Openreach Proposed FTTP Offer starting 1 October 2021

Non-confidential version – redacted for publication [✂] (with additional text unredacted)

STATEMENT:

Publication date: 30 September 2021

Contents

Section

Annex

1. 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 the risk 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 Premises ('FTTP') services (the 'Equinox Offer'). The Equinox Offer will last until 30 September 2031 and be available across Openreach's FTTP footprint.

In the consultation Openreach Proposed FTTP Offer starting 1 October 2021 (the 'Consultation') we assessed the Equinox Offer and set out our provisional view that we should not take any action at this time.

Having considered responses, in this statement we confirm that we are not taking any action at this time.

2. Introduction

2.1 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.

2.2 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] The relevant legal framework is summarised in Annex 1 of this statement.

2.3 On 1 July 2021, Openreach notified new pricing arrangements for its Fibre to the Premises ('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] 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 orders they place which are FTTP (we refer to these as the 'Order Mix Targets'). The Equinox Offer will be available for acceptance between 1 October 2021 and 30 March 2022 and ends on 30 September 2031.

2.4 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.

2.5 On 6 August 2021, we published a consultation, Openreach Proposed FTTP Offer starting 1 October (the 'Consultation'), setting out our assessment of the offer and provisional view that we should not take any action at this time.[4] In addition to responses to the CFI, our assessment took 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 also explained why we consider some issues raised are out of scope of our assessment.[5]

2.6 We received 15 responses to the Consultation. Non-confidential versions are published on our website.[6] In addition, since the Consultation we have used our statutory information

[1] Ofcom, WFTMR Statement, 18 March 2021 [accessed: 28 September 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 [accessed: 28 September 2021].
[4] Ofcom, Openreach Proposed FTTP Offer starting 1 October, 2021 [accessed: 28 September 2021].
[5] Consultation, paragraphs 2.80-2.81.
[6] See our published responses to the Openreach proposed FTTP offer consultation. Note that where respondents supplied both confidential and non-confidential versions, page/paragraph references in this document are to the confidential version.

gathering powers to confirm some of the material previously provided to us and obtain further evidence, including to further investigate points raised by stakeholders.

2.7 In the next section, we set out our updated assessment of the Equinox Offer, taking into account responses to the Consultation and further information gathered from stakeholders since publication of the Consultation.

2.8 We conclude that the Equinox Offer does not raise competition concerns requiring *ex ante* intervention. We are not therefore taking any further action at this time and anticipate that the Equinox Offer will come into force on 1 October as notified by Openreach.

2.9 The Consultation comprised our impact assessment for the purposes of section 7 of the Communications Act 2003 (the Act). We considered citizen and consumer interests, including the impacts on competition and on altnets and ISPs, and invited representations on our proposals. Ofcom is an evidence-based organisation and in making our assessment we have considered the range of evidence available to us including responses to our CFI and the Consultation.

3. Our assessment

3.1 Our assessment is structured as follows:

a) Summary of the Equinox Offer;

b) Ofcom's policy objectives;

c) Overview of stakeholder responses;

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) Our consideration of the concerns raised by stakeholders about the process we have followed in this case; and

f) Ofcom's conclusions.

Summary of the Equinox Offer

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

3.3 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.[7]

3.4 As noted above, ISPs pay discounted prices for Openreach's FTTP rental and connection services if they meet the Order Mix Targets for the percentage of new sales orders they place which are FTTP.[8] Only new orders placed with Openreach count towards the targets – these typically occur when an ISP signs up a new customer or when an existing customer moves to a different product. Ongoing provision to existing customers does not count. 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.[9]

3.5 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

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

[8] 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.

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

UK.[10] The level of the discount varies by product bandwidth although there is no discount 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).[11]

3.6 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.

3.7 Discounts on connection charges only apply to residential premises in Area 2.[12] 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.

3.8 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.

3.9 In the first year of the Equinox Offer, there is an 'on-boarding' period in which lower targets apply.[13] 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.[14]

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

3.11 The scheme is intended to start on 1 October 2021 and ends on 30 September 2031. There is an option to exit after five years or if Openreach increases its prices in year 6.[15] ISPs have six months to sign up to the Equinox Offer.

3.12 We expect that the main ISPs will sign up to the Equinox Offer.[16]

3.13 Some of the main ISPs purchase access from Openreach that they wholesale to smaller downstream ISPs, who in turn resell services to their retail customers (ISP Resellers). When

---

[10] 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.

[11] 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.

[12] 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.

[13] In the first six months (i.e. until the end of March 2022), full rental and connection discounts apply if the ISP achieves at least 75% of new orders on FTTP. In the second six months (i.e. until the end of September 2022), full rental and connection discounts apply if the ISP achieves at least 80%. There are also additional mechanisms during the first year to allow ISPs to 'catch up' if they fail to meet the target for a particular quarter.

[14] 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.

[15] For the first five 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.

[16] 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). [✂]

an upstream ISP signs up to the Equinox Offer, the Order Mix Targets will apply across orders from both its own retail customer base (including any sub-brands) and from its ISP Resellers.

3.14 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.[17]

3.15 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.[18] However, absent the Equinox Offer, Openreach would still be able to take advantage of the regulated copper retirement process.

Ofcom's policy objectives

3.16 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.

3.17 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 BT and other companies in order to promote network-based competition. We wanted to encourage BT'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 BT 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 to achieve our objectives.

3.18 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

[17] Our decisions in relation to copper retirement are set out in the WFTMR Statement, Volume 3, Section 2.
[18] 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.

demand to new alternative networks, and therefore deprive these network operators of demand. Ultimately this could undermine alternative operators' FTTP investment plans.

3.19 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.

3.20 As we explain in the WFTMR Statement[19], 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.

3.21 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.

3.22 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 in order to be eligible.

Overview of stakeholder responses

3.23 We received 15 responses to the Consultation including from Openreach, several ISPs, several altnets and one individual. In summary:

a) Openreach agreed with Ofcom's provisional conclusions.

b) Sky and Vodafone agreed with Ofcom's provisional conclusions. TalkTalk was broadly supportive of the Equinox Offer but had some concerns about its impact on downstream competition between ISPs.

c) Altnets were concerned about the impact of the Equinox Offer on competition and disagreed with key aspects of Ofcom's position in the Consultation.

3.24 This is similar to the pattern of responses we received to our CFI.[20]

3.25 Openreach submitted that the purpose of the 90-day notification period should be to assess whether prices or terms that are conditional on the volume and/or range of services purchased could deter entry and/or expansion by altnets. Openreach submitted that other issues fall outside of this exercise.[21]

---

[19] WFTMR Statement, Volume 3, paragraphs 7.45-7.46.
[20] Consultation, paragraphs 2.13, 2.23-2.25.
[21] Openreach Consultation response, paragraphs 2.1-2.6.

3.26 Openreach and ISPs submitted that the Equinox Offer will benefit consumers:

a) Openreach submitted that the Order Mix Targets incentivise ISPs to use FTTP which supports investment in FTTP networks and ultimately benefits UK consumers.[22]

b) Sky, TalkTalk and Vodafone submitted that lower FTTP prices will benefit consumers and encourage take-up of FTTP.[23] Vodafone submitted that the ten-year duration of the Equinox Offer allows ISPs to provide price certainty to consumers.[24]

3.27 The Joint Consultation Response estimated that altnet deployment in areas where Openreach has not yet deployed FTTP could generate substantial economic benefits since consumers get access to FTTP sooner.[25] [26] CityFibre, the Joint Consultation Response, KCOM, VMO2, Vodafone and [✂] [a confidential respondent] referred to the benefits of competition between FTTP networks.[27] The Joint Consultation Response submitted that the Equinox Offer could significantly reduce these benefits.[28] CityFibre, the Joint Consultation Response, the Common Wholesale Platform (‘CWP’), Dolomite Solutions, Fern Trading, Gigaclear, KCOM, VMO2 and [✂] [a confidential respondent] submitted that the Equinox Offer will harm altnet build.[29] [30]

3.28 The Joint Consultation Response, Fern Trading, Gigaclear and [✂] submitted that reductions in altnets’ build also reduces their ability to compete for publicly funded FTTP build programmes in adjacent areas.[31]

3.29 CityFibre, the Joint Consultation Response, Fern Trading, Simwood and [✂] [a confidential respondent] submitted that the Equinox Offer in its current form is not necessary to

---

[22] Openreach Consultation response, paragraph 1.6.

[23] Sky Consultation response, page 1. TalkTalk Consultation response, paragraph 1.2. Vodafone Consultation response, paragraph 5.

[24] Vodafone Consultation response, paragraphs 3, 5-6, 12-13.

[25] Joint Consultation Response, paragraphs 16, 61-74; Annex 3, paragraphs 2, 8-42.

[26] We received a combined response from Airband, Axione, County Broadband, Community Fibre, Digital Infrastructure, Fibrus, FullFibre, Glide, Hyperoptic, INCA, Lightning, Persimmon, Spring Fibre, Truespeed, Wight Fibre, Wildanet and Zzoomm (the ‘Joint Consultation Response’).

[27] CityFibre, the Joint Consultation Response and VMO2 also submitted that the WFTMR Statement recognised the long term benefits of network competition for consumers (e.g. at Volume 3, paragraph 7.103 and Volume 4, paragraph 1.96). CityFibre Consultation response, paragraphs 3.1, 3.4, 4.2. Joint Consultation Response, paragraphs 80, 85, 87, 88; Annex 3, paragraphs 20-25. KCOM Consultation response, paragraphs 3.3-3.4, 4.6, 6.5. VMO2 Consultation response, paragraphs 4, 9, 35. Vodafone Consultation response, paragraph 2. [✂] [A confidential respondent] Consultation response, page 7.

[28] Modelling in the Joint Consultation Response assumed that the Equinox Offer reduces altnets’ rate of fibre deployment by 10% or 50% and delays Openreach’s deployment by four or eight months. Joint Consultation Response, paragraphs 17-18, 43, 66, 75-84, 184; Annex 3, paragraphs 3-6, 39, 42-55.

[29] [✂]. CityFibre Consultation response, paragraphs 2.15, 3.2-3.3; [✂]. Joint Consultation Response, paragraphs 11, 14. CWP Consultation response, page 3. Dolomite Solutions Consultation response. Fern Trading Consultation response, paragraph 2. Gigaclear Consultation response, pages 1, 6. KCOM Consultation response, paragraphs 1.4, 4.2-4.3. VMO2 Consultation response, paragraphs 4-5, 8, 35. [✂] [A confidential respondent] Consultation response, pages 2, 5-6.

[30] The Joint Consultation Response and KCOM referred to a Barclays’ analyst’s view that the Equinox Offer represents a “land grab” by Openreach that will make altnets’ business cases harder. *BT Group PLC – Announcement of FTTP pricing, attempting “land grab”*, Barclays, 1 July 2021. Joint Consultation Response, paragraph 227. KCOM Consultation response, paragraph 4.2.

[31] The Joint Consultation Response, paragraphs 44-47. Fern Trading Consultation response, paragraphs 2, 42-44. Gigaclear Consultation response, pages 2, 7; [✂]. [✂].

achieve various benefits (such as lower prices, realising Openreach's FTTP deployment plans or supporting the switch-off of Openreach's legacy copper network).[32]

3.30 In the Consultation, we grouped stakeholder concerns about the Equinox Offer 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) Other issues that are not directly related to the Equinox Offer.

3.31 We consider that these broad categories remain relevant for this statement and consider each of these below. We have assessed some of them in detail but consider that others lie outside of the scope of the competition concerns which led us to put in place the 90 days' notification requirement. We also respond below to stakeholder comments about the process we have followed in this case.

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

Consultation position

3.32 In response to the CFI, 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.[33]

3.33 In the Consultation, we did not consider that the level of prices proposed in the Equinox Offer warranted further assessment as part of this 90 days' notification process.[34]

Stakeholder responses to the Consultation

3.34 Openreach submitted that the 90 day notification process was not intended to address general concerns about low prices.[35]

---

[32] CityFibre Consultation response 4.3(iii). Joint Consultation Response, paragraphs 185-186, 197-198, 230-231, 234, 237. Fern Trading Consultation response, paragraphs 32-34. Simwood Consultation response, page 6. [✂] [A confidential respondent] Consultation response, pages 7-8, 10.

[33] Consultation, paragraphs 2.28-2.29.

[34] Consultation, paragraph 2.30.

[35] Openreach Consultation response, paragraph 5.1.

3.35 Openreach, Sky, TalkTalk and Vodafone did not consider that Openreach's Equinox Offer prices were unduly low.[36] [37]

a) Openreach and Sky submitted that the 40/10 anchor price is sufficient to support efficient altnet entry and that, under the Equinox Offer, FTTP prices do not fall below this level.[38]

b) TalkTalk submitted that the average price under the Equinox Offer exceeds: (i) Ofcom's estimate of an altnet's FTTP costs in the WFTMR Statement; and (ii) Openreach's average cost.[39]

c) Vodafone [✂].[40]

3.36 Gigaclear submitted that, as a result of overbuild by Openreach FTTP, altnets in Area 3 would directly compete against Openreach FTTP.[41]

3.37 The Joint Consultation Response, CWP, Fern Trading, Gigaclear and Simwood submitted that the Equinox Offer (including the ARPU-related discounts) is likely to place downward pressure on wholesale and retail FTTP prices. This will weaken the business case for altnet investment, especially in areas with higher deployment costs (which are typically in Area 3).[42] The Joint Consultation Response, CWP and Fern Trading characterised these discounts as having a strong "loyalty inducing effect".[43]

3.38 Some altnets disagreed with Ofcom's assessment of FTTP prices in the Consultation:

a) Fern Trading submitted that the Consultation failed to consider whether prices closer to the 40/10 charge control allow sufficient headroom in Area 3, where build costs are much higher.[44] Gigaclear [✂].[45]

---

[36] TalkTalk and Vodafone both suggested that prices could be even lower. TalkTalk Consultation response, paragraph 1.3. Vodafone Consultation response, paragraph 8.

[37] [✂] TalkTalk Consultation response, paragraphs 2.6-2.9. [✂].

[38] Openreach Consultation response, paragraph 5.1. Sky Consultation response, page 1.

[39] TalkTalk referred to cost estimates in WFTMR Statement, Volume 4, paragraph 1.37. TalkTalk Consultation response, paragraphs 1.2, 2.2-2.5. 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.

[40] Vodafone Consultation response, paragraph 7.

[41] Gigaclear submitted that Openreach is expected to overbuild [✂] by the end of 2026. Gigaclear Consultation response, pages 2, 5; [✂]

[42] The Joint Consultation Response (at paragraphs 190-192) also submitted that the significance of the ARPU-related discounts is likely to grow over time and (at paragraphs 119-122) that lower retail prices may have different impacts on the likelihood of entry in Area 2 compared to Area 3. Joint Consultation Response, paragraphs 12-14, 184(a), 202-206, 209. CWP Consultation response, page 4. Fern Trading Consultation response, paragraphs 2, 12-17, 21, 23-25. Gigaclear Consultation response, pages 1-6. Simwood Consultation response, page 4.

[43] Joint Consultation Response, paragraph 195, 201. CWP Consultation response, page 4. Fern Trading Consultation response, paragraph 40.

