Openreach Proposed FTTP Offer starting 1 October 2021

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Annex

Overview

In the Wholesale Fixed Telecoms Market Review Statement, we set out a framework to promote investment and competition in gigabit-capable networks. In doing so we recognised that Openreach could set commercial terms that undermine new network build.

To address this concern, we required Openreach to notify commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased. This notification process would allow industry and us to scrutinise the terms before they are introduced, and where necessary allow us to intervene to prevent such terms being introduced.

On 1 July 2021, Openreach notified new pricing arrangements for its Fibre to the Premise ('FTTP') services (the 'Equinox Offer'). The Equinox Offer will last until 30 September 2031 and be available across Openreach's FTTP footprint.

In this consultation we have assessed the Equinox Offer and our provisional view is that we should not take any action at this time.

This consultation closes on 6 September 2021. We intend to publish the outcome of this consultation in September 2021.

1. Introduction

1.1 In the Wholesale Fixed Telecoms Market Review Statement (the 'WFTMR Statement') we said that the use of certain commercial terms by Openreach may give rise to competition concerns by deterring new network build by alternative network operators ('altnets').[1] We said we would consider proposed commercial terms that may deter altnet build on a case-by-case basis, and where necessary we would intervene to prevent such terms, including using our direction making powers under SMP conditions.

1.2 Openreach is required to provide 90 days' notification of commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased.[2] We set out the process we expect to follow in Annex 11 of the WFTMR Statement. The relevant legal framework is summarised in Annex 5 of this consultation.

1.3 On 1 July 2021, Openreach notified new pricing arrangements for its Fibre to the Premise ('FTTP') services that it intends to put in place from 1 October 2021, and on the same day published ACCN OR728 and an associated customer briefing which sets out the terms (the 'Equinox Offer').[3] [4] The Equinox Offer will be available for acceptance between 1 October 2021 and 30 March 2022 and ends on 30 September 2031.

1.4 In order to assist us in forming a provisional view on whether the Equinox Offer raises competition concerns requiring *ex ante* intervention, we published a Call For Inputs ('CFI') on 2 July 2021. The CFI invited stakeholders to raise any initial concerns with us and set out the process we intended to follow.[5]

1.5 In addition to responses to the CFI, we have taken into account material obtained from the WFTMR and further evidence gathered from stakeholders, both from meetings and through requests for information ('RFI') to help inform our initial assessment. We set out below our analysis, and why we consider some issues raised are out of scope of our assessment. Where appropriate we are publishing this information as part of this consultation.[6]

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[1] WFTMR Statement, 18 March 2021, https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-wholesale-fixed-telecoms-market-review [accessed: 7 July 2021]. Our competition concerns and reasoning are set out in Volume 3, Section 7.
[2] SMP Condition 8.6. This applies in relation to certain of our defined markets, including WLA Area 2 and WLA Area 3.
[3] Openreach briefing, https://www.openreach.com/news/openreach-announces-special-offer-for-communications-providers-to-drive-adoption-of-full-fibre-broadband/ [accessed: 7 July 2021]
[4] Openreach and BT Group submitted that the Equinox Offer does not trigger the requirement for a 90 days' notification period. Openreach stated that it had voluntarily given 90 days' notification since this is the first FTTP pricing initiative since the WFTMR Statement (Openreach CFI response, page 1; BT Group CFI response).
[5] Separately, on 2 July 2021 we published a statement in relation to pre-existing Openreach FTTP offers with geographic pricing. https://www.ofcom.org.uk/consultations-and-statements/category-2/existing-openreach-fttp-offers-with-geographic-pricing
[6] CityFibre referred to (i) the complexity of analysing the Equinox Offer; and (ii) the potential signal that a provisional Ofcom view sends to altnets, ISPs and investors. CityFibre submitted that Ofcom should make all material submitted by Openreach available to stakeholders for comment and should not rely solely on CFI responses or ISPs' views. CityFibre

1.6 In the next section, we set out our understanding of the Equinox Offer in more detail along with our assessment.

1.7 This document as a whole, including its annexes, comprises an impact assessment.[7] We are publishing for consultation our assessment of the Equinox Offer and our proposal not to apply any *ex ante* measures, to give stakeholders an opportunity to make representations. In preparing this document, we have considered citizen and consumer interests, including the impacts on competition and on altnets and ISPs. Ofcom is an evidence-based organisation and welcomes responses to this consultation. Any comments about our assessment of the impact of our proposals should be sent to us by the closing date for this consultation. We will consider all comments before deciding how to proceed.

stated that Ofcom should not reach a provisional view without thoroughly investigating various issues and making its initial analysis available to stakeholders (CityFibre CFI response, for example paragraphs 1.7-1.8, 1.10, and 5.1-5.2). We note CityFibre's points about the process we have adopted. In Annex 11 of the WFTMR Statement we explained that where Openreach notifies commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased, we will assess the information and evidence to reach a provisional view and consult where we consider that there are competition concerns that would be addressed by a direction under our powers under SMP conditions. In the CFI we explained that we also anticipated consulting in this case on any provisional view that we should take no further action given that this is Openreach's first market wide pricing initiative published since the WFTMR Statement. We believe that the process we have adopted in this case is consistent with these statements and is appropriate in the circumstances. Our view remains provisional and is subject to further engagement with, and evidence from, stakeholders.

[7] Annex 5 provides more information about impact assessments.

2. Our assessment

2.1 Our assessment is structured as follows:

a) Summary of the Equinox Offer;

b) Ofcom's policy objectives;

c) Overview of stakeholder submissions;

d) Our consideration of the concerns raised by stakeholders, namely (i) whether low Openreach FTTP prices act as a barrier to altnet entry and expansion; (ii) whether conditionality acts as a barrier to altnet entry and expansion; (iii) whether targeted discounts deter altnet build; (iv) compatibility of the Order Mix Targets with the prohibition on geographic targeted pricing; (v) competitive impacts on ISPs; (vi) whether the Order Mix Targets may leave vulnerable consumers exposed; and (vii) various issues that are not directly related to the Equinox Offer;

e) Ofcom's provisional conclusions; and

f) Consultation question.

Summary of the Equinox Offer

2.2 We summarise the Equinox Offer below. This summary reflects the main aspects and requirements of the offer but omits points of detail.

2.3 In essence, the Equinox Offer gives ISPs cheaper prices for Openreach FTTP products, so long as they largely stop making new sales of legacy broadband products where Openreach FTTP is available, and switch to selling mainly FTTP products instead.[8]

2.4 Under the Equinox Offer, ISPs pay discounted prices for Openreach's FTTP rental and connection services if they meet certain targets for the percentage of new sales orders they place which are FTTP (we refer to these as the 'Order Mix Targets').[9] The targets are evaluated on a quarterly basis and across all premises where Openreach FTTP is available to order at the start of that quarter.[10]

2.5 To qualify for rental discounts ISPs must achieve at least 80% of new sales orders on FTTP after the first year. The discounted prices apply to all the ISP's Openreach FTTP lines in the UK.[11] The level of the discount varies by product bandwidth although there is no discount

[8] Legacy broadband refers to both Fibre to the Cabinet ('FTTC') and products that solely use a copper connection.

[9] The percentage is calculated as follows. The denominator is the total volume of an ISP's new provision and transfer orders in that quarter that are placed with Openreach at premises where FTTP is available (i.e. both legacy and FTTP orders). The numerator is the volume of an ISP's new provision and transfer orders in that quarter that are placed on Openreach FTTP. Orders to modify speed on the same technology (e.g. a regrade from FTTC 40/10 to FTTC 80/20) and bulk moves between ISPs are not included in this calculation.

[10] The contract allows for some 'catching up' between quarters.

[11] The Equinox Offer supersedes pre-existing FTTP discounts and offers for those ISPs that sign up and all FTTP customers on previous deals will essentially move to Equinox pricing.

on the 40/10 product. There is a further discount for new-to-network customers taking the 550/75 product (i.e. those joining Openreach from another network).[12]

2.6 To qualify for the full connection discounts ISPs must achieve at least 90% of new sales orders on FTTP after the first year. Between 90% and 80% the level of the connection discount reduces at a constant rate from maximum discount to zero discount.

2.7 Discounts on connection charges only apply to residential premises in Area 2.[13] The discounted connection charge is £25 for new-to-network connections and £50 for other connections. In order to receive the full connection discount after 31 March 2022, ISPs must also provide accurate forecasts (within a certain margin of error) of the number of Openreach FTTP orders they expect to place.

2.8 The offer also includes an ARPU share mechanism if the ISP's average rental amount per Openreach FTTP consumer exceeds a threshold. ISPs are only eligible for this if they meet the target for 80% of new sales orders to be on FTTP.

2.9 In the first year of the Equinox Offer, there is an 'on-boarding' period in which lower targets apply.[14] In the first six months (known as the 'ramp-up period'), if an ISP fails to meet the target, it could still receive some discounts by meeting a target calculated by reference to only some of its orders.[15]

2.10 The Equinox Offer also includes free bandwidth upgrades and discounts on GEA Cablelink (which ISPs require to offer Openreach FTTP).

2.11 The scheme is intended to start on 1 October 2021 and ends on 30 September 2031. There is an option to exit after 5 years or if Openreach increases its prices in year 6.[16] ISPs have 6 months to sign up to the Equinox Offer.

2.12 We expect that the main ISPs will sign up to the Equinox Offer.[17]

2.13 Openreach, BT Group and TalkTalk submitted that the Equinox Offer will support FTTP take-up, which will benefit consumers.[18] Openreach, BT Group, TalkTalk and Vodafone also submitted that consumers will directly benefit from lower FTTP prices.[19] BT Group and Vodafone submitted that certainty of prices is beneficial e.g. since it allows ISPs to

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[12] For 12 months, the price of 550/75 is set at Openreach's 160/30 price. This discount is available for orders placed until 30 September 2026 provided the ISP is meeting the 80% FTTP share target.

