Zzoomm response to Ofcom consultation on price remedies in Area 3

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Introduction and executive summary

1. Zzoomm is pleased to respond to Ofcom's consultation relating to pricing remedies in Area 3 (the Area 3 consultation) – a follow-on consultation to the Wholesale Fixed Telecoms Market Review (WFTMR) consultation issued in January 2020 and to which Zzoomm submitted a response in May 2020.

Introduction

2. Zzoomm plc ("Zzoomm") builds and operates new ducted Full Fibre networks in selected UK market towns. It delivers services to homes, businesses, and enterprises within each service area over a combination of shared XGS-PON and point-to-point fibre infrastructures. It commenced operation in September 2019 in Henley-on-Thames, served its first customers there in January 2020 and expects to complete networks construction and to be in a position to serve all the 6800 properties in the town by the end of 2020. Take-up of broadband and leased line services has been encouraging, with approximately 14% of properties passed taking a Full Fibre service as at the end of August 2020. Subject to the availability of capital, Zzoomm expects to build new Full Fibre networks in approximately 80 market towns over the next 5 years, providing approximately 1 million properties with access to multi-Gigabit services.

3. Ofcom's regulatory interventions in the fixed telecommunications market, in particular how it regulates BT's[1] prices, have a significant impact on the prospects of BT's competitors to invest in competing infrastructure and/or compete with BT and large retail internet service providers (ISPs) at the retail level.

4. The Area 3 consultation is a supplementary consultation to the WFTMR consultation and proposes a different price regulation approach for the geographic locations in the UK known as Area 3. Zzoomm finds it very surprising that Ofcom is consulting on a revised pricing approach in Area 3 without also addressing the many comments it has received in relation to the definition of Area 3. The discussion with BT and assessment of proposal from BT of a commitment to deploy fibre to 3.2m premises in Area 3 (the BT Commitment) appears to fossilise the Area 3 definition (as the BT Commitment relates directly to the draft Area 3 definition on which Ofcom is supposedly still consulting).

5. Zzoomm presents its responses to the Area 3 consultation in this document and urges Ofcom to meet its statutory obligations[2] to consider all relevant responses received before making its final decision. The fact that Ofcom does not mention the fact that the Area 3 definition remains a subject of consultation and thus should not be assumed to remain as set out in the WFTMR is of deep concern.

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[1] In this response we use the term BT to mean BT and/or Openreach interchangeably. Where we use the term Openreach it is to specifically distinguish points directly and only relevant to Openreach.

[2] Amongst others, section 48 of the Communications Act 2003.

Executive Summary

6. Zzoomm believes that Ofcom's definition of Area 3 is fundamentally flawed, as it includes a large portion of locations where Zzoomm and other competitive providers (altnets) either have already deployed full-fibre networks or have advanced plans, some publicly announced and some just shared with Ofcom, to do so.

7. In the WFTMR, Ofcom stated 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. Zzoomm is now concerned that Ofcom is no longer committed to that position; this concern is amplified by the fact that locations in build plans (and details of locations already covered) submitted by Zzoomm and other altnets were included in the draft Area 3 definition, rather than in Area 2, suggesting that Ofcom has no confidence in altnet deployment and as such has disregarded plans from all smaller altnets. Ofcom is failing in its duties if it is, in effect, picking future winners.

8. 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.

9. Zzoomm 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.[3]

10. In this response, Zzoomm also provides a proposal for an alternative definition of Area 3 and a more appropriate way of determining which types of community would be appropriate for BT to consider in forming a Commitment.

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[3] Therefore, whether the EECC is transposed or not, Ofcom has duties under current and future legislation to not discriminate for or against individual communications providers.

Setting the boundary between Areas 2 and 3

11. Ofcom defines Area 3 as:

    "*a geographic market comprising postcode sectors where there is unlikely to be material commercial deployment by rival networks to BT*"

12. Our understanding of that definition is that Area 3 should include locations where altnets would not find it commercially attractive to deploy, and therefore deployment of fibre would be primarily down to BT. We do not agree that this definition should be interpreted as identifying areas where altnets would not build in addition to BT. This is because it would be entirely unreasonable for Ofcom to assume that BT will have fibre network everywhere and that altnets could only ever deploy in competition with BT as opposed to altnets deploying the only fibre network in a location.

