The purpose of setting a 40/10Mb FTTP price ceiling was not in itself to promote entry, but rather primarily to provide a level of protection from high prices to CP customers (and ultimately consumers) where copper-based anchor 40/10Mb FTTC services are not available (whether because they were never deployed to an area or where new sales are no longer required under permitted regulatory stop-sell). While Ofcom wanted to promote competition during the five-year period of the WFTMR framework, it still had concerns that Openreach's Significant Market Power could potentially give rise to excessive/exploitative pricing issues before competition took hold, giving rise to inefficient consumer outcomes.

4.12. In setting the level of the price ceiling for the 40/10Mb FTTP anchor product, Ofcom had regard to whether constraining Openreach's prices to the ceiling could undermine Ofcom's objective of promoting efficient entry. That is, it considered that a requirement on Openreach to supply anchor services at no more than the capped levels would leave room for Altnets to build FTTP networks and sell services from those networks profitably.

4.13. Ofcom set the 40/10Mb FTTC price cap at flat real term prices in the 2021 WFTMR review – i.e., prevailing prices in 2020/21 plus CPI each year. Ofcom then decided it would be reasonable to allow Openreach the opportunity to apply a premium on the 40/10Mb FTTC price if/when the 40/10Mb FTTP anchor cap took effect – i.e., where the 40/10Mb FTTC anchor product was not available. The premium driving the FTTP 40/10Mb price ceiling was set at £1.70 and was allowed to be indexed according to CPI each year. This figure reflected Ofcom's view of the additional value that could be available to CPs and end customers in switching a line from FTTC to FTTP, even while offering the same headline speed. As noted, the focus of this exercise in the WFTMR was on ensuring Openreach's CP customers were not at risk of excessively high prices if required to purchase FTTP where FTTC is not available, and would therefore only pay a maximum level of premium that aligned with the additional value they would receive.

4.14. To test whether the established price ceilings were consistent with Ofcom's objective of promoting entry or whether they could work against such an objective, Ofcom modelled the costs an entrant could incur in deploying FTTP efficiently in competition with Openreach. From

[36] See, e.g., Communications Act 2003, section 88.

this model, Ofcom derived a unit cost range that provided an indication of the average revenue an entrant would need from every connected line to generate a reasonable long-run return on its investments in building and operating the FTTP network. As Ofcom explained in the WFTMR and at Annex 10 of the Equinox 2 consultation document, the model was consulted on and calibrated according to the business plans of different FTTP network builders. Ofcom also flexed assumptions on key modelling parameters to generate a wide range of unit costs.

4.15. Following this consultation, Ofcom concluded that the price ceilings it was introducing were consistent with promoting entry. Specifically, the 40/10Mb FTTP anchor ceiling aligned with the upper bound of Ofcom's modelled unit cost range of £9.53 to £13.67 (2020/21 prices). Ofcom effectively believed that efficient Altnets could compete against the set of regulated anchor prices given the premium they could offer on their FTTP services relative to legacy anchor products and their ability at least to match the regulated 40/10Mb FTTP price ceiling.

4.16. None of the above supports a claim that the 40/10Mb FTTP anchor ceiling would or should be used as a rigid benchmark for testing whether Altnets could recover their efficiently incurred costs, particularly if used by reference to the lowest-priced FTTP service offered by Openreach. In fact, to do so would contradict Ofcom's decision not to introduce a hard price floor on Openreach's FTTP prices.

4.17. As Ofcom notes, in the WFTMR it modelled a wide range of entrant unit costs reflecting sensitivities it carried out on key modelling parameters. Fixing individual Openreach price points at the top end of that range would not have been consistent with efficient market outcomes given that it was clearly considered viable that Altnets could be pricing at lower levels within the range.