[13] Area 2 represents areas (postcode sectors) in which there is, or there is likely to be potential for, material and sustainable competition to BT in the commercial deployment of competing networks.

[14] In the first 6 months, full rental and connection discounts apply if the ISP achieves at least 75% of new orders on FTTP. In the second 6 months, full rental and connection discounts apply if the ISP achieves at least 80%.

[15] The target only applies in locations where the ISP has GEA Cablelinks enabled for FTTP. The target can also be applied to individual sub-brands and resellers.

[16] For the first 5 years, all prices are indexed in some way. In year 6 (1 October 2026 – 30 September 2027), the rental price, ARPU share threshold, and connection charges may increase following a review by Openreach, with the increase capped at £1.50/month for rental charges and ARPU share, and capped at £20 for connection charges. Indexation continues thereafter.

[17] Vodafone submitted that in practice ISPs need to sign up given the scale of the discounts under the Equinox Offer. Vodafone CFI response, paragraph 7 (second one). [✂]

[18] Openreach CFI response, page 5. BT Group CFI response. TalkTalk CFI response, paragraph 1.6.

[19] Openreach CFI response, page 5. BT Group CFI response. TalkTalk CFI response, paragraph 1.6. Vodafone CFI response, paragraph 5 (second one).

establish long term consumer offers.[20] However, a number of altnets submitted that the Equinox Offer is not necessary for Openreach's business case for FTTP rollout and/or that certain aspects of it will not benefit consumers.[21] [22] We discuss altnets' concerns in further detail below.

2.14 In the WFTMR Statement, we set out how regulation would transition from copper to full fibre services in exchange areas where fibre is built using a staged approach. The first stage allows Openreach to stop selling new legacy services ('stop sell') and applies when Openreach makes ultrafast services available at 75% of premises in the exchange area, and provides at least 12 months' notice prior to implementation. The second stage entails removing charge controls from legacy services, and applying them to the FTTP services, potentially 24 months after the first stage.[23]

2.15 The Equinox Offer is a commercial mechanism to bring forward the stop sell date. Essentially, Openreach is offering lower FTTP prices if its customers agree to (largely) stop selling legacy services sooner than would be allowed by regulation.[24] However, absent the Equinox Offer, Openreach would still be able to take advantage of the regulated copper retirement process.

Ofcom's policy objectives

2.16 Our Strategic Review of Digital Communications in 2016 set out our intention to regulate to encourage large-scale deployment of new full-fibre networks both to homes and businesses, drive widespread availability of competing ultrafast broadband services and support the roll out of 5G networks.

2.17 In our WFTMR Statement, we stated that we considered the best way to achieve this and deliver these outcomes for consumers is through competition in gigabit-capable networks in as many areas of the UK as possible. Therefore, we wanted to promote investment in such networks by Openreach and other companies in order to promote network-based competition. We wanted to encourage Openreach's competitors to build their own networks, rather than relying on network access from Openreach. In areas of the UK where there is unlikely to be material and sustainable competition to Openreach in the commercial deployment of competing networks, we wanted to promote investment by Openreach and ensure appropriate access to competitors in the interests of consumers. We considered that overall the resulting network competition should benefit consumers in the long term. Having identified that BT has significant market power ('SMP') in various markets, including WLA Area 2 and WLA Area 3, we imposed various ex ante remedies in

[20] BT Group CFI response. Vodafone CFI response, paragraph 5 (second one).
[21] [✂]. INCA CFI response, paragraphs 106-108. VMO2 CFI response, p4-5. KCOM CFI response, paragraph 3.25(b). Fern Trading CFI response, point 5(a) on page 2.
[22] We received a combined response from INCA, Zzoomm, County Broadband, Full Fibre, Truespeed, Fern Trading, Community Fibre, ITS, WightFibre, Persimmons, Digital Infrastructure and Airband. For brevity, in this document we refer to this group as "INCA" although some of the altnets in question are not INCA members.
[23] Our decisions in relation to copper retirement are set out in the WFTMR Statement, Volume 3, Section 2.
[24] However, the stop sell under the Equinox Offer is not absolute, as the full discounted prices are available if at least 90% of an ISP's new sales orders are FTTP.

Volume 3 Section 7 of the WFTMR Statement to achieve our objective to promote investment in gigabit-capable networks.

2.18 As set out in Volume 3 Section 7 of the WFTMR Statement, one concern is that Openreach may use commercial terms that undermine new network build which are unlikely to be in the interests of consumers in the long term. We also explained that terms which could induce loyalty are a particular concern because this could deter ISPs from switching demand to new alternative networks, and therefore deprive these network operators of demand. Ultimately this could undermine alternative operators' FTTP investment plans.

2.19 Openreach is the only operator with a national network footprint. In order to serve the national market, ISPs must purchase at least some wholesale services from Openreach (i.e. in areas where there is no alternative network). Openreach could design commercial terms which mean ISPs face a significantly higher average charge for services purchased from Openreach if they do not purchase all their services from Openreach. This would undermine the business case for sub-national competitive entry.

2.20 As we explain in the WFTMR Statement[25], alternative operators building new networks face considerable challenges in becoming established and overcoming Openreach's incumbency advantages. For example, Openreach benefits from economies of scale (meaning it has lower unit costs than an entrant); in relation to FTTP, a key advantage comes from Openreach having high existing customer volumes; and it has established relationships with ISPs and some level of system/process integration.

2.21 In the light of these objectives, Ofcom established the 90 days' notification requirement for commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased.

2.22 It could be argued that the discounts in the Equinox Offer are conditional on the range of services purchased, in that ISPs are required to purchase a minimum percentage of FTTP for new orders.

Overview of stakeholder submissions

2.23 In summary:

a) **Openreach and BT Group:** argued that the Equinox Offer does not raise any competition concerns;

b) **ISPs:** TalkTalk, Sky and Vodafone were generally supportive of the Equinox Offer, although TalkTalk had some concerns about its downstream impacts; and

c) **Altnets:** CityFibre, INCA, Virgin Media O2 ('VMO2'), KCOM, Fern Trading, [✂] and the Federation of Communication Services ('FCS') were concerned about the impact of the Equinox Offer on altnets and on infrastructure competition.

[25] WFTMR Statement, Volume 3, paragraphs 7.45-7.46.

2.24 CityFibre, VMO2 and Fern Trading referred to Ofcom's comments in the WFTMR Statement that there is a small window of opportunity to encourage altnet build.[26] [✂], INCA and Fern Trading also highlighted the existing barriers to altnet entry and expansion.[27]

2.25 Some altnets submitted that one objective of the Equinox Offer may be to reduce future infrastructure competition.[28] In the long term, this would ultimately not be in consumers' interests.[29] In particular, [✂] and INCA submitted that the Equinox Offer gives Openreach the ability to reduce the scale of the discounts in year 6 if the competitive threat from altnets is diminished.[30]

2.26 Stakeholder concerns about the Equinox Offer can be grouped into several broad categories:

a) Low Openreach FTTP prices act as a barrier to altnet entry and expansion;

b) Conditionality acts as a barrier to altnet entry and expansion;

c) Targeted discounts deter altnet build;

d) Compatibility of the Order Mix Targets with the prohibition on geographic targeted pricing;

e) Competitive impacts on ISPs;

f) The Order Mix Targets may leave vulnerable consumers exposed; and

g) Various issues that are not directly related to the Equinox Offer.

2.27 We consider each of these issues in turn below. While we have assessed some of them in detail, our provisional view is that others lie outside of the scope of the 90 days' notification process.

Low Openreach FTTP prices act as a barrier to altnet entry and expansion

Stakeholder submissions

2.28 Some stakeholders submitted that the magnitude of the discounts available under the Equinox Offer will encourage take-up of Openreach FTTP and act as a barrier to entry for altnets.[31] INCA and Fern Trading submitted that these discounts could result in retail prices that cannot be replicated by altnets in rural areas, where the costs of building an FTTP

[26] CityFibre CFI response, paragraph 3.2. VMO2 CFI response, page 7. Fern Trading CFI response, page 1.
[27] [✂] INCA 27 July 2021 response, paragraphs 39-45 and 58. Fern Trading CFI response, page 1.
[28] [✂] INCA CFI response, paragraphs 21. VMO2 CFI response, page 5. Fern Trading CFI response, points 5(a) and 6 on page 2.
[29] [✂] INCA CFI response, paragraphs 157-159. INCA 27 July 2021 response, paragraph 71-72.
[30] [✂] INCA CFI response, paragraphs 71, 124 and 138-139.
[31] These discounts include the ARPU share. [✂]

network are higher.[32] INCA also submitted that these discounts may discourage altnets from building in areas where one or two FTTP networks are already present and where networks are likely to enjoy fewer economies of scale.[33] INCA submitted that these effects are compounded by: (i) Openreach's pre-existing FTTC and FTTP discount schemes; and (ii) the other elements of the Equinox Offer that INCA is concerned about.[34]

2.29 In contrast, Openreach submitted that the "ladder" of discounted prices in the Equinox Offer begins at the regulated FTTP 40/10 price. As a result, it considered that efficient altnets can compete with its discounted prices.[35] TalkTalk submitted that the monthly FTTP rental prices in the Equinox Offer exceed its estimate of Openreach's average costs. An equally efficient competitor could thus profitably undercut Openreach's prices.[36] TalkTalk also submitted that [✂].[37]

Ofcom's provisional view

2.30 As discussed above, the 90 days' notification requirement is for commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased. It is not intended to address general concerns about low wholesale prices. In the WFTMR Statement we considered how we should *ex ante* regulate Openreach's FTTP prices. We set a price ceiling for the FTTP 40/10 'anchor' product but decided not to regulate the prices of Openreach's higher speed products. Further, we decided that a prohibition on geographic discounts was a simple and proportionate means of addressing our competition concerns. Beyond this we did not impose any further *ex ante* regulation on the extent to which Openreach can set low prices. Therefore, we do not consider the level of prices would warrant assessment as part of the 90 days' notification process in the absence of a *prima facie* concern.

