

Corporate Department

Are Your Contracts Consumer Friendly?

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Published: 1 July, 2014

The Consumer Rights Directive and Unfair Terms in Consumer Contracts

“Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.” Adam Smith

There exists a wealth of national (and EU) legislative measures designed to protect consumers in their dealings with traders. Two topical examples are mentioned below.

The Consumer Rights Directive (Directive 2011/83/EU)

The Consumer Rights Directive came into force in Ireland on 13 June, 2014. It seeks to harmonise the legislation in the area of consumer protection with the aim of providing a single set of core rules for certain ‘on-premises’, ‘off-premises’, distance and sales contracts. We summarised this pending legislation in our January 2014 e-Briefing. [Click here](#) to read the article. Traders, particularly those involved in the business of distance selling, should familiarise themselves with what the Directive means for their businesses.

Unfair Terms in Consumer Contracts (Directive 1993/13/EEC)

The legislation governing the fairness or otherwise of contractual terms, while not new, has undergone a number of amendments since Directive 1993/13/EEC (the **Unfair Terms Directive**) was first brought into force, the most recent being the European Community (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2013 (S.I. No. 160 of 2013). The 2013 Regulations allow the National Consumer Agency to apply to Court for a declaration that any term drawn up for general use in contracts concluded by sellers or suppliers is unfair.

On 5 June, 2014, the National Consumer Agency published guidelines on identifying and avoiding the use of such unfair terms. [Click here](#) for a link to the guidelines.

What is an ‘Unfair’ Term?

A term will be considered unfair “if, contrary to the requirement of ‘good faith’, it causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

‘Good faith’ requires the trader to deal fairly and equitably with the consumer, whose legitimate interests the trader must take into account.

‘Significant imbalance’ means where a term in a contract unduly favours one party over the other. For example, a term that allows a trader to retain amounts paid by a consumer if the consumer fails to perform the contract, without a provision allowing the consumer to obtain compensation of a similar amount from the trader if the trader fails to perform the contract.

What is the Position where a Contract Contains an Unfair Term?

In short, the Unfair Terms Directive provides that a consumer will not be bound by a term in a contract if that term is found to be unfair. The Unfair Terms Directive lists in a non-exhaustive way terms that may be regarded as being unfair. This is known as the ‘grey list’, as the

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examples of terms listed may not necessarily be unfair, and terms not so listed may nevertheless be unfair.

The existence of an unfair term does not mean that the underlying contract is void or ineffective, if the contract can be performed without the unfair term.

How do I Structure my Contract when Dealing with Consumers?

Contracts proffered by Irish traders (such as standard form contracts, particularly online) where the customer has little or no ability to negotiate the terms of the contract should therefore be drafted on the basis that:

1. There are no (clearly) unfair terms contained in the contract
2. The wording of the contract is in plain and intelligible language
3. The contract complies with the (applicable) provisions of the Consumer Rights Directive
4. The contract contains a severance clause designed to allow the validity or enforceability of the contract to remain unimpaired despite one or more terms of that contract having been found to be unfair (and thus void).

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