



European Banking Industry Committee

European Banking Federation (EBF) • European Savings Banks Group (ESBG) • European Association of Cooperative Banks (EACB) • European Mortgage Federation (EMF) • European Federation of Building Societies (EFBS)

European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)

European Association of Public Banks (EAPB)

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EBIC RESPONSE TO THE CONSULTATION ON THE STUDY ON TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICES SECTOR

European Commission Register of Interest Representatives Identification Number 5814023798-18

The European Banking Industry Committee brings together European banking associations with a mandate to provide advice, assure a comprehensive consultation of market participants and ensure a representative industry view throughout the process of drafting, adopting, implementing and enforcing EU-financial legislation and thereby provide input for the European institutions and their relevant sectorial committees. It is amongst the declared aims of EBIC to advise the Commission on relevant legislative banking and cross-sectorial initiatives and any developments at Community level affecting the banking and financial services activities associated with the establishment of a European Single Market for financial services.

EBIC has been established by the main banking industry federations: the European Banking Federation (EBF), the European Savings Banks Group (ESBG), the European Association of Cooperative banks (EACB), the European Mortgage Federation (EMF), the European Federation of Building Societies (EFBS), the European Federation of Finance House Associations (Eurofinas)/ the European Federation of Leasing Company Associations (Leaseurope), and the European Association of Public Banks (EAPB).

EBIC Secretariat: Rue Montoyer 10 – 1000 Brussels, Belgium

Tel. : +32 2 508 37 11 · Fax: + 32 2 511 23 28 E-mail: secretariat@eubic.org

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Executive Summary

1. EBIC is of the opinion that the practices under scrutiny, with exception of aggressive commercial strategies, are not *per se* detrimental to consumers and/or competitors in the retail financial services market. Only a case-by-case approach can allow a correct assessment of any anti-competitive nature and/or unfairness vis-à-vis consumers. The study considers this a drawback of the existing legal framework, while it should be rather considered the most appropriate way to proceed.
2. Due to the references made in the study to the 2006 Sector Inquiry on Retail Financial Services, the same shortcomings identified then by the industry now affect the present study as well. In particular, the assessment that the low level of switching in the internal market would conclusively demonstrate the existence of barriers and potentially abusive behaviour by financial services providers' vis-à-vis consumers is taken for granted. EBIC considers that switching should not be taken (in isolation) as a mere parameter of lack of consumer choice, rather it is mainly an indicator of customer satisfaction.
3. EBIC generally supports market surveys carried out by the European Commission as part of its evidence based approach and is committed to the dialogue with the Commission services throughout the legislative process. However, EBIC is of the opinion that the study's methodology, assumptions and empirical basis do not allow for the delivery of a comprehensive and correct picture of the market.
4. In the cost-benefit analysis of the practices under scrutiny, the study concludes by stressing both the potential unfairness and anticompetitive nature of cross-selling practices, but benefits like the quality of service and comprehensive advice are neglected. This disregards the trend towards long-term relationships due to the fact that financial services are not merely a matter of price but also of quality. A more balanced assessment is necessary including the benefits that exist for both providers and consumers. This would also bring consistency to the conclusions of the study compared to the specific results of the empirical test.
5. EBIC regrets that one of the typical features of the retail financial services market in Europe, i.e. the nature of the demand and the specificities of the long term retail bank-customer relation, has been widely disregarded by the study. This is also true for long term products which receive a negative connotation from the study, although being often beneficial for consumers and generally having a positive impact on financial stability.
6. EBIC challenges the assumptions related to the abuses of consumers' trust that, according to the study, could be systematically made by financial services providers enjoying a more "powerful" position in the contractual relationship with consumers.
7. The study only measures some potential risks of mis-behaviour without adequately valuing the benefits, thus not assessing the actual situation in the market. This does not allow the conclusion that the results of the study actually measure detriment caused to consumers by financial services providers using cross-selling practices.
8. In the EBIC's opinion, the existing legal framework, both at national and EU level, does provide sufficient protection to consumers as comparable, understandable and complete – but not overwhelming – information is provided to them. In particular, the Unfair Commercial Practices and the

Unfair Terms Directives have been conceived as flexible tools to adapt to changing market reality. They are already adequate to deal with situations where consumers are unfairly or misleadingly deprived of free choice or where anti-competitive situations arise (situations which EBiC firmly deplores). In addition, other measures in the EU *acquis* and other existing hard and soft law remedies at national level are in place to prevent specific behaviours so that any further layer put at EU level at this stage does not appear justified.

9. EBiC has consistently argued in favour of ensuring a level playing field in the retail financial services market. However, the industry does not agree that product tying and bundling is an area where a level playing field is under threat.

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I. Introduction

The European Banking Industry Committee (EBIC) welcomes the opportunity to comment on the study published by CEPS and Van Dijk Management Consultants (the consultant) in January 2010 on tying and other potentially unfair commercial practices in the retail financial services sector.

It is the EBIC understanding that, when commissioning this study, the Directorate General for Internal Market (DG MARKT) of the European Commission sought to gather more information on the size and features of this phenomenon, in order to establish whether and to what extent any regulatory intervention in this area was needed and/or justified at EU level in order to respond to the financial services users that identified tying practices as a key barrier to the integration of retail markets.

A more detailed set of comments in support of the EBIC's opinion are provided below.

II. The underlying theoretical approach of the study

It is unavoidable to note that the study title, as provided by the Commission to the consultant, outlines already a negative evaluation of all the practices under scrutiny, and lays down a shadow of bias on the fact-finding nature of such a research.

The Retail Financial Services Sector Inquiry

Since the mandate given by the Commission to the consultant requires the latter to take as background many assumptions from the Retail Financial Services Sector Inquiry, EBIC feels the need to reiterate some of the criticisms it already expressed at the time of the consultation on the Interim Reports of the Sector Inquiry in 2006 (see below). Indeed, in the EBIC's view, the same shortcomings identified in 2006 in the findings of the Sector Inquiry are now affecting the present study as well.

