

**DEPARTMENT OF TRADE AND INDUSTRY (DTI)
CONSUMER & COMPETITION POLICY**

**THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE
CONSULTATION ON A DRAFT EU DIRECTIVE COM (2003) 356**

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2003

The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4,900 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

1. APIL would like to take this opportunity to express its views on the proposals contained within the DTI consultation on the draft European Union (EU) directive relating to unfair commercial practices.
2. Many of the questions detailed in the consultation document relate to how businesses must deal with consumers and are not necessarily aimed at legal claimant organisations such as APIL. As a result, we do not seek to answer all the questions directly, but in the following paragraphs our response is limited to those issues (and questions) that are relevant to the victims of personal injury and to the issue of 'cold calling' as a business practice.
3. For the purposes of APIL's response, 'cold calling' is defined as follows:

"Cold calling encompasses any unsolicited direct contact made to a member of the public with a view to generating business, either in person or by telephone."

4. APIL has strongly opposed the use of 'cold calling' in respect of attracting clients. Indeed APIL's code of conduct states:

"9. No APIL member shall personally, or through a representative, directly contact a potential client except through permitted advertising, where there has been no request for such contact. "Permitted advertising" is defined as "advertising which complies with the Code of Practice of the Advertising Standards Authority and with the Rules of the member's relevant legal professional body".

5. APIL thus feels that the use of 'cold calling' as a business device should be incorporated within the definition of an unfair commercial

practice. We are, however, concerned that the current drafting of the EU directive may allow 'cold calling' to continue.

Definition of an unfair commercial practice

6. Article 5 of the directive – prohibition of unfair commercial practices – sets two cumulative tests for the purpose of deeming whether a practice is “unfair”:

- if it is contrary to 'professional diligence' and
- if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer to whom it is addressed, or of the average member of the group when a commercial practice specifically directed to a particular group of consumers.

Question 9: How well do you think the “professional diligence” test will work in practice (Article 5)?

7. APIL is concerned that this aspect of this test will allow the continuation of 'cold calling' if it can be shown that “*the measure of special care and skill exercised by a trader [is] commensurate with the requirements of normal market practice*”¹. Within the context of 'cold calling' of personal injury products, 'normal market practice' may well be the use of “*high pressure selling, complex documentation and inadequate explanation and advice*”². If it could be shown that the use of the above detailed techniques were standard within the industry, then the trader would not meet the requirements for his actions to be considered an unfair commercial practice. Due to the necessity to meet both tests, the fact that the 'professional diligence' requirement is not met will render the 'material distortion' test redundant.

¹ As defined in Article 2 (j)

² National Association of Citizens Advice Bureaux (NACAB) – 'Door to Door' report (September 2002), page 16, paragraph 2.35

Question 10: How well do you think the “material distortion” test will work in practice (Article 5)?

8. APIL fully supports the use of the second test (as detailed in article 5) of ‘material distortion’ as it uses the benchmark of the “average consumer”³. The test provides that when a commercial practice is specifically directed to a “particular group of consumers”, the capacity to materially distort should be examined from the perspective of the average member of the group. This should make it easier for action to be taken in respect of vulnerable consumers.
9. This provision should help combat concerns over door-step selling and the vulnerable consumer which were recently identified by the office of fair trading (OFT):

“A wide range of goods and services are sold in the home. This facility is useful for many consumers and for some it is essential. Many of these sales are trouble free. The law gives consumers certain rights but these can depend on whether visits were solicited or unsolicited. There also appears to be some evidence, including that from National Association of Citizens Advice Bureaux (NACAB), of practices such as high-pressure sales techniques and reliance on unfair contract terms. These can be particularly damaging to more vulnerable consumers.”

10. While Article 5 establishes the general clause under which a commercial practice will be considered unfair, Articles 6 to 9 detail the categories that constitute unfairness in a wider and more specific context; these include misleading actions, misleading omissions, aggressive commercial practices and use of harassment, coercion and undue influences.

³ As defined in Article 2 (b)

11. Whilst APIL has concerns over the applicability of the two stage test in the general clause (Article 5), the subsequent unfairness categories include provisions that would combat the use of 'cold calling'.
- Article 6.1 (a), (f) and (g) requires the trader to not mislead the consumer about benefits or risks of the product. These provisions help protect vulnerable customers and also protects against more aggressive forms of marketing.
 - Article 7.2 sets a requirement that a trader should not hide information, provide it in an unclear, unintelligible, ambiguous or untimely manner. This article would seem to be particularly applicable to the "*complex documentation and inadequate explanation and advice*" that the NACAB identified in its 'Door to Door' study.
 - Article 8 relates to aggressive commercial practices. The exact nature of these practices are detailed in Article 9 under the heading of 'use of harassment, coercion and undue influence'. The article sets out the factors that determine if a practice is considered aggressive in relation to the aforementioned reasons. Article 9 (a) concerns the timing, nature and persistence of the practice. The Law Society feels that the technique of 'cold calling' subjects "*people to repeated and prolonged visits to their home, as claims farmers try to make them sign an agreement*"⁴. It also feels that 'cold calling' involves "*people being pressurized into agreements to pursue claims and into buying unsuitable loan and insurance products to fund the claim*"⁵.

Need for regulation

12. Article 10 allows the control of unfair commercial practices through codes of practice provided there is recourse to formal enforcement bodies.

⁴ The Law Society press release – 'Compensation Claims' (10th July 2003), spoken by Janet Paraskeva (Chief Executive of the Law Society)

⁵ Ibid

Question 14: What are your views on the provisions on codes of conduct in Article 10?

13. APIL welcomes this article as it will hopefully lead to the establishment of some formal regulatory body to supervise the conduct of 'cold calling'.

