

TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICE SECTOR

FINAL REPORT

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LIST OF COUNTRY CODES

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DK	Denmark
EE	Estonia
DE	Germany
EL	Greece
FI	Finland
FR	France
HU	Hungary
IE	Ireland
IT	Italy
LV	Latvia
LT	Lithuania
LU	Luxembourg
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SK	Slovakia
SI	Slovenia
ES	Spain
SE	Sweden
UK	United Kingdom

TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICES SECTOR

EXECUTIVE SUMMARY

Financial services, encompassing the banking, insurance and securities sub-sectors, play a considerable role in the EU economy. Over the last two decades the sector has undergone a drive towards integrating the sector within one EU common market, especially after the launch of the Financial Services Action Plan (FSAP) in 1999 and the Financial Services Policy for 2005–2010, where the goal to establish an integrated and consolidated internal market is clearly set as one of the policy priorities for financial services by 2010. Actions undertaken to date have already yielded substantial benefits for consumers and society as a whole. However, in order to reap the full advantages of integration, the financial services sector needs well-functioning, transparent and competitive markets, where consumers can enjoy a wide variety of quality products at competitive prices. Providing end consumers with adequate information, variety of choice and ease of mobility to alternative providers is of utmost importance for the realisation of competitive market outcomes. In this respect, even if the full achievement of the internal market for financial services has been successful so far, several challenges still remain pending. Moreover, the current context characterised by an acute financial and economic crisis poses new challenges for policymakers, as it leads to an increased likelihood that players in the financial services market will recast their attention on the retail segment market and opt for a range of practices that would allow them to help restoring profitability. Amongst such strategies, the capture/retention of customers could certainly play a prominent role.

The European Commission launched a sectoral inquiry on the retail financial services sector in June 2005, pursuant to Article 17 of Regulation (EC) No 1/2003. The investigation focused on three main areas: payment cards, core retail banking and business insurance. The inquiry, opened in June 2005 and closed in 2007, reported a detailed picture of existing competitive conditions in retail financial services. The results highlighted a low level of mobility of European customers. Amongst the main factors identified as reducing customer mobility in the sector's inquiry, were the cross-selling - including tying - and conditional sale of banking products. The extent of tying practices was found to be a widespread conduct across EU Member States. The inquiry focused in particular on five types of practice: (i) mortgages and current accounts; (ii) mortgages and the obligation to pay salary into current accounts, (iii) mortgages and life insurance; (iv) loans (other than mortgages) and current accounts and; (v) loans (other than mortgages) and the obligation to pay a salary into a current account. This report confirms the finding that these practices are widespread in many Member States, but also extends the analysis in many respects.

THE SCOPE OF THIS REPORT: DEFINING TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES

In this report, we look at the issue of tying and other potentially unfair commercial practices in the retail financial services sector. This means that we adopt a broader approach compared to the sector inquiry of the European Commission. The practices we analyse include an array of different conducts, from tying to pure and mixed bundling, to conditional and loyalty rebates such as the offer of preferential rates or tariffs for single and combined products, and preferential or exclusivity agreements, such as cases in which the provider forces customers to purchase additional products from a specific associated provider. In addition, we look at a variety of aggressive commercial tactics, including unsolicited offers, churning and steering. More specifically, the report looks at the following practices:

- *Cross-selling practices, which include tying and pure bundling, mixed bundling (multi-product rebates) and preferential/exclusive agreements.* Tying occurs when two or more products are sold together in a package and at least one of these products is not sold separately. Pure bundling occurs when none of the package components is available separately, and the components are offered in fixed proportions. Mixed bundling occurs whenever two or more products are sold together in a package, although each of the products can also be purchased separately on the market. Mixed bundling can be associated with a rebate on the price of the bundled products, *i.e.* purchasing the bundle is cheaper for the customer than purchasing all the products separately, as the price for the bundle is lower than the sum of the standalone prices of the bundled products. This variant of mixed bundling can also be referred to as “multi-product rebate”. Finally, preferential and exclusive agreements refer to cases in which a financial service provider already has a contractual relationship with the customer and imposes a third party for an additional service, or offers better financial conditions if the customer chooses to purchase from a selected third party, with which the provider has a preferential agreement.
- *Conditional sales practices* include: (i) practices where the service provision is subject to a specific condition, such as an action undertaken by the customer; and (ii) practices that entail the provision of better contractual conditions to existing customers, subject to specific behaviour. An example of the former type of practice is the obligation to have the salary paid into the customer’s current account as a condition to obtain a mortgage loan; an example of the latter is banks that charge no credit card fee if the cardholder spends more than a given amount of money every year, or variable fees depending on usage, or on the number of products purchased. We term these latter practices conditional rebates.
- *Aggressive commercial strategies* are practices which may not relate to specific contractual conditions offered to customers, but to the exploitation of the information flow between the service provider and the customer in the pre-contractual and contractual phases. We basically define three aggressive commercial strategies:

- (i) “Unsolicited offers” (e.g. so-called “pressure selling” or “inertia selling” of products that were not requested), where a product or service offer is unsolicited when it is not expressly requested by customers and it involves a particular pressure on them to purchase that specific offer;
- (ii) “Churning”, consisting in a misuse of the fiduciary role between the intermediary and its customer. This practice entails for example the excessive use of the current account or the investment portfolio induced by the financial intermediary (agent) who exploits the informational gap of the other party (principal).
- (iii) “Steering”, defined as a practice, especially used in the mortgage market, consisting of stressing the credit risk of a potential borrower to steer him\her to higher cost loan.

