



**Response to Ofcom consultation on '*Payment of costs and expenses in regulatory disputes*'**

**on behalf of The Number UK Ltd (118 118)**

**10 December 2012**



## **Introduction and Overview**

kgb ('knowledge generation bureau') is a privately held, New York-based company and the world's largest independent provider of directory assistance and enhanced information services. kgb has built some of the most successful brands in the telecommunications, customer care and enhanced information services sectors.

In 2002, kgb (then known as InfoNXX) established 118 118 (The Number UK "TNUK") which soon became the largest and most well known provider of directory services in the UK. It handled approximately 40 million calls last year, providing both core directory services and a range of enhanced offer, advertising and other information services. kgb has also pioneered the provision of a broad range of wholesale and retail information services beyond traditional directory assistance services.

As a service provider, TNUK relies on originating and terminating communications providers in order to provide its service to consumers. Disagreements about the wholesale charges set by TNUK and the retail charges set by the originating operators, as well as disagreements with BT about access to directory information all have the potential to escalate into disputes. TNUK therefore has a strong interest in this consultation, particularly because as a relatively small provider, the costs involved in pursuing a dispute are likely to be of greater consequence to us than they would be to large originating and terminating providers.

We note that the consultation does not contain any specific questions and so we assume that Ofcom is interested in receiving comments on its guidance more generally. We therefore structure our comments in line with the structure of the guidance, but first we would like to highlight a particular matter of concern to TNUK.

### **Impact of the costs of disputes on smaller providers**

In any consideration of the disputes process, it is important to consider the imbalance between large providers (typically the established fixed and mobile operators) and smaller providers (new entrants, service providers and others).

A high proportion of the disputes which Ofcom handles feature large providers and a far smaller proportion feature small providers. This is despite the fact that there are actually only a handful of large providers which are greatly outnumbered by small providers. There is also no reason per se why smaller providers should have any less grounds for disagreement or dispute than larger providers. TNUK believes that the fact that they are less likely or less able to have their grievances dealt with by Ofcom is clearly harmful not only for the smaller providers themselves, but more generally for the effectiveness of competition and its impact on consumers.

There are probably many reasons for this disparity, which Ofcom may be unable to address directly. For example: smaller providers are unlikely to have the internal expertise (and in particular full-time regulatory staff) to feel able to manage the dispute process; larger providers tend to regard disputes as a 'business as usual activity', whereas small providers would regard it as exceptional or extreme; smaller providers are likely to have a general sense that they 'cannot win' against much larger, better-resourced and more experienced providers; and small providers are likely to be very concerned that vital future commercial



relationships with larger providers (upon which they rely entirely) will be detrimentally affected if the smaller provider has previously initiated a dispute against the larger provider .

However, TNUK believes strongly that the issue of costs is also a critically important consideration of which Ofcom should be mindful during this consultation. Currently, it is likely that some smaller providers are wary of pursuing disputes partly because of the cost of obtaining external advice (made necessary by a lack of internal expertise). Nevertheless, providers can still maintain fairly close control over their own costs, so although it's an important factor for them to consider, it is one which they can manage.

However, if Ofcom is considering the possibility of making smaller providers liable not only for their own costs, but also for the costs of other parties as well as Ofcom, TNUK believes that this could act as a very significant disincentive to them initiating disputes. Smaller providers are likely to be extremely concerned about open-ended liability for all of the costs which may be incurred by large providers in pursuing a dispute, as well as Ofcom's own costs. Indeed, smaller providers will probably have great difficulty in even forecasting what the level of those costs is likely to be and therefore calculating the liability to which they are opening themselves up.

TNUK appreciates that Ofcom does not intend that cost orders be made on a routine basis and that it will try to establish clear criteria as to when payment of costs would be appropriate. Nevertheless, small providers are likely to be understandably very cautious about even the possibility of having to pay significant costs incurred by others. This is particularly the case when combined with their general sense that they 'cannot win' against much larger, better-resourced and more experienced providers.

In these cases, it seems probable that smaller providers will be looking for virtual certainty of success before deciding to bring a dispute because of the financial risks involved. However, Ofcom has wide discretion as to how it resolves disputes and so such guarantees are unlikely to be forthcoming from any regulatory advisers. Worse still, there is also the possibility that smaller providers might even be reluctant to defend disputes (or potential disputes) brought against them by others for fear of the costs involved. Such a scenario may have a seriously detrimental impact on their businesses.

