



**EACB response
to the European Commission's Public Consultation on
the study on tying
and other potentially unfair commercial practices
in the retail financial service sector**

14 April 2010

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

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The voice of 4.200 local and retail banks, 50 million members, 160 million customers

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1. General remarks

The EACB welcomes the opportunity to respond to the European Commission's consultation on the study on tying and other potentially unfair commercial practices in the retail financial service sector (the study).

Detailed EACB comments on the study and the practices scrutinised therein, which provide answers to the questions contained in the European Commission's consultation document on the study, are listed hereunder. The sections 2 to 7 of this paper contain the EACB response to the consultation questions 1 to 4, and section 8 contain the response to the questions 5-7.

(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.

2. The role of co-operative banks in retail banking

The recent initiatives of the European Commission seem to suggest a political preference for consumers to develop short-term experiences with their banks, with the former purchasing single products with different providers, purely on the basis of cost. If this would indeed be the case, the Commission would – in our opinion – overlook the other values that customer consider in their relationship with a bank such as proximity, social commitment, solidarity resilience and trust, which are all values that EACB members are focused on when building their relationship with their customers.

Co-operative banks differ from non-cooperative banks in that owners are also clients, who have possibilities to participate in the administration of the co-operative bank, and as a result to influence its commercial policies. As co-operative banks, whose client-base is greatly founded in their membership-base, the EACB does not see the advantages for consumers of purchasing each and every product from a different bank each time. Such short term, ad hoc customer behaviour would be rather contradictory to the values sought after by the co-operative bank business model, which is based on a long-term, comprehensive member/customer to bank relationship.

The EACB opposes the consultant's conclusion #2.11 that the deeper and thicker the relationship of the consumer with the provider, the higher the probability that the provider will adapt commercial strategies detrimental to consumers. Just the contrary, long standing customers of co-operative banks draw advantages for their loyalty and

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receive extra attention to their needs, also in a form of tailor-made products and services, provided cost-effectively and 'close to home'. The primary mission of co-operative banks is to create value for their customers/members, by furnishing them with quality products, at the best price, and by supporting the economic and social integration of individuals. Long-standing consumers/members of co-operative banks choose to purchase a number of products from the same bank for a number of reasons not related to coercion or 'no choice', which include language, proximity, family history, trust, and membership. The EACB considers that a multi-product relationship of a consumer with his/her bank should not receive a negative scoring.

3. General observations on the study's scope and methodology

Executive Summary versus the study itself

As a general remark, the EACB wishes to express its reservations with regard to the validity of the conclusions drawn in the Section 7 of the study ('Conclusions'), as well as its Executive Summary. While the main-body of the report seems to develop a rather balanced approach and a rather objective analysis of both the costs and benefits of product linking practices, the final conclusions tend to lose some of that balance and paint a more coloured picture. Considering this in the context of the way in which the title of the study is formulated, it would almost seem as if the purpose of the study was – at least to a certain extent - to identify evidence supporting a thesis that the practices are harmful for consumers and competition. While the EACB agrees that indeed some of the practices are wide-spread in the EU and often are opted for by consumers, this fact, however, in isolation, cannot lead to a conclusion that consumers are deprived of choice, or that the competition is adversely affected.

Sample and questionnaire

The EACB wishes to firstly address the fact that the study was based on a very small sample of 66 responses, from a total of over 6,529 financial institutions and 430 national organisations invited to participate in the survey. The EACB appreciates that it is a challenging task to compare cross-selling, conditional sale, and aggressive commercial practices across the 27 Member States based on such a number of responses, and finds it difficult to accept such a sample as sufficiently representative of the EU market. For example, the outcome of the study for Finland is quite negative and is not taking due account of benefits of the practices under scrutiny, which may be partially due to the fact that the only respondent from Finland was a regulator.