A first result of our analysis is the establishment and mapping of the list of practices itself, as this exercise had not been performed to this extent to date. We analyse these practices from a twofold perspective. On the one hand, we appraise the potential of these practices to determine anti-competitive outcomes. On the other hand, we adopt a consumer policy approach, and assess whether any of these practices is likely to be unfair to customers such as consumers and SMEs, and under what circumstances. This requires both a legal and an economic analysis of the practices.

DATA COLLECTION: METHODOLOGY AND RESULTS

Little empirical evidence had been gathered to date on tying and other potentially unfair commercial practices in retail financial services. Apart from a number of studies carried out in some Member States, to date the most comprehensive resources available are the interim and final reports on the retail banking sector inquiry of the European Commission, although these reports focus only on the most recurring forms of tying of banking products and other unfair commercial practices.

In our data collection exercise, we have initially undertaken a set of exploratory interviews in ten Member States, and then developed and circulated a set of questionnaires among legal experts to collect information on the treatment of tying and other potentially unfair practices in all Member States. Finally, a survey was launched based on two questionnaires addressed to two target groups. The survey was launched to the national institutions and associations (430 targets, including regulators/supervisors) and financial institutions (6529 targets) in 27 Member States on 20 and 21 January 2009. The deadline for responses was set at 2 March 2009. The overall distribution of financial institutions per sub-sector was 44% banks, 41% insurance companies and 15% investment companies. While some financial institutions belong to several sub-sector associations (e.g. bank and insurance), they received only one email regarding the survey. The proportions of sub-sector distribution reflect thus an overall proxy indication. The selection was controlled so as to include for each country the most significant financial institutions. On the basis of the responses obtained, we then developed an Excel data base designed to process all

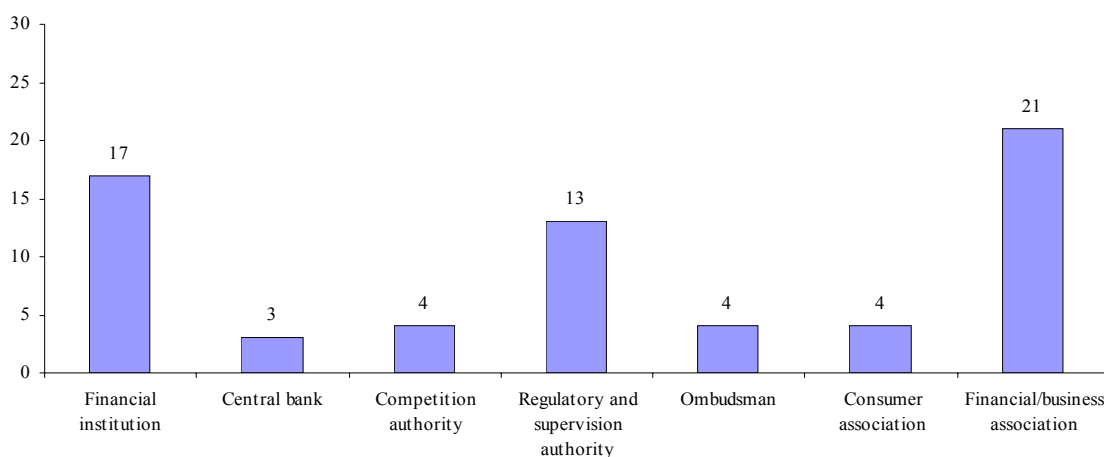
information on cross-selling and conditional sales practices collected with the questionnaire.

The reactions to the survey are characterised by a lower than expected rate of responses, in particular from financial institutions, and a relatively high rate of explicit refusals to participate. This might be explained by the context of the financial crisis with which financial institutions had to cope, and the sector insecurity. The data form however a reliable informative and indicative basis, even if they cannot be considered as fully representative, due to the low number of questionnaires completed. In addition, the uneven distribution of data retrieved across countries makes it difficult to fully reflect the diversity of national situations.

The sample of 66 survey respondents is characterised according to the categories of respondents, their countries and the financial products offered or concerned. Regarding the categories of respondents, there are 75% national organisations and associations, and 25% financial institutions. This means that most of the information gathered does not come from the market operators (financial institutions) but from regulators and associations of financial service providers: if some data might be less accurate (e.g. share of consumers concerned), there might be a benefit from the fact that regulators and business associations have a broad view on the markets. Among financial institutions, 14 are banks, 2 are insurance companies and the remaining one is an investment company. Among national organizations and associations, a majority of responses come from financial service providers associations (21) and financial regulators (13) which contributes to the reliability of data collected. The weak response rate of consumer organizations is also observed (4 responses)¹.

This is illustrated by the graph below.

Distribution of responses per category of respondent (N=66)



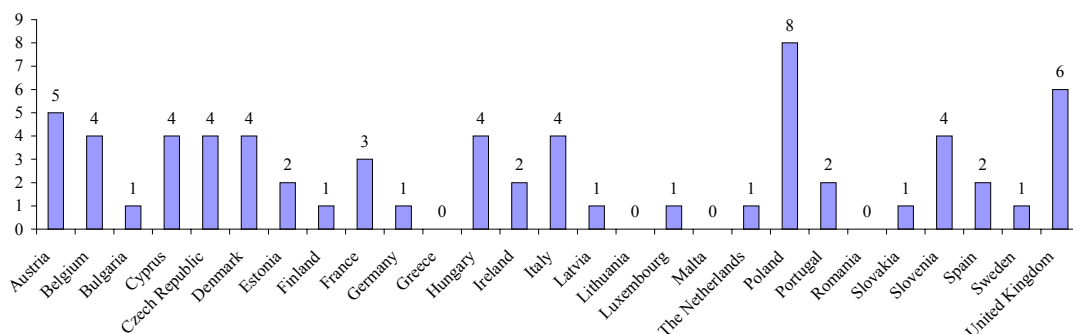
The financial service providers associations represent the insurance sector (7), the banking sector (6), investment (1), bank, insurance and investment (3),

¹ However, we received a summary qualitative response from a 5th organisation.

bank and insurance (3), and bank and investment (1). The majority of financial regulators cover the three sub-sectors together (7); others concern the insurance sector (6).

