
Openreach proposed FTTP offer starting 1 April 2023 (Equinox 2)

Non-confidential version – [X] indicates redacted information (with additional text unredacted on 29 June 2023)

STATEMENT:

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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 a concern 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 14 December 2022, Openreach notified new pricing arrangements for its Fibre to the Premise ('FTTP') services (the 'Equinox 2 Offer'). The Equinox 2 Offer is a supplemental offer to the Equinox 1 Offer that ISPs can opt into.

In the consultation [Openreach proposed FTTP offer starting 1 April 2023](#) (the 'Consultation') we assessed the Equinox 2 Offer and set out our provisional view that we should not take any action at this time to prevent the new terms from being introduced.

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

We also considered the level of prices under the Equinox 2 Offer. Having assessed the evidence we have, we do not at this time have *prima facie* concerns that would lead us to investigate them in further detail.

Finally, we have also considered stakeholders' concerns about Openreach's practice of discussing and developing discounts with ISPs. Having gathered information from ISPs and altnets we do not have *prima facie* concerns that would lead us to investigate the issues raised in further detail at this time.

2. Introduction

- 2.1 This introductory section covers the following issues:
- a) Background;
 - b) Summary of the Equinox 2 Offer;
 - c) Ofcom's policy objectives, in light of its duties; and
 - d) Overview of stakeholders' comments.

Background

- 2.2 In the Wholesale Fixed Telecoms Market Review statement (the 'WFTMR' and 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.
- 2.3 Openreach is required to provide 90 days' notification of commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased.² We set out the process we expect to follow in Annex 11 of the WFTMR Statement. The relevant legal framework is summarised in Annex 1 of this statement.
- 2.4 On 1 July 2021, Openreach notified new pricing arrangements for its Fibre to the Premise ('FTTP') services that applied from 1 October 2021 (the 'Equinox 1 Offer').³ Following our assessment of that offer, we published a Statement on 30 September 2021 setting out our view that the Equinox 1 Offer did not raise competition concerns requiring *ex ante* intervention.⁴ Therefore, we decided to take no action in relation to this offer at that time.
- 2.5 Our decision to take no action in relation to the Equinox 1 Offer was appealed to the Competition Appeal Tribunal (the 'Equinox 1 Appeal'). In July 2022 the Tribunal dismissed the appeal.⁵ Since then we have monitored the impact of the Equinox 1 Offer on ISPs.
- 2.6 On 14 December 2022, Openreach notified new pricing arrangements for its FTTP services that it intended to put in place from 1 April 2023, and on the same day published ACCN OR828 and an associated customer briefing NGA2018/22, which sets out the terms (the 'Equinox 2 Offer').⁶

¹ [WFTMR Statement](#), 18 March 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 The Equinox 1 Offer was available for acceptance between 1 October 2021 and 30 March 2022 and ends on 30 September 2031.

⁴ Statement on [Openreach Proposed FTTP Offer starting 1 October 2021](#), (the 'Equinox 1 Statement'), 30 September 2021.

⁵ Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#)

⁶ Openreach briefing, [NGA2018/22](#)

- 2.7 Also, on 14 December 2022, we published an update on our website regarding the Equinox 2 Offer notification, setting out the process we intended to follow to assess it.⁷
- 2.8 On 3 February 2023, we published a consultation [Openreach proposed FTTP offer starting 1 April 2023 \(Equinox 2\)](#), setting out our provisional assessment of the Equinox 2 Offer and inviting stakeholders to provide us with their views (the ‘Consultation’). We said that we intended to publish our final decision by the end of March 2023.
- 2.9 On 17 March 2023, we published an update on our website explaining that we had received a number of detailed and extensive responses to our Consultation, some of which raised issues that required further assessment. We said that we required additional time to gather and analyse additional information to assess these issues properly and that we intended to take a further 2 months to complete our assessment of the Equinox 2 Offer.⁸ Non-confidential versions of responses received to our Consultation are published on our website.⁹
- 2.10 In the remainder of this document, we set out our updated assessment of the Equinox 2 Offer, taking into account responses to the Consultation and further information gathered from stakeholders.
- 2.11 We conclude that the Equinox 2 offer does not raise competition concerns requiring *ex ante* intervention. We are therefore not taking any action at this time to prevent the new terms being introduced.
- 2.12 The Consultation comprised our impact assessment for the purposes of section 7 of the Communications Act 2003 (the ‘Act’).¹⁰ We have considered citizen and consumer interests, in light of our duties, including the impacts on competition and on altnets and ISPs and invited representations on our proposals. In making our assessment we have considered the range of evidence available to us including responses to the Consultation.

Summary of the Equinox 2 Offer

- 2.13 The Equinox 2 Offer is a supplemental agreement to the Equinox 1 Offer, that ISPs can opt into. It augments, and in some places, replaces the Equinox 1 Offer. We therefore first summarise the Equinox 1 Offer and then summarise the Equinox 2 Offer. The summaries below reflect the main aspects and requirements of the offers but omit points of detail.

The Equinox 1 Offer

- 2.14 In essence, the Equinox 1 Offer gives ISPs cheaper prices for Openreach FTTP products, as long as they largely stop making new sales of legacy broadband products where Openreach

⁷ [WFTMR website update](#)

⁸ On the same date, Openreach responded to this with an announcement that the Equinox 2 discounts would not take effect from 1 April 2023, as originally planned, but that it would apply the discounts retrospectively to that date if Ofcom ultimately decided not to intervene in relation to the offer ([Openreach announcement](#)).

⁹ [Ofcom Equinox 2 landing page](#).

¹⁰ Annex 1 provides more information about impact assessments.

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FTTP is available and switch to selling mainly FTTP products instead.^{11 12} In particular, 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' or 'OMTs').^{13 14}

- 2.15 Only new orders placed with Openreach count towards the OMTs. 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 OMTs are evaluated on a quarterly basis and across the whole of the Openreach FTTP footprint (defined as all premises where Openreach FTTP is available to order at the start of that quarter).
- 2.16 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'). The OMTs are calculated using an ISP's orders from both its own retail customer base (including any sub-brands) and from its ISP Resellers.
- 2.17 To qualify for the full rental discounts ISPs must achieve an Openreach Order Mix of at least 80% in each calendar quarter.¹⁵ The discounted rental prices apply to all the FTTP lines that the ISP purchases from Openreach (not just the orders placed in that quarter). The level of the discount varies by product bandwidth although there is no discount on Openreach's FTTP 40/10 product.¹⁶
- 2.18 To qualify for the full connection discounts ISPs must achieve an Openreach Order Mix of at least 90% in each calendar quarter. Between 90% and 80%, the level of the connection discount reduces at a constant rate from maximum discount to zero discount. The discounted connection prices apply to the orders placed in that quarter.
- 2.19 Historically, the OMTs were lower than these 80% and 90% targets.¹⁷

¹¹ Openreach briefing ([NGA2017/21](#)). On the same day Openreach published [ACCN OR728](#) and an associated customer briefing setting out the terms of the Equinox 1 Offer. An updated version of the Equinox 1 Offer was published on 29 September 2021 reflecting minor clarifications to the terms of the offer ([briefing NGA2019/21](#)). That briefing also notified an optional separate amendment to the Equinox 1 Offer (to take effect from 1 January 2022). That optional separate amendment is to account for the planned withdrawal of WLR (an Openreach voice product) in 2025. An updated version of that optional separate amendment was published on 4 October 2021 ([briefing NGA2021/21](#)).

¹² Legacy broadband refers to both Fibre to the Cabinet ('FTTC') and products that solely use a copper connection.

¹³ The percentage is calculated as follows. The denominator is the total volume of an ISP's new provision and transfer orders (i.e. both legacy and FTTP orders) in that quarter that are placed with Openreach at premises where Openreach FTTP is available. 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.

¹⁴ In this document we use the term 'Openreach Order Mix' to refer to the share of an ISP's orders from Openreach within the Openreach FTTP footprint that are for FTTP (i.e. disregarding orders from other networks). The share of an ISP's overall orders within the Openreach FTTP footprint that are for FTTP, including orders from other networks, will be higher than that ISP's Openreach Order Mix if it uses altnet FTTP.

¹⁵ Subject to the 'catch up' mechanisms in the contract, explained below.

¹⁶ When referring to different products, such as FTTP 40/10, the first figure refers to a 40Mbit/s download speed and the second figure refers to a 10Mbit/s upload speed. Products where the upload and download speeds are the same are sometimes referred to as 'symmetric'.

¹⁷ In the first six months of the Equinox 1 Offer (i.e. until the end of March 2022), full rental and connection discounts applied if the ISP achieved an Openreach Order Mix of at least 75%. In the second six months (i.e. until the end of

- 2.20 The Equinox 1 Offer also provides for a catch-up mechanism between quarters allowing ISPs to ‘catch-up’ if they fail to meet the OMTs in a particular quarter.¹⁸
- 2.21 On 5 May 2023, Openreach issued a formal waiver letter to ISPs signed up to the Equinox 1 Offer. This waived the requirement for ISPs that place fewer than one hundred orders for legacy products in the Openreach FTTP footprint per contract quarter, to meet the OMTs in order to obtain the full connection and rental discounts.¹⁹
- 2.22 The Equinox 1 Offer includes an average revenue per user (‘ARPU’) share mechanism if an ISP’s average FTTP rental amount exceeds the specified threshold.
- 2.23 The Equinox 1 Offer also places a requirement on ISPs to provide accurate forecasts (within a certain margin of error) of the number of Openreach FTTP orders they expect to place.²⁰ Openreach is entitled to compensation if an ISP’s forecast is persistently inaccurate by more than a specified tolerance.²¹
- 2.24 In the WFTMR Statement, we set out how regulation would transition from legacy to FTTP products where Openreach deploys fibre. The first stage allows Openreach to stop selling new legacy products (‘regulatory stop sell’). The second stage entails removing regulatory charge controls from legacy products and retaining only the charge control on the FTTP 40/10 product.²² The Equinox 1 Offer can be seen as a commercial mechanism to bring forward the regulatory stop sell date. Essentially, Openreach is offering lower FTTP prices if ISPs agree to (largely) stop selling legacy products sooner than would otherwise happen under regulated stop sell. Openreach’s commercial rationale for this is to increase the speed of take-up of FTTP, ultimately supporting its investment in FTTP.

The Equinox 2 Offer

- 2.25 Compared to the Equinox 1 Offer, the main amendments made by the Equinox 2 Offer are:
- a) Lower rental charges for all FTTP products except 40/10.

September 2022), full rental and connection discounts applied if the ISP achieved at least 80%. There are also additional mechanisms that applied during the first year to allow ISPs to ‘catch up’ if they fail to meet the OMT for a particular quarter. Further, in October 2022, Openreach issued a formal waiver letter to those ISPs that signed up to the Equinox 1 Offer. That letter gave ISPs notice that Openreach would temporarily waive the requirements to achieve the OMT in order to obtain the connection discounts. The formal waiver applies until 30 June 2023.

¹⁸ After 30 September 2022, an ISP can ask Openreach to check compliance across two quarters (where the ISP has missed an OMT in the first of these quarters). Where the ISP achieves the OMT when measured across the two quarters taken together, then they will qualify for the discounts. This is not amended by the Equinox 2 Offer and remains in effect. When we refer in the remainder of this document to an ISP achieving the OMTs, we mean that the ISP has achieved the OMTs in each calendar quarter. We note however that the ISP can still obtain the full discounts, even if it has failed to hit the OMTs, as a result of the catch up mechanism.

¹⁹ Openreach briefing ([NG2008/23](#))

²⁰ In brief, the Equinox 1 Offer requires ISPs to submit, on a rolling monthly basis, forecasts for their Openreach FTTP orders covering the next six months. These forecasts are broken down between 27 areas.

²¹ If an ISP’s forecast is inaccurate by more than a tolerance of +/- 10% (when measured in aggregate across all 27 areas) for three consecutive quarters then Openreach may recover 25% of the difference between the standard list connection charge and the discounted connection charge for any FTTP orders placed by the ISP in the third quarter and for each subsequent consecutive quarter in which the ISP’s forecast is inaccurate by more than the tolerance.

²² Our decisions in relation to copper retirement are set out in the WFTMR Statement, Volume 3, Section 2.

- b) Lower connection charges for migrating existing customers from legacy to FTTP 80/20 and above.
 - c) The introduction of a mechanism (the 'Failsafe Mechanism'), intended to address any risk of ISPs being disincentivised from placing orders with altnets.
- 2.26 The OMTs remain the same as in the Equinox 1 Offer.
- 2.27 Our analysis shows that the discounted rental charges introduced by the Equinox 2 Offer are between 8% and 15% lower than the Equinox 1 Offer (depending on bandwidth). Under the Equinox 2 Offer, annual price increases for some products are expected to be higher than under the Equinox 1 Offer (with below CPI annual price increases being replaced with CPI increases for certain bandwidths).²³
- 2.28 The Equinox 2 Offer also introduces connection discounts for residential premises in Area 3 (connection discounts under the Equinox 1 Offer only apply to residential premises in Area 2).²⁴ The connection discounts introduced by the Equinox 2 Offer apply to residential premises in Area 2 or Area 3 when the ISP migrates existing end customers to FTTP product bandwidths that are 80/20 and above (as specified in the offer).²⁵
- 2.29 The Equinox 2 Offer also introduces a new Failsafe Mechanism. The Failsafe Mechanism is intended to remove any risk of ISPs being disincentivised from placing orders with altnets, e.g. because they are concerned about meeting the OMTs. In practice, the Failsafe Mechanism allows ISPs who are also purchasing services from altnets to have their performance against the OMTs assessed outside of any overlapping areas. As discussed in further detail below, a third party (the 'Independent Verifier') is responsible for the detailed application of the Failsafe Mechanism. If an ISP's number of orders per premise for legacy services is more than 50% greater in the overlap area than in the rest of the Openreach FTTP footprint, then this may trigger a review and amendment of the Failsafe Mechanism by Openreach (the 'Legacy Cross-Check').
- 2.30 The Equinox 2 Offer amends the terms of the Equinox 1 Offer regarding FTTP forecasts, in particular by amending the amount of compensation to which Openreach is entitled if the ISP's FTTP forecast is persistently inaccurate.²⁶
- 2.31 The Equinox 2 Offer also amends the definition of bulk moves when calculating the Openreach Order Mix (by extending the scope of bulk moves not included in the calculation).

²³ For a detailed description of the Equinox 2 Offer discounts see Annex 2.

²⁴ 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. Area 3 represents areas (postcode sectors) in which there is not, and there is unlikely to be potential for, material and sustainable competition to BT in the commercial deployment of competing networks (WFTMR Statement, Volume 2, Section 7).

²⁵ For a detailed description of the Equinox 2 Offer discounts see Annex 2.

²⁶ Under the Equinox 2 terms, the compensation is £1 for each percentage point the forecast is inaccurate by more than +/- 10%, for each FTTP connection in the third quarter and in each subsequent consecutive quarter in which the ISP's forecast is inaccurate by more than the tolerance, subject to a maximum of £12.50 per connection.

Ofcom's policy objectives

- 2.32 Our Strategic Review of Digital Communications in 2016 set out our intention, in light of our duties, to regulate to encourage large-scale deployment of new full-fibre networks both to homes and businesses, drive widespread availability of competing ultrafast broadband services and support the roll out of 5G networks.
- 2.33 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, or enter into commercial arrangements with other network operators, rather than relying on network access from Openreach.²⁷ 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, we imposed a package of *ex ante* remedies to achieve our objectives.²⁸
- 2.34 As set out in Volume 3 Section 7 of the WFTMR Statement, one concern is that Openreach may use commercial terms that undermine new network build which are unlikely to be in the interests of consumers in the long term. We also explained that terms which could induce loyalty are a particular concern because this could deter ISPs from switching demand to new alternative networks, and therefore deprive these network operators of demand. Ultimately this could undermine alternative operators' FTTP investment plans.
- 2.35 Openreach is the only operator with a national network footprint, and moreover is the sole operator in some areas. In order to offer services nationwide, ISPs must purchase at least some wholesale services from Openreach (i.e. in areas where there is no alternative network). Openreach could design commercial terms which mean ISPs face a significantly higher average charge for services purchased from Openreach if they do not purchase all their services from Openreach. This would undermine the business case for sub-national competitive entry.
- 2.36 As we explained in the WFTMR Statement, alternative operators building new networks face considerable challenges in becoming established and overcoming Openreach's incumbency advantages. For example, in relation to FTTP, a key advantage comes from

²⁷ Provided the necessary technical developments have been carried out, ISPs can use FTTP to supply voice telephony services, without relying on legacy services from Openreach. In this document we refer to this as 'VoIP' (voice over IP).

²⁸ WFTMR Statement, Volume 1, paragraphs 2.43-2.52.

- Openreach having established relationships with ISPs and some level of system/process integration.^{29 30}
- 2.37 We imposed a requirement on Openreach 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, so that we could consider these terms on a case-by-case basis. We considered that this requirement struck a balance between the impact on Openreach and its ability to bring offers to the market which ultimately benefit consumers, and the risk that conditional pricing terms could undermine new network build.³¹
- 2.38 Subject to the requirements and restrictions set out in the WFTMR Statement, Openreach is allowed to compete with altnets and is allowed to make pricing offers, for example, to promote take up on its new FTTP network.³²
- 2.39 The discounts in the Equinox 2 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. As such, the 90-days' notification requirement is engaged.

Overview of stakeholders' comments

- 2.40 Openreach stated that the Equinox 2 Offer provides additional commercial incentives for ISPs to accelerate their adoption of Openreach FTTP. It stated that the Failsafe Mechanism eliminates any theoretical possibility that the OMTs disincentivise ISPs from using altnets.³³
- 2.41 Following the notification of the Equinox 2 Offer, but before the Consultation, we were contacted by CityFibre, Hyperoptic, Nexfibre, VMO2, INCA and Zzoomm.³⁴ These altnets expressed concern about the impact of the Equinox 2 Offer on competition.³⁵
- 2.42 In response to the Consultation:^{36 37}

²⁹ WFTMR Statement, Volume 3, paragraphs 7.45-7.46.

³⁰ The competition concerns set out in the WFTMR primarily relate to new network build, rather than established operators within their existing footprint (WFTMR Statement, Volume 3, paragraph 7.44). However, we have considered the impact of the Equinox 2 Offer on VMO2 in case future FTTP build is affected (e.g. if that future build is contingent on VMO2 reaching a broader arrangement to provide ISPs with access to its existing footprint).

³¹ In the WFTMR we also considered, but ultimately discounted, an explicit prohibition on Openreach offering these types of commercial terms which could deter alternative operator roll-out (subject to a consent mechanism). Although we recognised this could provide greater certainty, we considered that a prohibition might deter Openreach from bringing forward commercial terms that ultimately benefit consumers (WFTMR Statement, Volume 3, paragraphs 7.146-7.153).

³² See, for example, WFTMR Statement, Volume 1, paragraph 2.22 and Volume 3, paragraphs 2.88 and 7.169. Subject always to compliance with *ex post* competition law.

³³ [Openreach briefing, 14 December 2022](#)

³⁴ CityFibre letter, 13 January 2023 and CityFibre submission, 20 January 2023. Hyperoptic letter, 23 December 2022. Nexfibre letter, 16 January 2023. VMO2 letter, 22 December 2022 and VMO2 meeting slides, 12 January 2023. INCA and Zzoomm submissions, 24 January 2023 and 26 January 2023.

³⁵ We also received a submission on 10 January 2023 from INCA and Zzoomm in relation to the fibre cost model that we used for the WFTMR Statement.

³⁶ We also received a Consultation response from one individual.

³⁷ References to page numbers in Consultation responses correspond to the confidential version of these documents and may not match the page numbers in the non-confidential version.

- a) Openreach stated that the Equinox 2 Offer was driven by ISPs' requests for more attractive commercial terms to drive FTTP take-up.³⁸ Openreach agreed with Ofcom's provisional conclusions.³⁹
- b) Sky, TalkTalk, Vodafone and Zen supported the introduction of the Equinox 2 Offer.⁴⁰ These ISPs agreed with Ofcom's provisional conclusions.⁴¹
- c) With the exception of Hyperoptic, which agreed with Ofcom's provisional conclusions, the altnets that responded to the Consultation disagreed with some or all of Ofcom's provisional conclusions.^{42 43}

2.43 Altnet concerns about the Equinox 2 Offer can be grouped into four broad categories:

- a) The OMTs act as a barrier to altnet entry and expansion;
- b) The forecasting requirements act as a barrier to altnet entry and expansion;
- c) Lower Openreach FTTP prices act as a barrier to altnet entry and expansion; and
- d) This offer is part of an Openreach practice of developing and discussing discounts with ISPs that acts as a barrier to altnet entry and expansion.

The structure the remainder of this statement

2.44 The subsequent sections of this document cover the following issues:

- a) Section 3 sets out our consideration of whether Openreach's conditional pricing acts as a potential barrier to altnet entry and expansion;
- b) Section 4 sets out our consideration of whether we have *prima facie* concerns about the level of Openreach's prices;
- c) Section 5 sets out our consideration of whether we have *prima facie* concerns about Openreach's practice of discussing and developing discounts with ISPs;

³⁸ Openreach Consultation response, paragraph 1.11.

³⁹ Openreach Consultation response, paragraph 1.4.

⁴⁰ TalkTalk also stated that Openreach should further reduce its FTTP prices. Sky Consultation response, page 1. TalkTalk Consultation response, paragraph 1.2. Vodafone Consultation response, paragraphs 4 and 13-14. Zen Consultation response.

⁴¹ Sky Consultation response, page 1. TalkTalk Consultation response, paragraph 1.2. Vodafone Consultation response, paragraphs 4, 12 and 16. Zen Consultation response.

⁴² Hyperoptic Consultation response, pages 1-2 and 3.

⁴³ We received responses from the following altnets: Axione, CityFibre, Fern Trading, Freedom Fibre, G.Network, Hyperoptic, Nexfibre, OFNL, VMO2 and two confidential respondents [redacted]. We also received a joint response to the Consultation from INCA, Community Fibre, Fibrus, Freedom Fibre, ITS, Nexfibre, Spring Fibre and Zoomm (the 'Joint Consultation Response' and the 'Joint Respondents'). The Nexfibre Consultation response included a report by Keystone Strategy ('Keystone' and the 'Keystone Report'). The CityFibre Consultation response included reports by RBB Economics at Annexes 2 and 3 ('RBB', the 'RBB Failsafe Report' and the 'RBB Pricing Report') and by AlixPartners at Annex 4 (the 'AlixPartners Report'). CityFibre's Consultation response also cross-refers in places to submissions made in its Competition Act complaint of 5 December 2022 ('CityFibre Competition Act Complaint') and we have taken these into account where relevant. INCA also made two supplementary submissions on 12 May 2023 (the 'INCA Modelling Submission' and the 'INCA Area 3 Submission').

- d) Section 6 sets out our consideration of other concerns raised by stakeholders, including about the process we have followed in this case; and
- e) Section 7 sets out our conclusions.

3. Does conditional pricing act as a potential barrier to altnet entry and expansion?

Introduction

- 3.1 As explained above, the discounts in the Equinox 2 Offer are conditional. In this section we consider whether the following act as a potential barrier to altnet entry and expansion:
- a) The OMTs; and/or
 - b) The forecasting requirements.
- 3.2 We also consider the aggregate impact of the Equinox 2 Offer.

Do the OMTs act as a potential barrier to altnet entry and expansion?

Introduction

- 3.3 ISPs wishing to offer services on a UK-wide scale have no choice but to purchase access from Openreach in certain areas where network competition is not feasible and Openreach is the only provider. This could allow Openreach to leverage its position to raise barriers to entry and expansion for altnets in areas where network competition is feasible. For example, Openreach could make discounts on ISPs' purchases in areas where it is the only provider conditional on ISPs not using altnets in areas where both Openreach and altnets are present. This could exclude altnets even if ISPs found them preferable.⁴⁴
- 3.4 Accordingly, we have assessed whether the OMTs act as a potential barrier to altnet entry and expansion.

Ofcom's provisional conclusions in the Consultation

- 3.5 In the Consultation, we provisionally concluded that the OMTs do not create a potential barrier to using altnets.⁴⁵
- a) We could not rule out the possibility that in the future placing orders with an altnet could jeopardise some ISPs' ability to hit the OMTs, absent the Failsafe Mechanism.
 - b) However, the Failsafe Mechanism means that ISPs' performance against the OMTs should not ultimately be affected by whether they use an altnet.

