



STARCOMM LTD
CONVERGING COMMUNICATIONS™

145-157 ST. JOHN STREET
LONDON
ENGLAND
UNITED KINGDOM
EC1V 4PW

Tel: 08700 191919
Fax: 08700 191920

E-Mail: sales@starcomm.co.uk
Website: www.starcomm.co.uk

By Email: competition.complaints@ofcom.org.uk
Ofcom
FAO Keith Loader
Riverside House
2A Southwark Bridge Road
London, SE1 9HA

9th December 2012

RE: Payment of costs and expenses in regulatory disputes (Consultation)

Dear Sirs,

I respond with written comments on the questions raised in this consultation to be submitted to OFCOM by 5pm on 3rd December 2012. This is a two part reply which attempts to deal with legal costs stemming from OFCOM disputes directly (paragraph 1) and those disputes raised by PhonePayPlus Limited, (paragraph 2).

1. OFCOM Dispute Resolution

At para 1.9 and 1.10 OFCOM provides a summary of its proposed approach to costs in disputes.

The general principal in Civil Law Costs states that the loser of a claim pays the costs and expenses of that case. Costs matters are generally heard by Cost Judges which usually adds a further level of expense and delay to the proceedings if costs cannot be agreed.

Sadly, Civil Law has become an excessively expensive process and usually those with the deepest pockets win, not because they are innocent, but because they can carry on paying for legal fees longer than their more impecunious opposition. An indirect risk of this system, is that legal rules effectively get written for the benefit of the wealthy.

Thus it may appear to many small communications companies, who find themselves seeking justice against their much bigger, and better financed, internationally traded competitors, that the traditional Justice System has become a financial commodity which can only be “purchased” by the individual/s or organisation's with the “deepest pockets”.

Thus as a small operator, Starcomm Limited applauds and supports OFCOM's existing approach to deal effectively with this huge financial imbalance. OFCOM's current approach states that each party to a OFCOM dispute pays its own legal costs.

This method can be the only fair method when there are incumbent operator/s in the UK

who have almost unlimited funds and an army of legal expertise available to them, when the vast majority of their competitors do not.

Thus the current OFCOM costs methodology aims to ensure that there is a protective barrier to such anticompetitive behaviour.

Scope for Change

The current system although laudable, may however, have some limitations. Starcomm attempts to list below nine scenario's taken from past experience of the abuses within the current system it has witnessed in its own experience of over almost 20 years of struggling to compete in this highly competitive industry.

May we be so bold as to suggest OFCOM's divergence away from its current approach on costs and expenses (as stated above). If any complaints made to OFCOM contain any of the example scenario's listed below. (Our list of examples is not intended to be exhaustive but is intended to provide some guidance to OFCOM from our own experience).

1. If there is an historical pattern of abuse by one party, over another. For example where the smaller party is being deliberately kept in a impecunious position. Preventing it financing any judicial process to which may deal with that abuse.
2. When it is found that there is evidence of corruption or bias against one organisation by the other. Or if there is evidence of conspiracy by multiple parties against the complainant.
3. Where a Regulated party refuses requests to disclose helpful information to the other made under the Freedom of Information Act in ongoing or prior to legal proceedings. (e.g., preventing full assessment of damages or losses in ongoing proceedings against a third party, thereby protecting that third party from a correct assessment of full damages)
4. If one party may be judged by OFCOM, to have assisted a third party in breaching an Injunctive Order of the High Court. (e.g., assisting the third party in avoiding the consequences of that Order and thereby profiting from that assistance by continuing to trade with it).
5. Where one party has been led into a contract by the deliberate misrepresentation of the other party with the sole purpose of damaging a competitor company while profiting from that original misrepresentation.
6. When one party simply ignores repeated requests for payment of unpaid invoices, over several years, with the aim of making those invoices claims "time-out" under the statute of limitations.
7. If one party uses "blackmail" e.g. freezing all payments to force a weaker party to accept a small fraction of the sums due to it, or face bankruptcy. (e.g. forcing the weaker party to agree to loose all rights to claim on every part paid and unpaid historic invoice backdated to the first date of interconnection in exchange for a small part payment assessed by the stronger party as essential if the weaker party is to avoid bankruptcy).

8. Where any regulated company, modifies customer invoices, generates its own customer credit notes and repeatedly uses the same contractual procedures to avoid paying the full value of its customers invoices.
9. If one party sets off payment of any invoice/s without the consent of the other party. (which may have tax and VAT consequences for both parties) to avoid paying what is due and avoid any banking records.

In such scenario's Starcomm sees scope for dramatic change. Such change may take the form of the following Sanctions and Penalties:

1. 100% of OFCOM's costs and expenses and 100% of the successful parties costs and expenses falling on the guilty party (or part thereof as assessed by OFCOM).
2. 100% of the sums claimed by the successful party plus contractual or statutory interest being paid to the successful party by the losing party. (or part thereof as assessed by OFCOM).
3. A financial penalty assessed by OFCOM (such penalties aimed at dissuading other companies repeating such anti-competitive behaviour. Or a Penalty issued due to a repetition of a previously sanctioned case by the same party). Such penalties to be reasonable and fair and to be assessed as a proportion of the annual turnover of the losing party but in any event no more than 25% of annual turnover.

Conclusion

Starcomm agrees that the current OFCOM rules on costs and expenses be considered generally appropriate in the majority of disputes between parties.

However, based on its own experience Starcomm has listed example scenario's (points 1-9, not meant to be exhaustive) whereby OFCOM could diverge away from its general rule on costs. Such scenario's are meant to illustrate examples of anti-competitive behaviour which are so heinous and insidious as to invoke OFCOM's special powers.

Although such “Special Powers” are outside the scope of this Consultation document, Starcomm has suggested just three. The aim any such OFCOM Penalties is not to put out of business the party who is adjudged by OFCOM to be “guilty” but to prevent that party repeating such behaviour and unfairly profiting from it, at the expense of all of its competitors.

It is clear to Starcomm that the existing Civil Procedure Rules and the High Court Process is both too expensive, time consuming and general to be useful to small companies who strive to compete with former monopolies and international operators many of whom employ small armies of lawyers who may have to justify their salaries based on savings made from their customers.

Technological innovation in communications is of paramount importance to the country and its exports and that innovation takes place more rapidly in small companies than it does in multinational ones. Innovation requires unencumbered access to timely payment and cash flow and less time chasing disputes through a time consuming, expensive, and sadly, a technologically lacking, Civil Court process. Thus OFCOM role is essential in dealing with

such matters cheaply, quickly and most important of all fairly.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Clive Aldred". The signature is written in a cursive, slightly slanted style.

Clive Aldred
Director
Starcomm Limited
clive@starcomm.co.uk