

# An empirical study of unfair terms in online auction contracts in the UK: evidence of the need for better enforcement mechanisms

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Much is written about the theory of unfair contract terms in consumer contracts. The literature abundantly covers the rationale for intervention and control<sup>1</sup>, the scope of application of unfair contract term legislation.<sup>2</sup> Much also exists commenting on court decision and singling out unfair terms in a particular industry or a particular type of clause.<sup>3</sup> By contrast, few studies look at unfair terms 'in situ', attempting to assess the compliance levels of suppliers as well as the effectiveness 'on the ground' of the legislation in place and in particular its enforcement. This article proposes to do just that, using online auction contracts as its backdrop. More specifically, this article is based on the results of empirical research into the content of terms and conditions applicable to consumers on a total of 28 online auction websites. All auction sites included in the survey are established in a Member State of the European Union and operate in the UK.<sup>4</sup> The terms and conditions were

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<sup>1</sup> According to Paolisa Nebbia for example, unfair terms are controlled because of the use of standardised contract terms and/or the fact that consumers are weaker parties to a contract. See Nebbia, *Unfair Contract Terms in European Law, a study in comparative and EC Law*, Hart 2007, p. 34. Howells and Weatherill offer a more sophisticated interpretation, linking the control of unfair terms with market imperfections and the imbalance between suppliers and consumers. See Geraint Howells and Stephen Weatherill, *Consumer Protection Law*, second edition, Ashgate 2005, p. 261.

<sup>2</sup> See for example, Chris Willett, *Fairness in Consumer contracts: the case of unfair terms*, Ashgate 2007; Paolisa Nebbia, *Unfair contract terms in European Law: a study in comparative and EC law*, Hart 2007. See also, Chris Willett and Youseph Farah, *Unfair contract terms: rethinking remedies and enforcement*, in Eugene Buttigieg, *Rights and remedies for the consumer in the European Union*, Gutenberg Press (Malta) 2012, pp. 29-48.

<sup>3</sup> See for example, the scholarship studying *Office of Fair Trading v Abbey National Plc [2009] UKSC 6*, including Simon Whittaker, *unfair contract terms, unfair prices and bank charges*, M.L.R. 2011, 74(1), 106-122.

<sup>4</sup> Note that since data collection ended a small number of sites are no longer accessible. They continue to be included as they represent an accurate snapshot of compliance during the period of study enabling to derive trends and infer relevant course of action for the future.

collected between February 2012 and March 2013 and analysis conducted in April/ May 2013.<sup>5</sup>

Online auctions have been used as a method of sale to consumers for the best part of 20 years, democratised by the success of eBay in the mid 1990's. The spread of auctions as a popular way to sell property evolved across the years and many auction models are now competing. Essentially, two types of platforms are in operation: intermediary websites and proprietary websites. The survey conducted followed this architecture and tested compliance of number of clauses contained in terms and conditions on intermediary and proprietary auction platforms.

The archetype of the intermediary model is eBay, which enables sellers to organise auctions as well as fixed price sales, and matches them with buyers. eBay acts as an intermediary that does not take possession of the goods put up for sale, nor does it intervene in the collection of payments or the delivery of the goods. Other sites operate along the same model in the UK.<sup>6</sup> In total, the survey included 14 intermediary websites of varying size.<sup>7</sup>

The typology of proprietary website is more complex. The survey included a total of 14 of such sites, made out of a number of sub-groups: specialised auctions, tv auctions, penny auctions, sealed auctions, unique bid auctions and chicken race auctions.

Two specialised auction sites were included in the survey. Specialised auctions run like eBay, but since the sales are organised by the principal owning the site, there is no fees other than the price of the winning bid to pay. As their name indicates, they are auctions that run for specialised goods, in our sample, namely household appliances and Golf equipment.<sup>8</sup>

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<sup>5</sup> While I acknowledge that it is possible that some terms may have changed during the collection period and the results may, as a result, not reflect the exact landscape, a spot check of terms revealed no changes. Many of the Terms and conditions collected also reflected that they had not been updated for some significant periods (some dating back to 2010), indicating that the results obtained can be seen as representative at the time of submission to the publisher.

<sup>6</sup> Note that eBay also operate as a pay-to-sell site, a model mostly followed by all other intermediary websites with a few exceptions.

<sup>7</sup> The following sites were included in the sample: eBay, Cqout, eBid, Zolanta, 121bid, 2made, Armchair trading, auction1, Avabid, CJS auctions, Dream Auctions, Flogitall, Specialist auctions and UK Bids Away.

<sup>8</sup> The two sites included in the sample are Golfbidder and Comet clearance. The latter is now defunct at the time of writing because the mother company that also owned many high street shops has folded.

Four television auctions sites were included in the survey.<sup>9</sup> Those auctions run on television channels but are also accessible online, often in real time. Those websites run mostly Dutch auctions<sup>10</sup> but on a descending price model. In those auctions the successful bidders have to bid before quantities run out while the price decreases at regular interval. At the end of the auction, all buyers pay the lowest price. The television channel is normally in possession of the goods it sells and acts therefore as a principal and not an intermediary as was the case for eBay.

