

BEREC Report on Penalties

(Public Version)

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1. EXECUTIVE SUMMARY AND MAIN FINDINGS

In the European Economic Area (EEA) the electronic communications regulatory framework is harmonised¹. In accordance with Article 21(a) of the 2002 Framework Directive, as amended in 2009, Member States must lay down rules on penalties applicable to infringements of national provisions. Application of the Directive is intended to ensure that consistent enforcement principles and sanctions are applied throughout the EU. However, the concrete determination and calculation of telecommunications sanctions is based on the national sanctioning systems of the Member States.

The Body of European Regulators for Electronic Communications (BEREC) carried out an analysis of the rules on telecommunications penalties, as advised in its Work Program 2020. This analysis is based on national telecommunications legislations in force at the time of the report, these being pursuant to the Directives of the former Telecom Package 2002 as amended in 2009 that were transposed into national legislations.

Concerning sanctioning procedural law, BEREC notes that prior to the initiation of the sanctioning procedure, almost all NRAs carry out preliminary proceedings with the objective of investigating those facts that may result in a finding of non-compliance with telecommunications requirements. Information gathering is an important investigation tool for NRAs.

All NRAs enact at least two formal decisions through the sanctioning procedure, one to initiate the sanctioning procedure and another to conclude it and to impose (or not) penalties on operators. There are two phases in the process. These are (i) the investigation phase and (ii) the decision phase. The majority of NRAs do not envisage a formal separation between these two main phases. Half of the NRAs are subjected to a specific time limit to adopt a sanctioning decision but this varies from one country to another. The decision phase itself has two elements (i) a decision that an infringement has occurred and (ii) a decision to impose a penalty.

There is some harmonisation on the content of the sanctioning decision as all NRAs identify the facts that have been proven, its legal basis and details of the alleged offender. The great majority of NRAs publish their sanctioning decisions, only a few does not.

There is considerable diversity in the types of sanctions available to NRAs: administrative penalties, periodic penalty payments and other additional sanctions, which can be transmitted to a legal successor. COMREG, PTS and RTR cannot impose penalties directly on operators. In addition, CRC, PTS and TRAFICOM penalties require Court confirmation. The most common additional sanction is the order to cease or suspend the provision of ECN/S for a certain period of time.

More than half of national legislations do not rank infringing conducts according to their gravity which is assessed on a case-by-case basis together with other different criteria, while the rest of NRAs rank the infringing conducts according to its gravity: very serious, serious and minor infringements. In the latter, BEREC notes that there is considerable variation in the classification of infringements according to their gravity. The extinctive limitation period during which the infringement and/or the penalty must be sought is not a uniform period and can vary from one country to another in a range from 10 years to 6 months.

¹ The European Economic Area (EEA) Agreement brings together the 27 EU Members States and 3 of the European Free Trade Association (EFTA) states -Iceland, Liechtenstein and Norway- in the internal market governed by the same basic rules. So that, the EU electronic communications regulatory framework applies throughout the whole of the EEA members states.

Most national legislations consider a subjective element (act or omission and/or wilfulness or negligence) in certain circumstances when imposing a penalty, and also entrust NRAs to consider the concurrence of general causes of exclusion of responsibility (e.g. force majeure) on a case by case basis. When there is more than one operator or entity, responsibility may be shared among all operators involved in the infringement.

The assessment of principle of proportionality to impose penalties that have an appropriately deterrent element is an overall assessment that mainly encompasses the economic parameters, the duration of the infringement, the mitigating and aggravating factors, together with other different criteria determined under case by case basis (gravity, the size of the offender, the infringement committed on an ad hoc or on continuous basis, the impact of the infringement in the market, among others).

A final adjustment that can be made when setting the amount of the penalty, is to make sure that it is equal or higher than the minimum amount permissible in law and it does not exceed the maximum amount permissible in law. Apart from four (4) national legislations, all national telecommunications regulatory framework set legal maximum or minimum caps on penalties.

Finally, BEREC highlights that (i) there are no leniency programmes in force in relation to telecommunications breaches and (ii) ACM, AGCOM, COMREG and BIPT have adopted and published guidelines setting out the criteria for the calculation of the sanctions.

2. INTRODUCTION AND OBJECTIVES

The European legal traditions are basically centred around the Civil Law system, also known as Romano-Germanic law, and the Common Law traditions. The Civil Law System applies in the majority of Member States of the European Economic Area (EEA) while the Common Law traditions apply in Cyprus, Ireland and Malta.

In the European Economic Area (EEA) the electronic communications regulatory framework is harmonised². Adequate and equivalent enforcement powers across member states should ensure the application of consistent and coherent principles governing enforcement and

² Please see above footnote 1.

penalties for the whole EU regulatory framework. To this end, Article 21.a) of the Framework Directive 2002, as amended in 2009, establishes that “*Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. (...)*”. Therefore, the concrete determination and calculation of telecom sanctions are areas where the legislation is based on necessity upon the national systems of the Member States.

The Body of European Regulators for Electronic Communications (BEREC) carried out an analysis of the range of rules on telecommunications penalties, as stated in its Work Program 2020. Annex 1 lists the independent National Regulatory Authorities³ (NRA) participants in this workstream.

Due to the fact that the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (hereinafter, the EECC) is still under the transposition period (it finishes by 21 December 2020), BEREC’s analysis of the sanctioning powers assigned to NRAs is concerned with those laid down in national legislation at the time the Directives of the former “Telecom Package” (Framework, Authorization, Access, Universal Service Directives, etc) were transposed into national legislations.

The report is intended to give a comprehensive overview of the practices of independent NRAs who have the power to impose sanctions directly on providers of electronic communications networks and/or services (ECN/S) in case of breaches of national provisions adopted pursuant to the Framework Directive and Specific Directives 2002 as amended in 2009 (e.g. general authorisation, numbering and spectrum conditions and end users rights, among other). It does not cover scenarios in which sanctioning is performed by civil or penal courts.

The report covers the following headings:

- General overview of the national sanctioning procedure law and types of sanctions.
- NRAs sanction powers.
- Infringing conducts.
- Principle of Liability or Guilt.
- Calculation of the sanction
- Snapshot of NRA penalty decisions.

³ The term “NRA” is used in this report as reference to the independent National Regulatory Authority that fully correspond to the NRAs that are BEREC members and participants without voting rights.

3. GENERAL OVERVIEW OF THE NATIONAL SANCTIONING PROCEDURE LAW AND TYPES OF SANCTIONS

The concrete determination and calculation of telecom sanctions is an area where legislation is based upon the national systems of the Member States. BEREC has identified general trends in national sanctioning procedural approaches across the EEA. These are as follows:

1. NRAs are bound by the principles of non-retroactivity and 'non bis in idem' and prescription among others.
2. Apart from two NRAs, all NRAs carry out preliminary proceedings prior to the initiation of the sanctioning procedure -whether it is mandatory by law or it is performed under the NRAs own decision- with the objective to investigate those facts which can result in a finding of non-compliance of a telecommunications breach.

This preliminary investigation usually starts: (i) ex officio, (ii) after receiving a complaint, and (iii) upon a reasoned request from another authority and/or administrative entity. Furthermore, some NRAs can also initiate preliminary proceedings upon a superior order issued by a higher administrative body.

3. Based on the *prima facie* evidence of non-compliance found, NRAs must adopt a formal decision to initiate a sanctioning process. Only one NRA does not adopt such decision.

There is a high level of harmonisation in respect to the content of NRAs' initial decision as includes⁴: (i) a brief description of the factuals findings and its breached provision (28 out of 28 responses), (ii) an identification of the alleged offender (28 out of 28), (iv) the address of the office (28 out of 28) and (v) the right to address arguments to the initial resolution (23 out of 28) and also throughout the sanctioning procedure (23 out of 28).

In addition to the requirement to issue a notification to the offender, the majority of the NRAs (16 out of 28) publish a formal announcement of the beginning of the sanctioning procedure. This announcement may be either mandatory under law; or at the NRA's own discretion. The remaining NRAs (12 out of 28) do not publish such a formal announcement.

This initial decision can be appealed in fifteen (15) countries, in which some of them it is an administrative appeal: Latvia (distric -city- court), Malta (Administrative Review Tribunal) and The Netherlands (ACM, before being allowed to apply for an appeal at a court).

4. With regard to the formal requeriments of the sanctioning process, BEREC notes that the majority of the independent NRAs (20 out of 29) do not envisage a formal separation between the investigation phase and the decision phase. The decision phase itself has two elements (i) a decision that an infringement has occurred and (ii) a decision to impose a penalty.

However, the remaining NRAs must formally differentiate (i) the investigation phase carried out by the Investigation Unit and (ii) the decision phase which is exclusively entrusted to a separate group of decision-makers (e.g. the NRA's Board, Commission) who are responsible to decide whether and what sanctions the NRAs should impose on

⁴ One NRA did not report information at this point and therefore is not counted.

operators based on the findings and the facts that have been proven during the process by the Investigation Unit.

In this regard, Luxembourg is developing a formal written procedure which establishes a formal separation. Also, in Austria, RTR -beneath its function as the executive office of the Telecom Control Commission- serves as an Investigation Unit of the supervisory proceedings led by the Telecom Control Commission (NRA body with tribunal quality according to Art 6 of the European Convention on Human Rights (ECHR), but in cases where RTR's own telecoms competences are concerned, there is no such separation.