4.18. Furthermore, while Ofcom had assessed the value that could be available to CPs and end customers in switching from a 40/10Mb FTTC line to a 40/10Mb FTTP line, it was always recognised that there would much greater value to both CPs and end customers in providing higher bandwidth connections up to 1Gb and above. Ofcom was not seeking to determine what minimum level of premium Openreach must charge for a 40/10Mb FTTP line, but rather at what point concerns may arise that such a premium might be considered exploitatively high in circumstances where the only option was to purchase an FTTP connection. Ofcom's overall approach to FTTP price regulation was to allow Openreach the flexibility to determine price structures and associated bandwidth gradients that would efficiently reflect evolving end customer valuations of different bandwidths and the greater reliability of FTTP connections. Treating the 40/10Mb FTTP price ceiling as a price floor beneath which Openreach cannot charge would effectively result in Ofcom determining the market price that Openreach should set across the five years of the WFTMR regarding of how end customer demand evolved. This would be an unprecedented intervention and inconsistent with the conclusions Ofcom reached on this matter in the WFTMR.

4.19. It therefore makes sense for any focus on potential cost recovery issues to be on average prices earned on FTTP lines and not simply on the lowest FTTP price available at the lowest premium. In this regard, we have supplied Ofcom with our current mix of bandwidth sales and expected

changes in the mix over time. Ofcom can generate indicative ARPUs from this mix which will be considerably above the top end of Ofcom's modelled range, even if Ofcom fully accounts for the impact of high CPI inflation in October 2022 in its unit cost calculation (applying CPI each year to the 2020/21 upper bound of the cost range moves the top of that range by 17% to almost £16 in 2023/24 terms). We have also supplied Ofcom with our longer-term ARPU assumptions showing how the effects of differing levels of indexation on higher and lower bandwidths, and the incentive effects of the ARPU share mechanism, will drive APRU growth and support cost recovery.

Indexation of prices during the Equinox 2 offer

4.20. We have not seen the detail of any arguments made about the fact that under the terms of Equinox 2, future prices will increase each year either in line with CPI or at a discount to CPI. One suggestion seems to be that this signals an expectation that low pricing today will result in lower market entry and/or expansion, providing scope for higher future Openreach prices. Another claim seems to be that lower planned price rises on higher bandwidth services could lead to long term cost under-recovery. The claims therefore appear to contradict each other. There is a further contradiction in making generalised claims that 80/20Mb FTTP pricing is too low because it is beneath a price ceiling that is inflated by 11% in 2023/24, and then alleging that future price increases of CPI on lower bandwidth services must assume lower levels of future competition.

4.21. As noted, we have set Equinox 2 pricing to drive the shift to FTTP where it is available and set the bandwidth gradient and ARPU share mechanism to incentivise the sale of more higher value, higher bandwidth services over time. We expect to see volume and ARPU growth that supports our objective of earning a fair bet in return for our investment in FTTP over the long-term. Equinox 2 assumes annual price inflation but provides assurance to CP customers about the level at which that will apply, giving them the long-term certainty they need to shift sales activity to FTTP.

Stakeholder criticisms of Ofcom's modelling

4.22. We note that INCA and Zzoomm have made criticisms of Ofcom's WFTMR modelling exercise. We have not seen these criticisms but note that the model design was consulted on in 2019 and that Ofcom calibrated the outputs of the model to the business cases of network builders at the time. The WFTMR Statement was not appealed by the Altnets.

4.23. To the extent that the criticisms seek to argue that Altnets require prices to be above the top end of Ofcom's modelled range, it is not then clear whether stakeholders are seeking to argue that there should be changes to the WFTMR framework to further inflate regulatory anchor prices or belatedly introduce regulatory price floors in some way. If this is what stakeholders are demanding, then Ofcom should reject this approach. The WFTMR clearly sought to create long term certainty for all potential investors in network build in order to allow long term investment plans to be made. Network builders should not expect additional protections in the form of new restrictions on Openreach's commercial freedoms to be introduced within the

market review period to support their business models. Ofcom also struck a careful balance in terms of economic efficiency considerations in deciding where to cap prices and where to allow greater freedoms. There is no case to revisit that balance particularly when noting the level of investment that has been undertaken in FTTP networks since the start of the market review period.

Area 3 impacts

4.24. INCA and Zzoomm also claim that the proposed Equinox 2 discounts would harm competition in Area 3 and that Ofcom should look separately at the potential impacts in each of Area 2 and Area 3. We have not had sight of any modelling that may have been presented to support the arguments made.

