



Updated  
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# Guidelines for contracts of care in nursing homes





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# 1. Background

## What is the purpose of these guidelines?

- 1.1 The decision to move to a nursing home is usually influenced by many factors. Signing up to a contract will directly impact a consumer's welfare and well-being and the decision may be made with urgency and under stressful and pressurised circumstances. Nursing home services are largely provided on a commercial basis and these services, given their nature, can be expensive. Engaging the services of a nursing home may be one of the most expensive purchases that a consumer will make in their lifetime.
- 1.2 Like many other services, the relationship between the nursing home<sup>1</sup> and the resident<sup>2</sup> is often based on the terms and conditions that are contained within a contract. In the nursing home sector this is often referred to as a contract of care<sup>3</sup>. The contract of care is generally standard in that the terms have been drafted in advance and there may be little or no opportunity for the consumer, or their representative, to negotiate or change the terms. These types of contracts are referred to as standard form consumer contracts.
- 1.3 Standard form consumer contracts, when used correctly, benefit both traders and consumers. They provide certainty as to the service which will be provided by the trader and what is expected from the consumer in return for that service. The contract determines the commercial relationship between the trader and consumer for the duration of the contract.
- 1.4 The purpose of these guidelines is to assist providers of long-term residential care services for older people in nursing homes<sup>4</sup> comply with their obligations arising from the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, as amended, (the *Unfair Terms Regulations*). The Unfair Terms Regulations provide specific protections to consumers who enter into standard form contracts for goods or services, including nursing home services. The protections ensure that consumers are not bound by unfair terms and mean that standard terms must be provided to consumers in plain and understandable language.
- 1.5 Nursing homes cater for the welfare of their residents at an advanced stage of their lives. Service providers should be mindful, when drafting the terms in their contracts of care, of the many considerations as to why consumers avail of nursing home services. The focus should ultimately be upon ensuring the welfare of the resident is taken into account and adequately catered for.



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1 We consider that nursing homes are "suppliers" for the purposes of the Unfair Terms Regulations. The Unfair Terms Regulations define a supplier as "a person who, acting for purposes related to his business, supplies services". In consumer protection legislation, the term trader is often used to describe a supplier. For the purposes of these guidelines, we use the terms nursing homes, provider or trader interchangeably.

2 We consider that nursing home residents are "consumers" for the purposes of the Unfair Terms Regulations. The Unfair Terms Regulations define a consumer as a natural person who is acting for purposes which are outside his business. For the purposes of these guidelines we use the term "resident" to refer to those consumers who are availing of a nursing home's services.

3 The term "contract of care" is used in these guidelines to refer to the standard form contract entered into between a nursing home and a resident.

4 For the purposes of these guidelines we use the term "nursing home" to refer to providers of long-term residential care services for older people. The term "long-term residential care services" is defined in the Nursing Home Support Scheme Act 2009. The scope of these guidelines is limited to long-term residential care services for older people. For the purposes of these guidelines, we did not consider short-term residential care services nor residential care services for younger residents. Many of the principles contained within these guidelines will be applicable to such contracts.

## What is the scope of these guidelines?

- 1.6 These guidelines will be of assistance to traders in satisfying the requirements of the Unfair Terms Regulations. Obligations of nursing homes pursuant to other pieces of consumer protection legislation or legislation outside the CCPC's remit, such as legislation enforced by the Office of the Chief Inspector of Social Services within the Health Information and Quality Authority (HIQA), are not within the scope of these guidelines.
- 1.7 The guidelines are broken down into the following sections:

**Section 2** provides details on the Unfair Terms Regulations, in particular the legal test for determining when a term is unfair.

**Section 3** provides guidance regarding contract terms.

**Section 4** provides guidance on how nursing homes should draft fair terms.

**The appendices** provide further assistance and outline how the CCPC developed the guidelines.

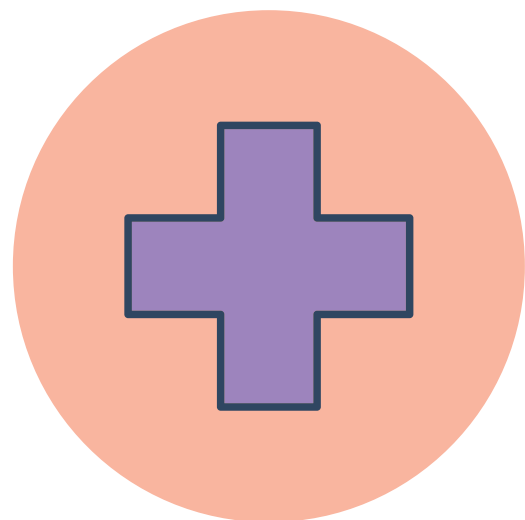
- 1.8 These guidelines are prepared for traders. Residents requiring information and assistance on how to challenge terms contained in their contract of care which they feel are unfair, should consult the CCPC's website, [ccpc.ie](http://ccpc.ie), which contains a dedicated information section and template letter to assist residents.

## What is the status of these guidelines?

- 1.9 These guidelines have a legal status. The CCPC is empowered, pursuant to section 10(3) (h) of the Competition and Consumer Protection Act 2014 and section 90 of the Consumer Protection Act 2007 (the CPA), to publish guidelines to inform and assist traders in understanding their obligations under consumer protection law. In any proceedings before a court, guidelines issued and published under section 90 of the CPA are admissible in evidence. If any provision of these guidelines is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question.<sup>5</sup>
- 1.10 These guidelines reflect the views of the CCPC as of May 2019. Although the views of key stakeholders and respondents to the public consultation were considered during the drafting of these guidelines, the contents of these guidelines are the views of the CCPC alone. The CCPC reserves the right to amend this guidance as necessary.
- 1.11 These guidelines do not constitute legal advice. A trader must decide whether its conduct, and/or that of its staff, complies with consumer protection law. However, these guidelines will assist traders in making that assessment. If a trader has doubts about whether or not its conduct complies with consumer protection law, they should seek independent legal advice.

## Current relevant developments in European Law

- 1.12 At the time of publication of these guidelines the CCPC is aware of proposals from the European Commission to further strengthen the enforcement possibilities for breaches of the Unfair Terms in Consumer Contracts Directive. The Commission's proposal includes the possibility of fines being imposed on traders for breaches. Developments in this area will be reflected where necessary in future updated guidelines which will be available on the CCPC's website, [ccpc.ie](http://ccpc.ie).



