

Economic Development Green Paper



A law to protect consumers from unfair trading practices

2nd November 2010

PURPOSE OF CONSULTATION

To seek the views of consumers, consumer organisations, businesses and business representative bodies on the desirability of introducing a new consumer protection law incorporating a general duty not to trade unfairly.

CLOSING DATE: 31 January 2011

SUMMARY

In May 2008 the United Kingdom (UK) brought into force Consumer Protection from Unfair Trading Regulations which implemented the Unfair Commercial Practices Directive (UCPD). This Directive was consistent with a well established European Union (EU) harmonisation policy to ensure a high level of consumer protection for EU citizens. The Regulations were hailed in the UK as the biggest overhaul of consumer laws for 40 years.

Their main aim is to prevent business practices that are unfair to consumers. In order to help businesses the Directive and the Regulations list 31 commercial practices which are always considered unfair and therefore, prohibited.

In the last decade the States of Jersey has actively supported the introduction of new consumer protection legislation. Progress has been achieved in areas such as anti-counterfeiting provisions, general product safety, distance selling and price marking of goods. Perhaps most significant was the introduction in 2009 of the Supply of Goods and Services Law which introduced consumer 'statutory rights' to the Island. To continue this trend the Economic

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Development Minister is seeking views on whether a new Consumer Protection Law should be introduced based on similar principles to those now operating in the UK and the rest of the EU. This paper sets out proposals for a similar law and seeks comments from stakeholders to assist the Minister in developing future policy.

SUMMARY OF QUESTIONS TO CONSIDER

1. Do you believe that the decision taken by the States in 1993 to introduce a fair trading law is still appropriate in today's trading environment? If you do please give reasons.
2. If a consumer protection law were to be implemented in Jersey do you think it should be based on the principles laid down in the Unfair Commercial Practices Directive? If not, please give reasons.
3. Do you think that any new consumer protection law should, if possible, also be used to regulate some areas of consumer credit? Examples could be advertising to include Annual Percentage Rates (APR), compulsory cooling-off periods for consumers after signing a credit contract or standardising early repayment penalties.
4. If a new Consumer Protection law was introduced do you think it should follow the UK enforcement model of a mix of civil court action and criminal prosecution? If not please explain why.
5. If you believe that criminal prosecution should be part of a consumer protection law do you think the powers as described above are appropriate? If not please give reasons.

Further information: This Green Paper can be downloaded from the States of Jersey website at www.gov.je/consultations

Please send your comments to:

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JE2 4WL

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How to contact us

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Email tradingstandards@gov.je

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This consultation paper has been sent to the following organisations:

The Public Consultation Register
 The Scrutiny Office
 Jersey Chamber of Commerce
 Jersey Hospitality Association
 Jersey Consumer Council
 Jersey Competition Regulatory Authority
 Jersey Citizens Advice Bureau
 Jersey Business Venture
 Jersey Financial Services Commission
 Jersey Motor Trades Federation
 Jersey Construction Council
 Jersey Law Society
 Jersey Law Commission
 Jersey Electrical Contractors Association
 Jersey Estate Agents Association
 Jersey Association of Plumbing & Heating Engineers
 Jersey Building and Allied Trades Employers Federation
 Genuine Jersey Products Association
 Channel Islands Co-operative Society
 Channel Island Wholesale Group
 Hanson Renouf
 Sandpiper
 Marks & Spencer Jersey
 Age Concern

Supporting document

Appendix1. The 31 banned commercial practices in the UCPD

Other supporting documents available on request

The Unfair Commercial Practices Directive (2005/29/EC)

The Consumer Protection from Unfair Trading Regulations 2008

Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive.

Contents of this Paper**1 – Background****2 – The Unfair Commercial Practices Directive**

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3 – The Case for Fair Trading Legislation

