

Nexfibre Response to Ofcom's Equinox 2 Consultation

3 March 2023

1. Executive Summary

1. On 3rd February 2023, Ofcom published a Consultation on Openreach's Fibre to the Premises (FTTP) pricing offer known as Equinox 2 (**the Consultation**). Equinox 2 is a supplement to the previous Equinox 1 pricing offer that was launched by Openreach on 1st October 2021 following a similar consultation by Ofcom, in which Ofcom concluded that Equinox 1 did not raise any competition concerns that required *ex ante* regulation.
2. Ofcom's provisional view in the Equinox 2 Consultation is that it too does not raise competition concerns and so Ofcom does not consider it necessary to prevent the new terms from being introduced.
3. Ofcom asks two questions in the Consultation:
 - Do you agree with our assessment of the Equinox 2 offer as set out above?
 - Do you have any comments on the matters set out in this document?
4. It will be clear from this response and the accompanying Annex that Nexfibre does not agree with Ofcom's assessment of Equinox 2 and that we do have comments to make on the matters set out in the Consultation.
5. In relation to Ofcom's first question, we do not agree that Equinox 2 does not raise any competition problems and that Ofcom does not need to take *ex ante* action in relation to the offer. Our detailed assessment of the anticompetitive effects of Equinox 2 are set out in the response and the accompanying Economic Study prepared by Keystone Strategy.
6. Indeed, the anticompetitive objective of Equinox 2 was laid bare by BT's Chief Executive, Philip Jansen, on February 2nd 2023, just one day before the publication of the Consultation. In an interview with the Financial Times (FT) on the day it announced its third quarter results, Mr Jansen made BT's objectives plain. Having described BT as an "unstoppable machine" he went on to say "There is only going to be one national network. Why do you need to have multiple providers?". He claimed that the process would "end in tears" for many of its fibre competitors.¹

¹ FT "BT chief warns Openreach fibre push will 'end in tears' for rivals" (2nd February 2023).

7. Ofcom describes itself as an “evidence-based organisation”.² In this response to the Consultation we address Ofcom’s second question and explain why we think that Ofcom is wrong to have concluded that Equinox 2 does not raise competition concerns and we provide supporting evidence.
8. The statement made by Mr Jansen quoted above should be sufficient evidence in its own right of BT’s intention to use its market power to re-monopolise the broadband access market. It is very clear from these statements that BT is not interested in a competitive market and will do its best to ensure the future for its rivals will “end in tears”. This should raise Ofcom’s concerns about BT’s intentions and justifies the need to constrain BT’s behaviour.
9. The accompanying economic study by Keystone Strategy examines how investment in alternative networks is highly dependent on Internet Service Providers (ISPs) switching to those networks. Indeed, financial backers of alternative networks stipulate market penetration objectives, which can only be achieved by signing up ISPs, for further funds to be made available.
10. The report then examines how Equinox 2 will undermine ISP switching as an element of a commercial strategy focussed on a frequent “drip feed” of changes to pricing terms and conditions that raise the cost of switching by ISPs. It also shows how the discount mechanism will incentivise ISPs to purchase from Openreach as the new Failsafe Mechanism, while a beneficial concept in theory, is flawed in its design.
11. Ofcom announced its intention in the consultation to gather evidence on drip feed price changes from stakeholders and asked whether this conduct creates uncertainty for ISPs such that they are deterred from using alternative networks.³
12. Keystone Strategy points out that the Equinox 1 Offer was announced by Openreach as a 10 year offer providing long-term certainty and stability in a competitive landscape. However, within a little over a year, Openreach has announced Equinox 2 which features further wholesale price reductions that are not subject to more stringent performance targets. This instability could lead to ISPs expecting further variations on Equinox and so deter them from making long-term commitments to alternative networks. Equinox 2 also increases the ‘cliff-edge’ effect, such that ISPs will further be deterred for fear of losing the even more substantial price reductions.
13. Keystone Strategy also point out that the Failsafe Mechanism is a beneficial concept but flawed in design. The report points to four specific issues: sequencing; uncertainty about how the

² The Consultation, Para. 2.8

³ The Consultation, Paras. 3.127 – 3.134

Independent Verifier (IV) will assess the overbuild areas; the IV being appointed by Openreach; and the lack of an appeals process. These four problems will not create the certainty that investors need so that they are able to compete on a level playing field with Openreach.

