

AXIONE'S RESPONSE TO OFCOM CONSULTATION

Pricing wholesale local access services in Geographic Area 3 with a BT Commitment to deploy a fibre network



Ofcom
making communications work
for everyone

NON-CONFIDENTIAL VERSION



Table of Content

1. Introduction and Executive Summary	3
1.1. Introduction	3
1.1.1. Introducing Axione	3
1.2. Executive summary	3
2. Defining Area 3	5
3. Area 3 Remedies.....	7
3.2. Ofcom’s regulatory focus in Area 3.....	7
3.3. Price regulation for WLA services in Area 3	8
3.4. The BT Commitment	9
3.4.2. BT Commitment is part of Ofcom’s remedy	11
3.4.3. The impact on altnets of the proposed BT Commitment	11
3.4.4. The impact on consumers of the BT Commitment	12
3.4.5. Ofcom’s approach is discriminatory	12
3.4.6. Proposed adjustments to Ofcom’s proposals	13
3.4.6.2. Remove the BT Commitment	13
3.4.6.3. Further define the parameters of the BT commitment	14
3.4.6.4. Change the definition of Area 3.....	14
3.4.6.5. Dynamic adjustment of the BT Commitment.....	14
3.5. Price regulation for leased lines and dark fibre in Area 3.....	15
4. Other Area 3 Remedies	16
4.2. Geographic discount restrictions	16
4.3. Restrictions on volume discounts, loyalty schemes and other similar arrangements	16

1. Introduction and Executive Summary

- 1.1 Axione is pleased to submit this response to Ofcom's consultation Promoting competition and investment in fibre networks: "pricing wholesale access services in Geographic Area 3 with a BT commitment to deploy a fibre network" (the Area 3) consultation, which is part of Ofcom's "Wholesale Fixed Telecoms Market Review 2021-26" (WFTMR) consultation process. Axione hopes that the response will prove helpful to Ofcom in its deliberations over the next few months before the commencement of the new review period on 1st April 2021.

1.1. Introduction

- 1.2 The WFTMR originally proposed a 'post-build' RAB approach to setting wholesale access prices for Area 3, which would result in different pricing in Area 3 compared to the CPI-0 pricing proposed for Area 2. The Area 3 consultation now proposes a 'forecast RAB' approach, which enables consistent pricing across both areas 2 and 3.
- 1.3 In its WFTMR response in May 2020, Axione warned about potential significant negative effects of both the post-build RAB and the forecast RAB approach. The Area 3 consultation suggests that it has considered comments received in the WFTMR responses, but we see no reference to our comments, nor to comments we are aware of from other altnets. Axione finds this disappointing and will reiterate relevant comments in this response.
- 1.4 Additionally, Axione (and many other respondents) submitted comments on Ofcom's proposed definition of Area 3, but we see no reference to those comments, nor to the impact of potential changes to the Area 3 definition on the proposals set out in the Area 3 consultation. For example, if Area 3 is reduced in size, will that impact on BT's commitment?

1.1.1. Introducing Axione

- 1.5 Axione, a joint venture between the Bouygues group (Bouygues Energies & Services) and Vauban Infrastructure Partners, is a key digital infrastructure player in France. Along with Vauban Infrastructure Partners and other equity partners such as Caisse des Dépôts, Axione has been investing in, building and operating FTTP networks for over 10 years in France and is on course to be operating a footprint of over 6 Million premises by 2025.
- 1.6 As described in detail in our previous WFTMR response and, in particular, in our Annex 1, Axione plans to deploy new fibre networks to [X] in what Ofcom currently defines as Area 3. Axione deploys high quality fibre networks and operates a wholesale only business model – thus enabling vibrant competitive downstream markets in both retail and wholesale services. Ofcom's proposals in this consultation puts that deployment at risk and we hope to engage in a constructive exchange with Ofcom about what changes could be introduced to enable this significant deployment to go ahead.

1.2. Executive summary

- 1.7 Axione believes that Area 3 should be defined such that it includes only areas which could support a single fibre network, including those areas which require state aid. There is considerable scope for investment by altnets in these single-network areas, and indeed Axione plans considerable investment in such areas.
- 1.8 We note that Ofcom has not conducted such an analysis of economic viability, instead using existing and planned deployments by altnets to determine Area 3, stating in the WFTMR that it would take into account any and all data it received from altnets in terms of current and planned coverage and that it would review the Area 3 definition in light of that data.