4 – Enforcement Issues

5 – Next Steps

1. BACKGROUND

- 1.1 Introducing a law in Jersey to deal with unfair trading practices is not a new concept. In 1991 the Chairman of the National Consumer Council (NCC), Lady Judith Wilcox, was invited to the Island by the Policy and Resources Committee to discuss consumer protection issues which affect small jurisdictions.
- 1.2 In June 1992, the NCC provided a report to the Committee entitled ‘Consumer Protection in Jersey’ which contained a number of proposals for the introduction of legislation. A total of 24 organisations were consulted on the proposals and, in general, the responses were supportive.
- 1.3 In February 1993 the States agreed in principle that a Fair Trading Law should be drafted and the then legal adviser to the NCC was engaged to assist in its development.
- 1.4 Drafting work was carried out during 1994 and 1995 but by November 1995 the Law Officers expressed concerns that the draft Law contained certain fundamental flaws and had moved away from the original concept of a simple means of protection from unfair practices and a mechanism for quick, cheap and informal resolution of disputes.
- 1.5 During 1996 and 1997 further substantial amendments were made to the draft until, in an effort to prevent conflicts, the single draft Law was split into two separate drafts – a Business Malpractices Law and a Supply of Goods and Services Law. The separation attempted to clarify how the proposed Business Practices Tribunal would sit within the existing court structure.
- 1.6 In July 1998 the Public Services Committee decided not to consider the two drafts but preferred to look into the possibility of introducing a Fair Trading Ombudsman. Discussions with the Law Officers continued through into 1999 and then in December of that year responsibility for consumer protection policy transferred to the newly created Industries Committee.
- 1.7 In 2000 the Committee considered the problems which had surfaced in the attempt to develop a ‘minibus’ Fair Trading Law and decided to wipe the slate clean. Several stakeholder meetings were held and Professor Alastair Sutton, an expert in EU consumer protection law, was invited to the Island to advise the Committee.
- 1.8 In early 2001 a consultant with strong Jersey connections, Mr Mark Boleat, was commissioned to review consumer protection in Jersey and make recommendations for an appropriate way forward. In July 2001 the Committee published a report entitled ‘Review of Consumer Protection in Jersey’ and subsequently set out its strategy to implement the recommendations.

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- 1.9 In 2003 the Industries Committee was replaced by the Economic Development Committee and a new emphasis was placed on moving the strategy forward. Consultations were carried out on proposals for a Distance Selling Law, a General Product Safety Law and finally a Supply of Goods and Services Law. All proposals received wide support and by 2009 all three laws were in force. Regulations on unfair contract terms were also introduced in 2010.
- 1.10 The implementation of the Supply of Goods and Services Law was a particular milestone as it introduced clear consumer 'statutory rights' for the first time instead of reliance on the somewhat obscure customary law of contract.

Question 1: Do you believe that the 'in principal' decision taken by the States in 1993 is still relevant in today's trading environment? If you do, please give reasons.

2. THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

- 2.1 Unfair trading practices can harm consumers. Whether through misleading pricing, prize scams, high-pressure selling techniques, misleading advertising or falsely described goods, most consumers will have had first hand experience of unscrupulous and sharp marketing practices.
- 2.2 Tackling deceptive and dishonest practices is key to reducing consumer harm. It is also good for honest businesses that lose out if the activities of their less honest competitors are left unchallenged. However, it is recognised that while there is a need to protect consumers, this should be done within a competitive and fair trading framework.
- 2.3 Most businesses are honest and wish to treat their customers fairly. For these businesses, the States of Jersey's role is to set the right legal framework, ensure appropriate compliance with the law and that it does not introduce additional and unnecessary burdens on traders. It should also make sure that non-compliance is handled consistently, transparently and proportionately.
- 2.4 The Unfair Commercial Practices Directive is designed to achieve this and had two major consequences. It harmonised unfair trading laws in all EU member states and introduced a general prohibition on traders not to treat consumers unfairly. This prohibition was intended to act as 'safety-net' consumer protection legislation.
- 2.5 Harmonisation is achieved by making the same rules apply throughout the EU without allowing individual member countries to exceed the protections contained in the Directive. This is called maximum harmonisation and it had important consequences for the UK as existing laws which conflicted with the Directive had to be amended.
- 2.6 The UK authorities actually used this as an opportunity to consider the simplification and rationalisation of a range of consumer protection legislation. It led to some notable changes, for example the repeal of much of the long established Trade Descriptions Act.

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- 2.7 Simplification had the added benefit of reducing burdens on business where possible without reducing the protection provided to consumers. Generally, the Directive has not introduced new burdens on businesses. It has been framed as a general duty not to trade unfairly. It does not contain positive obligations that businesses would need to demonstrate to prove that they are trading fairly.
- 2.8 So what is the scope of the UCPD? It applies to any act, omission and other conduct by businesses directly connected to the promotion, sale or supply of a product to or from consumers, whether before during or after a commercial transaction. It is important to note that it does not apply to private sales of goods where both parties are consumers.
- 2.9 What then determines whether a commercial practice is unfair? The UCPD sets out rules that determine when commercial practices are unfair. These rules fall into three categories:
- (i) there is a general prohibition which is intended to act as 'safety-net' consumer protection legislation
 - (ii) there are provisions on 'misleading' and 'aggressive' practices that are intended to function independently of the general prohibition
 - (iii) there is a list of 31 specific practices which are always considered to be unfair and therefore prohibited
- 2.10 The first two types of prohibition share the feature that they apply only if the effect of the trader's practice is to materially distort consumers' decisions in relation to products. For the last one there is no need to consider the effect on consumers. A commercial practice can still be unfair within the general clause if it is neither 'misleading' or 'aggressive' nor falls within one of the 31 specific practices. (See Appendix 1 for the 31 banned practices in the UCPD).
- 2.11 The Regulations also offer protection to consumers who may be particularly vulnerable to a commercial practice and whose economic behaviour may, as a result of the commercial practice in question, be distorted. The commercial practice will be assessed from the perspective of an average member of that group whose vulnerability the trader could reasonably be expected to foresee. Vulnerability is limited to infirmity (mental or physical), age (older or younger) and credulity (groups who more readily believe specific claims without good evidence).
- 2.12 The deliberately flexible provisions and wide scope means that it is intended to plug gaps in existing EU consumer protection legislation and set standards against which new practices will automatically be judged. The adoption of similar principles into Jersey law will provide a more comprehensive new tool for tackling unfair practices and should place the Island in a situation the States voted for some years ago.

