



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Information Notice

Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (no.12 of 2022)

Information Notice

Reference: ComReg 23/85

Version: Final

Date: 21/09/2023

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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1. Under the Competition Act 2002 as amended (the “2002 Act”), the Commission for Communications Regulation (“ComReg”) is, together with the Competition and Consumer Protection Commission (“CCPC”), a competent authority in respect of matters involving the provision of an Electronic Communications Network (“ECN”) or Electronic Communication Services (“ECS”) or associated facilities.
2. On 29 June 2022, the Competition (Amendment) Act 2022 (the “2022 Act”) was enacted by the Oireachtas. The 2022 Act implements Directive (EU) 2019/1 of the European Parliament and of the Council (also known as the ECN+ Directive) and amends the 2002 Act. The 2022 Act has not yet come into force but is expected to shortly.
3. As a competent authority under the 2022 Act, ComReg has the function of investigating possible breaches of the 2002 Act and Articles 101 and 102 of the Treaty of the Functioning of the European Union (“TFEU”) insofar as it relates to and ECN and ECS.
4. On 28 August ComReg published the following draft policies and guidelines at Annex 1 of the Information Notice (ComReg Document 23/78), and in doing so provided for a two week consultation¹:
 - a. Guidelines on the determination of administrative financial sanctions and periodic penalty payments under the Competition Act 2022 (“Financial Penalty Guidelines”);
 - b. Access to the File Policy in respect of investigations by ComReg under the Competition Act 2002 (“Access to the File Policy”); and
 - c. ComReg Administrative Leniency Policy (“ComReg ALP”).
5. ComReg received submissions from two respondents – Alternative Operators in the Communications Market (“ALTO”)² and Three Ireland (Hutchison) Limited (“Three”)³. These submissions are published at Annex 1 of this Information Notice (collectively referred to as the “Submissions”).
6. In light of those Submissions, a non-confidential copy of which is attached at Annex 1 of this Information Notice, ComReg has made some changes to the draft version

¹ Information Notice - Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (no.12 of 2022), ComReg Document 23/78, 28 August 2023.

² <http://www.alto.ie/>.

³ www.three.ie.

of the Financial Penalty Guidelines. No changes have been made to the Access to the File Policy or the ComReg ALP.

7. In summary, in the Financial Penalty Guidelines, ComReg has aligned its approach further with the CCPC by:
 - putting in place a cap of 30% of the basic amount for an adjustment due to a particular mitigating or aggravating factor and a cap of 50% for the total amount of adjustment to the basic amount;
 - removing the cap of 100% for adjustment of the basic amount due to recidivism; and
 - adding to the aggravating factor related to internal mechanisms or procedures, the possibility of ignoring the internal mechanisms or procedures.
8. ComReg is today publishing final versions of the three documents listed above at (a) to (c) and in addition, the joint administrative leniency policy of the Competition and Consumer Protection Commission (the “CCPC”) and ComReg (the “Joint ALP”). The Joint ALP is also being published on the CCPC’s website.

Annex 1: Submissions

Please see the following Submissions below:

alto

alternative operators in the communications market

Consultation: Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (no.12 of 2022) - Ref: 23/78

Submission By ALTO

Date: September 11th 2023

ALTO is pleased to respond to the Consultation: Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (No.12 of 2022) – Ref: 23/78

ALTO welcomes this opportunity to comment on this important consultation.

Section 3 of the Competition Act 2002 (as amended) (the "2002 Act") provides that the Commission for Communications Regulation ("ComReg"), together with the CCPC, is a competent authority in respect of matters involving the provision of an Electronic Communications Network, Electronic Communication Services or associated facilities.

On 29 June 2022, the Competition (Amendment) Act 2022 (the "2022 Act") was enacted by the Oireachtas. The 2022 Act implements Directive (EU) 2019/1 of the European Parliament and of the Council (also known as the ECN+ Directive) and amends the 2002 Act. The 2022 Act has not yet come into force.

