

Confirmation Decision under section 96C of the Communications Act 2003 served on British Telecommunications plc (BT) by the Office of Communications (Ofcom) for contravention of SMP Condition 5 of the Fixed Access Market Review 2014

Investigation into BT's conduct during the tender for the NIPSSN Contract

Non-confidential version – Redactions marked with [X]

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Overview

This document sets out our findings that, during the tender for the Northern Ireland Public Sector Shared Network contract, BT breached its regulatory obligations by failing to provide network access to its Fibre on Demand product to the two bidders – BT and eir – on an Equivalence of Inputs basis.

- 1.1 One of Ofcom's functions is to review electronic communications markets and impose regulatory obligations (known as SMP conditions) on businesses identified as having significant market power (SMP). These regulatory obligations are designed to facilitate effective competition, that the business with SMP might otherwise be able to impede or distort. We have imposed a number of regulatory obligations on BT as a result of its SMP.
- 1.2 We have determined that BT has contravened SMP Condition 5 of the Fixed Access Market Review 2014. This condition requires BT to provide access to its network (which is run via BT's Openreach arm) on an Equivalence of Inputs basis. This was intended to prevent BT discriminating against its competitors.
- 1.3 The breach we have found occurred in the context of a tender for the Northern Ireland Public Sector Shared Network contract, which took place in 2017-2018. This high-value contract is for the provision of essential telecommunications services to public sector organisations in Northern Ireland. There were two bidders for the tender – BT and eir.
- 1.4 We have found that BT breached SMP Condition 5 by failing to provide network access to its Fibre to the Premises on Demand product (FOD) to the eir and BT Bid Teams on an Equivalence of Inputs basis by:
 - a) Providing the BT Bid Team with Relevant Commercial Information about the way in which the initial non-binding estimate of the build charges was arrived at using the CAD Desktop Survey tool, why the actual build charges may differ from the initial non-binding estimates and a sense of the magnitude of those potential differences. It did not provide this information to the eir Bid Team.
 - b) Providing the BT Bid Team with a set of survey results within a reasonable timeframe once the work had been completed, and once the results had been passed to the relevant individual within BT. BT did not provide eir with its survey results within the same timeframe, despite the results being passed to the same individual and the same process being available.
 - c) Providing a message to eir that FOD was not a suitable solution for its NIPSSN bid and that the product had delivery limitations. In contrast, the BT Bid Team was provided information that suggested FOD was suitable for major multi-site network upgrade projects and that the product could be delivered at such a scale. Explicit assurances were provided to the BT Bid Team about its use of FOD despite a public announcement which appeared to contradict this position.

- 1.5 Ofcom views these contraventions of BT's regulatory obligations as very serious. They relate to equivalence of inputs which is important to ensure a level playing field in downstream markets and took place in the context of a major public sector tender which both BT and eir considered to be of high importance to their overall strategy in Northern Ireland.
- 1.6 We recognise that during the tender BT was aware of the risk of not treating the two bidders equally and had implemented compliance processes to address this risk. We do not believe that the contraventions we have found were deliberate.
- 1.7 We have imposed a penalty of £6,300,000 on BT to reflect the seriousness of the contraventions. This is also to deter further breaches by BT, in order to protect businesses and consumers and, more generally, to deter breaches by other Communications Providers (CPs) which are subject to regulatory obligations by virtue of their significant market power. This penalty includes a 30% discount, applied to the penalty figure of £9,000,000 which we would otherwise have imposed, as a result of BT admitting it contravened SMP Condition 5 and entering into a voluntary settlement agreement with Ofcom.

Background

Introduction

- 2.1 This document relates to BT’s conduct during the tender competition for the Northern Ireland Public Sector Shared Network (“NIPSSN Contract”).
- 2.2 The NIPSSN Contract is a high-value contract for the provision of essential telecommunications services across the public sector of Northern Ireland for a maximum of nine years (including an optional two-year extension period), set to begin at the start of October 2019. The contract value was stated as being between £50m and £400m over the duration of the contract.¹
- 2.3 The tender process for the NIPSSN Contract officially began on 22 April 2017 with the publication of a Contract Notice in the Official Journal of the EU (OJEU).² The tender process concluded on 29 March 2018 when the two bidders – eir and BT – submitted their final tenders.³ We understand that the bidders gave consideration to the tender prior to 22 April 2017. In this document we refer to the period from 1 April 2016⁴ to 29 March 2018 (inclusive) as the Relevant Period.⁵
- 2.4 The bidders’ Final Tenders were evaluated across several areas: technical, legal and financial. In June 2018, it was announced that BT had won the contract with a lower priced bid. The difference in price may have been in part due to the difference in technology used by the two bidders to provide connections to sites requiring bandwidth of 100Mbit/s: BT [included] Fibre to the Premises (“FTTP”), whereas eir mainly used a leased lines product (predominantly Ethernet Access Direct, “EAD”).
- 2.5 The rest of this section contains the following:
- a) a description of the relevant parties referred to in this document;
 - b) an overview of the NIPSSN Contract and bids;
 - c) background information on the relevant wholesale products;
 - d) a brief summary of the High Court⁶ case; and
 - e) an overview of Ofcom’s investigation.

¹ As set out in the original contract notice. <https://ted.europa.eu/udl?uri=TED:NOTICE:152489-2017:TEXT:EN:HTML>

² The OJEU contract notice is available here: <https://ted.europa.eu/udl?uri=TED:NOTICE:152489-2017:TEXT:EN:HTML>

³ Annex 3 sets out the tender timeline in more detail.

⁴ This is the date the BT Bid Team began considering the NIPSSN tender. See BT Response to Information Request 1, dated 16 April 2019.

⁵ The Relevant Period does not relate to the duration of the contraventions we have identified.

⁶ High Court of Justice in Northern Ireland.

Relevant parties

Department of Finance

- 2.6 The Department of Finance (“the Department”) is a government department in the Northern Ireland Executive. It undertook the procurement exercise for the NIPSSN Contract on behalf of the participating public sector organisations.

eir

- 2.7 Eircom UK Limited (“eir”), whose registered company number is 03478971, trading as eir Business NI, is a subsidiary company of eircom Limited, the largest provider of fixed line telecommunication services in the Republic of Ireland.
- 2.8 eir has operated in Northern Ireland for over ten years, serving public sector and corporate customers. eir entered the Northern Ireland market in 2007 when it was successful in winning the tender competition for the Northern Ireland Civil Service Contract Network NI (“Network NI Contract”). The Network NI Contract was due to end in September 2019, and be replaced by the NIPSSN Contract, which is the focus of this investigation.

BT and its subsidiaries

- 2.9 BT Group plc (“BT Group”), whose registered company number is 04190816, is the listed holding company for the BT group of companies, which provides communications services solutions, serving customers in more than 180 countries.⁷ In this document we refer, where possible, to actions taken by specific teams or organisations within BT Group. Sometimes it is necessary to refer to the entity as a whole.
- 2.10 British Telecommunications plc (“BT”), whose registered company is 01800000, is the principal operating subsidiary of BT Group. BT is a wholly-owned subsidiary of BT Group.⁸ BT is the legal entity to which Ofcom’s relevant SMP Conditions are applied.

Openreach

- 2.11 BT’s Openreach division (“Openreach”) provides the infrastructure which underpins much of the UK local access networks.
- 2.12 In March 2017 BT provided voluntary commitments to Ofcom (“the Commitments”) to legally separate its Openreach division, after Ofcom had identified competition concerns regarding Openreach’s vertical integration within BT.⁹ The Commitments provided for, amongst other things, stricter information sharing agreements between Openreach and downstream BT divisions.

⁷ <https://www.btplc.com/Thegroup/Ourcompany/Groupbusinesses/index.htm>

⁸ https://www.btplc.com/governance/2019_BTPLC_Annual_Report.pdf

⁹ Previously, Openreach was a division of BT Group, which meant that new, strategic investment decisions were taken at a group level. A separate legal entity, Openreach Limited was set up and became a wholly owned subsidiary of BT Group. Openreach has an independent Board of Directors, its own staff, management and strategy.

- 2.13 Openreach Limited whose registered company number is 10690039, is a wholly owned subsidiary of BT Group.

BT Business & Public Sector

- 2.14 During the Relevant Period, BT Business & Public Sector (“BPS”) was a retail division of BT which provided services to businesses and the public sector. [X] was [BT Executive [X]], at which point the division merged with BT Wholesale & Ventures to become BT Enterprise.
- 2.15 The Major & Public Sector team (“M&PS”) was a team within BPS whose [X] during the Relevant Period was [BT Executive [X]]. The team responsible for BT’s bid for the NIPSSN Contract (the “BT Bid Team”) sat within M&PS.

BT Northern Ireland Networks

- 2.16 During the Relevant Period, the products and services that Openreach provided in Great Britain were delivered in Northern Ireland by BT Northern Ireland Networks (“BTNIN”), a virtually separate organisation hosted within BPS.¹⁰ The [X] of BTNIN was [BT Senior Manager 1], until [X] when [X] became [BT Senior Manager 2]. This role reported into [BT Executive [X]].
- 2.17 In March 2017 a Governance Protocol was established by BT to ensure that BTNIN had a level of independence to BT and particularly BPS.¹¹
- 2.18 The team who provided support to eir’s bid (the “BTNIN eir Account Team”) sat within BTNIN. The individuals who provided support to BT’s bid (which we refer to collectively as the “BT Account Team”) included staff from both Openreach and BTNIN.

The NIPSSN Contract

- 2.19 This section explains the number of users and services which were to be provided through the NIPSSN contract.

Number of Users

- 2.20 An initial group of public sector bodies committed to participating in the NIPSSN contract at the tender stage and therefore were procured and priced as part of the tender competition. This included all schools and education bodies in Northern Ireland, the Police Service of Northern Ireland and Northern Ireland Civil Service Departments (including the Department of Finance).¹² They have a combined total of around 2000 sites.

¹⁰ As part of the Commitments, BT proposed a separate governance protocol (“the NI Protocol”) to govern these arrangements. In August 2018, BT announced that it was moving BTNIN into Openreach, and rebranding it as Openreach Northern Ireland. The change took effect from 1 October 2018, the date the Commitments formally came into effect.

¹¹ <https://www.btplc.com/Thegroup/Ourcompany/Theboard/Boardcommittees/BTComplianceCommittee/Publications/NorthernIrelandGovernanceProtocol.pdf>

¹² It also includes Business Services Organisation (BSO).

- 2.21 In addition, the contract envisaged that other Northern Ireland public sector organisations could use the NIPSSN contract at a later stage. This could expand the scope of the contract to over 150 public sector organisations covered by Northern Ireland Public Procurement Policy, including Government Agencies and Non-Departmental Public Bodies and all 11 local councils in Northern Ireland.¹³
- 2.22 Overall, this represented a significant portion of the business connectivity market in Northern Ireland. For example, the core sites alone covered more sites than all mobile network operator base stations in Northern Ireland taken together.¹⁴

Services

- 2.23 The NIPSSN contract included the following telecommunications services:
- a) shared network services - these are telecommunications services, provided on fibre, copper or other media, which transport data and voice between different computers and IT systems. The shared network connects public sector sites to a private, secure and fully interconnected network that links all public sector organisations' sites together.¹⁵ The network services included in the NIPSSN contract ranged from providing just the network connectivity links (wires only) to fully managed network services, such as proactive incident management;
 - b) Unified Communications (UC) - the provision of dedicated voice and video conferencing services for the Northern Ireland Civil Service (NICS) and Police Service of Northern Ireland (PSNI).¹⁶
 - c) Support services for both the shared network and UC services.
- 2.24 In addition to these (core) services, the NIPSSN contract also provided a framework from which a wide range of optional services (e.g. consultancy support, WAN optimisation, WiFi etc.) could be procured by participating public sector bodies.

Relevant wholesale products

- 2.25 The Department required bidders to provide network connectivity to around 2000 public sector sites.¹⁷ It provided bidders with the details of each site, including the required

¹³ Paragraph 2 of Schedule 12 states that all other "users identified via the links" <https://www.finance-ni.gov.uk/publications/list-public-bodies-which-can-participate-cpd-collaborative-frameworks> and <https://www.nidirect.gov.uk/contacts/local-councils-in-northern-ireland> "may opt to use this Agreement at a later stage". Approximately 30 of these public sector organisations and nine of these local councils were part of the first phase of the NIPSSN contract.

¹⁴ See paragraph A9.60 of Ofcom, June 2019, Business Connectivity Market Review Statement

https://www.ofcom.org.uk/data/assets/pdf_file/0028/154594/pimr-bcmr-llcc-final-statement-annexes-1-25.pdf

¹⁵ These are referred to as 'Wide Area Network' (WAN) services – see Schedule 2.1

¹⁶ In addition to voice and video conferencing services, the PSNI services includes a dedicated emergency 999 Contact Centre and non-emergency 101, call logging of all inbound and outbound calls from IP extensions and call recording of all emergency calls.

¹⁷ ISFT Volume 2, Schedule 2.1, Annex 1.

bandwidth, which ranged from 2Mbit/s to 15Gbit/s. Bidders were free to choose the technology they would use to provide this service.

- 2.26 A key input into the CPs' bids were the Openreach wholesale products that would provide the connections between the public-sector sites (schools, police departments, councils etc.) and the CPs' core networks. These products include:¹⁸
- a) Ethernet leased lines (EAD or EAD LA);
 - b) GEA Fibre to the Cabinet (FTTC); and
 - c) GEA Fibre to the Premises (FTTP).
- 2.27 The options available for bidders depended on the bandwidth requirements of the circuits in question:
- a) For circuits requiring download and uploads speeds of below 100Mbit/s, there were a number of options available to bidders, as both copper-based products and fibre-based products would be able to meet the bandwidth requirements.
 - b) For circuits requiring download and upload speeds of 100Mbit/s or more, but less than 1Gbit/s bidders would require full fibre products (e.g. FTTP or EAD/EAD LA).
 - c) For circuits requiring bandwidths of 1Gbit/s or more, only EAD or dark fibre would satisfy the bandwidth requirements.
- 2.28 Approximately half of the total circuits required download and upload speeds of 100Mbit/s or more, but less than 1Gbit/s.¹⁹ For these sites, Openreach offered two products: Ethernet Access Direct (EAD) and GEA FTTP products (including GEA FTTP on-demand), which would meet the technical specification.²⁰ In the rest of this section, we provide a comparison of these wholesale products.

EAD

- 2.29 Ethernet leased lines provide high speed, high quality, point to point data connections that telecoms providers use for connecting offices, mobile base stations, and broadband access networks. Ethernet leased lines are delivered over dedicated fibre connections. They tend to provide *symmetric* speeds (the same bandwidth is provided for upload and download) which are uncontented (the capacity is guaranteed and not subject to reduction).

¹⁸ In addition to these Openreach wholesale products, the CPs could build their own connections or buy wholesale products from another provider.

¹⁹ There are small discrepancies between the two bidders and the tender documents on the exact number of circuits which required 100Mbit/s, but all of these estimates are approximately 1000 circuits.

²⁰ While leased lines may offer extra features to purchasers (such as being uncontented – and so not subject to bandwidth reduction), these were not required by the Department's specification.

- 2.30 Openreach offers EAD which supports Ethernet connections from 10 Mbit/s to 10 Gbit/s. EAD is in the market for Contemporary Interface (CI) services, as defined in Ofcom's Business Connectivity Market Review. We identified BT as having SMP in this market.²¹

GEA Fibre to the Premises (GEA FTTP)

- 2.31 FTTP is a pure-fibre connection from the exchange to a customer's residential or business premises. While FTTP connections provide *asymmetric* broadband services where upload speeds are significantly lower than download speeds, Openreach offers a GEA FTTP product with up to 500Mbit/s download speed and 165 Mbit/s upload speed. Therefore, this product could be used to serve NIPSSN sites requiring upload and download speeds of 100Mbit/s.²²
- 2.32 There are two methods whereby Openreach can deliver FTTP products:
- a) In areas where Openreach has laid fibre as far as the connectorised block terminal ("CBT"), CPs can purchase GEA FTTP;
 - b) In areas where Openreach has not laid fibre as far as the CBT but has deployed FTTC within the exchange area, and the premises are served by an FTTC enabled cabinet, CPs and individual customers can purchase GEA FTTP on-demand, which may require the laying of fibre from the aggregation node. We refer to this as FOD throughout the document.
- 2.33 FTTP products (including FOD) are in the market for wholesale local access (WLA). In Ofcom's WLA market reviews 2018 and 2014, BT was found to have SMP in this market.²³

Usage of the relevant wholesale products

EAD

- 2.34 EAD is a well-established product, launched in 2009,²⁴ with other Ethernet leased lines products available before that time.
- 2.35 Demand for leased lines of 1Gbit/s and below has increased year on year since 2009, to just under 200,000 leased lines in the UK in 2017.²⁵ By 2016/17, 100Mbit/s accounted for around

²¹ Most recently in Ofcom, June 2019, Business Connectivity Market Review Statement <https://www.ofcom.org.uk/consultations-and-statements/category-1/review-physical-infrastructure-and-business-connectivity-markets>. Prior to this the applicable market review was the 2016 Business Connectivity Market Review. See Ofcom, April 2016, Business Connectivity Market Review Statement <https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2016>

²² Openreach also offers faster GEA FTTP products which have up to 1 Gbit/s download speed and up to 220 Mbit/s upload speed. We focus on the 500/165 product as it is the cheapest GEA FTTP product that could be used for NIPSSN sites requiring upload and download speeds of 100Mbit/s.

²³ See Ofcom, WLA market review, 28 March 2018: <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review> and Ofcom, Fixed Access Market Review, 26 June 2014, <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed/fixed-access-market-reviews-2014/statement>

²⁴ See Openreach price list:

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=0d0zetWgShsiqKWjcN2Y5WJA8BGGqsBLxL7lgSM4fRpZ6rNZujnCs99NblKJZPD9hXYmijxH6wr%0ACQm97GZMyQ%3D%3D>

²⁵ See figure 3.10 of Ofcom, June 2019, Business Connectivity Market Review Statement https://www.ofcom.org.uk/_data/assets/pdf_file/0025/154591/volume-2-bcmr-final-statement.pdf

60% of BT's leased lines volumes.²⁶ Around [X] leased lines circuit ends of 100Mbit/s were connected by Openreach in the UK (excluding Hull Area) in 2017.²⁷

GEA FTTP

- 2.36 CPs can order GEA FTTP where Openreach has already deployed an FTTP network:
- a) As of January 2018, only [X] of premises in Northern Ireland had access to a full fibre service from Openreach.²⁸
 - b) Openreach made an announcement in November 2017 that it planned to invest £20 million in a major expansion of ultrafast broadband to towns across Northern Ireland, predominantly through FTTP.²⁹ This investment would cover 140,000 premises, leading to 25% of Northern Ireland homes and business having access to ultrafast broadband by March 2019. However, in that announcement, it did not provide detailed roll-out plans regarding the premises or exchanges that would be covered by this investment or the timing of the investment and had not done so by the bid submission date (29 March 2018).

FOD

- 2.37 FOD is a product which allows CPs to order the GEA-FTTP product in areas where Openreach has not rolled out FTTP. FOD is available for customers within a GEA-FTTC exchange area and served by a GEA-FTTC cabinet.
- 2.38 FOD was launched in 2013, and take-up had been very limited. In the period 1 April 2017 until 30 October 2017 (on which date, as we explain below, Openreach announced a change in the pricing of FOD), only [X] FOD orders were made in the UK, and none of these were in Northern Ireland.³⁰
- 2.39 The FOD product has also been subject to capacity restrictions and holds on the acceptance of new FOD orders. On 14 March 2018, Openreach announced an overall industry-wide operational capacity of 20 FOD orders per calendar month from April 2018 – March 2019³¹ (see below).

²⁶ See paragraph A7.5 and Figure A7.1 of Ofcom, June 2019, Business Connectivity Market Review Statement https://www.ofcom.org.uk/data/assets/pdf_file/0025/154591/volume-2-bcmr-final-statement.pdf

²⁷ See Table A11.8 of Ofcom, June 2019, Business Connectivity Market Review Statement https://www.ofcom.org.uk/data/assets/pdf_file/0028/154594/pimr-bcmr-llcc-final-statement-annexes-1-25.pdf

²⁸ Source: Information gathered for the Connected Nations Update Spring 2018.

²⁹ <http://home.bt.com/tech-gadgets/tech-news/bt-invests-further-20-million-in-ultrafast-broadband-rollout-in-northern-ireland-11364230515774>

³⁰ Ofcom analysis of BT response to Question 11 of IR2.

³¹ <https://www.openreach.co.uk/orpg/home/products/ultrafastfibreaccess/fttpdemand/fttpod.do> Last accessed 18 October 2019

Following our recent Fibre First announcements and with greater focus on building Fibre to the Premises (FTTP) proactively within 8 major UK cities, we wish to advise that our FoD order capacity for the year ahead (April 2018 to March 2019) will support individual FoD customer orders where possible within an overall industry-wide operational capacity of 20 orders per calendar month. We advise that FoD is not suitable for major multi-site network upgrade projects. Before you commit to any sales plans, please consult us first to ensure suitability of your project for FoD delivery.

When order capacity for a period exceeds our ability to supply, we will advise CPs if they are required to hold back from placing further orders.

- 2.40 In June 2018 Openreach announced that it was “considering how to support and manage FoD orders for both individual customers and bigger bids, starting in 2019/20.”³²
- 2.41 In September 2018, Openreach placed a hold on the acceptance of any new FOD orders due to demand from existing orders exceeding its operational capacity.³³ The hold was in place until 1 December 2018.³⁴
- 2.42 In relation to the projected capacity for April 2019 to March 2020, Openreach’s website states:

We are reviewing our projected capacity for both single and multiple project orders for the 2019/20 financial year and starting from Q1 (April to June 2019) we currently expect to be able to support 100 industry-wide FoD orders per calendar month.

*We may need to apportion this capacity for single orders and multiple order projects to ensure that we can support CPs selling either type and we will advise further on this in due course. We also hope to be able to offer more capacity later in 2019/20 and will advise further when we can confirm our operational ability to manage additional demand.*³⁵

Pricing of relevant wholesale products

Pricing of EAD 100Mbit/s

- 2.43 Charges payable to BT for Ethernet leased lines, including EAD, are made up of a connection charge which is payable at the beginning of the term and an annual rental charge (see Table 2.1 below).
- 2.44 In addition to the EAD connection charges, Excess Construction Charges (ECCs) may also be payable if construction work is required to deliver a new leased line, unique to the site of a single end-user, which costs in excess of £2,800.³⁶ It covers activities such as a site survey,

³² Copper and Fibre Product and Commercial Forum Meeting Slides, June 2018

³³ Source: Openreach update to industry on Fibre First, Fibre First (GEA FTTP) updates, September 2018

³⁴ Source: Openreach update to industry on Fibre First, Fibre First (GEA FTTP) updates, November 2018

³⁵ <https://www.openreach.co.uk/org/home/products/ultrafastfibreaccess/fttpdemand/fttpod.do>

³⁶ EAD connection charges include an ECC Fixed Fee to fund an ECC exemption of £2,800. ECCs above the £2,800 exemption are notified to customers during the order fulfilment process and billed (for example if the total bespoke ECC price is £3,000, after the £2,800 exemption an ECC charge of £200 will be raised).

jointing, installation of new duct, blowing fibre tubing in duct and drilling through walls. These charges are subject to a charge control.

- 2.45 Leased lines were used by eir for the Northern Ireland public sector contract (Network NI Contract) which preceded the NIPSSN Contract. As such, given the charging structure for EAD, eir would pay no connection charge where a like-for-like service was required, whereas a rival bidder would need to pay a connection charge for each site they were not currently providing.

Pricing of GEA FTTP

- 2.46 Similar to Ethernet leased lines, charges for Openreach's GEA products consist of an up-front connection charge and an annual rental charge.³⁷ However, for GEA FTTP where Openreach has already rolled out FTTP, there are no additional build charges.

FOD pricing

- 2.47 The charges for Openreach FOD included build charges to cover the cost of laying of fibre from the aggregation node to the CBT. In addition to the FTTP connection charge, from 2014 to 2017, FOD build charges were distance-based charge bands which gave different costs depending on a customer's distance from the nearest NGA aggregation node e.g. a customer site 1.5km from an NGA node would be charged a build cost of £6,125.³⁸ These price bands were published and so provided transparency over the level of build charge.
- 2.48 On 30 October 2017, Openreach announced a new pricing model and minimum contract term of 12 months for the FOD variant of FTTP, which would take effect from 1 February 2018. The new pricing model:
- a) reduced connection and rental charges so that they were the same as the corresponding GEA FTTP product connection and rental charges; and
 - b) replaced distance-based charging with a bespoke build charge.³⁹
- 2.49 These bespoke build charges reflect the cost of providing the necessary infrastructure for each connection, and so are specific to the connection in question. The final build charge payable to Openreach would also include an exemption amount per FOD order of £700, and an exemption of £50 per premise for each premise that Openreach determines to have been enabled to use FTTP by the relevant build work.

³⁷ See Openreach price list

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=M80QNeH46o4g6JKGD604vTypQOKfNn%2Beo6vmoVhAOBZZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D> and

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=0WyIM7tTGGgucFf0dXUIWK4XSAPlAmgrRZNg5Pk%2B5%2F%2BkRgB7BL4KNYn%2FIKx2YB4Qe6YShZ82RgLOGLsH2e9%2Bmw%3D%3D>

³⁸ Source: Openreach price list.

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=0WyIM7tTGGgucFf0dXUIWK4XSAPlAmgrRZNg5Pk%2B5%2F%2BkRgB7BL4KNYn%2FIKx2YB4Qe6YShZ82RgLOGLsH2e9%2Bmw%3D%3D>

³⁹<https://www.openreach.co.uk/orpg/home/updates/briefings/ultrafastfibreaccessbriefings/ultrafastfibreaccessbriefingarticles/nga200717.do>

- 2.50 There was no publicly available specific information on the likely magnitude of build charges during the NIPSSN tender. Build charges were bespoke, to be established through an iterative survey and planning process by Openreach, and therefore only available on request. Openreach would provide an “*initial, non-binding estimate of the build charges, after which it would proceed with a planning phase, and establish a final firm price for the build costs.*”⁴⁰
- 2.51 As this was a change to the previous FOD pricing model, there was no previous pricing history to give an indication of likely build charges to potential users. BT has said that there were, however, ways of getting an indication of the potential build charges using other available tools.⁴¹

Summary

- 2.52 Table 2.1 below sets out the connection and rental charges for the EAD 100 Mbit/s and GEA FTTP 500/165 products applicable in March 2018.

Table 2.1: EAD and FTTP prices at time of bid (March 2018)

Product	Connection (£)	Annual Rental (£)
EAD 100Mbit/s	1,925	1,800
FTTP (i.e. GEA FTTP or FOD) up to 500Mbit/s upload 165Mbit/s download	500	660

Source: Openreach price list⁴²

- 2.53 As the figures show, the connection and rental charges for FTTP (i.e. GEA FTTP or FOD) are significantly lower than for Ethernet leased lines for NIPSSN sites that required download and upload speeds of 100Mbit/s. For example, absent build charges, assuming a flat rental price over a seven-year period, a FOD 500/165 circuit could save approximately £9,400 for a given site as compared to an EAD circuit.⁴³ Whether FOD offered a cheaper option than

⁴⁰ As stated on Openreach’s website: “Prices are subject to survey and relevant FTTP on Demand Build charges. We will provide an initial, non-binding estimate of the level of build costs. Upon confirmation by the communications provider, we will proceed with a planning phase, and establish a final firm price for the build costs which is valid for a period of thirty (30) days. At this stage, if the communications provider does not want to proceed with the Order then it is liable to pay the survey and design fee. This charge is subject to VAT.”

<https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=0WYIM7tTGGgucFf0dXUIWK4XSAPlAmqrRZNq5Pk%2B5%2F%2BkRqB7BL4KNYn%2FIKx2YB4Qe6YShZ82RqLOGLsH2e9%2Bmw%3D%3D>

⁴¹ [3<] amongst other things, the Advanced Order Management Process (AOMP), the Infrastructure Discovery and Address Matching tools and Google Maps. See BT’s Response to Information Request 2, Questions 3, 6 and 7, dated 24 May 2019.

⁴² <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=0d0zetWgShsiqKWjcN2Y5WJA8BGqSBLxL7lgSM4fRpZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D>,
<https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=M80QNeH46o4g6JKGD604vTypQOKfNn%2Beo6vmoVhAOBZZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D> and
<https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=0WYIM7tTGGgucFf0dXUIWK4XSAPlAmqrRZNq5Pk%2B5%2F%2BkRqB7BL4KNYn%2FIKx2YB4Qe6YShZ82RqLOGLsH2e9%2Bmw%3D%3D>

⁴³ If used for all of the approximately 1,000 circuits which required a speed of 100Mbit/s, but less than 1Gbit/s, this would suggest that use of FTTP would be £9.4 million cheaper than use of EAD at these sites, absent build charges. This assumes

Ethernet leased lines depends on the build charges which would apply to the FOD connection.

Products used in the final bids

- 2.54 In its Final Tender, BT used FOD for [X] of the NIPSSN circuits, of which [X] circuits were FOD 500/165.⁴⁴ BT used FOD for [X] of circuits requiring 100Mbit/s upload and download speed.
- 2.55 eir did not include any FTTP or FOD in its bid. For [X] of the circuits where BT used FOD 500/165, eir used EAD or EAD LA products.⁴⁵

Outcome of tender process

- 2.56 The bids were scored on two criteria: technical (including legal) aspects and price, both with a maximum score of 50. In June 2018, the Department of Finance announced that BT had won the NIPSSN Contract, with a total score of [X] compared to eir's total score of [X]. eir scored marginally higher than BT on the technical (including legal) aspects of the bid,⁴⁶ but BT's financial score was significantly higher,⁴⁷ as their bid price of £[X]m was significantly lower than eir's bid price of £[X]m.

Court action

- 2.57 Following the announcement that BT had won the contract, eir began procurement proceedings against the Department of Finance in the High Court of Justice in Northern Ireland on 14 June 2018. In those proceedings, eir challenged the award of the NIPSSN contract to BT on the grounds that:
- a) the Department had failed to comply with its duties under the Public Contracts Regulations 2015 inter alia by accepting a tender which was not capable of being performed at the abnormally low price submitted by BT; and
 - b) BT's tender was abnormally low and therefore that the Department by its decision to award the contract to BT is "*facilitating predatory pricing and/or margin squeeze to force the plaintiff out of the Northern Ireland market completely*" in contravention of competition law.

that a provider is not already connected at these sites, and so will face a connection charge. We noted above that at some sites eir would not have faced a connection charge for using EAD. However, even at these circuits, the rental saving alone would be around £8,000 per site from using FOD (£8 million over 1,000 sites).

⁴⁴ BT's proposal included [X] sites for which it proposed to use FOD 330/30. These were used exclusively for circuits which required bandwidths of either 2Mbit/s or 10Mbit/s, and for which there were other available substitute products. As such, our comparison focuses on BT's proposed use of the FOD 500/165 product. Ofcom assessment of spreadsheets titled "*BT Circuit Detail*", sent to Ofcom by BT on 13 February 2019.

⁴⁵ Ofcom analysis of information provided by eir. See also eir's Briefing Note to Ofcom, dated 7 November 2018.

⁴⁶ eir's score was [X] compared with BT's score of [X]

⁴⁷ eir's score was [X] compared with BT's score of [X]

- 2.58 Since proceedings had been issued, the award of the contract to BT was automatically suspended.⁴⁸
- 2.59 The Department applied to the court to lift the automatic suspension of the award of the NIPSSN contract to BT. On 3 October 2018, the court ruled in favour of the Department and removed the order suspending the award for the following reasons:
- (a) Damages will be adequate remedy for the plaintiff if it succeeds at trial.*

(b) Damages are unlikely to be an adequate remedy for the Department if it is vindicated.

(c) The balance of convenience and the public interest favours removing the suspension (and not imposing any injunction).⁴⁹
- 2.60 Following the court’s judgment, the Department awarded the NIPSSN contract to BT on 8 October 2018.⁵⁰ eir discontinued its procurement proceedings on the same date.⁵¹

Ofcom’s Investigation

- 2.61 On 6 November 2018, eir lodged a complaint with Ofcom that raised competition and regulatory concerns in relation to BT’s winning bid for the NIPSSN contract. In particular, eir set out two concerns about BT’s conduct in the bidding process:
- a) concerns associated with the price of BT’s bid. eir’s analysis of its own costs (including the regulated Openreach products it relies upon to reach end consumers) suggested BT’s pricing may be predatory and/or a margin squeeze; and
 - b) concerns associated with the substantial delays eir experienced in receiving from BTNIN/Openreach physical site surveys for FOD and a lack of material information regarding FOD. eir argued that this seriously impeded its ability to offer cost effective and innovative solutions for the NIPSSN tender.
- 2.62 Following receipt of eir’s submission, we met with, and sought further information on an informal basis from, both eir and BT as part of our initial assessment of the case.
- 2.63 On 4 April 2019, we opened an investigation under the Communications Act 2003 (“the Act”) to review BT’s compliance with SMP conditions imposed by the Fixed Access Market Review 2014 (“FAMR 2014”) and the Wholesale Local Access Market Review 2018 (“WLAMR 2018”). Specifically, we expected to consider:
- a) Whether BT provided network access on reasonable request and on fair and reasonable terms, conditions and charges as required by SMP condition 1;

⁴⁸ By operation of law pursuant to Regulation 95 of the Public Contracts Regulations 2015.

⁴⁹ See *Eircom UK Ltd v Department for Finance* [2018] NIQB 75

<https://judiciaryni.uk/sites/judiciary/files/decisions/Eircom%20UK%20LTD%20v%20Department%20for%20Finance%20and%20British%20Telecommunications%20PLC.pdf>

⁵⁰ See OJEU Contract Award Notice <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/OJEU-AWARD-NOTICE-shared-network.PDF>

⁵¹ eir’s Briefing Note to Ofcom, dated 7 November 2018

- b) Whether BT unduly discriminated against eir as prohibited by SMP condition 4; and/or
 - c) Whether BT provided network access on an Equivalence of Inputs basis as required by SMP condition 5.
- 2.64 Following the information gathering phase of the investigation, and in light of the evidence we had seen, we decided to reduce the scope of the investigation to consider whether actions taken by BT breached SMP conditions 4 and 5 of the FAMR 2014.⁵²
- 2.65 Having considered the available evidence we consider that BT has contravened SMP condition 5 of the FAMR 2014. In light of this conclusion, we do not consider it necessary to reach a view on whether BT's conduct also constitutes a breach of SMP condition 4 of the FAMR 2014.
- 2.66 This document explains Ofcom's decision to issue a Confirmation Decision (the "Confirmation Decision") to BT under section 96C of the Act in respect of our findings that BT has contravened SMP condition 5 of the FAMR 2014. This document accompanies the Confirmation Decision attached at Annex 1. This document also sets out the penalty we are imposing on BT for these contraventions.
- 2.67 As required by Section 96A(5) of the Act, prior to issuing the notification under section 96A of the Act (the provisional breach notification), Ofcom considered whether it would be more appropriate to proceed under the Competition Act 1998. In the circumstances of this case, we decided that it would not be more appropriate to do so.
- 2.68 A summary of the main steps and key events in the investigation is attached at Annex 2.

⁵² The actions we remain concerned about in the investigation (and are the focus of this Confirmation Decision) occurred before the obligations imposed on BT in the WLAMR 2018 took effect on 1 April 2018.

Legal framework

Jurisdiction

- 3.1 Section 45(1) of the Act gives Ofcom the power to set SMP conditions on a person having significant market power (“SMP”) in a specific market. In the FAMR 2014, Ofcom determined that BT had SMP in the market for the supply of loop-based, cable-based and fibre-based wholesale local access at a fixed location in the UK excluding the Hull Area (WLA market) and imposed SMP conditions on BT under section 45.⁵³
- 3.2 Under those SMP conditions, BT is required to provide network access on reasonable request in the WLA market. The relevant service in the context of this document is FOD. This is a service in the WLA market and it is therefore, in principle, within the scope of the network access obligation.
- 3.3 Although FOD requires a degree of network build, we do not consider that this takes FOD outside the scope of the network access obligation. Ofcom has the power to impose network access SMP conditions that require BT to make adjustments to its network, provided that those requirements are proportionate in the circumstances. This is established by the TDC case.⁵⁴
- 3.4 We consider that the network build element forming part of FOD in the context of this case comprises an adjustment to an existing network to enable the establishment of a link between that network and the end-user. Therefore, BT was required to provide this network access in accordance with the relevant SMP obligations (for example, in a way which does not favour BT’s downstream divisions over other CPs).
- 3.5 Ofcom notes that, while BT accepts Ofcom’s jurisdiction for the purpose of this case, it reserves its position for future Ofcom policy decisions or investigations, where jurisdiction will depend on the relevant circumstances.
- 3.6 These network access obligations include Condition 5 of the FAMR 2014 (Equivalence of Inputs basis) which is the relevant regulatory requirement which we are considering for the purpose of this investigation, which is a non-discrimination obligation. SMP condition 5 (Equivalence of Inputs basis) as applicable from 26 June 2014 to 31 March 2018 stated that:

5.1 Subject to condition 5.2, the Dominant Provider must provide network access in accordance with conditions 1 and 2 (as applicable) on an Equivalence of Inputs basis.

