



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Guidelines for the calculation of financial penalties under the Access Regulations – Response to Consultation and Guidelines

Response to Consultation and Guidelines

Reference: ComReg 21/10

Version: Final

Date: 10/02/2021

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Redacted Information

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Chapter 1

Executive Summary

- 1.1 The Commission for Communications Regulation ('**ComReg**') is the national regulatory authority for the electronic communications and postal sectors in Ireland. ComReg is responsible, *inter alia*, for the regulation of certain wholesale markets in the telecommunications sector and for monitoring and enforcing compliance with regulatory obligations in these markets.
- 1.2 Under the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 ('the **Access Regulations**')¹, ComReg is responsible, in particular, for imposing certain obligations or remedies on any operator which ComReg finds has Significant Market Power ('**SMP**'), in order to mitigate the effects of its market power and to encourage competition.
- 1.3 Under Regulation 19(8) of the Access Regulations, where ComReg forms the view that there has been a breach of obligations (an '**Access Regulations breach**') it may seek an order from the High Court for a financial penalty, and will make submissions to the High Court on the appropriate amount.
- 1.4 Following a Consultation² (the '**Consultation**') as to how ComReg might approach the determination calculation of an appropriate financial penalty, for Access Regulations breaches, for the purpose of submissions to be made by ComReg to the High Court under Regulation 19(8) of the Access Regulations (the '**Financial Penalty Methodology**'), ComReg has chosen the Financial Penalty Methodology consulted upon as a suitable approach to calculate appropriate financial penalties to submit to the High Court for Access Regulations breaches.
- 1.5 The Financial Penalty Methodology includes; a turnover-based methodology, and a tariff-based methodology (together the "**Methodologies**"). ComReg will apply the turnover-based methodology as the default methodology to calculate financial penalties for Access Regulations breaches, where practical. In some circumstances, however, ComReg will apply the tariff-based methodology, either (i) where it is not feasible to apply the turnover-based methodology (for example, where no turnover can be readily assigned to the Access Regulations breach); or (ii) for less serious breaches (typically breaches of a procedural nature, for example, a short delay³ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-

¹ S.I. 334 of 2011, as may be amended or replaced.

² Consultation on Calculating penalties for Access Regulations breaches, ComReg Document 20/25.

³ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).

- 1.6 Under the turnover based methodology, ComReg uses the relevant portion of turnover, an assessment of the gravity of the breach and the duration of the breach to calculate the basic amount of the financial penalty, followed by the application of relevant mitigating and aggravating factors (the '**Turnover Methodology**').
- 1.7 Under the tariff based methodology, ComReg starts with a one-off fixed tariff per breach and adds a weekly tariff for each week that the operator is in breach to calculate the basic amount of the financial penalty, followed by the application of relevant mitigating and aggravating factors (the '**Tariff Methodology**').
- 1.8 The Financial Penalty Methodology will allow ComReg to make consistent submissions to the High Court in respect of the financial penalty amounts that are appropriate, effective, proportionate and dissuasive in accordance with the requirements of Article 29 of the Directive (EU) 2018/1972⁴ (the '**Code**'). Further consideration of the Code is set out at paragraph 2.12 of this Response to Consultation.

⁴ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

Chapter 2

Background

2.1 ComReg and Regulatory Framework

- 2.1 ComReg was established by section 6 of the Communications Regulation Act 2002 (as amended) (**'the Act'**) and is the National Regulatory Authority (**'NRA'**) for the electronic communications and postal sectors in Ireland. ComReg is responsible, *inter alia*, for the regulation of certain wholesale markets in the Irish electronic communications sector and for monitoring and enforcing compliance with regulatory obligations in these markets.
- 2.2 The regulation of wholesale markets by ComReg is governed by the European regulatory framework for electronic communications, set out in the Code, which recast and repealed the suite of Directives adopted in 2002 and amended in 2009 including in particular Directive 2002/21/EC and Directive 2002/19/EC, both of which were amended by Directive 2009/140/EC. The European framework is embodied at national level for the time being in the suite of Statutory Instruments adopted in 2011, including in particular the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the **'Framework Regulations'**)⁵ and the Access Regulations.
- 2.3 Under this framework, ComReg is required to carry out market analyses to identify if any areas of the electronic communications sector require *ex ante* regulation. The markets are defined using principles grounded in competition law. The market analysis process includes a consultation with the interested parties, the European Commission, other NRAs in European Union member states and the Body of European Regulators for Electronic Communications (**'BEREC'**).
- 2.4 Once a market is defined, ComReg will decide whether or not that market is effectively competitive. If the market is not effectively competitive, ComReg must designate an operator or operators as having SMP in that market.
- 2.5 Where SMP is found in a market, ComReg will impose regulatory obligations on the operator with SMP in order to address competition problems that would be likely to arise, absent regulatory intervention, in accordance with the Access

⁵ S.I. 333 of 2011; other relevant Statutory Instruments include the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (the **'Authorisation Regulations'**) (S.I. 335 of 2011) and the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (the **'Universal Service Regulations'**) (S.I. 337 of 2011).

Regulations. The aim is to achieve competitive outcomes particularly in downstream markets by focusing regulation on key upstream wholesale markets.

- 2.6 The Access Regulations empower ComReg to impose obligations of transparency, non-discrimination, accounting separation, access to and use of specific network facilities, and pricing controls on operators who have been designated with SMP in a particular market.
- 2.7 A failure by the operator with SMP to comply with such obligations will have an impact on two levels. Firstly, there will likely be a direct impact on the operators seeking access to the SMP operators infrastructure and affected by the Access Regulations breach, possibly by losing business where wholesale access was provided at an inferior level of quality or not at all. Secondly, there will be an impact on competition more generally. An operator which is struggling to compete in the market will be less prepared to invest and innovate. Furthermore, this will be true not just of a directly impacted operator but of all operators reliant on access to an SMP provider's infrastructure. The impact may not be confined to the regulated market in question but may also extend to other regulated markets.
- 2.8 An effective enforcement regime is a key aspect of an effective regulatory framework.
- 2.9 If ComReg finds that an operator with SMP has failed to comply with an SMP obligation, ComReg will notify the operator of the findings and give the operator an opportunity to respond to the findings or to remedy the non-compliance under Regulation 19(1) of the Access Regulations. If ComReg is of the opinion that the operator has not complied with its obligations, ComReg may apply to the High Court under Regulation 19(4) of the Access Regulations for an order as ComReg may deem appropriate including an order for a declaration of non-compliance, an order directing compliance with the obligation, an order directing the remedy of any non-compliance with the obligation, or that the operator pay a financial penalty.
- 2.10 In seeking a financial penalty ComReg may make a submission to the High Court on the appropriate financial penalty pursuant to Regulation 19(8) of the Access Regulations., However it is the High Court that will decide whether a penalty is appropriate and what amount that the penalty should be.
- 2.11 In making its decision, Regulation 19(8)(d) of the Access Regulations provides that the High Court must consider, among other things, the circumstances of the Access Regulations breach, the duration, the effect on consumers, users and operators, any excuse or explanation for the breach and ComReg's submission on the penalty amount. In this regard any penalty amount submitted by ComReg under the current legislative framework is subject to the review and confirmation of the High Court.

- 2.12 Where necessary, ComReg will consider the implications of the Code when transposed on the Financial Penalty Methodology, if any. Any update necessary to the Financial Penalty Methodology following the transposition of the Code will be limited to the articles of the Code that are equivalent to the provisions in the current Access Regulations.

2.2 Methodology to calculate financial penalties

- 2.13 With the view to calculating appropriate financial penalties to submit to the High Court, pursuant to Regulation 19(8) of the Access Regulations on foot of a number of ComReg investigations⁶ into Access Regulations breaches, ComReg engaged Oxera Consulting Limited ('Oxera') in 2016 to explore whether a 'turnover-based' approach to setting penalties for breaches of ex ante wholesale obligations was appropriate (the '**2016 Oxera Report**')⁷.
- 2.14 ComReg sought a turnover based methodology for the following reasons:
- a) Effective: A Turnover Methodology appropriately recognises that non-compliance with regulatory obligations is intrinsically harmful for the economy and society and seeks to deter and punish such behaviour appropriately. This type of methodology produces financial penalties that are effective and dissuasive in that they have a substantial, yet appropriate, deterrent effect and are also capable of reflecting an appropriate level of disapproval for the conduct in question.
 - b) Proportionate: The penalty amounts produced by a Turnover Methodology are proportionate. First, the methodology considers only the value of affected sales or "relevant turnover" of the breaching operator. Second, the penalty amount produced relates directly to the degree of seriousness of the breach, through the application of a gravity factor. Third, the approach directly factors in the duration of the breach. Fourth, the approach specifically allows for consideration of the circumstances of the breach, including mitigating and aggravating factors of the breach, and other pertinent factors as required. Finally, penalties are also capped at a certain percentage of the non-compliant undertaking's turnover so as to absolutely ensure that disproportionate financial penalties are not proposed.
 - c) Transparent: a Turnover Methodology has the advantage that it is relatively simple to apply in practice and is transparent relative to other approaches.

⁶ See ComReg Information Notices 16/99, 16/100, 16/101, 16/102 and 16/103 for details of the cases that were investigated.

⁷ See Appendix: 4.

Accordingly, this approach provides a level of certainty to those in the regulated industry.

- 2.15 In considering the appropriate methodology, ComReg took into account the relevant legislation and in particular, the criteria at Regulation 19(8)(d) of the Access Regulations, and the requirement for penalties to be appropriate, effective, proportionate and dissuasive pursuant to Article 29 of the Code.
- 2.16 The 2016 Oxera Report concluded that a turnover-based approach was suitable for use by ComReg in assessing appropriate financial penalties and included the Turnover Methodology as the recommended methodology for ComReg to use to calculate financial penalties to submit to the High Court for Access Regulations breaches.
- 2.17 In June 2017, ComReg applied to the High Court pursuant to Regulation 19(4) of the Access Regulations for declarations of non-compliance and orders that Eircom Limited ('**Eircom**') pay to ComReg financial penalties in relation to five breaches of obligations in three regulated markets (the '**Compliance Proceedings**')⁸. ComReg used the Turnover Methodology to calculate the penalties that were submitted to the High Court.
- 2.18 In July 2017 Eircom brought separate High Court proceedings against the Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General in which the validity of aspects of the Access Regulations were challenged (the '**Access Regulations Proceedings**')⁹ to which ComReg was subsequently joined as a defendant.
- 2.19 In July 2017 Eircom also applied to the High Court for, and was granted, orders staying ComReg's Compliance Proceedings, pending determination of the Access Regulations Proceedings.¹⁰
- 2.20 In December 2018, ComReg reached a settlement¹¹ with Eircom in relation to the Compliance Proceedings and the Access Regulation Proceedings. As part of the settlement ComReg agreed to publicly consult on "*... its proposed methodology for the calculation of financial penalties for breaches by authorised undertakings of regulatory obligations imposed under the Access Regulations.*"¹²

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

⁹ High Court Record No. 2017/5929P.

¹⁰ High Court Record No. 2017/115 COM.

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

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

- 2.21 In 2019 ComReg engaged Oxera to undertake a further review of the latest approaches and precedents across Europe in calculating financial penalties for ex ante regulatory breaches, and to carry out a review of the continuing appropriateness of a turnover-based approach (the '**2020 Oxera Report**')¹³.
- 2.22 ComReg proposed two methodologies in the Consultation to be used to calculate financial penalties for breaches of obligations imposed under the Access Regulations depending on ComReg's view of the seriousness of the breach, to be determined on a case-by-case basis.
- 2.23 In the Consultation ComReg stated that the Turnover Methodology would be used for more serious Access Regulations breaches and that the Tariff Methodology would be used for less serious Access Regulations breaches.
- a) The Turnover Methodology – The Turnover Methodology considers the relevant portion of the turnover, the gravity of the breach and its duration followed by the application of mitigating and aggravating factors to calculate a financial penalty.
 - b) The Tariff Methodology –The Tariff Methodology calculates the penalty based on a one-off fixed tariff per breach plus a weekly tariff per week that the operator is in breach followed by the application of mitigating and aggravating factors.
- 2.24 The Tariff Methodology was developed by ComReg as a simple but effective methodology to calculate financial penalties for less serious breaches and where it is not feasible to apply the Turnover Methodology, that would be straightforward, proportionate, timely, administratively low-cost and effective.

2.3 ComReg's Objectives and Functions

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

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

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

¹³ See Appendix: 2.

- (i) to promote competition,*
- (ii) to contribute to the development of the internal market, and*
- (iii) to promote the interests of users within the Community,”*

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

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

...

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

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

...”

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

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

...

(d) to investigate complaints from undertakings and consumers regarding the supply of and access to electronic communications services, electronic communications networks and associated facilities and transmission of such services on such networks,...”.