The consultant tries to explain the low level of responses¹ by referring to the 'insecurity' of the financial sector. The EACB considers it necessary to stress that the low level of responses is rather a question of confidence, complexity and time. The language and scope of the questionnaire pre-supposed a derogatory situation as regards linked products, it was inadequate for trade associations and it was very complex to answer

¹ Page 216 of the study



(not only regarding the form but also the content). This complexity certainly had an impact on the level of responses to the consultants' survey. The consultants launched the study a few days before receiving the final version of the EBIC member associations' comments on the questionnaire, expressing the above concerns.

Additionally, the questionnaire addressed cross-selling and similar practices with respect to retail financial services, and not tying and other similar practices. This broadened the scope of the analysis with respect to what was originally requested by the Commission.

With regard to the response rate of the study we would like to point out that there were also rather few responses from other stakeholders. Perhaps the subject matter is simply not one of high priority and not requiring investigation at EU level.

Terminology

The EACB wishes to highlight a certain lack of consistency in the terminology used in the study, which makes the analysis of the report and the forming of conclusions more challenging. The study introduces new definitions of pure bundling and mixed bundling, while the notion of mixed bundling is unclear and seems to be an attempt to tackle problems arrived upon by the consultant when the case-by-case approach was not followed. Moreover, the definitions of practices do not correspond with the legal definitions in Member States. The use of terminology is not uniform throughout the study. For example, *multi-product rebates* in some parts of the study are classified as a variation of mixed bundling². In other sections of the study it is implied that the two are two separate types of practices ("*...* the other reported cases involve mixed bundling or *multi-product rebates*")³. To add to further confusion, multi-product rebates are also referred to as *mixed bundling with financial advantage*⁴ (to only later in the study explain that it is the same practice⁵), or to *conditional rebates*⁶. Such inconsistent terminology leaves the impression that the number of practices under investigation is higher than is the case in reality.

Scope

The study developed an analysis of the potential impact of the practices on SMEs, which seems to be out of place. The consultant carries out an analysis of national and EU competition and consumer protection legislation, and performs two empirical tests, in order to evaluate the potential impact of the practices in question: antitrust impact test and consumer impact test. However, the consultant states that they adopted a consumer policy approach, and assess whether any of these practices is likely to be unfair to

² Page 13 or 72 of the study

³ Page 294 of the study [emphasis by the EACB]

⁴ Page 16 of the study

⁵ Page 179 of the study

⁶ Page 130 of the study



customers such as consumers and SMEs⁷. It is not clear why the results of the consumer impact test are applied to SMEs. The definition of a consumer under the Unfair Commercial Practices Directive (UCPD)⁸ is clear and it should be observed in order to ensure the accuracy of the analysis and findings.

Scorecard

The consultant opted for a scorecard analysis to ensure the necessary robustness of the study analysis. The aim of this approach was to assess the intensity of costs and benefits generated by each of the practices identified to see if consumers across the EU were likely to be better-off or worse-off as a result. The disadvantage of this approach is that the picture provided by the scorecard only relates to the relative position of each Member State to one another, and – as the consultant himself admits - is reliant on assumptions and presumptions for expected effects⁹. The test does not provide a complete and exhaustive assessment, due to its dependence upon the available data and information. All this constitutes a weakness of the tool which was taken in the study as the major empirical evidence.

Assumptions of the Sector Inquiry

The consultant takes as a background of its analysis many assumptions of the Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking (SI)¹⁰. The EACB does not accept certain parts of the SI as representative. The main criticism is contained in the European Banking Industry Committee comments submitted to the Commission at the time the publication of the SI, which the EACB fully supports.