<sup>5</sup> Section 90(5) the CPA.

# 2. The Unfair Terms Regulations

## What are the Unfair Terms Regulations?

- 2.1 In Ireland, the Unfair Terms Regulations are the laws which implement EC Directive 93/13 on Unfair Terms in Consumer Contracts. The Unfair Terms Regulations act as a control against the use by traders of unfair terms in their contracts with consumers.

## What are unfair terms?

- 2.2 Unfair terms are those terms which significantly imbalance the contract to the detriment of the consumer. In effect, a term is unfair if it puts the consumer at an unfair disadvantage or is harmful to the consumer's interests.
- 2.3 When assessing fairness, all aspects of the contract are taken into consideration. This includes which goods or services it applies to and which consumer group may be affected. The CCPC considers that contract terms addressed to vulnerable consumers, such as older consumers, should be subject to a more stringent assessment in light of those consumers' distinct requirements.

## Who determines if a term is unfair?

- 2.4 In Ireland, only the courts can determine whether a term is unfair or not. The Unfair Terms Regulations provide powers to the CCPC, along with the Central Bank of Ireland, the Commission for Communications Regulation (ComReg), and particular consumer organisations to apply to the courts for a declaration that a particular term is unfair.<sup>6</sup> The CCPC, the Central Bank of Ireland, ComReg and consumer organisations can also apply to the courts for an injunction (including an interim injunction) against any trader using or recommending the use of a term that they consider to be unfair.<sup>7</sup>
- 2.5 In Ireland, consumers do not have the power to apply directly to the courts for a declaration that a particular term is unfair.<sup>8</sup> However, following recent High Court case law in Ireland, in contractual disputes relating to business to consumer (B2C) contracts, there is an increased awareness of the obligation on the court to establish if any of the terms of the contract which has been brought before it for consideration are unfair, irrespective of whether the court has been asked to consider that issue.<sup>9</sup>



## What are the consequences of unfair terms?

- 2.6 Even if a consumer accepted the terms when entering into the contract, this does not necessarily mean that he or she is bound by unfair terms. Such terms are never valid if they are in breach of the Unfair Terms Regulations. An unfair term is not binding on a consumer.<sup>10</sup> The entire contract will not be binding if the contract is not capable of continuing without the existence of the unfair term.<sup>11</sup>

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6 Regulation 8(1)

7 Regulation 8(4)

8 A consumer should directly raise with a trader any term in their contract which they believe may be unfair. Assistance on how to do this can be obtained in the CCPC's Nursing Home Consumer Information Booklet. If the trader refuses to accept that a term is unfair, a consumer has the option of proceeding to court. Consumers should seek independent legal advice in such instances. If the court decides that the term is unfair, the trader cannot rely on that term. If the contract is capable of continuing without the unfair term then the contract will continue.

9 AIB v Counihan [2016] IEHC 752; EBS v Kenehan [2017] IEHC 604

10 Regulation 6(1).

11 Regulation 6(2)

- 2.7 In addition to the power of the CCPC to apply for a court declaration that a term is unfair as described in paragraph 2.4 above, the CCPC also has the power to accept undertakings from a nursing home in respect of an infringement of the Unfair Terms Regulations. An undertaking is an 'out-of-court' facility available under the CPA whereby a trader can give a commitment to the CCPC to comply with the requirements under the Unfair Terms Regulations.<sup>12</sup>
- 2.8 In addition to legal consequences, unfair terms and conditions can also give rise to discontent, complaints and disruption that can negatively affect not alone the nursing home's relationship with the resident but also the nursing home's reputation.
- 2.9 Nursing homes that use fair terms and conditions can be confident that their terms are unlikely to be prohibited or set aside in the event of a dispute. Fair terms also ensure that residents better understand their rights and obligations under the contract. Nursing homes can therefore avoid unnecessary disputes and uncertainty, save both time and money, and also build and maintain good relationships with residents.



## What is within the scope of the Unfair Terms Regulations?

- 2.10 Appendix II of the guidelines includes a diagram, intended to provide an illustrative indication of the provisions in the Unfair Terms Regulations. The diagram will assist traders in understanding what comes within the scope of the Unfair Terms Regulations. The diagram should not be used, in isolation, to determine the fairness or otherwise of a particular term but considered in conjunction with the provisions in the Unfair Terms Regulations.

### B2C Terms

- 2.11 The Unfair Terms Regulations only apply to business to consumer (B2C) contracts. Business to business (B2B) or consumer to consumer (C2C) contracts are outside the scope of the Unfair Terms Regulations.

### Standard Form Contracts

- 2.12 The Unfair Terms Regulations apply solely to terms which have not been individually negotiated. The Unfair Terms Regulations do not apply to terms in B2C contracts which have been individually negotiated.<sup>13</sup> Terms contained within pre-formulated standard form contracts which are drafted in advance by the nursing home are never considered to have been individually negotiated.<sup>14</sup> Where one term has been individually negotiated, the rest of the contract remains within the scope of the Unfair Terms Regulations.<sup>15</sup> In the event of a dispute the burden is on the nursing home to prove that a term was individually negotiated and, therefore, outside the scope of the Unfair Terms Regulations.<sup>16</sup>

### Core Exemption

- 2.13 Terms that deal with the main subject matter of the contract, that is terms which set out the characteristics of a nursing home's services, or the adequacy of the price for the services received, provided they are in plain and intelligible language are exempt from the Unfair Terms Regulations.<sup>17</sup> This exemption is commonly referred to as the "core exemption" because it relates to the core of the contract. It is not an absolute exemption. Such terms will only benefit from the core exemption provided they are in plain and intelligible language.

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<sup>12</sup> Section 73, CPA

<sup>13</sup> Regulation 3(1)

<sup>14</sup> Regulation 3(4)

<sup>15</sup> Regulation 3(5)

<sup>16</sup> Regulation 3(5)

<sup>17</sup> Regulation 4

2.14 As previously mentioned, the appropriateness or adequacy of the price is also outside the scope of the Unfair Terms Regulations. The purpose of the Unfair Terms Regulations is not to assess the level of the price paid for the nursing home's services. However, pricing terms may still be assessed for fairness on grounds other than adequacy of price, such as the timing, method or variation of payment (see section 3 for further details).

### Mandatory Terms Exclusion

2.15 Terms which are required by law and reflect the requirements of mandatory, statutory or regulatory provisions of Ireland<sup>18</sup> are excluded from the scope of the Unfair Terms Regulations.<sup>19</sup> This exemption needs to be interpreted restrictively, taking account of the purpose of the Unfair Terms Regulations, which is to protect consumers as the weaker party from one-sided contracts.