- 1.9 Axione has material deployment plans in what is currently categorised as Area 3 and we are aware of plans by other altnets to deploy to a further > 2m premises. Ofcom's decision to disregard all these deployment plans will result in delayed and reduced fibre deployment in Area 3, both by BT and altnets, despite Ofcom's formal duty to maximise benefits to consumers.
- 1.10 While Axione welcomes Ofcom's proposal for a consistent CPI-0 price control across Areas 2 and 3, as a consequence of Ofcom's mis-categorisation of commercially viable locations to Area 3 instead of Area 2, BT has been given the opportunity to effectively reserve those attractive commercial locations for itself (through the Ofcom mandated BT Commitment), sterilising those locations from commercial altnet deployment through public announcements that result in local authorities, customers and retail ISPs becoming reluctant to engage with altnets despite the prospect of faster altnet deployment.
- 1.11 It is our view that there are likely to be very little or no incremental benefits to consumers located in Area 3 from the BT Commitment. It is, indeed, likely that deployment will be less than it would be without the effect of the BT Commitment and in any case, we expect the deployment to be later than would be the case without the BT commitment, due to BT being under much reduced threat of commercial altnet deployment in those areas.
- 1.12 Axione considers Ofcom's approach to be highly discriminatory against altnet investment and deployment and to favour BT. This appears to be in direct conflict with Ofcom's current duties under the Communications Act as well as under the new European Electronic Communications Code (EECC), which should be transposed into UK law by the time Ofcom issues its Final WFTMR Statement.
- 1.13 It is Axione's view that Ofcom has failed in its duties to perform an impact assessment on its proposals in the Area 3 consultation.
- 1.14 Axione does not believe that a BT Commitment for deployment in Area 3 is necessary, and that its existence in its current form will be harmful to fibre deployment. In this response we provide proposals for changes to the BT Commitment and the definition of Area 3.
- 1.15 Axione believes that the prices specified for the dark fibre remedy in Area 3 are too low and will undermine the provision of point-to-point connectivity services by Axione and other altnets.

2. Defining Area 3

- 2.1 The Area 3 consultation discusses the revised wholesale access pricing approach without referring to how Area 3 is defined. Ofcom appears to infer that, as it now proposes the same price regulation in Areas 2 and 3, the importance of where the boundary is drawn will be reduced¹, but does not refer to arguments made by Axione and others in their WFTMR responses in relation to the forecast RAB approach; that the mechanism of BT making an up-front commitment effectively allows BT to cherry-pick the most commercially attractive parts of Area 3, and associate its name to geographic areas, which would have been served commercially in any case by a mixture of BT and altnets.
- 2.2 As set out in our WFTMR response, Axione agrees in categorising the UK into 3 areas and believes that the current Area 3 definition works if it is defined as where only a single network is viable – constituting of a mixture of commercially viable and non-commercially viable locations. Axione actively targets areas that can support only a single network and our business model is to offer open access wholesale-only services, assuming a high level of penetration [\gg]. As a reminder, Axione believes that Areas 1 to 3 should be defined as follows:
- Area 1 should include locations that could support the presence of 3 or more competing fibre networks;
 - Area 2 should include locations that could support 2 competing fibre networks, and;
 - Area 3 should include locations that could only support a single fibre network (including some that may require state aid).
- 2.3 However, the way Ofcom is defining and regulating Area 3 has the consequence of BT being able to effectively reserve all the most commercially attractive locations for its own deployment. Axione considers it significant that BT has offered a commitment that appears to be in excess of what would be required to enable Ofcom to 'balance the books' when applying the CPI-0 charge control instead of the CPI-X+K charge control. The BT Commitment appears to be more in line with building 3.2m lines in the most commercially attractive areas of Area 3, rather than including less commercially viable areas.
- 2.4 Locations included on the BT Commitment list will in reality be sterilised for competitive investment as there will be certainty that BT will overbuild. Ofcom has expressed its opposition to a franchise-type arrangement in single-network areas, but appears to accept that BT can effectively make its own franchise area.
- 2.5 Whilst the committed locations may also be on BT's overall general target locations, it is our experience that once a network is in place in a location that is unlikely to support two competing networks and an open wholesale offer is available on this infrastructure, ISPs and/or other network operators seek access to that existing network, rather than overbuilding. Thus, unless there is a commitment to the regulator to cover specific locations, we believe that BT and other providers will be more pragmatic in how the selected deployment locations and deployment lists will evolve over time.
- 2.6 This is consistent with our WFTMR response, in which we stated that Ofcom's reliance on deployment plans by operators at a point in time would result in an arbitrary division of locations between Areas 2 and 3. A more systematic approach, based on transparent economic assessment, would be more appropriate and would result in a consistent distribution whether by density of premises or other relevant criteria.

¹ Paragraphs 3.3.48 - 3.51.

- 2.7 Whilst Ofcom cannot prevent operators from building a second fibre network in Area 3, the economic conditions in Area 3 locations should be consistent with them being able to support only a single network. Axione believes this would maximise commercial deployment in Area 3.

3. Area 3 Remedies

- 3.1 The primary focus of the Area 3 consultation is the change in the proposed price remedy. There are, however, also other proposed changes including the extension of the geographic discount restrictions to cover FTTP in Area 3 but to still exclude leased lines in Area 3.
- 3.2 Additionally, although not a formal remedy imposed by Ofcom, the BT commitment to deploy fibre to 3.2m premises in Area 3 by April 2026 has a significant impact of the likely level and type of competition that will emerge in Area 3.