13. In discussions with Ofcom since the WFTMR was issued, Ofcom has acknowledged that it considers scenarios where an altnet network is the only network in a specific location as valid and realistic, thus it would be incorrect to define a geographic market only based on whether both BT and an altnet would deploy when there is clear evidence of altnets deploying fibre networks in locations a long time in advance of BT doing so. Openreach themselves clearly believe that altnet deployments are a necessary contribution to national fibre deployment; Clive Selley (Openreach CEO), in response to a question on the government target for 1G broadband, said *"That is a very significant challenge, I think we will make a massive contribution in getting the nation to that milestone, but we can't do it alone. I expect others to help."*[4] Philip Jansen (CEO of BT) has also suggested that rivals must be allowed to co-operate in building networks in sparsely populated regions, and proposed a "single rural network" scheme to allow companies to avoid overlapping each other in the 20-30% of the country which cannot support multiple networks.[5]

14. In its preliminary consultations during 2018-19, Ofcom originally proposed to identify locations for inclusion in Area 3 through an economic analysis using size of premises clusters and other parameters. That approach was, however, abandoned for the WFTMR where Ofcom instead relied on deployment plans received from BT, Virgin Media and City Fibre Network. Zzoomm believes this change has led to a lack of consistency in the locations included in Area 3, as some very commercially attractive locations have been put into Area 3 simply because they happened to not be on the deployment lists of these three[6].

15. In paragraph 3.9 of the Area 3 consultation, Ofcom states that its objective from interventions in Area 3 is "*ensuring that consumers in Area 3 benefit from fibre*", thus we understand that <u>Ofcom's primary objective from its regulatory interventions in</u>

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[4] https://www.telegraph.co.uk/technology/2020/01/26/openreach-boss-clive-selleyone-home-every-23-seconds-gets-full/

[5] https://www.telegraph.co.uk/business/2020/01/16/bt-chief-warns-boris-johnson-rural-threat-broadband-pledge/

[6] We note that Ofcom did in fact not use all deployment lists and this may be part of the reason for the lack of homogeneity of locations included in Area 3.

Area 3 is to maximise fibre deployment (coverage) in Area 3, whilst also protecting consumers' interests and ensuring that consumers receive value for money.

16. In paragraph 3.4 of the Area 3 consultation, Ofcom also states that:
"*In Area 3, we do not consider there to be the potential for a material competitive dynamic. In the absence of such a dynamic <u>Openreach will face weak incentives to deploy new and better networks</u>. Therefore, <u>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</u>.*" [emphasis added]

17. That statement is in clear contradiction to the build plans Ofcom has received from Zzoomm and other altnets, but which Ofcom has chosen to ignore when deciding which areas to include in Area 3. At present Openreach is under commercial pressure to deploy in Area 3 in advance of altnets as many Area 3 locations can only support a single fibre network. This means that timing is important in Area 3. There is clear <u>competition for the market</u>, even if there may not be <u>competition in the market</u> at the infrastructure level. Therefore, focusing remedies on encouraging BT deployment is misguided and will only result in removal of competition for the market and so removing the existing pressures for BT to deploy quickly in advance of altnets. Ofcom's current position will thus slow down fibre investment and adoption across the UK and lead to the worst possible outcome for the UK nation, for its businesses and for its citizens.

Ofcom's proposed Area 3 definition includes many commercially attractive locations

18. Zzoomm submitted its build plans to Ofcom under an S.135 request in August 2019, in advance of the WFTMR consultation, and is aware that other altnets did the same. It was therefore a big disappointment to see that Ofcom considered virtually all altnet build plans to be "insufficiently material" to warrant inclusion in Area 2, leaving them in Area 3 and articulating its regulatory objectives for Area 3 as being to incentivise BT to deploy fibre to as many premises in Area 3 as possible.

19. Zzoomm's build programme in Henley-on-Thames proves the point. Less than a year after submitting plan data to Ofcom, Zzoomm has built close to 100% of the town and has a take-up rate of 14%. Zzoomm has brought the benefits of fibre to the citizens and business of Henley years in advance of Openreach. Yet Henley's postcode sectors (RG9 1 and RG9 2) are in Area 3.