14. Nexfibre is a new investor in ultrafast broadband with multi-billion pound backing from Infravia Capital Partners, Liberty Global and Telefónica as well as senior debt lenders, including the UK Infrastructure Bank. Ours is a fully backed plan to build a wholesale only, FTTP network covering up to five million premises in the UK outside the existing Virgin Media O2 (VMO2) footprint by 2026, with VMO2 as a day-one anchor tenant and, in due course, other ISPs. Together with VMO2's existing network, this will provide Gigabit networks to up to 23 million premises, making it the largest, and only nationwide, competitor to BT Openreach.⁴
15. Nexfibre will, therefore, have a major effect on the provision of competitive FTTP networks.
16. When the decision to invest in Nexfibre was made, the various backers were of course full cognisant of Equinox 1. In their opinion, the pricing stability over a 10-year period, albeit with a transparent and clear review mechanism in year six, provided the degree of certainty needed to commit the funds to build the network and to provide the level of competition in the market that Ofcom is keen to promote.
17. By sharp contrast, Equinox 2 raises significant concerns about the future competitiveness of the market as we see it as BT's attempt to re-monopolise access. Our backers' decision to invest was made on the expectation of a regulator ensuring a level playing field to support infrastructure competition. Ofcom's provisional decision to allow BT to introduce Equinox 2 raises a concern that Ofcom is not ensuring a level playing field for competitors.
18. Throughout this response and the accompanying economic report various suggestions have been made as to how the consultation process and Equinox 2 can be improved. These are summarised in the table below.

⁴ See Infravia Press Release, 29th July 2022, available at <https://infraviacapital.com/liberty-global-telefonica-and-infravia-capital-partners-form-joint-venture-to-build-a-new-fibre-network-in-the-uk-covering-up-to-7-million-homes/>

Summary of Proposed Changes to Ofcom's Findings

Problem	Solution	Benefit of making this change
<p>WFTMR SMP Conditions 8.6</p> <p>Ofcom does not allow enough time to assess the implications of Equinox 2.</p>	<p>The SMP Condition should be amended to require BT to provide 90 working days' notice of changes to commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services purchased.</p>	<p>Ofcom and other stakeholders will have more time to understand the implications of changes to these conditions and come to a better informed conclusion regarding likely effects on investment and competition in the market.</p>
<p>Analytical Framework Question 1</p> <p>As currently phrased, the question only looks at ISP use of alternative networks and not the second order effects on investment and competition.</p>	<p>The question should be rephrased as proposed below:</p> <p>"Does the Equinox Offer potentially create a barrier to switching to and using alternative networks? If so, is BT's SMP further protected by higher barriers to entry & expansion by alternative networks?"</p>	<p>The analytical framework would have to explicitly consider the effect of Equinox and similar Offers on investment by other operators and subsequent competition in the market.</p>
<p>Analytical Framework Questions 2 & 3</p> <p>As currently formulated it is not clear if only one or both conditions in these two questions needs to be fulfilled for Offers to be allowed. This is not in line with the framework as set out in the WFTMR and potentially weakens the framework.</p>	<p>Insert "and" after Question 2.</p> <p>Ofcom can also issue guidance that Offers that raise barriers to entry for alternative networks will only be allowed if they are unlikely to have a material effect on competitors <i>and</i> are likely to generate clear and demonstrable benefits.</p>	<p>The analytical framework in the Consultation will be brought into line with the WFTMR. A higher bar will need to be passed for potentially harmful terms to be allowed without <i>ex ante</i> regulation. This will support investment and competition.</p>

19. The following suggestions are taken from the Economic Study undertaken by Keystone Strategy.

Problem	Solution	Benefit of making this change
Drip feed pricing		
<p>Pre-announcing further changes to Equinox before official notification to Ofcom creates uncertainty for ISPs and alternative network providers and is therefore harmful to investment decisions.</p>	<p>Put in place guidance and subsequently introduce a requirement for BT Openreach not undertake any pre-announcements before official notice given to Ofcom.</p>	<p>Creates transparency and improves climate for competitive investment.</p>