2.4 ComReg’s Wholesale Enforcement Powers

2.29 In order to meet ComReg’s statutory objectives and functions, ComReg has wholesale enforcement powers pursuant to Regulation 19 of the Access

Regulations. In accordance with Regulation 19(4) of the Access Regulations, ComReg can apply to the High Court to seek such orders as:

- “(a) a declaration of non-compliance,*
- (b) an order directing compliance with the obligation, requirements, condition or direction,*
- (c) an order directing the remedy of any non-compliance with the obligations, requirement, condition or direction, or*
- (d) an order as provided for in paragraph (8).”*

- 2.30 Regulation 19(8) of the Access Regulations permits ComReg to apply to the High Court for an order *“...to pay to the Regulator such amount, by way of financial penalty, which may include penalties having effect for periods of non-compliance with the obligation, requirement, condition or direction, as the Regulator may propose as appropriate in the light of the non-compliance or any continuing non-compliance.”*
- 2.31 Article 29 of the Code, obliges Member States to specify *“...rules on penalties, ...applicable to infringements of national provisions adopted pursuant to this Directive ...and shall take all measures necessary to ensure that they are implemented.”* It also requires that, *“The penalties provided for shall be appropriate, effective, proportionate and dissuasive”*. The State meets the obligation at Article 29 of the Code through Regulation 19(8) of the Access Regulations.
- 2.32 ComReg has developed the Financial Penalty Methodology in order to clarify how ComReg will calculate appropriate and proportionate financial penalties for Access Regulations breaches that will be submitted to the High Court, in the event that a decision is made to seek a financial penalty. The Financial Penalty Methodology will ensure that the financial penalties proposed are appropriate, effective, proportionate and dissuasive and will provide transparency to all operators on how penalties might be calculated.

2.5 The Consultation

- 2.33 ComReg published the Consultation on 9 April 2020 setting out ComReg's proposed Financial Penalty Methodology on how to calculate financial penalties for Access Regulations breaches, where appropriate. The Consultation was accompanied by the 2016 Oxera Report and the 2020 Oxera Report.
- 2.34 Submissions to the Consultation were received from the following operators (the **'Respondents'**):

- c) Sky Ireland Limited (**'Sky'**);
- d) Eircom Limited (**'Eircom'**);
- e) Virgin Media Ireland (**'Virgin Media'**);
- f) BT Communications Ireland Limited (**'BT'**);
- g) ALTO - Alternative Operators in the Communications Market (**'ALTO'**).

2.35 Eircom's submission included a report from Frontier Economics titled "*Response to ComReg's Consultation on Regulatory Penalty Methodology*". This is considered by Oxera in its supplemental paper (**'Oxera Supplemental Paper'**)¹⁴.

2.36 This Response to Consultation and Guidelines take into account comments received from the Respondents.

2.6 Comments received outside the scope of the Consultation

2.37 Additional comments were provided by all Respondents that were outside of the scope of the original Consultation. ComReg will consider these points in Chapter 4.

¹⁴ See Appendix: 3.

Chapter 3

Financial Penalties Methodologies

3.1 Overview

- 3.1 ComReg developed the Financial Penalty Methodology, based on guidance and recommendations from the 2016 Oxera Report and the 2020 Oxera Report, to explain how ComReg will calculate appropriate financial penalties for the purpose of submissions to the High Court under Regulation 19(8) of the Access Regulations. It is only after ComReg notifies an operator of a finding of non-compliance and forms an opinion of non-compliance, pursuant to Regulation 19(4) of the Access Regulations, that ComReg may apply to the High Court and seek sanctions that may include a financial penalty.
- 3.2 The Financial Penalty Methodology consists of the Turnover Methodology and the Tariff Methodology. The Turnover Methodology is the default methodology for calculating financial penalties. In certain circumstances, however, ComReg will choose to apply to the Tariff Methodology. This is where it is not feasible to use the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach) or for less serious breaches (typically breaches of a procedural nature, for example, a short delay¹⁵ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).
- 3.3 Ex ante regulation takes a forward-looking view and considers that a dominant operator has the ability to leverage its position in a market by acting in a way that could negatively impact competition, other operators, or end users i.e. a position of SMP. The harm arising has the potential to be sufficiently serious that, having considered a priori evidence of actual or probable competition problems, preventative obligations are imposed on the dominant operator explicitly prohibiting these harmful actions. An important element of dissuasion against such harm is the ability of regulators (or as in Ireland, of the Courts) to levy penalties on a dominant operator where they are found to have breached relevant obligations.
- 3.4 Ex ante regulation therefore considers the potential for harm to competition, other operators, or end users at the time that obligations are imposed. This aspect of ex ante regulation is equivalent to a backward-looking "theory of harm" used in ex

¹⁵ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

post Competition law enforcement. However, in contrast to ex post Competition law, the ex ante “theory of harm” (i.e. a forward looking view of the means by which competition would be harmed by the actions of a dominant operator) is established at the point when obligations are imposed. The Consultation and Response to Consultation documents that accompany ComReg Decisions provides the detail on the likely harm to competition in a market arising from certain actions of the dominant operator thereby justifying the obligations that must be imposed on that operator to prevent the harm arising.

- 3.5 In this respect, enforcement of ex ante obligations relies on an established theory of harm that is built into the imposition of obligations and is triggered when those obligations are breached. This differs from ex post Competition law enforcement where a theory of harm must be established, on a case-by-case basis, based on observed conduct.
- 3.6 While ex post Competition law and ex ante regulation observe harm from different temporal viewpoints, the fundamental purpose of both is to prevent harm to competition.

3.2 The Turnover Methodology

- 3.7 The Turnover Methodology was selected as being appropriate to calculate financial penalties for Access Regulation breaches as it is consistent with the theory of optimal penalty design¹⁶ and recognises the role of both punishment and deterrence in an economic sense. It also recognises that breaches of wholesale regulatory obligations are potentially very serious and can lead to distortion in competition in downstream markets and it takes the impact at the downstream level into account in the assessment of the value of relevant sales. It is practical to implement and is not completely mechanistic, as it takes into account relevant aggravating and mitigating factors and includes a check on proportionality.
- 3.8 The Turnover Methodology reflects the approach followed in the context of competition law enforcement and is based on the principle that a breach of wholesale regulatory obligations will have knock-on impact on downstream competition.
- 3.9 The decision to seek an order for a financial penalty is made by ComReg based on the circumstances of the case and the evidence available. In order to calculate a turnover based financial penalty, ComReg would identify the Access Regulations breach, the market in which it occurred and the potential impact on the downstream market that the breach may have caused. ComReg would then evaluate qualitatively the impacts at the wholesale and retail levels and finally

¹⁶ See Figure 1: Optimal Penalty Design in the 2016 Oxera Report.

identify the subset of affected retail products which then informs the value of relevant retail sales. The value of relevant retail sales, the duration of the breach and the appropriate gravity factor are used to calculate the basic amount of the penalty before relevant mitigating and aggravating factors are applied.

- 3.10 In the Consultation ComReg proposed that the Turnover Methodology would be used for more serious Access Regulations breaches, but in light of the responses received ComReg has determined that the Turnover Methodology will be the default methodology to be used to calculate financial penalties, where possible.

3.2.1 ComReg's Assessment of Question 1

- 3.11 In the Consultation ComReg asked interested parties if they thought that the Turnover Methodology would be suitable for calculating financial penalties, that are appropriate, effective, proportionate and dissuasive, for Access Regulations breaches.
- 3.12 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.6 to **Error! Reference source not found.** of this Response to Consultation.
- 3.13 Three Respondents agreed without comment and one Respondent disagreed with comments.
- 3.14 The primary concerns raised by that Respondent were:
- a) ComReg would be implementing a methodology based on a competition law approach without considering the differences between ex ante and ex post regulation;
 - b) ComReg's failure to consider the Irish legislative framework under which the Financial Penalty Methodology would be used;
 - c) ComReg's failure to consult transparently, particularly in relation to the definition of the seriousness of a breach; and
 - d) ComReg proposing a methodology without a transparent compliance framework and published process.

3.2.2 ComReg's Final Position

- 3.15 ComReg remains of the view that the Turnover Methodology is suitable for calculating financial penalties for Access Regulation breaches that are appropriate, effective, proportionate and dissuasive.

3.16 At paragraphs A 5.6 to **Error! Reference source not found.** of Appendix: 5 ComReg sets out its position regarding the Turnover Methodology which can be summarised as follows:

- a) While there are differences between competition law cases and ex ante cases, including finding an operator to have SMP in particular markets and increased regulatory oversight, there still remains enough justification to use a Turnover Methodology as ex ante breaches can be just as serious as competition law cases. Some similarities between ex-post competition law and ex ante regulation include:
 - i. there is an equivalence between the concepts of dominance in an ex post competition law setting and SMP in an ex ante regulation setting;
 - ii. both approaches recognise that, in a situation of market power and vertical supply of an essential input, there is the potential for exclusionary conduct and effects; and
 - iii. the theories of harm are very similar in both approaches, and assessed using similar economic criteria.
- b) In order to calculate a penalty, ComReg will consider the effect of the activity that will inform the value of relevant retail sales while also considering the duration of the breach and the gravity of the breach. ComReg's penalty calculation will be used in a submission to the High Court, seeking an order for the imposition of a final penalty and the High Court will decide whether a penalty is appropriate and the penalty amount.
- c) ComReg's position in relation to the seriousness of an Access Regulations breach and how ComReg will decide which of the Methodologies to use is discussed in paragraph 3.2.
- d) The Financial Penalty Methodology is only one element of the overall compliance and enforcement process and ComReg is considering the proposal to publish Enforcement Guidelines.

3.2.3 ComReg's Assessment of Question 2

3.17 In the Consultation, ComReg asked interested parties if they thought 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?

- 3.18 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.54 to **Error! Reference source not found.** of this Response to Consultation.
- 3.19 One Respondent agreed without comment, two Respondents broadly agreed while providing comments and one Respondent disagreed and provided a number of comments.
- 3.20 The primary concerns raised by the Respondents were that ComReg does not accurately account for the regulatory oversight it has on the conduct of the SMP operator, that it failed to consult on important factors including the definition of the seriousness of breaches and also how the seriousness would be assessed, that it only considers proportionality once the penalty has been calculated and not earlier in the process and that an enforcement framework is needed.

3.2.4 ComReg's Final Position

- 3.21 ComReg proposed in the Consultation that the Turnover Methodology would be used for cases for more serious Access Regulations breaches. ComReg has now determined that the Turnover Methodology will be the default methodology and will be used to calculate financial penalties for Access Regulations breaches where practical. The Tariff Methodology will be used where it is unfeasible to use the Turnover Methodology (e.g. where no turnover can be readily assigned to the Access Regulations breach) or for less serious breaches (typically breaches of a procedural nature, for example, a short delay¹⁷ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).
- 3.22 Under the current legislative framework any penalty amount submitted by ComReg is subject to the review and confirmation of the High Court.
- 3.23 Should ComReg seek an order for a financial penalty, the operator(s) in question will have the opportunity to petition the judge in respect of the penalty through normal legal procedures.
- 3.24 At paragraphs A 5.54 to **Error! Reference source not found.** of Appendix: 5 ComReg sets out its position regarding the Turnover Methodology which can be summarised as follows:

¹⁷ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

- a) ComReg's position in relation to the seriousness of an Access Regulations breach and how ComReg will decide which of the Methodologies to use is discussed in paragraph 3.2.
- b) ComReg's position in relation to regulatory oversight is discussed in paragraphs A 5.15 to A 5.16.
- c) The scope of the Consultation was limited to the Financial Penalty Methodology and calculating financial penalties. ComReg will consider whether the penalty is proportionate once it has been calculated using the Financial Penalty Methodology.
- d) It is important to note that the Financial Penalty Methodology is one aspect of a wider compliance and enforcement process. ComReg is considering whether to publish Enforcement Guidelines.

3.2.5 ComReg's Assessment of Question 3

- 3.25 In the Consultation, ComReg asked interested parties if they thought that the maximum cap of 10% of the turnover of the operator in its last complete financial year prior to the breach for penalties calculated using the Turnover Methodology, is proportionate.
- 3.26 Five Respondents replied directly to question 3. Their views are set out in Appendix: 5, paragraphs A 5.67 to A 5.86 of this Response to Consultation.
- 3.27 Two Respondents agreed without comment, two Respondents broadly agreed while providing comments and one Respondent disagreed and provided a number of comments.
- 3.28 The primary concerns raised by the Respondents were that the turnover considered for the cap should be limited to turnover in the jurisdiction, that there is no economic justification given for the proposed cap and that the maximum cap is limited to €500,000 for regulations adopted under the European Communities Act 1972¹⁸ (the '**European Communities Act**').

3.2.6 ComReg's Final Position

- 3.29 ComReg remains of the view that a cap of 10% of turnover is proportionate for turnover based penalties. However in light of the responses received to the Consultation the scope of the turnover will be limited to the turnover in the jurisdiction in which the breach occurred only. In proceedings before the High

¹⁸ European Communities Act, 1972 - Revised - Updated to 13 April 2017 An Act to Make Provision with Respect to Membership of the State of the European Communities.

