



Ofcom's use of evidence during its
Equinox 2 impact assessment.
A supplementary submission.

INCA

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1 Introduction

- 1 In its consultation and final statement of Equinox 1, and the consultation for Equinox 2, Ofcom has attempted to assess the impact the two offers would likely have on the market and, in particular, on the emergence of fibre network competition.
- 2 The framework to protect against potentially anticompetitive effects of Openreach special offers with conditional pricing is an ex-ante framework with the overarching aim of preventing such offers from deterring nascent infrastructure competition.
- 3 Ofcom's specific test is whether an offer may deter retail service providers from using Altnets, but the overall stated objective is to ensure that special offers do not deter investment in competitive infrastructure. As Openreach operates only in the wholesale market, Ofcom has created a test at the wholesale level, but that test should be imputed into vertically integrated Altnets and would result in a test of whether an Altnet's retail business could profitably use that Altnet in competition with other retail providers using the Openreach network.
- 4 In contrast to ex-post competition investigations, where data is available for the analysis of any harm arising from alleged anticompetitive behaviour, ex-ante analysis relies on an understanding of likely market outcomes absent the introduction of the potentially anticompetitive measures (the counterfactual) and how such outcomes could be influenced by that potentially anticompetitive behaviour.
- 5 To perform the necessary ex-ante analysis to assess whether Equinox 2 is likely to cause harm to investment in competing infrastructure it is therefore necessary for Ofcom to rely on a combination of information sources, including:
 - Historical evidence of market developments and levels of infrastructure investment. This can be used for the purpose of developing the counterfactual and to assess what the historical reactions are to potentially similar measures;
 - Current market data. This would include an up-to-date representation of the current market situation, including current levels of investment, current levels of fibre deployment, government policy and initiatives, taxation rates, cost of capital and lending conditions amongst others;
 - Business plans of builders of new competitive fibre infrastructure. This would include cost measures such as costs per premises passed, assumptions of price levels (wholesale

and retail), penetration levels, and forward-looking assumptions of parameters such as the cost of capital, lending terms, taxation etc.

- Wholesale market conditions. This would include the liquidity of the wholesale market, barriers to switching, history of switching, etc.

2 Ofcom's evidence gathering and analysis for Equinox 2

- 6 This supplementary submission from INCA focuses on our understanding of the data and evidence Ofcom has collected and has had available to it to support its Equinox 2 assessment.
- 7 The reason for this submission is that INCA and its members are concerned that Ofcom appears to have not:
 - 1) Sought all the data and evidence we consider it would need for making an evidence-based decision, and
 - 2) Used the data and evidence available to it from stakeholder submissions and in the public demand, even if Ofcom has not actively sought it.
- 8 INCA is concerned that Ofcom needs to consider this submission before it reaches its final decision by the end May.
- 9 As this submission focuses on Ofcom's approach to the collection and use of data, we will not engage in the relevant substantive issues in each section.

2.1 Data and evidence sought by Ofcom

2.1.1 *Data and evidence to understand the impact on nascent competitors to Openreach*

- 10 The test Ofcom designed in the Wholesale Fixed Telecoms Market Review (WFTMR) to assess whether conditional pricing in Openreach offers could have an anticompetitive effect and, in particular be detrimental to the development of infrastructure competition, is¹:

- 1) Does the Equinox Offer potentially create a barrier to using Altnets?
(if so)

¹ Ofcom Equinox Consultation paragraph 3.35. Please note that this is Ofcom's modified version of the text, which it has applied to Equinox 2 despite the Competition Appeal Tribunal commenting that the version as stated in the WFTMR is clearer.

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

AND

3) Is the Equinox Offer likely or unlikely to generate clear and demonstrable benefits?

(the answer to '2' must be no, and the answer to '3' must be yes, in order for the offer to not be blocked).