Therefore, RTR does not have any legal competence to decide on penalties. The sole penalty to be imposed by the Telecom Control Commission applies in case of a violation of coverage obligations arising from a frequency auction. Sanctioning by applying administrative fines is in the exclusive competence of the "Telecom Office", a subordinated body of the competent Ministry -in no way related to the Telecom-Control-Commission as the NRA besides RTR-.

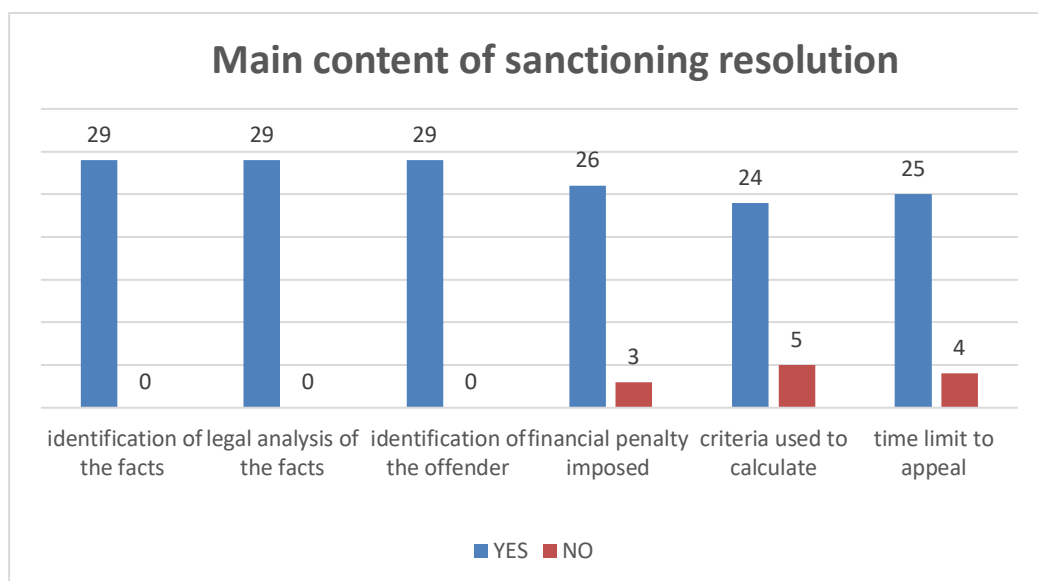
5. Fourteen (14) NRAs are required to comply with a specific legal time limit within which to adopt their sanctioning decisions as shown in the table below. Twelve (12) of these fourteen (14) NRAs cannot adopt sanctioning decisions after this period has expired.

1	2	3	4	5	6	7	8	9	10	11	12	13	14
13 W	150 D	3 M	6/12 M	12 M	3/12 M	12/3 6 M	1 M	36 M	2 Y	3 M	6 M	1/2 M	2 M

Table 1

6. Information gathering is an important investigation tool for NRAs where relevant information may be sought from (i) the alleged operator, (ii) complainant entity (with the exception of one NRA), (iii) third parties involved (with the exception of three NRAs), and (iv) other authorities (with the exception of six NRAs). In six (6) countries, the information gathering period suspends the applicable time limit of the sanctioning procedure.
7. All NRAs⁵ undertake an evidence phase (or trial period) to allow the alleged offending party to exercise its right of defence, to make a submission of further evidence and also to submit technical reports for examination by the NRA. There is only one NRA that does not have the power to require a submission of further evidence.
8. There is a high level of harmonisation in respect to the content of NRAs' sanctioning decisions is shown in the graph below:

⁵ One NRA did not report information at this point and therefore is not counted.

**Figure 1**

According to this graph:

- COMREG, PTS and RTR cannot impose penalties directly on operators.

As mentioned above, in Austria the Telecom Control Commission has the exclusive competence to impose penalties with regard to a violation of coverage obligations, while in Ireland and Sweden the Courts does. In Sweden, PTS establishes the amount of the penalty and if the penalty is to be imposed, the Court must impose the penalty by deciding the amount proposed by the NRA, lower the amount or not impose any penalty.

- Five (5) NRAs do not mention in their sanctioning decisions the criteria used for the calculation of the penalty, including the aggravating and/or mitigating factors taken into account.
 - Four (4) NRAs do not include a reference to a specific time limit in which to exercise the right to appeal before a Court. The legal time limit to appeal vary from one country to another. For instance, in one country, the right to appeal is 20 running days and while in another appeals must be made within 28 days mandated by the Courts. In another different country has 60 days specific time limit. In five (5) countries the operator must in the first instance raise an administrative appeal.
9. The great majority of NRAs (22 out of 29) publish their sanctioning decisions whether it is mandatory by law or is done at its own discretion. However, seven (7) NRAs do not publish its sanctioning decisions.
10. In general terms, NRAs' sanctioning decisions are directly applicable and no Court confirmation is needed. Notwithstanding, there are two exceptions: (i) as mentioned above, COMREG, PTS and RTR cannot directly impose financial penalties on operators and, (ii) CRC (only if appealed within 7 days), PTS and TRAFICOM penalties require Court confirmation. TRAFICOM may issue a notice and order the correction of the error or omission within a reasonable time. Fines are imposed conditionally after infringements. They may be ordered payable only after repeated infringement or failure to fulfil an obligation.

11. There is considerable diversity in the types of sanctions available to NRAs. In general terms, NRAs have the power to decide which is the most appropriate type of sanction to be imposed under justified and proportional grounds. Administrative penalties are used by all NRAs that have the power to impose them directly on operators with no Court confirmation needed.
12. NRAs can also impose periodic penalty payments (16 out of 29) and other additional sanctions (8 out of 28⁶): the most common of which is an order to cease or suspend the provision of ECN/S during a certain period in accordance to article 10.5 of the Authorisations Directive -for instance, BTK can order an undertaking to suspend an activity in addition to an administrative penalty-, and (iii) to replace the sanction by a reprimand or record only (16 out of 28⁷ NRAs) when facing minor contraventions.

⁶ One NRA did not report information at this point and therefore is not counted. In addition, BEREC notes that six NRAs cannot impose penalties other than economic ones.

⁷ One NRA did not report information at this point and therefore is not counted.

4. NRAS' SANCTION POWERS

For this report BEREC has collated specific and detailed information on sanctioning national competences entrusted to NRAs and has analysed 52 very specific infringements related to the telecommunications regulatory framework grouped in broader competence areas, such as SMP ex ante regulation; general authorization, allocation of scarce resources; dispute resolution involving providers of ECN/S; sector specific end-user rights and universal service obligations, among others.

In order to present the answers to the 52 sub-questions succinctly answers are regrouped in those broader competence areas (see the graph below). The term “*partial*” in the graph below means that NRAs have answered that they are competent to sanction very specific infringements in a certain category, while not being competent to sanction other infringements in this same category e.g. the category of “gathering information”, where many NRAs responded that they did not have the power to conduct inspection visits or to sanction a failure to respect procedural rules (such as a contravention of the requirement to attend a hearing) but are competent to sanction an operator for not delivering a (timely) response to a written request for information.

