



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Draft Guidelines on the determination of Administrative Sanctions

**pursuant to section 98(1) of the
Communications Regulation and Digital
Hub Development Agency (Amendment)
Act 2023**

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Amendments to the Guidelines

These Guidelines have been prepared and made in accordance with section 98(1) of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023.

These Guidelines may be amended from time to time or revoked in accordance with section 98(3) of the of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023. Where they are amended, an updated version will be published on ComReg's website.

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1 Introduction

1.1 Overview

- 1.1 The Commission for Communications Regulation (“ComReg”) is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radio-communications and broadcasting transmission) and the postal sector. It is a function of ComReg under the Communications Regulation Act 2002 as amended (the “2002 Act”) to monitor and ensure compliance with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks. In addition, ComReg has the function to carry out investigations into these and other matters.
- 1.2 The Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (the “2023 Act”) and the European Union (Electronic Communications Code) Regulations 2022 commenced on 9 June 2023. Under the 2023 Act suspected regulatory breaches may be referred to an adjudicator or panel of adjudicators for a determination as to whether a regulatory breach has been committed and appropriate sanctions and remedies. Sanctions and remedies which can be ordered include, as provided for under section 91(1) of the 2023 Act, administrative sanctions including financial penalties, the award of compensation, the award of refunds and suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources.
- 1.3 The 2023 Act empowers ComReg to make guidelines in relation to any matter provided for by or under Part 7. These guidelines on the Determination of Administrative Sanctions (“the Guidelines”) are intended to provide guidance in respect of: the calculation of administrative financial sanctions; the award of compensation; the award of refunds; and the suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources.
- 1.4 In these Guidelines, the terms “administrative sanctions”, “financial penalty”, “compensation”, “refund”, “regulatory breach”, “a person”, “end-user” and “adjudicator” have the same meaning as in the 2023 Act and the 2002 Act.
- 1.5 These Guidelines relate solely to the calculation of a financial penalty and the award of refunds or compensation and the suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources under the 2023 Act and should not be taken as pertaining to criminal proceedings under the 2002 Act.

1.2 Statutory Basis

- 1.6 ComReg may, under section 98(1) of the 2023 Act and subject to that Act and to any regulations and rules made thereunder, and having regard to the fairness and efficiency of the procedures, prepare and make guidelines in relation to any matter provided for by or under Part 7 of the 2023 Act. This includes the imposition of administrative sanctions (including the factors applicable to any financial penalty to be imposed under section 91, and the method of calculation of financial penalties), the award of compensation, the award of refunds and the suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources.
- 1.7 In preparing these Guidelines, ComReg has had regard to the need to ensure that a financial penalty, the award of compensation and the award of refunds are appropriate, effective, proportionate, and dissuasive.
- 1.8 Under the 2023 Act, where an adjudicator makes a decision under section 90(2) of the 2023 Act, that a person has committed a regulatory breach he or she may, under section 91(1)(b) (c), (d) and (e) of the 2023 Act, impose a financial penalty on a person, require a refund to be paid to an end-user in full or in part and/or require compensation to be paid to an end-user, and suspend or withdraw the person's authorisation to provide electronic communications networks or services (other than number-independent interpersonal communications services) or some or all of the person's rights of use for radio spectrum and of use for numbering resources, in accordance with sections 94, 95, 96 and 97 of the 2023 Act respectively.
- 1.9 A financial penalty, the award of compensation or the payment of a refund to a third party may, as appropriate, be imposed on a person where an adjudicator makes a decision, on the balance of probabilities, that a person has committed a regulatory breach by failing to comply with:
 - (a) A regulatory provision,
 - (b) A relevant vendor measure,
 - (c) A confidentiality requirement of the Minister under section 26(1) of the 2023 Act,
 - (d) A direction under section 33(2) of the 2023 Act,
 - (e) A commitment under section 67 of the 2023 Act, or
 - (f) An urgent interim measure.

