

# STATES OF JERSEY



## **DRAFT EU LEGISLATION (CONSUMER PROTECTION – UNFAIR PRACTICES) (JERSEY) REGULATIONS 201-**

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**Lodged au Greffe on 26th October 2015  
by the Minister for Economic Development**

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**STATES GREFFE**





Jersey

# **DRAFT EU LEGISLATION (CONSUMER PROTECTION – UNFAIR PRACTICES) (JERSEY) REGULATIONS 201-**

## **REPORT**

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### **Background**

In November 2010 the Minister for Economic Development published a Green Paper consultation seeking the views of consumers, consumer organisations, businesses and business representative bodies, on the desirability of introducing new consumer protection legislation to deal with unfair trading practices. The Green Paper set out a number of examples of trading practices in the Island which were unfair to consumers but for which, ultimately, legislative action was not possible.

The consultation also highlighted that the European Union (EU) had introduced the Unfair Commercial Practices Directive in 2005 with the aim of harmonising unfair trading laws in all EU member countries to ensure consistency across trading borders. The key to the Directive was that it did not introduce additional and unnecessary burdens on businesses, so if they do not engage in deceptive or dishonest practices there are no compliance costs.

The Green Paper generated 14 written responses which all expressed support for the introduction of legislation, and there was general agreement that it should be based on provisions in the Unfair Commercial Practices Directive.

Therefore the Minister for Economic Development has decided to propose these Regulations to ensure that consumers in Jersey are protected in the same way as consumers in the EU.

### **The draft Regulations**

The Regulations will control unfair practices used by traders when dealing with consumers, and they set out how this will be done. Persistent engagement in unfair practices could ultimately lead to action being taken through the criminal courts, but it must be stressed that this would be a last resort.

There are 31 specific practices (as set out in the Directive) that are always considered to be unfair, and include sanctions against aggressive practices. The Regulations prohibit 'misleading actions' and 'misleading omissions' that cause, or are likely to cause, the average consumer to take a transactional decision he would not otherwise have taken. They apply to commercial practices relating to products (which includes both goods and services) before, during and after a contract is made.

### **What is prohibited?**

Effectively, the Regulations prohibit trading practices that are unfair to consumers. There are 4 different types of practices which are covered –

- practices prohibited in all circumstances
- misleading actions and omissions
- aggressive practices
- general duty not to trade unfairly.

For the last 3 practice types mentioned above, it is necessary to show that the behaviour of a trader has an effect or is likely to have an effect on the actions of a consumer. This does not mean that there has to be evidence about how any particular individuals have been affected, as the test looks at the effect or likely effect on the average consumer.

The Regulations recognise that different types of consumers may react to a practice in different ways, and identify 3 different types of consumer –

- the average consumer
- the targeted consumer
- the vulnerable consumer.

### **Practices prohibited in all circumstances**

The Regulations will introduce 31 practices that are always considered to be unfair and are therefore banned in all circumstances. These practices are set out in Annex 1 to the Directive and they are transposed by reference in Regulation 3(2). The banned practices include –

#### False endorsements/authorisations

- false claims of membership of trade associations;
- claiming a product has been approved by a public or private body when it has not;

#### Misleading availability

- bait advertising (or ‘bait and switch’), where a trader lures a consumer into believing he can buy a product at a low price when the trader is aware they do not have reasonable stock available, or are not able to supply at that price; or attempts to ‘up-sell’ to a higher-priced product;
- falsely stating a product is only available for a very limited time in order to make the consumer make an immediate decision;

#### Misleading context/effect

- claiming a trader is going to cease trading or move premises when they are not (for example, bogus closing-down sales);
- falsely claiming a product has curative properties;
- describing a product as ‘free’, ‘gratis’, ‘without charge’ or similar if a consumer is going to have to pay more than the cost of responding to the advertisement and collecting or paying for delivery of the item;
- including an invoice or similar in marketing material, implying a consumer has ordered the product when he has not;
- failing to make it clear that a person is actually a trader or creating the impression he is a consumer (for example, failing to indicate trade status when selling a second-hand car);
- creating the impression that a product can legally be sold when in fact it cannot;

### Pyramid schemes

- operating or promoting such schemes is specifically prohibited, provided they fit within the definition of a pyramid scheme (that is, a scheme where a consumer pays for the opportunity to receive a greater payment that is derived primarily from the introduction of other consumers into the scheme, rather than from the sale or consumption of products);