⁴⁴ Competitors would need not only to offer a better deal than Openreach for those volumes that switch to them, but they would also need to compensate the ISP for having to pay a higher price for those volumes that they cannot switch away from Openreach.

⁴⁵ Consultation, paragraphs 3.84-3.86.

The structure of this subsection

- 3.6 This subsection is structured as follows.
- a) First, we discuss the analytical framework we have used to assess the impact of the OMTs.
 - b) Second, we cover the initial step in that framework (referred to as Question 1).
 - c) Finally, we cover issues raised by stakeholders that fall outside the Question 1 assessment:
 - i) Impacts on small ISPs; and
 - ii) The impact of accelerating Openreach's FTTP take-up, including in areas where altnets will overbuild Openreach.

Analytical Framework

Consultation position

- 3.7 In the WFTMR Statement we set out the analytical framework we would apply when notified of commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased. 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.⁴⁶
- 3.8 When assessing the Equinox 1 Offer we followed the approach set out in the WFTMR and stated that our analysis would consider up to 3 questions:⁴⁷
- a) **Question 1:** Does the Equinox Offer potentially create a barrier to using altnets?
 - b) **Question 2:** Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?
 - c) **Question 3:** Is the Equinox Offer likely to generate clear and demonstrable benefits?
- 3.9 In the Consultation we set out the analytical framework that we proposed to use to assess the Equinox 2 Offer.⁴⁸ In particular, we proposed to use Question 1 as set out in the

⁴⁶ WFTMR Statement, Volume 3, paragraphs 7.154 and 7.160.

⁴⁷ Equinox 1 Statement, paragraph 3.60.

⁴⁸ Consultation, paragraphs 3.34-3.41

Equinox 1 Statement and paragraph 3.8 above as a gating question to assess whether the Equinox 2 Offer potentially creates a barrier to using altnets.

- 3.10 When applying the gating question, in line with the Tribunal’s judgment in the Equinox 1 Appeal we proposed to consider the likelihood of events happening (or not happening). In making our assessment we would ascertain whether scenarios are real enough to justify intervention, bearing in mind our wider duties and responsibilities.
- 3.11 If after applying the gating question we considered that the Equinox 2 Offer did potentially create a barrier to using altnets, we proposed to go on to consider paragraphs a) and b) of our analytical framework as set out in the WFTMR Statement and in paragraph 3.7 above.

Stakeholders’ views

- 3.12 Openreach agreed with the proposed analytical framework and the need to consider plausibility as set out in the Consultation document.⁴⁹
- 3.13 CityFibre stated that Ofcom had not applied the gating question to the offer as a whole. Instead, Ofcom had applied it to three aspects of the offer taken individually: the OMTs, the forecasting requirements and the level of prices. It stated this approach is wrong and the relevant question is whether these features of the offer may in aggregate affect ISPs’ incentives to purchase from altnets.⁵⁰
- 3.14 The Joint Respondents submitted that, although the 90-day notification requirement is not intended to address general concerns about low wholesale prices, it is intended to address concerns about low wholesale prices that are specific to the offer under investigation. In support of this argument, the Joint Respondents submitted that Ofcom had previously indicated it considers it important to understand the impact of the specific price levels resulting from any offer or discount by Openreach to its wholesale customers.⁵¹
- 3.15 VMO2 stated that whilst “*drip-feeding pricing*” is an issue not limited to the Equinox 2 Offer, it should be part of the analytical framework for considering the Equinox 2 Offer.⁵²
- 3.16 VMO2 also stated that Ofcom should adopt a precautionary approach to assessing the offer, given the cliff edge design of the OMTs. In support, it cited previous Ofcom statements that expressed concerns about discounts linked to purchase volumes or aggregate expenditure.⁵³ ⁵⁴ VMO2 also suggested that, in order to take a cautious approach, Ofcom should not rely on assertions about how the market may, or may not,

⁴⁹ Openreach Consultation response, paragraphs 3.4-3.5.

⁵⁰ CityFibre Consultation response, paragraph 3.1.

⁵¹ The Joint Consultation Response, Annex 4, paragraphs 14-16.

⁵² VMO2 Consultation response, paragraph 202.

⁵³ Specifically, it referred to our view in 2004 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). It also cited other examples including from the Business Connectivity Market Review 2013 statement where it considered Ofcom had expressed similar views <https://www.ofcom.org.uk/consultations-and-statements/category-2/business-connectivity-mr>.

⁵⁴ VMO2 Consultation response, paragraphs 64-68. An earlier formulation of VMO2’s position is set out in VMO2 meeting slides, 12 January 2023, slide 3.

play out but should undertake a more complete analysis, that evaluates a wide range of circumstances.⁵⁵

- 3.17 VMO2 further stated that Ofcom should prohibit offers which contain cliff edge arrangements and that such offers should require Ofcom consent (a restriction similar to that introduced in the WFTMR in relation to geographic discounts). It stated that the burden of proof should sit with the provider designated with SMP to justify its behaviour, rather than relying other market participants to submit evidence that such pricing mechanisms are harmful, particularly in circumstances where much of the evidence or information rests with the dominant provider and its customers.⁵⁶

Ofcom's analysis and conclusions

- 3.18 As set out in Section 2 above, our policy objective in the WFTMR was to promote competition and investment in gigabit-capable networks by Openreach and altnets. We did not want to deter Openreach from bringing forward commercial terms that ultimately benefit consumers. We were also supportive of Openreach encouraging migration to full fibre and going beyond our copper retirement regulation to support its FTTP business case. Given this, we decided not to prohibit Openreach *ex ante* from offering conditional pricing arrangements.⁵⁷
- 3.19 We were however concerned about loyalty inducing terms and said that we would intervene to prevent such terms.⁵⁸ We also sought to put a framework in place that would give altnet investors more confidence, and market participants greater clarity, than if we were relying solely on *ex post* competition law alone.
- 3.20 The framework we set out in the WFTMR and applied in the Equinox 1 Statement reflects and balances the multiple considerations set out above. It was designed to place much tougher limits on Openreach's ability to use volume and loyalty discounts than would arise under *ex post* competition law. If Question 1 were satisfied, the starting point would be that the offer would be prohibited unless Openreach could show that the terms were likely to create clear and demonstrable benefits (even if the degree of impact on nascent network competitors – in terms of their network build – was unlikely to be material). Moreover, the offer would be prohibited if it was likely to have a material impact on nascent network competitors, even if there were benefits to consumers. Accordingly, the existence of a theoretical effect on ISPs' incentives would not be considered sufficient to conclude that the OMTs "potentially create a barrier to using altnets" under Question 1. Question 1 requires the identification of scenarios that are more than a theoretical possibility and real enough to justify intervention.
- 3.21 Ground 2 of the Equinox 1 Appeal focused on the meaning of "potentially" in Question 1 of the framework set out above. In its judgment, the Tribunal held that we had not

⁵⁵ VMO2 Consultation response, paragraph 46.

⁵⁶ VMO2 Consultation response, paragraphs 239-244.

⁵⁷ WFTMR Statement, Volume 3, paragraphs 7.152 and 7.169.

⁵⁸ WFTMR Statement, Volume 3, paragraphs 7.146-7.172.

- misdirected ourselves by taking into account under Question 1 the likelihood of events happening (or not happening), and that it was appropriate for us to make evaluative judgments about whether there was a realistic possibility of certain outcomes, such that we should be concerned about ISPs not using altnets.⁵⁹
- 3.22 The Tribunal also stated that in its view the formulation of the analytical framework in the WFTMR was easier to follow than the reformulation in the form of three questions in the Equinox 1 Statement.⁶⁰
- 3.23 For the purposes of assessing the Equinox 2 Offer, we have taken into account the Tribunal's comments and sought to balance clarity and consistency in formulating our analytical framework.
- 3.24 As noted in the Tribunal's judgment, Questions 1 to 3 set out in the Equinox 1 Statement include the same elements as set out in the WFTMR Statement. Under both formulations Ofcom must first determine the extent to which a notified offer might create a barrier for ISPs' use of altnets. This requires the identification of something which is not just a theoretical possibility, but instead needs to be plausible given the evidence available and based on reasonable underlying assumptions.⁶¹ ⁶² While the Tribunal noted that Question 1 might suggest a lower threshold than that set out in the WFTMR, the intended threshold has now been clarified and its appropriateness tested in the Equinox 1 Appeal.
- 3.25 Given this, and in the interests of consistency for stakeholders, we have decided again to use Question 1 as a gating question to assess whether the Equinox 2 Offer potentially creates a barrier to using altnets. When applying the gating question, in line with the Tribunal's judgment we will consider the likelihood of events happening (or not happening). As noted by the Tribunal, there could be a range of different degrees of plausibility which might arise in particular scenarios.⁶³ In making our assessment we will consider whether scenarios are real enough to justify intervention, bearing in mind our wider duties and responsibilities.
- 3.26 If after applying the gating question we consider that the Equinox 2 Offer does potentially create a barrier to using altnets, we will consider paragraphs a) and b) of our analytical framework as set out in the WFTMR Statement and paragraph 3.7 above. As Questions 2 and 3 as set out in our assessment of the Equinox 1 Offer were based on these paragraphs in the WFTMR Statement this is not a substantive change of approach, but a clearer

⁵⁹ Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#), paragraph 147.

⁶⁰ Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#), paragraph 143.

⁶¹ Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#), paragraph 144.

⁶² The Joint Consultation Response (paragraph 196) and Nexfibre (paragraph 63) commented that it was unclear whether Question 1 was referring to whether ISPs face a barrier to using altnets. We consider that this was clear from the WFTMR Statement and the analysis set out in the Equinox 1 Statement. It was also clearly understood by the Tribunal (Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#), paragraph 144). We have therefore not made any changes to the wording.

⁶³ Competition Appeal Tribunal Judgment [1426/3/3/21 CityFibre Limited v Office of Communications](#), paragraph 147.

formulation of the same test.⁶⁴ 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.⁶⁵

- 3.27 In relation to CityFibre's comment that we proposed applying the gating question to three aspects of the offer taken individually rather than as a whole, we address the interaction between the forecasting requirements and the OMTs in paragraphs 3.126 to 3.129 below. In relation to the level of prices (also raised by the Joint Respondents) and Openreach discussing and developing discounts (raised by VMO2), as set out in the WFTMR Statement the analytical framework set out above is designed to assess commercial terms that have an element of conditionality. Therefore, while our assessment of the OMTs takes into account the magnitude of the discounts (which depends on the difference between Openreach's list price and the Equinox 2 Offer prices) we have not applied the above analytical framework to the absolute level of the discounted prices or the impact of Openreach discussing and developing discounts. We set out our considerations in relation to low pricing and Openreach discussing and developing discounts in Sections 4 and 5 below.
- 3.28 VMO2 referred to previous occasions on which it considers Ofcom has noted the need to adopt a precautionary approach to mechanisms that could enable an operator with SMP to abuse its market power and to our assessment of how the market may play out in future. However, as VMO2 acknowledges, the previous examples it gives are not direct parallels to the circumstance of the market or the form of the pricing in this case.⁶⁶ As set out in the WFTMR we acknowledge that some commercial terms may deter new network build and therefore should be assessed on a case by case basis.⁶⁷ In this case we have carried out an evidence-based assessment of the OMTs to determine their impact and to assess the risks. In carrying out this assessment, in line with the Tribunal's judgment, we have considered whether scenarios are real enough to justify intervention in light of our wider duties and responsibilities.
- 3.29 While considering whether the existing SMP conditions should be amended is outside the scope of the 90-day process, we nevertheless disagree with the suggestion made by VMO2 that we should prohibit the type of terms included in the Equinox 2 Offer. As set out above from our analysis carried out in the WFTMR we concluded that while some commercial terms may have the potential to deter new network build, allowing Openreach some

⁶⁴ In their responses to the Consultation, the Joint Respondents and Nexfibre commented that, given the Tribunal's judgment, Ofcom should use the formulation of the analytical framework used in the WFTMR, instead of re-using the formulation of the analytical framework used in the Equinox 1 Statement. Based on their understanding that Ofcom proposed to re-use Questions 2 and 3 as set out in the Equinox 1 Statement they also made several comments on the drafting of these questions, in particular in relation to why the formulation in the WFTMR Statement should be used instead of Questions 2 and 3. As set out in paragraph 3.41 of the Consultation, Ofcom's proposal was that after applying Question 1 from the Equinox 1 Statement we would, if necessary, apply the formulation of the analytical framework as set out in the WFTMR, not Questions 2 and 3.

⁶⁵ WFTMR Statement, Volume 3, paragraph 7.160.

⁶⁶ VMO2 Consultation response, paragraph 65.

⁶⁷ WFTMR, Volume 3, paragraph 7.153.

flexibility on commercial terms may have benefits. An outright ban of such terms may deter Openreach from bringing forward commercial terms that ultimately benefit consumers.⁶⁸

Stakeholders' views on Question 1

- 3.30 As set out in paragraph 2.42, Openreach, Hyperoptic, Sky, TalkTalk, Vodafone and Zen agreed with our provisional conclusions. In contrast, CityFibre, the Joint Respondents and VMO2 stated that the OMTs potentially create a barrier to using altnets.^{69 70}
- 3.31 Nexfibre and VMO2 stated that there is more than a theoretical possibility that the OMTs create a barrier to using altnets, absent an effective corrective mechanism. Therefore, they considered that it is crucial that the Failsafe Mechanism eliminates that possibility in all likely or realistically possible scenarios.⁷¹ We also received further extensive comments on the Failsafe Mechanism, which are summarised in Annex 5. We have grouped stakeholders' comments on other topics as follows:
- a) Ofcom's approach to Question 1.
 - b) The importance of meeting the OMTs and ISPs' performance.

Stakeholders' views on Ofcom's approach to Question 1

- 3.32 Openreach stated that the key question is the extent to which there is a "*captive group*" of consumers that are resistant to using FTTP or other ultrafast connections. Openreach stated that ISPs may choose to supply this group with legacy services.⁷² Openreach stated that the best performing ISP has an Openreach Order Mix of over 95% which suggests the size of this "*captive group*" is under 5%.⁷³
- 3.33 VMO2 stated that the analysis in the Consultation considered competition in a single period (which it termed "*static*") rather than considering how competitive effects evolve over time (which it termed "*dynamic*").⁷⁴ VMO2 stated that Ofcom failed to consider how ISPs, when making an extended, upfront contractual commitment, will evaluate contracts with altnets that will ultimately overlap with a high proportion of Openreach's FTTP footprint.⁷⁵ CityFibre, Nexfibre and VMO2 stated that an ISP would be discouraged from entering into volume commitments with an altnet if it thought it might need to divert

⁶⁸ WFTMR Statement, Volume 3, paragraphs 7.150-7.152.

⁶⁹ CityFibre Consultation response, paragraphs 1.7(iii), 3.15 and 8.1(i). Joint Consultation Response, paragraph 101. VMO2 Consultation response, pages 3-5. These respondents also highlighted the resulting impact on altnet build. For example, [redacted]. Similarly, Nexfibre stated that [redacted] (Keystone Report, paragraphs 36-54).

⁷⁰ [redacted] also submitted that Ofcom should investigate: (i) the extent of network overlap; (ii) how difficult it is for ISPs to meet the OMTs; (iii) whether the Failsafe Mechanism is likely to be effective in protecting ISPs' incentives to purchase from altnets; and (iv) the magnitude of the discounts for ISPs that meet the OMTs [redacted].

⁷¹ Keystone Report, paragraphs 83, 85 and 86. VMO2 Consultation response, paragraph 84.

⁷² Openreach Consultation response, paragraph 3.12. Openreach Consultation response, Annex 1, paragraph 14.

⁷³ Openreach Consultation response, paragraph 3.18(i); also 3.18(iii). [redacted]. Openreach Consultation response, Annex 1, paragraphs 6-8 and 14.

⁷⁴ VMO2 Consultation response, paragraphs 35 (including footnote 30) and 133.

⁷⁵ VMO2 Consultation response, paragraphs 39 and 142.

orders away from that altnet to Openreach FTTP, in order to hit the OMTs in the future.⁷⁶ VMO2 stated that such commitments are important to underpinning altnets' plans for future FTTP build.⁷⁷

- 3.34 Stakeholders also made the following observations on how we should approach this analysis:
- a) VMO2 stated that Ofcom should investigate whether the intent of the Equinox 2 Offer is to inhibit competition.⁷⁸ CityFibre, the Joint Respondents and Nexfibre stated that comments by BT Group's CEO indicate that Openreach's intention is to exclude altnets.⁷⁹
 - b) Nexfibre said that Ofcom should consider altnets' and their investors' perceptions about the impact of the OMTs on ISPs' behaviour.⁸⁰
 - c) VMO2 stated that it is not necessary to demonstrate that an altnet is unable to profitably compete in order to conclude that the OMTs have an anticompetitive effect.⁸¹
 - d) The Joint Respondents stated that Question 1 should assess whether the Equinox 2 Offer maintains or raises a barrier to entry for altnets that already exists.⁸²

Stakeholders' views on the importance of meeting the OMTs and ISPs' performance

- 3.35 CityFibre and VMO2 stated that ISPs are highly incentivised to meet the OMTs, given the scale of the discounts.⁸³ CityFibre stated that this is particularly pronounced for rental discounts given the "cliff-edge" target.⁸⁴ However, it also stated that the connection discounts can be material.⁸⁵ VMO2 stated that the consequences for an ISP of failing to meet the OMTs are amplified if its competitors (including BT) are successful in meeting those targets.⁸⁶
- 3.36 CityFibre, the Joint Respondents, Nexfibre and VMO2 considered that at least some ISPs will face difficulties in meeting the OMTs, meaning that they discourage the use of altnets.

⁷⁶ Keystone Report, paragraph 84. RBB Failsafe Report, pages 5-6. VMO2 Consultation response, paragraphs 135(a)-(b), 141 and 144; also paragraph 96. VMO2 meeting slides, 12 January 2023, slides 3-4.

⁷⁷ VMO2 Consultation response, paragraphs 134, 139 and 160. VMO2 meeting slides, 12 January 2023, slide 4.

⁷⁸ VMO2 Consultation response, paragraphs 51-57.

⁷⁹ CityFibre Consultation response, paragraph 2.8(i). CityFibre Competition Act Complaint, paragraphs 1.3, 1.7 and 5.1; also paragraph 1.5. Joint Consultation Response, paragraph 28. Nexfibre Consultation response, paragraphs 6, 8 and 84. VMO2 also made a similar point. VMO2 Consultation response, paragraph 53.

⁸⁰ Nexfibre Consultation response, paragraph 13; also paragraph 65. Keystone Report, paragraphs 83 and 86-87. The Joint Respondents made a similar point. Joint Consultation Response, paragraph 198.

⁸¹ VMO2 Consultation response, paragraphs 156-158.

⁸² The Joint Consultation Response paragraph 200.

⁸³ CityFibre Consultation response, paragraph 5.8(i); also paragraph 1.7(i). RBB Failsafe Report, page 6. VMO2 Consultation response, page 3. Nexfibre made a similar point. Nexfibre Consultation response, paragraphs 12 and 69 and Keystone Report, page 3 and paragraphs 64-65 and 85.

⁸⁴ CityFibre Consultation response, paragraph 3.12.

⁸⁵ In particular: (i) the time value of money means that reducing upfront charges is important; and (ii) connection discounts are significant even when spread over a customer lifetime. CityFibre Consultation response, paragraphs 3.13-3.14 including footnote 69.

⁸⁶ VMO2 Consultation response, paragraphs 73-75.

In support, they referred to our position in the Consultation that using an altnet potentially affects the discounts received by [redacted] absent the Failsafe Mechanism.⁸⁷

3.37 Openreach stated that Ofcom's position in the Consultation was too cautious.⁸⁸ Openreach stated that ISPs can and will achieve a very high Openreach Order Mix. As a result, the OMTs will not disincentivise ISPs from using altnets.^{89 90} In addition:

- a) Openreach stated that historical performance data should be viewed in the context of the full Equinox 1 Offer discounts being paid if the ISP's Openreach Order Mix was 80% or higher.⁹¹
- b) Openreach stated that recent data suggests that [redacted] has addressed the issues that were limiting its performance and that it will achieve an Openreach Order Mix of over 90% before July 2023.⁹²
- c) Openreach stated that, where regulatory stop sell is in place, almost 100% of ISPs' orders will be for FTTP. Thus, over time the Openreach Order Mix will trend towards 100%.⁹³

3.38 Sky, [redacted] stated that placing orders with altnets is unlikely to jeopardise their ability to meet the OMTs.⁹⁴

3.39 Openreach stated that [redacted].⁹⁵

3.40 Vodafone stated that, [redacted].⁹⁶

3.41 VMO2 stated that ISPs cannot be confident that mitigation strategies to reduce the risk of missing the OMTs will be available, particularly if they risk missing the OMTs over an extended period of time.⁹⁷

3.42 [redacted] stated that, following the Equinox 1 Offer, [redacted].^{98 99}

⁸⁷ Consultation, paragraphs 3.64-3.65. CityFibre Consultation response, paragraph 3.10(ii). Joint Consultation Response, paragraphs 84-85, 99 and 236. Keystone Report, paragraphs 82. VMO2 Consultation response, paragraphs 92, 99, 161 and 168; also pages 2 and 3. More generally, VMO2 stated that there is a realistic possibility that ISPs will find the OMTs challenging e.g. due to an inability to control legacy orders placed by ISP Resellers. VMO2 Consultation response, paragraphs 40-42.

⁸⁸ Openreach Consultation response, paragraph 3.19.

⁸⁹ Openreach Consultation response, paragraph 1.13; confidential details are set out in Annex 1, paragraph 5.

⁹⁰ Openreach stated that Ofcom's illustrative calculations in Consultation, Table A8.2, show that if an ISP achieves an Openreach Order Mix of over 95% then there is no plausible risk that it is discouraged from using altnets. Openreach Consultation response, paragraphs 1.13, 3.3(i)-(ii), 3.18(i), 3.18(iii) and 3.19.

⁹¹ Openreach Consultation response, Annex 1, paragraph 4.

⁹² Openreach Consultation response, paragraph 3.18(ii). Openreach stated that [redacted]. Openreach Consultation response, Annex 1, paragraphs 9-11.

⁹³ Around 30%-35% of the Openreach FTTP footprint falls within exchanges where regulatory stop sell applies. Openreach Consultation response, paragraph 3.3(iii) (as clarified by Openreach by email dated 17 May 2023) and Annex 1, paragraph 12.

⁹⁴ Sky Consultation response, page 1. [redacted].

⁹⁵ Openreach Consultation response, Annex 1, paragraph 15.

⁹⁶ Vodafone Consultation response, paragraph 18.

⁹⁷ VMO2 Consultation response, paragraph 166.

⁹⁸ [redacted] Consultation response, pages [redacted].

⁹⁹ [redacted] also stated that [redacted] has indicated that it [redacted]. [redacted] Consultation response, page 3.

Ofcom's assessment of Question 1

- 3.43 Our detailed assessment of Question 1 is set out below, with further evidence set out in the annexes. In overview, our position is as follows:
- a) In theory, absent the Failsafe Mechanism, it is possible that using an altnet could jeopardise an ISP's ability to achieve the OMTs.
 - b) For this possibility to materialise it is necessary for the following conditions to all occur simultaneously:
 - i) The overlap between the altnet and Openreach's FTTP network needs to be of sufficient scale;
 - ii) The ISP must have an Openreach Order Mix in the vicinity of the OMTs but not too much above them; and
 - iii) The ISP must want to continue selling legacy products in the part of the Openreach footprint that overlaps with the altnet.
 - c) Even if such a possibility arises, the ISP would not necessarily be deterred from using an altnet. Another option is to adjust its commercial strategies to sell more FTTP and/or less legacy to achieve the OMTs whilst still using the altnet. The introduction of the Failsafe Mechanism gives ISPs a further option in addition to changing their commercial strategies.
 - d) Based on expected future performance against the OMTs, and assuming that no changes are made to their existing commercial strategies, and absent the Failsafe Mechanism, we believe that:
 - i) [X] will comfortably exceed the OMTs and thus using altnets would not potentially affect the discounts received.
 - ii) There is some uncertainty about [X] position. We cannot rule out the possibility that using an altnet could potentially affect some of the discounts received in the short term. It is possible that this risk could disappear by the end of 2023 or even sooner.
 - e) We have not seen any evidence to suggest that, in the period since the Equinox 1 Offer was introduced, ISPs have been deterred from placing orders with altnets as a result of the OMTs. We consider that, in the event that the Equinox 2 Offer discounts were in jeopardy, there are some indications that ISPs would change their commercial strategies rather than diverting altnet orders to Openreach FTTP.
 - f) In any event, ISPs are also able to activate the Failsafe Mechanism, and have their performance against the OMTs assessed for Openreach's FTTP footprint outside the overlap area. The Failsafe Mechanism is sufficient to address any links between the discounts received and using an altnet.
 - g) Given this we do not believe that the OMTs potentially create a barrier to ISPs using altnets.