In penny auctions, a price ascending technique is normally used to determine the winning bid. The auctions are run by a principal, the owner of the website, which offers for sale mostly electronics and other attractive items that have normally a fairly high ticket price in the shops. Bidders have to pay to place a bid online and this cost can vary, depending on the site and sometimes the item put up for sale. The bidders will pay for each bid placed and the site generates revenue not from the sale of the item per se, but from the placing of bids. Those auctions are called penny auctions because bids only go up by increments of one penny at a time. The highest bidder at the end of the auction will be the winner and will pay in addition to the cost of the bids placed already, the final value of the bid. However, losing bidders cannot recoup the costs they had to pay to enter the auction, leaving many consumers disappointed and out of pocket.<sup>11</sup> The survey included three penny auction sites.<sup>12</sup>

Techniques such as unique bid auctions, sealed bid auctions and chicken race auctions are also starting to develop, all tending to prefer pay-to-buy business models similar to penny auctions. Often those sites carried a number of mixed auction models. Bidson for example offers penny auctions, lowest unique bid and chicken race auctions. The sample

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<sup>9</sup> Those sites were gems.tv, bid.tv, speedauctions.tv and pricedrop.tv.

<sup>10</sup> Dutch auctions generally are auctions where multiples of the same items are available. They are traditionally organised following an ascending bid technique allowing multiple buyers to place a bid and all win the auction, up to the maximum quantity available. The use of this technique is also found on some intermediary platforms.

<sup>11</sup> This has raised concerns and in the USA, penny auctions were amongst the top 10 scams according to the Better Business Bureau, <http://www.bbb.org/blog/top-scams-of-2011.html>, accessed 17/04/2012. There are clear concerns about those sites in the UK also and the OFT acted back in 2010 to investigate resulting in the closure of one site and undertaking being agreed with a software company supplying this industry and who had included an artificial bid function considered to amount to an unfair commercial practice. For more information on this, see <http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/penny-auctions-battybid/> and <http://oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/penny-auctions-scriptmatix/>, both accessed 17/04/2012.

<sup>12</sup> This included Madbid, Ziinga and Quibids.

included a total of five sites using a variety of those auction techniques.<sup>13</sup> In unique bid auctions, the winner of the auction will be the buyer with the lowest (low bid auctions) or the highest unique bid (high bid auction).<sup>14</sup> In sealed bid auctions, buyers will only be able to place one single bid, and the winning bid will be the highest bid placed by the end of the auction.<sup>15</sup> Chicken race auctions follow a slightly different model. To enter the auction, participants have to pay a fee for which they can bid on a number of selected auctions. The winner of each auction is the person making the highest bid on a descending price auction. Auctions last for a short space of time (10 minutes or so).<sup>16</sup>

This article will start by laying down some basic legal principles concerning the control of unfair terms in the UK, before proceeding with a review of some of the terms uncovered as well as an assessment of their fairness. This part will conclude that compliance levels are rather low, considering that legislation has been in force for well over a decade in an industry that is no longer in development. This article moves on to demonstrate that amidst the lack of compliance with unfair term legislation, the current enforcement model is unlikely to yield positive results. The article concludes with a few practical solutions enabling prevention as well as improving enforcement and consumer protection on online auction platforms.

## **1. Control of unfair terms: basic legal principles guiding the survey**

The control of unfair terms in the UK finds its origin in the doctrine of incorporation of terms. Legislation was later enacted to correct the most unfair of terms (exclusion clauses) in all types of contracts through the Unfair Contract Terms Act 1977.<sup>17</sup> More recently the Unfair Terms in Consumer Contracts Directive<sup>18</sup>, implemented in the UK by the

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<sup>13</sup> The sites included in the sample are: Auctionair, Bidson, Spree4, Bassabids and Fastbidding.

<sup>14</sup> For an example of those auction techniques, see [www.auctionair.co.uk](http://www.auctionair.co.uk), bidson, spree4.com, Bassabids (all included in the survey).

<sup>15</sup> Auctionair.co.uk (included in our sample) also runs this type of auctions on some products.

<sup>16</sup> For more details, see <http://www.bidson.com/uk/chicken-race-auctions/how-it-works/>, last consulted 21/05/2013.

<sup>17</sup> Unfair Contract Terms Act 1977 (1977, c. 50). This Act still operates in the UK and can overlap with more recent legislation. It has a wider scope and can apply to B2B relationships as well as include notices and not just contractual relationships. However it is reserved to exclusion clauses only. All other clauses are not within its scope.

<sup>18</sup> Council Directive 93/13/EEC of 5. April 1993 on Unfair Terms in Consumer Contracts OJ L 95/29, 21.04.1993.

Unfair Terms in Consumer Contracts Regulations 1999<sup>19</sup> provides protection from unfair terms that have not been individually negotiated<sup>20</sup> in contracts concluded between a seller and a consumer. It is this latter piece of legislation that the survey used to assess the fairness of terms contained in online auction terms and conditions.

According to Reg 5, a term is *“regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”*.

There are therefore two main hurdles for unfairness to be demonstrated. First, the term needs to cause a significant imbalance between the parties, to the detriment of the consumer. Schedule 2 contains an indicative and non-exhaustive list of the terms, which may be regarded as unfair.<sup>21</sup> This includes terms granting traders ill-defined discretionary powers, especially when no equivalent protection is extended to consumers or terms imposing disproportionately heavy burdens on consumers and protecting the trader from claims that the consumer would ordinarily expect to be able to make.<sup>22</sup> The terms listed in the Regulations’ Schedule 2 are very diverse, but cover many of the terms habitually found in consumer contracts. However, because Schedule 2 is only a grey list, each terms needs to be assessed for fairness on a case by case basis to decide if it creates a significant imbalance between the parties or not. Under the Regulations, unfairness shall not be assessed in isolation. Under Reg 6, the *“unfairness of a contractual term is assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependant”*. As a result, the survey looked at each suspect term, taking into account a number of factors, including assessing if the process by which the consumer is committing himself is transparent or it may be construed as unfair. Terms must also be expressed in

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<sup>19</sup> SI1999/2083.