## What is the fairness test?

2.16 The fairness test, or the legal test for assessing fairness, provided in the Unfair Terms Regulations is set out as follows:

*"[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."<sup>20</sup>*

Consequently, the key elements to assessing fairness include: good faith, and whether there exists a significant imbalance to the detriment of the consumer. These elements are overlapping and should be assessed together.



### Good Faith

2.17 A 'good faith' concept embodies a general principle of fairness and openness. It relates to how terms are drafted and presented, as well as how they are negotiated and carried out. It looks at the standards of commercial fairness and practice. Terms should be expressed clearly and legibly, containing no concealed pitfalls or traps.

2.18 'Good faith' relates to both the content of the terms as well as how the terms are expressed. A trader shouldn't take advantage of consumers' circumstances to their detriment.

2.19 When determining 'good faith', consideration should be given to whether the consumer would have agreed to a particular term if it was open to negotiation.<sup>21</sup> In effect, traders are required to take the consumers' interests into account. Not only should the trader not take advantage of the consumers' circumstances but the trader should also treat vulnerable consumers, like nursing home residents, to a higher standard. Particular regard should be had to the strength of the bargaining positions of the parties, and whether the consumer had an inducement to agree to the term.<sup>22</sup> In assessing 'good faith' and the fairness of a term, the nature of the service should also be taken into account.<sup>23</sup>

2.20 The concept of 'good faith' is satisfied where the trader deals fairly and equitably with the other party and where the trader has taken the consumers' legitimate interests into account.

18 Schedule 1 lists other types of exclusions from the Unfair Terms Regulations which are not relevant for the purpose of these guidelines as they do not apply to contracts of care.

19 Regulation 3(1), Schedule 1

20 Regulation 3(2)

21 Court of Justice of the European Union case C-415/11 Aziz

22 Unfair Terms Directive Recitals 16.

23 Unfair Terms Directive Recitals 18.



## Significant Imbalance to the Detriment of the Consumer

- 2.21 It is generally recognised that the default position is that the law is fair and reasonable. Imbalance is likely to arise where terms impose additional obligations or risks on consumers which are not envisaged by law or unreasonably go beyond anything needed to protect the legitimate interests of the trader. A term is likely to cause imbalance if the term alters the balance in rights and obligations that the law would have struck itself.
- 2.22 The extent of the imbalance and whether it is a significant imbalance should also be assessed. Significant imbalance isn't limited to financial costs on the consumer but may also extend to other non-financial obligations.

## Plain & Intelligible Language

- 2.23 Written contract terms are required to be drafted in plain and intelligible language.<sup>24</sup> The requirement of plainness and intelligibility means that the term should not only make grammatical sense to the average consumer but must put the consumer in the position of being able to assess the consequences of each term.<sup>25</sup>
- 2.24 Terms should be clearly and transparently drafted so that consumers can make an informed choice whether or not to enter into the contract. The terms should set out all obligations and rights in a clear and comprehensible way. This is important so that the consumer can foresee and evaluate the impact or consequences of the terms in the future.
- 2.25 Particular care should be taken in the case of complex and technical issues. It should not be assumed, for instance, that the consumer understands the detail of how the nursing home market operates. Sufficient information should be given to ensure that the consumer understands both the words used and the practical implications of any onerous terms and their relationship with his or her other rights and obligations. Ambiguity should be avoided. Where the term is open to interpretation, the interpretation most favourable to the consumer shall prevail.<sup>26</sup>

## What is the Grey List?

- 2.26 Schedule 3 of the Unfair Terms Regulations illustrates the meaning of fairness by including a non-exhaustive and illustrative list of terms that may be unfair. It is a 'Grey' List because it does not 'blacklist' terms. A term corresponding to one of the types of terms in the Grey List is not necessarily unfair. It may be unfair in some circumstances but not others. Similarly, a term may bear no resemblance to any of the terms listed and yet be unfair if it fails the fairness test described above. However, a suspicion of unfairness arises if a term has the object or effect of one of the types of terms listed in the Grey List.
- 2.27 A copy of the Grey List is included at Appendix I to these guidelines.



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24 Regulation 5

25 Court of Justice of the European Union case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt.*

26 Unfair Terms Directive Recital 20.

# 3. Guidance regarding Contract Terms

- 3.1 This section provides guidance on what nursing homes should and should not include in their contracts of care to comply with the Unfair Terms Regulations. By way of assistance, we have also included examples of terms found in contracts of care which we consider could be open to challenge on fairness grounds to illustrate some of these points.

## Plain & intelligible language

- 3.2 Contracts of care should be presented in a way that makes them easily understood, clear and readable, for example, in the style and size of fonts used. Important terms should be given prominence and not hidden in 'small print'.
- 3.3 It is important that the wording used is not only informative but also clear as to what the terms mean and their effect. When drafting contracts of care, nursing homes should consider what the average resident would understand. This is important because residents must be in a position to understand the nature and extent of the obligations that they are signing up to.
- 3.4 Residents are unlikely to be able to understand their rights and obligations under a contract of care if complex, legal or technical terminology is used. The use of plain, simple, everyday language will greatly assist residents to understand their commitments.
- 3.5 Contracts should not contain terms that are ambiguous or lack certainty. Terms that are open to a number of different interpretations will not provide the clarity and certainty that a resident needs prior to entering a contract of this nature.
- 3.6 Terms which are conflicting run the risk of being considered unfair. Where two terms are used which contradict or conflict with each other, it is not possible for the resident to comply with the contractual requirements. For example, the following terms which appear in the same contract could potentially be unfair as they contradict one another.



### Examples of terms that could potentially be unfair:

*"Either party may terminate this Agreement by notice in writing, delivered or dispatched by registered mail or fax or e-mail as appropriate to the other Party"*

*"A notice given to a Party under this Agreement is not valid if sent by e-mail"*

- 3.7 Terms which cross refer to other documentation or legislation, which is either not provided to the resident or which the resident is unlikely to be able to access prior to concluding the contract, could be challenged on fairness grounds. Paragraph (i) of the Grey List includes any term which is *"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract"* as potentially unfair.