[44] Fern Trading also submitted that, in the WFTMR, Ofcom failed to gather suitable evidence on build costs in Area 3, including from altnets. Fern Trading Consultation response, paragraph 14-17.

[45] Gigaclear Consultation response, pages 1, 3-5; [✂]. Gigaclear also referred to data on ISPs' advertised dual play prices presented in WFTMR Statement, Volume 2, Figure 2.9. Gigaclear submitted that its retail prices are considerably higher than other ISPs' retail prices, reflecting its higher costs. Gigaclear Consultation response, page 6.

b) KCOM and the Joint Consultation Response submitted that Ofcom's modelling in the WFTMR Statement is insufficiently reliable to conclude that the 40/10 price allows an altnet to recover its costs.[46]

3.39 The Joint Consultation Response submitted that the consumer benefits of altnet build (as discussed in paragraph 3.27 above) such as increased competition outweigh any short term consumer benefits from lower FTTP prices. It referred to Ofcom's decision in the WFTMR Statement to set charge controls for WLA services in Area 2 that hold prices constant in real terms (rather than reduce them).[47] Fern Trading submitted that the Equinox Offer gives Openreach the ability to reduce the scale of the discounts in year 6 once investment by competing altnets has been deterred.[48]

Ofcom's analysis and conclusions

3.40 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.

3.41 In any case, we do not consider that the level of prices in the Equinox Offer is a concern, for the reasons set out below.

3.42 Our approach to pricing regulation in the WFTMR Statement supported our overarching strategic objectives, as follows:

a) In Area 2 we aimed to promote competition and investment in gigabit-capable networks by Openreach and other operators. We considered that there was potential for material and sustainable competition to Openreach in Area 2.[49]

b) In Area 3 we did not believe that commercial deployment of gigabit-capable networks would result in material and sustainable competition to Openreach. Our aim was to promote investment in gigabit-capable networks by Openreach. At the same time, we recognised that there was difficulty in accurately drawing the Area 2/Area 3 boundary and there might be some future competitive investment in Area 3.[50]

3.43 We decided to set a price ceiling for the FTTP 40/10 'anchor' product but not to regulate the prices of Openreach's higher speed products or set a minimum FTTP price. 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.[51] Our focus was on FTTP build costs in Area 2, given that this is where we expected the majority of new altnet build to occur.

[46] KCOM Consultation response, paragraphs 5.5-5.9. Joint Consultation Response, paragraphs 184(a), 207-208.
[47] In particular, it referred to WFTMR Statement, Volume 4, paragraphs 189-197. Joint Consultation Response, paragraphs 83-92.
[48] Fern Trading Consultation response, paragraphs 2, 28-30.
[49] WFTMR Statement, Volume 4 paragraphs 1.1-1.13. WFTMR Statement, Volume 1 paragraph 2.47.
[50] WFTMR Statement, Volume 4 paragraphs 2.7-2.10.
[51] WFTMR Statement, Annex 15, and Volume 4, paragraphs 1.36-1.38.

3.44 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, including when ARPU-related discounts are taken into account. Therefore, we consider that the Equinox Offer prices are 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 in Area 2. [✂].[52] We consider that the level of the Equinox Offer discounts do not undermine our objective to promote investment in gigabit-capable networks by Openreach and other operators in Area 2.

3.45 We recognise that FTTP build costs vary across geographic locations, and we expect build costs will typically be lower in Area 2 than Area 3. We also anticipate greater network competition in Area 2.[53] In the past Openreach has generally set broadband prices on a national uniform basis, although underlying costs of provision and competitive conditions vary on a geographic basis. It is proposing to maintain this approach for rental prices under the Equinox Offer.

3.46 Some altnets consider that the discounts in the Equinox Offer will weaken the business case for FTTP build in Area 3. Gigaclear argued that Equinox discounts should be prohibited in Area 3.[54]

3.47 We recognise that prohibiting the Equinox Offer discounts in Area 3 (and effectively forcing geographically de-averaged pricing) would lead to higher FTTP prices in Area 3 which could encourage some altnet build. However, in the WFTMR Statement, we did not pursue an approach of setting higher wholesale FTTP prices in Area 3 given our conclusion that material and sustainable competition to Openreach in Area 3 was unlikely. While we were aware of plans for rival network build in some locations in Area 3, the relatively higher build cost per premises and the significant variation in these costs across Area 3 means this is unlikely to occur on a widespread basis. Therefore, the benefits of such a policy are likely to be small, relative to the costs imposed on all consumers in Area 3 who would face higher FTTP prices.[55]

[52] [✂]

[53] Greater competition in Area 2 means that Openreach's share of sales will be lower than in Area 3. Accordingly, although build cost per premises passed may be higher in Area 3, cost per premises connected may not be.

[54] Gigaclear Consultation response, page 8.

[55] We note the possibility that some alternative networks could decide to de-scope higher cost locations from their build plans in response to the pricing pressures arising from the Equinox Offer. If these locations are not covered by Openreach FTTP, then it is possible these locations may be unable to access FTTP. Given that Openreach's current FTTP rollout plans cover the majority of Area 3 (around 6 million* out of a total of around 9 million premises), and since alternative networks are targeting areas where Openreach does not build, we consider the number of premises affected is likely to be relatively small. Further there are programmes in place which provide funding for coverage in high cost areas that are not commercially viable. *see https://www.ispreview.co.uk/index.php/2021/05/openreach-boost-rural-fttp-broadband-build-to-6m-uk-premises.html [accessed 28 September 2021]

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

Introduction

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

a) **The Order Mix Targets discourage ISPs from using altnets:** Some responses to the CFI and to the Consultation 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.

b) **The forecasting requirements discourage ISPs from using altnets:** A response to the CFI submitted that the potential loss of discounts for ISPs that submit inaccurate forecasts discourages ISPs from using altnets.

3.49 ISPs that wish to offer FTTP will have no choice but to purchase access from Openreach in some parts of the UK. 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. A particular concern could arise if Openreach were to 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.[56]

3.50 However, the Equinox Offer does not contain volume contingent pricing discounts or other terms that would directly penalise ISPs that purchased from altnets. The discounts in the Equinox Offer depend only the mix of new orders placed with Openreach. Also, the discounts are not dependent on the absolute volume of purchases from Openreach.

3.51 While Equinox does not contain the sorts of terms that would directly penalise ISPs that moved volumes to altnets, we have also considered whether there might be an indirect effect, in particular whether moving volumes to altnets might affect the ability of the ISP to meet the Order Mix Targets or forecasting requirements. Accordingly, and in line with the policy context set out in paragraphs 3.16-3.22, we have assessed stakeholders' submissions that the Order Mix Targets and the forecasting requirements may discourage ISPs from using altnets. For the reasons set out below, these concerns have not been substantiated by the evidence.

[56] WFTMR Statement, Volume 3, paragraphs 7.29-7.30.

Analytical framework

Consultation position

3.52 To assess the potential concerns that the Order Mix Targets and forecasting requirements create indirect barriers to using altnets, in the Consultation we followed the framework we established in the WFTMR by considering up to three questions:[57]

- **Question 1:** Does the Equinox Offer potentially create a barrier to using altnets?
- **Question 2:** Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?
- **Question 3:** Is the Equinox Offer likely to generate clear and demonstrable benefits?

3.53 In the Consultation we provisionally concluded that the Order Mix Targets do not create a potential barrier to using altnets, so we did not go on to consider Questions 2 and 3.[58]

Stakeholder responses to the Consultation

3.54 Openreach agreed with the approach in the Consultation.[59] [60]

3.55 The Joint Consultation Response submitted that Ofcom should have proceeded directly to an assessment of Questions 2 and 3.[61] It submitted that:

a) Question 1 was not set out in the WFTMR Statement.[62]

b) Question 1 is irrational given that Ofcom has already concluded that Openreach (as part of BT) has SMP. As part of that SMP assessment, Ofcom has concluded that barriers to entry *already* exist, and thus it is irrelevant to consider whether the Equinox Offer potentially creates a barrier to entry for altnets. Once barriers to entry are high enough to confirm that Openreach has SMP, any increase in barriers does not affect that SMP status.[63] Moreover, the WFTMR Statement already identified "loyalty inducing terms" as a concern.[64]

3.56 The Joint Consultation Response submitted that, in the WFTMR Statement, Ofcom stated that it will block other commercial terms that *could* cause material harm to nascent

---

[57] Consultation, paragraphs 2.38-2.42.
[58] Consultation, paragraph 2.54.
[59] Openreach Consultation response, paragraph 3.2.
[60] Sky submitted that it broadly supports Ofcom's analytical framework but, when considering the benefits of offers from Openreach, Ofcom should take into account the benefits of Openreach striking long-term agreements with ISPs. Sky Consultation response, page 2.
[61] Joint Consultation Response, paragraphs 22(a), 25(a), 58, 153-154, 174.
[62] The Joint Consultation Response referred to WFTMR Statement, vol 3, paragraphs 7.154, 7.159-7.160 in relation to the assessment framework. It suggested that we had created a legitimate expectation that such a process would be followed and that in departing from it we had breached their legitimate expectation and acted inconsistently. Joint Consultation Response, paragraphs 5, 8, 9(a), 31-32, 127(a), 128-130, 174. .
[63] Joint Consultation Response, paragraphs 9(a), 22(b), 25(b), 36, 127(b), 142-143, 146-147, 150, 152.
[64] The Joint Consultation Response referred to WFTMR Statement, vol 3, paragraphs 7.60. Joint Consultation Response, paragraph 31.

network competition but in the Consultation required proof that they *will* cause such harm.[65]

3.57 The Joint Consultation Response also submitted that it is irrational for Ofcom not to analyse Area 2 and Area 3 separately since these were identified as distinct markets for the provision of wholesale local access ('WLA') in the WFTMR Statement.[66]

3.58 KCOM submitted that Ofcom should balance the risk of deterred altnet investment against any consumer benefits, even if the Equinox Offer were unlikely to deter ISPs from using altnets. In doing so, KCOM considered that Ofcom should consider all plausible scenarios and err on the side of caution given the risk of irreversible damage to investor confidence (including the signal sent about Ofcom's stance in the future).[67] [68]

Ofcom's analysis and conclusions

3.59 To assess the potential concerns that the Order Mix Targets and forecasting requirements create indirect 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.[69]

3.60 Therefore, our analysis considers up to three questions:

- **Question 1:** Does the Equinox Offer potentially create a barrier to using altnets?
- **Question 2:** Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?
- **Question 3:** Is the Equinox Offer likely to generate clear and demonstrable benefits?

3.61 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.[70] An example would be if ISPs were potentially deterred because they face higher average charges for services purchased from Openreach if they switch some volumes to new networks.

---

[65] The Joint Consultation Response referred to WFTMR Statement, vol 3, paragraph 7.33. It also characterised Ofcom's position in the Consultation as having identified a plausible scenario in which the Order Mix Targets cause ISPs not to use altnets. Joint Consultation Response, paragraphs 9(f), 106-108.
[66] Joint Consultation Response, paragraphs 9(b), 22(d)(ii), 25(d), 34, 114-118, 123, 125.
[67] KCOM Consultation response, paragraphs 4.10-4.12, 6.3.
[68] KCOM also cited a Ofcom statement (the '2004 Statement') that concluded that certain types of discount scheme should be presumed to be unduly discriminatory. BT's pricing of Services for Business Customers, Ofcom, 27 May 2004, paragraph 4.16, available here. KCOM Consultation response, paragraph 5.10.4.
[69] WFTMR Statement, Volume 3, paragraph 7.154 and 7.160.
[70] WFTMR Statement, Volume 3, paragraphs 7.29-7.30.

3.62 We are not looking for proof that ISPs *will* be deterred from using altnets for Question 1 to be answered in the affirmative. Question 1 asks whether there is the *potential* for ISPs moving volumes to altnets to be penalised in some way. Some stakeholders argued that we should err on the side of caution in assessing whether this is the case given the risk of irreversible damage to new network build. We do not disagree with this at a level of principle. However, identifying theoretical scenarios where ISPs would be penalised is not enough; such a scenario needs to be plausible given the evidence available, and any underlying assumptions need to be reasonable.[71]

3.63 It is only if we conclude that 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).[72]

3.64 We do not agree that we should adopt the assessment framework proposed by KCOM since this would depart from the approach set out in the WFTMR Statement. We disagree with the argument in the Joint Consultation Response that we should proceed directly to Questions 2 and 3. Consistent with the analytical framework set out in the WFTMR Statement, Questions 2 and 3 are relevant if Openreach proposes commercial terms that potentially create a barrier to using altnets.[73] It is therefore logical that we first consider whether the specific terms proposed do in fact potentially create such a barrier.[74]

3.65 In response to the argument that we should analyse Area 2 and Area 3 separately when assessing the Order Mix Targets, we do not consider that this is necessary for the purposes of Question 1 in this case. We have considered whether these targets potentially create barriers to using altnets. Whether those altnets operate in Area 2 or Area 3 (or both) is not crucial to the outcome.

3.66 Finally, 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-

---

[71] KCOM referred to the 2004 Statement in which we presumed certain discount schemes are unduly discriminatory. This presumption was due to the complexity of applying a price-cost test. However, our framework for assessing the Order Mix Targets reflects the WFTMR Statement, which did not specify such a presumption. In any event, it is not appropriate to rely on such a presumption given that we have carried out an evidence-based assessment of the Order Mix Targets. Finally, it is unclear whether the 2004 Statement was referring to targets of the kind specified in the Order Mix Targets. It refers to "saw tooth discounts [sic] schemes based on aggregate expenditure (where, for example, a customer spending more than £1 million receives a discount on all expenditure, including the first £1 million)…" (paragraph 4.16). The Order Mix Targets are not based on an ISP's aggregate expenditure.

[72] WFTMR Statement, Volume 3, paragraph 7.160.

[73] In response to the argument made in the Joint Consultation Response that our approach breached their legitimate expectation, the analytical approach we have adopted is consistent with what we said in the WFTMR Statement and there is no basis on which to form a legitimate expectation to the contrary. In particular, we stated that "If Openreach proposes commercial terms that potentially create a barrier to using alternative networks, we will apply the framework set out in paragraph 7.154." WFTMR Statement, Volume 3, paragraph 7.160.

[74] Contrary to the suggestion in the Joint Consultation Response, Question 1 is not asking whether there are general barriers to entry for altnets, whether BT has SMP or whether loyalty inducing terms in general are a concern. Our focus is on whether the Order Mix Targets potentially create *additional* barriers to entry and expansion.