<sup>20</sup> Under Regulation 5(4), it is for the seller or supplier who claims that a term was individually negotiated to show that it was. In B2C contracts, there is therefore a presumption that terms are not negotiated but rather imposed by the supplier.

<sup>21</sup> Reg 5(5).

<sup>22</sup> G. Howell and S. Weatherill, *Consumer protection Law*, 2<sup>nd</sup> edition, (Aldershot, Ashgate 2005) 281.

plain and intelligible language or the supplier risk the term be interpreted against him under Reg 7, an element that is taken into consideration in the study conducted.

Second, the term needs to be contrary to the requirement of good faith. Commentators agree that the concept of good faith, whilst familiar to continental lawyers, is a relatively new concept for English lawyers.<sup>23</sup> Good faith involves fair dealing and the absence of 'sharp practice' according to Lord Bingham in the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*.<sup>24</sup> Lord Bingham further refined the definition of 'good faith' in *Director of Fair Trading v First National Bank Plc*<sup>25</sup> and noted that '*good faith in this context is not an artificial or technical concept; nor, (...) is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.*'<sup>26</sup> The requirement of good faith is one of fair and open dealing. This dictates that the online auction platform must behave in a way, which enables the consumer to make a well informed choice, having knowledge of the terms of the contract and what they imply. Any behaviour by which a business tries to camouflage terms in small print or lose it in a jungle of hyperlinks may be interpreted as contrary to the principle of good faith in the light of the above case law.

Any terms found to be unfair will not be binding on the consumer under Reg 8, a sanction which is, as I will explain, inappropriate for online auction contracts.

## **2. Review of a selection of unfair terms found in online auction platform's terms and conditions**

The terms and conditions varied greatly in their content. From very succinct to very detailed<sup>27</sup> accounting for discrepancies in some of the results. This was the case, for

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<sup>23</sup> Woodroffe and Lowe's, *Consumer Law and Practice*, seventh edition, (London, Sweet & Maxwell 2007) 166. G. Howell and S. Weatherill, *Consumer Protection Law*, 2<sup>nd</sup> edition, (Aldershot, Ashgate 2005) 285.

<sup>24</sup> [1988] 2 W.L.R. 615 at 620.

<sup>25</sup> [2002] 1 AC 481 (HL). Note that this case was decided against the backdrop of the 1994 Regulations and not the 1999 Regulations, but this makes little difference and the case is still good law.

<sup>26</sup> *The Director General of Fair Trading v First National Bank* [2002] 1 AC 481 (HL) para 17.

<sup>27</sup> This is for example the case of Armchair Trading and Dream Auctions, whose terms and conditions fit on one side of A4 and contains very little details and Madbid or eBay, whose contract were the most furnished. Within the sample we found a range of contracts, some of which were possibly crafted with little to no legal advice. For example, The Flogitall terms and conditions contain a rather humorous section on 'registering membership', which reads: '*Only idiots try it on with partial addresses and bogus names, we give them 24*

example, where a clause is only used in small number of sites. While in those cases less consumers are likely to be affected, it remains that the volume of consumer affected is not a measure of the unfairness of clauses.<sup>28</sup> Indeed, by means of private enforcement, only one consumer affected is sufficient for legal action to take place. Further, the measure of fairness in the UTCCR does not simply rest on actual impact, but rather on the propensity for a clause to cause a significant imbalance to the detriment of the consumer. Indeed, public enforcement dictates that a clause may be struck out from contracts before any detriment occurs for some consumers. Therefore, the presence of a clause that has propensity to cause detriment due to its unfairness is sufficient to justify its study. The survey thus considered that clauses used even in a small number of sites had sufficient significance and were included.

While the survey conducted on the 28 websites focussed on a larger number of unfair terms, this article only covers a small sample. In any event, it is important to note that out of the 28 websites surveyed, not a single one did not contain at least one term that had propensity to be unfair in isolation. Often however, terms also had a susceptibility to unfairness when put into a wider context, whereas procedural unfairness or simply by juxtaposition to a number of other terms contained in the contract.<sup>29</sup>

The terms discussed below include, terms arbitrarily reserving the right to cancel or suspend an online auction account and terms reserving the online auction platform the right to unilaterally modify the contract or service.<sup>30</sup> From even this small sample, it is possible to infer that unfair contract term legislation is deficient in protecting consumers.

## **2.1. Arbitrarily reserving the right to cancel or suspend an account**

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*hours to correct that or their membership is cancelled and IP addresses blocked for ever. We don't want these people or need them, neither do you'.*

<sup>28</sup> Although it is clear that it is in fact an important consideration for public enforcement, although the OFT has a duty to consider any complaint that a term contained in a standard form contract is unfair (see Regulations 10-12, UTCCR).

<sup>29</sup> Procedural unfairness is unfairness that affects the process leading to the conclusion of the contract. Regulation 6 UTCCR states: the *"unfairness of a contractual term is assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependant"*.

<sup>30</sup> The original survey studied further terms, including clauses unilaterally reserving the right to modify the price, clauses incorporating remote terms by reference, terms imposing onerous conditions, liability clauses and arbitration and exclusive jurisdiction clauses. The full survey will be published in my forthcoming monograph (under contract with Ashgate).