Court for single or multiple breaches, the total penalty sought in those proceedings will not exceed 10% of turnover.

- 3.30 In the Consultation ComReg proposed the timeframe for the turnover measurement for the maximum cap would be the last complete financial year prior to the breach. ComReg's final position is that a more appropriate timeframe is the full financial year preceding ComReg's recommendation of a financial penalty to the High Court. The use of this timeframe is in line with the EU Commission's Guidelines on the method for setting fines imposed pursuant to Article 23(2)(s) of Regulation No.1/2003¹⁹.
- 3.31 At paragraphs A 5.67 to A 5.86 of Appendix: 5 ComReg set out its position regarding the cap for the Turnover Methodology which can be summarised as follows:
- a) ComReg does not believe that section 3 of the European Communities Act limits financial penalties to €500,000 and ComReg remains of the view that a cap of 10% of turnover is proportionate for financial penalties calculated using the Turnover Methodology.
 - b) ComReg has taken note of comments regarding the scope of the turnover and agrees that it should be limited to the turnover in the jurisdiction only.
 - c) A maximum cap of 10% of turnover is used by many regulators across Europe including Ofgem²⁰, Ofcom²¹, Ofwat²² and ORR²³ in the UK and the Central Bank, the CCPC²⁴ and the CRU²⁵ in Ireland. ComReg's proposal of 10% of turnover is in line with other regulators.

3.3 The Tariff Methodology

- 3.32 In the Consultation, ComReg explored the question of whether or not the Turnover Methodology may be appropriate for Access Regulation breaches in all cases. In some cases it may not be feasible to use the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach). In other cases the Tariff Methodology may be more appropriate for less serious

¹⁹ COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁰ UK Office of Gas and Electricity Markets.

²¹ UK Office of Communications.

²² UK Water Services Regulation Authority.

²³ UK Office of Rail and Road.

²⁴ Competition and Consumer Protection Commission.

²⁵ Commission for Regulation of Utilities.

breaches (typically breaches of a procedural nature, for example, a short delay²⁶ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).

- 3.33 In the Consultation, ComReg explored the question of whether or not the Turnover Methodology may be appropriate for Access Regulation breaches in all cases. ComReg proposed that the Tariff Methodology would be used for less serious Access Regulation breaches.
- 3.34 In using the Tariff Methodology ComReg would apply a fixed tariff for the breach identified and then a weekly tariff for every week that the operator has been in breach. Any relevant mitigating and aggravating factors would then be applied.
- 3.35 ComReg proposed a financial cap of €500,000 on penalties calculated using the Tariff Methodology.

3.3.2 ComReg's Assessment of Question 4

- 3.36 In the Consultation ComReg asked interested parties if they thought that the Tariff Methodology would be suitable for calculating financial penalties that are appropriate, effective, proportionate and dissuasive.
- 3.37 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.88 to A 5.106 of this Response to Consultation.
- 3.38 One Respondent agreed without comment, two Respondents broadly agreed while providing comments and one Respondent disagreed and provided a number of comments.
- 3.39 The primary concerns raised by the Respondents were the lack of clarity on when the Tariff Methodology might be used, a request for clarity on the duration of a breach, a recommendation that the weekly tariff should be a range rather than fixed and how the seriousness of a breach would be assessed.

3.3.3 ComReg's Final Position

- 3.40 ComReg remains of the view that the Tariff Methodology is suitable for calculating financial penalties that are appropriate, effective, proportionate and dissuasive for Access Regulations breaches, either where it is not feasible to use the Turnover

²⁶ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

Methodology, (for example, where no turnover can be readily assigned to the Access Regulations breach) or for less serious breaches (typically breaches of a procedural nature, for example, a short delay²⁷ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).

- 3.41 In the Consultation ComReg proposed that the Tariff would be used for less serious Access Regulations breaches. In light of the responses to the consultation received ComReg will use the Tariff Methodology either (i) where it is not feasible to apply the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach); or (ii) for less serious breaches (typically breaches of a procedural nature, for example, a short delay²⁸ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).
- 3.42 At paragraphs A 5.107 to 4.31 of Appendix: 5 ComReg sets out its position regarding the use of the Tariff Methodology which can be summarised as follows:
- a) ComReg's position in relation to the seriousness of an Access Regulations breach and how ComReg will decide which of the Methodologies to use is discussed in paragraph 3.2. The Tariff Methodology is reserved for for less serious breaches (typically breaches of a procedural nature, for example, a short delay in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes) or where it is not feasible to use the Turnover Methodology.
 - b) ComReg does not believe it is necessary that the weekly tariff should be a range as the weekly tariff is only used to calculate the basic amount of the penalty before relevant mitigating and aggravating factors are applied.
 - c) A range for the weekly tariff would also add a layer of complexity to the Tariff Methodology which is intended to be simple and fair to apply.

²⁷ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

²⁸ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

- 3.43 The duration of a breach will be determined based on the number of weeks that the operator has been in breach, however any case specific factors affecting the duration will be considered, where relevant. It remains that the duration is used to calculate the basic amount of the tariff penalty only before relevant mitigating and aggravating factors are applied.

3.3.4 ComReg's Assessment of Question 5

- 3.44 In the Consultation ComReg asked interested parties if they thought that it would be appropriate that the proposed Tariff Methodology would be applicable to all operators for less serious Access Regulations breaches.
- 3.45 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.107 to 4.31 of this Response to Consultation.
- 3.46 One Respondent agreed without comment, two Respondents broadly agreed while providing comments and one Respondent disagreed and provided a number of comments.
- 3.47 The primary concerns raised by the Respondents were that before using the Tariff Methodology there should be an assessment on whether any penalty is required, that the seriousness of breaches needs to be determined on a case-by-case basis and that the effect on the consumer or market should be assessed.

3.3.5 ComReg's Final Position

- 3.48 ComReg remains of the view that the Tariff Methodology is suitable for calculating financial penalties (or where the Turnover Methodology is not feasible), while recognising that additional clarity was required on the definition of less serious breaches. Less serious breaches are typically breaches of a procedural nature, for example, a short delay²⁹ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes.
- 3.49 At paragraphs A 5.107 to 4.31 of Appendix: 5 ComReg sets out its position regarding the use of the Tariff Methodology for Access Regulations breaches which can be summarised as follows:

²⁹ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

- a) ComReg will only seek a penalty if ComReg is of the opinion that the breaching operator has not complied with an obligation and that a financial penalty is an appropriate sanction. ComReg may apply to the High Court for an order that it considers appropriate, pursuant to Regulation 19(4) of the Access Regulations, which may include an order for a declaration of non-compliance, an order directing compliance, an order directing remedy of a non-compliance or an order for a financial penalty.

3.50 ComReg's position in relation to the seriousness of an Access Regulations breach and how ComReg will decide which of the Methodologies to use is discussed in paragraph 3.2. ComReg can confirm that less serious breaches are typically breaches of a procedural nature, for example, a short delay³⁰ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes.

3.3.6 ComReg's Assessment of Question 6

- 3.51 In the Consultation ComReg asked interested parties if they thought that the proposed fixed and weekly penalty tariffs are appropriate and would result in a penalty that is proportionate and dissuasive?
- 3.52 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.115 to A 5.127 of this Response to Consultation.
- 3.53 One Respondent agreed without comment, three Respondents disagreed and provided a number of comments.
- 3.54 The primary concerns raised by the Respondents were that the fixed penalty should be lower, that the fixed weekly tariff should be a range based on an assessment of the nature of the breach and that ComReg should consider having grades of one-off fixed penalties as the resultant fines may be disproportionate.

3.3.7 ComReg's Final Position

- 3.55 ComReg remains of the view that the fixed and weekly tariffs are proportionate for the Tariff Methodology. These tariffs will be used to calculate the basic amount of the penalty before relevant mitigating and aggravating factors are applied.

³⁰ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

- 3.56 At paragraphs A 5.115 to A 5.127 of Appendix: 5 ComReg sets out its position regarding the fixed and weekly tariff amounts being proportionate for the Tariff Methodology which can be summarised as follows:
- a) The Tariff Methodology is intended to be a simple, proportionate, timely, administratively low-cost and effective approach to the calculation of an appropriate penalty either for Access Regulations breaches where it is unfeasible to use the Turnover Methodology or where the breach is less serious. Adding a range of values for the weekly and fixed tariffs would add a layer of complexity to the Tariff Methodology.
 - b) The fixed and weekly tariffs are used to calculate the basic amount of the penalty only, before any relevant mitigating or aggravating factors are applied which can significantly reduce the penalty amount.
 - c) Any penalty calculated is made as ComReg's submission to the High Court. Under Regulation 19(8) of the Access Regulations any penalty amount submitted by ComReg is subject to the review and confirmation of the High Court. Should ComReg seek a financial penalty through the High Court, operators will have the opportunity to petition the judge in respect of the penalty through normal legal procedures.

3.3.8 ComReg's Assessment of Question 7

- 3.57 In the Consultation ComReg asked interested parties if they thought 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?
- 3.58 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.128 to A 5.138 of this Response to Consultation.
- 3.59 One Respondent agreed with comments, two Respondents broadly agreed and provided a number of comments and one Respondent disagreed and provided comments.
- 3.60 The primary concerns raised by the Respondents were that penalties should increase if a breach is ongoing, that the weekly tariff should be a range so as not to be disproportionate, and that there should be a discount for remedying a breach.

3.3.9 ComReg's Final Position

- 3.61 ComReg remains of the view that the fixed and weekly tariffs are proportionate for the Tariff Methodology and that it would not be proportionate to increase the weekly tariff over time, as proposed.

3.62 At paragraphs A 5.128 to A 5.138 of Appendix: 5 ComReg sets out its position regarding the proposal to increase the weekly tariff over time which can be summarised as follows:

- a) The sanctions available to ComReg are not limited to financial sanctions; ComReg may also seek a declaration of non-compliance, an order directing compliance or an order directing remedy of a non-compliance from the High Court in accordance with Regulation 19(4) of the Access Regulations.
- b) The Tariff Methodology is intended to be a simple, proportionate, timely, administratively low-cost and effective approach to the calculation of appropriate financial penalties for Access Regulations breaches. Adding a range of values for the weekly and fixed tariffs would add an unhelpful layer of complexity to the Tariff Methodology. The fixed and weekly tariffs are used to calculate the basic amount of the penalty only as relevant mitigating and aggravating factors may be applied that may reduce or increase the penalty amount recommended by ComReg to the High Court.

3.3.10 ComReg's Assessment of Question 8

3.63 In the Consultation ComReg asked interested parties if they thought that the proposed maximum cap of €500,000 for tariff based penalties is proportionate.

3.64 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.139 to A 5.153 of this Response to Consultation.

3.65 One Respondent agreed with no comments, one Respondent agreed with comments and two Respondents disagreed with comments.

3.66 The primary concerns raised by the Respondents were that the maximum cap for the Tariff Methodology may be too low and stifle compliance and that larger penalties would need to continue to be ratified by the High Court. One Respondent expressed the view that the cap is too high as the maximum cap under European Communities Act is €500,000 which is reserved for more serious breaches.

3.3.11 ComReg's Final Position

3.67 ComReg remains of the view that a cap of €500,000 is proportionate for penalties calculated using the Tariff Methodology.

3.68 At paragraphs A 5.139 to A 5.153 of Appendix: 5 ComReg sets out its position regarding the cap of €500,000 for penalties calculated using the Tariff Methodology which can be summarised as follows:

- a) ComReg believes that as ComReg has already determined that the cap on penalties for the Turnover Methodology, the default methodology, is 10% of turnover in the jurisdiction, that a cap of €500,000 on penalties under the Tariff Methodology is sufficiently lower than the 10% of turnover as to be proportionate.
- b) ComReg does not agree that the European Communities Act limits financial penalties to €500,000, in respect of non-criminal penalties. Other legislation including: the European Union (Capital Requirements) Regulations 2014³¹ and the European Union (Markets in Financial Instruments) Regulations 2017³² (promulgated under the European Communities Act), allow for financial penalties in excess of €500,000.
- c) ComReg is not limited by the cap on penalties of €500,000 as ComReg may also seek a declaration of non-compliance, an order directing compliance with the obligation or an order directing remedy of any non-compliance with the obligation. Failure to comply with such orders would be a contempt of court.

3.4 Adjustment Factors

- 3.69 Adjustment factors are applied to penalties to increase or decrease the amount in order to take account of the particular circumstances of the case. In the Consultation ComReg proposed a non-exhaustive list of potential aggravating and mitigating factors. The Financial Penalty Methodology includes the possibility of applying both aggravating and mitigating factors, where applicable, to increase or decrease the basic amount of the calculated penalty.