In particular, the assessment that the low level of switching in the internal market is a proof of the existence of entry barriers and abusive behaviour by financial services providers vis-à-vis consumers is taken for granted, while EBIC considers that switching should not be taken (in isolation) as a mere parameter of lack of consumer choice or existing barriers to switch providers, rather it is also an indicator of customer satisfaction. Other, more structural and convenience-related reasons for customers not switching in large numbers must be considered in this context, particularly across national borders¹.

The Sector Inquiry and the subsequent technical report both highlighted certain limits of the model used to measure the impact of customer mobility on market

¹ For example, a survey conducted by IPSOS INRA 'Consumer Satisfaction Survey Report, May 2007' on behalf of DG SANCO monitored 29,000 consumers in 25 Member States and highlighted that consumers were mostly satisfied with domestic insurance offerings and 88% believed there was sufficient competition in their domestic insurance markets.

performance. In fact, in the Sector Inquiry it was not possible to take account of a number of elements such as, among others, (i) the direct effect of switching costs (including tying and bundling) on customer mobility, and (ii) the levels of customer satisfaction in explaining customer mobility². Furthermore, it was not possible to consider, or only on a superficial level, the whole spectrum of reasons others than price considerations which motivate customers not to switch banks (such as, for example, satisfaction, trust in the relationship and physical proximity). The study, by contrast, passively accepts the assumptions of the Sector Inquiry without verifying them empirically on the basis of a more exhaustive database constructed specifically for that purpose.

Whilst EBIC is supportive of a single market for banking and other financial services, we see no evidence that the practices dealt with in the report are the matters which are inhibiting cross-border consumer purchase of these services. Rather it is matters such as language and currency differences that are the salient factors. Previous research has for example shown that there is substantial cross-border activity where there are no such barriers, and it is thus reasonable to assume that the existence of such barriers is the reason for low cross-border activity and switching³.

Besides, it is surprising that no mention is made in the study about either national frameworks or the EU-level EBIC Common Principles for Switching adopted on 1st December 2008 which entered into force on 1 November 2009, to facilitate consumers who want to switch from one bank to another. It is particularly regrettable that the industry's significant efforts in preparing the EBIC Common Principles and their implementation just at the height of the global financial crisis, is not taken into account and it is presumed in the study that "... *players in the financial services market will tend to recast their attention on the retail markets and opt for a range of practises that would allow them to help restoring profitability. Amongst such strategies, the capture/retention of customers could certainly play a prominent role*"⁴. This is clearly not the case.

Finally, despite the acknowledgement of the benefits that the practices in question may bring to consumers, a totally negative approach is taken towards them in the findings/conclusions, disregarding also some of the data supporting the contrary view. Financial services providers are put in a very negative light as willing to abuse their customers and for whom "*improving the quality of information exchange [with the customers] is not profitable and thus not interesting...*"⁵. EBIC finds this statement unacceptable and, it has not been substantiated with evidence. The financial services industry has long been engaged in efforts to improve the quality of information provided to consumers, a task which the study recognises as difficult given that consumers "*when provided*

² See Commission staff working document Sec (2007)16 page 75, accompanying the Communication from the Commission Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking - COM (2007)33 final, 31 January 2007.

³ In particular, the barrier of language is evidenced by the findings of the Commission's Retail Insurance Market Study of November 2009,
http://ec.europa.eu/internal_market/insurance/docs/motor/20100302rim_en.pdf :

- (i) It notes significant reciprocity between the UK and Ireland which share a common language. Over 27% of all motor premiums written on a freedom of establishment (FOE) basis within the EU were either sold by branches of UK firms in Ireland or by branches of Irish firms in the UK; for free provision of services (FPS), the proportion is lower, but still over 15%;
- (ii) The study also notes that Luxemburg companies are active predominantly in the neighbouring states of Belgium, Germany and France; in particular, servicing the insurance needs of circa 6-8,000 Luxemburg citizens who have relocated to these countries to access more affordable housing

⁴ See study, page 32.

⁵ See study, page 93.

with more information and choice, either walk away from markets, choosing not to choose, or choose randomly”⁶.

Wrong perception of the “ideal consumer”

The study is based on the assumption of an ‘ideal’ consumer who is highly financially educated, has linguistic skills allowing him to regularly shop across borders, has will and time to systematically compare offers from a large number of providers, switch regularly from one provider to another, and in general behave in an economically rational and predictable way when looking for financial products.

While this model works well in theory, it is often limited in practice to fully explain consumer behaviour, as the complexity of the ‘real world’ with a magnitude of factors determining a consumer’s decision are difficult to incorporate in such a predictive model.

In particular, the consultant seems to have gauged the individual value of a financial product predominantly on the basis of price. Other important factors, such as trust in the provider, convenience (e.g. one-stop-shopping) or ease of access (e.g. proximity to the branch), have been widely neglected. The study especially ignores the importance of the bank-customer relationship that goes beyond merely monetary aspects and often significantly depends on its quality established over the years. If consumers are satisfied with a service provider on one product, it is a natural behaviour that this experience is incorporated into a decision on another product. Moreover, the study overestimates the readiness of consumers to engage in cross-border shopping especially with regard to financial services.

The main (demand) engine for the sector, namely the potential for the establishment of a universal business relationship between the provider and the customer, is not taken into account in the study, rather the opposite: it is viewed as detrimental for consumers⁷ (presented as “lock-in” effect), while in fact such a relationship brings benefits to the customer and is something the consumer values⁸. This is equally true for long-term products which are given a negative connotation from the study, but which are often beneficial for consumers and generally have a positive impact on financial stability. Long-term products, notably mortgage credit, establish an equity cushion that is likely to prove helpful at a given moment in a consumer’s life. More than simply granting citizens access to credit, mortgage loans also offer citizens affordable credit due to their long maturity and low interest rates, which are rendered possible by the existence of a surety that mitigates lenders’ risks.

It is recognised, also by the Commission itself, that “*consumers predominantly shop locally for mortgage credit and that the majority will probably continue to do*

⁶ See study page 100.

⁷ See study page 97 and following.