### Prize draws

- competitions where the prizes described (or equivalent) are not awarded;
- creating the false impression that a consumer has won, or will win, a prize when there is no prize; or claiming the prize is subject to the consumer paying money or incurring a cost;

### Aggressive sales

- creating the impression a consumer can't leave the premises until a contract is formed;
- visiting a consumer at home and refusing to leave when asked to leave (except when the trader has a legal right to enforce a contractual obligation);
- making persistent and unwanted approaches by telephone, fax or e-mail (except when a trader has a right to enforce a contractual obligation);
- making a direct appeal to children to buy a product or to persuade their parents to buy a product for them (pester-power);
- telling a consumer a trader's job will be in jeopardy if the consumer does not buy the product;

### Unreasonable demands

- requiring a consumer who wishes to claim on an insurance policy to produce irrelevant documents, or failing to respond to correspondence in order to dissuade the consumer from exercising his contractual rights;

### Inertia selling

- demanding payment for products sent to the consumer that he did not ask for;
- demanding that such unsolicited products are returned.

### **Misleading actions and omissions**

The Regulations prohibit 'misleading actions' and 'misleading omissions' that cause, or are likely to cause, the average consumer to take a different transactional decision, that is, any decision taken by the consumer concerning the purchasing of a product. A practice can mislead by action or omission or both. These prohibitions aim to ensure that consumers get from traders, in a clear and timely fashion, the information they need to make an informed purchasing decision.

### Misleading actions

Regulation 4 prohibits giving false information to, or deceiving, consumers. A misleading action occurs when a practice misleads through the information it contains, or its deceptive presentation, and causes, or is likely to cause, the average consumer to take a different transactional decision than he would otherwise have taken.

There are 3 different types of misleading actions –

- misleading information generally
- creating confusion with competitors' products
- failing to honour commitments made in a code of conduct.

The information that may be considered as misleading is wide, including such things as –

- the existence or nature of the product – for example, advertising goods that don't exist
- the main characteristics of the product – for example, the benefits of the product or the geographical origin
- the price or the manner in which it is calculated
- the need for a service, part, replacement or repair
- the nature, attributes and rights of the trader – such as qualifications.

#### Misleading omissions

Regulation 5 prohibits giving insufficient information about a product. It is likely to be a breach if a trader fails to give consumers the information they need to make an informed choice in relation to a product if this would cause, or be likely to cause, the average consumer to take a different transactional decision. For example, to make an informed decision about whether to buy or how much to pay, the average consumer buying a car needs to know whether the car has previously been an insurance write-off. The trader therefore has to disclose this information, whether or not the consumer asks for it.

Traders will be required to give information to consumers in a timely manner. It should be provided to assist the consumer in making an informed choice. Supplying information too late could constitute an omission.

It will be a breach of the Regulations to –

- omit material information
- hide material information
- provide material information in a manner that is unclear, unintelligible, ambiguous or untimely
- fail to identify the commercial intent (unless this is apparent from the context).

'Material information' means information that the consumer needs in order to make an informed transactional decision, and generally any information required to be given by law.

#### **Aggressive practices**

Regulation 6 prohibits aggressive commercial practices that intimidate or exploit consumers, restricting their ability to make free or informed choices. In order for an aggressive practice to be unfair, it must cause, or be likely to cause, the average consumer to take a different transactional decision.

A commercial practice is aggressive if –

- it significantly impairs, or is likely to significantly impair, the average consumer's freedom of choice or conduct in relation to the product through the use of harassment, coercion or undue influence, and it thereby causes him to take a different transactional decision.

To decide whether a practice breaches this Regulation, account shall be taken of –

- timing, location, nature or persistence
- use of threatening or abusive language or behaviour

- exploitation by the trader of any specific misfortune or circumstance that impairs the consumer's judgement in order to influence his decision with regard to the product
- any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract (for example, rights to terminate the contract or switch to another product or trader)
- any threat to take action that cannot legally be taken.

### **General duty not to trade unfairly**

Regulation 3 introduces a '*Prohibition of unfair commercial practices*', which effectively means failing to act in accordance with reasonable expectations of acceptable trading practice.

