

## Research Article

## The English Model for Preventing Unfair Terms

Morales, María- Elisa

Phd, Universidad de Chile.

Lecturer and researcher in the Department of Legal Science, Universidad de La Frontera, Chile.

## Abstract.

Consumer contracts are characterized by being asymmetrical. Therefore, consumer contracts often contain unfair terms. Consumer Law must prevent or repress unfair terms using different control mechanisms. Faced with the internal requirement for a good control mechanism for unfair terms, comparative law could provide answers. Thus, in a micro comparison context, according to Zwigert and Kötz, if we want to propose a foreign solution, the first question is “has it proved satisfactory in its country of origin?” This question refers to how effectively the chosen country solved the problem. Our study argues that the English way of preventing unfair terms works well for a significant amount of consumer contracts and therefore should be studied by micro comparison if we seek to propose an improvement on this area in our respective internal system.

**Key Words:** Consumer Law-English Law- Comparative Law- Unfair Terms- Preventive Control.

## Introduction

Unfair terms need to be controlled to protect weaker parts of consumer contracts. From a temporal viewpoint, there are at least two ways to control unfair terms: preventive and repressive control (García, 1969). This depends on whether it operates before or after contract conclusion, respectively. The English system combines both methods, emphasizing on the first.

The current study begins by explaining the reasons why it is advisable to study preventive control of unfair terms according to English law. Reasons have to do with implementation and application of Directive 93/13 as well as others, with proper control mechanism functions.

The second Part of this study describes the *modus operandi* for preventive control of unfair terms used by the English system. This is achieved principally through an analysis of works performed by the Office of Fair Trading (OFT) in this area. However, some references are made to the Director General of Fair Trade (DGFT) and to Competition and Market Authorities (CMA), as OFT predecessors and successors, respectively.

The third part of this study concludes by synthesizing virtues of English preventive control of unfair terms.

## I. English method to preventing unfair terms rationale

According to Micklitz, in Europe, three control models for unfair terms have been distinguished, namely the German, French and English models (Micklitz, 2008). The English system has been the most successful of these three in preventing unfair terms in business to consumer (B2C) contracts, based on the following reasons.

The English system is an example for favorable reception of Directive 93/13. This is concluded by Niglia (Niglia, 2003) in a study on contract law transformation in Europe, observing a very favorable reaction to European regulations against unfair terms. Proof of this receptive attitude was the Initial implementation made by the United Kingdom through the Directive<sup>1</sup> of Unfair Terms in Consumer Contracts

Regulations (UTCCR). The definition of an abusive clause was incorporated by means of an identical copy of the definition contained in Article 3.1 of the Directive, notwithstanding references to good faith<sup>2</sup> which, as we know, is an element outside *common law* or that, at least up to now, has not played an explicit role in English contract law<sup>3</sup>. Although in the first stage there was a regulatory overlap problem, this was overcome by the *Consumer Rights Act* (CRA) in 2015<sup>4</sup>. This situation did not affect preventive control of unfair terms, as will be seen<sup>5</sup>.

At the application level, during the first years of Directive 93/13 implementation, the administrative body in charge of applying these provisions, at that time the *General Director of Fair Trading*, played a central role in monitoring adhesion contracts<sup>6</sup>. According to the Commission of European Communities<sup>7</sup>, over the first five years of implementation, the

1994/3159, then it was replaced by “Unfair Terms in Consumer Contracts Regulations, 1999, SI 1994/2083. Currently, the statute implementing this Directive is the Consumer Rights Act 2015 c.15 (Eng.).

<sup>2</sup>Artículo 3.1. Directiva: “Contract clauses which have not been negotiated individually will be considered abusive if, despite good faith requirements, they cause a significant imbalance between the rights and obligations of parties deriving from contracts, to the detriment of the consumer”. Article 5.1 UTCCR 1999: “A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

<sup>3</sup> For an analysis of good faith as a means of controlling unfair terms in English law, see: Micklitz (2005) p. 292-429.

<sup>4</sup> Consumer Rights Act 2015. March 26, 2015.

<sup>5</sup> To see a synthesis in Spanish respect the unfair terms regulations in The United Kingdom, see: MORALES (2017).

<sup>6</sup>Niglia (2003) *op. cit.*, p. 184

<sup>7</sup> EUROPEAN COMMISSION, 2000. Commission report on the application of Council Directive 93/13/EEC (April 5, 1993) on unfair terms in consumer contracts. Brussels, 27.04.2000, p. 26

<sup>1</sup> Directive 93/13 was implemented in English law by “Unfair Terms in Consumer Contracts Regulations”, 1994, SI

Office of Fair Trading (OFT)<sup>8</sup>, in applying the Directive, examined an average 800 cases per year<sup>9</sup>. This Commission also created a database called CLAB (unfair terms) which gathered judicial administrative decisions on unfair terms, of which, 625 out of 865 administrative actions on this matter came from the United Kingdom

The second reason the English system is exemplary, is its proper functioning. According to Zwegert and Kötz, within the general considerations of the comparative process, if you intend to propose a foreign solution, the first question that must be answered is whether it have been satisfactory in the country of origin (Zwegert and Kötz, 2002). This question refers to the effectiveness with which chosen countries have solved the problem (Mancera, 2008).

It is very difficult to argue categorically that a system for controlling unfair terms is effective. For some, measuring abusive clause control system effectiveness is simply an impossible task (Niglia, 2003).

Therefore, it is preferable to speak of a system which functions or fulfills to some demonstrable extent proper functioning, constructing said affirmation based on reports from official organisms and authorized doctrine opinions on the matter.

