



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Switching and Number Portability – End-User Compensation

Response to Consultation 23/92 and Decision

Response to Consultation and Decision

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Chapter 1

1 Executive Summary

- 1.1 ComReg is the statutory body responsible for the regulation of Electronic Communications Services (“ECS”), Electronic Communications Networks (“ECN”), associated facilities¹ and the postal sector in Ireland. We have a wide range of responsibilities in the sectors we regulate and operate under Irish and EU legislation in these areas.
- 1.2 The European Union (Electronic Communications Code) Regulations 2022² (“the Code Regulations”) and the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023³, (“the 2023 Act”), transpose the European Electronic Communications Code⁴ (“the Code”) into Irish law.
- 1.3 Article 106(8) of the Code obliges Member States to lay down rules on the compensation of end-users by their providers in an easy and timely manner in the case of the failure of a provider to comply with the obligations laid down in that Article, as well as in the case of delays in, or abuses of, porting and switching processes, and missed service and installation appointments. Section 39 of the 2023 Act is the mechanism by which this is given effect in the State. The specification of failures under section 39(1) is a necessary prerequisite to the implementation of the required rules.
- 1.4 Regulation 90 of the Code Regulations contains various rights and obligations to protect end-users when they are porting numbers and/or switching between providers of internet access services (“IAS”).
- 1.5 Section 39 of the 2023 Act empowers ComReg to specify a failure to comply with an obligation under Regulation 90 of the Code Regulations as a “specified failure” which requires payment of compensation to an affected end-user.
- 1.6 ComReg notes that Regulation 25(10) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011), (“the Universal Service and Users Rights Regulations 2011”) already obliged undertakings to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf.

¹ Including telecommunications, radiocommunications and broadcasting transmission services

² S.I. No. 444/2022 - European Union (Electronic Communications Code) Regulations 2022

³ Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023

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

Chapter 2

2 Background

2.1 On 26 September 2023, ComReg published a Consultation and Draft Decision⁵ (“the Consultation”) containing proposals to specify failures of providers of IAS or number-based interpersonal communications services (“NBICS”), to comply with an obligation under Regulation 90 of the the Code Regulations.

Where ComReg specifies failures as provided for under Section 39 of the 2023 Act, the following obligations are engaged –

1. The obligation on the provider to pay compensation to the affected end-user when a specified failure is committed; and
2. The obligation on the provider to prepare and publish a compensation scheme within three months setting out a transparent procedure to obtain compensation and the amount of compensation to be paid.

2.2 This Response to Consultation and Decision is published to make the review process appropriately transparent and to summarise ComReg’s consideration of stakeholder responses to the Consultation.

2.3 On 27 October 2023, ComReg received seven responses the Consultation from:

- Alternative Operators in the Communications Market (“ALTO”)
- Eircom Limited (trading as ‘eir’ and ‘open eir’) and Meteor Mobile Communications Limited, collectively referred to as ‘eir Group’ (“Eir”)
- Sky Ireland Limited (“Sky”)
- Telecommunications Industry Ireland (“TII”)
- Three Ireland (Hutchison) Limited (“Three”)
- Virgin Media Ireland Limited (“Virgin”)
- Vodafone Ireland Limited (“Vodafone”)

⁵ ComReg Document No. 23/92

- 2.4 ComReg has reviewed these submissions and given them due consideration in respect of its consultation to specify a failure of a provider IAS or NBICS to comply with Regulation 90 of the Code Regulations in the case of switching and/or number portability by an end-user. When a specified failure is committed, providers will be obligated to pay compensation to the affected end-user. Providers will be required to prepare and publish a compensation scheme within three months setting out a transparent procedure of end-users to obtain compensation and the amount of compensation to be paid.

Chapter 3

3 Respondents' views – summary & analysis

3.1 In the Consultation, ComReg asked the views of respondents to the following two questions:

- Q. 1 Do you have any comments on ComReg's reasoning in this consultation?
- Q. 2 Do you have any comments on the text of the Decision Instrument included at Annex 1 of this consultation?