Out of the 28 sites surveyed, 75% reserved the right to cancel or suspend an account. It was unclear if such term existed in 7% of cases, mostly because the term included evoked the possibility of sanction on particular sales, but was unclear as to whether or not an account could be suspended or closed.<sup>31</sup> Finally, 18% of sites did carry terms and conditions that did not contain such term. More intermediary sites reserved such right compared to proprietary sites. Indeed, on intermediary platforms, such clause was found in 86% of cases compared to 64% only on proprietary websites. The survey looked at the justifications for suspending or closing accounts as well as the use of notices preceding such actions.

### **2.1.1. Justifications for suspending or closing accounts**

The presence of such clause is not, at face value, always problematic. Indeed, it seems perfectly justifiable for online auction sites to restrict access and participation of some users, in particular, in order to protect others. What is unfair is to impose a sanction such as suspension or cancellation without a valid justification.

Indeed, in most extreme cases where the account is cancelled, such action could be seen as contrary to Schedule 2(1)(f) according to which, *'authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer (...)'* could be considered unfair. We did not find, in any of the online auction contracts surveyed, a possibility for consumers to dissolve their contract on a discretionary basis. If such possibility exists in practice it is not clearly spelt out in the contracts. Since the discretion to dissolve is not offered to online auction consumers, online auction platforms can only proceed with objectively justified contract cancellations, or fall foul of the legislation.

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<sup>31</sup> This was the case for Avabid and Comet. On Avabid, the clause indicates that items that are put up to bids are subject to review by the staff of AVABID.com and may be removed without prior notice, if in violation with the User Agreement. On Comet, the clause indicates: *'We reserve the right to exclude you, or withdraw your participation, from any auction at any time'* but does not elaborate further on whether or not a suspension from the site would be possible.



In the sample, twelve main reasons for sanctions (including cancellation) were found (some of which could overlap). The most popular justification was the violation of the terms and conditions of use (31%) followed by the conduct of illicit activities on site (18%). Failure to comply with sales obligations such as paying the price or delivery an item (11%) came joint third with conducting practices such as shill bidding or team bidding or any kind (11%). Next, the violation of the rights of others and in particular intellectual property rights was used in 8% of cases, although on some other sites, such practices could also be caught by the conduct of illicit or illegal activities on site. Other justifications included the failure to pay fees (5%), misstatements or misleading descriptions of goods (here again sometimes covered by illicit or illegal activities on site) (5%), spamming (3%). Lastly a number of justifications exclusively concerned intermediary online auction platforms and included low feedback rating, the conduct of off-sites transactions and the lack of respect for buyer protection procedures.<sup>32</sup>

Despite the existence of an array of justifications present in the surveyed clauses, 'discretion' is a term that was found in almost all relevant clauses. On eBay, discretion can be used to decide on the appropriate sanction for repeat IP infringers, while on eBid, the site's sole discretion will be used to terminate any auction or use of the services. In practice, it is for the site to determine if the actions of the users are contrary to the site's rules or not. It would be impractical to expect an 'expert' determination from a mediator or even a court for such occurrences. However, the use of sole discretion suggests a potential for arbitrary decisions being made. If it was the case this would be a cause for concern.

Unfortunately, in the absence of data from users about potential suspensions and cancellations, the survey was not able to assess this aspect. It is true that in situations where the suspension or cancellation is considered arbitrary, the consumer is free to proceed in court in order to get re-established. This is however, only a theoretical incidence as the cost of going to court would most certainly act as a deterrent. However, one example of the application of the online platform right to cancel or suspend account disputed in court, is

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<sup>32</sup> Those justifications were found on eBay. The site does indeed offer buyer protection on some items. Sellers are required to comply with eBay's decisions on those cases.

found in the case of *eBay Europe et eBay France v DWC*.<sup>33</sup> Although the case emanates from a French court and concerns a small business and not a consumer, its findings are useful and could be persuasive on an English court. In this case, four accounts opened by DWC, an importer of motorcycles, scooters and spa products from China had been closed by eBay without warning. The closure was motivated by the fact that DWC's company directors were previously using other accounts, under the name of XSS that had been closed by eBay following much negative feedback. Indeed, the bulk of the negative feedback was due mostly to the dubious quality of their products, the misleading information communicated to their clients about the said products, and the use of tactics to avoid negative evaluations. This included the sale in mass of low value items without any link to its principal activity to build positive feedback. The practices were also the object of a press article published in a "Quad magazine" in August 2006, which criticised the activity of XSS and exposed the danger posed by the products that were sold (imported from China).

The closure, in accordance to eBay's terms and conditions, required XSS not to use eBay in whatever way including by the opening of new accounts or accounts linked to the litigious one. This closure was not contested. Instead Mr Louvet and Gornes created another company, DWC, the object of the present closures. DWC used with the same tactics employed by XSS and continued to source its motorcycles, scooters and other items from the same supplier in China leading to eBay deciding to close DWC accounts. While originally, a first instance court had ordered that DWC's account be re-instated but eBay appealed the decision.

The Paris Court of Appeal considered that eBay had enough elements to justify the closure, including the demonstration of the links with XSS and the fact that accounts had been reopened in violation of eBay's terms and conditions. The court also noted that given the links between XSS and DWC eBay could legitimately believe that the activity of DWC will expose eBay to liability and that the opening of new accounts was a way of getting around the previous closure. It found that eBay was not dispensed of an obligation to ensure, within its means, that the site was not used for reprehensible activities and that similarly, users had the obligation to respect eBay's terms and conditions.

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<sup>33</sup> CA Paris, 9 November 2007.

### 2.1.2. Notice of cancellation or suspension

Under Schedule 2(1)(g), a term *'enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so'* could be considered unfair.