### Example of a term that could potentially be unfair:

*"It is hereby agreed by the Parties that this Agreement shall be interpreted as an 'agreement' and/or a 'plan' for the purposes of Regulations 25(3) and 25(4) of the Regulations of 2013"*

## Guarantor terms



- 3.8 It may be the case that a nursing home requires not only a resident but also a guarantor to sign the contract of care, either jointly or separately. A guarantor is considered a third party who agrees, on the happening of an event, to assume the financial responsibilities that the resident would otherwise be liable for.
- 3.9 Assuming such a financial responsibility is a considerable commitment. Both the resident and the guarantor must fully understand the implications of what they are intending to commit to. The decision to be guarantor must be made on a fully informed basis.
- 3.10 The contract of care should provide all of the details as to the obligations and responsibilities that the guarantor will assume, including, the event or events that will result in the guarantor assuming financial responsibility. However, most importantly, the contract of care terms must outline the fees that the guarantor will be liable for or the mechanism by which such fees will be calculated.
- 3.11 Given the potential scale of the financial obligations they may become liable for, the guarantor will have to ensure that his or her finances are in a position to sustain such a commitment to the contract. This is only possible if the guarantor and the resident have access to all of the information relating to the contract, including full details of both the optional and unavoidable costs involved in the contract.
- 3.12 Broadly drafted 'catch-all' terms that simply pass the obligations of the resident onto the guarantor, without any detail as to what will trigger the commitment, or an indication of the extent of the commitment, run the risk of being considered unfair. Where there is a lack of certainty or clarity, a guarantor and resident cannot fully understand or appreciate what they are committing to. Therefore such terms may be open to challenge on grounds of fairness.

### Example of a term that could potentially be unfair:

*"In the event the Resident is unable to be responsible for their financial obligations, their nominated next of kin assume this responsibility"*

- 3.13 Where the contract contains terms that make the guarantor liable for all liabilities without disclosing the nature and extent of those liabilities, such terms run the risk of being considered as unfair. The guarantor's potential liabilities must be clearly detailed in advance. Where it is not possible to calculate the potential fees involved precisely, the method by which such fees would be calculated should be provided in the contract of care.

### Example of a term that could potentially be unfair:

*"The Guarantor guarantees to the Creditor the payment and discharge in full of all monies and liabilities (including without prejudice to the generality of the foregoing all principal, interest, costs, claims, damages, expenses or losses) (such monies and liabilities being hereinafter referred to as "Liabilities") which are now or shall from time to time hereafter be due, owing or incurred for whatsoever reason by the Principal Debtor to the Creditor whether actually or contingently and whether solely or jointly with any other persons and whether as principal or surety or in any other capacity including interest, commissions or other lawful charges and expenses which the Creditor may in the course of its business charge in respect of any of the matters aforesaid"*

Terms which either exclude or limit the legal rights of the guarantor could be potentially unfair. For example, any terms which limit the guarantor's ability to rely on a statute of limitation defence. Such terms are specifically provided for in the Grey List paragraph (b).

**Example of a term that could potentially be unfair:**

*"In any litigation relating to this Guarantee or any security given by the Guarantor the Guarantor irrevocably waives the right to interpose any defence based upon any statute of limitations or any claim of laches or set-off or counter-claim of any nature or description"*

## Exclusion or limitation of nursing homes' liability

3.14 Terms included in a contract of care which seek to either restrict or exclude the liability of a nursing home in instances where they would otherwise be liable, run the risk of being considered unfair when assessed under the Unfair Terms Regulations. Paragraph (a) of the Grey List includes terms which have the object or effect of *"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"* as potentially unfair terms.

As a consequence the following types of terms could potentially be unfair:

- A term that would seek to limit or restrict the liability of a nursing home for liability that was caused by the negligence of the nursing home in failing to adequately address a hazard that subsequently caused an injury to a resident.

**Example of a term that could potentially be unfair:**

*"[The Nursing Home] bears no responsibility for any unauthorised medicines used"*

- Terms which contain vague or uncertain wording (for example "in accordance with all legislative and regulatory requirements"). These are so broadly drafted that residents are unlikely to understand the practical effect of such terms.

**Example of a term that could potentially be unfair:**

*"The signatory agrees that the Proprietor, servant or agents shall not be liable for any personal injury howsoever caused to the Resident within the Nursing Home where the Proprietor, servants or agents act in accordance with all legislative and regulatory requirements"*

- Given that the nursing home will be the resident's home for the duration of the contract, the nursing home should provide a safe and secure environment. Terms which seek to restrict or exclude the nursing home's liability, for example, if property belonging to a resident is stolen and the nursing home had not taken reasonable security measures, run the risk of being considered as unfair.

**Example of a term that could potentially be unfair:**

*"The Proprietor shall not be responsible or liable for the theft by any person whomsoever of any property or valuables of the Resident which have not been given to the Proprietor by the Resident for safekeeping"*



## Sanctions for breach of contract

- 3.15 Residents should not be financially penalised for breaches of contract. When a breach of contract does occur, the nursing home is entitled to recover what is due and owing. However, any financial sanctions must be reasonable, proportionate and reflective of the loss that was incurred by the nursing home. A requirement to pay in excess is likely to be considered disproportionate and unfair. Paragraph (e) of the Grey List provides that any term which has the object or effect of *"requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation"* is open to challenge on fairness grounds.
- 3.16 Terms which oblige residents to pay interest on any outstanding fees at an excessive or penal interest rate run the risk of being unfair since it means the resident will pay more than the actual cost of meeting the liability.



### Examples of terms that could potentially be unfair:

*"The registered provider or person in charge reserves the rights to: [...] Charge interest on outstanding fees as outlined in the schedule of fees"*

*"The proprietor reserves the right to apply a late payment interest charges to all such balances. The interest charge will be calculated in respect of any balances that are as defined above. The rate of interest shall be applied at a rate of 10% and may be varied at the discretion of the proprietor (acting reasonably) and in accordance with the provisions of this contract"*

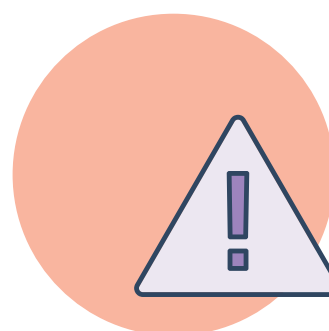
- 3.17 Terms imposing an arbitrarily calculated or fixed penalty fee are open to challenge on fairness grounds as the penalty fee is not based on the actual loss suffered or potentially suffered by the nursing home.