3.4.1 ComReg's Assessment of Question 9

- 3.70 In the Consultation ComReg asked interested parties if they thought that the proposed list of potential mitigating and aggravating factors, while not exhaustive, provides sufficient clarity to operators regarding the types of factors that may be considered by ComReg when calculating financial penalties, whether turnover or tariff based.
- 3.71 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.154 to A 5.168 of this Response to Consultation.

³¹ S.I. No. 158/2014.

³² S.I. No. 375/2017.

- 3.72 One Respondent agreed with no comments and three Respondents broadly agreed with comments.
- 3.73 The primary concerns raised by the Respondents were that the mitigating and aggravating factors should be determined on a case-by-case basis, that the mitigating and aggravating factors should be considered at all stages of an investigation, not just at the end, and that there is no clarity on how the factors would be considered in an investigation. One Respondent also expressed the view that the list needs to be more exhaustive and that the mitigating and aggravating factors should be on separate lists.

3.4.2 ComReg's Final Position

- 3.74 ComReg remains of the view that the list of aggravating and mitigating factors presented in the Consultation is sufficiently detailed to give operators some insight into the factors that may be considered during a penalty calculation. The facts of each case are unique and so it is not possible to provide an exhaustive list of mitigating and aggravating factors, however, over time the lists may be added to.
- 3.75 At paragraphs A 5.154 to A 5.157 of Appendix: 5 ComReg sets out its position regarding the list of potential mitigating and aggravating factors which can be summarised as follows:
- a) ComReg attempted to provide as comprehensive a list of mitigating and aggravating factors as possible but as these will be specific to the facts of a case, ComReg does not think it would be appropriate or proportionate to limit the list of factors to those already described.
 - b) As the aggravating and mitigating factors are specific to a particular case, ComReg is not in a position to propose how these factors will be treated or what percentage reduction or increase would be attributed to these factors.
 - c) In relation to the timing of considering aggravating and mitigating factors, ComReg considers mitigating and aggravating factors at the time of the penalty calculation but also may consider similar factors when a decision is being made to open a case or when a decision is being made as to whether it is appropriate to seek a penalty.

3.4.3 ComReg's Assessment of Question 10

- 3.76 In the Consultation ComReg asked interested parties if they thought that the proposed Financial Penalty Methodology is sufficiently transparent and provides enough information to inform operators on the potential financial penalties that may be calculated by ComReg.

- 3.77 Four Respondents replied directly to this question. Their views are set out in Appendix: 5, paragraphs A 5.169 to A 5.181 of this Response to Consultation.
- 3.78 Two Respondents agreed with comments and two Respondents disagreed with comments.
- 3.79 The primary concerns raised by the Respondents were that penalties should be calculated on a case-by-case basis so as to prevent non-compliant operators calculating the cost of non-compliance, while also providing a reasonable level of certainty. Respondents also expressed the view that the Financial Penalty Methodology needs to be part of a wider enforcement process and to provide more clarity on decision making regarding the seriousness of a breach. Concerns were also raised over how ComReg would calculate gravity factors, considering harm is not being assessed by ComReg.

3.4.4 ComReg's Final Position

- 3.80 ComReg remains of the view that the Financial Penalty Methodology is sufficiently transparent to allow operators to determine how ComReg would calculate appropriate financial penalties to submit to the High Court where necessary but recognises that the Financial Penalty Methodology is only one aspect of ComReg's compliance and enforcement process. Section 4.1 of this Response to Consultation sets out ComReg's position in relation to the Enforcement Process.
- 3.81 ComReg does not believe that the Financial Penalty Methodology would allow operators to calculate the specific cost of being in breach. In seeking a financial penalty, ComReg may only make a submission to the High Court on the appropriate financial penalties and it is ultimately the decision of the High Court as to whether a penalty should be applied and the amount of that penalty. In deciding the amount of the financial penalty, if any, the High Court must consider the factors in Regulation 19(8)(d) which includes ComReg's submission on the appropriate financial penalty, but it is at the High Court's discretion what the penalty amount should be.
- 3.82 Even if operators were able to calculate the approximate cost of being in breach, ComReg considers that the potential penalties available under the Financial Penalty Methodology are sufficient to deter operators from breaching their obligations
- 3.83 Both the Turnover and Tariff Methodologies apply relevant mitigating and aggravating factors, which are determined on a case-by-case basis. These mitigating and aggravating factors may increase or decrease the penalty making it difficult for operators to calculate the final penalty that ComReg would propose to the High Court.

- 3.84 The Financial Penalty Methodology provides guidance on possible gravity factors but the gravity of the Access Regulation breach will be determined on a case-by-case basis, based on the particulars of the breach. Therefore ComReg will have sufficient information to make an informed decision regarding the appropriate gravity factor for the Access Regulations breach.

Chapter 4

Submissions of the Respondents supplemental to the Consultation Questions

- 4.1 The Consultation posed ten questions regarding the ComReg Financial Penalties Methodology. In addition to the responses to these questions, three of the Respondents made submissions that were beyond the scope of the Consultation Questions. The following sections focus on the main themes of these submissions for the purpose of this Response to Consultation. ComReg does not seek to address every point raised by the Respondents, instead focusing on the key issues raised.³³
- 4.2 The key issues raised were:
- a) Lack of Compliance and Enforcement Process;
 - b) Transposition of the Code;
 - c) Direct fining powers; and
 - d) Frontier Economics Recommendations.

4.1 Compliance/Enforcement Process

- 4.3 BT stated in its submission that ComReg needs an *“enforcement framework and published guidelines ...and which the penalties methodology would be a component.”*
- 4.4 Eircom stated in its submission that there is a *“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.”*
- 4.5 ALTO stated in its submission that ComReg needs to *“set out an end-to-end decision making process, or very clear Enforcement Guidelines ..., where clearly set out processes and procedures are engaged resulting in reasoned decisions”*

³³ If an individual submission has not been considered in this section, it should not be interpreted that ComReg either agrees or disagrees with that submission.

- 4.6 In the Settlement Agreement ComReg agreed to undertake a public consultation on its proposed methodology for the calculation of financial penalties for breaches by operators of regulatory obligations imposed under the Access Regulations.
- 4.7 The Financial Penalty Methodology, produced as a result of the Consultation, contains the Turnover Methodology and the Tariff Methodology, which will be used to calculate appropriate financial penalties for Access Regulations breaches.
- 4.8 ComReg recognises that the Financial Penalty Methodology is only one aspect of a wider wholesale enforcement/compliance process. ComReg carries out its enforcement function pursuant to Regulation 19 of the Access Regulations. Under Regulation 19(1) where ComReg finds that an operator is non-compliant with an obligation, ComReg will notify the operator of the findings and give the operator an opportunity to respond to the findings or to remedy the non-compliance, within a reasonable timeframe. Then if ComReg is still of the opinion that the operator is non-compliant with the obligations, ComReg under Regulation 19(4) may apply to the High Court for an order it considers appropriate which includes a declaration of non-compliance, an order to become compliant, an order to remedy a non-compliance and an order for a financial penalty.
- 4.9 Under Regulation 19(8) of the Access Regulations ComReg may make a submission to the High Court on the appropriate penalty amount that will be considered by the High Court when determining whether a penalty is appropriate and if relevant, when setting the penalty amount.
- 4.10 ComReg is considering the proposal to publish Enforcement Guidelines.

4.2 Transposition of the Code

- 4.11 BT makes the point in its submission that it is *“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.”*
- 4.12 ALTO makes the point in its submission that *“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.”*
- 4.13 The Code of 11 December 2018 recast and repealed the suite of Directives adopted in 2002³⁴ and amended in 2009³⁵. The European framework is embodied

³⁴ Directive 2002/19/EC, Directive 2002/20/EC, Directive 2002/21/EC and Directive 2002/22/EC.

³⁵ Directive 2009/140/EC.

at national level for the time being in the suite of Statutory Instruments adopted in 2011 under the Code is transposed later this year.

- 4.14 In Ireland, the primary responsibility for transposition of the Code into domestic Irish law is with the Department for Environment, Climate and Communications (the '**DECC**').
- 4.15 Articles 29 of the Code refers to penalties and 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.”*
- 4.16 As discussed in paragraph 2.12, where necessary, ComReg will consider the implications of the Code when transposed on the Financial Penalty Methodology, if any. Any update necessary to the Financial Penalty Methodology following the transposition of the Code will be limited to the articles of the Code that are equivalent to the provisions in the current Access Regulations.

4.3 Direct fining powers

- 4.17 BT makes the point in its submission that it supports the recommendation of the Law Reform Commission (the "**LRC**") for an alignment of powers of regulators and that *“most other regulators in Ireland do have direct enforcement processes This allows those regulators to quickly respond to breaches by imposing fines (usually fixed or capped) following a clear and transparent process...”*
- 4.18 Eircom makes the point in its submission that ComReg needs to carry out a *“full consultation on the means by which any Regulator-imposed fines are to be calculated, including any penalty methodologies.”*
- 4.19 Under the current legislative framework ComReg does not have direct fining powers and must seek an order for a financial penalty from the High Court. Should ComReg seek a penalty, ComReg may submit to the High Court an appropriate financial penalty and it is the High Court who will determine whether it is appropriate to apply a penalty and determine the amount of that penalty.
- 4.20 In January 2016, the LRC published an Issues Paper on the wide-ranging subject of regulatory powers and corporate offences, followed by an extensive public

consultation process to which ComReg contributed. ComReg has sought administrative fining powers for the last number of years and made numerous submissions to the LRC. ComReg, along with the CCPC, the BAI³⁶, the CRU and the HPRA³⁷, submitted a joint submission³⁸ to the LRC's Consultation seeking an enforcement regime applicable to all regulatory bodies and a system for effective penalties to be established.

- 4.21 According to the Law Reform Commission's *"Report on Regulatory Powers and Corporate Offences"*,³⁹ administrative financial sanctions are easier to impose, they constitute a real threat for operators and regulators' expertise can be fully utilised.
- 4.22 In June 2020 the latest Programme for Government was agreed which included a commitment to *"Enable regulatory bodies such as ComReg, the Central Bank and the CCPC to have greater use of administrative penalties to sanction rogue operators, as is the norm in other EU Member States."* ComReg welcomes this commitment but until such a time as these powers are given, ComReg will continue to regulate and enforce under the current framework.
- 4.23 Therefore decisions on penalties will continue to be made by the High Court, for the full range of penalties that may result from using the Turnover and Tariff Methodologies.

4.4 Frontier Economics Recommendations

- 4.24 Eircom's submission to the Consultation included a report from Frontier Economics which included an assessment of the 2020 Oxera Report and proposals on how the approach could be adjusted and implemented in practice.
- 4.25 The Frontier Economics report is considered by Oxera in its supplemental paper the Oxera Supplemental Paper.
- 4.26 Frontier sets out in its response the Methodology would be improved if material harm to consumers and/or operators must be established and quantified when considering if a penalty is appropriate and when deciding on the appropriate methodology.

³⁶ Broadcasting Authority of Ireland.

³⁷ Health Products Regulatory Authority.

³⁸ *"Enforcement of Competition and Regulatory Law: The case for reform"*

³⁹ Law Reform Commission Report on Regulatory Powers and Corporate Offences LRC 119-2018 Vol. 1, LRC 119-2018 Vol. 2, 23 October 2018.

- 4.27 In ex ante regulation, undertakings are found to have SMP on a forward-looking basis without requiring any anticompetitive effects or harm to consumers to be demonstrated. Harm is assumed to exist in the absence of obligations imposed on the undertaking as remedies to its SMP status or; if the obligations imposed are not complied with. Under the Framework and Access Regulations, ComReg is the body with a statutory responsibility to consider which markets should be subject to ex ante regulation; to establish if an undertaking has SMP in those markets; to impose appropriate remedial obligations and; to pursue enforcement for breaches of those obligations, including financial penalties sought through the High Court. Exercising these powers must be conducted in a reasonable proportionate and impartial manner. Consistent with the Framework and Access Regulations it is ComReg's position that it is not necessary to establish and quantify the material harm to consumers and competitors in order to seek a financial penalty. ComReg does not agree with the position put forward by Eircom in the Frontier report.
- 4.28 Before ComReg makes a decision to seek an order for a financial penalty from the High Court, it will find that an operator has breached an obligation(s) under Regulation 19(1) of the Access Regulations. The decision to seek a financial penalty is not predicated on there being measurable harm to consumers and competitors.
- 4.29 ComReg does not agree with Frontier's position that material harm to consumers and/or operators must be established and quantified in order to determine that an Access Regulation breach justifies a penalty or; that it must be established that the breach led to significant quantified harm and had other aggravating circumstances to necessitate the application of the Turnover Methodology.
- 4.30 It is ComReg's position that harm at the wholesale level is harm to the competitive process. The principle of ex-ante regulation is not to impose obligations that result in a direct benefit for non-SMP operators but rather to encourage the process of sustainable competition to the benefit of end-users on a forward-looking basis. Access Regulations breaches may not directly harm operators or the harm may not be easily quantifiable.