2.31 When setting the price ceiling for the FTTP 40/10 anchor product, we compared it with our estimate of the price that an entrant operator would need to charge in order to recover its efficiently incurred costs.[38]

2.32 Under the Equinox Offer, the price for the FTTP 40/10 anchor product is set at the regulated price ceiling, i.e. it is not discounted. Further, all other FTTP rental prices under the Equinox Offer are set at a level above this.

[32] These discounts include the ARPU share, which INCA expects to become easier to attain over time. INCA CFI response, paragraphs 9, 17, 57, 64-65, 105, 109 and 112-123. Fern Trading CFI response, points 1-2 on page 1. This argument may also be advanced in [✂] CFI response, paragraph 2.3, final bullet.
[33] INCA CFI response, paragraphs 9 and 118. INCA 27 July 2021 response, paragraph 56-57 and 61.
[34] INCA submitted that Openreach's FTTC discounts discourage consumers from purchasing FTTP from altnets. INCA CFI response, paragraphs 19, 57, 65 and 142-147. INCA 27 July 2021 response, paragraph 15.
[35] Openreach CFI response, page 5.
[36] TalkTalk acknowledged that average costs depend heavily on the number of customers served by an FTTP network. Frontier Economics for TalkTalk estimated Openreach's average cost of serving FTTP customers is £9.49/month (or £12.60/month in a higher cost scenario). TalkTalk CFI response, paragraphs, 1.4 and 2.9-2.13.
[37] [✂] TalkTalk CFI response, paragraphs 1.4 and 2.18-2.24.
[38] WFTMR Statement, Annex 15, and Volume 4, paragraphs 1.36-1.38.

2.33 All prices under the Equinox Offer are therefore set at a level above our estimate of the price that an altnet would need to charge in order to recover its efficiently incurred costs. [✂].[39]

Assessment of whether conditionality acts as a barrier to altnet entry and expansion

Introduction

2.34 Some stakeholders submitted that the conditions that ISPs must meet to qualify for discounts may create a barrier to using altnets.[40] In particular:

a) **The Order Mix Targets discourage ISPs from using altnets:** INCA, KCOM and Fern Trading submitted that using an altnet may jeopardise an ISP's ability to meet the Order Mix Targets and thus benefit from discounted Openreach FTTP prices.[41]

b) **The forecasting requirements discourage ISPs from using altnets:** INCA submitted that the potential loss of discounts for ISPs that submit inaccurate forecasts discourages ISPs from using altnets.[42]

2.35 ISPs that wish to offer FTTP will have no choice but to purchase access from Openreach in some parts of the UK, reflecting Openreach's position as the incumbent, nationwide fixed telecoms network. In principle, this could allow Openreach to leverage its position to raise barriers to entry and expansion for altnets in those parts of the UK where infrastructure competition is feasible. In particular, it could *de facto* make discounts in those areas where ISPs are reliant on Openreach conditional on not using altnets in other areas. This could exclude altnets, even if ISPs find altnets more appealing than Openreach in those areas where both are present.

2.36 Accordingly, and in line with the policy context set out in paragraphs 2.16-2.22, we have assessed stakeholders' submissions that the Order Mix Targets and the forecasting requirements may discourage ISPs from using altnets.

2.37 In addition, INCA, Fern Trading and [✂] submitted that the 10-year duration of the Equinox Offer is not justified.[43] We do not consider that this is a self-standing competition concern. Rather, in the event that other competition concerns arise, the 10-year duration of the Equinox Offer may exacerbate them. Accordingly, we have not separately assessed the duration of the Equinox Offer.

[39] [✂]
[40] In addition, the FCS and [✂] inaccurately characterised the Equinox Offer as including volume discounts. FCS CFI response. [✂] CFI response, paragraph 2.3, second bullet.
[41] INCA CFI response, paragraph 2. KCOM CFI response, paragraphs 3.5 and 3.8. Fern Trading CFI response, point 5(b) on page 2. [✂].
[42] INCA CFI response, paragraphs 20. INCA 27 July 2021 response, paragraphs 76-78.
[43] INCA CFI response, paragraphs 18, 87(3) and 131-136. Fern Trading CFI response, point 6 on page 2. [✂] CFI response, paragraph 2.3, penultimate bullet.

Analytical framework

2.38 To assess the potential concerns that the Order Mix Targets and forecasting requirements create barriers to using altnets, we have followed the approach set out in the WFTMR Statement. In that statement, we explained that our starting point was that the creation of any barrier to using alternative network operators would only be justified where:

a) the impact on nascent network competitors is unlikely to be material; and

b) the arrangements will generate clear and demonstrable benefits, such as:

   i) the arrangements are essential to Openreach's business case for fibre roll-out; or

   ii) the arrangements are necessary to offer more efficient prices that would deliver benefits for consumers.[44]

2.39 Therefore, our analysis considers up to three questions:

a) **Question 1:** Does the Equinox Offer potentially create a barrier to using altnets?

b) **Question 2:** Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?

c) **Question 3:** Is the Equinox Offer likely to generate clear and demonstrable benefits?

2.40 Under Question 1, we consider whether the terms of the offer could deter ISPs from moving volumes from Openreach to altnets by penalising them in some way.[45] For example, do ISPs face higher average charges for services purchased from Openreach if they switch some volumes to new networks?

2.41 If the offer does potentially create a barrier to using altnets, we will go on to consider the likely impact on nascent network competitors (Question 2). Commercial terms that have a material detrimental impact on competitive network build are unlikely to be justified. Where the commercial terms constitute some barrier to access seekers using altnets but the effect is unlikely to be material, we consider the purpose and potential benefits of the terms (Question 3).[46]

2.42 As explained in the WFTMR Statement, our objective is to promote investment in gigabit-capable networks by Openreach and other operators in order to promote network-based competition, and this is our guiding principle in assessing the Equinox Offer. Given this, our analytical framework is concerned with the promotion of competition rather than the protection of competition as under competition law.[47]

[44] WFTMR Statement, Volume 3, paragraph 7.154 and 7.160.
[45] WFTMR Statement, Volume 3, paragraphs 7.29-7.30.
[46] WFTMR Statement, Volume 3, paragraph 7.160.
[47] WFTMR Statement, Volume 3, paragraph 7.159.

Assessment of whether the Order Mix Targets discourage ISPs from using altnets

Stakeholder submissions

2.43 INCA, KCOM and Fern Trading submitted that the Order Mix Targets discourage ISPs from using altnets for FTTP.[48] INCA submitted that the Order Mix Targets are likely to be challenging for ISPs to meet. If an ISP were to use an altnet in an area that will subsequently be part of Openreach's FTTP footprint then this risks dragging down the proportion of its Openreach orders that are for FTTP. This would jeopardise the significant discounts the ISP enjoys across the whole Openreach FTTP footprint and, as a result, strongly discourage ISPs from using altnets.[49] INCA provided illustrative examples in which some consumers are assumed to take FTTC (e.g. because of the hassle of FTTP installation). If an ISP uses an altnet for FTTP orders but Openreach for FTTC orders within the Openreach FTTP footprint then this increases the proportion of that ISPs' overall orders with Openreach that are for legacy products.[50]

2.44 In contrast TalkTalk, Sky and Vodafone submitted that they would not be inappropriately discouraged from using altnets by the Equinox Offer.[51] Openreach and TalkTalk submitted that the Order Mix Targets do not discourage the use of altnets. This is because orders with altnets are excluded from both the numerator and denominator when calculating compliance with these targets.[52]

Provisional Ofcom view on Question 1

2.45 Applying our analytical framework above, we first consider whether the Order Mix Targets create a potential barrier to using altnets.[53]

2.46 The Order Mix Targets could deter ISPs from moving volumes from Openreach to altnets if doing so jeopardised meeting these targets. If an ISP failed to reach these targets, it would pay higher prices across the entire Openreach FTTP footprint. Our analysis in Annex 6

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[48] INCA CFI response, paragraph 2. KCOM CFI response, paragraphs 3.5 and 3.8. Fern Trading CFI response, point 5(b) on page 2. [✂].

[49] This applies even if an altnet deploys FTTP in an area before Openreach or offers more attractive terms in that area than Openreach. INCA CFI response, paragraphs 2, 51-56, 63, 67, 87(1)-(2) and 150.

[50] INCA CFI response, Annex A, page 6. INCA 27 July 2021 response, paragraphs 28-31. KCOM also provided an illustrative example with a similar underlying premise. KCOM CFI response, paragraph 3.6.

[51] TalkTalk CFI response, paragraphs 1.4 and 2.4. Sky CFI response. Vodafone CFI response, paragraph 12.

[52] Openreach CFI response, pages 3-4. TalkTalk CFI response, paragraphs 2.5-2.7.

[53] INCA also submitted that Ofcom should separately assess the impacts in Area 2 and Area 3, given that competitive conditions differ between these areas (INCA CFI response, paragraphs 40-41; it specifically discussed Area 2 or Area 3 in paragraphs 72-75 and 80-85). We consider that the key locations to focus on for this theory of harm are those areas where altnets that supply FTTP to third party ISPs are present. It is these altnets that might potentially face increased barriers to entry and expansion as a result of the Equinox Offer. Whether they lie in Area 2 or Area 3 is not crucial to our analysis.

shows that the discounts if the Order Mix Targets are met could be substantial, in which case ISPs are could be strongly incentivised to meet them.[54]

2.47 As set out in Annex 7, we consider that there is considerable uncertainty about precisely how ISPs will perform against the Order Mix Targets.

a) We consider that there is a plausible scenario in which ISPs surpass the Order Mix Targets.

b) However, we also consider that are also plausible scenarios where at least some ISPs struggle to meet all of the Order Mix Targets, particularly in the next few years.

c) However, even in these more pessimistic scenarios, we would expect the challenges to be temporary.