As a competent authority under the 2022 Act, ComReg has the function of investigating possible breaches of the 2002 Act and Articles 101 and 102 of the Treaty of the Functioning of the European Union ("TFEU").

On 28 August 2023 ComReg made the below policies and guidelines available pursuant to the 2002 Act, arising out of the 2022 Act. ALTO both welcomes and has reviewed the files and publications associated with the Consultation listed below:

1. Guidelines on the determination of administrative financial sanctions and periodic penalty payments under the Competition Act 2022 ("*Financial Penalty Guidelines*") (ComReg 23/78A);

2. Access to the File Policy in respect of investigations by ComReg under the Competition Act 2002 (“*Access to the File Policy*”) (ComReg 23/78B); and
3. ComReg Administrative Leniency Policy (“*ComReg ALP*”) (ComReg 23/78C).

The draft policies and guidelines published by ComReg are virtually identical to the finalised policies and guidelines the Competition and Consumer Protection Commission (“CCPC”), published on 1 August 2023 on the operation of its powers and responsibilities arising out of the 2022 Act.

Preliminary Remarks

ALTO notes that this Consultation was published by ComReg as a combined Information Notice and Consultation and ran over a 2-week period from 28 August 2023 to 11 September 2023.

ALTO submits that the publication headers on the ComReg website and information emails did not indicate clearly that there was an active and full consultation underway on these important competition law instruments.¹

ALTO notes that this important consultation appeared behind the banner of an “*Information Notice*”. Despite the fact that the ComReg publications are virtually identical to the finalised policies and guidelines of CCPC, industry still expects ComReg to fulfil its transparency obligations in accordance with Regulation 101(6) of the European Union (Electronic Communications Code) Regulations 2022. While this is clearly a very minor housekeeping matter, it should be noted for future consultations conducted by ComReg. The draft policies and guidelines were published by ComReg to provide transparency around how ComReg will exercise

¹ See **Exhibits A and B**

their new powers, it is slightly regrettable that some confusion reigned over the online form and format of the exercise.

ALTO suggests that ComReg should be open to receiving any late feedback on this consultation under its own discretionary powers in the event that other parties may have confused matters.

The backdrop to this Consultation arises from changes to the legislation impacting the role of ComReg as sector regulator and more correctly, legislative reforms in the European Union.

ALTO has a healthy and productive working relationship with ComReg over its twenty-four-year history and it actively supports ComReg initiatives that seek to protect and facilitate EU competition laws. EU Laws built upon four pillars: (1) Antitrust and Cartels; (2) Market Liberalisation; (3) State Aid and Control; and (4) Merger Control.

ALTO notes that ComReg and the CCPC formerly the Competition Authority have previously concluded co-operation agreements to handle situations where sectoral matters fall squarely into one or other agency's area of competence. We note that this form of arrangement is likely to continue and will need to be updated given the changes to the legislation in the past year or longer.

At the time of responding, ALTO notes that ComReg seeks to actively recruit adjudicators for a panel of service providers that will facilitate disputes and enforcement activity on the market and on ComReg's behalf.

ALTO submits that ComReg's Guidelines to the adjudication officers deciding under section 15X must be robust and only permit discretion to be exercised in very limited circumstances. ALTO submits that ComReg must submit approved adjudicators to very robust procedures and training that is followed consistently to instil confidence

in industry that ComReg’s policies and Guidelines are fair, transparent and non-discriminatory.

Separately, and in particular, we submit that industry still has valid concerns about how a member of the ComReg staff could ever properly act as an adjudicator on a dispute and then seek to claim that the dispute of matter under adjudication was impartially handled. We note the CCPC policy for adjudication and the independence requirement of and for adjudicators appears to be a more robust approach to this issue. ALTO makes this remark fully conscious that the legislation permits this form of arrangement. However, we do not believe that a perceived lack of impartiality or perceived partisanship concerning a decision maker – in this case ComReg – will survive judicial scrutiny. Various legal decisions on this point underpin ALTO’s submission and in particular the *Zalewski v WRC*² decision by the Supreme Court.