⁸ We also note that the recent financial crisis has demonstrated that in Europe the universal banking model is well equipped to resist the (cyclical) economic shocks affecting financial markets.

so for the foreseeable future⁹". This remark is certainly valid for other, if not all, retail products. Yet, the filter through which the market is analysed in the study is mainly customer mobility in its wide, theoretical meaning (including the cross-border dimension). Such an approach negates the role played by accessibility of a trusted provider in the bank-customer relationship, even when part of that relationship is made at a distance via internet or telephone.

The findings borrowed from the literature on antitrust theories and referred to in the study highlight that tying and bundling are practices which, in theoretical economic contexts where ideal consumers make fully rational choices, may generate both costs and benefits for society. In terms of competitiveness and mobility the literature explicitly refers to the need to adopt an approach where the characteristics of individual consumers are evaluated on a *case-by-case* basis as well as the individual effects on the various markets determined by each combination of products offered. This approach, although referred to at various points in the study, is not acknowledged in either the methodological approach or the very conclusions of the study, which EBIC very much regrets.

Furthermore, the study does not take sufficiently into account the consistent case-law of the European Court of Justice (ECJ) that refers to the "average consumer" when assessing the level of protection afforded to consumers in a particular set of circumstances¹⁰. The fact that the study applies the consumer impact test by relating it generically to the "consumer" rather than to the "average consumer" is debatable. The latter definition is also applied by the Unfair Commercial Practices Directive (UCPD)¹¹ for the evaluation of the commercial practice in terms of its effects in relation to a 'typical consumer' who is "reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors"¹². The study has disregarded this important aspect.

III. The scope of the study

In the EBIC's view, the setting out of the scope is not accurate: the definition of the practices and products analysed is not clear and in many cases it does not match legal definitions in the Member States (in particular the distinction between

⁹ See White Paper on the Integration of EU Mortgage Credit Markets, COM (2007) 807, 12 December 2007, page 3.

¹⁰ See in particular the joint Cases C261/07 and C-299/07, VTB-VAB and Galatea BVBA, of 23 April 2009, point 54 where the Court has stated that "*in accordance with Article 5(2) [of the UCPD], a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely materially to distort the economic behaviour of the average consumer with regard to the product*". Also, under point 61 and following, the Court clearly states that "*a commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise*"(our emphasis).

¹¹ 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, 98/27/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 L149/22 of 11.06.2005.

¹² See UCPD, Recital 18.

tying, pure and mixed bundling). Even in the Sector Inquiry¹³ the categorisation of the practices did not distinguish between 'pure' and 'mixed' bundling, whereas the former appears rather an artificial category whenever applied to financial services, and difficult to refer to actual examples of practices.

The extension of the findings and conclusions to cover also small and medium enterprises (SMEs) in addition to individual consumers is equally questionable. Despite the acknowledgement of the existing and very well established definition of consumer made by the ECJ case-law and secondary EU law¹⁴, the consultants through the study partly extend the assessment to SMEs as well, which appears to EBIC as incorrect and unjustified. The relationship between enterprises (especially larger ones) and financial institutions relies on peculiar aspects related to entrepreneurial activity which makes difficult to consider them assimilated to consumers in the needs and product choices.

Furthermore, in the absence of an explicit definition of SME referred to in the study, such a choice in outlining the scope creates ambiguity as regards the subjects to be included in the analysis. Based on the criteria applied at EU level to define SMEs¹⁵, in some EU countries (e.g. Austria, Italy) where the local economy is largely based on small and medium companies, almost the whole national market would fall into the scope of the study under this definition thereby distorting the final outcome of the study itself.

IV. The methodology of the study

The Questionnaires

In the presentation of the methodology, the study acknowledges that only 66 responses were received over 6529 financial institutions and 430 national organisations invited to take part in the survey. Incidentally, we remark that a very little input is provided on behalf of consumers as well (4 answers over the total 66 received). The exceptionally low level of response from consumers, regulators, consumer lobbies and national governments indicates that this is not an issue that is causing them concern.

The consultant interprets the lack of responses from the industry as the sector's unwillingness to disclose financial advantages¹⁶ obtained from applying the practices under scrutiny. EBIC strongly rejects such an interpretation, especially in light of the remarks it addressed to the consultant at a very early stage in the process that highlighted a number of important deficiencies and difficulties for respondents to the questionnaire.

¹³ See page 49 of the Commission staff working document accompanying the Sector Inquiry, SEC (2007) 106, where the typologies are distinguished as follows: "*bundling occurs where two or more products are sold together in a package, although each product is also available separately. Tying occurs when two or more products are sold together in a package, and at least one of these products is not sold separately*".

¹⁴ See Article 2a of UCPD that defines the 'consumer' as '*any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*', thereby excluding any legal person of whatever size.

¹⁶ See study, page 222.

¹⁶ See study, page 222.

Despite the self-assessment of the consultant according to which the information gathered from 23 countries constitutes a reasonable information basis¹⁷, EBIC is of the opinion that the sample used is far too narrow to draw any conclusions valid for the whole EU-27.

Furthermore, the standard approach elaborated by the consultant to analyse each of the EU-27 and the EU market as a whole is not always appropriate to catch the peculiarities of national markets (see definitions of practices, of products, but also general business practices developed to fit the demand and the various clients' profiles). While the study gives evidence that there are significant differences in the market structure, behaviour of market participant and the regulatory environment throughout the Member States, the conclusions adopt a one-size-fits-all approach that does not allow any modulation following national diversity.

Concerning the explicit refusal of recipients of the questionnaire to respond, EBIC believes that the complexity of the questionnaire and its biased approach have been underestimated by the consultant in its assessment of the reactions thereto. The questionnaire was constructed in such a way that questions formulated suggested a predictable negative interpretation of the answers. While the consultant refers to "uncertainty" and "insecurity" feelings from the industry, EBIC would rather raise a problem of mistreated confidence in this exercise.

In general, there seems to be, from the consultant, a fundamental misunderstanding concerning the legal framework surrounding this type of inquiries. Almost all national financial services associations have to comply with national provisions implementing the rules of the EC Treaty in the area of antitrust that prevent them from collecting sensitive market data from associates. The fact that the consultant sent the national associations a questionnaire almost identical to the one sent to the individual financial institutions raises doubts on the consultant's knowledge of the role and mandate performed by the banking associations in the various countries.

