

Administrative priority decision

Donor conveyance charges for the period 2003 to 2008

Decision

- 1.1 Ofcom has decided to take no further action in relation to the donor conveyance charges (DCCs) that were applied by the mobile network operators (MNOs)¹ during the period 25 July 2003 to 7 February 2008 (the Relevant Period).
- 1.2 Ofcom was previously engaged with this matter between 2008 and 2013, but then effectively deprioritised this work. We have had minimal engagement with the MNOs in relation to this matter since then. However, Three has written several times to Ofcom during 2017 and 2018 requesting an update in relation to this matter. In light of Three's most recent letter, the matter was passed to a new decision maker to look at afresh against Ofcom's administrative priority criteria. We have now decided that this is not an administrative priority for Ofcom, and that our implicit decision to deprioritise this work in 2013 was reasonable.
- 1.3 We also consider that, had a formal assessment of administrative priority taken place at any point from late 2013 onwards, Ofcom would almost certainly have reached the same conclusion. This is because the facts of this matter have not materially changed since that point in time.
- 1.4 We set out some background to this matter below, and then summarise the reasons for our decision.

Background

DCCs

- 1.5 The DCC is a wholesale charge related to the provision of mobile number portability. When a customer switches from one MNO to another and ports their number, any subsequent calls to that number are first routed to the Donor Provider and then 'onward routed' to the Recipient Provider for termination to the customer. The DCC is the charge levied by the Donor Provider on the Recipient Provider in relation to this onward routing. Since switching and hence onward routing occurs between all MNOs, DCCs are both paid and received by all of the MNOs.

¹ At the time, O2 (now Telefonica), Orange (now EE), Three, T-Mobile (now EE) and Vodafone.

1.6 Since 25 July 2003, the General Conditions have required charges for the provision of portability to be cost oriented.² During the Relevant Period, this requirement was set out in General Condition 18 (GC18).

1.7 Since 2014, Ofcom has periodically set a maximum level of DCC on a forward-looking basis.

Ofcom's work prior to Spring 2011

1.8 In March 2008, Ofcom wrote to all of the (then five) MNOs, advising that Ofcom was considering whether enforcement action should be taken in relation to any contravention of this requirement of GC18 prior to 8 February 2008.³

1.9 In April 2010, Ofcom wrote again to all five MNOs setting out Ofcom's preliminary view on the maximum level of DCC compliant with GC18 for the Relevant Period. This letter covered both legal and economic issues and attached a cost model (the Ofcom 2010 DCC model).⁴ Ofcom's preliminary view was that the figures derived from the model represented the maximum compliant DCCs for the Relevant Period.⁵ The letter stated that, once it had received comments from the MNOs, Ofcom intended to reach a final view on the maximum DCC and whether it should take enforcement action.

1.10 Each of the MNOs responded to Ofcom, with differing views on many of the issues. Several MNOs objected to Ofcom's approach of using cost data sourced from the 2007 mobile call termination (MCT) model to calculate the cost of donor conveyance for the Relevant Period. They considered that the cost data used in that model were not contemporaneous with the Relevant Period and Ofcom could not calculate the DCC on the basis of data that could not have been known by the MNOs at the relevant time. There were a range of other modelling issues on which the MNOs held divergent views.

1.11 Work on this issue was effectively halted in the Spring of 2011 due to a decision to direct resources towards higher priority work.

Ofcom's work between Spring 2012 and Autumn 2013

1.12 In Spring 2012, Ofcom restarted work on this issue and undertook considerable work during the period up to Autumn 2013.

1.13 We recognised Ofcom's duty under Article 30(2) of the Universal Service Directive (USD) to ensure that pricing for interconnection related to the provision of number portability is cost oriented, and that the DCC is a charge falling within this description.

² This requirement is now in Condition B3.7; it was previously in General Condition 18.5 and, prior to that, in General Condition 18.2.

³ This followed on from disputes that Ofcom determined in August 2007 in relation to the DCC between Three and each of O2, Orange and T-Mobile. Ofcom effectively reset the DCCs between these parties from 0.8ppm to 0.1ppm with effect from various dates in 2006. This determination was subsequently appealed to the CAT by T-Mobile. Ofcom did not defend that appeal.