The general duty prohibits practices that –

- contravene the requirements of professional diligence (defined as the standard of special skill and care that a trader may reasonably be expected to exercise towards consumers, which is commensurate with either honest market practice in the trader's field of activity or the general principle of good faith in the trader's field of activity)
- materially distort the economic behaviour of the average consumer (or are likely to) with regard to the product (that is, appreciably to impair the average consumer's ability to make an informed decision, thereby causing him to take a transactional decision that he would not have taken otherwise).

### **Offences, penalties and defences**

A breach of the Regulations means that a criminal offence may have been committed and the maximum penalty on conviction is set at Level 4 on the Standard Scale, which is a fine of up to £5,000 (currently under review). In common with most types of consumer protection legislation, there is a statutory defence available to any person accused of an offence which in general terms would be engaging in unfair practices. An accused person would have to show that the commission of the offence was due to –

- a mistake
- reliance on information given by another person
- the act of another person not under the trader's control
- an accident
- another cause beyond his control.

In addition, the accused must show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under his control committing it.

### **Enforcement**

The Regulations will be enforced by 'authorized officers' as defined in Regulation 1, and in effect this will fall under the remit of trading standards officers. When considering enforcement action, officers will always have regard to the principles of proportionality, accountability, consistency and transparency in line with the existing enforcement policy. Where formal action is taken this will seek to –

- change the behaviour of the trader
- eliminate any financial gain from non-compliance
- be responsive and consider what is appropriate for the particular trader

- be proportionate to the nature of the offence and the harm caused
- remove the consumer detriment caused by the non-compliance and
- deter further non-compliance.

As well as criminal sanctions, there are also alternative enforcement mechanisms which are available to ensure compliance. For example, Regulation 18 enables H.M. Attorney General to apply for an injunction in the Royal Court against any person who appears to be responsible for a breach of the Regulations.

Regulation 19 will be a very useful alternative enforcement tool, as it introduces the concept of a trader providing an 'undertaking' that he will comply with the Regulations. It may be applied where a trader has engaged, is engaging, or is likely to engage in conduct which may, if proved, constitute an offence under other provisions set out in the Regulations. The key benefit here is that if a trader acknowledges that he has engaged in an unfair practice and agrees to cease the activity, it can be dealt with in an efficient, relatively informal, cost-effective manner.

### **Commencement**

If these Regulations are adopted, they will not come into force until 1st March 2016. The reason for this is to provide a reasonable lead-in time for businesses to consider what changes, if any, may need to be made to trading practices to ensure compliance. Detailed guidance notes have already been drafted and will be provided to businesses to allow ample time for any questions to be addressed.

It should of course be noted that these Regulations do not impose any positive obligations on businesses to demonstrate that they are trading fairly, and as a result there are no additional costly burdens. If consumers are treated fairly in line with the Regulations, then businesses have nothing to be concerned about and need take no action at all.

### **Financial and manpower implications**

There are no financial or manpower implications for the States arising from the adoption of these draft Regulations. Enforcement work will be prioritised within existing trading standards resources.



## Explanatory Note

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These Regulations would implement, for Jersey, certain provisions of the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (OJ L 149, 11.6.2005, p. 22)). This would confer protection on Jersey consumers (as defined in *Regulation 2*) against unfair commercial practices, which are defined in and prohibited by *Regulation 3*.

Particular examples of unfair commercial practices are specified in Annex 1 to the Unfair Commercial Practices Directive, and these are deemed by *Regulation 3(2)* to be always unfair. (The list in Annex 1 is incorporated into Jersey law as amended, substituted or interpreted from time to time, by virtue of *Regulation 1(2)* and the enabling power under which these Regulations would be made.) The prohibition extends to commercial practices which are actively misleading (as defined in *Regulation 4*) such as those which, by containing false information and thus deceiving the average consumer as to one of the elements specified in *Regulation 4(3)*, cause the consumer to take a decision (e.g. entering into a purchase transaction) which the consumer would not otherwise have taken. Misleading omissions (as defined in *Regulation 5*) would also amount to unfair commercial practices, as would aggressive commercial practices involving coercion, harassment or undue influence which significantly impairs the average consumer's freedom of choice or conduct with regard to the product in question (*Regulation 6*).