2.48 There is thus a plausible scenario in which using an altnet is unlikely to affect an ISP's eligibility for discounts under the Equinox Offer because that ISP is nonetheless likely to surpass the Order Mix Targets. In this scenario, these targets are unlikely to create a barrier to using altnets.

2.49 However, given it is also plausible that ISPs could be close to the Order Mix Targets, particularly in the next few years, we have considered how ISPs might behave.[55] In particular, we have considered whether ISPs using an altnet are likely to continue to sell Openreach legacy products in areas where Openreach's FTTP footprint overlaps with that altnet.

2.50 The scenario we have in mind is one where an ISP uses the altnet for orders from consumers that prefer FTTP but uses Openreach's legacy network for orders from consumers that prefer legacy broadband products. The ISP would be placing these legacy orders even though there are two FTTP networks available (Openreach and the altnet). If an ISP were to do this, it would find it harder to satisfy the Order Mix Targets.[56]

2.51 We consider that, under the Equinox Offer, ISPs are unlikely to continue to offer legacy broadband products for new sales in areas served by Openreach FTTP, including in those locations that are also served by an altnet. If ISPs adopt this approach, moving volumes to altnets will have no impact on whether the Order Mix Targets are met, and thus on whether the ISP receives the discounts available under the Equinox Offer. We consider that such a strategy is likely. In particular, [✂].

[54] If it were the case that moving volumes to new alternative networks jeopardised meeting the targets then, even if an altnet's proposition is more appealing in one area, ISPs may be deterred from using that altnet in order to protect their discounts in other areas where they depend on Openreach for FTTP. The extent of those other areas where ISPs depend on Openreach for FTTP is significant – see Annex 8.

[55] An ISP may also be able to engage in a variety of additional actions if it is concerned that this situation may arise e.g. by changing the relative retail prices of its legacy and FTTP broadband products.

[56] The scale of this effect depends on the proportion of the Openreach FTTP footprint where the ISP engages in this behaviour. If announced build plans are realised, in the longer term altnets that provide wholesale access to ISPs may be present in approximately a third of Openreach's FTTP footprint. In the shorter term the extent to which altnets that provide wholesale access to ISPs are present in Openreach's FTTP footprint is uncertain – see Annex 8.

2.52 Absent the Equinox Offer, it is possible that ISPs might sell Openreach legacy products in altnet areas so as not to lose orders from those consumers that prefer legacy broadband. The Equinox Offer means that ISPs lose the flexibility to do this if they are worried about meeting the Order Mix Targets. However, our provisional view is that this loss of flexibility is not significant for ISPs' choice of whether to purchase from altnets or not. In particular:

a) [✂].[57] This suggests that legacy products might only be supplied to a small number of consumers.

b) [✂][58] This also suggests that the benefits of continuing to make legacy broadband sales when FTTP is available are limited.

c) Absent the Equinox Offer, ISPs would in any event need to stop selling legacy products in areas that lie within the Openreach FTTP footprint once regulated stop-sell is triggered in an area.[59] Any effect from the Equinox Offer is thus limited to the period of time before regulated stop-sell would have been triggered.

2.53 In addition, some ISPs purchase access from Openreach that they resell to smaller ISPs downstream. If downstream ISPs were to continue ordering legacy broadband products, this would make it harder for the upstream reseller to meet the Order Mix Targets. However, our provisional view is that this risk is likely to be small and time limited. As a result, it is unlikely to be significant for upstream resellers' choice of whether to purchase from altnets or not. In particular:

a) We would expect these contracts to evolve to match the new incentives provided by Equinox, to include suitable provisions to limit legacy broadband sales.[60]

b) As well as any contractual protections, there may be a variety of actions open to ISPs to limit legacy orders e.g. by offering additional inducements to the downstream ISP.

c) All ISPs would need to stop selling legacy products in areas that lie within the Openreach FTTP footprint once regulated stop-sell is triggered in an area, so measures to accommodate the Equinox incentives will be required in due course in any case.

2.54 In the light of the above analysis, we provisionally conclude that the Order Mix Targets do not create a potential barrier to using altnets. Given this provisional conclusion, it is not necessary to consider Questions 2 and 3 in our analytical framework.

2.55 We cannot rule out the possibility that ISPs' strategies, in particular the extent to which they continue to rely on Openreach legacy services where FTTP is available, change in future. If this were to happen, and our provisional assessment above proved to be incorrect, it is still open to us to intervene to prevent terms which discourage use of altnets, including through our direction making powers under SMP Conditions.

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[57] [✂] [✂]
[58] [✂]
[59] As explained in paragraphs 2.14-2.15, the Equinox Offer appears to be a commercial mechanism to bring forward the stop sell date. It is unclear whether Openreach will also trigger regulated stop sell of legacy services.
[60] [✂]

Assessment of whether forecasting requirements discourage ISPs from using altnets

Stakeholder submissions

2.56 INCA submitted that the potential loss of discounts for ISPs that submit inaccurate forecasts increases the risks for ISPs that use altnets (e.g. because the date at which an ISP starts buying FTTP from an altnet may change).[61]

Provisional Ofcom view on Question 1

2.57 Under the Equinox Offer, ISPs are required to forecast their Openreach FTTP orders covering the subsequent 6 months on a rolling monthly basis for 27 geographic areas, with a submitted forecast in month 1 locking down the forecast for month 4.[62] We consider that these forecasting requirements are likely to provide enough flexibility to accommodate ISPs that wish to use altnets for the following reasons:

a) ISPs that are planning to use altnets can factor this into their forecasts of the amount of FTTP they intend to purchase from Openreach. INCA's concern would only appear to arise where an ISP, having submitted those forecasts, changes its mind e.g. it instead decides to use Openreach for some FTTP sales, rather than the altnet.

b) ISPs lose 25% of the connection discounts available under the Equinox Offer if the difference between forecast and actual Openreach FTTP orders is more than 10% in three consecutive quarters.[63] We consider it unlikely that forecast errors as a result of using an altnet occur over such a long period.

c) Forecast accuracy is assessed on aggregate across all 27 geographic areas.[64] Uncertainty caused by using an altnet is only likely to arise in areas where Openreach and an altnet roll out FTTP at a similar time. This is likely to only be the case in a small part of the Openreach FTTP footprint within any forecasting period, implying that uncertainty caused by using an altnet is likely to have a limited impact on the aggregate forecast.

2.58 Moreover, where an altnet's deployment of FTTP is significantly delayed (as implied by the scenario described by INCA), ISPs might reconsider whether to use that alnet even absent the Equinox Offer. In other words, in such a scenario the barrier to altnet take-up might be its reliability, rather than the Equinox Offer.

2.59 Therefore, we provisionally conclude that the forecasting requirements do not create a potential barrier to using altnets. Given this provisional conclusion, it is not necessary to consider questions 2 and 3 in our analytical framework.

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[61] INCA CFI response, paragraphs 20. INCA 27 July 2021 response, paragraphs 76-78.
[62] Equinox Offer, Schedule 1, clause 10.1. Forecasting Manual, section 2.
[63] Equinox Offer, Schedule 1, clause 10.3. Forecasting Manual, section 3.
[64] Equinox Offer, Schedule 1, clause 10.4.

Assessment of whether targeted discounts deter altnet build

Introduction

2.60 By offering lower prices only to those consumers that altnets compete for, rather than general low prices to all consumers, Openreach could deter new network build while limiting the extent to which consumers benefit from low prices.

2.61 In the WFTMR Statement, we were concerned that Openreach could deter new network build using geographic discounts, and therefore decided to prohibit geographic discounts on rental charges.

2.62 We have assessed stakeholders' submissions that the discounts for new-to-network customers (we refer to these as 'New-to-network Discounts') are restricted by the geographic pricing prohibition, and that they are targeted at and likely to deter new network build.

Stakeholder submissions

2.63 [✂], INCA and VMO2 submitted that the New-to-network Discounts in the Equinox Offer target altnets and ISPs that use altnets. In particular, they referred to:

a) 550/75 rental discount: [✂], INCA and VMO2 referred to this New-to-network Discount.[65] INCA submitted that pricing a 550/75 product at the level of a 160/30 product for a year is likely to be appealing to consumers.[66] INCA submitted that it would be complex for ISPs to target marketing of 550/75 services in areas served by altnets. However, INCA submitted that ISPs that initially sold FTTP services using altnets would be encouraged to convert consumers to the Openreach 550/75 product.[67]

b) Connection charges: [✂] and VMO2 referred to this New-to-network Discount.[68]

2.64 VMO2 and INCA submitted that the New-to-network Discounts have the same effect as a discount that specifies geographic locations where altnets deploy FTTP with the consequence that it is prohibited under the geographic discrimination prohibition unless Ofcom consents.[69] VMO2 also submitted that the New-to-network Discounts are discriminatory because they impose different conditions on equivalent transactions, placing altnets at a competitive disadvantage, and are therefore prohibited under SMP Condition 4.2.[70]

[65] [✂] INCA CFI response, paragraph 13. VMO2 CFI response, pages 2 and 5-7.
[66] INCA 27 July 2021 response, paragraph 80.
[67] INCA CFI response, paragraphs 98-101 and 151-153.
[68] [✂] VMO2 CFI response, pages 2 and 5-7.
[69] VMO2 CFI response, page 4. INCA CFI response, paragraphs 14 and 91-97. VMO2 submitted that both the New-to-network Discount for 550/75 rental charges and the New-to-network Discount for connection charges are prohibited. INCA submitted that the New-to-network Discount for 550/75 rental charges is prohibited.
[70] VMO2 CFI response, page 5.