⁴ The Ofcom 2010 DCC model was based on an earlier cost model produced by Vodafone.

⁵ This model gave a DCC of 0.2ppm in 2003/04 reducing in the intervening years down to 0.16ppm in 2007/08.

- 1.14 We also took account of the preliminary view set out in our previous letter to the MNOs of April 2010. Nevertheless, having considered the objectives of the USD and general principles of EU law, we considered that Ofcom may, as a matter of discretion, decide whether or not to take enforcement action against the MNOs. In this respect, we recognised that there were credible counter-arguments against enforcement action, including in relation to proportionality and the lack of any evidence of consumer harm.
- 1.15 We also considered the criticisms and comments that had been made in relation to the Ofcom's 2010 DCC model. We accepted the criticism levied by some of the MNOs that this model had taken a "retrospective" approach by using data from the 2007 MCT model that was not contemporaneous with the Relevant Period. We considered that we should instead bear in mind what was known, or reasonably knowable, to the MNOs during the Relevant Period. We also recognised that cost-orientation is a broad term and a range of different modelling approaches might be taken. In light of the context of potential enforcement action, we considered that we should be modelling the *maximum* rate consistent with the requirement for cost-orientation (on an incremental basis).⁶ ⁷ This differs from regulation in other contexts where Ofcom might choose a cost standard and modelling approach on the basis of other considerations, such as the trade-offs between different types of efficiency and impacts on competition, but which may not necessarily result in the *maximum* allowable rate.
- 1.16 On this basis, we modelled and considered a number of different approaches for calculating DCCs during the Relevant Period. However, the results of the different models varied widely in terms of ppm charges for donor conveyance, and we considered all of the approaches to have drawbacks. In addition, there remained a number of unresolved questions, such as whether (and, if so, how) to achieve industry-wide symmetry in relation to the DCCs charged between all of the MNOs during the Relevant Period.

Culmination of work on Relevant Period

- 1.17 Ultimately, by Autumn 2013, we reached a view that we did not have a robust evidential basis on which to calculate any potential repayments. Work on the Relevant Period did not progress further from this point. Although there was no formal decision taken, implicitly an administrative priority decision was put into effect.
- 1.18 During the period from Autumn 2013 to February 2014, we concentrated on setting a forward-looking maximum DCC through an industry-wide review.⁸ From that point onward, any further progress in relation to the Relevant Period was overtaken by work on other matters before Ofcom that would be of greater benefit for consumers.

⁶ GC18 also required charges to be based on the incremental costs of portability, unless the parties had agreed, or Ofcom had directed, another basis for the charges.

⁷ Although we stated in the April 2010 letter that the Ofcom 2010 DCC model aimed to produce the maximum level of DCC compliant with GC18 for the Relevant Period, the underlying approach taken was inconsistent with this objective.

⁸ This industry wide review had effectively been triggered by a dispute referral from Three.

- 1.19 We recognise that this view was not formally conveyed to the MNOs, and there was minimal engagement with the MNOs about this matter until 2017, when Three contacted Ofcom. Three has written several times to Ofcom during 2017 and 2018,⁹ requesting an update in relation to this matter. In light of Three's most recent letter, the matter was passed to a new decision maker to look at afresh against Ofcom's administrative priority criteria.
- 1.20 During the period since 2014, we have committed resources to setting a maximum level of DCC on a forward-looking basis, by way of a series of directions issued under the relevant General Condition. The maximum DCC is set through regular policy reviews linked to the MCT market review. The maximum DCC is currently set through to 2021.

Administrative priority assessment

- 1.21 We remain of the view (as set out above) that Ofcom may, as a matter of discretion, decide whether or not to take further action in relation to the DCCs charged by the MNOs during the Relevant Period.
- 1.22 We consider that the factors set out in Ofcom's 2017 Enforcement Guidelines¹⁰ form a suitable administrative priority framework to determine whether or not to take further action in relation to this matter.¹¹ These factors are:¹²
- a) The risk of harm arising from/seriousness of the alleged conduct. For example:
 - i) the risk to the interests of citizens or consumers resulting from the alleged contravention (including whether that risk is immediate or not and whether it is direct or indirect), and conversely the direct and indirect benefit to consumers of our taking action (e.g. to deter similar conduct by others);
 - ii) whether the conduct is on-going;
 - iii) whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement;
 - iv) whether the business which is under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance;
 - b) The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends. For example:

⁹ Specifically Three contacted Ofcom in March 2017, February 2018, June 2018, July 2018 and November 2018.