20. In discussions with Ofcom on this subject, Ofcom has referred to the complexity of incorporating all altnet plans in its analyses as well as its perception that altnet deployment plans are less dependable than plans submitted by BT and a small number of larger altnets (namely CityFibre, FibreNation (now part of CityFibre), and Virgin Media).

21. The WFTMR also appeared to consider that only those largest altnets would qualify as what Ofcom terms multi-service networks (MSNs). This is despite Zzoomm's business plan (and now established product portfolio) which clearly targeted both broadband and point-to-point (leased line) customers. We understand that the same is the case for the majority of altnets. Arbitrarily not being categorised as MSNs appears to also have been a factor in Ofcom's decision to not take account of altnet deployment plans when determining the location that should be included in Area 3. Now that Ofcom has clear evidence that Zzoomm and many other altnets are indeed MSNs, Zzoomm urges Ofcom to address this significant error in the WFTMR analysis.

22. It is Zzoomm's strongly held view that altnets which have secured financing are at least equally as likely to deploy new networks as BT, which is itself presently facing significant financial challenges. We are naturally not party to the confidential build plans submitted to Ofcom by other altnets, but we are aware of public information (including the report produced for INCA by Point Topic[7]), that (allowing for some duplication of target areas and the possibility that not all plans will become a reality) would deliver between 2 and 3m premises passed in Area 3. How Ofcom can consider that a cumulative altnet deployment in Area 3 of around 1/3 of the current 9 million Area 3 premises is "immaterial" remains a mystery and one which we believe Ofcom needs to revisit with some urgency.

23. Our advisors have on numerous occasions sought clarification from Ofcom as to how and why it determined that the deployment plans from all but 3 altnets were not sufficiently material (individually and cumulatively) to constitute competitive pressure on BT to deploy in those areas. As far as we are aware, no altnet has as yet received clarification. We understand that Ofcom has suggested that the plans

[7] https://www.inca.coop/altnet-metrics-point-topic-2018

of a large number of smaller altnets are difficult to validate and that some plans are unlikely to result in actual build.

24. It is clear that there can be no guarantees that all altnet plans will deliver actual deployments to exactly all the locations in their build plans. But it is also clear that if a location is included in an altnet plan that has received funding after a detailed investment due diligence process, then that location is likely to be viable for commercial deployment and thus should not be included in Area 3.

25. No other arguments have been presented by Ofcom to support its decision to exclude build plans from all but three altnets. In its 2018 initial consultation on geographic markets, Ofcom concentrated on identifying clusters of continuous premises and we have considered whether perhaps Ofcom has considered that the altnet plans were not sufficiently material due to not constituting large contiguous build areas. Whilst contiguity has not been mentioned in the WFTMR as a criterion for determining materiality of altnet build plans, we present our thoughts on the topic below:

Would large contiguous areas of altnet build constitute a stronger competitive constraint on BT than smaller more widely distributed areas?

26. Having considered this question carefully, we have come to the conclusion that it would be easier for BT to respond to competition in concentrated contiguous areas (for example through special offers, targeted retail offers, discounts etc) than to distributed competition across a larger geographic area. The cost to BT responding to distributed competition would likely be higher and this distributed competition would be considered a larger competitive threat by BT. It is therefore our view that lack of contiguity in altnet build plans cannot be considered a reason to consider those plans less material than if they had been in large contiguous areas.

27. In its WFTMR response in May 2020, Zzoomm stated that it believed that Area 3 had been drawn far too widely and significantly underestimated the potential for competitive Full Fibre network build (Vol 3, Q1.1 response): *'Is the area where you expect there to be no potential for competition going to be is drawn too broadly, and therefore define a larger area than necessary where competitive build is discouraged and which becomes "exclusive" to Openreach'*

28. Zzoomm urges Ofcom to review the locations proposed for Area 3 and incorporate updated altnet build plans (and locations already covered as should be available through the Connected Britain data collected). If Area 3 was reduced to between 5m and 6m premises that are genuinely challenging for commercial deployment, then Zzoomm's concerns with Ofcom's proposed price remedies (including the BT Commitment) would be overcome, at it is our view that this would also result in faster and broader fibre deployment across the UK in the 2021 – 2026 period.