3.2. Ofcom's regulatory focus in Area 3

- 3.3 In paragraph 3.4, Ofcom states:

"In Area 3, we do not consider there to be the potential for a material competitive dynamic. In the absence of such a dynamic Openreach will face weak incentives to deploy new and better networks. Therefore, our proposed approach to remedies in Area 3 is to promote competition through access to Openreach's wholesale services while also supporting BT's deployment of a fibre network."

- 3.4 In paragraphs 3.48 through 3.51, however, Ofcom states:

"we also considered whether our proposed approach would have adverse effects that are disproportionate to our objective; specifically, whether competitive investment could take place in some parts of Area 3 and that cost-based legacy services together with a post-build RAB approach could stifle that investment."

And

- 3.5 "We consider that one of the advantages of our revised proposal for a forecast RAB and alignment of our pricing approach in Areas 2 and 3 is that this will provide the same support to rival network investors regardless of where they plan to build."

- 3.6 In paragraph 2.5, Ofcom refers to competitive dynamic, stating:

"In Geographic Area 3, while we recognised there was potential for rival network investment this was not likely to be sufficiently material that we could rely on the competitive dynamic as in Area 2 to incentivise investment by BT in fibre networks. Our objectives were to promote competition through access to Openreach's wholesale services while also supporting BT's deployment of a fibre network. "

- 3.7 It is therefore clear that Ofcom seeks to support service competition over infrastructure competition in Area 3. Considerations to not harm infrastructure competition appear to be a matter of safeguarding, rather than active support.

- 3.8 In attempting to understand Ofcom's rationale for this approach we repeatedly came across the term 'material' in terms of assessing the probability of competitive deployment in Area 3; in the Area 3 consultation the term 'competitive dynamic' has been added.

- 3.9 Ofcom offers no definition of the term 'competitive dynamic', and there is similarly no definition of the term 'material' as used in paragraph 3.4 and extensively across the WFTMR. But we consider that Axione's announcement that it intends to deploy fibre to around [X] in Area 3 (with other altnets making announcements of plans to deploy to between 100,000 and 1m premises) to constitute material competitive fibre deployment in Area 3. At a minimum, this would amount to probable competitive deployment in Area 3 of at least 3m premises (and probably more, as there will be a strong incentive not to overbuild). That represents 1/3 of the total market size and would in our eyes qualify as material.

- 3.10 The type of competition may differ between Areas 2 and 3, with the scope for two or more fibre networks in some parts of Area 2 (thus creating competition in the market), but with competition for the market (i.e. first-mover advantage) in Area 3, where it is unlikely that more than one fibre network will be deployed in any one location.
- 3.11 Axione considers that competition for the market will also cause BT to deploy in a similar way that competition in the market would. In fact, it may be more important to BT to cover the larger single-network locations as soon as possible as it would not be economic to overbuild there. In multi-network areas, however, BT would not necessarily have to be the first mover as the market conditions can support two or more networks.
- 3.12 In paragraph 3.27, Ofcom refers to 'widescale competing fibre networks' as being less likely in Area 3 than in Area 2. We agree that the presence of multiple networks is less probable in Area 3 than in Area 2, but we do not agree that the existence of competition for the market does not provide similar benefits to consumers in terms of faster deployment of high quality fibre networks.
- 3.13 In paragraph 3.9 Ofcom states the objective for Area 3 as being "ensuring that consumers in Area 3 benefit from fibre". It is our view that competition for the market would deliver that to large parts of Area 3.
- 3.14 Axione notes that Ofcom has a formal duty to maximise benefits to consumers². As set out above, it is our strong belief that the current proposals will both delay and reduce the amount of fibre deployment in Area 3, thus most certainly not maximising benefits to consumers.
- 3.15 It would seem that the core problem in Ofcom's assessments may be what it considers as the counterfactual to implementing the proposed remedies. Although not stated explicitly, it is Axione's understanding that Ofcom expects that very little deployment would happen in Area 3, absent the proposed remedies, and this is where we disagree fundamentally.
- 3.16 As mentioned previously, Axione has material deployment plans in what is currently categorised as Area 3 and we are aware of plans by other altnets to deploy to > 2m premises in total. It is Ofcom's decision to disregard all those deployment plans that gives rise to the fundamental disagreement between Ofcom and altnets about what would happen in Area 3 (as currently defined) absent Ofcom's proposed remedies.
- 3.17 Axione believes that, at the aggregate level, Ofcom should at the very least assume that 50% of altnet plans in Area 3 would come to fruition. Say around 2.5m – 3m premises. Ofcom should consider a counterfactual with this level of altnet deployment and the impact that would have on BT's deployment incentives. Adding BT deployment to the 2.5m – 3m altnet premises would almost certainly result in more than the 3.2m BT Commitment and deployment would happen faster due to the competition to gain first mover advantage.