¹⁰ We have also considered the factors set out in the 2012 Enforcement Guidelines, as these guidelines were in force during part of the period where Ofcom was actively considering this matter. The factors set out in the 2012 Enforcement Guidelines are materially similar to the factors set out in the 2017 Enforcement Guidelines.

We have also referred to the 2004 Enforcement Guidelines, which were replaced by the 2012 Enforcement Guidelines.

¹¹ These are the factors we will consider when deciding whether to open an investigation. This matter was never formally opened as an investigation. However, substantial work was carried out in relation to potential enforcement action, to the extent that the work to date has gone beyond the parameters of an enquiry phase.

¹² 2017 Enforcement Guidelines, paragraph 2.5.

- i) whether an investigation would help clarify the regulatory or legal framework for stakeholders;
 - ii) whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan)
 - iii) whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint or whether planned market reviews may address the potential harm; and
- c) The resource implications of our conducting an investigation, for example, what resources (in particular what specialist resources) are required to conduct an investigation, given the need to do justice to the interests of all parties likely to be affected.
- 1.23 The 2017 Enforcement Guidelines also state that, where appropriate, we will also consider other factors.

The risk of harm arising from/seriousness of the alleged conduct

Risk to consumers from alleged contravention / benefit to consumers of taking action

- 1.24 As this matter is entirely historic, there is no forward-looking risk to the interests of citizens or consumers. As noted above, since 2014, Ofcom has set the maximum level of DCC on a forward-looking basis by way of a series of directions issued under the relevant General Condition. As far as we are aware, all of the MNOs are (and have been) compliant with the terms of those directions.
- 1.25 We have also considered whether consumers might previously have been harmed as a result of the DCCs charged during the Relevant Period. While there are plausible theories around consumer harm, we consider that there is little evidence in support of such theories and there are credible counter-arguments.
- 1.26 In any event, since the matter is historic, taking further action at this point in time would not clearly remedy any harm that might previously have arisen. For example, requiring repayments would not remedy any alleged inhibition of competition that might have occurred during the Relevant Period. Furthermore, to the extent that consumers might have been harmed during the Relevant Period it is not clear that taking action now would remedy this.
- 1.27 In summary, while it is possible that there was harm during the Relevant Period, we have found little evidence in support of this, and taking action at this point in time would not clearly address that harm and would have little direct or indirect benefit to consumers. Our view on this remains unchanged from the position we had reached internally by late 2013.

Whether the conduct is ongoing

1.28 As noted above, the matter is entirely historic.

Whether the allegation concerns conduct that is, or that appears to be, a repeated, intentional or particularly flagrant contravention or infringement

1.29 The facts suggest that the alleged contravention should not be characterised as repeated, intentional or particularly flagrant.

Whether the business which is under investigation has a history of similar contraventions or infringements, or a demonstrated record of poor compliance

1.30 As far as we are aware, all of the MNOs have complied with the terms of Ofcom's directions since we started setting a forward-looking maximum DCC in 2014.

The strategic significance of addressing the alleged conduct and whether alternative proceedings are likely to achieve the same ends

Whether an investigation would help clarify the regulatory or legal framework for stakeholders

1.31 The level of DCC charged during the Relevant Period is a contained matter, which would provide no clarification to the regulatory or legal framework as it stands today.

Whether the issue that has been identified directly relates to Ofcom's broader strategic goals or priorities (including those within Ofcom's Annual Plan)

1.32 Ofcom's Annual Plan for 2019/20 sets out several high-level, long term strategic goals and several key work areas.¹³

1.33 We note that the three strategic goals are to:

- a) Promote competition and ensure that markets work effectively for consumers
- b) Secure standards and improve quality for consumers; and
- c) Protect consumers from harm.

1.34 We do not consider that further action in relation to the Relevant Period would help Ofcom to meet its current strategic goals or deliver on key work areas outlined in the Annual Plan for 2019/20. In particular, in relation to protecting consumers from harm and promoting competition, having issued a direction that sets a maximum DCC through to 2021, Ofcom has mitigated any future risk of consumer harm that might arise from non-cost oriented DCCs.