4. Inaccuracies in the final analysis

The EACB is surprised at the difference between the Executive Summary, and the main body of the report. While the former seems to be more affirmative, the latter is much more reserved and not conclusive. The Executive Summary and the conclusions seem to create a certain image of the nature of the practices under scrutiny which is not as balanced as the analysis in the main part of the report. For example, the study analyses consumers' motivation for loyalty to their banks by referring to three different surveys carried out in the EU¹¹. The surveys demonstrate that "70% of the customers would not consider switching banks even if it could be done without costs", and the top reasons for the loyalty are familiarity, habit, tradition, practical convenience, level of trust, and a good personal relationship with the advisors at the local branch. Consumers are found to be simply uninterested in banking affairs. This analysis is then confronted with a

⁷ Page 14 of the Study

⁸ Article 2(a) of the Directive 2005/29/EC

⁹ Page 280 of the study

¹⁰ Page 48 of the study



surprising Finding #2.10 that *"Lack of financial education and limited effort by consumers in shopping around exacerbate the impact of the information asymmetry in the retail financial services sector, leading to low customer switching and limited pressure on providers to improve their quality of service. This, in turn, makes it even more likely that more informed service providers decide to adopt commercial strategies that are detrimental to customers"*. A logical link between the evidence analysed and conclusions drawn is missing.

Similarly, in the Section 6 of the study, where the results of the scorecard analysis are presented, it is stated that *"89% of the practices observed score negatively, which implies that the most common practices in which mortgage loans are used as gateway products are unlikely to create antitrust concerns"*¹². Similarly, for current accounts as gateway products *"87% of this group have been associated with zero or negative scores (thus, with efficiencies being equal to, or greater than, restrictions of competition)"*. Although such findings seem to be fundamental to the drawing of the final conclusions as to the potential anti-competitive effect of the practices, those findings are not reflected in the Executive Summary, which is limited to less relevant and slightly suggestive statement that *"mixed bundling, especially when providing a financial advantage to customers, is often considered to be less anti-competitive and unfair than tying, as products are anyway available separately on the market"*¹³.

Whenever the study makes some genuine conclusions, it does not provide reliable justification. For example, it states that *'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)'*¹⁴ is not supported by any empirical evidence (see point 6 of this paper). Further, the study concludes that *'the current fragmentation may make it difficult for firms to engage in cross-border trading; and for consumers to shop across borders'*¹⁵. However, the consultant does not elaborate further on how he came to this conclusion.

Another surprising turn in the study can be found with regard to the Finding #6.4 of the antitrust test, which states that on average the practices are potentially leading to pro-competitive effects¹⁶. In the Section 7, which would be referred to by most readers, it is stated that such practices would lead to anti-competitive effects¹⁷.

In more general terms, the EACB wishes to stress that the main body of the report makes no definite conclusions and only assesses the *potential* of different practices to be

¹¹ Page 94-96 of the study: Survey by nVision, study by the Nordic competition authority and survey by Berg and Borgeraas.

¹² Page 289 of the study

¹³ Page 21 of the study

¹⁴ Page 383 of the study

¹⁵ Page 209 of the study [emphasis by the EACB]

¹⁶ Page 302 of the study [emphasis by the EACB]

¹⁷ Page 408 of the study



harmful for consumers or anticompetitive, but provides no conclusive evidence that they indeed are detrimental. Tying cannot in itself be regarded as problematic, as stressed by the Sector Inquiry on Retail Banking¹⁸. Like any other practice carried out by any service provider, cross-selling practices may have the potential to be harmful or beneficiary for consumers and competition. But cross-selling and conditional sales cannot be treated as harmful *per se*. The EACB therefore fully agrees with the statement of the Sector Inquiry¹⁹ that the assessment of a particular tying will always depend on the specifics of the case. In the report the consultant himself admits that many of the practices normally do not create concerns, and only in specific circumstances they may have anticompetitive effect²⁰. The report acknowledges that the assessment is dependent on specific circumstances, however, it does not assign due value to this reservation when formulating final conclusions. The EACB would support a case-by-case approach to the assessment of the product linking practices and wishes to stress that such an assessment cannot be applied in a generalised manner. In line with this the EACB cannot agree with the consultant who considers the necessity to apply the UCPD on a case-by-case basis as a shortcoming of this legislation.

