



Ofcom Consultation

Openreach Proposed FTTP Offer starting 1 October 2021

Virgin Media O2 response

06 September 2021

Non-Confidential Response

1. INTRODUCTION

1. Virgin Media O2 (“**VMO2**”) welcomes the opportunity to respond to Openreach Proposed FTTP Offer Starting 1 October 2021 (“**this consultation**”).¹ We support Ofcom’s decision to issue a consultation. We believe it is critical that Openreach’s price plans are robustly scrutinised, and that Ofcom provides stakeholders with an opportunity to input at all stages of the process.
2. We remain of the view, however, that Openreach’s new price plan (“**Equinox**”) is likely to harm competition and undermine Ofcom’s strategic objective.
3. As a result, we disagree with Ofcom’s provisional conclusion. In particular, we maintain the view that the New-to-Network (“**NTN**”) discounts are manifestly geographic and targeted in nature. As a result, this aspect of the scheme should be considered pursuant to the presumed geographic pricing prohibition (SMP Condition 4.5) and be subject to Ofcom’s consent; in our view, that consent ought to be withheld.
4. Failure to recognise the geographic nature of NTN discounts risks giving Openreach latitude to expand the use of such discount mechanisms in the future. Were Ofcom to confirm its provisional view on geographic discounts of this nature, we expect this will have long-lasting implications (foreclosing some alt-nets or curtailing investment plans) on the dynamics of competition in the market contrary to Ofcom’s objective to promote investment and competition in gigabit-capable networks. Whilst Ofcom may rely on the fact that it could evaluate this impact during its next market review process in five years’ time or that alt-nets could raise concerns as part of an ex-post competition law complaint, the ‘narrow window of opportunity’ is likely to have closed for many alt-nets by that time. In turn, this risks undermining Ofcom’s long-term goals by jeopardising ‘the potential for material competition’ to emerge in Area 2 and as a result, impairs the longer-term prospect that Area 2 locations ultimately evolve into Area 1 locations.
5. Therefore, in its current form, Equinox is contrary to Ofcom’s intent to promote investment and competition in gigabit-capable networks, this is likely to remove incentives for alt-nets to compete and necessitate continued ex-ante regulation of Openreach.
6. In the remainder of our response, we focus on Ofcom’s evaluation of NTN discounts as well as the process adopted for this first notification, and its implications for any future notifications or consent requests.

¹ https://www.ofcom.org.uk/data/assets/pdf_file/0032/222989/Equinox-condoc.pdf

2. NTN DISCOUNTS

7. We disagree with Ofcom's provisional decision that the NTN discount is not a form of geographic pricing and not targeted to undermine new alternative network build. We remain strongly of the view that its targeting is surgically precise across both time and geography.
8. We think Ofcom's analysis has not adequately captured the risk to, and potential impact on, nascent alt-net rollout. Ofcom's evaluation ignores the longer-term effect of the scheme on investor incentives, and instead sets a worrying precedent for how Openreach will be free to target further discounts to lessen the competitive pressure it faces in the future.
9. Below we set out our rationale for these concerns and encourage Ofcom to revise its provisional conclusions by categorising NTN discounts as geographic pricing and prohibiting their introduction because they harm alt-net rollout and investment incentives. This is contrary to Ofcom's policy objectives of promoting investment in alternative infrastructures and competition in gigabit-capable networks, and its long-term objective to achieve a market structure that enables deregulation of Openreach.

Geographic pricing targeting NTNs

10. In its evaluation, Ofcom considers that neither the NTN rental nor connection charges can *"strictly be characterised as geographic pricing, on the basis that they do not involve charging different prices in different geographic areas."*²
11. Ofcom reasons that the discounts are available everywhere in Area 2 and are available where a premises is new to Openreach because it currently has no fixed broadband connection. In addition, Ofcom explains that it does not consider the scheme to delineate separate geographic areas because the applicable premises are dynamically defined as a result of customers switching from and to Openreach over time.
12. As we show later, contrary to Ofcom's provisional conclusions, NTN discounts constitute a geographic pricing scheme. As such it should have been incumbent on Openreach to seek explicit consent for its scheme rather than follow the notification route. Given the point in the process, we do not believe Ofcom needs to follow a different process for the purposes of this review. Rather, Ofcom should not grant consent to the NTN elements of Equinox and it should also signal to Openreach that it cannot shoehorn a geographic pricing scheme into the alternative commercial terms notification process in future. Going forwards, prior consent must be sought for geographic pricing schemes, or risk the whole pricing notification being rejected.