5.2 The obligation in condition 5.1 to provide network access on an Equivalence of Inputs basis shall not apply to—

⁵³ The SMP finding means that BT operates in the markets for the supply of loop-based, cable-based and fibre-based wholesale local access at a fixed location in the UK excluding the Hull Area without effective constraint from competition. See Annex 29 (Notification dated 26 June 2014):

https://www.ofcom.org.uk/data/assets/pdf_file/0033/78837/annex_29.pdf

⁵⁴ TDC A/S v Teleklagenævnet, case C-556/12 – Judgment of 19 June 2014.

(a) the provision of Sub-Loop Unbundling Services in accordance with conditions 1 and 2;

(b) the provision of Physical Infrastructure Access in accordance with conditions 1 and 2;

(c) network access which the Dominant Provider was not providing on an Equivalence of Inputs basis as at the date that this condition enters into force; and

(d) such provision of network access as OFCOM may from time to time otherwise consent in writing.

5.3 Without prejudice to the generality of condition 5.1, the Dominant Provider must not provide (or seek to provide) network access for its own services (including for those of its retail divisions, subsidiaries or partners), unless at the same time the Dominant Provider provides and/or offers to provide such network access to Third Parties (other than its retail divisions, subsidiaries or partners) on an Equivalence of Inputs basis.

5.4 For the avoidance of doubt, the obligations set out in this condition 5 apply in addition to the obligations set out in condition 4.

5.5 In this condition 5:

“Equivalence of Inputs basis” means that the Dominant Provider must provide, in respect of a particular product or service, the same product or service to all Third Parties and itself on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all Third Parties and itself of the same Relevant Commercial Information about such products, services, systems and processes as the Dominant Provider provides to its own divisions, subsidiaries or partners subject only to: (a) trivial differences; (b) differences relating to; (i) credit vetting procedures, (ii) payment procedures, (iii) matters of national and crime-related security (which for the avoidance of doubt includes for purposes related to the Regulation of Investigatory Powers Act 2000), physical security, security required to protect the operational integrity of the network, (iv) provisions relating to the termination of a contract, or (v) contractual provisions relating to requirements for a safe working environment; (c) differences relating to the provision of Relevant Commercial Information by the Dominant Provider to its own divisions, subsidiaries or partners where this is necessary for purposes other than relating to the provision of network access to those own divisions, subsidiaries or partners; and (d) such other differences as OFCOM may from time to time consent to in writing;. For the avoidance of any doubt, unless seeking OFCOM’s consent, the Dominant Provider may not rely on any other reasons in seeking to objectively justify the provision in a different manner. In particular, it includes the use by the Dominant Provider of such systems and processes in the same way as Third Parties and with the same degree of reliability and performance as experienced by Third Parties; and

“Relevant Commercial Information” means information of a commercially confidential nature relating to products and/or services to which this condition 5 applies, and which relates to any or all of the following in relation thereto—

- i. product development;*
- ii. pricing;*
- iii. marketing strategy and intelligence;*
- iv. product launch dates;*
- v. cost;*
- vi. projected sales volumes; or*
- vii. network coverage and capabilities;*

save for any such information in relation to which OFCOM consents in writing is to be treated as falling outside this definition.⁵⁵

Our approach to assessing BT’s compliance with the EOI obligation

- 3.7 In the FAMR 2014 Ofcom explained the purpose of a non-discrimination obligation as follows:

“10.130 A non-discrimination obligation is intended as a complementary remedy to the network access obligation, principally to prevent the dominant provider from discriminating in favour of its own downstream divisions and to ensure that competing providers are placed in an equivalent position. Without such an obligation, the dominant provider is incentivised to provide the requested wholesale network access service on terms and conditions that discriminate in favour of its own downstream divisions.”

“10.145 In particular, we are concerned that BT and KCOM are incentivised to provide the requested wholesale network access service, in each of the four wholesale fixed access markets in which we consider they hold a position of SMP, on terms and conditions that discriminate in favour of their own downstream divisions. For example, they might decide to charge competing providers more than the amount charged to their own downstream divisions or they might strategically provide the same services but within different delivery timescales. Both these behaviours could have an adverse effect on competition...”

- 3.8 We explained the specific purpose of an EOI obligation (as distinct from the “no undue discrimination” obligation) as follows:

“10.152 In our view, the normal undue discrimination remedy would, by its very nature, allow for certain discriminatory conduct – compliance with that obligation needs to establish in particular whether the discrimination in question is undue. However, whether the conduct in question is such as to amount to a breach of the undue discrimination obligation can only be determined on a case-by-case basis.

⁵⁵ Note that, after 1 April 2018, the wording was slightly different. See: https://www.ofcom.org.uk/_data/assets/pdf_file/0024/112488/wla-statement-annex-33.pdf

10.153 Conversely, an EOI obligation removes any degree of discretion accorded to the nature of the conduct. The distinction between these two forms of non-discrimination is that, in the case of the former, both the ability and the incentive on the part of the SMP operator may still exist to engage in the relevant conduct – however, in the case of the latter, the ability is removed ex ante altogether.

10.154 Further, EOI is particularly important in ensuring non-discrimination in relation to nonprice terms as it requires BT's downstream divisions to use the same systems, processes and information as its competitors in relation to the development, provision, maintenance and repair of access services. In contrast, it would be more difficult to detect and address non-price discrimination through the application of a normal undue discrimination remedy."

- 3.9 Therefore, to determine whether BT's conduct amounted to a breach of SMP Condition 5, we have considered whether BT provided access to FOD on the same basis to eir (or to other CPs more generally) as it did to itself. In particular, we have considered whether BT, when providing access to FOD:
- a) provided the same Relevant Commercial Information to eir as it did to itself on (i) the pricing and the costs of FOD; and (ii) the network coverage and capabilities of FOD;
 - b) did so for eir on the same timescales and by means of the same systems and processes as it did for itself.

Contraventions

Introduction

- 4.1 In this section Ofcom outlines the reasons for concluding that BT’s conduct during the tender for the NIPSSN Contract breached SMP Condition 5.
- 4.2 The effect of condition 5 is that when BT provides network access via FOD, it is required to do so on an Equivalence of Inputs (“EoI”) basis including on the same timescales, by means of the same systems and processes. BT is also required to provide, on an EoI basis, Relevant Commercial Information, for example about the cost, pricing and capabilities of FOD.
- 4.3 Ofcom’s findings are divided here into three sections, which deal with three separate breaches of Condition 5:
- a) **Information about desktop surveys**, in which Ofcom finds that information about the CAD Desktop Surveys (used to provide initial non-binding estimates of the cost of delivering FOD circuits) was not provided to the eir and BT Bid Teams equivalently, meaning information about the pricing and cost of FOD was not provided to the eir and BT Bid Teams on an EoI basis.
 - b) **Subsequent additional surveys**, in which Ofcom finds that the results from subsequent additional surveys were not provided to the eir and BT Bid Teams on an EoI basis, including on the same timescales and via the same systems and processes.
 - c) **Openreach’s position on FOD**, in which Ofcom finds that information about the network coverage and capabilities of FOD, including Openreach’s ability to deliver FOD on the scale required for the NIPSSN Contract, was not provided to both parties on an EoI basis.
- 4.4 In order to set out Ofcom’s findings it is first necessary to provide more detail on the relevant parties involved in both eir and BT’s bids for the NIPSSN Contract. The introduction to this section then ends with a short narrative summary of events, in order to provide appropriate context for the detailed findings which follow. A detailed account of the timeline of events surrounding the tender for the NIPSSN Contract can be found at Annex 3.

Relevant parties

- 4.5 A full breakdown of the various teams and the individuals which made up those teams can be found in Annex 3. A summary is below:
- a) The **BT Bid Team** was responsible for preparing BT’s NIPSSN bid and included [BT Bid Team Member 1] as its [redacted], as well as [BT Bid Team Member 2], amongst others. The team sat within BT Business and Public Sector (BPS).
 - b) The **BT Account Team** supported the BT Bid Team in preparing its NIPSSN Bid. It included some members of Openreach, as well as [BT Account Team Member 1] ([redacted], BTNIN), and subsequently [BT Account Team Member 2] ([redacted], BTNIN) who both provided local

support as members of BTNIN (the division that delivered Openreach products within Northern Ireland), which sat within BPS.

- c) The **eir Bid Team** comprised the individuals within eir responsible for preparing eir's NIPSSN bid and included [eir Bid Team Member 1], [eir Bid Team Member 2] and [eir Bid Team Member 3].
- d) The **BTNIN eir Account Team** supported the eir Bid Team in preparing its NIPSSN Bid. It comprised [BT eir Account Team Member 1]; [BT eir Account Team Member 2]; and [BT eir Account Team Member 3] from BTNIN.
- e) The **"Openreach Fibre Team"** is a term used for the purposes of this document, to refer to a collection of individuals who worked for Openreach and had, in some capacity, an involvement with fibre products during the Relevant Period.⁵⁶ These individuals provided information to both the eir and BT Bid Teams, directly or indirectly, through the respective account teams. The full list of individuals and job titles of those who make up the Openreach Fibre Team can be found in Annex 3 at paragraph A3.16. It includes the [redacted], [Openreach Fibre Team Senior Manager 1] ([redacted]) ; the [redacted], [Openreach Fibre Team Senior Manager 2] ([redacted]), [Openreach Fibre Team Member 4], [Openreach Fibre Team Member 7], [Openreach Fibre Team Member 5] and [Openreach Fibre Team Senior Manager 3].
- f) The **"BTNIN Planners"** is another term used for the purposes of this document. It refers to the individuals from BTNIN who supported the delivery of eir's physical site surveys and includes, amongst others, [BTNIN Planner 1].⁵⁷

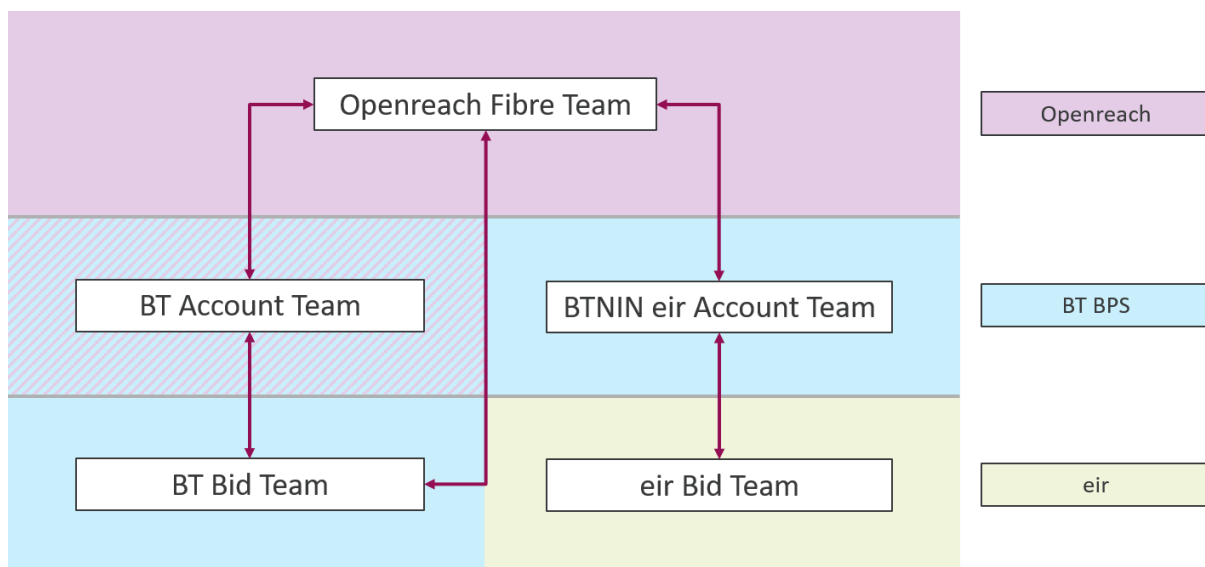
Information flow between parties

- 4.6 In Diagram 4.1 below we set out how information flowed between the relevant teams involved in both bids. Ofcom notes that much of the information set out under the sub-heading of 'Information about desktop surveys' at paragraphs 4.9 – 4.83 below, which Ofcom has concluded was not provided on an EoI basis, was provided directly from the Openreach Fibre Team to the BT Bid Team.

⁵⁶ The term is not intended to refer to a specific formal team within Openreach.

⁵⁷ The term is not intended to refer to a specific formal team within BTNIN.

Diagram 4.1: Overview of the relevant teams including information flows



Summary of various types of survey

4.7 In the following sub-sections, we refer to various types of surveys which were ordered or requested by both Bid Teams. Table 4.1 below provides a brief description of each.

Table 4.1 – Description of different types of checks and surveys referred to by Ofcom⁵⁸

Type of check / survey	Cost	Description
AOMP Checks	Free	The Advanced Order Management Process (AOMP) is used to check whether addresses are already served by fibre (FTTP or Ethernet fibre) or how far away the nearest fibre node is. AOMP indicates whether fibre is present; may be present; or is not present.
CAD Desktop Survey	Free	Initial and non-binding FTTP FOD costs are estimated by Openreach using a model called the ‘Cost at the DP Tool’ (“CAD”). The postcodes or property identifiers (called UPRNs – Unique Property Reference Numbers) are identified by customers. Postcodes, UPRNs or distribution point identifier codes are then put into the CAD tool and it produces a virtual FTTP network design and assigns costs.
Ethernet ECC Desktop Survey	Free	BTNIN Planners used a FOD trial calculation model which was the same as that used for Ethernet (EAD) ECCs. For example, if 100m of cable was required, the model applied the standard cabling rate for Ethernet (EAD) ECCs of £6.27 per metre to give a cost of £627.00.

⁵⁸ Information taken from BT’s Response to Information Request 2, Qs 1,2,9 and 10, dated 23 May 2019

Physical Site Survey £245.10 The final firm price for the build costs is calculated by a planner, following a visit to the premises to be connected and to the nearest fibre distribution point, completing a cost model with the findings from the site visit. The cost model then calculates a single 'cost to build' figure.

Summary of key events

4.8 Below is a simplified summary of some of the key events which occurred during the NIPSSN tender process in relation to FOD. The information included is expanded on, and fully referenced, in the later sub-sections of this chapter.

The BT Bid Team began considering FTTP as a solution for NIPSSN in January 2017. By March 2017, local support from BTNIN was being provided and the BT Bid Team was considering FOD for up to [X] sites. On 30 October 2017 Openreach announced a change to FOD pricing, to take effect in February 2018. On the same day, the eir Bid Team began enquiring about using FOD as part of its bid.

Throughout November and December 2017 both Bid Teams requested CAD Desktop Surveys for FOD build charges under the new pricing model. BT received results for nearly [X] circuits. eir received two batches; of 23 and 81.

For both bid teams, the CAD Desktop Survey results gave average build charge estimates of over £[AC] per site. These were also highly variable ranging from [5% of AC] - [1,500% of AC]. Both Bid Teams queried the high cost and variability of the results. eir was told by the BTNIN eir Account Team that requesting Physical Site Surveys was the only way to improve the accuracy of the estimated build charges.

Before receiving its CAD Desktop Survey output, a member of the BT Bid Team had been given detailed information by a member of the Openreach Fibre Team about the way in which the initial, non-binding estimate of FOD build charges was arrived at via the CAD Desktop Surveys. It was provided with information that, in the context of deploying FOD at scale, the CAD Desktop Surveys could be regarded as 'cautious', as well as reasons for this.

In January 2018 a member of the Openreach Fibre Team explained to the BT Bid Team the extent to which FOD build costs could be shared between sites, depending on how closely postcodes matched. eir did not receive this information.

eir requested 10 Physical Site Surveys at the end of November 2017 to better understand the likely build charges associated with FOD. All but one of the surveys had been carried out by 8 February 2018, but eir was not provided with the results by the NIPSSN submission deadline of 29 March 2018, despite chasing multiple times from mid-December until 8 February 2018. During the week commencing 12 February 2018 eir removed FOD from its NIPSSN bid because of the high costs and variability of the desktop survey results; advice that the FOD product had delivery limitations; and the fact it had not received physical site survey results after three months.

In February 2018 the BT Bid Team requested 19 surveys from Openreach to better understand the likely build charges associated with FOD. Six weeks later, BT received the results of 12 of the 19 surveys it had ordered.

In March 2018 Openreach issued a capacity announcement which advised that FOD was not suitable for major multi-sites network upgrade projects and announced an industry-wide operational capacity limit of 20 FOD orders per calendar month for the year April 2018 – March 2019. Openreach confirmed to BPS that this would not affect the NISSPN Contract.

Both eir and BT submitted bids for the NIPSSN Contract on 29 March 2018. In its final bid, BT proposed to use FOD for [X] sites [X].

Contravention 1: Information about desktop surveys

Introduction

- 4.9 As explained in section 3 above, Condition 5 requires BT, when providing network access, to provide the same Relevant Commercial Information about such products, services, systems and processes as it provides to its own divisions, subsidiaries or partners to third parties, such as eir. Relevant Commercial Information specifically includes the pricing and the costs of a particular product or service.
- 4.10 In the following sub-section Ofcom explains the basis for its view that BT, through its Openreach division, provided different Relevant Commercial Information about the pricing and costs of FOD to the eir and BT Bid Teams.
- 4.11 FOD pricing included a bespoke build charge element which was specific to the connection in question. An initial, non-binding estimate of the build charges could be requested from Openreach but the final firm build charge costs was established through an iterative survey and planning process conducted by Openreach that was only made available once an order had been placed.⁵⁹
- 4.12 It is Ofcom's view that the BT Bid Team was provided with Relevant Commercial Information, which was not provided to eir, regarding the way in which the initial non-binding estimate of the build charges was arrived at using the CAD Desktop Survey tool, why the actual build charges may differ from the initial non-binding estimates, and a sense of the magnitude of those potential differences.

Both Bid Teams received CAD Desktop Surveys which indicated comparatively high build charges for FOD

- 4.13 The revision of FOD pricing announced in October 2017, to take effect in February 2018, removed the distance-based charge bands that provided firm levels for build charges for the vast majority of FOD orders.⁶⁰ Openreach did not publish a methodology for calculating build charges under the new pricing. Instead, the Openreach website stated that build charges were subject to survey. As a result, both Bid Teams asked Openreach and their respective account teams for information on how build charges were calculated or estimated under the new pricing.
- 4.14 Both the eir and BT Bid Teams, when investigating the viability of using FOD for their NIPSSN bids, requested desktop surveys to be completed by Openreach to provide an estimated build charge for a number of circuits.

⁵⁹ See paragraphs 2.47 to 2.51.

⁶⁰ See <https://www.openreach.co.uk/fodpricing>, last accessed on 22 October 2020

- 4.15 Throughout November and December 2017 both eir and BT requested CAD Desktop Surveys of FOD sites to determine estimated build charges under the new pricing model.⁶¹ BT requested [X] sites.⁶² eir requested two batches of surveys for 23 sites and 81 sites respectively.
- 4.16 On 15 November 2017 eir received an initial batch of 23 CAD Desktop Surveys,⁶³ followed by a further batch of 81 on 22 November 2017.⁶⁴
- 4.17 On 13 December 2017, BT received CAD Desktop Survey results for [X] NIPSSN sites.⁶⁵
- 4.18 The CAD Desktop Survey results provided build charge estimates which both Bid Teams considered as very high when compared to Ethernet leased lines build charges.⁶⁶ eir noted a significant variance between the build charges of each site they received survey results for.⁶⁷ eir has also told Ofcom that there appeared to be no logic to the estimated build charges, for reasons set out later in this section.⁶⁸ A summary of the build charges included in the CAD Desktop Surveys received by both Bid Teams are included in the table below.

Table 4.2: Summary of CAD Desktop Survey Results received by eir and BT

CAD Desktop Survey Results	Total Cost	Average Cost	Lowest Cost	Highest Cost
eir initial batch of 23 (received 15 Nov 2017)	£[X]	£[AC]	[9% of £AC]	[896% of £AC]
eir second batch of 81 (received 22 Nov 2017)	£[X]	£[AC]	[9% of £AC]	[750% of £AC]
BT batch of [X] (received 13 Dec 2017)	£[X]	£[AC]	[5% of £AC]	[1,489% of £AC]

- 4.19 These CAD Desktop Survey results turned out to be a substantial overestimate of the likely build costs associated with deploying FOD.

⁶¹ In August 2017, the BT Bid Team requested estimated build charges for [X] NIPSSN [X] under the FOD distance-based pricing structure. For the response to this request, see the email from [Openreach Fibre Team Member 4] to [BT Bid Team Member 1], [Openreach Fibre Team Senior Manager 2], [BT Account Team Member 3] and [BT Account Team Member 1], dated 24 August 2018

⁶² Email from [BT Bid Team Member 2] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Senior Manager 1], dated 8 November 2017 at 10:56.

⁶³ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1] and [eir Bid Team Member 2], dated 15 November 2017 at 13:07

⁶⁴ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 22 November 2017 at 10:01

⁶⁵ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 6] and [BT Global Services Manager 2], dated 13 December 2017 at 17:07

⁶⁶ See, for example, the email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 13 December 2017 at 20:35, in which [BT Bid Team Member 1] attaches the CAD Desktop Survey output and notes that it “*makes for scary reading*”

⁶⁷ eir Response to Information Request 3, dated 13 December 2019

⁶⁸ Meeting Note between eir and Ofcom, dated 24 April 2019

- 4.20 BT's CAD Desktop Survey results estimated build charges of £[TC]m for [X] sites it identified as potential candidates for FOD from the [X] sites requested. By the time of submitting its bid, BT had estimated build charges for [X] FOD sites of [4.76 % of £TC]m, with an overall £[X] contingency for build charges across all NIPSSN sites.⁶⁹

Information provided by Openreach and BTNIN to the BT Bid Team

- 4.21 During the period when the BT Bid Team was receiving its CAD Desktop Survey results, certain additional information was made available to the BT Bid Team's [X] [BT Bid Team Member 1], on the tools used to conduct the CAD Desktop Surveys. We have therefore considered whether the provision of this information was in accordance with Condition 5.
- 4.22 We set out the relevant correspondence below, breaking down the content of the relevant communications for the sake of clarity, and so that we can explain its relevance in the context of understanding FOD build charges and building a model to estimate those charges. For the purpose of assessing whether this amounted to the provision of different Relevant Commercial Information for the purpose of Condition 5, we also take account of the communications with the BT and eir Bid Teams as a whole.

Information about how the CAD Desktop surveys worked

The '[other project]' Chain

- 4.23 During December 2017, before receiving the BT Bid Team's CAD Desktop Surveys, [BT Bid Team Member 1] was copied into an email chain which initially focused on the use of FOD for a project known as [other project], by another bid team in BT. Later, [BT Bid Team Member 1] announced [their] own interest in the discussion in relation to BT's NIPSSN bid. Ofcom understands that the [other] project was entirely unrelated to BT's bid for the NIPSSN Contract.
- 4.24 The '[other project]' email chain had begun in November 2017, following a meeting invite sent from [BT Global Services Manager 1] [X] to [Openreach Fibre Team Senior Manager 1] [X] and others in Openreach. [BT Global Services Manager 1] had wanted to discuss BT's use of FOD for "a number of large bids where the account teams believe FOD would [X]".⁷⁰
- 4.25 [Other Project Bid Team Member 1] [X] later replied to the meeting invite attaching a spreadsheet of [X] circuits for which [they were] looking for build charge estimates.⁷¹

⁶⁹ See Annex 3, paragraphs A3.17 to A3.82 for explanation of how the BT Bid Team estimated its FOD build charges.

⁷⁰ Meeting invite from [BT Global Services Manager 1] to [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [X] and [Other Project Bid Team Member 1], sent 2 November 2017 09:16, due to occur 7 November 2017 at 09:00

⁷¹ Email from [Other Project Bid Team Member 1] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [X] and [X], dated 8 November 2017 at 09:05

Ofcom understands this to be a request for FOD build charges to be estimated for the [other] project which [Other Project Bid Team Member 1] was leading.

- 4.26 [Other Project Bid Team Member 1] chased for results of these surveys and at the same time copied in [BT Bid Team Member 1].⁷²
- 4.27 In response, [Openreach Fibre Team Senior Manager 1] [redacted] provided desktop survey output for the [other project] sites.⁷³ [BT Bid Team Member 1] appears to have had access to this spreadsheet of results.
- 4.28 Later, in response to [Other Project Bid Team Member 1's] queries about estimated build charges being higher than those for Ethernet,⁷⁴ [Openreach Fibre Team Senior Manager 1] provided information about how the CAD Desktop Surveys worked, as well as how the estimated build charges could be reduced to more realistic levels.⁷⁵ These pieces of information are set out in the grey boxes below.

FTTP and Ethernet delivery can start from different places, often creating a cost advantage for Ethernet

“FTTP and Ethernet circuit delivery often starts from a different place of usable fibre presence (i.e. where a FTTP circuit may start from the nearest NGA Agg Node XXXm away, a useable P2P fibre presence for an EAD circuit may be only 50-100m away or even at the building itself and from this starting point the EAD has a build cost advantage as there is less work to do).”

- 4.29 This information indicates that it is necessary to build to (and therefore build charges relate to building to) the nearest point of usable fibre presence. It also explains why the estimated build charges for FOD and Ethernet at the same or nearby sites can vary greatly and why surveys for Ethernet circuits can, in some cases, return considerably cheaper results than those for FOD at the same location.

⁷² Email from [Other Project Bid Team Member 1] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted] and [BT Bid Team Member 1], dated 1 December 2017 at 16:11

⁷³ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted] and [BT Bid Team Member 1], dated 4 December 2017 at 14:31

⁷⁴ Email from [Other Project Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted], [BT Bid Team Member 1] and [redacted], dated 4 December 2017 at 16:31

⁷⁵ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted] and [BT Bid Team Member 1], dated 5 December 2017 at 11:24

Identifying re-usable fibre via physical survey can bring down high estimated build costs

“There are [X] circuits in the list with £[X]k - £[X]k ECC projections which account for £[X]m of the total FoD cost estimates. These high costs tend to be for circuits that need additional KMs of spine build to connect the customer. On physical survey, some of these may turn out to be a lot cheaper if we can identify re-usable fibre closer to the target, but there will be some that are legitimately expensive to connect.”

- 4.30 This information indicates that the re-use of existing fibre will reduce build charges (in some cases significantly) and that the CAD Desktop Surveys themselves do not identify whether there is any fibre nearby.

The CAD Desktop Survey tool reflects a cautious view of potential build charges

“Our FoD tool reflects a cautious view of potential build charge and so there is scope for actual survey to identify a lower figure. Across all circuits, this could easily be at least £[X]k per circuit on average, or £[X]m overall.”

- 4.31 This information indicates to the BT Bid Team that desktop surveys are likely to provide build charge estimates higher than those provided by more accurate surveys. The information also provides a scale for the “cautiousness” element of the discrepancy.⁷⁶

The CAD Desktop Survey tool double counts parts of the infrastructure required for circuits

“The tool itself has been run on an individual circuit basis, providing a separate result for each. This will in some cases be double counting the same spine and in some cases the same splitters and CBTs and so if we can connect multiple locations with the same components there is a reduction to apply.”

- 4.32 This information provides further understanding of how the CAD tool used to perform these surveys has been run. It is specific information about which pieces of infrastructure are likely to be double counted. It also suggests that actual build charges are likely to be lower because the tool is “double counting”. We consider this, and the other information provided about double counting, in paragraphs 4.43 to 4.55 below.

The CAD Desktop Survey estimates can be reduced significantly with the right information

- 4.33 Having set out the points covered in the grey boxes above, [Openreach Fibre Team Senior Manager 1] notes:

⁷⁶ We recognise the indication that “this could easily be at least £[X]k per circuit on average” is given in the specific context of the [other] project. We consider that the information is useful for other similar projects (such as NIPSSN) because it relates to how the CAD Desktop Survey tool works rather than [other project] specific factors.

“In short, if you rule out the highest cost FoD circuits (or place an order for a full survey to verify costs which may then come in a lot lower) and if you consider the potential for common cost saving and actual survey assessments of all circuits turning out lower, then it would not be too hard to see up to £[redacted]m knocked off the FoD total”

- 4.34 This information summarises the various steps set out in the exchange and puts a specific figure on the likely reductions that could be achieved for the [other] project as a result. The results of the desktop surveys for the [other] project (which [BT Bid Team Member 1] had access to) showed a total estimated build charge of £[redacted]m. The reduction [Openreach Fibre Team Senior Manager 1] suggests, made possible by taking the various steps [they set] out in this exchange, is therefore a decrease of more than 70%.
- 4.35 Although this estimate is for a different project, [BT Bid Team Member 1] had the benefit of seeing such an estimate applied to [redacted] FOD circuits before receiving the BT Bid Team’s own CAD Desktop Survey output for NIPSSN later in the month.
- 4.36 We recognise that one of the steps set out in the exchange relates to replacing FOD with an alternative technology for some circuits and therefore the likely reduction in FOD build charges cannot be directly inferred from the figures provided.⁷⁷ However, we consider that, taken as a whole with the other information in the [other project] chain set out above, this information provides insight into the potential scale of the reduction.

The ‘[other project]’ Chain – NIPSSN Discussion

- 4.37 After receiving the above information regarding [the other project], [BT Bid Team Member 1] replied to the chain announcing that [they have] *“the same vested interest as [Other Project Bid Team Member 1], but for the NI PSSN bid”*.⁷⁸
- 4.38 [BT Bid Team Member 1] asked whether Openreach had other datasets which would allow it to estimate the impact of fibre re-use on costings at the desktop survey stage. [Openreach Fibre Team Senior Manager 1] responded to [BT Bid Team Member 1’s] request, copying in [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 6] of the Openreach Fibre Team:⁷⁹

⁷⁷ BT has told us that the removal of high cost FOD circuits accounted for £[redacted]m of total FOD costs and 63% of the total FOD cost saving of £[redacted]m.

⁷⁸ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted] and [redacted], dated 5 December 2017 at 13:03

⁷⁹ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted], [redacted], [Openreach Fibre Team Member 6] and [Openreach Fibre Team Senior Manager 2], dated 5 December 2017 at 15:00

“we definitely don’t have the data sets to model Ethernet fibre re-use impact and provide you with a better and more confident view of likely cost. Our Ethernet P2P fibre records are often very different from what we find on survey”

- 4.39 This information is a further insight into the nature of how Openreach conduct its CAD Desktop Surveys and the information it has, and does not have, to inform its estimations.

Information from the BT Account Team

- 4.40 After receiving the above response from [Openreach Fibre Team Senior Manager 1], [BT Bid Team Member 1] forwarded this to [BT Account Team Member 2] who was a member of the BT Account Team, supporting the BT Bid Team. [BT Bid Team Member 1] asked [BT Account Team Member 2] for [their] thoughts on [Openreach Fibre Team Senior Manager 1’s] response.⁸⁰ [BT Account Team Member 2] provided [BT Bid Team Member 1] with two pieces of information, set out below.

Ethernet build charges appear cheaper than FOD because the Ethernet tool is looking for equipment closer to the customer’s premises

“Ethernet pricing is cheaper because:

It is picking up the nearest T code as the nearest intersect point (this could be any joint we have used last 25 years) whereas FOD will be looking for an agg [aggregation] node, a universal node 3A for example. The Agg node is in the main going to be further from the customer than a T coded joint”

- 4.41 This information confirms what [Openreach Fibre Team Senior Manager 1] stated earlier in the [other project] chain, that the CAD tool calculates the build cost from the nearest aggregation node (whereas the ethernet build cost is calculated to the nearest T node which will not be as far away). In other words, the CAD tool calculates the FOD price in a way which does not take account of any re-usable fibre nearby.

The CAD tool used for FOD will look for an aggregation node with spare fibres which may be further from the customer’s premises

“Secondly I would say The Ethernet Pricing tool is looking at getting one fibre from A to B whereas CAD which drives FOD pricing is looking at the best way to build out an FTTP network. So say you have a customer in an industrial estate CAD would be ensuring we have left the right infrastructure to build out the full DP area ie it wont necessarily put in CBTs, splitter nodes to do all estate but would put in Fibre DPs at key points

CAD will pick the agg node location it knows to have plenty of spares and again this might be further back into network”

- 4.42 [BT Account Team Member 2] explains in this exchange that the CAD tool is making assumptions about needing to deploy FTTP at multiple sites, and so it will be looking “further

⁸⁰ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 5 December 2017 at 15:29

back” into the network for an aggregation node with lots of spare fibre and thus the build charges would likely be increased. However, the proposed use of FOD for NIPSSN might involve only connecting one site at a particular location and so would not require the discovery of an aggregation node further back in the network. This means that, much like when connecting one individual premise via EAD, a bidder might be able to connect a site using FOD by locating re-usable fibre closer to the premises.

Information about double counting

The '[other project]' chain

- 4.43 As set out in paragraph 4.32 above, one of the pieces of information provided in the '[other project]' chain related to the issue of double counting:⁸¹

“The tool itself has been run on an individual circuit basis, providing a separate result for each. This will in some cases be double counting the same spine and in some cases the same splitters and CBTs and so if we can connect multiple locations with the same components there is a reduction to apply.”

- 4.44 This provided specific information about which pieces of infrastructure are likely to be double counted. It also suggested that actual build charges were likely to be lower because the tool was “double counting”.

Provision of desktop surveys

- 4.45 When [BT Bid Team Member 1] received the CAD Desktop Survey output on 13 December 2017, [they were] given the following information by [Openreach Fibre Team Senior Manager 2] of the Openreach Fibre Team:⁸²

“some costs have been reduced by assuming that all locations would be deployed together – ie there are economies of scale compared to doing this as independent builds for each DP / location separately.

If you ended up building into a cherry picked list of these, costs per DP / per location may end up higher.”⁸³

- 4.46 Upon receiving the desktop output from [Openreach Fibre Team Senior Manager 2], [BT Bid Team Member 1] queried whether there had been double counting in the desktop survey output. [BT Bid Team Member 1] provided an example of one site, served by the same “DP”

⁸¹ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted] and [BT Bid Team Member 1], dated 4 December 2017 at 14:31

⁸² eir was given almost identical information by the BTNIN eir Account Team when it received Openreach’s Proposed Design spreadsheet in December 2017, which contained a price per location for 1,703 NIPSSN circuits. Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 18 December 2017 at 12:37.

⁸³ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 6] and [BT Global Services Manager 2], dated 13 December 2017 at 17:07

(drop-point) but with six endpoints, for which the build cost totalled nearly £[redacted]. [BT Bid Team Member 1] suggested this was an overestimation and asked [Openreach Fibre Team Senior Manager 2] to “refine the desktop output in light of this sort of thing [and] to trap examples such as this.” [Openreach Fibre Team Senior Manager 2] replied the following day stating:

“the cost is cost per DP, so indeed when you have multiple lines with either the same address, or in fact the same DP, then you should not double count.”

- 4.47 This provided the BT Bid Team with further information on the underlying methodology of the CAD tool used to create desktop survey results, as well as information that the actual build charges would be lower as it would not include such double counting.
- 4.48 In addition to this information, in [Openreach Fibre Team Senior Manager 2’s] response, [they] provided a new version of the desktop survey output spreadsheet with a pivot table so that [BT Bid Team Member 1] could see the total cost per DP.⁸⁴ Using this spreadsheet, it is possible to see that the cost for the example [BT Bid Team Member 1] highlighted in [their] previous email is ~£[redacted],⁸⁵ a reduction of [89%].⁸⁶ The pivot table spreadsheet also has a total cost of £[redacted]m, which is [23%] less than the original spreadsheet of CAD Desktop Survey results.

Common Postcode Cost Methodology

- 4.49 In January 2018, [Openreach Fibre Team Senior Manager 1] [redacted] asked [BT Global Services Manager 1] [redacted] about the potential FOD demand for the year ahead from BT M&PS.⁸⁷ After [BT Global Services Manager 1] replied, [Other Project Bid Team Member 1] [redacted] added additional comments regarding the [other] project and the FOD desktop survey results [they] had received in December. [Other Project Bid Team Member 1] also copied in [BT Bid Team Member 1] [redacted].⁸⁸
- 4.50 In the resulting email chain [Openreach Fibre Team Senior Manager 1] provided further information, in addition to that provided in the [other project] chain, about how to improve the accuracy of estimated build charges for FOD. This method of improving accuracy is designed to ensure that build charges are reduced, as it aims to remove the “double counting” inherent in the CAD desktop tool.