The first relevant precedent in this regard is the report by the European Commission (EC) on Directive 93/13 application<sup>10</sup>. The purpose of this document was to evaluate the application of community standards throughout the first five years. The European Commission<sup>11</sup> highlights the United Kingdom and the role of the OFT in abusive clause eradication. The OFT began negotiations with the reception of complaints, to convince respective suppliers to introduce necessary modifications to contract clauses. OFT management had a great impact. Between 1995 and 1998, 1,200 suppliers modified or eliminated unfair terms<sup>12</sup>.

The quoted CCE report was released in 2000, this being the only report issued by the body on Directive 93/13 application by Member States<sup>13</sup>.

In the United Kingdom, not only CEE studies give objective information regarding its operation, but also internal reports. In this regard, we can cite a *London Economics*<sup>14</sup>

---

<sup>8</sup> Since April 1, 2014, this body has no longer existed and its faculties have been transferred to different organizations, including the Competition and Markets Authority and the Financial Conduct Authority, [online] <<https://www.gov.uk/government/organisations/office-of-fair-trading>>. [Consult: August 25, 2013]

<sup>9</sup> EUROPEAN COMMISSION. 2000. Commission report on the application of Council Directive 93/13 / EEC (April 5, 1993) on unfair terms in consumer contracts. Brussels, 27.04.2000, p.34

<sup>10</sup> Brexit, United Kingdom has been obligated to implement several directives, including Directive 93/13 on unfair terms.

<sup>11</sup> EUROPEAN COMMISSION. 2000. Commission report on the application of Council Directive 93/13/EEC (April 5, 1993) on unfair terms in consumer contracts. Brussels, 27.04.2000, p. 26

<sup>12</sup> Ídem.

<sup>13</sup> Europe Direct. Case\_ID: 1034290 / 4058184] Question regarding Directive 93/13 [online] In: <[elisa.moralesortiz@gmail.com](mailto:elisa.moralesortiz@gmail.com)> April 8, 2015 <[citizen\\_reply@edcc.ec.europa.eu](mailto:citizen_reply@edcc.ec.europa.eu)> [consult: 2015-08-08]

<sup>14</sup> LONDON ECONOMICS. 2009. Evaluation of a sample of Consumer Enforcement Cases. [Enlínea] <<http://londonconomics.co.uk/wp->

study whose objectives were to evaluate OFT intervention group effectiveness where all the analyzed cases demonstrated enormous benefits for consumers in comparison to implied costs<sup>15</sup>. Half of the case groups studied applied abusive clause regulations<sup>16</sup>.

Good functioning of the English system is supported, in addition, by important European doctrines specialized on the matter. An example of this is a comparative study by Guido Alpa, who compares implementation of Italian and English Directive 93/13, in which he highlights the latter as much more articulated and effective (Alpa, 2008). The same author, when evaluating impact of the Directive, points out that the Italians look at the English model with great interest since the OFT has shown impressive results.

In the same sense, Niglia highlights the English case, over French and German, due to the massive administrative intervention by the OFT in applying the referred community norm (Niglia, 2003).

A reason against choosing the English system as the object of a micro-comparison could be the cultural factor as a possible obstacle to transplant or adopt the English system. However, when dealing with unfair terms, an issue arising with regard to hiring, where interests at stake are of a patrimonial nature, it is assumed that, as a result of economic globalization, solutions to these problems are much easier to implement than solutions to matters with excessive patrimonial content, such as family law or inheritance law, matters where societies are more diverse and resistant to reception (Graziedei, 2006).

An interdisciplinary study on interests at stake and cultural viability, beyond a simple theoretical comparison, is considered essential for a true legislative adaptation of the English system.

However, our aim is much more modest. We present a solution that has demonstrated the prevention of unfair terms in many B2C contracts, which should be taken into account as an example to improve internal situations.

## II. Preventive Control Of Unfair Terms In English Law

Since the implementation of Directive 93/13, there have been three agencies in charge controlling unfair terms in the United Kingdom; from 1973 to 2002 the *General Director of Fair Trading* (DGFT); from 2002 to 2014 the *Office of Fair Trading* (OFT); and, from 2014 to date, the *Competition and Markets Authority* (CMA).

This article focuses on the OFT, however reference is made to the DGFT as an antecedent and to the CMA as a continuation.

### 1. Director General of Fair Trading

Preventive control was implemented in English law by the UTCCR 1994, where the duty to investigate complaints regarding unfair terms was imposed on the DGFT<sup>17</sup>, as well as their administrative powers of applying the right of consumption or taking action against the courts, if necessary, to obtain a court order (*injunction*). Therefore, to date, unfair

---

content/uploads/2011/09/32-Evaluation-of-a-sample-of-OFTs-consumer-enforcement-cases.pdf> [Consult: 2015-08-09]

<sup>15</sup> Study results showed a global annual figure of £ 243 million in benefits for consumers compared to a cost of £ 2.5 million for the OFT. London Economics. Sample evaluation...cit., p. 2

<sup>16</sup>Íbid. p.8

<sup>17</sup>Created by the Fair Trading Act 1973. Fair Trading Act 1973. July 25, 1973.

terms can only be determined judicially.

Pursuant to the Fair Trading Act (FTA) in 1973, in the case of conduct that is harmful or unfair to consumers by a company, the DGFT was authorized to communicate with its representatives in order to obtain a written guarantee that it will abstain from executing the respective conduct (undertaking). In the event that companies did not comply with their commitments, the DGFT was entitled to sue before the courts<sup>18</sup>. However, legal action was, and has been, viewed as a last resort (Bright, 2000).

The DGFT focused more on extrajudicial actions (*undertakings*). In effect, the DGFT pursued allegations concerning unfair terms vigorously, achieving contract alterations in several business sectors through negotiation. The clear majority of cases were resolved through negotiation. Bright describes this method of operating very well:

"The United Kingdom was far behind other Member States in controlling unfair terms before the Directive. Simply, the U.K had to catch up. But it is also clear that the form selected for application of standards has been particularly effective. Under the UTCCR, the DGFT has a duty to investigate allegations regarding unfair terms, described by Bright as "the most important extension of my responsibilities in terms of consumer protection since the 1970s». The Unfair terms Unit has vigorously pursued complaints and has ensured the modification of contracts in various business sectors through a process of rigorous negotiations, almost with no need to resort to legal actions" (Bright, 2000).