Problem	Solution	Benefit of making this change
Continual drip feeding of changes to prices and other commercial terms increases the barrier to switching to alternative network providers by ISPs.	Ofcom to set expectations that Openreach should not make continued amendments to Equinox and that any further amendments must be supported by clear, evidence-based reasoning as to why they are necessary.	Also reduces uncertainty and improves climate for competitive investment.
The current regulatory framework results in altnets having to prove that the Equinox terms are anti-competitive which is inherently difficult. This gives Openreach a significant strategic advantage when making changes to the terms of the Equinox offer.	Modify SMP conditions so that the burden of proof is on Openreach.	Removes strategic advantage from Openreach and levels the competitive playing field.
The current framework means all amendments to Equinox immediately come into effect following the notification process and review/acceptance by Ofcom. This short timeframe means that altnets are at a significant disadvantage as they have little time to respond.	Impose a “cooling-off” period following the announcement of change to prices and other commercial terms, before the changes can be implemented.	Alternative networks have more time to respond and so able to compete on more equal terms.
Improving the Failsafe Mechanism to make it fit for purpose		
The mechanism is applied ‘retrospectively’ meaning ISPs need to have already committed to alternative networks before the Overbuild area is defined and order mix targets recalculated.	Introduce an additional pre-notification process to enable ISPs to request an advanced estimation of an overbuild area and approximate impact on its Order Mix Target (OMT).	This provides advance visibility on the likely outcome of an ISP using an altnet and gives additional reassurance prior to committing volumes to an altnet, that this would not be likely to have any detrimental impact on its OMT.

Problem	Solution	Benefit of making this change
<p>Openreach appoints IV which assumes that the contractual requirements for independent are sufficient.</p>	<p>Ofcom to either directly or indirectly appoint the IV, and upfront rather than only after an ISP triggers the Mechanism.</p>	<p>Ofcom would be able to ensure directly that a suitably fair and independent IV has been appointed and provide ongoing oversight of the IV and use of the Failsafe Mechanism. This would provide reassurance to all market participants that the IV is acting fairly and proportionately and being independently held to account.</p>
<p>There are ambiguities in key definitions of the mechanism and there is no appeal process in Equinox against incorrect decisions by the IV.</p>	<p>The core definition of what constitutes an overbuild area, and therefore how OMT calculations should apply, needs to be amended to be precise and unambiguous.</p> <p>Introduce an appeals process.</p> <p>To reduce the likelihood of needing to use this dispute mechanism, there would also be significant benefits in producing a clear and detailed set of guidance, with illustrative examples to benefit all those involved in the process</p>	<p>Better definitions, a set of guidelines and an appeal process would all increase certainty for altnets and ISPs in the use of the Failsafe Mechanism</p>

20. The main body of our response is structured as follows:

- Section 2 sets out the policy and regulatory framework and how we consider Ofcom to have erred from its obligations set out in the government’s Statement of Strategic Priorities (SSP).
- Section 3 argues that Ofcom’s own process for assessing Equinox 2 does not allow it enough time to assess the competitive impact it is likely to have.
- Section 4 argues that the analytical framework adopted by Ofcom is fundamentally flawed and sets too low a threshold for Equinox 2 to be accepted by Ofcom.
- Section 5 sets out our summary and conclusions.

21. The accompanying Annex containing an Economic Study by Keystone Strategy addresses four main issues:

- Competition problems in the sector, discussed in Section 2.
- [●], discussed in Section 3.
- The negative effects of Equinox 2 on ISP switching including drip feed price changes and the Failsafe Mechanism, discussed in Sections 4, 5 and 6.
- Suggested changes that Ofcom should require to address the problems highlighted by the analysis, set out in Section 7.

2. Legal, Policy and Regulatory Background

In this section we demonstrate that by proposing to allow Equinox 2 without any amendments to address legitimate competition concerns, Ofcom does not comply with its legal obligation to promote competition and investment, nor does it comply with the government’s Statement of Strategic Priorities (SSP) for the sector.⁵ Ofcom is legally obliged to “have regard to the [SSP] when carrying out their functions relating to telecommunications”.⁶ We will argue that Ofcom has not taken such regard in allowing Equinox 2.