### Example of a term that could potentially be unfair:

*"Where the Resident terminates this Agreement without providing notice in accordance with this Clause, the Resident shall pay to the Proprietor the following fee in lieu of notice: €2,000"*

## Visiting rights

- 3.18 In moving to a nursing home, residents leave their friends, family, neighbours and their community and the ability to have visitors is important to them. A contract of care should include terms which set out resident's rights with respect to visitors. Any terms which seek to unreasonably restrict a resident from receiving visitors run the risk of being challenged on fairness grounds. The circumstances in which visitors may be prohibited should be very limited. Providers should take all necessary steps to accommodate visitors. They should, therefore, avoid using terms that grant a wide discretion to restrict or even ban visitors. Any such terms should not go beyond what is reasonably necessary. To avoid being regarded as unfair, the grounds upon which any visiting restriction will be implemented should be clearly outlined in the contract. The resident should not only be consulted in advance of implementation but also the mechanism by which any such decision can be challenged or appealed should also be provided.



**Examples of terms that could potentially be unfair:**

*"The Resident agrees that the Proprietor at all times, in accordance with all applicable legislative and regulatory requirements, may restrict visits by all persons in times of illness or distress of the Resident or under the direction of the medical practitioner where such restriction is considered to be in the best interest of the Resident"*

*"The Nursing Home reserves the right to refuse admission to a visitor/family member who may upset the resident or the home"*

## Termination Terms

3.19 Terminating a contract of care is a very significant step as it may have a considerable impact on the welfare and well-being of the resident. It is essential that the circumstances in which a nursing home will end a contract are clearly set out so that the resident is aware of the grounds on which it may happen. Any term which allows a wide discretion for a nursing home to terminate the contract runs the risk of being considered unfair.

**Example of a term that could potentially be unfair:**

*"We may terminate our contract for any reason upon notice in writing of six months to you"*

3.20 The contract of care should outline the specific instances which will trigger the termination clause in the contract, for example:

- The nursing home, following a review of the resident's changed needs, is not in a position to provide the level of service that is now required for the resident.
- The nursing home will not be in a position to provide the service as it is closing down permanently.
- Fees have been unpaid and there has been a verifiable pattern of failure on the part of the resident to discharge their fees.
- The resident's conduct has become a serious issue to the extent that he or she poses a substantial risk to the health and safety of staff and/or other residents and the nursing home is not in a position to adequately address this risk.

3.21 Contracts of care, where possible, should not include terms which would allow for the contract to be ended on the basis of matters which are outside the control of the resident.

**Example of a term that could potentially be unfair:**

*"The Proprietor shall have the right to terminate this Agreement with immediate effect in the event that the Proprietor forms the opinion that the behaviour of any member of the Resident's family or a visitor to the Resident is disruptive or a risk to the health and safety of any resident of the nursing home and/or any member of staff of the nursing home"*

3.22 In cases where there has been a serious breach of the resident's obligations, and the contract provides that the nursing home can terminate a contract in such exceptional circumstances, then reasonable notice should be given to the resident. Terms which allow immediate termination of a contract without notice run the risk of being considered unfair. The CCPC recognises that in extreme cases, for example, where a resident is violent, the nursing home may be required to take steps to protect other residents and staff. However, even in such extreme cases, where possible, a warning should be given and sufficient notice where termination is inevitable, to enable the resident to find an alternative nursing home.

**Examples of terms that could potentially be unfair:**

*"The Proprietor shall have the right to terminate this Agreement with immediate effect in the event that the Resident becomes disruptive and/or aggressive towards any other Resident of the nursing home and/or any member of staff of the nursing home"*

*"The Proprietor shall have the right to terminate this Agreement with immediate effect in the event that the Resident fails to pay all sums due and owing under this Agreement"*

*"The Nursing Home reserves the right to terminate this contract summarily in the event of a dependent person becoming disruptive and/or aggressive"*

3.23 Termination clauses should only be invoked for the most serious of breaches.

If a breach of the contract has occurred, the resident should be afforded a reasonable opportunity to address the matter and must be given adequate notice. What can be considered adequate notice will need to be assessed on a case by case basis.

3.24 Any terms which allow the nursing home to terminate a contract without following a fair and transparent process for termination, run the risk of being considered unfair. An appeal mechanism should also be in place to allow residents or their representatives to challenge any decision to terminate a contract.



**Example of a term that could potentially be unfair:**

*"The Resident acknowledges that the Proprietor shall have the right to exercise its right under this Clause at its sole discretion whether with or without consultation with the appropriate State authorities and/or the Residents next of kin"*

3.25 Terms which cross refer to other documentation or legislation which is not provided to the resident run the risk of being considered unfair as the resident will be unable to adequately assess the impact of agreeing to such a term. Paragraph (i) of the Grey List provides that terms that have the effect of *"irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract"* could potentially be unfair.

**Example of a term that could potentially be unfair:**

*"The Parties agree that where the Proprietor terminates this agreement, the Proprietor shall be entitled to discharge the Resident and it is hereby agreed by the Parties that this Agreement shall be deemed to be an agreement for the purposes of Regulations 25(4) of the Regulations"*

## Absences

3.26 Residents may be absent from their nursing home for a variety of planned or unexpected reasons. The contract of care should clearly outline what happens during such periods of absence, in particular, what happens in relation to payment of fees during an extended period of absence from the nursing home.

3.27 In drafting terms dealing with absences from the nursing home, service providers must always be fair to the resident. Providers should act in good faith in their assessment of the cost savings they will achieve whilst the resident is not availing of their services. Where a nursing home makes financial savings during a resident's period of absence, the contract should provide for a reduction in the resident's fees in such circumstances.

**Examples of terms that could potentially be unfair:**

*"The fee shall be payable during all and any periods that the Resident may be absent from the Home (i.e. on holiday or in hospital)"*

*"Where you are absent from the centre for an extended period of time, fees will be payable by you for us in respect of the period of absence"*

*"Where the Resident leaves the Nursing Home voluntarily during any period in respect of which the fees under this Agreement have been paid, the said fees shall not be refunded by the Proprietor to the Signatory or the Resident"*

3.28 The contract of care should clearly set out the circumstances under which a fee reduction will apply. These circumstances must be fair and balanced, taking into account the positions of both parties. Any requirements in relation to notice periods for absences should be clearly laid out in the contract so the resident clearly understands his or her obligations. Terms giving a nursing home a wide discretion to choose the notice requirements run the risk of being unfair.

