



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Calculating penalties for Access Regulations breaches Consultation

Consultation

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Reponses to Consultation

All responses to this Consultation and Draft Methodologies should be clearly marked–
“Reference: Submission to ComReg Document No. 20/25”, and sent by post, email or fax to arrive on or before 5pm on 18 June 2020.

ComReg is aware that there are significant operational challenges on Operators in Ireland due to the current Covid -19 situation and directions from the Irish Government. In light of this ComReg is extending the consultation period for this Consultation to 10 weeks in order to provide Operators with a sufficient period of time to consider the paper.

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Please note that ComReg will publish all respondents' submissions, subject to the provisions of ComReg's guidelines on the treatment of confidential information ComReg Document 05/24.

Legal Disclaimer

This Consultation is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation is not bound by it, nor does it necessarily set out the Commission's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Commission for Communications Regulation. Inappropriate reliance ought not therefore to be placed on the contents of this document.

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Chapter 1

Executive Summary

- 1.1 The Commission for Communications Regulation (**'ComReg'**) is the national regulatory authority for the electronic communications and postal sectors in Ireland. ComReg is responsible, *inter alia*, for the regulation of certain wholesale markets in the telecommunications sector and for monitoring and enforcing compliance with regulatory obligations in these markets.
- 1.2 ComReg is responsible, in particular, for ensuring that where it finds that an operator has Significant Market Power (**'SMP'**) can impose certain obligations or "remedies" on that operator to mitigate the effects of its market power and to encourage competition. The concept of SMP is akin to the concept of "dominance" in Competition Law.
- 1.3 The underpinning legislation governing findings of SMP in the telecommunications sector and the consequent imposition of remedies is set out in a suite of European Union Directives which were transposed into Irish law in 2011. (Note that these directives have been superseded by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (**'the Code'**) which passed into law at a European level in December 2018 and is due to be transposed into Irish law by the end of 2020). Those aspects of the legislation which are relevant to this document will likely be essentially unchanged.
- 1.4 Of particular relevance for this document are the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011¹ (**'the Access Regulations'**). These regulations set out the process for imposing remedies where SMP has been found and also set out the procedural requirements that must be followed where ComReg believes that an operator with SMP has not complied with the Access Regulations. Where ComReg forms the view that a breach has taken place it may apply to the High Court and request the court to *inter alia* impose a financial penalty on that operator. ComReg may propose to the Court as its view of how large such a financial penalty might be.

¹ S.I. 334 of 2011, as may be amended from time to time or replaced with equivalent effect.

- 1.5 The legislation provides that such financial penalties be appropriate, effective, proportionate and dissuasive.²
- 1.6 The purpose of this document is to consult on guidelines as to how ComReg might approach such a proposal to the High Court and, in particular to provide guidance as to the methodology it might use in respect of non-compliance with obligations imposed under the Access Regulations³ (**'Access Regulations breaches'**).
- 1.7 ComReg has procured the advice of Oxera Consulting LLP (**'Oxera'**), an economic consultancy, to help it in this process. Their report is appended to this document in Appendix: 5.
- 1.8 In summary, ComReg is proposing in this Consultation two methodologies for calculating financial penalties in the context of SMP related Access Regulations breaches depending on the type of operator and the nature of breach:
- (a) The Turnover Methodology will be used for more serious Access Regulations breaches. In particular, where a vertically integrated operator is with SMP in a wholesale market, is responsible for an Access Regulation breach, this affects other operators and end users in downstream retail markets through reduced competition. The Turnover Methodology considers the relevant portion of turnover, the gravity of the breach and its duration followed by the application of mitigating and aggravating factors to calculate a financial penalty.
 - (b) The Tariff Methodology will be used for less serious Access Regulations breaches. For example, where an operator breaches a transparency obligation by failing to notify ComReg of a new price tariff. The Tariff Methodology calculates the penalty based on a one-off fixed tariff per breach plus a weekly tariff per week that the operator is in breach followed by the application of mitigating and aggravating factors.
- 1.9 ComReg is of the preliminary view – subject to consideration of responses to this consultation, that these proposals meet the requirements of the legislation.
- 1.10 Interested parties should respond to this consultation by 18 June 2020 as described in Chapter 4.

² 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) (the **'Framework Directive'**).

³ The Access Regulations or their successor legislation.

