



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

# **Guidelines on the determination of Administrative Sanctions**

**Submissions to Consultation 25/77**

**Reference:** ComReg 26/17a  
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# 1 Submissions of Eircom Limited

**eir's Response to ComReg Consultation:**

Draft Guidelines on the determination of Administrative Sanctions

ComReg Document: ComReg 25/77a



28 November 2025

DOCUMENT CONTROL

Document name	eir response to ComReg 25/77a
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The comments submitted in response to this consultation document are those of Eircom Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

## eir comments

eir welcomes the opportunity to **provide comments on ComReg's Draft Guidelines on the determination of Administrative Sanctions ("Draft Guidelines")**, as set out below.

### Introduction

1. In 2020 eir submitted a consultation response to *ComReg 20/25: Calculating penalties for Access Regulations breaches*. We argue now, as we did then, that **a credible identification of substantial harm should be a threshold requirement for the decision to impose a financial penalty**. In 2020 eir set out, with the support of Frontier Economics, a clear two-step framework that would address whether a fine is appropriate at all, **and would calibrate the penalty type to the breach's severity**. This was in the context of both a turnover calculation and a tariff based approach, being the options for consideration then by ComReg. This approach was put forward with the aim of ensuring that fines were used judiciously. There are significant social and economic costs of disproportionately high fines and such penalties increase the regulatory uncertainty of investing in a regulated company.
2. That perspective informs a number of the comments we make in relation to the Draft Guidelines and eir requests that ComReg explicitly include the possibility of **no penalty at all** being imposed, as a clear potential outcome in its methodology. We ask that ComReg **re-familiarise itself with eir's and Frontier Economics'** submission so that relevant points therein can be considered by ComReg in moving to a final decision stage.
3. It is a fundamental principle of EU and Irish administrative law that sanctions must be **proportionate to the harm caused and must not exceed what is necessary to achieve regulatory objectives**. The explicit inclusion of 'no penalty' as a potential outcome is essential to ensure compliance with these principles and to avoid chilling investment through regulatory uncertainty.
4. The comments we make in this document are made strictly without prejudice to our right under section 91(8) of the 2023 Act to provide different, or additional, comments in the context of any specific adjudication proceedings to which eir may be, or become, subject and any specific administrative sanction proposed to be imposed on eir as a result of those proceedings.

### Application

5. Section 1.15 of the Draft Guidelines purport that they *'...will apply to a regulatory breach referred to the adjudication panel on or after 9 June 2023, irrespective of when the regulatory breach in question commenced'*.
6. eir considers that, in line with the principle against retroactive penalties, **any penalties methodology can only apply to infringements that occur after that new methodology is formally adopted**.
7. Applying new penalty methodology to conduct predating its adoption would contravene the principle of legal certainty and clearly infringes on undertakings' legitimate expectations. **ComReg should amend the wording of Section 1.15 to make clear that**

the Guidelines apply only to breaches occurring after their formal adoption, or clearly set out its legal basis for taking any other position on application in its response to the submissions received in this consultation.

### Gravity percentage range and guidance

8. The Guidelines propose to set the **gravity of the breach to a percentage “comprised between 0 and 30%”** of the relevant turnover. No explanation is provided for why the maximum percentage of possible gravity is to be triple the maximum level of 10% purported to be set under ComReg’s Guidelines for the calculation of financial penalties under the Access Regulations. While those Guidelines had no statutory basis (unlike the proposed Guidelines), ComReg did consult on them prior to publishing them. In paragraph A5.51 of its Response to Consultation and Guidelines<sup>1</sup>, ComReg stated the following:-

*“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.**”*  
[emphasis added by eir]

The proposed increase to a 30% maximum gravity factor is unsupported by evidence or regulatory precedent in an ex ante environment and risks imposing disproportionate penalties on regulated undertakings, contrary to the principle of proportionality. The regulatory context within which the Draft Guidelines would apply remains an ex ante setting of highly regulated undertakings being the subject of significant on-going ex ante regulation. Yet, in this unchanged regulatory context and without any explanation or assurance, the maximum gravity level is proposed to be raised by a factor of 3. eir submits that there is no justification for this and that **the maximum gravity level should remain at 10%.**