EBIC would also like to reiterate that comments on the questionnaires prepared for the industry were sent by EBIC to the consultant on 22 January 2009 and to the Commission on 11 March 2009 but that these were to a large extent disregarded. In particular, EBIC highlighted the following:

- The language and scope of the questionnaire pre-suppose a pejorative situation as regards linked products. Furthermore, confidentiality is not legally protected with the questionnaire;
- The questionnaires are very complex to answer (not only regarding the form but also the content); this complexity might impact the level of responses (...);
- The questionnaire is inadequate for trade associations. Most associations do not have current information on the industry's business choices or a database on the distribution of the referred practices. A different questionnaire would therefore be more adapted for the associations and other similar stakeholders.

As such, the questionnaire remained relatively difficult to answer and was not user-friendly (on top of the linguistic issue in the countries where English is not a common language).

¹⁷ See study page 218.

On the other hand, the complexity of the issue surveyed, together with the poor user-friendliness of the questionnaire, may explain the low number of responses from individual financial institutions as well, especially in a context – such as that relating to the period identified for the survey - in which the whole sector was strongly committed to resolving the problems linked to the economic crisis. According to the consultant, some of the responses sent by respondents also appear to have been invalidated by a certain level of uncertainty regarding the interpretation of the questions.

We are confident that the study's empirical basis will be carefully considered and put in its correct context before any policy decision is eventually taken by the Commission and in that respect we welcome the decision to open a public consultation on this matter.

EBiC is committed to cooperate with the EU institutions to improve the quality of market analyses as we believe that a better knowledge of the market is an essential prerequisite to take the right policy decisions at the appropriate time.

In the context of better regulation, a more robust and horizontal debate is necessary in order to establish clear minimum standards for reliable and fair market research.

The anti-trust test; the consumer impact test

A scorecard analysis was opted for by the consultant, in order to assess the intensity of costs and benefits generated by each of the practices identified. The picture provided by the scorecard relies on assumptions and presumptions for expected effects, and relates only to the relative position of each Member State to one another.

Concerning the anti-trust-analysis, the study provides no evidence of anti-competitive effects of the practices analysed. In fact for the whole sample it finds that in nearly 90% of the cases there are no anticompetitive effects. Nonetheless, it is conspicuous that the overall result at the end of the study is contrary to the test results. The assessed overall result is that *"all cross-selling practices score positively in [the] antitrust test, which suggests that on average they are leading to anti-competitive effects."*¹⁸ The test result instead is that *"all cross-selling practices score negatively in our antitrust test, which suggests that on average they are potentially leading to pro-competitive effects"*¹⁹. The latter seems to be the right interpretation of the test figures.

The results of the consumer-impact test are not significant either in EBiC's view. With the consumer-impact test the consultant tries to assess the unfairness of a concrete practice by scoring its potentially beneficial and the potentially detrimental effects and netting them to an "overall" impact on the consumer's choice. This approach is to be challenged. The test does not take other influences on consumers choice into consideration such as satisfaction with the providers performance, proximity etc. In fact the assessment criteria which are taken into account as beneficial are only those effects that provide the highest economic benefit to the consumer. In fact the study says *"it is quite obvious that the only efficiency that count are (i) demand-side efficiencies, such as upfront financial advantages, one-stop-shop effects and reduced transaction costs [...] and (ii) the share of production-side efficiencies that is likely to be passed on to customers in*

¹⁸ See Study page 408.

¹⁹ See Study page 302.

the form of lower prices". Other benefits like the quality of service and advice are mentioned but not taken into account in the quantification.

Furthermore, the test does not assess distinct practices but includes certain combinations of products which must be sold together.

This is for example true where a client is offered a debit card together with his current account, as operating a debit card without a current account would either be technically not possible or incur higher costs for the provider or the client.

Finally EBIC strongly disagree with the assessment of the customer-provider relationship elaborated in the "overall" impact score and with the way its effects are weighted. In the assessment of the switching costs²⁰, some products are rated negatively only because they are long term contracts. Similarly, a negative score is attributed to products only due to the fact that they require personal advice. Personal service leads to a 'thicker relationship' According to the study, the 'thicker' the personal relationship with the financial services provider, the stronger the impediment to switch might be. In this respect, EBIC cannot see in what trust, higher quality of the service and personalised advice could be detrimental to costumers.

Shortcomings in the analysis of Member States

In the presentation of Member States' analysis, EBIC finds that the study contains a number of inaccuracies which raise doubts on the validity of the methodology and conclusions of the research. By way of example, EBIC remarks that:

- When referring to **Luxembourg**, the study reports that the UCPD has not yet been implemented so that the legislative gap puts that country in a particularly critical situation in terms of ensuring an adequate level of consumer protection. Yet, the UCPD was implemented in Luxembourg by the law published on 30 April 2009 and has been in force since then. The study seems to have overlooked this information despite the fact that the entry into force of the law occurred well before the finalisation of the study;
- As regards **Spain**, the specific reference to the Spanish legal text Ley 26/1984 is incorrect. This law was repealed by Real Decreto Legislativo 1/2007 of 16 November 2006;
- Empirical data for **Sweden** reported no cases of tying and in the report reference is made to a study by the Nordic competition authorities confirming that banks in Sweden have even reduced the level of bundling. One of the reported cases from Sweden concerns mortgage credit combined with Payment Protection Insurance (PPI). It must be stressed that most banks offer the insurance as a separate service and thus they do not tie or bundle it with the mortgage credit. Despite these observations and an average antitrust

²⁰ See Study, annex 14, page 111 and footnote 576. The combination of mortgage loans and life insurance, both of them being long term contracts, is rated twice as unfair as each individual product. Using this kind of rating system, a result of 90% of unfair practices when mortgage loan is the gateway product, is inevitable. In addition, mortgage loans, consumer credits, life insurances, pension products etc. were classified as products with a higher degree of provider`s intervention in comparison to others, due to the necessary personal service. This is reportedly negative since "efforts in higher quality would result as an incentive for customers to stay and trust their providers; customers are retained and mobility is slowed down".

score of 0.00, Sweden is considered among the countries with "potential antitrust concerns"²¹. The conclusions of the study appear thus inconsistent;

- In the factual analysis of **France**, eight situations are included in the "List of unfair cross-selling practices found under both scenarios"²², but most of them appear to have been wrongly interpreted²³.