Ofcom's approach to Question 1

- 3.44 We first explain how we have considered whether the OMTs potentially create a barrier to using altnets (i.e. Question 1 above).
- 3.45 The Equinox 2 Offer does not: (i) commit ISPs to purchasing minimum volumes from Openreach; (ii) contain overt loyalty rebates or volume-based discounts; or (iii) otherwise explicitly make the terms of supply of Openreach products contingent on the split of purchases between Openreach and altnets. The rental and connection discounts under the Equinox 2 Offer are subject to the same OMTs as the Equinox 1 Offer, with the addition of the Failsafe Mechanism that is designed to break the link between the OMTs and ISPs' purchases from altnets.
- 3.46 Our review of the Equinox 2 Offer is therefore not an evaluation of a volume commitment or an overt loyalty discount scheme that is directly liable to affect ISPs' incentives to purchase from altnets. Rather, we are evaluating whether the OMTs operate with the indirect effect that obtaining the Equinox 2 discounts is in practice contingent on whether ISPs purchase from altnets.

The importance of ISPs' commercial strategies

- 3.47 It is important to recognise that an ISP's Openreach Order Mix depends on its chosen commercial strategy.¹⁰⁰ The Equinox offers are intended to incentivise ISPs to change their commercial strategies so that they place more Openreach FTTP orders and fewer legacy orders in the Openreach FTTP footprint.
- a) In principle, an ISP can achieve an Openreach Order Mix of almost 100%. This is shown by the experience in areas where regulatory stop sell is in place, since very few orders for legacy services are placed at premises where Openreach FTTP is available (see Annex 4).
 - b) In practice, the OMTs give ISPs flexibility to order additional legacy products compared to the situation in areas where regulatory stop sell is in place. Currently ISPs appear to be using this flexibility. ISPs require time to develop the capability to sell FTTP in all circumstances, such as making changes to their sales systems. In particular [§<] (see Annex 4 for further details). It may also be commercially attractive to sell legacy products to certain groups of consumers.
 - c) In the long term, as changes to the regulation of legacy services (particularly regulatory stop sell) become increasingly widespread, the Openreach Order Mix will rise towards 100%. The design of the OMTs is intended to accelerate this process.¹⁰¹

¹⁰⁰ In response to the Consultation, Openreach focused on the proportion of "captive" consumers that are particularly resistant to using FTTP. We understand Openreach's position to be that ISPs can steer consumers outside of this group into ordering FTTP. In our assessment below, we have engaged with this argument by assessing the likelihood that an ISP would make changes to its commercial strategies (rather than reducing orders of altnet FTTP) to ensure that it meets the OMTs.

¹⁰¹ This is consistent with Openreach's stated commercial rationale for the Equinox 2 Offer, which is to promote movement of its customer base from legacy products to FTTP. Openreach briefing, 14 December 2022, available [here](#).

3.48 ISPs that sign-up to the Equinox offers need to decide what commercial strategies to pursue to achieve a high Openreach Order Mix, regardless of whether or not they use an altnet. This includes taking steps to increase Openreach FTTP orders and steps to reduce legacy orders within the Openreach FTTP footprint. ISPs have a great deal of control over their Openreach Order Mix. Since the introduction of the Equinox 1 Offer ISPs have adjusted their commercial strategies in a variety of ways to ensure that [3].¹⁰²

The theoretical impact of the OMTs

3.49 In our assessment of the Equinox 1 Offer, we identified a theoretical scenario in which using an altnet could jeopardise an ISP's ability to meet the OMTs. In theory, in locations where altnets that provide wholesale access to ISPs overlap with the Openreach FTTP network, moving FTTP volumes from Openreach to altnets could jeopardise an ISP's ability to meet the OMTs if doing so skews the mix of orders that the ISP continues to place with Openreach from FTTP to legacy products.

3.50 For this theoretical possibility to materialise, it is necessary for the following conditions to all occur simultaneously:

- a) The overlap between the altnet and Openreach's FTTP network needs to be of sufficient scale;
- b) The ISP must have an Openreach Order Mix in the vicinity of the OMTs but not too much above them;¹⁰³ and
- c) The ISP must want to continue selling legacy products in the part of the Openreach FTTP footprint that overlaps with the altnet.

3.51 Table 3.1 illustrates mathematically a scenario where this theoretical possibility arises. In this example:¹⁰⁴

- a) 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% (i.e. 110 divided by 132).
- b) 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 82% (i.e. 100 divided by 122). We note the ISP would

¹⁰² In the Equinox 1 Statement we recognised that there is a range of things ISPs can do to mitigate the risk of missing the OMTs in the short term, although these possibly involve some costs. Equinox 1 Statement, paragraph A3.35.

¹⁰³ This condition is necessary for any change in the ISP's Openreach Order Mix as a result of using an altnet to affect whether it meets the OMTs and thus the scale of the discounts it receives.

¹⁰⁴ For the avoidance of doubt, the numbers in this illustrative example are not intended to reflect actual data.

be placing these legacy orders even though there are two FTTP networks available which the ISP has signed up to use.¹⁰⁵

Table 3.1: Illustrative example of how using an altnet can reduce an ISP's Openreach Order Mix

	ISP only uses Openreach		ISP uses altnet	
	Non-overlap area	Overlap area	Non-overlap area	Overlap area
Openreach FTTP orders	100	10	100	0
Openreach legacy orders	20	2	20	2
Openreach Order Mix	110/132 = 83%		100/122 = 82%	

Source: Ofcom calculations.

- 3.52 The logic in this example equally applies to an ISP that is considering whether to make an upfront contractual commitment to purchase altnet FTTP (including entering into a volume commitment with that altnet or agreeing to solely use that altnet for FTTP orders in certain areas). We thus do not agree with VMO2 that our analysis fails to cover this situation.
- 3.53 In the Equinox 1 Statement, whilst we recognised that it was a theoretical possibility, we concluded that the OMTs did not create a potential barrier to using altnets.¹⁰⁶
- 3.54 Openreach has introduced the Failsafe Mechanism in the Equinox 2 Offer. The Failsafe Mechanism is intended to remove any risk of ISPs being disincentivised from placing orders with altnets e.g. if they are concerned about the impact of using an altnet on meeting the OMTs. In practice the Failsafe Mechanism allows ISPs, who are also purchasing services from altnets, to have their performance against the OMTs assessed outside of any overlapping areas. In the above example, if the ISP activated the Failsafe Mechanism, its OMT performance would be calculated only for the non-overlap area. Its order mix would therefore be assessed as 83% (i.e. 100 divided by 120), rather than 82%.

Overview of the topics that we have assessed

- 3.55 If an ISP used the Failsafe Mechanism to break the link between the OMTs and its use of altnets, then this will eliminate the theoretical concern illustrated in Table 3.1 above. However, in our assessment we have first considered the likelihood that the theoretical concern arises in practice. We then go on to assess the Failsafe Mechanism.
- 3.56 When ISPs are considering whether to use an altnet and how they are going to meet the OMTs, they are likely to consider multiple factors in the round. However, to assist readers,

¹⁰⁵ It also assumes that the ISP is unable to convince any of the customers placing a legacy order to instead take the altnet's FTTP. For example, if the ISP were to place the two legacy orders with the altnet, its Openreach Order Mix would still be 83% (i.e. 100/120). Similarly, if the ISP exclusively uses the altnet in the overlap area (and thus places no orders at all with Openreach in that area) then its Openreach Order Mix would be 83% (i.e. 100/120).

¹⁰⁶ Equinox 1 Statement, paragraphs 3.76-3.88.

we have split our assessment of Question 1 into four topics which we cover in turn below.^{107 108}

- a) How are ISPs likely to perform against the OMTs in the future?
- b) Given this likely performance, is using an altnet likely to affect the discounts received, assuming that the ISP makes no changes to its commercial strategies and absent the Failsafe Mechanism?
- c) What is the likelihood that an ISP would make changes to its commercial strategies (rather than reducing its orders of altnet FTTP) to ensure that it meets the OMTs?
- d) What is the likelihood that an ISP would use the Failsafe Mechanism to address any links between the discounts received and using an altnet?

3.57 Given the interrelated nature of the four topics set out in paragraph 3.56, our conclusions on Question 1 reflect our combined assessment of these topics.

3.58 In terms of the other stakeholder observations on our approach to Question 1, as set out in paragraph 3.34:

- a) VMO2 stated that we should investigate Openreach's intentions. We requested copies of internal documents submitted to the Openreach Board for the approval of the Equinox 2 Offer.¹⁰⁹ We found no evidence of anticompetitive intent in the contemporaneous internal documents we collected from Openreach.¹¹⁰ Ofcom has expressed concern about reported comments made by BT Group's CEO.¹¹¹ However, we do not consider that these comments indicate that the intention behind the Equinox 2 Offer was to exclude altnets. In any event, we have assessed the effects of the OMTs. It is these that determine whether or not the OMTs potentially create a barrier to using altnets.
- b) We do not agree with Nexfibre that it is also necessary to consider altnets' and their investors' perceptions about the impact of the OMTs as part of our consideration of Question 1. If the OMTs do not potentially create a barrier to using altnets then we would expect ISPs to purchase altnet FTTP where they wish to do so. This should provide reassurance to altnets and their investors.¹¹²

¹⁰⁷ This further unpacks the framework set out in the Consultation, paragraph 3.56. This assists us in considering Consultation responses (including Openreach's "captive" consumers point) and the further evidence we have gathered on ISPs' performance against the OMTs.

¹⁰⁸ We recognise that ISPs are likely to consider these factors in the round, rather than the sequential approach implied by the way we have structured our assessment.

¹⁰⁹ s135 notice dated 22 February 2023, question 10.

¹¹⁰ Indeed, Openreach added the Failsafe Mechanism to the Equinox 2 Offer. In a paper submitted to the Openreach Board, this was described as [X]. Provided in Openreach response dated 2 March 2023 to s135 notice dated 22 February 2023, question 10. Openreach also provided two documents submitted to the BT Group Board (email from Openreach to Ofcom dated 11 May 2023, by way of follow up to 22 February 2023 s135 notice).

¹¹¹ [Letter from Dame Melanie Dawes to Philip Jansen, 6 February 2023 \(ofcom.org.uk\)](#)

¹¹² More generally, altnets and their investors can take comfort that Ofcom has carefully assessed the OMTs. Also, as explained in paragraph 3.91, we will continue to monitor the fixed telecoms market.

- c) When considering Question 1, it is not also necessary to demonstrate that an altnet is unable to profitably compete.
- d) We do not consider that our analysis is altered by the Joint Respondents' view that we should consider whether the Equinox 2 Offer raises or maintains a barrier to entry for altnets that already exists. Our focus is on whether the OMTs potentially create an additional barrier to entry and expansion, irrespective of whether this amounts to a new barrier, or increasing existing barriers that would otherwise exist. The wording of Question 1 in our analytical framework reflects this.

How are ISPs likely to perform against the OMTs in the future?

- 3.59 If an ISP is comfortably exceeding the OMTs then placing orders with an altnet will not affect the discounts received. As illustrated in Annex 4, if an ISP achieves an Openreach Order Mix of around 95% then using altnets will not jeopardise its ability to meet the OMTs even if overlap is very high. If overlap is lower, an ISP does not need to exceed the 90% OMT by as much for this to be the case.¹¹³
- 3.60 Stakeholders' views on ISPs' future performance are summarised in paragraphs 3.36-3.38 above.¹¹⁴ We have assessed the likely performance of Sky, TalkTalk, Vodafone and Zen against the OMTs in the future (see Annex 4 for further details).¹¹⁵ In doing so, we have taken into account the extent to which they have been meeting the OMTs under the Equinox 1 Offer, which we have been monitoring.
- 3.61 As a result of regulatory stop sell and the Equinox 1 Offer, ISPs are limiting the circumstances in which they supply Openreach legacy products in areas where Openreach FTTP is available. Historically, [redacted] and Zen have always obtained the full Equinox 1 Offer discounts. Looking forward, in summary our assessment is that:
- a) Sky [redacted].
 - b) TalkTalk's position is as follows.
 - i) TalkTalk has [redacted].
 - ii) [redacted].
 - c) Vodafone [redacted].
 - d) Zen [redacted].

¹¹³ See in particular Tables A4.1 and A4.2.

¹¹⁴ CityFibre, the Joint Respondents, Nexfibre and VMO2 referred to our position in the Consultation that using an altnet potentially affects the discounts received by [redacted] absent the Failsafe Mechanism. We have refined our position on ISPs' future performance against the OMTs in the light of the further evidence we have received since the Consultation. As explained below, we cannot rule out the possibility that using altnets could potentially affect the discounts received by [redacted] in some scenarios (see below for further details) assuming that it makes no changes to its commercial strategies and absent the Failsafe Mechanism. For the avoidance of doubt, the fact we cannot rule out these scenarios does not imply that we consider them to be likely.

¹¹⁵ These are the four largest ISPs aside from BT, which is under common ownership with Openreach, and VMO2, which has its own extensive network. Other, smaller ISPs are discussed in paragraphs 3.92-3.101 below.

Is using an altnet likely to affect the discounts received, assuming that the ISP makes no changes to its commercial strategies and absent the Failsafe Mechanism?

- 3.62 As explained above, different targets apply to receive the rental discounts (80%) and connection discounts (90% for the full discounts, with a partial discount with an Openreach Order Mix between 80% and 90%).¹¹⁶ ISPs could be deterred from moving orders from Openreach to altnets if this jeopardised meeting the OMTs.¹¹⁷ As explained in paragraph 3.50 above, whether this is in fact the case depends on: (i) the extent of network overlap; (ii) ISPs' performance against the OMTs; and (iii) whether the ISP continues to place legacy orders with Openreach in the overlap area.¹¹⁸
- 3.63 On (i), if an ISP were to use an altnet rather than purchase FTTP from Openreach, then the size of any potential impact on its Openreach Order Mix depends on the extent of the overlap between the altnet and Openreach's FTTP network. As set out in Annex 3:
- a) It is reasonable to assume that approximately 15% of Openreach's FTTP network is likely to be overlapped by altnets that provide wholesale access to the main third party ISPs during the first year or so of the Equinox 2 Offer.
 - b) While there is a great deal of uncertainty, we consider it is reasonable to assume that approximately 25% of Openreach's FTTP network is overlapped by altnets that provide wholesale access to the main third party ISPs two to three years after the Equinox 2 Offer comes into effect.
 - c) The estimate in the previous paragraph excludes overlap with VMO2 and Nexfibre, neither of which currently supply third party ISPs. If one of the main ISPs began using VMO2 and Nexfibre's networks then overlap of Openreach's FTTP network would be significantly higher, particularly if that ISP would use VMO2's cable network. In this scenario, overlap figures could be above 60%. We discuss this 'high overlap' scenario separately below.
- 3.64 On (ii), if an ISP is comfortably exceeding the OMTs, then placing orders with altnets is unlikely to jeopardise meeting the OMTs, notwithstanding the levels of network overlap.
- 3.65 In terms of ISPs' use of altnets other than VMO2 and Nexfibre (and assuming that the ISP makes no changes to its commercial strategies):
- a) Some ISPs ([X]) will exceed the OMTs to such an extent that using these altnets would not potentially affect the discounts received, even if the Failsafe Mechanism was absent.

¹¹⁶ While Openreach temporarily waived the requirements to achieve the OMTs in order to obtain the connection discounts, this only applies for the first quarter of the Equinox 2 Offer (i.e. until 30 June 2023). Since it only applies to a single quarter, we do not think this waiver affects our conclusions.

¹¹⁷ Assuming that the ISP makes no changes to its commercial strategies and absent the Failsafe Mechanism.

¹¹⁸ In terms of condition (iii), as explained in Annex 4 historically ISPs have continued to place at least some legacy orders with Openreach in areas where they use an altnet. In the illustrative examples in Tables A4.1 and A4.2, we assume the extreme case where the ISP continues to use Openreach's legacy products in the overlap areas in exactly the same way that it would have done if the altnet was not present.

- b) In terms of [X]:
- i) Historically, [X] always obtained the full Equinox 1 Offer discounts. [X]. However, from June 2023 ISPs will need to achieve an Openreach Order Mix of 90% to receive the full connection discounts. Also, as described in Annex 3, overlap is rising. Openreach and [X] stated that they expect [X].¹¹⁹ We are more cautious.¹²⁰
 - ii) We cannot rule out the possibility that using these altnets potentially affects some of the connection discounts received by [X], if the Failsafe Mechanism was absent, although we also cannot rule out the possibility that this risk disappears by the end of 2023 (and possibly even sooner).
 - iii) [X], we cannot rule out the possibility that using these altnets also potentially affects the rental discounts received by [X], absent the Failsafe Mechanism, although this potential risk [X].¹²¹
 - iv) For the avoidance of doubt, the fact we cannot rule out scenarios in which using these altnets would potentially affect the discounts received does not imply that we consider these scenarios to be likely.

3.66 A scenario in which ISPs agree to use VMO2 and Nexfibre is by no means certain and no such agreement is currently in place. Moreover, even if VMO2 were to reach an agreement with an ISP, we expect that it would take many months to establish the necessary practical arrangements (see Annex 3). This gives ISPs considerable further time to improve their Openreach Order Mix.¹²²

- a) Some ISPs ([X]) are already exceeding the OMTs to such an extent that using VMO2 and Nexfibre would not potentially affect the discounts received, even if the Failsafe Mechanism was absent.
- b) Given the time needed to reach agreement and then establish the practical arrangements, [X] is likely to be exceeding the OMTs to such an extent that using VMO2 and Nexfibre would not potentially affect the discounts received, even if the Failsafe Mechanism was absent. In particular, in an internal document, [X].¹²³ If material purchases from VMO2 and Nexfibre [X].
- c) We cannot rule out the possibility that using VMO2 and Nexfibre could potentially affect the connection discounts received by [X]. This risk depends on when material purchases from VMO2 and Nexfibre would begin [X].

¹¹⁹ Openreach Consultation response, paragraph 3.18(ii). [X].

¹²⁰ [X].

¹²¹ [X].

¹²² While a high proportion of Openreach's FTTP footprint is likely to be overlapped by VMO2 or Nexfibre, an ISP is unlikely to divert all its FTTP orders in this overlap area away from Openreach. For example, the ISP may prefer to use multiple suppliers, in order to strengthen its hand in future commercial negotiations and avoid being too reliant on one network. As shown by the illustrative calculations in Annex 4, this means the impact on an ISP's Openreach Order Mix is smaller than overlap figures alone might suggest.

¹²³ [X].

- d) For the avoidance of doubt, the fact we cannot rule out scenarios in which using these altnets would potentially affect the discounts received does not imply that we consider these scenarios to be likely.

The likelihood that an ISP would make changes to its commercial strategies to ensure that it meets the OMTs

Preliminary observations

- 3.67 As explained in paragraphs 3.47-3.48, an ISP's Openreach Order Mix depends on its chosen commercial strategy. If an ISP risks not receiving the discounts, it has a choice about how to respond. Below we discuss the likelihood that an ISP uses other commercial strategies (rather than reducing its orders of altnet FTTP) to ensure that it meets the OMTs. In assessing this topic, we are considering the further actions an ISP might take, in addition to the actions it would take to improve its Openreach Order Mix regardless of its altnet use.
- 3.68 In principle, one option would be to accept the loss of those discounts.
- a) We agree with VMO2 that an ISP will be more motivated to obtain the Equinox 2 Offer discounts as a result of competitive pressures from rival ISPs.
 - b) As set out in Annex 2, the total discount that an ISP qualifies for under the Equinox 2 Offer depends on multiple factors. However, we anticipate that there is a particularly strong incentive for ISPs to meet the 80% OMT to avoid the loss of all rental discounts.¹²⁴
 - c) As set out in Annex 2, [§<].¹²⁵ [§<] the connection discounts are achieved gradually in 10% increments as an ISPs' Openreach Order Mix increases by 1ppt within the 80% to 90% range. It is possible that an ISP might accept the loss of some of the connection discounts for a temporary period, rather than seeking to improve its Openreach Order Mix.
- 3.69 Assuming that the ISP instead considers that the most commercially attractive option is to improve its Openreach Order Mix, in principle there are three main ways it could accomplish this:
- a) Increase FTTP orders with Openreach;
 - b) Reduce legacy orders placed with Openreach within its FTTP footprint; and/or
 - c) Divert altnet orders to Openreach FTTP.
- 3.70 ISPs can alter their Openreach Order Mix by implementing a commercial strategy that promotes one or more of these strategies, choosing between them based on their cost and effectiveness.

¹²⁴ In Annex 2 we estimate that the average rental discount from list prices is £[§<] per subscriber per month under the Equinox 2 Offer. The rental discounts also apply to all the FTTP lines that the ISP purchases from Openreach (not just the orders placed in that quarter).

¹²⁵ In Annex 2, we estimate that the average connection discount from list prices is £[§<] per connection under the Equinox 2 Offer.

- 3.71 Before setting out evidence on ISPs' historical behaviour, we make two observations on the ways an ISP could improve its Openreach Order Mix.
- a) First, strategies that reduce the number of legacy orders placed with Openreach within its FTTP footprint are likely to be particularly effective.¹²⁶
 - b) Second, an ISP will seek to use an altnet when it is more attractive, whether in terms of lower prices or some other factor.¹²⁷ This implies that diverting orders away from that altnet in order to improve the Openreach Order Mix has downsides for the ISP. It is thus not necessarily the best commercial strategy for it to pursue.
- 3.72 To illustrate this second point, Table 3.2 below shows Openreach's average connection and rental charges (taking into account the full Equinox 2 Offer discounts and the blend of products each ISP takes) and [redacted] connection and rental charges. This is done for TalkTalk, Vodafone and Zen. We use these figures to calculate a rough estimate of the average lifetime amount charged per customer by these networks, assuming an average customer lifetime of 5 years.¹²⁸ ¹²⁹ The final row shows the difference in these lifetime charges. This shows that on average [redacted] is in the region of £[redacted]/customer [redacted] for [redacted] and £[redacted]/customer [redacted] for [redacted], over an average customer lifetime.

¹²⁶ To illustrate, consider an ISP that is on course to place 890 FTTP orders with Openreach and 110 legacy orders, giving an Openreach Order Mix of 89% (i.e. 890/1,000). That ISP could instead achieve an Openreach Order Mix of 90% in a number of ways. One option is to convert just 10 legacy orders to Openreach FTTP (resulting in 900 FTTP orders and 100 legacy orders). Another option is to decide not to place 12 legacy orders (resulting in 890 FTTP orders and 98 legacy orders). If however that ISP pursued a strategy of increasing its FTTP orders with Openreach (either by diverting them away from an altnet and/or by increasing demand for FTTP more generally) then it would need to raise its Openreach FTTP orders by 100 (resulting in 990 FTTP orders and 110 legacy orders).

¹²⁷ For example, the altnet might offer faster FTTP connection connections. Also, as discussed in footnote 258 below, ISPs are likely to have at least some interest in supporting competition from altnets.

¹²⁸ This is only intended to be an approximate calculation. Thus, for simplicity, we have not discounted future charges (to reflect the time value of money), applied any assumptions about how prices will change over time or made any assumptions about how the blend of Openreach products purchased by ISPs may change. Also, [redacted]. For simplicity, our calculations use [redacted] (as set out in [redacted]). [redacted] connection taken by ISPs.