It is the EACB's view that the study does not sufficiently develop on the reasons why such practices are used, which was to be one of the main aims of the study as announced in the contract award notice²¹, and confirmed in the Commission's consultation document. We oppose to the consultant's approach to the financial services providers who notably get involved in the capture/retention of customers²² to keep their profitability. The reference made to banks in Finland²³ imposing "*the obligation to have the salary paid into the current account is very commonly imposed in the case of consumer loans*" is factually incorrect. In fact 'the obligation' is not written into the general terms of contract by co-operative banks – if the customer wishes to switch the bank account without switching the loan, it is possible without any sanctions. Further, the study states that "*minimum initial deposit amount are quite common*". The EACB wishes to offer necessary clarification on this point and confirm that those conditions are connected only to investments accounts, not to the current account, and are justified by the aim of obtaining better interest rate.

5. Advantages, underlying reasons and consumer behavioural factors

As a general remark the EACB wishes to highlight that if the practices of cross- and conditional-selling are wide-spread in the EU, the underlying reasons for engaging in them by both financial services providers and consumers should be examined with attention. Rather than investigating whether the practices are applied by financial services providers, a more constructive approach would be to analyse why they are used,

¹⁸ Par 42 of the SI

¹⁹ Page 64 of the SI

²⁰ For example page 77 of the study

²¹ Contract Award Notice 2008/S 238-315674

²² Page 32 of the study

²³ Page 262 of the study



whether such practices are harmful, and what measures there are in place to ensure proper consumer and competition protection.

Except for some manifestly unfair practices, such as churning or steering, which are already covered by the UCPD, the EACB considers that it would seem unreasonable to prohibit any practices without studying why market players engage in them. Although the study identifies some of the underlying reasons, it does so without further elaboration. This refers even more so to the benefits for consumers of such practices, which are merely mentioned, but not given sufficient appreciation in the formulation of conclusions and recommendations. Perhaps the reason for this limited attention to the advantages of such practices partially results from the fact that in the questionnaires little space was provided for respondents to explain those advantages. The EACB would therefore like to take this consultation as an opportunity to bring up the main reasons and benefits resulting from those practices.

Firstly, the EACB considers that the practices under scrutiny may be pro-competitive and mutually beneficial for both consumers and banks in several ways. Linking of products presents advantages of economies of scope and scale, and enables banks to offer their customers well-differentiated products and services. Cross-selling may be a healthy marketing approach for client retention with no element of coercion. As long as consumers are able to terminate their contract, whether tied/bundled or not, there is no reason to prohibit such practices. For example in some Member States it is simply a series of several purchases made by a consumer, not necessarily at the same moment. Such practices can present tangible benefits for consumers, because the better the bank knows its clients, the higher the client satisfaction is. Any analysis should therefore focus only on unnecessary or unjustified product linking.

5.A. Benefits of the practices under scrutiny

The practices present advantages of one-stop shopping, by creating lesser burden on consumers to search products and ensure that they are inter-compatible. Time savings are generated on less time spent on research, administrative formalities and relationship management. When the bundle constitutes a package of services that are consumed on a recurring basis, consumers benefit from consolidated billing. In addition to the advantage of ease of payment, there are advantages of one-off fee leading to cost savings for consumers, by reducing the total amount paid to the bank. Cross-selling and similar practices can increase economic efficiency by enabling the firm to increase its total volume of sales of the products included in a bundle and thereby achieve cost efficiencies from economies of scale and scope. Marketing, distribution and administration costs are reduced, which in turn may result in a lower average unit price than would occur with uniform pricing of each good. In terms of quality, they enlarge the products/services on offer and support product innovation. Creating various relevant synergies between products leads to better offering for consumers. Consumers can be more certain that the combination of products is beneficial and leads to no difficulties resulting from incompatibility of component products. It is safer for consumers because of pre-existing relationship and access of the provider to all relevant information. The practices may

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increase the power of negotiation of customers with their bank (for instance, the bank will be more attentive to the long standing customer's needs and will lower prices to try to keep him/her; also the provider will tailor-make products to meet the consumer's needs).