² The consultation, para 2.67

13. We do not agree with Ofcom's characterisation of NTN discounts as being available everywhere in Area 2. This is not the case. The discounts are only to be available at each premises in Area 2 that has not had an active Openreach service in the last 90 days. Therefore, Ofcom's provisional conclusion fails on the facts.
14. In the vast majority of cases, the discount will only be available where the end user is currently receiving service provisioned on an alt-net. Whilst Ofcom notes the discount will be available to households that currently have no fixed connection, this is likely to have limited (if any) impact. In 2019, the BSG published a report on digital exclusion to assess why c.8% of the UK population has never been online.³ Survey evidence for the report found that c.60% of respondents cited 'no interest' in using the internet and 90% of those respondents indicated they were unlikely to have a need to go online in the future.
15. Furthermore, given Equinox is to apply until 2031, premises that are currently in an Openreach-only area (and still in scope of NTN discounts as they are an offline household) may be within the footprint of alt-nets in the future. For example, alt-nets other than VMO2 are forecasted to cover 6.6m premises by the end of 2021 and are targeting 29.9m premises by the end of 2025.⁴
16. As a result, it should be clear that these discounts are highly targeted at alt-nets, with the geographic area defined dynamically on a premises-by-premises basis.
17. Broadly, Openreach could have achieved the same targeted discounting by defining a scheme bespoke to each individual alt-nets' network build and the customers it has acquired, updated daily, if it had access to this information. The Equinox scheme achieves the equivalent outcome but without the hassle of trying to monitor each alt-net's build and customer acquisition and the infeasibly granular data analysis this would require.
18. As a thought experiment, we have imagined a different way in which Openreach could have designed its NTN discounts e.g.,:

"The postcodes listed in Annex X are located in Area 2 and contain premises supplied by one or more competing infrastructure supplier (a list of eligible suppliers is given in Annex Y). In these postcodes, signatories to Equinox will receive an additional connection and rental discount for connections that are new to the Openreach network (defined as premises that have not had an Openreach service within the last 90 days). The list of postcodes in which this discount is available will be updated weekly (and be available on the Openreach website) as the eligible competing suppliers provide service in new postcodes within Area 2."

³ <http://www.broadbanduk.org/2019/02/19/bsg-looks-into-why-the-offline-are-offline/>

⁴ <https://www.inca.coop/sites/default/files/inca-point-topic-report-2021.pdf> page 10

19. Ignoring the slight friction arising from weekly updates to eligible postcodes, the above characterisation is analogous to the current NTN scheme save for the fact that, in the latter, premises previously unconnected to any network (outside of the imagined listed postcodes, but still in Area 2) are included within the scheme. Put another way, the design described above is 'nested' within the actual, slightly broader, NTN discount scheme proposed by Openreach.
20. We hypothesise that, if Openreach had designed its NTN discounts as described above, Ofcom would have prohibited their introduction on the grounds that it is a blatant geographic discount. The fact that this scheme is nested within a (marginally) broader arrangement should not cloud Ofcom's judgement in this case. In effect, Ofcom should view Openreach's NTN proposal as two schemes: a) a geographic discount targeted at premises where a competing supplier is available and b) a discount available across the whole of Area 2 for those premises previously without a broadband connection. Accordingly, Ofcom should disallow the former in accordance with its stated rules.
21. If it were Openreach's intention was really to create a discount scheme targeted only at customers which were new to any network, i.e., those currently without broadband, it must be required to change the qualification criteria for NTN.