Ofcom's proposed price remedies for Area 3

29. In the WFTMR, Ofcom proposed to apply a RAB-style price remedy in Area 3, effectively reducing the price of copper and rewarding BT for fibre investment, based on proven investment in fibre (known as the CPI-X+K formula). Ofcom did, however, express a preference for another RAB-style remedy, referred to as the forecast approach.

30. The forecast approach would set the same price remedy in Area 3 as in Area 2, namely the CPI-0 control, but that would be dependent on a pre-commitment by BT to deploy fibre to a minimum number of premises in Area 3. The pre-commitment would be to balance the over-recovery by BT of its efficiently incurred costs in Area 3 – in the absence of a certain level of investment. The main difference between the two approaches was therefore that the CPI-X+K approach rewarded BT for investment once the investment was made, whereas the forecast approach takes into account pre-committed investment and thus enables a more stable and predictable price level.

31. The Area 3 consultation is caused by BT wishing to make such a pre-commitment and consequently Ofcom now proposing to apply the forecast approach for Area 3. In principle, Zzoomm welcomes the change as the removal of Openreach wholesale price differences between Area 2 and 3 could lead to significant market distortions, many of which we note were set out clearly in WFTMR responses now published on Ofcom's website.

32. Zzoomm's concern with Ofcom's proposals in Area 3 is therefore not related to the price remedy itself, but to the commitment made by BT and which it appears Ofcom is proposing to accept.

The BT Commitment

33. BT has proposed a commitment to deploy fibre to 3.2m premises in Area 3 (the BT Commitment) and published a list of locations (based on its exchange areas) that we believe represent approximately 2.6m premises, excluding Northern Ireland. That list appears to have been subsequently taken down, but it was captured in an ISP review article[8], and was then re-published and so is generally available. BT also recently published an updated list including maps of its fibre deployment plans.[9] In this latest list, BT itself seems to recognise the contradiction in the current Area 3 definition. The list of 67 exchanges is "in its Fibre Cities programme". In January 2020, Openreach announced the "rural market towns and villages" exchanges that it now claims for part of its Commitment and said that "[t]hey are distinct from the Fibre Cities programme"[10]. It then added to the "rural" list in July and proposed it as the BT Commitment. But Daventry and Burton-on-Trent are in both the Fibre Cities programme and the "distinct" Commitment, which is clear proof of the contradiction.

34. Ofcom's Area 3 remedy does not include an obligation for BT to publish a list of the 3.2m premises it plans to deploy to, but BT did so anyway – even in advance of Ofcom completing its consultation process (the outcome of which may be that Ofcom rejects BT's proposal). This in itself demonstrates that it is in BT's interest to 'lay claim' on its target locations as soon as possible, in order to deter altnet investment in those areas. In its latest publication BT states:
"*This gives stakeholders – like Communications Providers (CP), end-customers and*

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[8] https://www.ispreview.co.uk/index.php/2020/07/ofcom-tweak-uk-market-definitions-to-help-bts-rural-fibre-rollout.html

[9] https://www.openreach.com/news/openreach-adds-another-67-locations-to-its--future-proof-broadband-build-plan/

[10]

https://www.openreach.co.uk/orpg/home/updates/briefings/ultrafastfibreaccessbriefings/ultrafastfibreaccessbriefingarticles/nga200220.do

council planners - valuable information to make informed decisions on their FTTP investments ……"

35. This statement suggests that BT is signalling to altnets to not deploy where BT plans to do so.

The impact of the BT Commitment

36. In discussions, Ofcom has queried the impact of the BT Commitment, in particular in comparison to BT's standard practice of publication of its deployment targets, typically 18 months prior to deployment commencing. We understand why Ofcom would query this and have considered the issue carefully.

37. BT's general deployment target publications are general indications of where they intend to build and are dynamic and subject to change. This is generally accepted. The BT Commitment, however, is considered a contract, in the eyes of the public, between Ofcom and BT. Although we recognise that it is not legally binding *per se,* it will clearly be considered a binding commitment by BT.

38. The different perception of the BT Commitment as opposed to BT's general publication of target areas is important. Zzoomm has already experienced that impact in discussions with a local authority where the impact of the BT Commitment was that the local authority simply terminated discussion with Zzoomm, deciding to wait for BT – even though the only date given was "by March 2024". Having a supportive and welcoming local authority is important to Zzoomm for the ultimate success of its investment. This decision by the local authority is despite Zzoomm proposing to deploy in that location in 2021 as opposed to an uncertain time scale for BT, potentially meaning the areas will have to wait 2-3 years longer for fibre connectivity than if they had continued discussions with Zzoomm.