Ofcom’s provisional view

2.65 The geographic discrimination prohibition provides that BT may be deemed to have shown undue discrimination if it charges different prices in different geographic areas for rental services used to provide network access to VULA that is provided over FTTP.[71] In the WFTMR Statement we explained that this prevents differentiated prices and other pricing measures which might have the same effect, such as applying a migration credit.[72]

2.66 While the New-to-network Discount for 550/75 rental charges has the potential to be caught by the geographic discrimination prohibition on the basis that it is a rental discount, this is not the case for the New-to-network Discount for connection charges. In the WFTMR we decided that the geographic discrimination prohibition should not be extended to include ancillary charges such as connection charges.[73] Therefore, in order for the New-to-network Discount for connection charges to be caught by the geographic discrimination prohibition, it would need to be considered to be a pricing measure which might have the same effect as a rental discount. Although any connection discount could be said to have the same effect as an equivalent rental discount, in giving the example of a migration credit in the WFTMR statement, we were specifically referring to negative connection charges; i.e. Openreach going beyond fully discounting the connection charge (which is permitted), as a way to avoid the restriction on geographic rental discounts. This is not the case here.

2.67 In any event, we do not consider that either the New-to-network Discount for 550/75 rental charges or the New-to-network Discount for connection charges can strictly be characterised as geographic pricing, on the basis that they do not involve charging different prices in different geographic areas. Both discounts are available everywhere in Area 2. They apply to new-to-network customers not just in geographic locations where there are alternative networks, but also where there is only the Openreach network.[74] Moreover, the premises where the discounts are and are not available (i.e. premises that are not already connected to the Openreach network and those that are) do not comprise separate “geographic” areas, not least because the definition of those areas will change as customers switch to and from the Openreach network.

2.68 We have also considered whether the New-to-network Discounts indirectly target altnets rolling out new networks. We consider that the New-to-network Discounts are not targeted at new network build in the short run to any material degree. As noted above, the discounts apply everywhere in Area 2 and will immediately affect established altnets such as Virgin Media. However, as set out in the WFTMR Statement, our competition concerns primarily relate to new network build. The discounts will not have a material impact on

[71] SMP Condition 4.3.
[72] WFTMR Statement, paragraph 7.72.
[73] WFTMR Statement, paragraph 7.89.
[74] For example, the discount would apply in Openreach-only areas to customers without an existing fixed broadband service taking up the service.

new network build (or ISPs using these networks) until a material volume of customers has moved to the new network and those customers are at the point of switching away.

2.69 Although the impact of New-to-network Discounts on altnets building new networks (and ISPs using these networks) will grow over time as their subscriber bases grow, we anticipate that the magnitude of these discounts will be small, and are therefore unlikely to deter new network build or ISPs from using these networks.

a) In relation to connection charges, we said in the WFTMR Statement that over the longer-term recurring rentals will be a more significant element of total cost than connections.[75] Connection charges are likely to be a lesser consideration, given ISPs' expected average customer lifetimes for FTTP, which range from [✂] months.[76] By way of illustration, if we assume an average customer lifetime of 5 years, the additional £25 connection discount represents a discount of around 42 pence per month for new-to-network orders. Averaged across all new orders (not just new-to-network orders), this translates to a discount of less than 10 pence per month.

b) In relation to the 550/75 rental discount, we expect this product will represent a modest proportion of overall sales over the next 5 years (see Annex 6). This suggests that the overall impact of this discount on altnets is likely to be relatively minor. Further, as explained in Annex 6, for a customer taking 550/75, this additional discount equates to a further discount of around 4% off total connection and rental charges over a 5-year period. Averaged across all customers (rather than 550/75 customers) the additional discount becomes immaterial.

2.70 Given the above, our provisional view is that the New-to-network Discounts are not restricted by the geographic pricing prohibition, and do not raise competition concerns in terms of targeting or their impact on new network build.

Compatibility of the Order Mix Targets with the prohibition on geographic targeted pricing

Stakeholder submissions

2.71 KCOM submitted that the Order Mix Targets incentivise ISPs to focus their marketing activity within the Openreach FTTP footprint, at the expense of other areas. KCOM submitted that this is therefore a form of geographic pricing prohibited in SMP Condition 4.[77]

[75] This was a factor in our decision to exclude connection charges from the geographic discrimination prohibition. See WFTMR Statement, Volume 3, paragraphs 7.82-7.89.

[76] See Annex 6.

[77] KCOM CFI response, paragraphs 3.12-3.14.

Ofcom's provisional view

2.72 We disagree with KCOM. The geographic pricing prohibition proscribes charging different prices in different geographic areas, not giving ISPs incentives to focus their marketing activity within particular geographic areas, such as the Openreach FTTP footprint. Therefore, our provisional view is that the Order Mix Targets do not constitute a form of prohibited geographic pricing.

Competitive impacts on ISPs

Stakeholder submissions

2.73 Some stakeholders identified competitive impacts on ISPs:

a) **Impact of the Order Mix Targets on resellers:** Firms such as BT Enterprise and TalkTalk purchase access from Openreach that they resell to smaller ISPs downstream. TalkTalk submitted that the upstream reseller has much less control over what product end consumers take. If only a low proportion of the downstream ISPs' orders are for FTTP, this would make it harder for the upstream reseller to meet the Order Mix Targets. TalkTalk submitted that this is likely to result in a lessening of competition to serve downstream ISPs with relatively poorer customer bases.[78]

b) **Impact of the Order Mix Targets on ISP activity outside the Openreach FTTP footprint:** KCOM submitted that the Order Mix Targets incentivise ISPs to focus their marketing activity within the Openreach FTTP footprint. As a result, consumers outside that footprint may be neglected.[79]

c) **Weakened incentives for quality of service:** TalkTalk submitted that, under the Equinox Offer, [✂]. TalkTalk considered that this weakens Openreach's incentives to meet its quality of service commitments.[80]

d) **Openreach FTTP prices are too high:** TalkTalk submitted that the discounted prices under the Equinox Offer are substantially above cost, leading to consumer detriment.[81] Verastar submitted that the discounts for connection charges should apply to business as well as residential consumers.[82]

2.74 TalkTalk also submitted that Openreach has discretion to amend the Equinox Offer in the future.[83] Vodafone submitted that Ofcom should continue to monitor the impact of the Equinox Offer in the medium term and intervene if ISPs are disadvantaged relative to BT.[84]

[78] [✂] TalkTalk CFI response, paragraphs 1.5, 3.4-3.10.
[79] KCOM CFI response, paragraphs 3.12-3.14 and 3.18-3.19.
[80] [✂] TalkTalk CFI response, paragraphs 1.5 and 3.26-3.30.
[81] TalkTalk CFI response, paragraph 1.5.
[82] Verastar CFI response.
[83] [✂]. TalkTalk CFI response, paragraphs 1.5 and 4.2-4.7.
[84] Vodafone CFI response, paragraph 10-11.

Ofcom's provisional view

2.75 We have not assessed the various impacts on ISPs set out above. As set out in paragraphs 2.16-2.22 above, the purpose of the 90 days' process is not to address general competitive impacts on ISPs but to consider Openreach commercial terms that might directly undermine new network build.

2.76 Should stakeholders consider that these are significant concerns then they should provide a separate, evidenced submission that we will consider as part of a separate process (e.g. under the dispute resolution framework).

The Order Mix Targets may leave vulnerable consumers exposed

Stakeholder submissions

2.77 TalkTalk submitted that the Order Mix Targets mean that within the Openreach FTTP footprint, ISPs are likely to only offer FTTP and are likely to stop making new sales of legacy products. This may have detrimental impacts on vulnerable consumers e.g. those using legacy personal care alarms that cannot be served with FTTP or older customers with little interest in FTTP. There is also a risk that ISPs push these vulnerable consumers onto unsuitable FTTP contracts.[85]

Ofcom's provisional view

2.78 As discussed above, the 90 days' notification requirement is for commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased. It is not intended to address alleged concerns arising in relation to vulnerable customers. Therefore, we have not considered the issue raised by TalkTalk as part of this assessment.

2.79 This being said, we recognise that the Equinox Offer is intended to accelerate the take up of FTTP services. Indeed, as discussed above there is a regulatory process to assist copper retirement and effectively the Equinox Offer is bringing this forward by about 12 months. At some point consumers will therefore have to stop using legacy services and start using FTTP services and it will be important that there are adequate protections for all consumers, including vulnerable consumers, when this happens. To this end Ofcom already has an ongoing project on copper retirement and how to inform and protect consumers during the transition, and we will take account of the points raised as part of this process.

Various issues that are not directly related to the Equinox Offer

2.80 Finally, stakeholders also referred to various issues that are not directly related to the Equinox Offer. For example:

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[85] TalkTalk CFI response, paragraphs 3.11-3.19.

a) KCOM and Fern Trading were concerned that Openreach could focus its roll out on the most appealing locations, which would adversely affect altnets;[86]

b) BT Group expressed concern about Ofcom's regulatory approach to CP-to-CP migration charges for FTTP;[87]

c) Vodafone referred to the desirability of a "social" FTTP product for consumers with affordability concerns;[88]

d) TalkTalk submitted that provisioning lead time for FTTP may increase if Openreach does not have adequate engineering resources. TalkTalk submitted that Ofcom should monitor the situation and, if necessary, impose a quality of service requirement on Openreach;[89]

e) TalkTalk submitted that Ofcom should consider whether regulatory action will be required in the future since switching costs between FTTP networks are high;[90] and

f) [✂][91]

2.81 These concerns lie outside the scope of this consultation and we have therefore not considered them further as part of this process.

