



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Guidelines on the determination of administrative financial sanctions and periodic penalty payments under the Competition Act 2002

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Amendments to the Guidelines

These Guidelines may be amended from time to time or revoked in accordance with section 15AF(3) of the Competition Act 2002. Where they are amended, an updated version will be published on ComReg's website.

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1 Introduction

1.1 Overview

- 1.1 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. As a competent authority under the Competition (Amendment) Act 2022 (no.12 of 2022) (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”)¹.
- 1.2 On 29 June 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.
- 1.3 According to Section 15AF(1)(b) of the 2002 Act, a competent authority, having regard to the fairness and efficiency of the procedures, may prepare and make guidelines in relation to the imposition of administrative sanctions which an adjudication officer making a decision under Section 15X of the 2002 Act, shall apply unless the adjudication officer considers that having regard to all the circumstances of the case, there is a reason not to do so. Guidelines under Section 15AF(1)(b) may include the factors applicable to any order or administrative financial sanction and the method of calculation of administrative financial sanctions and periodic penalty payments.
- 1.4 These guidelines on the determination of administrative financial sanctions and periodic penalty payments (“Guidelines”) are made pursuant to Section 15AF(1)(b) of the 2002 Act. In accordance with Section 15AF(2)(b), an adjudication officer making a decision under Section 15X is required to have regard to the Guidelines unless the adjudication officer considers that having regard to all the circumstances of the case there is a reason not to do so.
- 1.5 In addition, ComReg will have regard to the Guidelines, as appropriate, when making submissions to an adjudication officer on the administrative financial sanction or the periodic penalty payment pursuant to Section 15X(3)(iii) or giving consent for the imposition of an administrative financial sanction pursuant to Section 15X(8).

¹ See Communications Regulation (Amendment) Act 2007

- 1.6 In these Guidelines, the term “relevant competition law” has the same meaning as in section 3 of the 2002 Act and means any of the following provisions: Articles 101 and 102 of the TFEU and sections 4 and 5 of the 2002 Act.
- 1.7 These Guidelines relate solely to administrative enforcement of relevant competition law under the 2002 Act and should not be taken as pertaining to criminal proceedings under competition law.

1.2 Statutory Basis

- 1.8 ComReg, as a “*competent authority*” under the 2002 Act, may make guidelines with respect to any matter in Parts 2C and 2D of the 2002 Act.² This includes guidelines in relation to the imposition of administrative financial sanctions (including the factors applicable to any order or administrative financial sanction³ and the method of calculation of administrative financial sanctions and periodic penalty payments). These Guidelines are issued pursuant to this power.⁴
- 1.9 ComReg has had regard to the fairness and efficiency of procedures under Part 2D of the 2002 Act when making these Guidelines. In preparing these Guidelines, ComReg has also had regard to the need to ensure that administrative financial sanctions imposed on undertakings are effective, proportionate, and dissuasive.⁵
- 1.10 The main purpose of these Guidelines is to provide guidance to the adjudication officers making a decision under section 15X. In addition, ComReg is promoting transparency by setting out detailed guidance regarding the methodology for the determination of the amounts of administrative financial sanctions and periodic penalty payments. It is also to provide transparent guidance as to some aggravating and mitigating factors which may be taken into account when calculating the amount of any administrative financial sanction or periodic penalty payment to be imposed.
- 1.11 An administrative financial sanction may be imposed on any undertaking or association of undertakings⁶ (referred to collectively as an “undertaking”, unless otherwise indicated⁷) where it has been decided that on the balance of probabilities the undertaking in question intentionally, recklessly or negligently:

² Section 15AF(1) of the 2002 Act.

³ Under section 15AF(1) of the 2002 Act.

⁴ To be imposed under section 15X.

⁵ In accordance with section 15AA(i) of the 2002 Act.

⁶ Pursuant to Part 2D of the 2002 Act.

⁷ For the avoidance of doubt, where a term used in these Guidelines is in any way inconsistent with a term in the 2002 Act, the term in the 2002 Act takes precedence and is not impacted by references in these Guidelines.