⁸⁴ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1] and [Openreach Fibre Team Senior Manager 1], dated 14 December 2017 at 10:22

⁸⁵ £[redacted]

⁸⁶ £[redacted]

⁸⁷ Email from [Openreach Fibre Team Senior Manager 1] to [redacted] and [BT Global Services Manager 1], dated 4 January 2018 at 08:13

⁸⁸ Email from [Other Project Bid Team Member 1] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [redacted], [redacted], [BT Bid Team Member 1] and [BT Global Services Manager 2], dated 4 January 2018 at 17:59

- 4.51 On 5 January 2018, [Openreach Fibre Team Senior Manager 1] replied to [Other Project Bid Team Member 1] and [BT Global Services Manager 1] (copying in all participants, including [BT Bid Team Member 1] and [Openreach Fibre Team Senior Manager 2]). In this email [Openreach Fibre Team Senior Manager 1] pushes back on one of [BT Global Services Manager 1's] suggestions to improve the accuracy of FOD build charges but suggests an alternative *"whereby you could make your own rough approximation and get similarly close to the mark if you look at the post codes for your target premises and see how closely they correlate."*⁸⁹
- 4.52 [Openreach Fibre Team Senior Manager 1] uses two sets of postcodes to illustrate [their] example. [Openreach Fibre Team Senior Manager 1] explains that where the postcodes indicate that the sites are close (in [their] example [2 circuits show commonality of post code to the 5th character]) *"most of the spine and splitter will be common and so as an approximation at least 60% averaging could be applied across those two"*, and where the postcodes are a perfect match (in [their] example [X]) *"at least 95% of the build cost is likely to be common and could be spread across the two."*⁹⁰
- 4.53 [BT Bid Team Member 1] replied to this email asking whether the two postcodes which exactly match should only have one set of costs accounted for.⁹¹ [Openreach Fibre Team Senior Manager 1] replied with some detailed reasons about being cautious about such assumptions:

⁸⁹ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 08:47

⁹⁰ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 08:47

⁹¹ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January at 09:29

“The build cost should account for anything required to get from a usable point of fibre towards the customer premises. When you reach the same DP (CBT) you still have the lead-in to each customer which if it requires civils on the street or across customer land, would be counted in the quote and each customer would have their own cost responsibility for that section. That’s why I suggested considering 95% of the build cost quote as common, which leaves a separate 5% of the quote to cover the cost of any civils for the lead-in for each customer.

If both customers sit with a few metres of the CBT, then close to 99% commonality is likely and if neither of them needed any civils for the lead-in from CBT to prem then 100% commonality might be possible. If however, one of them is a school (which in the case below, one is) or similar property with a very long distance from the CBT on the street to the actual premises and if this needs civils to cross 100s of metres of land, then the last drop cost might be a bigger proportion of the cost for that customer when a physical survey is carried out. That is why 95% would make more sense to me.”⁹²

- 4.54 [BT Bid Team Member 1] queried whether the estimate covers *“the build to the DP or to the Prem?”*⁹³ [Openreach Fibre Team Senior Manager 1] responded that [their] understanding is *“the quote also includes the potential cost of civils to reach the prem from DP / CBT, hence my steer that same post code prems shouldn’t assume 100% cost commonality.”*⁹⁴
- 4.55 In [Openreach Fibre Team Senior Manager 1’s] first email [they] provided the BT Bid Team with information on the proportion of the actual build costs that were likely to be common depending on how close the sites were using the postcodes of each site. The additional information provided in [Openreach Fibre Team Senior Manager 1’s] following email gave the BT Bid Team an explanation of how the specific infrastructure might affect the actual build costs.⁹⁵

⁹² Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 09:50

⁹³ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 10:26

⁹⁴ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 10:51

⁹⁵ The information is tailored to the types of sites which made up a considerable proportion of the NIPSSN Contract, i.e. schools. However, BT has commented that for NIPSSN, very few premises sharing the same postcode had equivalent bandwidth requirements of 100 Mbps.

Summary of the information received by the BT Bid Team

- 4.56 In summary, we find that between November 2017 – January 2018, [BT Bid Team Member 1] [REDACTED] of the BT Bid Team received Relevant Commercial Information from Openreach and BTNIN about the pricing and cost of FOD. In particular:
- a) Openreach disclosed that the CAD Desktop Survey tool that Openreach used to produce initial non-binding FOD build charge estimates, produced estimates which, in the context of deploying FOD at scale, it regarded as ‘cautious’. It explained that the reason for this was that the CAD Desktop Survey tool was designed to map out a FTTP network rather than a point-to-point network. This meant that the CAD Desktop Survey tool identified connection points higher in the network than necessary for a point-to-point connection. It explained that the actual build cost would be lower if re-usable fibre closer to the site in the question could be identified.
 - b) In relation to build charges for adjacent sites, Openreach provided information on the pieces of infrastructure that may be double counted by the CAD Desktop Survey tool; information that the actual build costs would not include double counting where sites were served by the same drop point; and an indication of the proportion of costs that were likely to be common depending on how close the sites were.
- 4.57 For the reasons set out in paragraphs 4.81 to 4.82 below, Ofcom considers that this information is Relevant Commercial Information about the cost and pricing of FOD.

Information provided by Openreach and BTNIN to the eir Bid Team

Information about how the CAD Desktop surveys worked

- 4.58 eir has told Ofcom that, when submitting its batches of 23 and 81 sites for CAD desktop Surveys, it was attempting to understand the underlying methodology of the surveys. The eir Bid Team deliberately chose a mixture of urban and rural sites spread across Northern Ireland. It initially chose sites only served by copper and then, in the second batch, it deliberately submitted some sites which it knew had existing fibre, in order to determine whether that made a difference to the estimated build charges.⁹⁶
- 4.59 Upon receiving its CAD Desktop Results for FOD build charges, the eir Bid Team sought to understand from Openreach (via the BTNIN eir Account Team) how the CAD Desktop Survey results were derived and why some of the build charge estimates were very high when compared to EAD build charges.
- 4.60 eir has told Ofcom that its own initial batch of 23 CAD Desktop Surveys did not tell it anything useful and that when comparing those results to desktop survey results for Ethernet circuits, it could not understand the differences.⁹⁷

⁹⁶ See both the Meeting Note between Ofcom and eir on 24 April 2019 and eir’s Response to IR3, dated 13 December 2019

⁹⁷ Meeting between Ofcom and eir on 24 April 2019

- 4.61 eir has told Ofcom that it discussed the output of desktop surveys with the BTNIN eir Account Team and attempted to obtain more information about these.⁹⁸ eir has said that it was clear from communications with the BTNIN eir Account Team *“that desktop surveys were not reliable to determine exact costs”* of FOD build charges.
- 4.62 eir also stated that the BTNIN eir Account Team could not provide an explanation around the significant variance amongst the results *“other than that this was a bespoke product and that build costs would be determined on a site by site basis.”* In reference to discussions with the BTNIN eir Account Team about the variance of the CAD Desktop Results, eir said *“Rather than seek to explain this variability, BTNIN/Openreach directed eir towards requesting physical site surveys as the only means of obtaining accurate cost information.”*⁹⁹
- 4.63 The BTNIN eir Account Team provided assistance to the eir Bid Team throughout the tender process, including in assisting with the preparation of potential bid designs. For example, in December 2017 the BTNIN eir Account Team provided eir with an initial bid design. This proposed alternative technologies for sites where the desktop surveys indicated high FOD build charges.¹⁰⁰
- 4.64 As part of this, the BTNIN eir Account Team sought further information from the Openreach Fibre Team. In November 2017, [BT eir Account Team Member 2] of the BTNIN eir Account Team organised a call with [BT eir Account Team Member 1] and [BT eir Account Team Member 3] of the BTNIN eir Account Team and [Openreach Fibre Team Member 7] and [Openreach Fibre Team Senior Manager 2] of the Openreach Fibre Team. One of the agenda items on the call was eir’s FOD surveys which had *“highlighted a number of sites with very large build costs where we know we have fibre.”* [BT eir Account Team Member 2] asks to *“discuss the accuracy/model used to ensure we are analysing the situation as accurately as possible”*.¹⁰¹
- 4.65 BT has confirmed that this call took place.¹⁰² If an equivalent explanation to that which the BT Bid Team received via the [other project] chain regarding the high build charges for FOD circuits was provided to the BTNIN eir Account Team during this call, there is no evidence that any such explanation was then passed to the eir Bid Team. Indeed, the eir Bid Team told Ofcom in April 2019 (a year after the submission of the NIPSSN bids) that its understanding of FOD build charge methodology still remained incomplete.¹⁰³
- 4.66 eir appeared to have asked questions about the variability and high costs of FOD build charges compared to EAD build charges and made attempts to better understand the nature

⁹⁸ eir Response to Information Request 3, dated 13 December 2019

⁹⁹ eir Response to Information Request 3, dated 13 December 2019

¹⁰⁰ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1] and [eir Bid Team Member 2], dated 18 December 2017 at 12:37

¹⁰¹ Meeting invite for 16:30 – 17:00 on 23 November 2017, sent from [BT eir Account Team Member 2] to [Openreach Fibre Team Senior Manager 2], [Openreach Fibre Team Member 5], [BT eir Account Team Member 1], [BT eir Account Team Member 3], [Openreach Fibre Team Senior Manager 3], and [Openreach Fibre Team Member 7] on 22 November 2017

¹⁰² BT’s Response to Information Request 6, dated 9 December 2019

¹⁰³ Meeting between Ofcom and eir on 24 April 2019

of the CAD Desktop Surveys, including how the results were derived. This information, which the BT Bid Team did receive, does not appear to have been provided to eir.

- 4.67 eir told Ofcom that *“the variability and inconsistencies in the [estimated] costs [of build charges for FOD, received as part of the CAD Desktop Surveys] meant that (a) there were significant doubts over how reliable the figures were and (b) it was impossible for eir to build any kind of pricing model for FOD in the tender out of results with such variability and with no discernible pattern or trend to the data received”*.¹⁰⁴

Information about double counting

- 4.68 After eir received its first batch of 23 desktop survey results¹⁰⁵, [eir Bid Team Member 1] enquired about whether the build charges would change if a second site was added. [BT eir Account Team Member 1] replied that *“Any additional sites will attract Build costs for FOD if not already served by NGA fibre. For example if a site is adjacent to an existing FOD fibre site then the build costs may be reduced due to adoption of some existing infrastructure.”*¹⁰⁶
- 4.69 [eir Bid Team Member 1] replied looking for confirmation that each site will need to be surveyed to get accurate costs. [BT eir Account Team Member 2] responded, confirming that *“a survey will determine exact build costs on an additional site.”* [BT eir Account Team Member 2] added that *“A second site may have some build costs i.e. the costs are likely to be lower but not necessarily total exclusion.”*¹⁰⁷
- 4.70 On 18 December 2017, [BT eir Account Team Member 2] wrote to the eir Bid Team about the CAD Desktop Survey results noting:

“some costs have been reduced by assuming that all locations would be deployed together – ie there are economies of scale compared to doing this as independent builds for each DP / location separately.

*If you ended up building into a cherry picked list of these, costs per DP / per location may end up higher.”*¹⁰⁸

- 4.71 This was consistent with the message given to the BT Bid Team (see paragraph 4.45 above).
- 4.72 Despite similarly seeking information on how to estimate build costs for adjacent sites, it appears that eir was not provided with as detailed information as the BT Bid Team was in relation to the pieces of infrastructure that may be double counted by the CAD Desktop Survey tool and the proportion of costs that were likely to be common depending on how close the sites were.

¹⁰⁴ eir Response to Information Request 3, dated 13 December 2019

¹⁰⁵ The heading to column Q of the spreadsheet containing the results of these 23 CAD desktop surveys stated that the build cost estimate for each site was for *“1 DP [Distribution Point] only.”*

¹⁰⁶ Email from [BT eir Account Team Member 1] to [eir Bid Team Member 1], [BT eir Account Team Member 2] and [eir Bid Team Member 2], dated 16 November at 15:36

¹⁰⁷ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1] and [eir Bid Team Member 2], dated 16 November 2017 at 17:05

¹⁰⁸ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1] and [eir Bid Team Member 2], dated 18 December 2017 at 12:37

Findings on the information about desktop surveys

- 4.73 SMP Condition 5 is an obligation on BT which requires it, when providing network access, to provide the same Relevant Commercial Information about such products, services, systems and processes as it provides to its own divisions, subsidiaries or partners to third parties, such as eir. Relevant Commercial Information specifically includes the pricing and the costs of a particular product or service.
- 4.74 In this case, in which two bidders were compiling competing bids for the same contract, Ofcom does not consider SMP Condition 5 requires BT to provide identical information to both bidders at all times.¹⁰⁹ However, we consider that SMP Condition 5 requires there to be broad equivalence in the Relevant Commercial Information provided to both bidders, particularly on information relevant to the bids. Our view is that was not the case here.
- 4.75 We have considered the information received during the [other project] exchanges; the provision of additional information alongside the desktop surveys for NIPSSN; and the postcode methodology together in the round. This information was provided to one individual in the BT Bid Team by two members of the Openreach Fibre Team and one individual in the BT Account Team in the context of developing a methodology to determine likely build charges for the mass-deployment of FOD for NIPSSN. While it was received in a series of exchanges, its nature and ultimately its relevance to a bidder was the same.
- 4.76 In the context of the CAD Desktop Surveys, Ofcom notes that BT did provide some of the same Relevant Commercial Information to the BT and eir Bid Teams. For example, the information accompanying the output of the CAD Desktop Surveys that some costs had been reduced by assuming that all locations would be deployed together.¹¹⁰
- 4.77 However, it is Ofcom's view that BT, through its Openreach division, provided different Relevant Commercial Information about the pricing and costs of FOD to the eir and BT Bid Teams in contravention of SMP Condition 5.
- 4.78 The BT Bid Team was provided with additional information about the way in which the initial, non-binding estimate of FOD build charges was arrived at via the CAD Desktop Surveys. It was provided with information that, in the context of deploying FOD at scale, the CAD Desktop Surveys could be regarded as 'cautious', as well as reasons for this. It was provided with information that the actual build cost would be lower if re-usable fibre closer to the site in the question could be identified.
- 4.79 eir, who was also attempting to build a methodology to allow it to determine appropriate build charges should it decide to deploy FOD, did not receive the same information despite seeking such information from Openreach via the BTNIN eir Account Team.

¹⁰⁹ In particular, Condition 5 permits "trivial differences" in the provision of Relevant Commercial Information. For the avoidance of doubt, in determining whether there is a breach of Condition 5 in a tender scenario Ofcom will consider all the circumstances, including the nature and relevance of the information itself, and the context in which it was requested and/or provided (such as whether it had been requested by a particular bidder, or whether a particular bidder had expressed an interest in the product to which the information relates).

¹¹⁰ See paragraphs 4.45 and 4.70 above.

- 4.80 The BT Bid Team was also provided with more detailed information than the eir Bid Team on build charges for adjacent sites. The BT Bid Team was provided with information on the pieces of infrastructure that may be double counted by the CAD Desktop Survey tool and an indication of the proportion of costs that were likely to be common (and, therefore, would not form part of the actual build costs) depending on how close the sites were. eir did not receive the same information. It received some information about the pieces of infrastructure that may be double counted. It did not receive an indication of the proportion of costs that were likely to be common depending on how close the sites were.
- 4.81 Ofcom considers that this information is Relevant Commercial Information about the cost and pricing of FOD. While the rental charges associated with the product were set out on Openreach's website, the build charges associated with deploying FOD were subject to survey. This means that the total cost of the product could only be known once build charge information was provided by Openreach to the customer.
- 4.82 Openreach provided build charge information for FOD via CAD Desktop Surveys. The information that was received during the exchanges above allowed for a better understanding of the build charges associated with FOD than those provided by the CAD Desktop Surveys alone. This information was therefore relevant in understanding the overall cost of the product in the context of the bid for the NIPPSSN Contract. As such, Ofcom's view is that it constitutes Relevant Commercial Information.
- 4.83 In being provided with such detailed information about the desktop survey results, the BT Bid Team received Relevant Commercial Information about the pricing and cost of FOD that was not provided to the eir Bid Team on an EoI basis. Ofcom's view is that this is a breach of SMP Condition 5.

Contravention 2: Subsequent additional surveys

Introduction

- 4.84 After being provided with estimated FOD build charges via CAD Desktop Surveys, both the BT and eir Bid Teams attempted to improve their understanding of these estimated build charges by requesting further surveys from Openreach.
- 4.85 Ofcom has found that BT provided the BT Bid Team with a set of survey results within a reasonable timeframe once the work had been completed, and once the results had been passed to the relevant individual within BT. BT did not provide eir with its survey results within the same timeframe, despite the results being passed to the same individual and the same process being available.

Results of subsequent additional surveys were not provided on an equivalent basis

The BT Bid Team's order journey

- 4.86 In January 2018 [BT Bid Team Member 1] [redacted] began enquiring about getting surveys for seven NIPSSN sites.¹¹¹ Internal discussion between the BT Bid Team and members of Openreach and BT Wholesale followed, in which [BT Bid Team Member 1] expressed that [they] did not mind whether the surveys carried out were desktop or physical,¹¹² nor whether they were for EAD or FOD, because *"It's ECC that we are wanting to validate which will be approximately the same for FOD / ECC?"*¹¹³ Ofcom believes that [BT Bid Team Member 1] meant "FOD / EAD".
- 4.87 [BT Bid Team Member 1] was given information that a new style survey would be available for FOD orders placed from 1 February 2018¹¹⁴ and that these would provide more accurate estimates than the CAD Desktop Surveys.¹¹⁵
- 4.88 BT has told Ofcom that 19 FOD orders were registered on Openreach's Workflow Management Tool (WFMT) between 1 – 6 February 2018.¹¹⁶ These are likely to have been ordered at [BT Bid Team Member 1's] request, as [BT Bid Team Member 1] was sent an email confirming the submission of these orders, which [they] then forwarded to [BT Account Team Member 2] [redacted].¹¹⁷
- 4.89 BT said that BTNIN Planners performed desktop surveys for 17 of these orders using the Ethernet ECC calculator¹¹⁸ and that it is likely they were all done on 2 March 2018. These 17 ECC Desktop Survey Results were then provided to [BTNIN Planner 1] on 2 March 2018 to input into the relevant system, WFMT.¹¹⁹
- 4.90 On 12 March 2018, [BT Bid Team Member 1] emailed [BT Account Team Member 2] asking for the output of the surveys. [BT Bid Team Member 1] said [they] appreciated *"the orders*

¹¹¹ Email from [BT Bid Team Member 1] to [redacted] and [BT Bid Team Member 5], dated 17 January 2018 at 17:57

¹¹² Email from [BT Bid Team Member 1] to [BT Account Team Member 3], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Senior Manager 2] and [BT Global Services Manager 2], dated 30 January 2018 at 18:53

¹¹³ Email from [BT Bid Team Member 1] to [redacted] and [BT Bid Team Member 5], dated 17 January 2018 at 17:57

¹¹⁴ Email from [redacted] to [BT Global Services Manager 2], [BT Global Services Manager 1], [redacted] and [redacted], dated 26 January 2018 at 17:59

¹¹⁵ Email from [BT Global Services Manager 2] to [BT Global Services Manager 1], [redacted], [redacted] and [redacted], dated 26 January 2018 at 17:45

¹¹⁶ [BT Bid Team Member 1] was told that *"the survey is part of the FOD order so that's one way to get the surveys"* Ofcom believes this is why 19 FOD orders were registered on WFMT. See email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Account Team Member 3] and [Openreach Fibre Team Senior Manager 1], dated 19 January 2018 at 16:54

¹¹⁷ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 1 February 2018 at 10:04

¹¹⁸ BT have explained that at that time a FOD planning calculator did not exist but that the BTNIN planners used a FOD trial calculation model which was the same as that for Ethernet ECCs. See BT's Response to eir's briefing note, Annex 2, dated 29 March 2019; and BT's Response to Information Request 2, Question 1, dated 23 May 2019.

¹¹⁹ BT's Response to Information Request 4, Question 9 (page 8), dated 11 September 2019

are all stuck in limbo on their way back to me through the system, but we need a view ASAP to finalise our ECC assumptions."¹²⁰

- 4.91 BT told Ofcom that *"As the desktop results were not available to the BT Bid Team on WFMT, [BT Account Team Member 2] asked [BTNIN Planner 1] on 13 March, 2018 to collate the results and send them to [BT Account Team Member 2] by e-mail"*. According to BT, on 14 March 2018 [BTNIN Planner 1] *"sent the results for 13 out of the 19 sites"* to [BT Account Team Member 2].¹²¹
- 4.92 On 14 March 2018 [BT Account Team Member 2] sent [BT Bid Team Member 1] a spreadsheet containing estimated ECCs for 19 sites. 13 of those sites correspond to the results that BT told us [BTNIN Planner 1] sent to [BT Account Team Member 2]. [BT Bid Team Member 1] later commented that only 12 of the results corresponded to the orders the BT Bid Team had placed. Ofcom understands that [§<].¹²²
- 4.93 The BT Bid Team therefore received the results of 12 of the 19 surveys it had ordered, within six weeks of ordering them, and within two weeks of the surveys themselves having been carried out.

The eir Bid Team's order journey

- 4.94 After receiving two batches of CAD Desktop Surveys in November 2017, eir was advised by the BTNIN eir Account Team to place orders for Physical Site Surveys in order to understand the true picture of FOD build costs.¹²³
- 4.95 As discussed in the previous sub-section, eir found that the results of the CAD Desktop Surveys did not provide any information that allowed them to understand the true nature of FOD build charges that would be incurred if it deployed FOD for those circuits in the NIPSSN Contract. eir also found many of the results of the CAD Desktop Surveys to be high when compared to the estimated cost of deploying EAD sites.¹²⁴
- 4.96 Ofcom has seen discussion between [eir Bid Team Member 1] and [BT eir Account Team Member 2], which occurred after eir had received its first batch of CAD Desktop Surveys. [eir Bid Team Member 1] queried whether each site would need to be surveyed in order to get accurate costs. [BT eir Account Team Member 2] replied stating that *"Yes a survey will determine exact build costs on an additional site."*¹²⁵
- 4.97 eir has told Ofcom that when enquiring about further detail being provided around the CAD Desktop Survey costs, the responses from the BTNIN eir Account Team were that the only

¹²⁰ Email from [BT Bid Team Member 1] to [BT Account Team Member 2] and [BT Bid Team Member 2], dated 12 March 2018 at 16:41

¹²¹ BT's Response to Information Request 4, Question 9 (page 9), dated 11 September 2019

¹²² [BT Bid Team Member 1] queried the results [BT Account Team Member 2] sent, suggesting 7 of the 19 results were not related to orders BT had placed (see paragraph A3.77). Ofcom has cross-referenced these results against the Physical Site Surveys eir requested in November 2017 and found that [§<].

¹²³ eir Response to Information Request 3, dated 13 December 2019

¹²⁴ eir Response to Information Request 3, dated 13 December 2019

¹²⁵ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1] and [eir Bid Team Member 2], dated 16 November 2018 at 17:05

way of obtaining more accurate costs and a detailed breakdown was by carrying out Physical Site Surveys. eir has told Ofcom it felt that ordering Physical Site Surveys was the only way it could find out how accurate the desktop results were.¹²⁶ eir ordered 10 Physical Site Surveys between 24 – 30 November 2017.¹²⁷

- 4.98 The eir Bid Team told Ofcom that when it placed the orders at the end of November, it was hoping to get the results back before Christmas and would have spoken to the BTNIN eir Account Team who was aware of this deadline.¹²⁸ eir has said that generally, the results of Physical Site Surveys are provided within a couple of weeks.¹²⁹
- 4.99 The eir Bid Team chased the BTNIN eir Account Team for the results of its surveys via telephone on 12 December; 15 December; and 18 December 2017, and on 3 January; 4 January; 11 January; 6 February; and 8 February 2018.¹³⁰
- 4.100 Ofcom has also seen evidence of the BTNIN eir Account Team chasing BTNIN Planners for the results on 13 December; 15 December; and 18 December 2017 and on 3 January; 4 January; 11 January and 6 February 2018.¹³¹
- 4.101 On 6 February 2018 the BTNIN eir Account Team was informed by the BTNIN Planners that all but two of the surveys had been completed.¹³² BT has told Ofcom that the penultimate on-site survey was performed on 8 February 2018, with the remaining on-site survey being conducted *“on or before 1 March 2018”*.^{133 134}
- 4.102 Table A3.2, which is based on information provided by BT, shows the estimated dates on which [BTNIN Planner 1] received the results of eir’s surveys, in order to upload them to the WFMT system. All of eir’s on-site survey results had been received by [BTNIN Planner 1] by 13 March 2018.¹³⁵ BT has told Ofcom that [BTNIN Planner 1] *“was unable to input any results such that the costs could be accessed by eir.”*¹³⁶
- 4.103 eir did not receive its survey results for these ten sites prior to the NIPSSN tender submission deadline of 29 March 2018 despite the last of the on-site surveys having been carried out four weeks before.

¹²⁶ Meeting Note between Ofcom and eir on 24 April 2019 and eir Response to Information Request 3, dated 13 December 2019

¹²⁷ BT’s Response to Information Request 4, Question 8 (page 8), dated 11 September 2019

¹²⁸ Meeting Note between Ofcom and eir on 24 April 2019

¹²⁹ Meeting Note between Ofcom and eir on 24 April 2019

¹³⁰ eir’s Briefing Note to Ofcom, dated 7 November 2018

¹³¹ Various emails provided as part of BT’s Response to Information Request 4, Question 1

¹³² Email from [BTNIN Planner 5] to [BT eir Account Team Member 3], [BT eir Account Team Member 1] and [BTNIN Planner 4], dated 6 February 2018 at 08:38

¹³³ BT’s Response to Information Request 4, Question 8 (page 4), dated 11 September 2019

¹³⁴ BT has told Ofcom that on-site surveys were conducted for nine of the ten sites, with one survey being desktop only. BT’s Response to Information Request 4, Question 8, dated 11 September 2019.

¹³⁵ Email from [redacted] [BT] to [redacted] [Ofcom], dated 25 October 2019 at 16:54

¹³⁶ BT’s Response to Information Request 4, Question 8 (page 7), dated 11 September 2019

- 4.104 In response to an Ofcom Information Request, BT stated “[BT eir Account Team Member 1] in the NIN eir account team provided the results for all 10 sites to [eir Bid Team Member 3] of eir by email on 27 June, 2018.”^{137 138}

Findings regarding the provision of subsequent additional survey results

- 4.105 Condition 5 requires BT to provide the same product or service to all third parties and itself on the same timescales and by means of the same systems and processes.
- 4.106 This was the first time that FOD Physical Site Surveys had been processed within Northern Ireland. BT has explained that “*the correct systems were not in place*”¹³⁹, that there were “*technical issues with the site survey FOD order system*”¹⁴⁰ and that “*the individuals in NIN who were tasked with processing both eir’s and BT’s FOD orders, including the NIN surveyors, were unfamiliar with the FOD product, with the product’s terms and conditions and with the Openreach Workflow Management Tool (“WFMT”).*”¹⁴¹
- 4.107 The individual responsible for inputting the survey results into the WFMT, [BTNIN Planner 1], was unable to do so in a way which allowed them to be read. Consequently, neither the eir Bid Team nor the BT Bid Team could read their results.¹⁴²
- 4.108 The effect of this appears to be that BT adopted an ad hoc process around the provision of the survey results to each of the BT and eir Bid Teams. However, the evidence indicates that this process was not applied in an equivalent way.
- a) All of eir’s on-site surveys had been completed by 1 March 2018 and the results had been passed to [BTNIN Planner 1], the individual responsible for inputting them into the WFMT, by 13 March 2018. Yet none of them were provided to eir.
 - b) The results of BT’s completed surveys were passed to the same individual ([BTNIN Planner 1]), who was responsible for inputting them into the WFMT, on 2 March 2018.¹⁴³
 - c) On 13 March 2018 [BTNIN Planner 1] was asked by [BT Account Team Member 2] to provide the BT Bid Team’s survey results via email.¹⁴⁴ [BTNIN Planner 1] then sent a spreadsheet containing 12 of those survey results to [BT Account Team Member 2] on 14 March 2018.¹⁴⁵ This spreadsheet was then forwarded to [BT Bid Team Member 1] on the same day.¹⁴⁶ Thus the BT Bid Team was provided with these survey results 12 days after the results were passed to [BTNIN Planner 1].

¹³⁷ BT’s Response to Information Request 4, Question 8 (page 7), dated 11 September 2019

¹³⁸ In its voluntary submission to Ofcom, dated 15 July 2020, BT states that “*the survey results eir ultimately received were also Ethernet ECC Desktop Survey results, not physical site survey results suitable for FOD.*”

¹³⁹ BT’s comments on eir’s Briefing Paper to Ofcom, dated 29 March 2019

¹⁴⁰ BT’s comments on eir’s Briefing Paper to Ofcom, dated 29 March 2019

¹⁴¹ BT’s Briefing Note to Ofcom, dated 22 October 2019 (page 3)

¹⁴² BT’s Briefing Note to Ofcom, dated 22 October 2019 (page 3)

¹⁴³ BT’s Response to Information Request 4, Questions 8-11, dated 11 September 2019

¹⁴⁴ BT’s Response to Information Request 4, Questions 8-11, dated 11 September 2019

¹⁴⁵ Email from [BTNIN Planner 1] to [BT Account Team Member 2] and [BTNIN Planner 5], dated 14 March 2018 at 11:39

¹⁴⁶ Email from [BT Account Team Member 2] to [BT Bid Team Member 1], dated 14 March 2018 at 22:11

- 4.109 Consequently, the BT Bid Team was provided with its survey results by email in March, while the eir Bid Team was not.¹⁴⁷ There appears to Ofcom to be no valid reason for the same process (emailing a spreadsheet of results) not to have been followed for both sets of results.¹⁴⁸ Nor does there appear to be any valid reason for eir's survey results not to have been provided to it on or around 13 March 2018 (i.e. on the same timescales as BT's survey results).
- 4.110 As a result of the above information, Ofcom concludes that BT has breached Condition 5 by not providing eir with access to FOD on the same timescales and by means of the same systems and processes as it did for BT.

Contravention 3: Openreach's position on FOD

- 4.111 During the Relevant Period, Openreach and BTNIN provided information about FOD, including information about the capabilities of the product and the capability of Openreach to deliver it, to both the eir and BT Bid Teams. Openreach also provided information about the capabilities of FOD to other parts of BT and issued information publicly about its own capacity to deliver FOD.
- 4.112 In this section we evaluate whether the messages provided to eir and BT about the network coverage and capabilities of FOD were provided equivalently. This evaluation is split into two parts:
- i) First, we assess information that was provided by Openreach and BTNIN to the eir Bid Team about FOD during its consideration of whether to use the product for its NIPSSN bid.
 - ii) Second, we assess information that was provided by Openreach to the BT Bid Team.
- 4.113 We conclude that the BT Bid Team was provided with information that suggested FOD was suitable for major multi-site network upgrade projects and that the product could be delivered at such a scale. Explicit assurances were provided to the BT Bid Team about its use of FOD despite a public announcement which appeared to contradict this position. This is in contrast to the information provided to eir which was that FOD was not a suitable solution for its NIPSSN bid and that the product had delivery limitations.
- 4.114 We are therefore of the view that the BT Bid Team was provided with information and advice that gave it comfort that widespread use of FOD in its NIPSSN bid was feasible, while eir was given a message that ultimately discouraged it from using FOD.

¹⁴⁷ BT's Response to Information Request 4, Question 8 (page 7), dated 11 September 2019

¹⁴⁸ BT has said the reason was that the BT Account Team had the idea of getting the results sent by email whereas that alternative did not occur to the BTNIN eir Account Team. BT also noted the strict Chinese walls separating the two account teams. See BT's Briefing Note to Ofcom, dated 22 October 2019.

FOD usage prior to the pricing announcement in October 2017 was low

- 4.115 In order to provide context around the messages Openreach communicated about its FOD capacity, it is important to understand how FOD had been used up until the NIPSSN tender began.
- 4.116 Since its launch in 2013, usage of FOD had been very limited. In the six months prior to the pricing announcement of 30 October 2017, [redacted] FOD circuits were ordered in the whole of the UK and none in Northern Ireland.¹⁴⁹ The widespread usage of FOD for over [redacted] circuits in BT's bid for the NIPSSN Contract was therefore a considerable departure from the way FOD had been used by CPs previously.

Information provided by Openreach and BTNIN to the eir Bid Team suggested FOD was not suitable for NIPSSN

- 4.117 Ofcom considers that the evidence shows that Openreach and BTNIN provided a message to eir that FOD was not a suitable solution for its NIPSSN bid and made it clear to eir that there were delivery limitations associated with FOD.
- 4.118 eir began enquiring about using FOD for their NIPSSN bid on 31 October 2017, the same day that a change in pricing was announced.¹⁵⁰
- 4.119 Upon receiving an initial batch of 23 desktop surveys, eir was told by the BTNIN eir Account Team that it would have *“substantially less certainty on pricing by choosing FOD, which remains a bespoke build on case by case, when EAD is instead a mass market product.”* [emphasis added]¹⁵¹
- 4.120 eir has told Ofcom it understood that the BTNIN eir Account Team was being given the message that FOD was not a mass market product by members of the Openreach Fibre Team.¹⁵² Indeed, Ofcom has seen evidence of this message being given by [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 1] and [BT eir Account Team Member 2] when discussing eir's first set of CAD Desktop Results.¹⁵³
- 4.121 eir has stated that it was advised by the BTNIN eir Account team *“on numerous occasions from December 2017 to February 2018 that the FOD product set had delivery limitations.”*¹⁵⁴
- 4.122 During December 2017, the BTNIN eir Account Team was chasing BTNIN Planners for updates on the progress of eir's Physical Site Surveys.¹⁵⁵ When [BT eir Account Team Member

¹⁴⁹ Ofcom analysis of BT response to Q11 of the Second Information Request

¹⁵⁰ Email from [eir Bid Team Member 2] to [BT eir Account Team Member 1], [eir Bid Team Member 1], [eir Bid Team Member 3] and [BT eir Account Team Member 2] dated 31 October 2017 at 11:36

¹⁵¹ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 15 November 2017 at 13:07

¹⁵² Meeting Note between Ofcom and eir on 24 April 2019

¹⁵³ Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 1], [Openreach Fibre Team Member 7] and [BT eir Account Team Member 2], dated 15 November 2017 at 10:32

¹⁵⁴ eir Response to Information Request 3, dated 13 December 2019

¹⁵⁵ Various emails between [BTNIN Planner 2], [redacted], [BTNIN Planner 1], [BT eir Account Team Member 1], [BT eir Account Team Member 2] and [BT eir Account Team Member 3] between 13 – 15 December 2017

2] was informed of a further delay, [they] remarked to other members of the BTNIN eir Account Team that *“it scares me if we propose over 200 FOD as the right product for Eir – are we set up to deliver it?”*¹⁵⁶

- 4.123 Also in December 2017, [Openreach Fibre Team Senior Manager 2] sent [Openreach Fibre Team Senior Manager 1] a message cautioning *“not to push [BT eir Account Team Member 3] one way or another”*. [Openreach Fibre Team Senior Manager 1] replied that [they were] *“trying to make sure that they [the BTNIN eir Account Team] remember that EAD is good too”*. [Openreach Fibre Team Senior Manager 2] recognised that if the BTNIN eir Account Team convince eir to use EAD instead of FOD, eir may lose the bid, as BT had *“decided to [X]”*. [Openreach Fibre Team Senior Manager 1] stated that *“my main concern is that resourcing of FoD is a big concern for me (both surveys and subsequent build)”*.¹⁵⁷
- 4.124 eir removed FOD from its NIPSSN bid during the week commencing 12 February 2018. eir cited a number of reasons for this, which included being given advice that the FOD product had delivery limitations.¹⁵⁸
- 4.125 eir has also told Ofcom that *“it was clear to the eir technical project team ([eir Bid Team Member 1] & [eir Bid Team Member 2]) who were in constant contact with the BTNIN/Openreach team ([BT eir Account Team Member 2], [BT eir Account Team Member 1] and [BT eir Account Team Member 3]) that the BTNIN/Openreach team had serious reservations in respect of FOD as a solution for the NIPSSN Contract”*.¹⁵⁹
- 4.126 The messages provided to eir either imply, or directly state, that FOD was not a suitable solution for the NIPSSN bid. There is clear concern from within BTNIN and Openreach, when discussing eir’s potential use of FOD, as to whether it was a suitable product and whether Openreach could deliver it at the scale required for the NIPSSN Contract. These concerns appear to have been relayed to eir via the BTNIN eir Account Team and were cited by eir as reasons for not using the product in its NIPSSN bid.