3.3. Price regulation for WLA services in Area 3

- 3.18 Ofcom now proposes to apply the forecast RAB charge control approach in Area 3. This results in the pricing in Area 3 being regulated to the same level as Area 2 prices, using the CPI-0 charge control.
- 3.19 In principle, Axione is very supportive of this pricing approach, as it provides better investment incentives to all parties (altnets and BT) and would not result in increased retail ISP lock-in to the Openreach pricing and platform. Axione's problem with Ofcom's forecast RAB approach for Area 3 arises from the BT Commitment to deploy to 3.2m premises in Area 3 and the naming of those locations as part of that process.

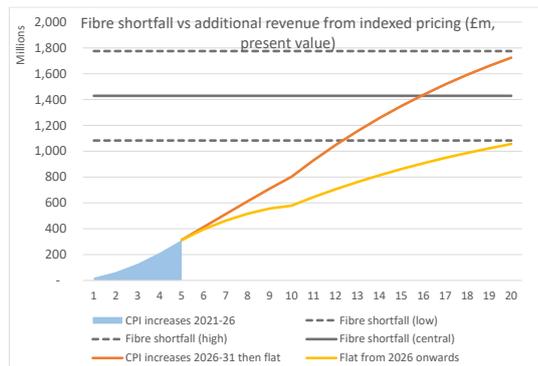
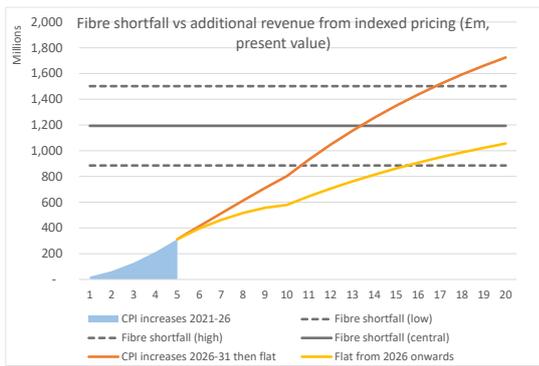
² *Communications Act 2003 section 4 (8) (b).*

- 3.20 Axione understands that Ofcom does not believe that, without the BT Commitment, there will be sufficient fibre deployment in the 5-year control period to ensure that customers are not being overcharged overall. This is because Ofcom does not believe that BT and others will voluntarily deploy to large parts of Area 3, despite the many altnets plans submitted to Ofcom as part of the WFTMR process and despite the general agreement in industry that there are many locations in Area 3 that BT wants, and has a commercial incentive, to cover with fibre.

3.4. The BT Commitment

- 3.21 As a quid pro quo, in return for applying the CPI-0 charge control in Area 3, Ofcom is looking for a commitment from BT to deploy fibre in Area 3 to an extent that compensates for the additional revenues to BT resulting from the CPI-0 charge control. Otherwise BT could be over-recovering its costs and earning monopoly profits in Area 3.
- 3.22 Axione understands this principle and does not, in principle, object to it. It is, however, clear from Ofcom's consultation that it is not possible to derive an exact level of investment or number of premises that BT must pass with new fibre networks. There are too many variables that are hard to predict for this to be done in an exact manner. In particular, the various components that contribute to the fibre shortfall over a 20-year forecast period are highly uncertain. For example, the revenue premium of fibre access over existing copper/FTTC services is speculative and will depend upon customer's willingness to pay for higher speeds and greater reliability; penetration levels and the speed of attaining those levels is not known and will depend upon the presence of competing networks; fibre deployment costs and the rate of copper recovery and associated cost savings are also highly uncertain.
- 3.23 Ofcom has therefore asked BT to make a proposal for a commitment to balance out the benefits it would receive from the CPI-0 charge control and BT has offered to deploy fibre to 3.2m premises in Area 3.
- 3.24 It is our understanding that, from the data presented in the Area 3 consultation and the models Ofcom has produced, the BT 3.2m premises proposal is generous in that it is unlikely that such a large amount of investment would be required to balance out the CPI-0 benefits. Indeed, in a call with Ofcom, one Ofcom representative stated that, "if BT had offered to pass 2m premises then we would most likely have accepted that".
- 3.25 Axione has reviewed Ofcom's models used to calculate the fibre shortfall and the impact of relaxing the charge control in Area 3. We note that Ofcom states that the fibre shortfall is calculated using build and connection costs for the least expensive 7m of the 8.8m lines in Area 3 scaled down to 3.2m lines on a pro-rata basis³. However, Ofcom's analysis does not do this; instead, the fibre shortfall is calculated from the costs of the least expensive 3.2m lines in Area 3. This error has a material impact on the analysis, as illustrated below:

³ Para A2.12, Pricing wholesale local access services in Geographic Area 3 with a BT Commitment to deploy a fibre network