In the EBIC's view, this makes difficult to draw consistent conclusions about France. In addition, the analysis of national legislation is not accurate either. The interpretation of the Monetary and Financial Code is not correct as, contrary to what it is said in the study, the prohibition of tying and pure bundling provided for by Article L 312-1-2 of the Code, is not subject to a *de minimis* rule²⁴. Furthermore, the study does not mention that the breach of these rules is tightly investigated by public authorities with far-reaching powers and punished by penal sanctions²⁵.

The findings of the study assert that in France no provision deals with the obligation to have the salary paid into the current account as a condition to access to some products or services. However, the French Unfair Terms Committee (*Commission des Clauses abusives*) has adopted a recommendation on this matter providing that such obligation is prohibited in mortgage credits contracts unless it complies with some conditions. National Courts apply largely similar criteria. According to the study, French legislation does not cover preferential agreements and mixed-bundling. However, no mention is made in the study either about the information requirements related to the selling method used by the services provider (marketing at a distance, off-premises sales...), as well as to the products or services at stake (consumer credits, home loans, financial instruments...), or the provisions regarding misleading commercial practices in general.

Finally, it should be mentioned that according to the 2008 Report of the Banking Mediation Committee, only 34 cases out of 28,724 (i.e. 0.12%) referred to the mediators concerned tying or bundling and this figure was decreasing compared with that in 2006 and 2007.

- As regards **Czech Republic**, based on the results of the anti-trust test, the study defines the cross-selling practices recorded in the country as anticompetitive. However, the main condition for a bank to abuse its dominant position in a specific reference market, i.e. a high concentration rate leading to

²¹ See Study page 21 and figure 39, page 304.

²² See Study page 351.

²³ The practices mentioned are the following:

- Consumer credit and Payment Protection Insurance (PPI): in France, PPI is optional with consumer credit, the customer is free to choose a product from the same provider or find an alternative one.
- Mortgage and PPI: as it is mentioned, the tying is no longer allowed after the entry into force of the new legislation, which makes the practice irrelevant for the assessment of the national situation;
- Credit cards and non-life insurance, Life insurance and portfolio management: the unfairness of these practices is not evidenced in the analysis in the absence of a case-by-case approach;

The remaining combinations analysed, namely home insurance with other non-life insurance, home insurance and motor insurance, saving account and motor insurance, are rather unclear in the absence of any relevant example.

²⁴ Only the prohibition of the selling of products or services with a premium in the form of products, services or pecuniary advantages is subject to a *de minimis* rule; this type of selling is only prohibited where the value of the premium exceeds a threshold set up by the decree.

²⁵ The officials authorised to establish the existence of such breaches have extended powers to do so: they "may enter any premises used for business purposes and request sight of the books and all other business related documents and make copies thereof, and may either gather information and proof in situ or summon the party concerned to a meeting".

a high market share, is not verified. Indeed, the main four banks in Czech Republic account for only 60 % of the national market and there is no evidence of a foreclosure effect due to the practices under analysis.

In the factual analysis of the practices in Czech Republic, there seems to be also some degree of misunderstanding: the Czech client has neither the obligation to have his salary paid into the current account with the mortgage provider, nor to buy an insurance when asking for a mortgage or consumer credit. He remains also free to choose the insurance company should he wish to have one; credit cards and current accounts are not offered as tied products, while debit cards and current accounts – that the study counts among the tied products, must be regarded as technically linked.

- With respect to the analysis of **Belgium**, the study does not incorporate input on the (already known) bill of law that in 2009 addressed the judgement of the ECJ in the joint cases VTB-VAB and Galatea BVBA of 23 April 2009 and that was communicated to the consultant before the completion of the study. In the 2009 bill, the Belgian legislator envisaged the modification of the current rules by lifting the general ban of tying practices while maintaining the existing exceptions for some financial services where relevant and duly justified. In that respect, the study appears already outdated in its analysis of this specific country.

Furthermore, the study seems to mix up tying practices and mixed bundling in the description of the Belgian market, whereas the possibility of having a discount on the mortgage credit rate if a PPI is bought with the same credit provider is considered a tying practice, which is incorrect. Also, the reference to the ‘*bancassurance*’ typology has to be put into perspective: the landscape in the banking and insurance sector has recently *partly* changed: due to the financial crisis, the model of “*bancassurance*” no longer takes shape within the same group, but rather via preferential partnership agreements between companies (banks and insurance companies) belonging to different groups. Finally, the negative appreciation of the bundle including mortgage credit and current account where no benefit is found for the consumer is wrong, since the bundled offer is definitely providing a reduction in costs to the consumer.

- Concerning the analysis of the legal provisions in **Germany**, the study rightly mentions the Unfair Competition Act (UWG) as the relevant applicable legislation. Nevertheless, the interpretation of the Act is incorrect in so far as it is stated in the study that “with its reliance on an ‘act of competition’, section 3 UWG maintains that the new law does not protect against ordinary torts in business [and....] irrelevant nuisances”.

The study does not take into consideration that section 3 (2) implements the unfairness test of Article 5.2 UCPD in German legislation. Under the provision of this section 3 (2) a practice is prohibited which is “contrary to professional diligence and is appropriate to distort the consumers ability to decide on the basis of the given information and therefore lead him to a decision he otherwise would not have made”. Just like the directive this clause also does not explicitly address cross-selling practices like tying and bundling in general. Those practices can be addressed by this section in a case-by-case approach, which means that a cross-selling practice can fall under the scope of this section if in an individual case it should lead to distortion of consumers’ decisions making.

- With reference to **the Netherlands**, the study describes a rather negative situation. However, the official financial complaints bodies do not have any data available for tying, either in the form of complaints on the practice itself

or on its effects on switching. Even, when looking at the issue from the perspective of SMEs, a recent survey conducted by the Netherlands Competition Authority²⁶ shows that tying is not an issue in switching banks for SMEs. The study also omits to take into account the national switching service made available since 2004 to facilitate customers that want to switch current account provider.