22. The general duties of Ofcom are set out in the Communications Act 2003. This states that one of the two principal duties of Ofcom is to “*further the interests of consumers in relevant markets, where appropriate by promoting competition*”.⁷ The Communications Act also states:

“OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

the desirability of promoting competition in relevant markets;

the desirability of encouraging investment and innovation in relevant markets;

the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;”.⁸

23. Section 4 of the Communications Act sets out six requirements that it is the duty of Ofcom to act in accordance with when carrying out its functions. The first of these requirements is to promote competition in relation to the provision of electronic communications networks and services. The sixth requirement is to promote connectivity and access to very high capacity networks (VHCNs) by members of the public and businesses in the UK. Whilst there is no formal definition of a VHCN, there is little doubt that FTTP would qualify.

24. Ofcom clearly recognises that it has an obligation to comply with these requirements as they are all referred to in the Wholesale Fixed Telecommunications Market Review (WFTMR).⁹

25. It is therefore clear that Ofcom has a legal duty to promote competition and investment whilst encouraging the availability of high speed data transfer, also referred to as a VHCN.

⁵ Department of Culture, Media and Sport (DCMS), Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services, 2019.

⁶ Communications Act 2003, as amended, Section 2b(2).

⁷ Communications Act 2003, as amended, Section 3(1)(b)

⁸ Communications Act 2003, as amended, Section 4(b), 4(d) and 4(e). Only the relevant clauses have been included here.

⁹ WFTMR Statement Vol I (2021). Para 2.14.

26. The SSP makes it clear that it is a strategic priority of the government promote competition and investment for the long term benefit of consumers. It states:

*“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.**”¹⁰(Emphasis added).*

27. The emphasised words above show that the government gives priority to competition and investment above further near term price reductions.

28. Ofcom makes it clear in the WFTMR that it understands its obligations. In the opening paragraph Ofcom states:

*“This document sets out Ofcom’s decisions for our regulation of the fixed telecoms markets that underpin broadband, mobile and business connections, for the period from April 2021 to March 2026. **These decisions are designed to promote competition and investment in gigabit-capable networks** – bringing faster, better broadband to people across the UK.”¹¹*
(Emphasis added)

29. Later on, in Paragraphs 2.20 – 2.23 Ofcom sets out the benefits of competition. We do not set out all of these benefits in this response. However, we do wish to highlight two specific points.

30. First, Ofcom describes its strategy as *“to promote investment in gigabit-capable networks through network competition in areas where this is sustainable. We consider that network competition brings potentially significant benefits to consumers, compared to competition based on regulated access to BT’s network and wholesale services”*.¹²

31. Secondly, Ofcom concludes this short section by stating:

“We recognise that promoting network competition may entail the replication of network investments. However, it will deliver significant benefits to consumers in the longer term from innovation (including innovation to increase efficiency and reduce costs), choice, stronger incentives to price keenly to attract customers, and higher quality of service.”¹³

¹⁰ Department of Culture, Media and Sport (DCMS), Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services, 2019. Para. 18

¹¹ WFTMR Statement Vol I (2021). Section 1.

¹² WFTMR Statement Vol I (2021). Para. 2.20

¹³ WFTMR Statement Vol I (2021). Para 2.23

32. Finally, the Equinox 2 Consultation opens its Overview section by recognising its concern that Openreach could set commercial terms that undermine the competition that Ofcom is trying to promote through the remedies applied in the WFTMR.
33. Summarising the above, there can be no doubt that Ofcom's duty is to promote competition and investment in VHCNs and that it should be promoting investment ahead of near term reductions in retail prices. Ofcom is also clearly cognisant of these duties.
34. Despite this, by allowing the Equinox 2 pricing package to be implemented by BT without making any adjustments, Ofcom is not complying with those duties, as we will argue in the rest of this submission, including the Annex. There are, however, a number of adjustments it can make to Equinox 2 that will reduce its anticompetitive effects and promote investment and competition. These are set out in the Executive Summary of this response.

3. The Equinox 2 Review Process

This section argues that the time Ofcom has allowed itself to review the changes to Openreach's terms is not sufficient for it to fully understand the likely effects of Equinox on the market and that Ofcom should allow more time.