¹²⁹ In the Equinox 1 Statement, our modelling assumed an average customer lifetime of 5 years. We see no reason why this figure would have materially changed since we published that statement. Equinox 1 Statement, paragraph A2.11.

Table 3.2: Openreach FTTP and [redacted] charges

	TalkTalk		Vodafone		Zen	
	Connection charge	Monthly rental charge	Connection charge	Monthly rental charge	Connection charge	Monthly rental charge
Openreach FTTP	£[redacted]	£[redacted]	£[redacted]	£[redacted]	£[redacted]	£[redacted]
[redacted]	£[redacted]	£[redacted]	£[redacted]	£[redacted]	£[redacted]	£[redacted]
Difference in lifetime charges	£[redacted]		£[redacted]		£[redacted]	

Notes: Openreach FTTP rental charge reflects Equinox 2 Offer discounts and estimated as an average based on the blend of products taken by each specific ISP in Q1 2023. Openreach connection charge estimated as average based on the overall blend of connections across all ISPs in 2022. See Annex 2 for further details.

Notes: [redacted].

Source: Ofcom calculations, using Openreach response dated 2 March 2023 to s135 notice dated 22 February 2023, questions 12-13; Openreach response dated 3 March 2023 to s135 notice dated 22 February 2023, question 15; Openreach response dated 9 May 2023 to s135 notice dated 2 May 2023, question 5; and [redacted].

ISPs' historical behaviour

- 3.73 As a result of the Equinox 1 Offer, the largest ISPs have all updated their commercial strategies in a variety of ways and, in particular, limited customers' ability to order legacy products.¹³⁰
- 3.74 We asked TalkTalk, Vodafone and Zen whether they have ever taken action to divert new FTTP orders from an altnet to Openreach, or reduced new FTTP orders from an altnet, with the aim of improving their performance against the OMTs.¹³¹ In response, all three of these ISPs said that they have not done so.¹³²
- 3.75 In terms of TalkTalk, as discussed in Annex 4, [redacted].
- a) Our analysis of TalkTalk's use of altnets [redacted] (see Annex 4).
 - b) [redacted]. For example:
 - i) In mid-2022, [redacted] (see Figure A4.5).
 - ii) TalkTalk estimated that [redacted].¹³³
 - iii) In Q1 2023, [redacted].¹³⁴
 - iv) More generally, we understand that TalkTalk [redacted] (see Annex 4 for further details).

¹³⁰ ISPs have also pursued a range of other strategies. For example, [redacted]. Further details are set out in Annex 4.

¹³¹ We did not ask this question to Sky since it currently does not use CityFibre or VMO2, the two largest altnets.

¹³² TalkTalk response dated 21 April 2023 to s135 notice dated 12 April 2023, question 8. Vodafone response dated 21 April 2023 to s135 notice dated 12 April 2023, question 4. Zen response dated 21 April 2023 to s135 notice dated 12 April 2023, question 4.

¹³³ TalkTalk response dated 7 March 2023 to s135 notice dated 22 February 2023, questions 3 and 4.

¹³⁴ Compared to February 2023, in March 2023 TalkTalk [redacted]. Openreach response dated 9 May 2023 to s135 notice dated 2 May 2023, question 3.

- c) [X] expressed concerns about TalkTalk's behaviour (see above). We have not investigated these specific concerns or considered whether the cause of any difficulties is the OMTs, rather than other factors such as [X]. Instead, we have focused on TalkTalk's treatment of CityFibre FTTP since order data is available that allows us to make comparisons with Openreach.
- 3.76 In terms of Vodafone, as discussed in Annex 4, [X].
- a) Our analysis of Vodafone's use of altnets [X] (see Annex 4).
- b) [X] (see Annex 4 for further details).
- c) In addition, Vodafone stated that, in practice, [X].¹³⁵
- 3.77 As set out in paragraph 3.41, VMO2 considered that ISPs cannot have confidence in mitigation strategies, particularly over an extended period of time. There is no evidence that, historically, ISPs have been deterred from placing orders with altnets as a result of the OMTs. However, we recognise that the evidence above is not definitive. Past behaviour is not always a good guide to future behaviour. On the one hand, overlap is rising and from July 2023 ISPs will need to achieve an Openreach Order Mix of 90% to receive the full connection discounts. On the other hand, the scale of any changes an ISP would need to make to its commercial strategies may be smaller in the future, since ISPs' Openreach Order Mix is expected to improve, including as a result of the growth in regulatory stop sell.¹³⁶
- 3.78 In summary, we consider that there are some indications that ISPs would pursue a strategy other than diverting altnet orders to Openreach FTTP, if the Equinox 2 Offer discounts were in jeopardy.

The likelihood that an ISP would use the Failsafe Mechanism to address any links between the discounts received and using an altnet

- 3.79 In the event that the discounts that an ISP receives might potentially be affected by use of altnets the introduction of the Failsafe Mechanism gives ISPs a further option in addition to changing their commercial strategy in the ways described above.
- 3.80 The Failsafe Mechanism can be applied to exclude overlap areas where an ISP uses either FTTP or cable from an altnet.¹³⁷ In principle, the Failsafe Mechanism should break the link between receiving the Equinox 2 Offer discounts and use of altnets in overlapping areas, thus removing any competition concern. This is because performance against the OMTs will be assessed in the Openreach FTTP footprint outside of the overlap area for ISPs who activate the Failsafe Mechanism.

¹³⁵ Vodafone response dated 21 April 2023 to s135 notice dated 12 April 2023, question 4.

¹³⁶ As set out in paragraph 3.65(b), any risks created by using an altnet may [X].

¹³⁷ Equinox 2 Offer, Appendix 1, paragraph 9.1 states that the Failsafe Mechanism can be applied to new orders for Eligible Services. Clause 1.1 defines Eligible Services as including fixed access broadband services provided over technologies capable of delivering similar or greater speeds as Openreach's standard GEA-FTTP service.

- 3.81 In assessing the Failsafe Mechanism, we have focused on ISPs' perspectives and what it means for their decision about whether to use an altnet. For example, consider the position of an ISP for which: (i) using an altnet potentially affects the Equinox 2 Offer discounts; and (ii) other commercial strategies for mitigating this risk are unappealing. We have considered whether an ISP in this position would lack sufficient confidence in the Failsafe Mechanism and thus choose to divert orders from altnets to Openreach FTTP rather than rely on the Failsafe Mechanism.
- 3.82 Sky, TalkTalk and Vodafone supported the Failsafe Mechanism. However, some altnets considered that ISPs cannot be confident in its effectiveness. We have assessed these stakeholder submissions and relevant evidence in Annexes 5 and 6. In summary:
- a) ISPs do not consider that the Failsafe Mechanism is too complex and ambiguous to be practically workable.
 - b) We do not consider that the Failsafe Mechanism is likely to be so onerous that ISPs do not regard it as an acceptable option to use.
 - c) Some altnets have presented hypothetical scenarios in which ISPs would prefer not to exclude overlap areas from their order mix calculation i.e. they would prefer not to use the Failsafe Mechanism. However, we do not consider that these scenarios present a real enough concern, such that the OMTs could potentially create a barrier to using altnets.
 - d) If an ISP's rate of orders for legacy services per premises in the overlap area is more than 50% greater than in the rest of the Openreach FTTP footprint (the 'Legacy Cross-Check') then this may trigger a review and amendment of the Failsafe Mechanism by Openreach. However, we consider that the natural variation of legacy sales within Openreach's FTTP footprint is very unlikely to result in an ISP inadvertently failing the Legacy Cross-Check.
- 3.83 We thus consider that the Failsafe Mechanism is sufficient to address any links between the discounts received and using an altnet.¹³⁸

Ofcom's conclusion in relation to Question 1

- 3.84 In summary, our analysis above is as follows:
- a) Some ISPs [X] will comfortably exceed the OMTs and thus using altnets would not potentially affect the discounts received, even absent the Failsafe Mechanism.

¹³⁸ Nexfibre and VMO2 considered that we should assess whether the Failsafe Mechanism eliminates the possibility that the OMTs create a barrier to using altnets in all likely or realistically possible scenarios (Keystone Report, paragraphs 83, 85 and 86; VMO2 Consultation response, paragraph 84). We have a duty to act proportionately and to have regard to the desirability of targeting regulatory intervention only where needed. In reaching our conclusion, we have considered the effectiveness of the Failsafe Mechanism in a range of scenarios put forward by stakeholders. However, we do not consider it appropriate in the circumstances for us to intervene at this point to prevent the Equinox 2 Offer from coming to market only on the basis that the Failsafe Mechanism might not be effective in some future scenario that neither we nor any stakeholder has been able to substantiate. As noted below, if our assessment is overtaken by a future change in circumstances or unforeseen events, it would be open to us to intervene including through our direction making powers under SMP conditions.

However, we cannot rule out the possibility that in certain scenarios placing orders with an altnet could potentially affect a proportion of the connection discounts received by [X], assuming that the ISP makes no changes to its commercial strategies to mitigate the impact and absent the Failsafe Mechanism.¹³⁹

- b) We have not seen any evidence to suggest that, in the period since the Equinox 1 Offer was introduced, ISPs have been deterred from placing orders with altnets as a result of the OMTs. We consider that, in the event that the Equinox 2 Offer discounts were in jeopardy, there are some indications that ISPs would change their commercial strategies rather than diverting altnet orders to Openreach FTTP.
- c) In any event, ISPs are also able to activate the Failsafe Mechanism and have their performance against OMTs assessed for Openreach's FTTP footprint outside the overlap area. The Failsafe Mechanism is sufficient to address any links between the discounts received and using an altnet.

3.85 In combination, these factors lead us to conclude that the OMTs do not create a potential barrier to using altnets.

3.86 As discussed elsewhere in this document (in particular, in Annex 5), some stakeholders have put forward scenarios which they consider should lead us to reach the opposite conclusion in relation to Question 1. However, we do not consider these scenarios are real enough to justify intervention, bearing in mind our wider duties and responsibilities.

3.87 Annex 1 summarises our legal duties which are relevant both to the decisions we took in the WFTMR to establish the 90-day process and the decision we are taking in this statement under that process.

3.88 As set out in the WFTMR, our objective is to promote investment in gigabit-capable networks by Openreach and altnets in as many areas of the UK as possible in order to promote network based competition. We implemented the 90-day process as we were concerned about loyalty inducing terms and said that we would intervene to prevent terms that could undermine network build. However, as noted above, this framework involved a trade off between, on the one hand, promoting competition and altnet investment by giving them greater confidence that loyalty inducing commercial terms would not be permitted and, on the other hand, allowing Openreach some flexibility to introduce commercial terms that ultimately benefit consumers, including allowing Openreach to encourage migration to full fibre to support its business case.¹⁴⁰ In establishing this framework, we also took into account proportionality and intervened no more than necessary to address our competition concerns. These considerations remain relevant and we have had them in mind in exercising our judgment in relation to Question 1.

3.89 Given our conclusion, it is not necessary to proceed past Question 1 in our analytical framework.

¹³⁹ Also, we cannot rule out a potential effect on rental discounts received by [X] but [X]. As noted above, the fact we cannot rule out these scenarios does not imply that we consider them to be likely.

¹⁴⁰ WFTMR Statement, Volume 3, paragraphs 7.152 and 7.169.

- 3.90 CityFibre, Nexfibre and VMO2 made various submissions in relation to the next step in Ofcom's test, if the Question 1 is passed.¹⁴¹ Nexfibre and VMO2 also identified alternative formulations of the Equinox 2 Offer which may address their concerns about the OMTs.¹⁴² We have not engaged with these submissions. Given our conclusion in relation to Question 1, it is not necessary to consider paragraphs a) and b) of our analytical framework as set out in the WFTMR Statement and paragraph 3.7 above.
- 3.91 The Equinox 2 Offer expires in 2031. Looking this far ahead is inherently uncertain. There is likely to be further growth in overlap by this time. However, there are also opportunities for further improvements in ISPs' performance against the OMTs, both as a result of measures they take and due to the growth in regulatory stop sell and other regulatory changes related to the retirement of Openreach's legacy copper network. We will continue to monitor the fixed telecoms market, as was also the case under the Equinox 1 Offer. We cannot rule out the possibility that our assessment above is overtaken by changing circumstances in the future (for example, if the Failsafe Mechanism is not working as we expect it to). If this were to happen, it would 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.^{143 144}

Other issues that fall outside the Question 1 assessment

Impacts on small ISPs

Stakeholders' views

- 3.92 In the Consultation, Ofcom focused on the impact of the OMTs on Sky, TalkTalk and Vodafone.¹⁴⁵ The Joint Respondents stated that Ofcom should also consider the impact of the OMTs (including the Failsafe Mechanism) on smaller ISPs. They stated that smaller altnets are likely to initially supply small, localised ISPs and use this to develop the scale needed to supply larger ISPs.¹⁴⁶ VMO2 made a similar point.¹⁴⁷

¹⁴¹ CityFibre Consultation response, paragraphs 7.2-7.6, 8.1(iii). Keystone Report, paragraphs 70-71. VMO2 Consultation response, paragraphs 52, 171-174 and 180-182.

¹⁴² Nexfibre Consultation response, paragraph 19. Keystone Report, paragraphs 109-113. VMO2 Consultation response, paragraph 120-123 and 233-238.

¹⁴³ Section 185 of the Act also provides that certain regulatory disputes may be referred to Ofcom, including disputes relating to network access and the terms (or conditions) on which network access is provided (s.185(1) and (6) of the Act).

¹⁴⁴ Nexfibre and VMO2 made submissions regarding the ineffectiveness of *ex post* regulation. VMO2 said that we appeared to be saying, at paragraph 3.86 of our Consultation, that we would be acting *ex post* to "correct for a regulatory error" (VMO2 Consultation response, paragraphs 127-129 and 131-132). A similar point is made in Keystone Report, paragraph 74. However, paragraph 3.86 of our Consultation does not refer to *ex post* intervention. That paragraph explained, as we set out above that, if our assessment were to be overtaken by changing circumstances, it would be open to us to intervene to prevent terms which create a barrier to using altnets, including through our *ex ante* direction making powers under SMP Conditions.

¹⁴⁵ Consultation, paragraph 3.48.

¹⁴⁶ The Joint Respondents stated that smaller altnets may supply small ISPs using aggregation platforms such as the Common Wholesale Platform. Joint Consultation Response, paragraphs 9(a)(ii), 9(b), 37, 41-50, 82, 97, 191 and 237.

¹⁴⁷ VMO2 Consultation response, paragraph 101 also page 4.

Ofcom's position

- 3.93 A total of [redacted] ISPs have signed the Equinox 1 Offer.¹⁴⁸
- 3.94 For the purpose of this assessment we have taken small ISPs to be all ISPs, excluding the five largest ISPs (BT, Sky, TalkTalk, Vodafone and Zen).¹⁴⁹ We have considered Sky, TalkTalk, Vodafone and Zen separately. The vast majority of Openreach FTTP orders come from the five largest ISPs.
- 3.95 Table 3.3 shows the average number of FTTP orders per quarter placed with Openreach by Sky, TalkTalk, Vodafone and Zen between Q2 2022 and Q1 2023.¹⁵⁰ This table omits BT, which is under common ownership with Openreach.

Table 3.3: Average Openreach FTTP orders/quarter (Sky, TalkTalk, Vodafone, Zen) (Q2 2022-Q1 2023)

	Sky	TalkTalk	Vodafone	Zen
Average Openreach FTTP orders/quarter	[redacted]	[redacted]	[redacted]	[redacted]

Source: Openreach response dated 2 March 2023 to s135 notice dated 22 February 2023, questions 2 and 3. Openreach response dated 7 March 2023 to s135 notice dated 1 March 2023, question 1. Openreach response dated 9 May 2023 to s135 notice dated 2 May 2023, questions 1, 2, and 3.

- 3.96 The other [redacted] ISPs that have signed the Equinox 1 Offer place far fewer FTTP orders with Openreach. As summarised in Table 3.4, [redacted] of these ISPs have not yet placed any FTTP order with Openreach, and [redacted] placed on average 10 orders or less per quarter since Q2 2022. [redacted] of these ISPs placed on average more than 40 orders per quarter.

Table 3.4: Average Openreach FTTP orders/quarter (small ISPs) (Q2 2022-Q1 2023)

Average Openreach FTTP orders/quarter	No orders	Less than 1	1-10	10-40	More than 40
Number of ISPs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Notes: Excludes BT, Sky, TalkTalk, Vodafone and Zen.

Source: Openreach response dated 7 March 2023 to s135 notice dated 1 March 2023, question 1. Openreach response dated 9 May 2023 to s135 notice dated 2 May 2023, question 3.

- 3.97 Given the very low volumes of Openreach FTTP orders placed by small ISPs, the potential influence of small ISPs on altnets' business cases seems highly questionable.¹⁵¹ It is possible that these ISPs place higher volumes of orders with altnets, but the fact that the Equinox 2 Offer discounts will be small (both in absolute terms and relative to orders with altnets)

¹⁴⁸ Openreach response dated 7 March 2023 to s135 notice dated 1 March 2023, question 1.

¹⁴⁹ VMO2 is also a large ISP but it uses its own network.

¹⁵⁰ Several ISPs, including [redacted], activated the Equinox 1 Offer after its launch in October 2021. For comparability, we thus calculate the average number of new FTTP orders per quarter of each ISP starting from Q2 2022 which is [redacted].

¹⁵¹ We consider that the assessment under Question 1 incorporates an element of materiality, namely whether the OMTs create a barrier to a non-trivial amount of altnet usage. Accordingly, even if there were an impact on some of these small ISPs (and possibly even Zen), it is questionable whether the Question 1 threshold would be passed. In any event, given the waiver announced by Openreach (see below), it is not necessary for us to reach a view on this point.

makes us doubt whether these ISPs' decision to use an altnet will be affected by whether or not they receive these discounts.

- 3.98 Moreover, the majority of the small ISPs appear to only offer FTTP services, and therefore using an altnet cannot jeopardise their performance against the OMTs. Specifically, of the [X] ISPs that ordered at least one FTTP connection with Openreach since Q2 2022, [X] ([X]%) did not order any legacy products and thus achieved an Openreach Order Mix of 100%. Of those that did place legacy orders, [X] have met the OMTs to qualify for the full discounts. [X] ([X]%) achieved an Openreach Order Mix of at least 90% and [X] ([X]%) achieved an Openreach Order Mix of between 80% and 90%.¹⁵²
- 3.99 In any event, on 5 May 2023 Openreach announced that it would waive the OMTs (and therefore also the Failsafe Mechanism) for small ISPs that place no more than 100 legacy orders with Openreach within the Openreach FTTP footprint in any quarter.¹⁵³ Openreach explained to us that given the de minimis nature of legacy orders by smaller ISPs, it saw limited or no benefit to Openreach of continuing to require smaller ISPs to meet the OMTs. It also stated that many of these ISPs are in any event 'FTTP-only'.¹⁵⁴
- 3.100 As explained in paragraph 3.50, one of the conditions necessary for the OMTs to raise even a theoretical concern is that the ISP must have an Openreach Order Mix in the vicinity of the OMTs. An ISP that falls outside the waiver would need to be placing around 400 or more FTTP orders with Openreach per quarter for this to be the case.¹⁵⁵ As shown in Table 3.4 above, no ISP is even close to the amount (other than BT, Sky, TalkTalk, Vodafone and Zen). This will continue to be the case even if these smaller ISPs grow in the future.
- 3.101 Accordingly, given this waiver, it is not necessary to consider the impact of the OMTs on these ISPs.

The impact of accelerating Openreach's FTTP take-up including in future overlap areas

Stakeholders' views

- 3.102 CityFibre stated that, once consumers have been migrated to FTTP, it is difficult to persuade them to switch to another FTTP network.¹⁵⁶ Thus, if the Equinox 2 Offer accelerates take-up of Openreach FTTP, this will reduce CityFibre's future take-up.¹⁵⁷

¹⁵² Openreach said that the legacy orders of one ISP, [X], had not been confirmed yet. Openreach response dated 9 May 2023 to s135 notice dated 2 May 2023, question 3.

¹⁵³ [NGA2008/23 \(openreach.co.uk\)](#) The waiver applies to both the Equinox 1 Offer and the Equinox 2 Offer. The waiver will apply automatically for those ISP that have signed up to the Equinox offer. Openreach informed us that, outside the five largest ISPs, no ISP exceeds this level of legacy orders. Email from Openreach to Ofcom, 5 May 2023.

¹⁵⁴ Email from Openreach to Ofcom, 5 May 2023.

¹⁵⁵ 400 FTTP orders plus 100 legacy orders (the upper end of the waiver) would give an Openreach Order Mix of 80%.

¹⁵⁶ CityFibre Consultation response, paragraph 3.3(iii).

¹⁵⁷ While CityFibre expressed this concern in the context of the Future Overlap Scenario (described below), we understand it to apply more generally. CityFibre Consultation response, paragraphs 3.3(iv), 3.4-3.6 and 5.8(ii).

- 3.103 CityFibre and VMO2 were concerned about a particular scenario where Openreach deploys FTTP to an area before an altnet (we refer to this as the ‘Future Overlap Scenario’).^{158 159}
- a) In this particular scenario, the OMTs encourage ISPs to place FTTP orders with Openreach, rather than waiting for altnet deployment. Moreover, in this scenario ISPs are less willing to migrate customers that are already taking Openreach FTTP to an altnet in the future, due to the cost and inconvenience of doing so.
- b) The Failsafe Mechanism does not address the Future Overlap Scenario, since it only applies to areas where an altnet is actually present.
- 3.104 CityFibre stated that Question 1 requires Ofcom to consider whether the Equinox 2 Offer potentially creates a barrier to using altnets in this scenario.¹⁶⁰
- 3.105 Openreach stated that a ‘race to invest’ is an important dynamic created by the remedies in the WFTMR Statement.¹⁶¹ CityFibre and VMO2 agreed with the Consultation that there is a ‘race to invest’. However, they stated that the Equinox 2 Offer risks undermining this by providing a further advantage to Openreach.¹⁶²

Ofcom’s position

- 3.106 As set out in the WFTMR, we recognise that consumers need to be migrated away from Openreach’s legacy network. Indeed, we introduced various regulatory rules (such as regulatory stop sell) that will support this process.¹⁶³
- 3.107 In the WFTMR Statement, we provided guidance on the types of commercial terms that we might consider to be problematic. We said that Openreach may want to consider different commercial terms as part of a strategy to migrate customers from copper to FTTP and support its FTTP business case. We explained that we may be concerned if such terms deter ISPs from switching to new network builders, but that we would be less likely to be concerned where use of an alternative network does not affect the prices that an ISP pays for Openreach services.¹⁶⁴
- 3.108 CityFibre’s concern that the Equinox 2 Offer accelerates take-up of Openreach FTTP is different in nature to the theoretical competition impact that we assess under Question 1 above.¹⁶⁵ In particular, CityFibre’s concern does not involve Openreach leveraging its

¹⁵⁸ CityFibre referred to this scenario as “*dynamic effects*”. VMO2 meeting slides, 12 January 2023, slide 4 and illustrative example on slide 10. VMO2 Consultation response, paragraphs 150-153. CityFibre Consultation response, paragraph 3.2.

¹⁵⁹ The Joint Respondents may also be concerned about this scenario. For example, the Joint Consultation Response at paragraph 91(c) referred to the Failsafe Mechanism not applying in this scenario.

¹⁶⁰ CityFibre Consultation response, paragraph 3.3(i). The CityFibre Consultation response also commented on the plausibility of this scenario (paragraphs 3.3(ii) and 3.4).

¹⁶¹ Openreach Consultation response, paragraph 3.41(ii)(c).

¹⁶² CityFibre Consultation response, paragraph 3.6. VMO2 Consultation response, paragraph 149.

¹⁶³ WFTMR Statement, Volume 3, Chapter 2. See for instance paragraph 2.2.

¹⁶⁴ WFTMR Statement, Volume 3, paragraph 7.169.