- 11 Ofcom addresses Question 1 first and uses it as a 'gating' question. If the answer to question '1' is yes, then it moves on to assessing Questions 2 and 3 together. Although Question '1' is concerned with creating a barrier to using Altnets in general (not focusing on nascent competitors), it seems clear that the desire to prevent harm to nascent competitors is central to the motivation behind this test and, therefore, when addressing Question '1', Ofcom would need to consider whether the offer would potentially create a barrier to using 'nascent' Altnets.
- 12 It is, however, our understanding that Ofcom has not sought any data or evidence of how Equinox 2 could affect the ability of ISPs to use nascent Altnets. Instead, the consultation document refers only to the impact on the three largest ISPs (Sky, TalkTalk and Vodafone), none of whom are likely to consider the use of nascent Altnets.
- 13 INCA understands that Ofcom has sought data and evidence from those largest ISPs, but we are not aware of Ofcom engaging with smaller ISPs who do in fact use small/nascent Altnets.
- 14 INCA is not aware of Ofcom having sought any information from small/nascent Altnets in terms of their plans to serve small/medium/large ISPs, and how Equinox 2 could affect those plans, nor the importance of the wholesale supply to the viability of these small/nascent competitors to Openreach. Given that the core of Ofcom's test relates to barriers to ISPs using Altnets and to the potential impact on nascent competitors to Openreach, in our view it would be entirely inappropriate for Ofcom to not seek any data on how nascent competitors would or could be affected.
- 15 It is important that the test considers the impact on **competitors**, not on consumers, nor on 'competition' overall. In order to assess whether Equinox 2 potentially creates a barrier to using Altnets should therefore not be weighted to reflect the number of customers served by an Altnet, but on the potential impact on individual Altnets of all sizes. All Altnets have gone through a start-up (nascent) period and there is a real limit to the pace with which an Altnet can grow, given that it needs to deploy new fibre network and to develop the internal resources and competencies to do so.

16 It is therefore not appropriate for Ofcom to consider that the impact on Altnets that happen to have started earlier (and are therefore larger today than those that started more recently) is the most important. Ofcom needs to focus on competitors to Openreach, including nascent and more mature providers, and not apply a weighting of size, premises served or numbers of customers connected, as that can simply be a factor of time. The prevention of deterrence to the emergence of **competitors** and competition is the focus of the intervention, and the exclusion of small/nascent competitors from its data collection and subsequent analysis would seem to be at the very least inconsistent with that purpose and focus.

17 In the WFTMR, Ofcom states:

*“We are seeking to support new network build during the early phase of roll out”.*²

*“[.our regulation..] is designed to prevent targeted action on the part of Openreach that has the potential to reduce the scope of competitive entry”.*³

18 INCA therefore urges Ofcom to ensure that it has collected sufficient data directly relevant to emerging competitors to understand the potential impact of Equinox 2 on those companies. INCA remains available to assist Ofcom with the collection of this data.

2.1.2 Data and evidence to understand the impact on larger competitors to Openreach

19 To assess the likely impact of Equinox 2 on larger Altnets, Ofcom appears to have focused on the ability of the three largest ISPs to meet the Equinox 2 Order Mix Targets (OMTs) and operate the failsafe mechanism (FM) where necessary.

20 INCA agrees that it is also necessary to assess the impact on large ISPs and Altnets, just not to the exclusion of analysing the impact on smaller entrants.

21 As part of that assessment, Ofcom has considered geographic footprints of “Altnets that provide wholesale access to the main third party ISPs”. This is to calculate the network overlap between Openreach and Altnets.

22 Understandably, the information collected by Ofcom from the individual large ISPs is confidential, and we therefore cannot comment on what data was collected, nor how it was used by Ofcom.

23 With regards to the network overlap calculation, however, we are not aware of Ofcom collecting information from the Altnet community in general. Ofcom will be aware that a

² WFTMR V3 heading above paragraph 7.44.