- 1.10 As provided for by section 95(1), an adjudicator may require that a person refunds an end-user in part or in full, if the adjudicator considers that the end-user has been overcharged for a service as a result of a regulatory breach.
- 1.11 Section 96(2) provides that an adjudicator may require compensation to be paid to an end-user in respect of a regulatory breach notwithstanding that the end-user may have received a refund.
- 1.12 Section 97 provides that an adjudicator may withdraw or suspend, either or both, the general authorisation or rights of use for radio spectrum or rights of use for numbering resources.
- 1.13 In accordance with section 98(2), an adjudicator shall apply these Guidelines when making a decision under section 91(1)(b), section 91(1)(c), section 91(1)(d) or section 91(1)(e) in accordance with sections 94, 95, 96 and 97 respectively, of the 2023 Act, unless the adjudicator considers that there is a good and substantial reason not to do so.
- 1.14 Section 98(3) provides that ComReg may amend or revoke these Guidelines at any time. In accordance with Section 98(4) of the 2023 Act, ComReg has published these Guidelines on its website, and will publish any amendment to, or revocation of, these Guidelines on ComReg's website.

1.3 Application

- 1.15 These Guidelines, provided for in Section 98(1) of the 2023 Act, will apply to a regulatory breach referred to the adjudication panel on or after 9 June 2023, irrespective of when the regulatory breach in question commenced.

1.4 Content of these Guidelines

- 1.16 The factors and methodology relevant to the determination of administrative financial sanctions may differ in respect of a financial penalty, compensation and refunds. In this regard the treatment of these various categories of sanction is addressed in different Chapters of these Guidelines.
- 1.17 Chapter 2 of these Guidelines sets out the factors relevant to, and the method of calculation of, a financial penalty, in respect of a regulatory breach. Chapter 3 deals with awards of refunds and Chapter 4 with compensation to a third party. Finally, Chapter 5 deals with the suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources.

2 Calculation of a Financial Penalty

2.1 Sanctioned person

- 2.1 Under the 2023 Act, where an adjudicator makes a decision under section 90(2) of the 2023 Act, that a person has committed a regulatory breach he or she may, under section 91(1)(b) of the 2023 Act, impose a financial penalty on the person in accordance with section 94 of the 2023 Act. This person is referred to in section 94(3) as the sanctioned person.
- 2.2 Section 94(3) provides that the adjudicator may, where he or she considers that it is necessary to do so in order to ensure that the financial penalty be appropriate, effective, proportionate to the regulatory breach and dissuasive, impose a financial penalty (whether jointly with or separately to the sanctioned person) on either or both of the following: (a) a subsidiary of the sanctioned person; (b) a person of which the sanctioned person is a subsidiary.

2.2 Limits to Financial Penalties

- 2.3 Section 94(5) sets the maximum amount of a financial penalty that an adjudicator may impose on a person under Part 7 of the 2023 Act in respect of a regulatory breach as follows:
- (a) in the case of a person other than a natural person, the greater of €5 million and 10 per cent of the turnover of the person in the State in the financial year ending in the year immediately before the financial year in which the regulatory breach last occurred in the State, and,
 - (b) in the case of a natural person, the greater of €500,000 and 10 per cent of the annual income of the person on whom the financial penalty is to be imposed, in the year preceding the year in which the regulatory breach last occurred.
- 2.4 In accordance with section 96(8), where in addition to a financial penalty the adjudicator also decides to impose a requirement to pay compensation, the maximum cumulative amount of financial penalty and the compensation that is required to be paid are subject to the limits set out in paragraph 2.3.

