An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Guidelines for the calculation of financial penalties under the Access Regulations

Submissions to Consultation 20/25

Submissions to Consultation

Reference: ComReg 20/25s

Date: 10/02/2021

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Submissions Received from Respondents

Document No:	20/25s
Date:	10 February 2021

Consultation:	20/25
Response to Consultation:	21/10

Content

1: ALTO

alto

alternative operators in the communications market

Consultation: Calculating Penalties for Access Regulations Breaches – Ref: 20/25

Submission By ALTO

Date: June 18th 2020

ALTO is pleased to respond to the Consultation: Calculating Penalties for Access Regulations breaches – Ref: 20/25

ALTO welcomes this opportunity to comment on this consultation.

1. Preliminary Remarks

1.1 ALTO supports ComReg's work in deriving a set of proper penalty guidelines.

1.2 ALTO is aware that ComReg sought legal advice Regulation 19 of the Access Regulations and on the issue of civil sanctions more generally. We believe that ComReg has a unique opportunity to remedy a clear issue for itself and the industry now, given that the State through the Department of Communications, Climate Action and Environment is working to transpose the new European Communications Code Directive (EU) 2018/1972.

1.3 ALTO has historically supported ComReg's work in the area of enforcement, particularly in the face of undisputed evidence. The factors giving rise to this Consultation are set out in the next section and make uncomfortable reading for the industry.

1.4 ALTO was particularly disappointed that ComReg's previous enforcement action outlined in the Consultation paper were not followed through to conclusion.

1.5 In particular, the compromise and settlement of the eir Regulatory Governance Model proceedings closed off subsequent or potential follow-on damages claims that may have flowed had there been findings of fact and breach made by the High Court.

1.6 ALTO notes that ComReg does not appear to have any Enforcement Guidelines and/or principles published. We submit that this is an

important matter in the event that ComReg decides to pursue sanctions in the manner intended in this consultation.

2. Background

2.1 In August 2015, the Head of Compliance and Equivalence at eir, Joseph Styles published a report ("**the Styles Report**") concerning eir's Regulatory Governance Model – RGM.[1] The Report made certain findings of fact concerning the operation and supervision of the eir retail and wholesale divisions.

2.2 The Styles Report was ground-breaking. For the first time, eir was directed by its own board to show compliance throughout the organisation, in a similar manner to regulatory standards mandated in the electricity sector.

2.3 The first Styles Report resulted in exposure of around thirty six (36) compliance issues. Some of the issues were minor in nature, others were less so.

2.4 The second Styles Report published in May 2016, resulted in exposure of around sixteen (16) compliance issues.[2] Some of which were compliance issue continuations from the first Styles Report. The third and final Styles Report appeared to follow that track of the second Styles Report.[3]

2.5 What ensued were preliminary findings made by ComReg resulting in two cases.[4] Case 481 and Case 568. The cases concerned various finding made by ComReg culminating in assessments and allegations

[1] https://www.openeir.ie/wp-content/uploads/2020/05/3.3-eir-RGM-Industry-Update-August-2015-1.pdf
[2] https://www.openeir.ie/wp-content/uploads/2020/05/3.2-eir-RGM-Industry-Update-May-2016-1.pdf
[3] https://www.openeir.ie/wp-content/uploads/2020/04/3.1-eir-RGM-Industry-Update-June-2017.pdf
[4] See ComReg document reference: 17/57.

of breaches of non-discrimination, transparency and access regulations, all of which were obvious from reading the Styles Reports.[5]

2.6 The industry fully endorsed and supported the findings made by ComReg, based upon very clear evidence and information that had been ultimately provided to it by eir itself.

2.7 ComReg 17/57, set out the basis for what would be enforcement proceedings (the "**Enforcement Proceedings**") before the High Court. ComReg would apply ask the High Court to make finding of breaches of the Access Regulations and then to level a sanction on eir pursuant to the provisions of Article 21a of the Framework Directive for electronic communications networks and services 2002/21/EC transposed into national law and given effect here by Regulation 19 of S.I. 334 of 2011 of the European Communities (Electronic Communications)(Access) Regulations 2011.

2.8 ComReg Document reference 17/98, paragraph 5, sets out that ComReg intended to apply to the High Court for approval of financial penalties. Which it ultimately did.

2.9 On 16 June 2017, ComReg issued two sets of legal proceedings against eir in the Irish High Court (Record Nos. 2017/186 MCA and 2017/187 MCA).

2.10 The first proceedings, concerning ComReg Case 481 concerned four (4) alleged breaches of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No 334 of 2011) (the "**Access Regulations**").

2.11 The second proceedings concerning ComReg Case 568 arose from an alleged breach of the Access Regulations in a separate matter.

[5] ComReg 17/57 – cf. ComReg 16/99; 16/100; 16/101; 16/102; and 16/103.

2.12 In the Enforcement Proceedings that were issued, ComReg sought declarations of non-compliance and the imposition of financial penalties of €5,011,943, €1,587,210, €986,726, and €498,580 for Case 481 and a financial penalty of €1,666,185 for Case 568.[6]

2.13 On 22 June 2017, eir issued legal proceedings challenging the validity of the provisions of Regulation 19 of the Access Directive invoked by ComReg in seeking to impose the financial penalties on eir in the Enforcement Proceedings. Those High Court proceedings were taken against the Minister for Communications, Climate Action and Environment, Ireland and the Attorney General This matter was set down for hearing on 14 June 2018 (Record No. 2017/5929P).

2.14 The Enforcement Proceedings were stayed by Orders of the High Court of 18 October 2017 pending resolution of the Regulation 19 Proceedings.

2.15 eir's argument in the Regulation 19 Proceedings was a constitutional one, and one directed at the State. There is a chance that eir's challenge may have ultimately succeeded given the nature of how Regulation 19 was drafted.

2.16 The Enforcement and Regulation 19 proceedings were ultimately compromised and settled on 10 December 2018. The terms of the settlement ("**Terms of Settlement**") being published on the same date.

2.17 The Terms of Settlement at Section 5 make it clear that this public Consultation process on the proposed methodology for the calculation of financial penalties for breaches by authorised undertakings was agreed as a requirement of the said Terms of Settlement. It is also clear from Section 5, that eir reserved its position entirely as to future

[6] During the High Court High Court proceedings these amounts were variously referred to as €10m.

challenges that may be mounted concerning Regulation 19 of the Access Regulations.

2.18 ALTO notes that to date that there is insufficient transparency concerning RGM implementation and actions taken over relatively significant aspects of the RGM KPMG and Cartesian recommendations. This lack of full attention and implementation may give rise to further findings by ComReg and a serious imperative that this area of regulatory enforcement be resolved properly for once and for all.

3. European Communications Code – Directive (EU) 2018/1972

3.1 As ComReg is aware the State is working to transpose the new European Communications Code which will replace Article 21a of the Framework Directive 2002/21/EC and 2009/140/EC, with a new Article 29 of the new Code to be read with Recital 64.

3.2 Article 29, reading broadly similarly to previous Article 21a:

> *"1. 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.*

2. Member States shall provide for penalties in the context of the procedure referred to in Article 22(3) only where an undertaking or public authority knowingly or grossly negligently provides misleading, erroneous or incomplete information.

When determining the amount of fines or periodic penalties imposed on an undertaking or public authority for knowingly or grossly negligently providing misleading, erroneous or incomplete information in the context of the procedure referred to in Article 22(3), regard shall be had, inter alia, to whether the behaviour of the undertaking or public authority has had a negative impact on competition and, in particular, whether, contrary to the information originally provided or any update thereof, the undertaking or public authority either has deployed, extended or upgraded a network, or has not deployed a network and has failed to provide an objective justification for that change of plan." (Emphasis Added)

3.3 Recital 64:

"While market participants can change their deployment plans for unforeseen, objective and justifiable reasons, competent authorities should intervene, including if public funding is affected, and, where appropriate, impose penalties if they have been provided, knowingly or due to gross negligence, by an undertaking or public authority with misleading erroneous or incomplete information. For the purpose of the relevant provisions on penalties, gross negligence should refer to a situation where an undertaking or a public authority provides misleading, erroneous or incomplete information due to its behaviour or internal organisation which falls significantly below

due diligence regarding the information provided. Gross negligence should not require that the undertaking or public authority knows that the information provided is misleading, erroneous or incomplete, but, rather, that it would have known, had it acted or been organised with due diligence. It is important that the penalties are sufficiently dissuasive in light of the negative impact on competition and on publicly funded projects. The provisions on penalties should be without prejudice to any rights to claim compensation for damages in accordance with national law." (Emphasis Added)

3.4 The transposition work, while ultimately a job for the State, provides a real opportunity for ComReg to work with the Department of Communications, Climate Action and the Environment to fix a serious problem with Regulation 19 in its current form.

3.5 ALTO assesses Regulation 19 as it stands, is unclear, loosely drafted and possibly unconstitutional vis-à-vis the proper basis for a Court to determine a financial penalty to the extent that it possibly could.

3.6 What is required is a tightly drafted new regulation designed to guide the Court and to permit those potentially subject to sanction and penalty to know, with precision, what a potential litigation outcome could be. We propose that the new Regulation sets out levels of penalty thresholds, such as low, medium and high with appropriate levels of fixed fines associated with each class or level of sanction.

3.7 ALTO calls on ComReg to engage fully in the work currently being undertaken by the Department of Communications, Climate Action and the Environment, and if necessary with the ComReg RGM team and Wholesale Division lawyers to ensure that the new and forthcoming provisions of Article 29 of the Code, are properly and tightly drafted to

give the requisite guidance and clarity to the High Court to determine penalties properly. The draft should also pass Constitutional muster.

3.8 In the event that ComReg does not engage on the transposition of this area, industry may find that a similar challenge to future enforcement proceedings and penalties follows.

3.9 Reform of this area of the law is very necessary to enable ComReg to regulate the market in appropriate, effective, proportionate and dissuasive manner, if required, and with the required sanctions in its armoury.

4. Further issues

4.1 ALTO considers that this Consultation paper taken in isolation, does not go far enough to protect ComReg against future legal challenge.

4.2 In particular, ALTO submits that ComReg should consider how it proposes reach its reasoned decisions concerning sanctions in the form of penalties. What those reasoned decisions shall look like, whether *pro forma* or not, and how it proposes to notify undertakings of findings of reasoned decisions giving rise to the potential penalties set out in the Consultation paper. This currently remains unclear.

4.3 Taking the questions in the ten Consultation paper, to the exclusion of the robust Oxera work, it is difficult to disagree with much of what ComReg consults upon. That is not to suggest that is it all unimpeachable.

4.4 If ComReg is serious about the issue of sanction and penalties, rather than simply fulfilling an agreed consultation process imperative set out at Section 5 of the 10 December 2018 Settlement Agreement. Then it must go further and set out an end-to-end decision making process, or

very clear Enforcement Guidelines (See Oxera paper dealing with this and Ofcom Penalty Guidelines[7]), where clearly set out processes and procedures are engaged resulting in reasoned decisions are present and feeding into the categories of tariff derived. In the event that this is not considered properly and robustly with further consultation, then ComReg is potentially leaving itself open future appeal and/or judicial review in any event.

4.5 ALTO notes that ComReg and in particular civil sanctions has been mentioned in the current programme for government. It remains to be seen whether or not this programme will be approved at the time of writing, however we note the various reports and work undertaken by the Law Reform Commission in this area.

[7] https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

Response to 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?

A. 1. ALTO agrees 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?

A. 2. ALTO believes that the proposal to use the Turnover Methodology for more serious Access Regulation breaches concerning vertically integrated operators found to have SMP in a given 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?

A. 3. ALTO answers this question in the affirmative.

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?

A. 4. ALTO has carefully reviewed the position at Section 3.2 of the Consultation paper, and we agree that it 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?

A. 5. ALTO agrees that it is appropriate that the proposed Tariff Methodology is applicable to all operators for less serious Access Regulations breaches. We submit that ComReg should evaluate the nature and form of an alleged breach and the severity on the consumer or the market properly, by a form of impact assessment prior to utilising the Tariff Methodology as a remedy, particularly for admitted errors and one off mistakes.

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?

A. 6. ALTO has carefully considered the figures set out at Table 5 of this Consultation. We submit that ComReg should consider a lower Fixed Tariff. Presently, the table accounts for a Fixed Tariff at €10,000, which is the same as the Weekly Tariff as presented. The one off Fixed Tariff might present an amount that is disproportionate to operators of a certain size and revenue and should also take account of grades of One-Off Fixed Penalty. ComReg should consider whether there

is a clear form of notified tariff grade that could be deployed instead to cater for smaller undertakings, but also to allow ComReg a form of additional discretion

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?

A. 7. ALTO requests that ComReg considers the answer above at A. 6, in this regard. It might be that an undertaking is able to mitigate the Access Regulation Breach at issue in a given case or set of circumstances and should be given a break or graduated tariff. This might case a slight rethink or reworking of the model, but if an operator is fairly remedying a breach, then a discount should be permissible, whether discretionary or modelled in advance.

Q. 8 Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?

A. 8. ALTO agrees that the proposed maximum cap of €500,000 for tariff based penalties appears to be 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?

A. 9. ALTO submits that ComReg's list, while non-exhaustive mixes the issues of potentially aggravating and mitigating factors. Those factors should stand to be

considered more exhaustively and indeed separately. Mitigating factors usually resulting in a discounted tariff and aggravating resulting in a weighted tariff, as is appropriate in a given case.

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?

A. 10. ALTO does not agree that this Consultation paper and the proposed Methodologies are sufficiently transparent and provide enough information to the market to properly inform Operators on the market of potential financial penalties, and reasons for those penalties that may be calculated by ComReg.

ALTO considers that the paper really only touches on high level points of principle. We submit that ComReg should engage in a more robust consultation and approach in order to stave off legal challenges to its decision making processes if this particular consultation and proposal is to hold any weight. In particular, there is nothing in the consultation in terms of ComReg's legal duty to give reasons and the proper procedures that will be undertaken in the event that a breach is admitted, found, realised, or notified. This is no criticism of the work undertaken by Oxera, but the paper is threadbare and rife for appeals and judicial review applications if a decision is taken on foot of it in its current form.

ALTO

18th June 2020

2: BT Ireland Limited

BT Communications Ireland Ltd "BT" Response to ComReg Consultation:

Calculating penalties for Access Regulations breaches – Consultation.

Issue 1 - 18 June 2020

1.0 Introduction

We welcome this consultation and generally support the proposals of ComReg and offer our constructive comments to the proposals. We would also like to commend Oxera for its detailed comparison of the penalty regimes in other jurisdictions and other sectors in Ireland. We found the Oxera document informative and welcome that it touched on some of the wider issues such as the limited powers available to ComReg compared to more recent sector regulators such as the Commission for the Regulation of Utilities (CRU) and the work of the Law Reform Commission with respect to telecoms regulation.

In addition to responding to the questions posed by the consultation in relation to appropriate financial penalties, we would like to highlight our views of the following issues (many of which were also touched upon in the Oxera report), which we believe must also be significantly reformed to improve the current wholesale enforcement regime which is largely ineffective in our view, and exists under legislation that is now significantly outdated.

In our view these issues are contributing to delay the development of competition and hence customer opportunities within the telecoms sector in Ireland.

For example the case of the Eircom RGM (Commonly known as "Styles") highlights the inadequacy of the current wholesale enforcement regime particularly where counter challenges can be taken to undermine the ability of the Regulator and indeed the judiciary to transact enforcement proceedings and impose penalties. In our view this challenge unduly put ComReg at a disadvantage in trying to enforce regulation in circumstances where breaches were clear and we believe undisputed, and leads to the question whether simply establishing a clear penalties regime (such as this consultation will seek to achieve) is adequate to ensure that breaches of regulation are dealt with swiftly, appropriately and in a way that deters repetition.

Below we set out some of these additional issues from our perspective, together with a forward looking approach at how they may be resolved as part of other reforms that are currently being discussed:

1. Enforcement Procedures - We consider penalties to be one aspect of the enforcement process and in addition we consider ComReg should look to publish/update its Enforcement Guidelines. Enforcement processes have an important role to play in driving compliant behaviour on the part of those who are subject to regulatory rules imposed to protect the interests of consumers and promote competition. But they have an equally important role to play as a system of checks and balances on the exercise of regulatory powers so as to ensure consistency, fairness, and proportionality of regulatory intervention. We therefore consider ComReg should additionally articulate the processes that it will operate with as great a degree of certainty and transparency as is possible (including detail on

standard of proof, determination of evidence and escalation/appeal processes) so that they can then be operated consistently, and with all parties having clear expectations of how the processes will operate. We believe such will also assist the judicial stage that ultimately determines the outcome.

2. Penalties - We support this consultation and ComReg's work to put in place the penalties guidelines which are required under legislation and this should complete without delay and without surprises or changes in direction. Our further comments on this are addressed in the specific questions below. However, as suggested, the penalty amount is only one part of achieving the goal of adequate and fair enforcement.

3. Transposition of the European Electronic Communications Code "The Code"
   We believe that the implementation of the Code by Ireland (currently due to be implemented by the end of 2020) is an important and unique opportunity to address in detail many of the issues that we refer to above with regard to powers of enforcement for both Comreg and the Courts in telecoms regulatory matters.

   In that regard, we consider it vital that ComReg is closely engaged as a matter of urgency in the detail of the transposition of the Code into Irish law, including the detailed legal provisions so that they support ComReg's objectives in bettering its powers of enforcement to the fullest extent possible.

   We would anticipate that a level of engagement is already in train but given industry speculation around past transposition errors we consider the focus on detail to be central. We understand ComReg is not drafting the transposition, but ComReg is well positioned and should be incentivised to lobby and influence strongly in this matter.

4. Law Reform and alignment of regulatory powers - We support the recommendation of the Law Reform Commission (Page 62 clause 4.6 of the Oxera report and as extracted below) for a general alignment of the powers of the regulators. ComReg was one of the earliest sector regulators in Ireland and except for some updates in 2007 relating to other topics, has been left behind more recent sector regulators such as the Commission for the Regulation of Utilities (CRU) in terms of wholesale regulatory enforcement powers (Please see the table below of Civil Powers to Fine extracted from the Oxera document). We note the UK successfully aligned their regulators powers in 2008 and its regulatory regime has advanced significantly in terms of published guidelines and execution whilst ComReg's powers of wholesale enforcement has continued to cause problems and has demonstrably failed when tested in the courts.

   It is of particular interest to note that in marked contrast to ComReg, most other regulators in Ireland do have direct enforcement processes (an exception is the CCPC, which equally has no power of civil enforcement powers but it does refer competition law breaches for criminal investigation and prosecution where appropriate). This allows those regulators to quickly respond to breaches by imposing fines (usually fixed or capped) following a clear and transparent process – something that is of particularly use in addressing lesser breaches, as it allows the courts process to focus on more serious breaches and also avoids what can be very significant legal costs incurred by both Comreg and the operators in undisputed matters.

Our perception from many years closely following regulation in Ireland is the lack of wholesale enforcement powers can lead to situations where ComReg finds itself (not through its fault) having to manage some wholesale enforcement cases through mutually agreed settlements with limited transparency of the arrangement, particularly to those who may have suffered harm as a result of the breach. Whilst settlement may be appropriate in certain circumstances within a transparent framework, no framework appears to exist in Ireland and ultimately this settlement approach is not a deterrent or dissuasive and creates distrust and suspicion outside of the arrangement and is not in line with the objectives of penalties highlighted by Oxera.

Extract from Oxera Paper Clause 4.6 – Italics added to highlight this is an extract.

> *"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)."*

End of Extract

Further Extract from Oxera Paper Clause 4.6 - Italics added to highlight this is an extract.

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*

End of Extract

2.0 Response to the detailed 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?

BT Response

We agree 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 breaches of the Access Regulations. We consider this aligns with the European Commission guidance on setting penalties which has benefited from experience and best practice learning. Such also aligns with approaches of other national regulators as demonstrated by the findings of Oxera.

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?

BT Response
Provided ComReg conduct the case within an appropriate enforcement framework which itself is clear to all: we agree with 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.

The appropriate enforcement framework conducted by ComReg is important to ensure proportionality and fairness given the requirement for all cases to be referred to the High Court. High Court legal and expert costs can be very significant (sometimes materially exceeding the proposed penalty) and it is important that due process is applied at the ComReg investigation stage to ensure that findings of breach are sound in advance of their being referred to the High Court.

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?

BT Response
We consider the proposed maximum cap of 10% of the turnover is proportionate, provided that turnover is limited to that of the operator business within the country which the offence occurred, based on the last complete financial year prior to breach. We consider this to be appropriate and reasonable for breaches of local regulation, a suitable deterrent for operators, and a measure that has been applied by other regulators including Ofcom. We are aware that some turnover penalty regimes are based on global turnover (such as under GDPR regulation), however we consider such to be excessive here and would have a disproportionate and devastating impact on the small local divisions of global operators.

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?

BT Response
We agree 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 that are less serious in nature. We agree that for circumstances that have a minor/small impact that the Tariff Methodology would likely be more efficient and should be available a part of the enforcement tool kit. As previously stated, it is unfortunate that under current legislation, even less serious breaches must be referred to the High Court, however we hope there will be an opportunity to address this matter separately.

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?

BT Response
We agree that the proposed Tariff Methodology should fall within the suite of enforcement tools and apply to all operators. We consider however that a level of discretion could be retained by ComReg as some less serious matters which do not have a customer or competition impact and are by their nature very minor may not be appropriate for Tariffs being applied, particularly where mitigating circumstances may also apply.

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?

BT Response
In addition to our comments above relating to Comreg maintaining a level of discretion, we consider the Proposed Tariff rates should be ranges rather than fixed amounts as the variety of offences means it's probable some fines will be disproportionately high compared to the offence, and levels of mitigating circumstances will vary. Applying a fixed Tariff in all circumstances may result in a disproportionate and unfair tariff being applied, which would run contrary to the objectives.

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?

BT Response
As for question six we consider ComReg should give itself the flexibility to make the 10k/week a range up to 10k. This would allow for a more proportionate approach considering the nature of the issue and whether the operator is progressing to a solution over time.

Q. 8 Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?

BT Response
We consider the proposed maximum cap of €500,000 for tariff based penalties based on the current regime is proportionate, provided that ComReg operates a clear enforcement process (as referred to in q 2).

We would add however that whilst we would advocate for ComReg to have the power of direct enforcement for lesser breaches, we would expect that where penalties in the upper end of this cap are considered, that they would continue to be ratified by the Courts, and/or an appropriate appeals process would apply.

For example, we note that the process followed by the BAI (which operates a maximum statutory cap of €250,000) gives broadcasters the option of having the matter dealt with by the BAI directly – based on a proposed penalty - or determined by Court (in which

case the BAI will give a recommendation to the Court but the Court ultimately deals with the matter)[1] .

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?

BT Response
We agree with 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. As mentioned previously, a clear and transparent enforcement framework will be required.

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? BT Response

BT Response
We would like to offer the following comments to the proposed Methodologies:

Details of the Penalty Methodology - We note the consultation discusses the concern of offenders potentially being able to calculate the risk vs. fine and for this reason detail is sparse in these matters; however we consider a balance is required in providing a reasonable level of certainty as to the general aspects of the penalty methodology to avoid arguments of ad hoc and inconsistent processes being used to undermining the case. As part of a wider Enforcement Methodology the penalties approach is fine, but on its own it lacks a supporting governance framework.

Enforcement Methodology/Guidelines - We are most concerned with the lack of an enforcement framework and published guidelines detailing ComReg's approach to regulatory investigations and which the penalties methodology would be a component. We believe an appropriate detailed enforcement framework of a similar style to Ofcom's Enforcement Guidelines for regulatory investigations[2] is necessary for both parties (the defendant and ComReg) to have clarity of the whole process. We believe this clarity of process will benefit all and assist the courts when it is requested to finalise the outcome of a case. As referenced above other regulators have consulted and published such guidelines, with such being updated from time to time with learnings of operating the process.

End

[1] Oxera report paper page 70.
[2] Ofcom's Enforcement Guidelines for regulatory investigations – Published 28 June 2017 and available on the Ofcom website.

3: Eircom Limited

eir

Response to ComReg Consultation:

Calculating penalties for Access Regulations breaches

ComReg Document 20/25

18 June 2020

DOCUMENT CONTROL

Document name	eir response to ComReg 20/25
Document Owner	Eir
Status	Non-confidential

The comments submitted in response to this consultation document are those of Eircom Limited and Meteor Mobile Communications Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

EXECUTIVE SUMMARY

1. An appropriate financial penalty framework can achieve the legislative goals of the Framework Directive. The balance in designing such a framework must be supported by a fit for purpose compliance process and allow for a clear impartial determination of which financial methodology, if any, is appropriate. It is unfortunate, therefore, that ComReg has not taken this opportunity to consult on the solid foundations upon which such a framework could be grounded or the pillars on which it could operate successfully to achieve those outcomes.

