

S.I. No. 27/1995: EUROPEAN COMMUNITIES (UNFAIR TERMS IN CONSUMER CONTRACTS) REGULATIONS, 1995.

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I, RICHARD BRUTON, Minister for Enterprise and Employment, in exercise of the powers conferred on me by section 3 of the European Communities Act, 1972 (No. 27 of 1972), and for the purpose of giving effect to Council Directive No. 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ⁽¹⁾ hereby make the following Regulations:

1. (1) These Regulations may be cited as the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995.

(2) These Regulations shall apply to all contracts concluded after 31st December, 1994.

2. In these Regulations—

"authorised officer" means a person appointed under Regulation 10 of these Regulations;

"business" includes a trade or profession and the activities of any government department or local or public authority;

"consumer" means a natural person who is acting for purposes which are outside his business;

"the Council Directive" means Council Directive No. 93/13/EEC, of 5 April 1993 on unfair terms in consumer contracts;

"the Director" means the Director of Consumer Affairs;

"the Minister" means the Minister for Enterprise and Employment;

"seller" means a person who, acting for purposes related to his business, sells goods;

"supplier" means a person who, acting for purposes related to his business, supplies services;

"unfair term" shall be construed in accordance with the provisions of the Council Directive and these Regulations.

¹ O.J. No. L95/29, 21.4.1993

3. (1) Subject to the provisions of Schedule 1, these Regulations apply to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated.

(2) For the purpose of these Regulations a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.

(3) In determining whether a term satisfies the requirement of good faith, regard shall be had to the matters specified in Schedule 2 to these Regulations.

(4) A term shall always be regarded as having not been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence its substance, particularly in the context of a pre-formulated standard contract.

(5) The fact that a specific term or any aspect of a term has been individually negotiated shall not exclude the application of this Regulation to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a contract as described in paragraph (4) of this Regulation referred to in Article 3.2 of the Council Directive as a pre-formulated standard contract.

(6) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(7) An indicative and non-exhaustive list of the terms which may be regarded as unfair, pursuant to Article 3.3 of the Council Directive, is set out in the Annex to the Directive and in Schedule 3 to these Regulations.

4. A term shall not of itself be considered to be unfair by relation to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration, as against the goods and services supplied, in so far as these terms are in plain, intelligible language.

5. (1) In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

(2) Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

6. (1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties, if it is capable of continuing in existence without the unfair term.

7. These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a country other than a Member State and would thereby deprive a consumer of protection under the Council Directive.

8. (1) The Director may apply to the High Court for, and may, at the discretion of the Court, be granted, an order prohibiting the use or, as may be appropriate, the continued use of any term in contracts concluded by sellers or suppliers adjudged by the Court to be an unfair term.

(2) The Director shall cause to be published notice of intention to apply to the High Court for an order under paragraph (1) of this Regulation in *Iris Oifigiúil* and at least two national newspapers and in such further or other manner as the Court may direct.

(3) Every person claiming to have an interest in any such application shall be entitled to appear before and be heard by the Court on the hearing of the application.

(4) On any such application it shall not be necessary for the Director or any such person to prove—

(a) actual loss or damage, or

(b) recklessness or negligence on the part of the seller or supplier.

(5) In the exercise of its jurisdiction under paragraph (1) of this Regulation the Court shall take account of all the interests involved and in particular the public interest.

(6) Paragraph (1) of this Regulation is without prejudice to the right of a consumer to rely on the provisions of these Regulations in any case before a court of competent jurisdiction.

9. In determining whether or not the terms of a contract are unfair account shall be taken of all its features and in particular of any information it contains concerning the matters set out in the Annex to the Council Directive and in Schedule 3 to these Regulations.

10. (1) The Minister or the Director may appoint in writing any person being a whole-time officer of the Minister to be an authorised officer for the purposes of these Regulations.

(2) The Minister or the Director may appoint in writing any person to be an authorised officer for a fixed period for the purposes of all or any of the provisions of these Regulations.

(3) Every authorised officer shall be furnished with a warrant of appointment as an authorised officer stating that the officer is acting under these Regulations and, when exercising any power conferred by paragraph (4) of this Regulation, if requested to do so, produce the said warrant.

(4) An authorised officer may, for the purpose of obtaining information which may enable the Director to discharge functions under these Regulations, on production of the warrant of appointment, if so required—

- (a) at all reasonable times enter premises at which any business or any activity in connection with a business is carried on and inspect the premises and any goods on the premises and, on paying or making tender of payment therefor, take any of the goods,
- (b) require any person who carries on such business or activity and any person employed in connection therewith to produce to the authorised officer any books, documents or records relating to such business or activity which are in that person's power or control and to give the officer information in regard to any entries in any books, documents and records,
- (c) inspect and take copies from such books, documents and records.
- (d) require any such person to give to the authorised officer any information the officer may require in regard to the persons carrying on such business or activity (including, in particular, in the case of an unincorporated body of persons, information in regard to the membership thereof and of its committee of management or other controlling authority) or employed in connection therewith,
- (e) require any such person to give to the officer any other information which the officer may reasonably require in regard to such business or activity.

(5) A person who obstructs or impedes an authorised officer in the exercise of a power under this Regulation, or does not comply with a requirement under this Regulation shall be guilty of an offence.

(6) A person guilty of an offence under this Regulation shall be liable on summary conviction to a fine not exceeding £1,500.

(7) An offence under this Regulation may be prosecuted by the Director.

SCHEDULE 1

Contracts and Particular Terms Excluded from the Scope of these Regulations

The provisions of these Regulations do not apply to—

- (a) any contracts of employment;
- (b) any contract relating to succession rights;
- (c) any contract relating to rights under family law;
- (d) any contract relating to the incorporation and organisation of companies or partnerships;
- (e) any terms which reflect—
 - i) mandatory, statutory or regulatory provisions of Ireland, or
 - ii) the provisions or principles of international conventions to which the Member States or the Community are party.

SCHEDULE 2

Guidelines for Application of the Test of Good Faith

In making an assessment of good faith, particular regard shall be had to

- the strength of the bargaining positions of the parties,
- whether the consumer had an inducement to agree to the term,
- whether the goods or services were sold or supplied to the special order of the consumer, and
- the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

SCHEDULE 3

Unfair Terms in Consumer Contracts

1. Terms which have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase

their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of subparagraphs (g), (j) and (l)

- (a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

- (c) Subparagraphs (g), (j) and (l) do not apply to;
 - transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
- (d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

GIVEN under my Official Seal, this 1st day of February, 1995.

RICHARD BRUTON,
Minister for Enterprise and Employment.

EXPLANATORY NOTE.

These Regulations have been made to give effect to Council Directive No. 93/13/EEC on unfair terms in consumer contracts.

The Regulations will apply to all consumer contracts concluded after 31st December, 1994.

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