39. Ofcom should not underestimate the impact of the BT Commitment on the ability of altnets to deploy. The BT Commitment is likely to all but remove the competitive pressure on BT to deploy in those locations quickly, simply because the locations will be considered 'reserved' for BT.

The BT Commitment cherry-picks the most commercially attractive locations in Area 3

40. Having analysed the locations covered by the BT Commitment, Zzoomm has found that the vast majority of premises covered in the Commitment are in towns (e.g. exchange sizes more than 10,000 premises) as opposed to exchange areas in rural areas with much smaller numbers of premises. Indeed, three towns in the Commitment have more than 30,000 premises in the BT exchange – Banbury, Burton-on-Trent, and Hereford.

41. It is therefore clear that BT's Commitment mostly focuses on larger towns that were attractive for fibre investment in any case (and often have substantial existing new housing developments already built with Openreach fibre) and which, as described above, should not be included in Area 3 in the first place. The current proposed BT Commitment therefore has the following consequences:

- It will not increase fibre deployment in Area 3, as the locations in the Commitment would in any case have been covered by altnets and/or eventually by BT, but

- The Commitment will deter altnet investment in those areas, due to the chilling effect of the certainty that BT will definitely deploy in those areas at some point in the near future, regardless of whether an altnet deploys there first, and
- Ofcom is trying to pick winners: BT reserving the most commercially attractive locations for itself would artificially weaken the overall investment case for altnets.
- Additionally, it is likely that the BT Commitment will position BT strongly to receive Government funding to deploy to smaller towns and villages surrounding the larger towns it has included in its Commitment, thus further hindering altnet deployment in Area 3.

42. Thus, as a consequence of Area 3 being defined to include commercially attractive investment locations, this has enabled BT to make a commitment that is unlikely to represent any incremental deployment over and above what it would have chosen to do anyway. The core problem here is the mis-categorisation of a large number of locations to Area 3, when they should rightly be in Area 2, but the problem is manifested in BT's ability to effectively reserve more than 3m of the more commercial premises for itself, sterilising those locations from competitive investment.

Ofcom performs inadequate Impact Assessment on BT's Commitment

43. Zzoomm understands that Ofcom has a formal duty to perform Impact Assessments on important proposals[11], but we note that the Area 3 consultations does not include an Impact Assessment, nor does the Impact Assessment in the WFTMR in any way adequately cover the proposals set out in the Area 3 consultation. Zzoomm is concerned that Ofcom may be in breach of its duties to perform and present Impact Assessments.

44. In particular, Ofcom does not analyse the impact of BT's overly generous Commitment. In this document we have set our clearly that the BT Commitment is effectively a means of BT designing its own uncontested franchise area, to the considerable detriment of altnet deployment and ultimately to consumers.
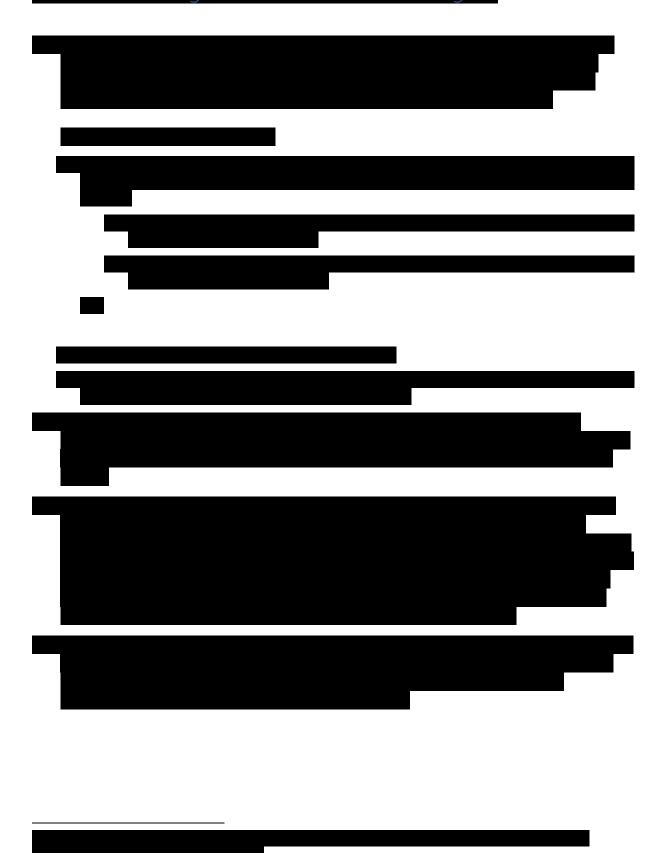
Ofcom's approach does not maximise benefits for consumers