35. Ofcom recognised in the WFTMR that BT could impose commercial terms in the Wholesale Local Access (WLA) market that may deter network build by alternative network operators. Ofcom stated that it would review such changes in terms on a case-by-case basis in the light of possible concerns they raise.¹⁴

36. The process Ofcom uses for assessing proposed changes to commercial terms that are conditional on the volume and/or range of services bought is set out in WFTMR:

*"In the case of an Access Change involving new or existing network access where the price or other contractual conditions are conditional on the volume and/or range of services purchased, the Access Change Notice must be sent not less than 90 days before any such amendment comes into effect."*¹⁵

37. Also in the WFTMR, Ofcom explains the necessity for a 90 day minimum notice period. It states that:

*"...we are concerned that in the WLA and LL Access markets some loyalty-inducing commercial terms could undermine or deter alternative network rollout. To facilitate the monitoring of these commercial terms, we have decided to impose a requirement in these markets for Openreach to notify contract/pricing changes 90 days in advance specifically for pricing structures where the price or other contractual conditions are conditional on the volume and/or range of services purchased."*¹⁶

38. In the Equinox 2 Consultation, Ofcom explains that the notification requirement "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".¹⁷

39. It is our view that, given the material impact Equinox 2 will have on competition and investment, the 90 day minimum notice period required by Ofcom is insufficient for reviewing the proposed

¹⁴ WFTMR Statement Vol III (2021). Para. 7.32

¹⁵ WFTMR Statement Vol VII (2021). SMP Condition 8.6.

¹⁶ WFTMR Vols III (2021). Para 3.156

¹⁷ The Consultation, Overview

terms and allowing Ofcom and the industry to scrutinise them before they are introduced. Our reasoning is explained below.

40. Within the 90 days Ofcom undertakes a public consultation giving stakeholders approx. 30 days to respond. For Equinox 1 this was issued approx. 30 days after BT sent the Access Change Notice.
41. The Access Change Notice for Equinox 2 was sent on 14th December 2022 with a planned launch date for Equinox 2 of 1st April 2023. Whilst this was 106 days before the planned launch, the Christmas and New Year holiday period meant that the effective notification period was approx. 90 days.
42. In the case of Equinox 2, Ofcom will have 28 days to consider responses to the Consultation and come to a final Decision before the planned launch of the new terms on 1st April 2023.
43. Given the complexity of the subject and Ofcom's duty to promote investment and network competition in this market, it is our view that this timescale is insufficient for Ofcom to assess the evidence and come to a reasoned decision.
44. Ofcom has two major tasks to perform. First, before the publication of the Consultation, it must assess the Access Change Notice and the new terms and determine whether there are any problems that may affect both competition and investment in the market. It must then draft and approve for publication a consultation document within a period of approx. 30 calendar days, on the assumption that it does not have advanced notice of the proposed change in terms.
45. We know that Ofcom takes this responsibility seriously and seeks views of stakeholders at a senior level whilst conducting this analysis, and we thank Ofcom for their engagement so far. Nevertheless, both Equinox offerings have been complex. In Equinox 2, Ofcom and stakeholders who wish to make early input, have had to understand several features such as the Failsafe Mechanism, including the Independent Verifier, the changes in price and indexation for the various wholesale products affected by Equinox and the Order Mix Targets. Ofcom also needs to understand the implications of these changes in light of their objectives as set out in law and the SSP. Ofcom also needs to prepare the detailed analysis set out in Annexes 6, 7, 8, 9 and 10 of the Consultation, redacting any sensitive information.
46. Once all this has been done, Ofcom has to come to a provisional decision on the effects of the changes on competition and investment, which presumably is made at a senior level in the organisation.
47. We note from the Consultation that Ofcom appears not to have sought the views of BT or any information from BT other than the details of Equinox 2. Given what Mr Jansen told the FT, we

are surprised that Ofcom has not used its powers under Section 135 of the Communications Act 2003 to request specific information from BT to discover what was discussed orally and on paper concerning Equinox 2 before it was announced by BT on 14th December 2022. This seems to be an oversight on Ofcom's part.