2. ComReg's clear desire to arrive at a turnover-based fining methodology places too great a reliance on the weak evidence presented by Oxera — that such a methodology is actually appropriate for use in an ex-ante regulatory context. ComReg and Oxera do not consider the underlying reason as to why the punishment and deterrence factors in an ex post competition law context typically result in very high fines and are less appropriate in an ex ante regulatory setting.

3. The failure to consult on what determines "*serious*" and "*less serious*" breaches leads to a binary conclusion that appears to suggest that all Access Regulations breaches (with the exception of transparency obligations) are "*more serious*" and result in a turnover-based approach and that transparency breaches are "*less serious*" and result in a tariff-based approach. This of course negates those cases where a fine is not appropriate and completely fails to consider whether it is proportionate.

4. eir's submission, supported by analysis undertaken by Frontier Economics, shows that actual harm must be considered to determine whether an appropriate fining mechanism is proportionate. Further, there are significant social and economic costs of high fines and high/disproportionate penalties may increase the regulatory uncertainty related to investing in the regulated company. It is therefore, wholly inconsistent for ComReg and Oxera to entirely exclude the importance of calculating actual harm. Solely referring to fanciful theories of harm means that there is no grounding to determine whether it is a priori an appropriate, effective, proportionate and dissuasive financial penalty methodology.

5. The majority of the proposal, as currently designed, is not clear, properly justified or consistent with the evidence, presented or otherwise. We would have expected more detail on ComReg's approach, so as to allow interested parties to make a more meaningful assessment of the proposal. Alternative methodologies are given a fleeting mention both in the ComReg consultation and Oxera paper and the tariff-based approach is merely given a single page in Oxera's economic advice to ComReg by way of consultation.

6. eir also has serious concerns as to the legality of ComReg's proposals for the implementation of a methodology that, in our view, in no way meets the legal requirements that financial penalties be appropriate, effective, proportionate and dissuasive. ComReg does not state which, if any, of the legal provisions it proposes to rely on to enable it adopt this methodology. None of the provisions cited explicitly give ComReg the power to adopt a methodology for the calculation of the penalties of the type proposed. Further, it is premature for ComReg to consult on a fining methodology in advance of transposition of the European Electronic Communications Code ('EECC'). In fact this would raise the question of whether consulting is what it is indeed doing, as interested parties can only rely and inform their submissions based on the current legislative framework and ComReg is aware that transposition of the EECC in six months' time will lead to the application of an entirely different framework.

7. Without prejudice to eir's view in paragraph 6, the Frontier Economics proposed approach provides a clear framework to determine whether breaches should result in a financial penalty and if so under what methodology the penalty should be calculated. Had ComReg consulted on a more comprehensive methodology, similar to that proposed by Frontier Economics, it could have properly consulted on key issues, including whether interested parties considered if Step 1 (whether a financial penalty is appropriate) and Step 2 (whether to apply a tariff or a turnover-based approach) provide a framework for financial penalties, which are appropriate, effective, proportionate and dissuasive.

8. Given the lack of clarity in the Consultation on the issues documented in our response, eir considers that it would now be appropriate for ComReg to provide additional detail and information to interested parties before a proposed

methodology can be properly consulted on. At the same time, ComReg must also take the opportunity to consult on and establish a formal and fit for purpose compliance process.

9. This is particularly relevant given the announcement in the proposed new Programme for Government that ComReg is to be given 'greater use of administrative penalties to sanction'. To the extent that this might involve the direct imposition of fines by ComReg, at a minimum eir considers any such powers will need to (a) be accompanied by full consultation on the establishment of comprehensive, transparent and fair investigation procedures and rights of defence, as well as a strict separation between investigation and adjudication units within ComReg and (b) full consultation on the means by which any Regulator-imposed fines are to be calculated, including any penalty methodologies. The present consultation in no way addresses these requirements, in particular as the proposed methodology has been designed only to be used in developing ComReg's penalty recommendations to the High Court under Regulation 19, recommendations which are then subjected to full assessment by the High Court; an entirely different scenario to Regulator-imposed fines without any such court involvement.

10. Finally, eir notes that the Consultation does not give any indication as to the date from which the proposed penalty methodology would apply. In line with the principle against retroactive penalties, eir considers that any penalties methodology can only apply to infringements that occur after the methodology is formally adopted. This is the first time that a proposed methodology has been consulted on and the application of this new and novel methodology to conduct that took place before its imposition would infringe on undertakings' legitimate expectations.

RESPONSE TO CONSULTATION

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?

11. eir does not consider that the Turnover Methodology, as proposed, by ComReg is suitable for calculating financial penalties. eir is concerned not only with regard to the components of its calculation but also the merits of what is proposed.

12. In particular, eir considers that ComReg has:

    (i) proposed a financial penalty methodology based on competition law without an adequate assessment of whether the environment of the fining methodology under Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') are consistent with the Regulatory Framework;
    (ii) failed to consider the Irish legislative framework;
    (iii) failed to consult transparently;
    (iv) proposed parameters for the calculation of financial penalties which are subjective, inappropriate and disproportionate; and
    (v) continued to depart from its regulatory requirements.

Competition law methodology fails to consider the differences in ex-ante regulatory framework

13. As set out in detail in the Frontier Economics Report, Oxera's analysis relies heavily on the framework for penalties in the competition law sphere. However, while Article 101 and Article 102 of the TFEU can overlap with some of the concepts considered under the Regulatory Framework, the jurisprudence of competition law is not determinative of the scope and application of the remedies proposed by ComReg through ex-ante regulatory obligations. Equally, the outcomes in breaches of competition law, through the implementation of a financial penalty methodology, do not necessarily hold in the context of ComReg's Access Regulations.

14. The only thread that links both competition law and ex-ante regulation is the concept of dominance. However, once a firm is designated with Significant Market

Power ('SMP') in a regulatory context the guidance on the behaviour and oversight of that firm is dramatically different to a firm that is "*dominant*" in a wholesale market determined ex-post by competition law. In particular, eir is closely scrutinised by ComReg, industry and eir's Independent Oversight Board ('IOB') and allegations of infringing behaviour can be acted on quickly — unlike within the sphere of competition law. Second, eir is subjected to very detailed ex ante regulations. These regulatory decisions establish certainty as to the parameters of acceptable market conduct and create defined regulatory processes, reporting and pricing obligations to which eir must adhere. In treating the outcomes of breaches of regulatory access obligations in the same way as anticompetitive behaviour, ComReg is inherently omitting the context in which competition law breaches occur and the very reason why punishment and deterrence parameters under such a framework typically allow for very significant fines.

15. Consequently, the proposed methodology for the application of the theory "*as an optimal penalty design*" in an ex ante regulatory context is fundamentally flawed. The proposed approach also puts too much weight on the European Commission's turnover-based approach, which is used to set fines for serious ex post competition breaches (e.g., cartel cases). These breaches are, in general, characterised by (i) significant harm to consumers and/or competitors, and (ii) by a low probability of detection.

16. Furthermore, in recommending an approach to ComReg, Oxera's report is too selective in the evidence it uses and how this evidence is interpreted. As evident from the Frontier Economics Report, the evidence used by Oxera continues to be skewed towards very serious breaches with high penalties, which lead to a biased recommendation i.e., a turnover-based approach as the default. The precedents used by Oxera and ComReg do not justify that the turnover-based approach is in any way appropriate.

17. Indeed in trying to justify the application of the competition law financial penalty methodology, Oxera states that "*the additional evidence that we have taken into account is somewhat mixed*". Similarly, the survey responses received by ComReg from other telecommunication regulatory authorities demonstrates that a turnover-based approach is far from being universally accepted in an ex-ante regulatory context – which is the context ComReg is consulting on.

18. Put simply, the reasoning and value judgments on which ComReg is basing its proposed methodology are wrong and not supported by the evidence. Therefore, ComReg cannot conclude, as required by Article 21a of the Framework Directive, that the proposed methodology is appropriate, effective, proportionate and dissuasive.

19. See also eir's response to Q2.

ComReg has failed to consider the Irish legal framework

20. eir also has serious concerns with regard to the legality of ComReg's proposals for the implementation of a methodology that, in our view, in no way meets the requirements that financial penalties be appropriate, effective, proportionate and dissuasive, eir's concerns on the legal merits of ComReg's approach include following issues:

(i) Absence of a legal basis for the adoption of the proposed methodology;
(ii) Legal invalidity of Regulation 19 of the Access Regulations;
(iii) Implications of the financial limits in Section 3 of the European Communities Act for the imposition of penalties utilising the methodology; and
(iv) Incompatibility of the proposed methodology with Regulation 19.

Absence of legal basis for the adoption of the proposed methodology

21. Appendix 1 of ComReg's Consultation is stated to be the 'Legal Basis' for the proposed methodology. This appendix however does not state which legal basis ComReg is relying on to introduce its proposed methodology. It simply describes the provisions of Article 21a of the Framework Directive, Regulation 19 of the Access Regulations 2011 and Article 10 of the Authorisation Directive. Nowhere does ComReg expressly state which, if any, of these legal provisions it proposes to rely on to enable it to adopt this methodology. ComReg also does not state what form of measure it proposes adopting on foot of this Consultation, for example whether it is to be a formal Decision. Given the lack of clarity in the Consultation on these issues eir reserves its rights to comment further when the position is clarified.

22. As a preliminary matter however, eir notes that none of the provisions cited explicitly give ComReg the power to adopt a methodology for the calculation of penalties of the type proposed.

- **Article 21a of the Framework Directive** cited by ComReg provides that '*Member States shall lay down rules on penalties*'. However, the Framework Regulations implementing that Directive contain no such provision, and consequently do not give this power, to '*lay down rules on penalties*' to ComReg. More generally, eir considers that it would be contrary to the provisions of Article 15.2.1 of the Constitution for such rules on penalties, with the potential for the imposition of unlimited fines, to be laid down by means of a regulatory decision, rather than primary legislation.
- **Regulation 19 of the Access Regulations 2011** sets out the procedure for applying to court to request the imposition of penalties. It contains no provisions authorising ComReg itself to adopt rules on penalties. Further, as set out in more detail below, eir considers that Regulation 19 itself is legally invalid, and not therefore a sound legal basis upon which to ground a regulatory decision.
- **Article 10(3) of the Authorisation Directive** also cited by ComReg specifically states that it is Member States that shall give powers to NRAs to impose dissuasive penalties. However, in the absence of such powers having been given, ComReg cannot rely on this provision to adopt rules on penalties.

23. In addition, and as noted by ComReg, the underpinning legislation governing findings of SMP in the telecommunications sector and the consequent imposition of remedies have been superseded by the EECC, which is due to be transposed by December 2020, it also submits at paragraph 1.3 that "*those aspects of the legislation which are relevant to this document will likely be essentially unchanged*". This is an odd observation for ComReg to make for two reasons. First this presupposes the outcome of DCCAE's implementation of the EECC in advance of DCCAE sharing proposed implementation measures with interested parties. Second, and more importantly, as we highlight throughout this response ComReg's proposed approach is incompatible with current legislation.

24. eir's understanding is that ComReg has been actively lobbying on the transposition of the EECC and additionally that it be granted fining powers rather than having to

apply to the High Court. eir notes that in the draft Programme for Government published on 15 June 2020, ComReg is to be given greater use of administrative penalties to sanction. It is possible that the issue of ComReg's enforcement powers and indeed the appropriate manner for calculating penalties as well as the appropriate caps for any such penalties could be addressed later this year. See also paragraph 25.

25. Consequently, ComReg's consultation is premature in seeking to establish a fining methodology in advance of transposition of the Code and/or any proposed new fining powers for ComReg. To the extent that these upcoming changes may grant ComReg the power to directly impose fines, at a minimum eir considers any such powers will need to (a) be accompanied by full consultation on the establishment of comprehensive, transparent and fair investigation procedures and rights of defence, as well as a strict separation between investigation and adjudication units within ComReg and (b) full consultation on the means by which any Regulator-imposed fines are to be calculated, including any penalty methodologies. The present consultation in no way addresses these requirements, in particular as the proposed methodology has been designed to be used in developing ComReg's penalty recommendations to the High Court under Regulation 19, which recommendations are then subjected to full assessment by the High Court; an entirely different scenario to Regulator-imposed fines without any such court involvement. For the avoidance of doubt, eir does not consider that the present consultation in any way meets ComReg's obligation to consult on any methodology to be applied under any new legal framework.

Legal invalidity of Regulation 19

26. Of particular relevance for ComReg's proposed methodology are the Access Regulations — and in particular provisions under Regulation 19 — which provide a mechanism for ComReg to apply to the High Court, where it has found that an operator or undertaking has not complied with an obligation, requirement, condition or direction under the Access Regulations, for orders including orders for the payment of "*such amount, by way of financial penalty… as the Regulator may propose as appropriate in the light of the non-compliance or any continuing non-compliance*."

27. ComReg states that the purpose of its proposed methodology is to calculate the financial penalties it will propose to the High Court in these circumstances. However, as ComReg is aware, eir considers that Regulation 19 itself is legally invalid, in particular as:

- It provides for the imposition of unlimited financial penalties on operators in civil proceedings without any certainty as to how they may be applied or the fines that may be imposed;
- They are without precedent under Irish law and involve the assumption by the High Court of responsibility for imposing quasi-criminal sanctions without the protections or thresholds of a criminal trial; their legal basis therefore requires careful scrutiny;
- The Access Directive which the Regulations purport to implement contains no requirement to adopt a system of financial penalties; nor did any other directive, regulation or statute;
- Any claim that Regulation 19 is implementing Section 21a of the Framework Directive, is incorrect as (a) this Directive was not cited in adopting Regulation 19 and (b) section 21a did not mandate a provision such as Regulation 19;
- Section 3 of the European Communities Act 1972 provides that Regulations adopted under the Act implementing EU law may create indictable offences with a maximum penalty of **€500,000**. Regulation 19 in allowing for unlimited penalties is inconsistent and irreconcilable with that;
- The decision to introduce the penalties envisaged by Regulation 19 could only have been made by primary legislation in accordance with Article 15.2.1 of the Constitution; and
- The imposition of unlimited civil penalties without the protections of a criminal trial is inconsistent with eir's rights under the Constitution as well as the EU Charter of Fundamental Rights and the European Convention on Human Rights and Fundamental Freedoms.

28. eir considers, therefore, that ComReg must first address the legal invalidity of Regulation 19, before it can adopt a penalties methodology for the purpose of such Regulation 19 applications.

Financial limits

29. Section 3 of the European Communities Act 1972 limits to €500,000 the fines that may be imposed on foot of Regulations adopted under that Act, such as the Access Regulations. ComReg is required therefore, as a matter of law, to limit any penalties it may seek, regardless of methodology, to that limit.

30. Such a restriction must clearly have been in ComReg's reasonable contemplation when seeking consultation advice from Oxera yet there is no reference to such a restriction in ComReg's Consultation.

Incompatibility of the proposed methodology with Regulation 19

31. Without prejudice to the legal invalidity of Regulation 19, eir further considers that the proposed methodology is not compatible with the requirements of Regulation 19.

32. In particular Regulation 19(8) sets out factors the court should take into account in deciding the amount of any penalty as follows:

> *(d) In deciding what amount, if any, should be payable, the High Court shall consider the circumstances of the non-compliance, including-*
> *(i) its duration*
> *(ii) the effect on consumers, users and other operators*
> *(iii) the submissions of the Regulator on the appropriate amount and*
> *(iv) any excuse or explanation for the non-compliance*

33. The methodology proposed by Oxera either ignores or discounts a number of these specific factors, and proposes the pursuit of deterrence as a 'key objective' contrary to Regulation 19(8). As such, it is wholly incompatible with the requirements of Regulation 19.

34. Regulation 19(8) specifically allows for the possibility that a penalty may not be payable in the circumstances of the case, in stating that the Court must decide '*what amount, **if any** should be payable*' [emphasis added]. It also requires the Court to consider '*any excuse or explanation for the non-compliance*' which might reduce or eliminate the need for a penalty. However, as set out in detail in the

Frontier Economics Report, the Oxera methodology, contrary to both established literature and regulatory precedents, proposes omitting any consideration of whether a penalty is appropriate, and instead appears to proceed on the assumption that a penalty is always justified in the event of a breach. This is not compatible with the requirements of Regulation 19(8) which require the Court to assess whether a penalty is appropriate at all; something it cannot effectively do if the Regulator does not even assess this question.

35. Furthermore, Regulation 19(8) specifically requires the Court to consider the effect of the non-compliance on consumers, users and other operators. However, the Oxera methodology seeks to specifically exclude any such consideration stating that '*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*'. This approach is entirely at odds with the requirements of Regulation 19(8) namely the requirement to assess whether the penalty is appropriate to the circumstances of the case, including the effect on consumers, users and other operators. This is particularly flawed as the justification for not assessing effect is that the '*key objective is effective deterrence*'. However, as considered in more detail below, deterrence is not in fact a stated factor in Regulation 19, and arguably runs contrary to the stated focus of Regulation 19, which is a penalty specific to the circumstances of the case before the court, rather than one with a more general, unspecific aim of 'deterrence'.

36. eir disagrees that it is justifiable to exclude any investigation of effect on the basis that it might be difficult for the Regulator to assess, and queries how the Court is to assess effect as required by Regulation 19(8) if the Regulator refuses to provide it with information on this issue, and presents a penalty that excludes this factor. Further, given the extent of eir's reporting obligations under the Access Regulations, together with the additional reporting to the IOB, together with its own extensive and regularly deployed powers of investigation under section 13D of the Communications Act, it is simply not supportable to argue that ComReg has any difficulty in accessing any information it might need to assess effect as required by Regulation 19(8).

37. Finally, Oxera indicate that the '*key objective is effective deterrence*' in calculating a penalty under its proposed methodology. However, in the list of factors in Regulation 19(8) to be taken into account in assessing whether a penalty is appropriate, deterrence is not mentioned at all. As a matter of law therefore there is no basis for this assertion that deterrence is the '*key objective*'. Rather, as noted above, Regulation 19(8) directs the High Court to consider '*the circumstances of the non-compliance*' and does not identify any factors external to the circumstances of the case, such as the general principle of deterrence, as a relevant consideration.

38. Even if ComReg could propose that additional factors be taken into account under Regulation 19(8), those additional factors must be a circumstance of the particular non-compliance alleged — a criterion which 'deterrence' fails to meet, as it is by definition not a circumstance of the case before the court, but rather the pursuit of a general objective.

39. Moreover, even if, which eir does not accept, deterrence was a legitimate objective which ComReg could pursue in recommending penalties to the Court under Regulation 19(8), it may not, in doing so, supplant the actual objective of a penalty under Regulation 19(8), namely that the payment required is appropriate to the circumstances of the breach. There is a real difference between taking into account a matter not expressly listed in Regulation 19(8) and the proposition made by Oxera, which is that this one additional factor, deterrence, should be the governing principle.

Failure to consult transparently

40. The Oxera reports states that "*ComReg is considering whether, for breaches of regulatory obligations at the wholesale level, it should adopt a turnover-based approach*". As such, it is only on page 94 of Oxera's 112 page report (107 excluding title page, table of contents etc.) that other potential methodologies are given a cursory mention. These are quickly discounted despite "*the additional evidence that we examined in 2019 is somewhat mixed* [in favour of a turnover-based approach]". As identified in the Frontier Economics Report, Oxera's choice of precedents are heavily skewed towards competition law cases and not regulatory breaches — as also identified by ComReg's survey of telecom regulators. "*Against this background, and in contemplation of enforcement litigation, 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". One of the critiques of Oxera's and ComReg's proposed methodology in 2016 was that no consideration was given to determine the actual harm caused by the alleged breaches, despite this being one of the requirements under Regulation 19. This 'one-tailed' test appears to be flowing through in ComReg's current Consultation by arbitrary terminology of "*more serious*" and "*less serious*" breaches to determine whether a turnover-based approach or tariff-based approach is considered appropriate. It is entirely unclear which methodology is to be determined by ComReg as appropriate and what considerations it will use to arrive at that decision.

41. Despite this being an important methodological step neither ComReg or Oxera attempt to define these key concepts which determine the outcomes, i.e., what constitutes 'serious' or 'less serious' breaches, but instead provides a few possible (i.e. non exhaustive) examples of 'less serious' breaches based on the form of conduct.

42. While ComReg implicitly defines a more serious breach as that which "*affects other operators and end users in downstream retail markets*", this is a fanciful theory of harm without assessing the effect or harm of a breach in any way and could equally apply to "more *serious*" and "*less serious*" breaches. How this step will operate in practice suffers from a serious lack of transparency.

43. eir acknowledges that credible regulatory systems require some form of enforcement mechanism. However, we are concerned about the lack of clarity on the proposed approach and that a number of requisite steps appear to be omitted from the approach entirely.

44. Oxera's turnover methodology and the briefly mentioned tariff-based approach (representing less than a page in Oxera's report) are based on the following assumptions:

- Breaches of ex ante regulatory obligations may be expected, a priori, to have a negative impact on downstream competition; and

- The penalties methodology assumes that a theory of harm has been established, which then justifies a penalty.

45. However, there is no a priori reason to expect that the seriousness of harm in an ex ante regulatory breach will be 'similar' to an ex post competition breach, if the nature of the breaches are different. Oxera does not discuss the many international precedents where no penalties were imposed. This leads to a biased picture, which might create the impression that penalties are imposed for all breaches. Frontier Economics' review of regulatory precedents shows that this is not the case.

46. This part of the proposal is therefore not clear, not justified and is not grounded in the evidence. Indeed, it is not clear what action should be taken if a credible theory of harm cannot be established, i.e., if the facts of the case suggest that the actual or potential consumer and/or competitor harm is immaterial and the nature of the breach does not justify a penalty. By assuming that any breach of ex ante regulation justifies a penalty, the methodology is likely to lead to a high risk of penalising regulated companies for trivial breaches that had no material consequences for consumers and/or for competitors.

47. Frontier Economics finds that a critical element of an approach that is reflective of both the relevant economic principles and regulatory practice is absent from the ComReg/Oxera methodology. We consider that the proposed mechanistic approach based on ex post competition methodology and benchmarks, as currently used, is not fit for purpose for considering if any financial penalty should be applied in the current context, and the level of such a penalty.

48. Having reviewed the justification provided by Oxera for its approach, relevant precedents, and taking into account the principles/objectives of financial penalties, Frontier Economics considers that there are a number of ways in which the approach could be improved and clarified.

49. If a credible theory of harm has been established, the steps of the methodology should be as follows;

    - Step 1: Is a financial penalty appropriate?

- Step 2: If a penalty is justified, should it be calculated using a turnover- or a tariff-based approach?

50. In line with Frontier Economics' assessment, eir considers that this approach provides the level of transparency required for market operators to understand the criteria that ComReg would apply to evaluate the seriousness of individual breaches while giving ComReg sufficient discretion to evaluate the breaches on a case-by-case basis.

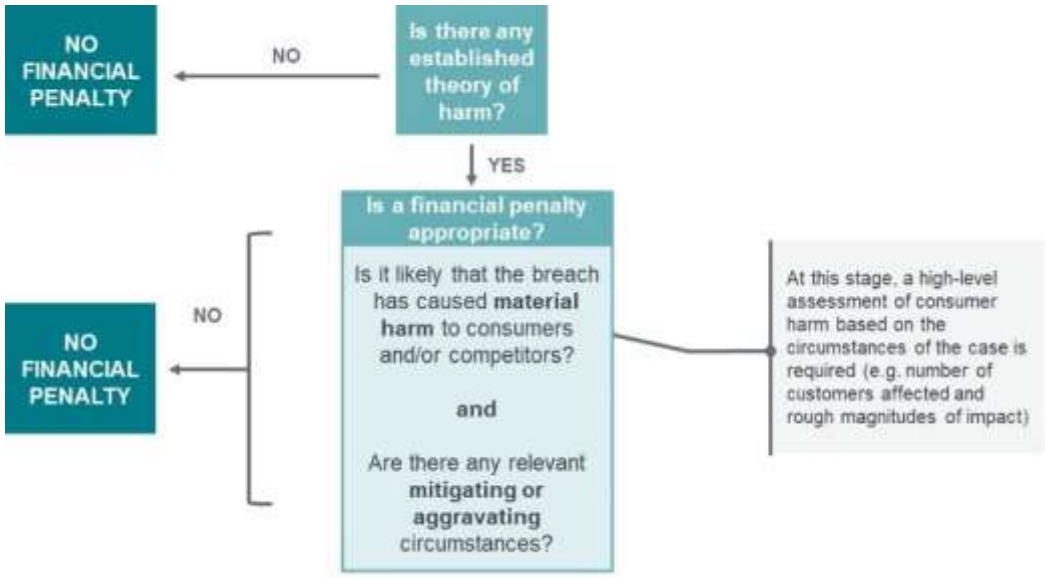
Is a financial penalty appropriate?