Information provided by Openreach to the BT Bid Team suggested FOD was suitable for NIPSSN

Openreach was aware of the scale of BT’s interest in FOD from early in the tender process but did not raise concerns about the suitability of the product or its capacity to deliver FOD on that scale

- 4.127 From early 2017, several months prior to the announcement of the change in FOD pricing, the BT Bid Team was interested in using FOD as a technical solution for parts of its NIPSSN bid.¹⁶⁰ Between March and May 2017, [BT Account Team Member 1] [X], in [their] role providing local support to the BT Bid Team, engaged with members of Openreach about the

¹⁵⁶ Email from [BT eir Account Team Member 2] to [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 15 December 2017 at 12:18

¹⁵⁷ Instant message exchange between [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Senior Manager 1], dated 6 December 2017

¹⁵⁸ eir Response to Information Request 3, dated 13 December 2019

¹⁵⁹ eir Response to Information Request 3, dated 13 December 2019

¹⁶⁰ See, for example, the email from [BT Bid Team Member 1] to [BT Account Team Member 4], [Openreach Senior Manager 2] and [Openreach Fibre Team Senior Manager 2], dated 23 January 2017 at 15:35

BT Bid Team’s FOD proposal, initially suggesting the BT Bid Team’s desire was to use FOD for [REDACTED] locations,¹⁶¹ then stating [they’d] received a list of [REDACTED].¹⁶²

- 4.128 An email [Openreach Fibre Team Senior Manager 2] [REDACTED] received, which is likely to be from [BT Account Team Member 1], stated *“The initial site list is over [REDACTED] but it could rise to over [REDACTED]”*. In June 2017 [Openreach Fibre Team Senior Manager 2] shared this email with other members of Openreach as a *“concrete example of where FOD for N¹⁶³ is in demand”*.¹⁶⁴
- 4.129 In August 2017, while chasing [BT Account Team Member 1] for FOD cost estimates, [BT Bid Team Member 1] queried whether Openreach can support FOD and asked, *“is this whole thing dead in the water?”* [BT Account Team Member 1] replied that *“no they [Openreach] are keen”*.¹⁶⁵
- 4.130 Before the announcement of the FOD pricing changes, the BT Bid Team received a spreadsheet from the Openreach Fibre Team containing the relevant FOD price banding for [REDACTED] NIPSSN circuits.¹⁶⁶ After the announcement, the BT Bid Team received CAD Desktop Surveys for [REDACTED] circuits, with [Openreach Fibre Team Senior Manager 2] stating that *“It should be noted that some costs have been reduced by assuming that all locations would be deployed together”*.¹⁶⁷
- 4.131 In these communications, in which the scale of the BT Bid Team’s interest in FOD was made clear, no specific concerns were raised about Openreach’s capability to deliver such a volume of FOD circuits in the context of the NIPSSN Contract. Indeed, some of these messages appear to provide comfort that widespread use of FOD in the context of NIPSSN was operationally feasible.
- 4.132 Openreach did appear to caution the BT Bid Team about its ability to perform a large number of physical site surveys. When suggesting that [BT Bid Team Member 1] request Physical Site Surveys, [Openreach Fibre Team Senior Manager 1] [REDACTED] stated that [BT Bid Team Member 1’s] scale of interest *“is significantly greater than we are resourced to cover currently (as mentioned on recent calls), so a request for [REDACTED] or [REDACTED] physical surveys is best avoided.”*¹⁶⁸

¹⁶¹ Email from [BT Account Team Member 1] to [Openreach Fibre Team Member 5], dated 24 March 2017 at 12:05

¹⁶² Email from [BT Account Team Member 1] to [Openreach Fibre Team Member 5], dated 29 March 2017 at 12:09

¹⁶³ *“FOD for N”* is referred to in an Openreach presentation to industry as follows: *“Multiple orders in a cluster can be processed as a single order, with contribution to build costs split across multiple customers”*. See slides titled *“IB_FFTP_FOD_CFPCG_Aug2017”* provided as part of BT’s Response to Information Request 1

¹⁶⁴ Email from [Openreach Fibre Team Senior Manager 2] to [Openreach Senior Manager 1], [Openreach Fibre Team Senior Manager 1] and [Openreach Senior Manager 2], dated 12 June 2017

¹⁶⁵ Instant Message exchange between [BT Bid Team Member 1] and [BT Account Team Member 1], dated 21 August 2017

¹⁶⁶ Email from [Openreach Fibre Team Member 4] to [BT Bid Team Member 1], [Openreach Fibre Team Senior Manager 2], [BT Account Team Member 3] and [BT Account Team Member 1], dated 24 August 2017 at 10:08

¹⁶⁷ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 2], [Openreach Fibre Team Member 6] and [BT Global Services Manager 2], dated 13 December 2017 at 17:07

¹⁶⁸ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [REDACTED], [REDACTED], [REDACTED], [Openreach Fibre Team Member 6] and [Openreach Fibre Team Senior Manager 2], dated 5 December 2017 at 15:00

- 4.133 In addition to not raising concerns about the BT Bid Team’s intended use of FOD for nearly [redacted] circuits, Openreach appeared to actively support the BT Bid Team in their attempts to build an accurate picture of build costs for this high volume.
- 4.134 For example, [Openreach Fibre Team Senior Manager 1] provided detailed information to the BT Bid Team about FOD build costs and how the estimated build costs could be reduced¹⁶⁹ and [Openreach Fibre Team Senior Manager 2] provided [BT Bid Team Member 1] with additional tools to better calculate the costs of deploying multiple FOD circuits in the same area.¹⁷⁰

The capacity announcement

- 4.135 Notwithstanding that the early engagement between Openreach and the BT Bid Team did not stress the delivery limitations with the FOD product, there is evidence to suggest that Openreach did appear concerned about BT using FOD for large scale bids.
- 4.136 On 14 March 2018 Openreach issued an announcement at the Copper and Fibre Products and Commercial Group (CFPCG) (“the capacity announcement”).
- 4.137 The capacity announcement set an industry-wide operational capacity limit of 20 FOD orders per calendar month for 2018/19, with the constraint being linked to Openreach’s focus on FTTP build in “8 major UK cities”.¹⁷¹ The full text of the announcement can be found at paragraph 2.39.
- 4.138 An email from [Openreach [redacted]] [redacted] to CPs, sent the day before the CFPCG, previewed the capacity announcement and stated that “as you know, FoD is not intended for major multi-sites network upgrade projects, for which there are more appropriate products in our portfolio”.¹⁷²
- 4.139 The capacity announcement itself said “FoD is not suitable for major multi-sites network upgrade projects”. The announcement also stated that “before you commit to any sales plans, please consult us first to ensure suitability of your project for FOD delivery.”¹⁷³

The capacity announcement was intended to stop the widespread use of FOD in public sector bids

- 4.140 In March 2018 there was increasing concern within Openreach about BT BPS planning to make [redacted] use of FOD [redacted]. Conversations were held at senior levels within Openreach, eventually being escalated to [Openreach Executive [redacted]].

¹⁶⁹ See paragraphs 4.27 – 4.39 and 4.50 – 4.55

¹⁷⁰ See paragraphs 4.45 – 4.48

¹⁷¹ Openreach Slide Pack titled “FTTP Product Developments March 2018”, page 8

¹⁷² Email from [Openreach [redacted]], dated 13 March 2018, titled “FTTP on Demand (FoD) Order Capacity for 18/19”

¹⁷³ Slide desk titled “FTTP Product Developments”, presented to the Copper and Fibre Products and Commercial Group on 14 March 2018, page 8

- 4.141 Openreach had been “trying to put [BPS] off [using FOD]” because of FOD’s “[redacted] process and systems”¹⁷⁴ as well as the fact that BPS’s projected use of FOD had Openreach “ramping up to [redacted] per month by Dec. [2018] [...] and we [Openreach] [redacted] resourced.”¹⁷⁵
- 4.142 On 9 March 2018 a call occurred which was attended by [Openreach Executive 1] [redacted], [Openreach Executive 2] [redacted], [Openreach Executive 3] [redacted] and [Openreach Senior Manager 1] [redacted].¹⁷⁶ Following this call a draft of the capacity announcement was circulated for comment.¹⁷⁷
- 4.143 It was noted that the intention of the capacity announcement was to continue delivering FOD for single orders and those customers utilising Government vouchers, “while stopping mass adoption in bids”.¹⁷⁸ Other comments from this time confirm that Openreach felt FOD was not intended for the use BPS was proposing, nor was the product designed for such a purpose.^{179 180 181}
- 4.144 The day before the announcement was issued, [Openreach [redacted]] contacted another member of Openreach staff to say “The World has moved in the last 2 days and FoD is now off-the-table for these bids. As of Friday, [Openreach Executive 3] and [Openreach Senior Manager 1] have agreed to constrain use of the product for use on only single orders (consumers and businesses typically), which means that it cannot be used by any CP in major network upgrade bids.”¹⁸²
- 4.145 When responding to press interest about the announcement, a statement from Openreach is discussed internally. [Openreach Senior Manager 1] commented that “The niche FTTP product is set for a bespoke delivery and is resource intensive”.¹⁸³ Clarifying this statement, [Openreach Senior Manager 1] said to another Openreach employee, “if you [a CP] want a

¹⁷⁴ Instant messages between [Openreach Senior Manager 1] and [Openreach Executive 3], dated 1 March 2018

¹⁷⁵ Email from [Openreach Senior Manager 1] to [Openreach Executive 1], [Openreach Executive 2], [Openreach Executive 3], [redacted], [redacted], dated 8 March 2018 at 19:48

¹⁷⁶ Email from [Openreach Executive 2] to [Openreach Executive 1], [Openreach Senior Manager 1], [Openreach Executive 3], [redacted] and [redacted], dated 9 March 2018 at 06:16

¹⁷⁷ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [redacted], [Openreach Executive 3], [redacted], [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 9 March 2018 at 12:24

¹⁷⁸ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [redacted], [Openreach Executive 3], [redacted], [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 9 March 2018 at 12:24

¹⁷⁹ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [Openreach Executive 3], [redacted], [redacted], [redacted], [redacted], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Senior Manager 2], [redacted], [redacted], [redacted], [redacted] and [Openreach Fibre Team Senior Manager 3], dated 9 March 2018 at 18:43

¹⁸⁰ Email from [Openreach Senior Manager 1] to [redacted], [Openreach Executive 2], [Openreach Executive 3], [redacted] and [redacted], dated 12 March 2018 at 17:30

¹⁸¹ Email from [Openreach Executive 2] to [redacted], [redacted], [Openreach Senior Manager 1], [Openreach Executive 3] and [redacted], dated 12 March 2018 at 19:42

¹⁸² Email from [Openreach [redacted]] to [redacted] and [BT Account Team Member 3], dated 13 March 2018 at 08:53

¹⁸³ Email from [[Openreach Senior Manager 1] to [redacted], [redacted], [redacted] and [Openreach [redacted]], dated 13 March 2018 at 17:20

*volume product (scale) then use Ethernet or NGA FTTC, don't bid something that is handcrafted - FOD! It will be a [redacted] customer experience.*¹⁸⁴

- 4.146 Ofcom notes that this internal reasoning and justification for the capacity announcement appears to align closely to the messages given to eir; that FOD was not suitable for use in public sector bids and that EAD was a preferable solution.

The potential impact of the capacity announcement on BT's NIPSSN bid

- 4.147 Despite having concerns that FOD was not suitable for public sector bids, the evidence demonstrates that Openreach provided BT with information that these concerns did not apply to FOD in relation to the NIPSSN bid.
- 4.148 On 22 March 2018 (eight days after the capacity announcement) a call occurred between [Openreach Senior Manager 2] [redacted], [Openreach Executive 3] [redacted], [BT Senior Manager 3] [redacted] and [BT Executive 2] [redacted].¹⁸⁵
- 4.149 Before the call occurred, [Openreach Senior Manager 2] notified [Openreach Executive 2] [redacted] of the call and noted that [Openreach Executive 3] and [BT Executive 2] were *"really not happy with the restriction to 20 per month"*¹⁸⁶
- 4.150 Immediately after the call, [BT Senior Manager 3] asked [BT Bid Team Member 3] to request that [BT Bid Team Member 1] reach out to [Openreach Senior Manager 2] on the FOD assumptions for NIPSSN and asked about different technical solutions for Great Britain. [BT Senior Manager 3] also said *"Don't need to review the PSSN bid as its too late now to make changes."*¹⁸⁷
- 4.151 The following day an email was sent by [Openreach Senior Manager 2] [redacted] to other Openreach Executives, in which the capacity announcement was referred to as a hurdle for whether the BT Bid Team could proceed with its NIPSSN bid.¹⁸⁸
- 4.152 [Openreach Senior Manager 2] stated [they] had already discussed the issue with, amongst others, [BT Bid Team Member 1] [redacted] and [BT Senior Manager 2] [redacted]. The issue was due to be discussed between [BT Executive [redacted]] [redacted] and [Openreach Executive [redacted]] [redacted].¹⁸⁹
- 4.153 [Openreach Senior Manager 2's] email states that *"Our issue is that we can't change tack for one customer or make NI an exception as there is another bidder for the NI networks and it*

¹⁸⁴ Email from [Openreach Senior Manager 1] to [redacted], [redacted], [redacted], [Openreach [redacted]], and [BT Account Team Member 3], dated 13 March at 17:27

¹⁸⁵ Meeting invite sent on behalf of [Openreach Executive 3] to [BT Executive 2], [BT Senior Manager 3] and [Openreach Senior Manager 2], due to occur on 22 March 2018 at 15:00

¹⁸⁶ Email from [Openreach Senior Manager 2] to [Openreach Executive 2], dated 22 March at 08:29

¹⁸⁷ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2] and [BT Bid Team Member 3], dated 22 March 2018 at 16:22

¹⁸⁸ Email from [Openreach Senior Manager 2] to [Openreach Executive [redacted]], [Openreach Executive [redacted]] and [Openreach Senior Manager 1], dated 23 March 2018 at 14:24

¹⁸⁹ The email only refers to "[redacted]". BT has confirmed this to be a reference to [Openreach Executive [redacted]], [redacted]. See BT's response to Information Request 7, dated 17 January 2020.

is important we give the same opportunities to all CPs especially given [X] [BT Executive [X]].”

- 4.154 The email states that BTNIN told [Openreach Senior Manager 2] it could “*deliver the demand by shaping unannounced FTTP rollout plans*” but that Openreach “*need to legitimise this in the context of our recent statement recently around limit orders to a maximum of 20 per month*”.
- 4.155 [Openreach Senior Manager 2’s] email suggested issuing a statement clarifying Openreach’s ability to “*support large scheduled PSN rollouts*” with enough notice. The email also suggests that, in the event of such a statement, Openreach would “*need a clear equivalent rationale for determining which ones we can do and which we cannot.*”
- 4.156 [Openreach Senior Manager 2’s] 23 March email also referred to the fact [BT Executive [X]] [X], was due to discuss the capacity announcement being a hurdle to BT submitting their NIPSSN bid with [Openreach Executive [X]] [X]. The discussion was planned for 26 March 2018.

The BT Bid Team was given information which differed from the position in Openreach’s capacity announcement

- 4.157 On 26 March 2018 [BT Senior Manager 3] [X] sent [Openreach Senior Manager 2] an email titled “*Feedback from [Openreach Executive [X]]/[BT Executive [X]] Session*”. [BT Senior Manager 3] said the direction [they] got was “*[Openreach Executive [X]] was to ask [Openreach Executive [X]]¹⁹⁰ and others for a way forward, [BT Executive [X]] was holding [their] ground*”.¹⁹¹ [Openreach Senior Manager 2] replied stating “*I think there is a way forward for PSSN for any bidder (B&PS or other) as the constraints on FoD FTTP are not an issue there in NI.*”¹⁹²
- 4.158 On 28 March 2018, [BT Senior Manager 3] sent an email to [Openreach Senior Manager 2] and [Openreach Executive 3] [X], in which [BT Senior Manager 3] stated “*I am for example unsure how we proceed [...] with PSSN given the note you issued to industry. I suspect there is a risk that whoever wins the deal the other party may challenge so we need to clear up our position – the deal could well come under significant scrutiny.*”¹⁹³
- 4.159 Later the same day [BT Senior Manager 3] sent an email to [Openreach Senior Manager 2], [Openreach Executive 3] and [Openreach Senior Manager 1] which stated “*We sign off the PSSN bid today... We will be doing so on the basis of your comments below that FoD FTTP*

¹⁹⁰ Ofcom assumes this to be [Openreach Executive [X]] [X]

¹⁹¹ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2], dated 26 March 2018 at 16:28

¹⁹² Email from [Openreach Senior Manager 2] to [BT Senior Manager 3] and [Openreach Senior Manager 1], dated 26 March 2018 at 16:37

¹⁹³ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2] and [Openreach Executive 3], dated 28 March 2018 at 08:18

will be provided for that opportunity” [referring to [Openreach Senior Manager 2’s] email of 26 March 2018 referred to in paragraph 4.157 above].¹⁹⁴

- 4.160 [Openreach Senior Manager 2] responded later to say that, regarding NIPSSN, *“the considered opinion is that this bid is deliverable once awarded to the successful bidder, whether B&PS or other.”*¹⁹⁵
- 4.161 The information communicated by Openreach to [BT Senior Manager 3] (who appears to have been responsible, in part, for signing off BT’s NIPSSN bid) was that BTNIN did not have the same resource constraints as Openreach and therefore the delivery of FOD could be supported at the scale required for NIPSSN. This information suggests that:
- i) the *“overall industry-wide operational capacity of 20 orders pcm”* did not apply to Northern Ireland; and
 - ii) FOD was indeed *“suitable for major multi-site network upgrade projects”*.
- 4.162 Ofcom therefore views this information to relate to both the geographic scope of the announcement and the general suitability of FOD. Both of these are pieces of Relevant Commercial Information about the capabilities of the product.

This information was not communicated to the eir bid team

- 4.163 There is no evidence that this information was communicated to the eir Bid Team. Nor is there any evidence that any changes or clarifications in relation to the capacity announcement were issued by Openreach to industry.

BT has suggested that it was well known that the capacity announcement was not intended to apply in Northern Ireland

- 4.164 BT has suggested to Ofcom during the course of our investigation that *“it was well known that the limit was not intended to apply in Northern Ireland.”*¹⁹⁶
- 4.165 Ofcom does not accept BT’s suggestion that it was well known that the capacity announcement did not apply in Northern Ireland, for the following reasons:
- i) The announcement suggested it applied to the whole of the United Kingdom; and
 - ii) The evidence shows that senior Openreach Managers and Executives were concerned about the applicability of the announcement to Northern Ireland.

The announcement suggested it applied to the whole of the United Kingdom

- 4.166 We note that in the language of the capacity announcement appears to apply to the whole of the UK. It referred to FTTP roll-out in UK cities, which was likely to be read as implying that the announcement was for the UK, not just Great Britain.

¹⁹⁴ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2], [Openreach Executive 3] and [Openreach Senior Manager 1], dated 28 March at 10:55

¹⁹⁵ Email from [Openreach Senior Manager 2] to [BT Senior Manager 3], [Openreach Executive 2], [Openreach Executive 3] and [Openreach Senior Manager 1], dated 28 March at 15:55

¹⁹⁶ BT’s Briefing Note to Ofcom, dated 22 October 2019 (page 5)

- 4.167 We understand that all Openreach announcements on products and pricing apply to the whole of the United Kingdom, unless otherwise stated. Indeed, we requested from BT copies of press releases and industry updates related to FTTP and FOD and did not see any evidence of BTNIN making any announcements related to its own capacity, nor did any of the Openreach announcements appear to exempt Northern Ireland in any way.
- 4.168 Therefore, on the face of the announcement alone, a CP (such as eir) is likely to have interpreted the capacity announcement to be for the whole United Kingdom.
- 4.169 The capacity announcement was delivered at the CFPCG meeting in March 2018. The restriction to 20 orders per month is then again referred to in slides presented at CFPCG meetings in April 2018; in September 2018 when a temporary hold was placed on FOD orders; and again in November 2018 when the temporary hold was lifted. None of these announcements refer separately to Northern Ireland.¹⁹⁷
- 4.170 Further, in the November 2018 CFPCG slides, it is noted that *“FoD orders within the Wales BDUK region will be accepted regardless of [Openreach’s] position on other orders”*. This exemption is referred to again in the February 2019 CFPCG slides.¹⁹⁸
- 4.171 However, a presentation to the Ethernet Products Commercial Group (EPCG) in April 2018 did state that *“As already communicated to Industry, we are not currently able to scale the Fibre on Demand (FoD) beyond more than 20 orders per month across Industry in Great Britain.”*¹⁹⁹ This appears to be the first time Openreach publicly refer to the capacity announcement as applying to Great Britain.
- 4.172 Overall, this evidence supports the view that the capacity announcement in March 2018 applied to the whole of the United Kingdom.

Senior Openreach Managers and Executives were concerned about the applicability of the announcement to Northern Ireland

- 4.173 We note that senior Openreach Managers and Executives discussed Openreach’s response to a press article covering the announcement. The headline of that article, which was shared with senior Openreach Managers and Executives, read *“FTTP on Demand Order Capacity Still “Constrained” for All UK ISPs”*.²⁰⁰ Despite offering views on the content of the article, no comment was made about the headline and the fact the article read the announcement as applying to all UK ISPs.²⁰¹
- 4.174 The evidence shows that, contrary to the assertion that it was well known that the limit was not intended to apply to Northern Ireland and that BTNIN was not capacity constrained,

¹⁹⁷ Copies of extracts from CFPCG slides provided as part of BT’s Response to Information Request 1, Q16, dated 18 April 2019

¹⁹⁸ Copies of extracts from CFPCG slides provided as part of BT’s Response to Information Request 1, Q16, dated 18 April 2019

¹⁹⁹ Copy of extract from EPCG slide provided as part of BT’s supplementary response to Information Request 1, Q16, dated 21 August 2020.

²⁰⁰ Email from [Openreach Executive 2] to [Openreach Senior Manager 1], [Redacted], [Redacted], [Redacted], [Openreach Fibre Team Senior Manager 1] and [BT Account Team Member 3], dated 14 March 2018 at 18:30

²⁰¹ We note that at the time BTNIN was a virtually separate organisation hosted within BPS (see paragraph 2.6). BT has argued that the applicability of the announcement in Northern Ireland was not the focus of Openreach’s consideration.

senior Openreach Managers and Executives were concerned about the capacity announcement's implications for Northern Ireland in the two weeks after it was issued:

- a) [Openreach Senior Manager 2] emailed other senior Openreach Managers and Executives on 23 March 2018 and referred to the capacity announcement as a hurdle for whether the BT Bid Team could proceed with their NIPSSN bid. [Openreach Senior Manager 2] noted that [they] had spoken to, amongst others [BT Senior Manager 2] [X]. [Openreach Senior Manager 2] clearly remained concerned about the applicability of the announcement to Northern Ireland, even after having spoken to the [BT Senior Manager 2].
- b) This was followed on 26 March 2018 by a discussion between [BT Executive [X]] ([X], which was the host organisation for BTNIN) and [Openreach Executive [X]] [X]. Ofcom assumes that [BT Executive [X]] would be aware of BTNIN's resource capacity and whether Openreach's announcement applied to Northern Ireland. If the capacity announcement did not apply to Northern Ireland and BTNIN had no issues in delivering FOD at the scale required for NIPSSN, it is unclear why [BT Executive [X]] would have needed to discuss the capacity announcement with [Openreach Executive [X]] two days before BT submitted its NIPSSN bid.
- c) On 28 March 2018 [BT Senior Manager 3] remained *"unsure how we proceed [...] with PSSN given the note you issued to industry"*.

4.175 In light of the above points, Ofcom does not accept that it was well known the announcement did not apply to Northern Ireland.

Reasons behind the capacity announcement were wider than just Openreach's capacity to deliver the product in a given geographic location

4.176 The assurances Openreach gave the BT Bid Team to allow them to submit a NIPSSN bid containing widespread use of FOD, contained information which differed from the capacity announcement in two ways: the geographic scope of the announcement and the general suitability of FOD.²⁰²

4.177 BT's suggestion that it was well known that the announcement did not apply to Northern Ireland refers only to the geographic scope of the announcement and not the general suitability of FOD. The difference between the information on this second point is important because the announcement specifically refers to the suitability of the product and there is evidence to suggest that reasons for the issuing the capacity announcement were based on the suitability of FOD, as well as Openreach's ability to deliver the product in a specific geography. This includes:

²⁰² See paragraph 4.161 above

- i) A number of different individuals within Openreach commenting that widespread deployment for a public sector bid is not what FOD was designed or intended for;²⁰³
204 205 and
- ii) The fact that the poor processes and systems of FOD were referenced as justifications for the announcement,²⁰⁶ as well as the resulting “[redacted] customer experience.”²⁰⁷

- 4.178 It is therefore not clear to Ofcom that BTNIN’s lack of capacity constraints would have removed these concerns. This is because the evidence outlined in the Subsequent Additional Surveys sub-section above suggests BTNIN did not have particularly well-established systems and processes for handling FOD orders.
- 4.179 Whether eir understood the announcement to apply to Northern Ireland or not, the information that FOD was indeed suitable for use in the NIPSSN Contract was Relevant Commercial Information about the capabilities of the product that should have been provided equivalently.

Findings on the information about the capabilities of FOD

- 4.180 It was clearly relevant for both Bid Teams to understand whether FOD was suitable for the NIPSSN contract, as well as understanding whether Openreach had the capability to deliver it. Ofcom considers that information about the suitability (or lack thereof) of a product for a particular purpose, constitutes Relevant Commercial Information about the capabilities of the product in question. In addition, we consider the capability of Openreach to deliver a product at a given scale is Relevant Commercial Information about the capabilities of a product.
- 4.181 Openreach was aware of the scale of BT’s interest in FOD from early in the tender process but did not raise concerns about the suitability of the product or its capacity to deliver FOD on that scale.
- 4.182 In addition, despite Openreach’s internal concerns about BT’s use of FOD for public sector bids and a public announcement which restricted Openreach’s FOD capacity, the BT Bid Team was provided with information that the delivery limitations associated with FOD did

²⁰³ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [Openreach Executive 3], [redacted], [redacted], [redacted], [redacted], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Senior Manager 2], [redacted], [redacted], [redacted], [redacted] and [Openreach Fibre Team Senior Manager 3], dated 9 March 2018 at 18:43

²⁰⁴ Email from [Openreach Senior Manager 1] to [redacted], [Openreach Executive 2], [Openreach Executive 3], [redacted] and [redacted], dated 12 March 2018 at 17:30

²⁰⁵ Email from [Openreach Executive 2] to [redacted], [redacted], [Openreach Senior Manager 1], [Openreach Executive 3] and [redacted], dated 12 March 2018 at 19:42

²⁰⁶ Instant messages between [Openreach Senior Manager 1] and [Openreach Executive 3], dated 1 March 2018

²⁰⁷ Email from [Openreach Senior Manager 1] to [redacted], [redacted], [redacted], [Openreach [redacted]], and [BT Account Team Member 3], dated 13 March at 17:27

not apply in Northern Ireland, including explicit assurances that FOD could be delivered at the scale required for NIPSSN.

- 4.183 Conversely, throughout its engagement with the BTNIN eir Account Team, eir was provided with a message that FOD was not suitable for NIPSSN and that there were delivery limitations associated with the product. Openreach's public announcement aligned with this position.
- 4.184 As set out above, we do not accept that it was well known that this announcement did not apply to Northern Ireland. The evidence indicates that the additional information and the explicit private assurances given to the BT Bid Team following Openreach's capacity announcement, which allowed BT to submit their NIPSSN bid, were not provided to eir or to the rest of industry. Therefore, Ofcom concludes that Relevant Commercial Information about the capabilities of FOD were not provided to both Bid Teams on an EOI basis.
- 4.185 Ofcom considers that Openreach should have provided the same information to the BT and eir Bid Teams during their enquiries about the use of FOD as it did to the BT Bid Team. This would have included providing the same messages about the capacity of Openreach to deliver the product and the suitability of FOD for major multi-site upgrade projects.
- 4.186 We consider that having identified that eir had received more limited and different information compared to that received by the BT Bid Team, thereby creating a potential equivalence issue, BT could have taken steps to ensure a consistent message was provided to both Bid Teams.
- 4.187 However, Ofcom considers that the evidence shows that Openreach, instead of mitigating or remedying the lack of equivalence between the bid teams, continued to provide assurances to the BT Bid Team around the inclusion of FOD in its NIPSSN bid. We note that no action was taken to provide similar assurances to eir that widespread use of FOD in Northern Ireland was possible for the purposes of NIPSSN.

Conclusion

- 4.188 In this section Ofcom has found that:
- a) BT, through its Openreach division, provided the BT Bid Team with Relevant Commercial Information about the way in which the initial non-binding estimate of the build charges was arrived at using the CAD Desktop Survey tool, why the actual build charges may differ from the initial non-binding estimates and a sense of the magnitude of those potential differences. The evidence indicates that BT did not provide the same information to the eir Bid Team, despite them seeking out such additional detail from Openreach. As such, BT did not provide the same Relevant Commercial Information about the pricing and cost of FOD to itself and to eir, in contravention of its obligation to provide FOD on an EOI basis.
 - b) BT provided the BT Bid Team with a set of survey results within a reasonable timeframe once the work had been completed, and once the results had been passed to the relevant individual within BT. These were sent on a spreadsheet via email because of a system error. BT did not provide eir with its survey results within the same timeframe,

despite the results being passed to the same individual and the same process being available. In doing so, BT did not provide eir with access to FOD on the same timescales and by means of the same systems and processes as it did for itself in contravention of its obligation to provide FOD on an EOI basis.

- c) The eir Bid Team was provided with a message that FOD was not a suitable solution for its NIPSSN bid and that the product had delivery limitations. In contrast, the BT Bid Team was provided with information that suggested FOD was suitable for major multi-site network upgrade projects and that the product could be delivered at such a scale. Explicit assurances were provided to the BT Bid Team about its use of FOD, despite a public announcement which appeared to contradict this position. BT did not provide the same Relevant Commercial Information about the capabilities of FOD to itself and eir, in contravention of its obligation to provide FOD on an EOI basis.

4.189 On this basis, Ofcom has determined that BT has contravened SMP condition 5 of the FAMR 2014.

Penalty

Summary

- 5.1 We have determined that BT breached SMP Condition 5 of the FAMR 2014.
- 5.2 We have imposed a penalty of £6,300,000 on BT in this case. This penalty includes a 30% discount as a result of BT admitting it contravened SMP Condition 5 and entering into a voluntary settlement agreement with Ofcom.²⁰⁸
- 5.3 We have decided to impose a single penalty in this case, rather than a separate penalty for each of the three contraventions of SMP Condition 5 we have determined. We have taken this approach because the contraventions all relate to conduct during a tender for one contract, and to the same regulatory condition. A number of the factors we take into account in specifying the penalty, in particular the need for deterrence, and the degree of harm caused, are most appropriately considered in the context of the conduct as a whole. We consider it appropriate to assess them in the round for the purpose of determining the appropriate penalty.
- 5.4 In specifying the penalty we have imposed, we have had regard to the need to deter BT, as well as other CPs, from non-compliance with regulatory obligations and to our principal duty of furthering the interests of citizens and consumers. Our judgement is that this penalty is appropriate and proportionate to the contraventions we have found and to have the appropriate deterrent effect on BT and CPs more generally.
- 5.5 The Penalty Guidelines²⁰⁹ set out a range of factors which may be relevant in any particular case and we have assessed those factors carefully. We have also considered whether there are any relevant precedents and the extent to which they should be followed in this case. Our view on the appropriate and proportionate level of penalty in this case has been determined taking these factors into account in the round. The following sections set out our consideration of each of these factors.

Consideration of whether to impose a penalty

- 5.6 Our principal duty in carrying out our functions is to further the interests of citizens and consumers in relevant markets. SMP conditions are imposed on a business identified as having SMP, following a market review by Ofcom, including a public consultation. These regulatory obligations are designed to address competition problems that might otherwise

²⁰⁸ For more information on settlement, see section 5 of Ofcom's Enforcement Guidelines for regulatory investigations published on 28 June 2017: https://www.ofcom.org.uk/_data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf

²⁰⁹ Section 392 of the Act requires Ofcom to prepare and publish guidelines for determining penalties under sections 96A to 96C of the Act. Section 392(6) of the Act requires us to have regard to those guidelines when determining such penalties. The current version of the Penalty Guidelines was published on 14 September 2017: https://www.ofcom.org.uk/_data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

arise from the SMP. The regulatory obligations we have imposed on BT includes SMP Condition 5 to which this document relates.

- 5.7 BT's failure to comply with these obligations is a serious matter. Unless BT complies with its regulatory obligations, its market power is capable of harming competition in downstream markets, making it more likely that CPs, and, ultimately, consumers, businesses and Government bodies, pay more or have less choice or quality in their communications services.
- 5.8 As explained in more detail below, these were serious contraventions from which BT's downstream arm had access to important Relevant Commercial Information that its competitor did not.
- 5.9 It is important that BT and others who are subject to similar legal and regulatory obligations are deterred on an on-going basis from contravening those obligations. We are therefore satisfied that it is appropriate to impose a penalty in this case.
- 5.10 We find that it is appropriate to impose a penalty for the contraventions of BT's SMP obligations in this case. Further, we do not consider that a finding alone, including any reputational impact flowing from such a finding, would act as a sufficient deterrent for BT (or the wider industry).

Penalty amount

- 5.11 In considering the level of penalty which should be applied we have had regard to our published Penalty Guidelines.²¹⁰
- 5.12 Under Section 97 of the Act, the maximum penalty we can impose on BT is 10 per cent of its turnover for its relevant business for the period 1 April 2019 to 31 March 2020.²¹¹ BT's turnover for its relevant business for that period was £20.095bn.²¹² The penalty which we can impose in respect of a contravention by BT during this period may not therefore exceed £2.01bn.

Deterrence

- 5.13 As set out in the Penalty Guidelines, the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient, having regard to the relevant turnover, to have a material impact on the regulated body so that it is incentivised to bring itself into compliance and avoid recurrences of the contraventions in future. It is also important that the penalty imposed serves to deter the wider industry from contravening regulatory requirements.

²¹⁰ https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

²¹¹ This is the relevant period for the purposes of calculating the maximum penalty, as defined by section 97(5) of the Act.

²¹² See BT's response to Ofcom's voluntary request for information, dated 16 November 2020. For these purposes, BT's turnover in the relevant business is calculated in accordance with the Schedule to The Electronic Communications (Networks and Services) (Penalties) (Rules for Calculation of Turnover) Order 2003 SI 2003/2712.

- 5.14 In setting the penalty, we are mindful that BT is one of the largest CPs that we regulate and is subject to a range of SMP obligations across a number of markets. We consider that it is important to ensure that any penalty we set in relation to the contraventions we have identified is large enough to incentivise compliance with not just SMP Condition 5, but all of BT's SMP obligations.

Seriousness of the contraventions

SMP Condition 5 is important to ensure a level playing field in downstream markets

- 5.15 A breach of an SMP condition is inherently serious. As set out above, SMP conditions are imposed on a business identified as having SMP, following a detailed market review by Ofcom, including a public consultation. These regulatory obligations are designed to address competition problems that might otherwise arise from BT's significant market power.
- 5.16 SMP Condition 5 is important to ensure a level playing field in downstream markets. As set out in the FAMR 2014:

10.151 Given the importance of these products and services, it is essential that BT is prevented from any discrimination both on a price and non-price basis in order to prevent the distortion or restriction of competition and ensure a level playing field on which other CPs can compete with BT.²¹³

- 5.17 This condition is fundamental to the proper functioning of the fixed access market. Strong downstream competition, facilitated by alternative network build, is vital to ensure the best outcomes for consumers. To achieve this, it is important that Openreach does not discriminate between different customers when supplying access services. Wherever possible, it should provide access to BT downstream and non-BT access seekers on the same terms. Without this level playing field, BT could engage in practices that could distort downstream competition, for example by providing access on less favourable terms compared to those obtained by its own downstream businesses. This may in turn discourage alternative network deployment, negatively affecting consumer outcomes.
- 5.18 Of the various forms of non-discrimination obligation, Equivalence of Inputs is the most strict. This reflects the importance attached to ensuring a level playing field in relation to services provided in the wholesale local access market.
- 5.19 CPs must also have trust in Openreach to deliver regulated services on an equivalent basis to all providers, including BT's own downstream arm. This is especially relevant during a tender process where Openreach is providing inputs to both bidders. We are concerned that if CPs do not trust that BT will comply with its regulatory obligations they could be discouraged from seeking to compete with BT, which could have a detrimental impact on competition in downstream markets.