The distribution of responses per country shows the following profile.

Distribution of responses per country of respondent (N=66)



Such distribution shows that responses originated from 23 countries, which gives a reasonable information basis, if taken globally. The responding financial institutions and national associations/organizations declared the financial products they were offering or they were concerned by. On a total of 125 products, there is an almost equal representation of banking products (42%), insurance products (39%) and investment products (19%). More than half the respondents offer or are involved with the whole range of respectively banking, insurance, or investment products, rather than specific ones.

Our empirical analysis has led to the following results:

- The data presented confirm the findings of the sector inquiry of the European Commission, especially regarding the leading role of mortgages, consumer loans and current accounts as gateway products for cross-selling practices, and of salary paid into current account for conditional sales practices. This also validates the reliability of the data presented.
- Cross-selling on the one hand, and conditional sales practices on the other hand, are in a proportion of 79% to 21%.
- Tying and pure bundling represents about one third of cross-selling practices, to be compared to one quarter for mixed bundling with no (dis)advantage and 40% for mixed bundling with financial advantage.
- Bank products represent three quarters of gateway products of cross-selling and conditional sales practices.
- The top three gateway products are mortgage loans, current accounts and consumer loans.
- Loans (especially mortgages), insurances (especially life), and current accounts, are part of the most frequently identified combinations of products.

- The requirement of having a salary paid into account is the most frequent conditional sales practice.
- Cross-selling practices are applied by a single financial institution in 50% of the cases, amongst the same financial group in 30%, and with another institution in 20%. The supply of combined products involves a branch or institution located in another country relatively infrequently (7% of the cases).
- The shares of consumers concerned by these practices were estimated by financial institutions: one third of them estimates that maximum 20% of consumers are concerned, while 50% estimate that more than 80% of consumers are concerned.
- The shares of financial institutions concerned by these practices were estimated by the national associations/organisations: half of them estimate that more than 60% of financial institutions are concerned.
- The leading reasons for financial institutions to engage in these practices are commercial strategy, followed by risk reduction, and cost efficiency. It is worth noting that the main reason to engage in conditional sales practices is risk reduction.
- Leading reasons for consumers to engage in these practices differ according to practices, but for two of them, namely tying and pure bundling, and conditioned access, the reference for having 'no choice' is the main justification. They are thereby potentially detrimental to consumers and constitute candidates to be further investigated. Concerning other cross-selling and conditional sales practices, convenience, as well as financial and other advantages, are the leading reasons.

IS THERE A PROBLEM? A LEGAL AND ECONOMIC ANALYSIS OF THE SELECTED PRACTICES, AND A MULTI-STAGE TEST

The fact that tying and other practices are widespread does not lead to the conclusion that they should be considered as always anti-competitive or unfair to consumers. In order to establish whether the observed practices lead to consumer detriment and to the competitiveness of financial markets as a whole, we performed a legal and economic analysis from a twofold perspective: on the one hand, we analysed the practices from a competition policy perspective; on the other hand, we assessed the potential for the selected practices to be unfair to consumers. This analysis was aimed at assessing: (i) whether the practices at hand are likely to prove anti-competitive; (ii) whether the practices are likely to prove unfair to consumers and SMEs; (iii) whether the retail financial services sector exhibits specificities that would warrant a different treatment compared to other sectors. Our main results can be summarised as follows:

- From the competition policy angle, the economic literature on tying and bundling does not give an unequivocal answer about the trade-off between costs and benefits borne by society. The key concept in Community

competition law in this respect is that of “anti-competitive foreclosure”, defined by the European Commission as a joint finding of actual or likely foreclosure of competitors, and the likelihood that the conduct creates consumer harm. As recently clarified by the Commission in its Guidance paper on the treatment of exclusionary abuses under Article 82 of the EC Treaty, this concept applies to all conducts, including not only tying and bundling, but also single-product (conditional or loyalty) rebates. In addition, preferential or exclusivity agreements can hamper competition and lead to anti-competitive foreclosure especially when competitors are unable to compete for the full supply to customers. This is the case when the dominant firm supplies a “must stick item”, such that even as efficient competitors would not be able to match its offers. Finally, any other aggressive commercial practice in which a dominant firm engages vis-à-vis consumers may be configured as an anti-competitive practice under Article 82 of the Treaty establishing the European Community if it leads to actual or likely foreclosure of rivals, harms consumers in the long run, and does not demonstrate sufficiently strong redeeming efficiencies.