51. This critical element of an approach that is reflective of both the relevant economic principles and regulatory practice is absent from the ComReg/Oxera methodology.

52. Frontier Economics finds that "*[s]ome breaches might not require a financial penalty even if one can establish a 'theory of harm' related to the breach.*" In order to come to a view as to whether a penalty is justified, at a high level, it will be necessary to assess whether the breach is likely to cause material consumer and/or competitor harm. At this stage, any aggravating or mitigating circumstances, which might influence the decision should also be considered including inter alia whether the breach is as a result of reckless or deliberate behaviour, is the first breach of its kind, was self-reported, as a result of a misinterpretation of the relevant obligation etc.

53. Frontier Economics concludes that in the event that "*the likelihood of significant consumer/ competitor harm is small and there are no aggravating circumstances, it would be reasonable to conclude that a financial penalty is not needed, even if some theory of harm could be established.*"

Figure 2. Frontier Economics' recommendation for Step 1 of Oxera's proposal



Source: Frontier Economics

If a penalty is justified, should it be calculated using a turnover- or a tariff-based approach?

54. On the basis of precedent and regulatory best practice, Frontier Economics finds that "*a turnover-based approach might in general only be applicable to very serious breaches, which caused significant consumer/competitor harm and had other aggravating circumstances (e.g. deliberate reckless behaviour, repeat offence, the operator refused to cooperate with investigation)*."

55. In order to determine if this is the case, Frontier Economics recommends that a detailed estimation/quantification of actual consumer and/or competitor harm should be carried out in conjunction with an evaluation of whether there are any other factors, which might suggest that the breach is very serious.

Proposed parameters for the calculation of financial penalties which are subjective, inappropriate and disproportionate

56. The turnover-based approach relies on 3 key parameters – relevant turnover, gravity factor and duration.

Relevant Turnover

57. In Oxera's view 'relevant turnover' is defined as X% of the breaching firm's annual retail sales in the affected downstream retail market, where X% is the proportion of the competitor retail sales that are affected by the wholesale breach. It is not clear why Oxera considers turnover to be a reasonable proxy of affected sales without any proper consideration of the mechanism through which actual customers have been harmed.

58. As noted by Frontier Economics, Oxera advocates a definition of turnover (offender turnover) which is designed to deliver a strong deterrent effect, thereby once again pursuing objectives that may be relevant in an ex post regulatory environment but are not justified in an ex ante context where different circumstances apply. The proposed approach differs from that adopted by other regulators, who in practice define relevant turnover by the affected customer sales (as opposed to offending firm's turnover), and count only 'niche turnover' in their calculations i.e., the part of the turnover that is directly relevant to customers affected by the infringement. By relying on turnover rather than sales, and defining turnover more expansively, this will again disproportionately increase the fines proposed by reference to objectives not set out in the legislation.

59. Frontier Economics finds that "*there should be a clear link established between the definition of value of sales considered in the turnover calculation and the established theory of harm*." The starting point for determining relevant must therefore establish the revenues attached to groups of customers or market sub-segments affected by the breach, either directly or indirectly.

Gravity factors

61. As with determining turnover, Oxera seems to suggest that the gravity factors should be determined based on the form of the conduct rather than on the effects of that conduct. Oxera does not define the relationship between conduct and gravity, but instead provides illustrative examples. It also provides a caveat, noting that '*gravity will vary on a case-by-case basis*.'

62. It therefore follows from this caveat that the circumstances of the case are indeed relevant for determining gravity. This part of the methodology not only directly contradicts itself, but serves to demonstrate that a pure 'form of conduct'-based assessment of gravity is too simplistic an approach to be reliable.

63. Oxera's proposed gravity factor distribution relies on case studies of serious ex post competition breaches, where gravity factors are 10-15% of relevant turnover. Oxera then effectively 'extrapolates' these numbers to significantly less serious and potentially immaterial breaches, assuming gravity factors of 10%, 5% and 2% depending on the case. These benchmarks are either anchored on precedents from an ex post competition cases, which is inappropriate for ex ante breaches (as discussed above), or otherwise extrapolated on an entirely arbitrary basis.

64. For the reasons set out in the Frontier Economics Report, this is not appropriate, as it fails to take account of the significant differences in regulatory environments between Access Regulations breaches and competition law breaches. It is a disproportionate approach – applying rules from one context to an entirely different context, which will have the effect of significantly increasing fines on the basis of criteria not even set out in Regulation 19.

65. ComReg's proposed approach is too subjective. Frontier Economics finds that "*[w]hen determining gravity factors, actual/potential harm need to be taken into account*." As identified by Frontier Economics, gravity factors in an ex ante context do not typically exceed 3-5%.

Duration

66. It is not clear how ComReg intends to treat forms of conduct that are discontinuous and/or materially vary in form or intensity of effect over their duration. The methodology should be clear that discontinuous breaches are treated as separate events and that consumer harm will be assessed separately for each event.

67. Given that ComReg investigations have historically often take place over a number of years, the duration must exclude the time of ComReg's investigation until the operator under investigation is clearly informed that it is in breach and the nature of the breach. The duration cannot include any period between ComReg opening a compliance case and the final determination of non-compliance i.e. the Opinion of Non-Compliance

68. See also paragraphs 69-80.

Continued departure from regulatory requirements

69. ComReg states that it *"undertakes compliance and enforcement activities that are targeted and prioritised to bring about compliance and deter future noncompliance"* [emphasis added].

70. ComReg is required by the Communications Act 2000 and Section 16 of the Framework Regulations in carrying out its functions to 'apply objective, transparent, non-discriminatory and proportionate regulatory principles', in particular by '*promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods and ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services…and promoting efficient investment and innovation in new and enhanced infrastructures*'

71. ComReg may take enforcement proceedings "*at the end of the period*" specified by ComReg under Regulation 19(1), that is the period "*within a reasonable time limit*" given to the operator in receipt of a Notification of Non-Compliance to state its views or to remedy the non-compliance. "*At the end of the period*" requires that any action on the part of ComReg is taken within a limited, reasonable, period of time,

in accordance with the principles of legal certainty and good administration. However, ComReg continues to depart from this regulatory requirement and instead of considering a framework to ensure "*targeted and prioritised*" compliance has embarked on a financial penalty consultation.

72. eir considers that there is an urgent need for ComReg to establish a formal and fit for purpose compliance process within which to apply the penalties methodology and in order to ensure that the manner in which investigations are handled is properly established and allows for full transparency.

73. As things stand, ComReg has no published process for the handling of the compliance investigations that may lead an Opinion of Non-Compliance and subsequently to the consideration of the imposition of fines using the methodologies proposed in this Consultation. From eir's perspective all investigations appear to be conducted in an ad hoc fashion without any transparent and fair procedure or time-line. There is no consistency in approach and no transparency as to the status of investigations, including when or if findings of non-compliance are likely or indeed whether a case is still open.

74. There is no information about the criteria upon which ComReg decides whether or not to open or pursue an investigation, nor has ComReg given any indication of the criteria it uses to make a finding of non-compliance, accept a settlement or close an investigation. There are no time-lines for the conduct of investigations, meaning compliance cases can be open without any progress or decision for many years, and with requests for information coming in stages over many years.

75. [✂]

76. The complete lack of transparency and absence of published processes or time-lines in current investigations means that operators have no way of knowing if ComReg is complying with its obligations of fairness, objectivity and non-discrimination. It also means operators are subjected to compliance processes that are completely unpredictable, an approach which directly contravenes the obligation to promote 'regulatory predictability'. This approach also has a chilling effect on investment and innovation, including by leaving compliance cases open

and dormant for many years, essentially 'hanging over' operators without being resolved.

77. eir does not consider that the present approach to compliance investigations can be said to be 'fit for purpose' for the assessment, in an objective, transparent, fair and proportionate way, of potentially multi-million euro fines particularly if the lapsed time of the investigation is taken into account in calculations.

78. eir considers that prior to adopting any penalties methodology, ComReg should as a priority publish a formal compliance investigation process within which any such methodology would then be deployed. eir notes that Ofcom, for example, has published Guidelines, setting out how it will investigate compliance with and approach enforcement of regulatory requirements relating to electronic communications networks and services, postal services and consumer protection legislation.[1]

79. The guidance includes the rationale as to why and how Ofcom opens cases, how it investigates those cases, the outcomes of investigations and the decision making process as well as the settlement procedure. eir considers that similar guidance is urgently required in the context of the Irish regulatory regime.

80. Finally, eir believes that the calculation of any penalty should be conducted by ComReg personnel that have not been involved in the compliance investigation to ensure that the penalty is considered in an impartial manner.

[1] Ofcom Enforcement Guidelines for regulatory investigations, 2017

Q. 2 Do you think 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?

81. For the reasons set out in our response to Question 1, we are of the view that the turnover-based approach for regulatory matters is inappropriate given its genesis is to consider ex post competition law matters.

82. ComReg is required, under multiple provisions, to act proportionately in carrying out its functions. This includes a requirement to act proportionately in developing any methodology, and also to ensure that the methodology itself complies with the requirement that it be proportionate, and that it leads to the imposition of fines that are proportionate. The Oxera methodology proposed by ComReg fails to comply with the obligation of proportionality on all of these counts. In particular, eir considers that ComReg has:

(i) incorrectly discounted the regulatory oversight it has on the conduct of the SMP operator;
(ii) failed to consult on important determining factors proposed;
(iii) proposed a sequence which incorrectly considers proportionately as a concluding matter;
(iv) not considered the evidence; and
(v) failed to identify the relevance of a vertical integrated operator having SMP.

ComReg's oversight of SMP behaviour

83. Unlike competition law, on which ComReg's financial penalty mechanism fundamentally relies in substance and form, the probability of detection of regulatory breaches is high given ComReg's oversight of the market and as augmented by eir's Regulatory Governance Model ('RGM'). eir also notes that other players in the market would readily make a complaint in the event of any potential abuse.

84. On the issue of detection, in particular, eir is subject to a large number of regulatory obligations aiming to limit its market power with obligations to provide Access to its network, to minimise the risk of discrimination between eir's own

downstream division and other downstream operators, to conduct its business in a transparent manner, to not charge excessive prices for its wholesale services, and to maintain accounting separation for its wholesale and retail activities. The RGM is how eir embeds practices to ensure compliance with its regulatory obligations and has been in place for several years. Oxera and ComReg do not appear to regard eir's RGM as a material consideration. This is deeply frustrating given the significant time and effort both eir and ComReg are expending on the effective operation of the RGM.

85. In December 2018, eir and ComReg reached a settlement in respect of on-going compliance litigation, resulting in a set of commitments, the RGM Undertakings, which resulted in the establishment and operation of an enhanced RGM. The Undertakings fall under one of three pillars; governance, assurance and, data governance and management.

86. eir's RGM has evolved since 2013 with substantial enhancements introduced in 2019. An IOB was established in May 2019 and the majority of its members including the chair are appointed by ComReg. eir is required to provide detailed reports to the IOB in relation to its regulatory compliance. In addition, pursuant to a range of ComReg Decisions, eir has obligations to provide very detailed Statements of Compliance (SoCs) in all regulated markets. The SoC must be reviewed and updated each time there is a change to an existing regulated access product/service or a new regulated access product/service is introduced. The SoCs and the operation of the RGM are scrutinised by a dedicated team in ComReg, the Regulatory Governance Unit. Taking due consideration of these comprehensive procedures and reporting tools in place, the probability of eir committing regulatory breaches is generally low and the probability of breaches being detected is high.

87. Oxera states that "*[o]ver 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*." For the reasons already explained we do not agree that the RGM is in its infancy. In any event we assume that it is ComReg's intention to use this methodology over the longer term and on a forward looking basis and it would therefore seem inappropriate to simply dismiss the

existence and impact of the RGM. In that context, the underlying reasons as to why the financial penalty equation for punishment and deterrence objectives under the turnover-based approach in a competition law sense is very different compared to those objectives in a regulatory context. It is wholly inappropriate in that sense to largely present to the uninformed reader the "*appropriateness*" and "*proportionality*" of a turnover-based fining methodology by drawing parallels to competition law cases despite the clear evidence that completely different considerations apply in a telecommunications regulatory context.

88. Finally, as Frontier Economics notes, the higher the probability of detection the lower the fine should be (as the deterrence component becomes less relevant). There is no comparison between eir's situation and the absence of proactive monitoring and compliance reporting that prevails in the competition law context. It is entirely disproportionate therefore to import the concept of deterrence from this context, into the extensively monitored, transparent setting of Access Regulations compliance where the same concerns do not arise.

Failure to consult on important determining factors

89. While, eir cautiously welcomes the implicit recognition by ComReg that the seriousness of breaches will vary based on the conduct of the operator in question and the manner in which this impacts on the market, it is unclear how ComReg intends to determine what constitutes a more serious breach or otherwise.

90. ComReg states at paragraph 1.8 that *"[t]he 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"* [emphasis added].

91. eir considers it odd that ComReg implicitly defines a more serious breach as that which "*affects other operators and end users in downstream retail markets*", yet the methodology does not propose to determine the effect of a breach in any way. It is therefore unclear to us how ComReg proposes to determine what constitutes a more serious breach.

92. In addition, a proper assessment of the harm would be required to ensure that if the proposed turnover-based approach were to be followed, any turnover considered is the relevant turnover that reflects the impact of the breach. For example, where a breach affects only a sub-segment of the market (e.g., consumers with faulty lines), only this sub-segment should be taken into account in the calculations, rather than the whole market.

Sequencing of ComReg proposal considers proportionality only at conclusion stage

93. ComReg states that *"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".* Therefore, ComReg does not propose any consideration of proportionality until after the fine has been calculated. As submitted and evidenced by Frontier Economics, one of the key tenets of determining proportionality requires that the theory of harm is first established and calculated.

94. Oxera acknowledges that *'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.'* This is in effect the application of the principle of proportionality. However, the approach proposed by Oxera seems to suggest that any breach of ex ante obligations justifies a penalty, thereby excluding the type of initial assessment acknowledged above, of whether a penalty is even an appropriate response in the first place.

95. As set out in detail in the Frontier Economics Report, this runs directly counter to the approach of other regulators, and will lead to the proposal of fines in cases where no fine at all is appropriate. Even if the Court were to ultimately exercise its discretion to find that ComReg were wrong in seeking a penalty, the effect of this approach is to impose significant unnecessary costs of defending a penalties case. In proposing a process which gives no consideration, as a preliminary step, to the fundamental question of whether a penalty is even warranted, the process proposed by ComReg lacks all proportionality.

96. Frontier Economics' analysis shows that telecommunications regulators explicitly assess harm in order to reach a view on the seriousness/materiality of each breach. While the amount of fine does not have to be equal to the actual harm caused, harm needs to be assessed in order to determine whether the proposed fine is proportionate or otherwise. As such a two-step approach is proposed by Frontier Economics.

97. The first step allows the correct determination on whether a financial penalty is warranted. It is only in circumstances where a fine is considered appropriate (noting that not all breaches require or result in a financial penalty) that the determination of consumer harm at a high-level will allow as a primary step to determine whether a turnover-based approach or tariff-based approach is appropriate and proportionate. In stark contrast, the Consultation including Oxera's report implies that it can be assumed that ex ante breaches would have a negative impact on competitors, and an assessment of harm is therefore not needed — and that a 'check' on proportionality is only considered once the fining equation has been followed. This suggests that a) whether a fining methodology is proportionate can only be determined once actual harm has been established, meaning that seeking industry views regarding the "*proportionality*" of a mechanistic fining methodology is simply wrong and can form no part of ComReg's consideration and b) that a proportionality sense check must be undertaken earlier in the process by ComReg to determine whether a tariff-based approach or turnover-based approach is justifiable and likely to be proportionate.

98. The General Court of the EU has described the requirement of proportionality in relation to fines as follows:

"*188. It should be recalled that the principle of proportionality requires that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-180/96 United Kingdom v Commission [1998] ECR I-2265, paragraph 96, and judgment of 12 September 2007 in Case T-30/05 Prym and Prym Consumer v Commission, paragraph 223).*

189. In the procedures initiated by the Commission in order to penalise infringements of the competition rules, the application of that principle requires that fines must not be disproportionate to the objectives pursued, that is to say, by reference to compliance with those rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole, having regard, in particular, to the gravity thereof (see, to that effect, Prym and Prym Consumer v Commission, paragraph 188 above, paragraphs 223 and 224 and the case- law cited). In particular, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (Case T-43/02 Jungbunzlauer v Commission [2006] ECR II-3435, paragraphs 226 to 228, and Case T-446/05 Amann & Söhne and Cousin Filterie v Commission [2010] ECR II-1255, paragraph 171)."[2]

99. Moreover, a failure to assess the harm caused would be inconsistent with Regulation 19(8)(d) of the Access Regulations, which requires the High Court to consider "*the effect on consumers, users and other operators*".[3] Oxera's proposed hypothetical 'theories of harm' are insufficient, as they fail to assess the impact on consumers and competitors of the specific breaches. This is in fact also recognised by the European Commission itself when considering "*materiality*".

Failed to consider the evidence of proportionality

100. As set out in detail in the Frontier Economics Report, Oxera proposes an approach aspects of which are unsupported by either academic literature or the precedents of other regulators, and which will lead to the imposition of significantly more severe penalties than those precedents advocate, both in terms of the types of infringements it penalises, and the size of the penalties it produces. This is clearly a disproportionate approach to the issue of penalty calculation.

101. The Oxera methodology proposes that '*the burden of proof should not necessarily be placed on the regulator to show cause and effect or downstream harm, in*

[2] Case T-39/06 *Transcatab SpA v European Commission*, 5 October 2011.

[3] S.I. No. 334/2011 - European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011

particular if a key objective is effective deterrence'. This in effect means that ComReg can set significant penalties without first establishing whether there is any consumer or competitor harm. As Frontier Economics notes, this leads to a "*high risk of penalising regulated companies for trivial breaches that had no material consequences for consumers and/or for competitors.*" Frontier Economics also considers this to be "*a fundamental omission in Oxera's overall methodology*".ComReg's approach is clearly counter to the requirements set by the General Court that

> '*the amount of the fine imposed on an undertaking for an infringement in competition matters must be proportionate to the infringement, seen as a whole.*'

102. Without any assessment of the harmful effects of the infringement, the penalty cannot by definition be proportionate to the infringement, as required by the General Court.

103. More generally, as set out in the Frontier Economics Report, the pursuit of deterrence as a key objective in calculating fines for breach of ex ante regulation, is simply not justified and therefore not proportionate. While deterrence can be a legitimate objective in relation to breach of ex post regulations, where there is minimal supervision and low likelihood of breach detection, this logic simply does not transfer to breach of ex ante regulations such as the Access Regulations where entirely different circumstances apply. Under the Access Regulations eir is subject to minutely detailed regulation, on foot of which it is required to provide a range of reports to ComReg.

Failed to identify the relevance of a vertically integrated operator

104. Neither ComReg nor Oxera consult on the relevance of breaching access regulations by a vertically integrated operator.

105. The only reference to a vertically integrated operator is in the Oxera Report which states that "*[t]he 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 this context such breaches could only refer to failure to make transparent its wholesale prices and its internal transfer prices under an accounting separation obligation or failure to place activities related to the wholesale provision of relevant access products in an independently operating business entity under a functional separation obligation.

106. When read in conjunction of ComReg's Question 5 this would seem to suggest that all other breaches by default would be considered "*less serious*" and would be considered under the tariff-based methodology.

107. Coupled with ComReg's failure to consult on a number of important matters (for example, see paragraphs 89-92) the current Consultation lacks the clarity to allow a regulated entity to understand clearly what ComReg is seeking views on. eir reserves its future rights to submit further views on the appropriateness of and methodologies used once the issue has been clarified by ComReg and Oxera.

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?

108. eir does not consider 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 appropriate or proportionate. In particular, ComReg has:

(i) failed to consider the Irish legislative framework; and
(ii) provided no economic justification for the proposed cap.

ComReg has failed to consider the Irish legal framework

109. As set out in paragraphs 20-31, ComReg has failed to consider the Irish legislative framework. In summary, without prejudice to eir's position on the legal invalidity of Regulation 19, Section 3 of the European Communities Act 1972 limits to €500,000 the fines that may be imposed on foot of Regulations adopted under that Act, such as the Access Regulations.

110. ComReg is required therefore, as a matter of law, to limit any penalties it may seek, regardless of methodology, to that limit.

Lack of economic justification

111. In addition, the choice of a 10% turnover cap is not sufficiently justified in either Oxera's report or indeed ComReg's own consultation document. There are vague allusions to the Commission's fining approach with Oxera noting that "*[w]here it finds a breach, the Commission has powers to fine companies up to 10% of their worldwide turnover*." However, this again is in an ex-post competition law context.

112. Oxera also notes that in the case of a margin squeeze case in Belgium (Box 4.3) the fine imposed on Proximus did not exceed the legal maximum of 10% of overall turnover. However, in the case presented, this again, is in an ex post competition fining setting, having come before the Belgian Competition Council ('BCC').

113. Oxera also cites the example of financial penalties under the GDPR as support for the consideration of gravity, duration as well as aggravating and mitigating circumstances but pays little attention to the actual thresholds determined by Article 83 of the GDPR other than to briefly mention them. eir notes that the two thresholds specified are as follows;

- 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.

114. eir notes that ARCEP applies a cap of 3% of net annual revenue and 5% for repeated breaches, while the CNMC applies absolute amount limits of €20m for very serious breaches, €2m for serious breaches and €50,000 for other breaches. For context, Telefónica's revenues in Spain in 2018 were €12.71 billion.

115. The 10% threshold proposed by Oxera and ComReg therefore seem excessive and incredibly disproportionate based on regulatory precedent.

116. In any event, the legislative cap in an Irish context is €500,000.

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?

117. The tariff-based approach is barely covered in Oxera's Report, in fact it is only mentioned in the closing remarks of the general methodology proposal. In addition, it is only briefly discussed in ComReg's own consultation document. ComReg's current proposal is therefore not sufficiently clear.

118. Given the lack of clarity in the Consultation, eir reserves its rights to comment further when the position is clarified.

119. However, our preliminary view is that the tariff methodology as proposed in Section 3.2 of this Consultation could be suitable for calculating financial penalties, in the event that the required amendments are made to the overall approach to ensure that each decision point and the criteria for determining the appropriate penalty methodology are sufficiently clear.

120. We consider that the following issues also need to be addressed:

(i) The lack of a clear decision mechanism to determine the severity of the breach
(ii) Variations in the weekly fee based on the nature of the breach
(iii) The lack of clarity with regard to the calculation of the duration parameter

Determining whether a tariff based approach is appropriate

121. While eir notes merit in a differentiated methodology based on the nature of the breach and the associated impact, it is once again unclear how ComReg is planning to determine whether a breach warrants a fine using the tariff-based approach or otherwise.

122. ComReg states that it intends to use the tariff methodology for less serious breaches "*particularly, those that have a lesser or negligible effect on competition in downstream retail markets or in related markets.*" However, it is unclear how ComReg intends to make such a determination if it does not intend to actually

assess the level of harm. In line with our response to Question 2, we consider that an additional step in the methodology is therefore required in order to determine the impact of a breach. ComReg's proposal to impose financial penalties in respect of breaches with a negligible effect seriously calls into question the proportionality of ComReg's approach to financial penalties.

123. As discussed in the Frontier Economics Report, the tariff-based approach should be considered the default methodology for most breaches, where the application of a financial penalty has been justified. Only very serious breaches, with very significant consumer harm and other aggravating circumstances, should be considered under the turnover approach.

Variations in the weekly tariff

124. Given that ComReg has only proposed to consider two categories of breaches i.e., more serious and less serious, it may be appropriate to have a range of different weekly fixed fees, with a maximum cap of €10,000. This would allow ComReg to better capture differences in less serious breaches in terms of aggravating and mitigating circumstances and as well as materiality of the harm caused to consumers and competitors.

Duration

125. It is not clear how ComReg intends to treat cases where a breach might not be evident to a regulated company acting diligently or where a difference in the interpretation of new regulations exists.

126. As noted earlier in this response an important determination of 'Duration' will be to consider when the entity reasonably knows it is in breach. Prompt remedial action thereafter should negate the need to impose a financial penalty.

127. In eir's experience, it might also take time for ComReg to conclusively establish whether there is a breach. This, however, could then affect a duration period over which a fixed penalty applies. This issue needs to be explicitly addressed in the penalty methodology. Adjustments will be required to reduce the relevant duration taking into accounts delays in the ComReg investigation process.

128. See also paragraphs 69-79.

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?

129. The phrasing of this particular consultation question is unclear. In particular, see paragraphs 104-107.

130. If on clarification, it is evident that the proposed methodologies will apply to breaches of the Access Regulations, all operators who are alleged to be in breach of the Access Regulations should be subject to the same regime in line with the principle of equal treatment.

131. [✂]

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?