*Regulation 7* would create offences of engaging in unfair commercial practices, and in the case of a commercial practice which is listed in Annex 1 or which is a misleading action or omission or is aggressive, the offence is one of strict liability. A person guilty of such an offence would be liable to a fine of level 4 on the standard scale (currently a maximum of £5,000, under the Schedule to the Criminal Justice (Standard Scale of Fines (Jersey) Law 1993). *Regulation 8* would create a limitation period for prosecutions of 3 years from discovery of the offence. *Regulation 9* would provide defences for traders including due diligence, mistake, and reliance on information supplied by another person. *Regulation 10* would impose liability on officers of corporate and other bodies.

*Regulations 11 to 17* would deal with powers of investigation, including the power of an authorized officer (defined in *Regulation 1(1)* as any person appointed as an inspector pursuant to Article 2 of the Weights and Measures (Jersey) Law 1967) to make test purchases (*Regulation 11*), and to enter premises and to seize and detain goods, either without warrant (in the circumstances specified by *Regulation 12*) or under a warrant from the Bailiff (*Regulation 13*). A person who obstructs an authorized officer would be guilty of an offence under *Regulation 15* and liable to a fine of level 4 on the standard scale; a person failing to give assistance or to produce information requested would similarly be guilty of an offence and liable to a fine of level 4.

Where an authorized officer subjects goods which are seized or detained to any test, *Regulation 16* would impose a duty to inform the owner of the goods of the results of the test, and under *Regulation 17* the Minister for Economic Development would be obliged to pay compensation where loss or damage arises from such seizure and detention but no offence has been committed.

*Regulations 18 to 20* would make additional provision as to enforcement of these Regulations, by means of injunctions or other orders to be obtained from the Royal Court by the Attorney General under *Regulation 18*, or by undertakings to be given to the Chief Inspector (as defined in the Weights and Measures (Jersey) Law 1967) under *Regulation 19* and which could be publicized by that officer under *Regulation 20*.

*Regulation 21* would provide that agreements may not be void solely because of a breach of these Regulations.

*Regulation 22* would provide for the citation of these Regulations and for their coming into force on 1st March 2016.



Jersey

## **DRAFT EU LEGISLATION (CONSUMER PROTECTION – UNFAIR PRACTICES) (JERSEY) REGULATIONS 201-**

### **Arrangement**

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Jersey

## **DRAFT EU LEGISLATION (CONSUMER PROTECTION – UNFAIR PRACTICES) (JERSEY) REGULATIONS 201-**

*Made*

*[date to be inserted]*

*Coming into force*

*[date to be inserted]*

**THE STATES**, in pursuance of Article 2 of the European Union Legislation (Implementation) (Jersey) Law 2014<sup>1</sup>, have made the following Regulations –

### **1 Interpretation**

(1) In these Regulations –

“authorized officer” means an inspector within the meaning of the Weights and Measures (Jersey) Law 1967<sup>2</sup>;

“business” includes a trade, craft or profession and the activities of any public administration;

“commercial practice” means a business-to-consumer commercial practice as defined by Article 2 of the Directive;

“Chief Inspector” has the meaning given by Article 2 of the Weights and Measures (Jersey) Law 1967<sup>3</sup>;

“Directive” means Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22);

“goods” includes –

- (a) corporeal movables except money;
- (b) industrial growing crops, and things attached to or forming part of land that are agreed to be severed before sale or under a contract of sale; and
- (c) an undivided share in goods;

“inducement” means an act which causes or is likely to cause the average consumer to take a transactional decision the consumer would not have taken otherwise;

“Minister” means the Minister for Economic Development;

“premises” includes any place and any stall, vehicle, aircraft, ship or boat (and any other description of vessel used in navigation);

“public administration” means –

- (a) any of the 12 parishes;
- (b) an administration of the States (including a department of the States); and
- (c) a body having functions under any enactment;

“unfair commercial practice” has the meaning given by Regulation 3.

- (2) A reference in these Regulations to the Directive is to be read as a reference to the Directive as amended or substituted from time to time by any other EU provision, or as the Directive has effect in the EU from time to time by virtue of any judgment of the European Court.
- (3) In determining the effect of a commercial practice on the average consumer for the purposes of these Regulations –
  - (a) where a commercial practice is specifically aimed at a particular group of consumers (such as children); or
  - (b) where –
    - (i) certain characteristics such as age, physical or mental infirmity or credulity make a group of consumers particularly susceptible to a commercial practice or to the underlying product, and
    - (ii) the economic behaviour only of that group of consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee,

the impact of the commercial practice is to be assessed from the perspective of the average member of that group.

