Guidelines and Methodology on Financial Penalties in the context of the Access Regulations T07029

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Executive summary

When a person or organisation breaks rules that they are subject to, it is commonly accepted that there should be some form of sanction.

In the case of electronic communications in Ireland, providers that have significant market power (SMP) within markets are subject to specific regulatory obligations. Among other things, these obligations are designed to address specific market problems that have been identified, and to ultimately protect competition and consumers.

These are 'ex ante' obligations in the sense that they are upfront requirements to be fulfilled by *certain* providers of electronic communications that have been found to have SMP. This can be contrasted with the more general 'ex post' requirements that *all* firms (across all sectors) are subject to, including competition law.

In Ireland, where a provider of electronic communications services that has been designated as having SMP also operates at the downstream retail level—while providing wholesale inputs to other operators (Other Authorised Operators, OAOs)—it must provide these inputs in a way that does not impede the competitive process or harm consumers. Under the Access Regulations,[1] the Commission for Communications Regulation (ComReg) may impose on operators with SMP appropriate obligations that may include access, non-discrimination, transparency price control, cost accounting, or accounting separation obligations. The precise legal framework is explained further below.

ComReg is responsible for enforcing compliance with obligations that have been imposed under the Access Regulations. Under the current legislative framework, if, following an investigation, ComReg finds that there has been a breach, it has civil enforcement powers to apply to the High Court to request the imposition of financial penalties as well as to make a proposal about the amount of those penalties. Ultimately, the Court decides whether a penalty should be levied and what its magnitude should be, albeit taking into account ComReg's proposal on the appropriate level.

Where penalties for breaches of wholesale obligations have been considered appropriate by ComReg in the past, these have been decided on a case-by-case basis rather than according to a pre-defined methodology.

Against this background, and in contemplation of enforcement litigation,[2] Oxera was asked by ComReg in 2016 to explore whether a 'turnover-based' approach to setting penalties for breaches of ex ante wholesale obligations is appropriate. This embodies the principle of deterrence (i.e. creating incentives not to breach ex ante wholesale obligations). Similar approaches are employed by the European Commission and many national competition authorities in the context of breaches of ex post competition law, as well as by some National Regulatory Authorities (NRAs) in an ex ante regulatory context.

In developing a workable methodology for ComReg, we noted that any penalty should be consistent with the Commission's guidance on setting penalties for

[1] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011). The Access Regulations transpose Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (as amended by Directive 2009/140/EC).
[2] High Court Record Nos 2017/186 MCA and 2017/187 MCA.

breaches of regulatory obligations.[3] In this respect, any penalty should be appropriate, effective, proportionate and dissuasive.

As part of our analysis we explored the theory of harm concerning breaches of wholesale regulatory obligations. Essentially, where an SMP provider of wholesale services hinders wholesale access by retail competitors, this may dampen competition downstream at the retail level.

Competition and regulatory policy are based on similar economic principles. Refusal to supply and margin squeeze share the same economics as breaches of regulatory requirements relating to non-discrimination, transparency and access. The theory of harm is that a breach of wholesale regulatory obligations would be expected to have a knock-on impact on downstream retail competition.

Ex ante regulatory obligations may go further than ex post competition rules, in that the former are intended to promote a level playing field, and that breaches of these may be expected, a priori, to have a negative impact on competition.

We also examined the theory of optimal penalty design. Based on full rationality and perfect information, the penalty would be one based on a narrow view of 'proportionality'—one in which the penalty reflects the wrongdoing, in terms of the illicit profits made or the harm caused by the infringement. However, with imperfect monitoring, an additional 'deterrence' element is needed—to take account of the probability that a non-compliant company may not always be caught.

We noted that there were various reasons why, for breaches of wholesale obligations, it may be difficult to implement a theoretical approach to penalty design.

In arriving at a suggested methodology, we also examined various precedents regarding the setting of penalties—namely:

- the European Commission 2006 ex post competition fining guidelines;
- international precedents on ex post competition law fines;
- ex ante communications fining methodologies in different member states;
- approaches adopted by various UK regulators for ex ante breaches.

Our review of precedents was not intended to be comprehensive, but, in addition to the European Commission 2006 guidance, it did highlight some useful experiences in various countries. As well as several competition law cases in national jurisdictions (including Belgium, South Africa and Poland), we examined examples of frameworks and penalties levied for ex ante regulation breaches (including in the Netherlands and the UK).

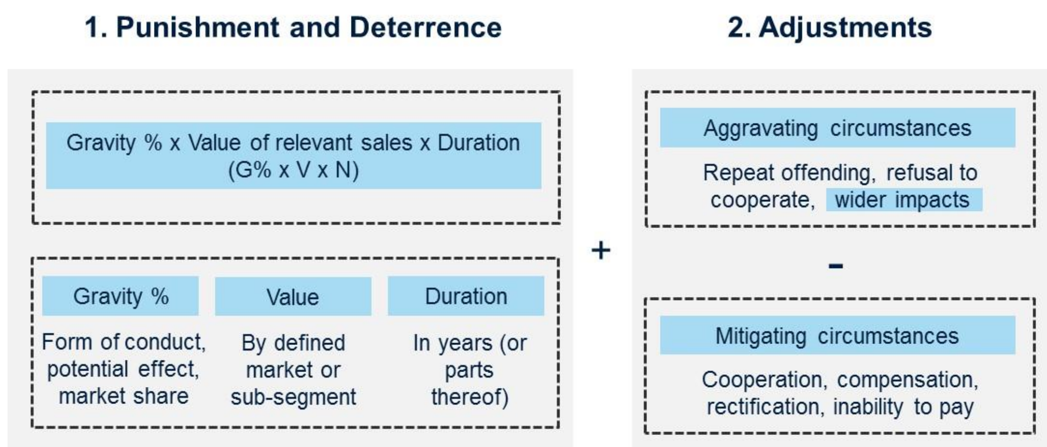
A number of examples refer to turnover in determining the level of the financial penalty, although the precise way in which turnover plays a role has varied. The approaches typically take account of the seriousness of the form of

[3] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108/21, 24.4.2002; as amended by Article 3, Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337/37, 18.12.2009. Also, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002; as amended by Article 1 of Directive 2009/140/EC.

conduct concerned, the assessment of any gains/harm identified (if possible), and any aggravating and mitigating factors.

Basing penalties on company turnover is intrinsically linked to ensuring adequate deterrence. On balance, we proposed that a turnover-based approach would be appropriate, and we put forward a workable methodology, as summarised in the figure below. This represented a practical, deterrence-based approach.

Recommended methodology for setting penalties



Source: Oxera.

The approach would then involve assessing the following:

- the turnover metric used for relevant sales;
- the determination of gravity;
- the determination of duration;
- the assessment of mitigating/aggravating factors.

Our approach (the 'general methodology') was not the only methodology that could be applied in an ex ante regulatory setting, but it was a practical methodology based on sound economic and policy principles.

As regards defining the value of relevant sales, we noted that it would be possible to take a wider or narrower view of this. A conservative approach would be to start with a narrow definition of relevant retail sales—the specific retail sub-segments that are affected by the breach—and then look at the extent to which there are reasons to support the expansion of the relevant market to consider other retail segments.

Once relevant sales were decided on, it would be necessary to apply an assumption on gravity (a percentage of affected sales). Gravity will depend on the nature of the conduct in question, and the market share of the breaching party with wholesale SMP in the affected retail market or sub-segment. Some potential ranges are set out in the box below (these figures are purely illustrative, as gravity will vary on a case-by-case basis).

Potential ranges for gravity (G) by conduct

- Equivalent to refusal to supply/margin squeeze: 10–15% (e.g. Belgacom Mobile, Telkom SA, Telekomunikacja Polska)
- Discrimination/transparency/access breach with a material (although less significant) potential impact on retail competition: 5–10%
- Discrimination/transparency/access breach with a potential impact on retail competition: 1–5%
- Pure regulatory breach with a very low potential impact on competition: <2%

Source: Oxera.

To obtain the 'basic amount' for the penalty, the percentage of sales figure obtained would then be multiplied by the duration of the breach (in years, or parts thereof).

Aggravating and mitigating circumstances would then also be taken into account—as adjustments to the basic amount. It might be sensible to offer discounts to penalties where a breach was not deliberate, where it has since been remedied, and where there has been cooperation with the regulator. Discounts to the basic amount might be as high as 50%, although this will vary on a case-by-case basis. For repeat offending (recidivism), penalties would be increased.

Taking our 2016 analysis in the round, we noted that:

- the turnover-based approach is consistent with the theory of optimal penalty design, and recognises the role of both punishment and deterrence in an economic sense;
- the approach recognises that breaches of ex ante regulatory obligations at the wholesale level are inherently serious, in that it is explicitly recognised that there is a need to promote a level playing field;
- the approach is transparent and practical to implement, using readily available data (for example, on turnover, duration, and benchmarks on gravity), even if a degree of judgement is necessarily involved;
- the approach is consistent with the EU rules on setting penalties for ex ante breaches in telecoms regulation (i.e. penalties should be appropriate, effective, proportionate and dissuasive);
- there are many examples of a turnover-based approach being used in ex post competition law and ex ante regulatory settings, and turnover is often referred to as a relevant consideration in assessing penalties;
- the recommended approach to gravity takes a conservative view of the seriousness of the breach relative to the approach in ex post competition cases;
- the approach is not completely mechanistic, and it recognises aggravating and mitigating circumstances and the need for a check on proportionality.

In December 2018, ComReg reached a settlement in respect of compliance litigation that was ongoing at the time.[4] As part of this settlement, ComReg

[4] ComReg (2018), 'Wholesale Compliance litigation update – Outcome of Cases 481 and 568 and related Litigation', Information notice 18/110, 10 December.

agreed to consult publicly on how it might calculate proposed financial penalties in future compliance litigation concerning breaches of obligations imposed on operators under the Access Regulations.

With this in mind, in 2019 we undertook a further review of approaches and precedents across Europe to explore again the suitability of the turnover-based approach. We explored a variety of other precedents to test whether our general methodology remained sound. This included:

- surveys of the approaches adopted by various European electronic communications NRAs, and further research on other sector NRAs in the UK;
- discussions with various regulatory authorities in Ireland (including in financial services, competition and consumer protection, broadcasting and utilities);
- the direction of travel in setting penalties for breaches of data protection rules across the EU;
- the direction of travel in setting penalties for breaches of net neutrality rules across the EU.

Based on our subsequent analysis in 2019, we have the following additional observations:

- given the broad requirements of the European electronic communications regulatory framework to date, there is considerable variation in the national statutory frameworks applied by member states in relation to penalties;
- relatively few communications NRAs across Europe have explicitly set out guidelines for assessing penalties for breaches of SMP regulatory obligations beyond the statutory provisions;
- there is inconsistency across EU member states in measuring harm for breaches of wholesale regulatory obligations (whether harm to consumers, competitors or retail competition), and penalties have been levied without the need to demonstrate specific quantified harm;
- there is more consistency in the fact that various factors tend to need to be taken into account by NRAs in determining the size of a penalty;
- the European Electronic Communications Code (EECC) contains further provisions in relation to NRA powers to set dissuasive penalties, which all member states (including Ireland) must transpose by the end of 2020;
- the approaches of Ofcom (UK), the Central Bank of Ireland and in EU data protection point towards a deterrence-based approach;
- the direction of travel in Ireland is towards enhanced regulatory powers to set deterrence-based penalties (the Law Reform Commission).

Therefore, on balance, we continue to consider that the turnover approach that we proposed in 2016 (the general methodology) remains valid. It is a practical, deterrence-based approach.

While the additional evidence that we have taken into account is somewhat mixed, we consider that there are clear examples, notably in the case of Ofcom in the UK, the Central Bank of Ireland, and developments in EU data

protection, that are consistent with our approach. In particular, these examples emphasise the role of deterrence in levying financial penalties.

Moreover, it is important to highlight the direction of travel in Ireland and recommendations made by the Law Reform Commission. The report highlights the importance of financial penalties as a core power that allows regulators to effectively enforce compliance. It emphasises the important goal of using financial penalties as a means of deterring non-compliance.

In undertaking our further analysis in 2019, we also considered how the following might be addressed for less serious Access Regulations breaches, such as where an operator breaches a transparency obligation by failing to notify ComReg of a new price tariff.

Some breaches of the Access Regulations may be regarded as less serious in nature, such as delays by the SMP operator in notifying an OAO of a refusal of a Regulated Access Product (RAP) request and/or a delay in notifying ComReg of this refusal, or the failure to notify a change to a Mobile Termination Rate. For these types of breach, implementing the above general methodology and applying a pro forma approach to the duration of the breach (based on a percentage of the year's duration) may not be an appropriate, proportionate solution—in that the general methodology should ideally be targeted at more serious breaches of SMP obligations in a vertically integrated setting.

In addition, from an administrative perspective, the pro forma approach would be time-consuming to implement—it would require the assessment of theory of harm, relevant sales, gravity and other factors on a frequent basis.

A simpler and more proportionate approach would be to adopt a tariff-based approach to the less serious breaches listed above.

For these types of breaches we recommend that a tariff should be set out by ComReg for each breach, composed of a fixed penalty (€ per breach) and a variable component (€ per week).

For example, the following approach might be adopted:

Penalty amount = [Fixed Tariff + (Weekly Tariff * No. of Weeks)]

Whereby:

- Fixed Tariff = one-off Fixed Penalty Tariff applied per breach (€ per breach)
- Weekly Tariff = Weekly Penalty Tariff applied per week for duration of the breach (€ per week)

Where breaches are repeated (recidivism), the fact that the tariff had been previously levied (e.g. in the same SMP market, but not necessarily in relation to the same product) would be an aggravating factor in applying the subsequent tariff. Other aggravating (and/or mitigating) factors may also be taken into account, as required.

The overall penalty would be subject to a maximum cap (in €, potentially related to wholesaler turnover in the market segment concerned).

This approach is simple, proportionate, timely, administratively low-cost and effective for less serious breaches. It also provides clarity to operators.

1 Introduction

1.1 Background to our research

When a person or organisation breaks rules that they are subject to, it is commonly accepted that there should be some form of sanction.

In the case of electronic communications in Ireland, providers that have significant market power (SMP) within markets are subject to specific regulatory obligations. Among other things, these obligations are designed to address specific market problems that have been identified, and to ultimately protect competition and consumers.

These are 'ex ante' obligations in the sense that they are upfront requirements to be fulfilled by *certain* providers of electronic communications that have been found to have SMP. This can be contrasted with the more general 'ex post' requirements that *all* firms (across all sectors) are subject to, including competition law.

In Ireland, where a provider of electronic communications services that has been designated as having SMP also operates at the downstream retail level—while providing wholesale inputs to other operators (Other Authorised Operators, OAOs)—it must provide these inputs in a way that does not impede the competitive process or harm consumers. Under the Access Regulations,[5] the Commission for Communications Regulation (ComReg) may impose on operators with SMP appropriate obligations that may include access, non-discrimination, transparency price control, cost accounting, or accounting separation obligations. The precise legal framework is explained further below.

ComReg is responsible for enforcing compliance with obligations that have been imposed under the Access Regulations. Under the current legislative framework, if, following an investigation, ComReg finds that there has been a breach, it has civil enforcement powers to apply to the High Court to request the imposition of financial penalties as well as to make a proposal on the amount of those penalties. Ultimately, the Court decides whether a penalty should be levied and what its magnitude should be, albeit taking into account ComReg's proposal on the appropriate level.

Where penalties for breaches of wholesale obligations have been considered appropriate by ComReg in the past, these has been decided on a case-by-case basis rather than according to a pre-defined methodology.

Against this background, and in contemplation of enforcement litigation,[6] Oxera was asked by ComReg in 2016 to explore whether a 'turnover-based' approach to setting penalties for breaches of ex ante wholesale obligations was appropriate. This would embody the principle of deterrence (i.e. creating incentives not to breach ex ante wholesale obligations). Similar approaches are employed by the European Commission and many national competition authorities in the context of breaches of ex post competition law, as well as by some National Regulatory Authorities (NRAs) in an ex ante regulatory context.

On balance we proposed that a turnover-based approach would be appropriate, and we put forward a workable methodology. This was not the

[5] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011). The Access Regulations transpose Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (as amended by Directive 2009/140/EC).
[6] High Court Record Nos 2017/186 MCA and 2017/187 MCA.

only methodology that could be applied in an ex ante regulatory setting. However, it was a practical methodology based on sound economic and policy principles. It was not entirely mechanistic, as an element of judgement would be required in its application.

1.2 The 2016 research: a recommended general methodology

In our original research we were asked to address the following questions.

- What are the economic principles underlying the European Commission's fining guidance for breaches of competition law?
- How does this compare with other potential methodologies used by electronic communications NRAs in the EU?
- Is the turnover-based approach, applied in ex post competition enforcement cases, suitable (i.e. economically well founded and soundly justified) for calculating penalties for breaches of ex ante wholesale regulatory obligations in Ireland's communications sector?
- How might the Commission's approach be adapted, if necessary, given this difference in context (ex ante versus ex post)?

In exploring the above, we examined the theory and practice of setting penalties, while taking into account the specific Irish context. We examined a variety of precedents, including:

- the European Commission's 2006 ex post competition methodology;
- international precedents on ex post competition cases;
- European communications NRAs' approaches to ex ante breaches;
- approaches adopted by various UK regulators for ex ante breaches.

Our review of the precedents was not intended to be a comprehensive review, but it did highlight some useful experiences in other countries. In addition to several competition law cases in national jurisdictions (including Belgium, South Africa and Poland), we examined examples of frameworks and penalties levied for ex ante regulation breaches (including in the Netherlands and the UK).

In each of these cases the precise application of the approach was different. A number of them referred to turnover in determining the level of the financial penalty, although the precise way in which turnover played a role varied. The approaches typically took account of the seriousness of the form of conduct concerned, the assessment of any gains/harm identified (if possible), and any aggravating and mitigating factors.

On balance, we proposed that a turnover-based approach would be appropriate, and we put forward a workable methodology.

1.3 The 2019 research: exploring further precedents

In December 2018, ComReg reached a settlement in respect of compliance litigation that was ongoing at the time.[7] As part of this settlement, ComReg agreed to consult publicly on how it might calculate proposed financial

[7] ComReg (2018), 'Wholesale Compliance litigation update – Outcome of Cases 481 and 568 and related Litigation', Information notice 18/110, 10 December.

penalties in future compliance litigation concerning breaches of obligations imposed on operators under the Access Regulations.

With this in mind, in 2019 we undertook a further review of approaches and precedents across Europe, and a further review of the suitability of the turnover-based approach. We explored a variety of other precedents to test whether our general methodology remained sound. This included:

- surveys of the approaches adopted by various European electronic communications NRAs, and further research with NRAs in other sectors in the UK;
- discussions with various regulatory authorities in Ireland (including for financial services, competition and consumer protection, broadcasting and utilities);
- examining the direction of travel in setting penalties for breaches of data protection rules and breaches of net neutrality rules across the EU.

In the additional research that we have undertaken on how penalties are set in other contexts, developments are continuing to unfold. Therefore, in addition to examining the situation now and case study precedents, we have taken a forward-looking view of the general direction of travel.

We have found that the way in which NRAs have applied the enforcement regime under the electronic communications regulatory framework varies markedly by member state.

However, it is important to look forward. We note, in particular, that there is an impetus in Ireland across various sectors to amend the legal and institutional regime to provide more powers to regulators to set deterrence-based penalties.

In addition, at the EU level, the recent frameworks developed for data protection and net neutrality emphasise the role of deterrence. This is the general direction of travel that we observe.

1.4 Structure of this report

The remainder of this report is structured as follows.

We begin by setting the scene:

- in section 2, we briefly discuss the relevant legal and regulatory framework in Ireland, and what this means for the design of an approach for calculating the penalty for a breach of regulatory obligations;
- in section 3, we outline the economic theory behind regulatory enforcement. In particular, we consider the objectives of regulatory sanctions before discussing different types of regulatory sanction, and how financial penalties (if deemed necessary) can be optimally designed;

We then move onto the evidence that we explored in 2016:

- in section 4.1, we examine the European Commission’s ex post fining guidelines;[8]

[8] This discussion also includes an update since the 2016 research on the ECN+ EU Directive, which was introduced in 2019.

- in section 4.2, we explore international precedents on ex post competition law fines levied by individual countries;
- in section 4.3, we look at the fining methodologies explored by communications regulators for breaches of ex ante obligations in different member states.

Following this, in section 4.4, we set out the approaches adopted by various UK NRAs for ex ante breaches. This is based on research undertaken in 2016, which we explored in more detail in 2019.

Finally, we summarise our core additional research in 2019:

- in section 4.5, we discuss our surveys of the approaches adopted by various European electronic communications NRAs;
- in section 4.6, we describe our discussions with various regulatory authorities in Ireland (including in financial services, competition and consumer protection, broadcasting and utilities);
- in section 4.7, we examine the direction of travel in setting penalties for breaches of data protection rules across the EU;
- in section 4.8, we look at the direction of travel in setting penalties for breaches of net neutrality rules across the EU.

We then discuss what would be an appropriate methodology for breaches of ex ante wholesale regulatory obligations in the Irish telecoms sector:

- in section 5, we present our original 2016 recommendations on a workable methodology for ComReg for calculating penalties for breaches of wholesale regulatory obligations, and we provide a hypothetical worked example;
- in section 6, based on our further 2019 research into the precedents, we then consider whether this general methodology remains appropriate. In particular, we consider the general direction of travel in setting penalties for breaches of ex ante regulatory obligations across EU member states.
- in section 7, we set out our main conclusions in the round.

Our 2019 survey of European electronic communications NRAs is described in more detail in the appendix.

Throughout this report we use the terms ‘penalties’ and ‘fines’. In practice, these terms are used in different contexts, but they are used interchangeably within this report. When we undertook our research, including of NRA precedents, the UK was an EU member state. Within this report, we refer to the UK precedent in the context that its regulators were then member state NRAs.

2 The legal and regulatory framework in Ireland

Any methodology for setting penalties for breaches of ex ante regulatory obligations needs to take into account the latest theory and regulatory best practice regarding penalty design.

Importantly, this must be consistent with the legal framework applicable to Ireland.

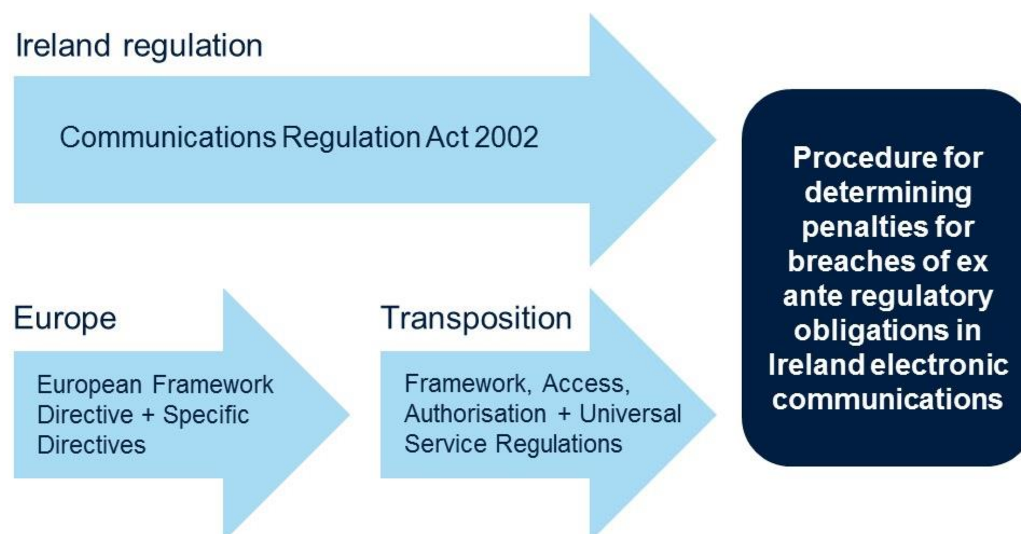
2.1 The legal and regulatory framework in Ireland

We have taken into account three key pieces of legislation in developing a methodology for imposing penalties for breaches of regulatory obligations.

First, ComReg has overarching regulatory functions and objectives, as set out in the Communications Regulation Act 2002 (as amended) (the '2002 Act'). Second, EU legislation requires member states to empower relevant authorities to levy penalties, while also requiring them to set out rules that are consistent with key criteria. Third, Ireland has transposed these requirements into its own legislation, through the adoption of a suite of Regulations. The Framework Regulations also set out ComReg's general objectives under this suite of Regulations, which are broadly consistent with ComReg's objectives under the 2002 Act.[9]

The various relevant elements of the legislation are illustrated in Figure 2.1.

Figure 2.1 Legal rules relevant to setting penalties in Ireland



Source: Oxera.

The 2002 Act sets out ComReg's *functions*, one of which is to:[10]

> ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks.

[9] Regulation 16 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the 'Framework Regulations').
[10] Section 10(1)(a).

The 2002 Act also sets out a number of objectives of the Commission, including: to promote competition; to contribute to the development of the internal market; and to promote the interests of users.[11]

In turn, ComReg must take 'all reasonable measures' towards achieving these objectives, including:[12]

> in so far as the promotion of competition is concerned—(i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality; (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector
>
> in so far as contributing to the development of the internal market is concerned—(i) removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level

In performing its functions—including setting penalties—ComReg must have regard to these objectives. It is also important that, in exercising its functions, ComReg applies objective, transparent, non-discriminatory and proportionate regulatory principles.[13] For example, ComReg may wish to apply penalties to encourage consumer choice at the retail level, and to discourage behaviour that could otherwise limit competition at the wholesale level.

As regards EU law requirements, member states across Europe have been required to transpose into their national legislation requirements set out in the 2002 Common Regulatory Framework for Electronic Communications. These requirements include those contained in the 'Framework Directive' and the 'Specific Directives' (Access Directive, Authorisation Directive, Universal Service Directive, and Directive on privacy and electronic communications[14]).

For example, Article 10 of the 2002 Authorisation Directive (as amended by the Better Regulation Directive of 2009)[15] provides the basis in EU law for the imposition by regulators of penalties for breaches of regulatory obligations in electronic communications. It states that, where such a breach occurs:

> The relevant authority shall have the power to require the **cessation** of the breach…either immediately or within a reasonable time limit and shall take **appropriate** and **proportionate** measures aimed at ensuring compliance. [emphasis added][16]

These 'appropriate and proportionate measures' include financial penalties, and member states must empower relevant authorities (in practice, government departments, economic regulators or courts) to impose:

> **dissuasive** financial penalties where appropriate, which may include periodic penalties having **retroactive** effect [emphasis added][17]

Further clarity is provided for cases in which a serious breach has occurred, and where the aforementioned penalties (or, indeed, other sanctions) have proven to be ineffective:

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[11] Section 12(1)(a).
[12] Section 12(2)(a) and section 12(2)(b).
[13] Regulation 16 of the Framework Regulations.
[14] Directive 2002/58/EC, OJ L 201, 31.7.2002, p. 37.
[15] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108/21, 24.4.2002; as amended by Article 3, Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337/37, 18.12.2009 (the 'Authorisation Directive').
[16] Article 10(3) of the Authorisation Directive.
[17] Article 10(3)(a) of the Authorisation Directive.

> In cases of **serious or repeated** breaches of the conditions of the general authorisation or of the rights of use, or specific obligations…, where measures aimed at ensuring compliance…have **failed**, national regulatory authorities may **prevent** an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use. Sanctions and **penalties** which are **effective**, **proportionate** and **dissuasive** may be applied to cover the period of any breach, even if the breach has subsequently been **rectified**. [emphasis added][18]

The above Article 10 Authorisation provisions need to be read in conjunction with Article 21a of the Framework Directive (again, as amended by the Better Regulation Directive). The latter states:

> Member States shall lay down **rules on penalties** applicable to infringements of national provisions adopted pursuant to this [the Framework] Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for **must** be **appropriate**, **effective**, **proportionate** and **dissuasive**. [emphasis added][19]

In the case of Ireland, the above EU provisions (set out in both the Framework Directive and Specific Directives) were transposed into national law in 2011. This was done through the adoption of a series of Regulations, as follows:

- the 'Framework Regulations';[20]
- the 'Access Regulations';[21]
- the 'Authorisation Regulations';[22]
- the 'Universal Service Regulations'.[23]

All four of these regulations contain materially identical terms regarding the methodology and process to be followed in imposing penalties for breaches of regulatory obligations. In all cases, there is a Civil law procedure for doing so.

If, following an investigation, ComReg is of the view that there has been a breach, it can use civil enforcement powers to apply to the High Court for a declaration of non-compliance and an order to impose financial penalties, whether or not the non-compliance has been remedied. The High Court must take account of ComReg's proposal, but is not bound by it—the Court ultimately decides whether a penalty should be levied and, if so, what its magnitude should be. Box 2.1 provides more details.

[18] Article 10(5) of the Authorisation Directive.
[19] Article 21a of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002; as amended by Article 1, Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337/37, 18.12.2009.
[20] Regulation 37 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).
[21] Regulation 19 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011).
[22] Regulation 16 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011).
[23] Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011).

Box 2.1 Procedure for determining penalties for breaches of ex ante regulatory obligations in Ireland electronic communications

The procedure, as set out in the four Regulations, is as follows.

- ComReg must apply to the High Court to seek a penalty for non-compliance by an operator (it does not have the power to apply the penalty itself).
- ComReg may then request that a penalty be paid for the period of non-compliance, even if there has since been compliance.
- The High Court must decide whether there has been a breach of regulatory obligations.
- It is then for the High Court to decide what amount, if any, should be paid, and it is not bound to the amount proposed by ComReg. In doing so, the High Court will consider the circumstances of the non-compliance, including:
  - its duration;
  - the effect on consumers, users and other operators;
  - the submissions of the regulator on the appropriate amount;
  - any excuse or explanation for the non-compliance.
- Any financial penalty ordered by the High Court shall be paid to ComReg as income.

Source: Oxera, based on Regulation 37 of the Framework Regulations; Regulation 19 of the Access Regulations; Regulation 16 of the Authorisation Regulations; and Regulation 31 of the Universal Service and Users' Rights Regulations.

An important distinction is between the *rules* that the EU provisions require and the *methodology* to be employed in setting penalties. The EU provisions are not prescriptive about the precise approach to be adopted by member states. In Ireland, the legislation sets out the rules to be followed by the High Court in terms of general principles and process. The particular penalty amount is then for ComReg to propose in its submissions to the High Court.[24] In doing so, ComReg may specify the methodology that it has used to derive the penalty.

More recently, in December 2018, the European Electronic Communications Code (EECC) was established. The EECC provides further provisions in relation to NRA powers to set penalties—as well as reiterating that such penalties should be 'appropriate, effective, proportionate and dissuasive'. The EECC needs to be transposed by all member states, including Ireland, by the end of 2020.[25]

[24] As discussed in section 4.2, EU member states differ in terms of the level of prescription in their rules on the methodology to be employed. In the Netherlands, for example, a government policy communication also sets out the methodology to be adopted. In the UK, the legislation requires the national regulatory authority (NRA) to set out a methodology.