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.[75]

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

Consultation position

3.67 In response to the CFI, some stakeholders submitted that the Order Mix Targets discourage ISPs from using altnets for FTTP.[76]

3.68 In relation to Question 1, in the Consultation we provisionally concluded that the Order Mix Targets do not create a potential barrier to using altnets. Accordingly, it was not necessary to consider Questions 2 and 3 in our analytical framework.[77]

Stakeholder responses to the Consultation

3.69 Openreach submitted that the Order Mix Targets will not discourage ISPs from using altnets. Openreach submitted that it is unrealistic to assume that ISPs will be close to the Order Mix Targets. Openreach submitted that, while overbuild of FTTP networks will grow over time, drivers of sales of legacy services within its FTTP footprint will weaken over time e.g. due to regulatory stop sell.[78]

3.70 Sky submitted that the Order Mix Targets do not deter it from placing orders with altnets.[79] Vodafone expressed a similar view and submitted that, [✂].[80]

3.71 CityFibre disagreed with Ofcom's provisional view that the Order Mix Targets do not create a *potential* barrier to using altnets (CityFibre's emphasis).[81] Accordingly, Ofcom should have gone on to consider Questions 2 and 3.[82]

a) CityFibre considered that Ofcom's provisional view is inconsistent with Ofcom's provisional findings that: (i) the discounts if the Order Mix Targets are met could be "substantial" particularly as they apply to all Openreach FTTP orders and since ISPs will be reliant on Openreach in some areas;[83] (ii) there are "plausible scenarios" in which

[75] WFTMR Statement, Volume 3, paragraph 7.159.
[76] Consultation, paragraphs 2.43-2.44.
[77] Consultation, paragraphs 2.45-2.55..
[78] Openreach Consultation response, paragraphs 3.12(a), 3.15-3.16.
[79] Sky Consultation response, pages 1, 3.
[80] Vodafone Consultation response, paragraphs 9-10.
[81] CityFibre Consultation response, paragraphs 1.6, 2.3, 4.3-4.5.
[82] Including whether the conditionality of the Equinox discounts is necessary. CityFibre Consultation response, paragraphs 1.7(ix), 1.7(xi), 2.7(iii).
[83] This point was also made in KCOM Consultation response, paragraphs 5.13-5.14.

some ISPs struggle to meet these targets;[84] and (iii) altnets will overlap with Openreach's FTTP network in some areas.[85]

b) CityFibre submitted that an ISP that identifies even a modest risk of failing to meet the Order Mix Targets will err on the side of caution and be reluctant to place FTTP orders with an altnet, to avoid the risk of a "cliff-edge" price increase.[86] [87]

3.72 The Joint Consultation Response also disagreed with Ofcom's provisional assessment of Question 1.[88] The Joint Consultation Response and CWP submitted that meeting the Order Mix Targets is likely to be challenging and, as a result, ISPs are likely to be deterred from using altnets in order to avoid the risk of losing the substantial discounts available under the Equinox Offer.[89] Further details on the obstacles altnets identified to meeting the Order Mix Targets are set out in Annex 3.

3.73 [✂] [A confidential respondent] submitted that failing to meet the Order Mix Targets is likely to cause an ISP to lose significant market share. It submitted that the Order Mix Targets reduce the addressable market for altnets that supply third party ISPs. [✂] [The confidential respondent] estimated that the impact could be very large, which would foreclose altnets from supplying third party ISPs and discourage such altnets from building.[90]

3.74 KCOM characterised Ofcom's position as being that the Equinox Offer discounts have a minimal effect across an ISP's customer base and thus do not affect that ISP's decision whether to use an altnet. It considered that this purported position fails to reflect the incentives facing ISPs that risk failing to meet the Order Mix Targets.[91]

3.75 CityFibre and the Joint Consultation Response submitted that it is no answer for Ofcom to say that any effects are temporary.[92] [93] They submitted that the next few years are crucial for altnet deployment, for example because it is important to reach consumers first, given that switching between FTTP networks is expected to be low.[94] They submitted that Ofcom's position is inconsistent with the WFTMR Statement which stated that there is a "relatively small window of opportunity to encourage new network build".[95]

---

[84] These scenarios are also referred to in Joint Consultation Response, paragraphs 108 and 110. See also KCOM Consultation response, paragraph 4.9.
[85] CityFibre Consultation response, paragraphs 1.7(i)-(vii), 2.3-2.5, 2.8-2.12, 2.16-2.17.
[86] CityFibre Consultation response, paragraphs 2.6, 2.7(i), 2.13(iv), 2.18-2.20; [✂].
[87] [✂]. CityFibre Consultation response, [✂]. CityFibre also submitted that [✂]. CityFibre Consultation response, [✂].
[88] Joint Consultation Response, paragraph 127(c)
[89] The Joint Consultation Response set out an illustrative example showing this impact. Joint Consultation Response, paragraphs 11, 110, 177-181, 183(b), 184. CWP Consultation response, page 3.
[90] [✂] [A confidential respondent] Consultation response, pages 2-5 and clarificatory email, 15 September 2021.
[91] KCOM Consultation response, paragraphs 5.10-5.12.
[92] CityFibre Consultation response, paragraphs 1.7(viii), 2.7(ii). Joint Consultation Response, paragraphs 111, 162(d).
[93] Fern Trading also incorrectly appears to have interpreted this point as applying to the theory of harm in relation to low prices. Fern Trading Consultation response, paragraph 31.
[94] CityFibre Consultation response, paragraphs 1.7(viii), (x), 2.15; [✂]. Joint Consultation Response, paragraph 63.
[95] WFTMR Statement, Volume 3, paragraph 7.56. CityFibre Consultation response, paragraph 2.15. Joint Consultation Response, paragraphs 111-113.

Ofcom's analysis and conclusions

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

3.77 The design of the Order Mix Targets is consistent with the purpose of offering ISPs lower prices in return for bringing forward in time the point at which they will largely stop offering Openreach legacy products to new customers or customers that are changing product,[96] and offer FTTP to those customers instead. In addition, they offer ISPs lower prices with long run certainty. As explained in paragraph 3.50, the Order Mix Targets do not represent volume contingent pricing discounts and therefore are not the sort of pricing arrangement that would have *prima facie* reason for concern.

3.78 However, we have considered the potential for an indirect effect. Our detailed assessment of Question 1 is set out below, with further evidence set out in Annexes 2-4. In overview, our reasoning is as follows:

a) The discounts if the Order Mix Targets are met could be substantial, in which case ISPs could be strongly incentivised to meet them. Therefore, the Order Mix Targets could deter ISPs from moving volumes from Openreach to altnets if doing so jeopardised meeting these targets.

b) ISPs that sign up to the Equinox Offer will be doing so in the knowledge that they will need to largely stop new sales of Openreach legacy products in areas where Openreach FTTP is available.

c) The main ISPs told us that [✂]. In the medium term, we expect ISPs to surpass the Order Mix Targets as a result of this strategy. As a result, almost all new orders will be for FTTP, so moving volumes to altnets will have no impact on whether the Order Mix Targets are met.

d) In the short term, some ISPs may surpass the Order Mix Targets while others may struggle to hit the targets in the first 12-24 months due to temporary challenges.

e) However, due to the limited overlap of the Openreach FTTP footprint by altnets in the next 12-24 months, placing orders with an altnet is likely to have very little effect on an ISP's mix of new Openreach orders across the whole Openreach FTTP footprint. As a result, ISPs are unlikely to be deterred from using altnets by those targets.

f) We thus conclude that the Order Mix Targets do not create a potential barrier to using altnets.

3.79 The Order Mix Targets could deter ISPs from moving volumes from Openreach to altnets if doing so jeopardised meeting these targets. This is because if an ISP failed to reach these targets, it would pay higher prices across the entire Openreach FTTP footprint. Our analysis in Annex 2 shows that the discounts if the Order Mix Targets are met could be substantial,

[96] As explained above, customers regrading to a different speed on the same technology (e.g. a regrade from FTTC 40/10 to FTTC 80/20) do not count towards the Order Mix Targets.

in which case ISPs could be strongly incentivised to meet them. After the first year, the incentive to meet the lower target to qualify for the rental discounts (80%) is particularly strong as just missing this target results in the loss of all rental discounts.[97] [98]

3.80 In theory, in locations where the altnets that provide access to third party ISPs overlap with the Openreach FTTP network (which will be very few in the short term), moving volumes from Openreach to altnets could jeopardise an ISP's ability to meet the targets if doing so skews the mix of orders that the ISP continues to place with Openreach from FTTP to legacy products. A scenario where this might occur is where an ISP uses an altnet for orders from consumers that prefer FTTP but uses Openreach's legacy network for orders from consumers that prefer legacy broadband products, which will reduce the proportion of total Openreach orders that are FTTP.[99] [100] There are two broad possible reasons why an ISP might wish to do this. First, as a commercial choice if the ISP perceives that there gains from continuing to offer legacy Openreach products to new customers. Second, if there are short term difficulties in moving away from selling legacy Openreach products, for example due to existing contractual deals with ISP Resellers or the need for technical changes to ordering systems.

3.81 It is unlikely that ISPs that sign up to the Equinox Offer will continue to widely offer legacy products for commercial reasons. Absent the Equinox Offer, ISPs may have had incentives to continue to offer legacy products to new consumers, for example because the wholesale prices would be moderately lower.[101] However, the purpose of the Equinox Offer is to offer cheaper prices for FTTP to compensate ISPs for giving up the option to sell new legacy products. Accordingly, ISPs that sign up to the Equinox Offer will be doing to in the knowledge that they will need to largely stop placing new orders for Openreach legacy products in areas where Openreach FTTP is available.

3.82 Our expectation that ISPs will largely cease placing new orders for legacy products for commercial reasons is supported by the evidence. The main ISPs told us that [✂]. In the medium term, we expect ISPs to surpass the Order Mix Targets as a result of this strategy. As a result, almost all new Openreach orders will be for FTTP so moving volumes to altnets

[97] 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 4.

[98] We do not agree with KCOM's characterisation of our position as being that the Equinox Offer discounts have a minimal effect across an ISP's customer base. KCOM may be confusing our assessment of the Order Mix Targets with our assessment of the 550/75 rental discount (see paragraph 3.123 below). In any event, our view is that the discounts (particularly the rental discounts) from meeting the Order Mix Targets could be significant.

[99] The ISP would be placing these legacy orders even though there are two FTTP networks available (Openreach and the altnet).

[100] By way of illustration, assume that an ISP purchases only from Openreach and places the following orders within the Openreach FTTP footprint: 100 FTTP orders and 20 legacy orders in those parts of the footprint where no altnet is present; and 10 FTTP orders and two legacy orders in those parts of the footprint where an altnet is also present. The resulting proportion of Openreach orders that are FTTP is 83% (110/132). If instead the ISP places the 10 FTTP orders with the altnet where it is available, but continues to place the two legacy orders with Openreach, the proportion of Openreach orders that are FTTP reduces to 76% (100/132).

[101] Openreach's list price for FTTP 40/10 is equal to the list price for FTTC 40/10 plus the £1.70 fibre premium.

will have no impact on whether the Order Mix Targets are met. In particular, as set out in Annex 3:

a) [✂]. In order to do this, we consider that ISPs will change how they market and sell broadband within the Openreach FTTP footprint, in order to drive FTTP sales. Equinox incentivises suppliers to drive take-up of FTTP, rather than relying on end-customer demand for FTTP alone.[102]

b) The experience of stop sell suggests that moving quickly to a scenario where almost all new orders are for FTTP is feasible.

c) ISPs will in any event need to prepare to stop selling legacy products in areas that lie within the Openreach FTTP footprint once regulated stop sell is triggered in an area.

3.83 We have also considered whether there are short term difficulties in stopping selling legacy products; on this, ISPs are in different positions. As set out in Annex 3, some ISPs ([✂]) may surpass the targets quickly. However, some ISPs expect to face temporary challenges, meaning they will continue to make some legacy sales and as a result may struggle to hit the targets in the first 12-24 months.

a) Some ISPs face short term issues with getting systems in place. For example, [✂][103]

b) Some ISPs (TalkTalk and Vodafone) purchase access from Openreach that they sell on to ISP Resellers downstream. If ISP Resellers were to continue ordering legacy broadband products, this would make it harder for the upstream ISP to meet the Order Mix Targets. [✂]

3.84 These challenges are mitigated to some extent by the Order Mix Targets being lower in the first year of the Equinox Offer.[104] The Equinox Offer also contains catch up mechanisms in the first year, which allow an ISP to meet the target across multiple quarters on an averaged basis, even if they fail to meet the target in any individual quarters in the period.[105] Notwithstanding this, some ISPs are likely to continue to need to place legacy orders and may struggle to meet all of the Order Mix Targets in the next 12-24 months.

3.85 We have therefore considered whether these ISPs could potentially be deterred from using altnets in this limited period. The evidence does not support this. This is because placing orders with an altnet is likely to have very little effect on an ISP's mix of Openreach orders across the whole Openreach FTTP footprint, implying there is no potential for altnets to be foreclosed.

3.86 As explained above, if an ISP uses an altnet for orders from consumers who would have taken the Openreach FTTP product had they not switched to the altnet, but continues to place orders for legacy products with Openreach, this will reduce the proportion of total

[102] We also note that ISPs only need to achieve the Order Mix Targets with respect to new orders at premises where Openreach FTTP is available (so existing customers can remain on legacy products).

[103] Vodafone response to Ofcom 26 July 2021 RFI, question 1; Vodafone response to s135 notice dated 16 August 2021, question 8.

[104] See summary of the offer above. In addition, in the first six months, 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.

[105] [✂]

Openreach orders that are FTTP. The scale of this effect depends on the proportion of the Openreach FTTP footprint where the ISP engages in this behaviour.

a) As set out in Annex 4, in the next 12-24 months the overlap of altnets within the Openreach FTTP footprint is likely to be limited. Regulated stop sell will also restrict the sale of legacy products in a significant proportion of the Openreach FTTP footprint. Therefore, placing FTTP orders with an altnet while continuing to purchase legacy products from Openreach will have an immaterial impact on an ISP’s mix of Openreach orders. In Annex 3, we present a simple calculation to illustrate that using an altnet will have a limited impact on the share of an ISP’s customer base that it can offer legacy products to and still meet the Order Mix Targets.

b) We recognise that the overlap of altnets within the Openreach FTTP footprint will grow over time, but so will the proportion of footprint subject to stop sell, and the temporary challenges some ISPs face will increasingly resolve.

3.87 Even in locations where there is an overlap in the FTTP footprints, moving volumes to altnets will not necessarily result in worsening performance against the Order Mix Targets. If instances do arise where meeting the Order Mix Targets is in the balance, ISPs are likely to have various responses available to them that, while possibly involving some costs, would avoid the ‘cliff edge’ effect.[106]

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

3.89 We cannot rule out the possibility that ISPs’ strategies, in particular the extent to which they continue to rely on Openreach legacy products where FTTP is available, change in future. If this were to happen, and our assessment above were overtaken by changing circumstances, it would still be open to us to intervene to prevent terms which create a barrier to using altnets, including through our direction making powers under SMP Conditions.

[106] Some respondents argued that even a very small impact will deter ISPs from using an altnet, as the consequence of missing the Order Mix Targets is so high (losing all of the FTTP discounts across their entire base). In reality, ISPs are unlikely to experience such a cliff-edge. As set out in Annex 3, there is a range of actions ISPs can take to mitigate the risk of missing the targets. Any associated costs or loss of flexibility is likely to be temporary and will be set against the longer term benefits of using an altnet instead of Openreach (for example, lower FTTP prices).

Assessment of whether forecasting requirements discourage ISPs from using altnets

Consultation position

3.90 The Joint CFI Response 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).[107] [108]

3.91 In relation to Question 1, in the Consultation we provisionally concluded that the forecasting requirements do not create a potential barrier to using altnets. Accordingly, it was not necessary to consider Questions 2 and 3 in our analytical framework.[109]

Stakeholder responses to the Consultation

3.92 Openreach, Sky and Vodafone agreed with Ofcom's provisional conclusions. They submitted that the forecasting requirements in the Equinox Offer provide enough flexibility for ISPs that wish to use altnets and that ISPs can factor their use of altnets into the forecasts they provide to Openreach.[110]

Ofcom's analysis and conclusions

3.93 The forecasting requirements in the Equinox Offer enable Openreach to plan capacity and resources for the purposes of meeting service level agreements (e.g. with respect to engineer appointment availability). The Forecasting Manual is the same as that used for the standard GEA-FTTP service.