In *eBay Europe et eBay France v DWC*<sup>34</sup>, the Court of Appeal did not find that the activity of an auction broker included an obligation to warn a user ahead of the closure of their account. This was justified, primarily because the party was a trader rather than a consumer (not benefiting from the protection of the unfair terms Directive implementation in France) but, in any event, because the grounds on which closure occurred could be considered serious, and thus not requiring notice.

As a result, it is possible to consider the following clause, found in eBid's terms and conditions fair, providing that the grounds for termination are considered sufficiently serious. The contract states: *You agree that eBid, in its sole discretion, may terminate any auction or use of the service immediately and without notice if (a) eBid believes that you have acted inconsistently with the spirit or the letter of this Terms of Service or (b) if eBid believes you have violated or tried to violate the rights of other users'.*

However, anecdotal evidence points towards the fact that some users have been barred from using online auction sites for less than serious or justified reasons (although we have not been able to verify with those sites their version of event).<sup>35</sup> For example, a post on 'screaming reviews.com', concerning a small business points towards a cancellation based on the denunciation of fraudulent activities on the site.<sup>36</sup> Similarly, on rip-off report, a number of allegations of closure on Quibids were easily located.<sup>37</sup>

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<sup>34</sup> CA Paris, 9 November 2007.

<sup>35</sup> This evidence primarily originates in the USA, but sites are known to operate in broadly the same manner in all jurisdictions. Thus, such reports are also relevant to EU consumers.

<sup>36</sup> See 'eBay cancelled my account because I wrote them a letter exposing the scams going on on eBay!', <http://screamingreviews.com/ebay-cancelled-my-account-because-i-wrote-them-a-letter-exposing-the-scams-going-on-on-ebay/>, last consulted 17/05/2013.

<sup>37</sup> See, Rip-off Report, Complaint review: Quibids LLC, <http://www.ripoffreport.com/r/quibids-llc/-internet/-quibids-llc-cancelled-auction-i-legitimately-won-internet-533597>, last consulted 17/05/2013. Note however that this report also contains a rebuttal apparently from a Quibids' employee claiming that the consumer in question had opened multiple accounts against the rules.

In those situations, it seems essential that the consumer be put on notice before any sanctions take place. This is because for closures concerning consumer accounts (and not small businesses), violations are likely to be less serious and therefore, any closure without adequate notice could be considered unfair under Schedule 2(1)(g). This is because in the absence of serious grounds, the absence of notice creates a significant imbalance between the rights and obligations of the parties to the detriment of the consumer.

## **2.2. Unilateral modifications to contract, service and price**

Online auction platforms terms and conditions contain a number of clauses effecting unilateral changes, most of which displayed the characteristics of an unfair term. Unilateral changes were primarily located concerning changes to the terms and conditions themselves as well as changes to the service or product offered, and on some rarer occasions the price at which a product or service is provided on online auction sites.

### **2.2.1. Unilateral changes to terms and conditions**

The survey encompassed a study of terms that fall within the scope of Schedule 2(1)(j), i.e. *'enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.'* Therefore unfairness is only derived if the modification of terms is not justified in the contract.

There are however secondary elements to consider with regard to these clauses. These concern the manner in which the changes are communicated to the consumer, as well as the freedom given to the consumer to walk away following the changes. Indeed, according to Schedule 2(2)(b), *'Paragraph 1(j) is (...) 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.'* A contrario, if such information as well as freedom to dissolve the contract is not offered, the term can be considered unfair.

Clauses in online auction contracts varied greatly, ranging from the absence of clause (on a total of 11 contracts) to pushing the responsibility of being informed about changes to consumers. The survey tested terms on all three grounds separately on the 17 contracts that contained a clause pertaining to unilateral changes of the terms and condition.

94% of clauses studied did not contain a justification for such change in the terms and condition and yet, all but a few made it very clear that the site retained the right to change terms.<sup>38</sup> Only Quibids provided a justification, although we doubt it would be sufficient since the clause indicates: *'We reserve the right to change these terms including for legal, regulatory or security reasons at any time'*. Therefore many other reasons could allow Quibids to proceed with modification without those being spelt out in the contract. Legal, regulatory or security reasons prompting changes would however be adequately justified. Thus, should controls over identity for example be changed to reduce frauds on the site, such change prompted by security concerns could be acceptable.

With regards to the way consumers are informed about any changes of the terms and conditions (justified or not), none of the sites that included a clause on this aspect provided adequate information about the changes.<sup>39</sup> 29% of clauses were clearly unfair on this point. The worst practice consists in reserving the right to revise the terms and conditions without giving prior notice.<sup>40</sup> The other 71% of clauses encountered could be deemed unfair, especially in light of the absence of justification or an absence of a clear message releasing the consumer from the contract, should he or she disagree with the changes. Indeed, in 71% of cases, the clauses often referred to informing the consumer of changes, but in most, the method by which changes would be notified was unclear. For many, it was for the consumer to monitor the changes on the website. For example, on 2made, the clause reads as follows: *'This agreement sets out legally binding terms for your*

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<sup>38</sup> Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 57% contained a clause where no justification was present and in 4% of cases, a justification was present but incomplete in our view.

<sup>39</sup> Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 18% did not provide information on changes to consumers and 43% contained some provisions for informing consumers but they were all likely to be considered unfair.

<sup>40</sup> For example, Auctionair's terms and conditions state: *'We reserve the right to review and revise our terms and conditions from time to time without giving prior notice and by participating in the auction subsequent to any revision of our terms and conditions, you agree to be bound by such changes'*.