- (a) committed, or is committing, an infringement of relevant competition law;⁸
- (b) committed, or is committing, a breach of a procedural requirement;⁹
- (c) failed, or is failing, to comply with commitments entered into with ComReg;¹⁰
- (d) failed, or is failing, to comply with a prohibition notice issued by ComReg;¹¹ or,
- (e) failed, or is failing, to comply with a structural or behavioural remedy.¹²

1.12 As provided for by section 15AD(6) of the 2002 Act, a periodic penalty payment¹³ may be imposed on an undertaking in order to compel such an undertaking to:

- (a) comply with a search conducted by ComReg;¹⁴
- (b) supply complete and correct information in response to a request issued by ComReg;¹⁵
- (c) attend at an interview, or otherwise give evidence or produce information or documentation, before ComReg;¹⁶
- (d) comply with a prohibition notice issued by ComReg;¹⁷
- (e) comply with commitments entered into with ComReg;¹⁸
- (f) comply with structural or behavioural remedies;¹⁹ or,
- (g) comply with any hearing requirement imposed in the course of a referral under section 15M of the 2002 Act.

1.13 ComReg may amend or revoke these Guidelines at any time.²⁰

⁸ See paragraph 1.2.

⁹ As defined in section 3 of the 2002 Act.

¹⁰ Under section 15AE of the 2002 Act.

¹¹ Under section 15H of the 2002 Act.

¹² Ordered under section 15Z of the 2002 Act.

¹³ Under section 15AD of the 2002 Act.

¹⁴ Under section 37 of the Competition and Consumer Protection Act 2014, as amended (the “2014 Act”) and 39(3B)(a) of the Communications Regulation Act 2002, as amended (the “CRA 2002”).

¹⁵ In accordance with section 18(1)(d) of the 2014 Act or section 37A of the 2002 Act, or 13D of the CRA 2002, as relevant.

¹⁶ In accordance with section 18 of the 2014 Act.

¹⁷ Under section 15H of the 2002 Act and section 44 of the CRA 2002, as relevant.

¹⁸ Under section 15AE of the 2002 Act.

¹⁹ Ordered under section 15Z of the 2002 Act.

²⁰ In accordance with section 15AF(4) of the 2002 Act.

- 1.14 ComReg has published these Guidelines on its website www.comreg.ie, and will publish any amendment to, or revocation of, these Guidelines on ComReg's website.²¹

1.3 Transitional Provisions

- 1.15 The administrative enforcement regime provided for in Parts 2C to 2H of the 2002 Act applies to infringements of relevant competition law which take place on or after 4 February 2021, irrespective of when the infringement in question commenced.²⁷ This means that the administrative enforcement regime will apply to infringements that commence prior to, and continue after, 4 February 2021.
- 1.16 For the purposes of determining the amount of an administrative financial sanction to be imposed on an undertaking pursuant to these Guidelines in respect of an infringement of relevant competition law, an adjudication officer should only have regard to conduct, behaviour, or any actions of that undertaking that relate to the infringement of relevant competition law concerned which took place on or after 4 February 2021. This includes, but is not necessarily limited to, considerations of duration of the undertaking's involvement in the infringement of relevant competition law. This is without prejudice to a finding that an infringement of relevant competition law relates to conduct, behaviour or any matter that, in whole or in part, took place on or after 4 February 2021.²²

1.4 Format of the Guidelines

- 1.17 The factors and methodology relevant to the determination of administrative financial sanctions may differ in respect of infringements, breaches of procedural requirements, and failures to comply.
- 1.18 Chapter 2 of these Guidelines deals with the factors relevant to and method of calculation of administrative financial sanctions in respect of infringements of relevant competition law.²³
- 1.19 Chapter 3 of these Guidelines deals with the factors relevant to and method of calculation for matters set out in paragraph 1.7(b) – 1.7(e) above.
- 1.20 Chapter 4 of these Guidelines deals with the factors relevant to and method of calculation in respect of periodic penalty payments.

²¹ In accordance with section 15AF(5) of the 2002 Act.

²² See section 3(1) of the 2022 Act.

²³ See paragraph 1.6(a) above.