Chapter 2

Background

- 2.1 ComReg was established by the Communications Regulation Act 2002 (as amended) (**‘the Act’**) and is the national regulatory authority (**‘NRA’**) for the electronic communications and postal sectors in Ireland. ComReg’s wholesale division is responsible, *inter alia*, for the regulation of certain wholesale markets in the telecommunications sector and for monitoring and enforcing compliance with regulatory obligations in these markets.
- 2.2 A suite of European Union (**‘EU’**) Directives, implemented in Ireland by way of secondary legislation, mandate the key aspects of ComReg's role in regulating the Irish electronic communications sector. The relevant directives were adopted in 2002 and amended in 2007 and 2009. The implementing secondary legislation was enacted in 2003 and, revoked and replaced in 2011. Along with the Access Regulations, this secondary legislation includes the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the **‘Framework Regulations’**)⁴, the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (**‘the Authorisation Regulations’**)⁵ and the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (**‘the Universal Service Regulations’**)⁶.
- 2.3 Market analysis is an essential element of the regulatory framework. ComReg must identify which areas of the electronic communications sector require *ex ante* regulation. This is done using principles grounded in competition law. It includes a consultation with the interested parties, the European Commission, other NRAs in European Union member states and the Body of European Regulators for Electronic Communications (**‘BEREC’**).
- 2.4 ComReg must define which particular electronic communications services market is in question and then, must decide whether or not that market is effectively competitive. If the market is not effectively competitive, ComReg may designate an operator or operators as having SMP in that market.
- 2.5 Where SMP is found in a relevant market, ComReg will impose regulatory obligations on the SMP operator in order to address competition problems that would be likely to arise absent regulatory intervention.

⁴ S.I. 333 of 2011, as may be amended from time to time or replaced with equivalent effect.

⁵ S.I. 335 of 2011, as may be amended from time to time or replaced with equivalent effect.

⁶ S.I. 337 of 2011, as may be amended from time to time or replaced with equivalent effect.

- 2.6 The Access Regulations empower ComReg to impose obligations of transparency, non-discrimination, accounting separation, access to and use of specific network facilities, and price controls on Operators who have been designated with SMP in the Relevant Market.
- 2.7 If ComReg finds that an SMP Operator has failed to comply with an SMP obligation, such as restriction of access at the wholesale level or breaches of non-discrimination, transparency, price control and associated obligations, ComReg may make a finding of non-compliance against the SMP Operator, pursuant to Regulation 19(1) of the Access Regulations. Following further investigation ComReg may form an opinion of non-compliance and at the same time may apply to the High Court to impose sanctions pursuant to Regulation 19(4) of the Access Regulations that can include financial penalties for breaches of the SMP obligation.
- 2.8 While ComReg may propose to the High Court the appropriate amount of the financial penalty, it is the High Court that makes an order for a financial penalty to be paid and the amount of that financial penalty, pursuant to Regulation 19(8) of the Access Regulations. In making its decision, Regulation 19(8)(d) of the Access Regulations provides that the High Court must consider, among other things, the circumstances of the Access Regulations breach, the duration, the effect on consumers, users and operators, any excuse or explanation for the breach and ComReg's recommendation on the penalty amount. In this regard any penalty amount proposed by ComReg under the current legislative framework is subject to the review and confirmation of the High Court.
- 2.9 Article 21a of the Framework Directive, obliges Member States to specify "*...rules on penalties...*" for breaches of obligations and "*...ensure that they are implemented...*". It also requires that "*...the penalties provided for must be appropriate, effective, proportionate and dissuasive.*". For the purpose of rules on penalties for Access Regulations breaches, Regulation 19 of the Access Regulations meets the requirements of Article 21a of the Framework Directive.
- 2.10 In 2016, ComReg considered that it was appropriate to develop a methodology for the calculation of appropriate levels of financial penalties. This was on foot of a number of ComReg investigations⁷ for Access Regulations breaches. ComReg engaged Oxera to explore whether a 'turnover-based' approach to setting penalties for breaches of ex ante wholesale obligations was appropriate.
- 2.11 ComReg considered a number of possible methodologies for calculating the appropriate level of financial penalty to be proposed to the Court, including:

⁷ See ComReg Information Notices 16/99, 16/100, 16/101, 16/102 and 16/103 for details of the cases that were investigated.