Bright's research was not limited exclusively to private contracts but was rather sectorial, extending to associations of suppliers in order to expand negotiation effects, following the aforementioned model of *pyramidal enforcement*, model that both the OFT and CMA have maintained in large part for performing well. In fact, following this model, between 1995 and 1998, 1,200 companies modified or eliminated certain clauses considered abusive from their contracts<sup>19</sup>.

Soon after, the UTCCR 1994 was replaced by the UTCCR in 1999. There were no substantial changes. It was sought to fully comply with Article 7 of Directive 93/13 which allows organizations with an interest in consumer protection, to go to competent judicial or administrative bodies to determine

---

<sup>18</sup> Sections 34 and 35. The most popular case is *DGFT vs. First National Bank. DGFT vs. First National Bank [2001] UKHL 52*. This was the first time that the House of Lords evaluated the abuse of a contractual clause under the UTCCR 1994. A bank loan contract clause allowing the bank to charge consumers agreed upon interest rates was questioned on the amount of outstanding capital and any interest accrued. Through this clause the bank ensured that, in case of default, interest would be calculated according to contractual rates and not according to lowest normal rates applicable. Faced with this, the DGFT, acted before the courts to prevent this clause from being used. The bank argued that this clause was not abusive and should be excluded from abuse clause testing. On appeal, the House of Lords decided unanimously that the clause was not abusive. For a case analysis see: MacDonald, Elizabeth, "Scope and Fairness of Unfair Terms in Consumer Contracts Regulations: General Director of Fair Trading vs. First National Bank" *Modern Law Review*, 65, no. 5, 2002, pp. 763-773.

<sup>19</sup> EUROPEAN COMMISSION. 2000. Commission report on the application of Council Directive 93/13 / EEC (April 5, 1993) on unfair terms in consumer contracts. Brussels, 27.04.2000. p. 26

whether certain contractual clauses, written in light of their general use, are abusive, as to apply the appropriate and effective means to cease said clauses. Until then, only the DGFT could sue the courts for that reason.

Thus, the UTCCR (1999) came to extend the power to act against clauses considered abusive to other bodies (*enforcement bodies or public qualifying bodies*). In addition, among other changes, the qualifying bodies were given the power to request documents, such as contracts containing general clauses, and information necessary for applying laws. In any case, these organizations had to notify the DGFT of agreements or commitments reached with companies, as well as legal proceedings, with the Director being able to publish this information.

In 2002, the *Enterprise Act*<sup>20</sup> (EA) suppressed the DGFT, transferring all its functions to the OFT.

## 2. Office of Fair Trading

The OFT was, for more than 40 years<sup>21</sup>, the most important body responsible for protecting consumer rights (Woodroffe and Lowe, 2013) in the United Kingdom. Its main function was to ensure that markets work well for consumers (Howells and Weatherill, 2005).

Within its powers were informing consumers, acting as a coordinating body, reviewing company practice fairness and competitiveness, and encouraging good practice codes. In addition, the OFT held a series of specific faculties to confront suppliers who infringed consumer rights, as well as other faculties to control unfair terms.

Although the OFT was not the body in charge of ensuring free competition<sup>22</sup>, since this function corresponded to the Competition Commission (CC), its functions recognized intimate connections between consumer protection and free competition and both agencies were legally bound under one collaborative scheme. It was the duty of the OFT to send certain mergers or market situations to the CC to initiate investigations into matters, taking appropriate measures<sup>23</sup>. In any case, this is an issue that is more related to other consumer rights, such as the free choice of goods or services that may be affected, for example, when there are monopolies in markets.

Regarding the duty to inform and educate consumers of unfair terms, the OFT published, in detail, company undertakings and relapsed court orders in proceedings on unfair terms<sup>24</sup>.

In practice, dissemination has been carried out through periodic bulletins containing detailed case reports<sup>25</sup>, together

---

<sup>20</sup> Enterprise Act 2002. November 7, 2002.

<sup>21</sup> The DGFT figure was understood within the OFT department for more than 40 years (1973-2014).

<sup>22</sup> The Competition Commission was the body responsible for ensuring healthy competition between companies in the United Kingdom, for the ultimate benefit of consumers and the economy.

<sup>23</sup> According to EA.

<sup>24</sup> Regulation 15, UTCCR 1999.

<sup>25</sup> In its final stage, the OFT stopped publishing newsletters, but produced annual reports of its work. Currently, it is possible to review the cases in detail (both undertakings and courtactions)

[online]<<http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/OFTwork/consumer-enforcement/>> [consulta: 03 de enero de 2017]; annual reports from 2000 to 2013,

[online]<<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/publications/publicati>

with press releases related to significant agency "triumphs" (Bright, 2000). According to the OFT, the periodic publication of its work also allowed for coordination with other enforcers (regulatory bodies that apply the right of consumption), facilitating complaints regarding new breaches and informing other companies<sup>26</sup>.

In accordance with the above, a form of administrative control can be seen here because what it seeks is, in addition to informing consumers, to inform suppliers of unfair terms, in order to refrain from using them. It would then be, on one hand, a preventive administrative control mechanism for consumers and, on the other, a voluntary control mechanism for suppliers if spontaneous abstention effects are achieved.

According to the OFT:

"Publication of our works promotes consumer rights awareness and allows other *enforcers* to easily search online for recent or current actions which the OFT or other agencies may be carrying out."

This helps to prevent multiple criteria regarding companies, by different *enforcers*, and promotes a consistent approach through sharing results and other case details with other law enforcement agents<sup>27</sup>.