2 Administrative Financial Sanctions – Infringements of Relevant Competition Law

2.1 Section 15AB(1) of the 2002 Act sets out the factors to which an adjudication officer shall have regard when determining the amount of an administrative financial sanction to be imposed on the infringing undertaking²⁴. These are:

- (a) the need to ensure that any administrative financial sanction imposed is appropriate, proportionate and dissuasive,
- (b) the gravity of the matter in respect of which an administrative financial sanction is imposed,
- (c) in respect of an infringement of relevant competition law:
 - (i) the duration of the infringement,
 - (ii) the value of the relevant undertaking's sales of the goods and services to which the infringement directly or indirectly relates, and,
 - (iii) where applicable, the amount of any compensation paid as a result of a consensual settlement in accordance with Article 18(3) of *Directive 2014/104/EU* (the "Damages Directive"),²⁵
- (d) any specific factors, criteria or methodology relevant to paragraphs (a), (b) and (c) which are prescribed by the relevant Minister to be taken into account by an adjudication officer in the calculation of the amount of administrative financial sanctions, and,
- (e) any guidelines issued by the competent authority under section 15AF in respect of specific factors, criteria or methodology relevant to the calculation of the amount of administrative financial sanctions.

²⁴ The infringing undertaking is an undertaking which has been found to have breached or not complied with competition laws and matters other than infringements of relevant competition law and will be subject to an administrative financial sanction or the periodic penalty payment for those infringements.

²⁵ O.J. No. L 349, 5.12.2014, p. 1; available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=en>.

2.2 General principles

2.2 Section 15AB(1)(a) of the 2002 Act requires any administrative financial sanction to be “*effective, proportionate and dissuasive*.”²⁶ Utmost regard should be given to the general principles that administrative financial sanctions must be “*effective, proportionate and dissuasive*” in determining the amount of an administrative financial sanction to be imposed.

2.2.1 Effective

2.3 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. An ineffective administrative financial sanction is one which bears no relation to the infringement for which it is intended to sanction or does not reflect the particularities of an infringement.

2.2.2 Proportionate

2.4 In order to ensure that the amount of an administrative financial sanction to be imposed is proportionate, the determination of the amount of the administrative financial sanction should be based on the particular circumstances of a given case and the particular circumstances of the undertaking on which an administrative financial sanction is to be imposed. This means that factors such as the nature, gravity, and duration of the infringement should be taken into account; as well as the size and financial position of the undertaking on which an administrative financial sanction is to be imposed; and the specific conduct and behaviour of the undertaking which may aggravate or mitigate the level of administrative financial sanction which may be considered appropriate.

2.5 The methodology set out in these Guidelines details how these factors should be considered in a given case and utmost regard given to ensuring that the amount of an administrative financial sanction is appropriate and proportionate in a given case. Regard should also be had to prior determinations of the amount of administrative financial sanctions in respect of the same or similar matters for which the administrative financial sanction is to be imposed in the case at hand with a view to considering fairness and proportionality across decisions. Adjustments may be made to the overall amount of an administrative financial sanction to ensure proportionality in these regards.

²⁶ In accordance with section 15AB(1)(a) of the 2002 Act.

2.2.3 Dissuasive

- 2.6 The principle that an administrative financial sanction ought to be dissuasive has two aspects. Firstly, the undertakings upon which an administrative financial sanction is to be imposed should be deterred from engaging in future conduct which infringes relevant competition law (this is referred to as 'specific deterrence'). Secondly, other undertakings which might be considering conduct or behaviour which would infringe relevant competition law should be deterred from doing so (this is referred to as 'general deterrence'). The determination of the amount of administrative financial sanctions should be made fully cognisant of the need to ensure both specific and general deterrence in light of the particular circumstances of a given case.

2.3 Methodology and relevant factors for determination of the amount of administrative financial sanctions

- 2.7 The following two-step methodology should be used when setting the administrative financial sanction to be imposed on an undertaking found to have infringed or to be infringing relevant competition law.
- 2.8 First, a basic amount should be calculated for each relevant undertaking (step 1). Second, the basic amount may be adjusted upwards or downwards (step 2).

Step 1: Basic amount of the administrative financial sanction

A: Determination of the value of sales

- 2.9 In order to provide a link between the relevant undertaking and the activity in which the infringement of relevant competition law occurred or is occurring, the calculation of the basic amount should be grounded in the value of the relevant undertaking's sales of goods or services calculated using relevant Accepted Accounting Principles. This should relate to sales to which the infringement directly or indirectly relates in the relevant geographic area within the State. This will normally include sales made by the relevant undertaking during the last full

financial year²⁷ of its participation in the infringement (for the purpose of these Guidelines, this is referred to as the “value of sales”).