Ofcom analysis as presented in consultation

Analysis using costs averaged over 7m lines

- 3.26 Once the error is corrected, the fibre shortfall increases by over £200m. In order to achieve the same “balance” between the fibre shortfall and benefit from charge control relaxation as assumed by Ofcom in the consultation, the BT commitments would reduce from 3.2m to around 2.6m lines.
- 3.27 We do note that, despite Ofcom’s intention to base the fibre shortfall on the average cost of 7m lines, there is no requirement on BT to choose its Commitment locations to reflect that average. So, there may well be a significant mismatch between the actual fibre shortfall for BTs 3.2m line commitment and the assumptions used in Ofcom’s analysis.
- 3.28 Even if the BT commitment were reduced to 2.6m lines, it still appears that the commitment is high in relation to the revenue benefits received; the extent to which BT recovers the shortfall is highly uncertain, depending on the charge control regime over the next 20 years as well as the commercial and operational risks around the fibre deployment. It seems unlikely that BT would make such a commitment purely based on this balance between fibre shortfall and charge control relaxation over 5 years.
- 3.29 Axione believes there are good reasons why BT has offered such a generous commitment and they fall into two categories:
- Openreach is only (or primarily) committing to deploy to premises that it would otherwise have deployed to in any case. This is witnessed by Openreach cherry-picking the most commercially attractive locations in Area 3 for its Commitment, and
 - Once locations are included in the BT Commitment, it will be hard for altnets to raise finance to deploy in those locations and BT has therefore managed to create its own reserved areas where it is extremely unlikely to face the threat of competitive deployment. This is despite the majority of locations on the BT Commitment list also being on deployment plans submitted to Ofcom as part of its data collection for the WFTMR and some already having been fully covered by altnet fibre networks.
- 3.30 Axione notes that, under Ofcom’s own analysis in the dcr-area3-model, Openreach can expect in excess of £14bn revenue (PV over 20 years) assuming no loss of market share. Scaling this to the 3.2m lines of the BT Commitment suggests that Openreach can expect over £5bn of revenue from the lines in its commitment area. Defence of this revenue by ensuring that BT is the sole network operator in these areas is surely a much stronger incentive than the relaxation of the charge control, which amounts to £1.2bn (20-year PV, central case), and is offset by the fibre shortfall. A 50% loss of market share from the Commitment lines would represent up to £2.5bn of revenue lost by Openreach (20-year PV).
- 3.31 Axione believes that Ofcom should not allow BT to cherry-pick the most commercially attractive locations in Area 3 for its Commitment. This is because there is no actual incremental benefit to the UK or consumers from BT committing to deploy in those locations, as BT and/or altnets would have deployed in those locations anyway.

3.32 Axione urges Ofcom to set criteria for the BT Commitment that will result in deployment in locations where the commercial case for investment is less attractive. This would result in real benefits to consumers and the overall economy and would maximise overall deployment in Area 3 as BT and altnets would still have commercial incentives to deploy in those locations that have attractive commercial investment profiles.

3.4.2. BT Commitment is part of Ofcom's remedy

3.33 The Forecast RAB approach has two separate components:

- The CPI-0 charge control, and
- The BT Commitment

3.34 It is clear from the consultation document that the application of the CPI-0 control is dependent on the making by BT of a commitment that allows Ofcom to 'balance the books', that is, to avoid over recovery in Area 3 due to the CPI-0 control.

3.35 As such, Ofcom needs to accept responsibility for the BT Commitment and carefully assess its impact. We note, however, that the Area 3 consultation does not include an Impact Assessment, nor does Ofcom in the consultation address the potential impact of the BT Commitment on competitive deployment of fibre in Area 3. The only assessment of the BT Commitment is to ascertain whether the fibre shortfall is likely to compensate adequately for the impact of the CPI-0 charge control.

3.36 It is Axione's view that Ofcom has failed in its duties to perform impact assessment⁴ on its proposals in the Area 3 consultation.

3.37 The Area 3 consultation does not contain an impact assessment at all and, as the Forecast RAB approach was only outlined very briefly in that consultation without any assessment of its likely impact, it cannot be reasonably argued that the impact assessment in the WFTMR covers the Area 3 consultation.

3.38 Had Ofcom performed a comprehensive impact assessment on the BT Commitment, this should have included the potential impact of an over-commitment by BT. Whilst Ofcom's primary concern is to balance the books, it should ask what motivation BT could have for making such a generous commitment, and what would be the impact of that on competition and investment incentives of altnets. Ofcom has completely neglected to perform that analysis and Axione considers this to be in breach of Ofcom's duties.

3.4.3. The impact on altnets of the proposed BT Commitment

3.39 Although the most commercially attractive locations in Area 3 would likely be on the BT deployment list, regardless of Ofcom's Area 3 interventions, their inclusion in a commitment to Ofcom changes their status considerably.