48. Finally, the Consultation needs to be checked to ensure confidential data are redacted and of course reviewed by lawyers to ensure it complies with all legal requirements.
49. Secondly, at the end of the consultation period, Ofcom needs to assess the responses received from stakeholders and determine whether they have provided sufficient evidence for Ofcom to overturn its provisional decision. There were responses from 14 stakeholders in response to the Equinox 1 consultation and there may well be a similar number of responses to the Equinox 2 consultation. If necessary, Ofcom may need further discussions with stakeholders.
50. The final decision document also needs checking for legality and that all confidential data are redacted. It also needs final approval by Ofcom at Board level.
51. Whilst Ofcom can assign a well-resourced team to these tasks, the volume of work is significant. Our own experience is that as one gets to understand the consultation subject matter in more detail, issues and questions that were not obvious on first analysis become clearer and may even result in a change of mind about the potential impact of the matter under review.
52. In both the Equinox 1 and 2 consultations, stakeholders have been given 30 days in which to respond. We also consider this to be too short a time period. Alternative networks have considered that both versions of Equinox have material effects on their ability to compete and incentives to invest. We expect that BT will have been working on designing Equinox 2 for several months deploying significant resources. To ensure altnets are able to understand BT's proposals in detail and present robust responses to Ofcom, supported by evidence, alternative networks need more time to draw together the evidence and analysis that sets out their case.
53. Alternative network providers' ability to provide a response is made more difficult by large amount of key evidence and underlying analysis has been redacted and so cannot be scrutinised in any detail. An example is the impact on the OMTs and legacy cross check analysis from the appendices.
54. As Ofcom knows full well, Equinox 1 has been the subject of an appeal to the Competition Appeal Tribunal and to a separate complaint for a possible abuse of a dominant position to Ofcom and the Competition and Markets Authority by CityFibre. The appeal and the Competition Act complaint demonstrate how some alternative network providers saw the Equinox 1 offer as BT

attempting to undermine their investment case and are prepared to invest significant resources to try to stop (or modify) it. In our view, this demonstrates further how important it is for Ofcom to have the time to review such offers in detail so that future complaints and appeals can be avoided.

55. Given all the above, it is our view that the 90 calendar day period Ofcom allows itself to review new terms and conditions is not sufficient for it to fully assess the evidence provided by all stakeholders and to come to a well-reasoned and rational decision on the investment and competitive effects of the new terms.
56. We recognise that 90 day notice period is imposed as an SMP Condition in the WFTMR and so is outside the scope of this consultation to change. However, it is our view that Ofcom should consider imposing a longer notice period in the next market review so that sufficient time is allowed for Ofcom and stakeholders to address the potential effects on competition and investment.

4. Ofcom's Analytical Framework

This section discusses the analytical framework used by Ofcom to determine whether Equinox 2 should be allowed. We argue that there are two significant problems with the process. First it ignores BT's existing position as the SMP operator protected by barriers to entry and secondly the framework as used in the Equinox 2 consultation is weaker than in the WFTMR.

57. Ofcom deploys the same analytical framework for assessing Equinox 2 as it used for Equinox 1.

That is, it asks three questions:

- **Question 1:** Does the Equinox Offer potentially create a barrier to using altnets?
- **Question 2:** Is the Equinox Offer likely or unlikely to have a material impact on nascent network competition?
- **Question 3:** Is the Equinox Offer likely to generate clear and demonstrable benefits (Para. 3.25)

58. Whilst this is substantially the same as that used in the WFTMR, the Competition Appeal Tribunal (CAT) said in its judgement on CityFibre vs. Office of Communications¹⁸ that the framework set out in WFTMR was “easier to follow” than the reformulation used in the Equinox 1 Review. The original formulation was:

In the consultation we set out a proposed analytical framework for considering other commercial terms. 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.*¹⁹

59. Despite the comments from the CAT, Ofcom again uses the formulation of its framework analysis from Equinox 1 in its consultation on Equinox 2.