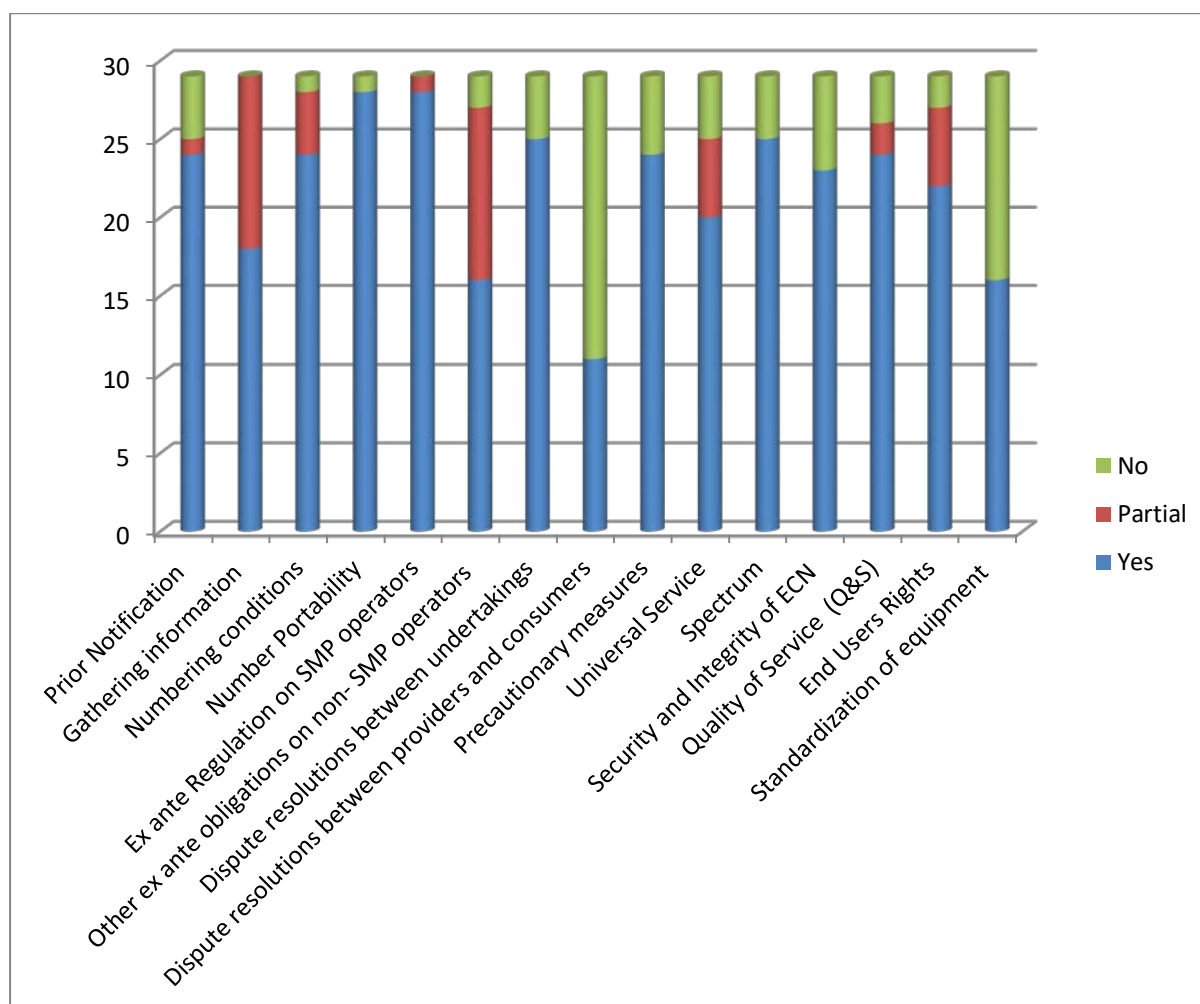


Figure 2

BEREC notes that sanctioning powers entrusted to independent NRAs differ from country to country. Those categories where most NRAs have full competence to sanction infringements

are number portability⁸ and ex ante Regulation on SMP operators. The reason why one NRA in the graph has partial competence to sanction infringements of ex ante regulation on SMP operators is because this NRA answered being competent to sanction infringements of the SMP obligations, but didn't answer the question on infringements of the terms & conditions of the reference offer. Therefore their answer has been taken as a no in that regard.

BEREC also notes that four (4) NRAs answered 'No' (or provided no response to the question) in respect to their competence to sanction the failure to comply with its decision adopted to resolve a dispute between undertakings. Three (3) NRAs further clarified that the decision resolving a dispute between two private parties is to be enforced privately, following the law on civil procedure, by the party that has obtained the decision in its favor and not by the NRA. The fourth NRA did not provide further information regarding its response.

On the other hand, areas where sanctioning competences are the least available to NRAs are Dispute Resolution between providers and consumers (11 out of 29 NRAs) and standardization of equipment (16 out of 29 NRAs). Broadly speaking, the main reasons for NRAs not having competences on the dispute resolution vis-à-vis consumers are (i) the fact that this is dealt with by another body, not BEREC member and participants without voting rights, (ii) the consideration that the respect of the decision resolving a dispute between two private parties is to be enforced privately, by the party that has obtained the decision in its favor and not by the NRA and (iii) that dispute resolution in their jurisdiction is an ADR-system, in which decisions are not mandatory.

Annex 2 shows BEREC's analysis regarding NRAs that also hold or share competences in competition law, "horizontal" consumer protection law and e-privacy law. This analysis broadly identifies which authorities other than the independent NRAs, such as Ministries (e.g. dealing with standardisation of equipment or security issues) or other bodies (e.g. dealing with dispute resolution), are competent in the mentioned fields. Finally, in some instances competences and thus sanctioning powers are shared with other public authorities, such as National Competition Authorities, Consumer Protection Authorities and Data Protection Authorities.

⁸ The only NRA answering "no" to this question clarified in its response that it cannot sanction the infringements of the technical requirements for porting processes, but it can impose the sanction in case of a breach of the general number portability obligations under the Article 30 of Universal Service Directive (i.e. the NP principle itself, the NP price regulation decision, the obligation to port and activate the number within the shortest possible time (including activation within one working day), in case of no porting of numbers against the will of the subscriber and obligations to compensate subscribers for the delay in porting of for porting against his will.

5. INFRINGING CONDUCTS

BEREC analyses how national legislations address infringing conducts using a list that sets out all possible breaches of general regulatory obligations and sectoral end users provisions.

5.1 Classification of the infringing conducts

The majority of national telecommunications sanctioning laws (18 out of 29) do not rank infringing conducts according to their gravity, which is assessed on a case-by-case basis together with other different criteria. By contrast, the remaining national legislations (11 out of 29) rank infringing conducts according to its gravity: very serious, serious and minor infringements. In these cases, there is considerable variation in the classification of infringements according to their gravity: A telecommunication breach can be considered by one NRA as a “*very serious infringement*”, whereas another could consider the same breach as a “*serious*” infringement or even a “*minor*” infringement.

In relation to end users’ rights, breaches of the rules regarding contract transparency, change rights, billing and switching (change of provider) are listed as either serious or very serious. Similarly, infringements of dispute resolution determinations, roaming charges (RLAH), Open Internet rules and obligations to maintain the confidentiality of relevant communications are regarded as being either serious or very serious. A similar classification of infringements can be derived from the NRA responses with regard to privacy-related obligations.

5.2 Continuous infringement as a particular type of breach

The great majority of national legislations (21 out of 29) do not consider continuous infringement as a particular type of breach. However, the duration of an on-going infringement could and would be addressed in the calculation of the penalty.

5.3 Combination of offences

Again, the majority of national legislations (18 out of 29) do not envisage combined offences where either (i) a single act or issue might breach multiple provisions or (ii) repeated acts would breach the same provision multiple times. Despite this, separate offences could be tried simultaneously i.e. that multiple charges could be brought or only pursue the most serious offence in such scenarios.

5.4 Extinctive limitation period

Finally, the majority of national telecoms legislations (22 out of 29) envisage an extinctive limitation, or fixed period, during which the infringement and/or the penalty must be sought such that when this period has elapsed no sanction or penalty can be imposed for the alleged breach.

The extinctive limitation period is not a uniform period and can vary from one country to another in a range from 10 years to 6 months. Annex 3 details national extinctive limitation periods.

6. PRINCIPLE OF LIABILITY OR GUILT

BEREC analyses how NRAs assess the responsibility of an operator, so called the “subjective element”, while breaching general regulatory obligations and sector end users’ provisions.

6.1 The subjective element (act or omission and/or willful or negligent)

Most national legislations consider a subjective element (act or omission and/or wilfulness or negligence) in certain circumstances when imposing a penalty in the context of general regulatory obligations (19 out of 29) and sector end users' provisions (13 out 29).

Three NRAs say that the establishment of a subjective element is not required by law because only a demonstration of the breach of the provision at stake ("material element") is sufficient. One of this three NRAs also points out that the subjective element is considered in criminal cases which apply to a few general regulatory obligations only and not end-users provisions. Another NRAs specifies that "Act or omission" is required but "intent" is not. On the other hand, one NRA observes that (i) act or omission are objective elements and (ii) wilfulness or negligence which are subjective elements and that it takes them into account in determining the penalty.

Finally, one NRA gave different answers in the different contexts of general sectoral obligations and national consumer protection rules pointing out that the subjective element was only relevant to them if the offender was a natural person.

6.2 Collective responsibility

When more than one operator or other entity contributed to an infringement, sanctions are imposed on all parties who contributed to the infringement. In some cases, the liability of each of the authors is analyzed on an individual basis and may be pursued in separate proceedings, while in others offenders are analysed together and addressed in the same proceeding.

6.3 General causes of exclusion of responsibility

The majority of NRAs (22 out of 29) take into account concurrent general causes of exclusion of responsibility (e.g. *force majeure*) on a case by case basis in sanctioning proceedings, even when these general causes of exclusion are not explicitly envisaged in telecommunications legislation.

One NRA national administrative legislation envisages general exclusions of responsibility such as: self-defense, state of necessity, duress, fortuitous case, irresponsibility, complete involuntary intoxication, fact error, infirmity when it has to do with the deed. In a similar way, another NRA can apply, by the principle of subsidiarity, the general clauses of exclusion of responsibility envisage in the national Criminal Law. One more national legislation envisages specific clauses of exclusions of responsibility.

6.4 Sanction transmission to the successor of the offender

Despite of the absence of specific provision in national telecommunications provisions, in most cases (19 out of 29) the sanction imposed on an operator can be transmitted to its legal successor relying on commercial, administrative or other general regulations, for example in cases where the offender is acquired by another legal entity through merger or acquisition.