¹³ https://www.ofcom.org.uk/_data/assets/pdf_file/0020/141914/statement-ofcom-annual-plan-2019-20.pdf

Whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation

- 1.35 There do not appear to be alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as an investigation.

The resource implications of conducting further work

- 1.36 Undertaking further work in relation to the Relevant Period would require a significant resource commitment from several Ofcom teams, including the Competition and Consumer Enforcement Team, the Legal Group, and the Economics Group.
- 1.37 The Competition and Consumer Enforcement Team currently has a significant caseload, and seeks to target its resource at those cases that will have the most significant positive benefits for consumers. It is likely that undertaking further action would divert resource away from investigations where there is clearer risk to the interests of citizens or consumers resulting from the alleged contravention, as well as clear direct and indirect benefit to consumers of our taking action.
- 1.38 Additionally, conducting further work on this matter could also impact other, non-enforcement projects within Ofcom, given that it will also draw on resource from the Legal and Economics Groups. This resource would have to be diverted from other ongoing projects.

Other factors

Incentive effect

- 1.39 One of the purposes of undertaking an investigation can be to ensure that, where there has been a breach, we create an incentive effect to ensure future compliance with relevant obligations. However, it is not clear that undertaking further work here and potentially finding a contravention would improve future compliance in relation to the cost orientation of DCCs.
- 1.40 As noted above, since 2014, Ofcom has set a maximum DCC by a series of directions issued under the relevant General Condition. We are not aware of any non-compliance with those directions. We therefore have no reason to believe that taking further action in relation to the Relevant Period will improve future compliance.

Availability of evidence

- 1.41 We have previously used data from Ofcom's 2007 MCT model in an effort to calculate a cost-oriented DCC for the Relevant Period. However, we no longer consider that the data in this model is a suitable evidential basis (we had reached this view by 2013).
- 1.42 Specifically (and as described above), we accepted the criticism that this resulted in the "retrospective" use of data, and sought to revise the Ofcom 2010 DCC model using contemporaneous evidence to inform our modelling of costs during the Relevant Period. We sought information in relation to more than a dozen engineering and economic input

parameters and undertook detailed analysis of the inputs to the 2002 and 2005 MCT models in order to inform this. Although these models were constructed contemporaneously with the Relevant Period, they still did not provide a definitive solution to what these input parameters should be.¹⁴

- 1.43 A number of sources of evidence were considered as part of the work carried out in relation to this matter to date, including the information supplied to us by the MNOs in relation to DCCs in March and October 2010, responses from the MNOs in relation to other Ofcom projects (e.g. Mobile Call Termination and Mobile Number Portability) and data submitted for the purpose of Oftel's 2002 Calls to Mobiles referral to the Competition Commission. A review of all data held (dating back to the information underpinning Oftel's 1999 Determination in relation to DCCs) results in an overall picture in which data on relevant engineering and economic input parameters is patchy across industry, with some MNOs not holding certain data, or holding it for only a limited time series, and other MNOs suggesting assumptions which may be influenced by their commercial interests.
- 1.44 We consider it unlikely that issuing further information requests to the MNOs will elicit more expansive or better data. Our view on this remains unchanged from the position we had reached internally by Autumn 2013.

Conclusions on administrative priority

- 1.45 Considering these factors in the round, we have concluded that it is not an administrative priority for Ofcom to take further action in relation to the DCCs charged by the MNOs during the Relevant Period, and that our implicit decision to deprioritise this work in 2013 was reasonable.
- 1.46 We also consider that, had a formal assessment of administrative priority taken place at any point from late 2013 onwards, Ofcom would almost certainly have reached the same conclusion. This is because the facts of this matter have not materially changed since that point in time.

¹⁴ For example, where a parameter was different in the 2002 and 2005 models, it is not clear whether we should assume that it changed in 2003, 2004 or 2005. This issue was further complicated by the need to make this judgement for two dozen parameters, each being examined with a greater level of scrutiny and at a more granular level than was needed when constructing the MCT models because of the specific focus on certain assets in this case.