[25] EECC (Directive (EU) 2018/1972), Art 29(1) states: 'Member States shall lay down rules on penalties, including, where necessary, fines and non-criminal predetermined or periodic penalties, applicable to infringements of national provisions adopted pursuant to this Directive or of any binding decision adopted by the Commission, the national regulatory or other competent authority pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. Within the limits of national law, national regulatory and other competent authorities shall have the power to impose such penalties. The penalties provided for shall be appropriate, effective, proportionate and dissuasive.' Directive (EU) 2018/1972 must be transposed in Ireland (and all other member states) by the end of 2020.

3 Theory of regulatory enforcement

This section provides an overview of the economics literature on regulatory enforcement, and the implementation and design of financial sanctions.

It first considers the objective of regulatory sanctions, before discussing different types of regulatory sanction. It then looks at how financial penalties, where they are deemed necessary, can be optimally designed to deliver the objectives of enforcement.

3.1 Objective of regulatory sanctions

The overall aim of regulatory sanctions is generally to ensure that regulated entities comply with regulatory obligations and are unable to benefit from non-compliance. Sanctions may also be used to provide redress to any parties that are harmed by regulatory non-compliance. These objectives are reflected, for example, in the six 'Macrory principles' for regulatory sanctions, which have been widely adopted by UK regulators, as set out in the box below. These principles are also broadly consistent with those adopted across Europe in setting penalties for non-compliance (see section 4).

Box 3.1 The Macrory principles

A sanction should:

1. aim to change the behaviour of the offender;
2. aim to eliminate any financial gain or benefit from non-compliance;
3. be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. be proportionate to the nature of the offence and the harm caused;
5. aim to restore the harm caused by regulatory non-compliance, where appropriate;
6. aim to deter future non-compliance (by both the offender and others within the regulatory community).

Source: Macrory, R. (2006), 'Regulatory Justice: Making Sanctions Effective', Final Report, Cabinet Office, November, http://webarchive.nationalarchives.gov.uk/20070305103615/http:/cabinetoffice.gov.uk/regulation/reviewing_regulation/penalties/index.asp.

3.2 The choice of regulatory sanction

Regulators typically have a spectrum of regulatory sanctions at their disposal, ranging from the less interventionist (such as written or verbal warnings) to more interventionist measures (such as financial penalties or licence revocation). This is captured in the literature in the concept of an enforcement pyramid, as introduced by Ian Ayres and John Braithwaite.[26]

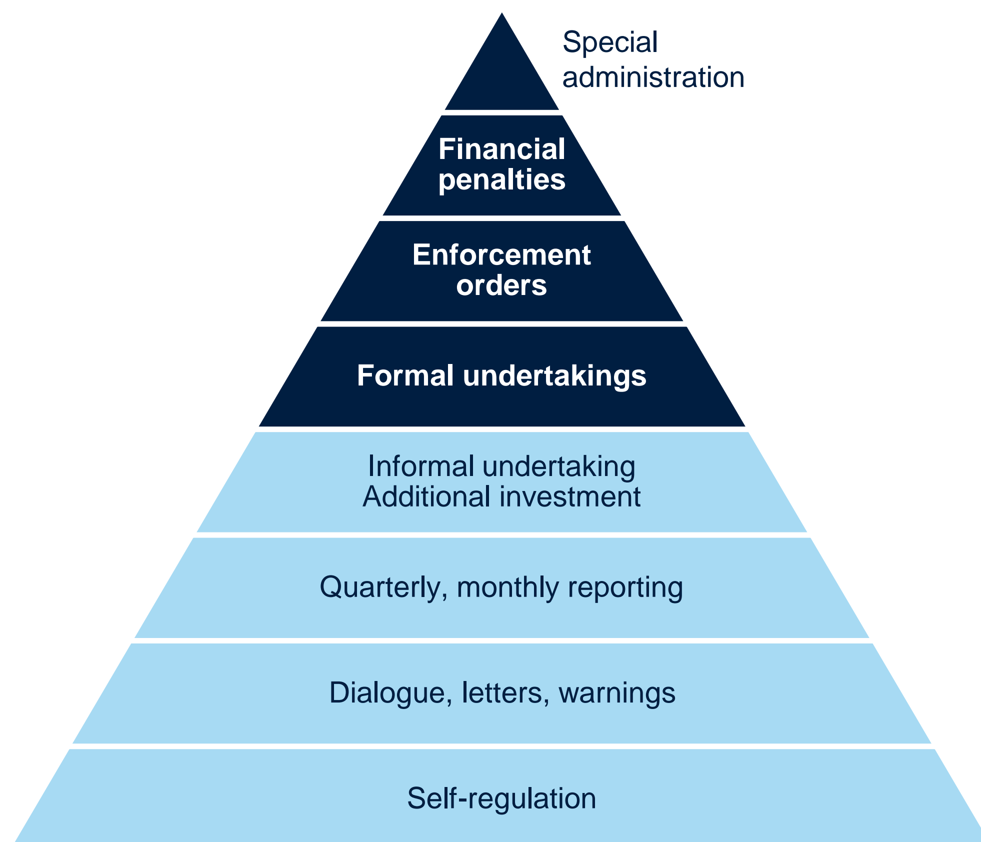
Under this model, the regulated company is subjected to increasingly interventionist sanctions in response to continued or more severe infringements (with less interventionist methods adopted where there is compliance). For example, a regulator might seek to address non-compliance through warnings and informal undertakings in the first instance, but impose

[26] Ayres, I. and Braithwaite, J. (1992), *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press.

formal enforcement orders or regulatory sanctions if the company continues not to comply.[27]

The enforcement pyramid concept has been adopted by a number of economic regulators—for example, Figure 3.1 outlines the hierarchy of sanctions that Ofwat (the economic regulator of the water industry in England and Wales) has available for enforcing compliance by water companies.

Figure 3.1 Ofwat's enforcement pyramid



Source: Ofwat (2009), 'Ofwat's approach to enforcement', July, p. 9.

Financial sanctions are therefore typically one component of a wider regulatory enforcement toolkit. An important initial task for regulators is deciding whether a financial sanction is the optimal regulatory response or whether the use of other enforcement tools (such as reparations and orders), if available, would be more appropriate.

Baldwin and Cave (1999) note that financial sanctions and prosecution are most likely to be pursued when infringements are flagrant, repeated or extreme in their consequences.[28] Conversely, more informal regulatory actions (including promoting self-regulation) may be more feasible and appropriate if there is a high level of compliance and serious breaches are infrequent.

[27] For example, the UK Office of Rail and Road has codified this through a 'regulatory escalator' process, under which areas of concern are recorded at an early stage and 'escalated' to more formal action where the regulator is not satisfied with the company's explanations or corrective actions.
[28] Baldwin, R. and Cave, M. (1999), *Understanding Regulation—Theory, Strategy, and Practice*, Oxford University Press.

3.3 Calculating the level of a financial sanction

Once it has been determined that levying a financial sanction is the most appropriate response to a contravention, the regulatory authority needs to calculate the optimal level of the sanction to achieve its stated objectives.

There are two basic objectives behind fines:

- **punishment (backward-looking, harm-based)**—a fine is set such as to reflect the net present value (NPV) of harm caused to the affected party in the past by the action of the firm (i.e. it 'internalises' the harm caused). This can also constitute redress for the affected party, if the fine is then awarded to them. Harm can include harm to a consumer (downstream) and/or to an industry participant (e.g. at the wholesale level);
- **prevention (forward-looking, deterrence-based)**—assuming that monitoring is imperfect, in this case a fine is set so as to create an incentive effect, based on a cost–benefit calculation that the potential breaching firm might undertake in terms of the additional benefits to the offender of the breach, less the expected fine (the fine if caught, multiplied by the probability of being caught).

The calculation of the optimal value for a penalty depends on two assumptions: whether the regulator is able to perfectly monitor compliance, and whether the behaviour of the economic agents (i.e. individuals and firms) is consistent with rational choice theory. These aspects are explored below.

3.3.1 Perfect monitoring, full rationality

Broadly speaking, the economics literature highlights that the optimal value for a penalty will depend on whether the regulatory authority is able to perfectly monitor compliance, and whether company behaviour is consistent with rational choice theory. This theory posits that economic agents are fully rational and decide whether or not to commit a breach by undertaking a cost–benefit assessment of the net benefits from doing so.[29]

With perfect monitoring and rational decision-making, the optimal penalty can be informed by:[30]

- the NPV of harm caused to the affected party by the action of the firm. This can include harm to a consumer (downstream) or to an industry participant (e.g. at the wholesale level);
- any benefit accrued by the company from non-compliance—for example, in the form of any additional profit earned by the company or costs avoided as a result of non-compliance.

Since there will not always be a 1:1 relationship between the benefit received by the company from non-compliance and the harm to third parties, the optimal penalty should, in theory, be the higher of these two values.

In practice, it may be easier to calculate just one of these two values in some instances—for example, where a significant proportion of the harm or benefit is

[29] For example, see Becker, G. (1968), 'Crime and Punishment: An Economic Approach', *Journal of Political Economy*, **76**:2 pp. 169–217; Landes, W.M. (1983), 'Optimal Sanctions for Antitrust Violations', *University of Chicago Law Review*, **50**, pp. 652–78; and Polinsky, A. and Shavell, S. (2000), 'The economic theory of public enforcement of law', *Journal of Economic Literature*, **38**:1, pp. 45–76.
[30] Niels, G., Jenkins, H. and Kavanagh, J. (2016), *Economics for Competition Lawyers*, second edition, Oxford University Press, pp. 394–95.

indirect or unquantifiable (such as reputational benefits)—leading to one approach being preferred. It should be noted that such approaches are often adopted in damages assessment,[31] and we understand that the approach followed by ComReg towards licence-breach penalties thus far has been predominantly harm-based.

3.3.2 Imperfect monitoring, full rationality

The above approach adopts a narrow view of 'proportionality'—one in which the fine reflects the illicit profits made or the harm caused by the infringement.

However, with imperfect monitoring, an additional 'deterrence' element is needed in the penalty, to take account of the probability that a non-compliant company will not be caught. In this instance, the fine is set to create an incentive effect, based on a cost–benefit calculation that the potential breaching firm might undertake in terms of the additional benefits to the offender of the breach, less the expected fine (i.e. the fine if caught, multiplied by the probability of being caught).

Importantly, with imperfect monitoring, the deterrence-based fine will *always* be higher than the harm-based fine, if only direct (rather than wider) impacts are taken into account.[32]

Take the example of a cartel at the retail level, in which prices are artificially raised above the competitive level. Assume that prices are 100 above what they should be. In this case, the harm to the consumer equals the gain to the firms of the conduct concerned—higher prices penalise consumers, while benefiting the cartel.[33]

Basing the penalty purely on harm caused would result in a fine of 100 on the colluding firms. However, this may not provide much of a deterrent in the future, if the regulator cannot readily monitor whether collusion is taking place.

Why is this? Assume that the probability of the firms being caught and prosecuted, should they form a cartel, is 0.3. On this basis, the expected benefits of cartel participation, to risk-neutral firms, is 100, while the expected fine is 0.3*100, or 30. The firms therefore—rationally—collude. In contrast, a fine based on deterrence would need to satisfy the condition that $100 < 0.3*(\text{fine})$, which implies a much higher fine of at least 333.

Consequently, when there is imperfect monitoring and the probability of detection is fixed, the optimal fine is equal to the maximum of the harm (or the benefit to the company) divided by the probability of detection.[34]

The level of fine in the optimal deterrence approach therefore reflects the monitoring technology available. If monitoring were perfect, the fine would simply be set at the level of consumer harm or the benefit to the offender. In practice, the probability of being caught will depend on the resourcing and monitoring effectiveness of the regulator, and the expediency and effectiveness of the investigation and prosecution process.

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[31] However, exemplary damages actions may also incorporate the second bullet in section 3.3.1—deterrence.
[32] See Oxera (2011), 'Crime doesn't (always) pay: what determines the level of fines?', *Agenda*, October.
[33] As discussed above, harm and gains may not always be equal. Also, cartels are often regarded as having few welfare benefits and wider harmful effects, including instilling inefficiency. These impacts are ignored in this simplified example.
[34] For example, see Polinsky, A.M. and Shavell, S. (2007), 'The Theory of Public Enforcement of Law', *Handbook of Law and Economics, Volume 1*, Elsevier, Chapter 6, p. 420.

The question is then how much effort the regulator should put into monitoring. In this respect, enforcement comes at a cost. The regulator will need to select an optimal monitoring strategy. It may need to prioritise and investigate the most serious breaches, but not all breaches. This will affect the probability of detection.

As a rule of thumb, raising the probability of detection can be costly, which means that raising fines would provide a more straightforward solution.

Sector regulators charged with implementing ex ante regulations (such as access provisions) usually have more day-to-day interaction with the firms that they regulate than a competition authority would have with firms in the economy in general. This may mean that the detection probability is higher than in the case of ex post enforcement.

Due to the nature of the ex ante SMP regime, where an undertaking needs to be formally identified and designated with SMP, there are a limited number of undertakings that ComReg needs to monitor. In Ireland, these are eircom Limited and Raidió Teilifís Éireann (RTÉ), and the relevant fixed and mobile termination service providers.[35]

In one sense, having this limited pool rather than all undertakings makes it easier for ComReg to monitor their activities and compliance with the obligations that ComReg has imposed.

However, this should not be taken as a given. To establish whether a regulatory obligation has been breached, a regulator requires detailed information that can be provided only by the regulated entity. Even where the regulated entity fully co-operates and engages with the regulator, information asymmetry creates difficulties. Regulated entities may have ineffective internal governance provisions, meaning that sufficient evidence demonstrating compliance cannot be readily provided.

Larger regulated entities often have complex and divergent internal IT systems with multiple interlinked processes, which can make monitoring more difficult. The regulator's compliance investigation will often be the first time that data from these divergent systems will have been gathered and presented in a format that allows analysis. Regulated entities also may have more resources than regulators such that, even with governance models, regulatory reporting requirements and monitoring, detection problems may be very much present.

The governance situation in Ireland is changing. As a result of the settlement agreement entered into with ComReg in December 2018, eircom agreed to implement the Regulatory Governance Model (RGM). The settlement agreement included a number of undertakings that related to corporate governance and assurance, the creation of an Independent Oversight Body (the IOB) with responsibility for the oversight of eircom's governance structures as they apply to its regulatory obligations, and risk management processes to identify and mitigate against the risk of non-compliance with SMP obligations.[36]

Over the longer term, the RGM should improve ComReg's ability to monitor eircom's compliance with SMP obligations and to detect breaches. However, the RGM is in its infancy.

[35] See https://www.comreg.ie/industry/electronic-communications/regulated-markets-competition/table-of-smp-obligations/ for a list of SMP obligations that ComReg has imposed.
[36] Annex 3 of the Settlement Agreement.

Proportionality remains a constraint. Given that detection rates may be low (for example, in the case of antitrust enforcement, cartel detection rates have been estimated to be below 20%[37]), setting a fine based on optimal deterrence may result in fines that are so high that they could be regarded as disproportionate. This is particularly the case given the chance of mistakes being made in enforcement, the possibility of negligence (rather than conscious infringement) by the parties involved, and the fact that high fines may lead to bankruptcy.

In practice, most regimes apply a cap—as a percentage of total turnover—on penalties (the European Commission has a cap of 10%, as do most member states). Mitigating circumstances (such as negligence), or inability to pay, may also be taken into account.

In practice, in order to demonstrate inability to pay, it would be necessary for the offending party to prove that the fine would make the company insolvent—or at least cause it serious liquidity problems. The Commission has taken into account, and sometimes accepted, such arguments in determining the level of fines. Inability to pay is relevant, as forcing a company to go insolvent could, by decreasing the number of firms in the market, reduce competition. However, it remains a controversial area and case law is mixed.[38]

While the above discussion has focused on cartels, the considerations are equally valid for abuse of dominance cases. The theory of harm is different here, however, and this needs to be taken into account in the penalties methodology. These issues are discussed further in section 3.3.3.

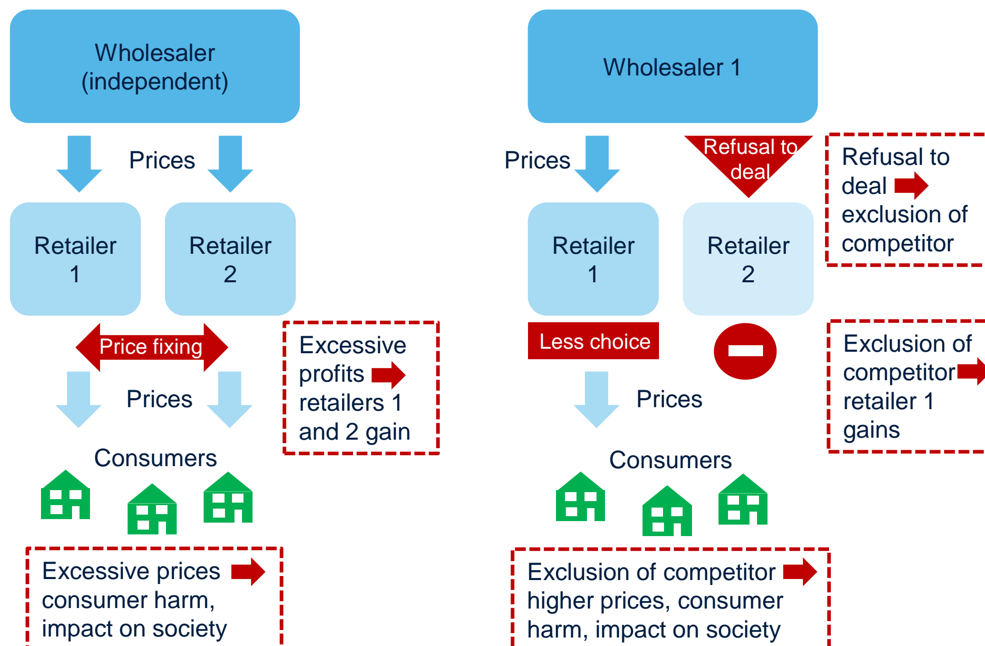
3.3.3 Theories of harm in a vertical setting

Cases of restrictions to access to competitors, as an abuse of dominance, are exclusionary forms of conduct that harm consumers indirectly by restricting competition. In this instance, the profits lost by entrants seeking access might be used to calculate deterrent-based penalties (in so far as lost profits to the entrants mean gained profits to the incumbent). Such an approach, for example, is used in calculating follow-on damages in margin squeeze cases.[39]

Figure 3.2 provides a comparison of what might be involved in examining firm gains and losses, or consumer and wider societal harm, depending on whether the issue of non-compliance lies at the retail level or wholesale level. The left-hand side of the figure considers the impact of collusion between two retailers. In this instance no firms suffer loss (except, potentially, the independent wholesaler, which faces lower overall market demand). The main impacts are felt by the colluding firms (which gain) and by consumers (who lose, as does wider society).

[37] Ormosi, P.L. (2011), 'How big is a tip of the iceberg? A parsimonious way to estimate cartel detection rate', University of East Anglia Centre for Competition Policy Working Paper 11-6, 5 June.
[38] For a discussion, see Niels G., Jenkins H. and Kavanagh J. (2016), *Economics for Competition Lawyers*, second edition, Oxford University Press, pp. 397–99.
[39] See Oxera (2013), 'Squeezed and damaged: follow-on damages actions in margin squeeze cases', *Agenda*, June.

Figure 3.2 Different theories of harm and implications for penalties



Source: Oxera.

On the right-hand side of Figure 3.2, it is assumed that the wholesaler owns Retailer 1, and refuses to allow Retailer 2 access to its network. In this instance there could be a cascade of gains and harm through the value chain. The excluded competitor would suffer a loss of profits, while Retailer 1 would gain from enjoying a monopoly position in the retail market. The higher retail prices that result would then translate into consumer harm at the retail level, with potential knock-on impacts for wider society.

The various pieces of information provided in Figure 3.2 can be used to calculate harm-based or deterrence-based penalties, for breaches of either ex post competition law or ex ante regulatory obligations. However, the economic deterrence-based approach, strictly applied, would require the calculation of a number of factors, including:

- the lost profits to the affected parties or gained profits to the breaching party, as compared to the counterfactual;
- the probability of detection and prosecution, which may vary by the type of offence;
- potentially wider factors (impact on society, market trust, other cascades of impact).

In practice, a compromise is often adopted, and percentage of turnover is often used as a relevant benchmark in calculating deterrence-based penalties. This includes the approach adopted by the European Commission in ex post competition cases, as discussed in section 4.1. In the case of refusal to supply, the restriction at the wholesale level is a means to an end for the dominant firm to restrict competition in the related retail market. Therefore, in such cases, the relevant turnover is often taken to be the turnover of the offending firm in a defined retail market or sub-segment of this market.

3.3.4 Allowing for irrationality of the firm

As discussed above, rational choice theory dictates that the optimal penalty with imperfect monitoring is equal to the expected net harm of the contravention divided by the probability of detection.

However, insights from behavioural economics suggest that firms (and individuals within those firms) may not behave in a fully rational way, and may not therefore respond to incentives as predicted by standard theory.[40] These behavioural biases may need to be taken into account in setting the optimal fine.[41] They stem mainly from a conflict between individual decision-makers within a firm and the biases they face, and the more rational desires of shareholders.

The potential biases include the following.[42]

- **Availability bias**—those that have breached before may soon forget past fines, and breach again. This highlights the importance of reminding parties of the presence of the regulator and its powers to set fines, as well as ensuring that market players have adequate governance in place to ensure that day-to-day compliance is maintained.
- **Optimism bias**—firms/senior management may be overconfident, and may underestimate the chances of being caught for a contravention. This implies that the optimal fines to deter breaches would need to be higher than implied by rational choice theory.
- **Lack of self-control**—depending on the governance of a firm, managers may lack self-control or may accept responsibility for their actions. Managers' personal interests and shareholders' interests may be misaligned. This provides support to the argument that fines should be only one aspect of the enforcement toolkit, since financial incentives alone may be insufficient to ensure compliant behaviour.

In so far as these behavioural biases manifest themselves through certain behaviours—revealed when the firm in question comes under investigation—they can be implicitly taken into account in the aggravating or mitigating circumstances that a regulator may apply.

For example, recidivism—a lapse into repeat offending after the offender has received financial penalties or other sanctions—is an important concept in criminal justice. From a psychological perspective, lapsing could be driven by availability bias, optimism bias and/or lack of self-control on the part of individual decision-makers in the firm. A key implication is that, compared with a fully rational world, much tougher financial penalties for repeat offenders are required to achieve any given deterrence effect. But another implication is that financial penalties alone may not be sufficient to deter breaches. Other instruments are needed.

Similarly, lack of cooperation with the authorities may stem from behavioural biases, which could also be taken into account as an aggravating factor.

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[40] Tversky, A. and Kahneman, D. (1974), 'Judgment under Uncertainty, Heuristics and Biases', *Science*, **185**:4157, pp. 1124–31.
[41] For example, see Korobkin, R.B. and Ulen, T.S. (2000), 'Law and Behavioural Science: Removing the Rationality Assumption from Law and Economics', *California Law Review*, **1051**, pp. 1085–90; and Wils, W.P.J. (2006), 'Optimal Antitrust Fines: Theory and Practice', *World Competition*, **29**:2, pp. 183–208.
[42] Niels, G., Jenkins, H. and Kavanagh, J. (2011), *Economics for Competition Lawyers*, first edition, Oxford University Press, p. 477.

A further behavioural bias relates to the corporate governance of firms. High fines may be ineffective in achieving deterrence if managers' and shareholders' interests are not aligned, such that the firm itself is not able to make 'rational' decisions in its own interests.

For example, it may be that certain managers have decided, in secret, to form a cartel. This could enable the company to make higher profits than otherwise, which would benefit the company, and which are (in part) shared with managers through larger bonus payments. If the infringement is subsequently detected, and the company is prosecuted and fined, it is unlikely that the managers—who have already received their bonuses—will bear these costs. Rather, they will be borne by the company's shareholders.

In such situations, higher fines on the company may be of limited use. Managers face a one-way bet. Instead, greater use of personal penalties—such as fines or limits on directors—may be required. Such issues may be uncovered if the issue of negligence by senior management is explored as part of a review of mitigating circumstances.

Another factor that may be relevant to fines is the role of trust in facilitating cartels. As highlighted by Stucke (2010):[43]

> Why are cartels more durable than the Chicago School's static framework would predict? One answer may lie in the behavioural economics research: namely, price fixers, like the test subjects in other experiments, may be more trusting and co-operative than rational choice theory predicts. As the behavioural experiments show, where trust will lead to more favourable outcomes, people tend to trust at a higher level than if all are operating under a traditional game theory...Social norms, long-standing personal relations, and peer pressure may facilitate trust in cartels with many members.

Understanding the role of this trust can help when designing fines, as well as other interventions, to deter future breaches. Stucke notes that, in the USA, despite escalating criminal and civil fines, treble private civil damages, longer jail sentences, and a generous leniency programme compared with elsewhere, the USA has not reached optimal deterrence—cases continue to come before the authorities. Stucke therefore recommends looking at the behavioural factors at work before responding with greater fines and jail sentences.

Trust is of more relevance to cartel cases than it is to abuse of dominance cases (such as refusal to supply and margin squeeze). However, other issues discussed above—such as recidivism and lack of cooperation with the authorities—may still be relevant to abuse of dominance cases. In such cases, while it is not completely necessary to determine precisely which behavioural biases are at work, understanding the psychology helps to determine whether any given penalties regime is likely to be effective in achieving deterrence, and the weight to give to different factors in the assessment of aggravating and mitigating circumstances. Personal penalties might be considered as complementary to—as opposed to an alternative to—fines on the firm.

[43] Stucke, M.E. (2010), 'Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels'.

4 Towards a practical methodology

This section discusses lessons from practical examples of levying penalties for breaches.

Our review of evidence from 2016, set out in sections 4.1 to 4.3, examines the following:

- the European Commission ex post fining guidelines;[44]
- international precedents on ex post competition law fines;
- ex ante communications fining methodologies in different member states.

Following this, in section 4.4, we set out the approaches adopted by various UK NRAs for ex ante breaches. This is based on research first undertaken in 2016, which we explored in more detail in 2019.

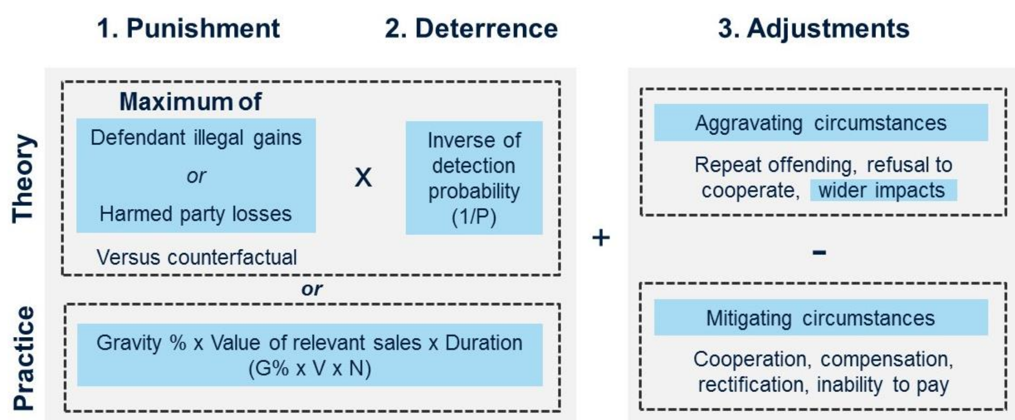
Finally, in sections 4.5 to 4.8, we summarise our core additional research undertaken in 2019, namely:

- our surveys of the approaches adopted by various European electronic communications NRAs;
- discussions with various regulatory authorities in Ireland (in financial services, competition and consumer protection, broadcasting and utilities);
- the direction of travel in setting penalties for breaches of data protection rules across the EU;
- the direction of travel in setting penalties for breaches of net neutrality rules across the EU.

Based on this review of practice, and the theory outlined in the preceding section, two potential approaches to assessing penalties for breaches of regulatory obligations are set out in Figure 4.1 below. This forms a reference point for the discussion. Another approach would be to adopt a checklist of factors that might be assessed.

[44] This discussion also includes an update since the 2016 research on the ECN+ EU Directive, which was introduced in 2019.

Figure 4.1 Optimal penalty design



Source: Oxera, adapted from a framework set out in Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova, E. and David, E. (2014), 'An optimal and just financial penalties system for infringements of competition law: a comparative analysis', Centre for Law, Economics & Society, UCL Faculty of Laws.

4.1 The European Commission ex post fining guidelines

The European Commission has powers to investigate allegations of anticompetitive behaviour at the EU level. This covers anticompetitive agreements (breaches of Article 101 TFEU) and abuses of dominance (breaches of Article 102 TFEU). Where it finds a breach, the Commission has powers to fine companies up to 10% of their worldwide turnover.

The Commission first issued guidelines on how it would assess the required penalties in 1998.[45] These were replaced with more stringent guidelines in 2006.[46] The intention was to enhance the deterrent effect of the fines.[47]

While the guidelines do not require member states to implement precisely the same approach when assessing alleged anticompetitive behaviour at a national level, a number of member states have adopted elements of the approach in their own decision-making on fines.[48]

The Commission's approach is summarised as follows:[49]

> The Commission's fining policy is aimed at **punishment** and **deterrence**. The fines reflect the **gravity** and **duration** of the infringement…The starting point for the fine is the percentage of the company's annual sales of the product concerned in the infringement (up to 30%). This is then multiplied by the number of years and months the infringement lasted. The fine can be increased (e.g. repeat offender) or decreased (e.g. limited involvement). The maximum level of fine is capped at 10% of the overall annual turnover of the company. [emphasis added?]

[45] European Commission (1998), 'Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty', (98/C 9/03) 14.1.98.
[46] European Commission (2006), 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003', (2006/C 210/02) 1.9.2006.
[47] European Commission (2006), 'Competition: Commission revises Guidelines for setting fines in antitrust cases', IP/06/857, Brussels, 28 June.
[48] For example, see UK Office of Fair Trading (2012), 'OFT's guidance as to the appropriate amount of a penalty', September.
[49] European Commission (2013), 'Competition: Antitrust procedures in abuse of dominance. Article 102 TFEU cases', July.

The 2006 guidelines introduced three main changes to enhance the deterrent effect of fines imposed by the Commission. The revised guidelines generally meant higher fines for offences. More precisely, the changes meant:[50]

- an 'entry fee' for serious breaches, regardless of the duration of the breach;
- a closer correlation between the fine and the duration of the infringement;
- higher fines for re-offending (i.e. recidivism).

In summary, the approach included the following components:

- a **basic amount**, composed of:
  - value of sales (V) x gravity (G) x duration (N);
  - an additional 'entry fee' (for particularly serious breaches);
- **adjustment factors**:
  - aggravating circumstances (increased fines);
  - mitigating circumstances (reduced fines);
- a deterrence multiplier (if required);
- a legal maximum (10% of total turnover);
- fine reductions (leniency, settlement, inability to pay).

Box 4.1 outlines in more detail the main provisions in the 2006 guidance, and the way in which the Commission proposes to calculate each of the components described above.

[50] European Commission (2006), 'Competition: Commission revises Guidelines for setting fines in antitrust cases', IP/06/857, Brussels, 28 June.

Box 4.1 European Commission methodology for determining fines

According to the 2006 guidance, the level of a fine, issued due to breaches of cartel rules or other anticompetitive agreements, or abuse of dominance, must be sufficiently high both to **punish** the firms involved and to **deter** others from infringing the competition rules.