Finally, BEREC highlights Decisions of the Court of Justice of the European Union (CJEU) taken in relation to this principle out of particular note are cases C-280/06⁹ and C-343/13¹⁰, where the CJEU considered that the assumptions of legal succession of a company do not imply the dissolution of the administrative responsibility when there is identity between both entities from a material or economic point of view. Also, the Court expressly established that the absorbing company must answer for the infringement of the absorbed company even after

⁹ <http://curia.europa.eu/juris/liste.jsf?language=en&num=c-280/06>

¹⁰ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-343/13>

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the absorption because, otherwise, the interest of the Member State that sanctions the company would not be protected.

7. CALCULATION OF THE SANCTION

Pursuant to Article 21(a) of the 2002 Framework Directive, as amended in 2009, “*the penalties provided for must be appropriate, effective, proportionate and dissuasive*”.

BEREC notes that the assessment of principle of proportionality to impose penalties that have an appropriately deterrent element is an overall assessment that mainly encompasses the economic parameters, the duration of the infringement, the mitigating and aggravating factors, together with other different criteria determined under case by case basis (gravity, the size of the offender, the infringement committed on an ad hoc or on continuous basis, the impact of the infringement in the market, among others).

A final adjustment that can be made when setting the amount of the penalty, is to make sure that it is equal or higher than the minimum amount permissible in law and it does not exceed the maximum amount permissible in law. Almost all national telecommunications regulatory framework set legal maximum or minimum cap on penalties as shown in Annex 4. There are only four (4) Member States in which the national telecommunication regulatory framework does not provide for legal maxima and/or minima thresholds.

Finally, BEREC highlights that (i) there are no leniency program in force in relation to telecommunications breaches and (ii) ACM, AGCOM, COMREG and BIPT have adopted and published guidelines setting out the criteria for the calculation of the sanctions¹¹.

7.1 Economic parameters

The most common criteria considered for the calculation of the amount of the penalty are the economic parameters derived from the provision of electronic communications activities such as the relevant turnover or the gross annual income.

The quantification of this criterion involves determining its territorial scope -whether it is the national turnover or the worldwide generated turnover- and its period of time which might consider the (i) last complete accounting period or (ii) the year or last full calendar year in which the infringement has taken place or (iii) the duration of the infringement or (iv) a specific period of time.

Additional economic parameters to determine the relevant turnover by NRAs can be: (i) yearly NRA statistical information gatherings, (ii) annual report of the undertaking, (iii) financial statements of the undertaking, (iv) data from cost models, (v) a specific financial statement for the duration of the infringement, and (vi) other additional economic parameters such as: data obtained from third parties (e.g. other public authorities); (vi) turnover of a comparable undertaking (benchmarking), and the offender's turnover for a similar good or service during the same or another period of time.

7.2 Duration of the infringements

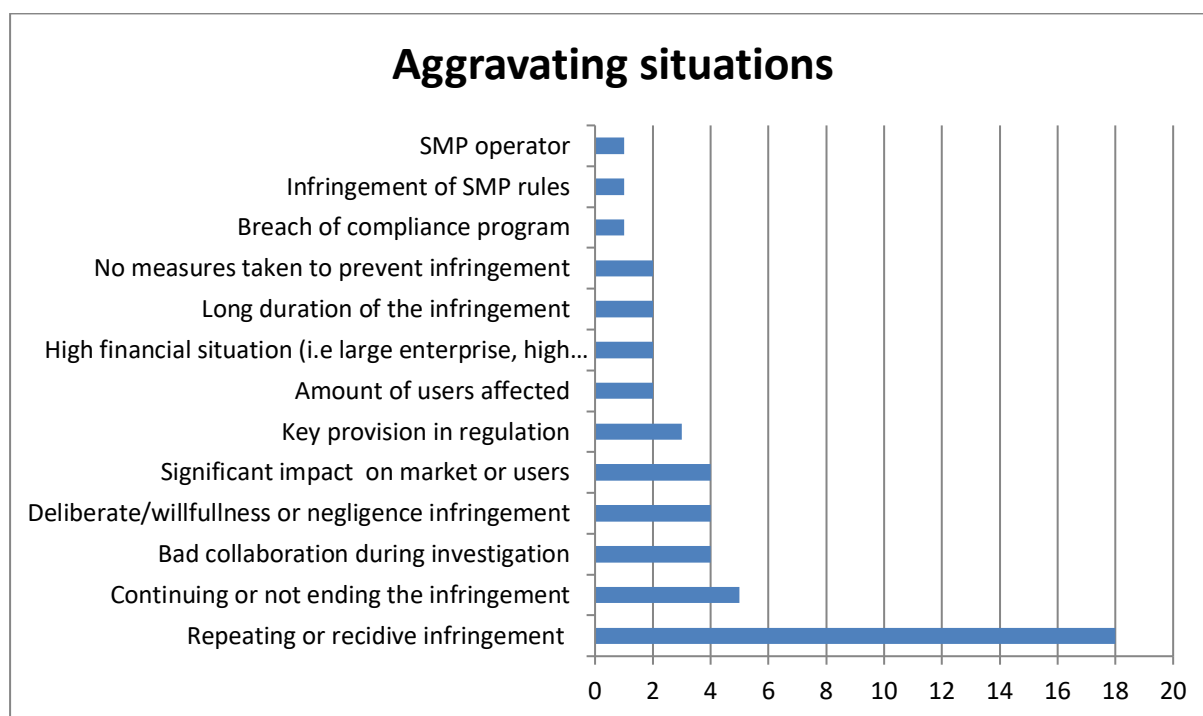
The majority of NRAs take into account the duration of the infringement in calculating appropriate penalties. This criterion is considered as a combination of only whole years, only whole months, and days.

7.3 Aggravating and/or mitigating factors

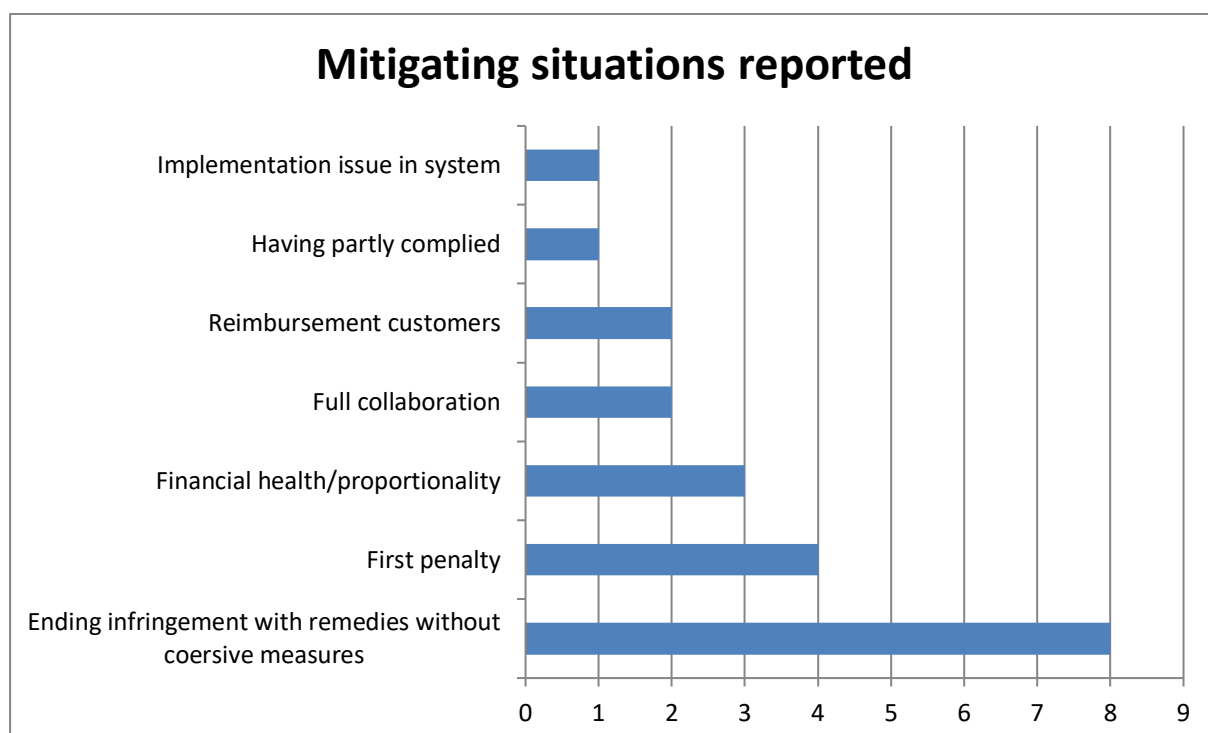
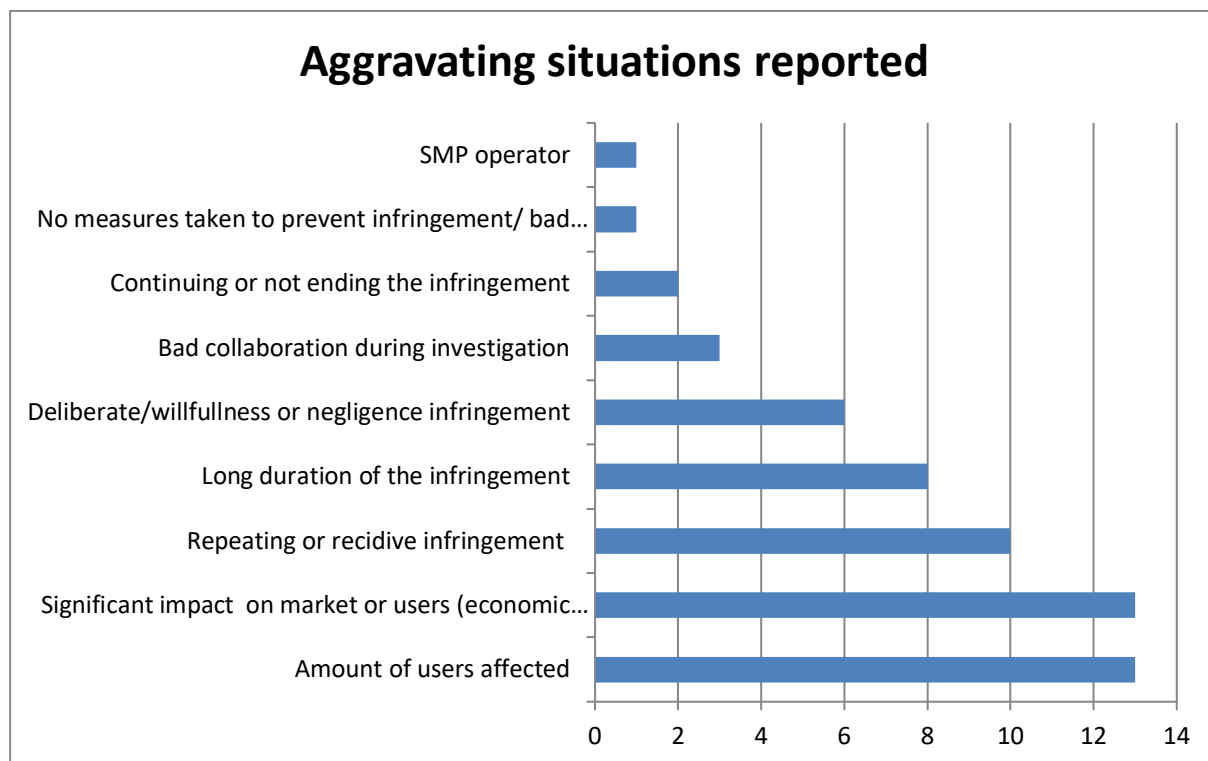
¹¹ Please see Annex 5 for further details.

