



Disclosure of Confidential Information

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1. Report Summary

The DCC wishes to include price and costs information of modifications in its submissions to the SEC modifications Working Group and as part of the corresponding industry consultations. This information is owned by DCC Service Providers and disclosed to the DCC under contractual confidentiality obligations. The purpose of this paper is to consider the legal and regulatory obligations relating to such disclosure.

DCC are seeking views from SEC Panel on their preferred approach to presenting commercially sensitive information to Working Group members and to SEC Parties via consultations. Three options have been presented:

- a. To contain the information in a separate appendix which remains confidential – the confidential information could be sent to named individuals only
- b. Present the costs within a tolerance range rather than an exact figure – the document could be classified as public and shared across all stakeholders.
- c. A hybrid of the above.

These options are presented in more detail in section 1.3 of the report.

It should be noted that this issue is limited to cost data that can be attributed to a single service provider, and not when the costs presented are aggregated and non-identifiable.

1.1. The legal and regulatory framework

DCC Service Provider Contracts define pricing and costs information as “Commercially Sensitive Information”. The DCC only has the right to disclose DCC Service Provider Commercially Sensitive Information:

- a. If required by the SEC, the DCC Licence or another Mandatory Requirement (law, standard, industry code or arrangement); and
- b. to the SEC Panel (including its Sub-Committees and any other sub-groups), SECCo, and the Secretariat and the Code Administrator.

SEC Section M4.22 provides for the DCC to classify as “confidential” any data provided under a DCC Service Provider Contract which is protected by a duty of confidentiality.

If data is classified as confidential under the SEC then the DCC must clearly mark it as “confidential” (M4.15) and may only disclose it to named individuals who are authorised by a Party to receive the confidential data (M4.17-M4.19).

1.2. Analysis of the legal requirements

If the DCC is using the price and costs of a number of DCC Service Providers in the submission to form an aggregated price then provided that the price/cost information is not broken down, itemised, named or the underlying commercially sensitive information is not identifiable then there should be no issue with disclosure. This is because the commercially sensitive information is effectively anonymised by aggregation. This information may be classified as “DCC Public”.

If the DCC is relying wholly or substantially on the price/costs information of one DCC Service Provider (the disclosing party) or the underlying price/costs information is easily identifiable then this would be disclosure of commercially sensitive information. Here, the DCC must comply with the requirements of both the relevant DCC Service Provider Contract and the SEC.

- a. SEC Section D6.9 provides for the DCC to prepare a Preliminary Assessment and/or Impact Assessment including “the DCC’s best estimate of the likely implementation and operating costs associated with the changes”. Accordingly, the information is required under the SEC.
- b. SEC Section D6.2 provides for Working Groups to be established by the SEC Panel as part of the modification process. Accordingly, it is arguable that such disclosure is permissible under a DCC Service Provider Contract.
- c. SEC Section M4.22 requires DCC to classify this information as confidential as it relates to DCC Service Provider confidential information. The DCC must ensure that these submissions are labelled “DCC Confidential”.
- d. SEC Section M4.17 requires Parties that wish to receive DCC Confidential data to provide the DCC with a list containing the names and contact details of individuals authorised to receive such data. The DCC is only permitted to disclose DCC Confidential data to persons on the list (M4.18). Therefore, the DCC must obtain a list of recipients in advance. When reviewing this list, the DCC must ensure that the recipients are SEC Parties and none of them are competitors of the disclosing party. Access to the data should not be granted to these parties for the following reasons:
 - i. the DCC does not have the contractual right to disclose commercially sensitive information to Service Users; and
 - ii. the disclosure of pricing information to a competitor of the disclosing party risks offending both DCC Licence obligations around competition and UK competition law more generally.

The SEC covers the DCC’s rights and remedies in relation to a misuse or disclosure by a Party. There is no need for the DCC to enter into an additional non-disclosure agreement (NDA) with the named individual. This would at best create confusion and at worst, be detrimental to the DCC’s rights and remedies under the SEC.

It should be noted that disclosure to any working group constituted by the Secretary of State rather than the SEC Panel is not covered by this analysis. The DCC does not have the right to disclose DCC Service Provider commercially sensitive information to BEIS working groups.

1.3. Impact on provision of modification costs

DCC provides the costs of implementing SEC modifications via its DCC Assessment. Where the solution impacts multiple Service Providers (e.g. the Data Service Provider (DSP) and both Communications Service Providers (CSPs)) then it can provide the aggregated information publicly. This is because it would not be possible to attribute specific costs to individual Service Providers.

However, if the modification’s solution impacts only a single Service Provider (e.g. a DSP-only change) then these costs, even the overall total, should not be made public, for the reasons outlined above. This would mean these costs could not be shared with Working Groups or included in modification consultation. Without this information it would be difficult to make a final decision.

1.4. Proposed approach

The DCC has discussed the issue with SECAS. Through this discussion three options have been proposed. If the DCC or SECAS wishes to publish commercially sensitive information relating to a single Service Provider within Working Group papers, or share them more broadly then it is proposed (e.g. in consultations):

- a. That all commercially sensitive information is set out in an appendix which would easily facilitate redaction. In this case the main document could be classified as “DCC Public” and the appendix as “DCC Confidential”. The “DCC Confidential” information could only be shared and sent to named individuals.

This appendix would provide more accurate information to a smaller set of individuals identified as responsible for challenging the value of the solution and associated Business Case.

- b. Alternatively, the commercial information could be presented within an agreed set of cost brackets. The public Modification Report would then state which of those brackets the cost falls into. This document would be classed as “DCC Public” and could be shared with all Working Group members and the wider industry as opposed to named individuals.
- c. A further option would be to administer a combined approach. The “DCC Public” document (option b) could be published on the SECAS website and made accessible to everyone. Working Group members could approach SECAS for the “DCC Confidential” commercial material (which would be contained in a DCC confidential appendix (per option a), should they wish to access more detailed costs. DCC would directly disclose this information to them in accordance with SEC M4.17 and M4.18 provided that they did not fall within the categories of members set out in 1.2d above.

This would mean that SECAS or DCC would not need to administer the distribution of the confidential material proactively to named individuals. They would only disclose this material upon receiving a request from a Working Group Party member.

DCC and SECAS consider the third option would be the most pragmatic approach. We are requesting views from SEC Panel on their preferred approach and will proceed accordingly.

1.5. Recommendations

The Panel is requested to PROVIDE its views on the best way to proceed with providing commercially sensitive costs for modifications.