14. On a related point in September 2002, NACAB made a 'super-complaint' to the OFT about door-step selling. The NACAB referred to the growth in the use of doorstep sales of complex legal services, noting that problems had been reported to Citizens Advice Bureaux (CABx) since legal aid for personal injury cases was abolished. In explaining that intermediaries canvas for cases to pass on to solicitors, it is noted that the transaction is facilitated by an insurance policy designed to pay legal costs if the case is lost and a credit agreement to pay for the insurance premium. The NACAB report states:

"The active selling of these services is often reported as cold calling at the prospective customer's home or in a public place. CABx evidence is indicating that consumers are not expecting to be cold called for this type of service. The problems with the sale of these personal injury services mainly concern three issues; high pressure selling, complex documentation and inadequate explanation and advice."

It goes on to state:

"Currently the intermediaries involved in canvassing for these services are not required to meet any standards of competence in legal matters and are not directly regulated. However, they, or their employer, must have a consumer credit licence for credit brokerage and the right to canvass off premises. The consumer credit licensing regime should be one means of addressing the need for industry wide standards. The General Insurance Standards Council (GISC) sets standards for the insurance market, including intermediaries, but its scope is limited by

the voluntary nature of the scheme. The Government has announced that the Financial Services Authority (FSA) will assume responsibility for regulation of the insurance industry at some time in the future. The content of the FSA's regulatory requirements is not yet known. So it is difficult to say whether, and if so, how, standards of sales practice by insurance intermediaries operating in this 'no win, no fee' market will be improved. In the meantime many CABx clients are suffering detriment."

15. In addition earlier this year, Viscount Goschen placed the following written question in the House of Lords:

"Whether [the Government] have any concerns about the business practices, and in particular the marketing techniques, used by personal injury claims management companies; and if so, what action they are taking to address those concerns."

In response, on 4 February 2003, Baroness Scotland⁶ stated:

"Provided claims management companies and similar organisations act responsibly and with probity they can expand access to justice for people with good claims. While improper approaches to vulnerable people must be a concern, it is of equal importance that people who may have been injured by others' negligence should have access to help in seeking compensation. If individuals are to enforce their rights they need to be aware of the ways in which they can enforce them. Marketing approaches, including advertising, provided that it is not misleading or dishonest, assist in raising awareness. The Government are keeping under review the emerging market and working with a range of organisations to encourage high and common standards in accident compensation. We would welcome the establishment of a

⁶ Parliamentary Secretary of the Lord Chancellor's Department

single voice for the claims management sector, particularly one which encompasses common standards.”

16. The Law Society has echoed these concerns, stating that these companies *“are not required under current UK law to provide any consumer protection or carry insurance, and ... are not governed by any code of ethics or conduct”*⁷.

17. APIL has noted, however, that the Financial Services Authority (FSA) has proposed the regulation of general insurance products, with new rules and guidance to be completed by the end of 2003, and finalised regulation by January 2005. Within this regulation of general insurance, there is a strong possibility that the selling of personal injury insurance products will be covered. APIL warmly welcomes the regulation of this particular area of ‘cold calling’, yet considers that there is still a need for ‘cold callers’ to be regulated on a more general level.

Question 23: Does the Annex provide a useful and complete set of examples of unfair practices? Is there anything that should be added?

18. APIL feels that there is strong justification for the inclusion of ‘cold calling’ under the ‘aggressive practices’ heading in Annex 1 of the EU directive. For example, in November 2002, the Trading Standards Institute conducted a survey seeking views and experiences of doorstep traders and callers. Of the 8700 people surveyed, 95.7 per cent said that they did not want doorstep sellers calling. Whilst this survey did not relate to cold calling in personal injury cases, it does, at least, give an indication of public feeling.

19. In 2002, Abbey Legal Protection⁸ surveyed 2027 people and found that the vast majority of people felt most uncomfortable with door-to-door or

⁷ The Law Society press release – ‘Compensation Claims’ (10th July 2003), spoken by Janet Paraskeva (Chief Executive of the Law Society)

⁸ A leading ‘after-the event’ insurance provider

telephone selling as opposed to other methods. Of those surveyed 69 per cent had a negative attitude towards companies that sell door-to-door or over the telephone and believed that companies that used these methods risked their reputation.

20. Of particular concern to APIL is the effect that 'cold calling' is having on access to justice for claimants and the ability for injured claimants to receive just and fair compensation. In August 2002, Professor Paul Fenn⁹ published a report entitled "The Impact of Conditional Fees on the Selection, Handling and Outcomes of Personal Injury Cases". It is stated:

"For referral companies, the picture in relation to outcomes is substantially different. By comparison with CFAs they obtain much lower damages for their clients (around 27% lower). Because they also charge their clients ex post, inevitably they compare badly in terms of the amounts paid to clients: they pay around 40% less to clients than CFAs, after controlling for case characteristics."

Whilst this research should be viewed historically, Fenn concluded:

"Finally, what does seem clear on the strength of our evidence, is that the services provided by referral agents over the period of our survey had little to recommend: they were relatively costly to clients and yet yielded less in terms of settlement awards, even though their caseload seemed to be one of relatively low risk. Their main advantage would appear to be one of reach: they advertise widely and as a consequence may induce claims from people who are otherwise unaware of the potential for CFA arrangements."

⁹ Norwich Union Professor of Insurance Studies, Nottingham University Business School, University of Nottingham

Conclusion

While APIL widely supports the establishment of an European Union 'general duty to trade fairly', in the form detailed in the EU Directive discussed, we have concerns over the applicability of the general clause of unfair commercial practices (Article 5) and the two stage test suggested.