- (a) a 'harm-based' approach (which could also take into account indirect harm, and an uplift to ensure deterrence in a world of imperfect monitoring);
- (b) a 'turnover-based' approach (based on relevant turnover, seriousness of the breach and duration);
- (c) a less structured 'criteria-based' approach (that sets out the relevant factors to be taken into account in calculating penalties, but no specific formula).

- 2.12 In considering the appropriate methodology, ComReg took into account the relevant legislation and in particular, the criteria at Regulation 19(8)(d) of the Access Regulations, and the requirement for appropriate, effective, proportionate and dissuasive penalties at Article 21a of the Framework Directive.
- 2.13 In the Report produced, it was concluded that a turnover-based approach was appropriate for use by ComReg in assessing appropriate financial penalties for non-compliance with ex ante regulatory obligations. The Report included the Turnover Methodology for ComReg to use for calculating financial penalties for regulatory breaches.
- 2.14 In June 2017, ComReg applied to the High Court pursuant to Regulation 19(4) of the Access Regulations for declarations of non-compliance and orders that Eircom Limited ('**Eircom**') pay to ComReg amounts by way of financial penalty in relation to five breaches of obligations in three regulated markets (the '**Compliance Proceedings**')⁸. ComReg used the Turnover Methodology to calculate the penalties that were recommended to the Court.
- 2.15 In July 2017 Eircom brought separate High Court proceedings against the Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General in which the validity of aspects of the Access Regulations were challenged (the '**Access Regulations Proceedings**')⁹ after which ComReg was joined as a defendant to the proceedings.
- 2.16 In July 2017 Eircom also applied to the High Court for orders staying ComReg's proceedings, pending determination of the Access Regulations Proceedings.¹⁰

⁸ High Court Record Nos. 2017/186 MCA and 2017/187 MCA.

⁹ High Court Record No. 2017/5929P.

¹⁰ High Court Record No. 2017/115 COM.

- 2.17 In December 2018, ComReg reached a settlement¹¹ with Eircom in relation to the Compliance Proceedings and the Access Regulation Proceedings. As part of the settlement ComReg also agreed to publicly consult on “... *its proposed methodology for the calculation of financial penalties for breaches by authorised undertakings of regulatory obligations imposed under the Access Regulations.*”¹²
- 2.18 ComReg has since engaged Oxera to undertake a further review of the approaches and precedence across Europe, and to carry out a review of the suitability of the turnover-based approach.
- 2.19 ComReg is proposing two methodologies for calculating financial penalties in the context of breaches of remedies imposed under the Access Regulations:
- (a) The Turnover Methodology will be used for more serious Access Regulations breaches. In particular, where a vertically integrated operator is with SMP in a wholesale market, is responsible for an Access Regulation breach, this affects other operators and end users in downstream retail markets through reduced competition. The Turnover Methodology considers the relevant portion of turnover, the gravity of the breach and its duration followed by the application of mitigating and aggravating factors to calculate a financial penalty.
 - (b) The Tariff Methodology will be used for less serious Access Regulations breaches. For example where an operator breaches a transparency obligation by failing to notify ComReg of a new price tariff. The Tariff Methodology calculates the penalty based on a one-off fixed tariff per breach plus a weekly tariff per week that the operator is in breach followed by the application of mitigating and aggravating factors.
- 2.20 The Methodologies will assist Operators in understanding how financial penalties are calculated and highlight some of the aggravating and mitigating factors considered by ComReg.

2.2 ComReg’s Objectives and Functions

- 2.21 ComReg’s role is to ensure that the communications markets in Ireland operate in the interests of competition, end-users and society.
- 2.22 Section 12 of the Act and Regulation 16 of the Framework Regulations sets out ComReg’s statutory objectives. Section 12(1) of the Act includes:

¹¹ ComReg Document 18/110 Wholesale Compliance litigation Update Outcome of Cases 481 and 568 and related litigation.

¹² Section 5.1 of the settlement agreement in ComReg Document 18/110.

“The objectives of the Commission in exercising its functions shall be as follows-

(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities-

(i) to promote competition

(ii) to contribute to the development of the internal market

(iii) to promote the interests of users within the Community,”

2.23 Regulation 16(2) of the Framework Regulations requires ComReg to “...*apply objective, transparent, non-discriminatory and proportionate regulatory principles...*” in pursuit of its objectives by, amongst other things:

“(a) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services

...