3.94 Under the Equinox Offer, ISPs are required to forecast their Openreach FTTP orders covering the subsequent six months on a rolling monthly basis for 27 geographic areas, with a submitted forecast in month 1 locking down the forecast for month 4.[111] 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. The concern in the Joint CFI Response 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.

---

[107] We received a combined response to the CFI from Airband, County Broadband, Community Fibre, Digital Infrastructure, Fern Trading, FullFibre, INCA, ITS, Persimmon, Truespeed, WightFibre and Zzoomm (the 'Joint CFI Response'). These respondents made a further submission on 27 July 2021 (the 'Joint Supplementary Submission') which was also provided with the Joint Consultation Response.

[108] Joint CFI Response, paragraph 20. Joint Supplementary Submission, paragraphs 76-78.

[109] Consultation, paragraphs 2.57-2.59.

[110] Openreach also submitted that the forecasting requirements in isolation do not trigger SMP Condition 8.4 and would thus fall outside the 90 day notification process. Openreach Consultation response, paragraph 4.1. Sky Consultation response, page 3. Vodafone Consultation response, paragraph 16.

[111] Equinox Offer, Schedule 1, clause 10.1. Forecasting Manual, section 2.

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.[112] We consider it unlikely that forecast errors as a result of using an altnet would occur over such a long period.

c) Forecast accuracy is assessed on aggregate across all 27 geographic areas.[113] 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.

3.95 Moreover, where an altnet's deployment of FTTP is significantly delayed (as implied by the scenario described in the Joint CFI Response), ISPs might reconsider whether to use that altnet 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.

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

Other issues

3.97 CityFibre submitted that the Equinox Offer (including the Order Mix Targets) encourages ISPs to redirect their resources to prioritise integrating their systems and processes with Openreach's systems rather than altnets' systems. [✂].[114] However, we do not think the Equinox Offer potentially creates this barrier to using altnets – ISPs would have a strong incentive to prioritise integration with Openreach regardless. In particular, integration with Openreach helps an ISP supply FTTP to far more consumers than integration with CityFibre.[115] Indeed, [✂].[116]

3.98 In its response to the Consultation, Fern Trading appeared to express concerns about the 10-year duration of the Equinox Offer.[117] We considered this issue in the Consultation.[118] In line with our provisional view, we consider that the duration of the Equinox Offer is not 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.

---

[112] Equinox Offer, Schedule 1, clause 10.3. Forecasting Manual, section 3.
[113] Equinox Offer, Schedule 1, clause 10.4.
[114] [✂]. CityFibre Consultation response, paragraphs 1.7(x), 3.6; [✂]. See also [✂] [a confidential respondent] Consultation response, page 7.
[115] CityFibre's network currently passes approximately [✂] premises compared to 5.2m premises passed by Openreach. Figures are for the end of July 2021. CityFibre Consultation response, [✂]. Openreach response to s135 notice dated 16 August 2021, question 2.
[116] CityFibre Consultation response, [✂].
[117] Fern Trading Consultation response, paragraph 35.
[118] Consultation, paragraph 2.37.

Assessment of whether targeted discounts deter altnet build

Introduction

3.99 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.

3.100 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.

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

Consultation position

3.102 In response to the CFI, some stakeholders submitted that the New-to-network Discounts target altnets and ISPs that use altnets. They submitted that these discounts are (i) prohibited under the geographic discrimination prohibition unless Ofcom consents; and/or (ii) discriminatory and therefore prohibited under SMP Condition 4.2.[119]

3.103 In the Consultation, we considered that the New-to-network Discounts are (i) not restricted by the geographic pricing prohibition; and (ii) do not raise competition concerns in terms of targeting or their impact on new network build.[120]

Stakeholder responses to the Consultation

3.104 We have grouped stakeholder responses concerning the New-to-network Discounts under three headings: (i) whether these discounts represent geographic pricing; (ii) the competitive impact of these discounts; and (iii) compatibility with SMP Condition 4.2.

Whether the New-to-network Discounts represent geographic pricing

3.105 Openreach, Sky and Vodafone submitted that the Equinox Offer, including the New-to-network Discounts on rental charges, applies to the whole UK and thus does not amount to differentiated geographic pricing.[121]

3.106 The Joint Consultation Response referred to the WFTMR Statement, which says that "The geographic discrimination prohibition … prevents differentiated prices and other pricing

[119] Some stakeholders just referred to the 550/75 rental discounts; others also referred to the connection discounts. Consultation, paragraphs 2.63-2.64.
[120] Consultation, paragraphs 2.65-2.70.
[121] Openreach Consultation response, paragraph 5.3. Sky Consultation response, page 1. Vodafone Consultation response, paragraph 15.

measures *which might have the same effect*" (their emphasis).[122] The Joint Consultation Response, Fern Trading and VMO2 submitted that the New-to-network Discounts are a form of geographic pricing.[123]

a) The Joint Consultation Response submitted that this is because eligibility depends on where the consumer lives – consumers in areas without an altnet cannot benefit from these discounts.[124] Similarly, VMO2 submitted that these discounts are only available at premises that are have not had an active Openreach connection in the last 90 days.[125]

b) VMO2 gave the example of a "blatant[ly] geographic" discount scheme bespoke to each individual altnet's footprint and customer base. It submitted that the New-to-network Discounts are essentially equivalent to such a scheme.[126]

c) VMO2 submitted that Ofcom's position in the Consultation is inconsistent with Ofcom's assessment of Openreach's previous FTTP discounts. In that earlier assessment, Ofcom concluded that it was unlikely that Openreach could use discounts on new sites to target geographic pricing to undermine altnet build. VMO2 considered that the New-to-network Discounts represent a similar form of geographic pricing that is more precisely targeted at altnets.[127]

d) VMO2 submitted that adopting a "very narrow view" of what constitutes geographic pricing would give Openreach the latitude to expand the use of such discounts in the future, which could harm altnet investment and network competition. It considered that relying on competition law or the next market review are inadequate.[128]

3.107 In relation to connection charges:

a) Openreach submitted that the New-to-network Discounts on connection charges are not relevant to SMP Condition 4.[129]

b) VMO2 noted that we considered that migration credits could be a mechanism to circumvent the prohibition on geographic pricing for rentals. It submitted that the purpose of migration credits or targeted connection discounts was the same, i.e. to encourage ISPs to attract customers to Openreach's network. It also considered that the New-to-network Discounts on connection charges have the same effect as the (12-month) New-to-network Discounts on rental charges.[130]

[122] WFTMR Statement, Volume 3, paragraph 7.72. Joint Consultation Response, paragraphs 9(c), 214.
[123] The Joint Consultation Response submission on this point only relates to the rental discount on 550/75. Joint Consultation Response, paragraphs 9(c), 22(c), 25(c), 214-220, 224-225. Fern Trading Consultation response, paragraph 41. VMO2 Consultation response, paragraphs 3, 7
[124] Joint Consultation Response, paragraphs 214-220.
[125] VMO2 Consultation response, paragraph 13.
[126] VMO2 Consultation response, paragraphs 17-20.
[127] *Existing Openreach FTTP offers with geographic pricing*, Ofcom, 2 July 2021, paragraphs 3.36-3.37 available here. VMO2 Consultation response, paragraphs 26-28.
[128] VMO2 Consultation response, paragraphs 4, 22-24, 29-30, 35, 49-53.
[129] Openreach Consultation response, paragraph 5.3.
[130] VMO2 Consultation response, paragraphs 40-43.

The competitive impact of the New-to-network Discounts

3.108 Sky submitted that the New-to-network Discounts are more likely to affect established networks, such as VMO2, rather than new network build. Sky anticipated that [✂]. Sky submitted that the connection charge discount is immaterial in the context of overall customer lifetime revenue.[131]

3.109 VMO2 characterised the New-to-network Discounts as "highly targeted" at altnets.[132] The Joint Consultation Response and CWP submitted that these discounts are directly targeted at altnets and will place downward pressure on their retail and wholesale prices.[133]

3.110 CityFibre submitted that the New-to-network Discounts incentivise ISPs to place new FTTP orders with Openreach rather than altnets. It considered New-to-network Discounts have the potential to act as a barrier to using altnets. It noted that Ofcom had presented no evidence regarding Openreach's rationale for the discounts.[134]

3.111 The Joint Consultation Response disagreed with our Consultation position that the New-to-network Discounts will not have a material impact until a material volume of customers have moved to a new network and are at the point of switching away. It submitted that, when deciding whether to invest, altnets will take a forward looking view that anticipates the possibility of such switching.[135] VMO2 appeared to make a similar point in relation to ISPs that use altnets.[136]

3.112 VMO2 submitted that the New-to-network Discounts will apply to the consumers that altnets have already acquired and submitted that there is a narrow window of opportunity for altnet build.[137] VMO2 submitted that consumers that have already switched to an altnet are particularly likely to switch back to Openreach (e.g. because they are particularly engaged and not deterred by installation costs).[138]

Compatibility with SMP Condition 4.2

3.113 VMO2 submitted that Ofcom had failed to consider its earlier submission that the New-to-network Discounts are discriminatory and therefore prohibited under SMP Condition 4.2. VMO2 submitted that these discounts create an unjustified competitive disadvantage for ISPs that use altnets.[139]

[131] Sky Consultation response, page 3.
[132] Few premises do not have a fixed connection, meaning that in the vast majority of cases the discount will only be available where the consumer is currently using an altnet. VMO2 Consultation response, paragraphs 14-16, 25.
[133] Joint Consultation Response, paragraphs 15. CWP Consultation response, page 4.
[134] CityFibre Consultation response, paragraphs 2.7(iv), 2.21-2.23.
[135] Joint Consultation Response, paragraphs 221-223.
[136] VMO2 Consultation response, paragraphs 37, 39.
[137] VMO2 Consultation response, paragraphs 4, 8, 32-34
[138] VMO2 did not provide any evidence to support its claim. VMO2 Consultation response, paragraph 38.
[139] VMO2 Consultation response, paragraphs 44-48.

Ofcom's analysis and conclusions

3.114 A number of stakeholders raised concerns that the New-to-network Discounts could be used to undermine alternative network build. We recognise that Openreach's New-to-network Discounts are targeted at consumers using rival networks, and this could potentially represent a concern if it undermines new altnet build. In Volume 3, Section 7 of the WFTMR Statement we set out how we would use regulation to deal with pricing structures that could undermine new network build. In particular, we (i) prohibited geographic discounts on FTTC and FTTP rental services (unless we consent), and (ii) said we would consider whether it was necessary to prevent other commercial terms proposed by Openreach as they are notified.[140]

Whether the New-to-network Discounts represent geographic pricing

3.115 A number of stakeholders argued that the New-to-network Discounts are a form of geographic pricing that should be prohibited. 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.[141] The geographic discrimination prohibition does not include connection charges, so New-to-network Discounts on connection charges would not be captured in any case.[142] To determine whether the New-to-network rental discounts are covered by the geographic pricing prohibition, we need to consider whether they result in different prices for different geographic areas. This means we consider whether premises which are not currently served by Openreach[143] represent a separate geographic area from premises which are currently served by Openreach.

3.116 As explained in the Consultation, we do not consider that premises where the discounts are and are not available comprise separate "geographic" areas, not least because the definition of those areas will change as customers switch to and from the Openreach

[140] WFTMR Statement, Volume 3, paragraphs 7.1-7.5.

[141] SMP Condition 4.5. VULA is a regulatory obligation requiring BT to provide access to its FTTC and FTTP network deployments which allows telecoms providers to connect at a local aggregation point and are provided a virtual connection from this point to the customer premises.

[142] VMO2 appears to argue that connection charges should be covered by the geographic discrimination prohibition. It noted that we considered applying migration credits on a geographic basis could have the same effect as a rental discount (WFTMR Statement, Volume 3, paragraph 7.72). It submitted that the purpose of migration credits or targeted connection discounts was the same i.e. to encourage ISPs to attract customers to Openreach's network, and that new-to-network connection and rental discounts should be considered to have the same effect. We set out in the WFTMR Statement why the geographic prohibition only applies to rental charges (WFTMR Statement, Volume 3, paragraphs 7.77 to 7.89). We do not consider (as argued by VMO2) that discounts to connection charges are akin to migration credits or reductions in line rental. This is because connection discounts generally have a more limited overall impact since they are one off charges, whereas rental charges are ongoing and form a greater proportion of total price over a customer lifetime than connection charges. Our assessment in the WFTMR Statement assumed that connection charges could not be less than zero (which places a limit on the impact of any connection discount). We consider that migration credits could potentially be applied on an ongoing basis (and thus be equivalent to a rental discount) or effectively result in negative connection charges (which could increase the value and impact of the connection discount above the level assumed in our assessment). We remain of the view that it is appropriate to capture migration credits within geographic pricing prohibition, but not connection discounts.

[143] And have not been served by Openreach in the previous 90 days.

network. The Joint Consultation Response submitted that eligibility for the discount depends on where the consumer lives – and consumers can only benefit in areas where an altnet is present. We consider that eligibility depends primarily upon whether the consumer is currently (or has recently) been served by Openreach, rather than specifically where they live. For example, consumers in areas where an altnet is available, but are currently served by Openreach, will not be eligible for the New-to-network Discount. Further, the rental discounts are available across the UK. They apply to new-to-network customers not just in geographic locations where there are altnets, but also where there is only the Openreach network.[144]

3.117 VMO2 considered that our position was inconsistent with our assessment of Openreach's previous FTTP discounts. In the previous assessment we considered that FTTP discounts for new sites were a form of geographic pricing.[145] It considered that the New-to-network Discounts were a similar form of geographic targeting.

3.118 The geographic pricing prohibition applies where different rental prices are used for different geographic areas. We consider that the FTTP discounts for new sites relate to geographic locations that can be defined in a clear and stable way (e.g. the location of a new housing development is fixed). By contrast, premises that are eligible for the New-to-network Discounts change depending on the serving network operator and cannot easily be grouped into geographic areas.

The competitive impact of the New-to-network Discounts

3.119 VMO2 was concerned that we were adopting an overly narrow view of what constituted geographic pricing and Openreach can design equivalent schemes to the New-to-network Discounts which would clearly represent geographic pricing.

3.120 We recognise there is a risk that Openreach designs pricing discounts which could undermine new network rollout, even if they are not strictly geographic pricing. Where there is a risk that other types of discounts or commercial terms could undermine new network build, we will consider whether to use our powers under SMP conditions to prohibit them.[146]

3.121 Following the approach set out in the WFTMR Statement, we will consider each scheme proposed by Openreach on a case-by-case basis reflecting the context and circumstances.[147] It is important to emphasise we will consider each pricing scheme as it is presented and with consideration to the situation (e.g. with regard to the level and take-up of new altnet rollout). If we do not intervene in relation to a specific Openreach pricing

[144] For example, the discount would apply in Openreach-only areas to customers without an existing fixed broadband service taking up the service.
[145] A new housing development could be an example of a new site. Openreach defines new sites as, "where Openreach either directly or through any BT Group Company holds an agreement (existing before or after the Effective Date) for installation of GEA-FTTP with a developer that is (either directly or through any affiliate, sub-contractor, agent or other representative) undertaking demolition, new build, conversion, and/or refurbishment works at a residential site." Openreach response dated 13 January 2021 to the s.135 notice dated 6 January 2021, Q1c.
[146] WFTMR Statement, Volume 3, paragraphs 7.18 to 7.33 and 7.146 to 7.172
[147] WFTMR Statement, Volume 3, paragraphs 7.165 and 7.133.

structure, it does not fetter our discretion when considering similar schemes (i.e. just because Openreach has used a similar scheme in the past, it does not automatically mean any future scheme of that type is acceptable).