¹⁶⁵ WFTMR Statement, Volume 3, paragraphs 2.73-2.74 consider the concern that increasing take-up on altnet networks will be more difficult for altnets where telecoms providers rapidly migrate their customers from Openreach copper to Openreach full fibre. We particularly highlighted additional proposals to support cross-platform switching.

position in areas where infrastructure competition is not feasible in order to raise barriers to entry and expansion for altnets in those areas where such competition is feasible.¹⁶⁶

- 3.109 As explained above, in areas where Openreach FTTP and an altnet are both present, the OMTs do not create a potential barrier to using altnets. In these areas, the OMTs discourage ISPs from ordering Openreach legacy products. They do not hamper altnets from competing (via the ISPs that use them) for those customers that order FTTP.
- 3.110 Turning now to the Future Overlap Scenario, we do not need to reach a view on the plausibility of this scenario or the extent of the areas that might be affected.¹⁶⁷ This is because, even absent the Equinox 2 Offer, the first network to deploy FTTP in an area is likely to enjoy some form of first mover advantage.¹⁶⁸ This ‘race to invest’ is an important part of the competitive dynamic in the package of remedies that we imposed in the WFTMR Statement and that was designed to support investment by Openreach and other companies. We consider the OMTs (or indeed other activities that Openreach may undertake to increase FTTP take-up in areas within its FTTP footprint, such as lowering FTTP prices) do not tilt the playing field between Openreach and altnets in an anti-competitive manner; rather they are part of the competitive process.
- 3.111 Moreover, as explained above, once an altnet has overbuilt Openreach’s FTTP network, the OMTs do not create a potential barrier to using altnets.
- 3.112 Given these points, CityFibre and VMO2’s concerns about the impact of the OMTs on incentivising FTTP take up, including in the Future Overlap Scenario, are not within scope of the competition concerns we set out in the WFTMR Statement (and which the analytical framework set out in paragraphs 3.18-3.26 above was designed to address).

Do the forecasting requirements act as a potential barrier to altnet entry and expansion?

Ofcom’s provisional conclusions in the Consultation

- 3.113 In the Consultation, we provisionally concluded that the forecasting requirements in the Equinox 2 Offer do not raise a potential barrier to using altnets.¹⁶⁹

Stakeholders’ views

- 3.114 Openreach stated that forecasting requirements do not act as a barrier to altnet entry and expansion. It stated that the forecasting requirements in the Equinox 2 Offer build on

¹⁶⁶ For example, CityFibre’s concern would appear to arise regardless of how Openreach chose to encourage take-up of its FTTP products (e.g. if Openreach were to introduce an unconditional FTTP price cut). It would also appear to arise where those measures encourage FTTP take-up by ISPs such as BT that do not use altnets.

¹⁶⁷ We set out some observations on the plausibility of this scenario in Consultation, paragraph 3.46.

¹⁶⁸ For example, Nexfibre and Openreach stated that the first network to deploy FTTP in an area enjoys a commercial benefit (e.g. an opportunity to attract early adopters), although [redacted] (Keystone Report, paragraphs 33-34 and 39-43; Openreach Consultation response, paragraph 3.41(ii)(a)). Similarly, [redacted] [redacted] response dated 28 February 2023 to s135 notice dated 22 February, question 5.

¹⁶⁹ Consultation, paragraph 3.91.

existing requirements in the Equinox 1 Offer and are necessary to assist Openreach's planning.¹⁷⁰

- 3.115 Sky stated that the forecasting requirements will not affect its ability to negotiate with altnets, since: (i) Sky will be able to [redacted]; and (ii) Sky would [redacted].¹⁷¹ TalkTalk stated that the forecasting requirements are reasonable.¹⁷²
- 3.116 An altnet [redacted] stated that Openreach's forecasting requirements cause significant difficulties for certain ISPs and require ISPs to dedicate considerable time and resource to developing and meeting forecasts. It stated the forecasting requirements in Equinox 2 Offer apply in addition to forecasting requirements contained in Openreach's existing GEA Volume Offer and that each time Openreach introduces new forecasting requirements ISPs have to prioritise developing Openreach specific forecasts. It said that this diverts ISPs from integrating with altnets such as [redacted].^{173 174}
- 3.117 CityFibre stated that the forecasting requirements reduce ISPs' freedom to reallocate orders to altnets.¹⁷⁵ The Joint Respondents stated that if an ISP risks failing to meet the forecasts it has provided to Openreach then it may divert orders from an altnet to Openreach to make up the shortfall.¹⁷⁶

Ofcom's assessment

- 3.118 The stated purpose of the forecasting requirements in the Equinox 1 Offer was to help Openreach plan capacity and resources for the purposes of meeting service level agreements (e.g. with respect to engineer appointment availability). In the Equinox 1 Statement, we concluded that those forecasting requirements did not create a potential barrier to using altnets.¹⁷⁷
- 3.119 [redacted].¹⁷⁸
- 3.120 The Equinox 2 Offer makes some changes to the detail of how the forecasting requirements operate. Openreach stated that these changes were to [redacted].¹⁷⁹
- 3.121 Under our analytical framework, we consider whether the forecasting requirements potentially create a barrier to using altnets (Question 1, as described above), not simply whether those requirements are straightforward for ISPs to meet. Crucially, the forecasting

¹⁷⁰ Openreach Consultation response, paragraph 3.43.

¹⁷¹ Sky Consultation response, page 3.

¹⁷² TalkTalk Consultation response, paragraph 3.1.

¹⁷³ [redacted] Consultation response, paragraph 4.4. [redacted] submission, 20 January 2023, paragraphs [redacted]. [redacted].

¹⁷⁴ [redacted] also stated that in its experience, [redacted]. [redacted] thus doubted the extent to which forecasting requirements help Openreach's planning. [redacted] Consultation response, paragraph 4.3.

¹⁷⁵ CityFibre Consultation response, paragraph 4.5.

¹⁷⁶ Joint Consultation Response, paragraph 100.

¹⁷⁷ Equinox 1 Statement, paragraphs 3.93-3.96.

¹⁷⁸ Openreach provided figures on the monthly variance between forecast orders and actual orders for BT, Sky, TalkTalk and Vodafone in the second half of 2022 under the Equinox 1 Offer (Openreach response dated 2 March 2023 to s135 notice dated 22 February 2023, question 11). [redacted]. Indeed, as explained in paragraph 3.120, [redacted]. Similarly, [redacted]. CityFibre response dated 16 March 2023 to s135 notice dated 23 March 2023, Attachment 1. [redacted].

¹⁷⁹ A document prepared for the Openreach Board states that [redacted]. Similarly, an internal document from [redacted].

requirements apply regardless of whether or not an ISP uses an altnet. They are something that all ISPs that sign the Equinox 2 Offer have to engage with.

- 3.122 An altnet [X] claimed that the forecasting requirements divert ISPs from integrating with altnets. We do not agree:
- a) Insofar as ISPs are not integrating with altnets, this is unlikely to be caused or intensified by the forecasting requirements. Regardless of the presence of those requirements, ISPs have a strong incentive to prioritise integration with Openreach since it helps an ISP supply FTTP to far more consumers than integration with an altnet.
 - b) The main ISPs are large businesses. The resources (such as staff time) that they have available to administer the relationships with their key suppliers are not fixed.
 - c) As set out in Annex 4, the analysis of TalkTalk's and Vodafone's FTTP orders per premises passed [X].
- 3.123 Annex 4 describes ISPs' use of altnets, including the circumstances in which they prefer to use altnets rather than Openreach FTTP. CityFibre argued that the forecasting requirements reduce ISPs' freedom to reallocate orders to altnets. We do not agree. ISPs that are planning to use altnets can factor this into their forecasts of the amount of FTTP they intend to order from Openreach. Moreover, we have not seen any evidence to suggest that using an altnet would increase the likelihood that an ISP would miss its forecasts.
- 3.124 The Joint Respondents argued that an ISP that risks missing its forecasts might reduce the amount of altnet FTTP that it purchases. We do not agree:
- a) The forecast requirements include a degree of leeway. In particular, Openreach can only recover compensation from an ISP if its forecast is inaccurate by more than 10% for three consecutive quarters.¹⁸⁰ An ISP that risks missing its forecasts has an opportunity to amend future forecasts to mitigate the risk of incurring a penalty.
 - b) An ISP that is undershooting its Openreach forecasts might mitigate this in other ways, rather than diverting altnet FTTP orders, including accepting the penalty.¹⁸¹ As set out in paragraphs 3.71-3.72 above, diverting altnet FTTP orders has downsides for the ISP.
- 3.125 Our conclusion is that the forecasting requirements do not potentially create a barrier to using altnets.

¹⁸⁰ Equinox 2 Offer, Appendix 1, paragraph 8.2

¹⁸¹ Paragraph 8.6 of Appendix 1 to the Equinox 2 Offer states that compensation for inaccurate forecasting is calculated on the basis of £1 per FTTP connection for each percentage point that the FTTP forecast is inaccurate by more than 10%. This is subject to a cap of £12.50 per connection.

Aggregate impacts

Stakeholders' views

- 3.126 CityFibre stated that Ofcom should have assessed the aggregate impact of the OMTs, the forecasting requirements and the level of Openreach's prices.¹⁸²

Ofcom's position

- 3.127 We have considered whether, in combination, the OMTs and the forecasting requirements potentially create a barrier to using altnets (i.e. the Question 1 test). Our assessment of the OMTs above took into account the magnitude of the discounts (which depends on the difference between Openreach's list price and the Equinox 2 Offer prices).
- 3.128 Individually we consider that the OMTs and the forecasting requirement do not create a barrier to using altnets. For the same reasons, we do not consider that the aggregate effects of these terms create such a barrier. Neither of these provisions discourage ISPs from using altnets and the aggregate effect is no different.
- 3.129 As explained in paragraph 3.7, our analytical framework is designed to assess commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased. Whether lower Openreach FTTP prices or Openreach discussing and developing discounts act as a barrier to entry is discussed separately in the Sections 4 and 5.

¹⁸² CityFibre Consultation response, paragraphs 3.1 and 4.5.

4. Lower Openreach prices

Introduction

- 4.1 In this section we consider the level of prices in the Equinox 2 Offer. Our consideration is structured as follows:
- a) Ofcom's position in the Consultation;
 - b) Overview of stakeholders' views;
 - c) The background to our assessment;
 - d) Our evidence and assessment; and
 - e) Whether a different approach is warranted in the parts of the UK known as Area 3.

Ofcom's position in the Consultation

- 4.2 We considered whether the level of Openreach prices in the Equinox 2 Offer raises *prima facie* concerns that would lead us to decide to investigate them in further detail.¹⁸³ We compared:
- a) Openreach's average FTTP price against an estimate of a reasonably efficient altnet's costs of deploying a fibre network derived from a model used in the WFTMR Statement (the '2021 Cost Model'); and
 - b) Openreach's portfolio of FTTP prices against prevailing altnet prices and offers.
- 4.3 Having assessed this evidence in the round, we did not at the time have *prima facie* concerns that would lead us to decide to investigate the level of the Equinox 2 Offer prices in further detail.¹⁸⁴

Overview of stakeholders' views

- 4.4 Openreach stated that the Equinox 2 Offer prices do not act as a barrier to altnet entry and expansion. It stated that the changes to its FTTP prices represent normal competition and encourage consumers to switch from legacy products to FTTP.¹⁸⁵

¹⁸³ Consultation, paragraph 3.99.

¹⁸⁴ Consultation, paragraphs 3.105 and 3.124-3.126.

¹⁸⁵ In particular, Openreach stated that its average FTTP price remains above the cost range generated by the 2021 Cost Model. Openreach Consultation response, paragraphs 1.16(i), 4.1(iii), 4.1(vi), 4.7-4.8 and 4.19.

- 4.5 Axione, CityFibre, Fern Trading, G.Network, the Joint Respondents, OFNL and two confidential respondents [redacted] were concerned about the level of the Equinox 2 Offer prices and their impact on altnets.^{186 187}
- 4.6 TalkTalk stated that FTTP prices under the Equinox 2 Offer are well above an estimate of Openreach's costs that it provided in 2021.¹⁸⁸

Background

Stakeholder views

- 4.7 CityFibre and Nexfibre stated that altnets face barriers to entry and expansion including Openreach's incumbency advantages, additional costs for ISPs that multisource (i.e. use altnets as well as Openreach), costs for consumers switching the network used to supply FTTP and Openreach's vertical integration with BT (the largest ISP).^{189 190}
- 4.8 CityFibre, Nexfibre, and OFNL stated that Ofcom should err on the side of promoting competition in the longer term and therefore be wary of the level of prices under the Equinox 2 Offer.^{191 192}
- 4.9 Openreach stated that altnets' concerns about the level of its FTTP prices are essentially challenging the suitability of the framework set out in the WFTMR Statement.¹⁹³ Openreach stated that there is no basis to amend that "balanced" regulatory framework since it is proving successful.¹⁹⁴

¹⁸⁶ Axione Consultation response. CityFibre Consultation response, paragraphs 5.4, 5.7 and 5.10. Fern Trading Consultation response, paragraph 21 on pages 8-9 and paragraphs 24-25 on page 9. G.Network Consultation response, pages 6-7 and 9. Joint Consultation Response, paragraph 8(c). OFNL Consultation response, page 1. [redacted] and Keystone (for Nexfibre) also made submissions on this topic, as set out below. [redacted] Consultation response, pages 1-2. [redacted] Consultation response. Prior to the Consultation, [redacted] and VMO2 also raised concerns about this issue [redacted]; VMO2 meeting slides, 12 January 2023, slide 2).

¹⁸⁷ CityFibre and G.Network also stated that it is doubtful whether lower wholesale prices will benefit consumers even in the short term since ISPs may not pass them on. CityFibre Consultation response, paragraph 7.6. G.Network Consultation response, pages 6-7.

¹⁸⁸ TalkTalk Consultation response, paragraphs 1.2 and 4.3.

¹⁸⁹ CityFibre Consultation response, paragraphs 2.5-2.6. CityFibre Competition Act Complaint, paragraphs 2.4 and 4.7-4.8. Keystone Report, page 2 and paragraphs 7-10 and 57-59.

¹⁹⁰ The Joint Respondents appeared to state that the additional costs for ISPs that multisource have more of an effect on altnets in Area 3. Joint Consultation Response, paragraphs 69-75.

¹⁹¹ CityFibre Consultation response, paragraphs 2.2 and 5.8(iii). CityFibre Competition Act Complaint, paragraphs 2.17-2.18. Keystone Report, page 2 and paragraph 14. OFNL Consultation response, pages 1-3. [redacted]. [redacted].

¹⁹² [redacted] also stated that ISPs [redacted]. [redacted].

¹⁹³ Openreach Consultation response, paragraphs 1.17 and 4.23.

¹⁹⁴ Openreach stated that FTTP availability increased from 18% of UK premises in December 2020 to 42% in December 2022 and is likely to now be around 50%. This reflects investment by both Openreach and altnets. Openreach also stated that altnets are expected to reach 11.5m premises by the end of 2023. Openreach Consultation response, paragraphs 1.8-1.10; also paragraphs 1.17-1.18, 2.3 and 4.23.

- 4.10 G.Network, the Joint Respondents and Nexfibre stated that there has been significant FTTP rollout by altnets.¹⁹⁵ However, CityFibre stated that take-up is the key metric that shows whether network competition is emerging.¹⁹⁶
- 4.11 Nexfibre and [redacted] stated that there are signs that altnets are struggling.¹⁹⁷ CityFibre and Nexfibre contrasted this with the position of Openreach.¹⁹⁸ For example:
- a) [redacted], G.Network and Nexfibre stated that altnets may be struggling to attract consumers, including ISPs.¹⁹⁹ Similarly, the Joint Respondents stated that Openreach's actions are causing take-up of altnets' services to be below expectations.²⁰⁰
 - b) G.Network, the Joint Respondents and Nexfibre stated that financing costs have significantly increased.²⁰¹
 - c) The Joint Respondents and Nexfibre stated that build costs have increased, for example due to labour shortages).²⁰²
- 4.12 CityFibre submitted modelling of the impact of [redacted].²⁰³

Ofcom's view

- 4.13 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.
- 4.14 We have nonetheless considered whether the level of Openreach's prices under the Equinox 2 Offer raises *prima facie* concerns that would lead us to decide to investigate them in further detail (albeit not bounded by the 90 day process).
- 4.15 In considering this, we have had in mind our approach to pricing regulation in the WFTMR Statement. That approach supported our overarching strategic objectives as follows:

¹⁹⁵ G.Network Consultation response, page 2. Joint Consultation Response, paragraph 25. Keystone Report, page 2 and paragraph 11.

¹⁹⁶ CityFibre Consultation response, paragraph 1.7(vii).

¹⁹⁷ [redacted] stated that [redacted]. Keystone Report, paragraph 13.

¹⁹⁸ Keystone referred to statements from BT (including BT Group's CEO) and equity analysts about Openreach's strong position (Keystone Report, paragraphs 16-17, 19 (first bullet) and 20-22). CityFibre referred to an investor presentation on 2 February 2023 in which BT Group's CEO stated that for "FTTP built ... 24 months ago, nearly 50% of end customers using Openreach's broadband network have made the switch to FTTP..." (CityFibre Consultation response, exhibit 2, page 4). CityFibre [redacted] (CityFibre Consultation response, Annex 1). See also CityFibre Consultation response, paragraphs 1.7(vii) and 2.9.

¹⁹⁹ [redacted]. G.Network Consultation response, pages 3-4. Keystone Report, page 2 and paragraphs 13, 19 (second bullet) and 24.

²⁰⁰ Joint Consultation Response, paragraph 26.

²⁰¹ G.Network Consultation response, pages 4-5. Joint Consultation Response, paragraph 205. Keystone Report, page 2 and paragraphs 15, 28 (first bullet) and 29; also paragraph 19 (fourth bullet).

²⁰² Keystone Report, paragraphs 28 (second bullet) and 29. Joint Consultation Response, paragraph 205.

²⁰³ [redacted]. CityFibre Competition Act Complaint, Annex D.

- 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 2.²⁰⁴
- 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.²⁰⁵

4.16 In the WFTMR Statement:

- a) We did not impose a minimum FTTP price for Openreach. One reason for not introducing a price floor was that we did not want to introduce regulation which would deny consumers the benefits of emerging competition.²⁰⁶
- b) We decided to prohibit Openreach from offering geographic discounts on FTTP rental charges without Ofcom's consent. This was to address the risk that Openreach uses geographically targeted price reductions to undermine altnet rollout.²⁰⁷
- c) We set a price ceiling for Openreach's FTTC 40/10 and FTTP 40/10 products but decided not to charge control Openreach's higher speed products.²⁰⁸
- d) We checked that the level of the price ceiling was consistent with our own estimate of the price that an entrant operator would need to charge in order to recover its efficiently incurred costs. These costs were presented as a range to reflect variations in certain key modelling assumptions. The FTTP 40/10 price ceiling was above the entrant operator cost range. We thus considered that our approach to price regulation in Area 2 was consistent with our objective of promoting full-fibre investment by rivals to Openreach.²⁰⁹

4.17 Ofcom has moved away from a cycle of reviewing markets every three years. This reflects that major fibre investments take time and require greater regulatory certainty, over a longer timescale. The WFTMR Statement sets out our decisions on the regulation of various fixed telecoms markets for the period to March 2026. On the basis of that statement, networks have invested significant sums. Ofcom recognises the importance of providing a predictable, stable regulatory environment. We would generally expect the next market review to be the place to re-evaluate our approach to regulation, in the light of developments since March 2021. Potentially revisiting the decisions taken in the WFTMR Statement at an earlier stage is not something we would do lightly.

4.18 We recognise that the wider economic climate has become tougher over the last year or so. However, Ofcom's goal is not to ensure that individual stakeholders (whether altnets or Openreach) achieve their business targets. Nor is it Ofcom's goal to shield stakeholders from the wider economic environment – that is a risk for them and their investors to bear.

²⁰⁴ WFTMR Statement, Volume 4 paragraphs 1.1-1.13. WFTMR Statement, Volume 1 paragraph 2.47.

²⁰⁵ WFTMR Statement, Volume 4, paragraphs 2.7-2.10.

²⁰⁶ WFTMR Statement, Volume 3, paragraph 7.76 and paragraph A12.103.

²⁰⁷ WFTMR Statement, Volume 3, paragraphs 7.3-7.4 and 7.11-7.12.

²⁰⁸ WFTMR Statement, Volume 4, Tables 1.1 and 2.1.

²⁰⁹ WFTMR Statement, Volume 4, paragraphs 1.36-1.38.

Indeed, had the economic climate proved to be more favourable than expected in 2021, then they would have benefited from this upside.

- 4.19 Altnets have expressed concerns about rising costs (including for financing) and take-up levels. However, we consider it is premature to suggest that these indicate that the regulatory environment established in the WFTMR Statement is failing to achieve our objectives.
- 4.20 It is against this background that we have considered whether the level of Openreach's prices under the Equinox 2 Offer raises *prima facie* concerns that would lead us to decide to investigate them in further detail. In considering this, we have had in mind whether the Equinox 2 Offer prices may be set at a level that prevents material and sustainable competition to Openreach emerging in Area 2.²¹⁰

Assessment of Openreach's FTTP prices

- 4.21 As noted by Consultation respondents, lower Openreach FTTP prices place commercial pressure on altnets. However, in itself this does not imply that those prices raise competition concerns.
- 4.22 In our consideration of whether the level of Openreach's prices under the Equinox 2 Offer raises *prima facie* concerns, we have looked at two readily available indicators. Below we compare: (i) Openreach's average FTTP price against an estimate of an altnet's costs derived from the 2021 Cost Model; and (ii) Openreach's portfolio of FTTP prices against prevailing altnet prices and offers.²¹¹ We then set out our position on whether the level of Openreach's prices under the Equinox 2 Offer raises *prima facie* concerns.

2021 Cost Model

Stakeholders' views

- 4.23 Stakeholders had differing views on whether we should revisit the assumptions and parameters in the 2021 Cost Model.
- a) Openreach stated that changing the 2021 Cost Model would effectively be reopening the basis on which decisions in the WFTMR Statement were taken.²¹²
- b) CityFibre, the Joint Respondents and a confidential respondent [redacted] stated that updating the 2021 Cost Model was warranted given changes since it was developed.²¹³ The Joint Respondents also stated that updating the 2021 Cost Model was warranted

²¹⁰ As set out above, we then consider in the next subsection whether a different approach is warranted in the part of the UK known as Area 3.

²¹¹ As explained in Annex 8, the fact that the rental charges for some Openreach FTTP products are below its FTTP 40/10 rental price and the level of FTTP 40/10 price ceiling is not a reliable *prima facie* indicator of whether the Equinox 2 Offer prices raise competition concerns.

²¹² Openreach Consultation response, paragraphs 4.1(iv) and 4.23.

²¹³ CityFibre Consultation response, paragraph 5.6(i); also paragraph 5.6(iii). Joint Consultation Response, paragraphs 171 and 192. [redacted] Consultation response, page 2. We understand that G.Network made a similar point (G.Network Consultation response, pages 5 and 10).

since it contains “*obvious flaws*”, some of which were raised during the WFTMR.²¹⁴ INCA stated that Ofcom should update the 2021 Cost Model since: (i) Ofcom uses current data elsewhere (e.g. overlap, current prices); and (ii) the parameters identified by INCA and Zzoomm are easily adjustable.²¹⁵ More generally, the Joint Respondents stated that the assumptions in the 2021 Cost Model are all in Openreach’s favour.²¹⁶

- c) The Joint Respondents stated that their proposed amendments to the 2021 Cost Model are straightforward to implement.²¹⁷ Similarly, CityFibre stated that some adjustments (e.g. updating the WACC to reflect Openreach’s position in 2023/4) could easily be done within the 90-day process.²¹⁸

4.24 We received various detailed criticisms of the 2021 Cost Model. These are summarised in Annex 7. In the light of these criticisms, CityFibre and the Joint Respondents stated that the Equinox 2 Offer prices are likely to be below the costs of an efficient altnet entrant.²¹⁹

4.25 In the Consultation, we compared the results of the 2021 Cost Model against average FTTP rental charges under the Equinox 2 Offer (specifically, the average for Openreach as a whole and the averages for Sky, TalkTalk and Vodafone).²²⁰ Hyperoptic, Openreach and Sky stated that the use of average FTTP prices, rather than the price of particular FTTP products, is appropriate.²²¹ However, other stakeholders disagreed with this approach:

- a) The Joint Respondents stated that it was not appropriate to use Openreach’s average FTTP price since altnets cannot replicate Openreach’s products, pricing and subscriber blend.²²²
- b) [3<] and the Joint Respondents stated that the Equinox 2 Offer may change the mix of Openreach products purchased by ISPs.²²³
- c) INCA and Zzoomm said that Openreach’s rental charges for faster FTTP products generally rise slower than CPI. They said that Ofcom should assess whether this means that these products are priced below a reasonably efficient operator’s costs.²²⁴
- d) The Joint Respondents appeared to suggest that Ofcom should have considered Openreach’s prices to smaller ISPs.²²⁵

²¹⁴ Joint Consultation Response, paragraphs 171-173 and 175.