Effect of Ofcom's provisional conclusion

22. If Ofcom does not conclude Equinox NTN discounts are geographically targeted, it is hard to envisage what mechanism it would find is in scope of the geographically targeted prohibitions it set out in the WFTMR.
23. For example, if Openreach defined a static set of postcodes in the vicinity of announced build activity by alt-nets, this would be less targeted and less geographically precise than Equinox. It might also be able to supplement this with evidence regarding lower cost to build in those given locations. If Ofcom confirms its provisional view, it unlikely to be able to conclude that a scheme which is applicable to a more generic geography, potentially supported by differential cost information, meets its threshold for geographic pricing prohibition.
24. Ofcom seems to take a very narrow view of what constitutes 'geographic pricing'. Based on its evaluation, Ofcom seems to consider geographic pricing needs to include a list or description of a generally understood geographic unit, perhaps such as postcodes or sectors. In addition, Ofcom seems to consider a static/one-off definition of such a list is more concerning than a definition that dynamically evolves to reflect alt-net rollout and customer acquisition throughout the term of the scheme.
25. As a result of this apparent approach, Ofcom seems to overlook the broader issue that the design of this aspect of the scheme is targeted at alt-nets in a practicable sense, i.e., it is geographically targeted to individual UPRNs where Openreach has lost the end customer to an alt-net and only at those UPRNs for the period of time the address is not taking service from the

Openreach network. The discount becomes available when an alt-net acquires a customer and is disappplied once the premises is returned to the Openreach network.

26. Ofcom's observation that NTN discounts are not available in locations that comprise separate geographic markets reveals an inconsistency with its previous evaluation of Openreach's existing FTTP offers.
27. Ofcom previously acknowledged⁵ that a scheme could act as a deterrent if an alt-net adopted a build strategy focused on new developments, despite Openreach having no active control over new development build locations (and we note, the targeting of those discounts would dynamically evolve as new houses are built over time). However, Ofcom noted that it was not aware of a CP adopting such a 'new developments' strategy.
28. There are a number of similarities between that offer and NTN discounts under Equinox in respect of geographic targeting. However, the key difference between the schemes is that unlike in the 'New Sites' case, each alt-net is, by definition, deploying its network to locations in line with its business strategy. The NTN discounts accurately target these locations for each alt-net simultaneously. Therefore, while Ofcom noted a potential, theoretical, deterrence concern for new developments, it concluded it raised no practical concern. In contrast, NTN discounts take on a similar form of geographic targeting, but they are aligned precisely to each alt-net's rollout strategy and as such raise a real concern about the continued promotion of investment in and rollout of gigabit capable networks by alt-nets.
29. Ofcom gave itself specific ex-ante powers to prevent such targeted discounts. Throughout the WFTMR consultation process it found it necessary to go further and enhance and expand these powers, because of stakeholder feedback and the legitimate *a priori* risk it perceived that Openreach would have the incentive to adopt such strategies.
30. Now presented with an accurate and efficient form of such geographic targeting (which we fear will establish decisive precedent), Ofcom seems to be content leaving these tools in their packaging.

Targeting of alt-net new rollout

31. In its evaluation, Ofcom seems to place significant weight on the immediate impact of the scheme. However, insofar as Ofcom concludes that there is an impact in the near-term, the main effect is likely to be on VMO2 within existing network footprint. As a result, Ofcom provisionally

⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0013/221332/statement-existing-openreach-ftp-offers.pdf, para 3.36-7

concludes there to be no impact as a result of the scheme because it is concerned about the effect on new network build.