3.2 Responses to the Consultation focused on a number of themes. These were:

- i. Proportionality and necessity;
- ii. Regulatory Impact Assessment;
- iii. Lead time to prepare and publish a compensation scheme;
- iv. Complexity of implementing a compensation scheme;
- v. Wholesale effects; and
- vi. Inclusion of Business Customers.

3.1 Proportionality and necessity

3.3 In this context a number of responses questioned whether a compensation scheme was necessary and whether the proposed measure was proportionate. These responses focused, amongst other things, on complaint volumes, switching initiatives that are being implemented, a lack of evidence supporting the need for the proposed measure, the absence of any problem justifying the proposed intervention, the financial and resource burden that would be imposed by the proposed measure, with one respondent suggesting that a “wait and see” approach by ComReg would be appropriate in the circumstances.

- 3.4 In the Consultation, ComReg observed that in “Q2 2023, 6.5% of all contacts received by ComReg related to issues concerning switching providers by end-users.⁶ In Q3 2023, the percentage was 7.2%.⁷ This is not insignificant in ComReg’s view.
- 3.5 More importantly, as ComReg noted in the Consultation,⁸ Member States are obliged to lay down rules on the compensation of end-users in this context. ComReg is proposing to lay down rules through the specification of compensable failures. ComReg is merely giving effect to the mandatory requirement imposed through a European Directive. Insofar as respondents submitted that the proposed measure was not justified by supporting evidence or the identification of a problem that required to be addressed, it is ComReg’s view that these submissions do not take account of the fact that the requirement to lay down rules is a mandatory one that derives from European law. It would not be appropriate for ComReg to look behind this mandatory requirement in the manner submitted.
- 3.6 While ComReg is empowered to determine that compensation is paid to an end-user automatically, without the need for the end-user to make a complaint or claim for compensation⁹, and it is also empowered to specify the amount of compensation that may be payable in respect of a specified failure¹⁰, ComReg’s approach in this consultation allows room for a provider-led process and affords providers flexibility in terms of their processes, matters advocated for in some of the responses received. One respondent noted that this allows for “healthy competition in the market”. This is relevant to the resource and financial burden points made in responses. ComReg will keep these matters under review, however.
- 3.7 With regard to the ongoing switching initiatives, ComReg understands that these are progressing, however they are separate to the obligations imposed by Regulation 90, which have been in force since 9 June 2023. ComReg has, however, taken account of the submissions received on this issue when considering the appropriate lead-in time, which is addressed below.

⁶ Page 7

⁷ ComReg Consumer Care Statistics Report, Q3 2023

⁸ See Paragraph 1.3 of the Consultation

⁹ Section 39(7) of the 2023 Act

¹⁰ Section 39(11) of the 2023 Act

3.2 Regulatory Impact Assessment

- 3.8 Four respondents, ALTO, Eircom, Sky and Virgin submitted that ComReg should carry out further regulatory analysis before introducing such measures which will impact service providers and competition in the market. In some submissions the absence of a Regulatory Impact Assessment (“RIA”) is specifically referred to.
- 3.9 As noted in the Consultation, and reiterated above, ComReg is of the view that a RIA is not required as there is an obligation on the Member State in Article 106(8) of the Code for rules to be laid down on the compensation of end-users by their provider for the specified failures.
- 3.10 Moreover, the conduct of a RIA presupposes that ComReg has discretion as to whether to impose a measure in the circumstances. It is clear from the legislative requirements, as laid out at some length in the Consultation that it does not have such discretion. While ComReg could have imposed further obligations, it has nonetheless allowed for a provider-led process and flexibility of processes at this time.