*membership or involvement with the website and may be edited by 2made from time to time. Any modifications shall commence upon posting or notification by email, by 2made on the website. You may also receive a copy of this agreement by emailing us at: support@2made.com, subject: terms of service agreement.'* Therefore the operator retains the option to notify either via email, or by posting on the website only. This type of clause was rather frequent, sometimes only included posting changes on the website as an acceptable method to communicate the changes. Indeed, on Bidson, the terms and conditions indicate: *'Bidsons reserves the right to change these terms during on-going bidding. The new terms come into force upon being published.'*

Worst, few online auction sites using a clause enabling a change of terms (justified or not), explained that consumers should stop using the site following a change to the terms and conditions they did not agree to, and when they did, gave a realistic deadline for doing so.<sup>41</sup> Out of the sites where a clause was found, 6% used a clearly unfair term while the rest of the sample (94%) could be seen as unfair, although the clauses did not specifically block consumers from walking away.

For example, Golfbidder's terms and conditions explain: *'We reserve the right to change these terms from time to time, and to post the new terms on the website. The new terms will take effect, and will govern all activity on or through the website and/or your relationship with us, commencing one (1) week after the date of such posting (or such later date as we indicate in such posting). If you do not wish to be governed by the new terms, you may notify us within the above period of one (1) week, and from the date when the new version takes effect you must cease to use the website.'*

Yet, one week seems extremely short for a change that the consumer needs to spot on using the site, especially since no notification seems to be sent by the online platform. Further, on this site, consumers need to notify Golfbidder but it is unclear if ceasing to use the site on its own would be sufficient. It seems that one week is too short a period to enable a consumer to gain knowledge of the changes, review them and decide if they are happy to continue or wish to spot suing the site. As a result, this clause could be deemed

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<sup>41</sup> Overall, across the 28 sets of terms and conditions reviewed, 39% did not have a term, 4% were not giving consumers the ability to walk away after changes to the terms and conditions and 57% contained some provisions that were often unclear and all likely to be considered unfair.

unfair. A better practice was spotted on eBay where the period to cancel the contract is of 30 days following the changes notified by email or on the site. In any event, it seems that notification at the very least should be required. It is indeed, almost impossible for consumers to monitor changes in terms and conditions if they have not been flagged. It seems that the clause contained in the contract with Gems TV would as a result be also considered unfair. This clause states: *'These terms and conditions may be revised at any time and we reserve the right to do so. You are, therefore, advised to keep up to date with the contents of these terms and conditions as revisions are binding upon you.'* This clause would force a consumer visiting the site to review the entirety of terms upon every visit in order to avoid a change being binding. This is a term that as a result, creates a significant imbalance between the rights and obligations of the parties, in particular because the terms and conditions do not state any justifications for the changes nor makes provisions to advise the consumer of such changes.

### **2.2.2. Unilateral changes to the service offered**

Schedule 2(1)(k) of the unfair terms in consumer contracts Regulations 1999 states that terms which have the object or effect of *'enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided'* may be regarded as unfair.

The survey therefore started with testing if terms and conditions carried a clause pertaining to the unilateral modification of the service or products offered. No clause concerning the unilateral modifications of the service of product was found in 32% of cases out of the 28 sites surveyed.<sup>42</sup> Out of the sites that contained a clause<sup>43</sup>, four sites (21%)<sup>44</sup> in our sample used a clause unambiguously reserving the right to unilaterally modify the service offered, while the rest of the sample (79%) contained a clause that did have the effect to allowing modification of service or product but without directly expressing this was the case.

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<sup>42</sup> This represents a total of 9 sites.

<sup>43</sup> The sample discussed is therefore composed of 19 sites whose terms and conditions contained a clause to the object or effect of unilaterally modifying the service or product offered.

<sup>44</sup> This included eBid, Specialist Auctions, Bassabids and Golfbidder.

The survey proceeded with assessing the fairness of the terms. This included testing whether or not a justification for the unilateral modification was included in the term as well any notice that accompanied the modification. Contrary to the unilateral modification of terms and conditions, a valid reason is required but it does not have to be spelt out in the contract. This made monitoring compliance more difficult, but not impossible, since the absence of justification would not render the clause unfair, but could contribute towards making the clause ambiguous for example, or at best, should the modification occur arbitrarily unfair. Thus in the absence of a justification, it is likely that the clauses could be interpreted to the consumer's favour as already explained above.<sup>45</sup>

In the four instances (21%) where unilateral modification of service was clearly expressed, the reasons for a modification were justified via a range of reasons including changes in the law or operational requirements<sup>46</sup>, but not always able to be considered fair. Indeed, on Golfbidder's for example, the site reserves the right to close their service where they have compelling legal or technical reasons for doing so (valid reason) or otherwise at their sole discretion (reason likely to be interpreted as invalid).<sup>47</sup> Similarly, Bassabids reserves the right to cancel any sales if it is reasonable to do so, or refuse access if it is considered necessary. The vagueness of this term may, in some circumstances, be interpreted in favour of the consumer.

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<sup>45</sup> Regulation 7(2) states: *'If there is a doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail.'*

<sup>46</sup> This concerned eBid and Specialist Auctions. eBid's terms read as follows: *'We reserve the right to modify or discontinue the service if there is a change in the law or our operational requirements. We will not be liable for you for any loss you may suffer if we have to modify or cease the service for reasons beyond our control if we give you at least 30 days-notice. In certain exceptional circumstances beyond our control we may have to change or discontinue the service without giving you this amount of notice. If this is the case we will give you as much notice as we can'*. Specialist Auctions term is quasi-identical and reads: *'We reserve the right to modify or discontinue the service if there is a change in the law or our operational requirements. We will not be liable for you for any loss you may suffer if we have to modify or cease the service for reasons beyond our control if we give you at least 30 day- notice. In certain exceptional circumstances beyond our control we may have to change or discontinue the service without giving you this amount of notice. If this is the case we will give you as much notice as we can. If you do not wish to use the new operating rules or policies you should not continue to use the service after the notice requirement'*.