32. In our view this is an overly narrow and short-term framing of the assessment and, as a result, Ofcom draws incorrect conclusions from its analysis.
33. We accept that, in absolute terms, the impact of NTN Equinox discounts is likely to primarily fall on VMO2's currently deployed network. However, it also affects smaller alt-net's hard-won initial gains and therefore ignores the marginal impact of Openreach winning back customers on nascent business cases. Customers acquired by alt-nets as recently as the launch of the CFI will be in-scope for the NTN discount.
34. For example, in June 2021 YouFibre announced it had successfully acquired its 1,000th customer to its network and it has plans to expand its network to serve 1 million premises by 2024.⁶ Each of YouFibre's 1,000 customers (and all customers it has acquired since), will be eligible for targeted Equinox NTN discounts. Given Ofcom recognises a small window of opportunity exists for encouraging alt-net build, we believe it should place greater weight on the immediate impact on other alt-nets alongside VMO2.
35. Around 130 alt-nets are PIA customers of Openreach. Cumulatively the targets and ambitions of alt-net investors are substantial. While Ofcom may consider the short-term impact on any one particular alt-net (other than VMO2) may not be material, permitting the NTN discount may have material ramifications on how many of these rollout plans are delivered and therefore the longer-term structure and dynamics of the market that Ofcom sought to cultivate. As set out above, this risks undermining Ofcom's long-term objective of achieving a market structure that permits deregulation of Openreach.
36. Once permitted, geographic discounting schemes like NTN will be hard to remove through regulation and may just systematically eliminate marginal alt-nets one at a time, leaving Ofcom's strategic objective unmet.
37. Ofcom notes that "*The discounts will not have a material impact on new network build (or ISPs using these networks) until a material volume of customers has moved to the new network and those customers are at the point of switching away.*"⁷ This risks becoming a self-fulfilling prophecy as NTN discounts act as an effective punishment mechanism for disloyal retailers and sap nascent alt-nets of their initial customer bases. The discount mechanism will have its

⁶ <https://www.ispreview.co.uk/index.php/2021/06/new-full-fibre-isp-youfibre-celebrates-1000th-uk-customer.html>

⁷ The consultation, para 2.68

harmful effects if investment incentives are curtailed before the prospect of material volumes moving to alt-nets.

38. End users that have already had the wherewithal to move to an alt-net are likely to be amongst the most engaged in the market and undeterred by the slight inconvenience associated with new network install. As a result, they are likely to be disproportionately receptive to targeted offers to return to Openreach.
39. We also believe it is a mistake to focus upon the immediate impact when Ofcom is evaluating a scheme due to last until 2031. Ofcom notes its competition concern associated with targeted geographic discounts primarily relate to new network build. As evidenced by CFI responses, alt-nets correctly recognise that the NTN discounts are targeted at all of Openreach's network competitors, not just VMO2.

NTN connection discounts and 'migration credit' concerns

40. Ofcom notes it would be necessary for the connection charge discount to have the same effect as the rental discount for it to be caught by geographic discrimination prohibitions.⁸
41. Ofcom goes on to confirm that there is scope for the connection charge and rental discounts to be considered fungible via its example of a negative connection charge acting as a mechanism to circumvent targeted rental discounts.
42. We disagree with Ofcom that this should only relate to negative charges. The purpose and the effect are the same. Whether a payment is made from Openreach to a retailer, or an incremental targeted discount is applied to win back customers to Openreach's network and to punish disloyal retailers. In either case it is accretive to the retailer's cashflow to remain loyal and to seek to target volumes provisioned on alt-nets.
43. Given both the NTN connection and rental discounts occur in the first year and we see no obvious rationale to restrict concerns about potential competitive impact only to negative cost payments, we believe the NTN connection discount should be considered to have the same effect as the NTN initial 12-month discount set out under Equinox.

No undue discrimination

44. Ofcom acknowledges our concern that the NTN vs non-NTN mechanism in Equinox is clearly discriminatory and inconsistent with SMP 4.2.⁹ However, Ofcom appears to provide no further

⁸ *ibid.*, para 2.66

⁹ *ibid.*, para 2.64

comment on VMO2's view, or whether it agrees or disagrees that Equinox imposes different conditions on equivalent transactions.

45. Our view remains that the NTN vs non-NTN creates a competitive disadvantage for retailers that opt to provision services with alt-nets. The latter would have to compete against the NTN prices offered to all other 'loyal' retailers who have an added inducement to attempt to win those customers back to the Openreach. If instead the retailer did not provision volumes via alt-nets, it would not face these incrementally sharp competitive terms.
46. In our view it is clear this leads to undue discrimination in favour of retailers that remain loyal (for example, BT Consumer would be expected to provision all its volumes via Openreach) and against retailers that choose to take wholesale services from the various alt-nets currently deploying network.
47. As we set out in our response to the CFI, this distinction is not justified and it is clear that it works against Ofcom's strategic objectives.
48. By failing to set out its views on our arguments, VMO2 has not been afforded the ability to rebut any arguments put forward by Ofcom and is only able to restate its previous position. We reserve the right to respond to new arguments put by Ofcom in its decision.