5.B. Underlying reasons for engaging in the practices by providers

Tying practices can occur as a result of technical causes. For example, as it is evidenced by the Payment Services Directive²⁴ (PSD), it is perfectly logical to sell together a means of payment with a bank account. Indeed, the "framework contract" under the PSD governs the future execution of individual and successive payment transactions and may contain the obligation for setting up a payment account (quote Article 4.12). Therefore execution of payment services listed in the Annex of the PSD may be subject to setting up a payment account. However, it would not be reasonable to assess such an obligation as the existence of an element of coercion as such a link is fully acceptable and justifiable by technical requirements. Technical limitations may mean that in some cases, purchase of a single component makes no sense for the customer as the overall functionality is no longer there. In this context a clear definition of products is also necessary.

Co-operative banks as lenders are committed to engaging in responsible lending practices. However, there seems to be a conflict between various regulations dealing with risk management and the direction of the study conclusions. Keeping in mind that the consumer must take a fair share of responsibility for providing correct information to the lenders, and for borrowing responsibly, the ongoing initiatives at EU level, such as the consultation on responsible lending and borrowing, or the inventory of measures taken to avoid foreclosures, clearly suggest that banks should continue to play an important role in preventing repayment incidents. It is clearly stated in the study that "*in the financial services sector, cross-selling strategies can help to improve the risk management by assuring a more efficient flow of information from the customer to the bank*"²⁵. The obligation to have a current account with the bank which granted a loan may allow banks to be early informed about any developments on the consumer's side which could lead to payment incidents. This is of particular importance in the context of the recent financial crisis, where often such an early warning arrangement could contribute to preventing foreclosures, etc. Responsible lending, from the banking industry's view, means - amongst others - that the bank will endeavour to find a solution satisfactory for both the bank and consumer, in case of changes of the circumstances of the client (e.g. difficulties in repaying his credit). The study confirms that for most of the cross-selling and conditional sales practices the potential for better risk management is high²⁶. The practices may be used as a risk management tool also in situations "*in which the customer is not able to understand the necessity of a service or product that would enable its counterparty to better manage risk*"²⁷.

²⁴ Directive 2007/64/EC

²⁵ Page 67 of the Study

²⁶ Table 5 of the Study

²⁷ Page 120 of the Study

5.C. Consumer perspective and consumer behavioural aspects

The study finds that from the consumer perspective, the reasons to buy cross-sold products include mostly convenience and financial or other advantages (82% in total). Regrettably, this rather important phenomenon is disregarded later in the study. Indeed, the study subsequently takes rather optimistic assumption of a consumer who acts *"rationally, i.e. they switch to another provider whenever the benefits associated with their current contract are more than compensated by the costs"*²⁸. Some similar developments can be observed in relation to the analysis of consumer demand for such practices. According to the study's Executive Summary, leading reasons for consumers to engage in tying, pure bundling, and conditioned access, is having 'no choice'²⁹, while the results of the survey confirm that the reasons to buy such products are convenience (52%) and financial advantages (52%) of the practices listed. 'No choice' was mentioned for no more than 25% of the cases³⁰.

In relation to consumer having no choice, the EACB wishes to draw the Commission's attention to the fact that no coercion - as implied by the consultant - exists. Consumers who do not wish to purchase tied/bundled products can always choose another provider. The fact that consumers choose linked products proves that such practices can present an interesting offer for them, or that they are simply not interested in purchasing the products separately (for various reasons, including cost and time efficiency, trust, habits, etc).