4.25. However, we agree with the distinction Ofcom draws in the consultation between Area 2 and Area 3. Ofcom's focus in the WFTMR was on promoting efficient entry into Area 2 and its policy approach was different in Area 3. As Ofcom saw less scope for efficient competitive build in Area 3, it allowed anchor prices to rise with CPI each year (and therefore remain the same as in Area 2) on the basis of a commitment Openreach made to pass at least 3.2 million premises commercially with FTTP in Area 3 by the end of this market review period. Ofcom also signalled an expectation that Openreach's rental pricing in Area 3 would be the same as in Area 2.

4.26. We accept that the economics of FTTP build in Area 3 will, on average, differ from those in Area 2. Higher build costs per premises passed in Area 3 will lead network builders to require higher assumed take-up to drive a reasonable expected return at the same price points. This inevitably provides less scope for competitive overlap of network build in these areas. However, the boundaries between Area 2 and Area 3 are inevitably imprecise and there will be scope for some competitive overlap in Area 3 locations and this was recognised by Ofcom in the WFTMR. It does not mean Ofcom should amend its policy approach after investment decisions have been made to build in Area 3.

4.27. Openreach has set national rental pricing for FTTP within Equinox 2 and this is consistent with Ofcom's policy of promoting efficient entry in Area 2. It is not clear whether INCA and Zzoomm are seeking higher anchor prices in Area 3 or the imposition of a hard price floor on Openreach FTTP, but these would both be significant departures from Ofcom's policy decisions taken in the WFTMR after extensive consultation. This would have significant impacts on investors and end customers in Area 3 and, therefore, on the balance of economic efficiency considerations.

5. Is Equinox 2 part of an Openreach practice of repeatedly amending its FTTP prices that could act as a barrier to Altnet entry and expansion?

Introduction

5.1. Ofcom appears to have received allegations that the Equinox 2 offer forms part of an Openreach practice of repeatedly amending its FTTP prices in a way that could act as a barrier to entry and expansion by Altnets. Any such allegations are without foundation and do not correspond to any established theories of harm. They entirely ignore the role of dynamic competition in pricing and customer conduct and seem based on a misapprehension that Openreach should only compete in a static manner, not reflecting the needs of its CP customers or market developments. This would lead to a poor CP customer and consumer experience. Openreach's offers represent competition on the merits.

5.2. Openreach's offers, including Equinox 2, are not unduly complex or onerous and its CP customers are well able to assess them, just as they are able to assess offers from Openreach's competitors. The apparent factual allegations of repeated amendments are also not supported by an examination of the history of Openreach's offers.

The allegations of a practice that acts as a barrier to entry are without foundation and do not correspond to any established theories of harm

5.3. Ofcom sets out limited insight into stakeholder views on this issue at paragraphs 3.127 to 3.129 of the consultation document:

i. VMO2 claims that Equinox 1 and Equinox 2 are part of a "*series of offers that are calibrated to create uncertainty*" and deter CPs from using Altnets.

ii. Specific claims from other stakeholders are redacted but are seemingly based on a similar claim that Openreach's approach to changing FTTP pricing and/or to CP engagement linked to those changes presents challenges to those CPs using Altnets.

5.4. As set out in more detail below, Openreach does not accept that its pricing offers are unduly complex or numerous. Further, given that Openreach's pricing offers are not loyalty-inducing (Section 3), nor do they set prices at a level that foreclose competitors (Section 4), competition concerns cannot in any event arise on the basis that prices have merely changed over time. Any allegations that Openreach is repeatedly amending its FTTP prices to create uncertainty for CPs and deter them from using Altnets are, therefore, without foundation and do not correspond to any established theories of harm.

5.5. Negotiating with CP customers and responding to their needs and demands is a key element of competition on the merits (and indeed an expectation that Ofcom had of Openreach following its Digital Communications Review) and drives a range of important benefits for both those CP

customers and consumers. CPs will actively seek strong and effective relationships with all of their suppliers, including both Openreach and Altnets. They will make commercial demands on their suppliers, and it is this process which led to the development of Equinox 1 and Equinox 2. Openreach's positive engagement with its CP customers cannot be viewed as problematic in this context – such engagement is a straightforward example of competition on the merits.