**Example of a term that could potentially be unfair:**

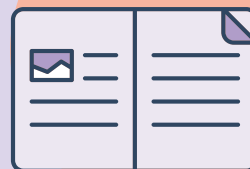
*"The Resident may leave the nursing home either permanently or temporarily provided that the Resident gives such notice as may be prescribed by the Proprietor from time to time"*

## Death of a resident

3.29 The contractual arrangements that follow the death of a resident should be set out in the contract. Such matters might include the process of handing back the resident's room and the collection of the resident's property. The terms should also clearly set out the arrangements regarding a resident's fees, in particular where fees have been paid in advance. Following a resident's death, the balance of fees should be capable of being refunded. The contract of care should clearly state how these fees would be refunded. Terms using language which grants the nursing home a discretion as to whether fees should be refunded are open to challenge on fairness grounds.

**Example of a term that could potentially be unfair:**

*"If through death, permanent hospitalisation or unforeseen permanent discharge, a resident leaves the nursing home during a period for which the fees have been paid, the said fee may be refunded by the proprietor to the resident or any person lawfully appointed under law or by the resident to act for and on behalf of the resident"*



## Changes to contract

3.30 Once agreed, the terms as set out in the contract should last for the duration of the contract. Residents are entitled to expect that the service they have contracted for will be provided to them for the duration of their stay. There may however be legitimate reasons as to why a contract of care has to be revised or even changed, for example, a nursing home may be obliged to comply with a new regulatory requirement. Any such changes have to be agreed with the resident in advance and in a manner which will allow the resident to consider the impact of such changes. Terms which grant the nursing home a right to unilaterally change the terms of the contract are open to challenge on fairness grounds.



**Examples of terms that could potentially be unfair:**

*"[The Nursing home] reserves the right to vary or alter the terms or conditions of the Contract of Care at any time"*

*"Provider, the Person in charge reserves the right to vary or alter the terms and conditions of this agreement at any time"*

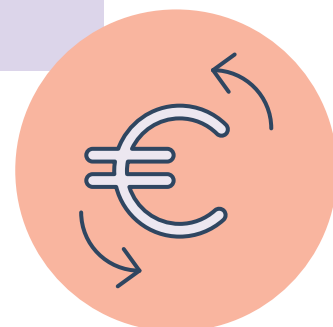
- 3.31 Once a resident has taken up residence in the nursing home and is settled in their new environment, it is unlikely that he or she will want to leave due to changes in their contract. Finding an alternative nursing home provider can be particularly inconvenient where the resident hasn't been provided with sufficient notice and many people may not have this option, due to an absence of choice. Before drafting any variation clause, the nursing home provider has to take the resident's circumstances into consideration. The contract should provide the specific instances under which such variations might be made, the notice periods associated with such changes and the ability to exit the contract without penalty if the resident does not agree to what is proposed.
- 3.32 The specific instances in which variations can be made to a contract should be limited to exceptional circumstances that are unavoidable. The nursing home should always first explore if there are any other ways of addressing such developments without having to change the contract. Where changes are necessary, then the resident must be able to consider and understand how the changes may affect them.

**Example of a term that could potentially be unfair:**

*"We reserve the right to vary or alter the terms and conditions of the Contract of Care at any time"*

## Fee variation and additional fees

- 3.33 Once both parties have agreed the fee to be paid for the service provided, then residents will base their financial planning around this cost. Unless the circumstances around variations or additions are clearly detailed in advance in the contract, then residents cannot plan for such possible variations.
- 3.34 With respect to additional fees, the CCPC's view is that all fees should ideally be included in the upfront fee for the services to be provided. Where this is not possible, all fees, whether mandatory or optional, should be provided to any prospective resident. Where the additional fee is genuinely optional then this has to be communicated clearly to the resident and the resident should be afforded the opportunity to either agree or otherwise to availing of the service concerned.
- 3.35 With respect to fee variation clauses, the circumstances around any such variations should be clearly provided for as a term in the contract. This includes providing sufficient detail as to how any proposed changes would be calculated. As a fee variation clause has the potential to significantly alter the resident's financial obligations, it should be limited to variations which are objectively necessary to continue to meet the resident's needs.



**Examples of terms that could potentially be unfair:**

*"Fees are subject to review and may be increased"*

*"We reserve the right to: [...] review the Fees payable by you under these terms and conditions and where necessary"*

*"The Resident agrees that the Proprietor at all times, in accordance with all applicable legislative and regulatory requirements, may review and agree with the Resident fees chargeable under this Agreement where considered necessary"*

3.36 Even where the nursing home seeks to rely on a variation clause by reference to the law, it runs the risk of being considered unfair. This is because it is not clear and transparent what the changes to the fees may be or what legal provision that this term relates to.

**Examples of terms that could potentially be unfair:**

*"The fees set out in this Agreement may, subject to law and regulations, be reviewed and revised by the Proprietor on an annual basis [...]"*

*"The Long Term Residential Care Charges may be revised or superseded from time to time as provided by law"*

## Entire agreement clauses

3.37 A nursing home may wish to ensure that all the obligations that they are committing to are included in one document e.g. by the use of 'entire agreement' clauses. The CCPC is concerned that entire agreement clauses may prevent a consumer from raising a claim concerning statements made during discussions which are not subsequently included in the contract.

3.38 Good faith requires that each party to a contract is bound by his or her promises and by any other statements which help secure the other party's agreement. Consumers commonly and naturally rely on what is said to them when they are entering a contract. This is especially true for older or vulnerable consumers. Promises or statements made verbally by a nursing home to a resident should form part of the contract. Any attempt by the nursing home to exclude such statements is open to challenge on fairness grounds.

3.39 Paragraph (n) of the Grey List includes any term which has the object or effect of "limiting the seller's or supplier's obligation to respect commitments undertaken by his agents" as a term where there is a probability of unfairness.

**Example of a term that could potentially be unfair:**

*"The preamble and all appendices or schedules to this Agreement form an integral and substantial part of the Agreement. This agreement sets out the entire agreement between the parties and shall supersede all prior discussions between parties and all statements, representations, terms and conditions, warranties, proposals, communications and understandings whenever given and whether orally or in writing by one Party to the other or by any Party to any third party"*

## Formalities

3.40 If a contract is to be fair and balanced, contractual rights cannot be lost due to technical breaches by a resident. Where compliance with a formality involves disproportionate costs or inconvenience, the potential for unfairness is increased. An example would be a requirement to use registered post for written notification when notification by ordinary post would be perfectly adequate. Nursing home contract terms that require residents to provide written notice by registered post run the risk of being considered unfair on the basis it involves disproportionate cost and inconvenience to the resident.