- The selected practices can create significant concerns from a consumer protection perspective. The practices at hand relate both to the contractual and pre-contractual phase of the relationship between the provider and its customer. A very important element in our approach is the consideration of the factors that make the retail financial services sector different from many other sectors, and as such potentially warranting a different treatment in terms of policy. These factors include, most notably, the behavioural patterns of consumers, which suffer from a structural information asymmetry vis-à-vis their providers, and are thus exposed to exploitation by their counterparts. Practices such as unsolicited offers, churning and steering are the consequence of this structural situation. This issue becomes even more relevant the “thicker” is the type of relationship at hand, thus whenever the role of the financial service provider becomes crucial in the provision of advice on consumer choice. Finally, we report ample evidence that the features of this sector – including often limited degrees of financial education on the side of customers – lead consumers and SMEs to a position in which they choose what they are offered, and are not in a suitable condition to compare offers, understand the consequences of their decisions, or fully appraise the price of what they purchase.

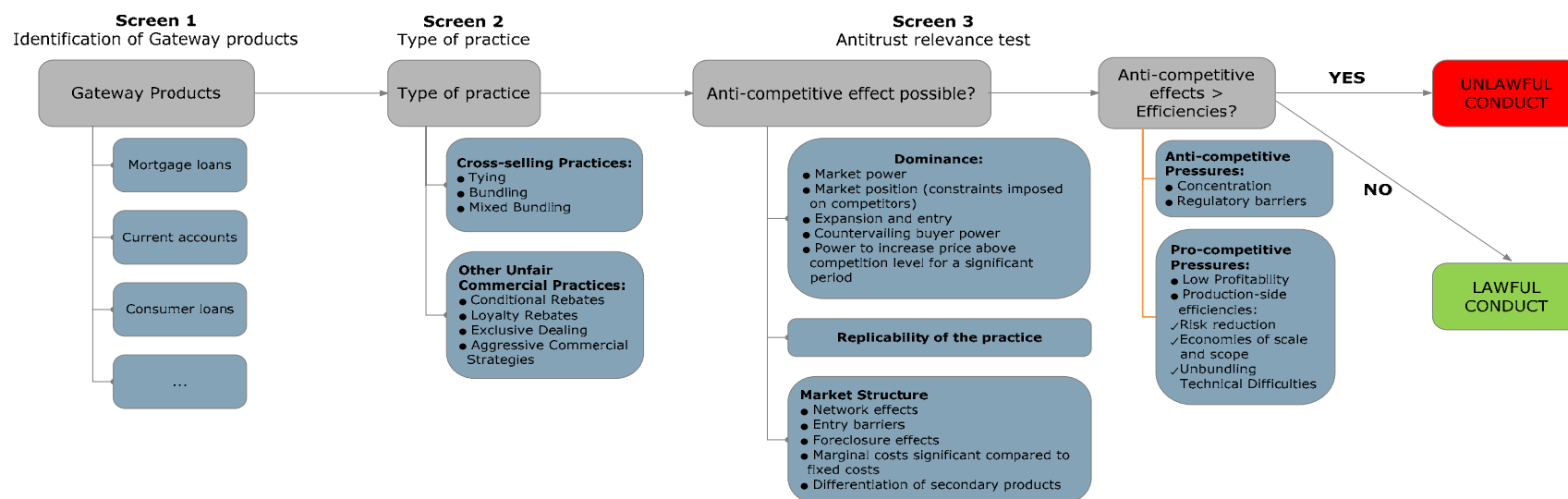
This does not mean that the practices selected are always anti-competitive or unfair. Much depends on the market conditions (especially for the anti-competitive nature of the practices), contextual factors (for example, the level of financial education of the customer, his or her propensity to switch, etc.) as well as the efficiencies generated by the practice – especially when they are passed-on downstream to the customer in the form of better contractual conditions or lower prices. In order to assess whether the practices observed in our empirical analysis are likely to be anti-competitive or unfair, we designed a complex multi-stage test based on three different stages of analysis. The logical steps of the test are graphically illustrated in the graph below. In particular, in the “preliminary test” stage we identify and score the type of gateway product and the type of practice associated with that product. We then look at the type of

practice, as for different gateway products, the same type of practice is likely to lead to different results. For example, a mixed bundling of mortgage loans with another product may have a different impact than tying it. In fact, having different combinations of gateway products and practices can help us later in the test, *e.g.* by evaluating the production and demand-side efficiencies associated with each specific practice observed.

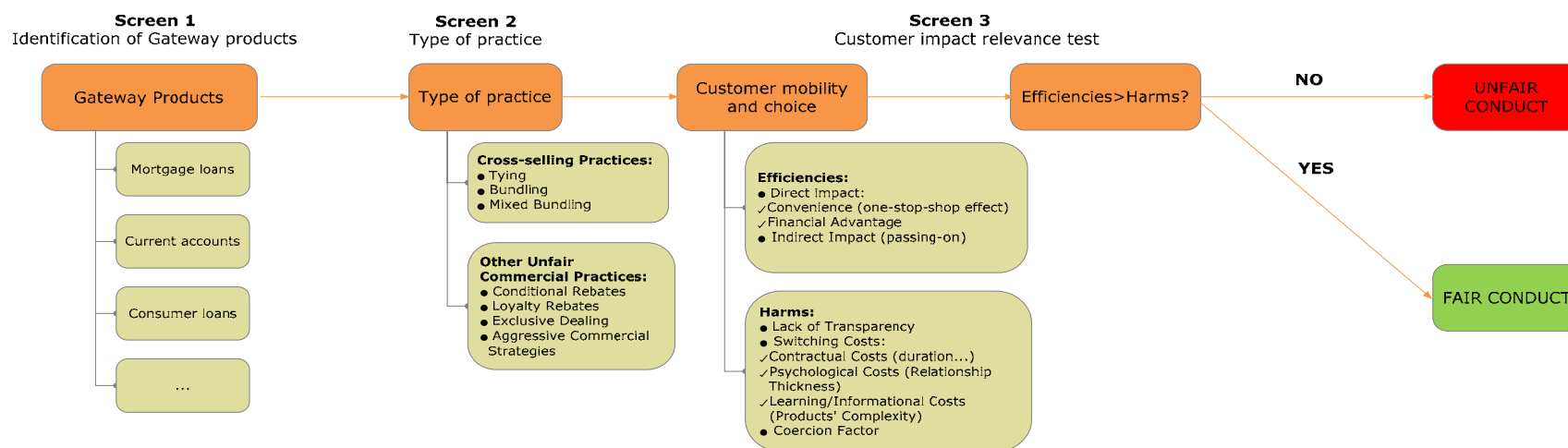
In the “antitrust impact test”, we check whether the anti-competitive effect is possible – this depends on whether the firm is dominant and whether the practice is likely to lead to anti-competitive foreclosure; then, following the Commission’ 2008 Guidance paper on exclusionary abuses under Article 82 of the EC Treaty, we ask whether the practice features redeeming efficiencies, which are likely to be shared with customers. An overall balance of harmful effects and efficiencies leads to determining whether the conduct is likely to be found anti-competitive, and thus unlawful.