## 2 Application

- (1) These Regulations apply to any unfair commercial practice which takes place before, during or after a transaction in which one person deals as consumer in relation to any product.
- (2) These Regulations apply without derogation from, and in addition to –
  - (a) any remedy conferred on a person dealing as a consumer by the Jersey customary law of contract;
  - (b) the Consumer Safety (Jersey) Law 2006<sup>4</sup>;
  - (c) the Distance Selling (Jersey) Law 2007<sup>5</sup>; and
  - (d) the Supply of Goods and Services (Jersey) Law 2009<sup>6</sup>.
- (3) These Regulations –

- 
- (a) apply to the States (subject to paragraph (4)), a Minister of the States and any public administration; and
  - (b) bind the Crown, but do not apply to Her Majesty The Queen in her private capacity.
- (4) A contravention by the States of any provision of these Regulations shall not impose criminal liability on the States, but –
- (a) the court may, on the application of the Minister, declare unlawful any act or omission of the States that contravenes a provision of these Regulations; and
  - (b) these Regulations apply to States employees as they apply to other persons.
- (5) In this Regulation, reference to a person “dealing as a consumer” shall be construed in accordance with Article 2 of the Supply of Goods and Services (Jersey) Law 2009<sup>7</sup>.

### **3 Prohibition of unfair commercial practices**

- (1) Unfair commercial practices, as further defined by paragraphs (2) to (4), are prohibited.
- (2) A commercial practice listed in Annex 1 to the Directive is always unfair.
- (3) A commercial practice is unfair if –
  - (a) it is contrary to the requirements of professional diligence; and
  - (b) it materially distorts or is likely to materially distort the economic behaviour, with regard to the product, of –
    - (i) the average consumer whom it reaches or to whom it is addressed, or
    - (ii) the average member of the group of consumers, where the commercial practice is directed to a particular group.
- (4) In particular, and without derogation from paragraph (3), a commercial practice is unfair if –
  - (a) it is misleading as described in Regulation 4 or 5; or
  - (b) it is to be regarded as aggressive under Regulation 6.

### **4 Commercial practices which are actively misleading**

- (1) A commercial practice, other than an omission, is misleading if it falls within paragraph (2) or paragraph (4).
- (2) A commercial practice falls within this paragraph if –
  - (a) it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer in relation to one or more of the elements listed in paragraph (3); and
  - (b) it is an inducement.
- (3) The elements mentioned in paragraph (2) are –

- 
- (a) the existence or nature of the product;
  - (b) the main characteristics of the product, such as –
    - (i) availability,
    - (ii) benefits,
    - (iii) risks,
    - (iv) execution,
    - (v) composition,
    - (vi) accessories,
    - (vii) after-sale customer assistance and complaint handling,
    - (viii) method and date of manufacture or provision,
    - (ix) delivery,
    - (x) fitness for purpose,
    - (xi) usage,
    - (xii) quantity,
    - (xiii) specification,
    - (xiv) geographical or commercial origin,
    - (xv) results to be expected from use,
    - (xvi) results and material features of tests and checks carried out on the product;
  - (c) the extent of the trader’s commitments, the motives for the commercial practice and the nature of the sales process;
  - (d) any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
  - (e) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
  - (f) the need for a service, part, replacement or repair;
  - (g) the nature, attributes or rights of the trader or his agent, such as –
    - (i) identity and assets,
    - (ii) qualifications, status, approval, affiliation or connection,
    - (iii) ownership of industrial, commercial or intellectual property rights, or
    - (iv) awards and distinctions;
  - (h) the consumer’s rights, including any rights the consumer may have under Part 10 of the Supply of Goods and Services (Jersey) Law 2009<sup>8</sup>.
- (4) A commercial practice falls within this paragraph if, in its factual context, taking account of all its features and circumstances, it is an inducement and involves –
- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or
  - (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where –



- (i) the commitment is not aspirational but firm and capable of being verified, and
- (ii) the trader indicates in a commercial practice that the trader is bound by the code.