²¹⁵ INCA also stated that updating the 2021 Cost Model would not reopen the WFTMR Statement; rather that statement provides a framework for assessing the Equinox 2 Offer. INCA Modelling Submission, paragraphs 12-15.

²¹⁶ Joint Consultation Response, paragraph 174.

²¹⁷ Joint Consultation Response, paragraphs 178-179.

²¹⁸ CityFibre Consultation response, paragraphs 5.5(i) and 5.6(i).

²¹⁹ CityFibre’s estimate of Openreach’s average FTTP price is set out in RBB Pricing Report, page 33. Various RBB estimates of a scale altnet’s costs are set out in CityFibre Consultation response, paragraph 5.5(ii). Joint Consultation Response, paragraph 8(c).

²²⁰ Consultation, paragraph 3.106.

²²¹ Hyperoptic Consultation response, pages 2 and 6. Openreach Consultation response, paragraphs 4.18-4.19. Sky also stated that [3<]. Sky Consultation response, pages 1 and 4.

²²² Joint Consultation Response, paragraphs 121-122 and 124-125.

²²³ Joint Consultation Response, paragraph 123. [3<] submission, 20 January 2023, paragraph 4.2.

²²⁴ INCA and Zzoomm, 26 January 2023 price levels submission, paragraph 7(b).

²²⁵ Joint Consultation Response, paragraph 126.

- 4.26 The Joint Respondents stated that it was “*strange*” for Ofcom to adjust connection charges in the 2021 Cost Model but not other input assumptions.²²⁶
- 4.27 TalkTalk disagreed with the use of CPI inflation to update the cost estimates produced by the 2021 Cost Model. TalkTalk stated that CPI overstates cost increases e.g. due to efficiency improvements and since wages have grown slower than CPI.²²⁷
- 4.28 Hyperoptic supported the use of the 2021 Cost Model.²²⁸ However, it stated that, in order to support investment, Ofcom should provide greater clarity about what action it would take should Openreach’s average FTTP price fall below the upper end of the range generated by the 2021 Cost Model.²²⁹

Ofcom’s analysis

- 4.29 As explained below, we have compared the Equinox 2 Offer prices against the 2021 Cost Model, as a readily available indicator of whether a reasonably efficient altnet in Area 2 could profitably match the Equinox 2 Offer prices. We have not sought to revisit the cost and modelling assumptions that we used in the WFTMR Statement and we have not attempted to gather further evidence in order to recalibrate the model.
- 4.30 Some stakeholders argued that this comparison is not appropriate since various adjustments should be applied to the 2021 Cost Model.²³⁰ We do not agree. We recognise that the wider economic climate has become tougher over the last year or so. However, we consider the 2021 Cost Model is still relevant to our consideration of whether the level of Openreach’s prices under the Equinox 2 Offer raises *prima facie* concerns.
- 4.31 Essentially this exercise considers whether the Equinox 2 Offer prices are consistent with the existing regulatory framework, as set in the WFTMR Statement. Specifically, we ask whether reasonably efficient altnets in Area 2 (as modelled in 2021) could profitably match the Equinox 2 Offer prices.
- 4.32 We consider this approach is consistent with the importance we place on providing a predictable, stable regulatory environment, to support investment by Openreach and altnets:
- a) Continuing to use the 2021 Cost Model provides a stable indication to the market of what price levels are likely to be acceptable. In contrast, the approach advocated by these stakeholders would involve repeated reviews of the 2021 Cost Model, thus undermining the stable regulatory environment the WFTMR Statement sought to create. Such an approach is likely to be disruptive, for example because Openreach

²²⁶ Joint Consultation Response, paragraph 152.

²²⁷ TalkTalk Consultation response, paragraph 4.2.

²²⁸ Hyperoptic Consultation response, pages 2, 6 and 7.

²²⁹ Hyperoptic proposed that Ofcom’s course of action should depend on the extent to which Openreach’s prices lie within that cost range. Hyperoptic Consultation response, pages 1, 2 and 8-10.

²³⁰ As well as arguing that the parameters in the 2021 Cost Model have changed since 2021, the Joint Respondents also argued that the original model included “*obvious flaws*”. We explained the rationale for our modelling choices in the WFTMR Statement, Annex 15.

pricing which was previously acceptable (and which ISPs have based their retail prices upon) might need to be unpicked.

- b) Changing market conditions may mean that, at any given point in time, altnets' investment cases turn out to be more or less challenging than expected. However, we do not consider that this should lead us to repeatedly reopen the issue of what level of Openreach FTTP prices is acceptable. An approach where unexpected rises in altnets' costs result in Ofcom requiring Openreach to set higher prices (which are ultimately borne by consumers using its network) would cushion altnets and their investors from changing market conditions.

4.33 Put another way, CityFibre, the Joint Respondents and [X] are effectively arguing that the regulatory framework established in 2021 is no longer suitable and should be revisited.²³¹ As explained above, potentially revisiting the decisions taken in the WFTMR Statement at an earlier stage is not something we would do lightly. We consider it is premature to suggest that the regulatory environment established in the WFTMR Statement is failing to achieve our objectives.

4.34 Even if (contrary to our position) it is not appropriate for us to take into account the 2021 Cost Model without revisiting the cost and modelling assumptions, the complex exercise of doing so would not form part of the *prima facie* assessment conducted in this statement. Such analysis is not readily available and, as explained in Annex 7, adjusting the 2021 Cost Model (as stakeholders have attempted to do) is not a straightforward exercise.²³²

4.35 Contrary to INCA's suggestion, we do not consider that this approach is inconsistent with our separate assessment of conditional pricing in Section 3 of this statement, which does use recent data on overlap, ISPs' performance, etc. That assessment is carried out under a different analytical framework (see in particular paragraphs 3.18-3.26).

4.36 We now explain how we have compared the Equinox 2 Offer prices against the 2021 Cost Model.

4.37 As explained in Annex 2, given its subscriber base in January 2023, Openreach as a whole would earn an average FTTP rental charge of around £[X] under the Equinox 2 Offer prices.²³³ We also estimate that, given their Q1 2023 subscriber bases, Sky, TalkTalk, Vodafone and Zen would pay Openreach an average FTTP rental charge of between £[X] and £[X] if the Equinox 2 Offer discounts are applied. In terms of the stakeholder criticisms of this approach listed in paragraph 4.25:

- a) We disagree with the Joint Respondents' view that this is inappropriate since altnets do not replicate Openreach's portfolio of prices. Essentially, we are testing whether an altnet that sets the same average FTTP rental charge as that arising under the Equinox

²³¹ For example, [X] estimated that the costs of a scale competitor in 2023/24 exceed [X]. If one were to accept [X]'s estimates (which, for the avoidance of doubt, we do not) then the implication would appear to be that current FTTP 40/10 charge control of £16.09 in 2023/24 needs to be substantially revised. [X].

²³² We disagree with INCA's claim that its preferred adjustments can easily be implemented.

²³³ Using Openreach's forecast blend of subscribers for 2023/24 results in [X] estimates.

2 Offer could do so profitably. This acts as a guide to whether altnets are able to compete in practice.²³⁴

- b) We recognise that the Equinox 2 Offer may change the mix of FTTP products that ISPs purchase. We have considered whether this means that the figures set out above overstate the average revenue that Openreach is likely to earn under the offer.²³⁵ We do not consider that this is the case. As set out in Annex 2, greater discounts are available under the Equinox 2 Offer (compared to the Equinox 1 Offer) for faster FTTP products. Openreach's business case for the Equinox 2 Offer [§<].²³⁶ If, as a result of the Equinox 2 Offer, customers shift towards purchasing faster FTTP products than they do currently then this will tend to increase Openreach's average FTTP rental charge.²³⁷
- c) INCA and Zzoomm referred to how Openreach's rental charges for faster FTTP products will change over time. As explained in Annex 8, we think it is appropriate to focus on Openreach's average price, rather than the price of particular products. In any event, while the rental charges for Openreach's faster FTTP products (FTTP 550/75 and above) rise by less than CPI inflation, this is from a higher starting point (e.g. the 2023/24 price for FTTP 550/75 is £19.30). Thus, if we focused just on the prices of these products, they would lie significantly above the range generated by the 2021 Cost Model.
- d) ISPs other than BT, Sky, TalkTalk, Vodafone and Zen typically place [§<] FTTP orders with Openreach per quarter (see Table 3.4 above). We thus do not consider that Openreach's average FTTP charges to any of these individual ISPs is a relevant figure when assessing competition.²³⁸

4.38 We have amended the 2021 Cost Model to reflect the lowest connection charge under the Equinox 2 Offer.²³⁹ We do not agree with the Joint Respondents' suggestion that this is inconsistent with our decision not to revisit the cost and modelling assumptions in that model. Using a connection charge from the Equinox 2 Offer is comparable to using the rental charges from that offer.²⁴⁰ It is entirely consistent with our approach of comparing the Equinox 2 Offer prices against the 2021 Cost Model.

4.39 In the WFTMR Statement, we estimated the following range for the unit costs/month of a FTTP entrant in Area 2: £9.53-£13.67 (2020/21 prices). We have indexed our cost range with inflation to express it in 2023/24 prices, so that it is comparable with the prices set

²³⁴ As discussed below in the comparison between Openreach and altnets' prices, in practice altnets structure their prices differently. Altnets may also offer non-price reasons to purchase their FTTP, such as faster speeds than those received by the typical Openreach customer.

²³⁵ For example, because there is a shift towards consumers taking the cheapest FTTP products, such as FTTP 80/20.

²³⁶ Openreach response dated 22 February 2023 to s135 notice dated 22 February 2023, question 14.

²³⁷ The impact on its real (inflation adjusted) revenue may be somewhat mitigated by factors such as the way individual product prices change over time.

²³⁸ Given the [§<] of Openreach FTTP orders placed by these ISPs, the average FTTP rental charge they pay is likely to be [§<] and a poor guide to the price that an altnet would need to compete against in the future. Moreover, such a [§<] that altnet would need additional revenue sources. Thus, the average FTTP charge paid by these small ISPs individually is unlikely to be a good guide to the overall FTTP revenues that an altnet is earning.

²³⁹ See Annex 7 for further details.

²⁴⁰ Essentially the cost figures presented below are 'costs net of connection charge revenue'. Those (net) costs are then compared with rental revenues. WFTMR Statement, paragraph A15.79.

out in the Equinox 2 Offer. Using our preferred CPI metric, the cost range expressed in a consistent manner as Openreach 2023/24 prices is £11.10-£15.93. We do not agree with TalkTalk that this metric is inappropriate since costs will increase at a slower rate. The purpose of this adjustment is to express the results of the 2021 Cost Model on a basis that can be compared with current prices. As explained above, we have not revisited the cost assumptions in that model.

4.40 Therefore, Openreach's average FTTP price under the Equinox 2 Offer is above the top end of the estimated range for the unit cost of a reasonably efficient altnet in Area 2.

4.41 Hyperoptic stated that we should provide greater clarity about what action Ofcom would take should Openreach's average FTTP price lie within the range generated by the 2021 Cost Model. When considering the results of the 2021 Cost Model, we have taken the following considerations into account.

- a) As explained in paragraph 4.32 above, the 2021 Cost Model provides a stable indication of what price levels are likely to be acceptable. If Openreach's average prices are clearly above the cost range generated by this model then they are unlikely to be problematic.
- b) However, the range of costs in the WFTMR Statement is fairly wide. The upper end is over 40% higher than the lower end. While it was not necessary to seek to identify a more precise cost range for the WFTMR Statement, a more in depth assessment of costs at the time might have resulted in a narrower range.
- c) We do not consider the comparison of Openreach's prices with the range generated by the 2021 Cost Model to be a bright line test. Given the wide range of costs, we are looking at where Openreach's average price sits relative to the range: is it at (or above) the top of the range, in the middle, or at the bottom of the range.²⁴¹ Also, as explained below, we have not just relied on the results of the 2021 Cost Model and additionally have also taken the prices that altnets are charging into account.

Comparison with altnet prices

Stakeholders' views

4.42 Axione, G.Network, the Joint respondents, OFNL and [redacted] stated that altnets must substantially undercut Openreach due to its incumbency advantages (e.g. the costs of multi-sourcing for ISPs).²⁴² Nexfibre stated that [redacted].²⁴³ CityFibre stated that [redacted].²⁴⁴

²⁴¹ Moreover, as explained in Annex 7, given the recent fluctuations in CPI experienced in the UK, the precise choice of inflation metric could affect the cost range when it is expressed in 2023/24 prices. Indeed, it is possible that average FTTP prices could lie at the top end of the cost range generated by some inflation metrics.

²⁴² Axione Consultation response. G.Network Consultation response, pages 7-8. Joint Consultation Response, paragraph 132. OFNL Consultation response, page 2. [redacted] Consultation response, [redacted].

²⁴³ Keystone Report, paragraph 32.

²⁴⁴ RBB Pricing Report, pages 3 and 8.

- a) CityFibre stated that [redacted].²⁴⁵
- b) CityFibre stated that, [redacted].²⁴⁶ CityFibre stated that [redacted].²⁴⁷ CityFibre also stated that [redacted].²⁴⁸
- 4.43 The Joint Respondents, Hyperoptic and [redacted] stated that comparing current prices is unreliable since those prices may not be sustainable in the medium term.²⁴⁹
- 4.44 In terms of the relativity of Openreach and altnet prices, Sky stated that [redacted].²⁵⁰ CityFibre stated that [redacted].²⁵¹ Vodafone stated that [redacted].²⁵² Zen stated that altnets remain commercially attractive compared to Openreach.²⁵³
- 4.45 The Joint Respondents stated that Ofcom should have considered the prices charged by smaller altnets.²⁵⁴ They stated that the Equinix 2 Offer prices are substantially lower than other altnets' prices.²⁵⁵ [redacted], CityFibre stated that [redacted].²⁵⁶

Ofcom's preliminary observations

- 4.46 We consider that a comparison between the Equinix 2 Offer prices and key altnets' prices is relevant evidence. It provides direct evidence of whether those altnets are able to match or undercut Openreach's FTTP prices.
- 4.47 We recognise that altnets face challenges in overcoming Openreach's incumbency advantages, in particular the costs that ISPs incur when dealing with multiple network operators. As a result, altnets are likely to need to offer terms that are at least as attractive as Openreach's to win business.²⁵⁷ One way to do this is by undercutting (rather than just matching) Openreach's FTTP prices.²⁵⁸ This could involve the altnet offering various additional incentives to the ISP.²⁵⁹ Another way to do this is to offer faster speeds than

²⁴⁵ RBB Pricing Report, page 9.

²⁴⁶ CityFibre also stated that [redacted] (CityFibre Competition Act Complaint, Annex A, paragraphs A12-A13). CityFibre stated that [redacted] (CityFibre Competition Act Complaint, Annex A, paragraphs A4-A7). CityFibre Consultation response, paragraphs 5.5(iii) and 5.6(vi). RBB Pricing Report, pages 3, 8 and 10. CityFibre Competition Act Complaint, Annexes A and B.

²⁴⁷ RBB stated that [redacted]. CityFibre Consultation response, Annex 1. RBB Pricing Report, pages 10-11.

²⁴⁸ RBB Pricing Report, page 10.

²⁴⁹ [redacted] stated that [redacted]. Hyperoptic Consultation response, pages 7-8. The Joint Respondents made a similar point. Joint Consultation Response, paragraph 138.

²⁵⁰ Sky Consultation response, page 4.

²⁵¹ RBB estimated that [redacted]. RBB Pricing Report, page 10 and Table 6 on page 41. CityFibre stated that [redacted]. CityFibre Competition Act Complaint, Annex B, paragraph B3.

²⁵² Vodafone Consultation response, paragraph 20.

²⁵³ Zen Consultation response.

²⁵⁴ For example, the altnets operated by Fern Trading. Joint Consultation Response, paragraphs 133-134; also paragraphs 9(a)(i), 37, 41 and 126. [redacted] stated that [redacted]. [redacted] stated that [redacted].

²⁵⁵ The Joint Respondents also stated that it is speculative to assume altnets can further reduce their prices in response to the Equinix 2 Offer. Joint Consultation Response, paragraphs 131 and 188.

²⁵⁶ CityFibre Consultation response, footnote 33.

²⁵⁷ WFTMR Statement, Volume 3, paragraph 7.46.

²⁵⁸ The extent to which an altnet needs to undercut Openreach may also depend on the extent to which an ISP values having additional supply options in the future. ISPs are likely to have at least some interest in supporting competition from altnets. For example, [redacted] stated that [redacted].

²⁵⁹ For example, [redacted].

those enjoyed by a typical Openreach FTTP customer. We have taken this into account in our interpretation of the pricing evidence below. In addition:

- a) As explained above, the OMTs do not create a potential barrier to using altnets, thereby exacerbating Openreach's incumbency advantages.
- b) We have considered whether there is evidence that altnets ([§<]) are unappealing to ISPs, even where they undercut Openreach's prices.

4.48 When comparing with altnets' prices, we have not just done so for time limited offers that will expire.

4.49 Below we compare the key features of Openreach's FTTP prices and the prices offered by CityFibre, [§<] and VMO2. As explained below, we consider that these altnets are particularly relevant. In our view, considering their prices is sufficient for the purposes of the *prima facie* exercise we are conducting. Moreover, to support our WFTMR objectives of promoting competition and investment (see paragraph 4.15 above), it is not necessary for *all* altnets (or even all altnets in Area 2) to be able to undercut Openreach's FTTP prices. Dozens of altnets are currently building FTTP networks and we recognise that some of them may ultimately prove commercially unsuccessful.

4.50 ISPs consider whether customers are profitable over the lifetime of their subscription. 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.²⁶⁰ Therefore, our comparison below mainly focuses on rental charges.

Ofcom's analysis of CityFibre's prices

4.51 CityFibre is the largest new entrant network and is deploying FTTP to a significant number of premises. It currently supplies Vodafone, TalkTalk and Zen.

4.52 For a [§<].²⁶¹ [§<].²⁶² CityFibre said that [§<].²⁶³

4.53 CityFibre has also [§<].²⁶⁴

4.54 [§<].²⁶⁵

²⁶⁰ In the Equinox 1 Statement, our modelling assumed an average customer lifetime of 5 years. We see no reason why this figure would have materially changed since we published that statement. Equinox 1 Statement, paragraph A2.11.

²⁶¹ [§<]. CityFibre's response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1 and Attachment 1, pricing tab. [§<].

²⁶² [§<]. CityFibre's response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1 and Attachment 1, pricing tab.

²⁶³ CityFibre's response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1.

²⁶⁴ CityFibre's response dated 28 February 2023 to s135 notice dated 22 February 2023, questions 1 and 4.

²⁶⁵ The contract with [§<]. The contract with [§<]. CityFibre response dated 16 March 2023 to s135 notice of 13 March 2023, question 4.

- 4.55 Thus, under the Equinox 2 Offer, [redacted].²⁶⁶ In terms of connection charges, [redacted]. As set out in Annex 2, Openreach's average connection charge under the Equinox 2 Offer is in the region of £[redacted]. This is [redacted] CityFibre's connection charge.
- 4.56 As explained above, [redacted].²⁶⁷
- 4.57 [redacted] pointed to [redacted]. However, as explained above, in its response to the Consultation [redacted].²⁶⁸ [redacted] internal contemporaneous documents corroborate this and indicate that [redacted].
- a) In May 2022, [redacted].²⁶⁹
 - b) In June 2022, [redacted].²⁷⁰
 - c) In August 2022, [redacted].²⁷¹
 - d) In September 2022, [redacted].²⁷²
- 4.58 CityFibre stated that [redacted].²⁷³ However, as explained in Annex 4, [redacted].
- 4.59 CityFibre stated that [redacted]. We do not consider that this suggests that Openreach's FTTP prices raise *prima facie* concerns. CityFibre's and Openreach's overall take-up will be affected by their own business models and strategic decisions, which are different. For example, Openreach sells FTTP via BT (both companies are part of the BT Group). In addition, CityFibre (unlike Openreach) has not reached a supply agreement with Sky, [redacted].
- 4.60 CityFibre pointed to [redacted].
- 4.61 In summary, [redacted].
- [redacted]
- 4.62 We have considered [redacted] pricing since [redacted].²⁷⁴
- 4.63 [redacted] in the Consultation.²⁷⁵ [redacted].²⁷⁶ [redacted].
- 4.64 [redacted].²⁷⁷
- 4.65 In terms of rental charges, [redacted].

²⁶⁶ [redacted].

²⁶⁷ We have not placed weight on CityFibre's modelling, which is described in paragraph 4.12. That modelling assumes [redacted]. Given these issues, we have not investigated the detailed assumptions underlying CityFibre's estimates, including whether they are reasonable and consistent.

²⁶⁸ [redacted] Consultation response, page 4.

²⁶⁹ [redacted]. Submitted on 15 February 2023 in response to s135 notice dated 20 January 2023, questions 1 and 2.

²⁷⁰ [redacted]. Submitted on 15 February 2023 in response to s135 notice dated 20 January 2023, questions 1 and 2.

²⁷¹ [redacted]. Submitted on 15 February 2023 in response to s135 notice dated 20 January 2023, question 2.

²⁷² [redacted]. Submitted on 15 February 2023 in response to s135 notice dated 20 January 2023, questions 1 and 2.

²⁷³ CityFibre did not refer to [redacted] (CityFibre's response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1 and Attachment 1). We discuss Vodafone's use of CityFibre FTTP in Annex 4. In summary, [redacted]. Also, [redacted]. Internal email to Zen's CEO dated 24 March 2023, submitted in Zen response dated 12 April to Ofcom's information request of 23 March 2022, question 13.

²⁷⁴ [redacted] response dated 27 February 2023 to s135 notice dated 22 February 2023, question 1. It has [redacted].

²⁷⁵ Consultation, paragraphs 3.116-3.117.

²⁷⁶ [redacted] response dated 27 February 2023 to s135 notice dated 22 February 2023, question 1.

²⁷⁷ [redacted] response dated 10 May 2023 to s135 notice dated 2 May 2023, question 2.

4.66 In terms of connection charges, [X]. As set out in Annex 2, Openreach’s average connection charge under the Equinox 2 Offer is in the region of £[X]. This is [X] connection charge.

4.67 In summary, [X].

VMO2

4.68 VMO2 currently has the largest gigabit capable network in the UK, and the second largest overall network, after Openreach.²⁷⁸

4.69 VMO2 engaged in discussions to [X].²⁷⁹ During these discussions, [X].²⁸⁰

4.70 [X]. However, for the main ISPs, Openreach’s FTTP rental charges under the Equinox 2 Offer are around [X]% – [X]% lower than under the Equinox 1 Offer.²⁸¹ Thus, [X].

4.71 VMO2 stated that [X].²⁸²

4.72 In summary, [X].

Ofcom’s position

4.73 As explained above, we have considered whether the level of Openreach’s prices under the Equinox 2 Offer raises *prima facie* concerns that would lead us to decide to investigate them in further detail. In considering this, we have had in mind whether the Equinox 2 Offer prices may be set at a level that prevents material and sustainable competition to Openreach emerging in Area 2.

4.74 As explained above:

- a) Openreach’s average FTTP price under the Equinox 2 Offer is above the top end of the estimated range for the unit cost of a reasonably efficient altnet in Area 2.
- b) [X] is [X].
- c) [X] is [X].

4.75 Having assessed this evidence in the round, we do not at this time have *prima facie* concerns that would lead us to decide to investigate the level of the Equinox 2 Offer prices in further detail.

²⁷⁸ In the future, [X]. Nexfibre response dated 27 February 2023 to s135 notice dated 22 February 2023, questions 1 and 2.

²⁷⁹ VMO2 response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1.

²⁸⁰ In the case of [X]. VMO2 response dated 28 February 2023 to s135 notice dated 22 February 2023, question 2. [X].