This submission is made taking account of the various Electronic Communications Appeal Panel (“ECAP”), procedural challenges taken to the ECAP itself and later to the High Court before the ECAP was scrapped as an appeal mechanism.

ALTO would welcome far more clarity from ComReg on its organisational plans for enforcement and adjudication activity. At the time of submission – which is granted, a time of great change – it remains unclear precisely how new communications framework practices and procedures will actually operate.

Comments on Guidelines and Policy

- 1. Guidelines on the determination of administrative financial sanctions and periodic penalty payments under the Competition Act 2022 (“*Financial Penalty Guidelines*”) (ComReg 23/78A)**

² *Tomasz Zalewski v The Workplace Relations Commission, an Adjudication Officer [Y], Ireland and the Attorney General* [2021] IESC 24.

The draft Financial Penalty Guidelines published by ComReg are drafted pursuant to Section 15AF(1)(b) of the 2002 Act. The purpose of the draft Financial Penalty Guidelines is to provide guidance to the adjudication officers and to promote transparency by setting out detailed guidance regarding the methodology for the determination financial sanction monetary amounts.

The Financial Penalty Guidelines outline:

- Two-step methodology to be used when deciding the administrative financial sanction to be imposed on an undertaking found to have infringed, or to be infringing, relevant competition law;
- Methodology and relevant factors for determination of the amount of administrative financial sanctions; and
- Methodology and relevant factors for calculating periodic penalty payments.

ALTO submits that ComReg appears to be approaching this particular set of Guidelines in the proper and appropriate manner.

2. Access to the File Policy in respect of investigations by ComReg under the Competition Act 2002 (“*Access to the File Policy*”) (ComReg 23/78B)

The draft Access to the File Policy sets out the procedures adopted by ComReg for providing access to its file in the context of investigations carried out by ComReg under the 2002 Act.

The file, in this context, consists of documents which have been obtained, produced and/or assembled by ComReg during an investigation and which have been relied upon by ComReg for the purposes of issuing a statement of objections / investigation report.

The Access to the File Policy sets out:

- Who is entitled access to the file;
- When access to the file is granted;
- Documents to which access may be granted; and
- Submission and treatment of confidential information.

ALTO submits that ComReg's proposed Access to the File Policy appears to adhere to the European Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation.³

We submit that ComReg's proposed Access to the File Policy, rules and procedures should be reconsidered, reviewed and if necessary redrafted – where appropriate, in light of the EU Commission Notice.

3. ComReg Administrative Leniency Policy (“ComReg ALP”) (ComReg 23/78C)

The draft ComReg ALP outlines ComReg's policy in relation to applications for leniency from undertakings for disclosing their participation in cartels or retail price maintenance and outlines the requirements applicant undertakings must meet in order to qualify for leniency.

³ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC1222\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC1222(03))

Leniency, in the context of the ComReg ALP, refers to both immunity from administrative financial sanctions, as well as a reduction of any such administrative financial sanctions, which would otherwise have been imposed by ComReg.

The ComReg ALP provides that applications for leniency must be made to the CCPC who will then decide, along with ComReg, whether a particular cartel matter shall be allocated to the CCPC or ComReg.

ALTO submits that it is notable, however, that the ComReg ALP is separate and in addition to the CCPC's Administrative Leniency Policy and the Cartel Immunity Programme, which outlines the joint policy of both the CCPC and the Director of Public Prosecutions in considering applications for immunity from prosecution for criminal cartel offences under the 2002 Act.

ALTO notes the position of the CCPC Leniency Policy as published in August 2023 pursuant to Part 2E of the 2002 Act. A CCPC publication modelled on the European Competition Network's revised Model Leniency Programme.⁴

At the time of drafting, the ComReg noted "*Joint Policy*" mentioned in the Preface of ComReg's Administrative Leniency Policy: "*For further information on how ComReg and the CCPC interact on the issue of leniency in the electronic communications sector, please see the Joint Policy on Leniency in the Electronic Communications Sector ("Joint Policy") available on ComReg's website at www.comreg.ie.*" does not appear to be available online. ALTO seeks to review this publication.