3.122 We have considered whether the New-to-network Discounts in the Equinox Offer could represent a barrier to using altnets that may undermine new network build. We do not consider that the New-to-network Discounts are targeted at new network build in the short run to any material degree. The rental discounts apply UK wide and the connection discounts apply everywhere in Area 2. We consider that the immediate impact will be on established altnets such as VMO2. 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 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. Sky agreed with this point.

3.123 We agree with the Joint Consultation Response and VMO2 that altnets' rollout decisions and ISP choices regarding network provider could take a forward-looking view that factors in the longer term impact of New-to-network discounts. We recognise that the impact of the New-to-network Discounts on altnets building new networks (and ISPs using these networks) will grow over time as their subscriber bases grow. However, the magnitude of the New-to-network Discounts is small, and they 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.[148] Connection charges are likely to be a lesser consideration, given ISPs' expected average customer lifetimes for FTTP, which range from [✂] months.[149] 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 2). This suggests that the overall impact of this discount on altnets is likely to be relatively minor. Further, as explained in Annex 2, for a new to network 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.

3.124 For the reasons above, we disagree with CityFibre that the New-to-network Discounts in the Equinox Offer have the potential to act as a barrier to using altnets.

[148] 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.
[149] See Annex 2.

3.125 VMO2 submitted that New-to-network discounts create an unjustified competitive disadvantage for ISPs that use altnets and thus should be prohibited under SMP Condition 4.2. Again, for the reasons above, we disagree that the New-to-network Discounts in the Equinox Offer create a material disadvantage for ISPs that use altnets.

3.126 Given the above, our view is that the New-to-network Discounts in the Equinox Offer 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.[150]

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

Consultation position

3.127 In response to the CFI, 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.[151]

3.128 In the Consultation, our provisional view was that the Order Mix Targets do not constitute a form of prohibited geographic pricing.[152]

Stakeholder responses to the Consultation

3.129 We did not receive any responses to the Consultation on this topic.

Our analysis and conclusions

3.130 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 conclusion is that the Order Mix Targets do not constitute a form of prohibited geographic pricing.

---

[150] CityFibre noted that Ofcom had presented no evidence regarding Openreach's rationale for introducing the New-to-network Discounts. Given our view that the New-to-network Discounts in the Equinox Offer do not represent geographic pricing or raise competition concerns in terms of targeting or their impact on new network build, it is not necessary to consider whether there is an objective justification for the discounts.

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

[152] Consultation, paragraph 2.72.

Competitive impacts on ISPs

Consultation position

3.131 In response to the CFI, some stakeholders identified competitive impacts on ISPs. We did not assess these impacts in the Consultation.[153]

Stakeholder responses to the Consultation

3.132 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. As a result, TalkTalk submitted that Ofcom should consider the impact of the Equinox Offer on competition to serve downstream ISPs.[154]

3.133 TalkTalk also submitted that the use of a simple average, rather than a weighted average, when calculating compliance with the Order Mix Targets across several quarters is "unreasonable" and its likely to benefit BT.[155]

Ofcom's analysis and conclusions

3.134 We have not assessed the various impacts on ISPs set out in paragraphs 2.73-2.74 of the Consultation and above. As set out in paragraphs 3.16-3.21 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.[156]

3.135 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

Consultation position

3.136 In response to the CFI, 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

---

[153] Consultation, paragraphs 2.73-2.76.

[154] TalkTalk Consultation response, paragraphs 1.4, 2.13, 2.15. It previously raised this concern in TalkTalk CFI response, paragraphs 1.5, 3.4-3.10.

[155] TalkTalk Consultation response, paragraphs 1.4, 2.19-2.22.

[156] We have taken the impact of resale via downstream ISPs into account when considering how difficult it is for ISPs to meet the Order Mix Targets. This is relevant to our assessment of whether the Equinox Offer potential creates a barrier to using altnets (see Annex 3). However, impacts on the strength of competition between ISPs lie outside the scope of this statement.

customers with little interest in FTTP. There is also a risk that ISPs push these vulnerable consumers onto unsuitable FTTP contracts.[157]

3.137 We did not consider these impacts in the Consultation.[158]

Stakeholder responses to the Consultation

3.138 We did not receive any responses to the Consultation on this topic.

Ofcom's analysis and conclusions

3.139 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.

3.140 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

3.141 As we noted in the Consultation, stakeholders raised in their CFI responses a number of issues not directly related to the Equinox Offer, which we have not considered further as part of this process.[159]

3.142 In particular, Vodafone referred to the desirability of a "social" FTTP product for consumers with affordability concerns.[160] Vodafone reiterated this point in response to the Consultation.[161]

3.143 In addition, a number of responses to the Consultation referred to issues that are not directly related to the Equinox Offer.

[157] TalkTalk CFI response, paragraphs 3.11-3.19.
[158] Consultation, paragraphs 2.78-2.79.
[159] Consultation, paragraphs 2.80-2.81.
[160] Vodafone CFI response, paragraphs 6 (second one) and 13. Consultation, paragraph 2.81.
[161] Vodafone Consultation response, paragraph 17.

a) The Joint Consultation Response submitted that Openreach's discounts on FTTC discourage consumers from switching from Openreach FTTC to altnet FTTP.[162] Openreach submitted that its FTTC discounts represent competition on the merits.[163]

b) Fern Trading expressed concerns about the lack of transparency in Openreach's build plans.[164]

c) Fern Trading appeared to express concerns about how the WFTMR charge controls were set.[165]

d) Simwood commented on Ofcom's approach to calculating BT's weighted average cost of capital ('WACC') when setting charge controls and the technical standard that Openreach uses for FTTP.[166]

3.144 These concerns lie outside the scope of this process and we have therefore not considered them further.

Comments on process raised by stakeholders in response to the Consultation

Stakeholder comments

Application of SMP condition

3.145 The Joint Consultation Response suggested that a 90-day notice period "is too short for complex offers like Equinox".[167] It said that the process followed by Ofcom to assess the Equinox Offer was "rushed", "procedurally unfair", and "given the very significant impact Equinox is likely to have on the sector, has resulted in Ofcom's proposal to take no action being unfair, irrational and illegal".[168] It suggested that, if we believed we could not consult meaningfully without first issuing a CFI and gathering evidence informally and formally from stakeholders, we should have allowed for a longer notification period.[169]

3.146 VMO2 noted Openreach's view (expressed in its response to the CFI) that it was not obliged to notify the Equinox Offer under the 90 day process, but had done so because it was the first FTTP pricing initiative since the WFTMR statement was published.[170] VMO2

[162] Joint Consultation Response, paragraph 248.
[163] Openreach Consultation response, paragraph 5.5.
[164] Fern Trading Consultation response, paragraphs 2, 37-39.
[165] Fern Trading Consultation response, paragraphs 2, 4, 18-20
[166] Simwood Consultation response, pages 4-6.
[167] Joint Consultation Response, paragraph 95.
[168] Joint Consultation Response, paragraph 95, 99, 100, 113.
[169] Joint Consultation Response, paragraph 99.
[170] As we noted at footnote 4 of the Consultation, Openreach and BT Group submitted in their CFI responses 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).

disagreed with Openreach's view and encouraged Ofcom to clarify this point for the future.[171]

Consultation process

3.147 Some stakeholders considered that the consultation process was flawed.[172]

3.148 The Joint Consultation Response considered that the 30 days we allowed for responses to the Consultation was insufficient.[173] Fern stated that a four week consultation process during the August holiday period was an inadequate period of time to respond to a "huge and complex pricing document".[174]

3.149 Gigaclear and the Joint Consultation Response said our analysis had relied on responses to our CFI, for which we allowed two weeks for responses, and on requests for information to stakeholders for which we allowed limited time to respond."[175] The Joint Consultation Response said that in the circumstances evidence provided by stakeholders would not be "exhaustive or supported by as much analysis and evidence as would typically be the case" but that we had nevertheless relied on it in reaching our provisional conclusions.[176] VMO2 noted that Ofcom had failed to set out a preliminary view in the CFI, meaning that Ofcom's provisional findings had been reached based on limited evidence from Openreach and third parties, who themselves only had access to limited information.[177]

3.150 As noted in the Consultation, CityFibre referred in its CFI response 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 stated that Ofcom should not reach a provisional view without thoroughly investigating various issues and making its initial analysis available to stakeholders.[178]

3.151 VMO2 stated that the process followed by Ofcom does not seem to have followed that set out in Annex 11 of the WTFMR Statement, which creates uncertainty about future processes and a lack of transparency.[179]

3.152 Several stakeholders argued that they were unable to respond meaningfully to the Consultation because Ofcom had redacted certain information.[180]

[171] VMO2 response to Consultation, paragraphs 56-58.
[172] Joint Consultation Response, paragraph 3, 9, 29, 93-103.
[173] Joint Consultation Response, paragraph 98.
[174] Fern response to Consultation, paragraph 46;
[175] Gigaclear response to Consultation, page 2; Joint Consultation Response, paragraph 29 and 30.
[176] Joint Consultation Response, paragraph 96, 100.
[177] VMO2 response to Consultation, paragraphs 59-64.
[178] Consultation, footnote 6.
[179] VMO2 response to Consultation, paragraphs 59-64.
[180] CityFibre response to Consultation, paragraph 2.13(i); Fern response to Consultation, paragraph 46; Joint Consultation Response, paragraph 9, 97.

3.153 Some stakeholders said they understood Ofcom had discussed the Equinox Offer with Openreach before it was notified.[181] Fern argued that this amounted to "both discrimination between operators, and an abuse of process".[182] The Joint Consultation Response said "Ofcom's approach of first discussing confidentially the Equinox Offer with BT [sic] […] was procedurally flawed and unfair."[183] The Joint Consultation Response said this could result in a situation where Ofcom has, in effect, approved an offer before it is notified. They said this would create a conflict for Ofcom as it assessed stakeholder submissions during the process, and carried a high risk of confirmation bias. They said this is what appears to have happened in this case.[184]

Statutory duties

3.154 The Joint Consultation Response argued that we had not taken account of our statutory duties of transparency and consistency.[185] In particular, the Joint Consultation Response submitted that we had failed to act consistently or transparently as our approach in the Consultation was inconsistent with that set out in the WFTMR Statement (see above under 'Analytical framework') and we had not separately considered the impact of Equinox in Area 2 and Area 3.

3.155 Several stakeholders argued that in conducting its assessment Ofcom had not had due regard to the UK Government's Statement of Strategic Priorities (SSP).[186] Fern said that the SSP makes it clear that Ofcom should prioritise network investment over interventions to reduce retail prices, and that the Equinox Offer "clearly does the opposite".[187] CityFibre said that Ofcom's assessment must be seen in the context of the UK Government's target for at least 85% of UK premises to have access to gigabit-broadband by 2025 and Openreach's stated objective to have completed 85% of its fibre roll-out by 2025.[188] The Joint Consultation Response said the SSP makes it clear that the UK Government considers altnets are a critical part of the market structure that will lead to the fastest and most efficient FTTP coverage in the UK, but that our assessment appeared to favour short term price reductions for consumers over long term infrastructure competition.[189]

Interim relief

3.156 The Joint Consultation Response submitted that, due to "serious procedural and legal errors" in Ofcom's analysis, we should issue an interim direction to BT to suspend the introduction of the Equinox Offer, pending consideration of the points raised by the Joint

[181] Fern response to Consultation, paragraph 46. Joint Consultation Response, paragraph 3.
[182] Fern response to Consultation, paragraphs 46 and 48.
[183] Joint Consultation Response, paragraph 30.
[184] Joint Consultation Response, paragraph 102.
[185] Joint Consultation Response, paragraph 7, 25, 27, 31.
[186] Fern response to Consultation, paragraphs 2 and 21; Gigaclear response to Consultation, page 8; Joint Consultation Response, paragraph 4, 8, 9, 37-39.
[187] Fern response to Consultation, paragraph 2.
[188] CityFibre response to Consultation, paragraph 2.7(ii).
[189] Joint Consultation Response, paragraph 9.

Consultation Response and a substantive reconsideration of the Equinox Offer.[190] CWP also submits that Ofcom should put the Equinox Offer on hold while we conduct a "comprehensive, transparent, and legally compliant review".[191]

Future consultations

3.157 VMO2 submitted that Ofcom should consult on all future Openreach discount schemes that meet the test for a notification, even if it reaches a provisional conclusion that it does not believe it ought to intervene. It stated that this would support investor confidence and ensure that future schemes are introduced via an orderly process that all stakeholders can have confidence in.[192]

Our analysis and conclusions

Application of SMP condition

3.158 We decided in the WTFMR Statement to require Openreach to provide 90 days' notice of commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased.[193] In deciding on an appropriate prior notice period it is necessary to balance two competing considerations. First, the time required for us to consider the proposed terms and for industry to be given advance warning of price changes. Second, the impact on Openreach's (and its contractual counterparties') commercial flexibility. We proposed in the WFTMR January 2020 Consultation that a 90 day notification period was appropriate and, having considered stakeholder responses, maintained this position in the WFTMR Statement.

3.159 With respect to whether the 90 day notification requirement was triggered in this case, 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 in order to be eligible. In any event, Openreach did provide us with 90 days' prior notice of the Equinox Offer and we have assessed the impact of the offer.

3.160 Every pricing offer is likely to have its own specifics and Openreach will need to reach a view as to whether the notification requirement in SMP Condition 8.6 is triggered in any given case. However, it would be open to Ofcom to take enforcement action if we consider that Openreach has failed to comply with the requirements of the SMP Condition.

Consultation process

3.161 Within the 90 day notification period for the Equinox Offer, we have allowed stakeholders 14 days to outline any initial concerns to us in response to the CFI, and 31 days to respond to the Consultation. We do not accept stakeholder submissions that these periods of time were inadequate. By way of comparison, if we had instead reached a provisional view that

[190] Joint Consultation Response, paragraph 23.
[191] CWP response to Consultation, pages 4 – 5.
[192] VMO2 response to Consultation, paragraph 55.
[193] SMP Condition 8.6.

we should intervene to prevent Openreach from introducing the Equinox terms by issuing a direction under the SMP conditions, then the applicable statutory consultation period would be 30 days.[194]

3.162 We also do not accept that we have relied on an inadequate evidence base in reaching our findings. It is inherent in a 90-day process that we (and stakeholders) are unable to conduct the same depth of analysis as in, for example, the two-year process leading up to a market review decision. However, our analysis of the Equinox Offer builds upon the prior knowledge and evidence we gathered through the WFTMR process. We have supplemented this with evidence obtained during the 90-day process from Openreach and a range of other stakeholders by way of submissions, meetings and use of our information gathering powers. We consider that we have sufficient evidence and information in this case to be able to reach a decision within the 90-day timeframe.