(c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure based competition,

(d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings.....while ensuring that competition in the market and the principle of non-discrimination are preserved’

...”

2.24 The ideal situation is for regulated entities to be fully knowledgeable of their obligations and understand how they should be met, for regulated entities to comply with the obligations and to have an internal culture of compliance with robust internal controls and policies intended to prevent and detect non-compliances and should take the necessary steps to remediate any issues before they emerge.

2.25 However as internal regulatory controls and monitoring by ComReg are insufficient, ComReg undertakes compliance and enforcement activities that are targeted and prioritised to bring about compliance and deter future non-compliance.

2.26 ComReg’s statutory functions in relation to compliance and enforcement are set out at Section 10 of the Act which include:

“(a) to 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,

...

(d) to carry out investigations into matters relating to—

(i) the supply of, and access to, electronic communications services, electronic communications networks and associated facilities and the transmissions of such services on such networks,...”

2.3 ComReg’s Enforcement Powers

2.27 In order to meet ComReg’s statutory objectives and functions ComReg has powers of enforcement pursuant to Regulation 19 of the Access Regulations. In accordance with Regulations 19(4) of the Access Regulations, ComReg can apply to the High Court to seek such orders as:

“(a) a declaration of non-compliance,

(b) an order directing compliance with the obligation, requirements, condition or direction,

(c) an order directing the remedy of any non-compliance with the obligations, requirement, condition or direction, or

(d) an orders provided for in paragraph (8).”

2.28 Article 21a of the Framework Directive, obliges Member States to specify “...rules on penalties...” for breaches of obligations and “...ensure that they are implemented...”. It also requires that “the penalties provided for must be appropriate, effective, proportionate and dissuasive.” The State met the obligation at Article 21a of the Framework Directive through Regulation 19(8) of the Access Regulations which permits ComReg to apply to the High Court for an order “...to pay to the Regulator such amount, by way of financial penalty, which may include penalties having effect for periods of non-compliance with the obligation, requirement, condition or direction, as the Regulator may propose as appropriate in the light of the non-compliance or any continuing noncompliance.”

2.29 ComReg has developed the following methodologies in order to assist in calculating financial penalties for breaches of the Access Regulations. The methodology proposals ensure that the penalties proposed are appropriate, effective, proportionate and dissuasive and to provide transparency to all operators on how penalties might be calculated.

Chapter 3

Proposed Financial Penalties Methodologies

- 3.1 ComReg has developed two methodologies to be used to calculate the appropriate level of financial penalties for Access Regulations breaches. The methodologies include both a turnover based methodology and a tariff based methodology, which would be applied depending on the nature of the breach.

3.1 The Turnover Methodology

- 3.2 The Turnover Methodology, is based on a competition rules approach, and assumes that a theory of harm has been established, which then justifies a penalty. In order to calculate a turnover based financial penalty, ComReg will identify the breach, the market in which it occurred and the potential impact downstream at the retail level. ComReg will then evaluate qualitatively the impacts at the wholesale and retail levels and finally identify the subset of affected retail products which will inform the value of relevant retail sales. The basis and research relating to this methodology can be found in Appendix: 5.
- 3.3 ComReg considered a number of possible methodologies for calculating the appropriate level of financial penalty to be proposed to the Court including the turnover approach, a harm based approach and an approach based on a list of factors that would be considered. The Turnover Methodology was selected as appropriate as it is consistent with the theory of optimal penalty design, and recognises the role of both punishment and deterrence in an economic sense. It also recognises that breaches of wholesale regulatory obligations are very serious and can lead to distortion in competition in downstream markets and takes the impact at the downstream level into account in assessment of the value of relevant sales. The Turnover Methodology is practical to implement and is not completely mechanistic, as ComReg will take into account the relevant aggravating and mitigating factors and carry out a check on proportionality.
- 3.4 The Turnover Methodology begins with calculating a basic penalty amount which is a combination of the value of the relevant retail sales, the gravity of the breach and the duration of the breach. Mitigating and aggravating factors can then applied to the basic amount while other contributing factors may be considered where appropriate. The financial penalty will also be subject to maximum cap. The Turnover Methodology is described in Table 1.

- 3.5 The financial penalty will be assessed to ensure it is appropriate, effective, and proportional and that it acts to deter future possible breaches.