45. As described throughout this document, we believe that Ofcom's proposals will result in less fibre deployment in Area 3 and delayed deployment in Area 3 due to the removal of incentives on BT to deploy quickly and the significant chilling effect of the BT Commitment on the ability of altnets to deploy in locations on the BT Commitment list.

46. Zzoomm understands that Ofcom has a formal duty to maximise benefits to consumers in a relevant market[12]. Area 3 is a separate geographic market and it is our strong belief that Ofcom's proposals will reduce and delay benefits to consumers in Area 3 and this would be in conflict with Ofcom's duty to maximise those benefits.

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[11] Communications Act 2003 Section 4.

[12] Communications Act 2003 section 4 (8) (b).

Ofcom's approach to defining and regulating is discrimination against altnets and favouring BT

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Publishing postcodes for each BT exchange

51. Before we begin the presentation of Zzoomm's proposed alternative definition and remedies for Area 3, we would highlight one structural flaw in the Ofcom consultation process. Ofcom's definitions of Area 2 and 3 are at the level of postcode sector (e.g. RG9 1). However, Openreach use lists of BT exchanges, i.e. the exchange areas covered by those exchanges. There is no publicly available data to match postcode sectors to BT exchanges. Indeed, BT's exchange boundaries are unlikely to match postcode sectors, so data at individual postcode level or property level has to be made available.

52. We therefore believe that the industry cannot properly analyse the impact of any announcement by BT of plans or ambitions to deliver fibre to an exchange without the postcodes or properties covered by that exchange to also be made available by BT. Thus, we urge Ofcom to make this publication a requirement. Indeed, for simplicity, we propose that Ofcom requires BT to make available a complete database of postcodes or properties for all its exchanges.

Proposed changes to Area 3 and remedies in Area 3

Redefine Area 3

53. It is clear from our response above that Ofcom's implementation of the Area 3 definition does not accurately reflect a significant difference in the commercial viability of locations in Area 2 and in Area 3. Some locations in Area 3 are larger and likely at least as commercial as locations in Area 2 and some locations in Area 2 are comparable to smaller and harder to reach locations in Area 3. There is no consistency, leading to a lack of homogeneity in both Areas 2 and 3 and to mixed and confusing investment incentives in the market.

54. Ofcom should redefine Area 3 to include only locations that are not on altnet deployment lists and/or are unviable for commercial deployment measured by transparent economic parameters including premises density. This would address Zzoomm's concerns relating to the impact of the BT Commitment and would maximise competitive deployment either in areas that can support only a single network or in areas where several competing networks could be viable.

55. It is wrong that a relatively arbitrary selection of locations by the regulator should determine whether consumers in those locations will benefit from fibre connectivity at the earliest possible time. Ofcom has effectively determined that consumers based in up to 4 million premises should wait till BT finds it convenient to provide fibre rather than have the opportunity of getting served by competitive fibre networks much earlier (or indeed be served by BT earlier due to the competitive pressure to ensure deployment before altnets deploy). We consider this approach to be in direct conflict with Ofcom's clearly stated objective for Area 3 of "*ensuring that consumers in Area 3 benefit from fibre*"[15].

56. Zzoomm urges Ofcom to properly apply its Area 3 definition and either apply reasonable economic criteria to define locations that are not economic for altnet fibre deployment or take full account of altnet deployment plans and include locations in those plans in Area 2.