- 2.10 In determining the relevant value of sales, the relevant undertaking’s best available figures should be taken into account.
- 2.11 Where the figures made available by a relevant undertaking are incomplete or do not appear to be reliable, the adjudication officer may determine the relevant undertaking’s value of sales on the basis of the partial figures it has obtained and/or any other information regarded as relevant and appropriate.
- 2.12 The value of sales should not include any payment in respect of taxes such as value-added tax on sales and other taxes directly related to sales in the State.

B: Determination of the basic amount of the administrative financial sanction

- 2.13 The basic amount of the administrative financial sanction for each undertaking should be based on a proportion (on a scale from 0% to 30%) of the value of sales in the most recent financial year multiplied by the duration of participation of the infringing undertaking.
- 2.14 In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of the 0-30% scale referred to at paragraph 2.13 above, the gravity of the infringement concerned should be considered by the adjudication officer.
- 2.15 The assessment by the adjudication officer of the gravity of an infringement will be based on the particular circumstances of a given case, and should have regard to a number of factors, such as, but not limited to:
- (a) the nature of the infringement;
 - (b) the combined market share of all the infringing undertakings;
 - (c) the geographic scope of the infringement; and,
 - (d) whether or not any agreement which is the subject of the infringement has been implemented.

²⁷ Financial year means a period of 12 consecutive months during which the undertaking is in operation. ComReg will use the best available data for the value of sales in the financial year at the time the penalty is calculated, subject to revision when audited data for the same period is available. If the most recent financial period was greater than 12 months, sales will be adjusted pro-rata to arrive at an annual figure.

- 2.16 Cartels²⁸ are, by their very nature, among the most harmful restrictions of competition. Therefore, generally the proportion of the value of sales taken into account for such infringements should be set by the adjudication officer at the higher end of the scale referred to in paragraph 2.13.
- 2.17 In addition to the amount determined pursuant to the calculation set out in paragraph 2.13, in order to deter undertakings from even entering into cartel agreements, a sum of between 15% and 25% of the value of sales should be included in the basic amount irrespective of the duration of the infringing undertaking's participation.
- 2.18 An additional amount may also be applied in the case of other infringements on a case-by-case basis. For the purpose of deciding the proportion of the value of sales referred to in this paragraph and paragraph 2.13 to be considered in a given case, regard will be given to a number of factors, in particular those referred to at paragraph 2.14.
- 2.19 The duration of an infringing undertaking's involvement in an infringement should be calculated to the nearest half financial year. Periods of less than six months should be counted as half a year; periods longer than six months but shorter than one year should be counted as a full financial year.
- 2.20 In determining the basic amount of the administrative financial sanction, rounded figures should be used.

Step 2: Adjustment of the basic amount

- 2.21 In setting an administrative financial sanction, 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

Aggravating factors

- 2.22 In deciding whether to adjust the basic amount upwards, regard should be had to any one or more of the following non-exhaustive set of aggravating factors where relevant:

²⁸ "Cartel" shall have the same meaning as specified in section 3 of the 2002 Act.

- (a) repeated the same or similar infringements of relevant competition law infringements (recidivism);
- (b) the continuation of the infringement after ComReg has issued notification of the investigation;
- (c) a lack of cooperation with, or active obstruction of, ComReg's investigation by the infringing undertaking (where such conduct was not found to be a breach of a procedural requirement which has already been sanctioned by way of administrative financial sanction or periodic penalty payment);
- (d) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the infringing undertaking intended to prevent infringements from occurring;
- (e) whether it has been decided that the infringement has been committed intentionally; and/or,
- (f) whether the infringing undertaking may be considered to be the leader in, or instigator of, the infringement of relevant competition law or whether that the infringing undertaking took steps to coerce another infringing undertaking to participate in or remain participating in the same infringement.

2.23 Where the infringing undertaking has repeatedly been found to have committed the same or similar infringements of relevant competition law in the State or the same or similar infringements of competition law in another Member State, the basic amount of the administrative financial sanction may be increased by up to 100% for each infringement established. In considering the repeated occurrence of infringements, regard should only be given to decisions which have become final. Any such increases should be considered by the adjudication officer on a case-by-case basis, having regard to all relevant circumstances and the general principles of effectiveness, proportionality and dissuasiveness.