Table 1: Proposed ComReg Turnover Methodology

Proposed Turnover Methodology
<ul style="list-style-type: none"> ◆ The Basic Amount <ul style="list-style-type: none"> ◆ Value of relevant retail sales (V) x Gravity (G) x Duration (N)
<ul style="list-style-type: none"> ◆ Adjustment Factors <ul style="list-style-type: none"> ◆ aggravating circumstances (increased penalties) ◆ mitigating circumstances (reduced penalties)
<ul style="list-style-type: none"> ◆ fine reductions (settlement, inability to pay) ◆ maximum cap of 10% of the turnover of the operator in its last complete financial year prior to breach

- 3.6 The value of relevant retail sales (V) is the proportion of the market affected by the Access Regulations breach. It considers the breaching operators own sales in the downstream retail market for the last full year of the breach and apportions this based on the market shares of the upstream wholesale products that were affected by the breach.
- 3.7 The gravity factor (G) is a measure of the seriousness of the breach of obligations and will depend on the nature of the conduct in question and the market share of the breaching operator in the affected retail market. The effect of the breach of obligations may also be a consideration in determining the gravity factor.
- 3.8 While gravity will vary on a case by case basis, Table 2 describes the proposed ranges for the gravity factor.

Table 2: Proposed gravity factor ranges for the Turnover Methodology

Proposed gravity factor ranges (%)	
Refusal to provide access/refusal to supply/margin squeeze/ price discrimination	10-15%
Discrimination/transparency/access breaches with <u>material impact</u> on retail competition	5-10%
Discrimination/transparency/access breaches with <u>potential impact</u> on retail competition	1-5%
Pure regulatory breach with <u>lower potential for impact</u> on competition	< 2%

- 3.9 The Duration (N) refers to the duration of the breach in years, or parts thereof¹³.
- 3.10 In calculating a financial penalty for a particular case, ComReg will consider any aggravating factors and mitigating factors that may be relevant. These will vary on a case by case basis but some examples are proposed by ComReg in Table 3.

Table 3: Potential Aggravating and Mitigating Factors

Potential Aggravating and Mitigating Factors (non-exhaustive)
<ul style="list-style-type: none"> ◆ Repeat behaviour resulting in the same or similar breaches of obligations (Recidivism). ◆ The effectiveness of governance arrangements in identifying or mitigating the root cause of the breach and any feedback processes to limit recidivism. ◆ The effectiveness of any commitments made to improve corporate governance arrangements. ◆ Whether the breach of obligations, when advised by ComReg, was admitted or denied by the operator. ◆ The extent to which the operator self-identified the breach (before being notified by ComReg) and brought this to ComReg's attention. ◆ Whether in all the circumstances appropriate steps had been taken by the operator to prevent the breach.

¹³ To the nearest half year.

- ◆ The extent to which the breach occurred deliberately or recklessly, including the extent to which senior management knew about it, or ought to have known about it.
- ◆ Whether the breach in question continued, or whether timely and effective steps were taken to end it, once the operator became aware of it.
- ◆ Any steps taken for remedying the consequences of the breach.
- ◆ The extent to which the operator has cooperated with the investigation.

- 3.11 ComReg is proposing a financial cap of 10% of the turnover of the operator in its last complete financial year prior to breach for turnover based penalties.
- 3.12 Penalties will be evaluated to confirm they are appropriate, effective, dissuasive and not so high as to be disproportionate.

3.2 The Tariff Methodology

- 3.13 The Turnover Methodology may not be appropriate for Access Regulation breaches in all cases. Certain breaches are of a less serious nature particularly, those that have a lesser or negligible effect on competition in downstream retail markets or in related markets. These breaches may be of very short duration or may have a very small value of relevant retail sales, leading to a penalty that is not proportionate or dissuasive. Therefore, in these circumstances ComReg may use the Tariff Methodology to calculate financial penalties for Access Regulations breaches.
- 3.14 The Tariff Methodology calculates a basic penalty amount, before aggravating and mitigating factors are considered, which comprises of a fixed penalty for the breach of obligations and a weekly penalty applied for every week that the operator is in breach.
- 3.15 Aggravating and mitigating factors may also be taken into account, as required. See Table 3 for a non-exhaustive list of potential aggravating and mitigating factors. A summary of the proposed methodology is described in Table 4.
- 3.16 ComReg is proposing a financial cap of €500,000 for financial penalties calculated using the Tariff Methodology.