132. As set out in paragraph 97, a fining methodology can only be determined as proportionate once actual harm has been established and therefore seeking industry views regarding the "*proportionality*" of a mechanistic fining methodology is simply wrong and can form no part of ComReg's consideration.

133. As proposed by Frontier Economics, ComReg must first undertake a two-step approach to determine if a financial penalty is appropriate and if so the appropriate financial penalty mechanism. If a tariff-based approach is determined as appropriate then, as set out in paragraph 124, eir considers that a tiered weekly cap would allow ComReg to better reflect nuanced facts of a case — which would be more likely to result in penalties that are proportionate and dissuasive. In that case, a maximum weekly cap of €10,000 that can be adjusted downward based on the harm caused and the nature of the breach would allow ComReg to better capture differences in the nature of the breaches in terms of aggravating and mitigating circumstances and as well as materiality of the harm caused to consumers and competitors.

134. See also response to Question 4.

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?

135. Neither ComReg nor Oxera provide any economic justification or reasoning as to why it would be appropriate, proportionate or justified to increase the weekly fine after a period of time.

136. In fact, such a "*fixed period of time*" provides no indication as to the severity or the nature of the breach. The requirement of Article 21a of the Framework Directive requires that "*penalties provided for must be appropriate, effective, proportionate and dissuasive*". As above, without any reasoning provided by ComReg it is difficult to determine with cogent reasoning as to whether ComReg's proposals met those requirements. Equally, it is impossible for any submission to provide justification that supports those requirements when neither ComReg nor Oxera has provided their stated position on same.

137. See also response to Question 4 and 6.

Q. 8 Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?

138. eir notes that the maximum cap set in national legislation is €500,000. This would apply to severe breaches. Therefore, the cap for tariff-based penalties which is proposed for "*less serious*" breaches should be set much lower relative to the legislative cap.

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?

139. eir considers that the proposed list of potential mitigating and aggravating factors, described in Table 3 of ComReg's Consultation, provides some clarity to Operators with regard to the factors that will be considered by ComReg when calculating financial penalties, whether turnover or tariff based is reasonable.

140. However, we remain concerned that the manner in which such factors would be considered remains unclear. A drawback of Oxera's proposed methodology is that it does not propose to consider these factors at the earlier stages, e.g., when determining whether a financial penalty is appropriate (per Step 1 of the Frontier Economics Report) and whether to apply a tariff or a turnover-based approach (per Step 2 of the Frontier Economics Report). This is not in line with the regulatory precedent presented by Frontier Economics and we consider that aggravating and mitigating circumstances need to be taken into account at all stages of the process, not just at the final stage.

141. It is also not clear how an accepted aggravating or mitigating circumstance should be accounted for in the final penalty, even if ultimately the proposed mechanism is not intended to be signalled to firms up front.

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?

142. The majority of the proposal, as currently designed, is not clear or consistent. We would have expected more detail on ComReg's approach, so as to allow interested parties to make a more meaningful assessment of the proposal.

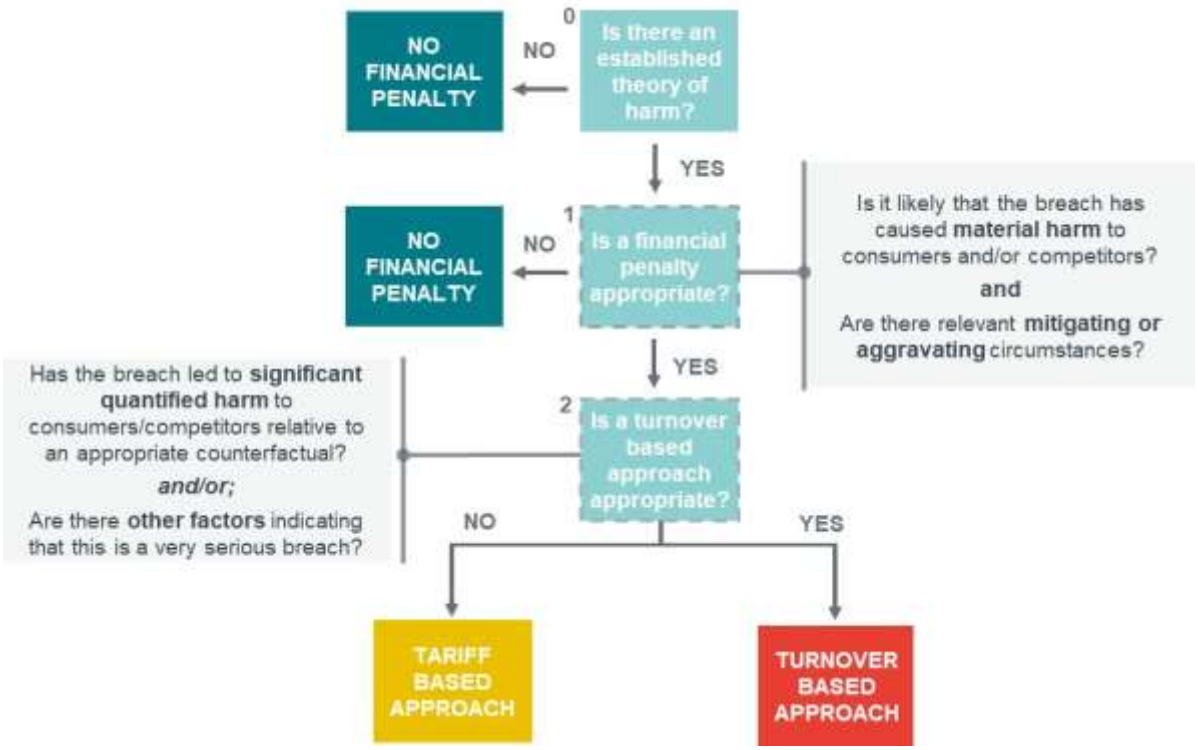
143. eir has serious concerns with regard to the manner in which it is proposed that the turnover-based methodology will be mechanistically applied and what would appear to be an arbitrary decision by ComReg between more serious and less serious breaches. eir is of the view that more clarity on each step of the proposal and in particular on the boundary between the tariff- and turnover-based approach is required to ensure sufficient transparency with regard to ComReg's decision making and that the approaches are applied in a consistent manner.

144. We therefore consider that a number of amendments to the approach are required in order to reflect the regulatory setting in Ireland. In the attached report, Frontier Economics has made a number of recommendations as to how to adapt the methodology proposed so as to ensure that it is not mechanistic, but takes into account all the circumstances of each case.

145. This would be achieved under an amended two-step approach as follows;

- Step 1: Assessment of the nature of the breach and potential to cause material harm to determine whether a financial penalty is appropriate
- Step 2: What is the appropriate level of the financial penalty (Using either the tariff- or turnover approach based on the assessment undertaken in Step 1)

Figure 2. Summary of Frontier Economics' recommendations



Source: Frontier Economics

146. eir does not consider that ComReg's proposed methodologies are sufficiently transparent or that they provide enough information to inform Operators on the potential financial penalties that may be calculated by ComReg. In addition, eir considers that the gravity factors and the determination of same remain completely arbitrary. Notwithstanding the fact that the gravity factors are inappropriate, it is unclear how exactly ComReg intends to determine the applicable gravity factor based on the impact of the breach, when it proposes not to even assess the harm.

147. The result of the varying levels of ambiguity within ComReg's proposed methodology would appear to provide a number of moving parts with few restrictions and little relation to the breach itself. Given the lack of clarity in the Consultation on the issues documented in our response, eir considers that it would now be appropriate for ComReg to provide additional detail and information to operators before a proposed methodology can be properly consulted on.

RESPONSE TO COMREG'S CONSULTATION ON REGULATORY PENALTY METHODOLOGY

June 2020

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CONTENTS

EXECUTIVE SUMMARY

This report has been prepared by Frontier Economics on behalf of eir as part of eir's response to ComReg's consultation on its proposed financial penalties methodology. The focus of this report is an assessment of the penalties methodology proposed by Oxera in its report "Guidelines and methodology on financial penalties in the context of access regulations"[1]; and, based on economic principles and best practice approaches, proposals on how the approach could be adjusted and implemented in practice.

We recognise that financial penalties must be determined and imposed in accordance with legal requirements. We understand in this regard that ComReg has suggested it will rely on Regulation 19 of the Access Regulations 2011. We are instructed that, under Regulation 19(8)(d), the High Court may impose financial penalties and in deciding the amount must consider the circumstances of the non-compliance, including its duration, the effects on consumers, users and other operators and any excuse or explanation for the non-compliance. Furthermore, we are instructed that eir disputes that as a matter of law, deterrence is a relevant consideration for the purposes of the application of Regulation 19 and, even if it is, we are instructed that there is a dispute as to the weight to be given to it. While we accept in this report that as a matter of economic theory, deterrence is an appropriate objective of a penalty regime, obviously disputed legal issues as to the correct interpretation of Regulation 19 are not within our expertise and we express no view on any such issues.

Summary of Oxera's proposed methodology

Oxera recognises that regulators typically use a range of regulatory tools, with financial penalties reserved for the most serious breaches. However, in its recommendations, Oxera does not propose any criteria to determine whether a financial penalty is appropriate. Instead, it states that if, following an observed breach of ex ante obligations, '*a theory of harm has been established, <it> then justifies a penalty*'. This is not in line with regulatory precedent – there are plenty of examples of cases, in similar regulatory environments, where breaches (which could arguably be associated with a theory of harm) have been considered immaterial and have therefore not attracted fines.

After discussing the economic principles and objectives of financial penalties[2], the Oxera report advocates an approach whereby fines are calculated as a percentage of the firm's relevant turnover.

*Penalty = gravity (%) * relevant sales * duration + (aggravating factors – mitigating factors)*

Oxera justifies its proposed approach on the basis that it is used by the European Commission to calculate fines in ex post competition cases (e.g. to punish cartels

[1] https://www.Comreg.ie/publication/oxera-report-on-guidelines-and-methodology-on-financial-penalties-in-the-context-of-the-access-regulations-2020

[2] In summary these are to punish the company engaged in the breach so it does not gain, and to deter it from similar behaviour in future.

or abuse of dominance). The report also uses a number of case studies (predominantly ex post competition cases) to make recommendations for the choice of the parameters - gravity factors, relevant turnover and duration - to reflect the nature/seriousness of the breach. This is in essence the same approach as used before by Oxera in 2016 to support the estimation of fines in relation to previous eir breaches.

In its final remarks[3], the report briefly introduces an approach which it proposes should apply to less serious breaches. Under this 'tariff based' approach, Oxera proposes that penalties should be calculated based on a fixed weekly charge multiplied by the duration of the breach (in weeks), with a cap on the total fine. Unlike the turnover based approach, Oxera provides very little detail on the tariff-based approach - for example, on the criteria that should be used to assess whether a breach is eligible for a tariff-based approach.

Frontier's assessment

Having reviewed the justification provided by Oxera for this approach along with the relevant precedents, and taking into account the principles/objectives of financial penalties set out above, we consider that a number of elements of Oxera's proposed methodology are not clear and not well justified.

Assessment of consumer harm

The Oxera approach gives a disproportionately low weight to estimating consumer harm and its materiality. This is important, as based on best practice, such an estimation guides both (i) whether a fine is appropriate or not, and, (ii) if one is appropriate, reaching a view on the seriousness of the breach (and hence of any applicable fine).

Furthermore, best practice also indicated that the estimation/assessment of consumer harm is an important element of fining approaches. Our detailed review of the case studies used by Oxera for example, indicates that consumer harm was assessed in 15 out of 16 cases.[4] Moreover, Irish law (Regulation 19(8)(d)) also requires a consideration to be given to "the effect on consumers, users and other operators".

Appropriateness of financial penalties

In its analysis, Oxera does not consider a number of instances where ex ante regulatory breaches have resulted in no fines, e.g. Ofcom imposed no financial penalty on 11 out of 26 regulatory breaches identified between 2018 and 2020. Our review of the approaches taken by other regulators reveals that this is a 'standard' element of their overall approach to fines. In addition to Ofcom, ACM (the Netherlands) and regulators in other sectors, including Ofgem (energy), Ofwat (water) and ORR (rail), all adopt a methodology that includes a mechanism to allow for a **'no penalty' outcome**. This typically involves an assessment of whether a breach is serious, whether it is deliberate and whether it has caused

[3] Section 6.3; 'An alternative approach for less serious breaches'

[4] The details are presented in Annex C. In 2 more cases, the decisions are not available in the public domain.

material harm to consumers and/ or competitors – absent which, no fine is imposed.

Tariff-based approach

The Oxera report recognises that there are less serious breaches that should be subject to a different and more 'lenient' fining approach. This distinction of breaches between 'less serious' and 'more serious' is consistent with the best practice discussed above.

As set out above however there is very little guidance provided on how ComReg should determine whether a breach is 'less serious'. Without further information and clarification about how this approach would be applied in practice, it would lead to significant uncertainty about the likely/possible regulatory approach to fining which would be inconsistent with the general principle of regulatory certainty.

Turnover-based approach

In justifying its recommendation of a turnover-based approach, Oxera relies disproportionately on ex post competition precedents, which are not appropriate in a context of ex ante regulatory breaches.

In its proposed application of the turnover-based approach, Oxera relies on precedent from EU ex post competition cases with high gravity factors (10-15%). However, gravity factors in the European Commission's approach are related to the seriousness of the infringement (i.e. to the degree of harm caused) and the probability of infringements being detected (i.e. the need for deterrence). There is no a priori reason to expect that the seriousness of harm in an ex ante regulatory breach will be 'similar' to an ex post competition breach, if the nature of the breaches are different.

- In relation to the degree of harm, Oxera's choice of "gravity factor" is 'anchored' on penalties relating to refusal to supply and margin squeeze cases (which are amongst the most serious ex post competition law breaches). Breaches of ex ante regulation are likely to result in significantly lower harm than the ex post competition breaches. Therefore, Oxera's choice of gravity factors is not justified.
- In relation to the probability of detection, in view of a combination of the reporting obligations which ComReg has put in place, as well as eir's operation of a Regulatory Governance Model (RGM), the scrutiny of ComReg and access seekers, the probability of potential breaches of ex ante regulatory obligations being detected are expected to be high. This is in contrast, for example, with cartels where the probability of detection is generally considered to be relatively low - 10-20%. Therefore, the need for deterrence in the current regulatory framework is significantly lower than in ex post competition cases.

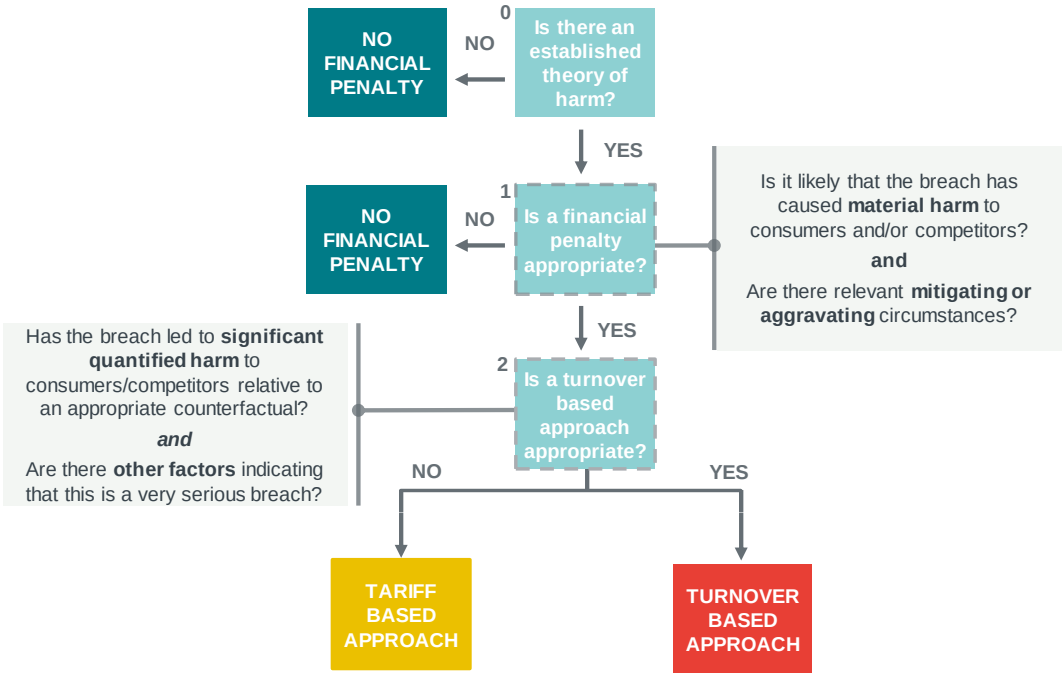
For a comparison, the 10-15% gravity factors recommended by Oxera contrast with a range of between 0.3% and 3.5% - 4.5% used by sector regulators (BIPT and Ofwat), where stated explicitly.

Proposals to improve the Oxera approach

In light of our assessment above, we consider that there are a number of steps that could be taken to improve Oxera's proposed approach. Overall, we are in agreement about the need to distinguish between less serious and more serious breaches, and with the application of a 'first step' to decide whether a fine is applicable or not. Our proposals aim to improve overall the clarity of the approach, to support regulatory certainty, and to better reflect best *regulatory* practice.

This overall approach is summarised as follows:

Figure 1 Summary of our recommendations



Source: Frontier Economics

Step 1: Is a financial penalty appropriate?

Some breaches might not require a financial penalty even if one can establish a 'theory of harm' related to the breach. In order to come to a view whether a penalty is justified, at a high level, it will be necessary to assess **whether the breach is likely to cause material consumer and/or competitor harm**. While a detailed quantification is not required at this stage, careful consideration should be given to all the relevant information, which would form the basis for a reasonable initial assessment.

At this stage, **any aggravating or mitigating circumstances**, which might influence the decision, should also be considered. Our review of regulatory precedent suggests that regulators typically consider the following questions:

- Was this breach a result of deliberate and/or reckless behaviour?
- Is this the first breach of its kind or a repeated breach?

- Has the operator in breach co-operated with the investigation?
- Was the breach self-reported?
- Has the operator in breach displayed proactive steps to ensure a similar breach does not occur again?[5]

If it is established that the likelihood of significant consumer/ competitor harm is small and there are no aggravating circumstances, it would be reasonable to conclude that a financial penalty is not needed, even if some theory of harm could be established.

Step 2: If a penalty is justified, should it be calculated using a turnover- or a tariff-based approach?

Based on regulatory precedent and best practice, it appears that a turnover-based approach might in general only be applicable to **very serious breaches, which caused significant consumer/ competitor harm and had other aggravating circumstances** (e.g. deliberate reckless behaviour, repeat offence, the operator refused to cooperate with investigation).

At this stage, a detailed estimation/quantification of actual consumer / competitor harm should be carried out, and an evaluation of whether there are any other factors, which might suggest that this is indeed a very serious breach. While there is clearly no one-to-one relationship between the consumer harm and the penalties imposed, the regulators typically refer to '*millions of pounds/ euro*' damages to consumers as one of the justifications for significant fines.

Recommendations on the application of a tariff-based approach

We recommend that a range of different weekly fixed fees should be considered to better capture differences in breaches (in terms of aggravating and mitigating circumstances and in terms of the materiality of the harm caused to consumers and competitors). In view of the fact that the €10,000 proposed by Oxera does not reflect the likelihood that some of the breaches could prove to have a relatively small consumer harm, it would seem appropriate to consider this as the maximum that could apply.

Recommendations on the application of a turnover-based approach (for very serious breaches)

The turnover-based approach relies on 3 key parameters – relevant turnover, gravity factor and duration.

On the **relevant turnover**, we recommend that:

- There should be a clear link established between the definition of value of sales considered in the turnover calculation and the established theory of harm.

[5] These circumstances should be considered 'in the round' rather than cumulatively, and their relevance may vary by type of breach.

- The starting point for determining the relevant turnover must be the revenues attached to groups of customers / market sub-segments affected by the breach (either directly or indirectly).

On **gravity factors**, as mentioned earlier, Oxera's proposed gravity factors are based on case studies of serious ex post competition breaches, where gravity factors were 10-15% of relevant turnover. We recommend that:

- When determining gravity factors, actual/ potential consumer harm needs to be taken into account.
- Gravity factors in ex ante context should not exceed a maximum of 3-5% (in line with BIPT and Ofwat guidelines and precedents).

On **duration** of the breach, we understand that sometimes it might take time for ComReg to conclusively establish whether there is a breach. If there is a delay due to ComReg's assessment of the case, it would seem reasonable for this to be taken into account when assessing the duration period for the purposes of penalty calculations.

Finally, Oxera proposes that, as a final proportionality check, the total fine should not exceed 10% of the offending company's turnover. As with gravity factors, we consider this threshold to be too high for ex ante regulatory cases and recommend that it should be reduced.

1 INTRODUCTION

This report has been prepared by Frontier Economics on behalf of eir as part of eir's response to ComReg's consultation on its proposed financial penalties methodology. The focus of this report is an assessment of the penalties methodology proposed by Oxera in its report "Guidelines and methodology on financial penalties in the context of access regulations"[6].

In this report, we critically assess the methodology proposed by Oxera in light of the relevant economic principles and regulatory practice. We also recognise that financial penalties must be determined and imposed in accordance with legal requirements. We understand in this regard that ComReg has suggested it will rely on Regulation 19 of the Access Regulations 2011. We are instructed that, under Regulation 19(8)(d), the High Court may impose financial penalties and in deciding the amount must consider the circumstances of the non-compliance, including its duration, the effects on consumers, users and other operators and any excuse or explanation for the non-compliance. Furthermore, we are instructed that eir disputes that as a matter of law, deterrence is a relevant consideration for the purposes of the application of Regulation 19 and, even if it is, we are instructed that there is a dispute as to the weight to be given to it. While we accept in this report that as a matter of economic theory, deterrence is an appropriate objective of a penalty regime, obviously disputed legal issues as to the correct interpretation of Regulation 19 are not within our expertise and we express no view on any such issues. We do dispute, as a matter of economic theory, Oxera's proposed approach for the reasons explained in this report.

The report is structured as follows:

- Section 2 – We briefly recap on the theory of enforcement and discuss some of the issues not addressed by Oxera - in particular, the economic and social costs of disproportionate fines;
- Section 3 – We outline our interpretation of the conceptual framework for Oxera's overall methodology;
- Section 4 – We assess Oxera's proposed implementation of the conceptual framework, focusing on determining whether a financial penalty is appropriate;
- Section 5 - We assess Oxera's proposed implementation of the conceptual framework focusing on justifying the appropriate approach for calculating the resulting financial penalty;
- Section 6 – We assess Oxera's proposed implementation of a turnover-based approach to calculating financial penalties;
- Section 7 – We assess Oxera's proposed implementation of a tariff-based approach to calculating financial penalties;

[6] https://www.Comreg.ie/publication/oxera-report-on-guidelines-and-methodology-on-financial-penalties-in-the-context-of-the-access-regulations-2020

- Section 8 – We draw together our conclusions and recommendations from the assessments made in Sections 4 to 7.

2 PRINCIPLES AND OBJECTIVES OF FINANCIAL PENALTIES

In this section, we first briefly summarise Oxera's discussion of the theoretical literature on enforcement and optimal fines, and then provide our own assessment, including some of the issues that are not discussed in the Oxera report - for example, the economic and social costs of high and disproportionate fines.

2.1 A summary of Oxera's discussion of the theory of fines

Oxera considers financial penalties in the overall context of regulatory sanctions and recognises that financial penalties are one of many tools available to regulators:

"Regulators typically have a spectrum of regulatory sanctions at their disposal, ranging from less interventionist (such as written or verbal warnings) to more interventionist measures (such as financial penalties or licence revocation)".[7]

The Oxera report notes that many regulators use a concept of an enforcement pyramid, with financial penalties reserved for the most serious breaches (i.e. they are at the top of the pyramid).

Oxera states:

"*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*".[8]

This is an important consideration, which, as we demonstrate below, Oxera has failed to implement in its proposed methodology for ComReg. More specifically, Oxera's penalties methodology assumes that, following an observed breach of ex ante obligations, '*a theory of harm has been established, which then justifies a penalty'*. It therefore appears that Oxera assumes that financial penalties are an appropriate response to any ex ante regulatory breaches, but does not properly justify this choice. Below we demonstrate that this approach is at odds with the approaches taken by other sector regulators (e.g. Ofcom, BIPT, Ofwat, etc.)

Oxera recognises that financial penalties have two main objectives:

- **punishment** (backward-looking, harm-based) – reflects the harm caused to the affected party (consumers, users and competitors) or benefit to the company that engages in the breach, if higher; and
- **deterrence** (forward-looking, deterrence-based) – deterrence is only needed if monitoring is imperfect (i.e. not every breach gets detected); it provides

[7] Oxera report, page 15

[8] Ibid, page 16

incentives to comply with the obligations, even if the probability of being caught is less than 100%.