Mitigating factors

- 2.24 In deciding whether to adjust the basic amount downwards regard should be had to any one or all of the following non-exhaustive set of mitigating factors:
- (a) the extent and timeliness of any steps taken by the infringing undertaking to end the infringement and any steps taken for remedying the consequences of the infringement;

- (b) where it has been demonstrated that the infringing undertaking's involvement in the infringement is substantially limited and during the period in which it was party to the infringing agreement, it actually avoided applying the infringing agreement by adopting competitive conduct in the market; and/or,
- (c) whether the infringing undertaking has effectively cooperated with ComReg outside the scope of the Administrative Leniency Programme and beyond its legal obligation(s) to do so.

2.25 The amount of an administrative financial sanction may also be reduced having regard to any compensation paid by an infringing undertaking as a result of a consensual settlement pursuant to Article 18(3) of the Damages Directive.²⁹

2.26 In considering any consensual settlement pursuant to Article 18(3) of the Damages Directive, regard should be had to the fact that consensual settlement between parties to private actions pursuant to the Damages Directive is intended to compensate specific aggrieved parties and not to provide the same effective, proportionate and dissuasive administrative financial sanctions imposed in the public interest pursuant to Part 2D of the 2002 Act. Therefore, the total amount of the consensual settlement pursuant to Article 18(3) of the Damages Directive should not be deducted from the amount of administrative financial sanction imposed under the 2002 Act. For example, to determine the appropriate reduction to be applied to the amount of administrative financial sanction under this factor only a proportion of the amount of such compensation may be factored in the calculation of an administrative financial sanction, or consideration may also be given to the number of customers who were compensated by the infringing undertaking on which an administrative financial sanction is to be imposed.

2.4 Specific Increase for Deterrence

2.27 When having regard to the general principles regarding specific and general deterrence, as set out in paragraph 2.5 above, the amount of an administrative financial sanction may be adjusted upwards for reasons of ensuring an appropriate deterrent effect.

2.28 In light of the obligations³⁰ to ensure that all administrative financial sanctions have a sufficient dissuasive effect, the administrative financial sanction to be imposed on the infringing undertakings which have a large turnover separate to the sale of

²⁹ In accordance with section 15AB(1)(c)(iii) of the 2002 Act.

³⁰ Under section 15AB(1)(a) of the 2002 Act.

goods or services to which the infringement relates may be increased for reasons of both specific and general deterrence.

2.29 In circumstances where the infringing undertaking's value of sales is low or zero in a particular market impacted by the infringement (for example, in the case of a market sharing agreement precluding entry into certain product or geographical areas), the administrative financial sanction calculated at the end of Step 2 may be correspondingly low and a significant adjustment may be made³¹ for reasons of both specific and general deterrence.

2.30 This approach may also be required in circumstances where the value of sales did not accurately reflect the infringing undertaking's involvement in the infringement or the likely harm to competition (for example, in relation to infringements involving bid-rigging).

2.5 Final Considerations

2.5.1 Inability to pay

2.31 The adjudication officer may, upon request, take account of the infringing undertaking's inability to pay in a specific social and economic context. In exceptional circumstances, a reduction of an administrative financial sanction may be granted if the calculated amount would be such as to force the infringing undertaking to cease trading. No reduction in the administrative financial sanction should be based on the mere finding of an adverse or loss-making financial situation. A reduction may be granted solely on the basis of objective evidence that imposition of the calculated administrative financial sanction would irretrievably jeopardise the economic viability of the infringing undertaking concerned and cause its assets to lose all their value.

2.5.2 Immunity from and reductions of administrative financial sanctions

2.32 After the adjudication officer has calculated an administrative financial sanction but prior to imposing the sanction, any decision of ComReg to grant: (i) immunity from; or (ii) reductions of administrative financial sanctions to an infringing undertaking pursuant to ComReg's Administrative Leniency Policy³² shall be

³¹ Pursuant to Section 15AB(1)(a) of the 2002 Act.

³² ComReg's Administrative Leniency Policy is available at [\[Link to ALP to be included here when final version published on ComReg website\]](#).

applied by the adjudication officer.³³ The reduction shall be applied to the overall amount of the administrative financial sanction calculated.

2.5.3 Settlement

- 2.33 In circumstances where an infringing undertaking has consented to the imposition of a specific administrative financial sanction under the 2002 Act, the appropriate reduction for this settlement should be applied as a final step to the overall amount of administrative financial sanction determined in accordance with this Chapter.