³ WFTMR V3 paragraph 7.51.

number of Altnets are either in direct negotiation with the three largest ISPs or are working with aggregators to offer access to their networks to the large ISPs in that way. Although the two or three largest Altnets represent the majority of the more than 8m premises now passed by Altnets, smaller Altnets represent approximately 40% of that and we are aware that many of those currently offer or are planning to offer wholesale in the relatively short term. In our view, it is likely, therefore, that Ofcom has underestimated the level of relevant network overlap between Openreach and Altnets.

- 24 INCA is concerned that Ofcom appears to not have sought information from the Altnet community overall to estimate the network overlap, as it seems clear that this measure is critical to Ofcom's assessment of the extent to which the three large ISPs can likely meet the Equinox 2 OMTs while also using Altnets.
- 25 Having completed its assessment for each of the three largest ISPs, Ofcom concludes that (unless an ISP exceeds the OMTs comfortably) one or two of those ISPs could be deterred from using Altnets even if VMO2 and Nexfibre do not enter the wholesale market and that all may be so deterred if VMO2 and Nexfibre do enter that market.
- 26 However, Ofcom then makes statements to the following effect:
- That an ISP is unlikely to switch all its FTTP orders from Openreach to one or more Altnets in a large part of the Openreach FTTP footprint, and
 - That, in any case, it would take so long to put such arrangements into place that ISP may in the meantime improve its OMT performance.
- 27 INCA is not aware of Ofcom having collected any evidence to support these statements. On the contrary, both INCA and Ofcom are aware that the large ISPs enter into some Altnet agreements that involve a level or period of exclusivity for that Altnet. Under such circumstances, it is very credible that an ISP will switch all its FTTP demand to an Altnet in substantial parts of the Openreach FTTP footprint. INCA is concerned that this absolutely critical conclusion appears to be based on an erroneous assumption, rather than one that is transparent and evidence-based.
- 28 Further, Ofcom is correct that it does take some time put new wholesale agreements in place, but with these likely already under way, it is entirely credible that they will take effect within the window of time (two to three years) considered by Ofcom in this assessment. In this context, it should also be noted that the presence of aggregators can make it quick for a wholesale provider to enter the market, perhaps in parallel with negotiating a direct wholesale provision agreement. INCA, therefore, does not consider it appropriate that Ofcom makes a blanket assumption that ISPs will remain able to meet the Equinox 2 OMTs

due to the time-lag associated with the establishment of new wholesale agreements and considers it would have been appropriate for Ofcom to seek specific data to support this assertion.

2.1.3 Data relevant to the practicability of the FM

- 29 If Ofcom has sought data from the three large ISPs on how they would practically use the FM and what information they would need from Altnets to do so, then it has not referenced it in the consultation document.
- 30 INCA and Altnets have submitted to Ofcom (well in advance of the Ofcom Equinox 2 consultation, giving Ofcom prior insight into their concerns, as well as in response to the consultation) that the FM differs substantially from the arrangement already in place under the GEA volume agreement. Despite this, the Ofcom consultation document does not ask respondents to advise Ofcom of any concerns they have in this context. Instead, it simply states that it considers that the use of the FM would not be a deterrent to the large, sophisticated ISPs.
- 31 INCA considers that Ofcom's approach to assessing the workability of the FM as well as the resources required to do so has not been evidence-based. For example, it appears that Ofcom has not attempted to compare the GEA volume agreement arrangement to the FM, to identify where they differ and what that means. INCA submitted such an analysis, and we encourage Ofcom to consider this carefully before reaching its final conclusion. We are also not aware of Ofcom seeking inputs from Altnets to ascertain what data they supply to their wholesale customers about coverage to assess whether that data would enable the ISP to comply with the FM.

2.1.4 Data and evidence to assess whether the Equinox 2 prices act as a barrier to Altnet entry and expansion

- 32 Consistent with its approach to the assessment of the OMTs and the FM, Ofcom has here entirely focused on analysis of the three largest ISPs and the three largest Altnets.
- 33 INCA is not aware that Ofcom has sought inputs from smaller providers to understand the impact the Equinox 2 prices would have on their investment incentives and ability to attract ISPs to offer services on their networks. This despite the very title to the relevant section in the Ofcom Equinox 2 consultation refers to "barriers to Altnet **entry** and expansion" [emphasis added].
- 34 INCA cannot understand how Ofcom considers that it has discharged its duties to assess any barriers to Altnet market entry or expansion without seeking any inputs from the vast

majority of Altnets and in particular those just entering the market. We consider this to be a significant weakness in Ofcom's approach and one which we believe will not allow Ofcom to reach an evidence-based conclusion.