¹⁸ Case No: 1426/3/3/21 July 2022, Para. 143

¹⁹ WFTMR Vol. III, Para. 7.154

60. Nexfibre has two major concerns with the analytical framework that we discuss below. First, the framework is only concerned with barriers to ISPs using alternative operators and not on barriers to entry for alternative networks. This means that this initial question leads to a somewhat static analysis rather than considering the dynamic effects of how the loyalty inducing effects of Equinox 2 may affect future investment and competition, which Ofcom has a duty to promote. We argue below that there is a second-order effect arising from a barrier to using alternative networks, which is a barrier to entry and expansion for alternative networks. The second order effect is harmful to investment and enhances BT's Significant Market Power (SMP).
61. Secondly, in the original formulation in the WFTMR, *both* the second and third parts of the framework (what become questions 2 and 3 in the Equinox consultations) must be fulfilled. In the reformulation used in the Equinox consultations it appears that only one of these questions must be fulfilled, making it a weaker framework.
62. It is our view, that had Ofcom considered the effect of barriers to using alternative networks on barriers to entry for alternative networks then it would have had to go on to assess both questions 2 and 3. In so doing, we believe it would have come to a different conclusion on allowing BT to launch Equinox 2.

4.1 Barriers to Using Alternative Networks

63. Question 1 of the reformulated analytical framework asks whether the Equinox offer “potentially creates a barrier to using alternative networks”. Although not stated in either the original formulation in the WFTMR or in the formulation in the Equinox consultation, we assume that this means a barrier to ISPs using alternative networks.
64. In answering this question, it is our opinion that Ofcom should examine the externalities arising from ISPs finding that Equinox 2 does create a barrier to using alternative networks on those alternative networks.
65. An alternative network considering market entry or expansion would ask itself whether an ISP faces a barrier to switching as a result of Equinox 2, a point that is explored in depth in Sections 3 & 4 of the Keystone Strategy report. If the alternative network did think that such a barrier exists then it might come to the conclusion that it would not be economically viable for it to enter or expand in the market as it would be too expensive for ISPs to switch. The alternative network may then decide not to enter the market, or if already there not to expand, or not to do so at the same rate.
66. Ofcom recognises this problem to some degree in the WFTMR Statement. It says:

“...our objective is to promote competition and investment in gigabit-capable networks by Openreach and others, and the resulting network competition should benefit consumers in the long term. If Openreach uses commercial terms that undermine new network build, our starting point is that they are likely contrary to the interests of consumers in the long term.”²⁰

67. Whilst the first order effect of Equinox 2 may be a barrier to ISPs using alternative networks, the second order effect could be less or delayed entry or expansion by alternative networks. This, of course, would mean that alternative networks face a barrier to entry.
68. In the WFTMR, BT is already found to have SMP in WLA Areas 2 & 3, in part on the basis of being protected by Barriers to Entry.²¹ Therefore, question 1 is wrongly formulated in both the WFTMR and in the Equinox consultations. The question is not whether E2 “potentially creates” a barrier to using alternative networks but whether in doing so it *raises* a barrier to entry for alternative networks that already exists and so is compatible with the government’s strategic priority of promoting competition and investment.
69. As discussed in the Keystone Strategy report, Equinox 2 makes it harder for ISPs to switch to alternative networks due to “cliff edge” discounting, the ambiguous definition of overbuild areas and the switching costs arising from drip feed price changes. Thus we do not see how Ofcom could have concluded that Equinox 2 does not create a barrier for ISPs to use altnets and therefore not address its questions two and three.

4.2 Formulation of Questions 2 and 3

70. Our second concern with the analytical framework is that there is an important and substantive difference between formulation in the WFTMR and in the E2 consultation that appears to make it easier for BT to comply with the framework as set out in the consultation compared with the WFTMR formulation. This was not raised in the Cityfibre case but is nevertheless important and can easily be corrected by Ofcom.
71. In the WFTMR statement, Ofcom defines its analytical framework as:

In the consultation we set out a proposed analytical framework for considering other commercial terms. Our starting point was that the creation of any barrier to using alternative network operators would only be justified where:

²⁰ WFTMR Statement Vol III (2021) Para 7.29

²¹ WFTMR Statement Vol II (2021) Paras 8.132 and 8.117 respectively

- 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.*²² (Emphasis added)

72. Note that parts a and b are linked by “and”. In other words, both conditions must be present for BT to introduce commercial terms that could create a barrier to using an alternative operator. So, the new commercial terms must not have a material impact on nascent competitors *and* must generate clear and demonstrable benefits. If only one of these criteria is fulfilled then the new terms would not be allowed by Ofcom.