9. ComReg provides **no sub-categories, examples, or benchmarks** within this range in the Draft Guidelines. It is therefore unclear how an adjudicator is to be guided to determine the gravity factor for different types of breaches. **This is in contrast to ComReg’s 2021 Guidelines for the calculation of financial penalties under the Access Regulations which included indicative ranges. eir believes that the lack of illustration in ComReg’s Draft Guidelines would lead to uncertainty and inconsistent application. We ask ComReg to add in Section 2.13, the words “(depending on the seriousness of the breach)” after the gravity percentage range and to include guidance on how to select the gravity percentage** in various scenarios, ideally supported by hypothetical examples which would enhance predictability. Those examples would help to ensure **that different adjudicators choose gravity percentages consistently for similar breaches.** Without guidance or precedent, two panels or adjudicators might treat similar breaches very differently.

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<sup>1</sup> ComReg 21/10

10. The **gravity percentage range is 0% - 30%** of turnover *‘which corresponds to the sales of products and services in the State to which the regulatory breach directly or indirectly relates’*. Noting that the legislative cap set by the 2023 Act is the greater of €5 million and 10% of total turnover, eir is concerned that, in practice, a 30% maximum gravity percentage range combined with a very high legislative cap, will lead to the imposition of enormous fines on larger operators even where breaches are not of the most significant kind. Increasing the gravity factor to 30% without justification risks imposing disproportionate penalties, contrary to the principle of proportionality under EU law and the EECC. It also creates regulatory uncertainty, which can deter investment and undermine confidence in Ireland’s telecoms sector. **Exactly how the application of relevant turnover will be applied in the gravity range must be set out in the final Guidelines and must not be broadly defined.** As set out above, it cannot be the case, all things being equal, that a potential regulatory fine could now be three times higher based on ComReg’s proposal to triple the gravity factor range compared to ComReg’s previous position in ComReg 21/10a.
11. The Draft Guidelines should explicitly guide the adjudicators to consider the **regulatory context and expectations at the time the breach occurred** when assessing gravity and proportionality. This point is also important in the **context of the ‘duration’ aspect of a penalty calculation, where operators have experience of long periods of silence from ComReg during the course of regulatory investigations.**
12. eir therefore requests that ComReg:
- Retain the 10% maximum gravity factor, consistent with previous consultations and international precedent.
  - Amend Section 2.13 to include the words “(depending on the seriousness of the breach)” after the gravity percentage range.
  - Provide clear guidance and hypothetical examples illustrating how gravity percentages should be applied in different scenarios.

### **Minor / technical breaches**

13. **Guidance for minor breaches:** eir asks that ComReg explicitly clarify how **minor, technical breaches** will be treated. In line with the principle of proportionality and efficient enforcement, breaches that are promptly rectified and have negligible impact should not attract formal sanctions. Instead, ComReg should adopt alternative measures such as compliance notices or informal resolution, consistent with the practice of other authorities (e.g. CMA and Ofcom), which often issue warnings or take no further action for minor violations. Clear criteria or examples of what would be considered a minor or technical breach and the likely sanction to be applied, for instance in the case of a late submission of a report, would be helpful.
14. **Avoiding formal process for near-zero fines:** Where the methodology would yield a gravity factor of 0%—resulting in no financial penalty—, or close to 0%, it is inefficient and disproportionate to refer such cases to adjudication. Doing so imposes unnecessary costs on both the regulator and the undertaking, without advancing consumer welfare

or deterrence objectives. ComReg should therefore confirm that such cases will not be escalated to the sanction stage.

15. **Statutory Cap:** With regard to the statutory cap set out in Section 2.3, reassurance is needed that the statutory cap will not distort penalties for small breaches. The cap should not be treated as a target; penalties must remain proportionate to the nature and impact of the breach, not the size of the undertaking.