The OFT used disclosure to produce natural coordination between agencies (horizontal coordination), suppliers and consumers (vertical coordination), reinforcing the coordinating role. Disclosure warned suppliers and alerted consumers regarding unfair terms.

Moreover, the OFT also had the mission<sup>28</sup> to encourage associations of entrepreneurs or traders to compose good practice codes which safeguard and promote consumer interests, providing an official seal or symbol to approved codes. Under this formula, associations had the duty to issue an annual report through which the OFT monitored code compliance.

In 2001, the OFT strengthened the system by raising approval requirements for good practice codes. The new system was evaluated in 2006 and proved to be quite efficient. Implementation costs were found to be lower than benefits obtained and the number of complaints against associates turned out to be less compared to suppliers outside the scheme. Affiliated provider associations improved their reputation and increased the number of membership applications (Ramsay, 2012).

Currently, this system favors compliance with general consumer protection norms, and hence can be considered a control mechanism for unfair terms. However, it can also be

---

on-categories/corporate/annual-report/>[consulta: 4 de enero de 2017]; and all bulletins and guides [online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/>> [consultation: Jan. 4, 2017].

<sup>26</sup> OFT. Retention of Undertakings on the Consumer Regulations Website [online] [http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention\\_policy](http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention_policy) [consultation: Dec. 21, 2016].

<sup>27</sup> OFT. The retention of Undertakings on Consumer Regulations Website [online] [http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention\\_policy](http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/crw/445520/630922/retention_policy) [consulta: 21 de diciembre de 2016].

<sup>28</sup> This faculty was transferred to the Trading Standards Institute in 2013.

considered a mixed form of abusive clause control, since code submission to OFT approval is voluntary.

Regarding abusive clause control functions, with UTCCR modification in 1999, these functions were formally established in several organisms, in addition to the OFT. These industry regulators and consumer associations, together, have been classified as qualifying bodies (also referred to as enforcers, only in the case of regulators), namely: *The Data Protection Registrar, The General Director of Electricity Supply, The General Director of Gas Supply, The General Director of Electricity Supply for Northern Ireland, The General Director of Gas for Northern Ireland, The General Director of Telecommunications, The General Director of Water Services, The Rail Regulator, Every Weights and Measures Authority in Great Britain, The Department of Economic Development in Northern Ireland, and Consumers' Association*<sup>29</sup>.

The UTCCR foresaw coordination between the OFT and other regulators<sup>30</sup> to avoid overlapping faculties or duplicating procedures. In fact, qualifying bodies were authorized to accept commitments from companies or to act judicially if a clause was considered abusive, with the limitation of always notifying the OFT at least 14 days in advance<sup>31</sup>. Additionally, the agency had to be informed of all commitments, *undertakings* and trial outcomes<sup>32</sup>. This coordination was strengthened through different agreements reached between the OFT and *qualifying bodies* (Howells and Weatherill, 2005). The above scenario has been described by Howells and Weatherill as a "*reinvigorated pattern of enforcement*" or reinvigorated model of abusive clause control, emphasizing control by public bodies, which seems quite adequate since it ensures asymmetry exclusion between parts.

### 3. Competition and Markets Authority

The CMA was established by the Enterprise and Regulatory Reform Act (ERRA) in 2013<sup>33</sup>. It is currently the main body responsible for promoting free competition in benefit of consumers in the United Kingdom. It was established in the context of a series of reforms that sought to strengthen consumer protection and free competition to benefit the economy and consumer interests<sup>34</sup>.

When the OFT was abolished on April 1, 2014<sup>35</sup>, its functions were transferred to different bodies, among them the *Financial Conduct Authority* (FCA) and the CMA.

---

<sup>29</sup> Schedule 1, Regulation 3, Part One and Two, UTCCR.

<sup>30</sup> The coordinating role of the OFT is also foreseen in section 214 of the EA.

<sup>31</sup> Regulation 12(2), UTCCR.

<sup>32</sup> Regulation 14, UTCCR.

<sup>33</sup> United Kingdom. Enterprise and Regulatory Reform Act 2013. April 25, 2013.

<sup>34</sup> This measure was part of several reforms that aimed to provide stronger protection for consumers and promote free competition in benefit of consumer economies. OFT. 2014. Office of Fair Trading Annual Report and Accounts 2013 to 2014, 17 p.

<sup>35</sup> According to Professor Stephen Weatherill, the reasons for this change are mainly budgetary, in addition to promoting the best protection of consumer interests. Meeting with Stephen Weatherill, May 28, 2015, Somerville College, Oxford University, Oxford, United Kingdom.

Abusive clause control functions were transferred to CMA<sup>36</sup>, with very similar faculties to the OFT.

Among its functions, like the OFT, the CMA has the duty to inform and educate; it is a coordinating body with respect to other *regulators*<sup>37</sup>; it has the power to consider complaints, but, in this case, continues with the sectorial approach, same as the OFT, when those infractions are related to systematic market failures<sup>38</sup>; it must also monitor company commitments, to take legal action in case of non-compliance.

Unlike the OFT, the CMA focuses on proper market function and in the consumer protection field its powers are limited to abusive clause control<sup>39</sup>, however, with very similar competencies in that field.

Our work focuses on reviewing and analyzing preventive control of unfair terms by the OFT. The reasons for this choice, first, is because the OFT exercised this function for approximately 15 years, while the CMA has not yet served two years in that role, which is why a true evaluation of its performance is not viable or just. Second, because there are important differences in methods and powers to exercise control. The style is the same.

### III. English style preventive control

Powers by the OFT to control unfair terms were found in the UTCCR and in part 8 of the EA referring to application of rights of consumption.