V. The findings of the study

In its consultation document, the Commission put some questions to the stakeholders:

(1) Do you agree with the study's findings and conclusions, in particular regarding the identified potential impact of tying and other identified potentially unfair practices on the different stakeholders groups?

(2) What other comments/suggestions would you have, including possible evidence supporting or rebutting the findings of the study? Please provide, where possible, concrete examples/quantitative information.

(3) How could it be ensured that market participants do not suffer from the negative effects of those practices? What could help consumers to avoid being locked in by these practices?

(4) Are you aware of complaints from stakeholders, in particular consumers, regarding tying and other identified potentially unfair practices? Please describe.

Below we comment on the findings of the study whereby many, if not all, these questions are answered.

Case-by-case approach

As remarked by EBIC in its preliminary comments of April 2008, a case-by-case approach is necessary in order to assess the unfair nature of individual practices under particular circumstances. A number of parameters were identified by EBIC and have been partly taken into consideration in the study. Among these²⁷, for instance, the study recognises the significance of the relevant market power of the provider²⁸. Or again the existence of actual anti-competitive effects

²⁶ NMA, ("Monitor financial sector" - March 2010.

http://www.nma.nl/nederlands/home/Actueel/Nieuws_Persberichten/NMa_Persberichten/Persberichten_2010/12-10_NMa overstappen van bank eenvoudiger dan gedacht.asp

The study shows the following results in relation to mortgages; 8% tying, 18% bundling and 74% none; for current accounts; 7% tying, 23% bundling and 70% none; credit; 5% tying, 21 % bundling and 73% none.

²⁷ See study page 68, Finding 2.1. Other criteria indicated by EBIC in its preliminary remarks are: (i) the existence of technical link between products, (ii) the conditional sale within the same entity, (iii) the level of transparency, (iv) the actual increase of switching costs, (v) the inappropriateness to fulfil customers' needs.

²⁸ The study makes reference to the ECJ case-law *Akzo* of 1991 on competition law establishing the relevant market share to measure the dominance of a supplier, where the Court states that "*dominance is not likely if the market share is below 40%.*" The analysis of a provider's dominance and of the actual and

(foreclosure of competitors or disadvantage for the consumers in the long run), that the study acknowledges as a necessary assessment to consider the practice illegal²⁹. Yet, surprisingly the study reaches the conclusion that the practices analysed have the potential to be unfair and harm consumers, without recalling that any assessment of that kind needs to be carried out in relation to the circumstances of a specific case of an individual consumer with his own level of financial education, (ir-) rational economic behaviour and with regard to a specific provider operating in a specific market³⁰.

The case-by-case approach is also consistent with the rationale of the UCPD, that was adopted in the form of a 'framework directive' rather than a sectoral legislation, in order to ensure that, once the principles were laid down in the law, possibly complemented by sectoral provisions as codes of conduct, the directive would have functioned as a "safety net for the regulation of practices (...) not falling within the fields coordinated by the specific sector directives"³¹. Thanks to its horizontal nature, the directive also offered the advantage of reducing the need for more detailed regulations regarding consumer protection and made it possible to assess innovative commercial practices without the need for a new regulation. The case-by-case approach in this context has proven instrumental to the functioning of the UCPD and EBIC regrets that the study disregarded it.

Retail financial sector's specificities

The study states that tying, pure bundling and mixed bundling are widespread in the EU-27.

EBIC considers that most of these practices do not bear a detrimental impact *per se* since they have evolved in the market to tailor-make the offer to match the demand of the customers. Also, they are applied with a mutual benefit approach, being for the provider a means to achieve economies of scale and scope and better risk management, and for the consumer a way to obtain lower prices and better and more convenient contractual conditions and services.

It is true that the financial services sector has its own specificities which must be given regard; however EBIC strongly contends that these specificities should not be interpreted as misleading practises or detrimental in any manner towards consumers.

Costs & benefits of the practices under scrutiny

One of the elements that are decisive in defining the unfair nature of a practice, according to the study, is the lack of passing-on of efficiencies at the level of the

likely foreclosure effects thereof, is then deepened and makes such an assessment much more complex (see footnotes 130 and 131 of the study). This should suggest that any conclusion *a priori* on the anti-competitive nature and the harmful character of the practices under scrutiny is inappropriate.

²⁹ See study pages 69-81.

³⁰ The EBIC particularly disagrees with Finding n. 2.8, since there the case-by-case approach is considered not efficient. As stated below, we conversely consider that analysing each practice in the specific context in which it applies is of paramount importance and it is not surprising that EU competition law has developed in that sense for Article 82 of the ECT (currently Article 102 of the Treaty on the Functioning of the European Union as renamed by the Treaty of Lisbon, which entered into force on 1 December 2009). Alternative general bans on such practices would not meet the criterion of proportionality.

³¹ See Commission's Green Paper on consumer protection in the EU, COM (2001) 531, paragraph 3.4.

provider to the level of the customer. The study omits to consider, however, that the efficiencies or the benefits for the customer may not necessarily be limited to the ones of monetary nature.

As a way of example, better risk management can result in a greater lending capacity (but not necessarily always in lower rates) on the side of the provider. Requiring the payment of the salary on a bank account may contribute to avoid any payment incident, thereby avoiding the use of foreclosure or judicial debt recovery that represent legal costs for the provider eventually impacting the final cost of the product to the consumer. To combine a mortgage loan with a credit insurance secures the borrower's family against the risk that in case of the borrower's death the instalments cannot be paid and the financed property has to be sold eventually at less than fair value. The benefit is measurable in terms of consumer confidence, trust in the financial services provider and sense of security. These kinds of benefits are not taken into consideration in the balance between costs and benefits of the practices at hand in the study, although they are of a major importance for they can lead to efficiencies or benefit for the customer long after the decision to purchase a certain product was made.