Appendix: 1 Non-Confidential Submissions to ComReg Document Number 20/25

- A 1.1 See ComReg Document Number 20/25s.
- A 1.2 A detailed review of these Submissions is included at Appendix: 5 of this Response to Consultation.

Appendix: 2 2020 Oxera Report

A 2.1 The 2020 Oxera Report was amended in January 2021.

A 2.2 See ComReg Document Number 21/10c.

Appendix: 3 Oxera Supplemental Report

- A 3.1 Eircom's submission to the Consultation included a report from Frontier Economics⁴⁰. The Report was an assessment of the penalties methodology proposed by Oxera.
- A 3.2 The Oxera Supplemental Report addresses the points raised by Frontier Economics.
- A 3.3 See ComReg Document 21/10b for the Oxera Supplemental Report.

⁴⁰ See Appendix: 1.

Appendix: 4 2016 Oxera Report

A 4.1 See ComReg Document Number 20/25b.

Appendix: 5 Review of Submissions to the Consultation

- A 5.1 In the Consultation ComReg invited all interested parties to respond to the questions raised. ComReg said it would analyse and consider the comments received and in light of such would then review the proposals set out in the Consultation and revise them as necessary.
- A 5.2 This Annex provides a summary and assessment of the five Submissions⁴¹ received in response to the Consultation. The Respondents to the Consultation were ALTO, BT, Eircom, Sky and Virgin Media.
- A 5.3 A total of ten questions were posed throughout the Consultation on which input was sought from interested parties on ComReg's preliminary views in relation to the key topics discussed in the Consultation.
- A 5.4 The main sections in the Consultation and the associated questions on which feedback was sought were as follows:

Section of Consultation	Topic Discussed	Consultation Question
Section 3.1	Turnover Methodology	Q1. Do you think that the Turnover 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?
Section 3.1	Turnover Methodology	Q2. Do you think that that the proposal to use the Turnover Methodology for <u>more serious</u> Access Regulations breaches, in particular, where a vertically integrated operator is found to have SMP in a wholesale market, is appropriate and proportionate?

⁴¹ See ComReg Document 19/46s.

Section of Consultation	Topic Discussed	Consultation Question
Section 3.1	Turnover Methodology	Q3. 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?
Section 3.2	Tariff Methodology	Q4. Do you think that the Tariff Methodology, as proposed in Section 3.3 of this Consultation, is suitable for calculating financial penalties that are appropriate, effective, proportionate and dissuasive for Access Regulations breaches?
Section 3.2	Tariff Methodology	Q5. Do you think that it is appropriate that the proposed Tariff Methodology is applicable to all operators for <u>less serious</u> Access Regulations breaches?
Section 3.2	Tariff Methodology	Q6. Do you think that the proposed fixed and weekly penalty tariffs, as described in the Consultation, are appropriate and will result in a penalty that is proportionate and dissuasive?
Section 3.2	Tariff Methodology	Q7. 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?
Section 3.2	Tariff Methodology	Q8. Do you think that the proposed maximum cap of €500,000 for tariff based penalties is proportionate?

Section of Consultation	Topic Discussed	Consultation Question
Section 3.1-3.2	Mitigating and Aggravating Factors	Q9. Do you think that the proposed list of potential mitigating and aggravating factors described in the 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?
Section 3.1-3.2	Transparency of the Methodologies	Q10. 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 5.5 ComReg now considers each of the above topics on a question by question basis. The approach is as follows:

- a) ComReg's preliminary view is summarised;
- b) The relevant question is then set out;
- c) The Respondents that replied directly to the question are listed;
- d) The overall response of each Respondent to the question is referenced;
- e) The main issues raised by the Respondents regarding the question are identified;
- f) For each issue, ComReg then summarises the points made by Respondents and assesses the issue and points made; and
- g) ComReg then concludes with its response to the issue.

Q. 1 Question 1 Responses – Appropriateness of the Turnover Methodology

A 5.6 In section 3.1 of the Consultation ComReg proposed a Turnover Methodology that considers the relevant turnover in the market affected by the breach, the duration of the breach and the gravity of the breach to calculate a basic amount, before applying any relevant mitigating and aggravating factors.

A 5.7 ComReg asked the following question, Question 1, in the Consultation:

Do you think that the Turnover 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 5.8 ComReg received four responses to Question 1, from Sky, BT, Eircom and ALTO.

A 5.9 Sky, BT and ALTO agreed with using the Turnover Methodology to calculate penalties for breaches of obligations in the Access Regulations. BT commented that the Turnover Methodology aligns with European Commission guidance on setting penalties and with other NRAs.

A 5.10 Eircom commented that it does not consider that the Turnover Methodology is suitable for calculating financial penalties and raised the following issues.

Issues raised regarding the Turnover Methodology

- a) Whether the Turnover Methodology, based on competition law, is consistent with the Regulatory Framework;
- b) Legality of the Turnover Methodology under the Irish legislative framework;
- c) Consultation was not transparent;
- d) Proposed parameters are subjective, inappropriate and disproportionate
- e) Continue to depart from its regulatory requirements.

Regulatory Framework

A 5.11 Eircom expressed the view that a Turnover Methodology has a place in an ex post competition setting due to dominance in the market and lack of oversight, both of which are addressed in an ex ante setting in particular through the designation of Eircom with Significant Market Power and the high level of regulatory oversight via the Regulatory Governance Model (the 'RGM')⁴². Eircom contends that because of the comprehensive procedures and reporting tools in place, the probability of Eircom breaching an obligation is low and the probability of detection is high.

ComReg Assessment and Response

A 5.12 The competition law-based approach to assessing penalties is relevant for assessing penalties in the event of breaches of ex ante regulatory obligations. In an ex ante setting the action by an operator with SMP can hinder wholesale access by competitors, which in turn may dampen competition downstream. In an ex post competition rules setting, similar behaviour may take the form of refusal to supply or a margin squeeze.

A 5.13 There are similarities between the approaches taken in ex post competition law and in ex ante regulation, such as:

- a) there is an equivalence between the concepts of dominance in an ex post competition law setting and SMP in an ex ante regulation setting;
- b) both approaches recognise that, in a situation of market power and vertical supply of an essential input, there is the potential for exclusionary conduct and effects; and
- c) the theories of harm are very similar in both approaches, and assessed using similar economic criteria.

A 5.14 Under ex ante regulation ComReg will determine whether the market is effectively competitive, that is whether an operator or operators enjoy a position equivalent to dominance in the market, namely, a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. If the market is not effectively competitive ComReg will designate an operator or operators as having SMP in that market. If ComReg designates an operator with SMP under the Access Regulations, it will impose obligations on the SMP operator. The imposition of obligations in a market is intended to mitigate the effects of SMP in the market with a view to encouraging a more competitive outcome.

⁴² The RGM sets out the structures, policies, processes and behaviours through which Eircom will fulfil its regulatory obligations.

- A 5.15 The detection of ex ante regulatory breaches is not as straightforward as Eircom appears to contend. Information necessary to detect breaches may not be readily accessible to ComReg or the operator under investigation. Large telecommunications operators frequently have complex interlinked systems across or within operational business units. These different systems, their relationships and the associated business processes may need to be compared to detect breaches. In some instances the investigation will be the first time that data from these divergent systems will have been compared. The complexity of these electronic communications networks and systems means the detection of breaches of regulatory obligations is not any easier than in a Competition law context.
- A 5.16 Effective regulatory governance and deterrence are complementary, not exclusive of each other, and deterrence will help bring about and reinforce effective regulatory governance such that the application of high penalties that include a deterrent effect can encourage an operator to improve its governance arrangements and improved governance arrangements can reduce the need for deterrence in a penalty calculation. While this increase in the probability of detection may increase the instances where an operator may be subject to a penalty, non-compliant activities must still be deterred through effective and dissuasive penalties.

Legal Basis for the Turnover Financial Penalty Methodology

- A 5.17 Eircom has expressed the view that it is concerned over the legality of the Turnover Methodology including the following issues:
- a) There is no basis for a methodology to be adopted by ComReg to calculate financial penalties in Article 21a of the Framework Directive, Regulation 19 of the Access Regulations or in Article 10 of the Authorisation Directive;
 - b) Regulation 19 of the Access Regulations is not legally valid and is irreconcilable with the €500,000 limit of penalties for indictable offences under the European Communities Act;
 - c) The proposed Turnover Methodology is incompatible with Regulation 19 of the Access Regulations, which does not provide for deterrence to be a factor relevant to determining the appropriate amount of the financial penalty.

- A 5.18 As a preliminary point, ComReg notes that the validity of Regulation 19(8) itself is not, and could not be, within the scope of the Consultation.. However, it is in ComReg's powers to adopt a methodology which it will rely on for the purpose of making submissions to the High Court on the appropriate amount of a financial penalty in accordance with the role given to ComReg under Regulation 19(8) of the Access Regulations. ComReg notes further in this regard that there can be no doubt that Regulation 19(8) clearly contemplates that an order for a financial penalty is sought by ComReg in the case of enforcement proceedings for breach of an SMP obligation.
- A 5.19 ComReg is further satisfied that its Financial Penalty Methodology is appropriate for the purposes of, and compatible with, Regulation 19(8), including in terms of the cap of 10% of turnover. Eircom claimed that the financial cap of 10% of turnover for financial penalties calculated using the Turnover Methodology is inconsistent with the Section 3(3) of the European Communities Act 1972 which limits financial penalties imposed under Regulations adopted further to the Act (including the Access Regulations) to €500,000.
- A 5.20 However, Section 3(3) of the European Communities Act does not limit the range of non-criminal penalties or sanctions that can be introduced pursuant to section 3(1). A civil financial penalty in excess of €500,000 can be introduced in regulations adopted under the European Communities Act. Other legislation including: the European Union (Capital Requirements) Regulations 201422 and the European Union (Markets in Financial Instruments) Regulations 201723 (promulgated under the European Communities Act) allow for financial penalties in excess of €500,000.
- A 5.21 Eircom also expressed the view that the Financial Penalty Methodology ignores or discounts some of the factors to be considered by the High Court in Regulation 19(8)(d) of the Access Regulations, specifically whether a penalty is even justified and the effect on consumers, users and operators and instead puts too much emphasis on deterrence.
- A 5.22 ComReg notes first that its role under Regulation 19(8) is to make a submission to the High Court on the appropriate financial penalty where ComReg has decided that it is appropriate to seek an order for a financial penalty from the High Court. The Financial Penalty Methodology will be used to determine the appropriate amount in those cases where a financial penalty is sought. The Financial Penalty Methodology does not mean that ComReg will in all cases seek a penalty. Furthermore, it is the High Court which has the power to determine if a penalty is appropriate and the appropriate amount of the penalty, taking into account the four factors listed in Regulation 19(8)(d), including ComReg's submissions on the appropriate amount.
- A 5.23 ComReg does not agree in any event with Eircom's view that Oxera ignored the requirement in Regulation 19(8) of the Access Regulations to consider the effect of

the non-compliance on end-users, consumers and operators as it is difficult to measure. The Financial Penalty Methodology involves a consideration of harm, considering the competition problems that result in the imposition of the ex ante obligation; the form of the conduct and, a qualitative evaluation of the main impacts of the conduct at the wholesale and retail level (who is harmed and who gains, directly and indirectly). In a “vertical theory of harm”, the conduct occurs at the wholesale level of the market, i.e., where the obligations are imposed, and has an effect on competition in the downstream market. The qualitative evaluation of the conduct involves identifying the market which is affected, as conduct at the wholesale level of the market which restricts competition in larger downstream markets, or multiple downstream market segments, will involve greater economic harm.

- A 5.24 The Financial Penalty Methodology will only be used to determine the financial penalty that ComReg would include in its submissions to the High Court and is not used to make a decision whether there has been a breach of an obligation. Any financial penalty proposed by ComReg will be determined having regard to the specific breach concerned, and a qualitative assessment of its impact at the wholesale and retail level.
- A 5.25 As for Eircom’s point that deterrence is not a factor to be considered under Regulation 19(8), Regulation 19(8) of the Access Regulations is a non-exhaustive list of factors which the High Court should consider in making a decision on an appropriate financial penalty. Regulation 19(8) also prescribes that the High Court should consider *“the submissions of the Regulator on the appropriate amount”* but the legislation does not prescribe what factors the regulator should take into account in making these submissions.
- A 5.26 Current legislation specifically requires penalties to be dissuasive. Article 29 of the Code⁴³ requires Member States to lay down rules on penalties and that the penalties provided for must be appropriate, effective, proportionate and dissuasive.
- A 5.27 Deterrence has a correlation with the probability of detection. Based on full rationality and perfect information, a penalty could be set so as to reflect the breach exactly, in terms of the profits made or the harm caused by the infringement. However, with imperfect monitoring, an additional ‘deterrence’ element is needed to take account of the probability that a non-compliant operator may not always be caught.