3.163 We noted in the WTFMR Statement that the exact process we would follow in any given case would depend on the proposed terms and the nature of any potential concerns.[195] The Equinox Offer was formally notified by Openreach on 1 July and the following day we announced to stakeholders the process that we intended to follow.[196] We recognise that the CFI did not set out our preliminary view, but this did not prevent stakeholders from providing us with any evidence or information they considered relevant to the issues under consideration.

3.164 To the extent that the process we have followed in this instance differs from the outline we provided in Annex 11 of the WTFMR Statement, it has been to provide stakeholders with more opportunities to comment (for example, by enabling stakeholders to input before we reached a provisional view, and by consulting on that provisional view notwithstanding that we were proposing not to intervene).[197]

3.165 In relation to the redaction of confidential information in the published version of our Consultation, we are prevented by the applicable legal framework from disclosing information that stakeholders have provided to us without the consent of the business that provided it, unless a statutory exception applies, including where we need to disclose it in order to carry out our functions.[198] We did not consider that it was necessary for us to disclose the confidential information redacted from the Consultation in order for respondents to understand and respond to our proposals. We remain of this view and do not accept stakeholders' assertions that they were unable to respond meaningfully to the

---

[194] Section 49A of the Act.

[195] WTFMR Statement, Annex 11, paragraph A11.8

[196] See CFI, paragraphs 1.3 – 1.6

[197] We noted at footnote 6 of the Consultation CityFibre's points, made in its CFI response, 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 expressing our provisional view in the Consultation was consistent with these statements and appropriate in the circumstances.

[198] Sections 393(1) and (2) of the Act.

Consultation as a result of our redactions. We are satisfied that the information and reasoning in the Consultation were sufficient to permit intelligent consideration and response. It was also open to stakeholders to provide their own evidence, where they considered that it would support a different conclusion to our provisional view.

3.166 Finally, it is appropriate for us to regularly engage with a wide range of stakeholders, including Openreach. We made clear in Annex 11 of the WFTMR Statement that informal discussions with Openreach ahead of formal notification under the 90 day process would enable us to share any initial concerns and to conduct initial analysis which could aid the overall expediency of the process.[199] In this particular case, informal engagement by Openreach enabled us to review the draft contract terms and to familiarise ourselves with the various mechanisms in the Equinox Offer ahead of formal notification, and to put in place an internal project team ready to start work immediately once the Equinox Offer was notified. We do not accept that our engagement with Openreach gave rise to discrimination between operators or that it was procedurally flawed.

Statutory duties

3.167 In undertaking this review we have had regard to principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed.[200] With respect to the particular points raised by the Joint Consultation Response in relation to transparency and consistency, we explain above how our analytical framework is consistent with that set out in the WFTMR Statement and have addressed separately the impact of Equinox in Area 2 and Area 3 insofar as this is necessary.

3.168 In reaching our decision, we have also had regard to the Government's SSP.[201] Of particular relevance are the Government's strategic priorities of nationwide deployment of gigabit-capable broadband networks at pace and furthering the interests of telecoms consumers. In relation to the first of those, the SSP notes the conclusion of the Government's earlier Future Telecoms Infrastructure Review that the most effective way to achieve gigabit-capable connectivity is to promote competition and commercial investment where possible, and to intervene where necessary.

3.169 As discussed above, our strategy in the WFTMR Statement was consistent with this objective. We wanted to promote investment in gigabit-capable networks by Openreach and other companies in as many areas of the UK as possible in order to promote network-based competition. In areas of the UK where we considered it unlikely that material and sustainable competition to Openreach would emerge, we wanted to promote investment by Openreach and ensure appropriate access to competitors in the interests of consumers.

3.170 This is also the guiding principle of our review of the Equinox Offer. We have considered whether the terms of the offer undermine new network build by altnets, which is unlikely

[199] WFTMR Statement, Annex 11, paragraph A11.8(a).
[200] Section 3(3) of the Act.
[201] Section 2B(2) of the Act.

to be in the interests of consumers in the long term. We have concluded that neither the Order Mix Targets nor the forecasting requirements potentially create a 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. We therefore conclude that the Equinox terms are consistent with competition between gigabit-capable networks.

Interim relief

3.171 In light of our findings, we do not consider it appropriate or proportionate to issue an interim direction to suspend the introduction of the Equinox Offer, pending a substantive reconsideration.

Future consultations

3.172 For any future pricing schemes notified to us by Openreach under the 90 day process, we will reach a view about the appropriate process to follow taking into account the outline in Annex 11 of the WTFMR Statement, the specific terms proposed by Openreach and the nature of any potential concerns. We will inform stakeholders of our intended process as soon as practicable.

Conclusion

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

3.174 In reaching our view, we have considered the impact on competition. For the reasons set out above, 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 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 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 conclusion is that the Equinox Offer is consistent with network-based competition.

c) **ISPs:** We consider that ISPs are likely to benefit from network-based competition. As explained above, we 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.

3.175 In reaching our view, we have had regard to our duties under sections 3 and 4 of the Communications Act 2003. As discussed in more detail above, we have also had regard to the UK Government's SSP.

A1. Legal framework

90 days' notification process

A1.1 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.

A1.2 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

A1.3 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.

A1.4 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

A1.5 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.

A1.6 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.

A1.7 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.

A1.8 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.

A1.9 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

A1.10 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[202] by members of the public and businesses in the United Kingdom.

A1.11 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

A1.12 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').[203] 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

A1.13 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[204], 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.

A1.14 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.

A1.15 For further information about our approach to impact assessments, see the guidelines 'Better policy making: Ofcom's approach to impact assessments' on our website.[205]

[202] 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)."

[203] https://www.gov.uk/government/publications/statement-of-strategic-priorities

[204] 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.

[205] An overview and link to the guidelines can be found on our Policies and Guidelines webpage.

Equality impact assessment

A1.16 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.

A1.17 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.

A1.18 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the potential impact of our decisions on persons sharing protected characteristics and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations.

A1.19 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.[206] 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.

A1.20 We said in the Consultation that the approach set out in that document was consistent with the position set out in Annex 23 of the WFTMR Statement. No stakeholder raised equality impact concerns in response to the Consultation.

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

A2. Rental and connection discounts if the Order Mix Targets are met

A2.1 As set out in Section 3, 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.

A2.2 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).

A2.3 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.

A2.4 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.

A2.5 In summary, our analysis shows that the discounts if the Order Mix Targets are met could be substantial, in which case ISPs could be strongly incentivised to meet these targets. The value of the discounts is substantially driven by the 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

A2.6 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 A2.1) 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.

A2.7 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.

A2.8 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 A2.1: 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

A2.9 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).

A2.10 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%.

A2.11 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.[207] Connection charges are likely to be minor, given expected ISPs' average customer lifetimes for FTTP, which range from [✂] months.[208] 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

A2.12 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.

A2.13 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.[209]

b) Sky forecast that in 2022, [✂] of new FTTP connections would be for 500Mbps, changing to [✂] in 2025.[210] Vodafone forecast that in 2022, [✂] of new FTTP connections would be for 500Mbps, changing to [✂].[211]

c) Openreach provided the bandwidth mix assumptions underpinning a paper submitted to the Openreach Board in June 2021. [✂][212]

A2.14 For new to network customers taking 550/75, we estimate this additional rental discount translates to a further discount of around 4% off total connection and rental charges over an average customer lifetime, compared to if this additional rental discount were not available.[213]

A2.15 We have also considered the value of this additional discount averaged across a wider group of customers (rather than just new-to-network 550/75 customers).

[207] 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.
[208] 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).
[209] VMO2 response to s135 notice dated 16 August 2021, question 2.
[210] Sky response to s135 notice dated 16 August 2021, question 3.
[211] Vodafone response to s135 notice dated 16 August 2021, question 10.
[212] Openreach response to s135 notice dated 16 August 2021, question 5.
[213] This assumes an average customer lifetime of 5 years.

a) Across all customers taking 550/75 (i.e. new-to-network and non-new-to-network customers), we estimate the discount translates to a further discount of around 1% off total connection and rental charges over an average customer lifetime, compared to if this additional discount were not available.

b) Across all FTTP customers, 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. This is because we expect this product will represent a modest proportion of overall sales.

Cumulative impact of the discounts

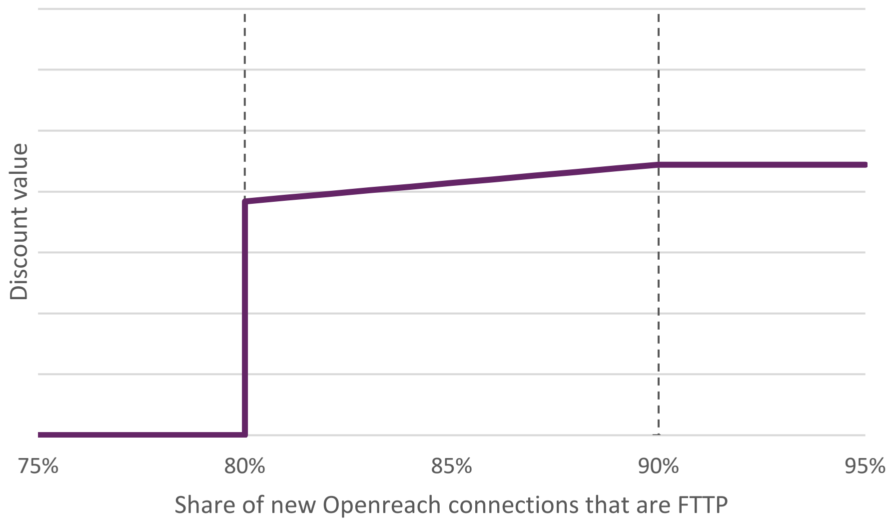
A2.16 Ultimately, it is the cumulative discount value that determines the incentives for an ISP to meet the Order Mix Targets. We have estimated the average total monthly discount on list prices based on the rental, connection, 550/75, and ARPU share discounts.

A2.17 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, where ISPs take their projected mix of speeds, including higher speed customers (if ISPs opted to focus on selling the 40/10 FTTP products the price discounts would be much lower, since there is no discount on 40/10 under Equinox).

A2.18 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.[214] This is illustrated in Figure A2.1.

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

Figure A2.1: shape of average Equinox discounts across different Openreach FTTP shares – illustration



A2.19 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.

A2.20 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 an 80% to 81% FTTP share (for example).[215] Therefore, after the first year, the incentive to meet the lower target to qualify for the rental discounts (80%) is particularly strong as just missing this target results in the loss of all rental discounts.

[215] This is more pronounced as the ISP builds its rental base.

A3. How difficult is it for ISPs to meet the Order Mix Targets?

Introduction

A3.1 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 a more straightforward installation process.

A3.2 As set out in Section 3, 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.

A3.3 This annex is structured as follows:

a) First, the we set out the experience in areas where regulatory stop sell is in place;

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

c) Third, we set out stakeholders' submissions;

d) Fourth, we set out our assessment of how easy it is for ISPs to meet the Order Mix Targets; and

e) Finally, we set out our modelling of the impact of moving FTTP orders from Openreach to an altnet in areas where their networks overlap.

Regulatory stop sell

A3.4 In the WFTMR Statement, we set out a staged approach for how regulation would transition from copper to full fibre services in exchange areas where fibre is built. 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.[216]

[216] Our decisions in relation to copper retirement are set out in the WFTMR Statement, Volume 3, Section 2.

Openreach submissions

A3.5 Figure A3.1 sets out Openreach estimates of the number of premises where Openreach FTTP will be available and where stop sell will be triggered. This shows that stop sell will apply at an increasing number of premises and an [✂] over time.

Figure A3.1: Openreach estimates of the extent of stop sell

	Q4 2021	Q4 2022	Q4 2023	Q4 2024	Q4 2025
FTTP footprint (premises)	[✂]	[✂]	[✂]	[✂]	[✂]
Stop sell (premises)	[✂]	[✂]	[✂]	[✂]	[✂]
Proportion where stop sell applies	[✂]	[✂]	[✂]	[✂]	[✂]

Source: Openreach response to s135 notice dated 13 September 2021, question 3(b). Openreach email dated 24 September 2021.

A3.6 Openreach provided evidence on the extent of orders for legacy products once stop sell is in place.

a) The 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 for legacy services.[217] [218]

b) As well as Salisbury, since 29 June 2021 regulated stop sell has applied at 13 other Openreach exchanges. Since that time, only a small number of orders for legacy broadband services were received and accepted by Openreach at these exchanges, representing well under [✂] of broadband orders at premises where FTTP is available.[219]

Altnet submissions

A3.7 In response to the Consultation, CityFibre and the Joint Consultation Response criticised Openreach's evidence in relation to Salisbury:

a) CityFibre submitted that Salisbury is not a reliable guide to sales in Openreach's FTTP footprint since it was selected as a test-bed for copper switchover because there were limited challenges to FTTP deployment (e.g. few multi-dwelling units).[220]

[217] Openreach response to Ofcom 26 July 2021 RFI, question 3. Openreach also referred to this evidence in Openreach Consultation response, paragraph 3.12(e).
[218] Openreach also provided slightly different figures in relation to orders of legacy broadband services in Salisbury. These represented under [✂] of total broadband orders at premises where FTTP is available. Openreach response to s135 notice dated 13 September 2021, question 2.
[219] Openreach response to s135 notice dated 13 September 2021, question 2.
[220] CityFibre Consultation response, paragraphs 2.13(ii)-(iii).

b) The Joint Consultation Response submitted that it is “feasible” that many orders for legacy broadband in Salisbury were placed but rejected by Openreach, meaning that this evidence understates the proportion of consumers who are unable or unwilling to use FTTP.[221]

c) The Joint Consultation Response submitted that by the time regulated stop sell was implemented in Salisbury, consumers would be more familiar with the benefits of FTTP.[222]

Ofcom’s analysis

A3.8 The number of premises where stop sell applies will increase over time and, in the light of the evidence set out above, we also consider it likely that [✂].

A3.9 Where stop sell is in place, there are very few orders for legacy services at premises where FTTP is available. This implies that very few consumers *must* take legacy services rather than FTTP. However, we recognise that the experience in stop sell areas does not show how many consumers prefer legacy services to FTTP, if ISPs make both equally accessible.

A3.10 We do not consider that the inferences we have drawn are undermined by CityFibre’s and the Joint Consultation Response’s criticisms of the evidence in relation to Salisbury. In particular:

a) CityFibre submitted that Salisbury is not a reliable comparator. However, in response to a statutory information request, Openreach submitted that Salisbury was selected as the trial location for scale FTTP deployment for a number of reasons, including that it was fairly representative and would allow Openreach to test a range of build cases (e.g. to multi-dwelling units and listed premises).[223] In any event, the experience in Salisbury is consistent with other stop sell areas where there were also few orders for legacy broadband services.

b) Consistent with the Joint Consultation Response, we accept that Openreach may not have received or accepted some orders for legacy services that would otherwise have been placed, absent stop sell.[224] However, this does not lessen the relevance of the Salisbury evidence to the situation once stop sell begins.