EBIC must challenge the reference in the study to consumers "having no choice" but to take tied or bundled products. Firstly, it must be mentioned again the very limited information gathered from consumers in the data gathering exercise (4 responses). Secondly, the subjective appreciation of consumers that are offered certain products by one provider at certain conditions is often related to the lack of comparison /shopping around exercise as a matter of choice or habit by the consumer and/or to the fact that specific benefits are only granted subject to a specific packaging formula. This does not imply any coercion of the consumer i.e. that he has no choice but adhering to the offer of that provider. This simply limits the availability of advantageous conditions to commercial criteria. When receiving an offer of tied products the consumer *always* has the choice of choosing another provider, instead or in addition. The financial services industry has always expressed its support for a more competitive environment, where consumers shop around to compare both products and providers, and thereby forces the latter to improve the quality of their offer. The study states the contrary and this is not acceptable. EBIC is convinced that there can be no harm as long as the consumer is given clear information about the products in a 'package' and is in fact free to buy individual components elsewhere in the market.

Reference is made to the informational asymmetry³² and the lack of autonomy of the consumer vis-à-vis the provider who, as a professional, is deemed to have a higher level of knowledge of financial products than the consumer and, as a result, is in a position to potentially abuse the consumer's trust. While the level of complexity of the financial services sector does not seem to be much higher for consumers than the one of some consumer goods or services (e.g. IT, cars, electrical appliances, energy supply, or others), the consequences of an insufficient financial education throughout the society cannot be tackled, in our view, by banning commercial practices in general. Besides, financial services providers are the first ones willing to invest in counter-balancing any information asymmetry within the customer relation.

What is more, EBIC strongly rejects the description of the providers' attitude vis-à-vis consumers that generalises abusive behaviours as if these were the market place norm³³. In particular, it is the EBIC's belief that no evidence exists to

³² See study page 90.

³³ See study page 90 and following.

support the statements in page 93 of the study, where financial advice is described as 'hostage' of predatory strategies put in place by financial advisers. In so far as these statements seem to refer to situations of risk assessment related mostly to retail investment products, we regret to note that the study largely underestimates the provisions of MiFID regulating best execution and suitability obligations that aim to ensure that the provider acts in the interest of the client³⁴. These provisions have been conceived to, and may well prove adapted to, protect retail investors more than anti-trust or UCPD rules. While it is fair to state that enforcement of these provisions is crucial, EBiC disagrees with the conclusions in Finding 2.9 according to which (more stringent?) consumer policy is considered necessary.

The actual informational/educational gap that consumers feel when dealing with financial services cannot be taken as the consequence of the providers' commercial practices, nor can it be inferred that such a gap is systematically exploited by providers for their own benefit to the detriment of customers. Equally, the decision-making biases identified in Finding 2.12 of the study cannot, in the view of EBiC, be tackled via policy intervention. EBiC firmly believes that consumers must receive comparable, understandable and complete- but not overwhelming - information at a pre-contractual stage so that they can choose the best offer for them. Efforts must be made by all stakeholders, public and private, in raising the level of financial education of consumers, for the benefit of consumers and providers alike.

EBiC would expect a more balanced consideration in the study of the added value that the 'universal' relationship with their bank brings to consumers (see above), in particular when interpreting the consumers' reaction towards mobility. EBiC deems that more factual evidence would also be necessary to support findings such as, for example, Finding 2.10 that do not bring elements of proof of misbehaviour, but merely try to evaluate a risk.

Impact on customer mobility

The study reflects the approach already adopted in the Sector Inquiry that considered the current levels of customer mobility in Europe as crucial in the assessment of competition in the retail financial services market. However, as in the Sector Inquiry, the evidence in the study that lack of mobility is a symptom of lack of competition is lacking.

First, customer mobility cannot be an aim in itself and does not *per se* reveal whether or not customers are given full choice of products/services. As a consequence, EBiC strongly rejects the assumption that the lack of, or the 'low' level of, mobility is synonymous with lack of choice for customers or their ability to switch; nor can EBiC subscribe to the finding that low customer mobility equates a lack of competition or means unfair treatment of the consumer.

Second, EBiC deems it inappropriate to try to define what level of mobility should be achieved in order to have a well-functioning retail market, at national or EU level - the two contexts being very different from this point of view. As a consequence, EBiC considers it inaccurate and arbitrary to define the level of customer mobility as 'low' or 'high', in the total absence of a reliable criterion to assess what is an 'optimal' level of mobility.

³⁴ See study Finding 3.5, page 146.

What EBIC does not see sufficiently covered in the study are the peculiarities of the retail banking relationship compared to the one customers can seek for other kinds of goods and services. The range of financial products and services is large, differing from one provider to another and from one country to another. But above all, there are as many customer's profiles as there are customers and the assessment of any 'need to move' from one financial services provider to another depends greatly – if not mostly - on the individual's preference which is in turn very much linked to his/her personal assessment of priorities and satisfaction. These aspects, in particular the link between the level of customer mobility and the level of customer satisfaction are largely overlooked in the study.

There is a 'natural' trend towards longer-term relationships in retail banking: consumers attach great importance to their confidence in a bank, once they have confidence they generally look to stay with that bank, rather than changing every couple of years. This is due to the fact that financial services are not merely a matter of price but also of quality of the whole customer service. The broader and longer the relationship between customer and bank, the better the level of service the bank can offer the customer, for example when it comes to risk assessment and pricing. Operating in highly competitive national markets, *customer satisfaction* is a key driver for European banking players.

Accordingly, EBIC cannot agree with the findings that consider the practices under scrutiny to be generally potentially anticompetitive and/or unfair vis-à-vis consumers because they potentially increase the customer's switching costs. Cross-selling practices are the reflection of costumers' demand. As explained above, the level of switching is not only related to costs. Moreover, even if switching was less straight forward because of the practices under analysis, which remains to be demonstrated, this cannot be considered in abstract terms. Unfairness and anticompetitive behaviour should be assessed on a case by case basis.

'Potential' versus 'actual'

EBIC is of the opinion that too little evidence is brought by the study on the actual impact of the practices under scrutiny as opposed to the evaluation of their potential detrimental effect. Nor is it evident why a policy intervention would be desirable preventing the practices under scrutiny. The study analyses only the *potential* of particular practices to have unfair or anticompetitive effect and does not demonstrate any actual detriment.