ALTO observes that the critical issue in leniency related matters is which agency acts as recipient for or in the leniency application and which agency takes priority – this may be clear in the Joint Policy which is not available at the time of drafting. Given the differences between the agencies in relation to policy approaches and publications in dealing with ALP, this is a matter which is likely to require further

⁴ <https://www.cpc.ie/business/enforcement/competition-consumer-protection-act/>

clarification. There should be no obvious divergence in policies if the ALP application is to be to the CCPC in the first instance. ComReg may open itself up to litigation if ALP requests are made to it and it cannot field those requests with the CCPC, or circumstances may dictate that other undertakings make approaches pursuant to other interpretations of the procedure, leading to confusion and a loss of first mover or ALP procedural cover. This is a matter ComReg should review, revise and later republish in conjunction with the CCPC.

Conclusion

ALTO notes the positions adopted by ComReg in the Guidelines and Policy, we broadly welcome the publications, and we request that the handful of issues raised in this submission in particular surrounding ALP approach differences and adjudicator independence be noted and raised at Commissioner level for resolution and if necessary, a decision.

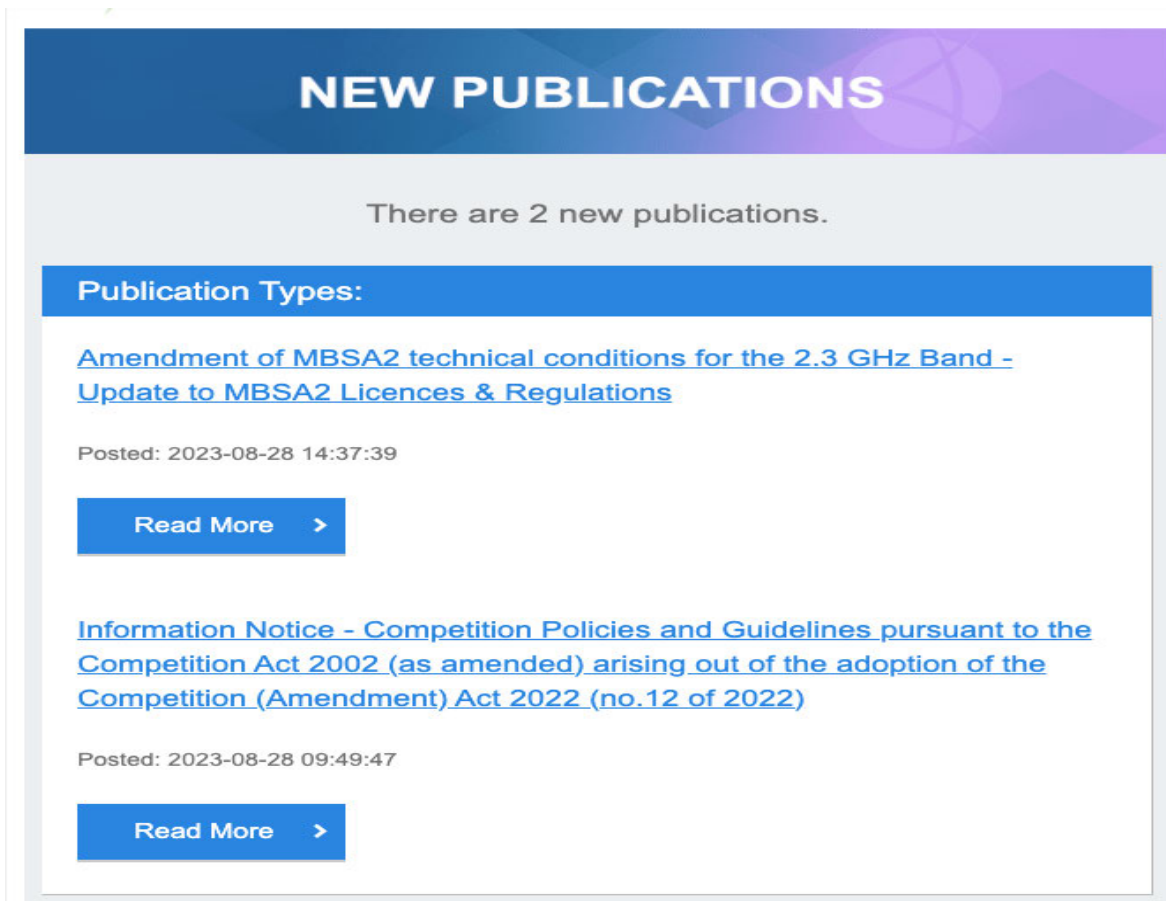
ALTO
11th September 2023

Exhibit A:

[Information Notice - Competition Policies and Guidelines pursuant to the Competition Act 2002 \(as amended\) arising out of the adoption of the Competition \(Amendment\) Act 2022 \(no.12 of 2022\)](#)

Consultation , Information Notice | Posted: 28th August 2023 | Reference Number: ComReg 23/78

Exhibit B:



NEW PUBLICATIONS

There are 2 new publications.

Publication Types:

[Amendment of MBSA2 technical conditions for the 2.3 GHz Band - Update to MBSA2 Licences & Regulations](#)

Posted: 2023-08-28 14:37:39

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[Information Notice - Competition Policies and Guidelines pursuant to the Competition Act 2002 \(as amended\) arising out of the adoption of the Competition \(Amendment\) Act 2022 \(no.12 of 2022\)](#)