### Mitigating & aggravating factors, deterrence & proportionality

16. Section 2.20 of the Draft Guidelines provides that the basic amount should then be **adjusted in light of mitigating and aggravating factors including...**

- *whether a financial penalty in respect of a similar regulatory breach has already been imposed on the undertaking by a court or competent authority including ComReg (section 94 (1)(n))*

17. ComReg had no statutory right to impose financial penalties directly under the Access Regulations and continues to have no statutory right to impose financial penalties under the 2023 Act directly on an undertaking. However, if section 94(1)(n) is intended to encompass prior financial penalties agreed to be imposed within a settlement agreement with ComReg, eir submits that an adjudicator should not have regard to a financial penalty imposed on the undertaking by ComReg where ComReg has sought to apply the methodology set out in its Guidelines for the calculation of financial penalties under the Access Regulations. Those Guidelines had no statutory basis and constituted nothing more than a statement (then) by ComReg as to its intended approach to penalties (and from which approach ComReg now proposes to deviate significantly). ComReg should clarify that penalties imposed under its previous Access Regulations methodology—lacking statutory basis—should not aggravate future sanctions. To do otherwise would unfairly penalize undertakings for compliance under a non-binding framework.

18. Section 2.21 sets out the following as an aggravating factor:

- (i) *‘the adoption when seeking to identify affected end-users, of an approach and/or methodologies reflecting a narrow interpretation of those affected and/or an attempt to exclude potentially affected end-users from any remediation programme,’*

As an operator will inevitably apply some approach / methodology to identify affected end-users of a remediation programme, eir believes it should not be aggravating for an operator to apply reasonable criteria in good faith when identifying affected customers. This factor is **overly subjective**, reasonable criteria applied transparently should never constitute an aggravating factor. We recommend deleting this provision.

19. In addition, exercising procedural rights—including contesting allegations—must not be treated as aggravating. An operator’s **engagement with the process (including defending itself)** should not be considered an aggravating factor and it is important that the process ensures there is no implicit pressure to waive defences. eir asks for explicit assurance in the Guidelines that an operator will **not be penalised simply for not**

**admitting a breach** (i.e., contesting allegations), even as the Draft Guidelines rightly allow mitigation for those who do admit and save resources. This distinction maintains fairness.

20. Section 2.25 states:

*‘Regard should be had in this respect to the amount of the penalty as compared to the overall turnover of the sanctioned person or the group to which that person belongs, and the proportion of the value of sales to the overall turnover. Adjustments may be required upwards where the calculated amount of financial penalty is insignificant having regard to the overall turnover of the person or the group to which that person belongs and could not be considered to be capable of having a dissuasive effect and to be proportionate to the regulatory breach.’*

Section 2.26 states:

*“In particular, adjustments may be required in circumstances where the value of sales related to the regulated breach is very low, or where the value of sales does not accurately reflect the person’s involvement in the regulatory breach or the associated harm.”*

eir submits that sections 2.25 and 2.26 should be deleted in their entirety as there is a risk that these sections will be relied on to completely displace the structured methodology (value of sales x gravity factor x duration) and the specific mitigating and aggravating factors which have come before. **The focus must remain on proportionality** and sections 2.25 and 2.26 are arbitrary and unconnected to the impact or real world harm of the relevant breach.

21. **The inclusion of the wording “or where the value of sales does not accurately reflect the person’s involvement in the regulatory breach or the associated harm”** in section 2.26 is particularly unclear. It appears to be language taken from equivalent Guidelines published by the CCPC for breaches of competition law, which include examples of circumstances in which the penalty for an operator should be dissuasive even though the value of sales of that operator might have been low (e.g., the operator is involved in bid-rigging). There seems to be no equivalent scenario likely to occur in the context of the Draft Guidelines and, as mentioned at paragraph 21 above, section 2.26 should be deleted in its entirety.
22. While deterrence is a legitimate objective, uplifts should only apply where a modest fine would **otherwise render a serious breach a mere “cost of doing business.”** Arbitrary uplifts based on turnover alone risk excessive penalties and undermine proportionality. ComReg should adopt a narrowly defined deterrence test, supported by clear examples, to ensure predictability and fairness.
23. In the Table at section 2.5 **of the Draft Guidelines, the word “coercion” appears.** This reference does not link back to any text used in the body of the Draft Guidelines and may be **a trailing reference from the equivalent table used in the CCPC’s equivalent Guidelines. The word “coercion” should be deleted in the Table.**

## General

24. Finally, we draw attention to two typos:

- a. Page 11: Heading "B: Gravity of the regulatory breach"
- b. 2.28 - "in particular it does not mean ...that it is not proportionate"

## **2 Submissions of Virgin Media Ireland Limited**



## **Virgin Media response to:**

The ComReg consultation on proposed Administrative Sanction Guidelines, to be adopted pursuant to section 98 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023.