Almost all NRAs consider aggravating and/or mitigating factors or even a combination of them with the effect to revise upwards or downwards the amount of the sanction. There is only one NRAs that does not consider either of these factors. Also, ten (10) NRAs point out that there are no fixed criteria to assess the effect of these factors because it depends on all the circumstances of each case.

The main aggravating and/or mitigating factors reported by NRAs in their five more relevant decision issued over the last ten (10) years with regards to infringements to general regulatory obligations are reflected in the following graph.



The other two graphs detail the aggravating and mitigating factors reported by NRAs in their five more relevant decision issued over the last 10 years related to infringements to end user's rights.



7.4 Fixed rate reductions applicable on general regulatory obligations

In addition, few NRAs can apply fixed rate reductions on the amount of the penalty. These NRAs reported that they can apply such rates in case of bankruptcy of the offender,

recognition of the infringement committed and its responsibility and willingness to pay the penalty.

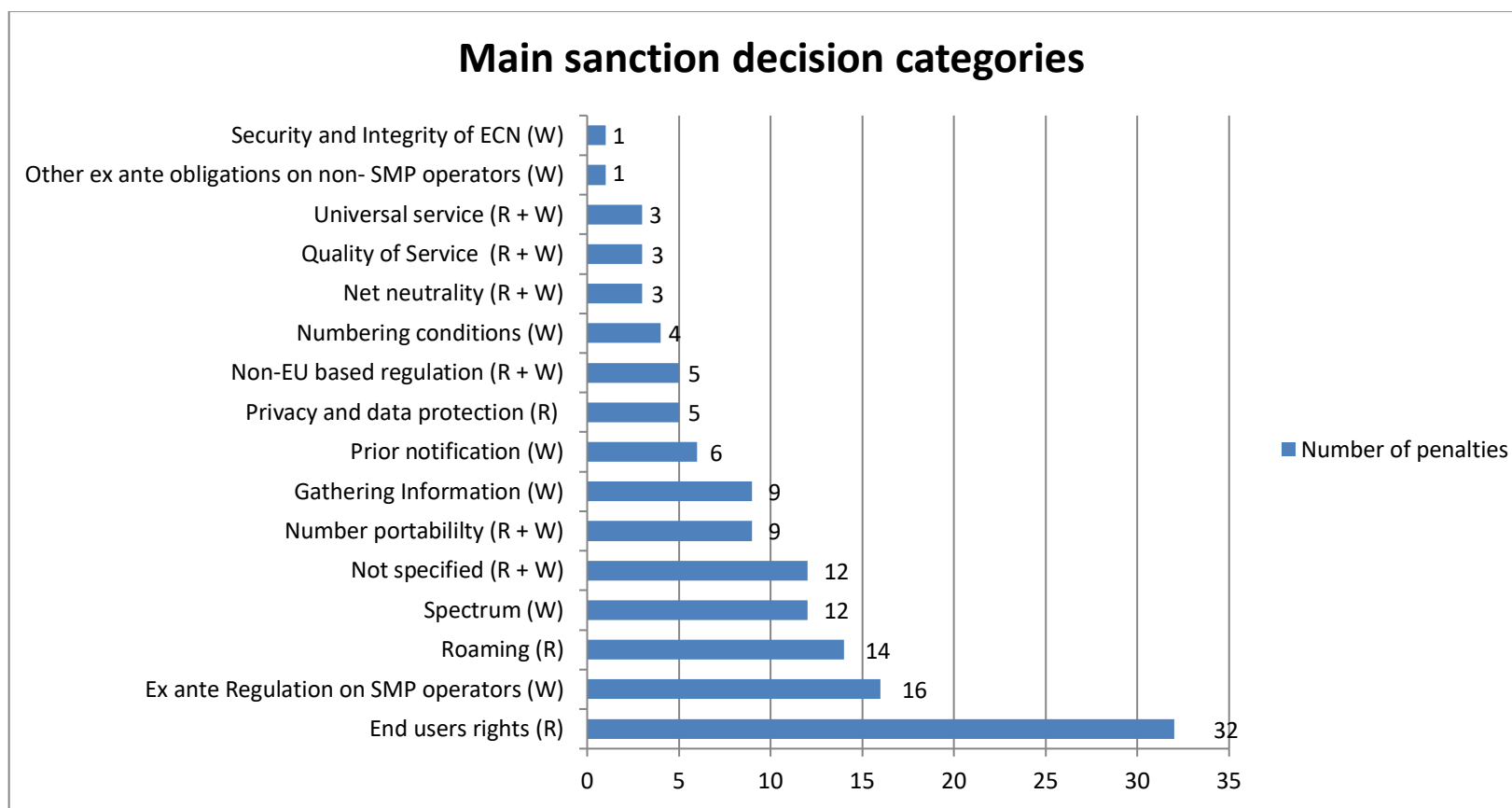
7.5 Remediation commitments involving sectoral end users obligations

More than a half of NRAs do not accept remediation commitments. Concerning specifically refunds, only 7 NRAs indicated that they can impose them. Among these NRAs, one NRA reported that refunds can be imposed in cases of portability and exceeding the roaming threshold, and another NRA in cases of billing on non-monthly basis. Finally, refunds can be imposed by one NRA in case of a breach of consumer protection rules and by another NRA in case of a breach of general requirements for electronic communications.