Posted: 2023-08-28 09:49:47

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Three Ireland (Hutchison) Limited.
Registered Office:
28/29 Sir John Rogerson's Quay,
Dublin 2, Ireland.

14 September 2023

██████████
ComReg
Dockland Central
1 Guild St, North Dock
Dublin
D01 E4X0
By email: ██████████

Re: Information Notice - Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (no.12 of 2022) - Response to Consultation

Dear ██████

Please find **attached** the submission from Three Ireland (Hutchison) Limited ("**Three**") in relation to the recently published Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (the "**Act**").

We note that the submission is dated after the consultation closing date however the document which published these policy documents and guidelines were not marked as the consultation but rather an information notice. This approach is somewhat unexpected given the significance of the content of these documents on how the new regime will operate.

We also note the timeline of two weeks for response, which appears excessively short and inconsistent with ComReg's own guidelines on consultation or proposed changes¹. As compared to the CCPC which consulted separately on each of these documents and provided for one month for each consultation, as well as an online forum ComReg's approach appears to have been fast tracked.

Having noted the above, we hope that ComReg will afford this submission due consideration. If you have any questions on this, please have no hesitation in letting me know.

Yours sincerely,

██████████
Senior Legal Advisor

¹ ComReg Document No. 23/73.



Three response to the consultation documents set out in Information Notice - Competition Policies and Guidelines pursuant to the Competition Act 2002 (as amended) arising out of the adoption of the Competition (Amendment) Act 2022 (no.12 of 2022)

A. Guidelines on the determination of administrative financial sanctions and periodic penalty payments under the Competition Act 2022 (“Financial Penalty Guidelines”/the “Guidelines”)) (ComReg 23/78A);