⁴³ Article 29 of the Code contains text equivalent to Article 21a of the Framework Directive.

- A 5.28 Eircom asserts that the probability of detection in ex ante cases would be much higher than in ex post competition cases due to a combination of the reporting obligations which ComReg has put in place, and the efficacy of the governance frameworks in place. Effective regulatory governance and deterrence are complementary, not exclusive of each other, and deterrence will help bring about and reinforce effective regulatory governance. While this increase in the probability of detection may increase the instances where an operator may be subject to a penalty, non-compliant activities must still be deterred through effective and dissuasive penalties.
- A 5.29 Deterrence is essential in dissuading operators from breaching obligations in the first instance. It should not be the case that financial penalties can be simply absorbed by the operator without any impact on its business with the operator accruing a net benefit for breaching the obligation. Financial penalties need to be sufficiently rated so as to deter operators from breaching obligations in the future.

Deterrence is not a relevant factor

- A 5.30 Eircom makes the point that deterrence is not a factor to be considered under Regulation 19(8) and should not be classed as an additional factor, as deterrence is a general objective of the compliance process and not specific to the particular case before the High Court.

ComReg Assessment

- A 5.31 Regulation 19(8) of the Access Regulations is a non-exhaustive list of factors which the High Court should consider when making a decision on an appropriate financial penalty. Regulation 19(8) also prescribes that the High Court should consider "*the submissions of the Regulator on the appropriate amount*" but the legislation does not prescribe what factors the regulator should take into account in making these submissions.
- A 5.32 Current legislation, specifically requires penalties to be dissuasive. Article 29 of the Code obliges Member States to "... *national regulatory and other competent authorities shall have the power to impose such penalties.*" Article 29 of the Code also requires Member States to lay down rules on penalties and that "...*The penalties provided for shall be appropriate, effective, proportionate and dissuasive*".
- A 5.33 Deterrence has a correlation with the probability of detection. Based on full rationality and perfect information, a penalty would be one based on a narrow view of 'proportionality'—one in which the penalty reflects the breach, in terms of the profits made or the harm caused by the infringement. However, with imperfect monitoring, an additional 'deterrence' element is needed to take account of the probability that a non-compliant operator may not always be caught.

- A 5.34 Eircom asserts that the probability of detection in ex ante cases would be much higher than in ex post competition cases due to a combination of the reporting obligations which ComReg has put in place, and the efficacy of the governance frameworks in place. However it is only effective regulatory governance and reporting that leads to a higher probability of detection. As reporting improves and regulatory governance becomes embedded in every activity and decision, the probability of detection will increase. While this increase in the probability of detection may increase the instances where an operator may be subject to a penalty, non-compliant activities must still be deterred through effective and dissuasive penalties.
- A 5.35 Deterrence is essential in dissuading operators from breaching obligations in the first instance. It should not be the case that financial penalties can be simply absorbed by the operator without any impact on its business with the operator accruing a net benefit for breaching the obligation. Financial penalties need to be sufficiently rated so as to deter operators from breaching obligations in the future.

ComReg Response

- A 5.36 ComReg remains of the view that the Turnover Methodology, in which deterrence is inherent, is an appropriate method of calculating financial penalties for Access Regulation breaches.

Failure to consult transparently

- A 5.37 Eircom expresses the view that ComReg did not adequately define less serious and serious breaches in the Consultation, that little background was provided on the Tariff Methodology and that the precedents presented are skewed as no examples were provided where penalties were not imposed.

ComReg's Assessment and Response

- A 5.38 Paragraph 3.2 of this Response to Consultation sets out ComReg's position on seriousness and how ComReg will decide which of the Methodologies to use.
- A 5.39 Oxera was asked to review precedents in other jurisdictions and in other regulated sectors in Ireland in order to inform the basis for the Financial Penalty Methodology. While the precedents provided in the Oxera report demonstrate cases where penalties were applied, these are only a snapshot of the enforcement actions taken by NRA's and were provided to show examples of how penalties are applied in other jurisdictions. This does not mean that there are no examples of cases where penalties were not applied by other NRA's. ComReg itself has not sought penalties for the majority of Access Regulations breaches it has investigated.

- A 5.40 The Financial Penalty Methodology will only be utilised to calculate a financial penalty to submit to the High Court once a decision has been made by ComReg that a penalty is appropriate for the breach of Access Regulations identified.

Proposed parameters are subjective, inappropriate and disproportionate

- A 5.41 Eircom expressed the view that it is not clear why Oxera considers turnover as a reasonable proxy for affected sales without considering how customers have been harmed. Eircom also expressed the view that it was unclear how the duration of breaches that are discontinuous will be accounted for, that the gravity factors are not based on the effect of the conduct and that they are based on serious ex post competition breaches.

ComReg Assessment

- A 5.42 In undertaking an investigation into an alleged breach of obligations ComReg will identify the breach and will consider what harm, if any, there has been to operators, end-users or on downstream competition in the market. A breach of wholesale regulatory obligations would be expected to have a knock-on impact on downstream competition. ComReg will assess what markets are affected by the breach and what specific product/s within the market may have been affected by the breach at the wholesale level, thereby accounting for direct and indirect harm.
- A 5.43 If perfect monitoring were possible, the penalty would be set at the level of consumer harm, i.e. direct harm, only. In the absence of perfect monitoring, breaches of the Access Regulations may remain undetected. Based on full rationality and perfect information, a penalty would be one based on a narrow view of 'proportionality'—one in which the penalty reflects the breach, in terms of the profits made or the harm caused by the infringement. However, with imperfect monitoring, an additional 'deterrence' element is needed to take account of the probability that a non-compliant operator may not always be caught. As ComReg has already demonstrated, even with a regulatory governance framework and the potential to assign SMP status to operators in particular markets, there is imperfect monitoring in an ex ante setting.
- A 5.44 However, the economic deterrence-based approach, strictly applied, would require the calculation of a number of factors, including:
- a) the lost profits to the affected parties or gained profits to the breaching party, as compared to the counterfactual;
 - b) the probability of detection and prosecution, which may vary by the type of offence;

- c) potentially wider factors (impact on society, market trust, other cascades of impact).

- A 5.45 In practice, these factors are almost impossible to quantify accurately, and a compromise is often adopted, where a percentage of turnover is used as a relevant benchmark in calculating deterrence-based penalties.
- A 5.46 In calculating a financial penalty for Access Regulations breaches ComReg does not use the whole company turnover but instead calculates the value of relevant retail sales (V) which is the proportion of the market affected by the Access Regulations breach in the upstream market. It considers the breaching operator's own sales in the downstream retail market for the last full financial year of the breach and apportions this based on the market shares of the upstream wholesale products that were affected by the breach.
- A 5.47 In Appendix 3 of the Consultation ComReg laid out the proposed gravity factor ranges. These ranges are proposals only and the actual gravity figure used in a specific case will be determined based on the circumstances of the case. Oxera, in its recommendations, proposed a maximum figure of 15% which is significantly lower than the maximum gravity factor used in ex post competition cases.
- A 5.48 In calculating financial penalties for the cases in the Compliance Proceedings ComReg applied a gravity factor of 5% for a non-discrimination breach which is on the upper end of the scale for breaches with a potential impact on retail competition or the lower end of a material impact. At the same time ComReg applied a gravity factor of 3% for a transparency breach which is in the middle of the range for transparency breaches with a potential impact on retail competition. These cases were deemed as serious by ComReg but ComReg still used gravity factors in the low to mid-ranges because they were deemed to be appropriate for the conduct in question.
- A 5.49 Duration is the third component of the calculation of the basic amount in the Turnover Methodology calculation. It refers to the number of years (or parts thereof) over which the breach occurred. The duration will be determined on a case-by-case basis depending on the circumstances of the case. Delays in detecting and reporting the breach, delays in complying with the obligation and repeated breaches over a period may all be assessed as aggravating or mitigating factors when adjusting the basic amount.

ComReg Response

- A 5.50 ComReg remains of the view that the Turnover Methodology and its constituent factors; value of relevant turnover, duration and gravity factor are appropriate to calculate the basic amount of a financial penalty for Access Regulations breaches before case specific mitigating and aggravating factors are applied.

- A 5.51 The gravity factors proposed provide guidance on the potential ranges of the gravity factors depending on the breaching conduct. These figures are only indicative and gravity is determined on a case-by-case basis. However in light of the responses to the Consultation ComReg believes that a maximum gravity factor of 10%, rather than the 15% proposed in the Consultation, would be more proportionate for the types of breaches that would occur in an ex ante setting.

Departure from Regulatory Requirements

- A 5.52 Eircom expresses the view that the absence of a published compliance process means compliance processes are unpredictable, cases can remain open indefinitely and operators do not know if ComReg is being reasonable. More information is also needed on the criteria it uses to make a finding of non-compliance, accept a settlement or close an investigation.

ComReg Assessment and Response

- A 5.53 Section 4.1 of this Response to Consultation sets out ComReg's position on the ComReg Enforcement process.

Q. 2 Question 2 Responses – Use of Turnover Methodology for more serious breaches

- A 5.54 In Section 3.1 of the Consultation ComReg considered the use of a Turnover Methodology that takes into account the relevant turnover in the market affected by the breach, the duration of the breach and the gravity of the breach to calculate the basic amount, before applying any relevant mitigating and aggravating factors. ComReg proposed in the Consultation that the Turnover Methodology would be used for more serious Access regulation breaches.

- A 5.55 ComReg asked the following question, Question 2, in the Consultation:

“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 5.56 ComReg received four responses to Question 2 from Sky, BT, Eircom and ALTO.
- A 5.57 ALTO agreed without comment. Sky and BT were in general agreement but noted some issues to be considered.
- A 5.58 Eircom disagreed that the Turnover Methodology is appropriate or proportionate for more serious Access Regulation breaches.

Issues raised

- a) Determination of the seriousness of a breach;
- b) Regulatory oversight;
- c) Lack of an appropriate enforcement framework; and
- d) No assessment of harm.

Seriousness of a breach

A 5.59 ComReg proposed in the Consultation that the Turnover Methodology would be used to calculate financial penalties for serious Access Regulations breaches. Sky made the response that the seriousness of a breach needs to be determined on a case-by-case basis.

ComReg Assessment and Response

A 5.60 Paragraph 3.2 of this Response to Consultation sets out ComReg's position on seriousness and how ComReg will decide which of the Methodologies to use.

Regulatory oversight

A 5.61 Eircom makes the point that the probability of detection of regulatory breaches is high for ComReg, compared to ex post competition cases, due to Eircom's RGM and the fact that operators will make a complaint in the event of a breach.

ComReg Assessment

A 5.62 See paragraphs A 5.15 to A 5.16 in relation to regulatory oversight.

A 5.63 Operators may make complaints in relation to Access Regulations breaches, however this is on the basis that a breach is readily apparent to an operator which is not always the case.

ComReg Response

A 5.64 ComReg remains of the view that using the Turnover Methodology to calculate financial penalties is appropriate and proportionate for Access Regulation breaches. As stated above, even with the current regulatory oversight, some non-compliances may remain undetected meaning that there is a need for deterrent penalties.

Assessment of proportionality

- A 5.65 Eircom makes the point in its submissions that proportionality is only assessed at the end of calculating a penalty, when in fact proportionality needs to be assessed earlier on by establishing a theory of harm and calculating the harm.

ComReg Assessment and Response

- A 5.66 The scope of the Consultation relates to the Financial Penalty Methodology only. Eircom's comments appear to relate to considering proportionality outside of calculating a penalty which is beyond the scope of this Consultation. ComReg discusses the use of the theory of harm in section 3.1.

Q. 3 Question 3 Responses – Use of the Turnover Methodology for more serious breaches

- A 5.67 In Section 3.1 of the Consultation ComReg considered that a 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 5.68 ComReg asked the following question, Question 3, in the Consultation:

“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 5.69 ComReg received five responses to Question 3 from Sky, BT, Eircom and ALTO and Virgin Media.

- A 5.70 Sky and ALTO agreed without comment. BT were in general agreement but noted some issues to be considered.

- A 5.71 Eircom disagreed with the maximum cap of 10% of turnover as no economic justification was provided and stated that the legislative framework would not allow for it.

Issues raised

- a) Legal limit of €500,000;
- b) 10% of relevant turnover in the market; and
- c) Lack of justification for 10% of turnover.

Legal limit of €500,000

A 5.72 Eircom expressed the view that on the basis of Section 3 of the European Communities Act, financial penalties may only be imposed up to a limit of €500,000 on foot of Regulations adopted under that Act, such as the Access Regulations. Therefore, ComReg is required to limit any penalties it may seek, regardless of the methodology, to this limit.

ComReg's Assessment and Response

A 5.73 Paragraphs A 5.17 to A 5.29 set out ComReg's Assessment and Response.