5.6. We note that Ofcom is separately gathering further evidence on the issues raised by certain stakeholders ahead of considering whether and/or how to take further action. We are happy to engage in any discussions with Ofcom as may be necessary to inform this exercise and to address any specific concerns raised by stakeholders.

Customers are used to assessing offers

5.7. Openreach anticipates that Altnets also engage in price negotiations with their CP customers and may well make special offers in response to their customers proactively or in response to their customers' requests. While their offers are not necessarily public and do not have to be offered to all CP customers on equivalent terms, they are not necessarily more or less complex than Openreach's offers. Further, while the Altnets' negotiations with their CP customers are less visible than Openreach's are, they may well take time to conclude given the value and significance of the arrangements. CPs are well-used to assessing offers and deciding whether to participate in them across the board.

In any event, Openreach's approach to FTTP pricing represents competition on the merits and cannot give rise to any competition concerns

5.8. Notwithstanding the above, we provide for completeness an overview of our approach to pricing FTTP services since 2019 to refute the factual basis on which these claims may have been made. We also summarise why we have changed pricing at certain points and how we engage with our CP customers more generally. Overall, Openreach does not accept that its pricing offers are unduly complex or numerous. Indeed, Openreach's CP customers are extremely sophisticated operators who are capable of working (and often do work) with multiple network providers at once, and Openreach's pricing offers have been developed in collaboration with our CP customers such that they are readily understood by industry and do not give rise to any uncertainty.

5.9. Since rebasing FTTP list pricing in 2019 as FTTP availability began to increase at scale and pace under the "Fibre Cities" programme, Openreach has only introduced offers that changed overall FTTP connection and rental prices three times: (i) two parallel offers ("FTTP Only" and "Localised Marketing") that introduced similar discounted price points on FTTP rentals and connections in January 2020 for an initially limited timeframe to encourage early adoption and testing by CPs of customer demand and price points; (ii) the Equinox 1 offer introduced in October 2021; and (iii) Equinox 2, which is due to take effect from 1 April 2023.

5.10. Openreach has been building FTTP and selling FTTP services to CPs in some form since around 2010. However, availability – and therefore take-up – was initially limited to new site

developments, certain trial areas and certain publicly funded programmes. We announced our Fibre Cities build programme in 2018 when only around 0.5 million UK premises had access to Openreach FTTP. Our announced ambition under the Fibre Cities programme was to pass three million UK premises by 2021, and this ambition has expanded over time as we approach almost 10 million premises passed today.

5.11. As we began to deploy at scale and pace, we naturally reviewed our FTTP pricing. In September 2019, when availability was still below one million premises passed, we reset FTTP list prices from prior levels at different bandwidths up to the 330/50Mb headline speed.

5.12. The challenge at that time was to encourage our CP customers to begin selling FTTP even though availability at that time remained low. Experience of building FTTC in the late 2000s and early 2010s demonstrated that CPs could be reluctant to promote services that were not available on a nationwide basis. We therefore started to look at developing offers that would reward CPs with lower prices if they demonstrated a commitment to use the Openreach FTTP network as it became available when placing orders with Openreach. At this early stage of build, we were also keen to work with our CP customers to support them in testing end customer demand for different bandwidths at different price points.

5.13. Two timebound offers specific to FTTP were then developed and introduced in January 2020 in light of this:

i. The **FTTP Only** offer included similar features to those introduced in Equinox 1 and Equinox 2, in that discounted prices were available to CPs on the condition of meeting a defined set of OMTs over time (and having GEA Cablelinks in place). The scope of the offer was initially set by reference to Openreach FTTP footprint in place before March 2020, but was then extended to include footprint built up to August 2021. New bandwidths up to 1Gb were included for supply in the offer from April 2020 and adjustments to 80/20Mb pricing were made in September 2020 under the FTTP Only v2.0 offer.