The OFT and qualifying bodies shared the duty to consider legal action regarding unfair terms in contracts with general conditions (contract terms drawn for general use), unless these were without basis or reckless. Control could be exercised with respect to clauses used in contracts (repressive control), or clauses recommended for use (preventive control)<sup>40</sup>.

If a complaint was brought to the attention of a *qualifying body*, it was obliged to notify the OFT, abstaining from taking legal action<sup>41</sup>, precisely to avoid procedure duplication.

<sup>36</sup> CMA took over some OFT powers, including the power to control unfair terms. In addition, the CMA follows the Competition Commission.

<sup>37</sup> "(1) In this Schedule 'regulator' means— (a) the CMA, (b) the Department of Enterprise, Trade and Investment in Northern Ireland, (c) a local weights and measures authority in Great Britain, (d) the Financial Conduct Authority, (e) the Office of Communications, (f) the Information Commissioner, (g) the Gas and Electricity Markets Authority, (h) the Water Services Regulation Authority, (i) the Office of Rail Regulation, (j) the Northern Ireland Authority for Utility Regulation, or (k) the Consumers' Association." Schedule 3, CRA 2015. This coordination only applies for unfair terms, because there is another general coordinating body called the Consumer Protection Partnership.

<sup>38</sup> This refers to cases which affect market sectors or various companies instead of individual companies, unless an individual company has an impact on the market as a whole. Gordana Cumming. June 2, 2015 [Online] Re: Solicitation for a meeting (CMA's approach to unfair terms) <Gordana.Cumming@cma.gsi.gov.uk> [consulta: 5 de enero de 2017]. Ver: CMA. 2014. The Competition and Market Authority response to the Smith Commission, p. 8

<sup>39</sup> Remaining faculties fighting for rights of consumption passed to the Trading Standard Service.

<sup>40</sup> See: Section 10 and ss.

<sup>41</sup> Except in the case of unfounded or reckless allegations, or if another enforcer notified the OFT that it has agreed to hear the complaint. Regulation 14, UTCCR 1999.

Regarding a complaint, both the OFT and *qualifying bodies* had more than one proceeding to follow: urge voluntary compliance, exercise their administrative control powers, or act before the courts. In any case, they base their decision to initiate legal action or not against who appears to be using or recommends using an abusive clause (Woodroffe and Lowe, 2013).

In case of reaching judicial control, remaining the only way for a clause to be declared abusive, terms will not bind to consumers<sup>42</sup>. A court order could rule not only on the abuse of a particular general clause but could also extend to any similar clause being used or recommended for use, with the same effect<sup>43</sup>.

It is important to clarify that the OFT was not empowered to represent individual consumer interests<sup>44</sup>, but this did not exclude the rights of individuals to bring actions against suppliers, independent of agency actions.

Both the OFT and other enforcers had the power to request documents and information to evaluate complaints and/or verify whether commitments or court orders were complied with.

In addition, the OFT had to publish details on commitments and judicial orders given under the UTCCR, as well as inform all persons required if a clause had been the object of some administrative action or judicial order<sup>45</sup>.

In summary, if the OFT considered that a complaint contained a potential abusive clause, it could adopt one of the following strategies (Woodroffe and Lowe, 2013):

a) Opening dialogue with suppliers, inviting them to modify or eliminate the clause that, in their opinion, is abusive.

b) If the above failed, it was sought to reach a compromise or undertaking<sup>46</sup>. (Ramsay, 2012)

c) Legal action was taken as a last resort.

In this scheme it is possible to identify 3 different forms of

<sup>42</sup> The standard was copied from Directive 93/13. Regarding the scope of this sanction "it should be noted that the Union legislator has not gone further in determining sanctions applicable to unfair terms and, in particular, in the fashion in which Member States should provide that they they do not have binding effects, as required by Article 6, paragraph 1, of Directive 93/13. The use of the future indicative ("will not link") reveals nothing about the possible intention of legislators to endow the lack of binding effects of a retroactive dimension. The same legislation has clearly chosen not to use a more precise legal term, as would have been the case, for example, with an express reference to nullity, annulment or resolution. The expression used is effectively neutral, as pointed out by Advocate General Trstenjak in his Opinion in the Invitel case. Conclusions by the Advocate General, Mr. P. Mengozzi, submitted on July 13, 2016. ECLI identifier: ECLI:EU:C:2016:552.

<sup>43</sup> UTCCR, section 12.

<sup>44</sup> Consumers can direct their complaints to the Citizen Advice Consumer Service.

<sup>45</sup> Currently it is possible to review the cases in detail (undertakings as well as court actions) [Online]<<http://webarchive.nationalarchives.gov.uk/20140525130048/http://oft.gov.uk/OFTwork/consumer-enforcement/>> [consulta: Jan. 3, 2017].

<sup>46</sup> Also contemplated in Enterprise Act 2002, section 219. These are commitments offered by the offender and may include the ceasing of a conduct, compensation, or compliance with a program, etc.

applying regulations or *enforcement remedies* (Ramsay, 2012): informal agreements achieved through negotiation; administrative orders, within which we find *undertakings* or commitments of voluntary compliance; and, finally, court orders.

Negotiation, although widely used, had no legal basis, but was based on broad OFT powers to protect consumers from unfair terms. Negotiation was an informal mechanism that sought voluntary compliance. A negotiation may or may not end in commitment. A commitment or *undertaking* is preceded by a negotiation aiming to rectify or prevent a specific problem, in this case, unfair terms.

The difference between an informal negotiation and a commitment or *undertaking*, is that the first is broad, informal, and not regulated. On the other hand, an *undertaking* is an administrative remedy with a legal basis, where persons commit themselves before an administrative body to do or stop doing something specific according to legality, also linked with negotiation because the first stage involves a *face-to-face* negotiation. Commitment is monitorable and enforceable, in the sense that, if it is not complied with, the OFT can take legal action.