The first step is to determine the basic amount. This is calculated as a percentage of the value (before tax) of relevant sales connected with the infringement, multiplied by the number of years the infringement has been taking place:

- relevant sales (V)—this is the undertaking's sales of goods or services to which the infringement **directly or indirectly** relates in the relevant geographic area within the EEA. The Commission will normally use the sales made by the undertaking during the last full business year of its participation in the infringement;
- sales percentage, or 'gravity' (G)—this will be between 0% and 30%, depending on the seriousness of the infringement. Considerations include the nature of the infringement (e.g. the abuse of dominance, price fixing), combined market share, the geographic scope, and whether the infringement has been implemented. For cartels, the relevant percentage will tend to be 15–20%;
- duration (N)—the (rounded) number of years the infringement lasted. Periods of less than six months are counted as half a year; periods of longer than six months but shorter than one year are counted as a full year.

The Commission then adds to this initial calculation a further amount—an 'entry fee'—that is applied to all cartel cases and, at the Commission's discretion, to certain other types of infringement. This will be between 15% and 25% of the value of annual sales (irrespective of the duration of the infringement). It is intended to deter firms from engaging in illegal practices in the first place.

The basic amount may then be adjusted by the Commission:

- upwards—in the event of aggravating circumstances: reoffering/recidivism; refusal to cooperate/obstruction; role of leader in, or instigator of, the infringement; and/or
- downwards—if it finds that there are mitigating circumstances: terminating the infringement; negligence; limited involvement; effective cooperation; conduct authorised/encouraged by public authorities.

In respect of aggravating circumstances, firms that reoffend will be penalised more heavily, taking into account not only the Commission's earlier decisions but also rulings by national authorities. Firms that re-offend could face a 100% increase in their fine for each subsequent infringement.

There is also the prospect of a deterrence multiplier. This will be imposed on undertakings with particularly large turnovers beyond the affected sales. The Commission will also take into account the need to increase the fine to a level that is necessary to exceed the amount of gains improperly made where it is possible to estimate that amount.

The legal maximum fine for each firm remains 10% of its total worldwide turnover in the preceding business year.

There are also arrangements for fine reductions:

- reductions for 'inability to pay'—where there is a risk of irretrievably jeopardising the economic viability of an undertaking due to the imposition of the fine;
- interaction with leniency—the guidelines acknowledge the application of the EU's leniency rules. For example, in the case of cartels there is a 100% leniency reduction for the first applicant, a 30% to 50% leniency reduction for the second applicant, and a 20% to 30% leniency reduction for the third applicant.

Source: European Commission (2006), 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation', No 1/2003 (2006/C 210/02).

Box 4.1 shows that, while incorporating aspects of an economic approach, the European Commission methodology is still based on a percentage-of-turnover calculation. However, in a paper on optimal antitrust fines, Wils (2006) notes:[51]

> In practice, it does not appear feasible to measure econometrically the theoretically optimal fine for a given antitrust violation. The theory on optimal fines remains however useful as general guidance for the practice affixing the amount of antitrust fines.

In this respect, in another paper, Wils (2007) highlights that the Commission's 2006 guidelines strike a balance between what is desirable in theory and what is possible in practice:[52]

> deterrence, at least in the case of antitrust violations committed by a single undertaking, requires that, from the perspective of the undertaking contemplating whether or not to commit a violation, the expected fine, discounted by the probability that a fine is effectively imposed, exceeds the expected gain from the violation. For deterrence to work, fines should thus in principle be set at a level exceeding the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed. It would not appear possible in practice for a competition authority or a court, even with the help of the best experts trained in econometrics, to measure or estimate reliably this theoretically correct minimum fine for a given antitrust violation

The author continues:[53]

> If it would thus not be a good idea to try to estimate the theoretically correct minimum fine for each given antitrust violation, the insight that, for deterrence to work, fines should in principle be set at a level exceeding the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed, may still be helpful in finding a workable method of setting fines. The expected gain from the violation can safely be assumed to be positively correlated with the undertaking's turnover in the affected market throughout the duration of the infringement

As such, Wils is generally supportive of the approach set out in the Commission's 2006 guidance. More serious offences are associated with a higher assumed gravity.

However, some other commentators have highlighted potential problems with this kind of approach. Bageri et al. (2013)[54] note that *most* competition regimes (including in the USA and EU) impose fines for competition law breaches based on affected commerce—normally as a percentage of revenue. They state that this 'rule-of-thumb' approach may generate the following distortions:

- firms operating in one core market (under investigation) can expect lower penalties than a firm operating across several diversified markets;
- when fines are based on revenues rather than excess profits, this provides an incentive to set a cartel price even higher to raise the gain relative to the penalty;

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[51] Wils, W. (2006), 'Optimal antitrust fines: theory and practice', *World Competition*, **29**:2, June, pp. 183–208.
[52] Wils, W. (2007), 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', Public Lecture, King's College London, Centre of European Law, 15 February.
[53] Wils, W. (2007), 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', Public Lecture, King's College London, Centre of European Law, 15 February .
[54] Bageri, V., Katsoulacos, Y. and Spagnolo, G. (2013), 'The distortive effects of antitrust fines on revenue', Bank of Greece Working Paper 153, February.

- firms at the end of the value chain, with lower profits-to-revenues ratios, expect to be penalised more harshly than those firms at the beginning of the value chain.

The authors recommend a deterrence-based approach incorporating profit gained or lost in the equation. Their view is that econometric methods have improved over the years, which makes calculating damage or gains easier.

Lianos et al. (2014)[55] undertake a comparative analysis of the situation in the EU, and propose a revised methodology (which nonetheless includes important aspects of the 2006 European Commission guidance). They note that, while expected ex ante profits gained due to the violation, divided by the probability of detection, provide for a more economic approach to setting penalties than a percentage of turnover based on affected commerce, expected profits are not observable and may be administratively costly to compute compared with simple turnover-based metrics. The authors therefore propose a compromise, as illustrated in Box 4.2.

Box 4.2 Optimal fines for competition law breaches

Determination of the basic fine amount

- Take the highest of the following:
  - estimate the excess illegal gains from the offence (that is, 100% of the overcharge);
  - estimate the pecuniary losses to the affected parties (100% of these losses) to the extent that the loss was caused intentionally, knowingly, or recklessly;
  - if the above options are too difficult, use a proxy based on a percentage of affected sales or volume of commerce (on the basis of, for example, 10–15% as an overcharge estimate—for example, in the EU the starting point is 30% of affected sales).
- Apply a multiplier equal to the inverse of the estimated detection probability (e.g. 6 if the detection probability is estimated as 1/6).
- In order to take duration into account, the base fine should be multiplied by the number of years of participation in the infringement.
- Where the calculated fine exceeds the statutory maximum, it should be possible to apply a higher fine disgorging the gains where the gains actually made can be calculated.

Source: Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova, E. and David, E. (2014), ‘An optimal and just financial penalties system for infringements of competition law: a comparative analysis’, Centre for Law, Economics & Society, UCL Faculty of Laws. The box covers the calculation of the basic amount but omits other aspects of the approach, such as aggravating and mitigating factors, as these are broadly similar to the European Commission’s 2006 model.

However, it is not always clear that the optimal fines approach is possible, given the available data and research methods.

As noted, calculating profits gained (or harm caused) relative to a counterfactual can be challenging and may not always be possible, although econometric methods have improved over the years. Perhaps more problematically, computing the estimated detection probability relies on knowing the number of breaches that go undetected relative to the number that are detected, given the monitoring activity of the regulator. This is not an easy

[55] Lianos, I., Jenny, F., Wagner von Papp, F., Motchenkova, E. and David, E. (2014), ‘An optimal and just financial penalties system for infringements of competition law: a comparative analysis’, Centre for Law, Economics & Society, UCL Faculty of Laws.

task, and will vary by the type of conduct and by jurisdiction. It is unlikely to be estimated with a sufficient level of robustness.

It is perhaps easier to compute gained profits in the case of cartels. Here, econometric ‘difference-in-difference’ methods can be used to estimate by how much prices were higher than they should have been—the ‘overcharge’. This is often employed in assessing follow-on private damages.[56]

To then create a deterrence effect as part of a competition law approach, a figure on illicit gains obtained through this method would need to be combined with an assumption on the probability of detection. In this respect, the European Commission notes:[57]

> For hardcore cartels, the detection rate is generally assumed to be no more than somewhere between 10% and 20%. For other infringements, the detection rate is higher, but the ‘conviction’ rate (i.e. the rate of successful damages actions) is likely to be much lower, since claimants often find it very difficult to produce proof that the contested conduct produced actual anti-competitive effects.

On balance, the European Commission 2006 approach is therefore an appropriate compromise, as it uses readily available data on sales, and takes account of punishment and deterrence through the calculation of the basic amount and the subsequent upward and downward adjustments.

The approach may also be easier to apply beyond cartel cases—i.e. to abuse of dominance cases such as refusal to deal and margin squeeze—where estimating gained/lost profits, harm to competitors and consumers, and the probability of detection is likely to be more difficult.

The emphasis on deterrence in the Commission’s approach also means that the ex post (competition law) approach is applicable to an ex ante (regulatory) context.

4.2 International precedents on ex post competition law fines

National competition authorities of individual member states also have powers to issue fines for breaches of EU competition rules. It is for individual national competition authorities to determine the methodology used to set fines.

In practice, where member states have employed a turnover-based approach, there has been significant variation across EU member states in the calculation of gravity and the treatment of mitigating and aggravating circumstances. As discussed above, the European Commission’s own competition guidelines state that the basic level of a fine will be a percentage of ‘the undertaking’s sales of goods or services to which the infringement *directly or indirectly* relates’.

This leaves open the question as to which market or sub-segment the fine should be based on. The short answer is that it all depends. Each case is examined on its merits and, while the guidelines are transparent, there is considerable discretion for the Commission. Most fines relate to cartels, and the question of what segments or sub-segments to look at in abuse of dominance cases has been less well examined. The question in a cartel is

[56] Difference-in-difference estimation involves econometric analysis of pricing data over time with a ‘before’ and ‘after’ period, and comparison of these prices between parties subject to the cartel and a control group of parties not participating in the cartel.
[57] European Commission (2008), ‘Accompanying document to the WHITE PAPER on Damages actions for breach of the EC antitrust rules. IMPACT ASSESSMENT’, COMMISSION STAFF WORKING DOCUMENT, COM(2008) 165 final, SEC(2008) 405.

about the value of commerce affected, which often relates directly to the specific definition of the products that are subject to the cartel.

A broader view of the affected sales is possible. In its approach to competition cases, the (former) UK Office of Fair Trading (OFT) stated that, in calculating the basic amount:[58]

> The relevant turnover is the turnover of the undertaking in the **relevant product market and relevant geographic market** affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended. [emphasis added?]

This is similarly reflected in the UK Competition and Markets Authority's latest guidance, issued in April 2018.[59] Affected sales in the UK are therefore calculated on the basis of a market definition exercise, which will have been undertaken prior to the assessment of penalties.

However, different approaches are possible. For example, the Belgian Competition Council (BCC) has taken a narrower view on the determination of relevant sales. In what follows, precedents from Belgium, South Africa and Poland is discussed, with a focus on the treatment of relevant sales, gravity, duration and aggravating/mitigating circumstances.

4.2.1 Case study: Belgium telecoms sector

On 26 May 2009, the BCC imposed a fine of €66.3m on the mobile operator Belgacom Mobile (under the brand Proximus) for abusing its dominant position in the market for mobile telephone services in 2004 and 2005. The BCC found that the incumbent had undertaken a margin squeeze.

The fine represented the highest ever fine levied by the BCC at the time. It took into account the nature of the infringement, the market share of Proximus, the impact of the infringement, and the weaker position of emerging competitors in the retail professional services space. Box 4.3 provides an overview of the case, including the methodology used by the BCC to calculate the fine.

[58] UK Office of Fair Trading (2012), 'OFT's guidance as to the appropriate amount of a penalty', OFT423, September.
[59] Competition and Markets Authority (2018), 'CMA's guidance as to the appropriate amount of a penalty', CMA73, April.

Box 4.3 Belgium telecoms margin squeeze case

In October 2005, a complaint was filed with the BCC by Base, a competitor in the business retail mobile sector. It complained that Proximus was undertaking a number of exclusionary practices, in particular in the retail sub-segment for professional clients (i.e. business customers with special requirements).

In its ruling, the BCC found that Proximus had a dominant position from 2002 to 2005 in the market for mobile telecoms in Belgium, and that it had an 'important position' in the retail sub-market for professional clients. The BCC also ruled that Proximus had abused its dominant position by engaging in a margin squeeze. A margin squeeze occurs where the wholesale prices charged by the dominant incumbent to competitors are too high, and/or the retail prices charged by the incumbent to end-users are too low, such that an as-efficient competitor cannot earn a sufficient margin.

First, the BCC found that Proximus held a dominant position at the wholesale level (call originating and call termination). Second, there was a *negative* margin between the prices for 'on-net' communications of Proximus (between customers on its own network) and the 'off net' termination rates charged to its competitors (for calls from competing networks to Proximus's network). This had a negative effect on competitors in the retail sub-market for mobile calls to business clients.

The BCC decided to fine Proximus and, in so doing, adopted an approach very close to that set out by the European Commission in its 2006 guidelines.

In determining **relevant turnover** as the basis for the starting point for calculating the fine, the BCC acknowledged that this could be 'directly or indirectly' related to the infringement. While the relevant market adopted by the BCC in its infringement decision was 'the market of mobile telephony in Belgium', as the impact of the incumbent's behaviour was in a specific sub-segment (retail professional clients), the BCC adopted a **narrower definition** of relevant turnover (i.e. one that related to the affected sub-segment). The BCC did not regard this as a contradiction of its decision to define a wider relevant market in finding an abuse.

Revenues from corporate customers for 2005 (the last full year of the infringement) were €340m. The BCC set a **gravity percentage at 15%** (and contrasted this against the European Commission maximum of 30% for 'severe' restrictions). This percentage reflected the 'serious but not very serious' nature of the offence, its impact on the market, and the size of the market. The abuse took place in a segment in which Proximus had a high market share but where competitors were just beginning to emerge. The initial basic amount was therefore set at €51m.

The **duration** of the infringement was two years. Interestingly, the BCC did not simply multiply the initial basic amount by two. Rather, given the circumstances of the case, the basic amount was increased as follows:

15% of the value of relevant sales in 2005 + 30% = €66.3m

There were **no aggravating or mitigating circumstances**. The incumbent had argued for reductions due to the complexity of the case, but this plea was rejected by the BCC. Proximus also argued that it was subject to regulation in setting mobile termination rates, and that this limited competition. In this respect, the BCC noted that companies operating in a regulated market must be attentive to competition law on their own initiative if regulations already in place limit free competition.

The fine was judged proportionate, and the deterrent effect was judged to have been secured by applying the additional 30% uplift for the second year of the infringement. The fine did not exceed the legal maximum of 10% of overall turnover, and lay well below the legal threshold. The BCC therefore imposed a fine of €66.3m.

Source: Oxera analysis of BCC (2009), 'Affaire CONC-P/K-05/0065: Base/BMB—Décision n° 2009-P/K-10 du 26 mai 2009', Conseil de la Concurrence, version publique.

A number or relevant observations emerge from the Belgian telecoms case, as follows:

- relevant sales were based on a narrow interpretation of the affected market—the retail sub-market for professional mobile services;

- gravity for margin squeeze was set at 15%—mid-way along the continuum put forward by the European Commission in its 2006 guidance (0% to 30%), reflecting the definition of a 'serious and not very serious' abuse;
- the duration calculation deviated from the European Commission approach, and was lower than might otherwise have been applied;
- mitigating circumstances were struck out, including the complexity of margin squeeze law and the case in hand, and the defence that regulation constrained the behaviour of the incumbent.

Refusal to supply, discriminatory conduct at the wholesale level, and margin squeeze are all interrelated, and so the BCC case is of particular interest to the current study.

4.2.2 Case study: South Africa

The experience of South Africa is of interest since the country has put into place a competition law framework based on the European Commission approach; has developed a framework for assessing fines based on the 2006 European Commission guidance; and has been explicit on the weightings given to different factors.

The approach to penalties has also developed over time.

- In 2005, the Competition Tribunal of South Africa (RSA Competition Tribunal), in *Competition Commission v South African Airways*, set out weightings based on nature, duration and extent, loss/gains, and mitigating/aggravating circumstances.
- In 2012 the RSA Competition Tribunal levied penalties in a cartel case, and explained the method adopted.
- In 2012 the RSA Competition Tribunal also levied penalties in an abuse of dominance case, and again explained the method adopted.
- In 2015 the South African Competition Commission published guidelines on assessing penalties, taking account of the European Commission 2006 guidelines.

Box 4.4 details the insights from the first case, in terms of the methodology used to set fines.

Box 4.4 South Africa penalties assessment: rebates

In the case of *Competition Commission v South African Airways*, the RSA Competition Tribunal examined the Commission's allegation that incentive schemes that South African Airways, the country's largest domestic airline, had with travel agents constituted an abuse of dominance, and were designed to exclude or impede South African Airways' rivals in the domestic airline market. The Tribunal ruled in 2005 that this practice was indeed an abuse. It also put forward a methodology for calculating the resulting fine.

The table below sets out the weights that the Tribunal assigned to different considerations in assessing the penalty. The middle column refers to the maximum percentage (totalling up to 10% of overall turnover), and the right-hand column sets out the Tribunal's ruling on each issue.

Factor	Maximum percentage (%)	South African Airways allocation (%)
a) nature, duration and extent of contravention	3.0	0.75
b) loss or damage as a result of contravention	1.0	0.25
c) behaviour of respondent	1.0	0.5
d) market circumstances	1.0	0.75
e) level of profit derived	0.5	0
f) degree of cooperation with the Competition Commission and Competition Tribunal	1.5	0
g) found in previous contravention	2.0	0
Total	**10.0**	**2.25**

Source: RSA Competition Tribunal (2005), *The Competition Commission v South African Airways (Pty) Ltd*, Case Number 18/CR/Mar01, 28 July.

Box 4.4 illustrates that around half of the penalty is the basic amount, and the remainder is mitigating/aggravating. In essence, factors 'a', 'b', 'd' and 'e' could be regarded as being relevant to the assessment of gravity (5.5% maximum in total), with the remaining factors being aggravating ('c' and 'g') or mitigating ('c' and 'f'). In this case, the gravity part of the calculation came to 1.75% of overall company-level turnover.

Box 4.5 sets out a more recent case that has taken on board the European Commission 2006 guidance.

Box 4.5 South Africa penalties assessment: cartels

The above approach had changed in the *Competition Commission v Steeledale et al.* case, which the RSA Competition Tribunal ruled on in 2012.

This case concerned a cartel in the wire mesh sector. One firm, BRC, had been granted conditional immunity by the Commission through a corporate leniency policy. Another, Steeledale, settled with the Commission through a consent agreement. The two remaining firms, RMS and Vulcania, had defended themselves on various grounds. However, the Tribunal ruled that they had indeed breached competition law.

The Commission sought as a remedy the imposition of a penalty of 10% of RMS's and Vulcania's respective annual turnovers, which was the maximum permissible under the law. The Tribunal was not bound by this recommendation, and set out its own approach to determining the penalties. In this respect, the Tribunal noted that it would follow the European Commission 2006 guidance, with adjustments:

> We have previously recommended in [a prior case] that the Commission, like its European counterpart, adopt guidelines to its approach to the imposition of penalties. At the time of deciding this case no such guidelines had been published. The [Competition Appeal Court] in [the prior case]…recommended having regard to the EU guidelines published in 2006…We have done so in this decision, but adapting some features of the approach to meet the requirements of our Act.

In calculating gravity, the Tribunal noted that Vulcania's and RMS's conduct was less severe than that of Steeledale and BRC, as the firms were not founding members of the cartel. As regards Vulcania:

> If the maximum proportion for this calculation by the EU is used as a guideline (…a maximum penalty of 30% in the most serious cases) we would regard this contravention as one for which 15% would be an appropriate figure. This gives a basic figure of R4,74 million (31,6x15%). This figure of 4,74 is then multiplied by 2, to provide for the two-year length of Vulcania's participation. This leads to a figure of R9,48 million.

However, Vulcania was not an instigator, and it also left of its own accord before the cartel was detected. This substantially reduced the penalty. The one aggravating feature was the presence of its most senior manager at the cartel meetings. The mitigating factors led to a reduction of 40% in the basic amount. This gave a final figure, as rounded off, of R5.6m. Annual turnover was R184m, hence the penalty applied was 3% of its total turnover.

RMS also had a gravity weighting of 15%, and a reduction in its basic amount by 40% due to mitigating circumstances, leading to a penalty of R21.6m. Turnover for RMS in the 2007 financial year was R363m, hence the fine came to around 6% of total turnover.

Source: Competition Tribunal of South Africa (2012), *Competition Commission v Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, BRC Mesh Reinforcing (Pty) Ltd*, 7 May.

Box 4.6 below sets out a case of abuse of dominance through refusal to supply services to VANS/VPN competitors.

Box 4.6 South Africa penalties assessment: abuse of dominance

In *Competition Commission versus Telkom SA*, the RSA Competition Tribunal concluded in 2012 that, during the complaint period of 1999 to December 2004, Telkom, the incumbent provider, refused to supply essential facilities to independent value-added network services (VANS) providers, and induced their customers not to deal with them.

The conduct was historical as opposed to current, and the case was an abuse of dominance matter rather than a cartel. In arriving at a penalty, the Tribunal noted:

> We start off by considering the affected turnover. Some difficulties were experienced here about whether the affected turnover should be limited to Telkom sales of Diginet lines or should include its VPN/VANs revenues. Telkom argued that only 62% of the total revenue of Diginet access should be considered in calculating affected turnover as the amount of R1,927,086,128 for 2004 also included other point-to-point services that had nothing to do with VPN services. The correct amount should therefore be R1,194,793,400. Added to this is the turnover for VPN services, R250,139,830 and for Internet Access R 159,873,512. The affected total turnover for 2004 is therefore R 1,604,806,742.

From the above it would seem that there were two points of contention: the proportion of wholesale Diginet turnover (100% or 62%) that should be assumed; and whether additional revenue from retail services (VPN and Internet access) should be taken into account. In practice, the Tribunal limited the Diginet wholesale revenues to those associated with VPN retail services (62% of Diginet wholesale turnover), but also included relevant VPN retail revenues.

In terms of gravity, the Tribunal stated:

> We must bear in mind that the nature of the contravention is an abuse of dominance and not a cartel and would therefore be at the lower end of the scale, namely between 10-15%...we consider 10% to be an appropriate percentage.

As such, the basic amount of the fine was calculated as 10% of the affected turnover of R1,604,806,742 for 2004, or R160,480,674, multiplied by four years, which amounts to R641,922,696. This was 'way below' the 10% turnover cap of R3.2bn.

However, there were some mitigating and aggravating factors:

> Having regard to the extent of harm caused by Telkom as summarised in [the Tribunal's] conclusion on the merits and taking into account all the factors discussed…, [the Tribunal] accordingly reduce the amount of R641,922,696 by 30% to R449,345,887, rounded down to R449 million...Had Telkom's actions not been tainted [the Tribunal] would have increased the level of the discount to above 50%. Its behaviour in this respect was an aggravating factor leading to the reduction in the discount that might otherwise have been granted.

The fine amounted to 2% of annual turnover for the 2010/11 financial year.

Source: RSA Competition Tribunal (2012), *The Competition Commission Applicant v Telkom SA LTD*, CASE NO: 11/CR/Feb04, 7 August.

The refusal to supply case is of interest, since the sub-segment used to define wholesale affected sales corresponded to the proportion of wholesale revenue associated with the VPN retail service. What is also of interest is that *both* wholesale and retail revenues were considered in the exercise—as opposed to simply a proportion of VPN retail revenues.

In this case the gravity factor was set at 10%, and the maximum reduction in the basic amount for mitigating circumstances was 50%. In practice, due to the presence of aggravating factors, the penalty was reduced by a lower amount of 30%.

In 2015, the South African Competition Commission published guidelines on setting fines.[60] In preparing these, it conducted a review of guidelines developed by other competition authorities, including the European Commission and UK Competition and Markets Authority (CMA), and also looked to principles established by the Tribunal. The Commission was also mindful of differences in law across jurisdictions. A turnover-based approach was put forward, with consideration given to the nature of the infringement, gravity, loss/damage, duration and any aggravating and/or mitigating circumstances. The Commission noted, however, that it was not always possible or necessary to measure actual loss or damage.

4.2.3 Case study: Polish telecoms sector

The case of the European Commission's investigation of Telekomunikacja Polska (TP) is interesting as, in this instance, a wide number of breaches for refusal to supply were detected over a period of around four years.

TP is the incumbent telecoms operator in Poland. In view of its SMP, the company was asked by the Polish national regulator to grant alternative operators access to its network in order to allow for effective competition in the downstream markets. However, the Commission found that from 2005 until 2009 TP engaged in abusive conduct towards alternative operators, by hindering alternative operators' access to TP's wholesale products. The abusive practices included:

- proposing unreasonable conditions governing access to the wholesale broadband products—i.e. exclusion or modification of contractual clauses and extension of deadlines to the detriment of alternative operators;
- delaying the negotiation process: for example, in 70% of cases TP did not meet a 90-day regulatory deadline for concluding negotiations;
- limiting access to its network by, for example, rejecting alternative operators' orders on unreasonable grounds;
- limiting access to subscriber lines by, for example, rejecting alternative operators' orders to activate subscriber lines on unreasonable grounds;
- refusing to provide reliable and complete general information on TP's network—this information was indispensable in allowing alternative operators to take business decisions.

On 22 June 2011 the European Commission imposed a fine on TP of €127.5m for refusing to supply wholesale broadband products to alternative operators. Box 4.7 describes how this fine was derived.

[60] Competition Commission South Africa (2015), 'Guidelines for the Determination of Administrative Penalties for Prohibited Practices', Final, Effective 1 May 2015.

Box 4.7 Telekomunikacja Polska

The fine was calculated on the basis of the average value of sales made by TP in the years between 2005 and 2009 to which the infringement directly or indirectly related. The European Commission considered that the value of *both* wholesale and retail sales of Internet products in Poland were directly related to the infringement. This is because the infringement took place in the wholesale market in order to protect the retail market. With regard to market share, TP had a dominant position in both the retail and wholesale markets.

The Commission defined three relevant product markets in broadband access—one retail market and two wholesale markets:

- the retail mass market, which is the downstream market of broadband access services offered at a fixed location by telecoms operators to their own end-users;
- the market for wholesale broadband access ('the BSA market');
- the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

In the wholesale market, TP is the sole supplier of local loop unbundling and BSA in Poland. In the retail market for the period of the infringement (2005–09), TP held high market shares in terms of both revenue (46–57%) and number of lines (40–58%). In addition, TP had a subsidiary in the market called PTK. The relevant geographic market was judged to cover the entire territory of Poland. The Commission also took into account the average annual sales over the period of the infringement (rather than the last period only), because it recognised that the infringement took place in a particularly high growth period for the market.

The Commission used a gravity percentage of 10%. In assessing this, the Commission took into account the fact that not all elements of TP's conduct were in place at the same time, as the process of obtaining access to TP's wholesale broadband products has several distinct consecutive stages (negotiating access and collocation contracts; accessing TP's network; activating subscriber lines; and obtaining general information). The Commission also noted that refusal to supply had already been condemned by the Commission and the European courts, and that TP was aware of the illegality of its behaviour.

The basic amount was then determined by calculating 10% of the average value of sales made by TP in the three relevant markets, and multiplying this by 4.2 (corresponding to the duration of the infringement of four years and two months). This led to a basic amount of €136m. The Commission decided not to adjust the basic amount of the fine on the basis of aggravating or mitigating circumstances.

Finally, the Commission acknowledged that TP's conduct had also been the subject of decisions of the national regulator, UKE, which had fined TP for breach of its regulatory obligations. In order to take account of these fines, the Commission deducted their amount from the basic amount of the fine and set the final amount of the fine at €127.5m.

Source: Oxera analysis of European Commission (2011), 'Commission Decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU): COMP/39.525 – Telekomunikacja Polska', 22.06.2011.

Notably, the markets directly affected were judged by the European Commission to be at both the wholesale and retail level. Affected sales were calculated using revenues from one retail market and two wholesale markets. In addition, a broad (as opposed to narrow) definition was adopted of the downstream retail market. The net result was a significant fine. There was also an element of double jeopardy that was recognised in this case, since TP had already been fined for breaches of regulatory obligations by the national regulator. This resulted in a deduction to the fine.

In this case, TP appealed to the General Court following the decision. It did not dispute the existence of the infringement, but argued that the Commission erred in calculating the basic amount of the fine. In particular, TP claimed that the Commission did not take account of the varying duration and intensity of the individual elements constituting the infringement.

The General Court, however, concluded that the Commission had taken due account of the differing duration and intensity of the separate elements and did not err by considering the elements as a whole when assessing the gravity of the infringement. Contrary to TP's claim, the General Court also found that the Commission had not taken into account the actual effects of the infringement in assessing its gravity and, consequently, did not have to provide any evidence to this effect.[61] In short, the General Court was of the view that the Commission did not need to prove that there had been an anticompetitive effect. Rather, the form of the conduct was sufficient.

4.2.4 Recent developments in the EU

In practice, the powers to levy penalties for breaches of ex post competition rules have varied markedly by EU member state.

In this regard, the ECN+ Directive 2019/1 aims to make national competition authorities more effective enforcers. This includes providing greater powers to issue fines. In particular, it is noted that:[62]

> To ensure the effective and uniform enforcement of Articles 101 and 102 TFEU, national administrative competition authorities should have the power to impose effective, proportionate and dissuasive fines on undertakings and associations of undertakings for infringements of Article 101 or 102 TFEU, either directly themselves in their own proceedings… or by seeking the imposition of fines in non-criminal judicial proceedings.

In particular, the European Commission notes that the deterrent effect of fines differs widely across the EU, and that in some member states the maximum amount of the fine that can be imposed is very low. The ECN+ Directive states that the maximum fine imposed for infringements should be no less than 10% of total worldwide turnover.

4.3 Ex ante communications penalties methodologies in member states

As highlighted in section 2, the European Commission has required member states to set out *in advance* the rules that they will adopt for calculating penalties for breaches of regulatory obligations in the electronic communications sector.[63] The EU requirements do not prescribe the precise approach to be adopted, other than that penalties should be appropriate, effective, proportionate and dissuasive.

The following subsections first discuss the frameworks adopted by different member states, and then describe in more detail cases in which penalties for breaches of ex ante regulatory obligations have been levied in the Netherlands.

This is based on our initial research undertaken in 2016. Further evidence based on our 2019 research is presented in sections 4.4 and 4.5.

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[61] Stibbe (2016), 'General Court dismissed Orange Polska's appeal against abuse of dominance decision', 5 January, http://www.stibbe.com/en/news/2016/january/general-court-dismissed-orange-polskas-appeal-against-abuse-of-dominance-decision.
[62] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market.
[63] Article 21a of the Framework Directive.