2.3 Statutory factors

2.5 Section 94(1) of the 2023 Act sets out the factors to which an adjudicator shall have regard when determining the amount of an administrative financial sanction to be imposed on the person. These are:

- (a) the need to ensure that the financial penalty is appropriate, effective, proportionate to the regulatory breach and dissuasive (including whether it will act as a sufficient deterrent to ensure that any similar regulatory breach will not occur in the future),
- (b) the seriousness of the regulatory breach,
- (c) in the case of breach by—
 - (i) a person that is not a natural person, the turnover of the person in the State in the financial year ending in the year immediately before the financial year in which the regulatory breach last occurred, or
 - (ii) a natural person, the annual income of the person on whom the financial penalty is to be imposed, in the year preceding the year in which the regulatory breach last occurred,
- (d) the extent of any failure by the person to cooperate with the investigation concerned, whether or not such failure is prosecuted,
- (e) any excuse or explanation offered by the person for the regulatory breach or failure to cooperate with the investigation concerned,
- (f) any gain (financial or otherwise) made, or loss avoided, by the person, or by any other person in which the first-named person has a financial interest, as a consequence of the regulatory breach,
- (g) the amount of any loss suffered, or costs incurred, by any person as a result of the regulatory breach,
- (h) the effect of the regulatory breach on other operators, consumers and other end-users,
- (i) the duration of the regulatory breach,
- (j) the number of times the regulatory breach has occurred,

- (k) whether or not the regulatory breach continued after the person was served with a notice of suspected non-compliance,
- (l) where applicable, the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the person intended to prevent such a regulatory breach from occurring,
- (m) where applicable, the extent and timeliness of any steps taken to end the regulatory breach and any steps taken to remedy the consequences of the regulatory breach,
- (n) whether a financial penalty in respect of a similar regulatory breach has already been imposed on the person by a court or a competent authority, including by ComReg,
- (o) any precedents set by a court or a competent authority, including ComReg, in respect of a similar regulatory breach,
- (p) where applicable, the amount of any compensation paid or to be paid in accordance with section 96,
- (q) any specific factors, criteria or methodology relevant to paragraphs (a) to (o) prescribed by the Minister for the purposes of this subsection, and
- (r) any guidelines made by ComReg under section 98 in respect of the calculation of the amount of a financial penalty.

2.6 The methodology that an adjudicator or panel of adjudicators should use to arrive at a financial amount that is appropriate, effective, proportionate to the regulatory breach and dissuasive, as required by section 94(1)(a), is detailed below. This methodology will form the basis for any submission that ComReg is invited to make by an adjudicator or panel of adjudicators under section 91(6).

2.4 Methodology

2.4.1 Overview

2.7 The methodology described below relies on the factors listed in sections 94(1)(b) to section 94(1)(p) to arrive at a financial penalty that is appropriate, effective, proportionate to the regulatory breach and dissuasive, as required by section 94(1)(a). Using as a starting point, the sanctioned person's turnover in the State (or the annual income in case of a natural person) (*section 94(1)(c)*), a basic

amount is calculated for the person which takes into account the gravity/seriousness of the breach and its duration (*section 91(1)(b) and (i)*)(step 1 – detailed in Section 2.4.2 below) which may then be adjusted upwards or downwards (step 2 – Section 2.4.3 below) having regard to mitigating and aggravating factors, and payments of refunds and compensation. After Steps 1 and 2 have been completed, further adjustments (described in Section 2.4.4 below) may be taken to ensure that the amount of the financial penalty is appropriate, effective, proportionate to the breach, dissuasive and have the necessary deterrent effect. Adjustments may also be required to ensure that it does not exceed the maximum legal limit for financial penalties set out in section 94(5) or as the case may be section 96(8) or, in exceptional circumstances, to take into account a person's ability to pay.

- 2.8 Where more than one breach is identified from the facts established in an investigation and a financial penalty is proposed in respect of each (or more than one of them), that financial penalty should be calculated for each breach following the methodology below. Consideration should then be given to the total amount of financial penalties for regulatory breaches related to the facts and where justified, adjustments may then be made to ensure the total sum is appropriate and proportionate.