Question 2: If a consumer protection law was to be implemented in Jersey do you think it should be based on the principles laid down in the Unfair Commercial Practices Directive? If not please give reasons.

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3. THE CASE FOR FAIR TRADING LEGISLATION

- 3.1 As mentioned in section 1, in 1992 the NCC produced a report for the Policy and Resources Committee titled 'Consumer Protection in Jersey'. The preface to the report was written by the Chairman, Lady Judith Wilcox, and the following is an extract

"What Jersey wants and needs is a law that ensures that consumers do not have to put up with business practices that were ruled out of court decades ago in the United Kingdom and Europe. The Islanders deserve – and its tourists expect – no less."

- 3.2 If this was the case in 1992 it is reasonable to ask the question – is it still the same today? It is clear that from a legislative point of view the Island is in a much stronger position than in 1992. However, the need to introduce a general duty on businesses not to trade unfairly is still evident.
- 3.3 So where is this evidence? The Trading Standards Service has a statutory duty to enforce various consumer protection laws. Its officers also identify practices which, although dealt with informally, need to be backed up by legislative powers to give teeth to any action, where necessary.
- 3.4 The following are just some actual examples of trading practices identified locally which were detrimental or unfair to consumers but for which, ultimately, legislative action was not possible.

- Trader falsely claiming to be a member of a recognised trade association and therefore covered by its code of conduct – misleading action.
- Trader falsely claiming to be an authorised installation engineer for a large satellite television company – misleading action
- Trader displaying discounted and cash price for road fuel in a manner that would deliberately mislead consumers to entice them onto the forecourt – misleading action
- Car salesman failing to advise a consumer that the car being purchased had a known problem with its Diesel Particulate Filter (DPF) due to low road speeds in Jersey - misleading omission
- Consumer purchased return ferry ticket. Outward leg was cancelled due to bad weather so consumer found alternative route but used the return leg. Tour operator refused a 50% refund for unused portion treating the return leg as a single fare. The condition was not clear and unfairly weighted against the consumer. Refund was a fraction of what it should have been – unfair practice
- Hotel supplying smoking room to non-smoker who could not sleep in the room due to smell. Failure to ask / tell customer it was a room used previously by smokers - misleading omission.

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- New jewellery trader opens with “sale price” and “50% of marked price”. The marked selling price has never been charged - misleading action.
 - Visiting fair displays advertising boards in various locations indicating prices - "all rides only 99p" - prices 30 July. The prices were increased the next day and the fair ran from 30 July to 15 August. The overall presentation would deceive or be likely to deceive the average consumer - misleading action.
 - Retailer deliberately double pricing goods where the higher price has never been charged. Equivalent to a "was and now price" - misleading action.
 - Trader arranges home demonstration of domestic appliance to elderly vulnerable lady who pays £1500 for an item she did not want or need just to get rid of the salesman. This could amount to undue influence (persistence, timing and possible exploitation of the consumers specific misfortune or circumstances) – aggressive practice.
 - Online trader calculating a percentage saving for their goods based on a manufacturer’s Recommended Retail Price (RRP), when the RRP is rarely, if ever, charged in the market and they could not show that the goods were “generally sold” at this price. Therefore the percentage was not representing a genuine saving for consumers - misleading action.
 - Travel business advertised day trip to French market. Clients arrived shortly before the Market closed at 1pm. Failure to supply material information (closing time of Market) which would have affected consumers decision to purchase – misleading omission
 - Internet trader advertises an unusually low price for a well known product “while stocks last”. In truth no items were available at that price and they are offered at the same prices as other traders – misleading action.
- 3.5 It has been said by at least one politician that Jersey consumers would benefit from some form of Consumer Credit regulation. Fortunately, those of us who obtain and use credit cards from UK based providers do enjoy some protection thanks to the Consumer Credit Act 1974. Although the Act does not extend to Jersey the contracts which are signed to obtain the cards make many references to the Consumer Credit Act so there is a strong argument to support the view that its provisions are contractual liabilities.
- 3.6 The main benefit comes in the form of the statutory joint liability of the card provider with the supplier (called connected lender liability) for breach of contract or misrepresentation provided the goods or services are valued over £100 and not more than £30,000. So, for example, if someone pays up front for goods to be delivered in the future with a credit card and the business goes bankrupt before delivery the consumer can obtain a full refund from the card provider. It is evident that for these provisions, the card providers extend the protection to Jersey based users.
- 3.7 The Consumer Credit Act is a large and complex piece of legislation which would be inappropriate for a jurisdiction like Jersey. However, there would be some useful benefits for consumers if some basic legislation existed to regulate