²¹³ Ofcom, Fixed Access Market Reviews, Volume 1: Statement on the markets, market power determinations and remedies, published 26 June 2014. https://www.ofcom.org.uk/data/assets/pdf_file/0032/78863/volume1.pdf. Page 206.

5.20 In considering the seriousness of the contraventions, we have accordingly taken account of the inherent seriousness in breaching an SMP Condition and in particular Equivalence of Inputs.

The context in which the contraventions occurred

5.21 In this specific case, we have also taken account of the following:

- i) The relevant conduct occurred only in relation to the tender for the NIPSSN Contract.
- ii) The relevant conduct took place in the context of a major public sector tender for contract worth up to £400m over at least seven years (the NIPSSN Contract).²¹⁴ Both bidders considered the Contract to be of high importance to their overall strategy in Northern Ireland.^{215 216}
- iii) The relevant conduct related to the provision of information regarding FOD which was an important potential technical solution in the context of the tender.²¹⁷
- iv) The relevant conduct had the potential to put BT's downstream arm at a competitive advantage compared to their competitor.

The importance of the inputs

5.22 In this section, we explain why we consider the inputs, which, broadly speaking, related to the pricing and characteristics of FOD, were important in the context of the NIPSSN tender. Ofcom has not made any findings on the questions of (i) whether the tenders submitted by BT and eir would have been different had the breaches that we have found not occurred; and (ii) whether the breaches that we have found had an impact on the outcome of the competitive tender process. Accordingly, our decision on the appropriate penalty has been reached on this basis.

5.23 As set out in Section 2, approximately half of the total circuits in the NIPSSN tender required download and upload speeds of 100Mbit/s or more, but less than 1Gbit/s. For these circuits, Openreach offered two products: Ethernet Access Direct (EAD) and GEA FTTP products (including FOD), which would meet the technical specification. Therefore, a bidder would need to understand the full implications of both technologies in order to assess the suitability for their bid. This includes a proper understanding of the cost implications. The total cost of the products could only be known once build charge information was provided by Openreach to the customer. For FOD, because of the change to the pricing model and

²¹⁴ The total contract period is for nine years consisting of an initial contract period of seven years from "go live", plus an optional extension period of a further two years.

²¹⁵ Document titled "*PSSNI Bid Brief Feb 2017v1*"

²¹⁶ eir's Briefing Note to Ofcom, dated 6 November 2018, page 3

²¹⁷ In BT's winning bid, FOD was used as the technical solution for []% of the circuits.

because it had not been deployed at scale before, there was no previous pricing history to give an indication of likely build charges to potential users.²¹⁸

- 5.24 Winning this tender was a vital part of BT's strategy in Northern Ireland, considering it a "[redacted]".²¹⁹ From an early stage in the tender, BT began considering FTTP deployment as a way to differentiate its bid from eir.²²⁰ BT itself noted that it was "[redacted]".²²¹ Therefore, information about FOD, its availability, and the likely cost of deploying it, was of high importance.

Contravention 1: Desktop Survey Information

- 5.25 In Section 4 we explained why we considered the information provided to the BT Bid Team in addition to the desktop survey results constituted Relevant Commercial Information.
- 5.26 Ofcom's view is that the information provided to the BT Bid Team, and not to the eir Bid Team, was relevant information for a bidder seeking to develop a methodology for estimating FOD build charges for the purpose of deciding whether to include FOD as a proposed technical solution in its tender submission and, if so, how to calculate its bid price. As such it was relevant for understanding the true cost of deploying FOD circuits for the NIPSSN Contract.²²²
- 5.27 Ofcom's view is that information provided to the BT Bid Team as described in Contravention 1 was important information in the context of a tender where for approximately half the total circuits FOD and EAD were both viable technical solutions and given that the annual rental charges and connection charge associated with FOD were lower than the corresponding charges for EAD.²²³ This meant that whether FOD or EAD was cheaper depended on the relative build charges of FOD and EAD.
- 5.28 Ofcom notes [BT Bid Team Member 1's] initial response when receiving the CAD Desktop Results. [BT Bid Team Member 1] sent these results to [BT Account Team Member 2] with the statement that *"it makes for scary reading"*.²²⁴ Another member of the BT Bid Team, upon receiving the same results, said of BT's bid *"so game over" "as it stands we no longer have a FOD price advantage and have no way of funding eccs... and need to fund a new network and £[redacted]m transition"*.²²⁵

²¹⁸ BT has said that there were, however, ways of getting an indication of the potential build charges using other available tools. [redacted] amongst other things, the Advanced Order Management Process (AOMP), the Infrastructure Discovery and Address Matching tools and Google Maps. See BT's Response to Information Request 2, Questions 3, 6 and 7, dated 24 May 2019.

²¹⁹ Document titled *"PSSNI Bid Brief Feb 2017v1"*

²²⁰ Document titled *"PSSN_Stakeholder_briefing v1.4"*

²²¹ Email from [BT Bid Team Member 5] to [redacted], [BT Global Services Manager 2], [redacted] and [BT Bid Team Member 1], dated 17 July 2017 at 15:14

²²² BT has said that the BT Bid Team did not use this additional information in the estimation of FOD build charges for its NIPSSN bid. In determining the appropriate level of the penalty we have not given any weight to whether or not the information was used by the BT Bid Team.

²²³ See Table 2.1.

- 5.29 This highlights that, before applying any reductions, CAD Desktop Survey Results for FOD build charge estimates were likely to be viewed by a bidder as prohibitively high for the purpose of deploying FOD for a significant number of sites.
- 5.30 Accordingly, Ofcom's view is that the Relevant Commercial Information provided to the BT Bid Team (and not to the eir Bid Team) was important information to assess the suitability and viability of FOD for NIPSSN.

Contravention 2: Subsequent Additional Surveys

- 5.31 As well as the information provided about desktop surveys, the BT Bid Team received the results of the subsequent additional surveys it had ordered. The eir Bid Team had not received the results of the subsequent additional surveys it had requested by the deadline for submissions of bids for the NIPSSN contract.
- 5.32 The 12 surveys the BT Bid Team received in March 2018 provided an average estimated build charge of £[X].²²⁶ This is compared to an average build cost for those 12 sites of £[X] in the CAD Desktop Surveys they received in December 2017.²²⁷ This represents a reduction of 97%. The BT Bid Team's methodology for estimating its FOD build charges states "*survey results used to inform & confirm assumptions on civils/cabling volumes and rates. Showed 88% reduction from Original OR [Openreach] Estimate.*"^{228 229}
- 5.33 eir requested its additional survey results having been told by the BTNIN eir Account Team that physical site surveys were required to obtain a more accurate picture of build costs for NIPSSN.²³⁰ We consider these survey results a relevant input to a CP considering whether to include FOD as a proposed technical solution in its tender submission and, if so, how to calculate its bid price.²³¹
- 5.34 The importance of this input is compounded by the fact eir had also not received equivalent information to that provided to the BT Bid Team, regarding CAD Desktop Surveys and how they were likely to be an overestimation, despite asking similar questions via the BTNIN eir Account Team (Contravention 1).

²²⁶ BT has said that these results estimated the cost for a single P2P fibre connection from the nearest 'T' node to the premise concerned.

²²⁷ Ofcom analysis of information provided in BT's Response to Information Request 2

²²⁸ See slide 6 of "Key Assumptions – Excess Construction Charges – Process" slides submitted as Annex 7 in BT's Response to Information Request 2, Question 6, dated 24 May 2019. The 88% average reduction figure in the slides differs from the 97% figure stated above, as the BT Bid Team used only 11 of the 12 survey results in calculating their average reduction figure. BT has submitted to Ofcom that the CAD Desktop Survey results and the subsequent additional survey results are not comparable.

²²⁹ BT has said that it did not change its FOD build charge estimates for any of the sites in its NIPSSN bid following receipt of the subsequent additional surveys. See Annex 3, paragraph A3.79. In determining the appropriate level of the penalty we have not given any weight to whether or not the information was used by the BT Bid Team.

²³⁰ E-mail from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1], [eir Bid Team Member 2], 16 November 2017 at 17.05

²³¹ We note that in June 2018, three months after the tender submission deadline, BT provided eir with survey results for the ten sites it had requested Physical Site Surveys for. Similar to the results the BT Bid Team received (see paragraph 5.32) eir's results showed an 86% reduction compared to its CAD Desktop Survey results. BT has submitted to Ofcom that the CAD Desktop Survey results and the subsequent additional survey results provided to eir are not comparable.

Contravention 3: Openreach's position on FOD

- 5.35 As well as it being important to fully understand the cost implications of the two main technical solutions, both bidders would have required an understanding of the capabilities of the products, including the capacity of Openreach to deliver it at the scale required for NIPSSN. In the case of FOD, this was especially relevant as it had not been widely deployed at the time of the NIPSSN tender.
- 5.36 As set out in Section 4, the eir Bid Team was provided with a message that FOD was not a suitable solution for its NIPSSN bid and that the product had delivery limitations. In contrast, the BT Bid Team was provided with information that suggested FOD was suitable for major multi-site network upgrade projects and that the product could be delivered at such a scale.
- 5.37 The capability of Openreach to deliver FOD on the scale required for the NIPSSN Contract is important information for bidders considering whether to use FOD as a potential technical solution. Accordingly, Ofcom's view is that the Relevant Commercial Information provided to the BT Bid Team (and not to the eir Bid Team) about the capabilities of FOD was important information to assess the suitability and viability of FOD for NIPSSN.

Summary

- 5.38 For the reasons set out above, we consider that the inputs that were not provided equivalently to the BT Bid Team and the eir Bid Team under each of the three contraventions were important inputs that were material for assessing the suitability and viability of FOD as a technical solution for NIPSSN and calculating a bid price.
- 5.39 In addition, we consider that the relationship between the individual contraventions we have found adds to the seriousness of the conduct when considering the appropriate penalty in the round. We consider that the combination of the three EOI contraventions we have found would likely have had a cumulative effect on the overall impression of the suitability and viability of FOD as a technical solution for NIPSSN.

The actions BT took when the capacity announcement was identified as a potential hurdle for BT's bid increased the seriousness of Contravention 3

- 5.40 We are concerned that, having identified a potential equivalence issue, BT did not take adequate steps to mitigate or prevent any potential contravention. In doing so, we consider that BT's actions increased the seriousness of the contravention we have found.
- 5.41 As discussed in paragraphs 4.135 – 4.139 above, on 14 March 2018 Openreach issued a capacity announcement which both advised that FOD was not suitable for major multi-sites network upgrade projects and also limited the number of FOD orders to 20 per month in 2018/19. Ofcom's view is that this announcement was likely to be interpreted as applying to Northern Ireland.
- 5.42 The evidence indicates that senior members of Openreach were aware that there was a potential issue with this announcement in relation to the NIPSSN contract and that it was important that all CPs were given the same opportunities.

- 5.43 This can be seen in an email sent on 23 March 2018 from [Openreach Senior Manager 2] [X] to [Openreach Executive [X]] [X]; [Openreach Executive [X]] [X] and [Openreach Senior Manager 1] [X]:

“Issue:

Our recent announcement of not being able to support more than 20 FoD orders a month has created a hurdle as to whether they [BT BPS] can proceed with their bid (going in next week), and [BT Executive [X]] is going to be discuss [sic] this with [Openreach Executive [X]] on Monday. Our issue is that we can’t change tack for one customer or make NI an exception as there is another bidder for the NI networks and it is important we give the same opportunities to all CPs especially given [X] [BT Executive [X]].”²³²

- 5.44 [Openreach Senior Manager 2] also raised the option of Openreach issuing a statement that it was reviewing its position and looking at how it may be able to support large, scheduled PSN rollouts that give sufficient notice and geographic forecasts. [Openreach Senior Manager 2] considered that such a statement may be enough to signal to CPs that they could bid using FOD at risk or wait for clarity. [Openreach Senior Manager 2] recognised such an approach could open Openreach to other PSN bids using FOD and that *“we need a clear equivalent rationale for determining which ones we can do and which we cannot.”^{233 234}*
- 5.45 Ofcom is aware that on 26 March 2018 a discussion occurred between [BT Executive [X]] [X] and [Openreach Executive [X]] [X] during which the issue of BT’s NIPSSN Bid in the context of the capacity announcement was discussed.
- 5.46 Ofcom also notes that [BT Senior Manager 3] [X], when discussing the hurdle created by the capacity announcement with [Openreach Senior Manager 2] and [Openreach Executive 3], stated *“there is a risk that whoever wins the deal the other party may challenge so we need to clear up our position – the deal could well come under significant scrutiny.”²³⁵*
- 5.47 We are concerned that, having identified the issue that the capacity announcement may be a hurdle for whether the BT Bid Team could proceed with its NIPSSN bid, Openreach appeared to be focused on finding a way by which BT could continue to submit its bid with a significant proportion of FOD sites and did not take adequate steps to mitigate or prevent any potential contravention. In particular, we note that despite recognising the contradiction between BT’s proposed NIPSSN bid and Openreach’s public position on FOD, and the importance of giving the same opportunities and information to all CPs, Openreach went on to give explicit assurances to the BT Bid Team that BTNIN could deliver FOD for

²³² Email from [Openreach Senior Manager 2] to [Openreach Executive [X]], [Openreach Executive [X]] and [Openreach Senior Manager 1], dated 23 March 2018 at 14:24

²³³ Email from [Openreach Senior Manager 1] to [Openreach Executive [X]], [Openreach Executive [X]] and [Openreach Senior Manager 1], dated 23 March 2018 at 14:24

²³⁴ The issue was also discussed with members of the Openreach Fibre Team, who suggested that Northern Ireland did not have a capacity issue. See Annex 3, paragraphs A3.173 to A3.177.

²³⁵ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2] and [Openreach Executive 3], dated 28 March 2018 at 08:18

NIPSSN (see paragraphs 4.157 – 4.162) and did not immediately inform eir, or the rest of industry, about this position.

Duration

5.48 In light of the specific factual circumstances of this case, with the contraventions we have found occurring in the context of an individual tender, we consider that the duration of the contraventions is of limited relevance in determining the appropriate penalty.

Summary

5.49 Considering all of these factors in the round, we view these contraventions of BT's regulatory obligations as very serious.

The degree of harm, actual or potential, arising from the contraventions

Ofcom has not formed a view on the impact of the contraventions on the outcome of the bid

5.50 Ofcom has not reached a conclusion on whether the contraventions we have found impacted the outcome of the NIPSSN tender process. We are not in a position to assess what the bid teams would have done in the absence of the contraventions we have found, and therefore what the outcome of the tender process would have been in that scenario.

The contraventions are likely to have harmed eir's ability to assess the suitability and viability of FOD

5.51 As set out in paragraphs 5.22 to 5.39, we consider that the differences in the inputs provided to the BT Bid Team and the eir Bid Team were material and meant that eir had less information on which to assess the suitability and viability of FOD as a technical solution for some of the circuits in the NIPSSN Contract.

5.52 The contraventions we have found led to one bidder having more information as to the costs of FOD, and how FOD could be a more cost-effective technical solution than EAD for some of the circuits in the NIPSSN Contract.

5.53 While we do not reach a view on what would have happened if eir had been provided with the same information, this disparity of information is likely to have impacted eir's ability to assess the suitability and viability of FOD as a technical solution for some of the circuits in the NIPSSN Contract.

5.54 In the absence of the contraventions we have found, the eir Bid Team would have had more information on which to assess the suitability and viability of FOD. eir was therefore deprived of an opportunity to reflect that information in its final bid, in a context where it was competing against another CP (BT) that had had access to that information.

Whether BT took appropriate steps to prevent the contraventions

5.55 It is clear from contemporaneous email evidence provided by BT that Openreach and BTNIN were aware of the risk of not treating BT and eir equally during the NIPSSN Contract tender

process. It is likely that this correspondence was referring to BT's obligations under SMP Condition 5, among others.²³⁶ The evidence also shows that Openreach and BTNIN took some steps to prevent a contravention occurring. Particular focus was given to Equivalence of Inputs.

- 5.56 An email from [BT Account Team Member 1] to [BT Bid Team Member 1] on 6 October 2017 shows BTNIN seeking to manage the information being provided to the BT Bid Team. [BT Account Team Member 1] states [they] *"had to ask a member of the PSSN team to stop approaching NI Networks team directly"* and goes on to explain that the only guidance [their] teams can offer is the technical/product guidance [BT Bid Team Member 1] had requested via Openreach and not any wider support on producing costs or product issues.²³⁷

Contravention 1: Desktop Surveys

- 5.57 In relation to FOD build charges, there is again evidence of Openreach and BTNIN taking steps to prevent a contravention. This is shown in an email from [BT Senior Manager 2] to [Openreach Fibre Team Senior Manager 2] on 4 December 2017²³⁸ where [BT Senior Manager 2] notes *"I'm conscious both teams have effectively asked for the same information and I wanted to ensure we treat each bid equally."* In this email [BT Senior Manager 2] explains how this has been working to date within BTNIN: *"In NI Networks we have been keeping air gaps between the teams supporting each CP."* [BT Senior Manager 2] then goes on to set out a proposed approach for dealing with the desktop survey requests from BT and eir, which in [BT Senior Manager 2's] words *"should allow us to be comfortable each is being treated equally."*
- 5.58 There is also a similar exchange within Openreach between [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Senior Manager 1] on 6 December 2017 by instant messenger:

²³⁶ BT is also required not to unduly discriminate under SMP condition 4 and has committed for Openreach to treat all customers equally under its Commitments of 4 March 2019.

²³⁷ Email from [BT Account Team Member 1] to [BT Bid Team Member 1], dated 6 October 2017 at 14:31

²³⁸ Email from [BT Senior Manager 2] to [Openreach Fibre Team Senior Manager 2], dated 4 December 2017 at 13:17

[Openreach Fibre Team Senior Manager 2] 11:43:

we need to be mindful not to push [BT eir Account Team Member 3] one way or another they need to make their own decisions...

as they are not the only ones asking for those quotes

so important everyone gets a level playing field!

[Openreach Fibre Team Senior Manager 1] 11:44:

*I'm on that page.*²³⁹

Contravention 2: Additional survey results

- 5.59 BT has stated that FOD physical site surveys had not been processed in Northern Ireland before and the correct systems were not in place at the time when the eir and BT Bid Teams submitted their additional survey requests.²⁴⁰
- 5.60 Given BT's obligations to treat customers equally, including under SMP condition 5, BT should have had in place additional measures or oversight of orders to ensure that equivalence was maintained despite the system issues.
- 5.61 When a solution to the delivery of the BT Bid Team's results was identified (sending a spreadsheet of results by email), there appears to Ofcom to be no valid reason for the same process not to have been followed for eir's results as well. BT should have established the necessary systems and processes to prevent a contravention occurring.

Contravention 3: Openreach capability to deliver FOD

- 5.62 The capacity announcement was made 15 days before the NIPSSN bid deadline.
- 5.63 We consider that it was earlier in the tender process when BT could have taken steps to prevent the contravention we have found by ensuring that both Bid Teams received equivalent information about the capability of Openreach to deliver FOD for NIPSSN.
- 5.64 In addition, we consider there were some potential steps that could have been taken following the capacity announcement to mitigate the impact of this contravention, including some identified by Openreach staff themselves. These are discussed below. However, we do not consider that any of these steps would have prevented the contravention we have found.

Reiterating public position to BPS

- 5.65 We consider that Openreach could have reduced the extent of the breach we have identified by maintaining a consistent line to BPS, including the BT Bid Team, on the suitability of FOD for major multi-site deployments and Openreach's capacity to deploy such volumes of

²³⁹ Instant messages between [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 6 December 2017

²⁴⁰ BT's comments on eir's briefing paper to Ofcom, dated 29 March 2019.

circuits. It would then have been for BPS to decide how it wished to proceed with its NISSPN bid.

Informing industry that FOD may be suitable for use in public sector bids

- 5.66 In [Openreach Senior Manager 2's] email of 23 March 2018, suggestions were put forward for how to remedy or mitigate the issue, which included signalling to CPs that Openreach were considering how they *"may be able to support large scheduled PSN rollouts"*.
- 5.67 Ofcom has not seen any evidence that such communications were made to industry before the NIPSSN bid deadline of 29 March 2018. Ofcom notes that at the Copper and Fibre Products Commercial Group Meeting on 13 June 2018, [Openreach [X]] announced that Openreach had been considering how to support and manage FOD orders for *"bigger bids"*, starting in 2019/20.²⁴¹

Clarifying that the capacity announcement did not apply to Northern Ireland

- 5.68 Following [Openreach Senior Manager 2's] email of 23 March 2018, suggestions were also put forward to clarify that the capacity announcement did not apply to Northern Ireland. [Openreach Fibre Team Senior Manager 1] said that *"Hopefully this will settle down, but if not, I think the clarifying statement that our position is for mainland UK and does not affect NI would be the way to go."*²⁴²
- 5.69 However, later the same day, when [Openreach Senior Manager 2] suggested that *they "need to think about how best to clarify this"*,²⁴³ [Openreach Fibre Team Senior Manager 1] said [I'm] *"not convinced of the need or value in Openreach making any more public statements."*²⁴⁴
- 5.70 Ofcom has seen no evidence that any clarifications were made to industry about the geographic scope of the capacity announcement before the bid deadline of 29 March 2018.

Summary

- 5.71 For the reasons set out above, we consider that BT did take some positive steps to prevent the contravention we have found and we have given this weight in determining the appropriate penalty. However, given the importance of providing network access on an equivalent basis and the significance of this particular contract, it is our view that there were specific steps that BT either considered but did not implement, or should have considered, that would have prevented or mitigated the contraventions we have found.

²⁴¹ CFPCG FTTP Slides June 2018

²⁴² Email from [Openreach Fibre Team Senior Manager 1] to [Openreach Fibre Team Senior Manager 3] and [Openreach Fibre Team Member 5], dated 26 March 2018 at 07:46

²⁴³ Email from [Openreach Senior Manager 2] to [Openreach Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 26 March 2018 at 09:57

²⁴⁴ Email from [Openreach Fibre Team Senior Manager 2] to [Openreach Senior Manager 2] and [Openreach Senior Manager 1], dated 26 March 2018 at 12:59

Whether the contraventions occurred deliberately or recklessly

- 5.72 The evidence does not suggest that Contraventions 1 or 2 were deliberate. Nor do we consider BT's actions with respect to Contraventions 1 and 2 to be reckless.
- 5.73 Nor does Ofcom believe that by providing eir with a message that Openreach did not have the capacity to deliver FOD on the scale required for the NIPSSN Contract, and not actively providing the same explicit message to the BT Bid Team, a deliberate contravention occurred.
- 5.74 With respect to Contravention 3, as set out in paragraphs 5.40 to 5.47, we have concerns about BT's actions once Openreach's capacity announcement was identified as a hurdle to BT submitting its NIPSSN bid. We have factored these actions into our assessment of the seriousness of the contravention we have found. We therefore do not attach any further weight to them in determining the appropriate penalty in respect of any potential recklessness.

Whether BT took timely and effective steps to end and remedy the contraventions

- 5.75 Although, as explained above, BT appears to have been mindful of its obligation to treat its customers equally, it does not appear to have been aware that it had breached its obligations. Given that we do not consider that BT had identified the contraventions we have found whilst the NIPSSN tender was still in progress, we do not consider that it was in a position to have taken timely and effective steps to end and remedy the contraventions.

History of contraventions and precedents

- 5.76 We have imposed a penalty on BT under section 96C of the Act for a breach of SMP conditions previously.
- 5.77 In March 2017 we imposed a penalty of £42m on BT. This included a 30% discount applied to the provisional penalty figure of £60m as a result of BT entering into a voluntary settlement with Ofcom.
- 5.78 This penalty was imposed upon BT for breaching its regulatory obligations which applied to the provision of its Ethernet services as a result of the way it used a contractual term known as Deemed Consent to extend the delivery timeframes for those services, and failings in its processes for paying compensation in the event of the late delivery of those services ("Deemed Consent Investigation").²⁴⁵
- 5.79 Our Penalty Guidelines say it may be necessary in appropriate cases to set higher penalties than those set previously, to secure a stronger deterrent effect.

²⁴⁵ See Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions, 29 March 2017. https://www.ofcom.org.uk/data/assets/pdf_file/0017/102167/cw-01170-11-15-bt-confirmation-decision.pdf

- 5.80 In this case, we do not consider that it is necessary or appropriate to adjust the penalty to take account of our previous penalty imposed upon BT for the contravention of SMP conditions.
- 5.81 This is in light of the nature of the breach in this case being very different to that in the Deemed Consent Investigation. In particular, the Deemed Consent Investigation identified some conduct which was deliberate in nature; the three contraventions identified in the Deemed Consent Investigation spanned a period of more than three and a half years; and the harm which resulted from the contraventions had a direct financial impact on hundreds of CPs.
- 5.82 We do not consider there are any directly relevant precedents as we have not previously made a breach finding in relation to equivalence of input SMP Conditions.

Co-operation with Ofcom's investigation

- 5.83 We are of the view that, overall, BT has co-operated closely with Ofcom's investigation and have considered this in determining the appropriate penalty. In particular, we note that BT made available to Ofcom, on a voluntary basis, key members of staff who were involved in the events under investigation. We found these meetings useful in developing our understanding of the issues and they helped us to progress the investigation in a timely manner.

Conclusion on the penalty amount

- 5.84 Considering all of the above factors in the round, the penalty we have imposed on BT is £6,300,000 in respect of the contraventions of SMP Condition 5 we have found. This includes a 30% discount applied to the penalty of £9,000,000 which we would otherwise have set, as a result of BT admitting it contravened SMP Condition 5 and entering into a voluntary settlement agreement with Ofcom.
- 5.85 Our regulatory judgement is that this is an appropriate and proportionate penalty to the contravention we have found. Our objectives in setting it are:
- a) To impose an appropriate and proportionate sanction that reflects the seriousness of BT's contraventions of SMP Condition 5 in the context of the tender for the NIPSSN Contract; and
 - b) To deter BT from contravening SMP Conditions, and in particular no undue discrimination/EoI obligations, in future.
- 5.86 Our judgement is that a penalty of £6,300,000 would secure these objectives in a proportionate way. It would reflect each of the factors described in more detail above.

Other action taken by Ofcom as a result of this investigation

- 5.87 While reviewing the evidence provided by BT as part of this investigation, Ofcom has identified incidents whereby the [redacted].

5.88 In particular we note that:

a) [REDACTED]²⁴⁶

b) [REDACTED]²⁴⁷

c) [REDACTED]²⁴⁸

5.89 These matters do not form part of the contraventions we have identified, so we have not taken them into account in determining the amount of the penalty. However, we have passed the information to the Openreach Monitoring Unit which will take these concerns forward according to its internal processes.

Steps that should be taken by BT

5.90 Given the specific factual circumstances surrounding the relevant contraventions, including the fact that the contraventions are not ongoing, Ofcom is of the view that there are no specific steps that BT should take in order to comply with the condition and/or remedy the consequences of the contravention we have found.

5.91 We would expect BT to consider our findings and ensure that it has appropriate procedures and controls in place to secure compliance with its regulatory obligations in particular in context in which both a BT group entity and a non-BT group entity are participating in a competitive tender process.

²⁴⁶ [REDACTED]

²⁴⁷ [REDACTED]

²⁴⁸ [REDACTED]

A1. Confirmation Decision issued to British Telecommunications plc relating to contraventions of SMP Condition 5 under section 96C of the Communications Act 2003

Section 96C of the Communications Act 2003

A1.1 Section 96C of the Communications Act 2003 (the “Act”) allows the Office of Communications (“Ofcom”) to issue a Confirmation Decision confirming the imposition of requirements on a person where that person has been given a notification under section 96A of the Act, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. However, Ofcom may not give a Confirmation Decision to a person unless, having considered any representations, it is satisfied that the person has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 96A.

A1.2 A Confirmation Decision:

- a) must be given to the person without delay;
- b) must include the reasons for the decision;
- c) may require immediate action by the person to comply with the requirements of a kind mentioned in section 96A(2)(d) of the Act²⁴⁹, or may specify a period within which the person must comply with those requirements; and
- d) may require the person to pay:
 - i) the penalty specified in the notification issued under section 96A of the Act, or
 - ii) such lesser penalty as Ofcom consider appropriate in light of the person’s representations or steps taken by the person to comply with the condition or remedy the consequences of the contravention, and may specify the period within which the penalty is to be paid.

SMP Conditions

A1.3 Section 45(1) of the Act gives Ofcom the power to set conditions, including SMP services conditions, binding on the person to whom they are applied.

²⁴⁹ Such requirements include the steps that Ofcom thinks should be taken by the person in order to remedy the consequences of a contravention of a condition.

A1.4 Ofcom imposed SMP conditions on BT in the June 2014 FAMR Statement (“FAMR 2014”) pursuant to Ofcom’s Notification of 26 June 2014, issued under sections 48(1) and 79(4) of the Act (the “2014 Notification”).

SMP Condition 5

A1.5 Condition 5 was imposed pursuant to the 2014 Notification and came into force on the same day.²⁵⁰

A1.6 Condition 5 stated that:

5.1 Subject to condition 5.2, the Dominant Provider must provide network access in accordance with conditions 1 and 2 (as applicable) on an Equivalence of Inputs basis.

5.2 The obligation in condition 5.1 to provide network access on an Equivalence of Inputs basis shall not apply to—

(a) the provision of Sub-Loop Unbundling Services in accordance with conditions 1 and 2;

(b) the provision of Physical Infrastructure Access in accordance with conditions 1 and 2;

(c) network access which the Dominant Provider was not providing on an Equivalence of Inputs basis as at the date that this condition enters into force; and

(d) such provision of network access as OFCOM may from time to time otherwise consent in writing.

5.3 Without prejudice to the generality of condition 5.1, the Dominant Provider must not provide (or seek to provide) network access for its own services (including for those of its retail divisions, subsidiaries or partners), unless at the same time the Dominant Provider provides and/or offers to provide such network access to Third Parties (other than its retail divisions, subsidiaries or partners) on an Equivalence of Inputs basis.

5.4 For the avoidance of doubt, the obligations set out in this condition 5 apply in addition to the obligations set out in condition 4.

5.5 In this condition 5:

“Equivalence of Inputs basis” means that the Dominant Provider must provide, in respect of a particular product or service, the same product or service to all Third Parties and itself on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all Third Parties and itself of the same Relevant Commercial Information about such products, services, systems and processes as the Dominant Provider provides to its own divisions, subsidiaries or partners subject only to: (a) trivial

²⁵⁰ See the 2014 FAMR Statement Annex 29 – Legal Instrument.

differences; (b) differences relating to; (i) credit vetting procedures, (ii) payment procedures, (iii) matters of national and crime-related security (which for the avoidance of doubt includes for purposes related to the Regulation of Investigatory Powers Act 2000), physical security, security required to protect the operational integrity of the network, (iv) provisions relating to the termination of a contract, or (v) contractual provisions relating to requirements for a safe working environment; (c) differences relating to the provision of Relevant Commercial Information by the Dominant Provider to its own divisions, subsidiaries or partners where this is necessary for purposes other than relating to the provision of network access to those own divisions, subsidiaries or partners; and (d) such other differences as OFCOM may from time to time consent to in writing;. For the avoidance of any doubt, unless seeking OFCOM’s consent, the Dominant Provider may not rely on any other reasons in seeking to objectively justify the provision in a different manner. In particular, it includes the use by the Dominant Provider of such systems and processes in the same way as Third Parties and with the same degree of reliability and performance as experienced by Third Parties; and

“Relevant Commercial Information” means information of a commercially confidential nature relating to products and/or services to which this condition 5 applies, and which relates to any or all of the following in relation thereto—

- i. product development;*
- ii. pricing;*
- iii. marketing strategy and intelligence;*
- iv. product launch dates;*
- v. cost;*
- vi. projected sales volumes; or*
- vii. network coverage and capabilities;*

save for any such information in relation to which OFCOM consents in writing is to be treated as falling outside this definition.

Subject of this Decision

A1.7 This Confirmation Decision is addressed to British Telecommunications plc (“BT”), whose registered company number is 01800000. BT’s registered office is 81 Newgate Street, London, EC1A 7AJ.

Notification issued by Ofcom under section 96A of the Act

A1.8 On 27 November 2020, Ofcom issued a Notification under section 96A of the Act (the “Section 96A Notification”) to BT, as Ofcom had reasonable grounds for believing that during the period 30 October 2017 to 29 March 2018 (the “Breach Period”), BT contravened SMP condition 5 of the FAMR 2014 in that it did not provide, with respect to its Fibre on Demand product, network access on an EoI basis to a third party (in this case, eir) as it provided to its own division or subsidiary (in this case BT Business & Public Sector).

- A1.9 The Section 96A Notification also specified that Ofcom was minded to impose a penalty of £9,000,000 on BT in respect of its contraventions of SMP Condition 5. It further specified the steps that Ofcom thought should be taken by BT in order to comply with the condition and/or remedy the consequences of the contravention.
- A1.10 The Section 96A Notification allowed BT the opportunity to make representations to Ofcom about the matters set out in the Section 96A Notification (but specified that, in the event that in the event that BT confirmed expressly and in writing in advance of the deadline specified in that notification that it waived all further rights of defence, including the right to provide written and oral submissions in response to that notification and the accompanying explanatory document, the period allowed for making representations would be treated as having expired on receipt by Ofcom of that confirmation).

Confirmation Decision issued under section 96C of the Act

- A1.11 On 4 December 2020, in a letter to Ofcom, BT confirmed that it waived its rights to make representations about the matters notified and admitted it had contravened SMP Condition 5 of the FAMR 2014 as set out in the Section 96A Notification. The period for BT to make representations has therefore expired.
- A1.12 Accordingly, Ofcom is satisfied that BT contravened SMP condition 5 of the FAMR 2014 during the Breach Period in that it did not provide, with respect to its Fibre on Demand product, network access on an EoI basis to a third party (in this case, eir) as it provided to its own division or subsidiary (in this case BT Business & Public Sector).
- A1.13 Ofcom has therefore decided to give BT this Confirmation Decision confirming BT's contraventions of SMP Condition 5 and Ofcom's decision to impose a financial penalty on BT of £6,300,000 in respect of these contraventions.
- A1.14 The extent of these contraventions and the reasons for Ofcom's decision are set out in the explanatory statement to which this Contravention Decision is annexed (and those reasons are incorporated into this notice by reference).

Requirements

- A1.15 Section 96C(4)(d) provides that a Confirmation Decision may require immediate action by the person to comply with requirements of a kind mentioned in section 96A(2)(d)²⁵¹, or may specify a period within which the person must comply with those requirements.
- A1.16 Given the specific factual circumstances surrounding the relevant contraventions, including the fact that the contraventions are not ongoing, Ofcom is of the view that there are no specific steps that BT should take following the receipt of this Confirmation Decision in order

²⁵¹ Section 96A(2) provides that a Notification under section 96A shall specify the steps that Ofcom think should be taken by the person contravening a condition in order to comply with the condition and/or remedy the consequences of the contravention.

to comply with the condition and/or remedy the consequences of the contravention. Accordingly, this Confirmation Decision does not specify any such requirements.

Penalty

A1.17 Ofcom has decided that BT must pay a penalty of £6,300,000 in respect of its contraventions of SMP condition 5 during the Breach Period. This includes a 30% discount to the penalty Ofcom would otherwise have imposed, as a result of BT admitting it had contravened SMP Condition 5 and entering into a voluntary settlement with Ofcom.

A1.18 BT has until 5pm on **13 January 2021** to pay Ofcom the penalty. If not paid by that deadline, it is recoverable by Ofcom.²⁵²

Interpretation

A1.19 Words or expressions used in this Confirmation Decision have the same meaning as in the SMP conditions or the Act except as otherwise stated in this Confirmation Decision.



Gaucho Rasmussen

Director of Enforcement

A person duly authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

11 December 2020

²⁵² Section 96C(7) of the Act.

A2. Ofcom's investigation

A2.1 This Annex sets out a summary of the main steps and key events in the investigation.

Opening the investigation

A2.2 On 6 November 2018, eir lodged a complaint with Ofcom that raised competition and regulatory concerns in relation to BT's winning bid for the NIPSSN contract. We met with eir on 14 November 2018 to understand its concerns.

A2.3 On 21 January 2019, eir submitted a Discussion Note on Remedies to Ofcom and on 12 March 2019 submitted an application for interim measures pursuant section 35 of the Competition Act 1998.

A2.4 BT voluntarily provided information on its bid for the NIPSSN contract on 13 February 2019 to help inform our initial assessment.

A2.5 We invited BT to comment on eir's briefing note. On 29 March 2019 BT provided a written response to eir's briefing note.