2.4.2 Step 1: Basic amount of a financial penalty

- 2.9 The basic amount of the financial penalty is calculated on the basis of three of the factors that section 94(1) requires regard is had to, namely the turnover or annual income, of the person in the State in the financial year ending in the year immediately before the financial year in which the regulatory breach last occurred (*section 94(1)(c)*), the seriousness of the breach (*section 94(1)(b)*), and the duration of the breach (*section 94(1)(i)*), as follows:

$$\text{Basic Amount} = \text{Value of sales [€]} \times \text{Gravity [\%]} \times \text{Duration [years]}$$

A: Value of sales

- 2.10 The starting point for the calculation of a financial penalty is the sanctioned person's turnover, that is, the amount of money taken from sales by the sanctioned person if a legal person, or the annual income of the sanctioned person if a natural person, in the State during the last full financial year during which the regulatory breach occurred. Of the total turnover in the State, only the sanctioned person's turnover which corresponds to the sales of products and services in the State to which the regulatory breach directly or indirectly relates should be taken into account. This referred to as the "value of sales".

- 2.11 Financial year means a period of 12 consecutive months during which the undertaking is in operation. The best available data for the value of sales at the time the penalty is calculated should be used. If the most recent financial period is greater than 12 months, sales should be adjusted pro-rata to arrive at an annual figure. Where the data made available by a person is incomplete or does not appear to be reliable, the adjudicator may determine the value of sales on the basis of all available data 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: Gravity the regulatory breach

- 2.13 A percentage, comprised between 0 and 30%, is then applied to the value of sales. The percentage value should be selected according to the gravity or seriousness of the breach: the more serious the breach, the higher the percentage value.
- 2.14 How serious a regulatory breach is, will depend on a variety of factors, including the nature of the regulatory breach and its effect on other operators, consumers and end-users (*section 94(1)(h)*) having regard, where relevant, to the number of times the regulatory breach has occurred (*section 94(1)(j)*). Account should also be taken of the gain made or loss avoided by the undertaking concerned (*section 94(1)(f)*), as well as the amount of any loss suffered or cost incurred by any person as a result of the regulatory breach (*section 94(1)*). Where appropriate, whether the breach in question was deliberate or reckless may be taken into account when assessing the seriousness or gravity of the breach.
- 2.15 In assessing the gravity of the breach, the adjudicator should have regard to any precedents set by a court or a competent authority including ComReg in respect of their assessment of the seriousness of a similar regulatory breach (*section 94(1)(o)*).

C: Duration of the regulatory breach

- 2.16 The amount obtained by applying a percentage between 0 and 30% to the value of sales is then multiplied by the duration of the regulatory breach.
- 2.17 The duration is the interval between the date the regulatory breach started and either the point at which it ended, or if continuing until then, the date of the decision of the adjudicator pursuant to section 90 of the 2023 Act that a regulatory breach has been committed. The duration should be measured in terms of years, or parts thereof.

- 2.18 The duration should be measured in terms of years, or parts thereof. Accordingly, a one year breach means that a factor of 1 is applied, a two year breach a factor of 2, a six month breach, a factor of 0.5 etc.

2.4.3 Step 2: Adjustment of the basic amount

- 2.19 In setting the financial penalty, regard should be paid to specific factors which either aggravate or mitigate the circumstances of a person's engaging in the regulatory breach, and consequent adjustment to the financial penalty should be made either upwards or downwards.
- 2.20 Specifically, the basic amount should then be adjusted in light of mitigating and aggravating factors including the factors listed in section 94(1) in terms of:
- the level of cooperation with the investigation (*section 94(1)(d)*),
 - whether there is any excuse or explanation offered by the undertaking for the regulatory breach or the failure to cooperate with the investigation (*section 94(1)(e)*),
 - whether the regulatory breach continued after the undertaking was served with a notice of suspected non-compliance (*section 94(1)(k)*),
 - where applicable, the absence, ineffectiveness or repeated failure of internal mechanisms or procedures of the undertaking intended to prevent such a regulatory breach from occurring (*section 94(1)(l)*),
 - where applicable, the extent and timeliness of any steps taken to end the regulatory breach and any steps taken to remedy the consequences of the regulatory breach (*section 94(1)(m)*), and
 - whether a financial penalty in respect of a similar regulatory breach has already been imposed on the undertaking by a court or competent authority, including ComReg (*section 94(1)(n)*).