<sup>47</sup> The clause reads: *'We reserve the to close auctions early, to extend auctions, to cancel or withdraw listings or to terminate the entire service of providing auctions, where we have compelling legal or technical reasons for doing so (including without limitation technical difficulties experienced by us or on the internet) or otherwise in our sole discretion. Where practicable we shall try to provide reasonable advance prior notice to you of any such steps we take. We will use our reasonable endeavours to process bids which are placed, but do not guarantee that any individual bid will be processed. We are not bound contractually or otherwise to offer any of the auctions'*.



Besides a justification, all sites committed to giving prior notice of such changes, although the length of this notice period as well as the communication of those changes to consumers was not clear on all sites. Golfbidder's terms explained that the site will try to provide advance notice, but does not guarantee it will do so, whereas Bassabids did not provide a notice period at all. By contrast on both eBid and Specialist auctions, a 30 days' notice period applies. Arguably, a modification not followed by a reasonable amount of time for consumers to consider the changes and decide whether or not to continue their relationship with the online auction platform seems a pre-requisite to fairness. Otherwise, any change could be considered contrary to Schedule 2(1)(i). Indeed, such changes would have the effect of irrevocably binding the consumer to terms with which he had no real opportunity to becoming acquainted before the conclusion of the amended contract. As a result, while 30 days seems adequate especially if it accompanied by direct notification to the consumer via email, the absence of a notice period or the provision of one of short length would be inadequate and would result in the clause being considered unfair.

For the remaining 79% of the clauses concerning the unilateral modification of the service of product, the clauses often referred to the right to amend the service to deal with system outage or other technical disturbances<sup>48</sup> or allowed the site to make changes due to suspected foul play in the running of an auction.<sup>49</sup> In some instances, the clauses were primarily concerning unilateral changes to terms and conditions but also contained a reference to operating rules or policies which may form part of the way the service is supplied to consumers. For example on eBay, the terms and conditions indicate that from time to time changes may be made to additional terms policy. Those include identity, prohibited items, outage policy, accepted payments, etc. and to some extent define the service provided by eBay. Thus, reserving the right to change those policy documents may result in unilateral changes to the service provided and similar clauses have therefore been included in the result. Overall, most clauses had the potential to be unfair principally

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<sup>48</sup> For example, on Bidson the term states: *'Normally, the service is in operation 24 hours per day, seven days a week. The service may encounter operational disturbances. Bidson reserves the right to postpone dates and times for finishing an auction after unforeseen operational disturbances. Included are, but not limited to, errors, in the internet connection to the server, unauthorized access to computer systems, service interruptions at the supplier and force majeure.'*

<sup>49</sup> Ziinga's terms and conditions state: *'Ziinga maintains the right to suspend auctions, revise bidding time of on-going future auctions and re-open closed auctions upon suspicions of any misdeeds.'*

because notice periods were unclear or inexistent at worst.<sup>50</sup> For example, on the TV auction channels bid.tv, speedacutions.tv and pricedrop.tv, the term reserved the right of the operator to cancel, suspend, extend, close or withdraw any auctions at any time and only committed to trying to give consumers notice where practicable.<sup>51</sup>

As already explained, should consumers not be made aware of changes with sufficient time to consider the use of the service under the new term, clauses could be considered contrary to Schedule 2(1)(i) for irrevocably binding consumers to terms that have not be able to get accustomed to. Since such assessment needs to be made on a case by case basis we were not able to conclude on the unfairness of each term.

### **3. Potential solutions for better enforcement of unfair terms on online auction platforms**

As we have seen, at least some terms in online auction consumer contracts show a high propensity for unfairness, while others are clearly unfair. We must therefore turn towards what a consumer can do when faced with an unfair term. Unfortunately, the system of enforcement currently in place is not sufficient to offer effective protection.

Indeed, the current system relies essentially on private redress. A consumer affected by an unfair term has to go to court to obtain that the term not be binding.<sup>52</sup> This means that for every consumer subjected to an unfair close on eBay for example, a separate court case would have to be started. This is because the decision on unfairness will only have affect between the parties. As a result, the same clause can continue to apply to any other consumers that are not disputing it in court. Yet, most consumers using an online auction site will not proceed with a claim in court in order to avoid the application of a term. Rather,

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<sup>50</sup> This was for example the case on most websites that either remained silent on the existence of a notice or worst barred the availability of a notice. For example, Madbid's term states: *'Madbid reserves the right to change the auction times at any time. Additionally, Madbid can add, reschedule or remove products from the Madbid.com website at any time without notice, including auctions already in progress or live. (...) In the event that Madbid cancels an auction, Madbid may give Credits back to affected Users.'*

<sup>51</sup> The clause reads: *'Bid shopping reserves the right to cancel, suspend, extend, close or withdraw any auction at any time, and with no liability for any bids or orders taken though it shall where practicable try to give customers notice of any such decisions (...).'*

<sup>52</sup> As per Regulation 8, unfair terms are not binding. However contracts, continue to bind the parties insofar that they are capable of continuing without the removed term.

because of low understanding of their rights or because the procedure necessary to void a term is too expensive by comparison to the benefit to be obtained, consumers are likely to let the term stand and yield to its effects.