²⁸¹ Ofcom calculations using subscriber figures for January 2023. See Annex 2 for further details.

²⁸² VMO2 response dated 28 February 2023 to s135 notice dated 22 February 2023, question 1.

Area 3

Stakeholders' views

- 4.76 Fern Trading, the Joint Respondents and a confidential respondent [X] stated that only Openreach has the ability to set nationwide prices that reflect its average nationwide costs, rather than the higher costs of build in Area 3.²⁸³
- 4.77 The 2021 Cost Model estimated the costs of an efficient FTTP entrant in Area 2. INCA stated that Ofcom should separately assess the impact of the Equinox 2 Offer in Area 3. In particular, INCA stated that Ofcom should compare the Equinox 2 Offer prices against an estimate of costs in Area 3 (which are higher than costs in Area 2).²⁸⁴ Axione, Fern Trading, the Joint Respondents and a confidential respondent [X] made a similar point.²⁸⁵
- a) The Joint Respondents, INCA and Zzoomm considered that separately assessing the impact on competition in Area 3 is appropriate since Area 3 was identified as a distinct market in the WFTMR Statement.²⁸⁶ As a result, INCA considered that it is unreasonable to assume that Openreach's prices cannot differ between Area 2 and Area 3.²⁸⁷
 - b) Fern Trading, The Joint Respondents, INCA and Zzoomm and a confidential respondent [X] stated that the WFTMR wrongly assumed that material and sustainable competition would not develop in Area 3.^{288 289}
- 4.78 INCA also stated that SMP condition 8.6 applies to both Area 2 and Area 3. It characterised Ofcom as having applied that condition using different criteria in Area 3.²⁹⁰
- 4.79 Openreach stated that introducing new restrictions on Openreach's pricing in Area 3 to promote entry would be a fundamental change to the policy position in the WFTMR

²⁸³ Fern Trading Consultation response, paragraphs 15-16 on page 4. Joint Consultation Response, paragraph 136. [X] Consultation response, pages 2 and 4.

²⁸⁴ INCA Area 3 Submission, paragraphs 35 and 45. INCA appeared to characterise this as applying a "fair bet" principle to altnets' investments (paragraph 32).

²⁸⁵ Axione Consultation response. Fern Trading Consultation response, paragraph 3 on page 1, paragraph 15 on page 7 and paragraph 17 on page 8. Joint Consultation Response, paragraph 187; also paragraph 136. [X] Consultation response, pages 1 and 4.

²⁸⁶ Joint Consultation Response, paragraphs 9(e) and 185. INCA and Zzoomm, 26 January 2023 geographic markets submission, paragraphs 5 and 14-15. Similarly, the INCA and Zzoomm, 26 January 2023 price levels submission referred to altnets' costs in each of Area 2 and Area 3 (see paragraph 7).

²⁸⁷ INCA Area 3 Submission, paragraphs 34-37 and 42-43.

²⁸⁸ INCA also stated that Ofcom wrongly assumed Openreach would be ubiquitous in Area 3 (INCA Area 3 Submission, paragraphs 24-26 and 31). Fern Trading Consultation response, paragraphs 4-6 on pages 1-2 and paragraphs 1-10 on pages 5-6. Joint Consultation Response, paragraphs 57, 76 and 189. INCA and Zzoomm, 26 January 2023 geographic markets submission, paragraphs 6 and 18-19. INCA Area 3 Submission, paragraphs 5-19 and 32. [X] Consultation response, pages 3-4. For example, INCA stated that 2.3m premises in Area 3 were passed by altnets at the end of 2022 (INCA Area 3 Submission, paragraph 5) and the Joint Respondents stated that altnets plan to pass at least 6m premises in Area 3 with FTTP by December 2026 (Joint Consultation Response, Tables 2 and 3 and paragraphs 27, 55-56).

²⁸⁹ INCA also stated that the Government's Statement of Strategic Priorities ('SSP') requires Ofcom to foster infrastructure competition. INCA Area 3 Submission, unnumbered paragraph on page 10; also paragraphs 17 and 22. [The UK Government's Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services](#), designated on 29 October 2019.

²⁹⁰ INCA Area 3 Submission, paragraphs 20-21, 33, 39-40 and 44.

Statement.²⁹¹ In contrast, Fern Trading and a confidential respondent [X] stated that Ofcom should revisit its approach to assessing prices in Area 3.²⁹²

Ofcom's position

- 4.80 INCA appears to have misunderstood our framework for assessing the level of prices in the Equinox 2 Offer. SMP condition 8.6 requires Openreach to give 90 days' notification where the price is conditional on the volume and/or range of services purchased. Our assessment of conditional prices is set out in Section 3, using the analytical framework set out in paragraphs 3.18-3.26. That assessment of conditional prices applies to the Openreach FTTP footprint as a whole, contrary to INCA's suggestion that Ofcom applied different criteria in Area 2 and Area 3.
- 4.81 In contrast, our consideration of whether the level of Openreach's prices under the Equinox 2 Offer raises *prima facie* concerns is conducted against the background set out in paragraphs 4.13-4.20 above. Given that FTTP build costs vary across geographic locations, and will typically be higher in Area 3 than in Area 2, stakeholders are essentially asking us to revisit the decisions we took in the WFTMR Statement by effectively forcing geographically de-averaged pricing (i.e. higher Openreach prices in Area 3), in order to support altnet build in Area 3. We disagree.
- 4.82 The fact that Area 2 and Area 3 are different markets was reflected in the WFTMR Statement, including in our different objectives in these two areas (see paragraph 4.15 above). In the WFTMR Statement we did not pursue an approach of setting higher wholesale FTTP prices in Area 3, given the downsides of such a policy and our conclusion that material and sustainable competition to Openreach in Area 3 was unlikely. Our comparison of the results of the 2021 Cost Model against the 40/10 price cap was conducted as part of our decision on remedies in Area 2, not in Area 3.²⁹³ The fact that altnet build has occurred in Area 3 during a period when Openreach's (nationwide) FTTP prices were higher does not provide a clear basis for revisiting that conclusion about material and sustainable competition.
- 4.83 In any event, as explained above, revisiting the decisions taken in the WFTMR Statement at an earlier stage than the next market review is not something we would do lightly. Rather, we consider the next market review to be the place to re-evaluate our approach to regulation, in the light of developments since March 2021.²⁹⁴

²⁹¹ Openreach Consultation response, paragraphs 4.1(v) and 4.25-4.27.

²⁹² Fern Trading Consultation response, paragraphs 21-23 on pages 8-9. [X] Consultation response, pages 2-4.

²⁹³ WFTMR Statement, Volume 4, paragraph 1.37 which is part of a section titled "*Price regulation in Area 2*".

²⁹⁴ We address INCA's comment about the SSP in Section 6 with as part of our consideration of comments on process and legal duties.

5. Openreach discussing and developing discounts

Ofcom's position in the Consultation

- 5.1 In our Consultation we noted stakeholder concerns that the Equinox 2 Offer is part of an Openreach practice of repeatedly amending its FTTP prices that acts as a barrier to altnet entry and expansion. We said that this potential competition concern was wider than the specific terms of the Equinox 2 Offer. For example, it also depends on the impact that Openreach's previous conduct has had on ISPs' incentives to commit volumes to altnets and the impact that the potential for future changes to Openreach's FTTP pricing could have.
- 5.2 Although this issue does not form part of the 90 day process for reviewing the Equinox 2 Offer we nonetheless considered whether the submissions by stakeholders raised *prima facie* concerns that would lead us to decide to further investigate the issues raised. At the time of our Consultation we noted that we were collecting evidence from ISPs and altnets to enable us to reach a view on whether to investigate this matter further.

Stakeholders' views

- 5.3 CityFibre said that Openreach's continual dialogue with ISPs about future FTTP offers is disincentivising ISPs from engaging with altnets and creating broader uncertainty in the market, which is in turn deterring investment in altnets and undermining their build plans.^{295 296}
- 5.4 CityFibre said that Openreach's protracted negotiations with the ISPs are having a profound effect on CityFibre's ability to win ISPs' business; [redacted].²⁹⁷
- 5.5 CityFibre said that [redacted].²⁹⁸
- 5.6 VMO2 said that Openreach is engaging in repeated and extended discussions with a small number of large ISPs about the nature of new pricing offers. It said Openreach's strategy of signalling forthcoming updated offers/pricing to its customers well in advance of their publication, acts as an additional barrier to ISPs making commitments to altnets. VMO2 claimed that ISPs fear that entering into agreements with altnets would endanger their ability to meet future Equinox terms and thus risk their current and future discounts.²⁹⁹

²⁹⁵ CityFibre Consultation response, paragraph 6.2. See also paragraphs 1.7(vi) and 2.11.

²⁹⁶ In its letter of 13 January 2023 CityFibre [redacted]. CityFibre asked for its letter to Ofcom of 13 January 2023 to be incorporated into its Consultation response.

²⁹⁷ CityFibre Competition Act Complaint, paragraphs 1.11 and 1.12.

²⁹⁸ CityFibre Competition Act complaint, paragraph 1.6.

²⁹⁹ VMO2 Consultation response, paragraph 186.

- 5.7 VMO2 said that [redacted].³⁰⁰
- 5.8 VMO2 maintained that it was not apparent from the Consultation whether Ofcom had gathered or intended to gather internal documents from Openreach to directly satisfy itself of Openreach’s “*true intent behind its pricing conduct.*”³⁰¹
- 5.9 Nexfibre said that Openreach price instability could lead to ISPs expecting further variations on Equinox and so deter them from making long-term commitments to alternative networks.³⁰²
- 5.10 Smaller altnets have also raised concerns about pricing instability. The Joint Respondents said that Openreach is engaging in a near-continuous negotiation process with its largest ISP customers for new discount schemes and that this raises the cost of switching for ISPs who fear they may lose out on future discounts.³⁰³ A confidential respondent [redacted]³⁰⁴ and G.Network³⁰⁵ said that unexpected reductions in price by Openreach create uncertainty, which harms their ability to secure investment and deters ISPs from switching. [redacted]³⁰⁶ and Axione³⁰⁷ said that [redacted].
- 5.11 Openreach said that the process of negotiating prices and responding to customer demands is a clear example of competition on the merits and reflects legitimate commercial relationships that are beneficial to both ISPs and UK consumers. Openreach said that it does not accept that its pricing offers are unduly complex or numerous and that ISPs are well able to assess them, just as they are able to assess offers from Openreach’s competitors.³⁰⁸
- 5.12 Sky said that it does not consider that the Equinox 2 Offer is part of an Openreach practice of repeatedly amending its FTTP prices that could act as a barrier to altnet entry and expansion. It said Openreach notifying the Equinox 2 Offer 18 months after the Equinox 1 Offer does not amount to “repeatedly amending” its FTTP prices. Sky said that the frequency of Openreach’s FTTP discount offers has no bearing on Sky’s ability to make decisions on whether to use altnets because Sky knows that Openreach offers cannot introduce: (i) discounts that prevent altnets from profitably competing for Sky’s business; or (ii) loyalty inducing features that prevent Sky from shifting some of its demand to altnets. [redacted].³⁰⁹
- 5.13 TalkTalk said that concerns from altnets about Openreach frequently amending its FTTP prices are unfounded and unreasonable. It said changes in prices and terms should generally be seen as a sign of a healthy market and whilst this can create uncertainty and risk it should be considered as an inherent part of a competitive market. It said that there

³⁰⁰ VMO2 Consultation response, paragraph 196.

³⁰¹ VMO2 Consultation response, paragraph 209.

³⁰² Nexfibre Consultation response, paragraph 12.

³⁰³ Joint Consultation Response, paragraph 223.

³⁰⁴ [redacted] Consultation response page 3.

³⁰⁵ G.Network Consultation response, pages 7-8.

³⁰⁶ [redacted] Consultation response, paragraph 25.

³⁰⁷ Axione Consultation response, page 2

³⁰⁸ Openreach Consultation response, paragraphs 1.16(ii) and 5.2.

³⁰⁹ Sky Consultation response, pages 4 and 5.

has not been that much change in Openreach FTTP prices and that these changes are manageable since ISPs and altnets are generally well resourced and sophisticated actors.³¹⁰

Ofcom's assessment

Background

- 5.14 Openreach started discussions with ISPs regarding the Equinox 1 Offer in around April 2021. It then notified Equinox 1 to Ofcom on 1 July 2021 with the offer coming into force on 1 October 2021. [X].³¹¹ During this period, Openreach also began parallel discussions with other ISPs.³¹² These discussions included a potential offer with targets to migrate an ISP's existing legacy customer base to Openreach FTTP. As envisaged in paragraph A11.8 of the WFTMR Statement, in April 2022 Openreach discussed its proposals for this 'percentage of base' offer with Ofcom on an informal basis. We subsequently shared some initial views/concerns with Openreach. The current Equinox 2 model emerged around June 2022. This pricing arrangement was then notified to Ofcom on 14 December 2022 with the offer intended to come into force on 1 April 2023.
- 5.15 This alleged competition concern is centred on the hypothesis that Openreach's practice of discussing and developing discounts with ISPs is causing ISPs to avoid making use of altnets. This could be because it creates an expectation of future conditional discounts that the ISP may not be able to exploit if it has committed to an altnet, future low prices that the ISP would not be able to exploit if it has committed volumes to an altnet or because of a lack of resources to consider alternative offers. This in turn could act as a barrier to altnet entry and expansion into the supply of wholesale FTTP services.
- 5.16 As noted above, this issue is wider than the specific terms of the Equinox 2 Offer and as such does not form part of the 90 day process for reviewing the Equinox 2 Offer. We have nonetheless considered whether the submissions by stakeholders raise *prima facie* concerns that would lead us to decide to further investigate the issues raised.
- 5.17 Our objective in the WFTMR was to promote competition and investment in gigabit-capable networks by Openreach and altnets. We said that our regulation was focused on encouraging competition between different networks where viable, which will provide high quality services, choice and affordable broadband for consumers throughout the UK.
- 5.18 We were concerned about the potential for Openreach to introduce loyalty inducing commercial terms and we also wanted to put a framework in place that would give altnet investors more confidence, and market participants greater clarity, than if we were relying

³¹⁰ TalkTalk Consultation response paragraphs 5.1-5.4.

³¹¹ [X] response to Ofcom's s135 notice dated 20 January 2023, paragraph 14. Openreach also noted that the changes introduced by Equinox 2 were "driven by Openreach's own [ISP] customers who requested more favourable commercial terms in order to drive further FTTP take-up by increasing the pace at which they could upgrade their end customers from copper-based legacy services to ultrafast-capable FTTP connections" (Openreach Consultation response, paragraph 1.11).

³¹² For example, [X] board extract from March 2022 notes the new Openreach proposed discount scheme. [X] response to Ofcom's s135 information notice dated 20 January 2023, question 3.

on *ex post* competition law alone.³¹³ However, we did not want to deter Openreach from bringing forward commercial terms that ultimately benefit consumers. We were also supportive of Openreach encouraging migration to full fibre and going beyond our copper retirement regulation. The framework we set out in the WFTMR reflects and balances these multiple considerations.

- 5.19 The WFTMR established the 90 day process for the introduction of certain commercial terms (such as conditional offers) that might prevent retail ISPs from using competing networks, so stifling investment. Through this process we can intervene if we consider that any conditional discount schemes are harmful to competition.³¹⁴
- 5.20 However, we decided in the WFTMR not to prohibit Openreach *ex ante* from offering conditional discounts. In part this was because we considered that stronger regulatory measures in this area may deter Openreach from bringing forward commercial terms that ultimately benefit consumers.³¹⁵
- 5.21 We also did not seek to constrain Openreach's ability to discuss and develop discounts and offers with its ISP customers. As noted above, it was a core objective of the WFTMR to establish network competition in the supply of FTTP broadband in as many parts of the UK as possible. One of the main reasons for adopting this strategy was that network competition would incentivise providers, including Openreach, to compete, for example by reducing their prices and/or offering better services.³¹⁶ On the face of it, Openreach discussing and developing discounts on its wholesale FTTP prices is a positive development. Regulatory restrictions in this area carry a risk of a 'chilling effect' on the type of network competition we wanted to encourage through the WFTMR and risk depriving customers of the benefits of robust competition.
- 5.22 The WFTMR Statement set out our decisions on the regulation of various fixed telecoms markets and the regulatory restrictions that apply to Openreach for the 5 year period to March 2026. Following that statement and the expectation of continued regulatory stability, altnets and Openreach have invested significant sums. Ofcom recognises the importance of providing a predictable, stable regulatory environment. We would generally expect the next market review to be the place to re-evaluate our approach to regulation, in the light of developments since March 2021. Potentially revisiting the decisions taken in the WFTMR Statement is not something we would do lightly. As discussed in section 4, it is in our view premature to suggest that the regulatory environment established in the WFTMR Statement is failing to achieve our objectives.

³¹³ WFTMR Statement, Volume 3, paragraphs 7.152-7.153 and 7.169-7.171.

³¹⁴ The WFTMR also prohibited Openreach from offering geographic discounts on its superfast and full fibre broadband wholesale services. This remedy prevents Openreach from targeting discounts at the geographic areas where there are competing networks which considerably increases the cost of a strategy by Openreach to use low prices to drive out competition. The WFTMR also included an *ex ante* assessment to test whether the regulated price cap was too low to allow a reasonably efficient competitor to recover its costs.

³¹⁵ WFTMR Statement, Volume 3, paragraphs 7.152 and 7.169.

³¹⁶ WFTMR Statement, Volume 1, Section 2 sets this out more fully.

5.23 It is against this background that we have considered whether stakeholders' submissions about Openreach's practice of discussing and developing discounts with ISPs raises *prima facie* concerns that would lead us to decide to investigate this in further detail.

Ofcom's view

5.24 To help us assess this concern we collected contemporaneous internal governance documents from the larger independent ISPs (Sky, TalkTalk and Vodafone)³¹⁷ and from the largest FTTP network operators (CityFibre, Openreach and VMO2).³¹⁸ We reviewed more than 120 internal documents covering the period from the publication of the WFTMR in March 2021 to January 2023.

5.25 Taken as a whole, the evidence we saw from internal governance documents does not support the hypothesis that ISPs are dissuaded from using altnets due to an expectation of future conditional discounts, future low prices or a lack of resources, as a result of Openreach's practice of discussing and developing discounts with them.

5.26 Sky has not announced a supply agreement with CityFibre or any other altnet. Its documents show that [redacted].³¹⁹

5.27 [redacted].³²⁰

5.28 [redacted].³²¹

5.29 [redacted].³²²

5.30 [redacted].³²³

5.31 Sky said that [redacted].³²⁴

5.32 TalkTalk has supply arrangements in place with both Openreach and CityFibre. TalkTalk documents indicate that [redacted].³²⁵ [redacted].³²⁶ TalkTalk documents show that it [redacted].³²⁷

³¹⁷ We asked the larger ISPs for internal governance documents that included a discussion of the use of the Openreach network for the provision of FTTP broadband services as alternative option to using altnets; or actual or potential pricing offers or deals with Openreach. We also asked larger ISPs for internal governance documents that included discussion of whether they intend to use the VMO2 broadband network (including the Nexfibre network), the factors affecting that decision, or negotiations in relation to use of that network. We asked a similar question to Sky regarding the CityFibre network. We asked TalkTalk and Vodafone for internal governance documents that discuss factors which affect their ability to make use of the CityFibre network, or whether they intend to undertake any investments or systems changes, to facilitate the use of the CityFibre network.

³¹⁸ We asked Openreach for documents submitted to the Openreach board for the approval of the Equinox 2 Offer. We asked CityFibre and VMO2 for internal governance documents that refer to negotiations with Sky, TalkTalk or Vodafone for the supply of wholesale network services for the provision of broadband.

³¹⁹ Sky response to question 2 of the s135 notice dated 30 November 2022 and questions 1 and 2 of the s135 notice dated 20 January 2023, questions 1 and 2.

³²⁰ See for example, [redacted].

³²¹ See for example, [redacted].

³²² See, [redacted].

³²³ See for example, [redacted].

³²⁴ See Sky response to s135 notice dated 20 January 2023, paragraphs 10 and 11.

³²⁵ TalkTalk response to s135 notice dated 20 January 2023, question 1, 2 and 3. See for example, [redacted].

³²⁶ See for example, [redacted].

³²⁷ See for example [redacted].

- 5.33 VMO2 noted that, in its view [redacted].^{328 329}
- 5.34 Vodafone has supply arrangements in place with CityFibre and Openreach. Vodafone documents indicate that [redacted].³³⁰ [redacted].³³¹ [redacted]³³² and [redacted].³³³
- 5.35 We found no evidence of anticompetitive intent in the contemporaneous internal documents we collected from Openreach.³³⁴ We also reviewed internal documents from CityFibre and VMO2, which were broadly consistent with the submissions they provided to us.³³⁵
- 5.36 We also found no support for the hypothesis that TalkTalk or Vodafone favours the Openreach network when we reviewed data on orders made by those ISPs. As set out in Annex 4, the analysis of TalkTalk's and Vodafone's FTTP orders per premises passed [redacted].
- 5.37 As discussed above, we have considered whether the submissions made by stakeholders about Openreach discussing and developing discounts raise *prima facie* concerns that would lead us to decide to investigate the issues raised in further detail at this time. In doing so, we have had in mind that potentially revisiting the decisions taken in the WFTMR is not something we would do lightly and that regulatory restrictions in this area carry a risk of a 'chilling effect' on the type of network competition we wanted to encourage in the WFTMR. Having assessed the large number of contemporaneous documents we have obtained from ISPs and altnets and the data on new connections made by TalkTalk and Vodafone, our view is that this evidence taken as a whole does not support the hypothesis put forward by some stakeholders. We therefore do not have *prima facie* concerns that would lead us to decide to investigate the issues raised in further detail at this time.
- 5.38 In parallel to collecting and reviewing contemporaneous documents from ISPs and altnets, we have also had discussions with Openreach about the potential competition concerns raised by stakeholders. However, as discussed above, we have concluded that the evidence as a whole does not support stakeholders' concerns. We therefore do not have *prima facie* concerns that would lead us to decide to investigate the issues raised in further detail at this time. We note that Openreach plans to make some commitments regarding its future conduct.³³⁶ This includes that it does not intend to initiate any further price changes until 31 March 2026 and that it would not propose any new form of conditionality relating to the volume or range of services offered in respect of FTTP rental prices, which goes beyond the conditionality already contained in the Equinox 2 Offer. These commitments may

³²⁸ [redacted].

³²⁹ See [redacted].

³³⁰ Vodafone response to questions 1, 2 and 3 of the s135 notice dated 20 January 2023. See for example [redacted].

³³¹ See for example [redacted].

³³² See for example [redacted]. [redacted].

³³³ [redacted].

³³⁴ Openreach response to question 10 of the s135 notice dated 22 February 2022. Openreach also provided two documents submitted to the BT Group Board (email from Openreach to Ofcom dated 11 May 2023, by way of follow up to the s135 notice dated 22 February 2023).

³³⁵ CityFibre response to Questions 1, 2 and 3 of the s135 notice dated 20 January 2023 and VMO2 response to question 1 of the s135 notice dated 19 January 2023.

³³⁶ Letter from Clive Selley to Dame Melanie Dawes, 12 May 2023.

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provide further clarity and be helpful for altnets and their investors. However, we have not relied on these commitments in reaching our conclusion.

6. Other issues raised by stakeholders

Other concerns raised by stakeholders

Stakeholders' views

- 6.1 In addition to the concerns discussed above, stakeholders raised the following issues with the Equinox 2 Offer:
- a) VMO2 stated that Ofcom should consider whether the Equinox 2 Offer unduly discriminates between ISPs. VMO2 stated that BT is likely to exhibit greater fidelity to Openreach than other ISPs.³³⁷
 - b) TalkTalk expressed concern about Openreach's contractual ability to increase FTTP prices in 2026/7.³³⁸ Fern Trading, VMO2 and a confidential respondent ([redacted]) were concerned about the degree to which the Equinox 2 Offer allows Openreach to raise prices in the future, once competition has been weakened.³³⁹
- 6.2 Stakeholders also raised the following issues in relation to the decisions taken in the WFTMR Statement:
- a) Axione stated that the FTTP 40/10 anchor specified in the WFTMR Statement loses its relevance as a result of the Equinox 2 Offer, since Openreach is now pricing some FTTP products below that anchor.³⁴⁰
 - b) [redacted] expressed concerns about Ofcom's stop sell regulations.³⁴¹

Ofcom's analysis

- 6.3 In terms of stakeholders' other concerns with the Equinox 2 Offer:
- a) We have not assessed whether the Equinox 2 Offer unduly discriminates between ISPs. As set out in paragraphs 2.37 above, the purpose of the 90 day process is not to address general competitive impacts on individual ISPs but to consider Openreach commercial terms that might undermine new network build. Should stakeholders consider that undue discrimination between ISPs is a significant concern then they should provide a separate, evidenced submission that we will consider as part of a separate process in accordance with the relevant SMP conditions.
 - b) In the WFTMR Statement we decided to only charge control Openreach's 40/10 products and to give it the freedom to choose the level of prices for its other FTTP products. Also, as explained above, we do not consider that the Equinox 2 Offer

³³⁷ VMO2 Consultation response, paragraphs 71-73 and 79.