Table 4: Proposed Tariff Methodology

Tariff Methodology	
<p>Penalty = One-off Tariff + (Weekly Tariff x No. of Weeks) – Mitigating Factors + Aggravating Factors</p> <ul style="list-style-type: none"> ◆ Fixed Tariff (<i>One-off Fixed Penalty Tariff applied per breach</i>) ◆ Weekly Tariff X No. of Weeks (<i>Weekly Penalty Tariff applied per week for duration of the breach</i>) ◆ Aggravating and mitigating factors (see Table 3) 	

- 3.17 ComReg is proposing the tariff value ranges described in Table 5 for the fixed and weekly tariffs.

Table 5: Proposed Tariff Values

Proposed Tariff Values	
Fixed Tariff	€10,000
Weekly Tariff	€10,000
Maximum cap	€500,000

- 3.18 ComReg will also consider any relevant mitigating and aggravating factors when calculating Tariff based penalties.
- 3.19 Penalties will be evaluated to confirm they are appropriate, effective, dissuasive and not so high as to be disproportionate. ComReg may consider the level of penalty in the context of the turnover of the operator in its last complete financial year prior to breach.
- 3.20 ComReg is proposing that Tariff Penalties are applied for less serious Access Regulations breaches. There is precedent for this approach in other NRAs such as the National Commission for Markets and Competition (**'CNMC'**) in Spain and the Authority for Consumers and Markets (**'ACM'**) in the Netherlands.
- 3.21 CNMC has discretion to set the level of penalties depending on the severity of the breach, and aggravating circumstances (e.g. previous breaches) subject to maximum financial penalties of €20m for very serious breaches, €2m for serious breaches, and €50,000 for other breaches.

- 3.22 Similarly, ACM has a detailed penalties policy in which they have discretion to apply penalties depending on the category in which the breach falls, with the level of penalty increasing in proportion to the severity of the breach.
- 3.23 Some worked examples of how tariff penalties might be calculated using the methodology in Table 4 and the values in Table 5 are provided in Appendix: 4.

3.3 Application of the Methodologies

- 3.24 The Turnover Methodology and the Tariff Methodology will be used by ComReg to calculate financial penalties for Access Regulations breaches and applies to all operators who may have obligations under the Access Regulations.
- 3.25 The Turnover Methodology will be used for **more serious** Access Regulations breaches. In particular, where a vertically integrated operator with SMP in a wholesale market, is responsible for an Access Regulation breach, this affects other operators and end users in downstream retail markets through reduced competition.
- 3.26 The Tariff Methodology will be used for **less serious** Access Regulations breaches. For example where an operator breaches a transparency obligation by failing to notify ComReg of a new price tariff.
- 3.27 The above methodologies and guidance should inform operators, based on the type of breach under investigation, which methodology ComReg may use to calculate financial penalties for Access Regulations breaches. However ComReg will inform the operator under investigation of the applicable methodology at the time of the making a finding of non-compliance¹⁴.

¹⁴ Regulation 19(1) of the Access Regulations.

Chapter 4

Next Steps

- 4.1 All comments on this Consultation are welcome. It would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this consultation document.
- 4.2 The consultation period will run from 21 May 2019 to 2 July 2019. During this time ComReg welcomes written comments on any of the issues raised in this Consultation.
- 4.3 Having analysed and considered the comments received, ComReg will review the main proposals set out in this Consultation, amend if necessary in light of representations received and publish the Final Penalties Methodology.
- 4.4 In order to promote further openness and transparency, ComReg will publish all respondents' submissions in relation to this Consultation. Respondents should submit views in accordance with the instructions set out below.
- 4.5 Respondents should be aware that all non-confidential responses to this Consultation will be published, subject to the provisions of ComReg's guidelines on the treatment of confidential information. Similarly, any associated correspondence received by ComReg from Service Providers in the course of the consultation process may also be published.
- 4.6 When submitting a response to this consultation that contains confidential information, respondents must choose one of the following options:
 - (a) Submit both a non-confidential version and a confidential version of the response. The confidential version must have all confidential information clearly marked and highlighted in accordance with the instruction set out below. The separate non-confidential version must have redacted all items that were marked and highlighted in the confidential version; or
 - (b) Submit only a confidential version and ComReg will perform the required redaction to create a non-confidential version for publication. With this option, respondents must ensure that confidential information has been marked and highlighted in accordance with the instructions set out below. Where confidential information has not been marked as per our instructions below, then ComReg will not create the non-confidential redacted version and the respondent will have to provide the redacted non-confidential version in accordance with Option (a) above.