⁴ Communications Act, 2003 Section 7

- 3.40 BT's general deployment list is likely to be relatively dynamic, changing over time as would the deployment lists of altnets. Locations where another provider has already deployed may be changed out with another location where BT can get first mover advantage. Where open wholesale access is available to existing altnet fibre infrastructure, BT may choose to not overbuild as that would in many instances not be economic. This is the kind of process observed in other countries, where increasingly the incumbents are teaming up with competitive providers to achieve national coverage in the most economically efficient manner. For example, Deutsche Telekom and Deutsche Glasfaser recently announced a pilot project in the city of Lüdinghausen whereby DG will open up its existing fibre network for use by DT. The two companies plan to evaluate further such collaboration projects in the future.
- 3.41 Locations on a list committed to Ofcom are in a different context, though. The near certainty of BT deployment in locations would make it very difficult for altnets to fund deployment in those locations, even if they were to do so years before BT. Additionally, local authorities, businesses, residents, and retail ISPs would be more sticky than would otherwise be the case (potentially waiting to see what the BT offer will be before deciding which fibre service to take), substantially weakening an altnet business plan for those locations.
- 3.42 It is Axione's view that locations on the BT Commitment list will effectively be sterilised with respect to competitive deployment. This leaves altnets to address the less commercially attractive locations only, making for much harder business propositions overall and very likely a substantial reduction in altnet deployment in Area 3.

3.4.4. The impact on consumers of the BT Commitment

- 3.43 Ofcom proposes to apply the CPI-0 charge control in Area 3, this means that, in the absence of fibre investment in Area 3 by BT, BT would over-recover, making super-normal profits which could be used to compete unfairly downstream or in Area 2.
- 3.44 It is, however, pretty certain that BT will deploy significant amounts of fibre in Area 3, regardless of the existence of the Commitment. In fact, 0.5m premises have already been passed by fibre and deployment is ongoing now in advance of the commitment period that starts April 2021. This is due to the fact that Area 3 includes commercially attractive locations, especially if only a single fibre network is deployed, resulting in high penetration rates, likely above 70%.
- 3.45 From a consumer perspective (business and residential), then, it is unlikely that the BT Commitment will result in increased deployment in Area 3. As stated above, (absent the BT commitment) the altnet industry is likely to deploy to around 3m premises in Area 3, constituting a mixture of the commercially attractive locations and smaller, harder to reach locations. The sterilising effect of the BT Commitment will likely deter altnet deployment in the vast majority of those locations, despite altnets potentially planning to deploy years in advance of BT's deployments, by rendering it more difficult to secure funding to address these areas.
- 3.46 It is Axione's view that there are likely to be very little or no incremental benefits to consumers located in Area 3 from the BT Commitment. It is, indeed, likely that deployment will be less than it would be without the effect of the BT Commitment and in any case, we expect the deployment to be later than would be the case without the BT commitment, due to BT being under much reduced threat of commercial altnet deployment in those areas.

3.4.5. Ofcom's approach is discriminatory

- 3.47 As described above, the proposed CPI-0 charge control in return for the BT Commitment is very unlikely to result in any additional fibre deployment in Area 3, and would indeed likely result in at least delayed and potentially even reduced deployment, due to the removal of the effect of competition for the market resulting from the BT Commitment.

- 3.48 The bottom line is that BT is only committing to build lines it would have built anyway and in return it gets to eliminate (or substantially weaken) any existing competitive threat for locations in the Commitment. That is a substantial advantage to BT and a vast disadvantage to altnets with existing plans and financing ready to commence deployments in those same locations in the very near future.
- 3.49 Paragraph 3.69 of the Area 3 consultation purports to examine whether the proposals made are discriminatory, but only considers whether they unduly discriminate against BT. Ofcom does not even consider whether its proposals discriminate against third parties such as altnets. This is despite Axione and other respondents having specifically expressed significant concerns in their main WFTMR responses that Ofcom's Area 3 proposals do in fact discriminate positively for BT and against BT's competitors.
- 3.50 In our WFTMR response, we stated:

"Further, we consider that Ofcom's Area 3 price remedies are in direct conflict with Ofcom duties to not favour or discriminate different providers of electronic communications networks and services. In particular, we believe the Area 3 price remedies to conflict with the following provisions:

Communications Act 2003 4. (6)

The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour—

(a); one form of electronic communications network, electronic communications service or associated facility or

(b) one means of providing or making available such a network, service or facility, over another. [emphasis added]; and

The European Electronic Communications Code 3. 4. (b)

ensure that, in similar circumstances, there is no discrimination in the treatment of providers of electronic communications networks and services;"

- 3.51 Axione remains of the view that Ofcom's revised proposals in the current consultation are discriminatory and in direct conflict with Ofcom's duties. It is clear that the effect of the BT Commitment, in its current form, will reduce competition in Area 3. In particular, it will reduce the likelihood of altnets seeking to deploy in the locations on the BT Commitment list, thus removing the competition for the market and leaving those locations as effectively reserved franchise areas for BT. The removal of locations on the BT Commitment list could also weaken the overall altnet investment proposition, thus reducing deployment outside the listed locations.

3.4.6. Proposed adjustments to Ofcom's proposals

- 3.52 Axione believes that there are actions that Ofcom could take which would mitigate some of the issues we have raised above.