For instance, in France there is no information about any case-law on cross-selling practices. The 2008 report issued by the French banking ombudsman indicates that out of about 30 000 complaints, only 0.12 % are on tying or bundling.

As regards Belgium, the study itself reports the ECJ judgment of 23 April 2009 pronounced in a preliminary ruling, where the Court overturned a product tying ban introduced by Belgian law as such a ban exceeded the scope of the UCPD and precluded the case-by-case unfairness test. In paragraph 50 of its judgment, the Court stated that combined offers constitute commercial acts which clearly form part of an operator's commercial strategy and relate directly to the promotion thereof and its sales development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of the Directive and, consequently, fall within its scope. The Court concluded that the UCPD "*must be interpreted as precluding national legislation, such as that at issue in the disputes*

in the main proceedings, which, with certain exceptions, and without taking account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer". It is surprising to read in the study that "each case should be analysed separately"³⁵ and at the same time not to find this rather correct reasoning in the conclusions of the study.

EBIC is of the opinion that the so called 'aggressive commercial practices', such as inertia selling or steering and churning, are already sufficiently addressed, on one hand, by Article 5 of UCPD and, on the other hand, by best execution provisions in MiFID. While these provisions apply only to individual consumers, it is the EBIC's view that SMEs have sufficient means to filter this type of practices so that to avoid being as vulnerable as individuals.

EBIC also regrets to note that, despite acknowledging some benefits in them, the study retains basically only arguments supporting the negative impact of the practices at hand, thereby suggesting a policy intervention against the latter. EBIC sees in the practices under scrutiny an equal potential for benefits and for costs, so that the conclusion drawn by the consultant appears unbalanced.

VI. The conclusions of the study

Possible follow-up

(5) Do you believe that, based on the findings of the study, the Commission needs to address the issue of tying and other identified potentially unfair practices? If yes, what are your views on the form that such a policy response should take?

(6) If you consider that a legislative solution on the EU level is necessary, do you believe that the issues should be dealt with by sector specific legislation or by horizontal legislation e.g. in the context of the review of the Unfair Commercial Practices Directive?

(7) In the light of the study's finding that in Member States where tying is officially banned, bundling tends to replace it with practically the same effects, what solution would you suggest to solve the problem?

EBIC takes note of the limited scope of the few "definite" conclusions contained in the study that in the EBIC's view are:

(p.383) 'The total number of contestable contracts in the EU27 reaches 572 million. The country where the highest number of contracts would be switched to a different provider is Italy (189 million), followed by Germany (128 million) and the United Kingdom (55 million)';

And (page 209): 'the current fragmentation may make it difficult for firms to engage in cross-border trading; and for consumers to shop across borders. The current fragmentation of legal systems has an obvious impact on the Internal Market and on the efficiency of individual national markets in the retail financial

³⁵ See study page 139.

services sectors, and the need to understand (or comply with) different national legal rules constitutes a first, important barrier to entry in national markets and, generally, more competitive retail financial services in Europe’.

However, even in relation to those two conclusions, the study fails to provide reliable justification.

The estimated impact of the regarded cross-selling practices on customer mobility is highly questionable, This can be illustrated by the example of Germany: The number of 128 million contracts in Germany that – according to the study – could be switched to another provider is solely based on the incorrect assumption that current accounts and fund transfers as well as current accounts and debit cards are tied products that could be split apart and be purchased from different providers. This judgment ignores the basic functionality of a current account as means for payment transactions within the existing payment infrastructures and is evidence of a lack of understanding of the financial products analysed.

Against this background, EBIC wishes to stress its serious concerns about the way the quantitative assessment of the practices has been conducted in the study measure and the fact that such a measure of the impact on customer mobility could serve as a meaningful indicator for the actual switching behaviour of consumers. Regarding the reference to the fragmentation of the legal systems (see also below), the study considers the EU consumer acquis as not fully adequate to tackle the practices at hand, in particular since the implementation of the UCPD has not been driven in the Member States by a full harmonisation approach. This is due to the exemption provided in the UCPD for the sector of financial services where Member States had requested and obtained more discretion to regulate even beyond the provisions of the directive despite its claimed full harmonisation approach³⁶. The exemption was justified in 2005 by the specificities of the sector.

The study does not take into account the ongoing assessment for the review of the UCPD undertaken by DG SANCO and, in particular, the fact that in its Guidance DG SANCO does not consider tying and the other practices as practices to be explicitly addressed under a review of the Directive³⁷.

While acknowledging that current EU competition law can capture most of the practices under scrutiny³⁸, the study deplores the fact that under the UCPD only a case-by-case approach could be possible, the result of which would depend on the appreciation of individual cases by national judges. This approach, in our view, is rather to be welcomed, since in any event and as stated by EBIC in its preliminary remarks of May 2008, any of the practices at hand must be assessed in the context in which it is undertaken and taking into account the specific factors of the individual situation. A case-by-case approach is thus the right approach to these practices that should not be banned *per se*.

³⁶ Article 3(9) of UCPD: “*In relation to financial services as defined in Directive 2002/65/EC and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates*”.

³⁷ See the Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices, SEC/2009) 1666 of 3 December 2009, page 10 and 58.

³⁸ See study page 123.

The Internal Market argument

Among the arguments supporting the main conclusions of the study, the need to tackle fragmentation of the legal and market systems in the EU is raised by the consultant. Namely, it refers to achieving the Internal Market for retail financial services, by lifting the barriers represented by inconsistent legal frameworks requiring providers to cope with diverging rules from one country to another. These are considered barriers to entry in national markets and more in general an obstacle to efficient competition.

EBiC would rather draw attention to a different perspective on the problem of achieving the internal market for retail financial services. As mentioned above, one of the typical features of the retail financial services market in Europe is the local nature of the demand and the specificities of the long term retail bank-customer relation.

EBiC has consistently argued in favour of ensuring a level playing field in the retail financial services market. However, the industry does not agree that product tying and bundling is an area where a level playing field is under threat.

As long as consumers are well informed about their choice of products and providers, they will steer supply towards a competitive situation in their local environment. This evolution of the market is already a reality and competition should remain the main driver.

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