73. This is not the case in either the Equinox 1 or the Equinox 2 consultation, where Ofcom's analytical framework consists of three questions. Questions 2 & 3, which are the equivalent of (a) and (b) above, appear to be independent of each other.

“Question 2: Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?”

*Question 3: Is the Equinox Offer likely to generate clear and demonstrable benefits?”*²³

74. In this formulation the missing “and” means that it is not explicit that Equinox 2 must be unlikely to have a material impact on competition and must generate clear and demonstrable benefits. The missing “and” means that it is possible that BT need only fulfil one condition for a new set of commercial terms such as Equinox 2 to be allowed. This would of course be a weaker test than set out in the WFTMR.

75. The reformulated test means that even though Equinox 2 could be likely to have a material impact on nascent competition, it could still be allowed if it generated clear and demonstrable benefits. If those benefits were lower retail prices in the near term at the expense of investment by alternative networks then the decision would be contrary to paragraph 18 of the government's Statement of Strategic Priorities quoted above at paragraph 26.

76. For clarity, it is our opinion that Equinox fulfils neither of these tests being likely to have a negative material impact on network competitors and not likely to generate demonstrable benefits for anyone except BT.

²² WFTMR Vol. III, Para. 7.154

²³ Equinox 2 Consultation Para. 3.35

77. In para 3.41 of the consultation document, Ofcom claims the changes introduced by Ofcom are “not substantive”. We disagree. Having to fulfil only one of the conditions in Questions 2 & 3 is a substantive change.
78. It may be that this substantive difference between the formulation in the WFTMR and in the Equinox 2 consultation is unintentional. If this is the case, then Ofcom should make it clear that the formulation in the WFTMR where both questions 2 & 3 need to be fulfilled is what was meant.
79. The CAT brought attention to the need for clarity in Ofcom’s formulations stating:
- “That said, we also note that very significant investment commitments and resource allocation decisions are made on the basis of such policy statements. Put another way, a lack of clarity and consistency in implementation has significant consequences and is therefore to be avoided. Regulators like Ofcom are afforded the discretion to make expert judgements in the expectation that they will provide clear and consistent guidance to those they are regulating.”²⁴*
80. We therefore urge Ofcom to provide the “clear and consistent guidance” the CAT expects from them and make a strong statement that *both* questions 2 & 3 need to be assessed before it can agree to any new commercial terms from BT, as expressed in the WFTMR.
81. Ofcom should take due consideration of what the CAT has stated in discussion in Ground 2 of the CityFibre case and reformulate and clarify all the points above.

²⁴ Case No: 1426/3/3/21 July 2022, Para. 146

5. Summary and Conclusions

82. Ofcom asks two questions in the Consultation concerning the Equinox 2 proposal:

- Do you agree with our assessment of the Equinox 2 offer as set out above?
- Do you have any comments on the matters set out in this document?

83. We have shown in this response that we do not agree with their assessment. It is our view that Equinox 2 does raise competition concerns and that Ofcom is wrong in deciding not to impose any *ex ante* regulation on BT in relation Equinox 2.

84. The question set by Philip Jansen, BT's CEO, in an interview with the FT the day before the Consultation was released clearly demonstrates BT's intention to re-monopolise the WLA market. He asked: "*Why do you need to have multiple providers?*" We argue that Equinox 2 is a tactic to achieve that intention.

85. Mr Jansen's question clearly sets BT at odds with the government's SSP where the government is clear that it has a priority to see investment by BT *and* alternative providers and that investment should be priorities over interventions that result in lower prices in the near term. The decision by Ofcom to allow Equinox 2 without *ex ante* regulation sets Ofcom against that priority as well.

86. This response has set out two specific concerns with the Consultation: the length of time allowed and the structure of the analytical framework used by Ofcom which we consider to be flawed.

87. The accompanying report by Keystone Strategy demonstrates the effect that Equinox 2 will have on ISP switching to alternative networks and the subsequent effect on investment. It then explains how the drip feed of price changes and the beneficial concept but flawed design of the Failsafe Mechanism will undermine ISP switching.

88. Overall, we conclude that a number of changes are required to Equinox 2 and the future regulation of such packages, as set out in the Executive Summary to this response.