In the “customer impact test”, the steps are different, and mirror to the extent possible the unfairness test of the EU Unfair Commercial Practices Directive (UCPD). We then ask whether the practice is likely to reduce customer mobility and choice; and whether it is objectively justified. This latter test includes an assessment of demand-side efficiencies generated by the practice. If the practice overall is found to be beneficial for consumers, we consider it to be lawful. Practices that restrict customer choice and mobility without producing efficiencies for consumers are considered to be unfair, if not objectively justified.

— Antitrust Test



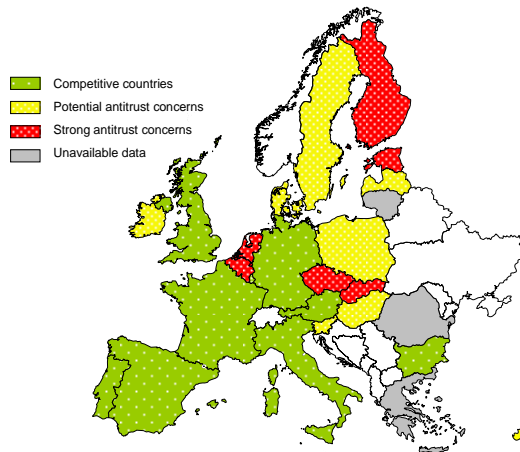
— Customer Impact Test



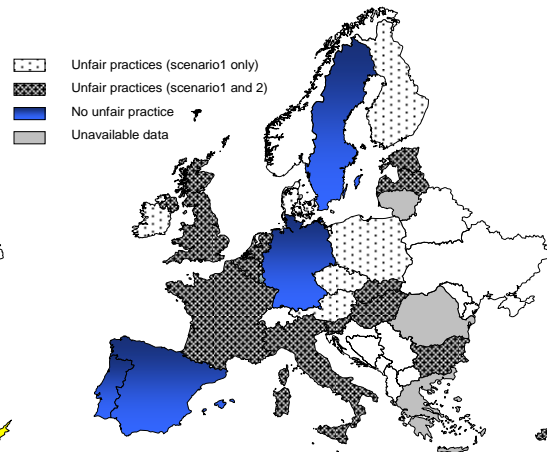
Source: Authors' elaboration.

Our test allowed us to map anti-competitive and unfair practices across the EU27. We report this information graphically in two maps of Europe below. For the assessment of unfair practices, we report two different scenarios: scenario 1 does not account for possible efficiencies generated by the practice for the provider and passed-on downstream to the customer; on the contrary, scenario 2 takes these types of efficiencies into account.

Anti-competitive practices in the EU27



Unfair practices in the EU27



More in detail, the results of our test revealed that tying and other potentially unfair commercial practices have important consequences:

- Tying and pure bundling practices (hereinafter grouped as “tying”), when not leading to efficiencies that are passed on to consumers, reduce customer mobility, price transparency and the comparability of providers on the market, increase switching costs and negatively affect consumer confidence. The results of our test suggest several cases of tying practices that are harmful, and point at types of combinations that emerge more frequently in a number of Member States, including Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands and United Kingdom.
- 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. However, from a consumer protection perspective, there is often little difference between the two practices, as consumers are often put in a situation where they have to trust the advice of their counterpart, and find it costly to shop around for alternatives. This finding is supported by evidence that in countries where tying is officially banned, bundling replaces it with practically the same effects. Mixed bundling with no (dis)advantage was found to be unfair in Austria, Belgium, Czech Republic, Estonia, Ireland and Latvia; whereas the offer of a preferential tariff or rate for the gateway or combined product was found to be unfair in Cyprus, Denmark, Estonia, Finland, Italy, and Slovenia. In addition, in our simulation of the impact of the practices in terms of restriction of competition, mixed bundling cases

dominate tying cases (See Table 70 in Section 6.2.2.5 of the Report). Some of these countries presented less concerns as regards tying, but witness widespread mixed bundling practices that are as unfair.

