

## Unfair terms

### CCPC guidelines for nursing home contracts of care



As noted earlier last week on our website, the Competition and Consumer Protection Commission (“the **CCPC**”) published legally binding guidelines for contracts of care for nursing homes (“the **Guidelines**”). The Guidelines set out the obligations and responsibilities that nursing home providers must adhere to and aim to provide greater transparency, clarity and certainty for consumers.

The purpose of the Guidelines is to assist nursing home providers comply with their obligations arising from the European Communities (Unfair Terms in Consumer Contract) Regulation 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. This is to ensure that consumers are not bound by unfair terms and means that standard terms must be provided to consumers in plain and understandable language.

#### Unfair terms

Unfair terms are terms which significantly imbalance the contract to the detriment of the consumer. A term is unfair if it puts the consumer at an unfair disadvantage or is harmful to the consumer’s interest.

In assessing fairness, the CCPC notes that terms addressed to vulnerable consumers, such as older residents, should be subject to a more stringent assessment. Even if a consumer accepts terms when entering into a contract, this does not necessarily mean that he or she will be bound by these unfair terms. If terms are deemed to constitute an ‘unfair term’ within the meaning of the Unfair Terms Regulations, then such a term will not be binding of said consumer/resident.

The Unfair Terms Regulations only apply to business to consumer contracts (“B2C”) and solely to terms which have not been individually negotiated. Terms contained in standard form contracts drafted in

advance by a nursing home provider are never considered to be individually negotiated. Therefore nursing home providers should review their current terms of service and ensure that they do not impose unfair terms on a resident within the meaning set out in the Unfair Terms Regulations.

#### Core exemption

Terms which deal with the main subject matter of the contract are exempt from the Unfair Terms Regulations, provided they are **in plain and intelligible language**. This is known as the “core exemption” as it relates to the core of the contract. For example, setting out the characteristics of a nursing home’s services or the adequacy of the price for the services received may not be subject to the Unfair Terms Regulation. The purpose of the Unfair Terms Regulations are not to assess the price paid for the nursing home services. However, the pricing terms, such as the timing, method or variation of payment may still be assessed for fairness.

#### Grey list

The Unfair Terms Regulations includes a non-exhaustive and illustrative list of terms that may be unfair. It is a ‘Grey List’ because it does not ‘blacklist’ terms. However, this list is solely intended as an indicator as to ‘suspicion of unfairness’ and terms will be assessed on an individual basis.

## Guidance on contract terms

The Guidelines give specific advice on a range of contract terms in nursing home contracts of care, such as:

- **plain and intelligible language** – the use of plain, simple everyday language is advised rather than complex legal terminology. This is to ensure residents understanding of the nature and extent of obligations that they are signing up to;
- **guarantor terms** – broadly drafted ‘catch-all’ terms that pass the obligations of a resident onto a guarantor without details on the triggering or extent of the commitment are at risk of being unfair;
- **exclusion or limitation of nursing home’s liability** – terms restricting the nursing homes liability in instances where they would otherwise be liable are at risk of being unfair;
- **sanctions for breach of contract** – where a breach occurs, the nursing home is entitled to recover what it is due and owing but financial sanctions must be reasonable, proportionate and reflective of the loss incurred by the nursing home;

- **visiting rights** – terms which seek to unreasonably restrict a resident receiving visitors are at risk of being challenged and circumstances where visitors are prohibited should be very limited;
- **termination** – it is essential that the circumstances in which a contract of care will be terminated are clearly set out and a wide discretion should be avoided.

The Guidelines also cover contract terms relating to absences, death of a resident, changes to contract, fee variation and additional fees, to name a few.

Nursing homes will be required to review their standard form contracts of care to ensure compliance with the Guidelines and the Unfair Term Regulations. The CCPC will then assess compliance in the sector after allowing a period of time for changes to be made.

The full Guidelines can be accessed on the [CCPC’s website](#).

If you have any questions in relation to the Guidelines, please feel free to contact a member of the Eversheds Sutherland Commercial Contracts and Healthcare team:



**Marie McGinley**

*Partner*

+353 1 6441 457  
mariemcginley  
@eversheds-sutherland.ie



**Aisling Gannon**

*Partner*

+353 1 6644 205  
AislingGannon  
@eversheds-sutherland.ie



**Dermot McEvoy**

*Partner*

+353 1 6644 238  
DermotMcEvoy  
@eversheds-sutherland.ie



**Peter O'Neill**

*Senior Associate*

+353 1 6644 943  
PeterOneill  
@eversheds-sutherland.ie



**Neasa Ni Ghráda**

*Senior Associate*

+353 1 6644 258  
neasanighrada  
@eversheds-sutherland.ie



**Fiona Lipsett**

*Solicitor*

+353 1 6441 470  
fionalipsett  
@eversheds-sutherland.ie

### Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.

### Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

© Eversheds Sutherland 2019. All rights reserved.

EVE.DUB.2242 05/19