3.41 Paragraph (n) of the Grey List includes any term which has the object or effect of "making the trader's commitments subject to compliance with a particular formality" as a term where there is a probability of unfairness.



**Example of a term that could potentially be unfair:**

*"Either party may terminate this agreement by notice in writing, delivered or dispatched by registered mail to the other party hereto"*

## Terms which allow nursing homes avoid legal obligations

3.42 Nursing homes are required to comply with all applicable laws and regulations. Terms which purport to allow nursing homes to avoid complying with statutory obligations under sector specific health care regulations or other legislative requirements, for example human rights, run the risk of being considered unfair.

**Examples of terms that could potentially be unfair:**

*"The Proprietor shall use its best endeavours to comply with the Regulations and all applicable legislative provisions governing the provision of long-term residential care to residents of Irish private/voluntary nursing homes"*

*"The Proprietor shall ensure so far as is reasonably practical that the resident has access to a safe supply of fresh drinking water at all times and is provided with food and drink and quantities adequate for the resident's needs"*

## Declarations

3.43 Declarations, in other words formal or explicit statements, in contracts of care are open to challenge on unfairness grounds in circumstances where residents are unlikely to fully understand the significance of such declarations. In particular, declarations which seek to limit a resident's statutory rights or limit a resident's ability to make a claim could in our opinion be potentially unfair. Further, declarations which waive nursing home's statutory obligations run the risk of being considered unfair.

**Examples of terms that could potentially be unfair:**

*"The parties agree that the provision by the proprietor of such information is sufficient to satisfy the regulatory obligations of the proprietor in this regard"*

*"It is hereby agreed by the Parties that this Agreement shall be deemed to be an agreement for the purposes of Regulations 25(4) of the Regulations"*

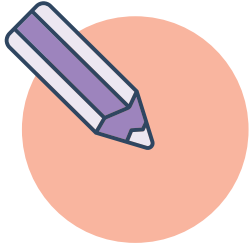
3.44 Declarations that the consumer has read or understood the contract of care can be of concern. The Unfair Terms Regulations require that terms are in plain and intelligible language and that the resident has an opportunity to read the terms. Including such a declaration effectively requires residents to agree that these conditions have been met, whether they have or not.

**Example of a term that could potentially be unfair:**

*"The Resident acknowledges and confirms that he understands the terms of this Agreement"*



# 4. Drafting Fair Contracts



## 1. CONSIDER THE CONSUMER AND THEIR SITUATION

You are likely to be dealing with a vulnerable consumer who may need your service in a time of stress and uncertainty and may be under a time pressure. Ensure your contracts consider the consumer and their legitimate interests at this time. Would you be happy to sign your contract if you were in a similar situation to the consumer in front of you?

## 2. WRITE YOUR CONTRACT TERMS IN PLAIN AND UNDERSTANDABLE LANGUAGE

Use clear and simple language that a consumer encounters in their everyday life. Avoid using technical language which is specific to your sector or legal jargon. Using language that allows consumers to understand your terms will ensure clarity and will reduce the scope for misunderstandings and disputes later in the contract.



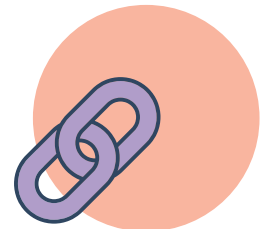
## 3. KEEP YOUR CONTRACTS AS CONCISE AS POSSIBLE

Due to the stressful circumstances and the time sensitivities involved with these contracts, consumers will not read or fully absorb endless pages of information. Ensure the contract covers all the necessary information in as concise a manner as possible.



## 4. THE CONTRACT SHOULD PROTECT BOTH PARTIES INTERESTS

Ensure the contract clearly and fairly sets out the scope of the service, the rights and obligations of all parties to the contract and any dispute resolution process you have in place.



## 5. DON'T HIDE IMPORTANT WORDING AWAY OR USE 'SMALL PRINT'

Deal openly and fairly with consumers. Ensure contract terms do not mislead or cause surprise. Where particular contract terms are likely to have important consequences for the consumer, these should be flagged from the outset to the consumer.

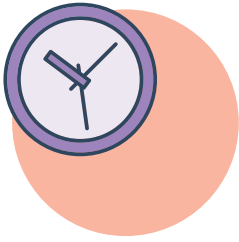


## 6. ENSURE YOUR CONTRACT COMPLIES WITH ALL APPLICABLE LAWS

Ensure the contract complies with all applicable laws that apply to this sector. Legal advice should be sought in relation to such compliance. You and your professional advisors may also wish to refer to the CCPC's website for general guidance on consumer protection law.



## 7. DETAIL A PROCESS IN YOUR CONTRACT TO HANDLE POSSIBLE FUTURE CONTRACT CHANGES



Contracts should provide certainty. Any future changes to the services or fees should be foreseeable. Your contracts should clearly identify the circumstances in which such changes can be made. Advance notification gives the consumer an opportunity to consider the implications of your changes. It also provides sufficient time to end the contract without penalty where the consumer does not wish to accept your proposed changes.

## 8. IT SHOULD BE EASY FOR CONSUMERS TO END THE CONTRACT

Avoid including terms which unnecessarily hinder the consumer's desire to terminate the contract. Notice periods for termination should be fair, reasonable and appropriate to the circumstances.



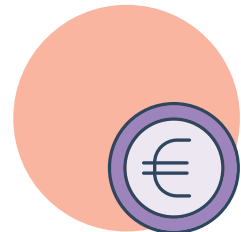
## 9. ENSURE YOUR CONTRACT HAS CLEAR RULES ON YOUR LIABILITY AND THE CONSUMER'S RIGHTS IF SOMETHING GOES WRONG



Contract terms should clearly inform consumers as to what happens when things go wrong. For example, what arrangements are in place if the service has to close, including details of any fee reductions for periods of non-service. Fees payable in relation to breaches of the contract should clearly set out their basis and method of calculation. Clearly describe the circumstances which could lead to a consumer's exclusion from the service and provide details of an appeals mechanism. Consumers should receive notice appropriate to the circumstances before a service is withdrawn.