Based on the economic literature, the magnitude of a penalty depends on whether the regulatory authority is able to perfectly monitor compliance. Indeed, if all breaches get reported and investigated, the need for the deterrence aspect of the penalty is eliminated. In that case, the optimal penalty is calculated as:

(1) the Net Present Value (NPV) of harm caused as a result of the breach; or

(2) any benefit accrued to the company from non-compliance.

Oxera further notes that the optimal penalty is determined as the maximum of the two values. Therefore, if all breaches get detected, financial penalties are based on the maximum value of the harm caused or the illicit gains made.

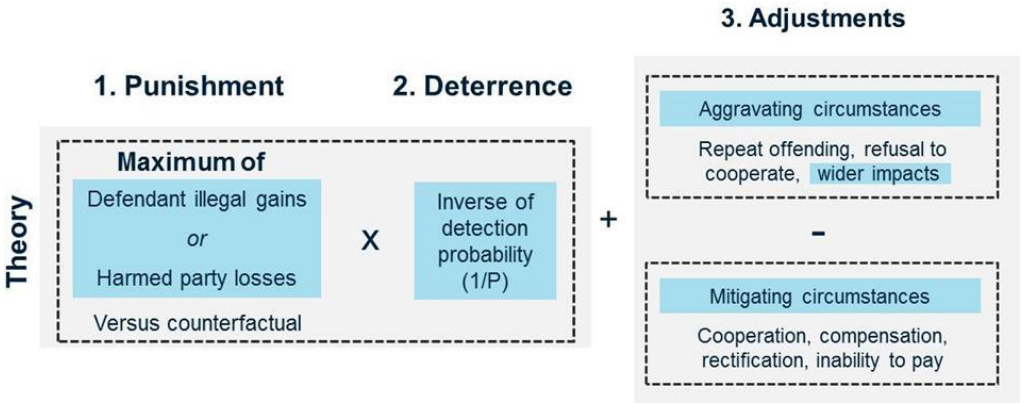
If, however, some breaches do not get caught (i.e. the probability of detection is below 100%), the fine needs to be designed in such a manner so as to reduce the firm's incentives to knowingly commit breaches. In other words, the fine needs to exceed the amount of pure gains from non-compliance to deter it.

In its report, Oxera emphasises the deterrence aspect of penalties, which suggests that Oxera has assumed that there is a very low ability for ComReg to monitor compliance with ex ante regulatory obligations.

Wils (2006) states that "*under the deterrence approach … the optimal fine should exceed the expected gain from the violation multiplied by the inverse of the probability of a fine being effectively imposed, so as to eliminate all violations*"[9].

This is reflected in Oxera's description of theoretical optimal penalty design.

Figure 2 Theoretical approach to optimal fines



Source: Oxera report based on academic literature, Figure 4.1

One implication of this theoretical framework is that the higher the probability of detection, the lower the fine should be (as the deterrence component becomes less relevant). In antitrust cases (e.g. cartels), the probability of detection can be

[9] Wils, Wouter PJ. (2006) "Optimal antitrust fines: Theory and practice." World Competition 29.2

relatively low (10-20%)[10], making deterrence critical[11]. This explains the significant fines imposed by the European Commission for ex post competition breaches. On the other hand, if the probability of detection is high, the need for deterrence is lower, and the optimal fines should be more in line with those based on the harm caused (unless there are significant mitigating/ aggravating factors justifying a downward/ upward adjustment).

Another important observation is that the theoretical framework does not imply that the fine should be in proportion to the breaching company's turnover. The key components of the formula are:

- a measure of harm caused (alternative operators' losses or breaching company's expected gains); and
- probability of detection.

It is possible that in some cases (e.g. in cartels), the breaching company's gains are likely to be proportional to its turnover, as the colluding parties would benefit from raised prices on all their relevant sales. But, this need not be the case in regulatory breaches, such as breaches of transparency or non-discrimination obligations, as these obligations are very specific (compared to broader competition and data protection guidance). Breaches of these obligations might only affect a small group of customers. In these cases, there is no direct link with the total turnover of a breaching company. Therefore, the statement above is not a general rule. Moreover, imposing a penalty in proportion to the total turnover of a breaching company could lead to a disproportionate fine, which is not reflective of the harm caused and does not take into account that high probability of detection.

2.2 Some limitations of the theoretical framework proposed by Oxera

We now turn to the relevant aspects of the economic literature that have not been discussed by Oxera, in particular the social and economic costs of high and disproportionate fines, and the economic benefits of cooperation with the regulatory investigation.

While Oxera has recognised the importance of certain mitigating factors, such as rewarding cooperation and efforts at compliance, there are relevant aspects of economic literature it has not discussed. For completeness, we have summarised the theoretical justifications for rewarding cooperation and efforts at compliance below.

[10] See J Connor (2006) "Optimal deterrence and private international cartels", working paper, Purdue University; E. Combe et al. (2008) "Cartels: The probability of getting caught in the European Union", working paper PRISM-Sorbonne and 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

[11] Other ex post competition breaches tend to have a higher probability of discovery than cartels, which is then reflected by the European Commission in lower gravity factors.

2.2.1 Rewarding cooperation and efforts at compliance

There are theoretical justifications for reducing penalties if the company under consideration cooperates with the investigation:

- First, it reduces the administrative cost and the duration of the investigation; and
- Second, if the violation is still ongoing at the outset of the investigation, the cooperation brings the violation to an end earlier.

Both of these effects can justify a lowering of the fine[12].

In practice, antitrust fines sometimes get reduced to reward companies that put in place compliance programmes. For example, in the US, a well-designed compliance programme may, in some circumstances, help the company qualify for sentence mitigation under the sentencing guidelines, as long as the employees who committed the violations were not "high-level personnel" of the company[13].

Similarly, in a regulatory context, as administrative costs get reduced, the regulator can redeploy its resources elsewhere, e.g. further increase the probability of detection. The shorter duration of the violation correspondingly reduces the gain from the violation (if any).

2.2.2 The social and economic costs of high fines

The academic literature considers the issue of social and economic costs associated with high fines. This aspect of the literature is not adequately reflected in the Oxera report.

High fines might lead to undesirable side-effects[14]. High/disproportionate penalties may increase the regulatory uncertainty related to investing in the regulated company, i.e. raise its cost of capital and reduce its ability to invest in its network. These costs need to be taken into account when the merits and size

[12] Wils, Wouter PJ. (2006) "Optimal antitrust fines: Theory and practice." World Competition 29.2, page 22-23

[13] Kolasky W.J. (2002) "Antitrust Compliance Programs: the Government Perspective", address before the corporate compliance 2002 conference

[14] For example, Lianos et al. (2014) identify six types of costs of over-deterrence in competition law:

1. Law enforcement could become so intense that beyond some level, the additional cost of law enforcement is higher than the cost that additional violations would impose on society.

2. It could also discourage potential investors away from markets and practices that could raise the possibility of infringement actions. In the context of regulated industries, it could increase regulatory uncertainty and discourage investment (especially if the fine is unexpected and disproportionate).

3. There is the possibility of costly enforcement errors. Houba et al. state: "excessive fines may amplify the possible negative impact of antitrust enforcement, which can stem from unobservable legal errors. Hence, the rationale for adopting the principle of proportionality is to minimize any potential undesirable impact of the antitrust policy"

4. If fines are very high and enforcement very intense, firms might over-invest in compliance. They would spend inefficiently high amounts on training and briefings, for example.

5. Excessive fines may lead to the insolvency of the undertakings on which they have been imposed and the resulting negative welfare effect.

6. Excessive fines may affect shareholders, bondholders and other creditors of the infringing undertaking. Furthermore, consumers may be harmed if the amount of the fine is passed on to them in the form of higher prices

of any fine is considered, with ComReg exercising caution if there are costs that could be material.

2.2.3 Conclusions

We have reviewed Oxera's theoretical approach to calculating fines. Oxera correctly identifies that, in general, financial penalties have two main objectives:

- **Punishment** – punishment reflects the harm caused to the affected parties (consumers, users and other operators) or benefit to the company that engages in the breach, if higher; and
- **Deterrence** – deterrence is needed if not all breaches get detected. In those cases, penalties should exceed the harm caused to reduce the incentive of the company to engage in future breaches.

According to the economic literature, the amount of a penalty should reflect the harm caused (or the illicit gain made) and be inversely related to the probability of detection.

Although the general theoretical framework is correct, we find that there are some important aspects of the theoretical literature which the Oxera report does not discuss, notably the costs of high or disproportionate fines. More specifically, disproportionate fines may increase the regulatory uncertainty related to investing in the regulated company (amongst other issues). This should be taken into account in the assessment of appropriate fines. It is also necessary to take account of the relevant legal context, including Regulation 19(8)(d) of the Access Regulations, as referred to above.

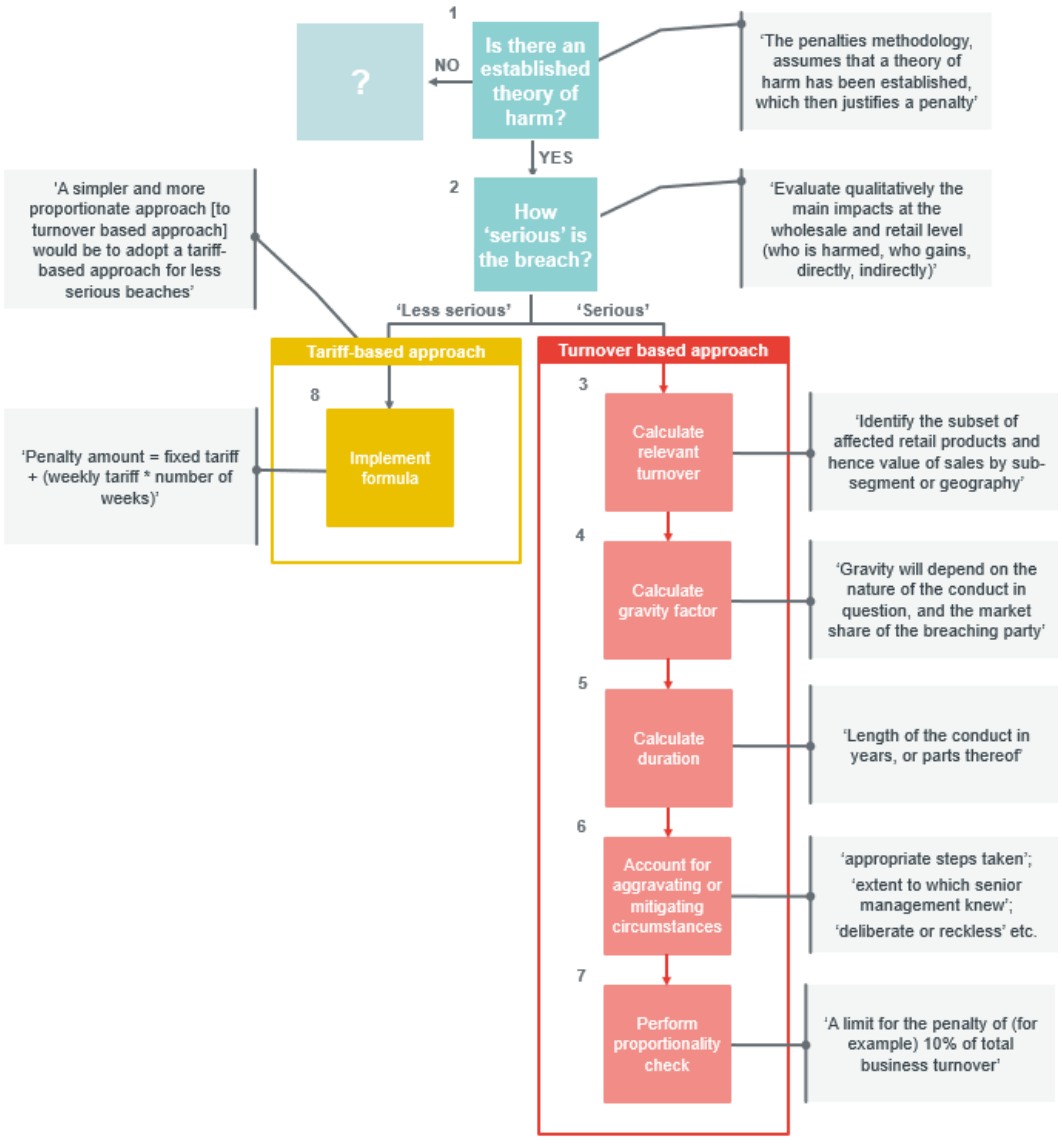
It is important that these issues are explicitly considered at the methodology application stage in order to ensure that ComReg achieves its objective of financial penalties being "appropriate, effective, proportionate and dissuasive".

3 AN OVERVIEW OF OXERA'S PROPOSED METHODOLOGY

In relation to the practical implementation of the theory, the Oxera report states that "*it may be difficult to implement the theoretical approach*" and advocates a "compromise" approach. The discussion focuses on the implementation of a penalty calculation process based on a percentage of firm turnover as the report's core proposal (Section 5.4, 'The recommended methodology').

However, in its final remarks (Section 6.3,'An alternative approach for less serious breaches'), the report briefly introduces an extension to this core proposal - a fixed weekly penalty ('tariff-based approach'). We have therefore taken Oxera's overall proposal to include both the *turnover* and *tariff-based* elements as characterised by Figure 3.

Figure 3 Oxera's overall penalty methodology proposal

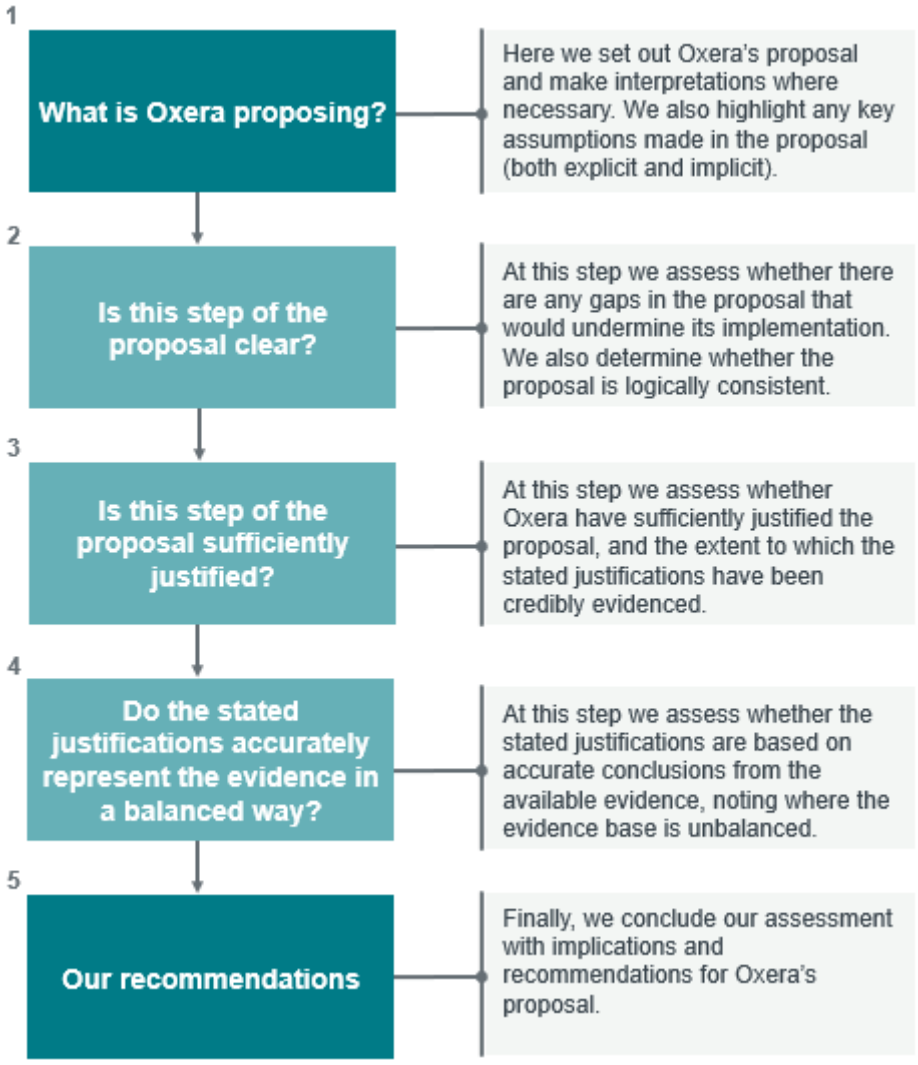


Whilst we accept that Oxera's general proposal amounts to a two-pronged approach, we note that the discussion is heavily skewed towards the implementation of the turnover based approach. In contrast, Oxera provides very little detail on the implementation of the tariff-based proposal beyond the general formula.

We have also characterised an implicit preliminary-step of the methodology, implied by the opening remarks of Section 5.4, that "[*t]he penalties methodology, being base on a competition rules approach, assumes that a theory of harm has been established, which then justifies a penalty*". This seems to incorrectly suggest that any breach of ex ante obligations justifies a penalty.

In the following sections we examine each step of Oxera's overall proposal characterised by Figure 3. At each step of Oxera's proposal we follow a common process, as set out in Figure 4.

Figure 4 Our framework for assessing Oxera's proposal



Source: Frontier Economics

4 AN ASSESSMENT OF OXERA'S METHODOLOGY: DETERMINING WHETHER A FINANCIAL PENALTY IS APPROPRIATE

In this and the following sections we assess each step of Oxera's proposal on a step-by-step basis. For each step, we first outline what Oxera is proposing, making interpretations where necessary, before assessing whether the proposal is justified on the basis of the facts presented. Next, we determine whether the justifications are based on a balanced and accurate interpretation of the available evidence. Lastly, we make recommendations based on our assessments.

4.1 Oxera's proposal

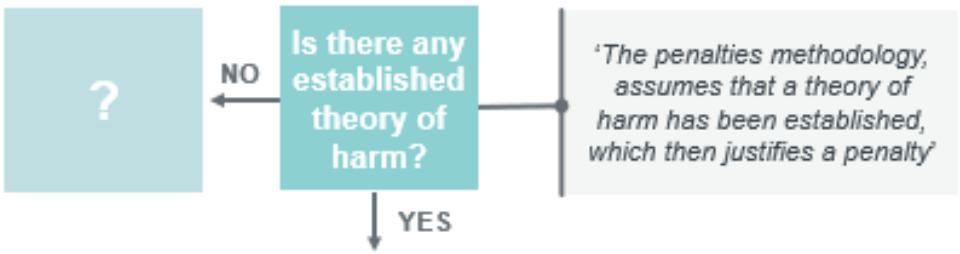
The Oxera Methodology aims to '*calculate the level of financial penalties for breaches of ex ante regulatory obligations in the context of the Access Regulations electronic communications*'.[15] The methodology opens with the following assumptions:

- *'Breaches of ex ante regulatory obligations may be expected, a priori, to have a negative impact on downstream competition';*
- *'The penalties methodology […] assumes that a theory of harm has been established, which then justifies a penalty'.*

Our interpretation of these assumptions is that, in Oxera's view, any form of conduct that represents a breach of ex ante obligations necessarily implies that a credible theory of harm has been established and therefore merits a financial penalty. It considers that a qualitative assessment of harm (who is harmed and who gains, directly or indirectly) is sufficient and that "*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*".

Therefore, it appears that, from Oxera's perspective, this step of the methodology is effectively redundant as any ex ante breach deserves a penalty. Below, we demonstrate that this approach is at odds with the approaches taken by other sector regulators, who explicitly assess whether a financial penalty is justified.

Figure 5 Oxera's proposed penalty methodology, Step 1



[15] Oxera report 2019, Section 5

Source: *Frontier Economics, based on the methodology outlined in Oxera 2020*

Note: *The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2020.*

4.2 Frontier's assessment

We consider that **this step of the proposal is not clear, not justified and is not grounded in the evidence.**

Indeed, it is not clear what action should be taken if a credible theory of harm cannot be established, i.e. if the facts of the case suggest that the actual (potential) consumer and competitor harm is immaterial. By assuming that any breach of ex ante regulation justifies a penalty, the methodology is likely to lead to a high risk of penalising regulated companies for trivial breaches that had no material consequences for consumers and/or for competitors.

We note that the presumption that all breaches merit a financial penalty is not internally consistent with Oxera's own presentation of the evidence. Specifically, Oxera acknowledges:

> '*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. 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*.'

Therefore, by disregarding any mechanism by which a breach of ex ante obligations may result in an outcome other than a financial penalty, this step of the methodology is at odds with Oxera's own review of the evidence.

Furthermore, Oxera does not provide evidence to justify the dismissal of any requirement to test its proposed theory of harm before determining whether a financial sanction is appropriate. Rather, Oxera appears to arrive at this position via conclusions from their review of precedence, in particular:

> *'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'.*

Whilst Oxera does not explicitly demonstrate how this conclusion flows from the evidence presented in the report, it appears to follow from comments that were attributed to a review of the Telekomunikacja Polska case. Oxera states:

> *"… 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. 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."

Our review of this case suggests that Oxera's interpretation of the evidence is flawed and that the EC did provide evidence to quantify consumer harm in that case (as explained in the textbox below).

Figure 6 Frontier review of 'Telekomunikacja Polska' case study presented by Oxera

Oxera have taken a statement made by the General Court ('GC') to support a procedural argument from an appeal process and applied these comments out of context. During this appeal process, the GC concluded that the Commission was 'not obliged to quantify the actual impact of the infringement on the market when determining the proportion of the value of sales established by reference to gravity'. From this, Oxera conclude that 'the General Court was of the view that the Commission did not need to prove that there had been an anticompetitive effect'.

However, Oxera have entirely misrepresented the question which the GC was answering. Furthermore, the original Commission Decision for this breach explicitly assessed likely effects on consumers from the contravention relative to the counterfactual, with estimates of the impact of the contravening conduct on penetration rates, connection speeds and broadband prices.

Source: Frontier Economics, based on Chapter 4.4.4; 'Quantitative assessment of the likely effects on consumers'. 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). https://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf

In addition to the above inaccuracy, we find that, of the 16 precedents that Oxera has highlighted as case studies, only one case appears to have imposed a financial penalty without an assessment of potential harm based on the circumstances of the case[16].

We further note that Oxera's presentation of the evidence is highly selective. Indeed Oxera does not present any examples of breaches where regulators imposed no penalties. Our own review of publicly available precedents and guidelines (in Section 4.3 below) illustrates the prevalence of 'no penalty' decisions following breaches of regulatory obligations, both in telecommunications and in other regulated sectors.

In summary, it is our assessment that this step of Oxera's proposal:

- is based on a flawed and internally inconsistent premise that all breaches of ex ante regulatory obligations have a negative impact on downstream competition and therefore justify a penalty;
- does not define what action should be taken if a credible theory of harm cannot be established; and

[16] Figure 20Annex E of Annex C sets out the relevant extracts from the underlying decisions that evidence an assessment of the circumstances of the case is conducted when determining the likely effects of a breach.

- relies on an inaccurate and unbalanced representation of recent precedents.

4.3 Our review of additional evidence

Our review of the approaches taken by Ofcom (UK), ACM (the Netherlands) and by regulators in other sectors, such as Ofgem (energy), Ofwat (water) and ORR (rail), reveals that:

- all these regulators assess whether a breach is serious, whether it is deliberate and whether it has caused material harm to consumers and/ or competitors, in order to establish whether a penalty is justified, and;
- these regulators adopt a penalties methodology that includes a mechanism to allow for a 'no penalty' outcome

We find that:

1. **Ofcom implements a holistic assessment of conduct and effects when investigating breaches of ex ante regulations. Our review shows that Ofcom imposed no financial penalty on 11 out of 26 regulatory breaches identified between 2018 and 2020 (42% of total cases closed over that period)** [17]**.**

Ofcom's stated justifications for settling a breach without a financial penalty include:

- **limited consumer harm and re-imbursement policies**, where consumers' may have been overcharged;
- **full-cooperation during the investigation** and written assurances of the steps to return to compliance as reasons for no financial sanction, where breaches were technical in nature;
- **self-reporting of a breach based on human error** to the regulator, where the breach related to the misreporting of data.

As such, Ofcom considered all the facts of the case, including consumer harm and other aggravating and mitigating circumstances before deciding whether a financial penalty is justified.

2. **ACM can use different instruments to address breaches, such as binding instructions, commitments, warnings and education.**

ACM[18] has a multi-tiered approach to addressing contraventions, along with having a range of instruments. In the first instance, when a breach has been established, ACM can use any given instruments to address the violation (such as binding instructions, commitments, warnings, or education). For some violations, ACM produces a statement of objections which is then further

[17] Figure 21 of Annex D provides a summary of the breach investigations that were closed with no financial penalty (based on https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases)

[18] https://www.acm.nl/en/about-acm/mission-vision-strategy/our-oversight-style

analysed to decide if a financial penalty is appropriate. Not all statements of objections result in financial penalties.