By contrast, larger providers are likely to be entirely unconcerned by the possibility of having to pay the costs of other (particularly smaller) providers and it is certainly most unlikely to have any impact on whether they decide to bring or defend any dispute. It will be viewed as simply a cost of doing business. Indeed, TNUK believes that larger providers are very likely to support these proposals for precisely the reason that we have identified. That is, that it will make other providers far less likely to bring disputes against them. That benefits them not only in terms of the reduced risk to their business from losing a dispute, but also the reduced impact on their regulatory department from not having to manage it.

The inevitable result of these proposed reforms would seem to be that small providers will be even more reluctant to initiate disputes than is the case currently, although their grievances and causes of dispute will be unchanged. That will be further reinforced by the 'dominance' of larger providers in their relationships with smaller providers, making it that much harder for the latter to compete effectively, particularly when they are new entrants in a market dominated by well-entrenched incumbents. Ofcom should be very slow to introduce reforms which would have this detrimental impact.



## **Factors relevant to the recovery of Ofcom's costs and requiring the payment of another party's costs**

Ofcom has outlined four principal factors by which it intends to judge whether or not a party may be required to pay Ofcom's or another party's costs. Whilst much of this may appear to be uncontroversial, TNUK does have some specific comments to make on some of the factors which Ofcom has identified.

As an overriding observation, TNUK believes that it would be helpful if Ofcom could provide some indication of the relative weight which it is likely to attach to the different factors which it has identified. Whilst acknowledging that every case will be different and Ofcom will want to judge each one on its merits, it seems clear that some factors should obviously have a greater weight attached to them than others. For example, TNUK believes that a refusal to enter into commercial negotiations is clearly a more serious matter than missing a deadline for submission of information and that should be reflected in Ofcom's decision as regards a cost order. Whilst we are confident that Ofcom is likely to approach the matter in this manner, TNUK believes that it should nevertheless provide a greater level of detail in the guidance.

However, of greater concern are some of the comments which Ofcom makes when discussing '*the nature and value of the issues in dispute*'. In particular, TNUK would highlight Ofcom's statement at para 3.18:-

*"As a general rule, Ofcom is more likely to require a party to pay Ofcom's costs and/or another party's costs where a dispute is primarily commercial in nature as between the parties to the dispute"*

There are two particular points to make in response to this statement. Firstly, TNUK is concerned that Ofcom appears to regard "*primarily commercial*" disputes as somehow less valid or worthy of its time than others. Whilst acknowledging the nature of Ofcom's primary duty as well as the fact that it now has discretion as to whether to accept disputes under s185(1), the resolution of commercial disputes is nevertheless a legitimate function which Ofcom can be required to fulfil. Indeed, many disputes which might be brought under s185(1) are by their very nature likely to be primarily commercial disputes, but that does not mean that they are less valid. TNUK is concerned that small providers who are in commercial dispute with larger providers may find themselves penalised further by having a costs order made against them.

Secondly, there is no clear or practical way in which Ofcom may be able to define what is meant by a 'primarily commercial' dispute. Ultimately, all CPs compete and provide a service to consumers in one form or another and therefore any dispute may to some extent be viewed as promoting competition or furthering the interests of consumers.

Whilst some disputes relate purely to wholesale revenue flows and are more likely to be viewed as 'primarily commercial', a great many more will be less clear cut and include issues such as the availability or cost of service to consumers, as well as disputes about wholesale charges. It is unclear how Ofcom would view such disputes and whether it believes that cost orders are more likely to be appropriate in these cases and so it would be helpful to provide clarification on this point within the guidance.



TNUK is also concerned by Ofcom's statement at para 3.19 that it will also "*have regard to the financial value of the matters in dispute*" and it cites £50,000 as the level below which it is more likely to require costs to be paid. It is unclear why Ofcom has chosen that particular value and it would be useful for Ofcom to provide clarification.

However, Ofcom will be aware that very many disputes do not have a clearly identifiable financial value. Whilst ultimately there will presumably be a financial benefit to the party bringing the dispute, it may well not be something which can be measured if, for example, it is simply seeking network access. In these instances, it is unclear how Ofcom will determine the financial value of the matters in dispute in order to assess whether or not a costs order may be appropriate.