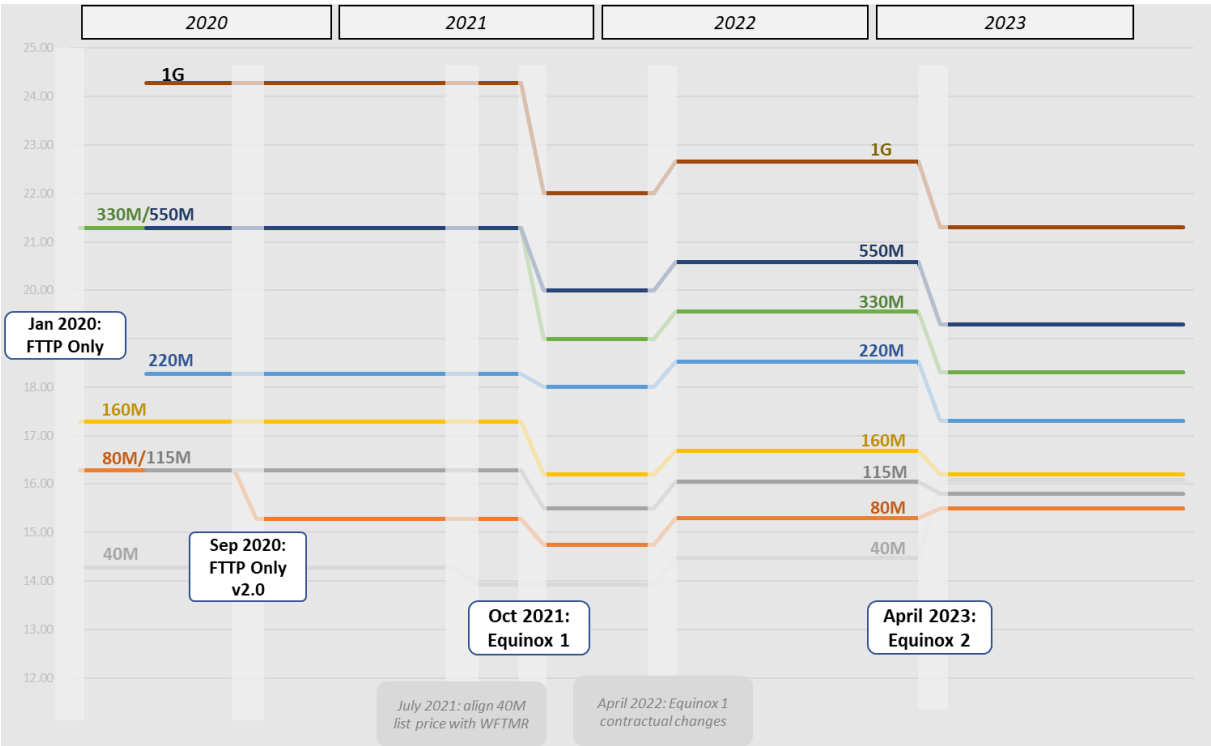
ii. The **Localised Marketing** offer provided participating CPs with the option of selecting specific areas where they would commit to certain marketing activities and a minimum ARPU spend (irrespective of bandwidths ordered) in return for access to discounted prices in those areas for a defined period. The discounted prices available under this offer were broadly the same as those available under the FTTP Only offer. Given the local nature of this offer, its overall scope was more limited, both in terms of footprint and the overall amount of the discounts provided. Openreach has not introduced an offer of a similar nature since the Local Marketing offer expired.

iii. Different CPs signed up to these offers at different times and offers were extended, but discounted prices applied until September 2021.

5.14. We then introduced Equinox 1 in October 2021, as the terms by which Openreach could compete under the new rules laid out in the WFTMR became clear. Under the terms of Equinox

1, discounted prices were adjusted upwards in April 2022 by CPI at lower bandwidths and CPI-1.25% at higher bandwidths. Equinox 2 was subsequently notified to Ofcom and industry as an overlay to Equinox 1 in December 2022, to take effect from 1 April 2023.

5.15. The figure below summarises how Openreach FTTP rental pricing has changed as a result of these offers since January 2020 (the figure does not overlay slight differences in pricing available under the lower volume Localised Marketing offer). In the context of overall network access pricing, which tends to adjust every April, there is nothing remarkable about the frequency of price changes implemented in this period even before account is taken of the evolving nature of demand for FTTP and growth in availability.