## **5 Misleading omissions**

- (1) A commercial practice is misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the medium used to communicate it –
  - (a) the commercial practice omits material information; or
  - (b) the trader –
    - (i) hides material information, or provides it in an unclear, unintelligible, ambiguous or untimely manner, or
    - (ii) fails to identify the commercial intent of the commercial practice (if not already apparent from the context),and the commercial practice is thereby an inducement.
- (2) For the purposes of paragraph (1)(a), where the medium used to communicate the commercial practice imposes limitations of space or time, such limitations and any measures taken by the trader to make material information available to consumers by other means shall be taken into account in deciding whether information has been omitted.
- (3) In this Regulation, “material information” –
  - (a) means information that the average consumer needs, according to the context, to take an informed transactional decision;
  - (b) includes information requirements established by EU provision in relation to commercial communication, in particular as listed in Annex II to the Directive; and
  - (c) where the commercial practice is an invitation to purchase, includes the matters listed in paragraph (4).
- (4) In the case of an invitation to purchase, the following information is to be regarded as material, if not already apparent from the context –
  - (a) the main characteristics of the product, to the extent appropriate to the medium used to communicate the invitation to purchase and to the product;
  - (b) the identity of the trader, such as a trading name, and of any other trader on whose behalf the trader is acting;
  - (c) the geographical address of the trader and of any other trader on whose behalf the trader is acting;
  - (d) the price of the product, inclusive of taxes or (where the nature of the product means that the price cannot reasonably be calculated in advance) the manner in which the price is calculated;
  - (e) where appropriate, all additional freight, delivery or postal charges or (where such charges cannot reasonably be calculated in advance) the fact that such charges may be payable;

- (f) arrangements for payment, delivery, performance, and complaint handling policy, where these depart from the requirements of professional diligence;
- (g) the existence of a right of withdrawal or cancellation, for products and transactions involving such a right.

## **6 Aggressive commercial practices**

- (1) A commercial practice is to be regarded as aggressive if, in its factual context, taking account of all its features and circumstances –
  - (a) by harassment, coercion, or undue influence it significantly impairs, or is likely to significantly impair, the average consumer’s freedom of choice or conduct with regard to the product; and
  - (b) it is thereby an inducement.
- (2) In determining whether a commercial practice uses harassment, coercion or undue influence, account shall be taken of –
  - (a) the timing, location, nature or persistence of the practice;
  - (b) the use of threatening language or behaviour;
  - (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product;
  - (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate the contract or to switch to another product or another trader;
  - (e) any threat to take any action which cannot legally be taken.
- (3) For the purposes of this Regulation –
  - (a) “coercion” includes the use of physical force; and
  - (b) using “undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed transactional decision.

## **7 Offences and penalties**

- (1) A trader is guilty of an offence if –
  - (a) the trader engages in a commercial practice knowing, or being reckless as to whether, the commercial practice is unfair in the sense given by Regulation 3(3); or
  - (b) the trader engages in an unfair commercial practice which is –
    - (i) a commercial practice listed in Annex 1 to the Directive,
    - (ii) misleading as described in Regulation 4 (other than a commercial practice falling within Regulation 4(4)(b)),
    - (iii) a misleading omission under Regulation 5, or

- (iv) to be regarded as aggressive under Regulation 6.
- (2) A person who is guilty of an offence under paragraph (1) is liable to a fine of level 4 on the standard scale.
- (3) For the purposes of paragraph (1)(a), a trader who engages in a commercial practice without due regard to whether the practice contravenes the requirements of professional diligence is deemed to do so recklessly, whether or not the trader has reason for believing that the practice might contravene those requirements.

## **8 Time limits on prosecution**

No proceedings for an offence under these Regulations shall be commenced after –

- (a) the end of the period of 3 years beginning with the date of the commission of the offence; or
- (b) the end of the period of 1 year beginning with the date of discovery of the offence by the prosecutor,

whichever is the sooner.

## **9 Defences: due diligence, etc.**

- (1) In any proceedings against a trader for an offence under Regulation 7, it is a defence for the trader to prove –
  - (a) that the commission of the offence was due to one of the following matters, namely –
    - (i) a mistake,
    - (ii) reliance on information supplied to the trader by another person,
    - (iii) the act or default of another person, not being a person under the trader's direction or control,
    - (iv) an accident, or
    - (v) another cause beyond the trader's control; and
  - (b) that the trader took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence, including by any person under the trader's control.
- (2) A trader may not seek to rely on the defence provided by paragraph (1) by reason of a matter in either sub-paragraph (a)(ii) or (iii) without leave of the court to do so, unless –
  - (a) the trader has served on the prosecutor a notice in writing giving all such information identifying the other person concerned or assisting in the identification as was in the trader's possession; and
  - (b) that notice is served no later than 7 days before the date of the hearing.