Provisional conclusion

2.82 Our provisional view is that we should take no action at this time.

2.83 In reaching our provisional view, we have considered the impact on competition. For the reasons set out above, provisionally we do not consider that the Equinox Offer will have a material adverse impact on competition. We have also considered the impact on different stakeholders:

a) **Citizens and consumers:** Our provisional conclusion is that the Equinox Offer is consistent with promoting investment in gigabit-capable networks by Openreach and other operators and promoting network-based competition, ultimately delivering better consumer outcomes.

b) **Altnets:** As a result of the Equinox Offer, altnets are likely to face stronger competition from Openreach. However, we provisionally conclude that the Order Mix Targets and forecasting requirements do not create a potential barrier to using altnets and that the New-to-network Discounts do not raise concerns in terms of targeting or their impact on altnet build. As a result, our provisional conclusion is that the Equinox Offer is consistent with network-based competition.

[86] KCOM CFI response, paragraph 3.10. Fern Trading CFI response, point 7 on page 3
[87] BT Group CFI response.
[88] Vodafone CFI response, paragraphs 6 (second one) and 13.
[89] TalkTalk CFI response, paragraphs 3.20-3.25.
[90] TalkTalk CFI response, paragraphs 1.7 and 2.25-2.31.
[91] [✂]

c) **ISPs:** We consider that ISPs are likely to benefit from network-based competition. As explained above, we provisionally conclude that ISPs will continue to be free to use altnets where they wish to do so.

d) **Openreach:** We consider that not preventing Openreach from introducing the Equinox Offer allows it to engage in network-based competition, without compromising our objective of promoting investment in gigabit-capable networks.

2.84 In reaching our provisional view, we have had regard to our duties under sections 3 and 4 of the Communications Act 2003. We have also had regard to Government's Statement of Strategic Priorities.

Consultation question

Question 1: Do you agree with our assessment of the Equinox Offer as set out above?

Please provide evidence in support of your views.

A1. Responding to this consultation

How to respond

A1.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 6 September 2021.

A1.2 You can download a response form from https://www.ofcom.org.uk/consultations-and-statements/category-3/openreach-proposed-fttp-offer. You can return this by email to the address provided in the response form.

A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to wftmr@ofcom.org.uk, as an attachment in Microsoft Word format, together with the cover sheet.

A1.4 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL, please upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link. We will publish a transcript of any audio or video responses we receive (unless your response is confidential).

A1.5 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but note otherwise.

A1.6 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 4. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom’s proposals would be.

A1.7 If you want to discuss the issues and questions raised in this consultation, please contact wftmr@ofcom.org.uk

Confidentiality

A1.8 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents’ views, we usually publish all responses on the Ofcom website.

A1.9 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don’t have to edit your response.

A1.10 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our Terms of Use.

Next steps

A1.12 Following this consultation period, Ofcom plans to publish a statement in September 2021.

A1.13 If you wish, you can register to receive mail updates alerting you to new Ofcom publications.

Ofcom's consultation processes

A1.14 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.

A1.15 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.

A1.16 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:
Email: corporationsecretary@ofcom.org.uk

A2. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.

A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.

A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.

A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.

A2.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

A3. Consultation coversheet

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing ☐

Name/contact details/job title ☐

Whole response ☐

Organisation ☐

Part of the response ☐

If there is no separate annex, which parts? ____

____

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name Signed (if hard copy)

A4. Consultation question

> Question 1: Do you agree with our assessment of the Equinox Offer as set out above?
>
> Please provide evidence in support of your views.

A5. Legal framework

90 days' notification process

A5.1 At the conclusion of our recent Wholesale Fixed Telecoms Market Review, we set SMP conditions on BT which took effect from 1 April 2021. SMP Condition 8 relates to the notification of charges, terms and conditions by BT. In particular, it requires BT to notify us and industry if it proposes to amend the charges, terms and conditions on which it provides regulated network access.

A5.2 SMP Condition 8.6 applies in relation to certain of the markets we defined in the WFTMR Statement, including WLA Area 2 and WLA Area 3. It requires BT to give not less than 90 days' notice of any amendment involving new or existing network access where the price or other contractual conditions are conditional on the volume and/or range of services purchased.

Directions in relation to network access

A5.3 SMP Condition 1.3 requires BT (amongst other things) to provide network access on such terms, conditions and charges as we may from time to time direct. SMP Condition 7.16 also requires BT to make such modifications to the Reference Offer as Ofcom may direct from time to time. In addition, SMP Conditions 1.10 and 7.18 require BT to comply with any direction we may make under the corresponding condition.

A5.4 If an SMP condition has effect by reference to a direction given by us, and we are proposing to give a direction that affects the operation of that condition, then section 49 of the Communications Act 2003 (the Act) applies. Section 49(2) states that we must not give the direction unless we are satisfied that to do so is:

a) objectively justifiable in relation to the networks, services or facilities to which it relates;

b) not such as to unduly discriminate against particular persons, or a particular description of persons;

c) proportionate to what it is intended to achieve; and

d) in relation to what it is intended to achieve, transparent.

Ofcom's general duties

Section 3 of the Act

A5.5 Under the Act, our principal duty in carrying out our functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

A5.6 In doing so, we are required to secure a number of specific objectives and to have regard to a number of matters set out in section 3 of the Act.

A5.7 In performing our duties, we are also required to have regard to a range of other considerations, as appear to us to be relevant in the circumstances. For the purpose of this consultation, we consider that a number of such considerations are relevant, in particular:

a) the desirability of promoting competition in relevant markets;

b) the desirability of encouraging investment and innovation in relevant markets; and

c) the desirability of encouraging the availability and use of high-speed data transfer services throughout the UK.

A5.8 We are also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, as well as to the interest of consumers in respect of choice, price, quality of service and value for money.

A5.9 However, we have a wide measure of discretion in balancing our statutory duties and objectives. In doing so, we take account of all relevant considerations, including responses received during our consultation process, in reaching our conclusions.

Section 4 of the Act

A5.10 Section 4 of the Act requires us, when carrying out our functions in relation to telecoms, to act in accordance with six requirements for regulation which are in summary:

a) to promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;

b) to promote the interests of all members of the public in the United Kingdom;

c) to take account of the desirability of Ofcom's carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of providing electronic communications networks, services or associated facilities over another (i.e. to be technologically neutral);

d) to encourage, to such extent as Ofcom considers appropriate the provision of network access and service interoperability for the purpose of securing: efficient and sustainable competition; efficient investment and innovation; and the maximum benefit for customers of telecoms providers and of persons who make associated facilities available;

e) to encourage compliance with certain standards in order to facilitate service interoperability, end-to-end connectivity, and secure freedom of choice for the customers of telecoms providers; and

f) to promote connectivity and access to very high capacity networks[92] by members of the public and businesses in the United Kingdom.

A5.11 We consider that the first, second, third, fourth and sixth of those requirements are of particular relevance to the matters under review and that no conflict arises in this regard with those specific objectives in section 3 of the Act that we consider are particularly relevant in this context.

UK Government's Statement of Strategic Priorities

A5.12 Under section 2B(2) of the Act, when exercising our functions relating to telecoms, we are required to have regard to the UK Government's Statement of Strategic Priorities ('SSP').[93] The SSP for telecommunications, the management of radio spectrum, and postal services was designated on 29 October 2019, having been laid in draft before Parliament on 18 July 2019.

Impact assessment

A5.13 Section 7 of the Act provides that where we are proposing to do anything for the purposes of, or in connection with, the carrying out of our functions, and it appears to us that the proposal is important[94], then we are required to carry out and publish an assessment of the likely impact of implementing the proposal, or a statement setting out our reasons for thinking that it is unnecessary to carry out such an assessment. Where we publish such an assessment, stakeholders must have an opportunity to make representations to us about the proposal to which the assessment relates.

A5.14 Whether or not a proposal is 'important' within the meaning of the Act will often be open to debate. However, because impact assessments form part of good policy making, we carry them out in relation to the great majority of our policy decisions.

A5.15 For further information about our approach to impact assessments, see the guidelines 'Better policy making: Ofcom's approach to impact assessments' on our website.[95]

[92] A *"very high capacity network"* is set out in the Act as meaning "an electronic communications network which—

(a) consists wholly of optical fibre elements at least up to the distribution point at the serving location; or

(b) is capable of delivering, under usual peak-time conditions, network performance that, in OFCOM's opinion, is similar, in terms of available downlink and uplink bandwidth, resilience, error-related parameters and latency and its variation, to the network performance of a network falling within paragraph (a)."

[93] https://www.gov.uk/government/publications/statement-of-strategic-priorities
[94] A proposal is 'important' if its implementation would be likely to do one or more of the following: (i) involve a major change in Ofcom's activities; (ii) have a significant impact on persons carrying on businesses operating in markets Ofcom regulates; or (iii) have a significant impact on the general public in the UK or a part of the UK.
[95] An overview and link to the guidelines can be found on our Policies and Guidelines webpage.

Equality impact assessment

A5.16 Section 149 of the Equality Act 2010 (the 2010 Act) imposes a duty on us, when carrying out our functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires us to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

A5.17 Section 75 of the Northern Ireland Act 1998 (the 1998 Act) also imposes a duty on us, when carrying out our functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom's Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the 1998 Act.

A5.18 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the impact of our proposals on persons sharing protected characteristics and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations.

A5.19 In Annex 23 of the WFTMR Statement we considered how different groups in society engage with communications services. In particular, we referred to market research we had conducted that enabled us to assess the potential impact of future regulation on certain equality groups, particularly older consumers.[96] While our research identified differences in take-up and use of fixed line services by different groups within society, we explained that we did not consider that our wholesale regulation is likely to have a disproportionate impact on any of the equality groups, as our regulation is aimed at promoting competition and investment across the range of services that rely on WLA. Therefore, we considered that our regulatory interventions would further the aim of advancing equality of opportunity between different groups in society by furthering the interests of all consumers that use retail services reliant on WLA.

A5.20 We consider that the approach set out in this document is consistent with the position set out in Annex 23 of the WFTMR Statement.