A2.6 On 4 April 2019, we announced that we had decided to open an investigation under the Act. At that stage, we had not reached a view as to whether it would be more appropriate to investigate the matters under the Competition Act 1998. In our case opening letters to BT²⁵³ and eir²⁵⁴, we informed them that we may subsequently change the scope of the investigation from a regulatory investigation to a Chapter II investigation under the Competition Act 1998 if we decided that it was appropriate to do so.

A2.7 In our case opening letter to eir²⁵⁵, we set out that, in addition to the investigation, we would be concurrently considering eir's request for interim measures under our power to deal with urgent cases under section 98 of the Act.

Information gathering

A2.8 During the course of our investigation, we have gathered evidence from BT, eir and the Department. These parties have also provided information concerning the investigation on their own initiative.

Information gathering from BT

Formal information requests

A2.9 We have issued BT seven notices under section 135 of the Act, requiring BT to provide specified information in relation to the investigation.

²⁵³ Ofcom's case opening letter to BT, 4 April 2019.

²⁵⁴ Ofcom's case opening letter to eir, 4 April 2019.

²⁵⁵ Ibid.

BT Information Request 1

A2.10 The 1st Notice²⁵⁶ (“BT IR1”) was sent alongside the case opening letter on 4 April 2019. It required BT to provide information relevant to a number of aspects of the investigation including:

- a) Documents associated with the final NIPSSN contract as agreed between BT and the Department;
- b) Information on the BT Bid Team;
- c) Information on the BT Account Team and correspondence between the BT Bid Team and the BT Account Team;
- d) Information on the BTNIN eir Account Team and correspondence between eir and the BTNIN eir Account Team; and
- e) Communications to industry issued by BT, Openreach or BTNIN relating to the availability and pricing of FoD and the roll out of FTTP in Northern Ireland.

BT Information Request 2

A2.11 The 2nd Notice²⁵⁷ (“BT IR2”) was issued on 25 April 2019. It required BT to provide information in relation to:

- a) documents related to BT’s bid;
- b) desktop and physical site surveys; and
- c) FOD orders and Openreach’s operational capacity for FOD delivery.

BT Information Request 3

A2.12 The 3rd Notice²⁵⁸ (“BT IR3”) was issued on 19 July 2019. It required BT to provide information in relation to:

- a) build charges; and
- b) the £20m Northern Ireland FTTP investment which was announced on 16 November 2017.

BT Information Request 4

A2.13 The 4th Notice²⁵⁹ (“BT IR4”) was issued on 23 July 2019. It required BT to provide:

- a) relevant correspondence related to FoD or FTTP;
- b) information related to physical site surveys;
- c) information about Openreach’s FoD capacity; and
- d) information about BT’s financial model.

²⁵⁶ Ofcom, 1st Notice to BT, 4 April 2019.

²⁵⁷ Ofcom, 2nd Notice to BT, 25 April 2019.

²⁵⁸ Ofcom, 3rd Notice to BT, 19 July 2019.

²⁵⁹ Ofcom, 4th Notice to BT, 23 July 2019.

BT Information Request 5

- A2.14 The 5th Notice²⁶⁰ (“BT IR5”) was issued on 13 August 2019. It required BT to provide further information on its financial model and information relating to any contracts agreed with new users under the NIPSSN Contract.
- A2.15 On 10 September 2019, we wrote to BT²⁶¹ suspending BT IR5 in its entirety. This was on the basis that we were preparing for an internal discussion and were of the opinion that the information provided by BT in response to BT IR3 was sufficient to inform that discussion.

BT Information Request 6

- A2.16 The 6th Notice (“BT IR6”) was issued on 25 November 2019. It required BT to provide:
- a) further information related to correspondence submitted in response to previous information requests; and
 - b) BT’s relevant turnover.

BT Information Request 7

- A2.17 The 7th Notice (“BT IR7”) was issued on 18 December 2019. It required BT to provide further information related to correspondence submitted in response to previous information requests.

Voluntary information request

- A2.18 We asked BT for its relevant turnover for the year 1 April 2019 to 31 March 2020 by way of a voluntary information request on 18 June 2020.

Voluntary meetings and interviews

- A2.19 As part of the investigation, BT voluntarily made a number of employees available to speak to us:
- a) On 24 June 2019 we met with [BT Account Team Member 1]. [BT Account Team Member 1] was [redacted] until [redacted], and then [redacted] for the remainder of the Relevant Period.
 - b) On 26 June 2019 we met with members of the BT financial team to discuss the BT Bid Team’s financial model.
 - c) On 6 September 2019 we met with [Openreach Fibre Team Senior Manager 1] [redacted]; and [Openreach Fibre Team Senior Manager 2] [redacted].

BT voluntary submissions

- A2.20 On 7 June 2019 BT wrote to us.²⁶² In this letter BT raised concerns about the legal basis of Ofcom’s investigation, in particular whether FOD was subject to SMP regulation. BT also set

²⁶⁰ Ofcom, 5th Notice to BT, 13 August 2019.

²⁶¹ Email from [redacted] (Ofcom) to [redacted] (BT), 10 September 2019, 15:42.

²⁶² Letter from [redacted] (BT) to [redacted] (Ofcom), 7 June 2019.

out its commitment to continuous improvement and outlined some of the steps BT was taking to improve the customer experience.

- A2.21 On 22 October 2019 BT sent us a briefing paper containing further representations on BT's alleged conduct.

Information gathering from eir

Formal information requests

- A2.22 We have issued eir three notices under section 135 of the Act, requiring eir to provide specified information in relation to the investigation.

eir Information Request 1

- A2.23 The 1st Notice ("eir IR1") was issued on 3 May 2019. It required eir to provide information in relation to its application for interim measures.

eir Information Request 2

- A2.24 The 2nd Notice ("eir IR2") was issued on 23 July 2019. It required eir to provide information in relation to:

- a) its bid for the NIPSSN contract; and
- b) desktop and physical site surveys.

eir Information Request 3

- A2.25 The 3rd Notice ("eir IR3") was issued on 10 December 2019. It required eir to provide information in relation to FOD desktop surveys and eir's decision to remove FOD from its NIPSSN tender submission.

Voluntary meetings

- A2.26 On 24 April 2019 we met with eir to discuss interactions with Openreach in relation to FOD during the NIPSSN tender process.

- A2.27 On 7 May 2019 we met with eir to understand the NIPSSN contract transition phase and key milestones, and issues raised in eir's application for interim measures.

Voluntary submissions

- A2.28 On 14 May 2019 [redacted] (on behalf of eir) provided additional information in relation to eir's engagement with BTNIN/Openreach on FOD following the meeting between Ofcom and eir on 24 April 2019.

- A2.29 On 4 September 2019 [redacted] (on behalf of eir) wrote to us in relation to a request received by eir from the Department relating to a potential extension of the Network NI contract and the potential implications of this for urgent action.

A2.30 On 17 September 2019 [§<] (on behalf of eir) provided a submission to us in response to queries raised by us in relation to additional services under the NIPSSN contract and urgent action.

Information gathering from the Department

A2.31 On 7 May 2019 we met with the Department to understand the NIPSSN contract transition phase, key milestones, and discuss potential urgent action.

A2.32 On 20 May 2019 the Department wrote to us setting out its view on the implications for the Northern Ireland public sector of urgent action that Ofcom may impose.

A2.33 On 31 July 2019 we met with the Department to understand how the NIPSSN contract was intended to operate in practice.

Ofcom’s provisional notification and the settlement procedure

A2.34 On 27 November 2020, Ofcom issued a notification under section 96A of the Act (the “Section 96A Notification”) to BT setting out our view that we had reasonable grounds for believing it had contravened SMP condition 5 of the FAMR 2014.

A2.35 On 4 December 2020, BT wrote to Ofcom as part of the voluntary settlement procedure it had entered into with Ofcom:

- a) admitting it had contravened SMP Condition 5 as set out in the Section 96A Notification;
- b) waiving all further rights of defence in this investigation, including its right to provide written and oral submissions in response to the Section 96A Notification;
- c) confirming its recognition that penalty imposed by Ofcom in respect of the contraventions would be reduced because of its admissions;
- d) confirming it will pay the penalty set by Ofcom in the confirmation decision;
- e) noting that Ofcom will issue to BT a confirmation decision confirming the findings set out in the Section 96A Notification; and
- f) noting that Ofcom will publish an update to its Competition and Consumer Enforcement Bulletin and will publish a press release announcing the issuing of the confirmation decision and settlement agreement; and that Ofcom will also subsequently publish a non-confidential version of the confirmation decision.

A3. Timeline of key events

A3.1 This Annex contains a chronological timeline of events associated with:

- i) the NIPSSN tender;
- ii) The BT Bid Team's use of FOD in its NIPSSN bid;
- iii) eir's enquiries about FOD for the purposes of its NIPSSN bid; and
- iv) Openreach's position regarding FOD during the Relevant Period

A3.2 The information and evidence contained in this Annex does not represent a comprehensive collection of every piece of evidence provided to Ofcom by both parties. Rather, the evidence presented is intended to provide a fair and accurate representation of events.

NIPSSN tender timeline

A3.3 This section sets out the key dates of the NIPSSN tender process from the publication of the contract notice in April 2017.

A3.4 Each step of the tender process is detailed in the table below.

A3.5 At the initial Pre-Qualification Questionnaire (PQQ) stage, three companies were potential bidders for the NIPSSN contract: BT, eir and [X]. [X]. After various rounds of discussions and iterations to their solutions, BT and eir²⁶³ submitted their Final Tenders on 29 March 2018.

Table A3.1: NIPSSN Tender Timeline

Date	Tender Stage	Description
22 April 2017	Contract Notice Published	The Department started the tender competition in April 2017 when it published a Contract Notice on its website and the Official Journal of the EU. ²⁶⁴
31 May 2017	Pre-Qualification Questionnaire (PQQ)	Three bidders (BT, eir and [X]) submitted a PQQ
2 October 2017	[X] withdraw from the process	
17 October 2017	Invitation to Submit Outline Solutions (ISOS)	BT and eir submitted their Outline Solutions. Verbal feedback on the proposed technical solutions was provided to the bidders on 6 and 7 November 2017.

²⁶³ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2]; [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 29 March 2018 at 15:48

²⁶⁴ <https://ted.europa.eu/udl?uri=TED:NOTICE:152489-2017:TEXT:EN:HTML> (last accessed 22 October 2020)

13 November 2017	Invitation to Continue Dialogue	Invitation to Continue Dialogue pack was issued to BT and eir.
22 January 2018	Invitation to Submit Detail Solutions (ISDS)	BT and eir submitted their Detailed Solutions. This was followed by dialogue meetings.
7 March 2018	Dialogue process formally closed	Final dialogue wrap-up sessions took place with each of BT and eir on 21 and 22 February and on 5 March to clarify and discuss the content of the draft Invitation to Submit Final Tenders. The dialogue process was then formally closed on 7 March 2018.
29 March 2018	Invitation to Submit Final Tenders (ISFT)	BT and eir submitted their Final Tenders. This stage comprised a technical evaluation, a legal evaluation and financial evaluation which led to a final tender evaluation score.
4 June 2018	Announcement of Contract Award Decision	The Department announced that BT had won the contract based on the evaluation score.
8 October 2018	Award of contract	The Department awarded the contract to BT.
1 October 2019	The beginning of the “Initial Term” of 7 years, according to the Contract	The contract was due to ‘go live’

BT’s NIPSSN Bid

Teams involved in supporting BT’s Bid

The BT Bid Team

- A3.6 BT has told us that the earliest point at which it gave any consideration to the NIPSSN Contract would have been 1 April 2016 as this was the date on which the Department published its Pre-Market Engagement Notice.²⁶⁵
- A3.7 Between 1 April 2016 – 23 April 2017 the BT Bid Team comprised of [redacted] individuals,²⁶⁶ eventually expanding to [redacted] individuals by 10 August 2017.²⁶⁷ BT considers that the seven individuals with the most responsibility for the NIPSSN Bid day-to-day within the overall BT Bid Team were:

²⁶⁵ BT’s Response to Information Request 1, page 8

²⁶⁶ BT’s Response to Information Request 1, Annex 4, page 3

²⁶⁷ BT’s Response to Information Request 1, Annex 4, page 5

- i) [BT Bid Team Member 4] [X];
- ii) [BT Bid Team Member 2], [X];
- iii) [BT Bid Team Member 1], [X];
- iv) [BT Bid Team Member 5], [X];
- v) [BT Bid Team Member 6], [X];
- vi) [BT Bid Team Member 7], [X]; and
- vii) [BT Bid Team Member 8], [X].²⁶⁸

A3.8 In our information requests to BT we have focused on these individuals, as well as [X], [X], when seeking correspondence in relation to BT's bid.

A3.9 The BT Bid Team sat within the Major and Public Sector (M&PS) department, [X]. This department was part of BT's Business & Public Sector (BPS) organisation, [X]. Ofcom understands that [BT Executive [X]] had ultimate responsibility for signing off BT's NIPSSN Bid.

The BT Account Team

A3.10 The BT Bid Team required information about wholesale inputs in order to construct its bid. As a result, a team within Openreach was set up to support BT's bid, which also included local support from members of BT Northern Ireland Networks (BTNIN). We refer to this team as the BT Account Team.

A3.11 Openreach individuals involved in the BT Account Team included:

- i) [BT Account Team Member 3], [X];
- ii) [BT Account Team Member 4], [X] (until 31 March 2017); and
- iii) [BT Account Team Member 5], [X].²⁶⁹

A3.12 In March 2017 [BT Bid Team Member 1] requested local support in Northern Ireland from [BT Account Team Member 1] [X].²⁷⁰ [BT Account Team Member 1] reported to [BT Senior Manager 1]. [BT Account Team Member 1] supported the BT Bid Team until [X] when [they] became [X], reporting to [BT Executive [X]], [X].

²⁶⁸ Email from [X], to [X], Ofcom, dated 8 August 2019

²⁶⁹ BT's Response to Information Request 1, Annex 3

²⁷⁰ Email from [BT Bid Team Member 1] to [BT Account Team Member 4] and [BT Account Team Member 1] dated 10 March 2017 at 08:24

A3.13 From [REDACTED] local support was provided to the BT Bid Team by [BT Account Team Member 2], [REDACTED].²⁷¹ [BT Account Team Member 2] reported to [BT Senior Manager 2] during this period.²⁷²

Openreach Fibre Team

A3.14 As discussed in Section 2: Background, FOD was a central part of BT’s NIPSSN bid. In order to include this technology in its bid, the BT Bid Team sought information from individuals within Openreach who were responsible for the development, [commercial pricing] and deployment of this technology. We refer to these individuals collectively as the “Openreach Fibre Team”.

A3.15 This is a term constructed by Ofcom for the purposes of this document and Ofcom is aware that these individuals were not part of the same team day-to-day, nor do we believe that providing information about fibre products was the only part of their role in Openreach. We note that the individuals who make up the “Openreach Fibre Team” all sat within the [REDACTED] business unit within Openreach.

A3.16 Ofcom uses the term “Openreach Fibre Team” to refer to the following individuals:

- i) [Openreach Fibre Team Senior Manager 1], [REDACTED]. From July 2017 [Openreach Fibre Team Senior Manager 1] reported to [Openreach Fibre Team Senior Manager 3].
- ii) [Openreach Fibre Team Senior Manager 3], [REDACTED].
- iii) [Openreach Fibre Team Senior Manager 2], [REDACTED.] [Openreach Fibre Team Senior Manager 2] reported to [Openreach Executive 2], [REDACTED].
- iv) [Openreach Fibre Team Member 5], [REDACTED]
- v) [Openreach Fibre Team Member 4], [REDACTED]
- vi) [Openreach Fibre Team Member 7], [REDACTED]

The BT Bid Team’s use of FOD

January 2017 – October 2017: Early consideration of FOD

A3.17 [REDACTED]²⁷³ ²⁷⁴ ²⁷⁵

A3.18 [REDACTED]²⁷⁶ ²⁷⁷

A3.19 [REDACTED]²⁷⁸

²⁷¹ BT Response to Information Request 1, Response Date 1, dated 16 April 2019

²⁷² BT Response to Information Request 1, Response Date 1, Annex 3, dated 16 April 2019

²⁷³ [REDACTED]

²⁷⁴ [REDACTED]

²⁷⁵ [REDACTED]

²⁷⁶ [REDACTED]

²⁷⁷ [REDACTED]

²⁷⁸ [REDACTED]

A3.20 [REDACTED]^{279 280 281}

A3.21 [REDACTED]^{282 283}

A3.22 [REDACTED]^{284 285}

A3.23 [REDACTED]²⁸⁶

A3.24 [REDACTED]^{287 288 289 290}

A3.25 [REDACTED]^{291 292}

A3.26 [REDACTED]²⁹³

A3.27 [REDACTED]^{294 295 296}

November – December 2017: The [other project] Chain

A3.28 On 2 November 2017 [BT Global Services Manager 1] sent out a Skype meeting request to [Openreach Fibre Team Senior Manager 1]; [Openreach Fibre Team Member 5]; [BT Global Services Manager 2] [REDACTED]; [REDACTED] and [Other Project Bid Team Member 1] [REDACTED], titled “[REDACTED]”. The body of the invite was written to [Openreach Fibre Team Senior Manager 1] and stated that “*we potentially have a number of large bids where the account teams believe FOD would [REDACTED]*”. Amongst other things, [BT Global Services Manager 1] wanted to touch on the ECCs on FOD, how they compared with EAD and whether there were any other concerns about managing large scale regional roll outs.²⁹⁷

A3.29 Following this meeting invite, on 8 November 2017 [Other Project Bid Team Member 1] sent an email to all the participants of the meeting attaching a spreadsheet containing a list of [REDACTED] sites that required an ECC estimate.²⁹⁸ Ofcom’s understanding is that [Other Project Bid

²⁷⁹ [REDACTED]

²⁸⁰ [REDACTED]

²⁸¹ [REDACTED]

²⁸² [REDACTED]

²⁸³ [REDACTED]

²⁸⁴ [REDACTED]

²⁸⁵ [REDACTED]

²⁸⁶ [REDACTED]

²⁸⁷ [REDACTED]

²⁸⁸ [REDACTED]

²⁸⁹ [REDACTED]

²⁹⁰ [REDACTED]

²⁹¹ [REDACTED]

²⁹² [REDACTED]

²⁹³ [REDACTED]

²⁹⁴ [REDACTED]

²⁹⁵ [REDACTED]

²⁹⁶ [REDACTED]

²⁹⁷ Meeting invite from [BT Global Services Manager 1] to [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [REDACTED] and [Other Project Bid Team Member 1], sent 2 November 2017 09:16, due to occur 7 November 2017 at 09:00

²⁹⁸ Email from [Other Project Bid Team Member 1] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [REDACTED] and [REDACTED], dated 8 November 2017 at 09:05

- Team Member 1] was one of the main individuals involved in a project known as '[other project]' [§].
- A3.30 On 1 December 2017 [Other Project Bid Team Member 1] chased for a response from [Openreach Fibre Team Senior Manager 1] and copied in [BT Bid Team Member 1] ([§]).²⁹⁹
- A3.31 On 4 December 2017 [Openreach Fibre Team Senior Manager 1] replied to [Other Project Bid Team Member 1] and the other participants in the chain. [Openreach Fibre Team Senior Manager 1] attached "*a rough indicative view of the potential build charges for connecting these locations with FoD*". [Openreach Fibre Team Senior Manager 1's] caveats included the fact that build charges are not based on physical surveys and so could go upwards or downwards. In reference to some sites with very high costs, [Openreach Fibre Team Senior Manager 1] stated that "*Full surveys would be the only way to understand the reality of cost to serve these locations.*"³⁰⁰
- A3.32 On 4 December 2017 [BT Bid Team Member 1] forwarded the '[other project]' chain, including the completed spreadsheet of indicative build charges for the [§] [other project] sites, to [BT Account Team Member 2] stating "[§]". [BT Bid Team Member 1] commented on Openreach's approach and noted that "[§]".³⁰¹
- A3.33 On 4 December 2017 [Other Project Bid Team Member 1] replied to [Openreach Fibre Team Senior Manager 1] (and all others in the chain). [§]. [Other Project Bid Team Member 1] noted that if the FOD estimate was correct [their] product charges would be [§] and in total the FOD solution would cost £[§]m more than a traditional EAD solution. [Other Project Bid Team Member 1] asked for confirmation the estimates were sound and for a rationale for the variances between the EAD estimated ECC (via AOMP) and the FOD estimate.³⁰²
- A3.34 On 4 December 2017 [Openreach Fibre Team Senior Manager 1] replied to [Other Project Bid Team Member 1], explaining that there are a number of influences on this (i.e. the variances [Other Project Bid Team Member 1] had identified). [Openreach Fibre Team Senior Manager 1] provided the following list of influences:

²⁹⁹ Email from [Other Project Bid Team Member 1] to [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [§], [§] and [BT Bid Team Member 1], dated 1 December 2017 at 16:11

³⁰⁰ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [§], [§], and [BT Bid Team Member 1], dated 4 December 2017 at 14:31

³⁰¹ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 4 December 2017 at 14:40

³⁰² Email from [Other Project Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [§], [§], [BT Bid Team Member 1] and [§], dated 4 December 2017 at 16:31

“1. FTTP and Ethernet circuit delivery often starts from a different place of usable fibre presence (i.e. where a FTTP circuit may start from the nearest NGA Agg Node XXXm away, a useable P2P fibre presence for an EAD circuit may be only 50-100m away or even at the building itself and from this starting point the EAD has a build cost advantage as there is less work to do).

2. There are [X] circuits in the list with £[X]k - £[X]k ECC projections which account for £[X]m of the total FoD cost estimates. These high costs tend to be for circuits that need additional KMs of spine build to connect the customer. On physical survey, some of these may turn out to be a lot cheaper if we can identify re-usable fibre closer to the target, but there will be some that are legitimately expensive to connect. We will only be able to tell which is which if you order a full survey and we would always recommend this if you want to proceed with anything estimated to cost more than £[X]k or for any lower threshold that you think is material.

3. Our FoD tool reflects a cautious view of potential build charge and so there is scope for actual survey to identify a lower figure. Across all circuits, this could easily be at least £[X]k per circuit on average, or £[X]m overall.

4. The tool itself has been run on an individual circuit basis, providing a separate result for each. This will in some cases be double counting the same spine and in some cases the same splitters and CBTs and so if we can connect multiple locations with the same components there is a reduction to apply. For example there are approx. [X] circuits in [X] which ought to be able to use common spine. I have asked our team to assess that example area to see how the costs reduce if the analysis considers multiple circuits together.”

A3.35 [Openreach Fibre Team Senior Manager 1] then stated that *“In short, if you rule out the highest cost FoD circuits (or place an order for a full survey to verify costs which may then come in a lot lower) and if you consider the potential for common cost saving and actual survey assessments of all circuits turning out lower, then it would not be too hard to see up to £[X]m knocked off the FoD total.”*³⁰³

A3.36 On 5 December 2017 [BT Bid Team Member 1] emailed [Openreach Fibre Team Senior Manager 1] (as well as all other participants in the chain) announcing that [they] had *“the same vested interest as [Other Project Bid Team Member 1], but for the NI PSSN bid”*. [BT Bid Team Member 1] asked a number of clarification questions about [Openreach Fibre Team Senior Manager 1’s] email to [Other Project Bid Team Member 1] of 4 December and suggested using Openreach FTTP datasets to improve the accuracy of the surveys.³⁰⁴

³⁰³ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [X], [X], [BT Bid Team Member 1] and [X], dated 5 December 2017 at 11:24

³⁰⁴ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [X], [X] and [X], dated 5 December 2017 at 13:03

A3.37 [Openreach Fibre Team Senior Manager 1] replied to [BT Bid Team Member 1] on the same day, copying in members of the Openreach Fibre Team; [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 6], saying:

“One thing I can say with absolute certainty ([redacted]) is that we definitely don’t have the data sets to model Ethernet fibre re-use impact and provide you with a better and more confident view of likely cost. Our Ethernet P2P fibre records are often very different from what we find on survey, which is why desk-based estimates are indicative only and is why we always recommend surveys for a more confident view.”

A3.38 [Openreach Fibre Team Senior Manager 1] suggested two ways forward:

- i) different indicative modelling estimates could be produced by clustering closely proximate circuits and apportioning costs to those that are able to use common spine. [Openreach Fibre Team Senior Manager 1] stated [they] would need the help of [Openreach Fibre Team Member 6], who was copied in, for this.
- ii) [BT Bid Team Member 1] could request physical surveys for very expensive locations *“to see if we are correct that they could come in at a much lower cost”*.

A3.39 [Openreach Fibre Team Senior Manager 1] noted that [BT Bid Team Member 1’s] scale of interest was *“significantly greater than we are resourced to cover currently”* and recommended that *“a request for [redacted] or [redacted] physical surveys is best avoided.”* [redacted].³⁰⁵

A3.40 On 5 December 2017 [BT Bid Team Member 1] forwarded the exchange described above to [BT Account Team Member 2] and said *“[redacted]?”*³⁰⁶ [BT Account Team Member 2] provided a technical explanation about why Ethernet pricing is cheaper:

³⁰⁵ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [Openreach Fibre Team Member 5], [BT Global Services Manager 2], [redacted], [redacted], [redacted], [Openreach Fibre Team Member 6] and [Openreach Fibre Team Senior Manager 2], dated 5 December 2017 at 15:00

³⁰⁶ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 5 December 2017 at 15:29

“It is picking up the nearest T code as the nearest intersect point (this could be any joint we have used last 25 years) whereas FOD will be looking for an agg node, a universal node 3A for example. The Agg node is in the main going to be further from the customer than a T coded joint

Secondly I would say The Ethernet Pricing tool is looking at getting one fibre from A to B whereas CAD which drives FOD pricing is looking at the best way to build out an FTTP network. So say you have a customer in an industrial estate CAD would be ensuring we have left the right infrastructure to build out the full DP area ie it wont necessarily put in CBTs, splitter nodes to do all estate but would put in Fibre DPs at key points

CAD will pick the agg node location it knows to have plenty of spares and again this might be further back into network”³⁰⁷

A3.41 [REDACTED]³⁰⁸

A3.42 [REDACTED]³⁰⁹

A3.43 [REDACTED]³¹⁰

A3.44 [REDACTED]³¹¹

A3.45 [REDACTED]³¹² [REDACTED]:

[REDACTED]

November 2017 - £20m FTTP investment in Northern Ireland

A3.46 On 17 November 2017 [BT Global Services Manager 1] emailed [BT Bid Team Member 1] and others, forwarding the text of an article which reported on a £20m investment by BT aimed at expanding ultrafast broadband to towns across Northern Ireland. The article stated that the investment would be focused on FTTP deployment and quoted the MD of BTNIN as saying that 25% of homes and businesses in Northern Ireland were scheduled to have access to ultrafast broadband by March 2019. The article also stated that *“We’ve been sharing our fibre broadband vision with key stakeholders”*.³¹³

A3.47 The next day, [BT Bid Team Member 1] forwarded this email to [BT Bid Team Member 2], saying “[REDACTED]?”³¹⁴

³⁰⁷ Email from [BT Account Team Member 2] to [BT Bid Team Member 1], dated 5 December 2017 at 17:02

³⁰⁸ [REDACTED]

³⁰⁹ [REDACTED]

³¹⁰ [REDACTED]

³¹¹ [REDACTED]

³¹² [REDACTED]

³¹³ Email from [BT Global Services Manager 1] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 2] and [REDACTED], dated 17 November 2017 at 21:27

³¹⁴ Email from [BT Bid Team Member 1] to [BT Bid Team Member 2], dated 18 November 2017 at 01:19

November 2017 – December 2017: Provision of desktop surveys

A3.48 [REDACTED]^{315 316}

A3.49 [REDACTED]³¹⁷

A3.50 On 13 December 2017 [Openreach Fibre Team Senior Manager 2] emailed [BT Bid Team Member 1] enclosing a spreadsheet containing CAD Desktop Surveys for [REDACTED] FOD circuits. [Openreach Fibre Team Senior Manager 2] provided the following caveat:

“As ever please note this does not constitute a formal quote but only the output of our desk based assessment.

It should be noted that some costs have been reduced by assuming that all locations would be deployed together – ie there are economies of scale compared to doing this as independent builds for each DP / location separately.

If you ended up building into a cherry picked list of these, costs per DP / per location may end up higher. We have also included the deductions for orders/THP to the best of our understanding – again this would be need verifying at the time of order.”³¹⁸

A3.51 On the same day [BT Bid Team Member 1] forwarded the email and spreadsheet to [BT Account Team Member 2] saying that it *“makes for scary reading”*.³¹⁹

A3.52 On 13 December 2017 [BT Bid Team Member 1] replied to [Openreach Fibre Team Senior Manager 2] querying whether there was some duplication or double counting in the desktop survey output. [They] listed six endpoints, all at [REDACTED], which would be served by the same “DP” but have been costed individually, totalling almost £[REDACTED].³²⁰ [BT Bid Team Member 1] suggested this was a considerable overestimation of costs. [BT Bid Team Member 1] conceded that there were limitations of the desktop surveys and the tools employed. [BT Bid Team Member 1] asked [Openreach Fibre Team Senior Manager 2] *“Anything that could be done on your end to refine the desktop output in light of this sort of thing would be much appreciated also, to trap examples such as this.”*³²¹

A3.53 On 14 December 2017, [BT Bid Team Member 1] emailed the desktop survey output to [BT Bid Team Member 5] [REDACTED] stating [they] hadn’t sent it earlier *“[REDACTED]”*.³²² Around the same time that [BT Bid Team Member 1] sent this email to [REDACTED], the following instant messages were sent between them:

³¹⁵ [REDACTED]

³¹⁶ [REDACTED]

³¹⁷ [REDACTED]

³¹⁸ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 6] and [BT Global Services Manager 2], dated 13 December 2017 at 17:07

³¹⁹ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 13 December 2017 at 20:35

³²⁰ £[REDACTED]

³²¹ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 2], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 6], [BT Global Services Manager 2], [BT Bid Team Member 4] and [BT Account Team Member 2] (Bcc’d), dated 13 December 2017 at 21:06

³²² Email from [BT Bid Team Member 1] to [BT Bid Team Member 5], dated 14 December 2017 at 09:43

[redacted]³²³

- A3.54 Later on 14 December 2017, [Openreach Fibre Team Senior Manager 2] emailed [BT Bid Team Member 1] in response to [BT Bid Team Member 1's] queries the day before. [Openreach Fibre Team Senior Manager 2] explained that *"the cost is cost per DP, so indeed when you have multiple lines with either the same address, or in fact the same DP, then you should not double count."*³²⁴ [Openreach Fibre Team Senior Manager 2] provided a new version of the desktop survey output spreadsheet with a pivot table so that [BT Bid Team Member 1] can see the total cost per DP. Using this spreadsheet it is possible to see that the cost for the six [redacted] endpoints [BT Bid Team Member 1] highlighted in [their] previous email is £[redacted], a reduction of more than [90%] from the cost according to the previous spreadsheet.³²⁵
- A3.55 On 22 December 2017 [BT M&PS Manager 1] [redacted] sent [BT Bid Team Member 2] an updated model, titled *"NI PSSN Master (working) V8"*. In the email [they] explained that [they] had *"asked for some desk based survey work to be completed by the TSO AOMP Team ([redacted]) to understand EAD fibre availability at relevant sites – it provides an initial indication of where OR fibre is understood to exist to site, core fibre issues, estimated radial and route distances, a high level view from 21C Infrastructure Capacity team"*. [BT M&PS Manager 1] explains that although this *"doesn't provide any estimate of ECC's it could help focus where OR's time and effort should be"*.³²⁶

January 2018: Common Postcode Cost Methodology

- A3.56 On 4 January 2018 [Openreach Fibre Team Senior Manager 1] sent an email to [BT Global Services Manager 1] asking for clarity on potential FoD demand for the year ahead. [redacted]. [BT Global Services Manager 1] goes on to discuss whether it is possible to consider clustered sites in order to get a more precise and cost-effective estimate for FOD ECCs. [Other Project Bid Team Member 1] added additional comments regarding [other project] and copied in [BT Bid Team Member 1].
- A3.57 On 5 January 2018 [Openreach Fibre Team Senior Manager 1] replied to [Other Project Bid Team Member 1] and [BT Global Services Manager 1] copying in all participants, including [BT Bid Team Member 1] and [Openreach Fibre Team Senior Manager 2]. In this email [Openreach Fibre Team Senior Manager 1] pushed back on one of [BT Global Services Manager 1's] suggestions to improve the accuracy of FOD ECCs but suggested an alternative *"whereby you could make your own rough approximation and get similarly close to the mark"*

³²³ [redacted]

³²⁴ Email from [Openreach Fibre Team Senior Manager 2] to [BT Bid Team Member 1], [BT Bid Team Member 2], [BT Global Services Manager 1], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 6], [BT Global Services Manager 2] and [BT Bid Team Member 4], dated 14 December 2017 at 10:22

³²⁵ See spreadsheet titled *"Copy of goldkeys_Final_V1_wPivot"*

³²⁶ Email from [BT M&PS Manager 1] to [BT Bid Team Member 2], [redacted] and [BT Bid Team Member 1], dated 22 December 2017 at 13:21

if you look at the post codes for your target premises and see how closely they correlate.”³²⁷ [Openreach Fibre Team Senior Manager 1] used two sets of postcodes to illustrate [their] example:

- i) [REDACTED];
- ii) [REDACTED].

“The first two circuits are clearly a perfect postcode match and so at least 95% of the build cost is likely to be common and could be spread across the two.

The other 2 circuits show commonality of post code to the 5th character and in that case, most of the spine and splitter will be common and so as an approximation at least 60% averaging could be applied across those two.”

A3.58 BT Bid Team Member 1 replied to this email asking whether the two postcodes which exactly match should only have one set of costs accounted for.³²⁸ [Openreach Fibre Team Senior Manager 1] replied with some detailed reasons about being cautious about such assumptions:

³²⁷ Email from [Openreach Fibre Team Senior Manager 1] to [Other Project Bid Team Member 1], [BT Global Services Manager 1], [REDACTED], [REDACTED], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 08:47

³²⁸ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [REDACTED], [REDACTED], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 09:29

“The build cost should account for anything required to get from a usable point of fibre towards the customer premises. When you reach the same DP (CBT) you still have the lead-in to each customer which if it requires civils on the street or across customer land, would be counted in the quote and each customer would have their own cost responsibility for that section. That’s why I suggested considering 95% of the build cost quote as common, which leaves a separate 5% of the quote to cover the cost of any civils for the lead-in for each customer.

If both customers sit with a few metres of the CBT, then close to 99% commonality is likely and if neither of them needed any civils for the lead-in from CBT to prem then 100% commonality might be possible. If however, one of them is a school (which in the case below, one is) or similar property with a very long distance from the CBT on the street to the actual premises and if this needs civils to cross 100s of metres of land, then the last drop cost might be a bigger proportion of the cost for that customer when a physical survey is carried out. That is why 95% would make more sense to me.”³²⁹

- A3.59 [BT Bid Team Member 1] queried whether the ECC estimate covered *“the build to the DP or to the Prem?”*³³⁰ [Openreach Fibre Team Senior Manager 1] responded that [their] understanding is *“the quote also includes the potential cost of civils to reach the prem from DP / CBT, hence my steer that same post code prems shouldn’t assume 100% cost commonality.”*³³¹

January – March 2018: Work undertaken to reduce estimated build charges

- A3.60 As noted above, the CAD Desktop Surveys BT’s bid team received, [X] produced an estimate of £[X]m. [BT Bid Team Member 2] noted that for the subset of sites with a [X], the total cost of these desktop surveys was £[TC]m.³³²
- A3.61 In early January 2018, the BT Bid Team had two similar cost estimates. One produced by [BT Bid Team Member 1] (“[BT Bid Team Member 1’s]Model”)³³³ and one produced by [BT Bid

³²⁹ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 09:50

³³⁰ Email from [BT Bid Team Member 1] to [Openreach Fibre Team Senior Manager 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 10:26

³³¹ Email from [Openreach Fibre Team Senior Manager 1] to [BT Bid Team Member 1], [Other Project Bid Team Member 1], [BT Global Services Manager 1], [X], [X], [BT Bid Team Member 1], [BT Global Services Manager 2], [Openreach Fibre Team Member 6], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 5 January 2018 at 10:51

³³² Email from [BT Bid Team Member 2] to [X], [BT Bid Team Member 1] and [BT Bid Team Member 4] dated 16 January 2018.

³³³ [X]

Team Member 2] (“[BT Bid Team Member 2’s] Model”)³³⁴ both with FOD ECCs of around £[redacted]m (a reduction of around 78% on the desktop survey results):

- a) [BT Bid Team Member 1’s] Model assumed FOD would be provided at [redacted] sites. It appears to have used AOMP outputs from [BT M&PS Manager 1] (see paragraph A3.55) to determine where Openreach already had (Ethernet) fibre. The model explains that it assumed:³³⁵
 - i) [redacted]; and
 - ii) [redacted].
- b) [redacted].³³⁶

A3.62 [redacted].^{337 338}

- a) [redacted].^{339 340}
- b) [redacted].
- c) [redacted].