57. The consequence of such changes would be that Area 3 would become significantly smaller (Zzoomm estimates between 4m and 6m premises would remain in Area 3) resulting in the need for a smaller commitment from BT (in harder to serve and thus more expensive locations) and in a commitment in areas where there is much less certainty of commercial deployment by either an altnet or BT. This would thus result in increased fibre coverage overall in Area 3 and deliver real tangible benefit to consumers in those locations.

Apply restrictions to which premises in Area 3 BT can use for its commitment

58. In the event that Ofcom determines to not redefine Area 3 (which Zzoomm considers would be in direct contradiction to Ofcom duties and as such open to legal challenge), Ofcom should impose restrictions on how the BT Commitment could be achieved. Such restrictions should prevent BT from cherry-picking the most commercially attractive locations in Area 3 and instead ensure that the BT Commitment is targeted at harder to reach locations where the probability of

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[15] Paragraph 3.9 of the Area 3 consultation.

commercial altnet deployment is much lower. This could be achieved by a number of means:

1. Ofcom could restrict BT's commitment areas to BT exchanges below a specific threshold of premises count. Zzoomm has analysed the distribution of BT exchanges with regards to the number of premises they serve and have found that exchange areas serving 5000 or fewer premises represent approximately 5m premises. If BT's Commitment was restricted to those exchange areas, then BT would not be forced to serve the smallest and most uneconomic locations but would also be prevented from targeting the largest and most lucrative areas as part of the Commitment. Zzoomm considers that this approach is straightforward and practicable and recommends that Ofcom considers it carefully.[16]

2. Ofcom could achieve the same or a similar effect if it were to use postcode sectors and premises clusters to determine the classes of locations that BT could access for its Commitment. We are aware that Ofcom has access to the postcode sector information and also that Ofcom performed premises cluster analysis to support its geographic markets consultation in December 2018, and therefore consider that the necessary analysis should be achievable with a limited level of effort.

3. Accept the BT Commitment, but immediately adjust it to exclude locations that either have already been built by altnet or are on altnet build schedules. This would achieve, as a minimum, the same level of deployment as if BT delivered its entire Commitment but would ensure that there is competition to deploy first in commercially attractive areas. This would likely also result in higher levels of deployment as BT and altnets seek to deploy in areas if their original target locations have already been addressed by a competitor

Adjust the BT Commitment dynamically over time

59. As well as the adjustments to the BT Commitment set out above, Zzoomm recommends that Ofcom adopts an approach by which any location completed by an altnet or on an altnet build plan that has full funding and has been notified as a Major Project to the relevant Highway Authorities should be removed from the BT Commitment on a dynamic basis. This would help reflect the dynamic changes to build plans as BT as well as altnets change target locations in response to competitive presence in their original target locations. It would maximise incentives for BT and altnets to deploy as quickly as possible, resulting in the broadest and fastest deployment in Area 3.

Restrictions on potentially anticompetitive pricing by BT

60. Zzoomm welcomes Ofcom's proposal to extend the geographic discounting restrictions, originally proposed only for Area 2, to also apply in Area 3. We urge Ofcom to also extend the proposed Area 2 restrictions on volume discounts, loyalty discounts and other potentially anticompetitive pricing structures to cover Area 3 as well. There is not logic that we can understand as to why only parts of the restrictions should apply to Area 3.

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[16] See Annex 1 for Zzoomm's proposal (separate document).

Pricing of dark fibre access in Area 3

61. Zzoomm considers that under Ofcom's proposals for dark fibre access in Area 3, the prices are set at a level that cannot be replicated by an altnet using PIA to build a new all fibre network. This denies the altnet access to the economies of scale and scope from which BT benefits, and therefore favours BT over altnets.

62. In discussions, Ofcom has acknowledged that, in some locations where only a single network is viable, that single network may be operated by an altnet. But the BT dark fibre obligation (on the specific terms mandated) results in BT having to continue to operate infrastructure in those locations if another communications provider is using the dark fibre service. The dark fibre pricing mandated by Ofcom enables BT to recover its costs on the basis of the economies of scale and scope achieved when BT operates a full network with a significant market share. If BT were to provide only a dark fibre service in an area where it no longer provided active services, the costs to provide the dark fibre would be considerably higher than the mandated price.

63. Zzoomm therefore believes that the proposed dark fibre pricing is too low and could lead to long-term untenable situations whereby neither BT nor an altnet would be able to recover their costs of the provision of dark fibre.