

Via Registered Post and E-mail
F.A.O. Mr. John Shine
Director of Commercial Practices
National Consumer Agency
4 Harcourt Road
Dublin 2

12th March 2013

Our Ref: AES/HOS

Your Ref:

Re: Potentially Unfair Terms in the AES Terms and Conditions

Dear Sir,

We act on behalf of AES and write in relation to your letter dated 5th of March 2013, received on the 6th of March, enclosing undertaking for AES to execute.

We enclose herewith executed undertaking on the part of AES.

Yours faithfully,


Legal Department
Bord Na Móna plc & Its
Subsidiaries

BORD NA MÓNA c.p.t - BORD NA MÓNA p.l.c.

Oifig Chláraithe: An bPríomhshráid, Droichead Nua, Co Chill Dara, Éire.

REGISTERED OFFICE: MAIN STREET, NEWBRIDGE, CO KILDARE, IRELAND.

Fón/TELEPHONE: 045 439000, Facs/FAX: 045 439001

Uimhir Chláraithe/REGISTERED NO: 297717 Cárán Bhreislúacha/VAT NO: 8297717E

Stiúrthóirí/Directors: J Horgan (Cathaoirleach/Chairman), G D'Arcy (Stiúrthóir Bainistíochta/Managing Director), P Bennett, D Cronin, P Fox, P McEvoy, G O'Donoghue, C Ó Gógáin, D Taylor, E Treacy, B Walsh, P Wyer.



AGREEMENT AND UNDERTAKING

national consumer agency
gníomhaireacht náisiúnta tomhaltóirí

The National Consumer Agency ("the Agency")

putting consumers first

-and-

Advanced Environmental Solutions Ltd ("AES")

This Agreement and Undertaking is made by and between the National Consumer Agency and AES on the date set forth below. The Undertaking of AES contained herein is accepted by the Agency pursuant to section 73 of the Consumer Protection Act, 2007. The Agency and AES are referred to collectively herein as the "Parties".

WHEREAS FOR THE PURPOSES OF THIS UNDERTAKING:

- A. AES is engaged in the waste collection and disposal of domestic waste. It provides a complete set of written terms and conditions for consumers who engage with the services of the company. These terms have been drawn up by the trader in advance and are presented as a standard form. The consumer is not presented with an option as to the terms upon which s/he may contract. None of the terms are individually negotiated.
- B. It is the function of the Agency pursuant to section 8(1) of the Consumer Protection Act 2007 ("the Act") to, *inter alia* –
 - i. Promote and protect the interests and welfare of consumers;
 - ii. Enforce the relevant statutory provisions, including by the prosecution of offences, by way of summary proceedings
 - iii. Encourage compliance with the relevant statutory provisions,
 - iv. Investigate instances of suspected offences under any of the relevant statutory provisions.
- C. The Agency has examined the standard contract terms described at "A" herein and considered whether any of the terms and conditions as presented by AES constitute an unfair term in a contract concluded between a seller or supplier and a consumer as measured against the provisions contained within the EC Directive 93/13 on Unfair Terms in Consumer Contracts given effect in Ireland by S.I. 27 of 1995.
- D. As a result of the findings of its examination, the Agency has reason to believe that particular terms and conditions of the standard form contract as presented by AES to consumers are unfair. The particular terms and conditions are as follows;

- In the Introductory paragraph, you publish the following;

“AES reserves the right, without agreement or notice, to amend these Terms and Conditions from time to time. Any amendment to these Terms and Conditions will take effect and will bind the Customer three days after notice of the amendment has been sent to the Customer”

The Agency considers this term to be unfair as it has the object or effect of enabling AES to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (as listed in Schedule 3.1(j) of the aforementioned Regulations). This is compounded by only providing three days notice of any amendments which the Agency considers causes a significant imbalance in the parties' rights, to the detriment of the consumer (contrary to the requirement listed in Regulation 3.(2) of the Regulations).