2.5.4 Other considerations

- 2.34 In certain cases, a symbolic administrative financial sanction may be imposed.³⁴ The justification for imposing such an administrative financial sanction will be given in the decision.
- 2.35 Although these Guidelines present the general methodology for the calculation of administrative financial sanctions, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the scale of 0% to 30% of the value of sales as specified in paragraph 2.8 in exceptional circumstances.
- 2.36 After reaching a decision that an infringement of relevant competition law has occurred or is occurring and prior to making a decision imposing any administrative financial sanction, the adjudication officer shall provide ComReg and the undertaking with a copy of its decision and inform them of any structural or behavioural remedies it proposes to impose and the amount of any periodic penalty payment or administrative financial sanction the adjudication officer proposes to impose. The adjudication officer may invite written submissions from ComReg and the infringing undertaking concerned in respect of the application of criteria and factors relevant to the determination of the amount of administrative financial sanctions.³⁵
- 2.37 The final amount of the administrative financial sanction shall not, in any event, exceed the maximum amount as set out in section 15AC of the 2002 Act.

³³ Pursuant to section 15AB(8) of the 2002 Act.

³⁴ See, for example, the fine imposed on AC Treuhand AG by the European Commission in case *COMP/E-2/37.857– Organic Peroxide*; on Deutsche Post by the European Commission in case *COMP/C-1/36.915 COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail*; and by the European Commission on certain undertakings in *Case COMP/C.38.238/B.2 — Raw tobacco — Spain*.

³⁵ In accordance with section 15X(3)(b) of the 2002 Act.

2.6 Summary

Figure 1: Summary of calculation of administrative financial sanction for infringements of relevant competition law

<p>Step 1</p> <p>Determination of basic amount</p>	<p>Basic Amount</p>	<p>Percentage value of sales (0-30%)</p> <p>X</p> <p>Duration (rounding up to nearest half year)</p> <p>+</p> <p>Additional sum for cartels and other infringements (15-25% of value of sales)</p>
<p>Step 2</p> <p>Adjustment of basic amount</p>	<p>Increased by</p>	<p>Aggravating Factors (e.g. intent, recidivism, absence of internal mechanisms or procedures, coercion)</p>
	<p>Decreased by</p>	<p>Mitigating factors (e.g. steps taken to end infringement; limited involvement; substantial cooperation outside leniency/immunity)</p>
<p>Overall maximum</p>	<p>Legal Maximum amount under 2002 Act</p>	<p>Greater of: 0-10% of worldwide turnover / €10 million</p>
<p>Final considerations</p>	<p>Possibly further decreased by</p>	<p>Leniency (As set out in ALP)</p> <p>Settlement (Case by case consideration)</p> <p>Inability to pay (Case by case consideration)</p>

3 Administrative Financial Sanctions – other than Infringements of Relevant Competition Law

- 3.1 As set out at paragraph 2.1 above, section 15AB(1) of the 2002 Act sets out the factors to which regard shall be had when calculating the amount of administrative financial sanctions. These provisions of the 2002 Act apply equally to administrative financial sanctions in respect of infringements of relevant competition law, breaches of a procedural requirement and other specified failures to comply under the 2002 Act which include (i) failure to comply with structural or behavioural remedies; (ii) failure to comply with a prohibition notice; and (iii) failure to comply with commitments.
- 3.2 This Chapter of the Guidelines sets out a methodology which should be applied when determining the amount of administrative financial sanctions for matters other than infringements of relevant competition law.³⁶
- 3.3 The following two-step methodology will be used when setting the administrative financial sanction to be imposed on an infringing undertaking found to have either breached a procedural requirement or failed to comply with any of the matters listed at paragraph 3.1 above.
- 3.4 First, a basic amount should be calculated for the infringing undertaking (step 1). Second, the basic amount may be adjusted upwards or downwards (step 2).
- 3.5 The following paragraphs set out factors which may be taken into account in determining whether, and by what amount, the basic amount may be adjusted upwards or downwards.

3.1 General principles

- 3.6 Regard should be had, *mutatis mutandis*, to the general principles of effectiveness, proportionality, and dissuasiveness referred to in paragraphs 2.2-2.5 above.