Evidence relevant to Altnet pricing levels

- 35 Ofcom appears to have collected data from Openreach and the three largest ISPs in order to calculate the weighted average Openreach FTTP price for each ISP and also pricing information from a small number of large Altnets.
- 36 There is, however, no indication that Ofcom has collected information from smaller Altnets to ascertain their wholesale pricing and pricing strategies. As small Altnets typically rely on small ISPs for wholesale business, and those small ISPs also can access the Equinox 2 pricing (there are no volume thresholds in the Equinox 2 offer), small Altnets will be equally exposed to the price pressures from Equinox as are the large Altnets, but their unit costs are likely to be higher due to a lack of economies of scale.
- 37 INCA is concerned that Ofcom appears to have made no effort to gather relevant data relating to wholesale pricing and overall cost levels for small Altnets. This is particularly a problem given the clear focus on nascent competitors within Ofcom's own test.
- 38 With regards to the assessment of the limited Altnet pricing gathered by Ofcom relative to the Equinox 2 pricing, Ofcom states that "*there may be scope for them to reduce them further*",⁴ but there is no suggestion that Ofcom has sought any data to support that assertion. Our concern is that, had Ofcom been that way inclined, Ofcom could equally have stated "The current Altnet prices may already be lower that Altnets can sustain in the long run". Both statements are without any basis in fact and as such perhaps neither should have been made.
- 39 Ofcom's presumption that Altnets may be able to reduce prices further in response to Equinox 2 is repeated in its summary points,⁵ so it appears to have been part of Ofcom's rationale for determining that the Equinox 2 prices do not represent a prima facie concern.
- 40 In that same vein, in relation to the costs ISPs incur to onboard new wholesale suppliers, Ofcom states in paragraph 3.121: "*On the other hand, ISPs may see value in having ongoing increased competition to Openreach, and may be prepared to invest to achieve this*". This statement is set against the fact that Altnets have to offer prices that are

⁴ Equinox 2 consultation paragraph 3.120.

⁵ Equinox Consultation paragraph 3.125: "*We recognise that Altnets may be able to further reduce their prices in response to the Equinox 2 Offer*"

competitive with the benchmark set by Openreach, including discount offers such as Equinox 2. It is widely recognised that Altnets need to not only match, but under-cut the Openreach prices in order to offset the costs to the ISPs of onboarding a new wholesale provider. There has never been any evidence that INCA has heard of to suggest that ISPs are making investments in that process without expecting Altnets to compensate through lower prices.

- 41 Finally, in paragraph 3.122, Ofcom states that the investments by TalkTalk and Vodafone to onboard CityFibre are now sunk, suggesting therefore (redacted text means we cannot see the conclusion) that the cost of onboarding is not a significant issue. This ignores the fact that CityFibre is one (and the largest) of a large group of Altnets seeking to attract ISPs to offer services on their networks. Ofcom refers to this as ‘evidence’ in its assessment of Equinox 2 on Altnets in general, that is clearly inappropriate. Ofcom’s analysis should be forward-looking, and it seems that Ofcom has made no efforts to consider the effect of the costs of onboarding for the many smaller Altnet wholesalers and aggregators.
- 42 These are instances of Ofcom choosing to make statements for which there is no factual evidence (and, to the best of our knowledge, for which Ofcom has not sought such evidence), which consistently paints a picture of the Equinox 2 offer not presenting a problem for Altnets in attracting ISPs to use their networks. It is conspicuous that no such assertions have been made to suggest that the impact on Altnets may be deeper and stronger than suggested by the limited facts and data collected by Ofcom.