## 10. REQUESTS FOR ADVANCE PAYMENTS

Where payments in advance are requested, the reasons for the request should be clearly conveyed to the consumer. The reasons provided should be valid. Upfront payment amounts should not be excessive. Terms should clearly set out how these upfront payments will be repaid where there is a change of mind, termination of the service by either party or on the death of the consumer.



# Appendix I: The Grey List

## Schedule 3 of the Unfair Terms Regulations

### Unfair Terms in Consumer Contracts

#### 1. Terms which have the object or effect of:

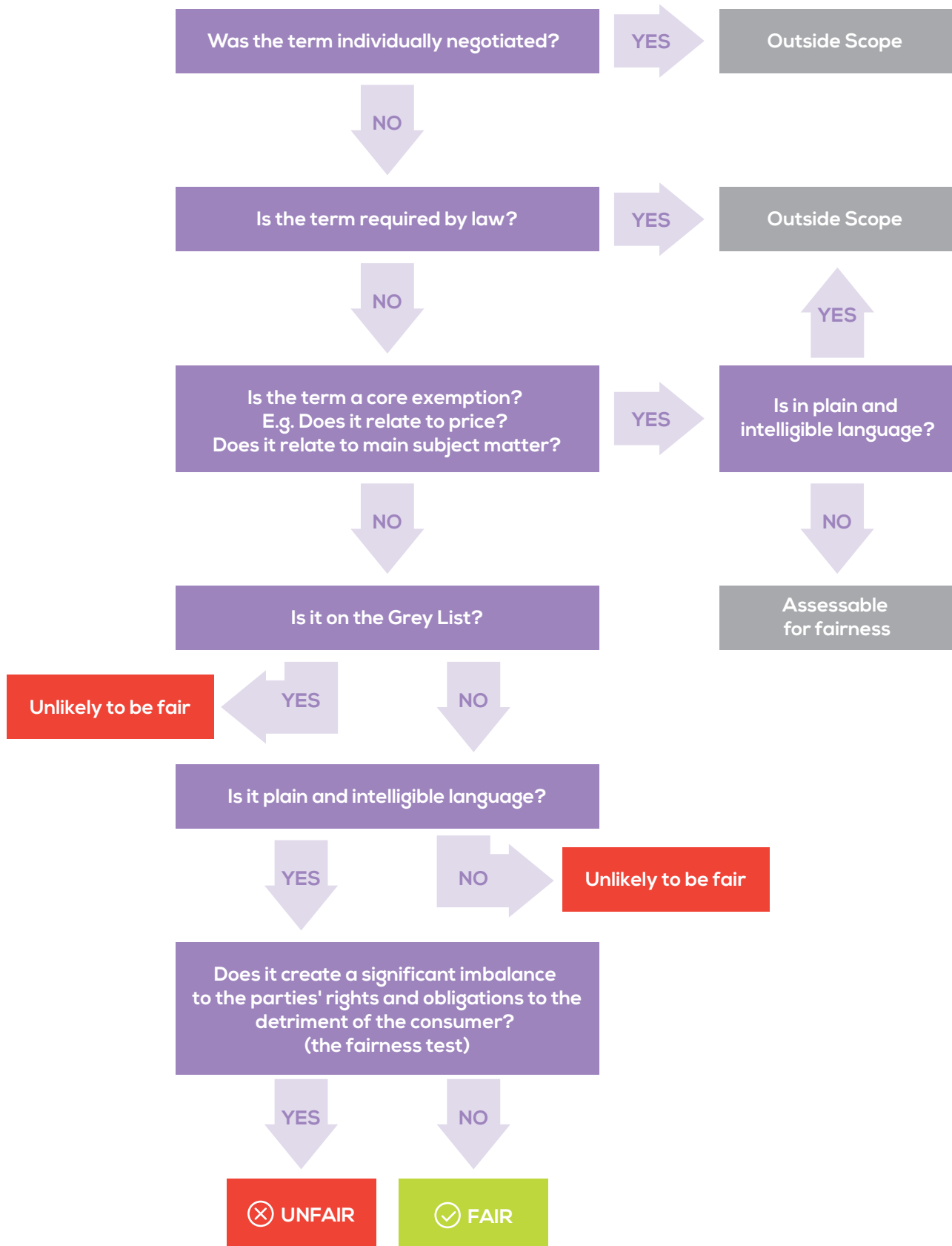
- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller 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) authorising 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.

# Appendix II: Unfair Terms Diagram





# Appendix III:

## Developing the Guidelines

### The guidelines development process

- a. In drafting these guidelines, the CCPC undertook an extensive programme of research, consultation and engagement with the sector to ensure it had as much knowledge and evidence as to the current practices within the sector as possible.
- b. The CCPC met with a number of stakeholders including advocacy groups for nursing home residents and nursing home representative groups. The purpose of these meetings was for the CCPC to gain better insight into the issues in the nursing home sector relating to contracts of care. In particular, the CCPC was interested to learn of the types of terms used in contracts of care, the language used in such terms, and residents' experiences of signing contracts and contractual disputes. Many different issues were raised by stakeholders, however, not all of the issues raised could be addressed within the context of a project concerned with the Unfair Terms Regulations.
- c. The CCPC also requested, from a sample of nursing homes in Ireland, information relating to and copies of nursing home contracts of care. A representative sample of approximately 10% of nursing homes was chosen based on various factors including location, size, and whether the nursing home was a private or public nursing home. These requests were voluntary in nature. The CCPC requested copies of contracts over a three year period (2015, 2016 and 2017), written policies and procedures in relation to admissions, communicating with residents, provision of information to residents and the handling and investigating of complaints.
- d. The quality and level of engagement with the information requests were varied. Not all nursing homes were able to comply in full with all the items of information requested. Some nursing homes were unwilling to respond to the information request. 36% of the nursing home sample responded to the voluntary information request. A preliminary review of the contracts of care provided, indicated that many nursing homes used template contracts which allowed the project team to quickly determine the types of contract terms being used in the sector and the potential issues. The CCPC wishes to thank the 24 nursing homes who assisted in the production of these guidelines through their responses to the voluntary information request.
- e. The CCPC's public consultation provided an opportunity for any member of the public including residents, residents' families, nursing homes and their representatives to share their experiences and views of the contracts of care. The CCPC received 14 written submissions from a range of interested parties. These included relatives of residents and organisations advocating on behalf of older people. Submissions highlighted concerns around a number of areas including language used in contracts of care, additional charges and transparency.

**The CCPC would also like to take this opportunity to thank those who contributed to the public consultation.**









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