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- (3) In any proceedings against a trader for an offence under Regulation 7 committed by way of publication of an advertisement, it shall be a defence for the trader to prove that –
    - (a) the trader is a person whose business it is to publish or arrange for the publication of advertisements;
    - (b) the trader received the advertisement for publication in the ordinary course of business; and
    - (c) the trader did not know and had no reason to suspect that publication of the advertisement would amount to an offence under the provision to which the proceedings relate.
  - (4) In paragraph (3) “advertisement” includes a catalogue, a circular and a price list.

## **10 Liability of officers etc.**

- (1) Where an offence committed by an entity listed in paragraph (2) is proved to have been committed with the consent or connivance of any person specified in the case of that entity in paragraph (3), the person shall also be guilty of the offence and liable in the same manner as the entity to the penalty provided for that offence.
- (2) The entities mentioned in paragraph (1) are –
  - (a) a limited liability partnership;
  - (b) a separate limited partnership;
  - (c) an incorporated limited partnership or other body corporate.
- (3) The persons to whom liability for an offence may attach in accordance with paragraph (1) are –
  - (a) in the case of a limited liability partnership, a person who is a partner of the partnership;
  - (b) in the case of a separate limited partnership or an incorporated limited partnership –
    - (i) a general partner, or
    - (ii) a limited partner who is participating in the management of the partnership;
  - (c) in the case of a body corporate other than an incorporated limited partnership, a director, manager, secretary or other similar officer of the body corporate; or
  - (d) any person purporting to act in any capacity described in sub-paragraphs (a) to (c).
- (4) Where the affairs of a body corporate are managed by its members, paragraphs (1) to (3) shall apply in relation to acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body corporate.

## **11 Power of authorized officers to make test purchases**

An authorized officer may –

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- (a) enter into an agreement to secure the provision of a product; or
  - (b) make a purchase of any goods,
- for the purpose of ascertaining whether or not an offence under these Regulations is being or has been committed.

## **12 Power of authorized officers to enter premises without warrant**

- (1) An authorized officer may enter any premises, other than premises used only as a private dwelling, at all reasonable hours, for the purpose of ascertaining whether or not an offence under these Regulations is being or has been committed.
- (2) If required to do so, an authorized officer exercising the power conferred by paragraph (1) must produce evidence of his or her authority.
- (3) The power conferred by paragraph (1) includes power –
  - (a) to inspect any goods;
  - (b) where the authorized officer reasonably suspects that an offence under these Regulations is being or has been committed –
    - (i) to seize and if necessary detain any goods, and
    - (ii) to require the trader or (if different) the owner or occupier of the premises to produce in legible form any documents relating to any commercial practice.
- (4) An authorized officer seizing or detaining any goods in exercise of powers under this Regulation must inform the person from whom they are seized of such seizure or detention.
- (5) Where goods are seized from a vending machine, the person to be informed under paragraph (4) shall be the person whose name and address are stated on the machine as being those of the proprietor of the vending machine or, if there is no such name and address, the occupier of the premises on which the machine stands or to which it is affixed.

## **13 Warrant to enter premises**

- (1) If the Bailiff is satisfied that there are reasonable grounds for an authorized officer to believe that there are on any premises goods or documents inspection of which is necessary for the purpose mentioned in Regulation 12(1), and that –
  - (a) entry to the premises has been or will be refused;
  - (b) the premises are unoccupied or the occupier is temporarily absent, and the case is one of urgency; or
  - (c) an application for admission would defeat the purpose of the proposed entry,the Bailiff may grant a warrant permitting an authorized officer to enter the premises.
- (2) A power of entry by virtue of a warrant granted under paragraph (1) shall include the same powers as mentioned in Regulation 12(3).

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- (3) A warrant granted under paragraph (1) shall continue in force for 30 days.

#### **14 Assistance and equipment of authorized officers**

An authorized officer entering premises by virtue of Regulation 12 or 13 may take with him or her such other persons and equipment as he or she may consider necessary.