³⁶ In accordance with section 15AB(1)(e) of the 2002 Act.

3.2 Methodology and relevant factors for determination of the amount of administrative financial sanctions (other than infringements of relevant competition law)

Step 1: Basic amount of the administrative financial sanction

- 3.7 The basic amount of the administrative financial sanction for the relevant undertaking should be based on a proportion of turnover of the infringing undertaking.
- 3.8 In respect of breaches of a procedural requirement, the applicable scale will be from 0% to 1%³⁷ of the total worldwide turnover of the infringing undertaking in the financial year preceding the decision to impose administrative financial sanctions.³⁸
- 3.9 In respect of failures to comply under paragraph 3.1 above, the applicable scale will be from 0% to 10%³⁹ of the total worldwide turnover of the infringing undertaking in the financial year preceding the decision to impose administrative financial sanctions.⁴⁰
- 3.10 In order to decide whether the proportion of the turnover to be considered in a given case should be at the lower end or at the higher end of the relevant scales referred to at paragraph 3.5 or 3.6 above, the gravity of the relevant breach or failure to comply concerned should be considered.
- 3.11 The assessment of the gravity of the relevant breach or failure to comply should be based on the particular circumstances of a given case, and have regard to a number of factors, such as, but not limited to:
- (a) the nature of the breach or failure to comply;

³⁷ In circumstances where 1% of the total worldwide turnover of the undertaking in the financial year preceding the decision does not exceed €1 million, the applicable scale shall be €0-1 million.

³⁸ In accordance with section 15AC(3) of the 2002 Act.

³⁹ In circumstances where 10% of the total worldwide turnover of the undertaking in the financial year preceding the decision does not exceed €10 million, the applicable scale shall be €0-10 million.

⁴⁰ In accordance with section 15AC(1) of the 2002 Act.

- (b) the harm caused to ComReg's investigation (if applicable);
- (c) the extent to which an infringing undertaking's failure to comply with its obligations has reduced the effectiveness of the commitments, structural or behavioural remedies, or the prohibition notice (as relevant, if applicable); and,
- (d) the duration of the breach or failure to comply.

Step 2: Adjustment of the basic amount

- 3.12 In setting an administrative financial sanction, regard may be had to specific circumstances in a given case which either aggravate or mitigate the relevant breach or failure to comply.

Aggravating factors

- 3.13 In deciding whether to adjust the basic amount upwards, regard will be had to any of the following non-exhaustive set of aggravating factors:
- (a) repeated breaches or failures to comply (recidivism);
 - (b) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the infringing undertaking intended to prevent such breaches or failures to comply from occurring; and/or,
 - (c) where it has been decided that the breach or failure to comply was committed intentionally.

Mitigating factors

- 3.14 In deciding whether to adjust the basic amount downwards regard may be had to the extent and timeliness of any steps taken by the infringing undertaking to end the breach or failure to comply and any steps taken for remedying the consequences of the breach or failure to comply and whether such steps were taken before or after the infringing undertaking concerned had been informed of ComReg's investigation of the relevant breach or failure to comply.

3.3 Final Considerations

3.3.1 Inability to pay

- 3.15 The principles set out in paragraph 2.30 above regarding an infringing undertaking's ability to pay should be applied in respect of administrative financial sanctions for matters other than infringements of relevant competition law.

3.3.2 Other considerations

- 3.16 Although these Guidelines present the general methodology for the calculation of administrative financial sanctions, the particularities of a given case or the need to achieve an effective, proportionate or dissuasive administrative financial sanction in a particular case may justify departing from the methodology set out in this Chapter in exceptional circumstances.
- 3.17 After reaching a decision that a breach of a procedural requirement or a failure to comply referred to in paragraph 3.1 above has occurred or is occurring and prior to making a decision imposing any administrative financial sanction, the adjudication officer may invite written submissions from ComReg and the infringing undertaking in respect of the application of criteria and factors relevant to the determination of the amount of administrative financial sanctions.⁴¹
- 3.18 The final amount of the administrative financial sanction shall not, in any event, exceed the maximum amount as set out in section 15AC of the 2002 Act.

⁴¹ In accordance with section 15X(3)(b) of the 2002 Act.