1. The draft Financial Penalty Guidelines contain the draft methodology for the calculation of administrative financial sanctions in respect of infringements of competition law breaches of procedural requirements or a failure to comply with commitments, prohibition notices or remedies. They also explain the method of calculation applicable to periodic penalty payments.
2. While Three recognises the legal basis under Section 15AF(1)(b) of the Competition (Amendment) Act 2022 for ComReg to prepare and make guidelines with respect to the imposition of administrative sanctions, it is important for ComReg to remember that it is also obliged to have regard to the “*fairness and efficiency of procedures*” under the Act. It is not evident to Three, from the content of the draft Guidelines, how ComReg has met this obligation.
3. We note that in section 15F (2) the adjudication officer shall “*have regard*” to the guidelines and shall apply guidelines unless the adjudication officer considers that having regard to the circumstances of the case there is a reason not to do so. It is therefore clear that the adjudication officer will have to consider the particulars of each case and that the guidelines cannot be considered to be binding or can only be deviated from in “*exceptional circumstances*” as suggested in **para. 2.35** of the Guidelines.
4. A fundamental aspect of the enforcement regime under the Act is the independence and expertise of adjudication officers. This is provided for expressly in section 15P and 15Q of the Act. It is therefore imperative that the scope and detail of the draft Guidelines are not overly prescriptive so as to constrain the adjudication officer from reaching a fair and proportionate decision.
5. Section 3(1) of the Act is read to provide that the new enforcement regime shall apply to an infringement of relevant competition law relating to conduct, behaviour or any matter that, in whole or in part, took place on or after **4 February 2021**. Three observes that the transposition date of the Directive (EU) 2019/1 of the European Parliament and of the Council (the “**Directive**”) was due for that date however the Act was not implemented until 29 June 2022, nearly 18 months after the due date for transposition and has not yet been commenced.



For the Directive to have had direct effect it needed to be precise, clear and unconditional and does not call for additional measures². It cannot be disputed, that this is not the case for the Act, in which the Ireland has exercised its discretion to further specify the obligations contained in the Directive to include significantly more detail than the Directive. Three considers that if ComReg sought to impose a financial penalty based on a conduct occurring before the commencement date of the Act, this would raise significant concerns about the transposition of the Act, under European and Irish Constitutional law.

6. Three notes that in accordance with Section 15AC(1) the maximum amount of administrative financial sanction relates to the “*total worldwide turnover of the undertaking or association of undertakings*” and that the draft Guidelines clarify that the relevant entity will be the “*undertaking that is subject to the infringement proceedings*”. Three observes that in most cases, the turnover amount will therefore be the turnover within the State. Three supports the position set out in paragraph 2.3 that an effective administrative financial sanction should fully reflect the “*particular circumstances of a given case*” and in particular the harm to competition caused by the infringement and the need for ComReg and guidance to the adjudication officer to act proportionality.
7. **Para. 2.10** states that where the figures made available by an undertaking are incomplete or do not appear to be reliable, the undertaking’s value of sales may be determined on the basis of any partial figures obtained and/or any other information regarded as relevant and appropriate. Three recommends that the principle of fair procedures requires that ComReg/the adjudication officer inform the undertaking if it considers that the figures are incomplete/unreliable and should take reasonable steps to afford the undertaking with the opportunity to provide further information.
8. Three considers that in certain instances in the draft Guidelines, ComReg puts forward recommendations however the reasoning and justification of those recommendations are not sufficiently elaborated upon, transparent or substantiated for an adjudication officer to properly understand whether those recommendations reflect the correct approach to be adopted.
9. **Para 2.12.** It is Three’s position that it would helpful and offer more transparency if ComReg could explain why it considers the suggested ranges i.e. 0-30% of the value of sale, a sum of between 15% and 25% for cartels and 10% for procedural requirements are the appropriate scales. It is recognised that the similar approaches have been adopted by the CPPC and European authorities,

² Judgment of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nethfdederlands Inland Revenue Administration, [C-26/62](#), ECLI:EU:C:1963:1.



however it would be beneficial to understand why the recommended rates are considered appropriate for the local communications sector³.