More importantly however, TNUK is concerned that the principle that costs orders are more likely to be made against parties who initiate disputes for a smaller financial value obviously discriminates against smaller providers. Inevitably, a dispute brought by a smaller provider is likely to be of a lower financial value than a dispute brought by a larger provider due to the nature and scale of the respective businesses. All other things being equal, it is obviously unfair and inequitable that a smaller provider should be more likely to end up having to pay Ofcom's costs purely because the scale of its business is smaller. TNUK would urge Ofcom to reconsider this approach.

Finally, TNUK notes that Ofcom has tried throughout this section to specify relevant factors and considerations that it will take into account in deciding whether or not any party should be required to pay Ofcom's or another party's costs. However, Ofcom has not provided any specific examples of how it may assess these factors in practice.

TNUK acknowledges that Ofcom must judge each new case on its merits and cannot fetter its discretion in that regard. However, it is also important that providers are able to make some kind of judgement on the likelihood of a costs order being made against them, in advance of deciding whether to bring or defend a dispute. This is particularly important for smaller providers for whom cost is much more likely to be an important consideration.

TNUK believes that without fettering its discretion Ofcom could do more to assist in this regard. Most obviously, Ofcom could review previous disputes and use them as the basis for creating (albeit hypothetical) case study examples of when cost orders may or may not have been made in those cases.

Whilst the factors which Ofcom has outlined are helpful to a degree, they are not detailed or specific enough to give any real sense as to whether Ofcom may make a costs order in any particular case and therefore allow stakeholders to make an informed decision on that basis. In essence, Ofcom has outlined the questions that it will ask in each case, but it has not provided the answers that it would give by reference to specific examples. TNUK would urge Ofcom to go further by providing more specific case studies.



## Methodology and process for calculating costs and expenses to be recovered

Ofcom helpfully outlines in brief the process which it intends to adopt in order to determine the level of costs and expenses which it will require to be paid. However, TNUK believes that Ofcom has overlooked some significant points.

Ofcom states at para 3.26.1 that the first stage in requiring a party to pay its own costs and expenses is that it will:-

*“indicate to all parties whether we are “minded to” to recover Ofcom’s costs and expenses from a party to a dispute as soon as possible and usually within 4 weeks after issuing a final determination”*

It makes a similar comment at para 3.27 in relation to requiring the payment of other parties’ costs and expenses. But it is unclear quite what Ofcom means by “*indicate to all parties*”. Specifically, what level of detail or justification does Ofcom intend to provide for its view that one or more parties should be responsible for payments of costs? In a different context, Ofcom indicates elsewhere (at para 3.19) that it envisages that these costs could very well exceed £50,000 and indeed, they may perhaps be a great deal higher. £50,000 is a significant sum that a party could be ordered to pay by Ofcom and therefore TNUK believes that no such order should be made without proper due process and the affected party being provided with a full explanation and justification.

In these circumstances, TNUK believes that it is important that the parties who will be made responsible for paying these costs are entitled to receive more than a simple indication or an expression of opinion from Ofcom that they should have to pay them. The wording in the consultation would strongly suggest that Ofcom intends making only a very brief formal notification. However, TNUK believes that Ofcom should instead be required to provide justification (in reasonable detail) as to why it believes that costs should be paid in this instance. This is particularly the case because Ofcom has stated that it does not intend to make cost orders routinely and they will very much be viewed as exceptional and out of the ordinary.

Ofcom’s justification should include specific reference to its guidance in order to explain which parts of it, it has relied upon in making its decision in this case. It should also highlight the particular features of the dispute in question which have led to its decision, be it the nature and value of the dispute or the conduct of the parties during or prior to the dispute etc.

In this context, the process which Ofcom outlines at para 3.26 is odd in that it begins by Ofcom indicating merely that it is “*minded to*” order the recovery of costs, but there does not seem to be any subsequent stage at which what appears to be an initial view is confirmed as a final decision. More importantly, there does not seem to be any right for the party who is subject to the proposed costs order to make representations in response to it, which TNUK believes is a significant failing that Ofcom must address.