[96] Ofcom, 2020. Affordability of Communication Services.

A6. Rental and connection discounts if the FTTP order mix targets are met

A6.1 As set out in Section 2, the Equinox Offer gives ISPs discounts conditional on almost all the new products that an ISP purchases from Openreach being FTTP rather than legacy products.

A6.2 In this annex we discuss the degree to which Equinox Offer discounts are lower than Openreach's list prices. The discussion focuses on rental discounts (including the additional discount on 550/75 for new-to-network orders), connection discounts, and the ARPU share discount. The Equinox Offer also includes free bandwidth upgrades and discounts on GEA Cablelink (which ISPs require to offer Openreach FTTP).

A6.3 The value of the discounts depends on the mix of products that an ISP purchases, which is uncertain. We present illustrative ranges for the average value of the discounts compared to list prices, based on different assumptions about the mix of products that an ISP purchases under Equinox. We have not made assumptions about how the speed mix might differ absent the Equinox Offer (for example, ISPs might be expected to sell fewer higher bandwidth products absent the discounts). To the extent that ISPs' speed mix would be lower absent Equinox, the figures in this Annex will overstate the average value of the rental discounts.

A6.4 Given the uncertainty we have also not assessed the different discounts (known as the 'ramp-up charges') which can only be obtained during the first six months of the Equinox Offer. These discounts are less generous that the standard discounts available under the Equinox Offer.

A6.5 In summary, our analysis shows that the discounts if the Order Mix Targets are met could be substantial, in which case ISPs are could be strongly incentivised to meet these targets. The value of the discounts is substantially driven by the line rental discounts, and to a lesser extent, the connection discounts. The new to network connection discount, 550/75 special offer, and ARPU share discount are likely to only have a small impact on average discount values.

Rental discounts

A6.6 After the first year, ISPs qualify for line rental discounts once they meet an 80% FTTP target. The value of the discounts relative to list prices varies by speed (see Table A6.1) but generally rises by speed band. While the 40/10 product is undiscounted, under the Equinox Offer 1000/115 rental is 30% lower than the list price.

A6.7 Prices on lower bandwidth products (up to 115/20) are pegged at a fixed increment to the regulated 40/10 price. Prices on higher bandwidth products are indexed to rise more slowly. Therefore, the gradient between lower and higher bandwidths will reduce over time.

A6.8 The value of the discounts on the average rental price paid by an ISP will depend on the speed mix of its customer base. Based on forecasts received from ISPs and Openreach, we estimate that at the end of 2022, the average rental discount could plausibly be around 13%-21% on list prices.

Table A6.1: Equinox discounted line rental

Speed band	Discounted monthly rental*	Discount on list price	Percentage discount on list price	Yearly increase 1 April 2022-30 September 2026
40/10	£13.93	£0.00	0%	CPI (regulated anchor)
55/10	£14.75	-£2.20	13%	40/10+£0.82
80/20	£14.75	-£2.69	15%	40/10+£0.82
115/20	£15.50	-£1.94	11%	40/10+£1.57
160/30	£16.20	-£5.14	24%	CPI-1.25%**
220/30	£18.00	-£3.48	16%	CPI-1.25%**
330/50	£19.00	-£5.51	22%	CPI-1.25%**
550/75	£20.00	-£7.53	27%	CPI-1.25%**
1000/115	£22.00	-£9.57	30%	CPI-1.25%**

**as at 1 October 2021 – 31 March 2022 conditional on achieving Fibre Only Target. Prices are indexed to CPI beyond this date, with higher bandwidth prices falling relatively more sharply. ** if change is less than zero, prices remain at previous year's level.*

Connection discounts

A6.9 Connection discounts are available to ISPs on new FTTP connections to residential premises in Area 2. After the first year, the discounts are phased in gradually between an 80% and 90% FTTP share: at 80%, an ISP pays the list price; at 90% they receive the full discount. The maximum value of this discount on the list price varies between customers that are new to the Openreach network (75% discount) and those already on it (50% discount).

A6.10 We have estimated the potential scale of these discounts given the size of Area 2, and assumptions about the proportion of connections that are (i) residential; and (ii) new-to-network. We estimate that for a national ISP achieving at least 90% FTTP share, the connection charge discounts could plausibly translate to an average discount of 40% across all connections in the short term. Excluding the additional £25 discount for new-to-network orders, this figure becomes 35%.

A6.11 In relation to connection charges, we said in the WFTMR Statement that, over the longer-term, recurring rentals will be a more significant element of total cost than connections.[97] Connection charges are likely to be minor, given expected ISPs' average customer lifetimes

[97] This was a factor in our decision to exclude connection charges from the geographic discrimination prohibition. See WFTMR Statement, Volume 3, paragraphs 7.82-7.89.

for FTTP, which range from [✂] months.[98] We estimate that over a customer lifetime of 5 years, for an ISP receiving full connection and rental discounts, the connection discount accounts for less than 7% of the total cost. Excluding the additional £25 discount for new-to-network orders has almost no impact on this 7% figure.

550/75 product 12-month offer

A6.12 There is an additional rental discount for new-to-network 550/75 orders placed before 30 September 2026. Eligible customers are charged at the Equinox 160/30 rental price for the first 12 months before reverting to the 550/75 rental price.

A6.13 We expect the 550/75 product will represent a modest proportion of overall sales (and be attractive to a modest proportion of an altnet's end customers) so the overall impact will be relatively minor:

a) VMO2 submitted that retail products with a download speed of [✂] were particularly substitutable with retail products offered by ISPs using Openreach's 550/75 product. It submitted that currently [✂] of its consumers take these products. While take-up forecasts are uncertain, it expected [✂] of its consumers to take these products in five years' time.[99]

b) Sky forecast that in 2022, [✂] of new FTTP connections would be for 500Mbps, changing to [✂] in 2025.[100] Vodafone forecast that in 2022, [✂] of new FTTP connections would be for 500Mbps, changing to [✂].[101]

c) Openreach provided the bandwidth mix assumptions underpinning a paper submitted to the Openreach Board in June 2021. [✂][102]

A6.14 For customers taking 550/75, we estimate this additional discount translates to a further discount of around 4% off total connection and rental charges over the average customer lifetime, compared to if this additional discount were not available.[103]

A6.15 We have also considered the value of this additional discount averaged across all customers (rather than just new-to-network 550/75 customers). Given we expect this product will represent a modest proportion of overall sales, we estimate that the additional 550/75 discount will have an immaterial impact on total wholesale charges across all customers over the average customer lifetime.

[98] ISPs' expected FTTP average customer lifetimes (in months) were as follows: BT Consumer: [✂]; Hyperoptic: [✂]; Sky: [✂]; TalkTalk: [✂]; VMO2: [✂]; and Vodafone: [✂]. [✂] [✂]. Source: Response to Ofcom 26 July 2021 RFI from BT, Hyperoptic (question 1), Sky (question 5), TalkTalk (question 5), VMO2 (question 1), Vodafone (question 5).
[99] VMO2 response to Ofcom 26 July 2021 RFI, question 2.
[100] Sky response to Ofcom 26 July 2021 RFI, question 3.
[101] Vodafone response to Ofcom 26 July 2021 RFI, question 3.
[102] Openreach response to Ofcom 26 July 2021 RFI, question 2.
[103] This assumes an average customer lifetime of 5 years.

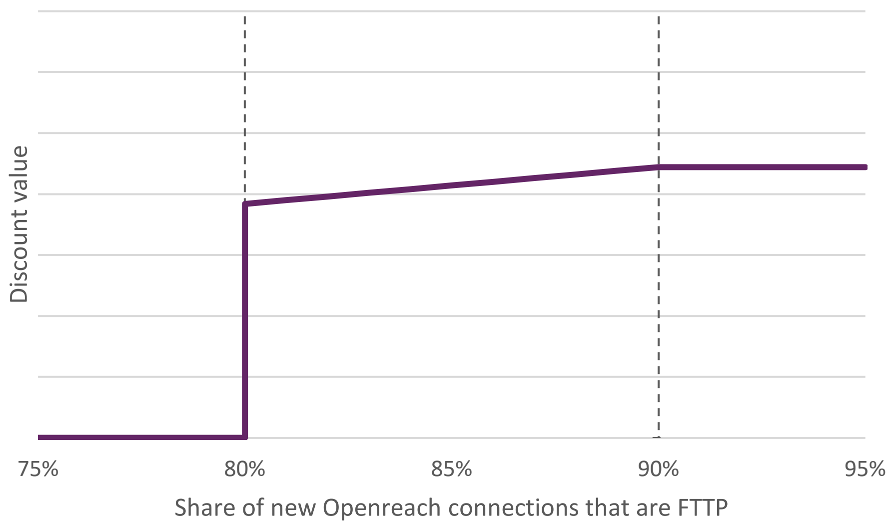
Cumulative impact of the discounts

A6.16 Ultimately, it is the cumulative discount value that determines the incentives for an ISP to meet the Order Mix Targets. We have estimated the average total monthly discount on list prices based on the rental, connection, 550/75, and ARPU share discounts.

A6.17 Our calculations show that the cumulative value of the discount is likely to be large for an ISP that meets all Order Mix Targets. We estimate the total value of the discounts could be as high as 15% - 30% over a customer lifetime compared to list prices although it could also plausibly be much lower if more of an ISP's customers use the 40/10 product.

A6.18 We estimate a large share of the discount is received by an ISP once it achieves an 80% FTTP share and therefore qualifies for rental discounts. From 80% to 90% FTTP, the value of the discount increases more gradually due to changes in the connection and ARPU share discounts. Beyond 90% FTTP share an ISP qualifies for no additional discounts.[104] This is illustrated in Figure A6.1.