3.3 Lead-time to prepare and publish a compensation scheme

- 3.11 In the Consultation, ComReg sets out that where ComReg specifies failures as provided for under Section 39 of the 2023 Act, there is an obligation on the provider to prepare and publish a compensation scheme within three months setting out a transparent procedure to obtain compensation and the amount of compensation to be paid.
- 3.12 The compensation scheme must meet the minimum requirements of section 39(4) and (5) of the 2023 Act, which address the compensation procedures, the compensation amount (taking account of the nature of any loss of service, the duration of that loss and any failure by a relevant provider to keep an end-user informed throughout the process), the means of payment and the time period for payment.
- 3.13 Many respondents expressed the view that additional time would be required to implement a compensation scheme beyond the three months granted under Section 39 of the 2023 Act.
- 3.14 Reasons for this suggested delay included consideration of legal aspects of a compensation scheme, time required to agree an inter-operator process on compensation, consideration of legal issues, time for inter-operator internet access services switching processes to bed down, development of technical solutions and reporting mechanisms and other matters.

- 3.15 ComReg noted in the Consultation¹¹ that, pursuant to Regulation 25(10) of the Universal Service and Users' Rights Regulations 2011, undertakings were already obliged to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf. ComReg would therefore have expected that compliance with this obligation would have required that many of the issues adverted to by respondents to the Consultation would already have been resolved.
- 3.16 Notwithstanding this, ComReg has considered the responses to the consultation and has taken account the views expressed regarding the three-month lead-time by which to implement a compensation scheme. ComReg has decided to delay the commencement of this Decision by six months, thereby granting a total of nine months, in which to prepare and publish a compensation scheme.

3.4 Complexity of implementing a compensation scheme

- 3.17 Almost all respondents expressed the view that implementing a compensation scheme is not without complexity. In general, the respondents stated that there is a need to consider technical difficulties, resource matters, inter-operator processes, legal considerations, liability, and operational complexities. One respondent stated that ComReg had not considered any mitigation provisions or circumstance in which compensation will not be paid. ComReg notes that section 39 of the 2023 Act provides for the specification of failures that require *the payment of compensation*. With regard to the other matters identified by Respondents, ComReg considers that these provisions are matters for service providers to address in their compensation schemes.
- 3.18 Respondents noted that there would be operational burden and costs to industry. One respondent stated that it was unclear how the compensation scheme would interact with other compensation schemes and dispute resolution. Finally, a respondent submitted that switching of services is already proposed to be covered by the customer charter and as such, the development of service provider charters should be assessed prior to the implementation of a compensation scheme.

¹¹ See Paragraph 1.6 of the Consultation

- 3.19 As stated, ComReg does not have discretion regarding the laying down of rules. Factors such as operational burden and costs to industry incurred in implementing a compensation scheme, are undoubtedly relevant considerations for implementation, but they cannot displace the obligation to lay down rules in the first place. The purpose of the compensation scheme is to set out the compensation that end-users are entitled to and the transparent procedure by which compensation is to be paid. These matters will be left to providers. In terms of the interaction between this compensation scheme and dispute resolution, it should not be the case that end-users have ‘double recovery’ of compensation from a provider in respect of the same breach. This is without prejudice to compliance action however that may be taken in respect of any such breach as ComReg considers appropriate.
- 3.20 These submissions argued for a delay in the implementation time required. As noted above, ComReg has decided to delay the commencement of this Decision for six months, giving a total nine-month period by which a compensation scheme should be published.

3.5 Wholesale effects

- 3.21 A number of respondents suggested there was a need to ensure that wholesale inputs were adequate to underpin Retail obligations and that this matter should be addressed before the obligations commenced.
- 3.22 ComReg notes that, as well as wholesale inputs, many of which are not regulated, there are a range of third-party inputs (equipment suppliers, installation contractors etc.) who would be involved in the customer’s experience at a Retail level.
- 3.23 Even if ComReg, had discretion to vary the Retail obligation, it would be unreasonable to the rights of end-users based on their provider’s ability to manage its suppliers. ComReg notes in this regard that the providers within the scope of section 39 of the 2023 Act are providers of internet access services and number based interpersonal communications services.
- 3.24 ComReg notes the submissions made by a number of respondents proposed that a longer lead-in time was required to agree inter operator processes. As noted, ComReg has decided to delay the commencement of this Decision for a period of six months which will allow time for providers to agree these processes. ComReg again refers to the long-standing obligations on providers to compensate in the context of number porting required under Regulation 25(10) of the Universal Service and Users’ Rights Regulations 2011. ComReg considers that the experience gained in that context would be highly relevant to the issue of inter-operator processes.

