

Your response

Question	Your response
<p>Question 1: Do you agree with our assessment of the Equinox Offer as set out above?</p>	<p>No</p>

Dolomite Solutions provides consulting services to a number of fibre operators in the UK, including a number of INCA members. This includes general regulatory advice, assistance with Code Powers, the calculation of Funds for Liabilities, the arrangement of Performance Bonds for same. In addition, we provide general consultancy services on resilience network design and submarine cable “fronthaul”. We also provide advice on data centre related connectivity, power, and operations.

We have contributed variously to other submissions and would not wish to repeat those here.

However, we would like to draw Ofcom’s attention to a competition law paper specifically looking at loyalty discounts entitled: -

“Loyalty Rebates under EU Competition and US Antitrust Law by Viktoria H.S.E. Robertson”¹

It was published by the Faculty of Law of the Vienna University and the author is Professor and Head of the Competition Law and Digitalization Group, Vienna University of Economics and Business; Professor of International Antitrust Law, University of Graz;

The opening section says: -

“As competition law generally strives for lower prices on the market, it can appear counter-intuitive to penalize rebates granted by companies with market power. However, on closer inspection the rationale that underpins the view that rebates can sometimes be anti-competitive emerges: Where a rebate is only granted based on conditions that induce loyalty or (near-)exclusivity on the buyer’s side, this can foreclose the seller’s competitors from access to the market, possibly even leading to the competitor’s market exit that ultimately benefits the seller.² While loyalty discounts can help to align the supplier and the purchaser’s interests, they can also prevent entry or expansion, lead to market exits, or involve below-cost pricing.³ The question, then, turns on how to distinguish between pro-competitive rebates that competitors can compete on, and anti-competitive rebates that may constitute vehicles to foreclose a market to competitors.”

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873148

² For an analysis of the foreclosure effects of loyalty rebates, see also Alexander Morell, Andreas Glockner and Emanuel V Towfigh, ‘Sticky Rebates: Loyalty Rebates Impede Rational Switching of Consumers’ (2015) 11 Journal of Competition Law and Economics 431.

³ Christian Ahlborn and David Bailey, ‘Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison’ (2006) 2 European Competition Journal 101, 108–10; Roger D Blair and Thomas Knight, ‘Bundled Discounts, Loyalty Discounts and Antitrust Policy’ (2020) 16 Rutgers Business Law Review 123, 130.

The paper goes on to look at the circumstances in which rebates would be a breach of Article 102 TFUE, now the Chapter II prohibition in the UK Competition Act, as amended. The Equinox discount scheme meets the criteria for an abuse of a dominant position and is therefore a Ch II breach.

The anecdotal evidence that the principal motive for the Equinox discounts is to damage competition, and therefore an abuse of a dominant position is that a senior BT manager was heard to say “[Equinox] will [expletive meaning damage] the altnets”.

We would urge Ofcom to consider whether as the paper shows, the principal or important effect of the proposed discount scheme is to reduce competition and restrict market entry.

If this is allowed to take place, it wrongly, in our view, puts potential short term benefits of fibre switch-over against longer term reductions in competition and choice. In particular, it is likely to affect the marginal areas where substantial Altnet investment is currently targeted.