2.2 Data and evidence already available to Ofcom

- 43 INCA and a number of Altnets have submitted to Ofcom, over time, data that suggests that the WFTMR assumption about the likely level of network competition in Area 3 was wrong. Although we disagreed with the assumption at the time, we understand that Ofcom needed to make assumptions at the time of making decisions. When faced with facts that disprove those assumptions, however, then Ofcom has a duty to revisit those assumptions and, where possible, adjust its actions and interventions going forward to reflect the factual situation.
- 44 Additionally, Ofcom has had at its disposal analysis from INCA and Altnets, as well as factual data from the economy and the overall telecoms market, that invalidate some of the assumptions used in Ofcom’s fibre costing model (FCM). These data have been set out in detail elsewhere and we will not repeat them here.
- 45 Despite the availability of these factual (and undisputed), data Ofcom has chosen to not include them into its Equinox 2 assessment process.

3 Ofcom's evidence thresholds for itself and Altnets

46 As set out in this brief paper, Ofcom has either:

- Sought only data that would be most likely to support its preliminary conclusion that Equinox 2 would not fail the test set out in the WFTMR, including only collecting data for and from the largest ISPs and Altnets.
- Made comments or assumptions suggesting that even that partial data may be overestimating the issues Altnets may face as a consequence of Equinox 2. Or
- Chosen to ignore evidence readily available to it wither in the public domain or in submissions made by stakeholders.

47 In addition to that, we have observed that Ofcom appears to hold Altnets to a higher evidential standard that it applies to itself. In some instances, it appears that Ofcom is expecting the presentation of the kind of data and evidence one could only produce in an ex-post investigation, where the harm has already been incurred and can be evidenced and measured.

48 For example:

- 1) At paragraph 3.46 of the Equinox 2 consultation, Ofcom refers to VMO2 not having provided evidence for its 'Future Overlap Scenario', when this would not have been possible, given that VMO2 has not yet entered the wholesale market. To counter VMO2's concern, Ofcom sets out a series of presumptions for which it presents no evidence, and which would appear to be at least as speculative as the concerns presented by VMO2.
- 2) In footnote 50 of the Equinox 2 consultation, Ofcom claims to have carried out an evidence-based assessment of the OMTs, and therefore rejects VMO2's reference to a presumption made by Ofcom in the past. As set out above, Ofcom's assessment has been extremely light on evidence and instead based on a serious of presumptions and assumptions, some which are factually incorrect. Again, Ofcom is imposing a higher evidence burden on stakeholders than on itself.
- 3) In the section listing the two consultation questions, Ofcom requires that respondents provide 'evidence' in support of their views. It will not be possible to provide evidence of the harm Altnets expect to arise from Equinox 2, as it has not happened yet. Although INCA acknowledged that Competition Appeal Tribunal's finding that Question 1 on the Ofcom test requires a level of materiality, that materiality needs to be assessed based on the possible impact on the Altnet community overall, not just on the three largest Altnets.

In dismissing the concerns submitted to Ofcom prior to it issuing its consultation document, Ofcom appears to have applied an evidence burden that is both unrealistic and inappropriate for an ex-ante assessment.

4 Conclusion

49 Having assessed the data Ofcom has sought, and actively chosen to not seek, the assumptions Ofcom has made in its assessment, the data Ofcom had available without having to issue additional information requests and the evidence burden Ofcom appears to have applied on stakeholders expressing concerns about the possible impact of Equinox 2, INCA has concluded that Ofcom appears to have:

- Intentionally limited the data it has sought to that which would be most likely to support a conclusion that Equinox 2 would not deter ISPs to from using Altnets.
- Relied on assumptions and presumptions that have no basis in facts, all of which are in support of Ofcom's preliminary conclusion.
- Intentionally ignored and not used data readily available to it, where that data would not support its preliminary conclusion.
- Applied a disproportionate and inappropriate evidence burden on stakeholders expressing concerns at the possible impact of Equinox 2.