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Directorate General Internal Market and Services

FINANCIAL INSTITUTIONS

Retail issues, consumer policy and payment systems

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CONSULTATION DOCUMENT

ON THE STUDY

ON TYING AND OTHER POTENTIALLY UNFAIR

COMMERCIAL PRACTICES

IN THE RETAIL FINANCIAL SERVICE SECTOR

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1. BACKGROUND

The study on *Tying and other potentially unfair commercial practices in the retail financial service sector* was announced in the Commission's White Paper on the Integration of EU Mortgage Markets¹ published in 2007. The objectives of the study were to:

- Present a comprehensive inventory of tying² and potentially unfair practices³ in retail financial services (banking, payments, insurance and investment services) in all 27 EU Member States.
- Describe and analyse the market, in particular to provide quantitative information on the use of these practices and to identify and explain why financial services providers as well as consumers engage in these practices.
- Present a quantitative and qualitative analysis of the potential impact of tying and other identified potentially unfair practices for different stakeholders groups and the relevant market, including on customer mobility and the cross-border supply of and demand for retail financial services products.

The tasks of the study were carried out between September 2008 and November 2009.

2. THE MAIN FINDINGS OF THE STUDY

The data presented in the study concludes that cross-selling practices⁴, of which tying represents about one third, and conditional sales practices are widespread in the EU 27 and that this is in line with previous findings, in particular with the findings of the EC retail banking sector inquiry⁵. The study also concludes that mortgages, consumer loans and current accounts take a leading role as gateway products for cross-selling practices. The same is true for the obligation to have a salary paid into a current account for conditional sales practices.

¹ COM(2007) 807.

² Tying occurs when two or more products are sold together in a package and at least one of these products is not sold separately.

³ Other potentially unfair practices include conditional sales practices and aggressive commercial strategies.

⁴ Cross-selling practices include tying and mixed bundling. Mixed bundling occurs when two or more products are sold together in a package, although each of the products can also be purchased separately on the market.

⁵ Report on the retail banking sector inquiry, SEC(2007) 106, European Commission, January 2007.

According to the study, the main reasons for financial institutions to engage in cross-selling practices are commercial strategy, risk reduction and cost efficiency. The main reason for financial institutions to engage in conditional sales practices is risk reduction. Consumers are seen as having no choice but to purchase products that are tied or subject to conditional access. Concerning other cross-selling and conditional sales practices, consumers cite convenience as well as financial and other advantages as reasons to accept these practices.

The results of the test developed by the contractor to assess whether the observed practices are likely to prove anti-competitive or unfair to consumers and SMEs suggest cases of tying practices that are anti-competitive as well as harmful to consumers and SMEs as they reduce customer mobility, price transparency and the comparability of providers on the market, increase switching costs and negatively affect consumer confidence. The test points at certain product combinations that emerge more frequently in a number of Member States. It also finds that mixed bundling often has a similar negative effect on consumers as tying, as consumers are often put in a situation where they have to trust the advice of their counterparts and find it costly to shop around for alternatives. Amongst the other potentially unfair practices, some are unlikely to provide efficiencies to customers, and are construed as being almost *per se* unfair.

Estimating the effect on customer mobility, the study suggests that a total number of 572 million contracts could be switched if practices at hand, in particular cross-selling and conditional practices, were not applied by financial service providers. Six percent of the total switching (33 million contracts) are estimated to go to foreign providers. The effects are felt differently in Member States.

In terms of legislation, the study found that national legal systems are fragmented with only twelve Member States having adopted specific solutions. Some of these Member States have enacted far-reaching prohibitions. However, even in those Member States where tying is officially banned, bundling replaces it with practically the same effects. The study suggests that while existing *EU acquis* (namely the Unfair Commercial Practices Directive⁶) can be considered as covering some of the practices, the current legal uncertainty surrounding its interpretation prevents effectively addressing the issues at stake.

⁶ 2005/29/EC.

3. QUESTIONS

General assessment

- (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.

Impact of tying and other identified potentially unfair practices

- (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.

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?

4. NEXT STEPS

Stakeholders are invited to send their responses to the questions raised in this document by **14 April 2010** to **markt-retail-consultation@ec.europa.eu**. Responses will be placed on the Commission's website unless explicitly indicated otherwise by the stakeholders in their response.

The study's findings, as well as the comments received during this consultation, will be taken into account by the Commission when developing its future position on tying in the retail financial services sector. Commission services don't exclude further discussions with stakeholders in order to complement the study findings and the consultation results.