



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

The Financial Penalty Methodology

Guidance on ComReg's approach to the calculation of financial penalties for the purpose of Regulation 19(8) of the Access Regulations

Guidance Document

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Introduction

- 1.1 The Commission for Communications Regulation (**‘ComReg’**) was established under section 6 of 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 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 Where ComReg finds that an operator has not complied with an obligation, ComReg will notify the operator, giving the operator an opportunity to state its views or remedy the non-compliance within a reasonable timeframe, pursuant to Regulation 19(1) of the Access Regulations. At the end of the timeframe allowed to remedy the non-compliance, if ComReg is of the opinion that the operator has not complied with the relevant obligation, pursuant to Regulation 19(4) of the Access Regulations. ComReg may apply to the High Court for an order as ComReg considers appropriate which can include a declaration of non-compliance, an order directing compliance with the obligation, an order directing the remedy of any non-compliance with the obligation, and an order to pay ComReg a financial penalty pursuant to Regulation 19(8) of the Access Regulations.
- 1.3 For the purpose of submissions to the High Court under Regulation 19(8) of the Access Regulations on the appropriate financial penalty, ComReg will choose to apply one of the Methodologies; the Turnover Methodology or the Tariff Methodology. The Turnover Methodology is the default methodology used to calculate financial penalties for Access Regulations breaches, where practical. In certain circumstances, ComReg will use the Tariff Methodology either where it is not feasible to apply the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach) or, for less serious Access Regulations breaches (typically breaches of a procedural nature, for example, a short delay¹ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA’s, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).

¹ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

Turnover Methodology

- 2.1 To calculate an appropriate financial penalty to submit to the High Court using the Turnover Methodology, ComReg will first calculate the basic amount.
- 2.2 The basic amount is composed of the value of relevant retail sales ('V') multiplied by the gravity of the conduct ('G') multiplied by the duration that the operator has been in breach ('N').
- 2.3 The value of relevant retail sales is the proportion of the market affected by the Access Regulations breach. It considers the breaching operators own sales in the downstream market for the last full financial year of the breach and apportions this based on the market shares of the upstream wholesale products that were affected by the breach.
- 2.4 Gravity is a measure of the seriousness of the Access Regulations breach 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.
- 2.5 While the gravity factor of the breach will be determined on a case by case basis, the following table presents some possible ranges for gravity factors for a range of breaches of regulatory obligations.

Gravity Factor Ranges	
Refusal to provide access/refusal to supply/margin squeeze/ price discrimination	8-10%
Discrimination/transparency/access breaches with material impact on downstream competition	5-8%
Discrimination/transparency/access breaches with potential impact on downstream competition	1-5%
Pure regulatory breach with lower potential for impact on competition	< 2%

- 2.6 The duration of the breach is measured in years, or parts thereof.
- 2.7 Following the calculation of the basic amount, ComReg will apply any relevant adjustment factors: aggravating factors that may increase the basic amount by a percentage or mitigating factors that may reduce the basic amount by a percentage.
- 2.8 The following table presents mitigating and aggravating factors that may be considered by ComReg when calculating an appropriate financial penalty to

submit to the High Court. The list is not exhaustive and does not provide figures for the percentage increase or reduction as these are determined on a case by case basis depending on the circumstances of the case.

Potential Mitigating Factors	Potential Aggravating Factors
<ul style="list-style-type: none"> ▪ First time offence ▪ Effective governance arrangements in identifying or mitigating the root cause of the breach and any feedback processes to limit recidivism. ▪ Effective commitments made to improve corporate governance arrangements. ▪ Breach of obligations, when advised by ComReg, was admitted by the operator. ▪ 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. ▪ Breach was not deliberate or because of reckless behaviour ▪ the extent to which timely and effective steps were taken to end the breach, once the operator became aware of it. ▪ Any effective steps taken for remedying the consequences of the breach. ▪ The extent to which the operator cooperated with the investigation. 	<ul style="list-style-type: none"> ▪ Repeat behaviour resulting in the same or similar breaches of obligations (Recidivism). ▪ Ineffective governance arrangements in identifying or mitigating the root cause of the breach and any feedback processes to limit recidivism. ▪ Ineffective commitments made to improve corporate governance arrangements. ▪ Breach of obligations, when advised by ComReg, was denied by the operator. ▪ The operator did not self-identify the breach ▪ No steps taken by the operator to prevent the breach. ▪ Breach occurred deliberately or recklessly, including the extent to which senior management knew about it, or ought to have known about it. ▪ Breach in question continued, or operator was slow to end it, once the operator became aware of it. ▪ A lack of or limited effective steps taken for remedying the consequences of the breach. ▪ Operator did not cooperate with the investigation or did not cooperate in a timely manner.

2.9 ComReg may also consider additional adjustment factors such as a reduction in the penalty due to a settlement agreement with the operator in breach or a reduction due to the operator’s inability to pay.

2.10 Financial penalties calculated using the Turnover Methodology will be subject to a maximum cap of 10% of turnover of the breaching operator in the jurisdiction in in the full financial year preceding ComReg’s recommendation of a financial penalty to the High Court. In proceedings before the High Court for single or multiple breaches, the total penalty sought in those proceedings will not exceed 10% of turnover.

Tariff Methodology

- 3.1 It will not always be practical or appropriate to use the Turnover Methodology, therefore ComReg will use the Tariff Methodology where it is not feasible to use the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach) or where the breach is for less serious breaches (typically breaches of a procedural nature, for example, a short delay² in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).
- 3.2 To calculate an appropriate financial penalty amount to submit to the High Court ComReg using the Tariff Methodology, ComReg will first calculate the basic amount.
- 3.3 The basic amount is composed of the Fixed Tariff, plus the Weekly Tariff multiplied by the duration in weeks that the operator has been in breach.
- 3.4 The Fixed Tariff is a one-off fixed penalty tariff applied per breach and the Weekly Tariff is the tariff applied per week for the duration of the breach.
- 3.5 The values for the fixed and weekly tariffs are shown in the following table:

Tariff Values	
Fixed Tariff	€10,000
Weekly Tariff	€10,000

- 3.6 Following the calculation of the basic amount ComReg will apply any relevant adjustment factors: aggravating factors that may increase the basic amount by a percentage or mitigating factors that may reduce the basic amount by a percentage.
- 3.7 In proceedings before the High Court for either a single or multiple breaches, the total penalty sought in those proceedings will not exceed a maximum cap of €500,000.

² Extended delays in complying with a procedural breach may not be considered as less serious breaches.