Relevant turnover in the market

A 5.74 BT made the point that the proposed maximum penalty for the Turnover Methodology of 10% of turnover is only proportionate if it is limited to turnover within the jurisdiction in which the breach occurred. Virgin Media went further and made the point that the cap of 10% of turnover should be limited to the relevant turnover only.

ComReg's Assessment

A 5.75 In the Consultation, ComReg proposed that there would be a cap on penalties calculated using the Turnover Methodology. The proposed cap of 10% of turnover referred to the breaching operator's turnover for the last full year prior to the breach.

A 5.76 In the Consultation ComReg proposed the timeframe for the turnover measurement for the maximum cap would be the last complete financial year prior to the breach. ComReg's final position is that a more appropriate timeframe is the full financial year preceding ComReg's recommendation of a financial penalty to the High Court. The use of this timeframe is in line with the EU Commission's Guidelines on the method for setting fines imposed pursuant to Article 23(2)(s) of Regulation No.1/2003⁴⁴.

A 5.77 Therefore an operator with operations in multiple countries, would have its turnover from each jurisdiction counted in the cap of 10% of turnover. These operators may end up with disproportionately higher penalties as a result.

A 5.78 The Access Regulations are only applicable in Ireland and as such there would be no effect in downstream markets in other jurisdictions.

⁴⁴ COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

- A 5.79 Limiting the cap to 10% of relevant turnover only as proposed by Virgin Media would limit the effectiveness of applying a penalty and would reduce its deterrent effect.

ComReg's Response

- A 5.80 ComReg recognises that it may not be proportionate to use the total turnover for an operator where some of that turnover was earned in a jurisdiction in which the breach is not applicable and the impact on competition has not been felt. Therefore in light of the responses ComReg is of the view that the cap on penalties of 10% of turnover should be limited to turnover in the jurisdiction only.

Justification for cap of 10% of turnover

- A 5.81 Eircom express the view that there is no economic justification given for the cap of 10% of turnover and that it is excessive and disproportionate.

ComReg's Assessment

- A 5.82 Oxera, in its 2020 Oxera Report, demonstrated that there is precedent for using a cap of 10% of turnover for calculating penalties. The 2020 Oxera Report shows that multiple regulatory authorities use 10% of turnover as their maximum including Ofcom, Ofwat, Ofgem, ORR in the UK and the Central Bank, the CRU and the CCPC in Ireland.
- A 5.83 The Law Reform Commission in their Report "Regulatory Powers and Corporate Offences"⁴⁵ also made the recommendation that "*...in the case of an administrative financial sanction as applied to a legal person, an upper limit of €10 million or 10% of annual turnover, whichever figure is the greater.*" should apply.
- A 5.84 In the most recent cases in which ComReg sought financial penalties from the High Court,⁴⁶ the penalties sought were 0.63% of turnover and 0.13% of turnover respectively, which are significantly lower than the maximum of 10% that was proposed.

ComReg's Response

- A 5.85 ComReg remains of the view that a cap of 10% of turnover for financial penalties calculated using the Turnover Methodology is proportionate and is in line with the precedents demonstrated in the Oxera report in both Ireland and other jurisdictions.

⁴⁵ Report Regulatory Powers and Corporate Offences Volume 1: Regulatory Powers, Chapters 1 to 7 Volume 2: Corporate Offences, Chapters 8 to 13 (LRC 119-2018).

⁴⁶ *ComReg v. Eircom, High Court, 2017/186 MCA.*

A 5.86 While ComReg is capping turnover based financial penalties at 10% of turnover that it will submit to the High Court, the decision to apply a penalty and the penalty amount is made by the High Court who would not be bound by the maximum cap in the Turnover Methodology.

A 5.87 Should ComReg seek an order for a financial penalty, operators will have the opportunity to petition the judge in respect of the penalty through normal legal procedures.

Q. 4 Question 4 Responses – Use of Tariff Methodology

A 5.88 In Section 3.2 of the Consultation ComReg considered whether the use of the Tariff Methodology was suitable for calculating financial penalties for less serious Access Regulations breaches.

A 5.89 ComReg asked the following question, Question 4, in the Consultation:

“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 5.90 ComReg received four responses to Question 4 from Sky, BT, Eircom and ALTO.

A 5.91 Sky and ALTO agreed without comment. BT and Eircom were in general agreement but noted some issues to be considered.

Issues raised

- (a) Determination of seriousness;
- (b) Tariff penalties would need to be referred to the High Court;
- (c) Weekly tariff values; and
- (d) Clarity needed on duration.

Determination of seriousness

A 5.92 Eircom made the point that insufficient information was provided on how the seriousness of a breach would be assessed, and Sky made the point that the seriousness of a breach needs to be assessed on a case-by-case basis.

ComReg’s Assessment and Response

A 5.93 Paragraph 3.2 of this Response to Consultation sets out ComReg’s position on seriousness and how ComReg will decide which of the Methodologies to use.

Tariff penalties would need to be referred to the High Court

- A 5.94 BT made the point that under the current legislative framework, ComReg may only recommend a penalty, but it is the High Court who will decide if a penalty is appropriate and the penalty amount, even for lower value tariff penalties.

ComReg Assessment and Response

- A 5.95 Section 4.3 of this Response to Consultation sets out ComReg's position on the direct fining powers.

Weekly tariff – Ranges

- A 5.96 Eircom has made the point in its submission that as there are only two categories of breaches i.e. more serious and less serious, that the weekly tariff of €10,000 should be a range rather than fixed to account for differences in less serious breaches.

ComReg Assessment

- A 5.97 In the Consultation ComReg proposed two categories of Access Regulations breach; more serious and less serious.
- A 5.98 Paragraph 3.2 of this Response to Consultation sets out ComReg's position on seriousness and how ComReg will decide which of the Methodologies to use.
- A 5.99 The Tariff Methodology is intended to be simple, easy to use, transparent and effective and including a range of values for the weekly tariff would complicate the methodology. Differences in the seriousness may be accounted for in the Tariff Methodology when considering mitigating and aggravating factors.

ComReg Response

- A 5.100 ComReg remains of the view that the Tariff Methodology is suitable for calculating financial penalties that are effective, appropriate, proportionate and dissuasive. The Tariff Methodology is simple to use, transparent and not completely mechanistic as it allows mitigating and aggravating factors to be considered.

Clarity on duration definition

- A 5.101 Eircom raised the question in its submission as to how ComReg intends to treat cases where a breach may not be evident to the operator or where there may be a difference in interpretation of the regulations. Eircom also makes the point that prompt remedial action should negate the need to impose a penalty.

A 5.102 Eircom also made the point that it can take time for an investigation to be completed in order to make a determination that there has been a breach of obligations which may affect the duration in which the operator was in breach.

ComReg Assessment

A 5.103 ComReg makes every effort to ensure the relevant obligations are concise and clear. Should there be a difference in interpretation of the regulations, ComReg will work with the operator to clarify the interpretation and this will be considered in the assessment of the duration of the breach, should a penalty be sought.

A 5.104 In order to determine if there has been a breach and what effect it has on the market and competition, ComReg must carry out an investigation. There are many factors that can affect the duration of an investigation which can include the scope of the investigation, the availability of information, the level of cooperation with the breaching operator and resources available. These will all be considered when calculating the penalty and do not only effect the duration but may also be considered in adjustments to the penalty amount.

ComReg Response

A 5.105 Duration as a factor in the Tariff Methodology refers to the number of weeks that the operator was in breach of the obligation, to the nearest week. Any delays in detecting a breach cannot necessarily be written off as the fault of ComReg as it remains the operator's responsibility to remain in compliance. However any alleged delays will be dealt with on a case by case basis.

A 5.106 ComReg remains of the view that the duration of a breach in terms of the Tariff Methodology is sufficiently defined and that the points raised in the submissions can be addressed on a case by case basis and in mitigating and aggravating factors.

Q. 5 Question 5 Responses – Use of Tariff Methodology

A 5.107 In Section 3.2 of the Consultation ComReg considered whether the use of the Tariff Methodology was suitable for calculating financial penalties for less serious Access Regulations breaches.

A 5.108 ComReg asked the following question, Question 5, in the Consultation:

“Do you think that it is appropriate that the proposed Tariff Methodology is applicable to all operators for less serious Access Regulations breaches?”

A 5.109 ComReg received four responses to Question 5 from Sky, BT, Eircom and ALTO.

A 5.110 Sky, BT, ALTO and Eircom broadly agreed but noted some issues to be considered.

Issues raised

- (a) Determination of seriousness; and
- (b) Penalty may not always be appropriate.

Seriousness of a breach

A 5.111 The point was made that the definitions provided in the Consultation regarding the seriousness of Access Regulations Breaches were unclear and it was unclear how ComReg would come to a decision on the seriousness of a breach.

ComReg's Assessment and Response

A 5.112 Paragraph 3.2 of this Response to Consultation sets out ComReg's position on seriousness and how ComReg will decide which of the Methodologies to use.

Penalty may not always be appropriate

A 5.113 BT and ALTO raised the point that in some instances there may be no need for a penalty such as if the breach is very minor or if there is no impact on competition and that an impact assessment should be carried out to determine if a penalty is appropriate.

ComReg Assessment

A 5.114 The Financial Penalty Methodology is an aspect of a wider compliance process and is only utilised once ComReg makes a decision that it is necessary and appropriate to seek a penalty. ComReg will determine, based on the available evidence, whether it is proportionate to seek a financial penalty for a particular breach of obligations. This will apply to both Methodologies. To date ComReg has only sought penalties in a very small number of cases.

ComReg Response

4.31 ComReg remains of the view that the Tariff Methodology is appropriate for calculating financial penalties for less serious breaches (typically breaches of a procedural nature, for example, a short delay⁴⁷ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of

⁴⁷ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes).

Q. 6 Question 6 Responses – Use of the Tariff Methodology

A 5.115 In Section 3.2 of the Consultation ComReg considered whether the Tariff Methodology was suitable for calculating financial penalties for less serious Access Regulations breaches or where it would not be feasible use the Turnover Methodology.

A 5.116 ComReg asked the following question, Question 6, in the Consultation:

“Do you think that the proposed fixed and weekly penalty tariffs, as described in Table 5 of the Consultation, are appropriate and will result in a penalty that is proportionate and dissuasive?”

A 5.117 ComReg received four responses to Question 6 from Sky, BT, Eircom and ALTO.

A 5.118 Sky, BT, ALTO and Eircom broadly agreed but noted some issues to be considered.

Issues raised

- (a) Proportionality of the Tariff Methodology;
- (b) Figures for fixed and weekly tariffs; and

Proportionality of the Tariff Methodology

A 5.119 Eircom made the point in its submissions that the proportionality of the methodology cannot be answered without establishing actual harm.

ComReg Assessment

A 5.120 The question that ComReg raised in the Consultation related to the proportionality of the penalties produced as a result of the Tariff Methodology.

A 5.121 As ComReg has noted, quantifying the harm caused to competition relative to a counterfactual can be challenging, and may not always be possible, also the theory of harm in ex ante regulation is discussed in section 3.1 of this Response to Consultation. ComReg will determine if a penalty is appropriate and proportionate based on the specific circumstances of a case. In such instances where a penalty is appropriate and proportionate, it would be sought through a recommendation to the High Court as set out at Regulation 19 of the Access Regulations.

ComReg Response

A 5.122 ComReg remains of the view that the Tariff Methodology will produce penalties that are proportionate and appropriate for the types of breaches it will be used for i.e. less serious Access Regulations breaches as it takes account of the particulars of the case in the application of mitigating and aggravating factors.

Ranges for fixed and weekly tariffs

A 5.123 BT and ALTO have both expressed the view that the weekly and fixed tariffs should be ranges rather than the fixed values they currently are. Both operators are concerned that these values will result in penalties that may be disproportionately high, especially for smaller operators.

ComReg's Assessment

A 5.124 The fixed and weekly tariff amounts are used to calculate the basic amount of a financial penalty, before any mitigating and aggravating factors are applied. Therefore while penalties may seem initially high, they may be decreased or increased depending on any mitigating or aggravating factors that may be considered relevant to the case.

A 5.125 The Tariff Methodology is intended to be simple, easy to use, transparent and effective and including a range of values for the weekly tariff would complicate the methodology. Differences in the seriousness of less serious Access Regulations breaches may be accounted for when considering mitigating and aggravating factors.

A 5.126 The size of an operator may be considered as a mitigating or aggravating factor, and will be considered in terms of the proportionality of the penalty. In assessing proportionality, the potential effect of the financial penalty on the operator will be considered and any penalty amount submitted to the High Court would not be such as to cause the business to cease trading.

ComReg's Response

A 5.127 ComReg remains of the view that the fixed and weekly tariffs are appropriate as the tariff methodology is reserved for Access Regulations breaches that are less serious breaches (typically breaches of a procedural nature, for example, a short delay⁴⁸ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with timeframes required of the negotiation of SLA's, short delays in providing a

⁴⁸ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes) and for cases where it may not be feasible to use the Turnover Methodology. The fixed and weekly tariffs are also only used to calculate the basic amount of the penalty before case specific mitigating and aggravating factors are applied.