Negotiation was the first step. When a provider belonged to an association, contact was made with them as well, for a greater impact<sup>47</sup>. An example is the famous case of the OFT and the *British Vehicle Rental and Leasing Association* where, through negotiation, a standard contract was reached for the sector, with great impact, since the association represented 85% of the car leasing sector in the United Kingdom. When the agreement on general contract conditions fell, a powerful abusive clause preventative control took shape.

The OFT had the duty of monitoring compliance<sup>48</sup> with agreements and in the face of a breach the next step was to take legal action. However, regarding the possibility of activating judicial control, the agency continued in the same line as the DGFT, considering this possibility as a last resort. The aim was to persuade suppliers to abandon or modify clauses considered abusive, leaving, in any case, legal action for breaches of compromises reached (*undertakings*). This process induces compliance with norms without formally taking legal action (Howells and Weatherill, 2005).

Another example of an *undertaking* is the *Carcraft Automotive Group Limited*<sup>49</sup> case. Due to a series of consumer complaints, the OFT decided to investigate this provider and other companies associated with it<sup>50</sup>, discovering a series of infractions, including towards the UTCCR. The agency estimated that *Carcraft* contemplated potentially unfair terms in the terms and conditions of its post-sale contracts. The agency warned *Carcraft* that it would consider legal action in the event that satisfactory compromises were not agreed on. Finally, the company made the necessary changes and offered a commitment to the OFT.

<sup>47</sup> OFT, Unfair Contract Terms Bulletin No1 (1996).

<sup>48</sup> Section 92, Enterprise Act 2002.

<sup>49</sup> CC Automotive Group Limited: Investigation into alleged unfair practices by a national second hand car dealer. Case Reference: *Carcraft - CRE-E//25462*. Case opened: May 2009. Case closed: October 2011. [Online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/cc-automotive/>> [consultation: Jan. 21, 2015]

<sup>50</sup> All in One Finance Limited, UK Car Group Limited, Pennine Metals A Limited and Pennine Metals C Limited.

According to the *undertakings* given, the company undertook, among other things, not using clauses which have the following effects: imposing liability on consumers to check vehicle history before sale; denying vehicle mileage; and, giving the company absolute discretion as to whether or not to grant a guarantee.

According to Woodroffe and Lowe (Woodroffe and Lowe 2013) the introduction of the UTCCR caused a great impact, which was measured not by litigation volume, but by the amount of extrajudicial activity concerning regulation application, and on that basis, since then, consumers have been in a better position than before. In fact, although very few cases came to court, thousands of clauses were reviewed by the OFT. The authors gave as an example what was reported in OFT bulletins 21 and 22, which reveal that between the months of July and December, 2002, approximately 765 clauses were modified or deleted as a result of works by the OFT and approximately 38 under the works of *qualifying bodies*. In addition, OFT negotiations resulted in being economically efficient, saving hundreds of millions of pounds in litigation costs<sup>51</sup>.

OFT works were steadily evolving<sup>52</sup>, always within a pyramidal enforcement model. In the first stage (until the year 2002) it had only acted judicially once (OFT vs. First National Bank), notoriously privileging negotiations coming to stand out within the European context for administrative actions carried out<sup>53</sup>. Several court cases took place since 2002<sup>54</sup>.

Judicial control exercised by the OFT was preventive and its impact was important not only because it was exercised on general conditions, but also because precedent forces indirectly dissuaded using clauses similar to those that had already been declared abusive judicially. For example, in *OFT v Ashbourne Management Services Limited*<sup>55</sup>, the defendant acted on behalf of 700 gyms in the United Kingdom, whose contracts it managed, recruiting for them approximately 300,000 clients with the same general conditions. In this case, the High Court stated that several of these clauses were abusive and therefore not binding to consumers. Based on that decision, the OFT alerted all gyms to review their adhesion

<sup>51</sup> LAW COMMISSION. UNFAIR TERMS IN CONSUMER CONTRACTS: A NEW APPROACH? Summary of Issues Paper. July 25, 2012. p. 21. Translation by authors.

<sup>52</sup> Ramsay, Iain, *op. cit.*, pp. 317 and ss.

<sup>53</sup> "The CLAB database reveals the importance of cases handled in the United Kingdom by administrative means from the expiration date of the deadline for the transposition of Directive: 625 of the 865 administrative actions registered up to date in the Member State database. The Commission launched the "CLAB" project (unfair terms) immediately after the adoption of Directive 93/13 / EEC. The aim was to create a tool for monitoring the practical application of the Directive through the creation of a database that would bring together "national jurisprudence" on unfair terms". EUROPEAN COMMISSION (2000). Commission report on the application of Council Directive 93/13 / EEC (April 5, 1993) on unfair terms in consumer contracts. Brussels, 27.04.2000, pp. 34 and 12

<sup>54</sup> Among them: *Office of Fair Trading vs. Abbey National plc and Others* [2009] UKSC 6; *Office of Fair Trading vs. Foxtons Ltd* [2009] EWHC 1681 (Ch); *Office of Fair Trading vs. Ashbourne Management Services Ltd & ors* [2011] EWHC 1237 (Ch). Ramsay, Iain, *op. cit.*, pp. 326 and ss.

<sup>55</sup> *Office of Fair Trading vs. Ashbourne Management Services Ltd & Ors* [2011] EWHC 1237 (Ch).

contracts and verify if they contained similar clauses, opening investigations, working jointly with the companies in contract improvement, and signing several agreements with providers<sup>56</sup>.

In a second stage within its evolution (since 2000 approximately), the OFT began to concentrate its works on "high-impact cases" (Ramsay, 2012) involving large business groups, merchant associations and "super complaints"<sup>57</sup>.

As a consequence of sectoral approaches (*sector-wide approach*), the number of cases reviewed by the OFT decreased in quantity, but without affecting intervention power. The previous became an OFT tendency until its closing.