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such things as annual percentage rates, early settlement rebates, advertising of credit facilities and credit agreements signed on traders' premises. If a Consumer Protection Law was introduced it may be possible to include a Regulation making power to address specific matters of concern as and when required.

Question 3: Do you think that any new consumer protection law should, if possible, also be used to regulate some areas of consumer credit? Examples could be advertising to include Annual Percentage Rates (APR), compulsory cooling-off periods for consumers after signing a credit contract or standardising early repayment penalties.

4 ENFORCEMENT ISSUES

- 4.1 If it is appropriate to implement a new law which aims to prevent unfair trading practices then it is obvious that to give that law teeth it must have some penalties for non-compliance.
- 4.2 The UCPD gives direction to member countries that they 'shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of the Directive in the interests of consumers'.
- 4.3 It goes further in stating that it shall be for each member state to decide how enforcement is carried out but at the least there should be a means for a court to order the prohibition of a particular unfair practice.
- 4.4. Importantly, the UCPD prescribes that member states shall lay down penalties for infringements of national provisions adopted and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, dissuasive and proportionate.
- 4.5 It is appropriate to look at how the UK dealt with enforcement in the Consumer Protection from Unfair Trading Regulations 2008 which transposed the UCPD into UK law. The UK government's aim was to establish an enforcement regime that was capable of tackling rogue and unfair practices effectively while minimising burdens on compliant businesses.
- 4.6 The result was that enforcers have been provided with a wide range of tools which includes both civil (injunctive) action as well as criminal prosecutions for serious offences. Some offences require what is called '*mens rea*' which means that enforcers would have to show that a business had engaged in an unfair practice knowingly or recklessly.
- 4.7 However, some offences are classed as strict liability which means that it need only be shown that there has been a prohibited act or omission, not that it was done knowingly or recklessly. To balance this, a business always has available a 'due diligence defence' (taking reasonable precautions to prevent breaches).

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Question 4: If a new consumer protection law were introduced do you think it should follow the UK enforcement model of a mix of civil court action (injunction) and criminal prosecution? If not please explain why.

- 4.8 If enforcement is to be carried out effectively then it is normal practice to prescribe powers to, for example, Trading Standards Officers to
- inspect goods and enter business premises to find out whether a breach has been committed
 - require traders to produce any documents relating to their business if there is reasonable cause to suspect that a breach has been committed
 - seize and detain goods and documents if there is reason to believe they may be required as evidence in any subsequent proceedings.

Question 5: If you believe that criminal prosecution should be part of a consumer protection law do you think that powers as described above are appropriate? If not please give reasons.

5 NEXT STEPS

- 5.1 This Green Paper sets out a proposal for possible consumer protection legislation based on the UCPD and seeks views on specific options as well as general comments. The closing date is **31st January 2010**.
- 5.2 All responses will be analysed and evaluated and a summary report will be published in the second quarter of 2011.
- 5.3 If the Minister decides to proceed with introducing a Law, a bid for allocation of drafting time will be made in the programme of work for 2012. Should this be successful, drafting instructions will be provided from within existing resources.
- 5.4 A second consultation will then be undertaken – a White Paper – seeking comments on the proposed draft law. It is hoped this could happen in the first quarter of 2013 or possibly earlier.

How to Respond

All respondents should indicate the capacity in which they are responding (i.e. as an individual, company or representative body).

If you are responding as a company please indicate the nature of your business.

Representative bodies should indicate the methodology used to gather the opinions of their members.

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APPENDIX 1

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Misleading commercial practices

1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
6. Making an invitation to purchase products at a specified price and then:
 - (a) refusing to show the advertised item to consumers;
 - or
 - (b) refusing to take orders for it or deliver it within a reasonable time;
 - or
 - (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch)
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is

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not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.

9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC [1].
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
15. Claiming that the trader is about to cease trading or move premises when he is not.
16. Claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

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23. Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

Aggressive commercial practices

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC [2] and 2002/58/EC.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).
30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:
- there is no prize or other equivalent benefit,
 - or
 - taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

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