---

[221] Joint Consultation Response, paragraph 162(a).
[222] Joint Consultation Response, paragraph 162(b).
[223] Openreach response to s135 notice dated 13 September 2021, question 1(b).
[224] We also followed up with Openreach about the figures it originally provided. Since December 2020, in Salisbury Openreach received [✂] orders at premises where FTTP was marked as available. This figure excludes novations and [✂] orders for legacy services were incorrectly accepted due to issues Openreach’s systems. Of the [✂] orders, [✂] were placed for legacy services (i.e. under 1%). If the [✂] orders were also taken into account then 3% of orders would have been for legacy services. Openreach response to Ofcom 26 July 2021 RFI, question 3. Openreach response to s135 notice dated 13 September 2021, question 1(a).

FTTP Only Offer v2

A3.11 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 for FTTP.[225]

A3.12 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 ISP Resellers participate in the FTTP Only Offer v2.[226] Also, during January 2021-March 2021, Openreach suspended non-essential FTTP installation as a result of COVID, although ISPs could continue to place FTTP orders. As a result, the targets under the FTTP Only Offer v2 were reduced in these months and Openreach submitted that ISPs did not ramp up FTTP sales to the extent that would otherwise be expected.[227]

Figure A3.2: 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.

A3.13 Openreach also submitted a slightly different variant of this data as part of its response to the Consultation. These further figures included June and July 2021, during which [✂]. These figures also showed that [✂].[228]

A3.14 In relation to this offer:

a) Sky submitted that [✂].[229]

b) Vodafone submitted that [✂].[230]

A3.15 We have taken this evidence into account as part of our assessment of the Order Mix Targets, set out in paragraphs A3.26 to A3.35 below.

[225] For further details see *Existing Openreach FTTP offers with geographic pricing*, Ofcom statement, 2 July 2021, paragraphs 3.43-3.46.
[226] Openreach response to Ofcom 26 July 2021 RFI, question 5.
[227] Openreach response to s135 notice dated 16 August 2021, question 1.
[228] Openreach Consultation response, Annex 2. Openreach response to s135 notice dated 13 September 2021, question 4.
[229] Sky response to Ofcom 26 July 2021 RFI, question 4.
[230] Vodafone response to Ofcom 26 July 2021 RFI, question 4.

Stakeholder submissions on the Order Mix Targets

ISP submissions

A3.16 TalkTalk and Vodafone purchase FTTP from CityFibre. We asked these ISPs in what circumstances they use legacy services from Openreach in those areas where they purchase FTTP from CityFibre:

a) **TalkTalk:** [✂].[231]

b) **Vodafone:** [✂].[232] [✂][233]

A3.17 We asked ISPs how they would meet the Order Mix Targets if they sign up to the Equinox Offer:[234]

a) **Sky:** [✂].[235]

b) **TalkTalk:** [✂][236] [✂][237]

c) **Vodafone:** [✂][238]

A3.18 We requested modelling done by TalkTalk of its ability to meet the Order Mix Targets. This contained a range of scenarios. What TalkTalk referred to as a “best case” scenario is set out in Figure A3.3 below, although we note that its modelling contains scenarios where the proportion of FTTP orders is even higher. Its modelling also contains a range of scenarios where [✂].[239] TalkTalk told us that this modelling [✂].[240] This modelling shows that [✂].

[231] TalkTalk response to s135 notice dated 16 August 2021, question 3. TalkTalk response to s135 notice dated 16 September 2021, question 1(c). TalkTalk response to Ofcom 26 July 2021 RFI, question 5.
[232] Vodafone response to s135 notice dated 16 August 2021, questions 2(a)-(b).
[233] Vodafone response to s135 notice dated 16 August 2021, question 3.
[234] We did not ask this question to BT since we consider that it is unlikely to use an altnet within the Openreach FTTP footprint.
[235] Sky response to Ofcom 26 July 2021 RFI, questions 1 and 2. Sky also referred to this evidence in Sky Consultation response, pages 2-3.
[236] TalkTalk response to Ofcom 26 July 2021 RFI, question 1.
[237] TalkTalk response to s135 notice dated 16 August 2021, question 10. [✂]. TalkTalk response to s135 notice dated 16 August 2021, question 4.
[238] Vodafone response to Ofcom 26 July 2021 RFI, questions 1 and 2. Similar points are made in Vodafone CFI response, paragraph 7 (first one).
[239] TalkTalk response to s135 notice dated 16 September 2021, question 4.
[240] Ofcom meeting with TalkTalk, 14 September 2021.

Figure A3.3: Proportion of TalkTalk orders that are for FTTP: "best case"

	Q4 2021	Q1 2022	Q2 2022	Q3 2022
TalkTalk Consumer	[✂]	[✂]	[✂]	[✂]
ISP Resellers supplied by TalkTalk	[✂]	[✂]	[✂]	[✂]
Overall TalkTalk	[✂]	[✂]	[✂]	[✂]
Equinox Offer target	75%	75%	80%	80%

Source: TalkTalk response to s135 notice dated 16 September 2021, question 4, "Route to success" sheet rows 1-48. Hardcoded figures have been corrected.

A3.19 In terms of ISP Resellers, [✂] firms account for [✂] of the total number of customers served by Vodafone's ISP Resellers.[241] [✂][242]

A3.20 In terms of ISP Resellers, [✂] firms account for [✂] of the total number of customers served by TalkTalk's ISP Resellers.[243]

a) TalkTalk submitted that [✂].[244] In response to the Consultation, [✂][245]

b) [✂][246] [✂][247]

c) TalkTalk submitted that for the first 12-24 months the Equinox Offer should be amended to allow ISPs to have separate contracts for their retail customers and for their ISP Resellers.[248]

Openreach submissions

A3.21 We requested internal documents submitted to the Openreach board. [✂][249] [✂][250]

A3.22 Prior to the Consultation, Openreach submitted that 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 [✂].[251]

A3.23 In response to the Consultation, Openreach submitted that it is unrealistic to assume that ISPs will be close to the Order Mix Targets.[252]

[241] [✂] Vodafone response to s135 notice dated 16 August 2021, question 4.
[242] Vodafone response to Ofcom 26 July 2021 RFI, question 2.
[243] [✂] TalkTalk response to s135 notice dated 16 August 2021, questions 4 and 10.
[244] TalkTalk response to s135 notice dated 16 August 2021, question 10.
[245] TalkTalk Consultation response, paragraph 2.16.
[246] TalkTalk response to s135 notice dated 16 August 2021, question 7.
[247] TalkTalk response to s135 notice dated 16 September 2021, questions 2(a)-(b).
[248] TalkTalk Consultation response, paragraph 2.17.
[249] [✂]
[250] [✂]
[251] Openreach response to Ofcom 26 July 2021 RFI, question 3. Openreach email of 3 August 2021.
[252] Openreach Consultation response, paragraphs 3.12(a), 3.16.

a) These targets only apply to premises marked as ready for service with FTTP, i.e. where any wayleaves or access permissions are in place.[253]

b) Under the FTTP Only v2 offer, ISPs have raised the proportion of their orders that are for FTTP to over 90% once they have adapted their sales processes (e.g. to restrict orders of legacy services). While there is a transitional period (while ISPs install Cablelinks, adapt sales process and work with ISP Resellers etc), this is reflected in the lower Order Mix Targets during the first year and through various catch-up mechanisms.[254]

c) The Order Mix Targets apply to consumers that are seeking to change their broadband service. Openreach submitted that hassle factors are less likely to deter such consumers from adopting FTTP.[255]

d) Openreach submitted that the number of exchanges where regulated stop sell applies will grow significantly.[256]

Altnet submissions

A3.24 The Joint Supplementary Submission stated 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.[257]

A3.25 In response to the Consultation, altnets identified a number of challenges for ISPs meeting the Order Mix Targets.

a) Altnets and [✂] [a confidential respondent] identified a range of consumer objections to purchasing FTTP (e.g. price, installation, satisfaction with existing speeds, uncertainty about the benefits of FTTP).[258]

b) [✂] [A confidential respondent] submitted that, in terms of legacy services, FTTC only achieved penetration of c.70% where it has been available despite the improved performance FTTC offers compared to ADSL broadband.[259]

---

[253] Openreach Consultation response, paragraph 3.11.
[254] Openreach Consultation response, paragraphs 3.12(a), 3.14.
[255] Openreach Consultation response, paragraph 3.12(b).
[256] In August 2021, stop sell applied at 14 exchanges (approximately 4% of the Openreach FTTP footprint). A further 133 exchanges will move to stop sell in October 2021. Openreach Consultation response, paragraph 3.12(d).
[257] This submission also noted that retail altnets regularly achieve penetration of 20-30%. Joint Supplementary Submission, paragraphs 34, 38, 43-46.
[258] Joint Consultation Response, paragraphs 11, 110, 166-169. [✂] [A confidential respondent] Consultation response, pages 8-10. [✂] [The confidential respondent] referred to a report by the Gigabit Take-up Advisory Group, which was asked by the Government to advise on ways to encourage take-up of high speed internet connections. *Gigabit Take-up Advisory Group: Final Report*, June 2021, available here.
[259] [✂] [A confidential respondent] Consultation response, page 8.

c) [✂] [A confidential respondent] submitted that Openreach may categorise certain premises as ready for service with FTTP even where a wayleave to allow installation has not been secured.[260]

d) KCOM considered it implausible that Openreach would have set the Order Mix Targets at a level that was not challenging but achievable for ISPs (since this means that the targets drive ISP behaviour).[261]

Ofcom's analysis

A3.26 In the light of the evidence set out above, we have considered how difficult it is for ISPs to meet the Order Mix Targets.

A3.27 As set out in Section 3, compliance with the Order Mix Targets is assessed by reference to new orders with Openreach.[262] These typically occur when an ISP signs up a new customer or when an existing customer regrades to a different product. Ongoing provision to existing customers does not count. Since these targets apply to new orders, they relate to consumers that are considering changing their broadband service in some way, which gives the ISP an opportunity to steer them towards FTTP. Consumers that are satisfied with their existing broadband service or that are disengaged from the market are unlikely to place a new order and thus are not included in any compliance calculations.

A3.28 An exception to this is where customers are supplied using Openreach's Wholesale Line Rental product ('WLR'). ISPs will need to migrate these customers to different products ahead of WLR withdrawal in 2025. In the Equinox Offer notified on 1 July 2021, these migrations will count towards the Order Mix Targets. For some ISPs (particularly [✂]), a large proportion of their existing customers are currently supplied using WLR.[263] We do not expect the need to migrate these customers to other products before 2025 presents a significant further challenge for these ISPs in terms of their performance against the Order Mix Targets.[264] This is because they will be able to migrate these customers to FTTP products, rather than legacy products, within the Openreach FTTP footprint. We also expect them to do so, not just because of the incentives provided by the Equinox Offer, but also because ISPs have told us they have a strong preference for a single-stage transition from WLR to FTTP where this is possible, rather than moving customers twice, first from WLR to another legacy product (SOGEA), and subsequently from SOGEA to FTTP.[265]

A3.29 We recognise the challenges highlighted by altnets in encouraging consumers to order FTTP. Consistent with this, we consider that ISPs that sign up to the Equinox Offer will have

---

[260] [✂] [A confidential respondent] Consultation response, page 9.
[261] KCOM Consultation response, paragraphs 5.17-5.19.
[262] As highlighted by Openreach, the targets apply to orders at premises which Openreach considers to be ready for service with FTTP. As a result, the difficulties highlighted by some altnets in obtaining access (e.g. wayleaves) should largely have been overcome.
[263] Figures on WLR volumes provided in Openreach email dated 24 September 2021.
[264] [✂].
[265] See, for example, Vodafone's response to the January 2020 WFTMR Consultation, Part 1, Section 4.

to change how they market and sell broadband within the Openreach FTTP footprint, in order to drive FTTP sales.[266] As explained above, the main ISPs told us that, [✁].

A3.30 In the medium term, we expect ISPs to surpass the Order Mix Targets as a result of this strategy. [✁]. The experience of stop sell shows that very few consumers actually require a legacy broadband service and thus moving quickly to a scenario where almost all new orders are for FTTP is feasible. 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.

A3.31 However, ISPs require time to grow the proportion of FTTP sales within the Openreach FTTP footprint. This reflects some of the practical issues identified by stakeholders (e.g. [✁], adjusting sales systems and practices). It is also consistent with [✁]. This is taken into account in the Order Mix Targets, since they are initially more lenient.

A3.32 Stakeholders provided evidence on ISP Resellers. We have considered whether there is a risk that only a low proportion of ISP Resellers' orders are for FTTP, which would make it harder for the upstream ISP to meet the Order Mix Targets.

a) 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. [✁].[267]

b) In addition, [✁]. This is also consistent with [✁].

c) We have considered the extent to which TalkTalk and Vodafone could unilaterally withdraw sales of legacy services from their largest ISP Resellers within the Openreach FTTP footprint. [✁].[268]

A3.33 In the short term, some ISPs may surpass the Order Mix Targets. [✁]. However, some ISPs may struggle to hit the targets in the first 12-24 months due to temporary challenges.[269] This is shown by [✁].

A3.34 However, 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 relationships with ISP Resellers adapt.

A3.35 There is also a range of things ISPs can do to mitigate the risk of missing the targets in the short term, although these possibly involve some costs.

[266] In response to KCOM's submission that Openreach would have set the Order Mix Targets at a level that was challenging but achievable for ISPs, we consider that this is the case. The targets require ISPs to significantly change their behaviour and, as set out below, pose challenges in the short term.

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

[268] [✁]. Contracts provided in response to question 5 of s135 information requests sent to each of Vodafone and TalkTalk, dated 16 August 2021.

[269] A 12-24 month period reflects the period for which TalkTalk thought that the Equinox Offer should be amended (see paragraph A3.20(c)). [✁], we are mindful that the Order Mix Targets become more challenging after the first 12 months.

a) Direct sales by ISPs: ISPs could undertake various activities to further increase FTTP sales, such as additional marketing or changes in the relative retail price of FTTP and legacy services. They could also act to limit the extent to which they make sales of legacy products in areas where they purchase FTTP. In this regard, [✂].[270] Similarly, [✂].[271]

b) ISP Resellers: We expect ISPs' contracts with ISP Resellers to evolve to match the new incentives provided by the Equinox Offer and to include suitable provisions to limit legacy broadband sales. ISPs can also offer additional inducements beyond their current contracts to encourage ISP Resellers to promote FTTP orders over legacy products. We note that [✂].[272]

Modelling of the impact using an altnet has on the order mix

A3.36 We have modelled the impact using an altnet has on an ISP's order mix in two ways:

a) First, we have modified TalkTalk's internal forecasts of its performance against the Order Mix Targets.

b) Second, we have undertaken some simple calculations to illustrate the impact that using an altnet could have on the minimum proportion of an ISP's orders that need to be FTTP for it to still meet the Order Mix Targets.

A3.37 We also discuss modelling submitted by [✂] [a confidential respondent].

TalkTalk modelling

A3.38 As set out in paragraph A3.18, TalkTalk provided modelling of its performance against the Order Mix Targets under various scenarios. [✂]

A3.39 We have used the forecast scenarios modelled by TalkTalk to assess the impact that moving FTTP volumes from Openreach to an altnet, in areas where the networks overlap, might have on TalkTalk's performance against the Order Mix Targets in that first year.[273] As set out in Annex 4, the evidence points to low levels of overlap of Openreach's FTTP footprint by altnets which provide access to third party ISPs over the period covered by TalkTalk's modelling. For these levels of network overlap, using an altnet for FTTP orders has a minimal impact on the share of TalkTalk's orders from Openreach that are FTTP, and does not affect TalkTalk's ability to meet the targets [✂].