3.4 Summary

Figure 2: Summary of calculation of administrative financial sanction for matters other than infringements of relevant competition law

Step 1 Determination of basic amount	Basic amount	Percentage turnover (0-10%/€10 million - failures to comply)(0-1%/€1 million - procedural breaches)
Step 2 Adjustment of basic amount	Increased by	Aggravating Factors (e.g. intent, recidivism, absence of internal mechanisms or procedures)
	Decreased by	Mitigating factors (e.g. steps taken to end breach/failure to comply and to remedy consequences)
Overall maximum	Legal maximum amount under 2002 Act	Failures to comply (Greater of 0-10% of worldwide turnover/ €10 million) Procedural breaches (Greater of 0-1% of worldwide turnover/ €1 million)
Final considerations	Possibly further decreased by	Inability to pay (Case by case consideration)

4 Periodic Payments

4.1 Introduction

- 4.1 A periodic penalty payment may be imposed on an infringing undertaking in order to compel such an infringing undertaking to comply with the matters set out in paragraph 1.8 above (each a “relevant obligation”).
- 4.2 Periodic penalty payments are financial penalties of a fixed daily amount imposed to compel an infringing undertaking to comply with a relevant obligation. For each day of non-compliance with a relevant obligation, the amount of the total periodic penalty payment increases by this daily amount.

4.2 Setting of the daily amount of the periodic penalty payment

- 4.3 The daily amount specified in the notice of periodic penalty payment issued to an infringing undertaking will be set at the maximum permitted by the 2002 Act, i.e. 5% of the average daily total worldwide value of sales of the infringing undertaking in the preceding financial year.⁴²
- 4.4 Following referral of the matter to an adjudication officer for decision,⁴³ the adjudication officer may consider it appropriate to impose a daily periodic penalty payment amounting to a figure which is less than the maximum permitted under the 2002 Act. The adjudication officer may do so for any reason, and may take into account, but not be bound by, factors such as the nature of the relevant obligation or the necessity of imposing a sufficient, proportionate, effective, and dissuasive periodic penalty payment in a given case.

⁴² See section 15AD(3) of the 2002 Act.

⁴³ In accordance with section 15X of the 2002 Act.

4.3 Fixing the definitive amount of the periodic penalty payment

- 4.5 The definitive amount of the periodic penalty payment should be fixed by multiplying the daily amount of the periodic penalty payment specified in the notice (or any lesser daily amount determined in accordance with paragraph 4.4 above, as the case may be) by the number of days elapsed from (and including) the date specified in the notice until (and including) the date on which it has been decided that the relevant obligation was complied with by the infringing undertaking.
- 4.6 In certain circumstances, the definitive amount of the periodic penalty payment may be fixed at a figure lower than that which would arise under the calculation set out in paragraph 4.5 above.
- 4.7 These circumstances include, but are not limited to, circumstances where the adjudication officer is satisfied that the infringing undertaking has:
- (a) provided some of the information which was required under section 18(1)(d) of the 2014 Act or section 37A of the 2002 Act during the overall period of non-compliance;
 - (b) implemented some of the commitments made under section 15AE of the 2002 Act during the overall period of non-compliance;
 - (c) complied with some of the relevant remedies ordered under section 15Z of the 2002 Act during the overall period of non-compliance; or,
 - (d) otherwise taken significant steps to comply with the relevant obligation in question during the overall period of non-compliance.
- 4.8 In paragraph 4.7 and 4.10, “*during the overall period of non-compliance*” means the period subsequent to the expiration of the period specified in the notice issued to the infringing undertaking under section 15AD(2) of the 2002 Act, but prior to the date on which the adjudication officer is satisfied that the relevant obligation was complied with by the infringing undertaking.
- 4.9 Where the adjudication officer is satisfied that an infringing undertaking may have the periodic penalty payment reduced from the amount which would arise under the calculation set out in paragraph 4.5 above, they maintain discretion as to the method of calculating the amount of that reduction.

- 4.10 One such method of calculation may be to calculate this reduction relative to the degree of compliance achieved by the infringing undertaking during the overall period of non-compliance on a certain date and reduce the daily amount of the periodic penalty payment imposed from that date.
- 4.11 The definitive amount of the periodic penalty payment imposed on an infringing undertaking may also be fixed at a figure lower than that which would arise under the calculation set out in paragraph 4.5 above when an adjudication officer is satisfied that it is appropriate for any reason to do so.