4.3.1 A comparison across EU member states

The approach adopted in the Irish legislation is discussed in section 2. The Irish *rules* set out the process and some general principles—but it is for the regulator to set out any further *methodology* for calculating penalties in the event of a breach of regulatory obligations.

In undertaking our research, we were also provided with a research briefing by Cullen International on the approaches adopted in various member states.[64] From this, we observe that there is considerable variation across member states in the way in which the European Commission requirement has been put into practice.

In many cases, the methodology for calculating penalties is specified in legislation or in government communications (this is the case in the Netherlands, Germany, Italy, Spain and Portugal). In one case (the UK), the sector legislation requires the regulator to publish upfront a methodology for calculating penalties. The Italian NRA has also published guidelines.

The rules and methodologies that emerge from this are varied:

- some countries (such as Austria) continue to have very basic and general approaches to setting financial penalties, with no formal process for linking the financial penalty to the harm suffered by affected parties or the benefits accrued by the offender;
- it is common for NRAs (including those in Italy, the Netherlands, Spain and the UK) to take a checklist approach, involving variations on the following steps:
  - establish a starting penalty, based on the seriousness of the breach (including the resulting economic harm or benefit to the offender), its duration, and the offender's culpability. This often involves assessing profits gained or lost, the observed impact on the market, and the size and value of the affected market (i.e. some measure of turnover);
  - consider whether there are any aggravating factors, including previous offences and the extent of senior management knowledge of the breach;
  - consider whether there are any mitigating factors, including attempts to remedy the harm and cooperation with the regulator's investigation;
- in some countries, there are pre-determined maximum penalties for different severities of breach, with the regulator given discretion to determine the level of the penalty within the legal limits.

Table 4.1 provides an overview of the interpretation of the European Commission framework in six countries.

[64] Cullen International (2016), 'Fines for ECS providers', prepared for ComReg, March.

Table 4.1 Review of practice in selected member states

Country	Approach to setting penalties
Austria	• Penalties related to telecoms regulations are imposed by regional authorities rather than the NRA • Thresholds for penalties are determined by the Telecommunications Act
Germany	• The Bundesnetzagentur has direct power to impose penalties under sections 126 and 149 of the Telecommunications Act (TKG) • The TKG sets upper limits for different offences • There is no guidance on the calculation of penalties. However, the Bundesnetzagentur applies the general rules of the Misdemeanour Act, which requires penalties to be based on the severity of the offence and the offender's culpability
Italy	• The legislation establishes ranges for penalties in response to different breaches (e.g. 2–5% of turnover for breaches of the NRA's market analysis decision) • The regulator adopts a two-step method to assess penalties, based on (i) setting the basic penalty; and (ii) reducing the basic penalty for any mitigating factors (namely, any actions to mitigate the consequences of the breach)
Netherlands	• The ACM has direct powers to set penalties, which it does on a case-by-case basis (following a government fining policy rule) • Penalties are set on the basis of a percentage of the operator's relevant turnover, and for certain breaches there are defined ranges for any financial penalties • Penalties are based on the severity, circumstances and duration of the breach and can be adjusted for mitigating and aggravating factors
Spain	• The National Commission for Markets and Competition (CNMC) has discretion to set the level of penalties subject to maximum financial penalties of €20m for very serious breaches, €2m for serious breaches, and €50,000 for other breaches • The CNMC takes account of the severity (i.e. social impact) of the breach, and aggravating circumstances (e.g. previous breaches)
UK	Discussed in detail in section 4.4

Source: Based on Cullen International (2016), 'Fines for ECS providers', prepared for ComReg, March.

4.3.2 Practice in the Netherlands

The case of the Netherlands is of particular interest, as the ACM has imposed penalties for breaches of regulatory obligations in numerous cases in recent years. These are discussed in Box 4.8.

Box 4.8 Penalties for regulatory breaches in the Netherlands

Although the levels of fines must be determined on a case-by-case basis, the ACM follows a fining policy rule set out by the Minister of Economic Affairs. The policy rule specifies factors that influence the level of fines for violations of telecommunication regulations (as well as competition law, procurement rules, consumer protection rules, and energy regulations).

The ACM sets fines based on a percentage of relevant turnover. The level of the fine depends on the severity, circumstances and duration of the breach. The ACM can increase the fine in the light of aggravating circumstances, including if the offender has been fined for a similar breach before; has obstructed the investigation; played a leading role; or has exerted pressure on others to maintain the breach. The ACM can decrease the fine for mitigating circumstances, including if the offender has compensated the affected parties or has cooperated with the ACM.

In November 2013, the ACM imposed four fines on the Dutch telecoms incumbent, KPN, totalling €973,000. KPN was judged to have placed retail broadband competitors using its fibre-optic and copper networks at a disadvantage. KPN is required to inform competitors two months in advance of any plans to offer new or revised services on its networks, in order to

give them time to offer an alternative. Since KPN introduced new retail broadband services without providing this notice, it did not comply with its **transparency** and **non-discrimination** obligations. This was not the first time that KPN had been fined for this type of behaviour, and it had not subsequently ended the behaviour. As such, the fines were higher than they might otherwise have been.

In January 2014, the ACM fined KPN almost €30m for putting competitors at a disadvantage in a government tender. KPN is required to allow itself and competitors equal **access** to its fixed telephony network, and any changes to access conditions must be announced in a timely and complete manner. The ACM established that, at a crucial moment in the tender process, KPN withheld tariff discount information that it was required to share with its competitors. By failing to inform its competitors, KPN placed them at a disadvantage since they were unable to incorporate the lower tariffs in their bids. The ACM noted that similar violations had occurred in the past, and KPN was therefore put under intensified supervision. This was lifted in July 2014.

In September 2014, the ACM imposed a fine of €2.7m for placing competitors at a disadvantage in call-forwarding. KPN had launched a new business call-forwarding service, *21 online, but competitors had not received sufficient advance warning. This fell foul of **non-discrimination** requirements. However, KPN had taken corrective action, and had also made the service available to competitors. Following an appeal, the ACM reduced the fine to €600,000, by adjusting for proportionality and the duration of the conduct.

In July 2015, KPN was fined a total of €8m for putting competitors at a disadvantage. A €6m fine was issued because KPN had not informed competitors of a new fault-monitoring and fault-correction service for businesses (ISDN line security) that it had introduced. This helped KPN to retain business customers. A €2m fine was also levied, as KPN had not allowed itself and competitors equal access to its SDF backhaul (a fibre-optic technology for fast Internet and television). The fines were appealed by KPN. The SDF backhaul fine was upheld by ACM in February 2016. The ACM also upheld the ISDN line security fine in March 2017, but reduced this to €5.7m. However, the District Court of Rotterdam subsequently overturned the €5.7m fine. This was because, in 2009, the ACM's had not been referred to the ISDN line security service when it set out the coverage of its regulatory requirements.

Source: Oxera analysis of ACM (2014), 'Policy rules regarding fines and leniency', 1 August; NL Minister of Economic Affairs (2014), 'Policy rule of the Minister of Economic Affairs of 4 July 2014, no. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (2014 ACM Fining Policy Rule)', July; ACM (2013), 'ACM fines KPN for putting competitors in broadband services at a disadvantage', 20-11-2013; ACM (2014), 'ACM fines KPN for putting competitors at a disadvantage in government tender', 23-01-2014; ACM (2014), 'KPN fined for putting competitors at a disadvantage with regard to its business call-forwarding service', 29-09-2014; ACM (2015), 'Dutch telecom company KPN fined for putting competitors at a disadvantage', 21-07-2015; ACM (2016), 'Besluit op bezwaar boete KPN voor SDF-backhaul', 04-02-2016; Executive People (2016), 'ACM handhaaft boete van 2 miljoen euro voor KPN', 04-02-2016; telecompaper, (2017), 'ACM upholds fine against KPN Wholesale over ISDN service', 24-03-2017; telecompaper, (2018), 'Rotterdam court overturns EUR 5.7 mln fine on KPN', 11-06-2018.

The cases discussed in Box 4.3 above illustrate how the ACM has imposed a wide range of fines for breaches of regulatory obligations, including transparency, non-discrimination and access.

4.4 Approaches adopted by UK regulators for ex ante breaches

This section considers the approaches adopted by various UK economic regulators when imposing penalties on regulated companies for breaches of ex ante obligations.

It presents both our 2016 review of the evidence, and further research that we undertook in 2019.

We examine the approaches adopted by Ofcom (the UK communications regulator), Ofwat (the economic regulator of the water industry in England and Wales), Ofgem (the energy regulator for Great Britain) and the Office of Rail and Road (ORR).

A review of the approaches adopted by these regulators suggests that the regulators' approaches to financial sanctions are based on high-level principles that are then applied on a case-by-case basis with individual consideration of the facts and circumstances of each breach.

The regulators' approaches share similarities, each taking account of the seriousness of the breach and the potential harm, and any aggravating or mitigating factors. The precise methodology employed varies.

Ofcom, Ofwat, Ofgem and the ORR all have the ability to levy penalties of up to 10% of company turnover for breaches of ex ante regulatory obligations (this is the same maximum that applies in respect of their concurrent powers to levy Competition Act penalties—which illustrates that both regulatory and competition breaches are serious issues).

In practice, in levying penalties, all four regulators make some reference to the form of conduct concerned and to company turnover. Indeed, Ofwat and Ofgem have used a percentage of turnover figure in the past as a starting point in assessing penalties.

4.4.1 Ofcom

The Communications Act 2003 requires Ofcom to publish guidelines on its policy for determining the amount of any penalty it imposes for breaches of ex ante regulatory obligations.[65]

Ofcom first published its guidelines in 2003 and updated these in 2011. However, given continued contraventions of regulatory requirements, Ofcom issued new guidelines in December 2015, and again in 2017.

To provide a stronger deterrent, in 2015 Ofcom stated that it might be necessary in certain cases to set higher penalties than previously.[66] The principal changes introduced by Ofcom were as follows:

- going forward, less weight would be attributed to precedent (which in Ofcom's view was non-binding), with the potential for higher penalties;
- a link would be established between deterrence and the size and turnover of the regulated body—in Ofcom's view, turnover (for the whole business, not just in the area of infringement) was a 'good indicator' of the kind of penalty required to secure the appropriate deterrent effect;
- the level of penalty could be greater than any calculation of harm or gain. Other factors were also to be considered, given that the intention of a penalty is to penalise wrongdoing and deter non-compliance;
- 'seriousness' would be added as an explicit consideration in the penalty assessment.

More detail is provided in Box 4.9.

Box 4.9 Ofcom's 2015 approach to penalties for regulatory breaches

In its 2015 guidelines, Ofcom stated that, in calculating penalties going forward, it would potentially take into account the following factors:

[65] Communications Act 2003, Section 392.
[66] Ofcom (2015), 'Penalty guidelines: s.392 Communications Act 2003', 3 December; and Ofcom (2015), 'Revising the penalty guidelines: Statement', 3 December.

- the seriousness and duration of the contravention;
- the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants;
- any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention.

In addition, the following would be considered when determining the penalty:

- whether in all of the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew about it, or ought to have known about it;
- whether the contravention in question continued, or whether timely and effective steps were taken to end it, once the regulated body became aware of it;
- whether any steps were taken for remedying the consequences of the contravention;
- whether the regulated body in breach had a history of contraventions (repeated contraventions might lead to significantly increased penalties);
- the extent to which the regulated body in breach had cooperated with the investigation.

Source: Oxera analysis of Ofcom (2015), 'Penalty guidelines: s.392 Communications Act 2003', 3 December; and Ofcom (2015), 'Revising the penalty guidelines: Statement, 3 December.

While in its 2015 guidance Ofcom stated that it would seek to quantify any harm or illicit gains made, it would 'not necessarily do so in all cases'. Furthermore, Ofcom did not explicitly set out a mathematical method for calculating penalties. Rather, it retained significant discretion in terms of how it would appraise conduct and set penalties.

Interestingly, Ofcom noted that the penalty guidelines were not to be interpreted as a mechanism to enable providers to work out the risks and benefits of a contravention, or to identify where risking a contravention might be profitable. A potential issue here is that this is what deterrence-based penalties are, in theory, intended to achieve. However, there is also an argument that having some *ambiguity* around the precise mechanism can assist deterrence (this is discussed further in section 5.3).

Ofcom's approach was also top-down as regards the assessment of turnover, in that it considered overall business turnover rather than turnover associated with the directly affected products. Ofcom stated:[67]

> A relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.

The rationale was further elaborated on elsewhere in Ofcom's 2015 guidance:[68]

[67] Ofcom (2015), 'Revising the penalty guidelines: Statement', 3 December.
[68] Ibid.

> If, in making our assessment in any particular case, we consider that the level of penalties set in previous cases is not [sufficiently effective] to enforce against the regulatory contravention concerned, and to deter future breaches, Ofcom may set higher penalties under these revised guidelines. Regulated bodies with a large turnover, for example, may be subject to higher penalties in order for a deterrent effect to be achieved.

Under earlier guidelines from 2011, Ofcom examined a case in which BT had breached regulatory obligations, relating to providing vulnerable users with equivalence of access to services. While this resulted in limited financial harm to consumers, Ofcom was of the view that a penalty was justified since breaches of regulatory obligations were inherently serious, and that any penalty should both publish the offence and have a deterrence effect. Box 4.10 provides more details.

Box 4.10 Ofcom's assessment of BT contravention

In March 2015 Ofcom issued a penalty on BT for breaching General Condition 15. The penalty levied was £800,000. This stemmed from the delayed launch by BT of its Next Generation Text (NGT) Service as a replacement for its Text Relay service. Both services are/were available to vulnerable users on home, office and mobile telephone lines from BT and other UK fixed and mobile telephone service providers.

While the delay did not result in subscribers being unable to make and receive calls, since the old Text Relay service remained in operation and the NGT service was also available on a trial basis, Ofcom deemed it appropriate to issue a penalty.

BT argued that there was no financial harm to consumers, that it had not previously been in breach of regulatory obligations, and that the contravention was caused simply by delays in the process.

Ofcom's view was that limited weight should be placed on whether there was direct financial harm, as BT's contravention was 'intrinsically serious' by denying equivalence of access to relevant services. Ofcom therefore sought a penalty to punish the contravention and to deter future non-compliance. It also took account of BT's compliance since the breach, and BT's past record of compliance with its various obligations.

Source: Oxera analysis of Ofcom (2015), 'Notification of Contravention of General Condition 15 under section 96C of the Communications Act 2003: Notice served on British Telecommunications plc ("BT") by the Office of Communications ("Ofcom")', non-confidential version, 16 March.

In this case the penalty levied by Ofcom was £800,000. While sizeable in absolute terms, this can be compared against BT's overall turnover (for the financial year to March 2014) of around £18,3bn. Nonetheless, the case illustrates that, even where there was limited direct harm to consumers, *per se* breaches of regulatory obligations can demand penalties. The rationale is that ex ante regulatory obligations are intrinsically important, and penalties are necessary to deter future non-compliance.

In 2017, Ofcom updated its penalty guidelines again.[69] These latest guidelines are substantively the same with respect to Ofcom's previous approach, and the regulator notes that in determining the amount of any penalty:[70]

- the central objective of imposing a financial penalty is deterrence;
- there is a recognition of the link between the turnover of the regulated body and setting the penalty amount so as to meet the objective of deterrence;

[69] Ofcom (2017), 'Penalty guidelines, Section 392 of the Communications Act 2003', September.
[70] Ofcom (2017), 'Penalty guidelines, Section 392 of the Communications Act 2003', September, pp. 1–3.

- the penalty amount could be greater than any calculation of harm or gain;
- a number of factors, such as the seriousness and duration of the contravention, whether the regulated body has a history of contraventions, and any remedial steps taken by the regulated body, may be used to determine the penalty amount.

In particular, in its 2017 guidance, Ofcom stated:[71]

> A relevant factor in securing [the] objective of deterrence is the turnover of the regulated body subject to the penalty. Penalties should be set at levels which, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and which provides signals to other bodies that misconduct by them would result in penalties having a similar impact. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.

The main change in the 2017 guidelines, relative to 2015, is the introduction of a new process for the settlement of an investigation.[72] Under this settlement process, a discount of 10–30% will be applied to the level of the penalty, which is intended to reflect resource savings achieved by Ofcom as a result of settlement. This is applied after other mitigating circumstances have been applied.

It was under these latest guidelines that, in 2017, Ofcom levied a £42m penalty on BT for breaches of its wholesale SMP obligations. Box 4.11 presents a summary of the issues considered in Ofcom's determination of the appropriate financial penalty.

Box 4.11 Ofcom case study: £42m penalty levied on BT

The 2017 penalty case concerned a breach by BT of its regulatory obligations in the provision of its Ethernet services. This was a result of the way it used Deemed Consent to extend the delivery timeframes for these services to other providers, and failings in its processes for paying compensation in the event of the late delivery of those services.

In assessing the penalty, Ofcom collectively considered the following factors in the round: deterrence, seriousness, duration, harm, the deliberate nature of the contravention, and cooperation with the investigation.

As regards deterrence, Ofcom noted that, since BT had SMP in the market concerned, it was important to ensure that any penalty set in relation to the breaches identified was large enough to incentivise compliance with not just the Relevant Regulatory Obligations, but all of BT's SMP obligations. Any penalty should therefore be sufficiently high to discourage bad conduct, and to incentivise BT's management to encourage good practices and a culture of compliance across BT.

Ofcom noted that the statutory maximum penalty was 10% of BT's turnover in the relevant business (£17.7bn). However, Ofcom then also took account of the fact that BT's total revenues for Alternative Interface leased lines (which comprise largely Ethernet services) were £813m, in addition to its liabilities that were relevant to the conduct. In this respect, Ofcom noted:

> We consider that the penalty which we have imposed is sufficiently large to promote the central objective of setting a penalty, namely deterrence, having considered this information about BT's revenues and its potential SLG liabilities in the round.[73]

As regards seriousness, Ofcom stated:

[71] Ofcom (2017), 'Penalty guidelines, Section 392 of the Communications Act 2003', September.
[72] Ofcom (2017), 'Penalty guidelines, Section 392 of the Communications Act 2003', September, paras 1.19–1.23.
[73] Ofcom (2017), 'Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions', May, para. 8.22.

> A breach of an SMP condition is inherently serious. 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 facilitate effective competition, that the business with SMP might otherwise be able to impede or distort, and thereby further the interests of consumers and businesses in relation to communications matters.[74]
>
> This breach is particularly serious when we consider the importance of Ethernet services to consumers. As noted, Ethernet services play a significant role in allowing CPs [communications providers] to deliver broadband services to consumers.[75]

Accordingly, Ofcom takes a very serious view of these contraventions of BT's regulatory obligations, since they were capable of harming competition in downstream markets and, as a consequence, of harming consumers.

In addition to the above, Ofcom considered the duration of the breaches. Harm was then considered in two ways: the potential for harm, given the above distortions to competition; and the direct financial harm to competitors (£719,031, although Ofcom noted that this was likely to be 'significantly higher').

The deliberate nature of one of the breaches, the lack of cooperation with the Ofcom investigation, and delays in remedial action, were then also taken into account (in effect, as aggravating factors).

Considering these factors collectively in the round, Ofcom determined the penalty amount as £42m. Ofcom noted that:

- the £42m penalty included a 30% discount applied as a result of BT accepting liability and entering into a voluntary settlement with Ofcom; the provisional penalty figure was £60m;
- in determining the penalty amount, it had taken account of the likely cost to BT of implementing a remedy for the consequences of its contravention. Taking this and the other factors into account, it considered that the penalty was appropriate and proportionate.

Source: Oxera analysis of Ofcom (2017), 'Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions, Confirmation Decision issued to British Telecom plc ("BT") by the Office of Communications ("Ofcom")', 29 May 2017.

4.4.2 Ofwat

Ofwat has powers under section 22A of the Water Industry Act 1991 to impose financial penalties on providers of water and sewerage services who operate in England and Wales. Any financial penalty levied on a provider is not returned to customers but is paid into the Consolidated Fund operated by HM Treasury. However, Ofwat does expect companies to provide direct redress to customers where the companies have received direct financial benefits from a breach of licence:[76]

> Companies may have benefited financially through price limits or through incentive mechanisms, such as the overall performance assessment. If this occurs, we expect companies to provide full redress to their customers.

The level of penalties set by Ofwat is discretionary, but the regulator considers the factors in Table 4.2 below when assessing whether a penalty is appropriate, the starting level of any penalty, and whether any modifications should be made to reflect aggravating or mitigating factors.

[74] Ofcom (2017), 'Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions', May, para. 8.23.
[75] Ofcom (2017), 'Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions', May, para. 8.26.
[76] Ofwat (2010), 'Section 22A Water Industry Act 1991: Statement of penalties with respect to financial penalties', November.

Table 4.2 Factors considered by Ofwat when calculating penalties

Considerations	Aggravating and mitigating factors
The seriousness and duration of the contravention	Repeated contraventions or failures
The degree of harm caused, including any increased costs incurred by customers	The continuation of a contravention or failure
Whether a penalty would be likely to create an incentive to comply and thereby deter future contraventions	Any involvement of senior management
Any financial or indirect gains made by the licensee as a result of the contravention	The level of cooperation with any investigation carried out
Any damage to other market participants	Proactive reporting of the contravention
Avoiding double jeopardy (i.e. not levying a penalty when the licensee is being, or has already been, prosecuted for the contravention concerned)	Taking appropriate action to rectify the contravention
Precedents set under equivalent provisions for other utilities	Activities to provide restitution and compensation

Source: Ofwat (2010), 'Section 22A Water Industry Act 1991: Statement of penalties with respect to financial penalties', November.

The maximum amount of any penalty is 10% of a licensee's turnover in the preceding year. There have been numerous instances in the England and Wales water sector in which penalties and/or redress have been required, for various breaches. In its 2017 position paper on enforcement, Ofwat noted that, in practice, the penalties levied had been between 0.3% and 3.5% of overall company turnover.

Regarding this spectrum, the regulator has noted:[77]

> Some contraventions are so serious that they are likely to always require formal enforcement action. For example, we have dealt with cases where companies have deliberately misreported information to us, causing harm to customers and other market participants. Deliberate misreporting also prejudices the regulatory framework and our ability to protect customers. Where this has occurred we have imposed substantial financial penalties. Part of the rationale for doing this has been to incentivise future compliance [paragraph 26]

Ofwat also noted:

> If customers have suffered, we expect the company to provide redress as soon as possible to restore customers to the position they would [otherwise] have been in. In some circumstances, we would expect companies to provide compensation to their customers to reflect the harm and inconvenience they have suffered. We also expect companies to act swiftly to put right the contravention or failure and to make sure that it does not happen again [paragraph 30]

Ofwat has always used its discretion to achieve a balance between penalties and redress in examining breaches of ex ante regulatory obligations (set out in company licence conditions). Nonetheless, the issue of company turnover (for the subset of services concerned) has been a fairly constant theme.

There have been numerous cases in which Ofwat has levied penalties for breaches of ex ante obligations.

[77] Ofwat (2017), 'Ofwat's approach to enforcement', January.

For example, in 2008, Severn Trent Water was fined a total of £35.8m, comprising £34.7m (2.9% of turnover) for deliberately misreporting information and £1.1m (0.1% of turnover) for providing a substandard service to customers.[78] In the same year, Southern Water was fined £20.3m (3.5% of turnover) for deliberate misreporting and providing substandard service;[79] and Veolia Water East was fined 0.3% of its turnover for accidental misreporting—but it also agreed to reduce consumer bills.[80]

In 2014, Thames Water faced the prospect of a penalty of £6.2m for accidental misreporting of sewer flooding information (0.7% of total sewerage turnover). However, the company proposed a package of customer measures instead, and Ofwat agreed to these in lieu of a penalty.[81]

In 2018, Ofwat intended to levy a penalty on Thames Water in respect of its failure to meet leakage targets (3%), and instead accepted a package of measures put forward by the company to compensate customers in this case. It noted:[82]

> Having regard to each of the relevant facts and matters and to all of the factors set out in the statement of policy, Ofwat judges that the level of the penalty should be calculated by reference to a **starting point of 3%** of the relevant turnover, based on 2016-17 **wholesale water revenue** and assuming customers are adequately recompensed. This represents the broad level of the penalty and would equate to c£25.3 million. This starting point is consistent with a serious and prolonged failure to adequately deliver a core operational function for a water undertaker. It is slightly lower than the penalties imposed on Southern Water (3.5%) and Severn Trent (3.1%) for deliberate misreporting to take account of the fact that the breaches were not deliberate. It is however higher than the broad level for a previous fine against Thames Water for misreporting (0.7%), in recognition of the additional harm to consumers and the environment and the failures at Board level. [emphasis added]

In a fairly recent case, concluded in 2019, Ofwat was minded to impose a penalty on Southern Water of 6.7% of turnover (its eventual decision is discussed further below). **Relative to the size of the company, this would have represented the highest penalty that Ofwat had ever imposed on a company.** The transgression involved deliberate misreporting of wastewater treatment works compliance data. This meant that the company had escaped financial sanctions for underperformance at price reviews.

In assessing the appropriate penalty, Ofwat noted:[83]

> Having regard to [various considerations], the evidence gathered, our statutory duties, and the factors set out in our Statement of Policy, Ofwat judges that the broad level of the penalty should be calculated by reference to **a starting point of 6% of the relevant turnover**, based on 2017-18 wholesale wastewater revenue. [emphasis added]

Ofwat then noted how this compared with previous cases:

[78] Ofwat legacy website (2008), 'Severn Trent Water: customer service - Investigation into customer service performance and reporting of customer service data'.
[79] See Ofwat (2019), 'Ofwat's final decision to impose a financial penalty on Southern Water Services Limited', October.
[80] Ofwat legacy website (2008): 'Veolia Water East (formerly Tendring Hundred Water): accounting error - Investigation into reporting of accounting information'.
[81] Ofwat (2014), 'Notice of Ofwat's imposition of a penalty on Thames Water Utilities Limited', June.
[82] Ofwat (2018), 'Notice of Ofwat's imposition of a financial penalty on Thames Water Utilities Limited', August.
[83] Ofwat (2019), 'Ofwat's final decision to impose a financial penalty on Southern Water Services Limited', October.

> This is a higher percentage than that imposed on Southern Water (3.5%) in 2008 and Severn Trent Water also in 2008 (2.9%) for misreporting. This is because of the serious and prolonged failure to adequately deliver a core operational function for a sewerage company. It also reflects Ofwat's ability to consider breaches that have occurred since July 2014; that is over a longer period than Ofwat was able to consider in 2008 ... Our penalty in this case is also higher than the penalty considered appropriate in our enforcement action against Thames Water in respect of leakage failures in 2018 (3%) and that would have been imposed in the absence of the package of measures put forward by the company in that case … [The Southern Water] case is considered more serious given the additional element of deliberate misreporting and because of evidence pointing to a concerted practice at senior management levels of the organisation to mislead regulators.

Ofwat's eventual decision was that a penalty of 6.7% of (2017–18) turnover should apply (£37.7m). This was reduced to £3m in the light of commitments provided by Southern Water to reduce bills going forward as part of a reparation package (valued at £34.7m). Ofwat noted that, had Southern Water not taken steps to put things right, including through the reparation package, a greater penalty might have been imposed.

4.4.3 Ofgem

Ofgem regulates the GB energy sector, and can impose financial penalties of up to 10% of a licensee's turnover, and make consumer redress orders and issue provisional/final orders, for breaches of ex ante regulatory provisions (under the Gas Act 1986 and the Electricity Act 1989).

Ofgem's latest policy on levying penalties was set out in November 2014[84] and is referred to in its most recent enforcement guidance of October 2017.[85]

Ofgem has stated:

> The Authority [Ofgem] considers that non-compliance should normally cost significantly more than compliance and that penalties should act as a significant deterrent to future non-compliance.[86]

The total penalty calculated by Ofgem is made up of two elements: (i) removal of the detriment suffered by consumers and any gain made by the regulated entity; and (ii) a 'penal element' that reflects the seriousness of the contravention and the need for deterrence.

These elements are addressed through a six-part process as follows.[87]

- Calculate the detriment to consumers and the gain to the regulated entity (in the form of additional profits or avoided costs/losses). In doing so, Ofgem will consider any prior efforts made by the regulated entity to provide redress to customers.
- Assess the seriousness of the contravention, including whether it was deliberate; whether senior management was aware or should have been aware of the contravention; and whether the contravention reveals a

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[84] Ofgem (2014), 'The Gas and Electricity Markets Authority's Statement of Policy with respect to Financial Penalties and Consumer Redress under The Gas Act 1986 and The Electricity Act 1989', November.
[85] Ofgem (2017), 'Enforcement Guidelines', October.
[86] Ofgem (2014), 'The Gas and Electricity Market Authority's statement of policy with respect to financial penalties and consumer redress under the Gas Act 1986 and the Electricity Act 1989', November, p. 3, para. 2.4.
[87] Ofgem (2014), 'The Gas and Electricity Market Authority's statement of policy with respect to financial penalties and consumer redress under the Gas Act 1986 and the Electricity Act 1989', November, p. 5.

systemic weakness in compliance procedures. This is an important determinant of the 'penal element' of the fine.

- Consider aggravating or mitigating factors, including repeated offences, continued contravention, and any attempt to conceal the contravention. These factors also influence the 'penal element' of the fine.
- Consider whether a further adjustment to the penal element is needed to enhance the deterrent effect.
- A discount may be applied if the company agrees to settle the case early (30% discount in the early settlement window, 20% in the middle settlement window, and 10% in the late window).
- Establish the total financial penalty.

Ofgem notes that financial penalties should be borne by shareholders and should not be passed on to customers through higher prices (and that, consequently, financial penalties should not be reflected in allowed costs).

Ofgem's 2014 guidance makes it clear that redress payments may be required to address consumer harm, but that a financial penalty may be levied 'significantly in excess of the gain or detriment' to deter non-compliance. An examination of actual cases reveals that, in practice, redress payments to address harm have been required mainly at the retail level, whereas penalties have tended to be levied on network businesses for breaches of wholesale obligations. However, this distinction is not exact—we discuss various cases below.

At the retail level, numerous players in the market have fallen foul of their obligations. Redress payments in these instances have been intended to address consumer harm, while financial penalties provide an additional deterrence effect. As Ofgem notes:[88]

> When determining the amount of a financial penalty and/or consumer redress payment, the Authority will consider any remedial measures that have been taken by a regulated person. However, the Authority may impose a **financial penalty significantly in excess of the gain or detriment even where the gain or detriment has been mitigated in full**. The Authority considers that this may be necessary in order to **deter non-compliance** and provide appropriate encouragement for all regulated persons to comply with their obligations. [emphasis added]

Ofgem also notes:[89]

> The Authority will assess the **seriousness*** of the contravention or failure. This is a key factor in calculating the **penal element** of the final liability, **irrespective of whether the Authority has identified and calculated detriment and/or gain**. In assessing seriousness, the Authority will take into account various factors, which will usually relate to the **nature** and **impact** of the contravention or failure and whether it was deliberate and/or reckless. (*Footnote: The seriousness of a contravention or failure includes its **potential** seriousness.) [emphasis added]

In this way, such penalties embody the principle of deterrence. Ofgem then considers at a later stage whether an additional adjustment is needed to *enhance* the deterrence effect. This might be required in cases where the

[88] Ofgem (2014), op. cit., para. 5.
[89] Ofgem (2014), op. cit., para. 5.10.

penalty would otherwise be insufficient in deterring the company (or others) from committing further or similar contraventions or failures.