In fact, following amendments to consumer protection regimes introduced in 2013, the Local Authority Trading Standards Services began to play a more important role in consumer protection legislations at the national level. The OFT inclined its actions to violations which demonstrate systemic failures in a market. OFT actions were no longer directed against individual companies, but groups of several companies or sectors, unless the first was appropriate to set precedents or could have an impact on the market<sup>58</sup>.

The following is a comparison of commitments adopted in different periods, to clarify the situation: 116<sup>59</sup> between April 2003 and March 2004, and only 20<sup>60</sup> between April 2012 and March 2013.

Changes in general conditions were sought for large parts of sectors, maximizing impacts of their works. Specifically, negotiations took place with supplier organizations which represented sectors with significant abusive clause problems, providing them with general contract models. It was possible to preventively influence a greater number of suppliers using this strategy than negotiating individually with each one of them<sup>61</sup>.

In the used car market, approximately 300 dealers were able to use general conditions resulting from OFT<sup>62</sup> actions. In the tickets sector, fairer conditions for consumers were achieved as a result of negotiations with the *Society of Ticket Agents and Retailers* (STAR), where several of its members, among them *Lastminute.com*, *Ticketmaster*, the *Big Bus Company*, agreed to implement a contract model reviewed by the OFT<sup>63</sup>.

---

<sup>56</sup> To see the implications of the Ashbourne case see: CMA. Health and fitness clubs: unfair contract terms. Office of Fair Trading (OFT) closed consumer enforcement case, [Online] <https://www.gov.uk/cma-cases/health-and-fitness-clubs-unfair-contract-terms>. > [Jan 21, 2017]

<sup>57</sup> Complaints made by organizations to protect consumer rights regarding a market that is or appears to be significantly harming consumer interests. See: Section 11, Enterprise Act, 2002.

<sup>58</sup> [Online] <<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/OFTwork/consumer-enforcement/internet-enforcement/?jsessionid=EC4FCAA88551E13CB267FB12B074179F>> [Jan 21, 2017]

<sup>59</sup> OFT. Annual Report and Resource Accounts 2003-2004. SUMMARY OF OFT CONSUMER LAW CASEWORK 2003 TO 2004 EXCLUDING CONSUMER CREDIT.

<sup>60</sup> OFT. Consumer protection casework, April 1, 2012 to March 31, 2013

<sup>61</sup> OFT. Annual Report and Resource Accounts 2003-2004. Objective 1: enforcing consumer protection legislation. p. 30

<sup>62</sup> Idem.

<sup>63</sup> OFT. Annual Report and Resource Accounts 2009-10, 26p.

In order to enhance abusive clause prevention within the discussed sectoral approach, the OFT published guides<sup>64</sup> for consumers in commercial sectors considered especially risky, using as criteria the number of complaints, for example: "Guidance on unfair terms in tenancy agreements" and "Guidance on unfair terms in health and fitness club agreements"<sup>65</sup>.

The OFT has understood that consumers who understand their rights play an important role in ensuring that companies comply with consumer rights, for this reason, the OFT sought to align consumer education with supplier education, to maximize impacts through periodic publications of guides and reports. Companies are more likely to improve their compliance with standards if they perceive that consumers are better trained<sup>66</sup>.

#### IV. Final considerations

Abusive clause preventive control has existed in the United Kingdom since 1994. Since then, the OFT works have evolved from reviewing a large number of cases involving individually considered companies, towards a sectoral approach based on revision of general contract conditions by sectors, maximizing performance and impact.

Within OFT evolution, there are certain characteristics in control methods that were maintained, which are surely the reason for success.

The first is the *enforcement model* which prefers compliance before sanctions (*compliance approach*) in the context of a dynamic pyramid where negotiation (or even self-regulation) is at the base and sanctions are at the top (*pyramid of enforcement*).

The OFT illustrates the above very well. Such was the preeminence that was given to negotiation that the agency has been described as a negotiating agent for consumers (Ramsay, 2012)<sup>67</sup>. The OFT was able to achieve voluntary compliance through informal negotiations or commitments with suppliers, applying a mechanism of mixed administrative control which combines agency actions with the will of companies.

The OFT also influenced the voluntary compliance of norms by participating in the elaboration of good practice codes that, in turn, encouraged ADR mechanism existence; publishing in detail reviewed cases and clauses considered abusive, to inform consumers, entrepreneurs and other enforcers; and, publishing guides or guidelines on unfair terms by sector.

In addition, the OFT had the duty to monitor compliance with the agreements or commitments regarding unfair terms. Whether negotiation failed or if commitments were not fulfilled, then the agency acted in court to obtain abuse declarations, thus activating judicial control.

As Bright argues (Bright, 2000), it is interesting to speculate why this mixed control formula has been so successful and why suppliers have abandoned or modified general clauses, without forcing the issue until judicial control. According to the author, it is presumably due to fear of bad publicity. There

---

<sup>64</sup> National Audit Office. 2003. The Office of Fair Trading Progress in Protecting Consumer Interests. REPORT BY THE CONTROLLER AND GENERAL AUDITOR HC 430 Session 2002-2003: March 6, 2003, pp.31-33.

<sup>65</sup> [Online] <<https://www.gov.uk/government/publications/unfair-terms-in-health-and-fitness-club-agreements>> [Jan. 17, 2017].

<sup>66</sup> OFT. 2010. Consumer Law and Business Practice Drivers of compliance and non-compliance, pp. 63-64.

<sup>67</sup> "The OFT as a bargaining agent for consumers", p. 357.

is also the fact that many of the clauses can be considered unfair only in part and modifying them can save part of their original wording, but, under judicial control, the clause is declared abusive and will not obligate consumers.