- Under the heading '6 Title to the Equipment', you publish the following;

“6.2 AES may re-take possession of the Equipment at any time. For this purpose AES may visit (and AES and its authorised agents are hereby expressly authorised to enter) any premises of the Customer or third party where the Equipment is kept for the purpose of taking possession of the Equipment”

The Agency has concerns about AES seeking a facility of free entry to the consumer's property and considers that this provision causes a significant imbalance in the parties' rights, to the detriment of the consumer (contrary to the requirement listed in Regulation 3.(2) of the aforementioned Regulations).

The Agency has a similar concern in relation to provision 11.9 below

“11.9 On termination of the Contract AES shall have the right, in accordance with the provision of clause 6.2, to remove Equipment without prior consultation with the Customer and without any liability arising out of such removal”

- Under the heading '7 Pricing and Payment', you publish the following;

“7.2 AES reserves the right to amend any Pricing Plan, the Cancellation Fee, the Surcharge or the Service Charge during the Term, in line with AES's pricing review”

The Agency considers this term to be unfair as it allows AES to amend its pricing and charges without giving the consumer the corresponding right to cancel the contract if the costs are too high in relation to the price agreed when the contract was concluded (as listed in Schedule 3.1(l) of the Regulations).

- Under the heading '11 Termination or Cancellation of Services', you publish the following;

"11.6 Upon termination of this Contract by the Customer, outside of the Cooling-Off Period, AES reserves the right to charge the Customer a Cancellation Fee and this charge will become due and owing to AES by the Customer as a normal contract debt"

The "Cancellation Fee" is defined as ***"a fee of at least €15 per bin or no more than the cost of the administration of the Customer account for the Term, charged by AES to the Customer who cancels the Services"***. The Agency considers this to be a penalty clause as the quantum cannot be considered to be a genuine pre-estimate of the loss that would be suffered by AES in the event of a termination. The Agency notes the absence of a counterbalancing sanction on the company if it does not comply with its obligations. The Agency notes that the cancellation fee refers to "at least €15 per bin" and does not define the cost of administration and is therefore considered unfair as it potentially exposes the consumer to being irrevocably bound to a term which s/he had no real opportunity of becoming acquainted with before the conclusion of the contract (as listed in Schedule in 3.1(i) of the Regulations).

- E. As a result of the findings of its examination, the Agency is contemplating an application to the High Court wherein the Agency would seek an order prohibiting the use of the terms and conditions as outlined at 'D' herein.
- F. As a result of this investigation, the Parties have reached an agreement, as more particularly described below, wherein the Agency accepts AES undertaking of certain obligations in respect of its use of the subject terms and conditions.

IT IS HEREBY AGREED AS FOLLOWS :

1. AES undertakes that:-
 - a) It will refrain from using terms and conditions in its standard form contract which are non-negotiated and cause a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer.
 - b) Within **7 days**, from the date of this agreement, it will amend its standard form contract so as to address the unfair aspects of the terms and conditions contained at 'D' herein.
 - c) It will communicate the changes to its standard contract to its consumers at the earliest opportunity but no later than **7 days** from the date of this agreement.
2. In consideration of the undertakings furnished by AES as set out herein, the Agency agrees that it will not institute an application to the High Court under S.I. 27 of 1995 for an order prohibiting the use of the terms and conditions described at "D" herein. Nothing in this agreement shall be construed so as to impair the Agency's right to institute civil or criminal proceedings for any matter not specifically described herein.
3. This Agreement and Undertaking shall be and is intended by the Parties to be a binding and enforceable agreement which may be enforced by action in any Court of competent jurisdiction in the State.
4. The Undertakings provided herein shall be binding on the directors, officers, employees, servants, agents, and successors and assigns of AES.
5. The terms "and" and "or" as used herein have both conjunctive and disjunctive meanings.

dated this 12th day of March 2013 in Dublin, Ireland.

AGREED AND ACCEPTED BY:

Signed _____

Mr/Ms

Greg Moran

(Block Capitals)

Director / ~~Manager~~ / ~~Secretary~~ / ~~other officer~~ * on behalf of AES

Signed _____

John Shine

Director of Commercial Practices for and on behalf of the National Consumer Agency

* Delete where appropriate