Nonetheless, most overall sanctions imposed by Ofgem over recent years have been levied on retail businesses, and have involved a consumer redress payment plus a zero (or nominal) penalty beyond this. Such cases have related to an array of issues such as missed deadlines, mis-selling, complaints handling and (very recently) independent third-party networks serving end-consumers.

However, there are many more retailers than wholesalers, which explains in part the imbalance of cases between retail and wholesale. In addition, it is of note that there was a core batch of cases between 2010 and 2012 in which various wholesale (core network) businesses were penalised. Penalties were issued for issues around misreporting, network connections and emergency standards. These cases preceded the 2014 guidelines, but the sanctions were imposed with a penalty (fine) and no redress element.

As shown in Table 4.3 below, National Grid Gas was fined £8m for mis-reporting in 2011. Deterrence was central to the penalty. A turnover approach was adopted (1% of £1,516m total Gas Distribution turnover, or £15.2m). A penalty was levied even though there was no lasting detriment to consumers or market participants, and no overall gains to National Grid Gas. Mitigating factors were taken into account (including remediation, prompt reporting, cooperation and settlement), which reduced the penalty to £8m.[90]

Table 4.3 Ofgem wholesale (core network) financial sanctions 2011–12

Case decision date	Company	Case type	Fine (£)	Redress payment (£)	Total (£)
October 2012	Wales and West Utilities Ltd	Misreporting	375,000	0	375,000
February 2012	National Grid Gas	Emergency Standards	4,300,000	0	4,300,000
February 2012	Northern Gas Networks Ltd	Emergency Standards	900,000	0	900,000
May 2011	National Grid Gas	Misreporting	8,000,000	0	8,000,000
April 2011	Electricity North West	Network Connections	100,000	0	100,000
April 2011	Central Networks	Network Connections	400,000	0	400,000
April 2011	SHE Power Distribution	Network Connections	500,000	0	500,000

Source: Ofgem 'Investigations and enforcement data' webpage, https://www.ofgem.gov.uk/investigations/investigations-and-enforcement-data.

In some cases, however, Ofgem has both levied a fine and ordered redress payments. Evidently, Ofgem's distinctions between the two illustrate one approach. As illustrated above, Ofwat has also exercised its discretion in enforcing penalties versus consumer redress packages.

[90] Ofgem (2011), 'Decision of the Gas and Electricity Markets Authority to impose a financial penalty, following an investigation into compliance by National Grid Gas plc with Special Conditions E2B, E6 and E20, Standard Special Condition D9 and A40 of its gas transporter licence in respect of its Distribution Networks (the "licence")', May.

4.4.4 ORR

Under the Railways Act 1993, the ORR has powers to levy financial penalties on a railway licence-holder for breaches of licence. Section 57B of the Act requires the ORR to publish a penalties statement outlining its approach to the calculation of penalties. The ORR published its penalties statement in December 2015, and updated this in November 2017.

When assessing the size of a penalty, the ORR looks at three factors: proportionality; mitigating and aggravating factors; and consistency with its financing duty.

In terms of proportionality, the size of the penalty is intended to reflect the seriousness of the breach. When considering seriousness, the ORR takes into account the following:

- the actual and potential harm caused to passengers, freight customers and the public interest. This can involve calculating the likely financial value of the harm (e.g. by multiplying the estimated passenger delay by a value of time for those affected);
- the culpability of the offender (i.e. whether the offender has intentionally acted negligently or recklessly);
- the extent to which the offender has cooperated with the ORR during the investigation.

The ORR has determined five levels of seriousness for breaches of licence, and outlined indicative starting penalties for each. The maximum amount of penalty is 10% of a firm's turnover. An important principle is that the starting penalty should not be less than any benefit that the licence-holder has obtained from the breach. Table 4.4 presents the five levels of seriousness as set out in the ORR's 2015 guidance (as updated in 2017).

Table 4.4 The ORR's starting penalty thresholds

Seriousness of breach	Examples	Starting penalty
Technical or de minimis	A breach involving no, or very little, culpability, and causing no harm to third parties	Usually no penalty
Less serious	A breach involving a relatively small amount of harm, or isolated to a small geographical area	Up to £2m
Moderately serious	More serious implications, actual or potential harm for third parties	Up to £10m
Serious	Evidence of systemic failings resulting in serious harm or potential harm to third parties	Up to £25m
Very serious	Significant harm, or the risk of significant harm, caused to a wide range of third parties and/or greater culpability on the part of the licence-holder	Up to 10% of a licence-holder's turnover

Source: Office of Rail and Road (2015), 'ORR's economic enforcement policy and penalties statement for Railways licence holders', December; updated in Office of Rail and Road (2017), 'ORR's economic enforcement policy and penalties statement - Great Britain', November.

The starting penalty may be adjusted to take account of the net effect of any relevant mitigating and aggravating factors, including:

- any steps taken to rectify the breach;
- any steps taken to minimise the risk of the breach recurring;

- any reparations offered;
- the extent of involvement of directors or senior management in the (in)action that caused the breach;
- repeated or continuing infringement;
- cooperation with the ORR's investigation.

4.5 Further evidence: European communications NRAs

In 2019 we undertook a further review of approaches and precedents across Europe. This covered a wide range of sectors. Our research is set out in sections 4.5 to 4.8 for each context.

We start in this section by presenting further evidence reviewed in 2019 of the fining methodologies used across European communications NRAs. As such, this presents an update to section 4.3.

The research includes cases where an NRA has imposed financial penalties for breaches of ex ante regulatory obligations. As we describe below, we obtained much of this information through a survey of European NRAs.

4.5.1 ComReg survey of the approaches adopted by IRG members

In September 2019, as part of our research update, ComReg sent a survey to NRAs that are members of IRG.[91] NRAs are responsible for regulating each country's electronic communications sector, including in various EU member states and Turkey.

The ComReg survey asked each NRA about three key issues:

- the legal framework that exists to impose financial penalties for regulatory breaches;
- whether the NRA has, in addition, produced any guidance and/or a methodology with respect to levying financial penalties;
- any recent examples where financial penalties have been levied on telecoms providers for regulatory breaches.

In total, ComReg received 12 responses to the survey, from Austria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, the Slovak Republic, Slovenia, Spain, Turkey and the UK. In what follows, we draw together the key findings from the survey responses.

There is variation in the legal frameworks across member states

Under the European regulatory framework, the requirements for the setting of penalties for breaches of obligations are set out in Article 21a of the Framework Directive, which states that:[92]

> Member States shall lay down **rules on penalties** applicable to infringements of national provisions adopted pursuant to this [the Framework] Directive and the Specific Directives and shall take all measures necessary to ensure that they

[91] IRG is the European Independent Regulators Group, established in 1997. See https://www.irg.eu/.

[92] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002; as amended by Article 1, Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337/37, 18.12.2009 by the insertion of a new Article 21a.

are implemented. The penalties provided for **must** be **appropriate**, **effective**, **proportionate** and **dissuasive**. [emphasis added]

There have been further developments since our 2016 research. In December 2018 the EECC was established. The EECC provides further provisions in relation to NRA powers to set penalties—as well as reiterating that such penalties should be 'appropriate, effective, proportionate and dissuasive'. The EECC needs to be transposed by all member states, including Ireland, by the end of 2020.[93]

Within the current legal framework, and as explained in section 2.1 above, Article 21a of the Framework Directive needs to be read in conjunction with Article 10 of the Authorisation Directive.

In the case of Ireland, the above provision was transposed into national law in 2011 through the adoption of a series of Regulations, including the 'Access Regulations'.[94]

The requirements set out in the Framework Directive and Authorisation Directive were very broad. The legal framework—and the detail around the methodology—for setting penalties was left to individual member states.

From the responses received from NRAs, we first observe that there is considerable variation in the statutory provisions for financial penalties set out in legislation across member states. For example, legislative provisions differ across member states with respect to:

- the statutory maximum, and in some cases minimum, limit at which a financial penalty can be set;
- whether the maximum limit is defined as an absolute amount (e.g. in euros), a percentage of turnover, or a combination of the two where the larger value applies;
- whether a single maximum limit is used, or whether this is tiered depending on the type and/or seriousness of the breach;
- whether there are statutory factors that the NRA must have regard to in determining the appropriate level of the penalty;
- whether, and how, the NRA must account for any economic gain from the infringement.[95]

As is clear from the discussion above, the statutory considerations relevant to levying financial penalties differ across member states. In general, we observe that all member states from which ComReg received responses have, at the

[93] EECC (Directive (EU) 2018/1972), Art 29(1) states: 'Member States shall lay down rules on penalties, including, where necessary, fines and non-criminal predetermined or periodic penalties, applicable to infringements of national provisions adopted pursuant to this Directive or of any binding decision adopted by the Commission, the national regulatory or other competent authority pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. Within the limits of national law, national regulatory and other competent authorities shall have the power to impose such penalties. The penalties provided for shall be appropriate, effective, proportionate and dissuasive.'
Directive (EU) 2018/1972 must be transposed in IE (and all other MS) by the end of 2020.

[94] Regulation 19 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011).

[95] For example, the German Telecommunications Act, Section 149(2) stipulates that the fine should exceed the economic benefit that the offender has derived from the offence (the Bundesnetzagentur's response to the ComReg survey of IRG members, Question 1). The Austrian Telecommunications Act 2003, Article 111(1), stipulates that, where the NRA establishes that an economic advantage has been gained through the infringement, it can apply to the Cartel Court to confiscate an amount equal to the economic advantage (where it can be quantified) or a reasonable amount determined by the Court (RTR's response to the ComReg survey of IRG members, Question 1).

very least, statutory maximum limitations on the penalty amount. While some member states appear to make limited further provisions, others stipulate factors that are relevant to determining financial penalties. Taken in the round, we observe varying degrees of prescriptiveness.

At one end of the spectrum, in some member states the legislation for determining financial penalties is reasonably prescriptive. To a certain degree, this acts as a constraint on the methodology that the NRA can choose to adopt. For example, in its response, the CNMC of Spain highlighted the provisions contained in the General Telecommunications Act 9/2014.[96] There are extensive provisions that the CNMC must have regard to when setting financial penalties for regulatory breaches. Box 4.12 presents an overview of the legislative provisions in respect of financial penalties.

Box 4.12 Financial penalties provisions in the Spanish General Telecommunications Act 9/2014

The General Telecommunications Act 9/2014 sets tiered maximum limits on the penalty amount. Depending on the seriousness of the infringement, breaches of regulatory obligations are treated as being ‘very serious’, ‘serious’ or ‘minor’, depending on their form.

In the case of **very serious offences**, where the CNMC can determine the gross profit gained through the infringement, the penalty must be **at least equal to the value of the gross profit, but is subject to a maximum level of five times the value of the gross profit**.[97] Where this cannot be determined, the statutory limit on the penalty amount is €20m. A number of very serious offences are specified, including very serious non-compliance with obligations regarding access, interconnection and interoperability required by the legislation.

In the case of **serious offences**, where the CNMC can determine the gross profit gained through the infringement, the penalty must be no more than twice the value of the gross profit. Where this cannot be determined, the statutory limit on the penalty amount is €2m. Serious offences include ‘failure to comply with obligations regarding access, interconnection and service interoperability’.

Minor infringements are subject to a limit of €50,000.

In addition, the General Telecommunications Act 9/2014 contains a list of aggravating and mitigating factors that should be considered when determining the amount of the financial penalty:

- the seriousness of any contraventions previously committed by the person being sanctioned;
- the social repercussions of the contravention;
- the profit to the offender from the act that is the object of the contravention;
- the damage caused and its redress;
- voluntary compliance with any precautionary measures that might be imposed in the disciplinary proceedings;
- denying or hindering access to the installations or refusing to provide the information or documentation demanded;
- ceasing the offending behaviour prior to the course of the disciplinary proceedings;
- the offender’s financial situation.

[96] The General Telecommunications Act 9/2014, Law 9/2014 of 9 May on Telecommunications, Official State Gazette No. 114, May 2014.
[97] The gross profit is defined as the total (direct and indirect) gross profit obtained as a result of the acts or omissions of which the contravention consisted (information provided by the CNMC to ComReg in an email dated 24/01/2020).

Source: Oxera analysis of the CNMC's response to the ComReg survey of IRG members, Question 1; Oxera analysis of the General Telecommunications Act 9/2014, Law 9/2014 of 9 May on Telecommunications, Official State Gazette No. 114, May 2014, Articles 75 to 78.

In contrast to the above, some other member states have less prescriptive legislation that does not specify the factors that the NRA should have regard to. This gives the NRA a reasonable amount of discretion. For example, in the UK, the legislation affords Ofcom considerable discretion over how it will determine the appropriate financial penalty, and requires Ofcom to produce its own guidelines.[98] We discuss a recent case of a penalty levied by Ofcom below.

There is limited evidence of NRAs producing guidelines and/or methodologies on setting financial penalties

A second observation from the survey responses is that there is limited evidence of NRAs producing their own guidelines and/or methodologies with respect to imposing financial penalties (in fact, only two of the 12 respondents do so).

While the statutory provisions can act as guidance that the NRA must have regard to, for example where it must consider a set of factors, it is still for the NRA to decide how to apply the factors in practice to determine the penalty amount. Therefore, while the statutory provisions can constrain an NRA's discretion, the legislation does not in itself prevent NRAs from producing their own guidelines and methodology.

Some IRG members, such as Germany's Bundesnetzgentur and the Czech Republic's CTU, explained that, while they do not have a methodology or guidance, they follow general provisions when imposing financial penalties.[99]

In its response to the ComReg survey of IRG members, the Spanish CNMC noted that, in addition to the statutory provisions (see Box 4.11 above), it uses internal criteria to apply proportionate penalties or determine the gross profits as the result of an infringement.[100] These include, for example, the annual income of the operator in the activity affected by the infringement, and the charges that were overpriced by the SMP operator for providing regulated wholesale services to other operators.

We observe two clear examples from the survey responses of where an NRA has put forward guidelines on its approach to financial penalties: the Cypriot communications NRA, the Office of the Commissioner of Electronic Communications and Postal Regulation (OCECPR); and Ofcom in the UK. We also note that, in our 2016 research, we discussed the Netherlands penalty guidelines and cases in which penalties had been levied (see Table 4.1 and Box 4.8 above).

In its response to the ComReg survey of IRG members, OCECPR said that the Commissioner (of the OCECPR) had issued secondary legislation as guidance on how the OCECPR would impose financial penalties.[101] The legislation states that:[102]

[98] Communications Act 2003, Section 392.
[99] The Bundesnetzagentur's (German energy and communications regulator's) response to the ComReg survey of IRG members; Question 2; the CTU's (Czech telecoms regulator's) response to the ComReg survey of IRG members, Question 2.
[100] The CNMC's response to the ComReg survey of IRG members, Question 2.
[101] The OCECPR's response to the ComReg survey of IRG members, Question 2.
[102] Decree 300/2008, Decree under Articles 20(k) and 152 of Law 112(I) / 2004.

- the Commissioner has the power to impose financial penalties of up to €170,800, which can be doubled for a repeat infringement (as specified by the primary legislation);
- where the infringing party has gained an advantage from the breach, it can impose an administrative fine of up to twice the amount of the benefit;
- the amount will depend on the seriousness of the breach.

The OCECPR also explained that, where the operator has gained an advantage from the breach, a financial penalty of up to twice the amount of the benefit can be imposed.[103]

The guidance is somewhat limited in explaining the methodology that the OCECPR will use to determine the penalty amount. However, it does state that the penalty amount will be determined by the seriousness of the breach, and that the penalty amount can exceed the economic gain from the infringement. Moreover, where an operator breaches repeatedly, it may receive a higher penalty than would have otherwise been the case.

In the UK, Ofcom has produced guidelines outlining the approach that it will follow in determining the amount of penalties. Notably, under the UK legislation, Ofcom has a statutory obligation to produce such guidelines.[104]

We discussed Ofcom's 2017 (and prior) guidelines in section 4.4. In these guidelines the regulator sets out the relevant factors that it will consider in determining the amount of the penalty. In particular:[105]

- the central objective of imposing a financial penalty is deterrence;
- there is a recognition of the link between the turnover of the regulated body and setting the penalty amount so as to meet the objective of deterrence;
- the penalty amount could be greater than any calculation of harm or gain;
- a number of factors, such as the seriousness and duration of the contravention, whether the regulated body has a history of contraventions, and any remedial steps taken by the regulated body, may be used to determine the penalty amount.

Turnover is central to Ofcom's approach. Ofcom did not explicitly set out a mathematical method for calculating penalties. Rather, it retains significant discretion in how it will appraise conduct and set penalties.

There are recent cases of financial penalties being levied for breaches of SMP obligations at the wholesale level

The survey responses revealed a number of recent cases where financial penalties had been levied for breaches of SMP obligations at the wholesale level, which are additional to those covered in our 2016 research. Such cases have occurred in Croatia, Slovenia, Spain, Turkey and the UK. Below we provide an overview of each case.

[103] Information provided by the OCECPR to ComReg in an email dated 13/12/2019.
[104] Communications Act 2003, Section 392.
[105] Ofcom (2017), 'Penalty guidelines, Section 392 of the Communications Act 2003', September, pp. 1–3.

In its response to the ComReg survey of IRG members, the **CNMC (Spain)** highlighted three examples of where financial penalties had been imposed on an SMP operator for non-compliance at the wholesale level.[106]

In March 2017, the CNMC imposed a financial penalty of €3m on Telefónica for a 'very serious' breach. Telefónica was found to have breached a non-discrimination obligation imposed in the broadband market. In this case, it was not possible to determine the gross profit obtained as a result of the infringement.[107] To determine the penalty amount, the CNMC took into account the revenue earned in the fixed telephony and broadband retail market in the year in which the infringement took place, and the deliberate intention of Telefónica to commit the infringement.[108] The CNMC said that this decision had been challenged in court and was an ongoing case.[109]

In April 2018, the CNMC imposed a financial penalty of €8.5m on Telefónica for submitting an offer in a public bidding process that was not economically replicable by other operators. The CNMC took into account the following factors in determining the penalty amount:[110]

- the fact that the infringement was 'very serious' and wilful in nature;
- the NPV of the amount by which Telefónica's bid was below the economically replicable level, amounting to approximately €8.5m;
- Telefónica's position as a prominent player in the Spanish broadband market, and in particular within the Public Administration sector;
- Telefónica's significant economic capacity within the business segment.

The CNMC said that this decision had been appealed in court and was an ongoing case.[111]

In April 2019, the CNMC imposed a financial penalty of €3m on Telefónica for deploying its new fibre-optic network in offices that had declared it to be unfeasible, without informing the CNMC or alternative operators, as specified by its wholesale reference offer. The CNMC took into account the following factors in determining the penalty amount:[112]

- the infringement was deemed to be of a 'very serious' nature;
- the infringement was over a long duration (2012–18), and was particularly severe in 2017–18;
- Telefónica's position was as a particularly prominent player in the Spanish broadband market;

[106] The CNMC's response to the ComReg survey of IRG members, Question 3. The CNMC subsequently provided further details on these cases to ComReg in an email dated 26/11/2019.
[107] Information provided by the CNMC to ComReg in an email dated 26/11/2019.
[108] Information provided by the CNMC to ComReg in an email dated 26/11/2019.
[109] This decision was challenged on the grounds of the criteria used to establish the proven facts on which the contravention (such as the parameters of the methodology used to determine replicability of services or KPIs used to monitor compliance with the non-discrimination obligation) or the interpretation of the obligations regulated in the reference offer (information provided by the CNMC to ComReg in an email dated 29/01/2020).
[110] Information provided by the CNMC to ComReg in an email dated 26/11/2019.
[111] This decision was challenged on the grounds of an incorrect classification of the contravention, which should be considered to be only a serious contravention, not a very serious contravention or unlawful action (information provided by the CNMC to ComReg in an email dated 29/01/2020).
[112] Information provided by the CNMC to ComReg in an email dated 26/11/2019.

- the conduct did not have a significant effect on the development of the broadband market;
- Telefónica did not extract any direct benefits from the infringement.

The CNMC said that this decision had been challenged in court.[113]

In their response to the ComReg survey:

- the **Croatian Regulatory Authority for the Network Industries (HAKOM)** said that it had recently imposed a financial penalty of 28.101.444,00 HRK (approximately €375,000) on the SMP operator for breaching its regulatory obligations. The penalty was determined as a proportion (1–10%) of the total annual gross revenue of the operator. The judgment was upheld by the High Misdemeanour Court—this decision is final;
- the **Agency for Communication Networks and Services of the Republic of Slovenia (AKOS)** said that it had recently imposed a financial penalty on the SMP operator—Telekom Slovenije—for refusing a legitimate request on wholesale access. The decision in this case is not publicly available information;
- the UK NRA, **Ofcom**, highlighted the financial penalty that it imposed on BT in 2017 for a breach of wholesale SMP obligations. We discussed this as a case study in section 4.4. The £42m penalty levied had, at its heart, the central objective of deterrence, taking into account the relevant turnover of the business.

4.5.2 Implications of the further evidence on the approaches to financial penalties in member states

The evidence gathered from the ComReg survey sent to IRG members is mixed. As noted above, the requirements in the Framework Directive and Authorisation Directive were very broad and gave member states discretion over the legal framework and rules for setting penalties. As is clear from the survey responses, and as might be expected in light of this discretion, there appears to be considerable variation across member states.

There are different degrees of prescriptiveness in the national legislation that transposes the Specific Directives. Some member states include reasonably extensive provisions, which to some extent give the NRA some guidance on how to determine financial penalties. These provisions also act so as to constrain the NRA in the methodology that it can adopt to set financial penalties. However, this in itself does not prohibit an NRA from adopting its own methodology, as long as it complies with the statutory provisions.

Notwithstanding this, in many cases NRAs have not set out guidelines or a methodology to determine financial penalties. In some cases, NRAs may not have produced guidance as they consider that the legislative provisions offer sufficient guidelines. In other cases, it might simply be the case that the NRA has not proactively produced guidance. This means that the precedent of communications NRAs setting out guidelines is limited. However, this in itself does not rule out producing such guidelines.

A clear example of where guidelines have been produced is by Ofcom in the UK, which notes that it is statutorily obliged to do this. Ofcom has adopted a

[113] This decision was challenged on the grounds of an absence of proportionality in the calculation of the sanction (information provided by the CNMC to ComReg in an email dated 29/01/2020).

deterrence-based approach. As discussed in section 4.4, it states that deterrence is the central objective in imposing financial penalties, and it recognises the relevance of turnover in respect of meeting this objective. It also notes that, while the harm and/or gain associated with the infringement is a relevant consideration, the penalty level could exceed this amount. We note that, in a 2017 case in which Ofcom fined BT £42m for breaches of wholesale SMP obligations, it explicitly stated that this penalty amount promoted the central objective of deterring non-compliance, having considered BT's revenues.[114]

While the Ofcom approach is not mechanistic, in the sense that the factors are considered in the round (against certain criteria) rather than as part of a formulaic approach, there are a number of commonalities with the turnover approach that we will describe in section 5. Most notably, both approaches place deterring non-compliance at the forefront, recognise the relevance of turnover, and consider a number of similar aggravating and mitigating factors.

Indeed, as discussed in section 4.4, Ofcom, Ofwat and Ofgem are three UK-based regulators with the power to levy financial penalties of up to 10% of company turnover. All three consider a range of factors in the guidance that they have issued, and in assessing specific cases. Across these sectors, the turnover of the business concerned (for a subset of activities in question) has been a key benchmark in setting the appropriate deterrence-based penalty. This is also the case with the general methodology that we will discuss in section 5.

4.6 Further evidence: Irish regulatory authorities

In 2019 we also explored the financial sanctions regime that various Irish regulatory bodies, across different sectors, are subject to. We discuss our findings below.

Currently, there is no standard framework of powers among regulators in Ireland. There is significant variation in the powers available to different regulatory authorities, including in the ability to levy financial penalties. Table 4.5 presents an overview of which Irish regulators have the power to impose financial penalties.

Table 4.5 Summary of Irish regulators' powers to impose financial penalties

Regulator	Power to impose civil financial sanctions
Central Bank of Ireland	Yes
ComReg	No
Competition and Consumer Protection Commission	No
Commission for Regulation of Utilities	Yes
Health Product Regulatory Authority	No
Broadcasting Authority of Ireland	Yes
Commission for Aviation Regulation	Yes
Office of the Director of Corporate Enforcement	Yes

Source: Oxera analysis of The Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', p. 72.

[114] Ofcom (2017), 'Confirmation Decision under Section 96C of the Communications Act 2003 relating to a contravention of SMP Conditions', May.

To explore the issues further, we spoke to several Irish regulatory authorities to understand the approaches to the framework for setting financial penalties in Ireland:

- the Central Bank of Ireland (the Central Bank);
- the Broadcasting Authority of Ireland (BAI);
- the Competition and Consumer Protection Commission (CCPC);
- the Commission for Regulated Utilities (CRU).

Our discussions covered the legal framework that each authority operates under with regard to setting financial penalties, whether the authority has a methodology for setting financial penalties, and whether there were any recent cases where the authority had imposed financial penalties. The Central Bank and BAI subsequently sent us documents in relation to the topics that we discussed.

The regulatory authorities that we spoke to have differing provisions with respect to financial penalties. The Central Bank, BAI and CRU have the power to impose such penalties, whereas the CCPC does not.[115] Moreover, the prescriptiveness of the legislation differs across the Central Bank, the BAI and the CRU. For example, the Central Bank has a reasonable degree of discretion in defining its own methodology for determining financial penalties, whereas the BAI and CRU must have regard to a number of statutory factors set out in their legislation.

Looking forward, the legal framework that currently gives regulatory authorities their powers could be subject to important reforms. In particular, in 2018, the Law Reform Commission of Ireland put forward its final recommendations on regulatory powers and corporate offences.[116]

The report recommends that a common legislative template of powers should be developed for all similarly situated financial and economic regulators. One of the 'core' powers that is recommended is the ability to impose administrative financial penalties (subject to court oversight, to ensure compliance with constitutional requirements).

We understand that the Law Reform Commission recommendations are not legally binding, and are still being considered and debated in Ireland (including within the affected sectors).

In the following subsections, we set out the statutory powers and, where appropriate, the methodologies of the Irish regulatory authorities that we spoke to. We also present the key recommendations that the Law Reform Commission makes in its report with respect to financial penalties.

4.6.1 The Central Bank of Ireland

The Central Bank is responsible for regulating firms that provide financial services in Ireland and overseas. The Central Bank monitors the compliance of financial service providers, and has the power to directly impose sanctions. Its

[115] The CCPC does have the power to impose criminal fines.
[116] The Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences'.

objectives with respect to regulation are to ensure financial stability, consumer protection, and market integrity.[117]

Legal framework

The Central Bank can directly impose sanctions on financial services providers or persons concerned in the management of such firms in respect of breaches of regulatory requirements (referred to as 'prescribed contraventions'). It may publicise the findings and sanctions imposed. Where the Central Bank has reason to suspect that a prescribed contravention has been committed, it may investigate the matter. Following such investigations, the Central Bank may, pursuant to the Administrative Sanctions Procedure (ASP) under Part IIIC of the Central Bank Act, 1942 (as amended) (the 1942 Act), refer the matter to an inquiry.[118] However, the ASP also provides the Central Bank with the means to resolve the breach by entering into a Settlement Agreement at any time prior to the conclusion of an inquiry.[119] To date, sanctions under the ASP have been imposed only through Settlement Agreements, rather than by inquiry.[120]

For many prescribed contraventions,[121] the level of the financial penalty that may be imposed on regulated financial services providers pursuant to section 33AQ of the 1942 Act is subject to the following maxima:

- in the case of a corporate or unincorporated body, either €10m or 10% of annual turnover of the regulated financial service provider in the previous year (whichever is the greater);[122]
- in the case of a natural person, who is a regulated financial service provider, €1m.

In addition, where a person concerned in the management (PCM) is found to be participating or to have participated in the commission by the regulated financial service provider of a prescribed contravention, for many contraventions, the PCM may be subject to a financial penalty of €1m.[123]

Further, the Central Bank cannot set a penalty amount that would be likely to cause a corporate entity to cease business or an individual to be adjudicated bankrupt.[124]

The Central Bank's guidance on financial penalties

The Central Bank does not have a statutory obligation to produce guidance on imposing administrative sanctions. However, it has produced a number of guidance documents in respect of imposing sanctions under the ASP. The

[117] See Central Bank of Ireland, 'How We Regulate', https://www.centralbank.ie/regulation/how-we-regulate, accessed 22/10/2019.
[118] Section 33AQ of the 1942 Act.
[119] Section 33AV of the 1942 Act.
[120] However, certain matters have settled after referral to inquiry. Furthermore, other matters have been referred to inquiry and these inquiries are ongoing—such inquiries may conclude with the imposition by inquiry of sanctions including monetary penalties.
[121] The Central Bank told us that the transposition of EU Directives and Regulations has had an impact on the sanctions available under the ASP in respect of several financial services sectors, including banking and securities markets, as the EU seeks to harmonise sanctions across member states within those sectors. It is now the case in several sectors—and is becoming ever more the case with each relevant transposition of EU financial services law—that sanctions required under EU law modify or are substituted for the sanctions provided in section 33AQ of the 1942 Act. There is therefore no longer a uniform list of sanctions available for all sectors under the ASP. The new sanctions are set out in the various statutory instruments transposing EU law, and consequently the ASP is no longer neatly contained in Part IIIC of the 1942 Act but is becoming increasingly distributed across several sources of legislation.
[122] Section 33AQ(4) of the 1942 Act.
[123] Section 33AQ(6) of the 1942 Act.
[124] Sections 33AS(1) and 33AS(2) of the 1942 Act.

Inquiry Guidelines (2014) set out the 'procedures which the Central Bank will ordinarily follow when holding an Inquiry under Part IIIC of the 1942 Act'.[125] This document provides guidance on the process and procedure for such inquiries.

The Outline of Administrative Sanctions Procedure (2018) provides guidance on the ASP and the imposition of sanctions, including financial penalties.[126] The ASP Sanctions Guidance provides further guidance on the application of the sanctioning factors set out in the Outline of Administrative Sanctions Procedure (2018).[127]

The Central Bank will consider all relevant circumstances of the case in determining sanctions. In its 2018 guidance, the Central Bank sets out the factors that it may give regard to in determining sanctions.

The Central Bank states that it will take into account the deterrence effect of the sanction, not only on the contravening entity but also on other regulated entities. In particular, the Central Bank states that it 'continues to place an **increased emphasis on deterrence**' [emphasis added].[128] In its ASP Sanctions Guidance, issued in November 2019, the Central Bank notes that, in setting sanctions, it will bear in mind the need for deterrence—meaning that in certain cases a significant sanction may be merited despite the presence of mitigating factors.[129]

Box 4.13 presents an overview of the factors that the Central Bank will consider that are most relevant to ComReg (i.e. excluding factors that are specific to issues in financial markets).