Public enforcement of a preventative nature is therefore necessary to complement private redress. In the UK, this type of enforcement is conducted by the Office of Fair Trading (OFT) under Regulation 10 which imposes a duty to consider any complaints made to it regarding the unfairness of a term. The OFT can seek an injunction to prevent the continued use of unfair terms.<sup>53</sup> In those instances the OFT can require that a term be struck out in a standard term contract, benefiting the entire class of consumers. Unfortunately, there is evidence that such public enforcement is not having the impact it ought to and that it remains somewhat inadequate to the needs of consumers.

Willett argues that preventive enforcement has limits<sup>54</sup>, mostly located in the reluctance of higher courts in the UK to take a protective approach in cases where the action is preventive rather than in individual cases where the impact of the decision will be limited to the parties. In those later cases, higher courts in England have shown that they can be more lenient and apply a higher standard of protection.

Further, the OFT is not in a position to pursue all infringements. Even with qualifying bodies being allowed to act on behalf of the OFT (such as consumer associations), resources are scarce and only the worst and most systematic infringements are likely to be pursued. To date, no intervention in the area of online auctions has taken place. This is not surprising since the industry itself and the potential losses generated by online auctions are not top priorities for enforcement authorities. Yet, the real damage caused is not quantified. Because it is at best a diffuse damage, enforcement authorities have little incentive to act. It seems therefore that solutions must be found elsewhere.

As a result, with reliance on public and private enforcement being inadequate to fully assist consumers using online auctions, it seems that ex-ante controls ought to be used. A recent economic study shows that only 4% of consumers do read terms and conditions

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<sup>53</sup> See Regulation 12.

<sup>54</sup> Chris Willett and Youseph Farah, *Unfair contract terms: rethinking remedies and enforcement*, in Eugene Buttigieg, *Rights and remedies for the consumer in the European Union*, Gutenberg Press (Malta) 2012, pp. 29-48.

presented to them online.<sup>55</sup> This means that pre-contractual information is unlikely to help ex-ante. In any event, the same study demonstrated that consumers who had read the terms continued to have incorrect interpretation of the contract terms (due to over-optimism and as a result of various biases).<sup>56</sup> Consequently, the best way to protect online auction users is, in my view to ensure via a universal mechanism, that terms do not reach online auction contracts in the first place. While this is something that may not work in every setting, it is possible to envisage that some form of industry standard may be used as a model for many online auction sites operating in the UK.

Indeed, while the empirical survey conducted did not look into the causes for lack of compliance and the use of unfair terms, the results highlight some root-causes. Compliance was indeed better on bigger sites. For example, eBay, while not carrying a perfect record, tends to perform better than other sites. This may be because it has access to better legal advice and is also more exposed having attracted the attention of enforcement authorities, courts or media in the past, all contributing to forcing the site to move towards better compliance practices. Amongst the smaller players, the survey identified a number of quasi-identical sets of terms and conditions. On intermediary platforms, a number of websites used a standard set. It seems that some of the sites using this set all appear to use the same software to run their auctions.<sup>57</sup> In the TV auction industry, 3 sites, all run by the same company, carried identical terms and conditions. However, cross-fertilisation of terms and conditions also appeared on sites not using identical software, or being owned by the same company. It appears that smaller sites possibly put terms and conditions together without any real legal knowledge or having obtained advice. A certain amount of 'copying' was clearly identified across the industry.

Therefore, it seems that one way to avoid the use of unfair terms in online auction consumer contracts may be to start by forcing big sites, through public enforcement to

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<sup>55</sup> Michael G. Faure & Hanneke A. Luth, Behavioural Economics in Unfair Contract Terms, Cautions and Considerations, *Journal of Consumer Policy* (2011) 337-358.

<sup>56</sup> Michael G. Faure & Hanneke A. Luth, Behavioural Economics in Unfair Contract Terms, Cautions and Considerations, *Journal of Consumer Policy* (2011) 337-358.

<sup>57</sup> The most common software used was PHP Pro Software, [www.phpprobid.com](http://www.phpprobid.com). The live user end demo site displays a set of terms and conditions ([http://www.phpprobid.com/auction-software-demo/terms/page/content\\_pages](http://www.phpprobid.com/auction-software-demo/terms/page/content_pages)) which seems to have been used by most sites using the software as a template without much modification.

comply with legislation. A simple action against the main auction software provider also ought to fix a vast number of issues. Such action could push standards up as the terms are likely to be emulated by smaller structures. Further, the use a set of model terms that smaller sites could use could be useful for any newcomers. It seems that the OFT could carry such model contract and enable any trader to use them as a blueprint. While variations are allowed, using the OFT standard terms could be incentivised by the ability for the trader to display some kind of kite mark.

## **Conclusions**

This empirical study revealed that many terms likely to be considered unfair were identified in online auction contracts. While this will come as no surprise, this article deplores the level of non-compliance as well as the potential detriment caused to consumers, who for lack of knowledge or resources are unlikely to challenge the imposition of such terms in their relationship with an online auction platform. While public enforcement may also assist, this technique also has limitations. Those include the reaction of higher courts setting lower standards of fairness and most importantly the lack of resources devoted to combatting unfair terms in the online auction industry. As a result, and given a particular pattern of drafting unfair term observed on online auction platforms, this article recommends the exploration of targeted public action followed by the use of model terms that are likely to be adopted by at least the smaller online auction platforms.