- Amongst the other potentially unfair practices, some are unlikely to provide efficiencies to customers, and are construed as being almost *per se* unfair. This is the case for all practices in which the financial service provider exploits its superior information to extract more surplus from the relationship with the customer, as is the case for churning and steering. This is also the case for unsolicited offers and pressure/inertia selling, as the financial service provider can induce customers to purchase unnecessary or unwanted products, materially distorting the customer's choice. These are the practices that are most difficult to capture in an empirical analysis, especially if consumers do not report them in practice: limited participation of consumers and consumer associations was indeed one of our major problems in collecting data for our empirical analysis.
- In any event, we found evidence of unfair preferential or exclusive agreements in Italy, Slovenia and Latvia; and cases of conditional practices that reportedly produced no efficiencies in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Italy and United Kingdom. Some of these practices refer to products (like current accounts) that usually do not require any guarantees from consumers. Nevertheless, these practices have been found in Czech Republic, Denmark and Hungary.

As regards the types of potentially unfair practices most commonly observed in the EU27, as well as the reasons stated by respondents for engaging in these conducts, we found that the top three gateway products are mortgage loans, current accounts and consumer loans.

When a mortgage is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of mortgage loans with long-term accounts. Frequent practices that may create restrictions of competition also include the cross-selling of mortgage loans plus (i) life insurance or (ii) current account. Very harmful practices of this type are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.
- *From a consumer policy perspective*, approximately 90% of the cross-selling practices are found to be unfair in our test. The most unfair practices involved term investment accounts, bank deposits and a variety of insurance products.

When a current account is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of current accounts with (i) specific investment services (underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients); and (ii) loans (consumer and corporate banking loans, mortgage loan). Other more frequent practices that may create

competitive restrictions are the cross-selling of current account with (i) credit and debit cards, and (ii) life insurance. Here too, examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.

- *From a consumer policy perspective*, and unlike the case when mortgage is the gateway product, in our test nearly two-third (i.e. 65.3%) of combinations with current accounts as gateway product proved beneficial or neutral to consumers (through zero and negative scores). Consequently, nearly 35 % of such combinations resulted in unfairness. Amongst the latter, the most unfair cross-selling practice is the combination with mortgage loans. In addition, cross-selling of current accounts proves unfair when the combined product is home insurance and consumer loans. Other cross-selling practices that prove particularly unfair are the combination of current accounts with various forms of investment advice, which may pave the way towards additional aggressive commercial practices such as unsolicited offers, churning and steering.

When consumer loans are used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by; (i) the combination of consumer loans with current accounts; and by (ii) the cross-selling of consumer loan with motor insurance. Examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Estonia and Finland.
- *From a consumer policy perspective*, in our test 90.5% of cross-selling practices in which consumer loan is the gateway product resulted in consumer unfairness. Practices that are most unfair are the ones involving insurance products, including life insurance, PPI, health/disability insurance and motor insurance.

As regards conditional sales practices:

- *Restrictions on access to products or services are imposed in all segments of financial services. However, they concern principally banking products.* Such practices tend to provide consumers and producers with efficiencies, but producers extract a greater amount of efficiencies than consumers. Critical cases can however be identified where no efficiency is generated for customers and producers, and conditioning the access to financial products and services may prove unfair, given the lack of counter-balancing effects provided by the absence of efficiencies. In our sample, 17% of the observed practices led to no efficiency gains, for both consumers and producers. No efficiency gains were observed in nine countries (Belgium, Cyprus, Czech Republic, Denmark, Estonia, Hungary, Ireland, Italy, and United Kingdom).
- *Conditional and loyalty rebates tend to advantage customers more than producers.* While 84% of such practices generate efficiencies, practices that produce no efficiencies were found in the banking sector in Hungary,

Slovenia, Finland and Poland; in the insurance sector in Poland; and in the investment sector in Poland and Ireland.

- There are a limited number of cases (10) in which non-financial products are included in the offer of retail financial services. These cases almost exclusively involve insurance products. Of these, two critical cases that may lead to a detrimental impact for customers were spotted in France and Poland.

On aggressive commercial practices:

- Given the specific nature of aggressive commercial practices, it was very difficult to identify instances of such practices through an empirical analysis, as respondents (especially when they are financial institutions) had no real incentive to report the existence of such practices. Even if our results do not cover aggressive commercial practices, in our empirical analysis we have identified a number of instances in which investment advice is tied with long-term products that are often used as gateway products, such as mortgage and consumer loans or current accounts. In particular, such cases have been identified in Poland and Austria, and most notably in Estonia. When this situation occurs, financial advisors have the potential to capitalise on information asymmetries and thick relationships by putting pressure on customers to secure the purchase of additional products, through unsolicited offers or practices such as churning and steering.

DO THE OBSERVED PRACTICES AFFECT CUSTOMER MOBILITY AND CROSS-BORDER TRADE?

The practices under scrutiny, and in particular cross-selling and conditional practices, negatively affect customer mobility. The fragmentation in the national legal systems and the legal uncertainty surrounding the interpretation of some parts of the EU *acquis* (such as the UCPD) to the practices at hand (in particular to cross-selling and conditional sales practices) may be an obstacle for both providers wishing to operate across borders, and customers ready to engage in cross-border shopping.

In our simulation:

- The total number of contracts that would be switched in the EU27 if the practices at hand were not applied by financial service providers is 572 million. This effect would be felt mostly in Italy, Germany and the United Kingdom.
- The number of contracts that would be switched to foreign providers reaches 33 million (6% of total switching), mostly located in Italy, Austria and Estonia. In addition, entry of new players would be likely especially in Cyprus, Hungary, and Spain. In these countries, foreign providers are most likely to find it profitable to enter the market within a reasonable timeframe, boosting the cross-border supply of financial products. Other

countries in which this effect may materialise – though with a lower intensity – are Belgium, Czech Republic, Denmark, France, Germany, Latvia, Poland, Slovakia, Sweden, and the UK.