Precedent of Ofcom's final conclusions

49. As we have set out, we strongly disagree with Ofcom's provisional view that NTN discounts do not amount to geographically targeted discounts. If Ofcom were to confirm this conclusion, we believe it would substantially constrain its ability to prohibit future targeted discounts of a similar form. The general geographic discrimination prohibition would therefore be expected to provide little, if any, practical constraint on Openreach's approach to targeting and curtailing alt-net roll-out in the future.
50. As we argue throughout this response, the NTN mechanism is the purest practicable form of geographic targeting available to Openreach today. It would be irrational for Openreach to experiment with other designs for geographic targeting if precedent is established that this approach is acceptable.
51. Openreach would have a material incentive to introduce further NTN-only discounts or special offers in the future. By definition, such a scheme would not cannibalise any existing revenues as it would not be applicable to its on-net customer base and it would further reinforce the loyalty inducement effect that the NTN discounts create; by adding further incremental 'punishment' for disloyalty by providing further tools for loyal retailers to win customers from their less loyal competitors.
52. In its response to the CFI, Openreach indicated it did not believe it was obliged to notify Ofcom of the terms of Equinox, but only did so as it was the first scheme following the WFTMR's

publication. If Ofcom concludes that terms akin to the NTN discount in Equinox do not require consent, it is likely Openreach will have every incentive to regularly deploy NTN-only special offers or short-term discounts without any compulsion to trigger notification to Ofcom or seek consent.

53. In our view Ofcom should place significant weight on the risks of such an eventuality when assessing whether NTN discounts constitute geographic targeting.

3. EQUINOX EVALUATION AND APPROACH TO FUTURE SCHEMES

54. Below we comment on:

- Why Ofcom should replicate its notification and approval approach to Equinox for similar schemes in the future;
- How it could be improved; and
- Our concern regarding Openreach's interpretation of its obligations as well as its stance in relation to future potential schemes.

Process for future schemes

55. Without prejudice to VMO2's position that the Equinox discounts are geographic in nature and should be scrutinised by Ofcom as such, we encourage Ofcom to adopt similar processes for any future Openreach schemes that do meet the test for a notification and conduct a consultation in all circumstances; even if Ofcom reaches a provisional conclusion that it does not believe it ought to intervene. Transparency and the opportunity for stakeholder feedback would support investor confidence and help to ensure that if any subsequent discounts schemes are introduced in the future, this happens via an orderly process that Openreach, its customers and competitors have confidence in.

Openreach's viewpoint

56. We note that in its response to the CFI, Openreach considered that it was not obliged to notify Ofcom of Equinox, but in its view, it has done so because it was the first FTTP pricing initiative since the WFTMR statement was published.¹⁰

57. We disagree with Openreach's view that it was under no obligation to notify the terms of Equinox. We are also clear that the NTN discount component forms a targeted geographic discount, for which explicit consent is required.

58. Openreach would risk creating confusion and a disorderly process for its customers and the wider market if it were to adopt the stance it sets out in its response to future discount schemes. We would encourage Ofcom to provide clarity on this point. There should be no doubt about the circumstances in the future that may trigger the 90-day notice period and the need to inform Ofcom.

¹⁰ https://www.ofcom.org.uk/data/assets/pdf_file/0025/222982/Openreach.pdf, page 1

Potential process improvements for future evaluations

59. As above, without prejudice to VMO2's position that the Equinox discounts are geographic in nature and should be scrutinised by Ofcom as such, the process which has been followed by Ofcom and Openreach for the review of volumetric/conditional discounts does not seem to have followed that which is set out in Annex 11 of the WFTMR which gives rise to confusion and concern. As Ofcom has repeatedly stated, this is the first review of its kind post the implementation of the WFTMR and as such sets a precedent for the future. Without certainty of the process, interested parties lack not only transparency but also a means to raise their legitimate concerns with Ofcom based on appropriate levels of information, thereby undermining Ofcom's objectives.