5.16. It is also noted for completeness that Openreach has introduced other special offers or pricing from time-to-time such as, for example, in relation to ancillary services such as GEA Cablelinks or as part of trials or pilots for new products or processes.[37] New pricing or offers is necessarily required for such initiatives, as revenue and cost impacts are assessed. Many pilots and trials will take place on an opt-in basis, such that CPs are free to choose whether to participate or ignore depending on their circumstances. Overall, such developments should not be considered surprising for any large organisation – it is not unusual for companies in any sector to launch prices and offers as new products are launched and market dynamics change. The mere existence of multiple offers or price changes over time is to be expected in any well-functioning competitive market and is in no way indicative of underlying anticompetitive conduct.

[37] For example, Openreach has recently launched pilots or trials in relation to multiport ONTs (allowing multiple lines to be provided via a single ONT), advanced FTTP installations and new 1.2Gb/1.8Gb FTTP bandwidths.

5.17. Rather than questioning the frequency of changes in their own right, stakeholders may also be questioning why certain terms in the Equinox 1 offer are being overlaid by Equinox 2 after 18 months when the Equinox 1 offer set a 10-year framework for the terms of supply of FTTP services. However, in a dynamic market with evolving demand, it should be no surprise that the changes to be introduced by Equinox 2 came about following CP engagement and were in response to CP requests.

5.18. Specifically, as the market continued to develop following the launch of the Equinox 1 offer, our CP customers understandably sought pricing that was more competitive, provided greater longer-term pricing certainty and assisted them in migrating their existing end customer bases to FTTP (given that the focus on Equinox 1 was on the acquisition of new end customers, at least in part to help manage service provision as demand increased over time). It is no surprise that CPs sought additional adjustments to prices within the 10-year framework as they reviewed their needs and the needs of their end customers. The structure of Equinox 2 reflects this and should not be seen as adding any complexity. Existing targets remain and no additional targets or requirements are introduced. CPs are also under no obligation to purchase from Openreach under the Equinox 1 offer or the proposed terms of Equinox 2.

5.19. In this regard, it is important to recognise that whilst the Equinox 1 offer has been successful in encouraging CPs to pivot new sales activity away from copper and towards FTTP in our growing footprint, it was never expected to meet fully our objectives or our CP customers' demands in terms of driving all Openreach volume onto FTTP over the next decade. It was also never realistic to expect that CPs would be satisfied with all prices tracking the agreed ceiling over the full term of the offer as market dynamics changed. Further, given that the original Equinox 1 offer was designed with the objective of shifting acquisition activity towards FTTP, it was always the case that CPs may need further support to increase the pace of migrating existing copper lines to FTTP, in addition to supporting end customer acquisitions. It is natural, therefore, that CPs have sought additional commercial incentives from a relatively early point as we engaged with them on what was required to increase the pace at which they migrate their bases of existing copper end customers to FTTP when using the Openreach network, where available.

5.20. As competition embeds in network access markets and demand evolves, it is pro-competitive for reviews of Openreach's terms of supply to take place and for Openreach, in dialogue with its CP customers, to consider how long-term ambitions to drive the pace of migration to FTTP should be reflected in overall price levels, the balance between connection and rental pricing and bandwidth premiums.

5.21. Stakeholders seem to suggest that the mere act of Openreach engaging with its CP customers to discuss their pricing and service needs via detailed and ongoing dialogue is itself acting as an inappropriate barrier to those CPs using Altnets. We note here that while our close engagement with our CP customers reflects our legitimate commercial relationships with CPs, it is also a fundamental requirement of the Commitments agreed with Ofcom and reflects the need for us to act as an independent and neutral wholesale supplier of network access services on equivalent terms as required under the SMP conditions. This places additional burdens on

the way we engage with our CP customers and consult with them ahead of making commercial decisions with significant financial implications. Openreach must also take the time necessary to ensure that its pricing and offers are fully compliant with its legal and regulatory obligations – such assessments often require careful consideration.

5.22. Finally, it is noted that the process of Openreach reaching agreement with its CP customers on FTTP pricing is complicated by the fact that each CP customer has a different starting position and varied requirements that Openreach must seek to reconcile in order to develop pricing proposals that work for all and are consistent with the principle of equivalence.

CONFIDENTIAL ANNEX 1

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