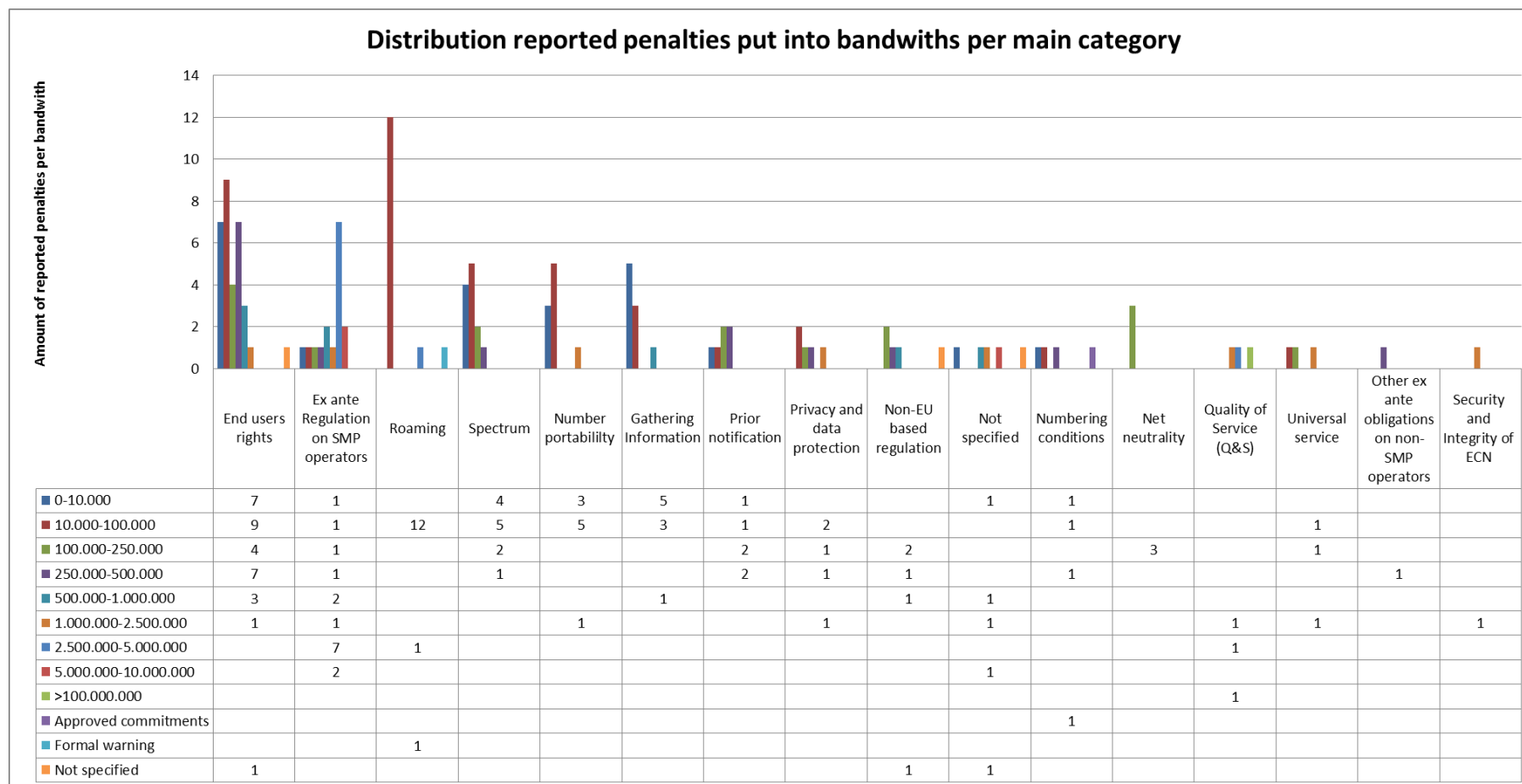
8. SNAPSHOT OF NRA PENALTY DECISIONS

Eighteen (18) NRAs reported their five more relevant sanctioning decisions issued over the last 10 years both for non-compliance of general regulatory obligations and sectoral end users' obligations. Thus, BEREC collected information on 135 sanctioning decisions for breaches of general regulatory obligations and sectoral end users' obligations.

BEREC gathered the following data from these reported penalties, as shown in the graphs below.

Figure 3¹²

¹² The above mentioned 'Not specified' category means that the information reported of a penalty of a NRA was not adequately specified to fit in any category. Also the Non-EU based regulation refers to the obligation to register Prepaid users.

**Figure 4¹³**

A breakdown of the 32 reported penalties for infringements for end-users rights is shown in the following graph:

¹³ Due to there is only one penalty that was higher than 10 million and this one was higher than 100 million, the penalty bandwidths in between have been omitted.

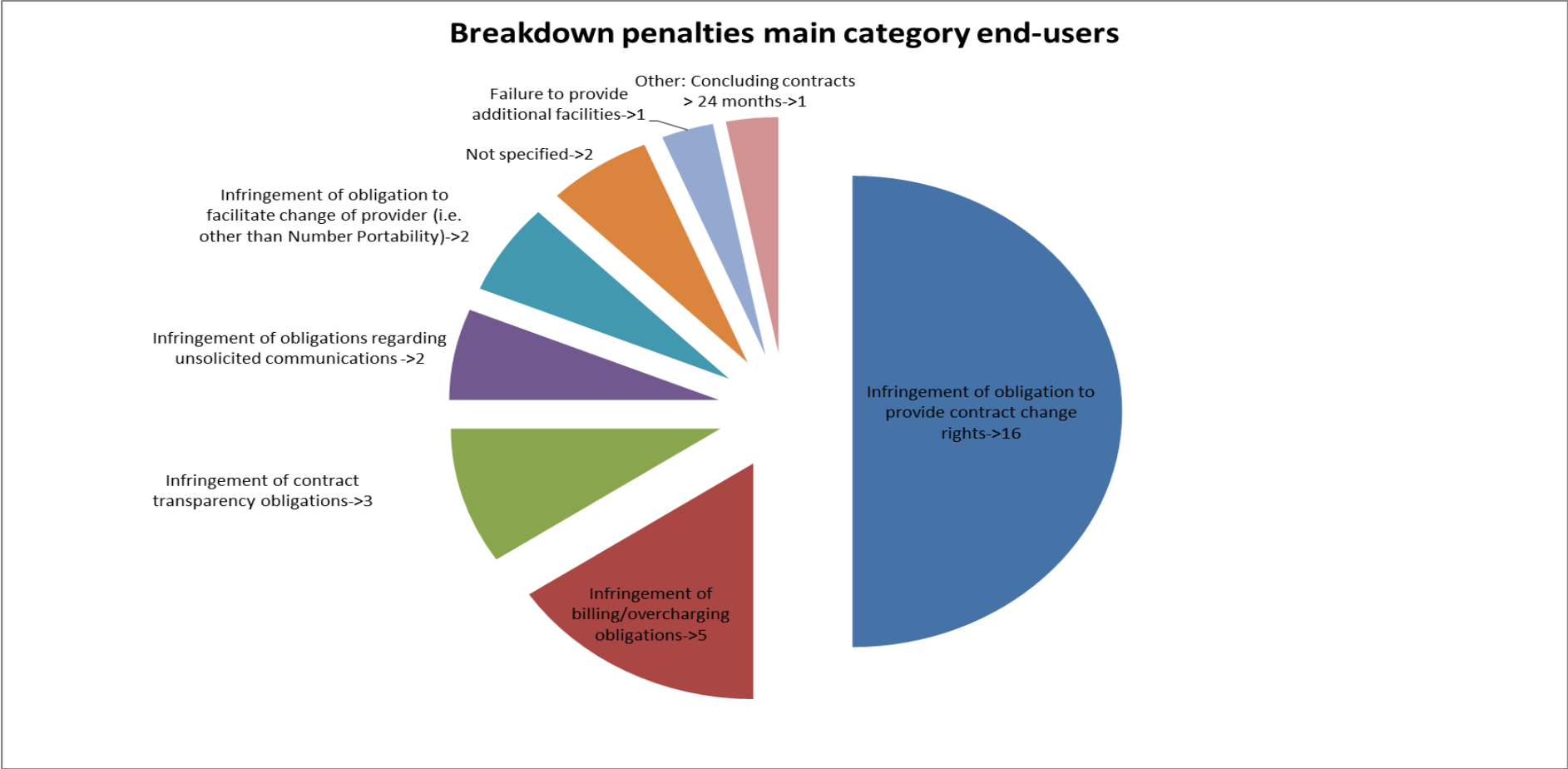


Figure 5

ANNEX 1 - LIST OF RESPONDING MEMBERS AND PARTICIPANTS WITHOUT VOTING RIGHTS OF BEREC

Name of the Authority	Acronym	Country	Member/Participants without voting rights
Austrian Regulatory Authority for Broadcasting and Telecommunications	RTR	Austria	Member
Belgian Institute for Postal services and Telecommunications	BIPT	Belgium	Member
Communications Regulation Commission	CRC	Republic of Bulgaria	Member
Croatian Regulatory Agency for Network Industries	HAKOM	Croatia	Member
Office of the Commissioner for Electronic Communications & Postal Regulation	OCECPR	Cyprus	Member
Czech Telecommunication Office	CTU	Czech Republic	Member
Danish Business Authority	DBA	Denmark	Member
Consumer Protection and Technical Regulatory Authority of Estonia	CPTRA	Estonia	Member
Finnish Transport and Communications Agency	TRAFICOM	Finland	Member
Autorité de régulation des communications électroniques, des postes et de la distribution de la presse	ARCEP	France	Member
Bundesnetzagentur	BNETZA	Germany	Member
Hellenic Telecommunications and Post Commission	EETT	Greece	Member
National Media and Infocommunication Authority	NMHH	Hungary	Member
Commission for Communications Regulation	COMREG	Ireland	Member