A3.63 By 26 March 2018, BT’s bid team reduced its ECC estimates to [4.76 % of TC].³⁴¹ This is set out in more detail below.

January – March 2018: Additional survey requests

A3.64 On 17 January 2018 [BT Bid Team Member 1] emailed [redacted] asking for surveys of seven NIPSSN sites. [BT Bid Team Member 1] highlighted some issues in raising the orders including that “FOD doesn’t appear to be an option for a survey order”. [BT Bid Team Member 1] suggested that if FOD surveys could not be raised “in the interests of expediency, I’d suggest we just raise EAD surveys. It’s ECC that we are wanting to validate which will be approximately the same for FOD / ECC?”³⁴²

A3.65 [redacted]^{343 344 345}

A3.66 [redacted]³⁴⁶

³³⁴ [redacted]

³³⁵ [redacted]

³³⁶ [redacted]

³³⁷ [redacted]

³³⁸ [redacted]

³³⁹ [redacted]

³⁴⁰ [redacted]

³⁴¹ Email from [BT Bid Team Member 1] to [BT Bid Team Member 3], dated 26 March 2018. Note in this email [BT Bid Team Member 1] states that their previous ECC estimate was [redacted]

³⁴² Email from [BT Bid Team Member 1] to [redacted] and [BT Bid Team Member 5], dated 17 January 2018 at 17:57

³⁴³ [redacted]

³⁴⁴ [redacted]

³⁴⁵ [redacted]

³⁴⁶ [redacted]

- A3.67 [REDACTED]^{347 348}
- A3.68 [REDACTED].³⁴⁹ [REDACTED] replied discussing a “new style survey” which Openreach “are not open for [...] until 1 February”. [They] commented that “We’ve been told to expect a 10 day turn around. [REDACTED].”³⁵⁰
- A3.69 [REDACTED]^{351 352}
- A3.70 Before midnight on 31 January 2018 the BT Bid Team placed [REDACTED] FOD orders. Only 19 of those were registered on WFMT, the relevant Openreach system.³⁵³ After midnight an email was sent to [BT Bid Team Member] with a spreadsheet showing 17 orders having been placed.³⁵⁴ [BT Bid Team Member 1] forwarded this spreadsheet to [BT Account Team Member 2] the next morning.³⁵⁵
- A3.71 BT has said that “NIN planners did not perform physical site surveys for any of the 19 BT Bid Team FOD projects. Instead, they performed desktop surveys for 17 of them, [...] using the Ethernet ECC calculator.” BT also said that it is likely all these surveys were completed on 2 March 2018.³⁵⁶
- A3.72 BT has said that “Those 17 results were provided to [BTNIN Planner 5] also on 2 March, 2018 who communicated them to [BTNIN Planner 1] [REDACTED] on the same day for [BTNIN Planner 1] to input into WFMT.”³⁵⁷
- A3.73 On 12 March 2018 [BT Bid Team Member 1] chased [BT Account Team Member 2] for the survey outputs. [BT Bid Team Member 1] said [they] appreciated “the orders are all stuck in limbo on their way back to me through the system, but we need a view ASAP to finalise our ECC assumptions.”³⁵⁸
- A3.74 BT has said that “As the desktop results were not available to the BT Bid Team on WFMT, [BT Account Team Member 2] asked [BTNIN Planner 1] on 13 March, 2018 to collate the results and send them to [them] by e-mail. [BTNIN Planner 1] did this on 14, March 2018 but only sent the results for 13 of the 19 sites, as shown in the table below. [BT Account Team Member 2] forwarded these 13 results to the BT Bid Team by e-mail on 14 March, 2018.”³⁵⁹

³⁴⁷ [REDACTED]

³⁴⁸ [REDACTED]

³⁴⁹ [REDACTED]

³⁵⁰ Email from [REDACTED] to [BT Global Services Manager 2], [BT Global Services Manager 1], [REDACTED] and [REDACTED], dated 26 January 2018 at 17:59

³⁵¹ [REDACTED]

³⁵² [REDACTED]

³⁵³ BT’s Response to Information Request 4, ‘Qs8to11’, dated 11 September 2019

³⁵⁴ Spreadsheet titled “Copy of FTTP FOD orders”

³⁵⁵ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 1 February 2018 at 10:04

³⁵⁶ BT’s Response to Information Request 4, ‘Qs8to11’, dated 11 September 2019

³⁵⁷ BT’s Response to Information Request 4, ‘Qs8to11’, dated 11 September 2019

³⁵⁸ Email from [BT Bid Team Member 1] to [BT Account Team Member 2] and [BT Bid Team Member 2], dated 12 March 2018 at 16:41

³⁵⁹ BT’s Response to Information Request 4, ‘Qs8to11’, dated 11 September 2019

- A3.75 On 14 March 2018 [BT Account Team Member 2] sent an email to [BT Bid Team Member 1].³⁶⁰ Attached to the email spreadsheet which contained estimated ECCs for 19 sites.³⁶¹ This spreadsheet had been sent to [BT Account Team Member 2] by [BTNIN Planner 1].³⁶²
- A3.76 The next day [BT Bid Team Member 1] responded to [BT Account Team Member 2] stating that “[X]”.³⁶³ On 22 March [BT Bid Team Member 1] asked [BT Account Team Member 2] to [X].³⁶⁴
- A3.77 On 23 March 2018 [BT Bid Team Member 1] sent [BT Account Team Member 2] an email which outlined that 19 results have been provided but “[X].”³⁶⁵ The email attached a spreadsheet which highlighted those circuits in red [X].³⁶⁶
- A3.78 On 26 March 2018, [BT Bid Team Member 1] sent an email to [BT Bid Team Member 3] reviewing a number of points in light of these survey results:³⁶⁷

“[X].

So, outworking of all of this is that our ECC’s are now estimated at [4.76% of TC].”

- A3.79 The BT Bid Team did not change its FOD build charge estimates for any of its sites in its NIPSSN bid following receipt of the subsequent additional survey results.³⁶⁸ It used 11 of the 12 survey results to calculate an average ECC per [X] site of £[X]. Applying this to [X] [X] sites in [X] led to an additional £[X]k being added to the FOD build charge estimate.³⁶⁹ The BT Bid Team’s methodology for estimating FOD build charges also indicates that *“survey results were used to inform & confirm assumptions on civils/cabling volumes and rates.”*³⁷⁰

March 2018: DCMS vouchers

A3.80 [X]³⁷¹ ³⁷²

A3.81 [X]³⁷³

March 2018: Bid submission

³⁶⁰ Email from [BT Account Team Member 2] to [BT Bid Team Member 1], dated 14 March 2018 at 22:12

³⁶¹ Spreadsheet titled “Book2”

³⁶² Email from [BTNIN Planner 1] to [BT Account Team Member 2] and [BTNIN Planner 5], dated 14 March 2018 at 11:39

³⁶³ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 15 March 2018 at 08:59

³⁶⁴ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 22 March 2018 at 11:23

³⁶⁵ Email from [BT Bid Team Member 1] to [BT Account Team Member 2], dated 23 March 2018 at 20:24

³⁶⁶ Spreadsheet titled “FTTP FOD orders”

³⁶⁷ Email from [BT Bid Team Member 1] to [BT Bid Team Member 3], dated 26 March 2018 at 16:37.

³⁶⁸ See BT’s Response to Information Request 3, Question 5 and 13, dated 23 August 2019.

³⁶⁹ See BT’s Response to Information Request 3, Question 5(c), dated 23 August 2019.

³⁷⁰ See slide 6 of “Key Assumptions – Excess Construction Charges – Process” slides submitted as Annex 7 in BT’s Response to Information Request 2, Question 6, dated 24 May 2019.

³⁷¹ [X]

³⁷² [X]

³⁷³ [X]

A3.82 BT submitted its NIPSSN bid on 29 March 2018. BT used FOD for [X] of the NIPSSN circuits.^{374 375}

eir's NIPSSN Bid

Teams involved in eir's bid

eir

A3.83 Ofcom understands that there were two main individuals at eir who were responsible for the engagement with BTNIN during the preparation of eir's NIPSSN bid:

- i) [eir Bid Team Member 1] [X]; and
- ii) [eir Bid Team Member 2] [X]

A3.84 Additionally, Ofcom understands that [eir Bid Team Member 3] [X] provided planning support during the preparation of eir's bid.

BTNIN eir Account Team

A3.85 The BTNIN eir Account Team consisted of three individuals who were part of BTNIN. They were:

- i) [BT eir Account Team Member 1] [X] who reported to [BT eir Account Team Member 3];
- ii) [BT eir Account Team Member 2] [X] who reported to [BT eir Account Team Member 3];
- iii) [BT eir Account Team Member 3] [X], who reported initially to [BT Senior Manager 1] and subsequently to [BT Senior Manager 2] from [X], [themselves] reporting to [BT Executive 2]

Openreach Fibre Team

A3.86 As discussed below, eir made enquiries via the BTNIN eir Account Team about using FOD as part of its bid for the NIPSSN Contract. Ofcom has seen evidence that the BTNIN eir Account Team engaged with individuals in Openreach in order to provide information to eir about FOD.

A3.87 The individuals within Openreach who provided the information about FOD to the BTNIN eir Account Team, are the same individuals that provided information to the BT Bid Team about FOD. In this document we refer to those individuals collectively as the "Openreach Fibre Team"

³⁷⁴ Spreadsheet titled "BT Circuit Detail", sent to Ofcom by BT on 13 February 2019

³⁷⁵ For more detail on how the BT Bid Team estimated the FOD build charges used in its bid see BT's Response to Information Request 2, Questions 3, 6 and 7, dated 23 May 2019; and BT's Response to Information Request 3, Questions 3 – 9, and 13, dated 23 August 2019.

A3.88 This is a term constructed by Ofcom for the purposes of this document and Ofcom is aware that these individuals were not part of the same team day-to-day, nor do we believe that providing information about fibre products was the only part of their role in Openreach.

A3.89 Ofcom uses the term “Openreach Fibre Team” to refer to the following individuals:

- i) [Openreach Fibre Team Senior Manager 1] [X]. From July 2017 [Openreach Fibre Team Senior Manager 1] reported to [Openreach Fibre Team Senior Manager 3].
- ii) [Openreach Fibre Team Senior Manager 3] [X].
- iii) [Openreach Fibre Team Senior Manager 2] [X]. [Openreach Fibre Team Senior Manager 2] reported to [Openreach Executive 2] [X].
- iv) [Openreach Fibre Team Member 5] [X]
- v) [Openreach Fibre Team Member 4] [X]
- vi) [Openreach Fibre Team Member 7] [X]

BTNIN Planners

A3.90 As discussed below, eir ordered some physical site surveys of locations to determine more accurately, the estimated build charges associated with delivering a FOD circuit.

A3.91 Various members of BTNIN were involved in delivering these physical site surveys. For the purposes of this document, Ofcom occasionally refers to these individuals collectively as the “BTNIN Planners”, although Ofcom recognise that these individuals had many different job roles and may have worked in different teams.

A3.92 For the purposes of this document, Ofcom uses “BTNIN Planners” to refer to the following individuals:

- i) [BTNIN Planner 1], [X] reporting to [BTNIN Planner 2];
- ii) [BTNIN Planner 2], [X] reporting to [BTNIN Planner 4];
- iii) [BTNIN Planner 5], [X] reporting to [BTNIN Planner 4]
- iv) [BTNIN Planner 4], [X] reporting to [BTNIN Planner 3];
- v) [BTNIN Planner 3], [X]

eir’s enquiries about FOD

March – September 2017: FTTP enquiries

A3.93 On 8 March 2017 [eir Bid Team Member 1] [X] emailed [BT eir Account Team Member 1] asking about Openreach FTTP deployment across Northern Ireland and enquired whether the price had changed.³⁷⁶ On 22 May 2017 [eir Bid Team Member 1] again enquired about

³⁷⁶ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 1], dated 8 March 2017 at 09:58

FOTP in Northern Ireland.³⁷⁷ It is not clear whether these requests related to a desire to use FOTP as part of NIPSSN.

- A3.94 On 26 September 2017 [eir Bid Team Member 2] [S<] asked [BT eir Account Team Member 1] to “get pricing done using Wholesale Ethernet or any other products that might meet the criteria and is cost effective?”³⁷⁸ As part of the resulting exchange, [BT eir Account Team Member 1] sent [eir Bid Team Member 2] “an indication of UK Connect NGA pricing” which included FOD pricing.³⁷⁹ At this time FOD build charges were distance-based charge bands which gave different costs depending on a customer’s distance from the nearest NGA aggregation node.³⁸⁰

October – November 2017: Pricing announcement and first batch of desktop surveys

- A3.95 On 30 October 2017 [BT eir Account Team Member 1] received an email from Openreach Pricing about a change to FOD pricing. The email contained a link to Openreach’s pricing page which set out that distance-based charges by band would be withdrawn from 1 February 2018.³⁸¹ [BT eir Account Team Member 1] sent this email to [eir Bid Team Member 1], [eir Bid Team Member 2] and [eir Bid Team Member 3] [S<] later that day.³⁸²
- A3.96 On 31 October 2017 [eir Bid Team Member 2] replied to [BT eir Account Team Member 1’s] email asking a number of questions about the announcement. One of which asked “What does this mean for your EAD LA estate? From the looks of this it is going to decimate Openreach EAD estate as discussed in last meeting”.³⁸³ On the same day [eir Bid Team Member 1] sent an email to [BT eir Account Team Member 2] (BTNIN eir Account Team) and [BT eir Account Team Member 3] (BTNIN eir Account Team) referring to the FOD pricing changes. [eir Bid Team Member 1] noted that “If correct any competitive edge will be greatly reduced with how NGA terminates at pop level”.³⁸⁴

³⁷⁷ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 1] and [BT eir Account Team Member 2], dated 22 May 2017 at 08:29

³⁷⁸ Email from [eir Bid Team Member 2] to [BT eir Account Team Member 1], [eir Bid Team Member 1] and [BT eir Account Team Member 2], dated 26 September 2017 at 10:01

³⁷⁹ Email from [BT eir Account Team Member 1] to [eir Bid Team Member 1], [eir Bid Team Member 2] and [BT eir Account Team Member 2] dated 26 September 2017 at 16:45

³⁸⁰ Source: Openreach price list.

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=0WYlM7tTGGgucFf0dXUIW K4XSAPlAmgrRZNg5Pk%2B5%2F%2BkRgB7BL4KNYn%2FIKx2YB4Qe6YShZ82RgLOGLsH2e9%2Bmw%3D%3D>

³⁸¹<https://www.openreach.co.uk/orpg/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQlNXj7BV oAzMfOClw%2B7d4ELMHNgDeSRikU3pMj%2B%2FsXea48ksdHWgDMx84ljD7t3gQswc2AN5h5lI0XiKu8GtuFINK%2FATgP%2FPqHX8N7wMqJrDCqzxUjKX9ukq4RSuolZF02%2ByFJag%3D%3D>

³⁸² Email from [BT eir Account Team Member 1] to [eir Bid Team Member 1], [eir Bid Team Member 2], [eir Bid Team Member 3] and [BT eir Account Team Member 2], dated 30 October at 12:20

³⁸³ Email from [eir Bid Team Member 2] to [BT eir Account Team Member 1], [eir Bid Team Member 1], [eir Bid Team Member 3] and [BT eir Account Team Member 2], dated 31 October 2017 at 11:36

³⁸⁴ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2] and [BT eir Account Team Member 3], dated 31 October 2017 at 12:20

- A3.97 On 12 November 2017 [BT eir Account Team Member 2] sent an email to [eir Bid Team Member 1] and [BT eir Account Team Member 1] referencing a call with Openreach and a decision to do *“some desk based FOD surveys”*.³⁸⁵
- A3.98 [BT eir Account Team Member 1] sent an invitation to a call on 14 November 2017 to [Openreach Fibre Team Senior Manager 2] [X] asking for a discussion to go through some background work [they] had done *“on the financial impact of the new FOD pricing may have in NI terms.”*³⁸⁶
- A3.99 On 15 November 2017 [Openreach Fibre Team Member 7] [X] sent [BT eir Account Team Member 1] a spreadsheet with *“requested FOD survey with prices”* and noted that *“as you can see, prices greatly fluctuate”*.³⁸⁷ The spreadsheet contained CAD Desktop Surveys for 23 FOD circuits, as well as AOMP checks for deploying EAD circuits at the same sites.³⁸⁸ Later in the chain, [Openreach Fibre Team Senior Manager 2] replied to [BT eir Account Team Member 1] stating that:

“headline is as per our discussion that EAD is therefore comfortably absorbing most ECC costs, and FOD is not at all the case.

*We ll [sic] let you carry on the modelling, but you can see that a CP will have substantially less certainty on pricing by choosing FOD, whih [sic] remains a bespoke build on case by case, when EAD is instead a mass market product”*³⁸⁹

- A3.100 On 15 November 2017 [BT eir Account Team Member 2] sent an email to [eir Bid Team Member 1] and [eir Bid Team Member 2] attaching the spreadsheet containing eir’s CAD Desktop Surveys for FOD and AOMP checks for EAD. [BT eir Account Team Member 2] stated that *“I think you can see that you will have substantially less certainty on pricing by choosing FOD, which remains a bespoke build on case by case, when EAD is instead a mass market product.”*³⁹⁰
- A3.101 [eir Bid Team Member 1] replied to [BT eir Account Team Member 2’s] email asking [them] to *“verify that these charges don’t change if a second site is added to the green cab enabled”*.³⁹¹ [BT eir Account Team Member 1] replied that *“Any additional sites will attract Build costs for FOD if not already served by NGA fibre. For example if a site is adjacent to an*

³⁸⁵ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1], [eir Bid Team Member 2] and [eir Bid Team Member 3], dated 12 November 2017 at 21:38

³⁸⁶ Invitation sent from [BT eir Account Team Member 1] to [Openreach Fibre Team Senior Manager 2] and [BT eir Account Team Member 2], due on 14 November 2017 at 16:00

³⁸⁷ Email from [Openreach Fibre Team Member 7] to [BT eir Account Team Member 1], [Openreach Fibre Team Senior Manager 2] and [BT eir Account Team Member 2] dated 15 November 2017 at 10:13

³⁸⁸ Spreadsheet titled *“FOD UPDATE 101117”*

³⁸⁹ Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 1], [Openreach Fibre Team Member 7] and [BT eir Account Team Member 2], dated 15 November 2017 at 10:32

³⁹⁰ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1] and [eir Bid Team Member 2], dated 15 November 2017 at 13:07

³⁹¹ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 15 November 2017 at 13:25

existing FOD fibre site then the build costs may be reduced due to adoption of some existing infrastructure.”³⁹²

A3.102 [eir Bid Team Member 1] replied to [BT eir Account Team Member 1] looking for confirmation that each site will need to be surveyed to get accurate costs.³⁹³ [BT eir Account Team Member 2] replied confirming that *“a survey will determine exact build costs on an additional site”*, adding that *“A second site may have some build costs i.e. the costs are likely to be lower but not necessarily total exclusion.”³⁹⁴*

November 2017: Second batch of desktop surveys

A3.103 On 16 November 2017 [BT eir Account Team Member 3] sent [eir Manager 1] [✂] and [eir Bid Team Member 1] a copy of a press release regarding a £20m investment in broadband in Northern Ireland by BT, through the deployment of FTTP.³⁹⁵ [eir Bid Team Member 1] replied, querying whether this would impact FOD and FTTP rollout for NIPSSN.³⁹⁶ [BT eir Account Team Member 3] responded that *“It’s in 12 cities / towns across NI – it is overbuild where C exists and pushing it up to P. In very high density areas.”³⁹⁷*

A3.104 On 16 November 2017 [BT eir Account Team Member 1] sent an email to [Openreach Fibre Team Senior Manager 2], thanking [them] for [their] offer to check a further quantity of FOD available sites for build costs.³⁹⁸ [BT eir Account Team Member 1] attached a spreadsheet containing a list of 81 circuits.³⁹⁹

A3.105 On 17 November 2017 [Openreach Fibre Team Member 7] sent [BT eir Account Team Member 1] an email attaching some analysis of 81 circuits, which compared the price associated with using FOD or EAD. The spreadsheet contained a column titled *“who wins?”* which is populated with either FOD or EAD. Of the 81 sites, FOD ‘wins’ in 17, EAD ‘wins’ in 64.⁴⁰⁰

A3.106 Following this, on 21 November 2017 [BT eir Account Team Member 1] asked [Openreach Fibre Team Member 7] and [Openreach Fibre Team Senior Manager 2] for *“access to the CAD application to perform the necessary checks on all remaining inventory sites thereby permitting a full analysis of FOD/EAD.”⁴⁰¹* [Openreach Fibre Team Senior Manager 2] replied

³⁹² Email from [BT eir Account Team Member 1] to [eir Bid Team Member 1], [BT eir Account Team Member 2] and [eir Bid Team Member 2], dated 16 November 2017 at 15:36

³⁹³ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 1], [BT eir Account Team Member 2] and [eir Bid Team Member 2], dated 16 November 2017 at 16:04

³⁹⁴ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 1] and [eir Bid Team Member 2], dated 16 November 2017 at 17:05

³⁹⁵ Email from [BT eir Account Team Member 3] to [eir Manager 1] and [eir Bid Team Member 1], dated 16 November 2017 at 10:06

³⁹⁶ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 3], dated 16 November 2017 at 11:26

³⁹⁷ Email from [BT eir Account Team Member 3] to [eir Bid Team Member 1] and [BT eir Account Team Member 2], dated 16 November 2017 at 11:30

³⁹⁸ Email from [BT eir Account Team Member 1] to [Openreach Fibre Team Senior Manager 2], [BT eir Account Team Member 2] and [Openreach Fibre Team Member 5], dated 16 November 2017 at 15:11

³⁹⁹ Spreadsheet titled *“FOD site check 161117”*

⁴⁰⁰ Spreadsheet titled *“FOD ANA Northern Ireland”*, tab *“sheet 3”*.

⁴⁰¹ Email from [BT eir Account Team Member 1] to [Openreach Fibre Team Member 7], [Openreach Fibre Team Senior Manager 2], [BT eir Account Team Member 2] and [BT eir Account Team Member 3], dated 21 November 2017 at 16:13

on 21 November saying [they were] happy with [BT eir Account Team Member 1] accessing the CAD tool. [They] referenced earlier discussions with “[X]’s team” and queried what the hold up was.⁴⁰²

- A3.107 Later on 21 November, [BT eir Account Team Member 3] emailed [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 7], saying that they had “surveyed ~100 sites for FoD / Ethernet” and asked “How can we get the full estate of 1,900 sites surveyed?” [BT eir Account Team Member 3] stated that the question was coming from eir “who has asked us what is the Openreach process for a CP requesting a high volume of desktop surveys. Is this a request / service we provide for CPs” [BT eir Account Team Member 3] also asked whether a request had been submitted to [X]’s team about this.⁴⁰³
- A3.108 On 16 November 2017 [BT eir Account Team Member 2] had emailed [Openreach Fibre Team Senior Manager 2], referring to a call, and had asked “you mentioned the build survey for FOD tend to take the highest ceiling price. What is the ceiling range?”⁴⁰⁴ After [BT eir Account Team Member 2] chased on 22 November, [Openreach Fibre Team Senior Manager 2] responded that “There is no ceiling range per se that I am aware – however I have been told that when numbers are very high (so for outliers) this desk survey tends to act as an upper limit of what to expect.”⁴⁰⁵
- A3.109 On 20 November 2017 [BT eir Account Team Member 2] sent [eir Bid Team Member 1] and [eir Bid Team Member 2] an email which contained a link to an article on the website Think Broadband, published on 15 November 2017.⁴⁰⁶ The headline of the article is “Fibre on Demand a cautionary tale”. The article referenced the “new set of Openreach pricing” and suggested that “with the monthly cost matching that of the native FTTP products lots of people were once again excited”. The article goes on to state that “we believe that once you work out the total cost of ownership over a couple of years, that the new pricing may be no different to the previous model. In short while the monthly cost has come down the costs installation will go up.”⁴⁰⁷
- A3.110 On 22 November 2017, at 10:01, [BT eir Account Team Member 2] sent [eir Bid Team Member 1] and [eir Bid Team Member 2] an email attaching the spreadsheet analysis for 81 circuits that had been sent to the BTNIN eir Account Team on 17 November 2017. In this email [BT eir Account Team Member 2] also answers some questions about exemption fees.⁴⁰⁸

⁴⁰² Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 1], [Openreach Fibre Team Member 7], [BT eir Account Team Member 2] and [BT eir Account Team Member 3], dated 21 November 2017 at 20:21

⁴⁰³ Email from [BT eir Account Team Member 3] to [Openreach Fibre Team Senior Manager 2], [Openreach Fibre Team Member 7], [BT eir Account Team Member 2] and [BT eir Account Team Member 1], dated 21 November 2017 at 22:57

⁴⁰⁴ Email from [BT eir Account Team Member 2] to [Openreach Fibre Team Senior Manager 2] and [BT eir Account Team Member 1], dated 16 November 2017 at 14:31

⁴⁰⁵ Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 2], [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 22 November 2017 at 16:09

⁴⁰⁶ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1] and [eir Bid Team Member 2], dated 20 November 2017 at 10:50

⁴⁰⁷ <https://www.thinkbroadband.com/news/7874-fibre-on-demand-a-cautionary-tale> last accessed 22 October 2020

⁴⁰⁸ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 22 November 2017 at 10:01

- A3.111 The spreadsheet provided to eir contained build charges for 81 FOD circuits, ranging from [9% of AC to 750% of AC – see Table 4.2]. The average build charge was £[AC]. 40 of the 81 circuits had build charges of more than £[<]. As mentioned in paragraph A3.105, the spreadsheet also provided a comparison between the three year costs of FOD (including the initial build charge) and the three year cost of EAD (assuming no build charge).⁴⁰⁹
- A3.112 On 22 November 2017, at 20:44, [BT eir Account Team Member 2] sent a call request to [[BT eir Account Team Member 1]]; [BT eir Account Team Member 3]; [Openreach Fibre Team Member 5]; [Openreach Fibre Team Member 7]; [Openreach Fibre Team Senior Manager 2]; and [Openreach Fibre Team Senior Manager 3] [<]. [BT eir Account Team Member 2] stated that *“we have some outstanding questions on the recent FOD desk based surveys and further questions on the FOD Product.”*⁴¹⁰ The agenda items included the following:
1. *FOD surveys – these have highlighted a number of sites with very large build costs where we know we have fibre. Could we discuss the accuracy/model used to ensure we are analysing the situation as accurately as possible as our design to the CP will be based on this data.*
 2. *The remaining sites in the project. How do we normally approach a request like this from a CP to desk base survey a large number of sites?*
 3. *FOD v Ethernet. We had discussed in the initial call a one pager being drawn up to differentiate the 2 products.*
- A3.113 BT has confirmed that, to the best of [BT eir Account Team Member 2]’s knowledge, this call took place and that the participants who joined the call were [themselves], [Openreach Fibre Team Member 7]; [BT eir Account Team Member 1]; [Openreach Fibre Team Senior Manager 2]; and [BT eir Account Team Member 3]. BT has not been able to find any notes of this call.⁴¹¹
- A3.114 After this meeting, on 24 November 2017, eir began to place orders for physical site surveys. The timeline of these orders is discussed below at paragraphs A3.122 – A3.136.
- A3.115 On 1 December 2017 [Openreach Fibre Team Member 7] sent [BT eir Account Team Member 2] a fact sheet on the differences between EAD and FTTP.⁴¹² The fact sheet covered availability, delivery time, speeds, service, security and resilience.⁴¹³
- A3.116 On 4 December 2017 [BT eir Account Team Member 2] asked [Openreach Fibre Team Member 7] and [Openreach Fibre Team Senior Manager 2] whether they had *“established the costs yet for the bulk FOD desk based surveys”*.⁴¹⁴ [Openreach Fibre Team Senior Manager

⁴⁰⁹ Spreadsheet titled *“FOD ANA Northern Ireland”*

⁴¹⁰ Meeting invite from [BT eir Account Team Member 2] to [BT eir Account Team Member 1], [BT eir Account Team Member 3], [Openreach Fibre Team Member 5], [Openreach Fibre Team Member 7], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Senior Manager 3], due on 23 November 2017 at 16:30

⁴¹¹ BT’s Response to Information Request 6, dated 9 December 2019

⁴¹² Email from [Openreach Fibre Team Member 7] to [BT eir Account Team Member 2], [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Member 5], dated 1 December 2017 at 12:04

⁴¹³ Document titled *“FOD vs EAD”*

⁴¹⁴ Email from [BT eir Account Team Member 2] to [Openreach Fibre Team Member 7] and [Openreach Fibre Team Senior Manager 2], dated 4 December 2017 at 15:48

2] replied that *“We’re going to need about a week so estimating Wed. next week by the time you can have it all”*.⁴¹⁵

A3.117 The following day [BT eir Account Team Member 1] sent [Openreach Fibre Team Senior Manager 2] an email attaching a spreadsheet which contained 1,815 circuits.⁴¹⁶ The email referred to conversations between [Openreach Fibre Team Senior Manager 2] and [BT Senior Manager 2].⁴¹⁷ On 8 December [BT eir Account Team Member 2] emailed [Openreach Fibre Team Senior Manager 2] to check on the progress of the desktop surveys.⁴¹⁸ Later that day [BT eir Account Team Member 1] resubmitted another spreadsheet to [Openreach Fibre Team Senior Manager 2] *“which includes NAD keys where available”*.⁴¹⁹ This spreadsheet contained 2,021 circuits.⁴²⁰

A3.118 On 13 December 2017 [Openreach Fibre Team Senior Manager 2] sent [BT eir Account Team Member 1] a spreadsheet containing 1,815 circuits. A column titled Price Per Location gives costs for 1,703 of these circuits, which comes to £[X]m with an average cost of £[X]. [X] of the circuits are listed as having FOD available, with a further [X] scheduled for Q1 2018. Of these [X] circuits, [X] have a cost associated with them under Price Per Location. The total cost of these [X] circuits is £[X]m with an average cost of £[X].⁴²¹ It is not clear whether the Price Per Location is a build charge associated with deploying a FOD circuit. Nor it is clear which tool was used to derive these results.

A3.119 [Openreach Fibre Team Senior Manager 2] stated in [their] email to [BT eir Account Team Member 1]:

Please note this does not constitute a formal quote but only the output of our desk based assessment. It should be noted that some costs have been reduced by assuming that all locations would be deployed together – ie there are economies of scale compared to doing this as independent builds for each DP / location separately.

*If you ended up building into a cherry picked list of these, costs per DP / per location may end up higher.*⁴²²

A3.120 On 18 December 2017 [BT eir Account Team Member 2] emailed [eir Bid Team Member 1] and [eir Bid Team Member 2], attaching the BTNIN eir Account Team’s *“initial design following the completion of desk based surveys”*. The email noted that the attached spreadsheet (the Proposed Design Spreadsheet) contained *“the detail on the FOD build*

⁴¹⁵ Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 2] and [Openreach Fibre Team Member 7], dated 4 December 2017 at 16:02

⁴¹⁶ Spreadsheet titled *“FOD Site List 051217”*

⁴¹⁷ Email from [BT eir Account Team Member 1] to [Openreach Fibre Team Senior Manager 2], [BT eir Account Team Member 3], [BT Senior Manager 2] and [BT eir Account Team Member 2], dated 5 December 2017 at 11:36

⁴¹⁸ Email from [BT eir Account Team Member 2] to [Openreach Fibre Team Senior Manager 2] and [BT eir Account Team Member 1], dated 8 December 2017 at 09:14

⁴¹⁹ Email from [BT eir Account Team Member 1] to [Openreach Fibre Team Senior Manager 2] and [BT eir Account Team Member 2], dated 8 December 2017 at 15:45

⁴²⁰ Spreadsheet titled *“Final Full Site List 281117”*

⁴²¹ Spreadsheet titled *“FOD Site List 051217_Final_v1”*

⁴²² Email from [Openreach Fibre Team Senior Manager 2] to [BT eir Account Team Member 1] and [BT eir Account Team Member 2], dated 13 December 2017 at 17:09

costs/Ethernet ECC costs/NGA and DSL in a separate tab". The email also contained the exact wording [Openreach Fibre Team Senior Manager 2] had sent to [BT eir Account Team Member 1] in the email of 13 December 2017.⁴²³ [eir Bid Team Member 1] responded to this email stating *"This is great news as all mostly appear to be schools with rollout after 2020..."*⁴²⁴

- A3.121 In reference to an earlier call, on 5 January 2018 [eir Bid Team Member 2] emailed an updated version of the Proposed Design Spreadsheet to [BT eir Account Team Member 1].⁴²⁵ The spreadsheet contains a tab for circuits which are proposed to be delivered using FOD. [redacted] circuits are included, with a column identifying the build charges for each. The total build charges for these [redacted] circuits (before a £750 exemption is applied to each site) is £[TC] with an average build charge of just over £[AC]. The build charges range from [29% to 362% of £AC].⁴²⁶

November 2017 – June 2018: Physical site surveys

- A3.122 Between 24 and 30 November 2017 eir placed 10 orders for FOD physical site surveys. Three of the 10 were closed by [a New Sites Planner, NIN] on 29 November 2017 due to [their] unfamiliarity with FOD orders, while the other seven were sent to [BTNIN Planning Service Team Member 1] on 30 November 2017. [BTNIN Planning Service Team Member 1] then sent these jobs to [BTNIN Planner 1]. Later, on 5 December 2017, the three jobs which had been closed were resubmitted. Two of these were sent to [BTNIN Planner 1] and a third was sent to [a Resource Planner, Openreach].⁴²⁷
- A3.123 On 30 November, [BTNIN Planning Service Team Member 1] sent a screenshot of some of the tasks in WFMT to [BT eir Account Team Member 2], following an email [BT eir Account Team Member 1] had sent to the Openreach Fibre Team about eir's physical site surveys. This email contained the line that *"As you know we have been engaging with yourselves on FOD services in NI and recently our CP raised some actual orders as below for full site surveys to understand actual build costs."*⁴²⁸ [BTNIN Planning Service Team Member 1] also copied in [a Survey & Planning Manager] into [their] email to [BT eir Account Team Member 2].⁴²⁹ [redacted].⁴³⁰ [redacted].⁴³¹

⁴²³ Email from [BT eir Account Team Member 2] to [eir Bid Team Member 1] and [eir Bid Team Member 2], dated 18 December 2017 at 12:37

⁴²⁴ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2], [eir Bid Team Member 2] and [BT eir Account Team Member 1], dated 18 December 2017 at 13:57

⁴²⁵ Emails from [eir Bid Team Member 2] to [eir Bid Team Member 1], [BT eir Account Team Member 2] and [BT eir Account Team Member 1], dated 5 January 2018 at 11:36 and 14:56

⁴²⁶ Spreadsheet titled *"Proposed design 171217 v2"*

⁴²⁷ BT's Response to Information Request 4 Q8-Q11, page 2

⁴²⁸ Email from [BT eir Account Team Member 1] to [Openreach Fibre Team Senior Manager 3], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Member 5], [Openreach Fibre Team Senior Manager 2], [Openreach Fibre Team Member 7] and [BT eir Account Team Member 2], dated 24 November 2017 at 15:32

⁴²⁹ Email from [BTNIN Planning Service Team Member 1] to [BT eir Account Team Member 2] and [a Survey Planning Manager], dated 30 November 2017 at 10:32

⁴³⁰ [redacted]

⁴³¹ [redacted]

- A3.124 On 13 December 2017 [BTNIN Planner 2] informed [BT eir Account Team Member 1] that there were still some systems access issues and that *“until we have access we are limited with what we can see”*.⁴³² [BT eir Account Team Member 2] chased [BTNIN Planner 2] again on 15 December to confirm when these surveys would be completed, stating that *“we are under real pressure now to get the information”*.⁴³³ [BTNIN Planner 2] responded that access had been approved, but because of annual leave it was *“looking like Monday [18 December 2017] at the earliest before we can move forward”*.⁴³⁴ [BT eir Account Team Member 2] forwarded this email to the other members of the BTNIN eir Account Team and said *“it scares me if we propose over 200 FOD as the right product for Eir – are we set up to deliver it?”*⁴³⁵
- A3.125 On 18 December 2017 [BT eir Account Team Member 3] emailed [BTNIN Planner 2] and [BTNIN Planner 3] [S<] asking to be advised when the surveys would be completed, noting that *“we are under severe pressure from our CP who is paying for the surveys”*.⁴³⁶ On 3 January 2018 [BT eir Account Team Member 2] followed up with another email to [BTNIN Planner 2] and [BTNIN Planner 3] asking to *“advise the latest on this”*.⁴³⁷ [BTNIN Planner 2] replied on 3 January explaining that a survey for the external network had been completed but further support was needed to get an idea of the total cost. [BTNIN Planner 2] mentioned a meeting with [BTNIN Planner 4] [S<] to discuss additional support from within [their] planning team.⁴³⁸
- A3.126 On 4 January 2018 [BT eir Account Team Member 3] thanked [BTNIN Planner 2] for [their] response and asked [BTNIN Planner 4] *“if this will be addressed with committed timescales”* and noted they had a session with the customer that afternoon.⁴³⁹ [BTNIN Planner 4] responded with the following:

⁴³² Email from [BTNIN Planner 2] to [BT eir Account Team Member 1], dated 13 December 2017 at 12:37

⁴³³ Email from [BT eir Account Team Member 2] to [BTNIN Planner 2], [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 15 December at 10:01

⁴³⁴ Email from [BTNIN Planner 2] to [BT eir Account Team Member 2] dated 15 December 2017 at 12:15

⁴³⁵ Email from [BT eir Account Team Member 2] to [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 15 December 2017 at 12:18

⁴³⁶ Email from [BT eir Account Team Member 3] to [BTNIN Planner 2], [BTNIN Planner 3], [BT eir Account Team Member 1] and [BT eir Account Team Member 2], dated 18 December 2017 at 11:25

⁴³⁷ Email from [BT eir Account Team Member 2] to [BT eir Account Team Member 3], [BTNIN Planner 2], [BTNIN Planner 3] and [BT eir Account Team Member 1], dated 3 January 2018 at 11:09

⁴³⁸ Email from [BTNIN Planner 2] to [BT eir Account Team Member 2], [BT eir Account Team Member 3], [BTNIN Planner 3], [BT eir Account Team Member 1] and [BTNIN Planner 4], dated 3 January 2018 at 11:24

⁴³⁹ Email from [BT eir Account Team Member 3] to [BTNIN Planner 2], [BTNIN Planner 4], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 4 January at 08:08

“We’re still working through these orders. This is the first time we’ve done FOD and we’re working through the complexities of it. (I’m told Openreach have done a very minimal amount of order so far so [redacted]).

