



Full Fibre broadband

Zzoomm response to Ofcom consultation:

Regulatory Enforcement Guidelines for
Investigations

July 19th 2022

Introduction

Zzoomm is pleased to respond to Ofcom's consultation: Regulatory Enforcement Guidelines for investigations.

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 completed network construction and was in a position to serve all the properties in the town by the end of 2020. Take-up of broadband and leased line services has been encouraging, with approximately 26% of properties passed taking a Full Fibre service as at the end of June 2022.

Zzoomm commenced construction of a Full Fibre networks in an additional 15 towns during 2021 which comprise approximately 250,000 homes and business in total. 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.

Scope of this response

Zzoomm is responding to this consultation in order to bring to Ofcom's attention its experiences in attempting to use Ofcom's existing enforcement framework and to highlight that we do not consider that Ofcom has acted in accordance with the existing (and proposed continued) principles and guidelines.

We do not offer responses to the specific questions posed by Ofcom other than to welcome the updating of guidelines to incorporate Ofcom's new duties and powers and to make the guidelines overall more accessible and easier to use.

Zzoomm's experience

In August 2021 Zzoomm submitted a draft complaint to Ofcom. The scope of the complaint was that Openreach was in breach of competition law by abusing its dominance in the provision of EAD circuits and applying a surcharge to circuits purchased for a specific purpose, but not to others.

Zzoomm acknowledged that Ofcom had chosen to exclude EAD circuits used for FTTP traffic aggregation from the regulated market definition as was not challenging that decision.¹ The Zzoomm complaint was in relation to an alleged breach of competition law. Zzoomm's complaint was not in relation to regulated EAD circuits but to the pricing of unregulated EAD circuits for which Openreach was discriminating according to the use to which the customer was putting otherwise identical products

The Zzoomm complaint was supported by a number of other builders of fibre networks and data submitted included data collected from across the industry.

Zzoomm had a meeting with Ofcom in September 2022, in which the issues were discussed. Ofcom subsequently asked if it could share the draft complaint with BT, which Zzoomm agree to. Later, Ofcom reverted and requested additional information, which meant that Zzoomm had to collect

¹ Indeed, a challenge of that decision would have to have been done as part of the WFTMR process, not via Ofcom's complaint procedures.

additional data from a number of parties and analyse that data to address the queries raised by Ofcom. That data and analysis was sent to Ofcom in November 2021.

Subsequently Zzoomm did not hear from Ofcom and responses to emails stated that Ofcom was short of the necessary resources and therefore its analysis was taking longer than normal. After several attempts to chase Zzoomm finally received a reply from Ofcom on March 31st 2022.

Ofcom's reply is attached to this document. In summary, it states that Openreach's ability to apply surcharges for EADs used for FTTP aggregation is consistent with Ofcom's regulatory policy and as such Ofcom would not be taking the complaint further. Other points covered in the letter include:

- Ofcom's regulatory policy is that PIA is the appropriate remedy for FTTP aggregation, and this was Ofcom's rationale for excluding such circuits from the ex-ante relevant market definition
- Although the imposition of the surcharges would likely result in potentially significant delays in customers in rural areas and small villages getting ultrafast broadband services, this is an acceptable consequence.
- An investigation into a competition law breach would require considerable resources.

Ofcom's letter did not refer to any of the data or analysis provided by Zzoomm, nor to Ofcom's analyses of that data. When requested by email subsequently about that analysis, Ofcom declined to share it.

Ofcom's duties and guidelines

Ofcom's existing (and proposed revised) enforcement guidelines specifically refer to a requirement to be "*evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome*"² [emphasis added].

It is not Zzoomm's experience that the process it engaged with as outlined above was in any way transparent, nor does it seem that Ofcom considers itself accountable for how it evaluated the draft complaint.

It would seem that Ofcom simply concluded that its regulatory policy to exclude EAD circuits from ex-ante regulation meant that it would not consider the impact of Openreach pricing in the commercial market for EADs.

Ofcom's conclusion that the delays in availability of ultrafast broadband to consumers was consistent with its policy to not regulate this particular use of EADs does not address the question of whether the abuse of dominance in the market for commercial EADs is justifiable and whether the delays in ultrafast broadband availability was an acceptable consequence of that behaviour.

It is unclear why Ofcom asked Zzoomm to incur the costs of collection additional data, given that it appears from Ofcom's letter that Ofcom's conclusion is entirely founded in its regulatory policy decision and that Ofcom has made a blanket decision that the consequences of the alleged abuse of dominance were acceptable without the need to quantify them.

² Paragraphs 1.2 and 3.2 of the draft guidelines.

Proposals for changes to Ofcom's approach

Zzoomm will pursue the specifics of the complaint procedure outlined above separately. The purpose of this response is to highlight that the existing guidelines do not appear to result in satisfactory, transparent, and accountable behaviour by Ofcom.

Zzoomm suggests that Ofcom conduct an internal review of how it communicates with complainants and other relevant parties and identify how those interfaces can be improved to deliver a better user experience.

Complaints are not registered without considerable forethought. For Zzoomm it involved enlisting outside assistance for both the preparation of the complaint and the collection and analysis of data from a number of other parties. For a new market entrant with a focus on expanding its network footprint as quickly as possible, the additional expense and resource involved in the making of a complaint to Ofcom is not a trivial matter.

The experience described above does not reflect Ofcom's recognition of the seriousness of the complaint for Zzoomm and it has left Zzoomm feeling dismissed rather than heard and carefully considered. Zzoomm accepts that Ofcom does not agree to launch an investigation for each complaint it receives, but it is important that complainants are treated with respect and that the reasoning provided for not proceeding is commensurate with the amount of data and analysis requested by Ofcom and the time taken by Ofcom to reach its conclusion.