3.6 Inclusion of Business Customers

- 3.25 Respondents submitted that business customers may have bespoke contracts which will include negotiated terms and conditions, of which, compensation arrangements can form part of the negotiated terms. Therefore, they suggest that flexibility is required for providers serving business customers to meet compensation requirements as provided for in their contracts.
- 3.26 ComReg is of the view that such necessities do not conflict with the general obligation and that it would be sufficient to mention the possibility of these arrangements for business customers within the overall compensation scheme, noting however the obligation under Section 39(2) of the 2023 Act to pay compensation to any end-user where a specified failure has been committed.

3.7 Miscellaneous

- 3.27 While reporting obligations were raised by one respondent, these are not within the scope of this consultation and are, in any event, obligations imposed by statute. A number of respondents made submissions regarding the level of compensation; however, this is not something that ComReg is determining at this time. Providers will have the flexibility of determining compensation levels themselves. While one respondent submitted that this approach was “unworkable” this view was not shared by other respondents. ComReg will nonetheless keep this issue under review. Certain providers submitted that ComReg should consult before imposing any further measures. ComReg will comply with its consultation obligations. One provider submitted that framing all instances where a right to port a number is not upheld as an abuse did not take account of factors outside providers’ control, such as technical issues. ComReg considers that either these are the provider’s technical issues (and therefore within its control) or they are technical issues of a wholesale provider, in which case appropriate inter-operator processes should address this.

Chapter 4

4 ComReg's Assessment

- 4.1 ComReg has fully considered the submissions to the consultation and has decided to delay the commencement of the Decision for a period of six months.

5 Annex 1: Decision Instrument

1 STATUTORY FUNCTIONS AND POWERS

- 1.1 This Decision and Decision Instrument is made by the Commission for Communications Regulation (“ComReg”) established under section 6 of the Communications Regulation Act 2002 (“the Principal Act”), and is made:
- i. Having regard to the functions and objectives of ComReg as set out in sections 10 and 12 of the Principal Act,
 - ii. Pursuant of the functions and powers conferred upon ComReg by section 39 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023,
 - iii. Pursuant to and having regard to Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications code (Recast),
 - iv. Having regard to European Union (Electronic Communications Code) Regulations 2022 (“S.I. 444 of 2022”).

2 DEFINITIONS

- 2.1 In this Decision Instrument, terms used are as defined in the European Communities (Electronic Communications Code) Regulations 2022 (S.I. No. 444 of 2022), and the Communications Regulation Acts 2002 to 2023, unless the context otherwise admits.
- 2.2 References to European legislation, primary legislation or secondary legislation shall be construed as references to that legislation as amended from time to time.
- 2.3 Words in the singular form shall be construed to include the plural and vice versa unless the context otherwise admits or requires.
- 2.4 A reference to a section, clause, or schedule, is a reference to a section, clause or schedule of this Decision Instrument unless the context otherwise admits or requires.
- 2.5 A reference to the “Code Regulations” is a reference to the European Communities (Electronic Communications Code) Regulations 2022, (S.I. No. 444 of 2022).
- 2.6 A reference to “of the 2023 Act” is a reference to the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023.

3 SCOPE AND APPLICATION

Specified Failures

3.1 Under and in accordance with section 39(1) of the 2023 Act, and Regulation 90 of the Code Regulations, a failure by a provider of an internet access services (“IAS”) or number-based interpersonal communications services (“NBICS”) as applicable –

- i. to comply with any obligation provided for in Regulations 90(1), (5), (7), (8) or (11) of the Code Regulations, or
- ii. to uphold any end-user right provided for in Regulations 90(3) or (4)(a) of the Code Regulations,

is specified as a failure and is thereby a “specified failure” as referred to in section 39 of the 2023 Act.

3.2 The text of Regulation 90 of the Code Regulations is set out in the Schedule to this Decision Instrument.

4 STATUTORY POWERS NOT AFFECTED

4.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument) from time to time.