Moreover, it should be mentioned that there were increasing interests by business sectors to avoid the effects of precedent doctrines, since, once a clause is declared abusive, it will most likely influence modification, at the request of state agencies, of all contracts that contain similar clauses, voluntarily, by persuasion, negotiation, *undertaking*, or court order.

In short, preventive administrative control of unfair terms in English law can be classified as an experience that should be regarded as an object of micro comparison when it is sought to improve the respective internal system.

First, because it has several control mechanisms: voluntary, administrative and judicial, attacking the unfair terms from several sides and avoiding system permeability.

Second, because control is exercised mostly over general contract clauses and not on individual accession contracts<sup>68</sup>. In addition, an attempt was made to cover market sectors by exercising control through supplier associations or by following high impact cases. Both circumstances maximize control effects by achieving a large number of potential contracts.

Third, because mixed administrative control exercises and judicial control activation, are used by several agencies coordinated by the OFT, which reinforce or strengthen control, especially when it comes to matters whose specialty requires an expert eye, such as telecommunications.

Finally, sanctions are avoided seeking compliance with legal norms.

This system or model of preventive control has been very well valued throughout its validity. Several opinions can be cited, both from doctrines and reports of organisms that highlight its proper functioning. For example, Bright has argued that it is a particularly effective system (Bright, 2000) the National Audit Office has highlighted system success and its efficiency; according to the European Commission, the abusive clause control system of the United Kingdom has brought quite satisfactory results; Ramsay has pointed out that the OFT demonstrates the capacity of an administrative agency to produce changes in general conditions of a sector; and Collins, commenting on a work by Alpa, maintained that the work by the OFT seems to have been especially effective in controlling unfair terms and that this success is related precisely to agency approaches which favor negotiation<sup>69</sup>.

The above statements maintain that the English system for preventive control of unfair terms, conformed by a mixed and coordinated formula of control mechanisms, without prejudice to repressive control, has achieved the consumer rights protection by avoiding abusive clause incorporation in a significant number of contracts and is, therefore, an exemplary preventive control system.

## V. References

- [1] Alpa, G. (2008). *Standard Contract Terms: The Role of the Courts and Moral Persuasion by Independent Authorities*. Collins, H (Ed.) *Standard Contract Terms in Europe. A Basis for and a Challenge to*

<sup>68</sup> Regulation 12, UTCCR 1999.

<sup>69</sup> Collins, Hugh. "The Directive on Unfair Terms: Implementation, Effectiveness and Harmonization". In Collins, H. (Ed.) *Standard Contract Terms in Europe. A Basis for and a Challenge to European Contract Law*. Lower countries, Kluwer Law International, 2008, p.10.

- European Contract Law. The Netherlands: Kluwer Law Internationals BV.
- [2] Bright, S. (2000). *Winning the battle against unfair contract terms*. *Legal Studies*, 20, 3.
- [3] Collins, H. (2008). *The Directive on Unfair Terms: Implementation, Effectiveness and Harmonization*. Collins, H. (Ed.) *Standard Contract Terms in Europe. A Basis for and a Challenge to European Contract Law*. Lower Countries: Kluwer Law International.
- [4] Graziedei, M. (2006). *Comparative Law as the Study of Transplants and Receptions*. Reimann, M., & Zimmermann, R. (Eds.). Oxford: Oxford Handbook of Comparative Law, OUP.
- [5] Howells, G., Weatherill, S. (2005). *Consumer Protection Law*. 2nd Ed. Ashgate. Aldershot.
- [6] Macdonald, E. (2002). *Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations: Director General of Fair Trading v First National Bank*. *Modern Law Review*. 65, num. 5.
- [7] Mancera, A. (2008). *Consideraciones durante el proceso comparativo*. Mexico: Boletín Mexicano de Derecho Comparado. Nueva serie, núm. 121.
- [8] Micklitz, H. (2008). *Some reflections on Cassis de Dijon and the Control of Unfair Terms in Consumer Contracts*". Collins, H. (Ed.) *Standard Contract Terms in Europe. A Basis for and a Challenge to European Contract Law*. Lower Countries: Kluwer Law International.
- [9] Micklitz, H. (2005). *The Politics of Judicial Cooperation in the EU. Sunday Trading, Equal Treatment and Good Faith*. Cambridge University Press.
- [10] Morales, M. E. (2017). *Reforma al derecho inglés en materia de cláusulas abusivas*. Chile: Revista Chilena de Derecho Privado, núm.28.
- [11] Nava, W. (2017). *Problemas de ejecución en el marco de los sistemas extrajudiciales de resolución de conflictos en línea, vinculados al comercio electrónico B2C*. México: Boletín Mexicano de Derecho Comparado, nueva serie, núm. 149.
- [12] Niglia, L. (2003). *The transformation of Contract in Europe*. Lower Countries: Kluwer Law International.
- [13] Ramsay, I. (2012). *Consumer Law and Policy. Text and Materials on Regulating Consumer Markets*. 3rd Ed., Oxford and Portland. Oregon: Hart Publishing.
- [14] Woodroffe, G., Lowe, R. (2013). *Woodroffe and Lowe's Consumer Law and Practice*, 9th Ed. London. Sweet & Maxwell.
- [15] Zweigert, K., Kötz, H. (2002). *Introducción al Derecho Comparado*, trad., de Arturo Aparicio Vázquez. Oxford: OUP.

## Author Profile

### Morales, María- Elisa

Phd, Universidad de Chile.

Lecturer and researcher in the Department of Legal Science, Universidad de La Frontera, Chile.

Member of the Research Center on International Challenges (CIDI) and of the Research Center of Economic and Consumer Psychology (CEPEC), Universidad de La Frontera Chile.

Member of the Faculty of Legal and Business Sciences,

Universidad de La Frontera, Temuco, Chile. Francisco Salazar 1145, Temuco, Región de la Araucanía, Chile.