60. In Annex 11 of the WFTMR, Ofcom sets out the following process following receipt of a formal notification of commercial terms from Openreach (Step (b) in Ofcom's process):

"d) We will form a preliminary view on whether the proposed commercial terms raise competition concerns. Stakeholders are welcome to raise any initial concerns with us.

e) If we decide the proposed commercial terms may raise competition concerns, we will publicly announce a review and start initial evidence gathering. The exact form of the process will depend on the proposed terms and the nature of any potential concerns. In some cases, it may be appropriate for us to issue a general call for inputs/evidence from interested stakeholders. In other cases, we may only require specific input or evidence from Openreach and specific stakeholders. We anticipate using our statutory information gathering powers.

f) We will assess the information and evidence to reach a provisional view. We discuss the analytical framework and provide guidance on specific types of terms at Volume 3, Section 7. The next steps depend on whether we plan to use ex ante intervention:

i) If we consider that there are competition concerns that would be addressed by a direction under our powers under SMP conditions, we would generally expect to consult for one month. At the end of the consultation period we would consider stakeholder responses and aim to issue a final decision (and where appropriate direction) shortly after the consultation period (clearly this would depend on the nature and extent of responses).

ii) If our analysis suggested that there were no substantive concerns requiring ex ante intervention, we would expect to announce that we were closing our review to give certainty to the market”¹¹

61. With respect to the current Equinox review, Ofcom has issued:
- i. a Call for Inputs from any interested third party on 2 July, closing on 16 July
 - ii. a Consultation on its Provisional Findings on 6 August, closing on 6 September
62. Based upon the above process, Ofcom does not appear to have followed procedural steps (d) and (e) as set out in Annex 11 for the purposes of the Equinox review. In Step (d), Ofcom indicates it will form a provisional view on whether the terms raise competition concerns and then in (e), if Ofcom considers they may raise competition concerns, it will gather initial evidence (which may be in the form of a generic Call for Inputs) before reaching a provisional finding in (f).
63. For the purposes of the Equinox review, Ofcom appears to have elided steps (d) and (e) omitting some of the key elements. When publishing the Call for Inputs, Ofcom simply declared that information was being gathered “*in order to assist us in forming a provisional view on whether the notified offer raises competition concerns requiring ex ante intervention*”. Ofcom did not set out its preliminary view it was to have formed as the first part of step (d) (which would have provided invaluable guidance/level of transparency to alt-nets) nor confirm that it considered the terms may raise competition concerns or the nature of those concerns as presumed in Step (e). Instead, Ofcom appears to have used the mechanism set out in Step (e) i.e. a general Call for Inputs to gather initial evidence to determine its Provisional Findings in Step (f). Ofcom’s Provisional Findings have therefore been reached based on limited evidence from Openreach and third parties who themselves only had access to limited information (namely the original publication of terms by Openreach) upon which to express their immediate concerns.
64. VMO2 is concerned that adopting this approach, Ofcom not meeting its own objectives as alt-nets will have limited confidence that Ofcom will, in future, seek to gather appropriate levels of information from Openreach and to intervene on an ex ante basis. Such lack of confidence in a process which is designed to promote competition, weakens alt-nets incentives to continue to invest in network build.

¹¹ See [2021WFTMR: Annexes 1-26 \(ofcom.org.uk\)](#), paragraph A11.8, page 122

4. RESPONSE TO OFCOM'S CONSULTATION QUESTIONS

65. For completeness, below we respond to Ofcom's consultation question.

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

66. No. We do not agree with Ofcom's assessment of NTN discounts. In particular, we disagree with Ofcom's provisional conclusion that these discounts do not constitute geographic pricing and that they do not raise competition concerns with respect to new network build. Our view is that Ofcom should not grant consent to such geographic pricing which is designed to targeted alt-nets and to undermine new and existing alternative network build.