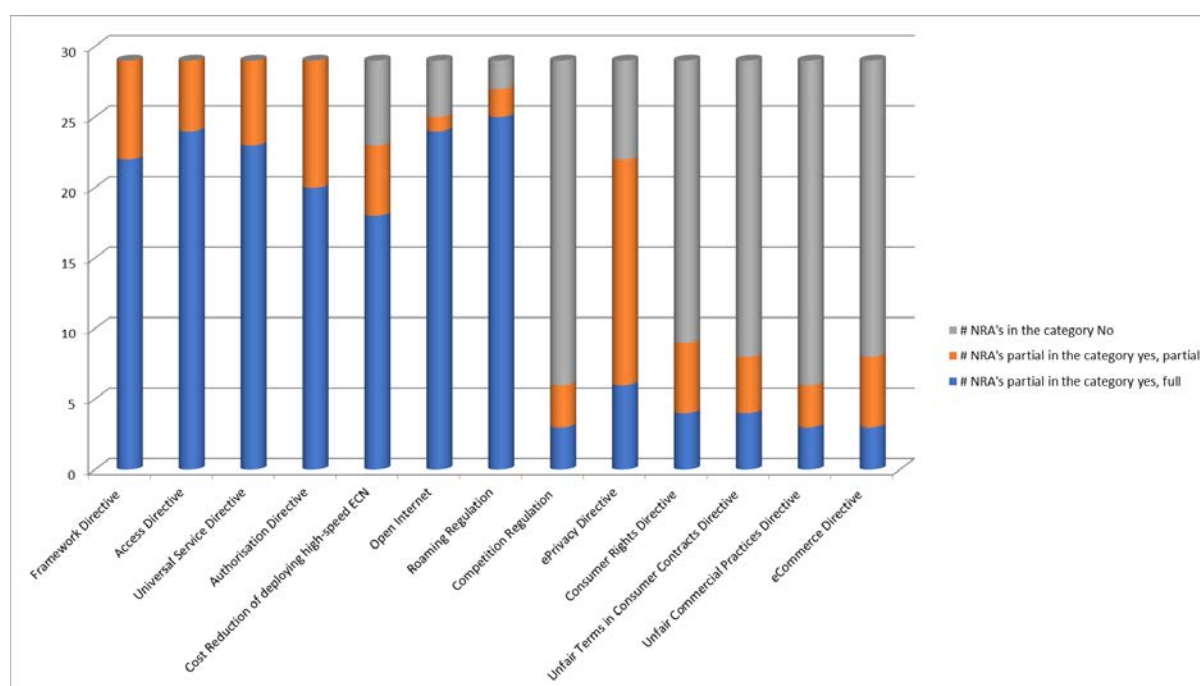
Autorità per le Garanzie nelle Comunicazioni	AGCOM	Italy	Member
Public Utilities Commission	SPRK	Latvia	Member
Communications Regulatory Authority of the Republic of Lithuania	RRT	Lithuania	Member
Institut Luxembourgeois de Régulation	ILR	Luxembourg	Member
Malta Communications Authority	MCA	Malta	Member
The Norwegian Communications Authority	NKOM	Norway	Participant without voting rights
Office of Electronic Communications	UKE	Poland	Member
Autoridade Nacional de Comunicações	^{Draft} ANACOM	Portugal	Member
National Authority for Management and Regulation in Communications of Romania	ANCOM	Romania	Member
Regulatory Authority for Electronic Communications and Postal Services	RU	Slovak Republic	Member
Agency for communication networks and services of the Republic of Slovenia	AKOS	Slovenia	Member
Comisión Nacional de los Mercados y la Competencia	CNMC	Spain	Member
Swedish Post and Telecom Authority	PTS	Sweden	Member
Authority for Consumers & Markets	ACM	The Netherlands	Member
Bilgi Teknolojileri ve İletişim Kurumu	BTK	Turkey	Participant without voting rights

ANNEX 2 - OTHER NRAS' COMPETENCES

BEREC analyzed in what general fields of law besides electronic communications law, such as (i) competition law, (ii) privacy law and (iii) “horizontal” consumer protection law, NRAs, member of BEREC, have a competence to sanction infringements (and, if so, whether that competence was “full” or “partial”, and in the latter case, with whom that competence was shared).

The general picture of the responses to this question can be presented as follows:

Question 2: What national legal powers/framework does your NRA have to impose financial penalties on operators who are found to be non-compliant with obligations imposed under the telecommunication’s regulatory framework in your country? Please provide regulation references if available.



With respect to the “extra” areas of competences, BEREC notes that:

- AGCOM, ACM, CNMC, COMREG, EETT and UKE (6 out of 29 NRAs) are (either fully or partially) competent to sanction infringements of the 1/2003 Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Besides this, ACM, CNMC and EETT stated they are also competent to sanction infringements of national competition rules.
- Generally, more NRAs responded that they are competent to sanction infringements of **horizontal consumer protection rules**:
 - ACM, AKOS, ANACOM, ANCOM, COMREG, CPTRA, CTU, HAKOM and OCECPR (9 out of 29 NRAs) are (either fully or partially) competent to sanction infringements of national provisions transposing the Consumer Rights Directive.
 - ACM, AKOS, BTK, COMREG, CPTRA, CTU, HAKOM and TRAFICOM (8 out of 29 NRAs) are (either fully or partially) competent to sanction infringements

of national provisions transposing the Unfair Terms in Consumer Contracts Directive.

- ACM, AKOS, ANACOM, BNETZA, CPTRA and CTU (6 out of 29 NRAs) are (either fully or partially) competent to sanction infringements of national provisions transposing the Unfair Commercial Practices Directive;
- ACM, ANACOM, BNETZA, CPTRA, MCA, NMHH, TRAFICOM and UKE (8 out of 29 NRAs) are (either fully or partially) competent to sanction infringements of national provisions transposing the eCommerce Directive.
- With respect to sanction powers for infringements of national provisions transposing the **e-Privacy** Directive:
 - AKOS, BTK, CTU, HAKOM, NKOM and RU (6 out of 29 NRAs) are fully competent to sanction the following breaches identified in BEREC's questionnaire: (i) Infringement of the obligation to safeguard the confidentiality of communications (and exceptions to this principle), (ii) Infringement of obligations regarding the use of traffic and location data, (iii) Infringement of the obligation to ensure transparency and/or consent rights before personal end-user data are included in directories and, (iv) infringement of the obligation to provide privacy protective tools specific to ECS (presentation and restriction of CLI, automatic).
 - ACM, ANACOM, ANCOM, ARCEP, BIPT, BNETZA, COMREG, CRC, DBA, MCA, NMHH, OCECPR, PTS, RTR, TRAFICOM and UKE (16 out of 29 NRAs) are partially competent to impose sanctions in those areas.
 - AGCOM, CNMC, CPTRA, ILR, EETT, RRT and SPRK (7 out of 29 NRAs) are not competent under the e-Privacy Directive.
- With regard to the **Open Internet Rules**, 24 out of 29 of NRAs answered that they were fully competent to sanction infringements of the Open Internet regulation.
 - RTR is competent for all kinds of supervisory proceedings, but is considered to be partially competent because the administrative fine is imposed by the Telecom Office (Part of competent Ministry) on violation notice by RTR. In Spain, the Ministry of Economic Affairs and Digital Transformation through its Secretariat of State for Telecommunications and Digital Infrastructures is the competent authority. Although CPTRA has a full competence on Open Internet Regulation and power to start administrative procedures, issue precepts and impose penalty payments, CPTRA cannot impose administrative fines. BTK states it has the competence to regulate this issue, but that it is not transposed to national legislation in Turkey yet. ANACOM has no sanctioning competence in this area.
- Finally, the great majority of NRAs (25 out of 29 NRAs) responded that they were fully competent to sanction infringements of the **Roaming Regulation**. RTR and CNMC responded that they were partially competent: CNMC's sanctioning competences on Roaming Regulation depends on the specific infringement at stake; where CNMC is still not competent, nowadays the Ministry of Economic Affairs and Digital Transformation through its Secretariat of State for Telecommunications and Digital Infrastructures is the competent authority. RTR's competence encompasses all kinds of supervisory proceedings with regard to the Roaming Regulation except

administrative fines (imposed by the Telecom Office). BTK states it has the competence to regulate this issue, but that it is not transposed to national legislation in Turkey yet. ANACOM has no sanctioning competence in this area.

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ANNEX 3 - NATIONAL EXTINGTIVE PERIOD

The extinctive limitation period is a fixed period that varies from country to country: (i) 10 years (Belgium when the infringement is treated under administrative law); (ii) 5 years (Belgium -if the infringement is treated under criminal law-, Hungary –in the cases specified in the Electronic Communications Act, Netherlands, Norway and Poland), (iii) 4 years (Slovakia), (iv) 3 years (Croatia and France), (v) 2 years (Malta), (vi) 1 year (Austria and Ireland) and (vii) 1 year/6 month (Romania).

Italian legislation also envisages a fixed period which varies according to whether or not the offending operator is resident in that country or not: 90 days if residents are involved and 360 days if non-residents are involved.

However, in other cases the extinctive limit period depends on the seriousness of the violation as shown in the table below:

Very Serious Contraventions	Unlimited (Ireland)
	90 months (Portugal)
	5 years (Slovenia and Spain)
	3 years (Czech Republic and Germany)
Serious Contraventions	3 years (Czech Republic)
	2 years (Spain, Slovenia, Germany)
	54 to 90 months (Portugal), depending on the size of the operator
Minor Contraventions	2 years (Germany, Slovenia)
	1 year (Spain, Ireland, Czech Republic)
	54 to 90 month (Portugal), depending on the size of the operator

In Bulgaria, administrative penal proceedings shall not be opened if an instrument has not been issued establishing the violation during a three-month period from finding against the offender, or if one year has elapsed from when the offence was committed.