---

[270] [✂] TalkTalk response to s135 notice dated 16 August 2021, question 2(a). Vodafone response to s135 notice dated 16 August 2021, question 2(c).
[271] Vodafone response to s135 notice dated 16 August 2021, question 2(c).
[272] [✂]. TalkTalk response to s135 information request dated 16 August 2021, question 6(b).
[273] For example, if altnets are assumed to cover 2% of the Openreach FTTP footprint, we reduce TalkTalk's FTTP orders from Openreach by 2% in all scenarios. TalkTalk's legacy orders are assumed to remain unchanged.

Illustrative calculation

A3.40 The design of the Order Mix Targets is consistent with the purpose of offering ISPs lower prices in return for bringing forward the point in time at which they will largely stop offering Openreach legacy products. However, the Order Mix Targets allow ISPs flexibility to place some legacy orders and still qualify for discounts. For example, for a target of 90%, up to 10% of an ISP's orders can be for legacy products. We have undertaken some simple calculations to illustrate the impact that using an altnet could have on the minimum proportion of an ISP's orders that need to be FTTP for it to still meet the Order Mix Targets.

A3.41 We first illustrate the impact that regulated stop sell has on an ISP's flexibility to continue placing some legacy orders, assuming the ISP uses only Openreach.[274] In those parts of the Openreach FTTP footprint where regulated stop sell applies, ISPs cannot place new legacy orders. As a result, in the remainder of the Openreach FTTP footprint where regulated stop sell does not apply, a higher proportion of an ISP's orders can be for legacy products. As the proportion of the Openreach FTTP footprint covered by regulated stop sell increases, the share of new orders outside the stop sell areas which can be for legacy products, while still meeting the Equinox FTTP targets, also increases.

A3.42 This is illustrated in Figure A3.4 below. Under different assumptions about the proportion of Openreach's FTTP footprint where stop sell is in place, this shows the minimum proportion of orders outside stop sell areas which need to be FTTP in order for the ISP to meet a particular order mix target. For example, if stop sell is assumed to apply to 20% of the Openreach FTTP footprint, 87.5% of new orders in the non-stop sell areas must be FTTP to achieve a 90% target overall.[275]

Figure A3.4: Minimum proportion of new orders outside stop sell areas that need to be FTTP to meet the Order Mix Targets – ISP uses only Openreach

		Proportion of Openreach FTTP footprint stop sell applies		
		20%	30%	40%
Order Mix Target	75%	68.8%	64.3%	58.3%
	80%	75.0%	71.4%	66.7%
	90%	87.5%	85.7%	83.3%

Source: Ofcom calculations.

A3.43 We now illustrate the impact of moving FTTP orders from Openreach to an altnet in parts of the Openreach FTTP footprint, while leaving any legacy orders with Openreach.

A3.44 Keeping all else equal, moving new FTTP orders that would otherwise have gone to Openreach to an altnet increases the minimum proportion of orders in non-stop sell areas that need to be FTTP in order to meet the Order Mix Targets. This is because the FTTP

[274] We do this first because the impact of stop sell is potentially significant.
[275] For example, assume there are 100 new orders equally distributed across the Openreach FTTP footprint. A target of 90% means at least 90 orders need to be for FTTP. Given there will be 20 FTTP orders in the 20% of the footprint where stop sell applies, there needs to be at least 70 FTTP orders (out of a total of 80 orders) in the areas where stop sell does not apply. This amounts to a minimum proportion of 88% (=70/80) in areas where stop sell does not apply.

orders now placed with an altnet do not count towards the Order Mix Targets, so the proportion of orders placed with Openreach that are FTTP has to increase to offset this. The size of this effect depends on the extent to which altnets which provide access to third party ISPs overlap with the Openreach FTTP footprint. We assume the greater the overlap, the more FTTP orders the ISP will move to an altnet, and therefore the less flexibility the ISP has to place legacy orders and still meet the Order Mix Targets.

A3.45 Figures A3.5 and A3.6 below show how the minimum proportions shown in Figure A3.4 could change if an ISP uses an altnet instead of Openreach for the FTTP orders in those parts of the Openreach FTTP footprint where an altnet is available.[276] Figure A3.5 assumes an altnet is available in 2% of the Openreach FTTP footprint and Figure A3.6 assumes an altnet is available in 5% of the Openreach FTTP footprint. These levels of overlap have been chosen as the overlap of altnets within the Openreach FTTP footprint is likely to be limited in the next 12-24 months (see Annex 4).

Figure A3.5: Percentage point change in minimum proportion of new orders outside stop sell areas that need to be FTTP to meet the Order Mix Targets when ISP uses altnet in 2% of Openreach FTTP footprint, compared to Figure A3.4

		Proportion of Openreach FTTP footprint stop sell applies		
		20%	30%	40%
Order Mix Target	75%	+0.6	+0.7	+0.8
	80%	+0.5	+0.6	+0.7
	90%	+0.3	+0.3	+0.3

Source: Ofcom calculations.

Figure A3.6: Percentage point change in minimum proportion of new orders outside stop sell areas that need to be FTTP to meet the Order Mix Targets when ISP uses altnet in 5% of Openreach FTTP footprint, compared to Figure A3.4

		Proportion of Openreach FTTP footprint stop sell applies		
		20%	30%	40%
Order Mix Target	75%	+1.6	+1.8	+2.1
	80%	+1.2	+1.4	+1.7
	90%	+0.6	+0.7	+0.8

Source: Ofcom calculations.

A3.46 For example, Figure A3.6 shows that if an altnet is used for FTTP in 5% of the Openreach footprint, and stop sell applies in 20% of the Openreach footprint, the minimum proportion

[276] These figures are upper bounds. The impact will depend on whether stop sell applies in the parts of the Openreach FTTP footprint that the altnet covers. To maximise the estimated impact of using an altnet, we assume the maximum overlap of altnet and stop sell areas, as this maximises the number of FTTP lines that the ISP moves to an altnet (and which no longer count towards the Order Mix Targets). For example, if an altnet is present in 20% of the Openreach FTTP footprint, and stop sell also covers 20% of the footprint, we assume these areas overlap completely, so all orders in that area are for FTTP and all of these are moved to the altnet.

of orders outside stop sell areas which need to be FTTP in order for the ISP to achieve a 90% order mix target increases by just 0.6 ppt, from 87.5% (in Figure A3.4) to 88.1%.[277]

A3.47 The calculations show that, for the levels of overlap we expect to see in the next 12-24 months, placing FTTP orders with an altnet while continuing to purchase legacy products from Openreach is likely to have very little effect on the minimum proportion of orders in non-stop sell areas that need to be FTTP in order to meet the targets. Put another way, in the next 12-24 months, using an altnet is likely to have very little effect on the share of an ISP's customer base that it can offer legacy products to and still meet the Order Mix Targets.

[✂] [A confidential respondent's] modelling

A3.48 [✂] [A confidential respondent] submitted that its calculations show that the Order Mix Targets could reduce the addressable market for altnets that supply third party ISPs by a very large amount.[278] However, these calculations are based on a misunderstanding of how compliance with the Order Mix Targets is assessed.

A3.49 [✂] [The confidential respondent] appears to have assumed that 80% of an ISP's total orders must be for Openreach FTTP (i.e. the denominator includes both orders outside of the Openreach FTTP footprint and orders from altnets). Such a target would leave little scope for ISPs to use altnets, especially as not all premises can receive FTTP. However, in fact the Order Mix Targets apply to the proportion of an ISP's orders from Openreach within its FTTP footprint.

[277] For example, assume there are 100 new orders equally distributed across the Openreach FTTP footprint. 5 of these orders are in areas covered by the altnet. There will be 20 FTTP orders in the 20% of the footprint where stop sell applies, 5 of which are assumed to move to the altnet (see previous footnote). A target of 90% means at least 86 out of the 95 orders that remain with Openreach need to be for FTTP. Given there will be 15 Openreach FTTP orders in the 20% of the footprint where stop sell applies, there needs to be at least 71 FTTP orders (out of a total of 80 orders) in the areas where stop sell does not apply. This amounts to a minimum proportion of 89% (=71/80) in areas where stop sell does not apply. (This is higher than the 88.1% figure in main text due to using integer values for the number of orders.)

[278] [✂] [A confidential respondent] Consultation response, pages 3-5. [✂] [A confidential respondent] email dated 15 September 2021.

A4. To what extent will wholesaling altnets' FTTP footprints overlap with Openreach's FTTP footprint?

Introduction

A4.1 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.

A4.2 Below we first consider overlap currently and in the short term. We then consider the longer-term position.

Current and short-term overlap of Openreach's FTTP network

A4.3 Investment in FTTP networks is being made by established operators such as BT and VMO2 as well as newer entrants. These investments are numerous and vary considerably in terms of location and scale.[279]

A4.4 As of the end of July, around 5.2m premises were ready for service using Openreach FTTP.[280] In terms of overlap by other FTTP networks:

a) Openreach estimated that currently a very small percentage of the premises it has passed with FTTP are also covered by altnet FTTP, excluding VMO2.[281]

b) The Joint Consultation Response submitted that in Spring 2021, more than 2.5m premises were passed by altnets, of which more than 2m are outside of the Openreach FTTP footprint.[282] This implies 0.5m premises passed by altnets are within the Openreach FTTP footprint, which equates to around 10% of that footprint.

[279] 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]
[280] Openreach response to s135 notice dated 16 August 2021, question 2.
[281] Openreach response to s135 notice dated 16 August 2021, question 2. This figure includes Hyperoptic. This figure excludes VMO2 FTTP since VMO2 currently does not provide wholesale access to third party ISPs. Openreach estimated that a very small percentage of its FTTP network overlapped with other FTTP networks in July 2021 if VMO2 FTTP (but not VMO2 DOCSIS) were included.
[282] Joint Consultation Response, paragraphs 40-42.

A4.5 We understand that the figures in the preceding paragraph include 'retail only' altnets and thus overstate the degree of overlap with altnets that currently provide access to third party ISPs.

A4.6 How these figures will change in the next couple of years depends on:

a) Networks' build strategies. Stakeholders submitted that altnets generally avoid overbuilding Openreach's FTTP network.[283] Modelling in the Joint Consultation Response implies that the number of premises that only altnets pass will start to decline after 2024 as a result of overbuild with Openreach FTTP.[284]

b) The extent to which altnets become credible wholesale suppliers from the perspective of third party ISPs. The Joint Consultation Response and the CWP submitted that many altnets that presently do not offer wholesale access to third party ISPs plan to do so in the future.[285] However, it is uncertain how successful they will be.[286]

A4.7 CityFibre is the largest altnet FTTP provider to third party ISPs and currently supplies both TalkTalk and Vodafone. At the end of July 2021, CityFibre, passed approximately [✂] premises.[287] CityFibre estimated that approximately [✂] of its network overlapped with the Openreach FTTP network.[288] This equates to approximately [✂] premises at present. Given the size of Openreach's FTTP network as set out in paragraph A4.4, this implies CityFibre is currently available in approximately [✂] of the Openreach FTTP footprint.

A4.8 The number of premises which are passed by both Openreach FTTP and CityFibre is likely to increase over time as both Openreach and CityFibre deploy more network. However, the *proportion* of the Openreach FTTP footprint where CityFibre is available is likely to remain low over the next 12-24 months, as the Openreach FTTP footprint grows. For example, if Openreach were to add 3m premises to its FTTP footprint, and 300,000 of these overlapped with CityFibre's build, the proportion of the total Openreach FTTP footprint where CityFibre is available would increase to [✂].

A4.9 The evidence therefore points to low levels of overlap of Openreach's FTTP footprint by CityFibre's network, currently and over the next 12-24 months. More generally, we consider that there will be very few locations where altnets that provide access to third party ISPs overlap with the Openreach FTTP network in the short term.

---

[283] Joint Consultation Response, paragraphs 63-65; Annex 3, paragraph 23. TalkTalk CFI response, paragraph 2.30. [✂]
[284] Joint Consultation Response, Annex 3, paragraph 37.
[285] Joint Consultation Response, paragraphs 48-55. CWP Consultation response, pages 1-3. KCOM also referred to the potential for the CWP to make it easier for ISPs to use altnets. KCOM Consultation response, paragraphs 4.5-4.6.
[286] In the WFTMR Statement, we discussed factors that suggest it may be challenging for new entrants to secure this engagement from ISPs, particularly for smaller networks. WFTMR Statement, Volume 2, paragraphs 8.60-8.71.
[287] CityFibre Consultation response, [✂].
[288] CityFibre response to s135 notice dated 16 August 2021, question 1.

Longer term overlap of Openreach's FTTP network

A4.10 The ultimate overlap between the Equinox footprint and new altnets is highly uncertain. In terms of longer-term plans:[289]

a) Openreach has said it will pass 25 million premises with FTTP by December 2026.[290]

b) CityFibre's current plan is to roll out its network to [✂] premises.[291]

c) The Joint Consultation Response submitted that collectively altnets have ambitions to cover 29m premises.[292]

A4.11 We recognise that it is uncertain whether build plans will all come to fruition.[293] In addition, there is also considerable uncertainty around the pace at which overbuild might occur and about the extent to which altnets become credible wholesale suppliers from the perspective of third party ISPs.

A4.12 Nonetheless, we consider that overbuild is likely to grow over time:

a) Openreach forecasts suggest that [✂] of its FTTP network will be covered by altnet FTTP by December 2026.[294] We understand that this includes altnets that may be 'retail only'.

b) Assuming that CityFibre's and Openreach's plans are realised, then this suggests that in the longer term CityFibre would be present in approximately [✂] of Openreach's FTTP footprint (assuming Openreach ultimately overbuilds most of CityFibre's network).

c) Build by other altnets could increase the proportion of Openreach's FTTP footprint covered by a new rival network further.

A4.13 While there are considerable uncertainties, these figures give a sense of the possible extent of overlap in the longer term.

A4.14 We also note that [✂].[295] [✂] claim suggests there will be limited overlap between altnets and Openreach's FTTP network for several years, especially given altnets generally do not overbuild Openreach (see paragraph A4.6). [✂] did not provide evidence to support this claim and we consider it unlikely. In particular, the longer-term build plans set out in paragraph A4.10 imply a degree of overbuild will occur.

---

[289] VMO2 is supplementing its existing network with FTTP but currently does not provide wholesale access to third party ISPs.
[290] BT press release (13 May 2021)
[291] [✂]. CityFibre Consultation response, [✂].
[292] Joint Consultation Response, paragraph 43.
[293] For example, the Joint Supplementary Submission noted that Openreach's statements do not amount to a firm commitment (Joint Supplementary Submission, paragraphs 23-24). Similarly, altnet plans may change as views about the commercial environment evolve.
[294] Openreach response to s135 notice dated 16 August 2021, question 3. This figure includes Hyperoptic. This figure excludes VMO2 FTTP. Openreach estimated that [✂] of its FTTP network would be overlapped with other FTTP networks in December 2026 if VMO2 FTTP (but not VMO2 DOCSIS) were included.
[295] [✂] TalkTalk Consultation response, paragraphs 2.6-2.9.