The issues for us are around order journey, systems, etc (the network aspect is fairly straight forward for us). We expect that it is going to take another number of weeks for delivery – however this should be within the expected timescales of 60 working days (as per attached).”⁴⁴⁰

- A3.127 [BTNIN Planner 4] attached a Fibre To The Premises on Demand Fact Sheet which contained information about the product. In the fact sheet it stated that *“orders are expected to take at least 60 working days to complete”*.⁴⁴¹
- A3.128 [BT eir Account Team Member 3] replied to [BTNIN Planner 4] later on 4 January that [they were] aware of the ‘expected complete’ timescale of ~60 days, but *“we really need to understand the ‘survey complete’ timescales”*.⁴⁴² [BTNIN Planner 4] replied the same day that *“we expect to have all surveying completed by end of next week”*.⁴⁴³
- A3.129 On 11 January 2018 [BT eir Account Team Member 3] emailed [BTNIN Planner 4] and [BTNIN Planner 2] stating that *“we are being pushed by our customer as to when they might get output to FoD survey requests”*.⁴⁴⁴ [BTNIN Planner 4] replied, copying [BTNIN Planner 5] and explained that [they were] leading on FOD and would provide an update the next day.⁴⁴⁵ On 15 January 2018 [BTNIN Planner 5] replied to [BT eir Account Team Member 3] stating that *“There are serious system issues holding us up; however, my Team will prioritise the surveys and get costs over as soon as possible. Im hoping the majority will be ready this week.”*⁴⁴⁶
- A3.130 On 23 January 2018 [eir Bid Team Member 1] sent an email to [BT eir Account Team Member 2] requesting a meeting to discuss a number of areas of the NIPSSN bid, including:

⁴⁴⁰ Email from [BTNIN Planner 4] to [BT eir Account Team Member 3], [BTNIN Planner 2], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 4 January 2018 at 09:15

⁴⁴¹ Document titled *“fibre to the premises on demand fact sheet”*

⁴⁴² Email from [BT eir Account Team Member 3] to [BTNIN Planner 4], [BTNIN Planner 2], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 4 January 2018 at 09:49

⁴⁴³ Email from [BTNIN Planner 4] to [BT eir Account Team Member 3], [BTNIN Planner 2], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 4 January 2018 at 09:56

⁴⁴⁴ Email from [BT eir Account Team Member 3] to [BTNIN Planner 4], [BTNIN Planner 2], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 11 January 2018 at 16:45

⁴⁴⁵ Email from [BTNIN Planner 4] to [BT eir Account Team Member 3], [BTNIN Planner 2], [BTNIN Planner 5], [BT eir Account Team Member 1], [BTNIN Planner 3] and [BT eir Account Team Member 2], dated 11 January 2018 at 19:54

⁴⁴⁶ Email from [BTNIN Planner 5] to [BT eir Account Team Member 3], [BT eir Account Team Member 1], [BT eir Account Team Member 2], [redacted] and [BTNIN Planner 4], dated 15 January at 08:58

FTTP – Current status review, I have not had a response from [BT eir Account Team Member 3] as yet but would like to understand the level of detail we will receive to allow us to start planning to insert or not? In otherwards will it go to street, school location and date for works to be completed?

AOB – Update on any other areas BT are working on to reduce the costs base and when we are likely to be provided with a position?⁴⁴⁷

- A3.131 On 6 February 2018 [BT eir Account Team Member 3] sent an email containing no text to [BT eir Account Team Member 1] and [BTNIN Planner 5] with the subject “FOD -- Folks what is the current state of play re the 12 surveys”.⁴⁴⁸ [BTNIN Planner 5] replied on the same day saying that “all but 2 surveys completed”.⁴⁴⁹ During the course of Ofcom’s investigation, BT told us that the penultimate on-site survey was performed at [redacted] on 8 February 2018, while the final on-site survey took place “on or before 1 March 2018”.⁴⁵⁰
- A3.132 BT has told Ofcom that the survey results were provided to [BTNIN Planner 1] for [them] to input into WFMT and that “[BTNIN Planner 1] was unable to input any results such that the costs could be accessed by eir.” BT also told Ofcom that “the planners were made aware by the BTNIN eir Account Team (and later the BTBPS Account Team technical support) that the results were not available. As a result, the planners repeatedly tried to rebuild the orders so that the results would be available on the CP portal.”
- A3.133 Ofcom enquired about when these survey results were provided to [BTNIN Planner 1]. BT responded with the following information:

Table A3.2 – Information provided by BT regarding survey results being provided to [BTNIN Planner 1]⁴⁵¹

Site	Date survey results provided to [BTNIN Planner 1] [redacted]
[redacted]	Costs compiled by [BTNIN Planner 1] on 29 December 2017
[redacted]	15 January 2018
[redacted]	Details of required cost related installation work following survey sent to [BTNIN Planner 1] on 22 January 2018. Estimated build charges appear to have been sent to [BTNIN Planner 1] after this but searches have failed so far to locate relevant e-mails. Estimated build charges resent to [BTNIN Planner 1] on 27 June 2018.
[redacted]	As for [redacted]
[redacted]	24 January 2018

⁴⁴⁷ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2], dated 23 January 2018 at 13:48

⁴⁴⁸ Email from [BT eir Account Team Member 3] to [BT eir Account Team Member 1] and [BTNIN Planner 5], dated 6 February 2018 at 08:19

⁴⁴⁹ Email from [BTNIN Planner 5] to [BT eir Account Team Member 3], [BT eir Account Team Member 1] and [BTNIN Planner 4], dated 6 February 2018 at 08:38

⁴⁵⁰ BT’s Response to Information Request 4, ‘Qs8to11’, page 4

⁴⁵¹ Information provided as part of BT’s Response to Information Request 4, ‘Qs8to11’

[X]	25 or 26 January 2018
[X]	Between 30 January and 6 February 2018
[X]	Between 30 January and 6 February 2018
[X]	Between 8 February and 16 February 2018
[X]	13 March 2018

A3.134 eir told Ofcom that it chased the BTNIN eir Account Team for the survey results via telephone calls on the following dates: 12 December 2017; 15 December 2017; 18 December 2017; 31 January 2018; 4 January 2018; 11 January 2018; 6 February 2018; and 8 February 2018.⁴⁵²

A3.135 BT told Ofcom that *“eir stopped chasing on 8 February 2018 [...]. NIN staff dealing with the systems issues therefore assumed that results were visible/no longer required.”*⁴⁵³

A3.136 BT informed Ofcom that *“[BT eir Account Team Member 1] in the NIN BTNIN eir Account Team provided the results for all 10 sites to [eir Bid Team Member 3] of eir by e-mail on 27 June, 2018.”*⁴⁵⁴

February 2018: eir’s removal of FOD

A3.137 In the week commencing 12 February 2018, eir removed FOD from its NIPSSN bid. eir told Ofcom that this decision was taken for the following reasons:⁴⁵⁵

- i) the high costs results and inconsistencies from the FOD desktop survey results which meant that there were significant doubts over how reliable the figures were and it was impossible for eir to build any kind of pricing model for FOD in the tender out of results with such variability and with no discernible pattern or trend to the data received;
- ii) advice that the FOD product had delivery limitations, principally on the basis of representations made by the BTNIN/Openreach team ([BT eir Account Team Member 1]), who advised [eir Bid Team Member 2] on numerous occasions from December 2017 to February 2018 that the FOD product set had delivery limitations.
- iii) advice that FOD was not a mass market product and the limitations highlighted by [BT eir Account Team Member 2] in the email of 4 October 2018;
- iv) the suitability of FOD for multi-site deployments;

⁴⁵² eir’s Briefing Note to Ofcom, dated 6 November 2018

⁴⁵³ BT’s Comments in response to eir’s Briefing Paper to Ofcom, dated 29 March 2019

⁴⁵⁴ BT’s Response to Information Request 4, ‘Qs8to11’

⁴⁵⁵ Adapted from eir’s Response to Information Request 3, dated 13 December 2019

- v) the negative communications from BTNIN/Openreach in respect of use of FOD including an email received by [eir Bid Team Member 1] and [eir Bid Team Member 2] from [BT eir Account Team Member 2] with a link entitled "*fibre on demand a cautionary tale*" which provided information on potential limitations with the FOD product set;
- vi) failure to get the 10 FOD physical survey results within 3 months after a series of requests and escalation, which BTNIN/Openreach had informed eir was the only means of acquiring accurate cost information;
- vii) communication from BTNIN/Openreach that FOD was bespoke and not a mass market product and thus unsuitable for multi-site deployments which resulted in an erosion in eir's confidence in the FOD product; and
- viii) the cumulative effect of the information being provided by BTNIN/Openreach that FOD had delivery limitations and pricing uncertainty. It was clear to the eir technical project team ([eir Bid Team Member 1] & [eir Bid Team Member 2]) who were in constant contact with the BTNIN/Openreach team ([BT eir Account Team Member 2], [BT eir Account Team Member 1] and [BT eir Account Team Member 3]) that the BTNIN/Openreach team had serious reservations in respect of FOD as a solution for the NIPSSN Contract.

A3.138 On 29 March 2018 eir submitted their Final Tender for the NIPSSN Contract.⁴⁵⁶

Openreach's position regarding FOD

Openreach Fibre Team

- A3.139 As discussed above, both the eir and BT Bid Teams made enquiries with Openreach (either directly or indirectly) about using FOD as part of their bid for the NIPSSN Contract.
- A3.140 The individuals within Openreach who provided the information to both Bid Teams about FOD are referred to in this document collectively as the "Openreach Fibre Team".
- A3.141 This is a term constructed by Ofcom for the purposes of this document and Ofcom is aware that these individuals were not part of the same team day-to-day, nor do we believe that providing information about fibre products was the only part of their role in Openreach.
- A3.142 Ofcom uses the term "Openreach Fibre Team" to refer to the following individuals:
- i) [Openreach Fibre Team Senior Manager 1], [REDACTED]. From July 2017 [Openreach Fibre Team Senior Manager 1] reported to [Openreach Fibre Team Senior Manager 3].
 - ii) [Openreach Fibre Team Senior Manager 3], [REDACTED].
 - iii) [Openreach Fibre Team Senior Manager 2] [REDACTED]. [Openreach Fibre Team Senior Manager 2] reported to [Openreach Executive 2], [REDACTED].

⁴⁵⁶ Email from [eir Bid Team Member 1] to [BT eir Account Team Member 2]; [BT eir Account Team Member 1] and [BT eir Account Team Member 3], dated 29 March 2018 at 15:48

- iv) [Openreach Fibre Team Member 5] [REDACTED]
- v) [Openreach Fibre Team Member 4] [REDACTED]
- vi) [Openreach Fibre Team Member 7] [REDACTED]

February – June 2017: Non-NIPSSN FOD Discussion

A3.143 [REDACTED]^{457 458}

A3.144 [REDACTED]^{459 460}

A3.145 [REDACTED]⁴⁶¹

A3.146 [REDACTED]⁴⁶²

June – November 2017: FOD for NIPSSN

A3.147 [REDACTED]^{463 464}

A3.148 [REDACTED]⁴⁶⁵

A3.149 [REDACTED]^{466 467 468}

A3.150 After the changes to FOD pricing were announced on 30 October 2017,⁴⁶⁹ on 1 November 2017 [BT eir Account Team Member 3] sent a meeting invite for 16 November 2017 to, amongst others, the members of the Openreach Fibre Team and other members of the BTNIN eir Account Team. The invite refers to a “customer with large estate of circuits” whose “contract is up for renewal”.⁴⁷⁰ Ofcom assumes this to be eir. [BT eir Account Team Member 3] goes on to say that:

457 [REDACTED]

458 [REDACTED]

459 [REDACTED]

460 [REDACTED]

461 [REDACTED]

462 [REDACTED]

463 [REDACTED]

464 [REDACTED]

465 [REDACTED]

466 [REDACTED]

467 [REDACTED]

468 [REDACTED]

469

<https://www.openreach.co.uk/orpg/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQINXj7BVoAzMfOClw%2B7d4ELMHNgDeSRikU3pMj%2B%2FsXea48ksdHWgDMx84IjD7t3gQswc2AN5h5IIOXiKu8GtuFINK%2FATgP%2FPgHX8N7wMqJrDCqzxUjKX9ukq4RSuolZF02%2ByFJag%3D%3D>

⁴⁷⁰ Meeting invite from [BT eir Account Team Member 3] to [REDACTED], [BT eir Account Team Member 1], [BT eir Account Team Member 2], [Openreach Fibre Team Senior Manager 3], [Openreach Fibre Team Senior Manager 1], [REDACTED], [Openreach Fibre Team Member 5] and [Openreach Fibre Team Senior Manager 2], due to occur on 16 November 2017 at 13:00

Our aim was [X]. As a result of the recent FttFOD price announcement the customer (who is the incumbent in this account) is worried [they have] spent years and a lot of money building a robust high bandwidth network for it to pulled away from [them] by a competitor using much cheaper product !!

November – December 2017: Approach to Equivalence

A3.151 On 24 November 2017 [BT Senior Manager 2] emailed [Openreach Fibre Team Senior Manager 2] to notify [them] of a change in [their] [X].⁴⁷¹ The email stated that:

When we spoke previously I had been [X] BPS and within the NI team we had been maintaining separation between the parts of the team supporting other CP's.

In the intervening time I've had to [X] the BPS work as I've been asked to [X] and now have [X].

I've asked [X] to see if [they] can get us together on a call next week. I'm conscious that we can each see both sides and wanted to make sure we can offer each the same information should they ask. The request that triggered this is the ask to do desktop surveys from Eir which is very similar to the fod banding we did for [BT Bid Team Member 1] in BPS.

A3.152 On 30 November 2017 [Openreach Fibre Team Senior Manager 2] forwarded an email chain to [BT Senior Manager 2] in which [BT Bid Team Member 1] [X] had been asking [Openreach Fibre Team Senior Manager 2] to run desktop surveys for nearly [X] FOD sites. [Openreach Fibre Team Senior Manager 2] said to [BT Senior Manager 2] *“following our discussion Tuesday did you have a think about this – [BT Bid Team Member 1] has come back to us today...”*⁴⁷² [Openreach Fibre Team Senior Manager 2] then chased [BT Senior Manager 2] for a response on 4 December 2017 and asked *“Do we proceed as planned ie further analysis done by your team?”*⁴⁷³ Later that day [BT Senior Manager 2] replied with the following message:

⁴⁷¹ Email from [BT Senior Manager 2] to [Openreach Fibre Team Senior Manager 2], dated 24 November 2017 at 17:04

⁴⁷² Email from [Openreach Fibre Team Senior Manager 2] to [BT Senior Manager 2], dated 30 November 2017 at 10:45

⁴⁷³ Email from [Openreach Fibre Team Senior Manager 2] to [BT Senior Manager 2], dated 4 December 2017 at 08:38

Sorry for the delay after our call. I would suggest the following approach.

As you know there are two cp's competing for the same public sector contract in NI. Initially only BT BPS had been exploring FoD but more recently Eircom have too. In NI Networks we have been keeping air gaps between the teams supporting each CP. As both CP's have been expressing an interest in FoD it has meant that you have been providing information on both bids and [X] I now see activity across both.

I'm conscious both teams have effectively asked for the same information and I wanted to ensure we treat each bid equally. My understanding is that we initially supported BPS with indicative distance bandings (subject to survey) and also pure build costs (the ODN route) for roughly [X] sites. Subsequently, the commercials of the FoD product changed and this initial modelling is no longer valid. I'd appreciate your views but as Eir haven't asked for the bandings I do not think we should provide this to them? Should they ask for the sites to be modelled against the old commercials we would provide the same output as BPS received.

As the product changed to its current version both parties are asking for a modelling exercise to be completed against the new commercials. Eir have had a small sample of c.80 fully modelled and have requested all remaining sites to be modelled while BPS have submitted [X] to be modelled with none completed. No commitments have been made to either in terms of further modelling. My understanding is we supported BPS in getting the [X] so should give the NAD detail to Eir.

In terms of actual modelling I would suggest that we agree to give a modelled cost for every NAD BPS or Eir ask us to. This would be on a best endeavours basis and would be subject to an actual survey before we would commit to a cost. My view is that all requests come to you but I will support in the background with a dedicated NI resource to do the modelling. In order to ensure the two bids are kept separate in NI I will do specific briefings with [them] to explain the confidentiality and any outputs will be shared with BPS/Eir via your team only.

If you are in agreement with the above. I'd suggest the next steps.

- 1. [BT Senior Manager 2] to brief [X] on the modelling approach*
- 2. [Openreach Fibre Team Senior Manager 2] to contact BPS and Eircom separately to explain approach – i.e. we will support in identifying NAD keys and will model each site on a best endeavours basis.*
- 3. On Completion of the modelling outputs – [X]/[BT Senior Manager 2] will share output with [Openreach Fibre Team Senior Manager 2] to onward share with CP's*

I'm happy to change any of the above if you have any concerns. I think this should allow us to be comfortable each is being treated equally⁴⁷⁴

A3.153 On 4 December 2017 [Openreach Fibre Team Senior Manager 2] replied to the above emailed stating “that plan works for me”.⁴⁷⁵

December 2017: Approach to Desktop Survey Outputs

A3.154 [REDACTED]^{476 477}

A3.155 [REDACTED]⁴⁷⁸

December 2017: Discussion of Ethernet vs FOD for eir

A3.156 On 6 December 2017 [Openreach Fibre Team Senior Manager 2] and [Openreach Fibre Team Senior Manager 1] began a conversation over instant messenger which contained the following exchanges:

⁴⁷⁴ Email from [BT Senior Manager 2] to [Openreach Fibre Team Senior Manager 2], dated 4 December 2017 at 13:18

⁴⁷⁵ Email from [Openreach Fibre Team Senior Manager 2] to [BT Senior Manager 2], dated 4 December 2017 at 14:56

⁴⁷⁶ [REDACTED]

⁴⁷⁷ [REDACTED]

⁴⁷⁸ [REDACTED]

[Openreach Fibre Team Senior Manager 2] R 11:43:

we need to be mindful not to push [BT eir Account Team Member 3] one way or another they need to make their own decisions...

as they are not the only ones asking for those quotes

so important everyone gets a level playing field!

[Openreach Fibre Team Senior Manager 1] R 11:44:

I'm on that page. I'm also trying to make sure that they remember that EAD is good too (good for all of us)

[Openreach Fibre Team Senior Manager 2] R 11:45:

well yes but the problem is if they convince Eircom to do EAD

and BTBPS anyway has decided [X] then that's not great either

one way or the other there will be a loser here

either OR NI loses the Eircom contract or they lose BTB

except of course today they do not have BTB serving this end-customer

[Openreach Fibre Team Senior Manager 1] R 11:48:

My main concern is that resourcing of FoD is a big concern for me (both surveys and subsequent build). That is what I'd like to discuss with you as I had a thought about that yesterday. Have discussed with [X] and [X] and wanted to bring you into this.⁴⁷⁹

January 2018: [BT Executive 2's] views on BT's Bid

A3.157 On 16 January 2018 [BT Bid Team Member 8] [X] shared a proposed agenda for a "PSSN Meeting" on 18 January with [PA to BT Executive 2] and asked [them] to check [BT Executive 2's] view.⁴⁸⁰ [BT Executive 2] [X] replied to [PA to BT Executive 2] on 17 January stating the focus would be on the financial model and assumptions. [BT Executive 2] also said "How do we get to a win price."⁴⁸¹

March 2018: Openreach's public position including to BPS

A3.158 On 1 March 2018 [Openreach Senior Manager 1] and [Openreach Executive 3] discussed issues with BT BPS wanting to use FOD. [Openreach Senior Manager 1] expressed a "need to get them on EAD" and stated "we are trying to put them off [using FOD] but it's not working." One of the reasons for the issue is cited as the "[X] process and systems" of FOD.⁴⁸²

⁴⁷⁹ Instant messages between [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 6 December 2017

⁴⁸⁰ Email from [BT Bid Team Member 8] to [PA to BT Executive 2], dated 16 January 2018 at 14:34

⁴⁸¹ Email from [BT Executive 2] to [PA to BT Executive 2], dated 17 January 2018 at 07:13

⁴⁸² Instant messages between [Openreach Senior Manager 1] and [Openreach Executive 3], dated 1 March 2018

- A3.159 On 6 March 2018 [BT Account Team Member 3] [X] emailed [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2] asking them to join a planned session with members of BPS at which FOD would be discussed. [BT Account Team Member 3] said that: *“I’m conscious we will be covering old ground here and the answers we give may not be what BPS want to hear, but as they are pressing ahead with using FoD [X] then I think it would pay to stay close to BPS on this and ensure they are fully aware of all the product limitations.”*⁴⁸³
- A3.160 [X].⁴⁸⁴
- A3.161 On 9 March 2018, [Openreach Senior Manager 1] raised the issue of BT BPS’s use of FOD with [Openreach Executive 1] and other Openreach Executives, stating of BT Business: *“They have bid FOD for [X]. The forecast has us ramping up to [X] per month by Dec. [...] and we are [X] resourced.”* [Openreach Senior Manager 1] continued: *“Since Monday we have been pushing to change technology and limit volume, but we have not got anywhere...”*⁴⁸⁵ It was agreed that the issue should be discussed during an already planned FTTP call, which [Openreach Executive 1, [Openreach Executive 2], [Openreach Executive 3] and [Openreach Senior Manager 1] were due to attend on 9 March 2018.⁴⁸⁶
- A3.162 On 9 March 2018 an announcement was drafted to set a limit on the number of FOD orders (“the capacity announcement”). The intention of the announcement was to continue delivering FOD for single orders and those customers utilising Government vouchers, *“while stopping mass adoption in bids”*.⁴⁸⁷
- A3.163 When circulating the capacity announcement for sign-off, [Openreach Senior Manager 1] noted the rationale as being that *“[X].”*⁴⁸⁸
- A3.164 Concerns were raised about the optics of the capacity announcement.⁴⁸⁹ In response, [Openreach Senior Manager 1] said the capacity announcement will *“stop the service being used for something which it was not intended”*.⁴⁹⁰ Later, [Openreach Executive 2] noted that

⁴⁸³ Email from [BT Account Team Member 3] to [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 6 March 2018 at 09:47

⁴⁸⁴ [X]

⁴⁸⁵ Email from [Openreach Senior Manager 1] to [Openreach Executive 1], [Openreach Executive 2], [Openreach Executive 3], [X], [X], dated 8 March 2018 at 19:48

⁴⁸⁶ Email from [Openreach Executive 2] to [Openreach Executive 1], [Openreach Senior Manager 1], [Openreach Executive 3], [X] and [X], dated 9 March 2018 at 06:16

⁴⁸⁷ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [X], [Openreach Executive 3], [X], [Openreach Fibre Team Senior Manager 1] and [Openreach Fibre Team Senior Manager 2], dated 9 March 2018 at 12:24

⁴⁸⁸ Email from [Openreach Senior Manager 1] to [Openreach Executive 2], [Openreach Executive 3], [X], [X], [X], [X], [Openreach Fibre Team Senior Manager 1], [Openreach Fibre Team Senior Manager 2], [X], [X], [X], [X] and [Openreach Fibre Team Senior Manager 3], dated 9 March 2018 at 18:43

⁴⁸⁹ Email from [X] to [Openreach Senior Manager 1], [Openreach Executive 2], [Openreach Executive 3], [X] and [X], dated 12 March 2018 at 13:21

⁴⁹⁰ Email from [Openreach Senior Manager 1] to [X], [Openreach Executive 2], [Openreach Executive 3], [X] and [X], dated 12 March 2018 at 17:30

“we understand that folks may be trying to use [FOD] for wider scale rollout (for which it wasn’t designed).”⁴⁹¹

- A3.165 On 13 March 2018 [Openreach [X]] emailed [X], saying that *“The World has moved in the last 2 days and FoD is now off-the-table for these bids. As of Friday, [Openreach Executive 3] and [Openreach Senior Manager 1] have agreed to constrain use of the product for use on only single orders (consumers and businesses typically), which means that it cannot be used by any CP in major network upgrade bids. We are currently shaping and will be publishing a statement on this to Industry at CFPCG tomorrow.”⁴⁹²*
- A3.166 On 13 March 2018, [Openreach [X]] sent an email to CPs who had previously ordered or enquired about FOD. The email previewed the capacity announcement and stated that *“as you know, FoD is not intended for major multi-sites network upgrade projects, for which there are more appropriate products in our portfolio”⁴⁹³*.
- A3.167 The update itself was delivered at the Copper and Fibre Products and Commercial Group (CFPCG) on 14 March 2018 and read as follows:

Further to our January 2018 CFPCG Industry Forum guidance inviting you to share with us your plans for the FTTP on Demand (FoD) product, we now wish to clarify our position regarding FoD order capacity for the 18/19 Financial year (April 18 to March 19).

Following our recent Fibre First announcements and with greater focus on building Fibre to the Premises (FTTP) proactively within 8 major UK cities, we wish to advise that our FoD order capacity for the year ahead will remain constrained in 18/19

We will continue to support individual FoD customer orders where possible within an overall industry-wide operational capacity of 20 orders pcm

We advise that FoD is not suitable for major multi-sites network upgrade projects. Before you commit to any sales plans, please consult us first to ensure suitability of your project for FOD delivery.

We value your continued use of this product within these product and existing contractual guidelines. If you wish to discuss this further, please contact your Sales and Relationship Manager who will be happy to arrange.⁴⁹⁴

- A3.168 In responding to press interest about the announcement, a statement from Openreach was discussed internally. [Openreach Senior Manager 1] commented that *“The niche FTTP product is set for a bespoke delivery and is resource intensive”*. Clarifying this statement, [Openreach Senior Manager 1] said to another Openreach employee *“if you [a CP] want a*

⁴⁹¹ Email from [Openreach Executive 2] to [X], [X], [Openreach Senior Manager 1], [Openreach Executive 3] and [X], dated 12 March 2018 at 19:42

⁴⁹² Email from [Openreach [X]] to [X] and [BT Account Team Member 3], dated 13 March 2018 at 08:53

⁴⁹³ Email from [Openreach [X]], dated 13 March 2018, titled *“FTTP on Demand (FoD) Order Capacity for 18/19”*

⁴⁹⁴ Slide desk titled *“FTTP Product Developments”*, presented to the Copper and Fibre Products and Commercial Group on 14 March 2018, page 8

*volume product (scale) then use Ethernet or NGA FTTC, don't bid something that is handcrafted - FOD! It will be a [X] customer experience."*⁴⁹⁵

- A3.169 Following [Openreach [X]]'s email of 13 March 2018 previewing the capacity announcement, on 14 March 2018 [X] sent an email to other colleagues in BT adding some context to the capacity announcement, which was later forwarded to [BT Bid Team Member 1]. [X]:

[X].

- A3.170 On 22 March 2018 (eight days after the capacity announcement) a call occurred between [Openreach Senior Manager 2], [Openreach Executive 3], [Openreach Senior Manager 2] and [BT Executive 2].⁴⁹⁶
- A3.171 Before the call occurred, [Openreach Senior Manager 2] notified [Openreach Executive 2] of the call and noted that [Openreach Executive 3] and [BT Executive 2] were *"really not happy with the restriction to 20 per month"*⁴⁹⁷
- A3.172 Immediately after the call, [BT Senior Manager 3] asked [BT Bid Team Member 3] to request that [BT Bid Team Member 1] reach out to [Openreach Senior Manager 2] on the FOD assumptions for NIPSSN and asked about different technical solutions for Great Britain. [BT Senior Manager 3] also said *"Don't need to review the PSSN bid as its too late now to make changes."*⁴⁹⁸
- A3.173 On 23 March 2018 [Openreach Senior Manager 2] sent an email to [Openreach Executive [X]], [Openreach Executive [X]] and [Openreach Senior Manager 1] titled *"FoD and PSSN (North Ireland PSN) bid escalation"*. [Openreach Senior Manager 2] said [they] wanted to give [Openreach Executive [X]] and [Openreach Executive [X]] sight *"so you can agree [X] [Openreach Executive [X]] and also so you can think about we want to play this."* The email contained the following detail:

⁴⁹⁵ Email from [Openreach Senior Manager 1] to [X], [X], [X], [Openreach [X]], and [BT Account Team Member 3], dated 13 March at 17:27

⁴⁹⁶ Meeting invite sent on behalf of [Openreach Executive 3] to [BT Executive 2], [BT Senior Manager 3] and [Openreach Senior Manager 2], due to occur on 22 March 2018 at 15:00

⁴⁹⁷ Email from [Openreach Senior Manager 2] to [Openreach Executive 2], dated 22 March at 08:29

⁴⁹⁸ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2] and [BT Bid Team Member 3], dated 22 March 2018 at 16:22

Context:

BT B&PS are bidding on a multi-year PSSN in Northern Ireland I spoke with [BT Bid Team Member 1] [X] to understand the volume of FTTP/FoD required for the B&PS PSSN bid: [X].

Issue:

Our recent announcement of not being able to support more than 20 FoD orders a month has created a hurdle as to whether they can proceed with their bid (going in next week), and [BT Executive [X]] is going to be discuss this with [Openreach Executive [X]] on Monday. Our issue is that we can't change tack for one customer or make NI an exception as there is another bidder for the NI networks and it is important we give the same opportunities to all CPs especially given [X] [BT Executive [X]].

NI delivery looks viable:

NI Networks tell me it could deliver the demand by shaping unannounced FTTP rollout plans to take benefit from FoD revenues, [X]. However, we need to legitimise this in the context of our recent statement recently around limit orders to a maximum of 20 per month.

The above is based on speaking to [BT Account Team Member 2] and [X] and [BT Senior Manager 2], who have been gearing themselves to do this for either BT B&PS or Eir. They report in to [BT Executive 2] via [BT Senior Manager 2], though there is separation in relation to B&PS and NI Networks on bids and network delivery.

Options to move forward:

One idea is do we make a statement that "we have received CP feedback in relation to our recent statement constraining FoD and we are now reviewing our position and looking at how we may be able to support large scheduled PSN rollouts that give sufficient notice and geographic forecasts". Such a statement may be enough to signal to CPs that they can either bid at risk or continue to wait for clarity.

I am sure there are similar options related to how we would message this, however we may then be opening up wider PSN bids with sufficient notice and geographic forecasts and we need a clear equivalent rationale for determining which ones we can do and which we cannot."⁴⁹⁹

A3.174 [X]^{500 501 502 503}

A3.175 [X]⁵⁰⁴

⁴⁹⁹ Email from [Openreach Senior Manager 2] to [Openreach Executive [X]], [Openreach Executive [X]] and [Openreach Senior Manager 1], dated 23 March at 14:24

⁵⁰⁰ [X]

⁵⁰¹ [X]

⁵⁰² [X]

⁵⁰³ [X]

⁵⁰⁴ [X]

A3.176 [REDACTED]^{505 506 507}

A3.177 [REDACTED]^{508 509}

A3.178 Ofcom has not seen any evidence of a statement being issued which clarified the announcement was not intended to apply to Northern Ireland.

A3.179 [Openreach Senior Manager 2's] 23 March email referred to the fact [BT Executive [REDACTED]], was due to discuss the capacity announcement being a hurdle to BT submitting their NIPSSN bid with [Openreach Executive [REDACTED]]. The discussion was planned for 26 March 2018.

A3.180 On 26 March 2018 [BT Senior Manager 3] sent [Openreach Senior Manager 2] an email titled *"Feedback from [Openreach Executive [REDACTED]]/[BT Executive [REDACTED]] Session"*. [BT Senior Manager 3] says the direction [they] got was *"[Openreach Executive [REDACTED]] was to ask [Openreach Executive [REDACTED]]⁵¹⁰ and others for a way forward, [BT Executive [REDACTED]] was holding [their] ground"*.⁵¹¹ [Openreach Senior Manager 2] replied stating *"I think there is a way forward for PSSN for any bidder (B&PS or other) as the constraints on FoD FTTP are not an issue there in NI."*⁵¹²

A3.181 On 28 March 2018 an email was sent by [BT Senior Manager 3] to [Openreach Senior Manager 2] and [Openreach Executive 3], in which [BT Senior Manager 3] stated *"I am for example unsure how we proceed [...] with PSSN given the note you issued to industry. I suspect there is a risk that whoever wins the deal the other party may challenge so we need to clear up our position – the deal could well come under significant scrutiny."*⁵¹³

A3.182 Later the same day [BT Senior Manager 3] sent an email to [Openreach Senior Manager 2], [Openreach Executive 3] and [Openreach Senior Manager 1] which stated *"We sign off the PSSN bid today... We will be doing so on the basis of your comments below that FoD FTTP will be provided for that opportunity [referring to [Openreach Senior Manager 2's] email of 26 March 2018 quoted above]."*⁵¹⁴

A3.183 [Openreach Senior Manager 2] responded later to say that, regarding NIPSSN, *"the considered opinion is that this bid is deliverable once awarded to the successful bidder, whether B&PS or other."*⁵¹⁵

⁵⁰⁵ [REDACTED]

⁵⁰⁶ [REDACTED]

⁵⁰⁷ [REDACTED]

⁵⁰⁸ [REDACTED]

⁵⁰⁹ [REDACTED]

⁵¹⁰ Ofcom assumes this to be [Openreach Executive [REDACTED]]

⁵¹¹ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2], dated 26 March 2018 at 16:28

⁵¹² Email from [Openreach Senior Manager 2] to [BT Senior Manager 3] and [Openreach Senior Manager 1], dated 26 March 2018 at 16:37

⁵¹³ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2] and [Openreach Executive 3], dated 28 March 2018 at 08:18

⁵¹⁴ Email from [BT Senior Manager 3] to [Openreach Senior Manager 2], [Openreach Executive 3] and [Openreach Senior Manager 1], dated 28 March at 10:55

⁵¹⁵ Email from [Openreach Senior Manager 2] to [BT Senior Manager 3], [Openreach Executive 2], [Openreach Executive 3] and [Openreach Senior Manager 1], dated 28 March at 15:55

March – June 2018: FOD industrialisation

A3.184 Between March and June 2018, Openreach began internal discussions about how they might begin to support the use of FOD in bigger bids. This became known as ‘FOD industrialisation’.

A3.185 An update was presented at the Copper and Fibre Products and Commercial Group (CFPCG) on 13 June 2018.⁵¹⁶ The relevant minutes for the meeting read: “[Openreach [X]] stated that Openreach have been considering how to manage and support FoD orders for both individual customers and larger bids. Starting in 2019/20, Openreach are proposing to increase order capacity while managing orders by adapting availability and order management systems and process.”⁵¹⁷

⁵¹⁶ CFPCG FTTP Slides June 2018

⁵¹⁷ “CFPCG_Minutes_13 June_2018_V4”