- The most substantial impact on mobility concerns contracts in which the current account is the gateway product. Other gateway products leading to an important numbers of potential switchers are mortgage loans, home insurance, consumer loans and – to a lesser extent – motor insurance and corporate banking loans.
- The impact on cross-border demand would affect mostly contracts that have as gateway product the current account (97% of the practices having an impact on cross-border demand).
- The combined product for which switching occurs most often are credit line/overdraft, fund transfers, savings accounts, other non-life insurance, bank deposits, debit cards, execution of orders on behalf of clients and payment protection insurance.
- The combined products that would be switched most often to foreign providers are investment advice, bank deposits, debit cards and the execution of orders on behalf of clients. In all these cases, the degree of switching falls in the range between 11% and 12% of total switched contracts.

The practices that exert the greatest impact on cross-border demand are found in Austria, Belgium, Czech Republic, Estonia, Germany, Hungary, Italy, the Netherlands, Slovenia and the UK.

HOW IS THE PROBLEM ADDRESSED BY LEGISLATORS?

The fact that tying and other potentially unfair commercial practices are widespread has called for the attention of some national legislators. However, our survey of legal approaches throughout the EU27 portrays a situation of extreme fragmentation.

- As regards the specific solutions adopted by Member States, our analysis reveals that *12 Member States have adopted policy initiatives addressing tying and other potentially unfair commercial practices*. These are Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Hungary, Ireland, Poland, Portugal, Romania and Slovakia. Of these, 8 countries have decided to take specific action to restrict tying and cross-selling behaviour in the financial services sector. This latter group of countries include Member States that have enacted very far-reaching prohibitions (Belgium, France, Ireland, Portugal, Slovakia); countries that rely on “soft-law” schemes couples with narrower legal prohibitions (Hungary, Poland); and one country where prohibitions are narrower in scope (Denmark).
- *15 countries have no specific provisions on tying and bundling practices*. These include also legal systems in which the issue of cross-selling practices has been extensively debated, such as the Netherlands and the United Kingdom; countries where there is evidence that tying creates high

switching costs in the financial services (in particular, banking) sector, but no initiative has been undertaken to date on cross-selling practices (Italy); countries where there is a general ban on tying in the consumer legislation, but application is non-existent (Spain); and countries where the issue of tying in the retail financial services sector has barely surfaced in the debate so far (Austria, Czech Republic, Estonia, Germany, Greece, Malta, Latvia, Lithuania, Luxembourg, Slovenia, Sweden).

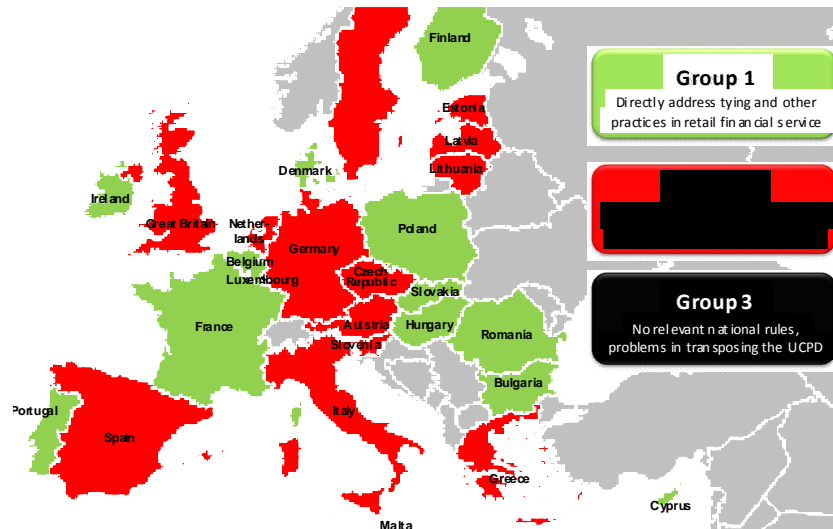
- *As regards rebate schemes and preferential/exclusive agreements, only 3 countries have specific rules in place that concern these practices even in cases that fall outside the scope of competition rules.* Belgium, France and (to a lesser extent) Ireland have enacted rules that can tackle (though often not entirely) the problem of rebates, discounts, and the imposition of providers for specific additional services.
- *For what concerns aggressive sales practices such as unsolicited offers, pressure and inertia selling, only France has introduced specific bans.* In all other countries, these practices can potentially be tackled through consumer legislation, including provisions implementing the UCPD (with the exception of Luxembourg). The same can be said for churning and steering.
- *Although it is possible to challenge a number of unfair commercial practices through the UCPD, there seems to be limited prospects for this to occur absent a clarification on the applicability of this directive and the relative transposing legislation.* This is certainly the case for tying, rebates, and preferential/exclusive agreements. This is even more important for the purposes of our Report since Member States differ noticeably as regards their regulatory framework and legal tradition on unfair commercial practices.
- *As the UCPD does not apply to SMEs, only countries where a general clause applying to B2B and B2C relationships exists will be able to protect SMEs against unfair commercial practices,* whereas other countries where legislation focuses exclusively on consumers will not be able to address this problem. In addition, national general clauses generally do not refer to the standard of professional diligence as the UCPD does. When defining unfair commercial practices most general clauses refer to good trading practice – in particular, to *boni mores* of the competition (Austria, Czech Republic, Germany, Greece and Slovakia); to good business, trade and marketing practice, fairness, honesty and good morals (Denmark, Estonia, Finland, Germany, Luxembourg, Portugal, Slovenia, Sweden), to the principle of good faith (Poland, Italy and Spain) and to business integrity (Hungary). In countries in which the general rules of the Civil Code apply, the standard is, for example, '*faute*' in France and '*onrechtmatigheid*' (unlawfulness) in the Netherlands.