3.4.6.2. Remove the BT Commitment

- 3.53 As currently defined, Area 3 comprises approximately 8.8m premises. Axione has plans to deploy to many of those and we estimate that altnets (making allowance for some overlap in current plans) would deploy commercially to between 4m and 5m premises in Area 3.
- 3.54 Assuming a conservative 4m premises commercial altnet deployment in Area 3, that leaves fewer than 5m premises, which would be covered by the Government's last 20% (F20) initiative.

- 3.55 It would appear, therefore that there is absolutely no need for a BT Commitment in Area 3. Axione has no doubt that, in addition to the willingness of altnets to deploy commercially to at least 4m premises, BT would also be willing to deploy commercially to the vast majority of those premises. This is evidenced by BT having already deployed to 0.5m premises in Area 3 before any incentives or commitments have been implemented.
- 3.56 In Axione's view, Ofcom has not properly understood the substantial willingness by BT and altnets to deploy commercially to more than 4m premises in what Ofcom has classified as Area 3. If Ofcom believes that there is still value in keeping the Area 3 classification as proposed in the January 2020 WFTMR consultation, then it needs to change its approach to remedies from one that focuses only on incentivising BT deployment to one that incentivises all market players to deploy, allowing consumers in Area 3 to benefit from the race to deploy first in locations that are unlikely to support more than a single network.
- 3.57 It is completely understandable that BT is seizing the opportunity offered by Ofcom to create its own virtually uncontested franchise area. The fact that either BT or altnets would deploy in any case is immaterial in that respect; BT is simply using Ofcom's concern that there will be insufficient deployment to its own advantage. It is Ofcom's responsibility to ensure that such opportunities are not presented to BT.

3.4.6.3. Further define the parameters of the BT commitment

- 3.58 If Ofcom chooses to retain a BT Commitment, then Axione believes that the parameters of the commitment must be changed.
- 3.59 The application of the forecast RAB price control approach in Area 3 is predicated on BT committing to a forecast level of fibre deployment in Area 3. We understand from the Area 3 consultation and discussions held with Ofcom since the publication of that consultation that the BT Commitment is a proposal from BT, and the parameters defined by BT. Axione understands that the BT Commitment is voluntary, and as such cannot be dictated by Ofcom, but Ofcom could set parameters within which it would accept a BT Commitment.
- 3.60 For example, Ofcom could characterise the geographic areas to be included in the commitment to ensure that they include only locations not included in altnet deployment plans.

3.4.6.4. Change the definition of Area 3

- 3.61 In the absence of restrictions on which parts of Area 3 BT can select for its Commitment, Axione believes that Ofcom should amend the definition of Area 3 to exclude the areas put forward by all providers, including altnets, with an open wholesale offer, which would ensure all ISPs have access to this infrastructure and hence the delivery of effective retail competition. The remaining premises in Area 3 would be available for BT to select from for its commitment, and the higher unit costs, compounded with lower premise scope, could allow a significantly reduced commitment level. The premises removed from Area 3 (and moved to Area 2), as well as the remaining premises in Area 3 outside the BT Commitment, would be available to whichever operator made the first move.

3.4.6.5. Dynamic adjustment of the BT Commitment

- 3.62 In discussions, Ofcom has suggested that the BT Commitment could potentially be adjusted to exclude locations that have already been covered by altnet fibre. It is understood that this would not prevent BT from deploying in those locations, but it would remove the commitment to do so. We understand that Ofcom would not necessarily look to BT to replace such locations with other locations in area 3, partly as a result of BT's current Commitment already being extremely generous and also of the fact that BT would not be enjoying the excess profits from customers in those locations as the altnets increase their market share.
- 3.63 Axione finds this idea attractive, but has a number of reservations:

- Locations to be excluded from the BT Commitment should include those for which an altnet had secured funding and notified the Highways Authority. Limiting the exclusions to those that have already been fully covered would likely result in a substantial overbuild by BT due to timing issues;
- The granularity of clusters of premises Ofcom would exclude needs to be sufficiently fine to reflect altnet deployments in villages and small towns. Axione has severe concerns with regards to Ofcom's market definition process which has allocated a number of locations already fully covered by altnet fibre to Area 3, so the descoping of locations would need to be sufficiently granular to be meaningful in terms of actual altnet deployments;
- There would need to be a formal and public process for the removal of locations from the Commitment, and it would be important to communicate up-front that the BT Commitment is not fixed but subject to change if altnet fibre is deployed first; and
- It would be important to understand how much notice BT/Openreach would need for the removal of locations from the Commitment to be meaningful. We understand that if BT had also notified the Highway Authority of the same location, then it would not be meaningful to remove the location from the Commitment. Would it make sense to use that as the determining factor? As BT has large scale deployment plans, we do not anticipate that the removal of single locations should cause it significant operational challenges.

3.64 If a meaningful arrangement could be designed that would address the concerns outlined above, Axione believes that the ability to remove locations from the BT commitment could be of some value. It would, however, be of significantly lower value than removing the BT Commitment or restricting it to the less commercially attractive deployment locations.