Box 4.13 Factors considered by the Central Bank in determining sanctions

The nature, seriousness and impact of the contravention, including:

- whether the contravention was deliberate, dishonest or reckless;
- the duration and frequency of the contravention;
- the amount of any benefit gained or loss avoided due to the contravention;
- the extent to which the contravention departs from the required standard;
- the loss or detriment or the risk of loss or detriment caused to consumers or other market users;
- the effect, if any, of the contravention on vulnerable consumers;
- whether there are a number of smaller issues that individually do not justify an administrative sanction, but that do so when taken collectively.

The conduct of the regulated entity after the contravention, including:

- how quickly, effectively and completely the regulated entity brought the contravention to the attention of the Central Bank or any other relevant regulatory authority;
- the degree of cooperation during the investigation of the contravention;

[125] The Central Bank of Ireland (2014), 'Inquiry Guidelines prescribed pursuant to Section 33BD of the Central Bank Act 1942', p. 3.
[126] Central Bank of Ireland (2018), 'Outline of the Administrative Sanctions Procedure'.
[127] Central Bank of Ireland (2019), 'ASP Sanctions Guidance', November.
[128] Central Bank of Ireland (2018), 'Outline of the Administrative Sanctions Procedure', para. 6.1.1.
[129] Central Bank of Ireland (2019), 'ASP Sanctions Guidance', November, para. 13.

- any remedial steps taken since the contravention was identified, including identifying whether consumers have suffered loss or detriment and compensating them, taking disciplinary action against staff involved (where appropriate), addressing any systemic failures, and taking action designed to ensure that similar problems do not arise in the future;
- the likelihood that the same type of contravention will recur if no administrative sanction is imposed;
- whether the contravention was admitted or denied.

The previous record of the regulated entity, including:

- whether the Central Bank has taken any previous enforcement action including instances resulting in a settlement or sanctions, or whether there are relevant previous criminal convictions;
- whether the regulated entity has previously undertaken not to do a particular act or engage in particular behaviour;
- whether the regulated entity has previously been requested to take remedial action, and the extent to which such action has been taken.

Other considerations, including:

- the prevalence of the contravention;
- the appropriate deterrent impact of any sanction on the regulated entity and on other regulated entities;
- action taken by the Central Bank in previous similar cases;
- the level of turnover of the regulated financial service provider in its last complete financial year prior to the commission of the contravention;
- any other relevant considerations.

Source: Oxera analysis of The Central Bank of Ireland (2018), ‘Outline of the Administrative Sanctions Procedure’, section 6.3.

As noted, additional guidance was issued in 2019—in effect, on each of the sanctioning factors outlined in Box 4.13. In particular:

- the factors listed relating to the nature, seriousness and impact of the contravention determine the serious of the infringement;[130]
- the factors relating to the conduct and the previous record of the regulated entity generally act as aggravating or mitigating factors;[131]
- the final group of factors (other considerations).[132]

With respect to the nature, seriousness and impact of a contravention, the Central Bank notes, for example, that infringements will be more serious where the infringement is deliberate or dishonest and/or takes place over a long period of time or with high frequency.[133]

In relation to the benefit gained or loss avoided, the Central Bank states that the benefit/loss does not have to materialise; potential benefits/losses can be taken into account.[134] Moreover, with regard to the loss or detriment caused to consumers, the Central Bank explains that with widespread loss or detriment

[130] Central Bank of Ireland (2019), ‘ASP Sanctions Guidance’, November, pp. 6–8.
[131] Central Bank of Ireland (2019), ‘ASP Sanctions Guidance’, November, pp. 9–18.
[132] Central Bank of Ireland (2019), ‘ASP Sanctions Guidance’, November, p. 19.
[133] Central Bank of Ireland (2019), ‘ASP Sanctions Guidance’, November, p. 6.
[134] Central Bank of Ireland (2019), ‘ASP Sanctions Guidance’, November, p. 6.

the infringement will be viewed as more serious.[135] However, the Central Bank does not explain whether the losses or detriment are quantitatively assessed or whether these factors mechanistically affect the penalty amount.

In respect of the level of turnover, the Central Bank states that the level of turnover 'may be relevant for a determination of the impact of a monetary penalty on a regulated entity, and by extension, to the deterrent effect of a monetary penalty'.[136] This implies that a regulated entity with a high level of turnover may receive a greater financial penalty than it would have otherwise received with a smaller turnover, in order to ensure the effect of deterrence.

Case study: financial penalty levied on Permanent TSB

On 30 May 2019, the Central Bank imposed a financial penalty on Permanent TSB (PTSB) under the ASP.[137] This was with respect to 42 separate regulatory breaches, which affected approximately 2,000 tracker mortgage accounts. This is the largest fine imposed to date by the Central Bank under the ASP.

The Central Bank determined that the appropriate amount for the penalty was €30m, which was reduced by 30% to €21m in accordance with its settlement discount scheme. In its public statement on the case, the Central Bank set out how it took into account the various factors in determining the penalty amount (see Box 4.14).

[135] Central Bank of Ireland (2019), 'ASP Sanctions Guidance', November, p. 7.
[136] Central Bank of Ireland (2019), 'ASP Sanctions Guidance', November, p. 19.
[137] Central Bank of Ireland (May 2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.'.

Box 4.14 Factors considered by the Central Bank of Ireland in determining the penalty amount in the Permanent TSB case

The Central Bank stated that the sanctions imposed reflected the '**seriousness** with which the Central Bank regards PTSB's admitted regulatory failings and the **unacceptable harm and detriment** caused', and that the sanctions imposed 'should also serve to act as an **effective deterrent**' [emphasis added].[138] In deciding on the appropriate sanctions, the Central Bank took into account, among other things:[139]

- the effect of the contravention on customers;
- the duration of the contravention which, in some cases, resulted in customers being overcharged interest for extended periods of time;
- the frequency of the breaches—i.e. approximately 2,000 customer accounts were affected;
- the need for a credible deterrent with regard to the serious regulatory failings.

The Central Bank stated that an aggravating factor for the case was PTSB's initial failure to 'engage satisfactorily with the Central Bank's request for satisfactory remediation proposals […]'.[140] The Central Bank stated that PTSB's action to identify affected customers and provide redress, its admission in respect of the matters under investigation, and its (subsequent) cooperation with the investigation, were mitigating factors.[141]

In this case, the Central Bank gave strong consideration to both the seriousness of the breach and the deterrence effect in determining the amount of the financial penalty. In particular, it is worth noting that, in addition to the financial penalty, PTSB was required to pay redress and compensation amounting to approximately €54m.[142]

Source: Oxera analysis of Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', May.

4.6.2 The Broadcasting Authority of Ireland

The BAI is the regulator of broadcasting in Ireland. Its remit and powers are set out in the Broadcasting Act 2009.

One of the responsibilities of the BAI is setting broadcasting codes and rules, and monitoring and enforcing compliance of licensed broadcasters with these codes and rules, and with requirements set out in the Broadcasting Act 2009. These monitoring and enforcement duties are overseen by the BAI. There are respective roles for both the Authority itself, and the BAI's statutory Compliance Committee.

Legal framework

The Broadcasting Act 2009 contains provisions for imposing financial penalties. However, as explained below, the BAI can only directly impose financial penalties under certain circumstances.

The Compliance Committee is responsible for appointing an investigative officer pursuant to section 53 of the 2009 Act, and for considering the

[138] Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', May, p. 7.
[139] Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', May, p. 7.
[140] Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', May, p. 7.
[141] Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', May, p. 8.
[142] Central Bank of Ireland (2019), 'Public statement relating to enforcement action against Permanent TSB p.l.c.', p. 1.

investigation report on an apparent breach.[143] Where the Compliance Committee finds that there has been a breach by the broadcaster concerned, it may recommend to the BAI that the Authority notify the broadcaster—and the Authority must comply with this recommendation.[144]

The Authority's notification to the broadcaster will:

- set out the reasons for the notification;
- state that the BAI intends to apply to the High Court for a determination that there has been a breach, unless the broadcaster concerned requests that the Authority deal with the matter under section 55(2);
- indicate the amount of the financial sanction that it proposes, up to the statutory maximum limit of €250,000, if the matter is dealt with by the Authority under Section 55(2) of the 2009 Act.[145] The Authority may indicate in the notification the amount of the financial sanction—not exceeding €250,000—that it intends to recommend to the Court if the matter is dealt with by the Court, under Section 55(1) of the 2009 Act.[146]

If the broadcaster opts to have the matter dealt with by the Court, it is then ultimately for the court to determine whether there has been a breach and the penalty amount, having regard to the BAI's recommendation.[147]

In response to the notification issued by the BAI, if the broadcaster requests that the BAI, rather than the Court, deals with the infringement,[148] the BAI itself can make the final determination of whether there has been a breach and specify that the broadcaster must pay the BAI a financial penalty not exceeding the amount specified in the notification.[149]

The Broadcasting Act 2009 stipulates the factors that the BAI, and the High Court, must take into account in determining the financial penalty amount. A summary is provided in Box 4.15, focusing on the factors that are most relevant to ComReg (i.e. excluding factors that are specific to issues in broadcasting).

[143] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 53.
[144] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 54(3).
[145] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 54(4).
[146] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 55(1).
[147] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 55(1).
[148] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 54(4)(b).
[149] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 55(2).

Box 4.15 Factors in determining financial penalties in Ireland under the Broadcasting Act 2009

The Broadcasting Act 2009 states that the penalty should be **appropriate** and **proportionate**, and should 'act as a **sufficient incentive to ensure future compliance** in respect of the requirement breached' [emphasis added].[150]

The Broadcasting Act 2009 stipulates an extensive list of factors that the BAI and the High Court must take into account in determining the amount of any financial penalty. The penalty amount must reflect, for example:

- the seriousness of the breach;
- the turnover of the broadcaster in the financial year ending in the year previous to the breach and the ability of the broadcaster to pay the amount;
- the extent of any failure to cooperate with the investigation;
- any excuse or explanation by the broadcaster for the breach or failure to cooperate with the investigation;
- any gain (financial or otherwise) made by the broadcaster as a consequence of the breach;
- the degree of harm caused or increased cost incurred by audiences, consumers or other market participants as a result of the breach;
- the duration of the breach;
- continuation by the broadcaster of the breach;
- repeated breaches by the broadcaster;
- whether the broadcaster knew, or ought to have known, that the breach was occurring or would occur;
- the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the broadcaster to prevent breach by the broadcaster;
- the extent and timeliness of any steps taken to end the breach in question and remedy the consequences of the breach;
- submissions by the broadcaster of the appropriate amount of the financial sanction;
- whether financial penalties have been imposed in respect of similar conduct, and any precedents set by the Court or the BAI.

Source: Oxera analysis of the Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2.

In addition to its statutory obligations, the BAI has internally set out a series of principles that it will consider in determining the appropriate level of a financial penalty.[151] The BAI states that the issuance of financial penalties should reflect the general practice of the Irish Courts—i.e. it should have regard to the specific circumstances of the case, the seriousness of the breach, and any mitigating factors that might reduce the amount of the penalty. In general, the BAI's principles have a high degree of overlap with the factors specified by the Broadcasting Act 2009.

[150] Broadcasting Act 2009 (Number 18 of 2009), Part 5, Chapter 2, Section 56(a).
[151] Information provided by the BAI to ComReg in an email dated 25/09/2019.

Case study: financial penalty levied on Raidió Teilifís Éireann

There is only one case where the BAI has levied a financial penalty on a broadcaster. In 2012, the Compliance Committee found that a programme broadcast by the Public Service Broadcaster Raidió Teilifís Éireann (RTÉ) breached requirements of the Broadcasting Act 2009.[152] In this case, RTÉ requested that the BAI, rather than the Court, deal with the matter.

The Authority determined that the infringement represented a serious breach of the Broadcasting Act 2009.[153] However, it noted that RTÉ had admitted that the broadcast breached the Broadcasting Act 2009, that it had fully cooperated with the investigation, and that no gain (financial or otherwise) had been made by RTÉ as a consequence of the breach.[154]

In considering the above, and aspects of the case, the BAI determined that the penalty should be set at €200,000. The BAI stated that:[155]

> The Authority wishes to stress that its findings should not, in the slightest way, be construed as representing a deterrent, for this or any other broadcaster, in respect of a continuing engagement with investigative journalism. On the contrary, it is to emphasise for audiences the importance that the Authority attaches to the observance of the highest standards in policy and practice in respect of current affairs and to act as a reassurance that the audience's confidence in the expectation of such high standards, especially from a publicly funded broadcaster, will be respected and quickly restored.

4.6.3 Commission for Regulated Utilities

The CRU is Ireland's independent energy and water regulator.

The Energy Act 2016 gives the CRU statutory powers to impose administrative sanctions for breaches of licence conditions.[156] The CRU may impose a financial penalty of up to 10% of the turnover of the infringing provider.[157] The decision to impose a financial penalty will not take effect unless the decision is confirmed by the High Court.[158]

The Energy Act 2016 states that, in determining sanctions, including financial penalties, the CRU or High Court must take into account the circumstances of the infringement concerned (including the factors that caused the infringement), and may take into account a number of specified factors (see Box 4.16).[159]

[152] Broadcasting Authority of Ireland (2012), 'Statement of findings issued pursuant to Section 55 (2) of the Broadcasting Act 2009'.
[153] Broadcasting Authority of Ireland (2012), 'Statement of findings issued pursuant to Section 55 (2) of the Broadcasting Act 2009', p. 2.
[154] Broadcasting Authority of Ireland (2012), 'Statement of findings issued pursuant to Section 55 (2) of the Broadcasting Act 2009', p. 5.
[155] Broadcasting Authority of Ireland (2012), 'Statement of findings issued pursuant to Section 55 (2) of the Broadcasting Act 2009', p. 6.
[156] Energy Act 2016, Part IX.
[157] Energy Act 2016, Part IX, Section 55.
[158] Energy Act 2016, Part IX, Section 61.
[159] Energy Act 2016, Part IX, Section 65.

Box 4.16 Factors in determining financial penalties in Ireland under the Energy Act 2016

The Energy Act 2016 states that a number of factors may be taken into account in determining sanctions. These include:

- the need to ensure that the sanction is **appropriate** and **proportionate** and, if applicable, will act as a sufficient incentive to **deter future infringements**;
- the seriousness of the conduct;
- the turnover of the specified body in the financial year preceding the financial year in which the infringing conduct last occurred;
- the extent of any failure of the specified body to cooperate with the investigation;
- any excuse or explanation for the infringement or failure to cooperate with the investigation;
- any gain (financial or otherwise) made as a result of the infringement;
- the amount of loss suffered or costs incurred as a result of the infringement;
- the duration of the infringement;
- the repeated occurrence of infringing conduct;
- if applicable, the continuation of the infringement after the specified body was notified of the investigation;
- if applicable, the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent infringements from occurring;
- if applicable, the extent and timeliness of any steps taken to end the conduct, and any steps taken for remedying the conduct;
- any precedents set by a court, the Commission or another party in respect of previous infringements.

Source: Oxera analysis of the Energy Act 2016, Part IX.

We understand that, to date, the CRU has not used its powers to impose financial penalties.

4.6.4 The Competition and Consumer Protection Commission

The CCPC is an independent statutory body responsible for enforcing competition and consumer protection law in Ireland. The CCPC does not currently have the power to impose administrative financial sanctions for breaches of EU or Irish competition law or for breaches of consumer protection law.

Breaches of competition law can be pursued through either civil or criminal proceedings in the Irish courts. As regards civil sanctions, under the current legal framework, the CCPC can apply to the Circuit Court or High Court to seek a declaration that a particular conduct is unlawful, and/or request that a particular conduct be terminated in any case involving an infringement of competition law.[160] However, neither the CCPC nor the Irish Courts currently have the power to impose any form of civil financial penalty for infringements of competition law.

[160] Competition Act 2002, as amended by the Competition Act 2006, by the Competition (Amendment) Act 2012, and by Parts 3 and 4 of the Competition and Consumer Protection Act 2014, Section 14.

The CCPC can investigate a case and bring a summary prosecution in the District Court, or in more serious cases can refer the case to the Director of Public Prosecutions. The Director of Public Prosecutions will decide whether to bring a prosecution on indictment in the Central Criminal court. If convicted on indictment, a business or an individual can be fined up to €5m or 10% of its annual business turnover, whichever is greater, and individuals can be sentenced to a term of imprisonment not exceeding ten years.[161]

For breaches of consumer protection law, the CCPC's financial penalties are limited to fixed penalty notices of €300, and it cannot impose administrative fines.[162]

4.6.5 The Law Reform Commission of Ireland's recommendations

There is considerable variation in the powers available to regulatory authorities in Ireland. This includes varying degrees of power with respect to imposing financial penalties.

The Law Reform Commission is an independent statutory body, whose primary responsibility is to 'keep the law under review and to make proposals for reform, in particular by recommending the enactment of legalisation to clarify and modernise the law'.[163] Its recommendations are advisory and not legally binding.

In 2018, following an initial report and a public consultation, the Law Reform Commission put forward its final recommendations in respect of regulatory powers and corporate offences. These included a recommendation to standardise the statutory framework for legal powers, to equip regulatory authorities with the same regulatory toolkit of six 'core' powers. This included the recommendation to give regulatory authorities the '[p]ower to impose administrative financial sanctions (subject to court oversight)'.[164]

The Law Reform Commission considered in detail what the statutory framework should be with respect to imposing administrative financial sanctions.[165] Box 4.17 outlines some of the key recommendations made in the report by the Law Reform Commission.

Box 4.17 Recommendations on administrative financial sanctions

The Law Reform Commission considered the benefits and weaknesses of financial sanctions. It also set out the principles of financial penalties as: deter non-compliance; impose a proportionate sanction; prevent financial benefit ('disgorgement'); be responsive to the regulated entity.

The Law Reform Commission Report recommended that 'subject to the principles and procedural safeguards recommended … the power to impose administrative financial sanctions is both valuable and necessary in ensuring that financial and economic regulators have the requisite powers to achieve their regulatory objectives.'[166]

The Report recommended that, 'in determining the appropriate level of administrative financial sanction, the Adjudicative Panel Committee should be required to take into account all relevant circumstances, including, where appropriate:

[161] Competition Act, 2002 (Number 14 of 2002), as amended by the Competition (Amendment) Act 2006, by the Competition (Amendment) Act 2012, and by Parts 3 and 4 of the Competition and Consumer Protection Act 2014, Section 8.
[162] Consumer Protection Act 2007 (Number 19 of 2007), Part 5, Chapter 5.
[163] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', p. ii.
[164] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 2.02(4).
[165] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', Chapter 3.
[166] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.01.

- the gravity and duration of the breach;
- the degree of responsibility of the natural or legal person responsible for the breach;
- the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;
- the importance of profits gained, or losses avoided, by the natural or legal person responsible for the breach, insofar as they can be determined;
- the losses for third parties caused by the breach, insofar as they can be determined;
- the level of cooperation of the natural or legal person responsible for the breach with the competent authority;
- previous breaches by the natural or legal person responsible for the breach; and
- any action taken to mitigate the damage caused by the breach.'[167]

Other recommendations made in the Law Reform Commission Report are that:

- the financial and economic regulators encompassed by the report be provided with the express power to remove economic benefit derived from a regulatory breach;[168]
- the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an upper limit of €10m or 10% of annual turnover, whichever figure is the greater;[169]
- the standardised regulatory powers template should involve, in the case of an administrative financial sanction as applied to a legal person, an overriding requirement that the level of the sanction should not be so high that it would be likely to cause the regulated entity to cease business;[170]
- each regulator should be required to publish guidance on enforcement policy and its use of administrative financial sanctions.[171]

Source: Oxera analysis of Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', Chapter 3.

4.6.6 Implications from the approaches to financial penalties across Irish regulatory authorities

As is clear from the above, there is considerable variation in the regulatory powers afforded to different regulatory authorities in Ireland. Several regulatory authorities, including the CCPC and ComReg itself, do not have the power to levy financial penalties. Moreover, among the authorities that we spoke to that do have the power to impose financial penalties, there are differing legislative provisions. For example, these provisions can act in a way to constrain the authority's ability to directly impose financial penalties and/or prescribe the factors that the authority must have regard to in determining the penalty amount.

While several authorities do have the power to impose financial penalties, of those that we spoke to the Central Bank appears to have been the most active in respect of levying these.[172]

[167] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.31.
[168] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.32.
[169] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.33.
[170] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.35.
[171] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', para. R 3.37.
[172] The BAI has used this power only once, while the CRU has not used it. We did not speak to the Commission for Aviation Regulation, nor the Office of the Director of Corporate Enforcement, which also have the power to set financial penalties.

However, a general observation from the authorities that we spoke to is that the factors that they have regard to in determining the penalty amount are similar. For example, the Central Bank, the BAI and the CRU all have regard to:

- the seriousness and duration of the infringement;
- the deterrent effect of the penalty;
- the turnover of the infringing party;
- other aggravating and mitigating circumstances, such as the level of cooperation and whether the conduct was intentional.

We understand that the Law Reform Commission recommendations are not legally binding, and are still being considered and debated in Ireland (including within the affected sectors). Nonetheless, the Law Reform Commission highlights—as a point of principle—that to be effective, financial penalties should deter non-compliance, be proportionate, prevent financial benefits from infringement, and be responsive to the regulated entity.

The above suggests that the direction of travel in Ireland is towards increased regulatory powers, including the power to impose proportionate financial penalties that deter non-compliance with regulatory obligations. Moreover, it is worth noting that the Law Reform Commission recognises each authority's expertise with respect to specifics of the cases that might arise in the authority's sector,[173] and that it recommends a requirement for each authority to publish guidelines on the approach. This suggests that authorities will have a degree of discretion in determining financial penalties, should they be granted the power to do so.

4.7 Further evidence: data protection breaches

As part of our research we also explored recent developments in penalties for breaches of EU data protection regulations.

In 2016 the European Commission updated the Data Protection Regulation with Regulation 2016/679 (GDPR). The GDPR is a Pan-European prescribed approach that was adopted across member states in May 2018, and provides a single set of data protection rules for all companies operating in the EU.[174]

The GDPR protects individuals with regard to the processing of personal data and the free movement of such data. It applies to all organisations that process the personal data of individuals within the EU, whether or not that processing takes place within the EU. Therefore, the GDPR is not limited to large organisations that process personal data on a large scale (or which have SMP).

4.7.1 Financial penalties under the GDPR

Article 83 of the GDPR establishes the general conditions for imposing administrative fines in respect of regulatory infringements, and states that

[173] Law Reform Commission of Ireland (2018), 'Regulatory Power and Corporate Offences', paras 3.169–171.
[174] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation).

these fines should be 'effective, proportionate and dissuasive'.[175] The European Data Protection Board (EDPB) has issued guidelines with respect to levying administrative fines for breaches of the GDPR. The EDPB and each supervisory authority (SA) have agreed on using the guidelines as a common approach, so as to achieve a consistent approach in levying fines under the GDPR.

Article 83 defines the maximum amounts that administrative fines can be set at for breaches of the GDPR. The maximum amount is tiered depending on the specific provision of the infringement breaches. The two thresholds specified are:[176]

- up to €10m or 2% of the total worldwide annual turnover of the preceding year, whichever is higher;
- up to €20m or 4% of the total worldwide annual turnover of the preceding year, whichever is higher.

The tiered thresholds imply that certain breaches are more serious in their form than others, and that therefore the SA has the direction to impose a larger financial penalty. Indeed, the EDPB guidelines state that 'setting up two different maximum amounts of administrative fine … already indicates that a breach of some provisions of the Regulation [the GDPR] may be more serious than for other provisions'.[177]

Article 83 of the GDPR also stipulates a list of factors that SAs are expected to give regard to in the assessment of whether a fine should be imposed and at what amount the fine should be set. Box 4.18 summarises the factors specified by Article 83.

Box 4.18 Factors for determining administrative fines under the GDPR

The GDPR regulation states that SAs shall give regard to:

- the nature, gravity and duration of the infringement, taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
- the intentional or negligent character of the infringement;
- any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- the degree of responsibility of the controller or processor, taking into account the technical and organisation measures implemented by them;
- any relevant previous infringements by the controller or processor;
- the degree of cooperation with the SA, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- the categories of personal data affected by the infringement;

[175] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation), Article 83, para. (1).
[176] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation), Article 83, paras (4)–(5).
[177] European Data Protection Board (2017), 'Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679', p. 9.

- the manner in which the infringement became known to the SA, and in particular whether, and if so to what extent, the controller or processor notified the infringement;
- where measures have previously been ordered against the controller or processor concerned with regard to the same subject matter, and compliance with those measures;
- adherence to approved codes of conduct or approved certification mechanisms;
- any other aggravating or mitigating factors, such as the financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Source: Oxera analysis of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation).

The relevant factors specified by Article 83 are similar to a number of factors listed in the European Commission's ex post competition law fining guidelines (see Box 4.1).

Both guidelines point to the gravity, which reflects the seriousness of the infringement, and the duration of the infringement as being relevant factors for determining the value of the fine. Moreover, a number of the other factors mentioned in the EDPB Guidelines resemble the aggravating and mitigating factors set out in the European Commission's ex post finings guidelines, which would act so as to increase or decrease the financial penalty.[178]

However, a notable distinction is that, whereas the European Commission's ex post fining guidelines provide a starting point for the fine in monetary terms (given by the relevant sales), the EDPB guidelines do not propose how to identify an appropriate monetary amount using the factor set out in Article 83.

Case study: the CNIL fine on Google

There have been a number of fines for breaches of GDPR since it came into force. For example, the Information Commissioner's Office in the UK has published statements outlining its intention to levy fines of approximately £183m on British Airways[179] and approximately £99m on Marriott International.[180] However, these fines are only provisional, and there is no publicly available information on the determination of the amount of the fine.

In 2019, the French SA, the Commission nationale de l'informatique et des libertés (CNIL), levied a €50m penalty on Google LLC for breaches of the GDPR. More specifically, CNIL fined Google for breach of transparency (Article 5 of the GDPR) and information obligations (Articles 12 and 13 of the GDPR), and for a lack of a legal basis for data processing (Article 6 of the GDPR). CNIL published its decision on the case, which included its determination of the appropriate sanction.[181]

[178] Indeed, this was noted in Hogan Lovells (2019), 'A point for setting administrative fines under the GDPR', https://www.hldataprotection.com/files/2019/02/W.-Maxwell-C.-Gateau-A-point-for-setting-administrative-fines-under-the-GDPR.pdf, p. 106.
[179] See Information Commissioner's Office (2019), 'Intention to fine British Airways £183.39m under GDPR for data breach', 8 July, https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/ico-announces-intention-to-fine-british-airways/, accessed 11/12/2019.
[180] See Information Commissioner's Office (2019), 'Statement: Intention to fine Marriott International, Inc more than £99 million under GDPR for data breach', 9 July, https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/statement-intention-to-fine-marriott-international-inc-more-than-99-million-under-gdpr-for-data-breach/, accessed 11/12/2019.
[181] Commission nationale de l'informatique et des libertés (2019), 'Deliberation of the Restricted Committee SAN-209-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.', Part III.

Google had made representations arguing that it considered the amount of €50m to be disproportionate. It noted that it did not receive a formal notice that would have enabled it to undertake a compliance procedure; that not all of the factors in Article 83 were taken into account—in particular, the impossibility of taking corrective measures in the absence of a prior notice; and the low number of users affected by the breaches.[182]

However, the Restricted Committee of the CNIL considered that the imposition of an administrative fine on Google was justified. It set out its considerations with respect to the factors specified in Article 83 (see Box 4.19).

Box 4.19 Determination of the financial penalty levied on Google for breaches of the GDPR

The CNIL Restricted Committee placed significant weight on the importance of the provisions that were breached:

> Articles 6 and Articles 12 and 13 are among the provisions which, when disregarded, are most severely punishable under Article 83, Paragraph 5 of the GDPR.[183]
>
> The disregard for these essential obligations therefore appears particularly serious, because of their nature alone[184]

The Restricted Committee also considered the duration of the infringement, noting that the breaches were found to have continued to the date of the decision and were therefore an ongoing violation.

The Restricted Committee assessed the gravity of the violation with regard to the purpose of the processing, its scope, and the number of people involved. It noted:

- that, while Google said that the infringement affected only 7% of Google's users, the number of people affected was particularly significant;
- the scope of processing in the context of mobile phones using the Android operating system;
- that the large amount of information collected could be used to draw inferences about people's lifestyles and habits, and therefore closely concerned their identity and privacy.

The Restricted Committee said that, given the above factors, the breaches were of a particular gravity.

The Restricted Committee also noted the context of Google's business model, and in particular the processing of users' data for advertising purposes via the Android operating system, as putting the breaches in context. Given the benefit that Google derives from this processing, the Restricted Committee stated that it should pay particular attention, in its implementation, to its responsibilities under the GDPR.

In light of the factors considered, and the maximum amount established on the basis of 4% of Google's global turnover (€96bn) in 2017, the Restricted Committee considered that a financial penalty of €50m was justified, in addition to the complementary penalty of negative publicity. The penalty amount is equivalent to approximately 0.05% of Google's global turnover in 2017.

Source: Oxera analysis of Commission nationale de l'informatique et des libertés (2019), 'Deliberation of the Restricted Committee SAN-209-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.'.

[182] Commission nationale de l'informatique et des libertés (2019), 'Deliberation of the Restricted Committee SAN-209-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.', Part III, p. 25.
[183] Commission nationale de l'informatique et des libertés (2019), 'Deliberation of the Restricted Committee SAN-209-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.', Part III, para. 176.
[184] Commission nationale de l'informatique et des libertés (2019), 'Deliberation of the Restricted Committee SAN-209-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC.', Part III, para. 177.

4.7.2 Implications from financial penalties under the GDPR

The GDPR provisions give SAs the power to impose financial penalties that are proportionate, effective and dissuasive for breaches of the Regulation. This ex post regime, which applies to all firms, treats infringements as being inherently serious by their nature alone, even if no harm materialises.

The tiered statutory maximum limit indicates that certain breaches are more serious than others according to their form—i.e. in respect of the specific infringement that has been allegedly breached.

Despite the GDPR having come into effect relatively recently, there have been a number of significant penalty announcements, which in one case is in excess of €200m. These very high penalties—in absolute terms—could be indicative of SAs signalling to organisations the seriousness with which they will treat breaches of the GDPR, and to lay down a marker so as to deter future non-compliance.

One point to note, however, with regard to the magnitude of the fines, is that the largest fines—the fine against Google LLC in France, and the provisional fines levied against British Airways and Marriott International in the UK—have been levied against organisations with multi-billion-euro annual turnovers.

What does appear clear, however, is that SAs have signalled the seriousness with which they will treat infringements of the GDPR, and the recognition that the penalty amount relative to turnover is a relevant consideration in setting proportionate and dissuasive penalties.

4.8 Further evidence: net neutrality breaches

As part of our research we also explored recent developments in penalties for breaches of EU net neutrality regulations.

The principle of net neutrality and statutory provisions setting out the regulatory framework surrounding this principle across the EU were established in the Net Neutrality Regulation that came into effect in April 2016.[185] As is the case with the data protection regime (the GDPR) and competition law, the Net Neutrality Regulation is an ex post regime.

4.8.1 Legal framework for imposing financial penalties

As per Article 5 of the Net Neutrality Regulation, NRAs have the responsibility to monitor and enforce compliance with Article 3 (safeguarding of open Internet access), Article 4 (transparency measures for ensuring open Internet access), and Article 5 (supervision and enforcement). Similarly to the GDPR, the Net Neutrality Regulation applies to large and small providers of electronic communications and of Internet access services, rather than being limited to those that are found to have SMP.