Aggravating factors

- 2.21 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:
- (a) the person repeated the same or similar regulatory breach (recidivism),

- (b) the continuation of the regulatory breach after the person has been served with a notice of suspected non-compliance further to section 63 of the 2023 Act (*section 94(1)(k)*),
- (c) the extent of any failure by the person to cooperate with the investigation concerned, whether or not such failure is prosecuted (*section 94(1)d*),
- (d) the provision of false, inaccurate and/or misleading information by the person,
- (e) the failure by a person to preserve relevant information under its control including electronically stored information,
- (f) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent the regulatory breach from occurring (*section 94(l)*),
- (g) the failure to identify adequately whether end-users suffered loss or detriment and to put in place an appropriate plan to redress and compensate those adversely affected or to do so only in response to action taken by ComReg,
- (h) the failure to adequately test the implementation and/or effectiveness of a remediation plan put in place requiring follow-up engagement/action,
- (i) the adoption when seeking to identify affected end-users, of an approach and/or methodologies reflecting a narrow interpretation of those affected and/or an attempt to exclude potentially affected end-users from any remediation programme,
- (j) the regulatory breach has been committed intentionally,
- (k) the regulatory breach has been committed with wilful disregard as to its impact upon affected persons.

2.22 Increases to the financial penalty amount on the basis of repeated occurrences of the regulatory breach should be considered by the adjudicator on a case-by-case basis, having regard to all relevant circumstances and the requirement under section 94(5)(a) that the the financial penalty is appropriate, effective, proportionate to the regulatory breach and dissuasive.

Mitigating factors

- 2.23 In deciding whether to adjust the basic amount downwards regard should be given to any mitigating factors, including in particular, as and if appropriate:
- (a) any excuse or explanation offered by the person for the regulatory breach (*section 94(1)(e)*),
 - (b) any excuse or explanation offered by the person for a failure to cooperate with the investigation concerned (*section 94(1)(e)*),
 - (c) a full and frank admission made at the earliest opportunity,
 - (d) the person has meaningfully cooperated with the investigation on a voluntary basis, such that time and resources have been saved, or otherwise facilitated the investigation, for instance by bringing the breach to ComReg's attention or bringing evidence to the attention of the authorised officer on a proactive basis,
 - (e) the extent and timeliness of any steps taken to end the regulatory breach and any steps taken for remedying the consequences of the regulatory breach (*section 94(1)(m)*) including whether compensation has been paid or refunds made on a voluntary basis, and the amount of compensation paid,
 - (f) the person has developed effective customer-facing processes to remediate its conduct,
 - (g) the person proactively and voluntarily implements in a timely manner additional internal controls, procedures, oversight or takes other similar measures, that are substantiated, to reduce the likelihood of recurrence of the breach.

2.4.4 Further adjustments

Ensuring that the penalty is appropriate, proportionate, dissuasive and has a deterrent effect

- 2.24 Further adjustments to the calculated penalty may be required to ensure that the penalty has a sufficient dissuasive effect, including in terms of deterrence to others, to ensure that no similar regulatory breach will occur in the future, as required by Section 94(1)(a).

- 2.25 Regard should be had in this respect to the amount of the penalty as compared to the overall turnover of the sanctioned person or the group to which that person belongs, and the proportion of the value of sales to the overall turnover. Adjustments may be required upwards where the calculated amount of financial penalty is insignificant having regard to the overall turnover of the person or the group to which that person belongs and could not be considered to be capable of having a dissuasive effect and to be proportionate to the regulatory breach.
- 2.26 In particular, adjustments may be required in circumstances where the value of sales related to the regulated breach is very low, or where the value of sales does not accurately reflect the person's involvement in the regulatory breach or the associated harm.
- 2.27 Where more than one breach is identified from the facts established in an investigation and a financial penalty has been calculated in respect of each, the approach set out at paragraph 2.8 should be followed.