³³⁸ TalkTalk Consultation response, paragraph 6.2.

³³⁹ Fern Trading Consultation response, paragraph 2 on page 1. VMO2 meeting slides, 12 January 2023, slide 2. [redacted], paragraphs 1.6.3 and 4.1-4.7.

³⁴⁰ Axione Consultation response.

³⁴¹ [redacted] Consultation response, pages [redacted].

contains terms that harm competition between networks. We thus do not consider that the terms in the Equinox 2 Offer that allow Openreach to increase its FTTP prices over time raise competition concerns and note that they are consistent with the current SMP conditions and charge controls.

- 6.4 Concerns about the 40/10 FTTP charge control or our decisions on stop sell lie outside the scope of this process. We have therefore not considered them further.

Comments on process and legal duties raised by stakeholders in response to Consultation

Stakeholders' views

Consideration of altnets' views

- 6.5 CityFibre submitted that in carrying out its assessment of the Equinox 2 Offer, Ofcom must give equal attention to the views of altnets.³⁴² The Joint Respondents also referred to Ofcom's "*strong bias*" to protect Openreach's FTTP business plan and Ofcom's "*complete disregard*" of the smaller market entrants.³⁴³ They also maintained that Ofcom's "*consistent bias*" reflects "*a desire [...] to find a rationale to support a decision not to block [the Equinox 2 Offer]*".³⁴⁴

Lack of evidence and provisional assessment based on incomplete information

- 6.6 The Joint Respondents said that our analysis of the Equinox 2 Offer was "*deficient*" and "*incomplete*".³⁴⁵ VMO2 submitted that "*as an expert regulator*", Ofcom was "*afforded a wide discretion to exercise [its] power*".³⁴⁶ However, Ofcom must act rationally and must ensure that the inquiries it makes ahead of its final decision are "*sufficient to arrive at a rational conclusion*".³⁴⁷ VMO2 also said that Ofcom did not sufficiently use its information gathering powers to "*gather the evidence necessary to form a rational conclusion*".³⁴⁸
- 6.7 VMO2 submitted that some of the language used by Ofcom, notably in respect of the efficacy and reliability of the Failsafe Mechanism, shows that Ofcom made "*unquantified speculation or assertion*" to form its provisional conclusion.³⁴⁹ VMO2 said that any final decision must be based on evidence provided by the ISPs, and if necessary, Ofcom should

³⁴² Cityfibre Consultation response, paragraph 1.6.

³⁴³ Joint Consultation Response, paragraph 10.

³⁴⁴ Joint Consultation Response, paragraph 232.

³⁴⁵ Joint Consultation Response, paragraph 242.

³⁴⁶ VMO2 Consultation response, paragraph 19.

³⁴⁷ VMO2 Consultation response, paragraph 20.

³⁴⁸ VMO2 Consultation response, paragraph 204.

³⁴⁹ VMO2 also gives examples of "*assumptions*" made by Ofcom regarding the Openreach Order Mix and the level of orders that would be switched in overlap areas. Consultation response, paragraph 205. CityFibre also said that Ofcom made assertions regarding the comparability of the Failsafe Mechanism with other Openreach discount contracts, CityFibre Consultation response, paragraph 3.26(i). The Joint Respondents said that Ofcom dismissed concerns about the Failsafe Mechanism's workability by stating simply that ISPs are "*sophisticated businesses*", Joint Consultation Response, paragraph 9(b).

use its formal information gathering powers to ensure it has carried out “sufficient enquiry to deliver a robust decision.”³⁵⁰

- 6.8 VMO2 also suggested that Ofcom should not “rely on assertions about how the market may, or may not, play out” but “should undertake a more complete analysis, that evaluates a wide range of circumstances”.³⁵¹
- 6.9 VMO2 further said that it was not clear whether Ofcom had requested Openreach’s internal board papers to form its provisional conclusion on the Equinox 2 Offer, as it did for its assessment of the Equinox 1 Offer, and to consider the offer in the context of Openreach commercial incentives to “foreclose rival altnets.”³⁵² Nexfibre also made the point that it did not appear, from the Consultation, that Ofcom used its information gathering powers to “discover what was discussed orally and on paper concerning [the Equinox 2 Offer]”.³⁵³
- 6.10 A confidential respondent [X] referred more generally to the “informal and piecemeal evidence gathering exercise” carried out by Ofcom noting that it had not been issued with any formal or informal request for information ahead of the Consultation.³⁵⁴

Insufficient time to take due considerations of all relevant elements

- 6.11 Several stakeholders submitted that Ofcom did not have enough time to consider the consultations responses and evidence to reach a final decision by or on the initial deadline of 31 March 2023.³⁵⁵ VMO2 submitted that SMP condition 8.6 does not place any restriction on Ofcom to conduct a review within 90 days, but only requires Openreach to notify its commercial terms no less than 90 days before implementation.³⁵⁶
- 6.12 VMO2 also said that it had provided preliminary submissions to Ofcom prior to the Consultation (as did other stakeholders) and that a wide range of documents had been provided to Ofcom both informally and under Ofcom’s statutory powers. VMO2 said that not all of these documents had been sought in a timeframe allowing Ofcom to consider them before making any provisional finding and that Ofcom confirmed that information from ISPs was also incomplete or not fully analysed at the time it formed its provisional view.³⁵⁷

³⁵⁰ VMO2 Consultation response, paragraph 206.

³⁵¹ VMO2 Consultation response, paragraph 46.

³⁵² VMO2 Consultation response, paragraph 54, 57.

³⁵³ Nexfibre Consultation response, paragraph 47.

³⁵⁴ [X] Consultation response, introduction.

³⁵⁵ VMO2 Consultation response, paragraph 220, paragraph 222. Nexfibre Consultation response, paragraph 42 to 56. [X] Consultation response, introduction.

³⁵⁶ VMO2 Consultation response, paragraph 224.

³⁵⁷ VMO2 Consultation response, paragraphs 25-26.

Extensive redactions

- 6.13 Several respondents explained that the Consultation document had been extensively redacted. Nexfibre stated that a *“large amount of key evidence and underlying analysis”* had been redacted, referring to analysis on the OMTs and the Legacy Cross-Check.³⁵⁸
- 6.14 Some stakeholders submitted that the redactions carried out by Ofcom made it impossible to understand Ofcom’s position and to meaningfully reply to the Consultation.³⁵⁹ VMO2 maintained that Ofcom had *“presented a degree of reasoning underpinning its provisional decision”* but did not provide, in sufficient detail, all the factors that Ofcom sought to rely on to reach its provisional conclusion. On the difficulties that some ISPs may have in reaching the targets, VMO2 said that it was not able to establish the *“precise factual position”* due to the *“extensive redactions”* (although it then set out its understanding of the position).³⁶⁰
- 6.15 The Joint Respondents said that Ofcom’s lack of transparency meant that stakeholders were not able to fully scrutinise Ofcom’s analysis and assumptions. For example, they stated that it was *“impossible”* for stakeholders to assess whether Ofcom’s assumptions about the blend of Openreach FTTP products purchased by ISPs was reasonable.³⁶¹
- 6.16 VMO2 further said that altnets do not have access to key evidence underpinning Ofcom’s assessment of the Failsafe Mechanism as shown by the *“extensive redactions”* made to the Consultation.³⁶²

Transparency on cost modelling

- 6.17 The Joint Respondents commented on the subsequent publication of corrections to the non-confidential version of the 2021 Cost Model, saying that the provision of *“a revised model at such a late stage in the consultation [was] highly obstructive”* to stakeholders providing meaningful responses to the Consultation.³⁶³

Failure to have regard to all relevant considerations

- 6.18 Several respondents submitted that Ofcom failed to have regard to all the considerations that were relevant to properly assess the Equinox 2 Offer. VMO2 submitted that Ofcom failed to consider several specific points and must consider all of these as part of its final decision in line with its duty to give due consideration to all consultation responses.³⁶⁴

³⁵⁸ Nexfibre Consultation response, paragraph 53. Keystone Report at paragraph 94 which stated that *“the details of the ISP performance against the OMTs are excised from Ofcom’s consultation.”*

³⁵⁹ Cityfibre Consultation response, paragraphs 3.10(i) and 3.11. VMO2 Consultation response, paragraphs 100 and 210-215.

³⁶⁰ VMO2 Consultation response, paragraph 100.

³⁶¹ Joint Consultation Response, paragraphs 128-129.

³⁶² VMO2 Consultation response, paragraph 115.

³⁶³ Joint Consultation Response, paragraphs 143-148.

³⁶⁴ VMO2 Consultation response, paragraphs 202-203. Specifically, VMO2 submitted that Ofcom had failed to (a) consider the effects of Equinox 2 on a *“dynamic”* basis (as inherently required by Ofcom’s duties and objectives); (b) undertake an analysis as set out in the WFTMR of the materiality and objective justifications for the OMTs; and (c) take account of the

6.19 The Joint Respondents submitted that, in addition to not being transparent, Ofcom's assessment was not comprehensive, had failed to take account of the SSP and was *"inconsistent with Ofcom's legal duties"*.³⁶⁵ They state that Ofcom does not have a duty to assist Openreach in migrating to full fibre, and Openreach's aim to migrate is both an irrelevant consideration and not an appropriate justification for the introduction of price levels and structures that could harm competition.³⁶⁶ They further stated that a decision to allow the Equinox 2 Offer to proceed would prioritise near term reduction in prices over altnet investment, contrary to the SSP.³⁶⁷ They considered that the Equinox 2 Offer could cause significant harm to network competition which is in direct conflict with Government policy, Ofcom's duties and Ofcom's own published policies.³⁶⁸ INCA also stated that the SSP requires Ofcom to foster competition.³⁶⁹ Nexfibre set out Ofcom's duties and the requirement to promote competition. It stated that Ofcom is not complying with its duties to promote competition by allowing implementation of the Equinox 2 Offer.³⁷⁰

Ofcom's analysis

Consideration of altnets' views

- 6.20 We do not accept the Joint Respondents' submission that the analysis conducted by Ofcom was consistently biased with a view not to block the Equinox 2 Offer. We also do not accept the suggestion made by CityFibre that altnets' views may have been given "less attention" than Openreach when we carried out our analysis.
- 6.21 Our assessment of the Equinox 2 Offer has been carried out having regard to our statutory duties, including the requirement to have regard to principles of best regulatory practice.³⁷¹
- 6.22 Various stakeholders expressed views on the Equinox 2 Offer before the publication of our Consultation and in response to that document, and ahead of our final decision. In line with our statutory duties, our provisional analysis and our final assessment reflects the concerns and views expressed by all stakeholders, including altnets, either through written submissions and/or meetings with us. In line with the requirement to act in a transparent and accountable manner, our Consultation and our statement give a detailed account of the views expressed by all stakeholders before considering each of these concerns in turn to conduct our provisional analysis and reach our final decision.³⁷²

"impact of drip-feed pricing as part of its Equinox 2 analytical framework". These specific substantive points are addressed elsewhere in this statement.

³⁶⁵ The Joint Consultation Response, paragraphs 24 and 232.

³⁶⁶ Joint Consultation Response, paragraphs 58-64.

³⁶⁷ The Joint Consultation Response, paragraphs 35-36 and 137

³⁶⁸ The Joint Consultation Response, paragraph 243.

³⁶⁹ INCA's Area 3 Submission, unnumbered paragraph on page 10; also paragraphs 17 and 22.

³⁷⁰ Nexfibre Consultation response, paragraphs 23-34.

³⁷¹ Section 3(3) of the Act.

³⁷² By way of illustration, see for example, paragraph 3.25 of our Consultation explaining that altnets' concerns could be grouped into four categories and that these four theories of harm were considered in turn throughout our provisional analysis.

6.23 The structure of our Consultation document and of our statement, as well as the detailed descriptions of the stakeholders' concerns show that the views of all stakeholders, including altnets, and their submissions were fully considered when we conducted our overall assessment.

Lack of evidence and provisional assessment based on incomplete information

6.24 We note VMO2's point that Ofcom has a wide discretion in the use and exercise of our information gathering powers. We do not accept the submission that we did not make sufficient use of our statutory powers or otherwise failed to make sufficient enquiry to form a rational conclusion on the Equinox 2 Offer.

6.25 We first note that our assessment of the offer builds upon the prior evidence, knowledge and analysis carried out in relation to the Equinox 1 Offer and our monitoring work in the interim period since then. Our Consultation explicitly, and extensively, referred to the evidence we gathered when detailing key elements of our analysis. This is true, for example, when comparing the key features of Openreach's FTTP prices and the prices offered by altnets,³⁷³ when considering the scale of the Equinox 2 Offer discounts,³⁷⁴ when conducting a detailed assessment of the altnet overlap of Openreach's FTTP footprint³⁷⁵ or when analysing ISP's performance against the OMTs.³⁷⁶

6.26 The evidence gathered for the purpose of our provisional analysis was further supplemented by the information requested under our statutory powers for the purpose of reaching our final conclusion, as set out in more detail throughout this statement.³⁷⁷ As explained in our update of 17 March 2023, we took the view that a publication of our final decision by the end of March would not be possible, as we considered that further gathering and analysis of additional information was necessary to address issues raised in response to the Consultation. The further evidence gathered since the Consultation has confirmed our provisional conclusion.

6.27 We note VMO2's submission that any final decision on the Failsafe Mechanism should be based on evidence gathered from ISPs. We used our formal information gathering powers to request copies of the final versions of any internal documents submitted to the ISPs' boards since 1 July 2022 discussing the Equinox 2 Offer and/or earlier iterations of this

³⁷³ Consultation, paragraphs 3.111-3.123.

³⁷⁴ Annex 6 to the Consultation.

³⁷⁵ Annex 7 to the Consultation. That annex also refers to data gathered for the purpose of Connected Nations, data gathered under our statutory powers.

³⁷⁶ Annex 8 to the Consultation.

³⁷⁷ We also used our statutory powers to confirm evidence that we had previously collected by way of non-statutory information requests prior to the Consultation (i.e. requests that were not made pursuant to s.135 of the Act). Given the time constraints of the 90-day process, requesting information first on a non-statutory basis allowed us to obtain information in writing and commence our analysis more quickly than if these first written requests were s.135 information requests. Due to the enforcement regime applicable to s.135 information requests, Ofcom and stakeholders have internal processes for drafting and responding to these requests that typically require additional time on both sides.

offer.³⁷⁸ We also formally requested Openreach to provide copies of the final versions of any internal documents submitted to the Openreach board for approval of the Equinox 2 Offer.³⁷⁹ We have taken all of this evidence into account in reaching our conclusion.

- 6.28 Finally, the absence of formal or informal request(s) to a particular stakeholder cannot in itself mean that the overall information gathering exercise carried out by us is flawed. Rather this shows that we exercised our discretion in gathering the specific information necessary to carry out our analysis and to reach a robust decision.

Insufficient time to take due considerations of all relevant elements

- 6.29 We do not agree with the suggestion that we have had insufficient time to fully consider the issues raised by stakeholders and the evidence gathered ahead of our final decision. We decided to postpone the publication of our decision having regard to the detailed and extensive submissions received in response to our Consultation. We took the view that the further gathering and analysis of information was necessary to properly consider the issues raised by respondents.

Extensive redactions in published version of the Consultation

- 6.30 The relevant legal framework prevents Ofcom from disclosing information relating to a particular business without consent unless one of the statutory exceptions apply; including where the information need to be disclosed for the carrying out of our functions.³⁸⁰ We are also required to carry out our duties having regard to the principles of transparency and accountability.³⁸¹ When publishing our Consultation, we carefully considered the level of disclosure sufficient to ensure transparency of our underlying reasoning. We also considered the confidentiality of the information gathered to reach our provisional view and have done the same in reaching our final conclusions here. Much of the information we have received pertains to commercially and competitively sensitive information, including information about current or very recent commercial negotiations, the dissemination of which could materially affect ongoing and future negotiations, and relations between suppliers, customers and competitors. We did not consider that it was necessary for us to disclose the redacted confidential information for stakeholders to understand and respond meaningfully to our Consultation.³⁸² To assist stakeholders as far

³⁷⁸ Section 135 notice dated 22 February 2023 to TalkTalk, question 14; section 135 notice dated 22 February 2023 to Sky, question 8; section 135 notice dated 22 February 2023 to Vodafone, question 14; section 135 notice dated 23 March 2023 to Zen, question 13. We also formally requested copies of any internal documents submitted to a governance body that mention the Failsafe Mechanism or any proposals of such mechanism in the draft Equinox 2 Offer since July 2022; section 135 notice dated 12 April 2023 to Sky, question 1; section 135 notice dated 12 April 2023 to TalkTalk, question 2; section 135 notice dated 12 April 2023 to Vodafone, question 2; section 135 notice dated 12 April 2023 to Zen, question 2.

³⁷⁹ Section 135 notice dated 22 February 2023 to Openreach, question 10. Openreach also provided two documents submitted to the BT Group Board (email from Openreach to Ofcom dated 11 May 2023, by way of follow up to the s135 notice dated 22 February 2023).

³⁸⁰ Section 393(1) and (2) of the Act.

³⁸¹ Section 3(3) of the Act.

³⁸² On the submission made by the Joint Respondents that stakeholders were not able to assess Ofcom's assumptions about the blend of Openreach FTTP products purchased by ISPs, we note that the approach described above was followed when considering disclosure and redactions in Annex 6 to the Consultation.

as possible, we also made subsequent minor amendments to the non-confidential version of our Consultation by publishing further unredacted text and provided high level summaries of other redacted information.

- 6.31 Though several respondents made the point that redactions in our published Consultation were too extensive, we note that stakeholders were able to submit extensive consultation responses (complemented in some cases by detailed expert reports) and provide us with detailed analysis of our provisional conclusion and reasoning. Several stakeholders explained that they understood specific and detailed aspects of our provisional analysis, for example on the ability of ISPs to meet the OMTs.³⁸³
- 6.32 We therefore remain of the view that the evidence and analysis contained in our published Consultation was sufficient to allow intelligent and meaningful response by stakeholders.
- 6.33 We also note that stakeholders can always provide their own evidence and information should they consider that this would support a different conclusion to the provisional view consulted on by Ofcom.

Transparency on cost modelling

- 6.34 We use the 2021 Cost Model to estimate a range of costs (entrant's costs) when considering whether Openreach's prices under the Equinox 2 Offer raises any *prima facie* concerns. For the purpose of that exercise, and for the reasons set out in more detail in Section 4 and Annex 7, we have not sought to revisit the modelling assumptions set in the WFTMR Statement. Rather we have sought to compare outputs of the 2021 Cost Model and the Equinox 2 Offer prices and made specific adjustments, on connection charges and indexation, to ensure consistency when carrying out the comparison. The corrections made to the non-confidential version of the 2021 Cost Model therefore do not impact on the cost ranges discussed in our Consultation and this statement. We therefore do not agree with the Joint Respondents that the publications of these corrections meant that stakeholders could not meaningfully respond to our Consultation. Further, and as explained, the errors identified only affect the published non-confidential version of the 2021 Cost Model.³⁸⁴

Failure to have regard to all relevant considerations

- 6.35 We do not accept stakeholders' assertions that we failed to have regard to all relevant considerations when conducting our assessment of the Equinox 2 Offer, including our legal duties and the SSP, or that we have taken into account irrelevant considerations.

³⁸³ For example, VMO2 said at paragraph 100 of its Consultation response that despite not being able to "establish the precise factual position" due to "extensive redactions", it saw from Ofcom's analysis that "it was not only plausible that ISPs might be below the OMTs, but that that was, in fact, likely to be the case." CityFibre indicated that "Indeed it appears that ... ISPs have in fact struggled to meet the OMTs; and at least one major ISP ([X]) is expected to continue to do so." CityFibre Consultation response, paragraph 1.7(iii).

³⁸⁴ Ofcom's [Update 22 February 2023](#) - Formula errors in the non-confidential version of '2021 Cost Model'. We note that the errors did not exist in the model published in 2020 for consultation during the WFTMR.

- 6.36 As set out above, our policy objective in the WFTMR was to promote competition and investment in gigabit-capable networks by Openreach and altnets in as many areas of the UK as possible. The WFTMR set out a regulatory framework that involves a trade-off between, on the one hand, promoting competition and altnet investment and, on the other hand, allowing Openreach some flexibility to introduce commercial terms that would ultimately benefit consumers. We were also supportive of Openreach encouraging migration to full fibre and going beyond our copper retirement regulation to support its FTTP business case.
- 6.37 This is consistent with our legal duties and with the Government's strategic priorities of world-class digital infrastructure and furthering the interests of telecoms consumers. Having regard to the conclusion of the Government's Future Telecoms Infrastructure Review, the SSP noted that the most effective way to deliver nationwide gigabit-capable connectivity at pace is to promote competition and commercial investment where possible, and to intervene where necessary.³⁸⁵ In relation to its strategic priority of stable and long term regulation, the SSP also considered it desirable that regulation is imposed only where and to the extent necessary to address competition concerns, and ensure the interests of consumers are safeguarded as fibre markets become more competitive.³⁸⁶
- 6.38 When assessing the Equinox 2 Offer, we have also had regard to the need to balance these considerations of promoting competition and investment and furthering the interests of consumers, as well as the desirability of targeting regulatory intervention only where needed.³⁸⁷ For the reasons set out in detail throughout this statement, we have concluded that neither the OMTs nor the forecasting requirements potentially create a barrier to using altnets. We recognise that the Equinox 2 Offer may increase the commercial pressure on altnets insofar as it sharpens competition between networks. However, this is not in itself a reason for intervention. As noted above, Openreach is allowed to compete with altnets.³⁸⁸ .
- 6.39 Our conclusion is therefore that the Equinox 2 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.

³⁸⁵ SSP, paragraph 10.

³⁸⁶ SSP, paragraph 20.

³⁸⁷ In relation to the Joint Respondents' comment, we note that the SSP states at paragraph 18 as follows: "*The Government's aim is to promote investment and competition in world-class digital networks, to as many people and businesses as possible. Investment in new networks by BT and alternative providers is key to improving consumer outcomes, in terms of choice, service quality, and innovation. The Government's view is that promoting investment should be prioritised over interventions to further reduce retail prices in the near term.*" We have taken this into account in reaching our decision. In particular, we are not intervening to reduce retail prices and have had regard to the objectives of promoting investment and network competition throughout this statement.

³⁸⁸ Subject to compliance with the requirements and restrictions set out in the WFTMR and *ex post* competition law.

7. Conclusion

- 7.1 We have decided not to take action at this time to prevent the Equinox 2 Offer terms from being introduced.
- 7.2 In reaching our decision, we have considered the impact on competition. For the reasons set out above, we do not consider that the Equinox 2 Offer will have a material adverse impact on competition. We have considered the impact on different stakeholders:
- a) **Citizens and consumers:** Our conclusion is that the Equinox 2 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 2 Offer, altnets are likely to face stronger competition from Openreach. However, we conclude that the OMTs and forecasting requirements do not create a potential barrier to using altnets. Our conclusion is therefore that the Equinox 2 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 2 Offer allows it to engage in network-based competition, without compromising our objective of promoting investment in gigabit-capable networks.
- 7.3 In reaching our view, we have had regard to our duties under sections 3 and 4 of the Communications Act 2003. As discussed above, we have also had regard to the SSP.³⁸⁹

³⁸⁹ Annex 1 sets out the relevant legal framework in further detail.