Article 6 obliges member states to implement national provisions for 'effective, proportionate and dissuasive' penalties.[186] Initial progress has been slow. In a report published by epicenter.works, it was highlighted that approximately 60%

[185] Regulation (EU) 2015/2120 of the European Parliament and of the Council of the 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

[186] Regulation (EU) 2015/2120 of the European Parliament and of the Council of the 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, Article 6.

of member states had yet to implement such penalties in 2018.[187] Moreover, there has been significant variation across member states with regard to the maximum penalty amount. For example, the UK and the Netherlands have set statutory maximums at 10% of turnover, while Estonia does not allow penalties to exceed €9,600.[188] The report found that, as of 2018, only 11 countries had sufficient national provision to fulfil the obligations of Article 6:[189]

> In fact, only eleven countries (BE, CZ, FR, GB, HU, LT, MT, NL, PL, RO, SK) have fulfilled their obligations under Article 6 of the Regulation as they have set penalties at a percentage of the annual turnover of the infringing company: **in order to be dissuasive and proportionate, a penalty has to be measured against the annual turnover of the company found in violation. This has proven effective in other fields of ex-post regulation like competition and data protection**. Such penalties act as an effective and equal deterrent for both small and big companies. [emphasis added]

In July 2019, Ireland adopted the European Union (Open Internet Access) Regulation 2019,[190] which implements the requirements of Article 6. Under this Regulation, ComReg (as the designated Regulator) may make an application to the Court for an order to pay a financial penalty. However, the decision on the amount of any financial penalty is ultimately at the Court's discretion.

4.8.2 Implications from the net neutrality financial penalty provisions

There has been a mixed response from member states in respect of setting out financial penalties under the net neutrality regime. The EU rules require countries to set out provisions for dissuasive penalties for breaches of the rules, yet many have not done so. The benchmark of percentage of turnover is also emphasised in the rules, yet this has likewise not been implemented in many cases.

Where there is the lack of a credible threat of enforcement, or the penalty limit is insufficiently high to deter non-compliance, the effectiveness of net neutrality enforcement is at risk of being undermined. This is recognised by the epicenter.works report, and by member states that have set higher statutory maximum limits, which give them the discretion to impose sufficiently large penalties to be effective, proportionate and dissuasive, as per Article 6 of the Net Neutrality Regulation.

The Net Neutrality Regulation shows that the direction of travel that the EU would like member states to take is to implement credible dissuasive penalties for breaches regarding an issue that it regards as serious. The provision applies to all firms. The discussion of implementation to date reveals the EU's frustrations regarding member states' adherence to the principles of Article 6.

[187] epicenter.works (2019), 'The Net Neutrality Situation in the EU, Evaluation of the First Two Years of Enforcement', p. 13.
[188] epicenter.works (2019), 'The Net Neutrality Situation in the EU, Evaluation of the First Two Years of Enforcement', p. 13.
[189] epicenter.works (2019), 'The Net Neutrality Situation in the EU, Evaluation of the First Two Years of Enforcement', p. 14.
[190] S.I. 343/2019.

5 A workable methodology for ComReg

Based on the research that we originally undertook in 2016, in this section we recommend a methodology that ComReg could use to calculate the level of financial penalties for breaches of ex ante regulatory obligations in the context of the Access Regulations electronic communications. Section 6 then considers whether this methodology is still valid in light of the additional research undertaken in 2019.

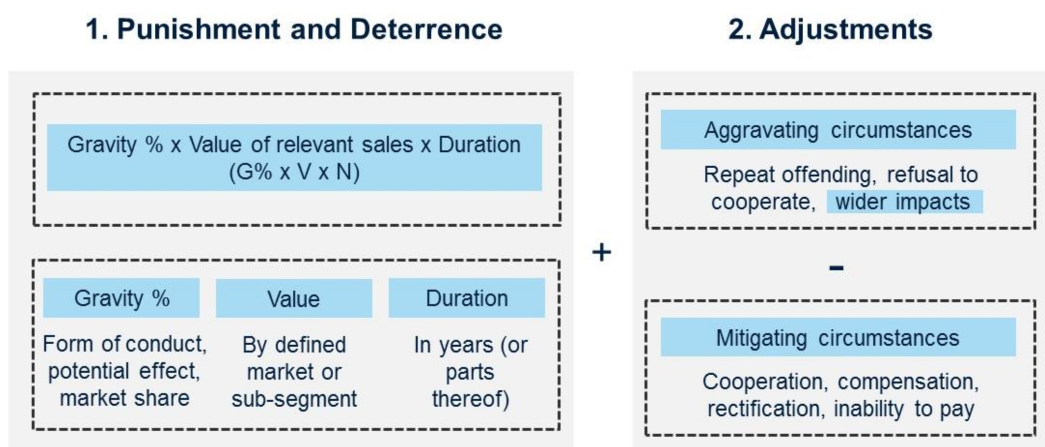
The focus of this methodology is on a particular theory of harm, where the action by a dominant provider of wholesale services hinders wholesale access by competitors, which in turn may dampen competition downstream at the retail level. In an ex post competition rules setting, such behaviour may take the form of refusal to supply or a margin squeeze.

Dominance in an ex post competition rules setting is equivalent to the concept of SMP in an ex ante regulatory setting. Where a provider of wholesale services has SMP, the EU telecoms framework states that it is necessary to have some form of ex ante regulation for the set of wholesale services concerned, in order to protect consumers and to ensure a level playing field for competitors.

This can include price regulation for some wholesale inputs, and/or regulatory obligations at the wholesale level—for example, relating to transparency, non-discrimination and access. The theory of harm is then that breaches of these ex ante regulatory obligations may be expected, a priori, to have a negative impact on competition downstream.

The overarching penalties methodology that Oxera recommends is summarised in Figure 5.1.

Figure 5.1 Recommended methodology for setting penalties



Source: Oxera.

In what follows, we describe:

- reconciliation with regulatory objectives and economics;
- the relevance of the European Commission competition law approach;
- issues to bear in mind in arriving at the methodology;
- the recommended methodology.

5.1 Reconciliation with regulatory objectives and economics

The methodology should be consistent with ComReg's overarching functions and objectives to promote competition, promote consumer choice, and remove obstacles to the development of communications infrastructure.

Any penalty should also be consistent with the European Commission guidance on setting penalties for breaches of regulatory obligations.[191] In this respect, a penalty should be:

- **appropriate**—it should rectify a clearly identified breach of regulatory obligations that has a sufficiently material impact at a defined point in the value chain;
- **effective**—it should be practical to implement such that it can achieve its intended effects;
- **proportionate**—it should seek to address the harm caused or the illicit gains made;
- **dissuasive**—it should also deter future breaches of regulatory obligations by the party concerned or by other parties.

5.2 Relevance of a competition law-based approach

As discussed in the preceding sections, the competition law-based approach to assessing penalties is relevant for assessing penalties in the event of breaches of ex ante regulatory obligations.

This is because:

- competition and regulatory policy are based on similar economic principles. Refusal to supply and margin squeeze share the same economics as breaches of regulatory requirements relating to non-discrimination, transparency and access (at least in so far as the latter result in exclusionary effects in downstream retail markets);
- EU rules require member states to enable relevant authorities in electronic communications to issue penalties for breaches of ex ante regulatory obligations, and for member states to set out rules on deciding on penalties for infringements. These penalties must be appropriate, effective, proportionate and dissuasive;
- a number of EU member states have adopted methodologies, within or as a consequence of these rules, that specifically include a role for deterrence (i.e. dissuasiveness), although there is variation across member states in the methodologies employed and the level of detail provided;
- while the objective of 'deterrence' is not mentioned explicitly in the rules contained in the Irish legislation, it should still play an important role. As discussed in section 2.1:
  - EU requirements highlight a role for 'dissuasiveness' and are binding;

[191] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108/21, 24.4.2002; as amended by Article 3, Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, OJ L 337/37, 18.12.2009. Also, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.04.2002; as amended by Article 1 of Directive 2009/140/EC.

    - ComReg has general regulatory duties that it must take into account in setting penalties;
    - the Irish legislation states that the circumstances of the non-compliance need to be taken into account 'including' certain factors (i.e. not necessarily excluding others);
    - the High Court must take account of the effect on other operators (which may, in practice, be over the long term);
    - the High Court must take account of the regulator's proposal. The ultimate decision is, however, for the High Court;
- the economics literature on optimal fines points to deterrence-based penalties, and this influenced the European Commission guidance on fines for competition breaches. The guidance was a practical reflection of what may be feasible to compute, in order to have a deterrence effect, given the data available.

We therefore consider that a reasonable methodology would be based in part on the European Commission's competition approach, the approach adopted by member states in relation to regulatory obligations in communications, and lessons from other regulators.

5.3 Issues to consider in arriving at the methodology

We note that setting penalties on the basis of the theoretically optimal level is usually difficult in practice, as it requires a calculation of the exclusion at the wholesale level and the knock-on impact on competition at the retail level, to determine the profits gained by the incumbent or lost by the retail competitor relative to the counterfactual (i.e. no breach of regulatory obligations). The probability of detection would also need to be taken into account. For *practical purposes*, this data might not be readily available at low cost or in a timely way.

A related issue is that a purely effects-based approach places the *burden of proof* on the investigating competition authority or regulator to show that there has been a negative impact on competition. This may not be conducive to effective deterrence where data availability is limited.

Instead, the European Commission's competition approach provides a compromise, using the percentage of turnover on relevant sales, which is a more readily available metric.

It should also be borne in mind that ex ante regulatory obligations go *further* than competition rules in limiting certain behaviours.

Price discrimination by a dominant incumbent between different customer classes in the retail market is not a *per se* abuse under competition law. This is because it may be a way of spreading fixed costs that is output-enhancing. However, discrimination by a dominant incumbent at a wholesale level, between its own retail affiliate and the retail business of a competitor, and which in turn would be expected to have an exclusionary effect on competition at the retail level, may be prohibited under competition law. Margin squeeze and refusal to supply are examples of the latter.

Ex ante regulatory obligations often go further than ex post competition law in the following key respects.

- Regulatory obligations take a forward-looking view on potential market developments, and seek to address the risk of future harm.
- In this vein, it is recognised that there is SMP at the wholesale level, which necessitates some form of ex ante regulation, for example including obligations for non-discrimination, transparency and/or access. It is the responsibility of providers with SMP in providing wholesale services to comply with these obligations.
- It can be assumed that, in the absence of this compliance, there would be a negative impact on downstream retail competition, or a risk of such an impact in future.
- In assessing breaches of ex ante regulatory obligations, therefore, the burden of proof should not necessarily be placed on the regulator to show cause and effect or downstream harm, in particular if a key objective is effective deterrence.

It would still be necessary for the regulator, in recommending a penalty, to confirm that the form of the conduct concerned corresponded to the ‘theory of harm’ established when the ex ante SMP obligation was imposed. The regulator may then also consider any further specifics relating to the theory of harm in the particular case concerned; including a qualitative evaluation of the main impacts at the wholesale and retail level (who is harmed and who gains, directly and indirectly).

The European Commission competition-based approach then involves assessing the following:

- the turnover metric used;
- the determination of gravity; and/or
- the assessment of mitigating/aggravating factors.

All other things remaining constant, conduct at the wholesale level that would be expected to harm competition in one or more retail segments will attract a higher candidate turnover figure, higher gravity, and/or more aggravating factors (and fewer mitigating factors).

As discussed, there is wide variation across EU member states as to the precise methodology used to calculate penalties for breaches of regulatory obligations in electronic communications, including in the assessment of mitigation or aggravating circumstances. Our proposed methodology leans towards the European Commission competition-based approach.

The calculation of the basic amount as ‘relevant sales x gravity x duration’ in effect encapsulates, by proxy, both punishment and deterrence.

There is also a matter of retaining regulatory discretion versus establishing aspects of its methodology in a systematic way upfront. From a practical perspective, while predictability creates legal certainty, it also restricts the flexibility of the regulator to arrive at a decision based on the merits of the case. Each case will be different.

Also, from a deterrence perspective, there are arguments for and against predictability. As Wils (2007) notes:[192]

> There appears to be a wide divergence of opinion as to how foreseeable or predictable fines should be. It is often argued, or implied, that the more predictable fines are, the better. On the other hand, enforcement officials, authorities and courts have often warned against the risk of too high a degree of foreseeability.

In theory, it might be expected that more predictability will increase deterrence as, given the level of the potential penalty, a firm will undertake a cost–benefit calculation of whether to breach. However, Wils (2007) highlights two main ways in which more predictability might actually reduce deterrence. First, if firms are risk-averse to high penalties (given that these can lead to financial distress), a more indeterminate approach to setting penalties enhances deterrence. Alternatively, as penalties may be insufficient to provide effective deterrence, predictability may lead some firms—which would otherwise be law-abiding—to consider an infringement. Whereas before they did not have the calculations to perform the cost–benefit assessment, predictability enables them to do so.[193]

In short, any methodology will need to balance prescription and flexibility. In most policy contexts in which deterrence is an objective, some predictability of penalties is considered desirable in order to achieve fair and effective enforcement.[194] From a practical perspective, the methodology should be transparent, but it need not be completely comprehensive.

As discussed in section 4, another important issue will be which market segment or sub-segments to use in defining relevant sales. There are two perspectives here:

- from the perspective of *actual* competitors that suffer harm, the relevant turnover will be the specific sub-segment affected by the wholesale breach (e.g. the small business retail market for a specific product), although there may also be wider long-term effects;
- from the perspective of consumers, however, the market definition determines where competitive constraints lie. This may lead to a wider definition of relevant turnover (for example, fibre broadband retail turnover).

For example, on the second point, exclusion of competitors in one retail sub-market may mean higher prices in this sub-market (e.g. large businesses) and this may, in turn, mean higher prices in another sub-market (e.g. SME businesses). In contrast, if the two sub-segments did not constrain each other in this way—through demand-side substitution—they would not be deemed to be in the same market in the first instance (save for any rapid supply-side substitution).

Business and domestic users may be in separate retail markets, with separate pricing practices applying to each. If so, the 'relevant market' for determining the relevant sales would be narrower than in the case where different market segments constrain each other.

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[192] Wils, W. (2007), 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', Public Lecture, King's College London, Centre of European Law, 15 February.
[193] Wils, W. (2007), 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', Public Lecture, King's College London, Centre of European Law, 15 February.
[194] For a discussion of deterrence-based fines, see Niels G., Jenkins H. and Kavanagh J. (2016), *Economics for Competition Lawyers*, second edition, Oxford University Press, pp. 394–6.

It is still within the discretion of the member state, however, to determine which approach it will use. The European Commission 2006 guidance relates to its own investigations, and does not require member states to follow precisely the same approach at the national level.

The European Commission 2006 guidance also refers to sales of goods or services that are 'directly or indirectly' associated with the breach. This provides some discretion for a narrow or wider definition of relevant sales to be adopted in the downstream market. The terminology also leaves open the possibility of considering, along the vertical chain, both retail *and* wholesale revenues in the analysis.

Practice varies. As discussed in section 4, following aspects of the Commission's approach, some countries have adopted a narrow definition of relevant turnover, whereas others have adopted a wider definition:

- **narrow definitions (retail)**—in Belgium there is precedent for adopting a narrow definition of relevant sales, based on a subset of the retail market. There has been discussion in this instance of the difference between assessing market definition and assessing relevant turnover for setting fines;
- **wider definitions (retail)**—in the UK, the (former) OFT favoured using 'the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year',[195] which may in practice mean a wider retail market;
- **account of wholesale revenues**—there is also recent precedent in which the European Commission, in assessing relevant turnover, has taken into account revenues from both wholesale and retail services. This is evident from its examination of the Polish telecoms case. There also appears to be precedent for this in a refusal-to-supply case in South Africa.

The last approach could lead to concerns of double-counting if it is not implemented carefully, since it is likely that retail revenues already implicitly include payments for wholesale services. Ultimately, in refusal to supply and related cases, the restriction of access at the wholesale level is simply a *mechanism* through which harm would be expected to be caused to competition at the retail level, rather than an end in itself.

As regards market definition, it is of note that it would also be possible to define separate downstream markets by distribution channel. Once again, domestic and business products may be sold through different channels, and might be in different downstream markets.

For example, in its 2011 wholesale broadband access market review, ComReg noted that, while it was not necessary to conclude on the *precise* scope of the retail broadband market, it was likely to be fairly broad. ComReg defined this market as encompassing broadband products offered over copper DSL, cable, fixed wireless access (FWA), and alternative fibre (FTTx) networks. These products were similar in terms of their product and pricing characteristics—to the extent that a customer would be likely to consider them substitutes.

A number of other retail products were excluded from this market definition—namely those delivered through retail narrowband access, satellite networks,

[195] UK Office of Fair Trading (2012), 'OFT's guidance as to the appropriate amount of a penalty', OFT423, September.

leased-line networks, or mobile broadband networks. ComReg also reached the view that the retail broadband market, as defined, should not be segmented by customer type (e.g. residential versus business), given likely demand- and supply-side substitution.[196]

These past assumptions, in the context of a market review, do not prevent a narrower approach being adopted to determine penalties. If wider impacts are not taken into account in determining relevant sales, they might instead be taken into account in the calculation of gravity and/or wider aggravating impacts.

In any event, historical market definitions at the retail level may not be appropriate if these have not been updated for some time and have not taken into account developments in technology (for example, to determine SMP markets) that may affect the definition of the relevant markets.

Where it has been deemed appropriate to use a conservative approach, and to use a narrow definition of relevant sales at the retail level, it will be necessary to determine relevant sales for the retail sub-segment that is directly affected by the wholesale breach. This can be undertaken through an apportionment exercise, based on the share of wholesale lines associated with the breach. A potential approach is illustrated in section 5.4 below.

Another relevant issue is that of monitoring. As discussed in section 3.3, sector regulators usually have more day-to-day interaction with the firms that they regulate than a competition authority would have with firms in the economy in general. This may mean that the detection probability is higher than in the case of ex post enforcement. In turn, gravity, and therefore penalties, might be lower than in the ex post competition cases discussed in section 4.4, while achieving the same deterrence effect. However, as was noted in section 3.3, this should not be taken as a given. Detection problems will still very much be present in enforcing ex ante regulatory obligations, and deterrence will still be important.

Moreover, even if the breaching party has remedied its behaviour, a penalty will still be required to ensure deterrence. Otherwise the firm may simply breach in the knowledge that, if this is discovered, it can simply remedy its behaviour and escape the penalty altogether. In effect, it would face a one-way bet. As such, remedies are simply a mitigating factor to be weighed alongside other factors.

Double jeopardy may also need to be taken into account in assessing proportionality. This is recognised by some member states in relation to ex post competition law enforcement. For example, in the UK, if a penalty or fine has been imposed by the European Commission (or by a court or other body in another member state) for the same agreement or conduct, the CMA must take this into account when deciding on the appropriate fine. This is to ensure that the firm will not be penalised again in the UK for the same anticompetitive effects.[197]

In competition investigations, the European Commission has also recognised the potential for double jeopardy, and has reduced the fine when an amount has already been levied for the same offence by a national court.[198] In an

[196] Ofcom (2011), 'Market Review: Wholesale Broadband Access (Market 5)', Response to Consultation and Decision, Decision D06/11, 8 July. See p. 8, p. 26 and p. 34.
[197] UK Office of Fair Trading (2012), 'OFT's guidance as to the appropriate amount of a penalty', OFT 423, September, p. 16. See also Section 38(9) of the UK Competition Act 1998.
[198] See the discussion of Telekomunikacja Polska in section 4.4.

ex ante setting, Ofwat notes that double jeopardy is a relevant consideration in calculating penalties.[199]

By analogy, within Ireland, if two regulatory breaches occur at the same time (e.g. non-discrimination and transparency) that might be regarded as stemming from the same underlying offence, it may be that separate penalties for the two breaches are not levied since they are not necessarily additive offences.

5.4 The recommended methodology

The penalties methodology, being based on a competition rules approach, assumes that a theory of harm has been established at the time the obligation was imposed, which then justifies a penalty. This requires the following steps:

- identify the relevant theory of harm (for example, breaches of non-discrimination at the wholesale level and their potential impact on downstream retail competition);
- evaluate qualitatively the main impacts at the wholesale and retail level (who is harmed, who gains, directly, indirectly);
- identify the (subset of) affected retail products (defined narrowly or more broadly), and hence the value of sales by sub-segment and geography. Make starting assumptions as necessary.[200]

The methodology then incorporates the components set out in Box 5.1. It involves calculating the penalty as 'value of retail sales x gravity x duration' of the breach, plus adjustments for any aggravating or mitigating circumstances. A deterrence multiplier might also be taken into account, as well as reductions for settlement or inability to pay.

Box 5.1 Recommended methodology for ComReg

In summary, the approach includes the following components:

- a basic amount, composed of:
  - Value of retail sales (V) x Gravity (G) x Duration (N);
- adjustment factors:
  - aggravating circumstances (increased penalties);
  - mitigating circumstances (reduced penalties);
- a deterrence multiplier (if required);
- a legal maximum (10% of total turnover);
- penalty reductions (settlement, inability to pay).

Source: Oxera.

The principal theory of harm in an ex ante setting is where a breach of wholesale regulatory obligations would be expected to have a knock-on impact on downstream retail competition, given current and potential market developments. Such behaviour needs to be punished and deterred.

[199] See the discussion of Ofwat's approach in section 4.3.
[200] An illustration of the theory of harm in a refusal to supply (or deal) case was presented in Figure 3.1.

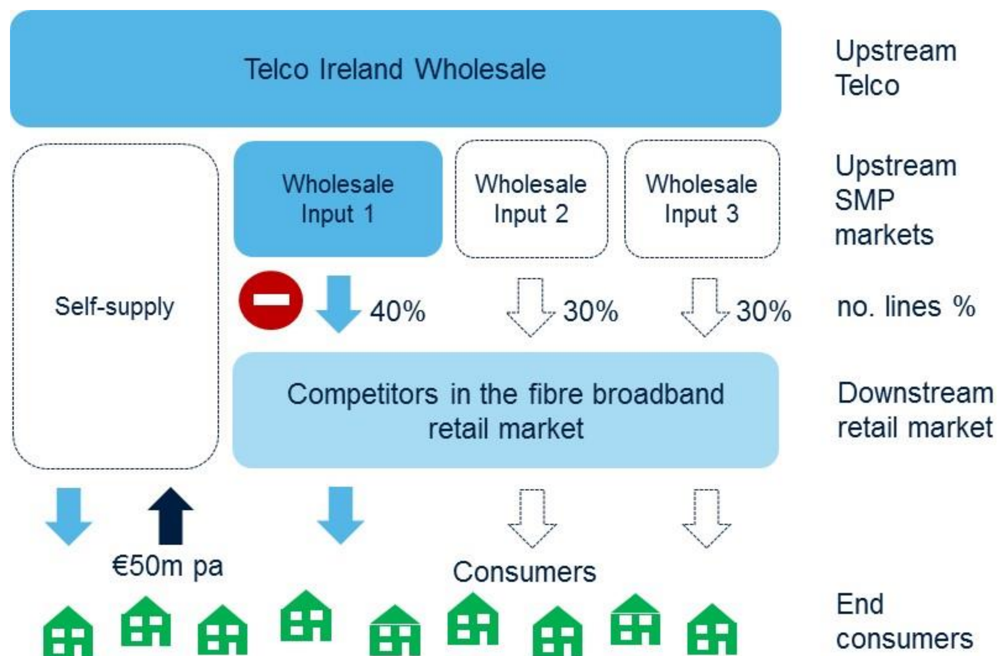
The European Commission 2006 guidance makes it clear that it is the undertaking's sales that are of relevance. The issue of contention is whether only retail revenues are taken into account, or also wholesale revenues; and whether a wide or narrow approach is adopted to assessing affected retail revenues. We proxy the harm and deterrence effect by considering (i) the affected retail sales of (ii) the breaching party in (iii) the downstream market or sub-segment for (iv) the last full business year of the breach.

As discussed, in practice there is discretion to adopt a wide or narrow approach to assessing the relevant retail sales of the breaching party. The European Commission 2006 methodology also leaves open the possibility of considering wholesale revenues in addition to retail sales.

A conservative approach would be to focus on retail sales only, based on an assumption of what proportion of a competitor's retail sales are affected by the wholesale conduct breach (non-discrimination, transparency, access) in question. In practice, retail products (e.g. fibre retail broadband) are often supplied through multiple wholesale inputs (e.g. line-sharing, bitstream), and so an apportionment exercise would be necessary if this approach is adopted.

Figure 5.2 provides a hypothetical example where a wholesaler (Telco), which supplies three wholesale products to competitors, is in breach of a non-discrimination obligation in supplying Wholesale Input 1. It has upstream SMP and is not treating competitors in the same way as it treats its own self-supply division (i.e. there is not 'equivalence of inputs'). This places competitors in the retail fibre broadband market (assuming that the market is defined in this way) at a disadvantage.

Figure 5.2 Determination of value of relevant affected sales



Source: Oxera.

In this example, 40% of wholesale lines are supplied to competitors in the fibre broadband retail market through Wholesale Input 1. It may then, as an approximation, be assumed that the wholesale contravention *directly* affects only 40% of the fibre broadband retail market that is served by competitors. In order to take account of this potential harm—and to generate a deterrence

effect—it might also be assumed that the relevant sales figure to be applied to the breaching party is its own retail fibre broadband sales (of €50m) multiplied by 40%. This leads to a relevant retail sales figure of €20m.[201]

Alternatively, this segmentation might be obtained by asking the wholesaler directly for the relevant data about which wholesale lines correspond to which portions of its self-supply fibre broadband retail revenues.

As noted, it would be possible to take a wider or narrower view of the relevant affected sales. A conservative approach would be to start with a narrow definition of relevant retail sales—the specific retail sub-segments that are affected by the breach—and then look at the extent to which there are reasons to support the expansion of the relevant market to consider other retail segments.

Once relevant sales have been decided on, it will be necessary to apply an assumption on gravity (a percentage of affected sales). Gravity will depend on the nature of the conduct in question, and the market share of the breaching party with wholesale SMP in the affected retail market or sub-segment. The potential effect of the conduct could also be taken into account although, as discussed, this is likely to be qualitative in nature.

In practice, the cases that are likely to be examined by ComReg would be expected to be less serious than cartel cases. As discussed in section 4.1, the European Commission's competition fining guidelines assume a gravity of 15–20% for cartels. Based on the competition precedents discussed in section 4.4, Box 5.2 presents some possible ranges for gravity for a range of breaches of regulatory obligations. These are purely illustrative, as gravity will vary on a case-by-case basis.

Box 5.2 Potential ranges for gravity (G) by conduct

- Equivalent to refusal to supply/margin squeeze: 10–15% (e.g. Belgacom Mobile, Telkom SA, Telekomunikacja Polska)
- Discrimination/transparency/access breach with a material (although less significant) potential impact on retail competition: 5–10%
- Discrimination/transparency/access breach with a potential impact on retail competition: 1–5%
- Pure regulatory breach with a very low potential impact on competition: <2%

Source: Oxera.

In Box 5.2 it has also been assumed that the telecoms ex post competition breaches discussed in section 4.4 (refusal to supply and margin squeeze) form an upper bound for the gravity element (10–15%), and that any breaches of regulatory obligations that are less serious in nature will attract a lower gravity. These ranges would need to be adjusted for the market share of the breaching party in the relevant retail market or sub-segment.

The UK CMA states that, in enforcing ex post competition law, a starting point of 21% to 30% will be used for the most serious types of infringement (e.g.

[201] As a thought experiment, if Telco had breached across all three wholesale inputs, the relevant retail sales figure would be €50m. Keeping the number of retail fibre competitors constant, now assume that only one wholesale input exists (e.g. Wholesale Input 1). Assume that this is provided to all competitors in the retail fibre market, but that there is a wholesale breach of regulatory obligations. In this alternative scenario, the relevant retail sales would (again) be €50m. In theory, the impacts of the breaches on competition would be the same. The methodology outlined thus achieves a form of internal consistency.

more serious cartel infringements), and that 10–20% is more likely to be appropriate for certain less serious 'object' infringements, and for infringements by 'effect'.[202]

Section 4.4 discussed an Ofcom case in which a penalty was levied for a breach of ex ante regulatory obligations in 2015 that had limited impact on competition or consumer harm. This led to a penalty at the lower end of the scale (£800,000, which was a very small fraction of total company turnover). We also discussed a more serious contravention in which, in 2017, a higher penalty was levied for breaches of wholesale SMP obligations, of £42m.

Wider impacts not captured in relevant sales (e.g. in related markets) might be captured in the gravity figure as part of the basic amount (alternatively, these might be captured as aggravating factors).

The percentage of sales figure obtained should then be multiplied by the duration of the breach (in years, or parts thereof).

There is limited information on the assessment of aggravating and mitigating factors in abuse of dominance cases. In cartel cases, there can be increases in penalties of up to 50% (e.g. for recidivism) and decreases of up to 50% for mitigating circumstances (e.g. negligence, cooperation with the authorities).

While the cases involving breaches of regulatory obligations before ComReg may be somewhat less serious in nature, it may nonetheless be sensible to offer significant discounts to penalties where a breach was not deliberate, where it has since been remedied, and where there has been cooperation with the regulator. Discounts to the basic amount might be as high as 50%. For recidivism, penalties might be increased by this or a different percentage.

One option would be to set out in advance the weights that might be applied to alternative aggravating or mitigating circumstances, as per the approach previously adopted in South Africa (discussed in section 4.4). However, there will be case-by-case considerations, and an important role for regulatory discretion, which we recommend should be preserved.

As such, the recommended approach is to adopt a set of aggravating and mitigating factors without specifying weights, as summarised in Box 5.3. A similar approach was adopted by Ofcom in the UK telecoms sector.

Box 5.3 Aggravating (+) and mitigating (-) circumstances

The following aggravating and/or mitigating circumstances would be considered in determining the penalty:

- whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention;
- the extent to which the contravention occurred deliberately or recklessly, including the extent to which senior management knew about it, or ought to have known about it;
- whether the contravention in question continued, or whether timely and effective steps were taken to end it, once the regulated body became aware of it;
- any steps taken for remedying the consequences of the contravention;

[202] Competition and Markets Authority (2018), 'CMA's guidance as to the appropriate amount of a penalty', CMA73, April.

- whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties);
- the extent to which the regulated body in breach has cooperated with the investigation.

Source: Oxera.

The behavioural biases and associated factors discussed in section 3.3 could be taken into account at this stage. Wider effects on related markets, or over the longer term, may also be reflected in this assessment—in so far as they have not been reflected in the determination of relevant sales or gravity. This could, for example, be related to the recklessness or otherwise of the breach.

Finally, a limit for the penalty of (for example) 10% of total business turnover could apply (although in practice this might be greater or lesser than 10%). Penalty reductions for settlement or (in the unlikely event of) inability to pay would also apply. The overall turnover cap, and consideration of inability to pay, are safeguards aimed at ensuring that penalties are not disproportionate.[203]

5.5 An illustrative example

In order to illustrate the application of the recommended approach, Box 5.4 provides an example in which a hypothetical provider of wholesale telecoms services—Telco—has breached one of its wholesale regulatory obligations (non-discrimination). The products and numbers are fictional, and are for illustration only.