Statutory limit

- 2.28 The final amount of the financial penalty shall not, in any event, exceed the maximum amount as set out in section 94(5) of the 2023 Act so that where the amount calculated using Step 1 and Step 2 exceeds the maximum amount under section 94(5), the amount should be adjusted and lowered to the statutory limit. For the avoidance of doubt, the fact that the amount calculated following Step 1 and Step 2 above exceeds the amount set out in section 94(5) does not call into question the application of the methodology and in particular it does mean that it is not proportionate. Simply, it should be further adjusted to comply with the statutory limit.
- 2.29 In addition, in accordance with section 96(8) of the 2023 Act, where an adjudicator decides to impose both a financial penalty and a requirement to pay compensation, the statutory limit set in section 96(5) and section 96(6) of the 2023 Act applies in respect of the combined amount of financial penalty and compensation. Section 94(1)(p) of the 2023 Act provides that the amount of compensation paid or to be paid is to be considered as part of the matters to be taken into account when determining a financial penalty. Accordingly, where both a financial penalty and compensation are to be imposed, each of the amounts for compensation and financial penalty should be calculated separately, so that both the compensation amount and the financial penalty accurately reflect the circumstances of the regulatory breach, and adjustments then made as appropriate to either or both amounts in order to ensure that in aggregate, the total amount is within the prescribed statutory limit.

Payment timeframes and inability to pay

- 2.30 Any claim by a person that no financial penalty should be imposed, or that the financial penalty calculated under Steps 1 and 2 should be lowered because of the person's inability to pay will be considered but should only be accepted in exceptional circumstances where the person has adduced convincing evidence that the financial penalty would cause such irreparable harm as to call into serious question its economic viability as a going concern. Circumstances such as temporary cash flow constraints, operating at a loss for a limited period, or the deferral of shareholder dividend payments would be, in general, unlikely to demonstrate an inability to pay.
- 2.31 Delayed or instalment payments may undermine the effectiveness of a financial penalty by diminishing its role as both a punitive measure and a deterrent. For a financial penalty to achieve these purposes it must be paid in full and without deferral. Accordingly, delayed or instalment payments are not appropriate, save in the exceptional circumstances described in paragraph 2.30.

2.5 Summary

Figure 1: Summary of calculation of financial penalty

Step 1 Determination of basic amount	Basic amount:	(0-30%) x value of sales x duration
Step 2 Adjustments	Increased by:	Aggravating Factors (e.g., intent, recidivism, absence of internal mechanisms or procedures, coercion)
	Decreased by:	Mitigating factors (e.g. steps taken to end regulatory breach; limited involvement; substantial cooperation, timely and effective compensation)
Further adjustments	Where necessary and appropriate:	Increased or decreased to ensure that the penalty is appropriate, proportionate, dissuasive and has a deterrent effect
		Decreased to ensure financial penalty is no greater than maximum amount legally permissible: <ul style="list-style-type: none"> Legal person: Greater of 10% of total turnover / €5 million, Natural person: Greater of 10% of annual income / €0.5 million. taking into account amount due under requirement to pay compensation
		Decreased , exceptionally, to account for inability to pay