The financial penalty is not based on conduct alone, but is based on the circumstances in which the breach was committed alongside the seriousness and duration of the breach. ACM further notes that "*A company is given a deadline before which it must have adjusted its practices. If it fails to do so, it will have to pay the penalty payments until it has made the necessary adjustments*."

Of the 10 cases launched by ACM in 2019, for which decisions are available in the public domain[19], only 4 (40%) were subject to penalties payments, while 6 (**60%**) were resolved using other instruments and involved **no financial penalty**.

3. **The UK water regulator (Ofwat) pursues a risk-based pyramid approach to enforcement, where financial penalties are considered to be the last resort.**

As acknowledged by Oxera, Ofwat's pyramid approach to enforcement includes a range of tools, both informal (targeted reviews and informal undertaking) and formal actions (formal undertakings, enforcement orders and financial penalties). Ofwat is "*willing and able to use **all the tools** in our regulatory tool kit … both traditional tools, as well as broader tools to shine a light on issues and provoke debate"*.[20]

Ofwat's enforcement guidelines further state that even if a company is found to have breached its obligations, Ofwat may "*consider not opening a formal enforcement case if that company satisfies us that the potential breach is not ongoing and it has taken steps to provide appropriate redress to its customers*"[21]. We note that, in practice, Ofwat may impose a nominal penalty in view of the offending party's commitment to customer redress[22].

4. **The UK energy regulator (Ofgem) may take alternative action, issue nominal penalties or impose consumer redress to ensure compliance.**

Ofgem notes in their 2017 enforcement guidelines[23] that it may consider alternative actions (such as non-statutory undertakings, assurances or independent audits) in cases where issues have been **self-reported**, where the company had taken **prompt corrective action**, where the full-extent of the breach has been established and the breach is **unlikely to recur**, where not pursuing formal action is the proportionate and targeted response[24].

In practice, Ofgem has favoured no financial penalty or a very small nominal penalty along with consumer redress (which could be significant). Between 2010-2020, Ofgem reviewed 83[25] cases and imposed only consumer redress and **no penalty or a nominal penalty** on 60 cases (**72%**). Fines only were issued for 16

[19] https://www.acm.nl/sites/default/files/documents/2020-03/2019-acm-annual-report.pdf

[20] https://www.ofwat.gov.uk/publication/ofwats-approach-to-enforcement/

[21] Ibid

[22] Ofwat imposed a nominal penalty of £1 on Thames Water on two occasions (2014 and 2018)

[23] https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf

[24] https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf (section 3.33)

[25] https://www.ofgem.gov.uk/investigations/investigations-and-enforcement-data

out of 83 cases (19%), and a combination of consumer redress and fines on the remaining 7 out of 83 cases (8%).

5. **The UK rail regulator (ORR) enforcement guidelines make explicit reference to possible no penalty outcome.**

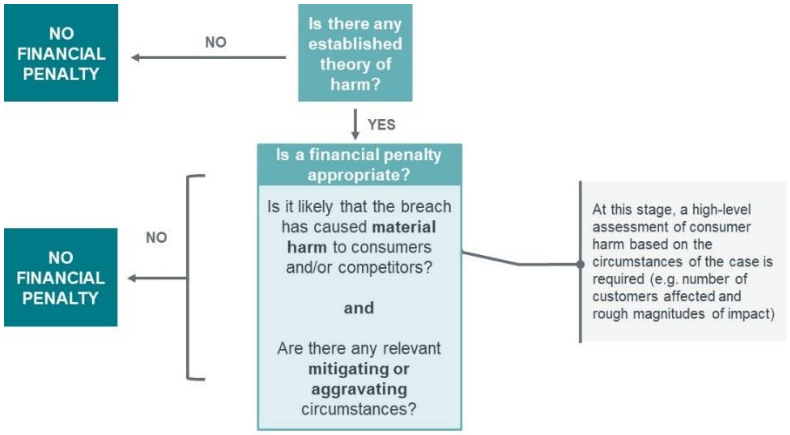
ORR's enforcement guidelines closely resemble that of Ofwat, but also explicitly reference no penalty as a starting point. Similar to the other UK regulators, ORR also recognises that the use of enforcement tools, such as reparations and orders, can be highly effective, clarifying that "*a penalty is likely to be a 'last resort'*".[26]

ORR sets out five levels of seriousness and the corresponding levels of 'starting penalty' (i.e. before adjusting it for aggravating and mitigating circumstances). The first level of seriousness is classified as technical or de minimis breaches and is associated with "usually no starting penalty". Our review of the evidence finds that, out of 13 cases investigated between 2019-2020 for which a public decision is available, ORR imposed a penalty in only four cases (31%). Of these four cases, three involved serious actual harm. For the other nine cases (**69%**) that did **not result in a financial penalty** (e.g. risk assessment, improper record keeping, failure to take preventative measures, etc.), ORR sent out Prohibition or Improvement notices that outlined the necessary actions to return to compliance.

4.4 Our recommendations

Based on our review of the regulatory guidelines and precedent (discussed above), we recommend that ComReg should explicitly recognise that some breaches might not require a financial penalty. We therefore recommend that this step of the proposal be adjusted as illustrated in Figure 7.

Figure 7 Frontier recommendation for Step 1 of Oxera's proposal



Source: Frontier Economics

The assessment of whether a financial penalty is appropriate should be based on questions that determine the relevance of the financial penalty objectives,

[26] https://orr.gov.uk/__data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf

namely: internalisation of harm and/or a deterrence incentive. In particular, the factors that need to be taken into consideration when determining whether a penalty is appropriate are as follows:

How likely is it that the breach has caused material harm to consumers and/or competitors?

At this stage, the assessment of consumer / competitor harm can be high-level. ComReg would need to set out the theory of harm, the appropriate counterfactual and provide an initial view on the magnitude of the harm (e.g. number of customers likely affected), but without having to provide a detailed quantification of the harm (which would be required under Step 2). While a detailed quantification is not required at this stage, ComReg would still need to carefully consider all the relevant information, which would form the basis for a reasonable initial assessment and allow for a more detailed and robust quantification of the harm at the later stage.

Are there any other aggravating or mitigating circumstances that might influence the decision?

To understand the nature of the breach and other relevant circumstances of the case, we would expect ComReg to focus, among others, on the following factors:

- Was this breach a result of deliberate and/or reckless behaviour?
- Is this the first breach of its kind or a repeated breach?
- Would the breach be apparent to a regulated entity acting diligently?
- Is the breach due to a difference in interpretation of the regulatory obligations, and reasonably justified?
- Has the operator in breach co-operated with the investigation?
- Was the breach self-reported?
- Has the operator in breach displayed proactive steps to ensure a similar breach does not occur again?

Note that the factors proposed above are not cumulative, i.e. it is not necessary for all these factors to be present for ComReg to be able to conclude that a penalty is not appropriate. As a general rule, we would expect that if the consumer / competitor harm is immaterial and other circumstances of the case suggest that the breach was not deliberate, it would be reasonable for ComReg not to impose a penalty.

We believe that this approach provides enough transparency for the market operators to understand criteria that ComReg would apply to evaluate the seriousness of individual breaches. At the same time, it gives ComReg enough discretion to evaluate the breaches on a case-by-case basis, thus making the decision whether a financial penalty is justified for any given breach transparent, but not entirely predictable.

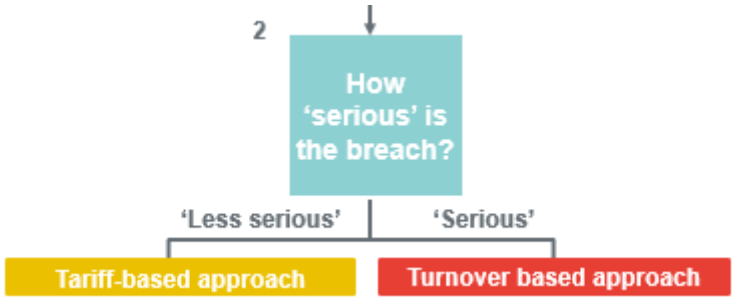
5 AN ASSESSMENT OF OXERA'S METHODOLOGY: DECIDING WHETHER A TURNOVER-BASED OR TARIFF-BASED APPROACH IS JUSTIFIED

5.1 Oxera's proposal

After concluding that the conduct represents a breach of ex ante obligations (and, in Oxera's view, therefore justifies a penalty), this specific step of the methodology sets out to determine which financial penalty approach is appropriate: a 'turnover approach' or a 'tariff-based approach'.

This part of the methodology stipulates that penalties for '*less serious*' ex ante breaches should be based on a tariff-based approach, whilst penalties for '*serious*' breaches should follow a turnover-based approach. This step of the methodology appears to be based on the form of the conduct rather than any assessment of possible effects (i.e. consumer / competitor harm).

Figure 8 Oxera's proposed penalty methodology, Step 2



Source: Frontier Economics, based on the methodology outlined in Oxera 2020

Note: The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2020

We note that throughout its report, Oxera places substantial emphasis on the role of turnover-based approach. Indeed, the methodology discussion opens with the general formula for implementing a turnover-based approach. It would therefore appear that Oxera takes a turnover-based approach to be the 'default' outcome of this step of the proposal, with relatively little emphasis on the role of a tariff-based approach.[27]

5.2 Frontier's assessment

Oxera supports this decision node (i.e. allowing for an outcome of either tariff-based or turnover-based approach) on the basis that this is '*proportionate, timely, administratively low-cost and effective for less serious breaches. It also provides*

[27] Note that this section focuses exclusively on the decision whether to apply the turnover- vs. tariff-based approach rather than the details of each methodology. The details of the turnover-based methodology are discussed in Section 6, while the details of the tariff-based methodology are discussed in Section 7 below.

clarity to operators'. We do not find that this step of the proposal is sufficiently clear to conclude whether it is justified on the grounds provided.

In particular, it is not clear how ComReg would determine whether a given breach is more serious or less serious, and therefore which penalty methodology to apply.

We consider that this decision should be based on a detailed assessment of the consumer / competitor harm caused by the breach. Indeed, both the theoretical framework and relevant regulatory practice indicate that this is a critical step to assess the merits and proportionality of any financial penalty.

Moreover, we observe that in justifying its recommendation of a turnover-based approach, Oxera relies disproportionately on ex post competition precedents, which are not appropriate in a context of ex ante regulatory breaches because:

- the harm from ex ante breaches (which, under Oxera's proposed methodology need not be assessed) is low compared with ex post breaches; and
- the probability of detection of these breaches is high.

We find that most sector regulators do not use a mechanistic turnover-based approach when assessing fines. The first step in their analyses is typically an assessment of the detriment to consumers (i.e. consumer harm) and seriousness of the breach. If there is no consumer harm found and there are no other aggravating circumstances, then material penalties are unlikely.

We discuss these issues in more detail below.

5.2.1 An assessment of the materiality of harm is critical

Although Oxera recognises that regulators typically assess consumer harm and take it into account when determining the amount of penalty, it states that:

"*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.*"

This is clearly at odds with the regulatory practices. Our review of recent precedent suggests that sector regulators typically carry out a detailed assessment of the consumer / competitor harm before they reach a decision on whether to apply significant financial penalties. While there is clearly no one-to-one relationship between the consumer harm and the penalties imposed, the regulators typically refer to '*millions of pounds/ euro'* damages to consumers / competitors as one of the justifications for significant fines (see Annex C for more details).

Other sector regulators also assess consumer harm when they classify breaches as serious or very serious. For example, ORR classifies breaches as serious if "*there is evidence of systemic failings and results in serious harm or potential harm to third parties*" and as very serious if they "…*involve significant harm, or the risk of significant harm, being caused to a wide range of third parties and/or greater culpability on the part of the licence holder, for example, where it was deliberately misleading*."

Furthermore, we note that the Irish legal framework requires that the High Court, when deciding the amount of the financial penalty, if any, to be imposed must consider the circumstances of the non-compliance, including, amongst other things, the effect on consumers, users and other operators[28].

Indeed, based on Oxera's own analysis (see Box 4.13), the Central Bank of Ireland considers "*the amount of any benefit gained or loss avoided due to the contravention*" and "*the loss or detriment or the risk of loss or detriment caused to consumers or other market users*" when determining the amount of appropriate penalty. In its assessment of PTSB breaches, the Central Bank identified more than 2,000 affected accounts, with some breaches lasting over a decade. In its assessment the Central Bank states:

"*This fine is the largest imposed to date by the Central Bank under the ASP. It reflects the gravity with which the Central Bank views PTSB's failings and the unacceptable harm PTSB caused to their tracker mortgage customers, from extended periods of significant overcharging <leading> to the loss of 12 family homes and 19 buy to let properties*".[29]

Therefore, the Central Bank of Ireland, similar to other regulators, assesses consumer harm (as well as other factors) when deterring an appropriate penalty.

Without assessing the likely harm caused by a breach, one cannot form a view on whether a penalty is merited, which penalty approach is appropriate, and whether the resulting penalty is proportionate.

Therefore, it is important that ComReg carries out a detailed assessment of consumer / competitor harm in each case where its high-level preliminary assessment under Step 1 suggests that the harm is likely to be significant.

5.2.2 A turnover-based approach is far from being universally accepted

Despite focusing the majority of the discussion on the implementation of a turnover approach, the Oxera report admits that this approach is not universally accepted, even in the context of ex post competition cases. For example:

- Bageri et al[30] argue that a turnover-based approach could lead to distortions and that fines should be proportional to profits gained or lost as a result of the infringement.
- Lianos et al (2014) also criticise the European Commission's approach and provide an alternative, which is more reflective of the economic theory. This is presented in Box 4.2 of Oxera's report.

We further note that in justifying the turnover-based approach Oxera relies disproportionately on ex post competition cases, which might have a low

[28] S.I. No. 334/2011 - European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, Regulation 19 (8) (d).

[29] https://www.centralbank.ie/news-media/press-releases/press-release-enforcement-action-permanent-tsb-30-may-2019

[30] Bageri, V., Katsoulacos, Y. and Spagnolo, G. (2013), 'The distortive effects of antitrust fines on revenue', Bank of Greece Working Paper 153, February

probability of detection (e.g. the probability of cartels being discovered is estimated to be 10-20%[31]) and therefore a relatively strong deterrence objective.

In contrast, ex ante breaches considered by ComReg are within a strict Regulatory Governance Model in a highly regulated framework. Operators with SMP are mandated to report a wide range of KPIs, which facilitates detection of regulatory breaches (the RGM is outlined in Annex A). It therefore follows that the probability of the detection of regulatory breaches is generally high, and consequently less weight should be given to the deterrence objective when determining regulatory sanctions.

We further note that very few sector regulators rely on a pure turnover-based approach, with most regulators (Ofcom, Ofwat, Ofgem, ORR, CNMC, etc.) relying on a more holistic approach that takes into account a number of different factors, including actual/ potential consumer harm.

We consider that Oxera exaggerates the practical difficulties of estimating consumer / competitor harm[32]. In fact, illegal gains and/or losses to the affected parties need to be estimated in any case in order to ensure that the proposed fine is not disproportionate and we understand that this is also required to comply with Regulation 19(8)(d) of the Access Regulations.

A proper assessment of the harm can also ensure that even if the turnover-based approach was followed in the current context, any turnover considered is the relevant turnover that reflects the impact of the breach. For example, where a breach affects only a sub-segment of the market (e.g. consumers with faulty lines), only this sub-segment should be taken into account in the calculations, rather than the whole market.

5.3 Our recommendations

Based on our assessment above, it appears that a turnover-based approach might only be applicable to very serious breaches, which caused significant consumer / competitor harm and had other aggravating circumstances.

In light of that, we recommend that ComReg should carry out a detailed assessment of consumer / competitor harm and establish whether there are any other factors, which might suggest that this is indeed a very serious breach. More specifically, ComReg should consider the following questions:

Has the breach caused significant harm to consumers / competitors?

As set out above, our review of precedents shows that in cases where significant fines were imposed, the regulators typically carried out a detailed assessment of the consumer / competitor harm. While there is clearly no one-to-one relationship between the consumer harm and the penalties imposed, the regulators typically

[31] J Connor (2006) "Optimal deterrence and private international cartels", working paper, Purdue University; and E. Combe et al. (2008) "Cartels: The probability of getting caught in the European Union", working paper PRISM-Sorbonne

[32] Indeed, Oxera have submitted detailed quantification of consumer harm on behalf of ComReg in Case 1059.

refer to '*millions of pounds/ euro'* damages to consumers as one of the justifications for significant fines (see Annex C for more details).

We consider this assessment to be key to determining whether a breach is very serious and whether it justifies an application of the turnover-based approach. This assessment needs to:

- establish an **appropriate counterfactual**, i.e. what would have most likely happened in the market, had the breach not taken place;
- compare the actual outcomes with those in the counterfactual in order to **robustly quantify the harm to consumers / competitors** (and/or any financial gains to a non-compliant operator). This would involve, for instance, estimating the number of affected consumers and average damage per person.

In its assessment, ComReg might also take into account whether a given breach has afforded the breaching party an economic advantage over its competitors.

Are there other factors indicating this is a very serious breach?

Oxera states in its report that aggravating and mitigating circumstances should be considered later in the case, when the basic penalty has already been calculated. This appears to be at odds with the regulatory precedents. Our review suggests that the regulators typically consider all relevant factors at the point when they establish whether a breach is serious. These factors include, among others:

- whether the breach is perceived to be caused by deliberate or reckless behaviour;
- whether this is a repeat offence; and
- whether the operator has refused to cooperate with/obstructed the investigation.

In our view, if a financial penalty has been considered appropriate it is only when a combination of significant consumer / competitor harm (i.e. 'millions of euro'), and significant aggravating circumstances listed above would justify imposing a penalty based on the entity's appropriate turnover. In all other cases where a financial penalty has been justified, **the default position should be a tariff-based approach**.

This approach will ensure that the risks of imposing disproportionately high fines, which would increase regulatory uncertainty, are sufficiently mitigated. At the same time, this approach would give ComReg the necessary tools to impose sufficiently high fines for very serious breaches, where a material penalty is required to fully internalise the harm and/or generate the appropriate deterrence effect.

6 AN ASSESSMENT OF OXERA'S METHODOLOGY: IMPLEMENTING A TURNOVER-BASED APPROACH

As explained earlier for 'serious' breaches, Oxera proposes to adopt a turnover-based approach. In this section we describe Oxera's turnover-based approach on a step-by-step basis, considering each parameter of the calculation as set out in Figure 9.

Figure 9 Overview of Oxera's turnover approach

Financial penalty =	Value of retail sales (V) x Gravity (G) x Duration (N)
	+ Adjustment for aggravating or mitigating circumstances
	+ Deterrence adjustment
	– Penalty adjustments (for settlement or inability to pay).

Source: Oxera 2020

We provide a brief overview of detailed assessment below, before going into the detail of each step in the following section.

6.1 Our overall assessment of Oxera's turnover-based approach

Oxera's proposed turnover-based approach (as set out in Figure 9) is consistent with penalty frameworks adopted in ex post enforcement cases and some ex ante regulatory guidelines (in particular, BIPT and ACM). However, some fundamental aspects of Oxera's proposal are not sufficiently justified and are not grounded in the evidence. In particular, we find that Oxera's proposal:

- disregards the assessment of potential and/or actual harm to consumers (as discussed in Section 5 above);
- is not sufficiently clear on how relevant turnover should be established; and
- uses gravity factors, which are based on ex post competition cases. These gravity factors are not appropriate in an ex ante regulatory context.

Our review shows that some elements of Oxera's proposal are either (a) inconsistent with the evidence provided in Oxera's own report, or (b) are based on a selective sample of the available evidence. Our assessment of Oxera's evidence, and a review of further evidence, shows that:

- An assessment of actual/ potential harm should be performed as a first step;
- In an ex ante setting, the turnover should be based on the value of sales of affected customers (i.e. those identified in the process of assessing consumer harm);

- In an ex ante setting, gravity factors should be determined based on the likely effects of the breach rather than simply by the nature of the breach.

As highlighted by Oxera, the turnover-based approach in Oxera's 2020 report is the same as that proposed in their 2016 report (then denoted 'general methodology'). Annex B illustrates how this methodology was applied by Oxera within the context of historic breaches of ex ante obligations, to demonstrate the shortcomings of the turnover-based proposal in practice.

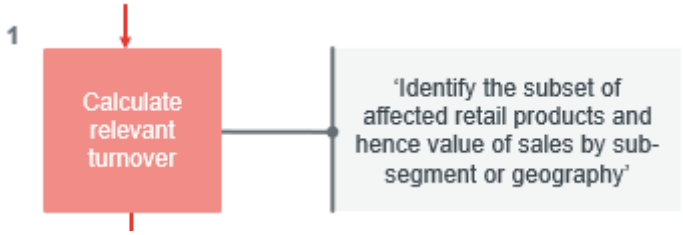
6.2 Turnover-based approach: calculating relevant turnover

6.2.1 Oxera's proposal

The first step of the turnover based penalty calculation is to estimate the value of sales that have been affected (directly or indirectly) by the breach. This component of the calculation is the so-called 'relevant turnover'.

Oxera defines relevant turnover as '*the (subset of) affected retail products (defined narrowly or more broadly), and hence the value of sales by sub-segment and geography*'. This step of the process is illustrated in Figure 10 below.

Figure 10 Oxera's proposed penalty methodology, turnover-based approach step 1



Source: *Frontier Economics, based on the methodology outlined in Oxera 2020*

Note: *The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2020.*

Oxera illustrates how to interpret this definition of relevant turnover by way of the presented in Figure 11.

Figure 11 Example for determining the value of relevant affected sales

'In this example, 40% of wholesale lines are supplied to competitors in the fibre broadband retail market through Wholesale Input 1 [which is subject to the breach]. It may then, as an approximation, be assumed that the wholesale contravention directly affects only 40% of the fibre broadband 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.'

Source: *Oxera 2020*

In other words, in Oxera's view 'relevant turnover' is defined as X% of the offending firm's annual retail sales in the affected downstream retail market, where X% is the proportion of the competitor retail sales that are affected by the wholesale breach.

The stated justification of this part of Oxera's methodology is that '*the European Commission 2006 guidance makes it clear that it is the* ***undertaking's sales*** *that are of relevance*.'

Oxera notes that the EC guidelines adopt a practical compromise to a strictly-applied economic deterrence-based approach. In particular, Oxera asserts that the EC guidelines take offender turnover as a benchmark for relevant turnover as a practical way to account for the following effects:

(a) '*The lost profits to the affected parties or gained profits to the breaching party, as compared to the counterfactual'* (i.e. internalising harm);
(b) '*The probability of detection and prosecution, which may vary by type of offence'* (i.e. deterrent effect); and
(c) Potentially wider factors (e.g. impact on society, market trust, etc.).

Finally, Oxera notes that it is possible to take a wider or narrower view of the relevant affected sales. Oxera appears to advocate a conservative approach that starts 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*'.

6.2.2 Frontier's assessment

This step of the proposal is not clear and is not properly justified. Indeed, it is not clear why Oxera considers offender turnover to be a reasonable proxy of affected sales without any proper consideration of the mechanism through which actual customers have been harmed. Moreover, an assumption that any difference between offender turnover and affected sales can be justified on the basis of a deterrent effect is also not justified.

It appears that Oxera has inappropriately applied the Commission's ex post competition guidelines in an ex ante regulation context. In particular, Oxera seems to advocate a definition of relevant turnover (i.e. offender turnover), which is designed to deliver a strong deterrent effect in a context where the probability of detection and prosecution is significantly lower than in an ex ante regulation context[33] (as discussed in Section 5.2 above).

It therefore follows that in an ex ante context the definition of V should be designed to reflect (a) consumer harm (i.e. affected sales) and, potentially (c) 'wider factors' (where appropriate), with proportionately less weight given to the deterrent effect (b).

[33] Indeed, Oxera notes that 'Sector regulators charged with implementing ex ante regulations (such as access provision) usually have more day-to-day interaction with the firms that they regulated 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'.

The proposed implementation of this part of the proposal does not represent the evidence in a balanced way. In arriving at the illustrative implementation of relevant turnover above, Oxera has relied on evidence from ex post competition context in order to justify that offender sales is an appropriate proxy for affected competitor sales. From our own review of precedents from an ex ante setting, we find evidence that relevant turnover is in practice defined by the affected customer sales (as opposed to offending firm's turnover).

In the following section we present our review of ex ante precedents and guidelines to illustrate how the general definition of relevant turnover is practically implemented in an ex ante setting.

6.2.3 Frontier's review of additional evidence

BIPT is one of few sector regulators that use a turnover-based approach in addressing contraventions and therefore provides useful evidence on how relevant turnover is determined in practice.

Specifically, BIPT defines '*relevant turnover'* as the offending company's turnover "*on the market on which the offense was committed and, where applicable, on the market(s) on which the effects of the infringement occur*"[34].

In practice, BIPT uses the *niche turnover* definition, i.e. the part of the turnover that is directly relevant to customers affected by the infringement.