We note that the party in question will have 2 weeks to agree (or not) to the level of the costs, but in reality they will have limited grounds for dispute. However, before having to decide whether or not to agree to the level of costs, we believe that the party should have the ability to make representations as to whether a costs order should be made at all. Once again, this is particularly important because of what Ofcom envisages will be the exceptional nature of such orders.



The logical process therefore would be for Ofcom to provide a notification that it is minded to make a costs order, together with a written justification for that view. The party in question would then have two weeks to respond if it felt such an order was unwarranted, explaining the reasons why it disagreed with Ofcom's justification. Subsequent to that, (if Ofcom did not accept those representations) Ofcom would then provide its high level estimate of its costs and expenses or require the party to provide an estimate of its costs, as appropriate.

Furthermore, TNUK believes that Ofcom should also publish its initial justification for proposing a cost order, so as it can be considered by all interested stakeholders. We accept that this may have to be after the issue of costs has been fully resolved and perhaps with confidential sections redacted. However, the publication of Ofcom's decision and reasoning will be of vital importance to other stakeholders who may be considering bringing (or defending) a dispute. As Ofcom is establishing an entirely new process without any existing precedent, stakeholders will be very anxious to understand the basis upon which Ofcom is making its decisions, so as they can be better informed as to how or whether to progress their disputes. Of course, the transparency which results from publication will also help to promote consistency in Ofcom's costs decisions which is of significant importance to all parties.

Finally, TNUK also seeks clarification on the proposal contained in para 3.26.4 that Ofcom will:-

*"ensure that this high level estimate will have regard to the nature and value of the issues in dispute, and whether Ofcom's determination represents a "win" or "loss" for the party (i.e. does Ofcom's determination of the dispute materially support or reject the position for which that party advocated)"*

This statement appears to say that the level of costs which Ofcom seeks to recover (as distinct from the level of costs which Ofcom actually incurs) will vary according to the "*nature and value of the issues in dispute*". That would imply that the party in question will not necessarily be required to pay all of Ofcom's genuinely incurred costs, but rather it will pay a proportion of them depending on Ofcom's assessment of those factors.

It is not clear whether or not this is actually what Ofcom intends or whether it is simply saying that the level of genuinely incurred costs (and therefore Ofcom's initial high level estimate) will vary according to those factors (although there is no reason why the costs would vary simply according to whether the party ultimately won or lost).

Either way, TNUK believes that there is in fact genuine merit in pursuing the possibility of costs varying according to the level of 'fault' of the party in question. In conventional litigation, this is obviously not the case and costs are typically awarded on a simple basis of the losing party paying the costs of the winning party. However, it may well be fairer on occasion not to adopt such a simplistic approach.

For example, Ofcom may see genuine merit in the dispute brought by one party (who has conducted themselves properly throughout), but may still not ultimately resolve the matter in its favour, perhaps because of some unintended consequence which such a decision may have on third parties. In this situation, it would seem unfair if the losing party were required to pay all of Ofcom's costs, which would suggest that it should never have brought the dispute, despite its obvious merit.



TNUK would support an approach whereby costs payable varied according to the degree of fault of the losing party and the merit of its argument i.e. to what extent the final decision was clear cut or finely balanced. However, if Ofcom does intend to follow this approach, far greater detail is needed in the guidance as to the basis upon which Ofcom will make these judgements, so stakeholders can have a much clearer sense as to the likelihood of them being required to pay all or only some of Ofcom's costs. At the very least, this would be required in order to allow the affected party to be able to respond meaningfully when required to agree (or not) to Ofcom's high level estimate of costs.

It should be noted that it is less clear how well this approach would work in relation to one party paying the costs of another party (as opposed to Ofcom) because the winning party is more likely to feel that it should have its costs paid regardless of the reasons why Ofcom has decided in its favour.

Alternatively, if Ofcom does not intend to follow this approach (and prefers the conventional approach of any costs order covering all genuinely incurred costs), TNUK would welcome clarification within the guidance.

*All queries in relation to this response should be to Simon Grossman, Director of Government, Regulatory & Business Affairs, The Number, Whitfield Court, 30-32 Whitfield Street, London W1T 2RG – [simon.grossman@118118.com](mailto:simon.grossman@118118.com) – 07971 050 001*