ANNEX 4 - MINIMUM AND MAXIMUM PENALTIES CAPS

NRA	MINIMAS PENALTIES CAPS		
	Very serious infringements	Serious infringements	Minor infringements
ACM	400.000 EUR or 5/1000 of the yearly revenue	150.000 EUR or 0,75/1000 of the yearly revenue	15.000 EUR or 0,25/1000 of the yearly revenue
AGCOM	2% turnover	240.000,00 EUR	15.000,00 EUR
AKOS	50.000 EUR	20.000 EUR	1.000 EUR
ANACOM¹⁴	375 EUR	125 EUR	50 EUR
ANCOM	5.000 RON	5.000 RON	5.000 RON
BNETZA¹⁵	Periodic penalties: 1.000 EUR Fines: -	Periodic penalties: 1.000 EUR Fines: -	Periodic penalties: - Fines: 5 EUR
CRC	Regulatory obligations	Regulatory obligations	Regulatory obligations
	25.000 EUR	5.000 /15.000 EUR	250 EUR
	End-users rights	End-users rights	End-users rights
	25.000 EUR	1.500 EUR	250 EUR
HAKOM	1% of the total annual gross income	100.000 HRK	50.000 HRK
RU¹⁶	200 EUR	200 EUR	200 EUR

¹⁴ ANACOM specify that the indicated values are the ones for the minimum limit of fines for infractions committed by negligence by natural persons.

¹⁵ BNetzA specify that there are two kinds of financial penalties that can be imposed: periodic penalties in case of non-compliance with BNetzA's orders, and fines imposed conditionally on the infringement of a legal obligation with different minimum amounts each.

¹⁶ RU specify that the amount of 200 EUR indicated in the table represents the general minima pecuniary penalty set by the law, RU cannot impose the penalty that is less than this amount in any case.

NRA	MAXIMUM PENALTIES CAPS		
	Very serious infringements	Serious infringements	Minor infringements
ACM	800.000 EUR or 75/1000 of the yearly revenue	650.000 EUR or 25/1000 of the yearly revenue	300.000 EUR or 5/1000 of the yearly revenue
AGCOM	5% turnover (for SMP operators)	5.000.000 EUR	1.150.000,00.EUR
AKOS	400.000 EUR up to 5% yearly turnover	50.000 EUR	20.000 EUR /5.000 EUR
ANACOM	5.000.000 EUR	1.000.000 EUR	100.000 EUR
ANCOM	60.000 RON (or 100.000 RON for repeated infringements) if the turnover is over 3.000.000 RON then the maximum amount is up to 5% of the turnover and up to 10% of the turnover for repeated infringements	60.000 RON (or 100.000 RON for repeated infringements) if the turnover is over 3.000.000 RON then the maximum amount is up to 5% of the turnover and up to 10% of the turnover for repeated infringements	60.000 RON (or 100.000 RON for repeated infringements) if the turnover is over 3.000.000 RON then the maximum amount is up to 5% of the turnover and up to 10% of the turnover for repeated infringements
BIPT¹⁷	Initial sanction 5% of turn-over (or 1.000.000 EUR if no turn-over); if continued after the initial sanction the max. are doubled	Initial sanction: 5% of turn-over (or 1.000.000 EUR if no turn-over); if continued the max. are doubled	Initial sanction: 5% of turn-over (or 1.000.000 EUR if no turn-over); if continued the max. are doubled
BNETZA	Periodic penalties: 10 Mio EUR. Fines ¹⁸ : 10.000 EUR/50.000 EUR/100.000 EUR/ 300.000 EUR/ 500.000 EUR and up to 2% of the average annual turnover of undertakings with an annual turnover more than 50.000.000 EUR	Periodic penalties: 10 Mio EUR. Fines: 10.000 EUR/50.000 EUR/100.000 EUR/ 300.000 EUR/ 500.000 EUR and up to 2% of the average annual turnover of undertakings with an annual turnover more than 50.000.000 EUR	
BTK	Up to 3% of the company's net sales in the previous calendar year	Up to 2% of the company's net sales in the previous calendar year	Up to 0.5% of the company's net sales in the previous calendar year

¹⁷ It is to be noted that the national telecommunications regulatory framework applicable to BIPT does not specify the legal maxima according to the gravity of the infringements.

¹⁸ BNETZA specifies that the maximum fines that can be imposed vary according to the specific area the infringements refers to.

CNMC	The amount must be not less than equal to and not more than five times the gross profit obtained as a result of the acts or omissions of which the contravention consist or, in the event it is not possible to apply this criterion, the maximum limit of the penalty shall be 20.000.000 EUR	The amount must be not more than to twice the gross profit obtained as a result of the acts or omissions of which the contraventions consist or, in the event it is not possible to apply this criterion, the maximum limit of the penalty shall be 2.000.000 EUR	50.000 EUR
CPTRA	50.000 EUR	50.000 EUR	50.000 EUR
CRC	Regulatory obligations	Regulatory obligations	Regulatory obligations
	1.000.000 EUR	15.000/150.000 EUR	2.500 EUR
	End-users rights	End-users rights	End-users rights
	500 000 EUR	Draft 30.000 EUR	2.500 EUR
CTU	50.000.000 CZK or 10 % of turnover of the last accounting period, whichever is higher	15.000.000 CZK or 5 % of turnover of the last accounting period, whichever is higher	5.000.000 CZK
EETT¹⁹	3.000.000 EUR		
HAKOM	10% of the total annual gross income generated from the performing ECN/S	1.000.000 HRK	500.000 HRK
ILR	1.000.000 EUR	1.000.000 EUR	1.000.000 EUR
MCA	In extremely serious and repeated infringements amount can be increase up to 5% of the turnover of the operator for the previous year	350.000 EUR (one off fines) and/or 12.000 EUR in the case of fines for each day of non-compliance	
NKOM	Maximum five per cent of the undertaking's revenue	Maximum five per cent of the undertaking's revenue	Maximum five per cent of the undertaking's revenue
NMHH	The minimum and maximum depends on the nature of the infringement, for example 0.5 per cent of the of the infringer's turnover for breaching or non-compliance with the obligations conferred upon service		

¹⁹ EETT indicated that the amount of 3.000.000 EUR is the only maximum amount decided on a case by case basis.

	providers with significant market power by resolution, and if such obligation is carried out belatedly or improperly, in the amount of 100.000 forints in the case of construction or demolition works carried out before the notification of succession.		
OCECPR	The Commissioner may impose an administrative fine of up to 170,800 Euros and in case of recurrence of the violation, up to 341,720 Euros, depending on the seriousness of the violation. There is also a fine of 850 Euros for each day of continuation of the violation.	Draft	
RU	up to 10 % of annual turnover	up to 5 % of annual turnover	up to 5 % of annual turnover
SPRK	The law stipulates the Regulator's right to impose a warning or a fine (280-14.000 EUR). The law does not specify the fine division according to the gravity of the violation.		
RRT		In case where an undertaking commits a repeated or serious infringement, RRT shall have the right to impose a fine of up to 5 % of the annual gross income from activities associated with electronic communications, and if it is difficult or impossible to calculate	RRT shall have the right to impose a fine of up to 3 % of the annual gross income from activities associated with electronic communications, and if it is difficult or impossible to calculate the volume of such activity – a fine of up to 86.886 EUR. Where the annual gross income is less than

		the volume of such activity – a fine of up to 144.810 EUR. Where the annual gross income is less than 86.886 EUR, a fine of up to up to 5.792 EUR shall be imposed.	86.886 EUR, a fine of up to 2.896 EUR shall be imposed.
RTR²⁰	58.000 EUR	37.000 EUR	1.000 / 3.000 / 4.000 / 8.000 EUR
UKE	up to 3% of annual income	up to 3% of annual income	up to 3% of annual income

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²⁰ The amounts cited by RTR solely apply to maximum caps as set in administrative fines.

ANNEX 5 - GUIDELINES OR METHODOLOGY USED BY NRAS

NRA	ADOPTED OR ON-GOING
ACM	<p>Beleidsregel van de Minister van Economische Zaken van 4 juli 2014, nr. WJZ/14112617, met betrekking tot het opleggen van bestuurlijke boetes door de Autoriteit Consument en Markt (Boetebeleidsregel ACM 2014)</p> <p>https://wetten.overheid.nl/BWBR0035322/2016-07-01#</p>
AGCOM	<p>Linee guida sulla quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorita per la garanzia nelle comunicazioni</p> <p>https://www.agcom.it/documents/10179/1686063/Allegato+16-7-2015/918b1815-127e-41a7-a3e9-86e8334b6b64?version=1.0</p>
BIPT	<p>Communication du Conseil de l'IBPT du 31 mars 2020 concernant les lignes directrices relatives au calcul du montant des amendes administratives imposées par l'IBPT.</p> <p>https://ibpt.be/consommateurs/publication/communication-concernant-les-lignes-directrices-relatives-au-calcul-du-montant-des-amendes-administratives-imposees-par-libpt</p>
COMREG	<p>COMREG is currently consulting on an appropriate methodology to use to calculate sanctions for breach of obligations imposed pursuant to the Access Regulations 2011.</p> <p>https://www.comreg.ie/publication/consultation-on-calculating-penalties-for-access-regulations-breaches</p>
NKOM	<p>The Regulations on Electronic Communications Networks and Services, section 10-3a, provides detailed guidance on determining the amount of the infringement fine.</p>