In our review of 11 cases between 2017 and 2020, BIPT implemented the niche turnover definition in 8 out of 11 cases (73%). In the 3 remaining cases where BIPT used the relevant turnover definition, the infringements had the potential to affect the whole customer base of the offending companies. Figure 21 of Annex D provides more details on the breaches where BIPT used niche versus relevant turnover.

Based on our assessment of Oxera's proposals and the available evidence, we make the following recommendations for this step of the methodology:

RECOMMENDATIONS

- There should be a clear link established between the definition of value of sales considered in the turnover calculation (V) and the established theory of harm.
- The starting point for determining V must therefore establish the revenues attached to groups of customers / market sub-segments affected by the breach (either directly or indirectly).

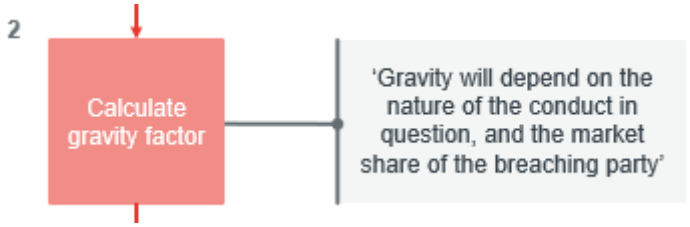
[34] https://www.bipt.be/file/cc73d96153bbd5448a56f19d925d05b1379c7f21/7cfbd2a0b407116e47c56f763f1f7f5c5bc6885c/Communication_lignes_directrices_calcul_montant_amendes_administratives.pdf (in French)

6.3 Turnover-based approach: gravity factors

6.3.1 Oxera's proposal

The next step of the turnover based penalty calculation is to determine a gravity factor. This step of the process is capture by Figure 12.

Figure 12 Oxera's proposed penalty methodology, turnover-based approach step 2



Source: Frontier Economics, based on the methodology outlined in Oxera 2020

Note: The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2020.

As with determining turnover, Oxera seems to suggest that gravity factors should be determined based on the form of the conduct rather than on its effects. Oxera caveats this approach, by noting that '*the potential effect of the conduct could also be taken into account although, as discussed, this is likely to be qualitative in nature*.'

Oxera does not define the relationship between conduct and gravity, but instead provide illustrative examples. These are summarised in Figure 13.

Figure 13 Illustrative examples of gravity ranges provided by Oxera

- *'Equivalent to refusal to supply/margin squeeze: 10-15%*
- *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 2020

Oxera provides a further caveat to this discussion, noting that '*gravity will vary on a case-by-case basis*'.

6.3.2 Frontier's assessment

This step of the proposal is not clear and is not sufficiently justified. In particular, Oxera proposes that gravity factors should be based on the form of the conduct and that the assessment of actual/ potential harm is optional. However, in the following discussion of illustrative examples, Oxera caveats that '*gravity will vary on a case-by-case basis'*.

It therefore follows from this caveat that the circumstances of the case are *indeed* relevant for determining gravity. This part of the methodology not only directly

contradicts itself, but serves to demonstrate that a pure conduct-based assessment of gravity is too simplistic an approach to be reliable.

Oxera justifies its position by references to ex post competition guidelines and precedents. However, this is not an appropriate benchmark for several reasons.

Firstly, as explained above, penalties in an ex post competition context need to have a strong deterrence component (due to a low probability of detection). In a setting where deterrence is a key objective of penalty setting, it is justified to consider the form of the conduct when determining gravity.

However, in an ex ante context, where the probability of detection is high, the fundamental objective of a financial penalty is to internalise harm insofar as it exists. It therefore follows that for a financial penalty to be considered an effective enforcement mechanism, a detailed assessment of actual or potential harm need to be made when determining gravity.

Secondly, the practical difficulties of estimating harm for ex ante regulatory breaches are much lower than for ex post competition breaches, given that the offenders operate within a regulatory framework with comprehensive mandatory data reporting.

We also note that Oxera's proposed gravity factor distribution relies on case studies of serious ex post competition breaches, where gravity factors are 10-15% of relevant turnover. Oxera then effectively "extrapolates" these numbers to significantly less serious and potentially immaterial breaches, assuming gravity factors of 10%, 5% and 2% depending on the case. These benchmarks are either anchored on precedents from an ex post competition cases, which is inappropriate for ex ante breaches (as discussed above), or otherwise extrapolated on an arbitrary basis.

Lastly, we note that Oxera proposes that gravity factors should also be based on '*the market share of the breaching party*'. The offending party's market share therefore enters twice into the penalty calculation; once as a function of the gravity factor (G) and again in the value of relevant sales (V). Overall, this approach amounts to imposing a double-penalty on the basis of market share which has not been justified.

We consider that **this part of the proposal does not accurately represent the evidence in a balanced way.** In particular, Oxera asserts that gravity depends on the nature of the conduct and that any assessment of potential effects is optional and otherwise qualitative in nature.

As discussed earlier, few regulators rely on an explicit turnover-based formula and, therefore, there are few examples of gravity factors being determined in an ex ante context. However, as discussed earlier, when deciding whether a given breach is serious, most regulators do carry out an assessment of consumer harm. Indeed, out of the 16 case studies provided in Oxera's report, 15 involved an assessment of potential consumer harm made in the process of calculating a financial penalty.

Furthermore, the illustrative examples of gravity factor ranges provided by Oxera do not reflect the evidence in a balanced way. For example, BIPT's penalty

guidelines state that gravity factors should not exceed 5%. This is significantly lower than Oxera's proposed maximum of 10-15%.

Moreover, our review of BIPT precedents suggest that in practice gravity factors ranged between 0.25% to 4.5%. In 7 out of 11 cases (63%), gravity factors were below 1%. Note that these gravity factors were multiplied to niche (narrow) turnover, i.e. turnover specific to the affected customers.

When determining gravity factors, BIPT takes into account consumer harm as well as aggravating and mitigating circumstances.[35]

Based on our assessment of Oxera's proposals and the available evidence, we make the following recommendations for this step of the methodology:

OUR RECOMMENDATIONS

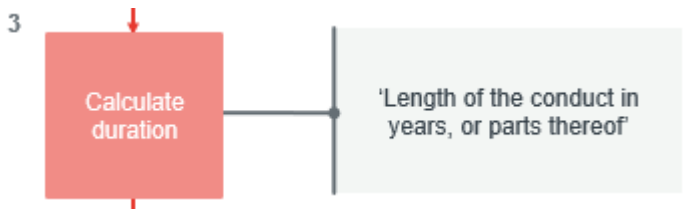
- When determining gravity factors, ComReg needs to take actual/ potential harm into account.
- Ex post competition cases, such as refusal to supply and margin squeeze cases, are not relevant in an ex ante regulatory context. Therefore, gravity factors used in those cases are not appropriate benchmarks.
- Gravity factors in ex ante context should not exceed a maximum of 3-5% (in line with BIPT and Ofwat guidelines and precedents)
- As stated earlier, a turnover-based approach should only apply to very serious breaches with significant consumer harm. For all other breaches, a tariff-based approach is more appropriate.

6.4 Turnover-based approach: establishing duration

6.4.1 Oxera's proposal

The methodology states that the duration is based on the length of the contravening conduct. There is relatively little discussion given to this point.

Figure 14 Oxera's proposed penalty methodology, turnover-based approach step 3



Source: *Frontier Economics, based on the methodology outlined in Oxera 2020*

Note: *The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2020.*

[35] For example, for in a breach, which involved incorrect invoicing, BIPT considered a gravity factor between 0.5% and 1% [Brutele (2017)]. However, as the breach only affected a subset of Brutele's customers, BIPT judged that the gravity factor should be 0.5%.

6.4.2 Frontier's assessment

This step is broadly justified, but more clarity is needed in its implementation. To the extent that one accepts a turnover-based approach as an appropriate methodology (which may not be appropriate in all cases), one then needs to determine the duration of the breach.

However, it is not clear from Oxera's proposal how to treat forms of conduct that are discontinuous and/or materially vary in form or intensity of effect over their duration. Taken at face value, this step of proposal implies that a single duration parameter is estimated every time a breach *event* occurs (and possibly a distinct corresponding gravity factor per event). However, Oxera has not defined what constitutes an event (e.g. a contravening behaviour/process or a market impact).

We also understand that in some cases a breach might not be evident to a regulated company acting diligently. This may be due to a difference in interpretation of new regulations, for example. It might also take time for ComReg to conclusively establish whether there is a breach. This, however, could then affect a duration period over which a penalty applies.

Given that ComReg investigations often take place over a number of years, the duration must exclude the time of ComReg's investigation until the operator under investigation is clearly informed that it is in breach and the nature of the breach. The duration should not include any period between ComReg opening a compliance case and the final determination of non-compliance, i.e. the Opinion of Non-Compliance.

OUR RECOMMENDATIONS

- The methodology needs to be clear on how to treat discontinuous breaches. We propose to treat them as separate events and to assess consumer harm separately for each event.
- The duration should not include any period between ComReg opening a compliance case and the final determination of non-compliance, i.e. the Opinion of Non-Compliance

6.5 Turnover-based approach: accounting for aggravating or mitigating circumstances

6.5.1 Oxera's proposal

The methodology states that discounts to the basic amount of up to 50% might be permitted where '*a breach was not deliberate, where it has since been remedied, and where there has been cooperation with the regulator*', whilst penalties might be increased by this or a different percentage for recidivism.

The methodology suggests that this should be implemented by defining a set of aggravating and mitigating factors that would trigger changes – but that the corresponding percentage discounts themselves are *not* set out in advance so as to retain regulator discretion.

Figure 15 Oxera's proposed penalty methodology, turnover-based approach step 4

Source: Frontier Economics, based on the methodology outlined in Oxera 2020

Note: The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2020.

Oxera provide the follow list of aggravating and mitigating circumstances that should be considered at this step of the methodology:

Figure 16 Proposed aggravating and mitigating circumstances

- 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
- 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 2020

6.5.2 Frontier's assessment

The main drawback of Oxera's proposed methodology is that it does not propose to consider these factors at the earlier stages, e.g. when determining whether a financial penalty is appropriate (Step 1) and whether to apply a tariff or a turnover-based approach (Step 2).

Our review of the regulatory precedents discussed above suggests that sector regulators (Ofcom, Ofwat, Ofgem and ORR) take these factors into account at the early stages of their assessment. This is discussed in detail in Section 4.2.

We also consider **that this step of the proposal, as currently presented, is not clear and is not consistent with the evidence.** In particular, it is not clear whether the set of aggravating or mitigating circumstances should be considered exhaustive or illustrative. It is also not clear how an accepted aggravating or mitigating circumstance should be accounted for in the final penalty, even if ultimately the proposed mechanism is not intended to be signalled to firms up front.

Whilst the set examples provided by Oxera represent the breadth of factors typically considered by regulators, we find that Oxera's proposal to remove any certainty from their application is not consistent with the evidence.

Ofcom, in its revised guidelines (2017), explicitly sets out a tiered approach to penalty discounts on the basis of clearly defined mitigating circumstances. In particular, Ofcom states that fines may be reduced if voluntarily settled by the entity in breach according to the following three tier scale:

- 30% reduction where settlement is commenced before provisional breach notification is issued;
- 20% reduction where settlement process is commenced after provision breach notification is issued but prior to written representations being received;
- 10% reduction where a successful settlement process is commenced after written representations are received.

Ofgem's penalty guidelines (2014)[36] also set out the same discount scheme.

Based on our assessment of Oxera's proposals and the available evidence, we make the following recommendations for this step of the methodology:

OUR RECOMMENDATIONS

- Aggravating and mitigating circumstances need to be taken into account at all stages of the process, and not only at the final stage (as suggested by Oxera).
- There should be more clarity on how mitigating and aggravating circumstances will affect the amount of penalty.

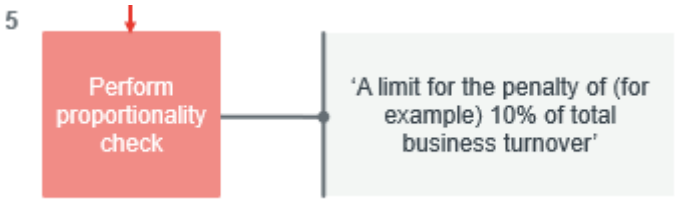
6.6 Turnover-based approach: performing proportionality check

6.6.1 Oxera's proposal

The final step of the proposed turnover-based approach is to determine whether the calculated penalty is within a specified threshold related to the offending firm's turnover. Oxera does not propose an explicit threshold, but instead offers an example of '10% of total business turnover could apply (although in practice this might be greater or lesser than 10%'). This step of the proposal is represented in Figure 17.

[36] https://www.ofgem.gov.uk/sites/default/files/docs/2014/11/financial_penalties_and_consumer_redress_policy_statement_6_november_2014__0.pdf

Figure 17 Oxera's proposed penalty methodology, turnover-based approach step 5



Source: Frontier Economics, based on the methodology outlined in Oxera 2019

Note: The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2016 and Oxera 2019.

6.6.2 Frontier's assessment

We consider that this step of the proposal is not clear and not sufficiently justified. In particular, Oxera does not define what is meant by 'business turnover', which could relate to anything from turnover on the market affected by the breach to the total annual turnover of the offending firm accrued from telecommunications activities.

Oxera does not elaborate on how to determine an appropriate percentage multiplier to apply to their definition of 'business turnover'. It appears to justify the 10% threshold on the basis of selected statutory limits from the UK and Netherlands.

We note that the maximum fine a UK regulator can impose is 10% of the regulated company's turnover in the relevant year. However, in practice penalties tend to be significantly lower than the threshold. In particular, Ofwat's penalty guidelines states that *'Although, we [Ofwat] have the power to set penalties of up to 10% of a company's turnover, in the past, where a substantial penalty has been imposed it has been **between 0.3% and 3.5% of the company's turnover**.'*[37]

We also note that BIPT states in its penalty guidelines that fines should not exceed 5% of the offending party's total turnover.[38]

[37] https://www.ofwat.gov.uk/wp-content/uploads/2015/11/Approach-to-enforcement.pdf

[38] https://www.bipt.be/file/cc73d96153bbd5448a56f19d925d05b1379c7f21/7cfbd2a0b407116e47c56f763f1f7f5c5bc6885c/Communication_lignes_directrices_calcul_montant_amendes_administratives.pdf

7 AN ASSESSMENT OF OXERA'S METHODOLOGY: IMPLEMENTING A TARIFF-BASED APPROACH

7.1.1 Oxera's proposal

In the closing remarks of the general methodology proposal, Oxera sets out a complementary penalty calculation approach: tariff-based approach. As discussed in Section 5, the methodology stipulates that '*less serious*' ex ante breaches should follow a tariff-based penalty, whilst '*serious*' breaches should follow a turnover-based penalty[39]. The tariff-based approach proposal is summarised in Figure 18.

Figure 18 Oxera's proposed penalty methodology, tariff-based approach step 1

Source: Frontier Economics, based on the methodology outlined in Oxera 2020
Note: The above is a characterisation of Oxera's proposed methodology, as outlined in Oxera 2020.

The proposal states that aggravating circumstances (specifically recidivism or precedence of similar breaches being penalised) would be 'taken into account' in applying the subsequent tariff. Lastly, the penalty would be subject to a maximum cap 'in €, potentially related to wholesaler turnover in the market segment concerned'.

ComReg, in its consultation document, proposes the maximum cap to be set at €500,000. ComReg further proposes to set the fixed and weekly tariffs at €10,000.

7.1.2 Frontier's assessment

As discussed in Section 5.2 above, where a financial penalty has been justified, the tariff-based approach should be considered the default methodology for most breaches, with only very serious breaches (with very significant consumer harm and other aggravating circumstances) being considered under the turnover approach.

In light of that, it may be appropriate to have a range of different weekly fixed fees (with the maximum fee of €10,000). This variation in weekly fees would allow ComReg to better capture differences in breaches (in terms of aggravating and

[39] We discuss the definition of 'serious' and 'less serious' in Section 0.

mitigating circumstances and in terms of materiality of the harm caused to consumers and competitors).

Further, as discussed in Section 6.4.2, we note that in some cases a breach might not be evident to a regulated company acting diligently. This may be due to a difference in interpretation of new regulations, for example. It might also take time for ComReg to conclusively establish whether there is a breach. This, however, could then affect a duration period over which a fixed penalty applies. Again, this issue needs to be explicitly addressed in the penalty methodology. Indeed, if there is a delay due to ComReg's assessment of the case, this should not affect the duration period for the purposes of penalty calculations.

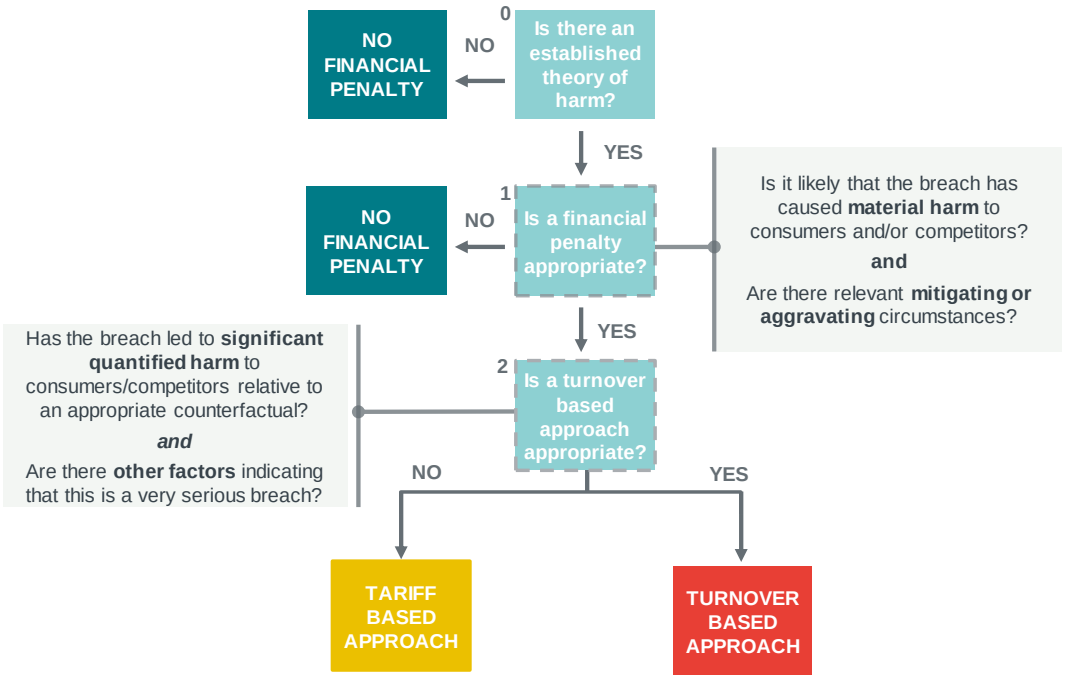
RECOMMENDATIONS

- Weekly fees – ComReg should introduce a range of weekly fixed fees (with maximum weekly fee of €10,000) to reflect different aggravating/ mitigating circumstances and materiality of harm.
- The duration should not include any period between ComReg opening a compliance case and the final determination of non-compliance, i.e. the Opinion of Non-Compliance

8 SUMMARY OF OUR RECOMMENDATIONS

Figure 19 summarises our recommendations for the conceptual framework for determining financial penalties in the context of breaches of ex ante regulatory obligations, with Steps 1 and 2 being particularly critical.

Figure 19 Summary of our recommendations



Source: Frontier economics

Step 1: Is a financial penalty appropriate?

Some breaches might not require a financial penalty even if one can establish a 'theory of harm' related to the breach. In order to come to a view whether a penalty is justified, at a high level, it will be necessary to assess **whether the breach is likely to cause material consumer and/or competitor harm**. While a detailed quantification is not required at this stage, careful consideration should be given to all the relevant information, which would form the basis for a reasonable initial assessment.

At this stage, **any aggravating or mitigating circumstances**, which might influence the decision, should also be considered. Our review of regulatory precedents suggests that regulators typically consider the following questions:

- Was this breach a result of deliberate and/or reckless behaviour?
- Is this the first breach of its kind or a repeated breach?
- Has the operator in breach co-operated with the investigation?
- Was the breach self-reported?

- Has the operator in breach displayed proactive steps to ensure a similar breach does not occur again?[40]

If it is established that the likelihood of significant consumer/ competitor harm is small and there are no aggravating circumstances, it would be reasonable to conclude that a financial penalty is not needed, even if some theory of harm could be established.

Step 2: If a penalty is justified, should it be calculated using a turnover- or a tariff-based approach?

Based on regulatory precedent and best practice, it appears that a turnover-based approach might in general only be applicable to **very serious breaches, which caused significant consumer/ competitor harm and had other aggravating circumstances** (e.g. deliberate reckless behaviour, repeat offence, the operator refused to cooperate with investigation).

At this stage, a detailed estimation/quantification of actual consumer / competitor harm should be carried out, and an evaluation of whether there are any other factors, which might suggest that this is indeed a very serious breach. While there is clearly no one-to-one relationship between the consumer harm and the penalties imposed, the regulators typically refer to '*millions of pounds/ euro'* damages to consumers as one of the justifications for significant fines.

Recommendations on the application of a tariff-based approach

We recommend that a range of different weekly fixed fees should be considered to better capture differences in breaches (in terms of aggravating and mitigating circumstances and in terms of the materiality of the harm caused to consumers and competitors). In view of the fact that the €10,000 proposed by Oxera does not reflect the likelihood that some of the breaches could prove to have a relatively small consumer harm, it would seem appropriate to consider this as the maximum that could apply.

Recommendations on the application of a turnover-based approach (for very serious breaches)

The turnover-based approach relies on 3 key parameters – relevant turnover, gravity factor and duration.

On the **relevant turnover**, we recommend that:

- There should be a clear link established between the definition of value of sales considered in the turnover calculation and the established theory of harm.
- The starting point for determining the relevant turnover must be the revenues attached to groups of customers / market sub-segments affected by the breach (either directly or indirectly).

[40] These circumstances should be considered 'in the round' rather than cumulatively, and their relevance may vary by type of breach.

On **gravity factors**, as mentioned earlier, Oxera's proposed gravity factors are based on case studies of serious ex post competition breaches, where gravity factors were 10-15% of relevant turnover. We recommend that:

- When determining gravity factors, actual/ potential consumer harm needs to be taken into account.
- Gravity factors in ex ante context should not exceed a maximum of 3-5% (in line with BIPT and Ofwat guidelines and precedents).

On **duration** of the breach, we understand that sometimes it might take time for ComReg to conclusively establish whether there is a breach. If there is a delay due to ComReg's assessment of the case, it would seem reasonable for this to be taken into account when assessing the duration period for the purposes of penalty calculations.

Finally, Oxera proposes that, as a final proportionality check, the total fine should not exceed 10% of the offending company's turnover. As with gravity factors, we consider this threshold to be too high for ex ante regulatory cases. We would propose that it should be reduced in line with sector regulators' precedents.

ANNEX A EIR'S REGULATORY GOVERNANCE MODEL

eir is subject to a large number of regulatory obligations aiming to limit its market power. In particular, it is obliged to provide access to its network, to minimise the risk of discrimination between eir's own downstream division and other downstream operators, to conduct its business in a transparent manner, to not charge excessive prices for its wholesale services, and to maintain accounting separation for its wholesale and retail activities. The regulatory governance model (RGM) is how eir embeds practices to ensure compliance with its regulatory obligations and has been in place for several years.

eir's RGM was originally designed to function in two main ways: 1) to control the ***ability*** of individuals within eir to behave in a discriminatory manner, and 2) to minimise the ***incentives*** of staff to unduly discriminate by addressing the motivation for discriminatory behaviour. In December 2018, eir and ComReg reached a settlement in respect of ongoing compliance litigation, resulting in a set of commitments, the RGM Undertakings, which resulted in the establishment and operation of an enhanced RGM. The Undertakings fall under three pillars: governance, assurance and data governance and management.

- Governance
  - Putting in place and documenting measures to manage/mitigate potential regulation related conflicts of interest, a full review of the entire risk environment and the implementation of any additional controls identified as part of the review.
  - The establishment of an Independent Oversight Body (IOB) tasked with oversight of the operation and effectiveness of eir's RGM. The IOB consists of 5 members, 2 non-executive directors from the eir Board and 3 members nominated by ComReg, including the Chairperson. It can issue recommendations to the eir Board in relation to issues it has identified and will issue and publish an annual report and convene an annual meeting with all Industry stakeholders.
  - An internal RGM Committee ensures that the RGM undertakings are implemented and operationalised across eir.
  - Further governance is operated through separate fora including the Wholesale Senior leadership Team, separate Senior Management Team (SMT) for open eir and eir retail, the Product Development Council (PDC), the IT portfolio Board and the Network Portfolio Board.
  - Performance management and incentive remuneration for the wholesale function solely reflects objectives of the function while performance management for internal Audit relating to RGM are based on their objectives and not the financial performance of the group.
  - All employees are required to annually complete a mandatory training course online outlining eir's regulatory obligations. Employees who do not complete

the mandatory training are not eligible to receive a bonus. There are also HR policies to ensure disciplinary procedures are in place if employees are found to have breached the code of conduct.