- 4.7 For ComReg to perform the redactions under Option (b) above, respondents must mark and highlight all confidential information in their submission as follows:
- a) Confidential information contained within a paragraph must be highlighted with a chosen particular colour,
 - b) Square brackets must be included around the confidential text (one at the start and one at the end of the relevant highlighted confidential information),
 - c) A scissors symbol ✂ must be included after the first square bracket.

Appendix: 1 Legal Basis

Consultation

- A 1.1 Pursuant to 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), amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (Better Regulation Directive) Member States must lay down rules on penalties applicable in the case of Access Regulations breaches; ensure they are implemented and; ensure that the penalties are appropriate, proportionate, effective and dissuasive.
- A 1.2 Pursuant to Regulations 19(4) and 19(8) of the Access Regulations, ComReg may seek an order from the High Court for payment of a financial penalty (Regulation 19(4)) and ComReg may recommend to the Court the appropriate amount of that financial penalty (Regulation 19(8)(a)). Regulations 19(4) and 19(8) of the Access Regulations fulfil the requirement on Member States in respect of Article 21a of the Framework Directive.
- A 1.3 Pursuant to Article 10(3)(a) of 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 (Authorisation Directive) member states shall give powers to the NRA to impose dissuasive financial penalties where appropriate including penalties that may have a retroactive effect.

Functions and Objectives of ComReg

- A 1.4 The functions of ComReg are set out in section 10 of the Communications Regulation Act 2002 (as amended) and Regulation 6 of the Access Regulations.
- A 1.5 The objectives of ComReg are set out in section 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations.

Appendix: 2 Consultation Questions

- Q. 1 Do you think that the Turnover Methodology, as proposed in Section 3.1 of this Consultation, is suitable for calculating financial penalties that are appropriate, effective, proportionate and dissuasive for Access Regulations breaches?
- Q. 2 Do you think that that the proposal to use the Turnover Methodology for more serious Access Regulations breaches, in particular, where a vertically integrated operator is found to have SMP in a wholesale market, is appropriate and proportionate?
- Q. 3 Do you think that the proposed maximum cap of 10% of the turnover of the operator in its last complete financial year prior to breach for turnover based penalties is proportionate?
- Q. 4 Do you think that the Tariff Methodology, as proposed in Section 3.2 of this Consultation, is suitable for calculating financial penalties that are appropriate, effective, proportionate and dissuasive for Access Regulations breaches?
- Q. 5 Do you think that it is appropriate that the proposed Tariff Methodology is applicable to all operators for less serious Access Regulations breaches?
- Q. 6 Do you think that the proposed fixed and weekly penalty tariffs, as described in Table 5 of this Consultation, are appropriate and will result in a penalty that is proportionate and dissuasive?
- Q. 7 Do you think that the weekly tariff should remain at €10,000/week or should it increase after a fixed period of time e.g. after 3 months, after 6 months?
- Q. 8 Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?
- Q. 9 Do you think that the proposed list of potential mitigating and aggravating factors described in Table 3 of this Consultation, while not exhaustive, provides sufficient clarity to Operators in factors that will be considered by ComReg when calculating financial penalties, whether turnover or tariff based?
- Q. 10 Do you think that the proposed Methodologies are sufficiently transparent and provide enough information to inform Operators on the potential financial penalties that may be calculated by ComReg?

Appendix: 3 ComReg Financial Penalties Methodologies

Turnover Methodology

Proposed Turnover Methodology
<ul style="list-style-type: none"> ◆ The Basic Amount <ul style="list-style-type: none"> ◆ Value of relevant retail sales (V) x Gravity (G) x Duration (N);
<ul style="list-style-type: none"> ◆ Adjustment Factors <ul style="list-style-type: none"> ◆ aggravating circumstances (increased penalties) ◆ mitigating circumstances (reduced penalties)
<ul style="list-style-type: none"> ◆ fine reductions (settlement, inability to pay) ◆ maximum cap of 10% of the turnover of the operator in its last complete financial year prior to breach