In its conclusions the study underestimates the non-monetary aspects such as security, closer relationship, and confidence of the client in the bank, when consumer decisions are considered, and focuses on benefits which can be passed onto consumers in a form of lower prices. Meanwhile, the combination of a mortgage and life insurance, for example, gives the consumer security that cannot be measured in pecuniary terms.

6. Impact on customer mobility

On the aspect of customer mobility the study takes as a point of departure the Sector Inquiry. The consultant recognises that the actual extent of the relationship between mobility and cross-selling depends on a number of different factors, such as the availability of switching facilities/programmes; the degree of financial education of the average customer; the price elasticity of the customer's demand; the availability of alternative offers on the market; the extent to which alternative offers are comparable and more advantageous than the incumbent firm's one. Accordingly, *"it is very difficult to measure the actual impact that each practice exerts on customers"*³¹.

²⁸ Page 415 of the study

²⁹ Page 17 of the study

³⁰ Page 240 of the study

³¹ See page 372 of the study



Unfortunately the consultant does not further develop this line of thinking and seems to abandon it when trying to calculate the number of potential contracts affected. The EACB would therefore question the reliability of the claims in the study that approximately 572 million contracts would have been switched, out of which 30 to 33 million would be switched to foreign providers³². Beyond the fact that the number seems to be vastly inflated (the estimated population of the EU in 2010 is just over 501mln³³, which means that on average each citizen would have to switch approximately 1,14 contracts), there is no explanation as to what sort of calculation was carried out, and what kind of evidence was used, to arrive at this figure. An important weakness of this calculation is the wrong definition of a product. The consultant classified some typical bank products, such as for example current account with its payment features, as cross-selling of two or more separate products which they are not (e.g. current account and debit card). Further, the consultant based this calculation on the assumption that consumers act rationally³⁴, but again does not stress that in the Executive Summary or final conclusions. The EACB considers that it would be more appropriate to assess how many consumers feel they would like to switch but cannot. According to the last EUROBAROMETER, with regard to current accounts *"two surveys show a similar general trend: most users are not interested in switching providers (62% in 2009 vs. 69% in 2008). Among those who succeeded in switching providers, most respondents thought that it was an easy process"*, and then again *"only 3% considered it [switching] difficult. 2% of bank account owners tried to switch providers but weren't successful"*³⁵.

There is recorded preference of consumers for local providers, physical proximity and long-term relationships in the area of retail financial services. Objective barriers to cross-border demand for financial services are mainly language barriers and cultural habits³⁶. There are different traditions and ways of banking, which non-residents will not be familiar with. Communication difficulties also play an important role.

The study does not take account of a very important factor, and that is consumer satisfaction. According to the Flash EUROBAROMETER³⁷ consumers who did not decide to switch their provider *"indicated that their current provider offered the best value for money (34%)"*. Further 8% stated that *"the potential savings would be too small and not worth the effort"*. Although the study analyses the above data in its *Figure 12*, it draws somewhat different conclusions in its *Finding #2.13*, stating that *"In the retail financial services sector, switching is made difficult by the existence of transaction costs, compatibility costs, learning costs, contractual costs, informational costs, uncertainty*

³² See page 383 of the study

³³

<http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1>

³⁴ Page 376 of the study

³⁵ http://ec.europa.eu/consumers/strategy/docs/FL282_Analytical_Report_final_en.pdf, Page7

³⁶ This was also confirmed in the context of cross-border consumer borrowing, in The study establishing of a benchmark on the Economic Impact of the Consumer Credit Directive on the Functioning of the Internal Market in this sector and on the level of consumer protection, carried out by GHK

³⁷ http://ec.europa.eu/consumers/strategy/docs/FL243_Analytical_report_Final.pdf, see page 35



costs and psychological costs. Empirical evidence suggests that consumers in the retail financial services sector are particularly unwilling to switch providers, also since they consider it very difficult to compare alternative offers. In particular, compared to other services, consumers consider that the cost and effort required in switching is too large; for mortgages and long term loans". In this finding, the consultant cherry-picks those of the reasons for not switching which are the least favourable for providers, rather than the reasons considered by consumers as the most relevant.