5 MAINTENANCE OF OBLIGATIONS

5.1 If any section or clause contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section or clause shall, the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s) or clause(s) of this Decision Instrument and shall not in any way affect the validity or enforcement of this Decision Instrument.

6 EFFECTIVE DATE AND DURATION

6.1 This Decision and Decision Instrument is fully effective from 8 July 2024, unless otherwise amended by ComReg.

Signed

Robert Mourik

Commissioner, Commission for Communications Regulation

Dated this 8th day of January, 2024

6 Annex 2: Schedule

Regulation 90 of the Code Regulations

Provider switching and number portability

90. (1) In the case of switching by an end-user between providers of internet access services —

(a) the providers concerned shall provide the end-user with adequate information before and during the switching process and ensure continuity of the internet access service, unless technically not feasible,

(b) the receiving provider shall ensure that the activation of the internet access service occurs within the shortest possible time on the date and within the timeframe expressly agreed with the end-user, and

(c) the transferring provider shall continue to provide its internet access service on the same terms until the receiving provider activates its internet access service.

Loss of service during the switching process shall not exceed one working day.

A provider who fails to comply with this paragraph commits an offence.

(2) The Regulator shall ensure the efficiency and simplicity of the switching process for the end-user and may specify requirements to be complied with by providers in this regard.

(3) An end-user with a number from the national numbering plan has the right, upon request, to retain his or her number independently of the provider providing the service —

(a) in the case of geographic numbers, at a specific location, and

(b) in the case of non-geographic numbers, at any location.

This paragraph does not apply to the porting of numbers between networks providing services at a fixed location and mobile networks. A provider who fails to allow an end-user to retain their number in accordance with this paragraph commits a hybrid offence.

(4) (a) Where an end-user terminates a contract with a provider, the end-user has the right to port a number from the national numbering plan to another provider for a minimum of one month after the date of termination, or such other period as may be agreed with the provider, unless that right is renounced by the end-user.

(b) A record of such renunciation by an end-user shall be maintained by the provider in accordance with data protection law.

(c) A provider who fails to comply with subparagraph (a) commits an offence and is liable on summary conviction to a class A fine.

(5) Pricing among providers related to the provision of number portability as provided for in paragraph (3) shall be cost-oriented and no direct charges shall be applied to end-users.

(6) The Regulator may issue a direction to a provider to ensure compliance by that provider with its obligations under paragraph (5). A provider who fails to comply with a direction issued to him or her commits a hybrid offence.

(7) (a) The porting of numbers and their subsequent activation shall be carried out within the shortest possible time on the date explicitly agreed with the end-user.

(b) In the case where an end-user has concluded an agreement to port a number to a new provider, that number shall be activated within one working day from the date agreed with the end-user.

(c) In the case of failure of the porting process, the transferring provider shall reactivate the number and related services of the end-user until the porting is successful.

(d) The transferring provider shall continue to provide its services on the same terms and conditions until the services of the receiving provider are activated.

(e) Operators whose access networks or facilities are used by either the transferring or the receiving provider, or both, shall ensure that there is no loss of service that would delay the switching and porting process.

Loss of service during the porting process shall not exceed one working day.

A provider who fails to comply with subparagraph (a), (b), (c) or (d) or an operator who fails to comply with subparagraph (e) commits an offence.

(8) (a) The receiving provider shall lead the switching and porting processes set out in paragraphs (1) and (7) and both the receiving and transferring providers shall cooperate in good faith.

(b) The receiving and transferring providers shall not —
(i) delay or abuse the switching or porting processes, or
(ii) port numbers or switch end-users without the end-users' explicit consent.

(c) An end-user's contract with the transferring provider shall be terminated automatically upon conclusion of the switching process.

(d) A provider who fails to comply with subparagraph (b)(ii) or (c) commits an offence.

(9) The Regulator may take measures to establish the details of the switching and porting processes, taking into account national provisions on contracts, technical feasibility and the need to maintain continuity of service to the end-user. This shall include, where technically feasible, a requirement for the porting to be completed through over-the-air provisioning, unless an end-user requests otherwise. A provider who fails to comply with any switching or porting process established by the Regulator commits an offence.