3.5. Price regulation for leased lines and dark fibre in Area 3

- 3.65 The Area 3 consultation is silent about remedies for the business connectivity market (leased lines and dark fibre). In our WFTMR response, we explained the detrimental effect on competitive fibre deployment of very low price dark fibre remedies. As an MSN, Axione plans to build out full networks to serve all market segments, including the point-to-point connectivity market, whether by active leased lines or dark fibre.
- 3.66 Ofcom's proposal for a very low price – cost-based – dark fibre remedy in Area 3 undermines the point-to-point connectivity business opportunity for Axione and similar operators. This is because the cost of providing dark fibre on our own network, using PIA to the maximum extent possible, are significantly higher than the proposed dark fibre price from Openreach. Axione considers that Ofcom's approach in this respect is inconsistent with its support for competitive fibre deployment in Area 3, which is expressed through the application of the CPI-0 charge control for WLA and the extension of FTTP geographic discount restrictions to Area 3.
- 3.67 The WFTMR has a focus on MSNs, and Axione plans to become an MSN where it deploys, but the proposed differences in approach between the WLAM and BCM work counter to Ofcom's explicit desire to align regulatory interventions in fixed telecommunications to ensure that there are investment incentives across fixed telecommunications.

4. Other Area 3 Remedies

- 4.1 In addition to the headline charge control remedy, a number of other remedies are also proposed for Area 3, including restrictions on geographic discounting for specific services.

4.2. Geographic discount restrictions

- 4.2 In the Area 3 consultation, Ofcom proposes to extend the geographic discounting restrictions for FTTP services from Area 2 to Area 3 but does not propose the same for leased lines.
- 4.3 Axione welcomes the proposal that geographic discounting restrictions should apply to FTTP services in Area 3. Axione plans to deploy fibre networks mostly across Area 3 and we would be very concerned if BT were free to deploy geographic discounting tactics to harm our deployment prospects.
- 4.4 In our WFTMR response, we explained that the geographic discounting restrictions proposed by Ofcom are not sufficiently tightly defined and as such leave open opportunities for BT to use geographic discounting in manners that would harm competitive fibre deployment. We remain of that view and refer Ofcom to section 5.5.1.1 paragraphs 5.57 – 5.75 of our WFTMR response.
- 4.5 Axione is disappointed that Ofcom is not proposing to also extend the geographic discounting restrictions to leased lines provision in Area 3. As an MSN, Axione will be delivering a full set of fibre connectivity products, including leased lines which form an important part of the overall business plan.
- 4.6 If Ofcom accepts that geographic discounting could harm competitive deployment of WLA services in Area 3, then it is clear that the same applies to leased lines. Axione is not certain whether the reason Ofcom has not mentioned the application of the geographic discounting restrictions to leased lines in Area 3 is due to the focus of the Area 3 consultation is entirely on the WLA market – or whether it is because Ofcom proposes no changes to the leased lines remedies proposed in the WFTMR.

4.3. Restrictions on volume discounts, loyalty schemes and other similar arrangements

- 4.7 Axione is extremely disappointed that Ofcom appears to not have extended the restrictions initially proposed for Area 2 to limit BT's abilities to design commercial terms for wholesale access that restrict BT's wholesale customers from consuming wholesale services from other providers.
- 4.8 Axione is a wholesale-only provider and the ability to attract wholesale customers is therefore critical to our business model. It is difficult to persuade large national internet service providers (ISPs) to use altnet infrastructure, even without the existence of commercial terms that directly incentivise the ISPs to purchase as much wholesale access from BT as possible, and potentially even penalise the ISPs if they were to use altnet wholesale services in preference to the BT wholesale services.
- 4.9 Although Ofcom maintains that its primary approach to regulation in Area 3 is to encourage BT to deploy fibre and to encourage downstream competition through access to the BT fibre infrastructure, Ofcom also acknowledges that there will be altnet deployment in Area 3 and that there are direct benefits to consumers from imposing remedies that remove (or reduce) BT's ability to lock in wholesale customers or offer them incentives that could lead to direct harm to altnet deployment plans.

- 4.10 Axione agrees with Ofcom that the restrictions on geographic discounts should be applied in Area 3 and it is logically consistent that restrictions on other potentially harmful commercial arrangements to deter altnet deployment and/or lock in/incentivise ISPs, to prefer BT wholesale access over altnet access, should also be applied in Area 3.
- 4.11 Axione cannot see that any significant harm can result from the application of these restrictions in Area 3 but can easily see potential harm from not doing so. We refer Ofcom to our WFTMR response, paragraphs 5.57-5.75.
- 4.12 Axione urges Ofcom to apply all restrictions to prevent market foreclosure through discounts or commercial wholesale terms proposed for Area 2 in Area 3 also.
- 4.13 Axione also refers Ofcom to paragraphs 5.76-5.80 in its WFTMR response in which it sets out why Ofcom's proposed remedies are insufficient to fully deter BT from anticompetitive pricing or contractual practices. Axione urges Ofcom to strengthen both geographic discount restrictions and restrictions on potentially anticompetitive contractual terms.