The EACB would therefore wish to reiterate its position expressed previously in the context of the dialogue on the retail bank fees that the higher switching rates should not be an aim in itself, and due regard should be given to the true reasons why consumers choose not to switch. No evidence has been produced to support statements that consumers have 'no choice'. In fact data on consumer complaints, available for example in France, confirms that for 28,724 requests for mediation, only 34 of them were related to tying and bundling, which constitutes only 0.12%. Five requests concerned the selling or offering for sale of products or services to a customer which gives immediate or eventual entitlement to a pecuniary advantage or a benefit in kind in the form of products, goods or services above a threshold set in relation to the type of product or service offered to the customer, which constitutes no more than 0,02%³⁸.

Finally , a lot has already been achieved by the banking industry to improve consumer choice and mobility, and the EACB wishes to express its disappointment that nowhere in the study is there recognition (or even mention) of the Common Principles on Switching Bank Accounts³⁹ developed by the industry (the European Banking Industry Committee) to enhance switching.

7. No anticompetitive effect

The EACB considers that the report provides no evidence which would support EU action with regard to a potential anti-competitive effect of cross-selling and conditional-sale practices.

The study concentrates on analysing the potential anti-competitive effect of the practices under scrutiny and provides no unequivocal answer about the trade-off about costs and benefits of those practices. The study analysis leads to a conclusion that the majority of practices under scrutiny are unlikely to create concerns from an antitrust perspective where the three main gateway products are concerned (overall nearly 90% of cases: 89% for mortgage loans, 87% for current account and 89% for consumer loans). The study states that the specific products and market conditions are essential considerations in reaching the conclusion on whether the efficiencies generated by the practices under scrutiny will outweigh the potential detrimental effects. This remains in line with the

³⁸ Rapport 2008 du Comité de la Médiation Bancaire, http://www.banque-france.fr/fr/instit/telechar/services/cmb_bilan_2008.pdf

³⁹ <http://www.eubic.org/>



case-by-case approach taken by the Commission in its enforcement priorities in applying Article 82 of the EC Treaty⁴⁰.

The EACB wishes to stress that the practices under scrutiny can actually be used pro-competitively in concentrated markets and may facilitate the entry of new firms and products by providing a means of overcoming barriers to entry. The European Commission itself recognized that *"tying and bundling are common practices that often have no anti-competitive consequences"*⁴¹. Further in the same document the Commission acknowledges that companies engage on those practices *"in order to provide their customers with better products or offerings in cost effective ways"*.

(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?

8. Possible follow-up: No need to further legislate at EU level

Upon analysing the findings of the main body of the report the EACB comes to an observation that the study does not provide a strong basis for an action at EU level. The EACB wishes to remind that - in the context of consideration of possible policy decisions - consumers should always be the real beneficiaries of any possible actions. Prohibiting practices having multiple advantages for consumers in general, without any further qualification, is far from reaching this objective. This remains in line with the recent judgements of the Court of Justice of the European Union, in which it clearly states that *"Unfair Commercial Practices Directive must be interpreted as precluding national legislation 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"*⁴². In an earlier judgement⁴³ the Court confirmed that combined offers

⁴⁰ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)

⁴¹ DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, 12/2005

⁴² ECJ judgement (Third Chamber) of 11 March 2010 in Case C- 522/08, Reference for a preliminary ruling under Article 234 EC from the Naczelny Sąd Administracyjny (Poland), made by decision of 17 September 2008, received at the Court on 28 November 2008, in the proceedings Telekomunikacja Polska SA w Warszawie v Prezes Urzędu Komunikacji Elektronicznej.



constitute commercial practices within the meaning of Article 2(d) of the UCPD. It clarified that, since combined offers are not listed in Annex I of the UCPD as commercial practices which are prohibited in all circumstances, they can therefore only be prohibited if they can be qualified as unfair trade practices on a case-by-case basis, having regard to the factual context at hand.