Figure A6.1: shape of average Equinox discounts across different Openreach FTTP shares – illustration



A6.19 The exact share of the total discount value that an ISP qualifies for on achieving an 80% FTTP share, compared to the share achieved by increasing the FTTP share from 80% to 90%, will depend on many factors including the ISP's bandwidth mix and average customer lifetime.

A6.20 Overall, in most plausible scenarios, the largest impact on the discounts an ISP receives comes from meeting the 80% FTTP share threshold, rather than the increase in the discount from going from a 80% to 81% FTTP share (for example).

[104] As discussed in paragraph 2.9, these targets are more lenient in the first year of the Equinox Offer.

A7. How difficult is it for ISPs to meet the Order Mix Targets?

Introduction

A7.1 Some consumers may be unable to take FTTP, for example because they require personal care alarms which are not compatible with FTTP or they live in premises where obtaining permission to install a FTTP connection is difficult. Some other consumers may prefer to order a legacy broadband product, if it is available, rather than FTTP, for example because they would prefer cheaper broadband or a more straightforward installation process.

A7.2 As set out in Section 2, some stakeholders submitted that using an altnet might make it harder for an ISP to meet the Order Mix Targets. In this annex we present evidence on how difficult it is for ISPs to meet the Order Mix Targets. If an ISP is likely to exceed or undershoot these targets then using an altnet is unlikely to affect that ISP's eligibility for discounts under the Equinox Offer. In contrast, if an ISP is likely to be close to these targets then it is more important to consider how its mix of orders from Openreach may be affected by using an altnet.

A7.3 This annex is structured as follows:

a) First, we set out evidence on ISPs' mix of orders under an existing Openreach offer;

b) Second, we set out stakeholders' submissions; and

c) Finally, we set out our provisional assessment.

FTTP Only Offer v2

A7.4 Openreach currently offers discounts on FTTP rentals and connections (the 'FTTP Only Offer v2'). To qualify for discounts, access seekers need to meet minimum requirements in terms of the proportion of new orders within the offer area that are FTTP.[105]

A7.5 Openreach provided data on the proportion of orders under this offer that were for FTTP. Note that the way in which this proportion is calculated under the FTTP Only Offer v2 is not the same as for orders under the Equinox Offer. For example, ISPs are able to select which sub-brands and resellers participate in the FTTP Only Offer v2.[106] We also understand that the mix targets under the FTTP Only Offer v2 were reduced in January 2021-March 2021 to reflect the impact of COVID on FTTP installation.[107] This suggests that the proportion of FTTP orders in these months may be depressed.

[105] For further details see *Existing Openreach FTTP offers with geographic pricing*, Ofcom statement, 2 July 2021, paragraphs 3.43-3.46.
[106] Openreach response to Ofcom 26 July 2021 RFI, question 5.
[107] Vodafone response to Ofcom 26 July 2021 RFI, question 4.

Figure A7.1: FTTP as a proportion of orders under the FTTP Only Offer v2

	BT	Sky	Vodafone
Sept 2020-Nov 2020	[✂]	[✂]	[✂]
Dec 2020 – Feb 2021	[✂]	[✂]	[✂]
March 2021-May 2021	[✂]	[✂]	[✂]

Source: Openreach response to Ofcom 26 July 2021 RFI, question 5.

A7.6 In relation to this offer:

a) Sky submitted that [✂][108]

b) Vodafone submitted that [✂][109]

Stakeholder submissions on the Order Mix Targets

ISP submissions

A7.7 We asked ISPs how they would meet the Order Mix Targets if they sign up to the Equinox Offer:[110]

a) **Sky:** [✂][111]

b) **TalkTalk:** [✂][112]

c) **Vodafone:** [✂][113]

Openreach submissions

A7.8 We requested internal documents submitted to the Openreach board. [✂][114] [✂][115]

A7.9 Openreach submitted that:

a) The regulated stop-sell process was initiated in Salisbury in December 2020. Since then, for premises where FTTP is available, only 1% of the orders Openreach accepted were placed as copper.[116]

b) Over the last ten months, within the Openreach FTTP footprint [✂] of BT Retail Consumer's orders for FTTC and FTTP were for FTTP. Openreach submitted that [✂].[117]

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[108] Sky response to Ofcom 26 July 2021 RFI, question 4.
[109] Vodafone response to Ofcom 26 July 2021 RFI, question 4.
[110] We did not ask this question to BT since we consider that it is unlikely to use an altnet within the Openreach FTTP footprint.
[111] Sky response to Ofcom 26 July 2021 RFI, questions 1 and 2.
[112] TalkTalk response to Ofcom 26 July 2021 RFI, questions 1 and 2.
[113] Vodafone response to Ofcom 26 July 2021 RFI, questions 1 and 2. Similar points are made in Vodafone CFI response, paragraph 7 (first one).
[114] [✂]
[115] [✂]
[116] Openreach response to Ofcom 26 July 2021 RFI, question 3.
[117] Openreach response to Ofcom 26 July 2021 RFI, question 3. Openreach email of 3 August 2021.

Altnet submissions

A7.10 INCA submitted that the Order Mix Targets were challenging due to: (i) the more inconvenient FTTP installation process; (ii) difficulties in obtaining wayleaves to install FTTP for consumers in multi-dwelling units; and (iii) limited consumer understanding about the benefits of FTTP over FTTC.[118]

Provisional Ofcom assessment

A7.11 We consider that those ISPs that sign up to the Equinox Offer will have to change how they market and sell broadband within the Openreach FTTP footprint, in order to drive FTTP sales. As explained above, ISPs told us that, [✂].

A7.12 However, as highlighted by TalkTalk, some ISPs purchase access from Openreach that they resell to smaller ISPs downstream.[119] Depending on the contractual relationships, there is a risk that only a low proportion of the downstream ISPs' orders are for FTTP, which would make it harder for the upstream reseller to meet the Order Mix Targets. Based on actual and forecast data gathered for the WFTMR Statement, we estimate that resale will account for around [✂] of TalkTalk's and around [✂] of Vodafone's broadband customers. [✂].[120] In addition, [✂].

A7.13 In summary, we consider that there is considerable uncertainty about precisely how ISPs will perform against the Order Mix Targets.

a) We consider that there is a plausible scenario in which ISPs surpass the Order Mix Targets. In this scenario, almost all new orders are for FTTP. The experience of stop sell in Salisbury suggests that this is feasible. We would expect ISPs require some time to grow the proportion of FTTP sales within the Openreach FTTP footprint, as shown by [✂]. However, the Order Mix Targets are initially more lenient.

b) However, we also consider that are also plausible scenarios where at least some ISPs struggle to meet all of the Order Mix Targets, particularly in the next few years. In this scenario, resellers struggle to incentivise third party ISPs to promote FTTP. In addition, ISPs face more consumer resistance to FTTP, leading them to place more legacy broadband orders in order to retain sales. This is shown by [✂].

c) However, even in these more pessimistic scenarios, we would expect the challenges to be temporary. The proportion of FTTP orders would be likely to rise over time, moving ISPs closer towards attaining those targets e.g. as resale contracts with third party ISPs are renegotiated. Moreover, as build out of the Openreach FTTP footprint progresses, the regulated copper retirement provisions will take effect, resulting in a formal stop-sell which would largely end any further new sales of legacy broadband products.

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[118] INCA also noted that retail altnets regularly achieve penetration of 20-30%. INCA 27 July 2021 response, paragraph 34, 38, 43-46.

[119] TalkTalk CFI response, paragraphs 1.5, 3.4-3.10.

[120] Sky response to Ofcom 26 July 2021 RFI, question 2.

A8. To what extent will altnets' FTTP footprints overlap with Openreach's FTTP footprint?

A8.1 In this annex, we outline evidence on the proportion of the Openreach FTTP footprint where altnets that provide wholesale access to ISPs are likely to be present. This is relevant to our assessment of the Order Mix Targets since it informs:

a) The potential impact if ISPs were to buy legacy products from Openreach in those areas where both Openreach and such an altnet supply FTTP; and

b) The extent of those areas where ISPs are dependent on Openreach for FTTP. In principle, Openreach could effectively make discounts in these areas conditional on ISPs not using altnets elsewhere in Openreach's FTTP footprint.

A8.2 Investment in FTTP networks is being made by established operators such as BT and Virgin Media as well as newer entrants. These investments are numerous and vary considerably in terms of location and scale.[121] In particular:[122]

a) Openreach has said it will pass 25 million premises with FTTP by December 2026;[123] and

b) CityFibre has said its FTTP rollout target is up to 8 million premises.[124] [✂].[125]

A8.3 We recognise that there is uncertainty about the extent to which these plans will come to fruition. For example, INCA noted that Openreach's statements do not amount to a firm commitment.[126] Similarly, altnet plans may change as views about the commercial environment evolve.

A8.4 However, assuming that these announced plans are realised, then this suggests that in the longer term altnets that provide wholesale access to ISPs may be present in approximately a third of Openreach's FTTP footprint.

A8.5 In the short term, the level of overlap will depend on the build strategies of different networks, for example, the extent to which Openreach prioritises overbuilding altnets in some areas rather than being the first network to deploy FFTP in other areas.[127] As a result,

[121] By way of illustration, ISPReview has been tracking the progress of around 80 firms building FTTP networks to homes and businesses and reporting this https://www.ispreview.co.uk/index.php/2020/04/summary-of-full-fibre-build-progress-across-uk-broadband-isps.html/2 [accessed 27 July 2021]
[122] VMO2 is supplementing its existing network with FTTP but currently does not provide access to third party ISPs.
[123] BT press release (13 May 2021)
[124] CityFibre press release (21 January 2020)
[125] [✂]
[126] INCA 27 July 2021 response, paragraphs 23-24.
[127] Stakeholders suggested that generally altnets may not overbuild Openreach. TalkTalk CFI response, paragraph 2.30. [✂]

in the shorter term the extent to which altnets that provide wholesale access to ISPs are present in Openreach's FTTP footprint is uncertain.