- In addition to the code of conduct, there are whistleblowing policies in place and a wholesale operator complaints process.

- Assurance
  - eir has established a three lines of defence model comprising of 1) eir's business units and a self-certification process; 2) the risk management function to administer the self-certification process, the risk testing function and the Wholesale Regulatory Operations function acting in an advisory capacity and 3) an independent assurance function, Internal Audit.
  - For RGM matters, Internal Audit has a functional reporting line to the IOB.
  - The IOB receives regular reporting on the operation of the RGM in addition to copies of mandates for the 2nd line of defence and relevant Internal Audit reports.
- Data governance and management
  - All employees are subject to a business access review (BAR) and technical system data segregation (TSDS) reviews, which, on a quarterly basis, reviews employees access to IT systems on a need to know basis.
  - CRI guidelines and overarching policy on the management of data handling for Confidential Regulated or Confidential Wholesale information exist and are communicated through the code of conduct and HR disciplinary process exist if breaches occur.

eir's RGM has evolved since 2013 with substantial enhancements introduced in 2019. The IOB was established over a year ago in May 2019. eir has obligations to provide very detailed Statements of Compliance (SoC) in all regulated markets. The SoC must be reviewed and updated each time there is a change to an existing regulated access product / service or a new regulated access product / service is introduced. The SoCs and the operation of the RGM are scrutinised by a dedicated team in ComReg: the Regulatory Governance Unit. Because of these comprehensive procedures and reporting tools in place, the probability of eir committing regulatory breaches is generally low and the probability of breaches that did take place being detected is high. Breaches can be identified through numerous avenues.

ANNEX B CASE STUDY – APPLYING OXERA'S METHODOLOGY TO THE PAST NON-DISCRIMINATION AND TRANSPARENCY BREACHES

[✂]

ANNEX C REVIEW OF CASE STUDIES PRESENTED IN OXERA 2020

Figure 20 Frontier Economics review of harm assessments in the case studies presented in Oxera 2020

Case study title (as per Oxera 2020	Assessment of harm evidenced
Belgium telecoms margin squeeze (ex post competition)	▪ 'The BCC set a gravity percentage at 15% […]. 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'
Source:	*Extracts provided in Oxera 2020*
South Africa penalties assessment: rebates (ex post competition)	▪ The table below sets out the weights that the tribunal assigned to different considerations in assessing the penalty. […] **'b) loss or damage as a result of the contravention […] d) market circumstances e) level of profit derived**.
Source:	*Extracts provided in Oxera 2020*
South Africa penalties assessment: cartels (ex post competition)	▪ '[…] we must accept Vulcania's and RMS's version that the cartel arrangements were not lucrative and that the **firms involved did not make undue profits as a result of its existence**. There is also evidence that rebar was considered a substitute for customers seeking an alternative form of reinforcement to wire mesh. To some extent the installed price of rebar would have acted as a price ceiling on the installed price of wire mesh.'
Source:	*Competition Tribunal of South Africa (2012), Competition Commission v Aveng (Africa) Limited t/a Steeldale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd, BRC Mesh Reinforcing (Pty) Ltd, 7 May.*

Case study title (as per Oxera 2019)		Assessment of harm evidenced
South Africa penalties assessment: abuse of dominance (ex post competition)		▪ '**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 £641,922,696 by 30%.
	Source:	*Extracts provided in Oxera 2020*
Telekomunikacja Polska (ex post competition)		▪ 'The commission demonstrated that TP's conduct was likely to constrain the ability of DSL operators to compete effectively in the retail market.' ▪ 'It was also observed that there was a low take up of BSA and LLU lines, and that TP remains the largest xDSL supplier on the retail market. **The low number of unbundled local loops is a revealing indicator of the likely effect of TP's refusal to supply access to its wholesale products, delaying the growth of competition and thereby the development of alternative infrastructures**.' ▪ '[Telekomunikacja Polska, 'TP'] **conduct resulted in a low broadband penetration rate** […] By January 2010 Poland had the third lowest penetration rate in the EU (13.5%) and had experience an increase in the number of lines of around 2% only. One should expect [absent the conduct] that **the growth in the penetration rate in Poland should be higher compared to the mature markets such as the Netherlands than the rate in Poland**.'
	Source:	*'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 – Telekommunikacja Polska, 22.06.2011*

Case study title (as per Oxera 2019)	Assessment of harm evidenced
Penalties for regulatory breaches in the Netherlands: KPN Jan-14	▪ 'As a result of this delay, **the State alone suffers a damage in the millions of euros** that, given that until now the contract was note possible, are still increasing.' ▪ 'the delay around the fixed telephony cluster caused the government parties involved in the tender to receive 1 million euros cost per month'
Source:	*Decree of the Board of the Independent Post and Telecommunications Authority on the ground of Article 15.4 of the telecommunications Act to impose a fine in respect of violation of the obligations arising from article 6.a2 jo 6a.8 and 6a.9 of the Telecommunications Act in the Fixed Telephony Market Analysis Decree have been imposed. OPTA / AM / 2011/202958 21.12.2011*
Penalties for regulatory breaches in the Netherlands: KPN Sep-14	▪ 'In view of what has been considered for this purpose with regard to the gravity of the offence, the economic context and the particular circumstances of the case, ACM qualifies the breach of the transparency obligation with regard to the service *21Online is not considered serious, but as less serious.' ▪ 'ACM also considers that **the economic impact of the violation, given the limited level of turnover concerned and given the number of customers, is expected to be limited**.'
Source:	*Decision of the Consumer and Market Authority to impose two fines on Royal KPN N.V. and KPN B.V. in the area of non-discrimination violations transparency obligation ex Article 6a.8 and Article 6a.9 of the Telecommunications Law. 14.0222.32 01.06.2014*
Penalties for regulatory breaches in the Netherlands: KPN Jul-15 Part A: fine relating to SDF backhaul	▪ '**there are some indications that the market for SDF backhaul, regardless of the way in which KPN has used its significant market power, would be underdeveloped**. ACM therefore deems a moderate fine to be used for the violations in place'

Case study title (as per Oxera 2019)	Assessment of harm evidenced
Source:	*Decision by the Netherlands Authority for Consumers and Markets to impose a fine Koninklijke KPN NV and KPN BV for violations of those imposed on it transparency obligations, non-discrimination obligation and ND-5 obligation pursuant to Article 61.2, first paragraph, of the Telecommunications Act jo. Article 6a.9 and Article 6a.8 of the Telecommunications Act. 14.1207.32 23.06.15*
Penalties for regulatory breaches in the Netherlands: KPN Jul-15 Part B: fine relating to SDF backhaul	No apparent assessment of potential effects of the conduct from the original decision.
	Decision by the Netherlands Authority for Consumers and markets to impose a fine Kominkiljke KPN NV and KPN BV with regard to violations of the non-discrimination and transparency obligation under Article 6a.2 in conjunction with Article 6a.8 and Article 6a.9 of the Telecommunications Act accompanying the Market Analysis Decisions VT 2008 and VT 2012 was imposed on them. 14.0681.32 23.06.15
Ofcom's assessment of BT contravention	▪ 'We [Ofcom] reduced the amount of the penalty we were provisionally minded to impose mainly on account of BT's representations about: **the limits to practical harm arising from the contravention'** ▪ 'Applying the methodology we used in the 2011 Consultation to estimate lost consumer and externality benefits, and applying a slight adjustment following BT's representation that its Subscribers now only comprise [redacted]% of NGTR users, would **produce an estimate of lost benefits, and corresponding financial harm, arising from the contravention of only around £70,000**.'
Source:	*Notification of the 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"). 16.03.15*

Case study title (as per Oxera 2019)		Assessment of harm evidenced
Ofcom case study: £42m penalty levied on BT		▪ '**Harm was 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')'
	Source:	*Extracts provided in Oxera 2020*
Penalties for regulatory breaches in Spain: Telefónica Mar-17		*This decision is currently pending an appeal on the grounds of the criteria used to establish the proven facts of the contravention.*
Penalties for regulatory breaches in Spain: Telefónica Apr-18		▪ '**the NPV of the amount by which Telefónica's bid was below the economically replicable level, amounting to approximately €8.5m**'
	Source:	*Extracts provided in Oxera 2020*
Penalties for regulatory breaches in Spain: Telefónica Apr-19		▪ 'the infringement was over a long duration (2012-18) and was particularly severe in 2017-18' ▪ '**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'**
	Source:	*Extracts provided in Oxera 2020*
Penalties for regulator breaches in Croatia		No public documents
Penalties for regulatory breaches in Slovenia		No public documents

Case study title (as per Oxera 2019)		Assessment of harm evidenced
Case study: financial penalty levied on Permanent TSB		▪ 'In deciding on the appropriate sanctions, the Central Bank took into account, among other things: the effect of the contravention on customers' ▪ 'This fine is the largest imposed to date by the Central Bank under the ASP. It reflects the gravity with which the Central Bank views PTSB's failings and the **unacceptable harm PTSB caused to their tracker mortgage customers, from extended periods of significant overcharging to the loss of 12 family homes and 19 buy to let properties**.' ▪ 'The effect of PTSB's failings on 2,007 customer accounts, including the loss of 12 family homes and 19 buy to let properties.'
	Source:	*Extracts provided in Oxera 2020, and;* *Enforcement Action: The Central Bank of Ireland and Permanent TSB p.l.c.*
Case study: financial penalty levied on Radio Teilifís Éireann (RTÉ)		▪ 'There was **no gain (financial or otherwise) made by RTÉ as a consequence of the breach**' ▪ 'The impact [of the breach on the complainant] was particularly severe'
	Source:	*Statement of findings issue pursuant to section 55(2) of the Broadcasting Act 2009. The Broadcasting Authority of Ireland (2012).*
Case study: the CNIL fine on Google		▪ "**The number of people affected was particularly significant**" ▪ "**The large amount of information collected could be used to draw inferences about people's lifestyles and habits, and therefore closely concerned their identify and privacy**" ▪ "Given the above factors, the breaches were of a particular gravity"
	Source:	*Extracts provided in Oxera 2020*

ANNEX D BIPT PRECEDENTS

Figure 21 BIPT precedents between 2017-2020

Date	Company	'Niche' Market Definition for Turnover	Gravity Factor	Reasons given for choice of gravity factor[41]
Breach: Prior identification of end-users of prepaid cards				
Jan-20	Telenet	Residential Market for mobile services provided via prepaid cards	0.25%	▪ Qualitative assessment of harm to end-users (*effects*) ▪ Failure to comply with one aspect of the regulation (*conduct*)
Jan-20	Proximus	Residential Market for mobile services provided via prepaid cards	0.50%	▪ Number of users affected / misidentified (*effects*) ▪ Illustrated large-scale problem in monitoring (*effects*) ▪ Failure to comply with 2 aspects of the regulation (*conduct*)
Jun-18	Lycamobile	Market for mobile services provided via prepaid cards	3.00%	▪ Qualitative assessment of harm on end-users (*effects*) ▪ Breached an elementary guideline (*conduct*) ▪ Regulation relates to protection of public order (*conduct*)
Breach: Roaming charges				
Oct-17	Lycamobile	Whole market as potentially all customers affected	0.01-1%	▪ Several hundreds of thousands of customers affected (*effects*)
Breach: Lack of cooperation with the Office of the Ombudsman for Telecommunications				
Nov-17	Lycamobile	Whole market as potentially all customers affected	0.01-1%	▪ Widespread potential affects qualitatively assessed (*effects*) ▪ Failure to comply with Mediation Service (*conduct*)

Note: this table continues on the following page

[41] This column reports key factors assessed in the determination of gravity by BIPT, which can be categorised as under either 'potential harm' or 'conduct'.

Date	Company	Niche Market Definition	Gravity Factor	Reasons given for choice of gravity factor
	Breach: Shortcomings in the invoices			
Oct-17	Orange	Fixed broadband revenues	0.80%	▪ Information was not available (*effects*) ▪ Only customers who had switched contracts were impacted (*effects*)
Oct-17	SFR	Fixed broadband internet revenues	0.7%	▪ Qualitative assessment on impact on end-users (*effects*) ▪ Information was not transparently available (*conduct*)
Apr-17	Brutele	Fixed broadband revenues, including a factor to account for only the subset of customers affected	0.50%	▪ Qualitative assessment on impact on end-users, as quantitative aspect unfeasible (*effects*) ▪ Factoring that not all users were affected (*effects*) ▪ Information was available, but difficult to retrieve (*effects*)
Apr-17	Nethys	Fixed broadband revenues, including a factor to account for only the subset of customers affected	0.50%	▪ Qualitative assessment on impact on end-users (*effects*) ▪ Quantitative aspect unfeasible ▪ Factoring in that not all users were affected (*effects*) ▪ Information was available, but difficult to retrieve (*effects*)
	Breach: Under-operation of selected frequency bands			
Jan-18	Gigaweb sprl	Whole market as potentially all customers affected	4.50%	▪ Prevents users from having to greater coverage (*effects*) ▪ Lower impact due to rural customer base (*effects*) ▪ Failed to meet commitment in 50% of assigned municipalities (*conduct*)

Jul-17	**Citymesh**	**Whole market as potentially all customers affected**	**3.00%**	▪ **Prevents users from having to greater coverage (*effects*)**

ANNEX E FRONTIER'S REVIEW OF OFCOM PRECEDENTS

Figure 22 List of breaches with no penalty, Ofcom (2018-2020)

Date	Party	Breach	Justifications provided
Jan-20	Openreach	Excess Construction Charges	Limited consumer harm; Voluntary reimbursement to affected customers
Oct-19	Openreach	Statutory information request	Proactive steps taken
Aug-19	BT	Statutory information request	Self-reporting; Reimbursement; No direct harm; Full cooperation
Mar-19	Lycamobile	Roaming charges	Remedial action; Reimbursement; No prior history
Jan-19	Vodafone	Statutory information requests	Reviewed and updated its approach; Full cooperation
Oct-18	EE	Statutory information requests	Compensation policy established for affected customers; Full cooperation
Aug-18	Vodafone	EU Open Internet Access Regulation	Written assurances; No material reduction in customer choice
Aug-18	Three	EU Open Internet Access Regulation	Written assurances
Aug-18	O2	EU Open Internet Access Regulation	Written assurances
Jun-18	Royal Mail	Quality of service	Minimal difference in quality; Limited consumer harm; Proactive steps taken
May-18	Direct Save Telecom	Debt recovery or disconnection	Written assurances; Administrative priority grounds

Source: *https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases*

frontier economics

www.frontier-economics.com

4: Sky Ireland Limited

Sky response to CONSULTATION ON CALCULATING PENALTIES FOR ACCESS REGULATIONS BREACHES – 20/25 (non-confidential)

1. Since Sky's entry into the broadband market in 2013 there has been significant and conclusive evidence of breaches of the Access Regulations by Eircom Ltd ("Eircom"). In the same period, Eircom has effectively been fined a meagre €3m for a fraction of those breaches that had a material impact on competition and OAOs, while at the same time it earned revenues of just under €10bn. Numerous other breaches have gone completely unchecked in Sky's opinion.

2. The only substantive cases taken by ComReg seeking fines totalling €10m were settled out of court between ComReg and Eircom pursuant to a legal action taken by Eircom against the Irish State in relation to the transposition of the European Access Directives into Irish law in 2011. The €3m penalties (to be paid over 3 years) eventually settled on did not fulfil the requirements of 21 (a) of the Framework Directive insofar as being "*appropriate, effective, proportionate, and dissuasive*". As part of the settlement, ComReg secured agreement from Eircom to install an Independent Oversight Board ("IOB") as part of its regulatory governance model (RGM). For all intents and purposes, as far as the rest of industry can observe, the IOB has had no substantive impact on the RGM in Eircom, has had only limited engagement with OAOs which it ostensibly is supposed to protect, and as such has done little but add an additional layer of administration to a clearly dysfunctional RGM.

3. In the two and half years since ComReg reached the settlement with Eircom, it is difficult to view the settlement as anything other than, at best, well-meaning but ill-conceived.

4. What was peculiar about the settlement agreement reached in December 2018 was that ComReg were not the defendant in the legal proceedings taken by Eircom but rather were joined as a notice party to a case taken by Eircom against the Irish State. The implications of ComReg reaching a settlement with Eircom in order that it drop its proceedings against the Irish State (which appears to have been a silent bystander in those discussions) has meant that Eircom succeeded in: (1) materially reducing the level of the fines being proposed by ComReg, which were at a level that arguably met at least some of the objective of being "*appropriate, effective, proportionate and dissuasive*", to a new level that ensured none of these objectives were achieved, and (2) Eircom reserved its rights to take precisely the same challenge against the Irish State again in the event that ComReg sought to impose a fine under Regulation 19 commensurate with the objectives of 21 (a) of the Framework Directive.

5. With respect to the second aspect of the deal struck with Eircom, the incumbent's intent to preserve its rights to take the same legal approach pursuant to any future fine sought by ComReg is called out in the settlement agreement in great detail:

> *"The parties agree that eir will not be precluded, estopped or otherwise prevented from raising the issues, arguments and grounds raised in the Regulation 19 Proceedings in any subsequent proceedings (including but not limited to any proceedings challenging Regulation 19 of the Access Page | 5 Regulations, or any like provision), and that no argument of issue estoppel, res judicata, abuse of process or other such argument will be raised against eir in any subsequent proceedings on the basis of any of the arguments, issues or grounds raised by eir in the Regulation 19 Proceedings…..For the avoidance of doubt, eir's execution of the Settlement Agreement, payment of the settlement monies described in clause 3 below, and any future engagement by eir with ComReg (including but not limited to engagement in any consultation processes regarding Regulation 19 of the Access Regulations or any like provisions) are wholly without prejudice to eir's position in the Regulation 19 Proceedings and to eir's rights to raise the arguments, grounds and issues raised in the Regulation 19 Proceedings in any legal proceedings in the future and do not constitute an acceptance by eir of the validity of Regulation 19 of the Access Regulations or of ComReg's right to seek the imposition of financial penalties under Regulation 19 of the Access Regulations or any like provision."*

6. It is clear from this passage that Eircom does not accept the legality of the enforcement powers granted to ComReg under Regulation 19. The Irish State, ComReg and most importantly the parties that rely on Eircom's compliance with the Access Regulations in order to compete in the market, i.e. the OAOs, would have been better served had the Irish High Court answered the question posed by Eircom's litigation for better or worse.

7. The limbo the settlement agreement has left ComReg and the industry in as a consequence of this question not being answered would appear to have paralysed ComReg in relation to taking appropriate action against Eircom for breaches of the Access Regulations, while at the same time and in equal measure emboldened Eircom to take an increasingly ambivalent attitude towards compliance. It is only logical that a SMP operator identified in multiple decisions by ComReg as having the "*incentive and ability*" to engage in anti-competitive behaviour will be more likely to do so when there are little or no material repercussions for pursuing such a strategy. Sky has previously made submissions that the culture of non-compliance is, at least partly as a direct consequence of ComReg's failure to take necessary enforcement proceedings against Eircom and we consider that to be an on-going contributory factor.

8. It would appear from the outside, that ComReg's inaction owes something to the fact that it may consider there is merit in the technical legal arguments made by Eircom in its action against the Irish State. This is also evident by the very fact that it reached such a settlement in the first instance which involved very serious issues

of non-compliance by Eircom that materially impacted on competition and by extension Irish consumers. However, it is unclear why ComReg was unwilling to allow the court to provide an unequivocal answer to the question if the implication of settling has been to carry on as though the High Court ruledin Eircom's favour in any event. Had the High Court ruled in Eircom's favour, the Irish Government would have been required to address the matter urgently via new primary legislation in order to remain complaint with European law and the two and a half years and counting would not have been lost in the meantime.

9. The time lost would also appear to make this current consultation entirely meaningless and unnecessary when far more pressing issues, like an Access Network Review that is more than 2 years late, ought to have been focussed on. Of fundamental importance is that these Access Regulations have been in Irish law since 2011 (9 years) and will become obsolete on 21 December 2020.

10. In this regard, Article 29(1) of the Directive establishing the European Electronic Communications Code (Directive 2018/1972) 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.*

11. The issue of laying down rules on penalties is therefore a matter for the Irish Government between now and the end of this year and it is difficult to see how this consultation will feed into this process. The consultation therefore seems to be more about fulfilling a term of the settlement agreement whereby ComReg agreed to carry out a consultation as a condition of settlement demanded by Eircom.

12. Notwithstanding the above, Sky provides the following responses to the questions in the consultation:

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?

Sky are in broad agreement that for breaches of the Access Regulations the Turnover Methodology would achieve the objectives outlined.

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?

Sky consider that for more serious offences the Turnover Methodology would be appropriate and the seriousness of such breaches needs to be considered on a case by case basis as opposed to assuming breaches of certain obligations (e.g. transparency) will never fall into this category.

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?

Sky agree this is proportionate for breaches of the Access Regulations by SMP operators.

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?

Sky consider the Tariff methodology may be appropriate but the seriousness of breaches should be dealt with on a case by case basis as opposed to assuming breaches of certain obligations (e.g. transparency) will never fall into the most serious category.

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?

See answer to Q 4

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?

This may be appropriate on a case by case basis.

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?

Sky consider that in the circumstances described an on-going failure to comply should see penalties increase given initial penalties have not been sufficient to drive behaviour.

Q. 8 Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?

Sky consider setting a cap could defeat the purpose of achieving compliance and frustrate ComReg's ability to enforce compliance once the cap is reached in scenarios described under question 7. Once the cap is reached there needs to be some form of jeopardy on the SMP provider where non-compliance is on-going.

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?

These do not appear unreasonable but should be dealt with on a case by case basis

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?

Operators should have transparency on how ComReg calculate penalties when they have settled on a proposed penalty. The extent to which they should have transparency prior to being to a breach is highly questionable however. Operators should not be engaged in exercises where they can calculate trade offs between actively pursuing a strategy of non-compliance against the likely penalty they will incur in such a scenario. ComReg should approach the appropriate penalty to each breach on a case by case basis to avoid such gaming of the process. In this regard, operator uncertainty about the likely penalty they will face for a breach is likely to promote compliance because the jeopardy faced will always be informed by the maximum penalty.

17 June 2020

5: Virgin Media Ireland Limited

Virgin Media response to:

Consultation: Calculating penalties for Access Regulations breaches

ComReg 20/25

18th June 2020

Virgin Media Ireland Limited ('Virgin Media') welcomes the opportunity to respond to ComReg's Consultation ('the Consultation') on Calculating penalties for Access Regulations breaches ('ComReg 20/25).

Virgin Media welcomes this consultation as the outcome of this process will clarify how penalties are calculated in response to breaches of the requirements under the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 ('the Access Regulations')[1].

Any entity operating in a regulated environment faces much uncertainty. This is not only the case when new regulations are introduced but also when the regulatory authorities initiate compliance cases and issue notifications of non-compliance. Such cases necessitate the investment of significant resources and can result in hefty penalties.

Clarity on the interpretation of requirements and what is expected of entities is essential for regulated operators. Unclear regulatory requirements and regulatory environment can create significant levels of uncertainty and can have a severe impact on the ability of telecommunications providers to continue providing essential services to end-users.

While understanding that these proposals focus on the Access Regulations only, such guidelines can assist operators to better understand what penalties could be imposed for any unforeseen issues therefore allowing them to plan accordingly.

ComReg has designated Virgin Media with Significant market power (SMP) in markets 1 and 2 of the European Commission's list of recommended markets (the fixed and mobile termination markets). As such, pursuant to Regulation 12(1) of the Access Regulations, Virgin Media has obligations to provide access and must meet all reasonable requests from undertakings for the provision of access.

ComReg proposes that the Turnover Methodology is utilised for more serious breaches of the Access Regulations and proposes that it will be calculated by considering the relevant portion of turnover, the gravity of the breach and its duration followed by an application of mitigating and aggravating factors to calculate a financial penalty. ComReg also proposes that there will be a financial cap of 10% of turnover of the operator in its last complete financial year prior to the breach for such penalties.

Virgin Media believes that the cap of turnover must be on the turnover of the specific market that the breach is associated with in the jurisdiction. Article 21a of the 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), stipulates that rules for penalties associated with breaches of obligations *"…must be appropriate, effective, proportionate and dissuasive."*. It would be disproportionate to introduce a cap on turnover on the entire turnover of the entity that is in breach. Virgin Media is of the view that the cap must be on the turnover of the Relevant Market, as defined in the associated Decision Instrument. The impact of any breach will be limited to the Relevant Market and therefore the penalty should only be limited to the Relevant Turnover.

[1] SI 334 of 2011.