The study itself recognises that *"the UCPD suggests that this Directive could, in principle, be applied to most of the practices under scrutiny, provided that they meet the conditions of the general unfairness test contained at Article 5(2)"*⁴⁴. This would seem logical, since there are no grounds to prohibit practices if they do not carry adverse effects on consumers.

The consultant indicates possible difficulties in proving the case under the UCPD as a main weakness of the Directive. However, the study itself recognises that the UCPD is a rather new document, and a body of case law is yet to be built. This will undoubtedly provide necessary clarifications and guidelines. We fail to understand what the grounds for the consultant's fear of divergent interpretation are. Surely the national courts in each EU country are responsible for ensuring that EU law is properly applied in that country. To avoid the risk of divergent interpretation there is a 'preliminary ruling procedure'.

The EACB wishes to emphasise that the existing EU legislation sufficiently addresses the issue of cross-selling, conditional-selling and aggressive commercial practices. The UCPD allows for the necessary case-by-case approach, and the EACB is of a strong view that indeed legislation of such a nature, flexible and adaptable, with capacity to embrace the specificities of a particular consumer, particular market, particular products, practices and other factors is the right approach. The EACB disagrees with the consultant who views this aspect as a weakness of the Directive. There is no one-size-fits-all approach suitable to address all practices under scrutiny and it seems unlikely that introducing legislation at EU level prohibiting the practices will provide the best form of protecting consumer's interests. Indeed, the study itself concludes that the relative weight of tying and other cross-selling practices does not seem strongly dependent on the existence of a legal framework that bans tying of retail financial services⁴⁵.

Finally, the study does not take due account of the review of the UCPD by the Directorate General for Health and Consumer Affairs. The Commission Staff Working Document: Guidance on the Implementation/application of Directive 2005/29/EC on unfair commercial practices⁴⁶ does not identify cross-selling and conditional-sales as issues requiring particular attention, and at the same time recognises that the practices fall under the scope of the Directive.

⁴³ ECJ Judgment (Third Chamber) of 2 April 2009 in Case C-260/07, Reference for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) — Pedro IV Servicios SL v Total España SA (2009/C 141/04)

⁴⁴ See page 139 of the study.

⁴⁵ Page 273 of the study

⁴⁶ SEC(2009) 1666, Pages 10 and 58



The study also recognises that anti-competitiveness of the practice is strongly linked to the market context⁴⁷. EU competition law can capture most of the practices, including tying, bundling, conditional and loyalty rebates, and exclusive dealing arrangements, to the extent they lead to anti-competitive foreclosure of competitors.

Retail banking (excluding credit cards) has – to a great extent – always been of local or regional nature. The EACB believes that the practices under scrutiny should be addressed at local level, as measures must depend on how well the particular market is developed. Also it should be borne in mind that consumers choose proximity, trust and long-standing traditions to benefit from the maximum guarantees and convenience. The existing EU legal framework - including the UCPD, the Directive on Unfair Contract Terms⁴⁸, Markets in Financial Instruments Directive⁴⁹ (MiFID), and EU competition law - sufficiently addresses the issue of practices analysed. The EACB is of a strong opinion that no further legislative solution at EU level is desirable.

9. Conclusions

The EACB does not agree with the Executive Summary and the final conclusions of the report, which do not reflect the analysis contained in the main body of the report. The report is sometimes confusing, contains inconsistent terminology and does not account for all relevant arguments of the analysis in the formulation of the findings. The EACB does not consider that the study provides a justification for formulating new policy decisions or the introduction of legislative solutions at EU level.

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⁴⁷ Page 68 of the study

⁴⁸ Directive 93/13/EEC

⁴⁹ Directive 2004/39/EC