10. **Para 2:21** – notes that regard should be paid to specific factors which either aggravate or mitigate the circumstances of the relevant undertaking's participation in the relevant infringement, and consequent adjustment to the administrative financial sanction should be made either upwards or downwards. Three observes that, unlike the CCPC's approach, a floor/cap in terms of percentage amount is not recommended in the draft Guidelines, and therefore fails to provide transparency of ComReg's position in this regard. On the other hand, at **para 2.23**, ComReg notes that the basic amount can increase by up to 100% where the undertaking has repeatedly been found to have committed the same/similar infringements. It seems odd to Three that this cap of 100% is suggested for one criterion (without being substantiated) while being silent on the cap/floor for other criteria.
11. **Para. 2.34** states that in certain cases a "*symbolic administrative financial sanction may be imposed*" with reference to a number of European Court decisions. Three believes that ComReg should explain what it understands to be a "*symbolic*" sanction, what is its objective and the legal basis under the Act and Irish Constitutional law. Three considers that vague references to such adjustments (which could have significant financial impacts) create significant legal and regulatory uncertainty. Three notes the reference in para 2.6 of the draft Guidelines to the concept of "*general deterrence*" but would like to add that this objective needs to be carefully balanced with the principles of transparency, proportionately and non-discrimination.

B. Access to the File Policy in respect of investigations by ComReg under the Competition Act 2002 ("Access to the File Policy") (ComReg 23/78B)

12. The draft Access to the File Policy sets out the procedures adopted by ComReg for providing access to its file in the context of investigations carried out by ComReg under the Act.
13. **Para 1.2** notes that the file consists of documents which have been "*obtained, produced and/or assembled by ComReg*" during an investigation and which have been relied upon by ComReg for the purposes of issuing a Statement of Objections/Investigation Report under section 15L of the Competition Act 2002 or referring the matter to an adjudication officer pursuant to section 15M of the Competition Act 2002 (the "File"). In order to guarantee the principle of equality

³ See alternative position set out in ComReg Document No. 21/10a - Financial Penalty Methodology concerning the infringements of the Framework Regulations.



and ensure that the parties can effectively exercise their right of defence it is important that the scope of the file is sufficiently wide to include all relevant information obtained, produced and/assembled and the material grounds for the decision.

14. We note that the ComReg's Guidelines on the treatment of confidential information (ComReg document No. 05/24) does not apply to investigations carried out by ComReg under the Act, it is not clear to Three why this is the case. It is important that ComReg acts in a proportionate and transparent manner in the way in which it makes its decision regarding confidentiality and affords parties a right of appeal where appropriate. It is also important that ComReg's processes, and application of such, are subject to the legitimate interest of undertakings in the protection of their business secrets. For example, Three finds it unhelpful, as set out in **para. 3.5**, for ComReg to broadly suggest that it can redact a document for "*good and sufficient reason*" but that it will not be under any obligation to provide that reason. Where such a decision by ComReg has an impact on the undertaking and impacts their commercial interests, there must be transparency of decision making or alternative approaches adopted.

C. ComReg Administrative Leniency Policy ("ComReg ALP") (ComReg 23/78C).

15. The draft ComReg ALP outlines ComReg's policy in relation to applications for leniency from undertakings for disclosing their participation in cartels or retail price maintenance and outlines the requirements applicant undertakings must meet in order to qualify for leniency. As set out in the draft ComReg ALP, *leniency* refers to both immunity from administrative financial sanctions, as well as a reduction of any such administrative financial sanctions, which would otherwise have been imposed by ComReg.
16. Three observes (as did ALTO in its submission to this consultation) that the draft ComReg ALP is distinct from the CCPC's Administrative Leniency Policy and the Cartel Immunity Programme (that outlines the joint policy of both the CCPC and the Director of Public Prosecutions in considering applications for immunity from prosecution for criminal cartel offences under the 2002 Act). Three notes that the CCPC and ComReg "Joint Policy" is currently unavailable⁴. Given the differences between the agencies in relation to approaches and publications in dealing with ALP, this is a matter which is likely to require further clarification when the Joint Policy becomes available. **END**

⁴ See Preface on page 2 which states "*For further information on how ComReg and the CCPC interact on the issue of leniency in the electronic communications sector, please see the Joint Policy on Leniency in the Electronic Communications Sector ("Joint Policy") available on ComReg's website at www.comreg.ie.*"