Reference: ComReg 25/77.

28 November 2025

This response is non-confidential

## Virgin Media response

This is the Virgin Media response to ComReg's proposed Administrative Sanction Guidelines, to be adopted pursuant to section 98 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 ("the Act.")

ComReg is right to seek stakeholder feedback ahead of finalising the document – which should then serve as a framework for how relevant authorities will apply Administrative Sanctions in practice. Provided that the document is correctly specified and does not depart from the legal powers contained within the Act, this will give stakeholders greater certainty as to the approach that ComReg (or its authorised agents) will apply in practice. It is essential that the document does not (inadvertently or otherwise) award to ComReg or its agents any powers outside of those solely derived from section 98 of the Act.

To provide stakeholders with more certainty as to how ComReg (or its agents) will exercise powers in practice, ComReg must give more clarity as to what would constitute a “*..good and substantive reason..*” for departing from standard practice. In the present draft this matter is left open to interpretation.

The methodology selected by ComReg to determine the financial penalties must above all ensure procedural fairness considering the material impact that such financial penalties could have on those they are imposed upon.

Virgin Media notes ComReg's proposed approach to the calculation of a financial penalty is set out in paragraph 2.3 as follows: *“A percentage, comprised between 0 and 30%, is then applied to the value of sales. The percentage value should be selected according to the gravity or seriousness of the breach: the more serious the breach, the higher the percentage value.”*

This approach provides no guidance to stakeholders on how the level of seriousness will be determined by the Adjudicator(s) and to what percentage of the weighting (0-30%) will be attributed to the alleged breach or even if the same weighting will be applied in each case. In accordance with fair process and a need for transparency, Virgin Media urges ComReg to revisit the proposed guidelines in this respect to provide more detail on the calculations it will use and the weighting/scale to be attached.

In terms of the mitigating or aggravating factors set out in paragraph 2.21, ComReg refers to the list being “*non-exhaustive.*” Virgin Media considers that the reference to “*non-exhaustive*” is beyond the scope of Section 94 of the Act. Section 94 of the Act states that the Commission may make rules for the purposes of implementation of Section 94. It does not confer the right for ComReg to add additional reasons for mitigation or aggravation.

In that regard, the draft guidelines presently list more than the prescribed list of mitigating/aggravating factors set out in Section 94 of the Act. In particular, references to making a full and frank admission to obtain a discount on the financial penalty is not set out in the legislation. ComReg's guidelines should be limited to those factors listed in the Act and not create additional factors that were not intended by the legislation.

Virgin Media notes that an administrative sanction imposed by an Adjudicator is only effective upon confirmation by the High Court and therefore any mitigating/aggravating factors it sets out in the guidelines should not in any way prejudice a person's right to appeal or be heard by a court of law.

In the document, ComReg notes that: *"These Guidelines may be amended from time to time or revoked in accordance with section 98(3) of the of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023. Where they are amended, an updated version will be published on ComReg's website."*<sup>1</sup> Given the inherently serious nature of the imposition of administrative sanctions, in circumstances where the document is amended in future, ComReg should conduct further consultation with industry ahead of making any final amendments.

Virgin Media considers that the exception regarding a person's ability to pay outlined at paragraph 2.7 in the document is presently rather vague, running the risk that stakeholders would be unsure as to the circumstances in which such an event would be triggered. Virgin Media calls on ComReg to provide more certainty in this matter.

Virgin Media would be willing to participate in further discussion with ComReg and industry if this is needed to complete this process.

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<sup>1</sup> ComReg Information Notice 25/77, page 2.