[203] See section 3.3.2 for a discussion.

Box 5.4 Hypothetical illustration of the approach—'Telco'

In January 2015, ComReg launched an investigation into a potential breach of Regulatory Obligation A by Telco following complaints by its competitors. Specifically, competitors in the fibre broadband retail market argued that Telco had not provided access to Wholesale Service 1 on the same terms to competitors as it had provided to itself. This, they argued, placed them at a disadvantage in the retail market and harmed competition.

In February 2015 ComReg ruled that there had been a breach of Regulatory Obligation A. ComReg sought undertakings from Telco to ensure that remedial action was taken so as to achieve compliance. ComReg also judged that it was appropriate to recommend a penalty in this instance, which would seek to both punish the offence and deter non-compliance in future.

In doing so, ComReg relied on an established a **theory of harm**—that discriminatory behaviour by Telco, which held SMP in a relevant market that included the supply of Wholesale Service 1, placed retail competitors at a disadvantage in the **fibre broadband retail** market, and which could be expected to have a negative impact on competition in that downstream market.

Telco's fibre retail broadband turnover in 2014, the last year of the contravention, was **€50m**. The contravention lasted for **two years**, from January 2013 to December 2014. In the last year of the contravention, retailers in the fibre broadband retail market obtained around **40%** of their wholesale inputs via Wholesale Input 1 (see Figure 5.2 above). For practical purposes, the 40% figure was obtained through a proxy. This considered the number of wholesale lines accounted for by Wholesale Input 1 as a proportion of *all* wholesale lines (1 + 2 + 3) serving the fibre broadband retail market.

In calculating a basic amount for the penalty, ComReg took account of the gravity (G) of the offence, and judged this to be a discrimination breach with a material expected impact on retail competition. Telco had 65% of the fibre broadband retail market, and 75% of the fibre broadband retail market that could be linked to Wholesale Service 1. On this basis, ComReg decided on a **gravity of 5%**.

If based on a broad definition of the downstream market (fibre retail broadband), the relevant value of sales figure (V) would be €50m. However (as noted earlier in this section), a variety of approaches are available for determining relevant sales. In this instance, a conservative approach was adopted. Here it was assumed that the relevant sales were based on the proportion of the fibre broadband retail market served by competitors using Wholesale Input 1, or 40%*€50m = **€20m**.

Given that the duration of the breach (N) was two years, this provided a **basic amount** (G*V*N) = 5%*€20m*2 = **€2.0m**.

ComReg then considered whether there were aggravating and/or mitigating circumstances that might lead to an adjustment to the penalty.

In terms of **mitigating circumstances**, Telco had not engaged in the behaviour deliberately, and had remedied the breach soon after ComReg became aware of the contravention. It was also a first offence of this type. These factors would have justified a 50% reduction in the penalty.

However, there was also a degree of non-cooperation with the investigation, when ComReg asked for data that would assist it in undertaking its calculations. This **aggravating factor** meant that ComReg would adjust the basic amount of the penalty downwards by 40% rather than the full 50% that would have otherwise applied.

In total, this means that the final penalty to be applied to Telco for breach of Regulatory Obligation A was (1-40%)*€2.0m = **€1.2m**.

This amount was significantly below the cap of 10% of the total turnover of Telco in 2014. There were no reasons to expect inability to pay.

Source: Oxera.

The key sensitivity in Box 5.4 is in the categorisation of the market used to determine the value of relevant affected sales, and whether this is broad or (as

assumed in Box 5.4) narrow. The other major sensitivity relates to the assumed gravity.

5.6 Is the turnover methodology suitable for all wholesale breaches?

The general methodology set out above describes the calculation of penalties for breaches of obligations imposed under Regulation 8 of the Access Regulations in a vertically integrated setting. In 2019, we explored whether this is suitable for all wholesale breaches. We discuss this in section 6 below.

6 Critical review of the turnover-based approach

In this section, we set out our review of the turnover-based approach that we proposed based on our 2016 research (the 'general methodology'). **We consider whether, in light of the additional evidence reviewed in 2019, the turnover-based approach remains fit for purpose.**

In addition, we set out our view on whether the approach is suitable for all breaches of SMP regulatory obligations, and in particular for less serious breaches.

6.1 What evidence have we reviewed, and what are the implications?

In principle, three broad alternative approaches to applying penalties might be:

- a '**harm-based' approach** (which could also take into account indirect harm, and an uplift to ensure deterrence in a world of imperfect monitoring);
- a '**turnover-based' approach** (based on relevant turnover, seriousness and duration);
- a less structured **'criteria-based' approach** (that sets out the relevant factors to be taken into account in calculating penalties, but no specific formula).

We have considered a range of additional evidence to that examined in 2016 to ascertain whether the turnover approach that we recommended remains valid, including:

- the approaches adopted in EU member states (and Turkey), and case studies where financial penalties have been levied for regulatory breaches;
- the approaches used by various regulatory bodies in Ireland and their experience of imposing financial penalties, and ongoing debate around strengthening regulatory powers;
- the GDPR and Net Neutrality Regulation for imposing financial penalties.

In section 4.5 we observed that, across the NRAs that responded to the ComReg survey, there was considerable variation in the national statutory frameworks. This is not necessarily surprising, given the wide discretion afforded to member states under the European electronic communications regulatory framework.

In a number of cases, the statutory provisions for applying penalties (and/or regulatory enforcement powers) constrain the ability of the NRA to impose dissuasive penalties. However, we do not consider that such cases represent the current benchmark, or the general direction of travel going forward across the EU.

The survey also revealed that relatively few NRAs had explicitly set out guidelines for assessing penalties for breaches of SMP regulatory obligations. This does not, however, undermine the production of such guidelines. For example, in the UK Ofcom has issued penalty guidelines that place significant weight on deterrence, and recognise the link between turnover and securing this objective.

In 2017 Ofcom actively applied these principles in determining the appropriate penalty amount for BT's infringement of its wholesale SMP obligations (see section 4.4). Ofgem and Ofwat similarly emphasise the need for deterrence-

based penalties and the role of turnover in this. None of the three UK regulators require the demonstration of specific quantified harm first in order to levy a penalty.

The EECC provides further provisions in relation to NRA powers to set penalties—as well as reiterating that such penalties should be dissuasive. All member states (including Ireland) must transpose this by the end of 2020.

As discussed in section 4.6, in Ireland we observe that there are disparities in the powers afforded to different regulatory authorities, and in their experiences of setting penalties. While several authorities do have the power to impose financial penalties, of those that we spoke to the Central Bank appears to have been most active in respect of this.[204]

Nonetheless, across the Central Bank, the BAI and the CRU, we observe a relatively consistent set of considerations with regard to determining the penalty amount—in particular, the need to deter non-compliance, the seriousness of the infringement, and the turnover of the infringing party.

Looking forward, the recommendations from the Law Reform Commission report suggest that there could be important future reforms to the existing legislation in Ireland. This includes increased powers for regulators to impose dissuasive financial penalties.

While the Law Reform Commission has set out a series of recommendations, the precise measures to be adopted will continue to be a source of discussion. Our 2016 methodology was developed on the assumption that ComReg operated within the current legal framework.[205] However, moving forward, we consider that the methodology should be consistent with any future regime that may be introduced to increase ComReg's powers to levy penalties.

We have also explored the emerging direction of travel across the EU in setting penalties for breaches of the GDPR and the Net Neutrality Regulation.

In section 4.7, we noted how, under the recent GDPR, fairly prescriptive pan-European provisions were set out on data protection. Member states have since agreed on a set of guidelines (the EDPB guidelines). Since the GDPR penalty guidelines came into effect, several large fines (in the region of tens or hundreds of millions of euros) have been levied.

This demonstrates the seriousness with which SAs will treat infringements of the GDPR—which could be indicative of SAs laying down an early marker so as to deter future non-compliance. A caveat is that, while large in absolute terms, these penalties represent a relatively low proportion of overall annual turnover (when defined very broadly). Nonetheless, the high absolute value reflects the fact that SAs recognise that the penalty amount must be sufficiently large to deter non-compliant firms with significant global annual turnovers.

In section 4.8 we discussed how, under the recent Net Neutrality Regulation, member states are responsible for implementing national provisions. This is in contrast to the pan-EU GDPR provisions. The requirements have been met

[204] The BAI has used this power only once, while the CRU has not used it. We did not speak to the Commission for Aviation Regulation, nor the Office of the Director of Corporate Enforcement, which also have the power to set financial penalties.

[205] As described in section 1, under the current legislative framework, if ComReg finds that there has been a breach, it has civil enforcement powers to apply to the High Court, request the imposition of financial penalties, and make a recommendation on the amount of the financial penalty. Ultimately, the Court decides whether a penalty should be levied and what its magnitude should be, albeit taking into account ComReg's recommendations on the appropriate level.

with a mixed response. In some cases, member states have not implemented any provisions. In others, the statutory maximum limits have been set at a very low level. This could undermine the effectiveness of net neutrality enforcement, as noted in the recent epicenter.works report.[206]

The EU clearly wants member states to do more in this area to ensure adequate deterrence of net neutrality breaches. While there have been issues, the future direction of travel is that member states will need to set out guidelines that facilitate proportionate, deterrence-based penalties.

6.2 Does the turnover approach remain fit for purpose? The evidence in the round…

We consider that a modern penalties methodology in electronic communications is required in Ireland that allows for sanctions that are effective, proportionate and dissuasive.

Our recommended 2016 general methodology, as described in section 5, follows a turnover approach. Our approach was not the only methodology that could be applied in an ex ante regulatory setting, but it was a practical methodology based on sound economic and policy principles.

Taking our 2016 research in the round, we observe the following:

- the turnover-based approach is consistent with the theory of optimal penalty design, and recognises the role of both punishment and deterrence in an economic sense;
- the approach recognises that breaches of ex ante regulatory obligations at the wholesale level are inherently serious, in that it is explicitly recognised that there is a need to promote a level playing field;
- the approach is transparent and practical to implement, using readily available data (for example, on turnover, duration, and benchmarks on gravity), even if a degree of judgement is necessarily involved;
- the approach is consistent with the EU rules on setting penalties for ex ante breaches in telecoms regulation (i.e. penalties should be appropriate, effective, proportionate and dissuasive);
- there are many examples of a turnover-based approach being used in ex post competition law and ex ante regulatory settings, and turnover is often referred to as a relevant consideration in assessing penalties;
- the recommended approach to gravity takes a conservative view of the seriousness of the breach relative to the approach in ex post competition cases;
- the approach is not completely mechanistic, and it recognises aggravating and mitigating circumstances and the need for a check on proportionality.

Based on our subsequent research in 2019, we also observe the following:

- given the broad requirements of the European electronic communications regulatory framework to date, there is considerable variation in the national statutory frameworks applied by member states in relation to penalties;

[206] epicenter.works (2019), 'The Net Neutrality Situation in the EU, Evaluation of the First Two Years of Enforcement'.

- relatively few communications NRAs across Europe have explicitly set out guidelines for assessing penalties for breaches of SMP regulatory obligations beyond the statutory provisions;
- there is inconsistency across EU member states in measuring harm for breaches of wholesale regulatory obligations (whether harm to consumers, competitors or retail competition), and penalties have been levied without the need to demonstrate specific quantified harm;
- there is more consistency in the fact that various factors tend to need to be taken into account by NRAs in determining the size of a penalty;
- the EECC provides further provisions in relation to NRA powers to set dissuasive penalties, which all member states (including Ireland) must transpose by the end of 2020;
- the approaches of Ofcom (UK), the Central Bank of Ireland, and in EU data protection point towards a deterrence-based approach;
- the direction of travel in Ireland is towards enhanced regulatory powers to set deterrence-based penalties (as recommended by the Law Reform Commission).

Therefore, on balance, we continue to consider that the turnover approach that we have proposed remains valid. It is a practical, deterrence-based approach.

While the additional evidence that we have taken into account is somewhat mixed, we consider that there are clear examples, notably in the cases of Ofcom in the UK, the Central Bank of Ireland, and developments in EU data protection, that are highly consistent with our approach. In particular, these examples emphasise the role of deterrence in levying financial penalties.

Moreover, it is important to highlight the direction of travel in Ireland and recommendations made by the Law Reform Commission. The report highlights the importance of financial penalties as a core power that allow regulators to effectively enforce compliance. Moreover, it emphasises the important goal of using financial penalties as a means of deterring non-compliance.

6.3 Is the turnover methodology suitable for all wholesale breaches? An alternative approach for less serious breaches…

The general methodology set out in section 5 describes the calculation of penalties for breaches of obligations imposed under Regulation 8 of the Access Regulations in a vertically integrated setting.

In undertaking our further research in 2019, we also considered how the following might be addressed for less serious Access Regulations breaches, such as where an operator breaches a transparency obligation by failing to notify ComReg of a new price tariff.

Where there are less serious breaches of obligations imposed under the Access Regulations (see below), implementing the above general methodology and applying a pro forma approach to the duration of the breach (based on a percentage of the year's duration) may not be an appropriate solution—in that the general methodology should ideally be targeted at more serious breaches of SMP obligations in a vertically integrated setting.

In addition, from an administrative perspective, the pro forma approach would be time-consuming to implement—it would require the assessment of theory of harm, relevant sales, gravity and other factors on a frequent basis.

A simpler and more proportionate approach would be to adopt a tariff-based approach to less serious breaches. Such breaches might include delays by the SMP operator in notifying an OAO of a refusal of a Regulated Access Product (RAP) request, and/or a delay in notifying ComReg of this refusal, or the failure to notify a change to a Mobile Termination Rate.

For these types of breach we recommend that a tariff should be set out by ComReg for each breach, composed of a fixed penalty (€ per breach) and a variable component (€ per week). This would be subject to a maximum cap (in €, potentially related to wholesaler turnover in the market segment concerned).

For example, the following approach might be adopted:

Penalty amount = [Fixed Tariff + (Weekly Tariff * No. of Weeks)]

- Whereby: Fixed Tariff = one-off Fixed Penalty Tariff applied per breach (€ per breach)
- Weekly Tariff = Weekly Penalty Tariff applied per week for duration of the breach (€ per week)

Where breaches are repeated (recidivism), the fact that the tariff had been previously levied (e.g. in the same SMP market, but not necessarily in relation to the same product) would be an aggravating factor in applying the subsequent tariff. Other aggravating (and/or mitigating) factors may also be taken into account, as required.

The overall penalty would be subject to a maximum cap (in €, potentially related to wholesaler turnover in the market segment concerned).

This approach is simple, proportionate, timely, administratively low-cost and effective for less serious breaches. It also provides clarity to operators.

7 Conclusions

On balance, we continue to consider that the turnover approach that we proposed in our 2016 research (the general methodology) remains valid. It is a practical, deterrence-based approach.

While the additional evidence that we examined in 2019 is somewhat mixed, we consider that there are clear examples, notably in the cases of Ofcom in the UK, the Central Bank of Ireland, and developments in EU data protection, that are highly consistent with our approach. In particular, these examples emphasise the role of deterrence in levying financial penalties.

Moreover, it is important to highlight the direction of travel in Ireland and recommendations made by the Law Reform Commission. The report highlights the importance of financial penalties as a core power that allows regulators to effectively enforce compliance. Moreover, it emphasises the important goal of using financial penalties as a means of deterring non-compliance.

In undertaking our more recent research we also considered the issue of less serious breaches and how these might be dealt with.

For less serious breaches of the Access Regulations, a tariff-based approach is simpler and more proportionate.

The tariff comprises fixed and variable components and is capped, and other aggravating (and/or mitigating) factors can also be taken into account. This approach is simple, proportionate, timely, administratively low-cost and effective for less serious breaches. This also provides more clarity for operators.

A1 ComReg survey of the approaches adopted by IRG members: summary of responses

In September 2019, ComReg sent a survey to NRAs (NRAs) across various EU member states and Turkey. These NRAs are responsible for regulating each member state's communications sector, and are members of IRG.

The ComReg survey contained the following questions.

1. What national legal powers or framework exist to impose financial penalties on operators that are found to be non-compliant with obligations imposed under the Access, Authorisation, Framework, and the Users Rights Directives in your country?
2. What methodology or guidance, if any, has been drafted by your NRA for imposing these types of penalties, and is it publicly available?
3. Have you had any recent examples where financial penalties have been imposed on an SMP operator for non-compliance with obligations at the SMP wholesale/access regulations level?
4. Are there any other notable cases of penalties being imposed by your office for non-compliance with other obligations (e.g. non-compliance with obligations under the Framework, Authorisation or Universal Service Directives)?

In the following, we summarise the responses that ComReg received from the IRG members.

A1.1 Austria

The NRA in Austria is the Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR).

RTR explained that financial penalties on operators that are found to be non-compliant with obligations under the Access, Authorisation, Framework and Users Rights Directives are imposed by administrative authorities after conducting a formal administrative penalty proceeding.

RTR explained that the maximum penalties are defined by Article 109 of the Telecommunications Act 2003.[207] Moreover, RTR highlighted that Article 111 of the Austrian Telecommunications Act 2003 stipulates that:

- where the regulatory authority establishes that an undertaking has gained an economic advantage due to a violation of the Act, the Authority can apply to the Cartel Court for an amount to be confiscated depending on the extent of the economic advantage and subject to a limit of 10% of the undertaking's turnover;
- where the amount of the benefit cannot be proven, or can be provided only with reasonable difficulty, the Cartel Court has the discretion to set a reasonable amount to be confiscated.

RTR said that no methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive is publicly available.

[207] Telecommunications Act 2003 (TKG 2003), as last amended by Federal Law Gazette I No. 6/2016.

It said that it had no recent examples of imposing financial penalties on an SMP operator for non-compliance with obligations at the SMP wholesale level, or any other notable cases of penalties being imposed for non-compliance with other obligations.

A1.2 Croatia

The NRA in Croatia is the Croatian Regulatory Authority for Network Industries (HAKOM).

HAKOM said that the power to impose financial penalties on operators that are found to be non-compliant with the Access, Authorisation, Framework and Users Rights Directives is from the misdemeanour provisions in the Electronic Communications Act.[208]

It said that no methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive was available, and that sentences were imposed through the courts, according to the provisions of the Electronic Communications Act.

HAKOM said that a financial penalty of 28.101.444,00 HRK was recently imposed on the SMP operator for breaching its regulatory obligations. The penalty was determined as a proportion (1–10%) of the total annual gross revenue of the operator. This judgment was upheld by the High Misdemeanour Court—and this decision is final.

A1.3 Cyprus

The NRA in Cyprus is the Commissioner of Electronic Communications and Postal Regulation (the OCECPR).

The OCECPR said that, under Article 20(k) and Annex 1 of Law 112(I)/2004, the Commissioner has the power to impose financial penalties on operators that are found to be non-compliant with the Law or any other European Legislation.[209] It said that the financial penalty can be set at a maximum amount of €170,800, which can be doubled in the case of recurrence. However, the OCECPR explained that, where the operator has gained an advantage from the breach, a financial penalty of up to twice the amount of the benefit can be imposed.

The OCECPR said that the Commissioner had issued secondary legislation (Decree 300/2008) as guidance on imposing such financial penalties, which is publicly available.[210]

It had no recent examples of imposing financial penalties on an SMP operator for non-compliance with obligations at the SMP wholesale level. It had imposed penalties for non-compliance with other obligations under general authorisation.

[208] Electronic Communications Act, Official Gazette, No. 73/2008, as last amended by the Act on Amendments to the Electronic Communications Act, Official Gazette No. 90/11.
[209] The Regulation of Electronic Communications and Postal Services Law of 2004, Number 112(I) of 2004, as last amended by Law No. 46(I)/2008.
[210] Decree 300/2008, Decree under Articles 20(k) and 152 of Law 112(I) / 2004.

A1.4 Czech Republic

The NRA in the Czech Republic is the Czech Telecommunications Office (CTU).

The CTU said that non-compliance with the Access, Authorisation, Framework and Users Rights Directives is a violation of Article 118 of Act No. 127/2005 Coll. on electronic communications and amendments to certain related acts, as amended (the Electronic Communications Act).[211] Under Article 118 paragraph 23 of this Act, it has the power to impose financial penalties up to a maximum of either CZK 50,000,000 or 10% of net turnover for the last closed financial year, whichever amount is higher.

The CTU said that it did not have specific guidance or methodology for imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive. It follows the legal provisions contained in the Act No. 250/2016 Coll.[212] and Act No. 251/2016 Coll.[213] Act No. 250/2016 contains a list of conditions for imposing punishments, including financial penalties and their amount, in addition to aggravating and mitigating circumstances.

The CTU said that it had no recent examples of imposing financial penalties on an SMP operator for non-compliance with obligations at the SMP wholesale level, or any other notable cases of penalties being imposed for non-compliance with other obligations.

A1.5 Estonia

The NRA in Estonia is the Consumer Protection and Technical Regulatory Authority.

The Authority said that financial penalties on operators that are found to be non-compliant with the Access, Authorisation, Framework and Users Rights Directives are imposed under the Electronic Communications Act, Chapter 14.[214]

It said that no methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive was available.

The Authority said that it had no recent examples of imposing financial penalties on an SMP operator for non-compliance with obligations at the SMP wholesale level, or any other notable cases of penalties being imposed for non-compliance with other obligations.

A1.6 Finland

The NRA in Finland is the Finnish Transport and Communications Agency (Traficom).

Traficom said that the Information Society Code (917/2014) contains provision in relation to imposing financial penalties.[215] Conditional financial penalties can

[211] Act No. 127/2005 Coll. on Electronic Communications and on Amendment to Certain Related Acts (Electronic Communications Act), as subsequently amended.
[212] Act No. 250/2016 Coll., on responsibility for administrative offences and on proceedings thereof (Administrative Offences Act).
[213] Act No. 251/2016 Coll., on certain administrative offences.
[214] Electronic Communications Act, RT I 2008, 87, 593, entry into force 01.01.2005, as last amended by RT I, 13.03.2019, 2.
[215] Information Society Code (917/2014), Sections 332–336.

be imposed under Section 332. Traficom explained that Section 333 defines provisions in respect of financial penalties imposed on telecoms operators for violations, where the operator fails to rectify its actions within a reasonable time period. Moreover, it said that Section 336 grants the NRA the possibility to impose a conditional fine when there is an unfair term or agreement in telecoms services.

Traficom said that it has not produced a methodology or guidance. However, when imposing conditional fines or other penalties, Traficom must follow the national previsions defined in the Act of Conditional Fines and the Administrative Procedure Act.[216]

It had no recent examples of imposing financial penalties on an SMP operator for non-compliance with obligations at the SMP wholesale level, or any other notable cases of penalties being imposed for non-compliance with other obligations.

A1.7 Germany

The NRA in Germany is the Bundesnetzagentur.

The Bundesnetzagentur explained that the Access, Authorisation, Framework and User Rights Directives are implemented in the German Telecommunications Act, which also contains provisions concerning financial penalties.[217] It explained that Section 126 gives the Bundesnetzagentur the competence to assess and prosecute infringements, and contains provisions that say:

- where the Regulatory Authority finds that an undertaking is failing to meet its obligations under the Act or Regulations (EU) No. 531/2012 and No. 2015/2120, it shall require the undertaking to state its view and take remedial action within a time limit;[218]
- where the undertaking fails to meet its obligations within the time limit, the Regulatory Authority may order measures to secure adherence with the obligations, to be carried out within a reasonable time limit;[219]
- to enforce orders made by the authority, a penalty not exceeding €500,000 may be set in accordance with the Administrative Enforcement Act;[220]
- the penalty is set in order to ensure compliance with the Telecommunications Act.[221]

The Bundesnetzagentur explained that Section 149 contains provisions in relation to financial penalties that require intent or at least negligence. The maximum penalty depends on the provisions that have been violated and can range from €10,000 to €500,000. Moreover, Section 149 states that the penalty should exceed the economic benefit gained from the infringement.

The Bundesnetzagentur said that the Administrative Offences Act contains details on imposing financial penalties,[222] although the Bundesnetzagentur

[216] Act on Conditional Fines, 1113/1990. Administrative Procedure Act, 434/2003.
[217] The German Telecommunications Act (Telekommunikationsgesetz – TKG), Section 126(1).
[218] The German Telecommunications Act (Telekommunikationsgesetz – TKG), Section 126(1).
[219] The German Telecommunications Act (Telekommunikationsgesetz – TKG), Section 126(1).
[220] The German Telecommunications Act (Telekommunikationsgesetz – TKG), Section 126(1).
[221] The German Telecommunications Act (Telekommunikationsgesetz – TKG), Section 126(1).
[222] Act on Regulatory Offences in the version published on 19 February 1987 (Federal Law Gazette [Bundesgesetzblatt] I p. 602), last amended by Article 5 of the Act of 27 August 2017 (Federal Law Gazette I 3295).

itself has not set out a methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directives.

The Bundesnetzagentur said that no financial penalties had been imposed on SMP operators for non-compliance with obligations at the SMP wholesale regulations level.

However, it said that it had recently threatened to impose a financial penalty of €200,000 on Deutsche Telekom for infringements of net neutrality and roaming regulations. The Bundesnetzagentur explained that the Higher Administrative Court of Münster ruled recently in a preliminary decision that Deutsche Telekom's offer in its present form breached the Telecommunications Act. Deutsche Telekom subsequently modified its offer and a decision in the main proceeding has not yet been reached.

A1.8 Slovak Republic

The NRA in the Slovak Republic is the Regulatory Authority for Electronic Communications and Postal Services (RÚ).

RÚ said that it has the power to impose financial penalties under Section 73 of the Act no. 351/2011 Coll. on Electronic Communications.[223] It highlighted that the minimum penalty amount is €200 and the maximum is 10% of the annual revenue of the undertaking. RÚ noted that it could prevent an undertaking from providing services for up to 24 months in the case of severe or repeated violations.

The Authority said that no guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive was available.

A1.9 Slovenia

The NRA in Slovenia is the Agency for Communication Networks and Services of the Republic of Slovenia (AKOS).

AKOS said that the Electronic Communications Act contains provisions on financial penalties on operators that are found to be non-compliant with obligations imposed under the Act.[224]

It said that the Agency and Information Commissioner decide on sanctions for infringements of the Electronic Communications Act. AKOS does not have a methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directive. It is the responsibility of the Authorised individual at AKOS, who runs the procedure, to complete the evaluation in accordance with the Act of Offences.

AKOS said that it had recently imposed a financial penalty on an SMP operator for refusing a legitimate request on wholesale access. The decision in this case is not publicly available information. It also noted that it had imposed financial penalties for infringements in relation to end-user rights, number portability and remaining regulations.

[223] Act no. 351/2011 Coll. on Electronic Communications.
[224] Electronic Communications Act (Official Gazette of the Republic of Slovenia, Nos. 109/12 , 110/13 , 40/14 - ZIN-B, 54/14 - Dec. US and 81/15 , 40/2017.

A1.10 Spain

The NRA in Spain is the CNMC.

The CNMC said that the General Telecommunications Act 9/2014 of 9 May contained provisions in respective financial penalties that could be imposed against operators.[225] The penalty depends on the gravity of the infringement (Article 79), as follows.

- In the case of very serious offences (Article 76), where the CNMC can determine the gross profit gained through the infringement, the penalty must be at least equal to, and not more than five times, the value of the gross profit. Where this cannot be determined, the statutory limit on the penalty amount is €20m.
- In the case of serious offences (Article 77), where the CNMC can determine the gross profit gained through the infringement, the penalty must be no more than twice the value of the gross profit. Where this cannot be determined, the statutory limit on the penalty amount is €2m.
- In the case of minor infringements (Article 78), the penalty is subject to a limit of €50,000.

The CNMC explained that Act 9/2014 set up aggravating and mitigating circumstances for determining the amount of the penalty, depending on proven facts relating to the infringement (Article 80), such as:

- the seriousness of any contraventions previously committed by the person being sanctioned;
- the social repercussions of the contravention;
- the profit to the offender from the act that is the object of the contravention;
- the damage caused and its redress;
- voluntary compliance with any precautionary measures that might be imposed in the disciplinary proceedings;
- denying or hindering access to the installations or refusing to provide the information or documentation demanded;
- ceasing the offending behaviour prior to the course of the disciplinary proceedings;
- the offender's financial situation.

The CNMC has not drafted a methodology or guidance on imposing financial penalties for infringements of obligations imposed under the Access, Authorisation, Framework and Users Rights Directives.

However, it noted that, in addition to the statutory provisions, it uses internal criteria to apply proportionate penalties or determine the gross profits as the result of an infringement. These include the annual income of the operator in the activity affected by the infringement; the income received due to the incorrect use of the numbers assigned to the operator; the overpriced charges by the SMP operator for providing regulated wholesale services to other operators; and the public taxes that the operator did not pay when it operated

[225] The General Telecommunications Act 9/2014, Law 9/2014 of 9 May on Telecommunications, Official State Gazette No. 114, May 2014, Article 79.

in the market without notifying the Operator Register (managed by the CNMN) about its electronic communication services.

The CNMC provided three recent examples of cases where it had levied financial penalties on an SMP operator for non-compliance with obligations at the wholesale level.

- In March 2017, the CNMC imposed a financial penalty of €3m on Telefónica for a very serious breach. Telefónica was found to have breached a non-discrimination obligation imposed in the broadband market. The CNMC said that this decision had been challenged in court and was an ongoing case.
- In April 2018, the CNMC imposed a financial penalty of €8.5m on Telefónica for submitting an offer in a public bidding process that was not economically replicable by other operators. The CNMC said that this decision had been challenged in court and was an ongoing case.
- In April 2019, the CNMC imposed a financial penalty of €3m on Telefónica for deploying its new fibre-optic network in offices that it had declared to be unfeasible, without informing the CNMC or alternative operators, as specified by its wholesale reference offer. The CNMC said that this decision had been challenged in court and was an ongoing case.

In response to a follow-up question from ComReg, the CNMC provided further details on how it had reached the decision on the penalty amounts; this is discussed in more detail in section 4.5.[226]

A1.11 Turkey

The NRA in Turkey is the Information and Communications Technologies Authority (BTK).

According to Article 60 of the Electronic Communications Law, BTK has the power to impose financial penalties of up to 3% of the previous calendar year's net sales.[227]

Article 44 of the Ordinance on Administrative Sanctions imposed by BTK shows the general approach of how it will impose sanctions under the Access, Authorisation, Framework and Users Rights Directive.[228] Article 44 states that damage, unfair economic gain, repeated non-compliance and previous administrative sanctions imposed on the operator in the last five years for similar violations and the presence of goodwill are considered as decreasing and increasing factors in determining penalties.

A1.12 The UK

The NRA in the UK is Ofcom.

Ofcom said that it has the powers to impose financial penalties under the Communications Act 2003, Sections 35A, 37, 41, 96, 110A, 130, 139, 329.[229]

It had published penalty guidelines on its website (see section 4.5 of this report).

[226] Information provided by the CNMC to ComReg in an email dated 26/11/2019.
[227] Electronic Communications Law, Law No. 5809, Article 60.
[228] Regulation on Information and Communication Technologies Authority Administrative Sanctions.
[229] Communications Act 2003.

Ofcom imposed a financial penalty on BT in 2017 for breaches of its SMP obligations. It also highlighted a number of other financial penalties that it had imposed for breaches of other regulatory obligations.

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