Q. 7 Question 7 Responses – Use of Tariff Methodology

A 5.128 In Section 3.2 of the Consultation ComReg considered whether the use of the Tariff Methodology was suitable for calculating financial penalties for less serious Access Regulations breaches.

A 5.129 ComReg asked the following question, Question 7, in the Consultation:

“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 5.130 ComReg received four responses to Question 7 from Sky, BT, Eircom and ALTO.

A 5.131 Sky, BT, ALTO broadly agreed but noted some issues to be considered.

A 5.132 Eircom did not think that enough information had been provided in the Consultation to allow Eircom to comment fully, especially as no justification was provided to support the increase in the weekly tariff after a time period.

Issues raised

- (a) Ongoing non-compliance; and
- (b) Ranges for fixed and weekly tariffs.

Ongoing non-compliance

A 5.133 Sky made the point in its submission that an on-going failure to comply with obligations should see penalties increase given initial penalties have not been enough to ensure compliance.

ComReg’s Assessment

A 5.134 ComReg proposed in the Consultation that the weekly tariff could be increased after a number of months, in order to deter any operator who may continue to be in breach.

A 5.135 While a financial penalty may reach the maximum of €500,000, ComReg is not limited to financial penalties as a sanction. ComReg may also seek additional sanctions from the High Court. Pursuant to Regulation 19(4) of the Access Regulations, ComReg may also seek an order directing compliance with the obligation or an order directing remedy of any non-compliance with the obligation. Failure to comply with such orders would be a contempt of court.

ComReg Response

A 5.136 ComReg is of the view that it would not be proportionate to increase the weekly tariff over time as there should be sufficient deterrence in the maximum penalty of €500,000 and there are additional sanctions that ComReg may seek from the High Court under regulation 19(4) of the Access Regulations.

Ranges for fixed and weekly tariffs

A 5.137 BT, Eircom and ALTO have both expressed the view that the weekly and fixed tariffs should be ranges rather than the fixed values they currently are. Both operators are concerned that these values will result in penalties that may be disproportionately high, especially for smaller operators.

ComReg Assessment and Response

A 5.138 Paragraph A 5.123 to **Error! Reference source not found.** of this Response to Consultation sets out ComReg's position on the fixed and weekly tariffs.

Q. 8 Question 8 Responses – Use of Tariff Methodology

A 5.139 In Section 3.2 of the Consultation ComReg proposed that a maximum cap of €500,000 was appropriate for penalties calculated using the Tariff Methodology.

A 5.140 ComReg asked the following question, Question 8, in the Consultation:

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

A 5.141 ComReg received four responses to Question 8 from Sky, BT, Eircom and ALTO.

A 5.142 Sky, BT, ALTO broadly agreed but noted some issues to be considered.

A 5.143 Eircom did not agree as it thought €500,000 was too high a cap for less serious breaches.

Issues raised

- (a) Maximum cap of €500,000 too high;
- (b) Cap could stifle compliance; and
- (c) Ratification of large fines still needed.

Cap of €500,000 is too high

A 5.144 Eircom expressed the view that Section 3 of the European Communities Act limits financial penalties to €500,000 that may be imposed on foot of Regulations adopted under that Act, such as the Access Regulations and as such ComReg is required to limit any penalties it may seek, regardless of the methodology, to this limit.

ComReg's Assessment

A 5.145 Paragraphs A 5.19 to A 5.20 of this Response to Consultation sets out ComReg's position on the maximum cap for the Tariff Methodology.

ComReg's Response

A 5.146 ComReg remains of the view that €500,000 is an appropriate cap for financial penalties calculated as a result of the Tariff Methodology. The cap is significantly lower than the cap of 10% of turnover which is reserved for financial penalties calculated using the Turnover Methodology.

A 5.147 In the event that a decision is taken to seek a financial penalty, ComReg may only make a submission on an appropriate financial penalty to the High Court and it is the High Court who decides whether a penalty is appropriate and what that amount may be.

A 5.148 Should ComReg seek an order for a financial penalty, operators will have the opportunity to petition the judge in respect of the penalty through normal legal procedures.

Maximum cap may stifle compliance

A 5.149 Sky raised the point in its submission that a maximum cap on penalties may stifle ComReg's ability to enforce compliance and that ComReg needs to be able to enforce compliance even after the maximum had been reached.

ComReg's Assessment

A 5.150 While a penalty may reach the maximum of €500,000, ComReg is not limited by this and can seek additional sanctions from the High Court. Pursuant to Regulation 19(4) of the Access Regulations ComReg may also seek a declaration of non-compliance, an order directing compliance with the obligation or an order directing remedy of any non-compliance with the obligation. Failure to comply with such orders would be a contempt of court.

ComReg's Response

A 5.151 ComReg remains of the view that the cap of €500,000 on tariff financial penalties is proportionate and there are additional sanctions available to ComReg through the High Court that can ensure compliance.

Ratification of large fines

A 5.152 BT expressed the view that should ComReg have direct fining powers, larger fines should still be ratified by the High Court and that there should be an appropriate appeals process.

ComReg's Response

A 5.153 Section 4.3 of this Response to Consultation sets out ComReg's position on direct fining powers.

Q. 9 Question 9 Responses – Mitigating and Aggravating Factors

A 5.154 In Section 3.2 of the Consultation ComReg proposed a non-exhaustive list of potential mitigating and aggravating factors that may be considered when calculating financial penalties for Access Regulations breaches.

A 5.155 ComReg asked the following question, Question 9, in the Consultation:

“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 5.156 ComReg received four responses to Question 9 from Sky, BT, Eircom and ALTO.

A 5.157 Sky, BT, Eircom and ALTO broadly agreed but noted some issues to be considered.

Issues raised

- (a) Mitigating and aggravating factors are not considered at earlier stages of the enforcement process;
- (b) More exhaustive list and should be separated; and
- (c) Information needed on how they will be used.

Factors not considered at earlier stages of the enforcement process

A 5.158 Eircom made the point in its submissions that mitigating and aggravating factors should not just be considered at the time of calculating financial penalties but should be considered earlier in the process, particularly when making a decision on whether a penalty is appropriate and whether to apply the Turnover or Tariff Methodology.

ComReg Assessment

A 5.159 The scope of the Consultation was limited to the Financial Penalty Methodology to be used to calculate appropriate financial penalties that would be submitted to the High Court in the event that ComReg makes a decision that an Access Regulations breach warrants a penalty. Mitigating and aggravating factors are an essential component of calculating a penalty that is proportionate and appropriate as they account for the specifics of each case.

A 5.160 Where appropriate, ComReg considers mitigating and aggravating factors at other stages throughout the investigation including at case opening; as to whether it is appropriate to open a case and also when making a decision on whether to seek a financial penalty from the High Court. These mitigating and aggravating factors considered at case opening will not necessarily be the same. Some factors will be unknown at the time of opening a case, for example, the operators level of cooperation with the investigation.

ComReg Response

A 5.161 ComReg remains of the view that the mitigating and aggravating factors described in the Consultation provide clarity to operators on what factors might be considered by ComReg when calculating financial penalties. However the list is not exhaustive as the factors will be particular to the circumstances of each case.

List of factors should be separated

A 5.162 ALTO has suggested that the list should be separated into mitigating and aggravating factors and that the list should be exhaustive to provide more transparency to operators. Sky noted that the factors should be considered on a case by case basis.

ComReg's Response

A 5.163 In providing the list of mitigating and aggravating factors in the Consultation ComReg attempted to include as many examples as possible of relevant mitigating and aggravating factors that could be considered during a penalty calculation. Where additional factors come to light in the future, they may be added to the list of relevant mitigating and aggravating factors

A 5.164 ComReg recognises the list is not exhaustive but it is not practical to provide an endless list as mitigating and aggravating factors are specific to the case and it would not be reasonable to produce a finite list of mitigating and aggravating factors that could exclude genuine mitigating factors that may arise in future cases.

A 5.165 In light of the submissions received in relation to separating out the list of adjustment factors, ComReg now provides a separated list of mitigating and aggravating factors in the Financial Penalty Methodology in Appendix: 6.

Unclear how Mitigating and Aggravating factors will be considered

A 5.166 Eircom has expressed the view that there is uncertainty as to how the mitigating and aggravating factors will be accounted for in the final penalty.

ComReg's Assessment

A 5.167 How mitigating and aggravating factors will be considered in a penalty calculation will vary depending on the background and circumstances of each case. There will be varying degrees of mitigation and aggravation such that it is not possible to provide a breakdown of the percentages of mitigation and aggravation.

ComReg Response

A 5.168 ComReg remains of the view that the list of mitigating and aggravating factors is sufficiently detailed to give operators insight into the factors considered by ComReg. However this list is not exhaustive and ComReg will consider all mitigating and aggravating factors relevant to a case. The percentage reduction for a particular mitigating factor or percentage increase for a particular aggravating factor are specific to a particular case so must be determined on a case by case basis.

Q. 10 Question 10 Responses – Financial Penalty Methodology

A 5.169 In Section 3 of the Consultation ComReg proposed a Methodology that contained both a Turnover and Tariff Methodology that could be considered when calculating penalties for Access Regulations breaches.

A 5.170 ComReg asked the following question, Question 10, in the Consultation:

“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 5.171 ComReg received four responses to Question 10 from Sky, BT, Eircom and ALTO.

A 5.172 Sky, BT, Eircom and ALTO broadly agreed but noted some issues to be considered.

Issues raised

- (a) Calculating the cost of non-compliance;
- (b) Enforcement/Compliance Guidelines; and
- (c) Uses of Turnover and Tariff Methodology.

Cost of non-compliance

A 5.173 Sky raised the point that it was concerned that operators may be able to calculate the cost of non-compliance so penalties should be calculated on a case by case basis.

ComReg’s Assessment

A 5.174 The Financial Penalty Methodology which calculates a basic amount to which relevant mitigating and aggravating factors are applied is not completely mechanistic as the mitigating and aggravating factors can only be determined on a case by case basis. Therefore operators would find it hard to calculate the true cost of non-compliance ahead of time. Were an operator found to have intentionally breached an obligation this would count as a serious aggravating factor and could see the financial penalty increase significantly.

A 5.175 Even if operators were able to calculate the approximate cost of being in breach, ComReg considers that the potential penalties available under the Financial Penalty Methodology are sufficient to deter operators from breaching their obligations

ComReg Response

A 5.176 ComReg remains of the view that the Financial Penalty Methodology is sufficiently transparent. ComReg will use the Financial Penalty Methodology to calculate financial penalties, where appropriate, that will be proposed to the High Court pursuant to Regulation 19(8) of the Access Regulations. It is then the High Court's decision whether to seek a penalty and what that penalty amount should be, taking into account ComReg's submission and other factors.

Enforcement/Compliance Guidelines

A 5.177 BT, ALTO and Eircom all raised the point that the Financial Penalty Methodology is only a component of the overall enforcement framework and that ComReg needs to provide more clarity on the investigation and decision making processes which result in the use of the Financial Penalty Methodology.

ComReg's Response

A 5.178 Section 4.1 of this Response to Consultation sets out ComReg's position on the ComReg Enforcement process.

Use of Tariff and Turnover Methodologies

A 5.179 Eircom made the point that more clarity needs to be provided on each step of the proposal and in particular on the boundary between the tariff-and turnover-based approaches to ensure sufficient transparency.

ComReg Assessment and Response

A 5.180 ComReg committed to consulting on the Financial Penalty Methodology to calculate financial penalties pursuant to the Access Regulations. However the Financial Penalty Methodology as described in the Consultation is only one element of the compliance and enforcement process.

A 5.181 ComReg has chosen the Turnover Methodology as the default methodology. The gravity factor used in the Turnover Methodology calculation will allow for variances in the seriousness of an Access Regulation breach. The Tariff Methodology will be used where it is not feasible to use the Turnover Methodology (for example, where no turnover can be readily assigned to the Access Regulations breach) or, for less serious breaches (typically breaches of a procedural nature, for example, a short delay⁴⁹ in publishing documentation required by a transparency obligation, a failure to notify ComReg of a refusal of an access request, non-compliances with

⁴⁹ Extended delays in complying with a procedural breach may not be considered as less serious breaches.

timeframes required of the negotiation of SLA's, short delays in providing a Statement of Compliance, short delays in notifying ComReg of Fixed or Mobile Termination Rate changes). ComReg believes it is not necessary to have a range for the fixed and weekly tariffs for these types of breaches.

A 5.182 Both methodologies have a place in the Financial Penalty Methodology in order to calculate financial penalties that are effective, appropriate proportionate and dissuasive, for the wide range of Access Regulations breaches.

Appendix: 6 Financial Penalties Methodology – Access Regulations

A 6.1 See ComReg Document Number 21/10a.