Proposed gravity factor ranges (%)	
Refusal to provide access/refusal to supply/margin squeeze/ price discrimination	10-15%
Discrimination/transparency/access breaches with <u>material impact</u> on retail competition	5-10%
Discrimination/transparency/access breaches with <u>potential impact</u> on retail competition	1-5%
Pure regulatory breach with lower <u>potential for impact</u> on competition	< 2%

Tariff Methodology

Proposed Tariff Methodology	
<p>Penalty = One-off Tariff + (Weekly Tariff x No. of Weeks) – Mitigating Factors + Aggravating Factors</p> <ul style="list-style-type: none"> ◆ Fixed Tariff (<i>One-off Fixed Penalty Tariff applied per breach</i>) ◆ Weekly Tariff X No. of weeks (<i>Weekly Penalty Tariff applied per week for duration of the breach</i>) ◆ Mitigating and Aggravating Factors 	

Tariff Ranges

Proposed Tariff Ranges	
Fixed Tariff	€10,000
Weekly Tariff	€10,000
Maximum cap	€500,000

Aggravating and Mitigating Factors for Turnover and Tariff Methodologies

Potential Aggravating and Mitigating Factors (non-exhaustive)
<ul style="list-style-type: none"> ◆ Repeat behaviour resulting in the same or similar breaches of obligations (Recidivism). ◆ The effectiveness of governance arrangements in identifying or mitigating the root cause of the breach and any feedback processes to limit recidivism. ◆ The effectiveness of any commitments made to improve corporate governance arrangements. ◆ Whether the breach of obligations, when advised by ComReg, was admitted or denied by the operator. ◆ .

- ◆ The extent to which the operator self-identified the breach (before being notified by ComReg) and brought this to ComReg's attention.
- ◆ Whether in all the circumstances appropriate steps had been taken by the operator to prevent the breach.
- ◆ The extent to which the breach occurred deliberately or recklessly, including the extent to which senior management knew about it, or ought to have known about it.
- ◆ Whether the breach in question continued, or whether timely and effective steps were taken to end it, once the operator became aware of it.
- ◆ Any steps taken for remedying the consequences of the breach.
- ◆ The extent to which the operator has cooperated with the investigation.

Appendix: 4 Examples of possible Tariff Penalty Calculations

A 4.1 This Annex provides some worked examples¹⁵ of how tariff penalties might be calculated with the methodology in Table 4 and the values in Table 5.

Example 1

Operator A confirmed receipt of an access request to Operator B, who made the access request, **5 days late** after the request was received in breach of Section 8.10(i) of Decision Instrument 10/18¹⁶. The basic tariff penalty may be calculated as follows:

<i>Tariff</i>	<i>Amount</i>
<i>Fixed Tariff</i>	€10,000
<i>Weekly Tariff</i>	€10,000
<i>No. of Weeks</i> ¹⁷	1 week
Basic Tariff Penalty	= €10,000 + (€10,000 x 1 week) = €20,000
NOTE: This basic tariff penalty may be increased or decreased depending on any relevant aggravating or mitigating factors that may be applied.	

Example 2

Operator C does not publish a Reference Interconnect Offer ('RIO') pursuant to Section 11.2 of Decision Instrument D10/19¹⁸, for **four months** after the effective date. The basic tariff penalty may be calculated as follows:

<i>Tariff</i>	<i>Amount</i>
<i>Fixed Tariff</i>	€10,000
<i>Weekly Tariff</i>	€10,000
<i>No. of Weeks</i> ¹⁷	16 weeks
Basic Tariff Penalty	= €10,000 + (€10,000 x 16 weeks) = €170,000

¹⁵ These are for illustrative purposes only and penalties will be calculated on a case by case basis.

¹⁶ Market Review Wholesale Local Access (WLA) provided at a Fixed Location Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products Response to Consultation and Decision ComReg Document No. 18/94

¹⁷ The duration of the breach will be rounded to the nearest week.

¹⁸ Market Review Fixed Voice Call Termination and Mobile Voice Call Termination Response to Consultation and Decision ComReg Document No. 19/47

NOTE: This basic tariff penalty may be increased or decreased depending on any relevant aggravating or mitigating factors that may be applied.

Appendix: 5 Oxera Report 2020

A 5.1 See ComReg Document Number 20/25a

Appendix: 6 Oxera Report 2016 - Calculation of penalties for breaches of regulatory obligations

A 6.1 See ComReg Document Number 20/25b.