(10) The Regulator shall take appropriate measures to ensure that end-users are adequately informed and are protected throughout the switching and porting processes and not switched to another provider without their consent.

(11) Transferring providers shall refund, upon request, any remaining credit to a consumer using pre-paid services. Such refunds may be subject to a fee only if provided for in the consumer's contract. Any such fee shall be proportionate and commensurate with the actual costs incurred by the transferring provider in offering the refund.

(12) The obligations referred to in this Regulation apply to all providers, and operators whose access networks or facilities are used by providers with a role in facilitating change of provider, including the provider to which the end-user is porting and any wholesale provider with involvement in the process.

7 Annex 3: Section 39 of the 2023 Act

End-user compensation

- (1) The Commission may, for the purposes of this section, specify a failure (referred to in this section as a “specified failure”) of a provider of internet access services or number-based interpersonal communications services (referred to in this section as a “provider”) to comply with an obligation under-
 - (a) A minimum quality-of-service standard, or
 - (b) Regulation 90 of the Code Regulations.
- (2) Where a commits a specified failure the provider shall pay compensation to any end-user affected.
- (3) Where the Commission specifies a failure under *subsection (1)* providers shall, not later than 3 months thereafter, prepare and publish a scheme (in this section referred to as a “compensation scheme”) setting out the compensation that end-users are to be entitled to in respect of the specified failure and a transparent procedure by which compensation shall be paid.
- (4) A compensation scheme shall include at least the following in respect of the specified failure-
 - (a) a user-friendly description of the procedure by which compensation is paid,
 - (b) the amount of compensation that end-users are entitled to,
 - (c) the means by which compensation will be paid, and
 - (d) the time periods within which end users will receive compensation.
- (5) Providers shall ensure that the amount to which end-users are entitled under a compensation scheme is sufficient to compensate them having regard, *inter alia*, to-
 - (a) the nature of any loss of service experienced,
 - (b) the duration of any loss of service experienced, and
 - (c) any failure on the part of the provider to keep the end-user informed throughout the process.
- (6) A provider shall not charge an end-user any fee in connection with the payment of compensation.
- (7) The Commission may determine that providers pay compensation to end-users in respect of a specified failure without the need for an end-user to make a complaint or claim for compensation.

- (8) A compensation scheme shall be published by the provider on its website in a clear and comprehensible format that is easily accessible by end-users and, in particular, by end-users with disabilities and in any other manner as may be specified by the Commission.
- (9) Where a provider prepares a compensation scheme it shall ensure that end-users are informed about the scheme in a user-friendly manner.
- (10) Where a provider prepares a compensation scheme it shall ensure that end-users are informed, in a clear and comprehensible way, that the compensation scheme does not prejudice their right to pursue compensation in respect of a specified failure by other legal means or proceedings.
- (11) The Commission may specify the amount of compensation to be payable in respect of a specified failure.
- (12) Providers shall report to the Commission annually in relation to the operation of this section in such a manner as may be required by the Commission, detailing in particular, in respect of the period to which the report relates-
 - (a) the specified failures in respect of which compensation was paid by the provider,
 - (b) the number of instances of each specified failure in respect of which compensation was paid by the provider,
 - (c) the amount of compensation that was paid in respect of each specified failure by the provider, and
 - (d) the average time taken by the provider to pay compensation to the end-user.
- (13) The Commission may require a provider to submit to an independent audit or review, paid for by the provider, on its compliance with this section.

8 Annex 4: Legal Basis

This consultation document is issued:

- Pursuant to the functions and powers conferred upon ComReg by section 39 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023,
- Having regard to ComReg’s functions and objectives as set out in sections 10 and 12 of the Communications Regulation Act 2002,
- Having regard to Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications code (Recast) and in particular Article 106 thereof,
- Having regard to European Union (Electronic Communications Code) Regulations 2022 (“S.I. 444 of 2022”) and in particular Regulation 90 thereof.