#### **15 Offences of obstructing etc. investigation by authorized officers**

- (1) A person who intentionally obstructs an authorized officer acting in execution of powers conferred by Regulation 12 or 13 is guilty of an offence and liable to a fine of level 4 on the standard scale.
- (2) A person who –
- (a) fails to give such an officer any assistance which that officer may reasonably require; or
  - (b) when required to produce any document or give any other information, produces a document or gives information which is false in a material particular, knowing the document or information to be false in that particular,
- is guilty of an offence and liable to a fine of level 4 on the standard scale.

#### **16 Duty to inform as to results of tests, etc.**

- (1) This Regulation applies where any goods –
- (a) purchased by an authorized officer under Regulation 11; or
  - (b) seized and detained by an authorized officer under Regulation 12 or 13,
- are submitted to a test, and the test leads to the institution of any proceedings under these Regulations.
- (2) Where this Regulation applies –
- (a) the officer shall inform –
    - (i) the person from whom the goods were purchased, or
    - (ii) where the goods were purchased by way of a vending machine, the person mentioned in Regulation 12(5),of the result of the test; and
  - (b) if it is reasonably practicable to do so, persons against whom proceedings are instituted shall be given the opportunity to have the goods tested on their own behalf.

#### **17 Compensation where no fault**

- (1) Where an authorized officer exercises any power to seize and detain goods under Regulation 12 or 13, the Minister must pay compensation to any person having an interest in the goods, in respect of any loss or damage

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caused to that person by reason of that seizure and detention, provided that –

- (a) there has been no contravention, in relation to the goods, of any provision of these Regulations; and
  - (b) the exercise of the power is not attributable to any neglect or default by that person.
- (2) Any dispute as to the right to, or amount of, any compensation payable under paragraph (1) shall be determined by a single arbitrator appointed by the parties.
  - (3) If the parties cannot agree on the appointment of an arbitrator within a reasonable period, any party may apply to the Judicial Greffier who shall appoint an arbiter.

## **18 Orders to enforce Regulations**

- (1) The Attorney General may apply to the Royal Court for an injunction (including an interim injunction) or other order, against any person who appears to the Attorney General to be responsible for a breach of these Regulations.
- (2) The Royal Court, on an application under this Regulation, may grant an injunction or other order, on such terms as it thinks fit, to secure compliance with these Regulations.

## **19 Undertakings**

- (1) This Regulation applies where it appears to the Chief Inspector that a person has engaged, is engaging or is likely to engage in conduct which would, if proved, constitute an offence under Regulation 7.
- (2) Where this Regulation applies, the Chief Inspector may accept an undertaking from the person that the person will not, as the case may require –
  - (a) continue or repeat the conduct;
  - (b) engage in such conduct in the course of the person’s business or another business; or
  - (c) consent to or connive in the carrying out of such conduct by a body corporate with which the person is connected.
- (3) Having accepted an undertaking under this Regulation, the Chief Inspector –
  - (a) must notify the Attorney General of the terms of the undertaking and the identity of the person who gave it; and
  - (b) may accept a further undertaking from the person to publish the undertaking, or may arrange for publication in accordance with Regulation 20.
- (4) A person is “connected” with a body corporate for the purposes of paragraph (2) if the person is –
  - (a) a controller of the body corporate; or

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- (b) a director, manager, secretary or other similar officer of the body corporate or a person purporting to act in such a capacity.

## **20 Publication of undertakings**

- (1) The Chief Inspector may arrange for the publication, in such form and manner as he or she considers appropriate, of details of –
  - (a) an undertaking given to that officer by or on behalf of any person as to compliance with these Regulations;
  - (b) an application made by the Attorney General for an injunction or other order for the purposes of enforcing these Regulations; and
  - (c) an undertaking given to, or injunction or other order made by, the Royal Court in proceedings on such an application.
- (2) The Chief Inspector may arrange for the dissemination, in such form and manner as he or she thinks fit, of information and advice concerning the operation of these Regulations.

## **21 Validity of agreements**

An agreement shall not be void or unenforceable by reason only of a contravention of, or an offence under, these Regulations.

## **22 Citation and commencement**

These Regulations may be cited as the EU Legislation (Consumer Protection – Unfair Practices) (Jersey) Regulations 201- and shall come into force on 1st March 2016.



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- 1 *chapter 17.245*
  - 2 *chapter 05.925*
  - 3 *chapter 05.925*
  - 4 *chapter 05.100*
  - 5 *chapter 05.130*
  - 6 *chapter 05.800*
  - 7 *chapter 05.800*
  - 8 *chapter 05.800*