3 Refunds

- 3.1 An adjudicator may impose a requirement to pay refunds (in part or in full) or compensation (or both) in addition to a requirement to pay a financial penalty. Where this arises the payment of refunds or compensation may have a bearing on the amount of the financial penalty. Section 95(1) of the 2023 Act in particular provides that when an adjudicator considers that an end-user has been overcharged for a service as a result of a regulatory breach, the adjudicator may require that the person concerned refund the end-user in part or in full.
- 3.2 In some cases, it may not be possible to identify some, or all of the end-users overcharged. There may also be cases where having identified the affected end-users it is not possible to refund them or, having attempted to refund them, the refunds remain unclaimed. It may be appropriate in these circumstances that any amount of unpaid refunds is paid instead as a financial penalty, and that an order in these terms is made by an adjudicator requiring payment of any unpaid refunds as a penalty. A sanctioned person should not make a financial gain by its own wrongdoing and a financial penalty that comprises an amount equal to the total amount of unpaid/unclaimed refunds may be appropriate and proportionate. Any alternative approach may lack a deterrent effect.
- 3.3 A full refund of the amount paid by the end-user will not be due in all cases and only part of the amount paid may be refundable. This will depend on the circumstances of the case, however, where these circumstances arise a partial refund may be ordered.
- 3.4 The refund should have no impact on the calculation of the basic amount for the penalty in step one (Section 2.4.2 above). However, if the person responsible for the breach has taken it upon themselves to pay a refund prior to any requirement to do so under the 2023 Act then the extent of and timeliness shown in paying any refund may be taken into account as a mitigating factor in the calculation of the financial penalty.

4 Compensation

4.1 Section 91(1)(d) of the 2023 Act provides that an adjudicator may require the person to pay compensation to a third party in accordance with section 96. Insofar as payments to end-users are concerned, section 96(2) makes it clear that an adjudicator may require compensation to be paid to an end-user in respect of regulatory breaches notwithstanding that the end-user may have received a refund.

4.2 Section 96(3) of the 2023 Act sets out the factors that shall be taken into account at a minimum, when determining the amount of compensation. These include:

- (a) the need to ensure that the compensation is appropriate and proportionate.

In order to ensure the compensation is appropriate and proportionate, the determination of the amount of the compensation should be based on the particular circumstances of a given case and, where applicable, the particular circumstances of the person on which a financial penalty is to be imposed. Insofar as end-users are concerned, compensation can be considered in cases where there is a direct cost of the regulatory breach and where a refund has been required but also in cases where a refund has not been required and it is not possible to determine the direct cost of the breach to individual end-users,

- (b) the amount of any loss suffered, or costs incurred by any person affected by the breach,
- (c) the effect of the breach on any person affected by the breach, including any distress, inconvenience or emotional upset caused by the breach,
- (d) whether the regulatory breach continued after the person was served with a notice of suspected non-compliance,
- (e) if applicable, the extent and timeliness of any steps taken to end the regulatory breach and any steps taken to remedy the consequences of the regulatory breach,
- (f) any relevant precedents set by a court or ComReg.

4.3 The payment of any compensation should not impact the calculation of the financial penalty (Section 2.4.2) above except that the cumulative amount of the

financial penalty and the compensation shall not exceed the limits as set out in section 94(5) of the 2023 Act. The payment of compensation voluntarily can be considered as a mitigating factor. The extent of the mitigation may be impacted by the point in time during the investigation at which the compensation is paid.

5 Suspension or withdrawal of authorisation or rights of use for radio spectrum or rights of use for numbering resources

- 5.1 Section 97 of the Act of 2023 provides that where an adjudicator receives a recommendation from ComReg under section 91(9) and the adjudicator considers that there are, or have been, serious or repeated breaches of conditions by a person, the adjudicator may withdraw or suspend, either or both, the general authorisation of a person to provide electronic communications networks or services (other than number-independent interpersonal communications services) and some or all of the person's rights of use for radio spectrum and of use for numbering resources.
- 5.2 It should be noted that an adjudicator can only withdraw or suspend the general authorisation of a person and some or all of the person's rights of use for radio spectrum and of use for numbering resources where the adjudicator considers that there have been serious or repeated breaches of conditions by a person. ComReg considers that such withdrawal or suspension of the general authorisation, or of rights of use for radio spectrum or rights of use for numbering resources, is likely to be exceptional in nature, taking into account the potential impact of any withdrawal or suspension on the person's ability to provide electronic communications networks or services.