In any event, only some of the policies implemented in Member States seem to have reached the desired goal of tackling these practices when they are unfair to customers or to competitors. Also evidence from the US anti-tying restrictions introduced in the 1970 Bank Holding Act suggests that banning tying alone is very unlikely to prove effective, as several other practices (e.g. bundling, or

rebates) can easily replace contractual tying by reaching similar effect without showing actual evidence of coercion. Comparing the legal approaches with the available empirical evidence, what emerged is the following:

- *Cross-selling and conditional sales practices are widespread in the EU27.* In addition, the relative weight of tying compared to other cross-selling practices varies across countries, and does not seem strongly dependent on the existence of a legal framework that bans tying of retail financial services. Compared to the results of the sector inquiry, which reported the percentage of banks engaging in given cross-selling practices, our survey revealed that the share of the market affected by cross-selling and conditional sales is often quite big. For example, the offer of multi-product rebates for the joint purchase of mortgage loans and current accounts reportedly affects more than 80% of the market in Belgium and Slovenia. In Spain, the use of mixed bundling (with no (dis)advantage for customers) for these two products affects more than 80% of the market. The two products are reportedly tied in the Netherlands and in Hungary in more than 80% of the transactions, and in 60% to 80% of the transactions in Italy.
- *In Member States that have prohibited tying, the practice either survives or was replaced by mixed bundling.* Tying survived despite a legal prohibition in Belgium, Portugal and Slovakia and has been replaced by other practices *i.a.* in Ireland and Spain.
- *Soft law initiatives seem to have been ineffective in a number of countries:* apart from the case of the UK, in countries such as Ireland, Hungary and Poland the existence of Codes of Ethics or recommendations from competition authorities or financial regulators does not seem to have stopped financial service providers from practising cross-selling and conditional sales practices.
- *In countries that have a general ban on tying, whenever exceptions are available financial service providers engage in this form of binding cross-selling practice* (e.g. Belgium, France). For example, our data on France confirm that the mortgage and PPI markets – where no prohibition currently exists as regards tying practices – are the ones that deserve more careful attention, as they affect more than 80% of the market. This confirms the direction taken by the *Loi Lagarde* that will ban the combined sale of mortgages and PPI policies from 1 January 2010. A similar situations exists in Finland.
- *Some conditional sales practices are widespread and systematically applied.* The most frequently observed conditional sales practice is the obligation to have the salary paid into the current account. In most countries this clause is used as a necessary condition to access a given service (normally, a mortgage loan), and is thus associated with a cross-selling practice (current account plus mortgage loan). These countries include Denmark, Cyprus, Ireland, Italy, Estonia, Poland, Slovenia, Latvia, Hungary, Belgium and the Czech Republic. In some of these countries, there are also cases in which this practice is used as a condition to obtain a more favourable service (e.g. lower interest rate on a loan). In Germany and Portugal, the practice was observed only in this latter form.

Legal approaches in the EU27



CAN THE CURRENT EU ACQUIS ADDRESS TYING AND OTHER POTENTIALLY UNFAIR PRACTICES IN RETAIL FINANCIAL SERVICES?

Another important finding of our report is that the potential for challenging tying and other potentially unfair commercial practices mostly relies on whether the Unfair Commercial Practices Directive (UCPD) can be interpreted as covering some or all of the practices at hand, including especially unsolicited offers, pressure/inertia selling, churning and steering. It is also worth noting that, focusing on specific sectors, other pieces of legislation may have a potential to catch the practices covered by this study². More specifically on the UCPD, as explained in Section 4 of this Report, it is a rather new document, and it is not clear as of now which direction the practice would evolve. However, already at this stage it can be observed that:

- The Directive applies to unsolicited offers, “inertia” or “pressure” selling (as “aggressive practices” ex Articles 8 and 9 UCPD), when these are contrary to professional diligence.
- The UCPD can also be applied, depending on the interpretation that will be given by national courts, to cases of churning and steering (as “misleading practices” under Articles 6 and 7 UCPD).
- The UCPD potentially applies also to tying, bundling, rebates and preferential or exclusivity agreements, provided that: (i) the practice at hand is proven to be contrary to professional diligence; and (ii) it forces

² For example, this is the case of the Market in Financial Instruments Directive (MiFID) that already covers practices such as churning in the context of the provision of investment services and also contain high level principles concerning the obligation of investment firms to act in the best interest of the clients.

customers into the purchase of a product they would not have bought, or into a consumption pattern they would not have followed (in the case of conditional rebates). However, proving one's case may be extremely difficult here, absent a clear indication that a given practice is captured by the UCPD.

- The applicability of the UCPD to some types of conditional sales, such as the obligation to pay salary into the current account as a condition to access a mortgage loan, appears more difficult.

Generally, the effective enforcement of the UCPD relies on a case-by-case assessment carried out by Member States' authorities and courts, and there are some risks of divergent interpretations. In particular, the *onus probandi* for consumers will depend on the national implementation of the UCPD, especially as regards the "good faith" principle. What emerges from our analysis is that retail financial services should be approached with particular attention when defining the concept of unfairness, due to the specific problems these products pose to customers in terms of rational ignorance and decision-making biases. In addition, clarifications would be needed about the possibility to apply the UCPD also to cross-selling and conditional sales practices, where appropriate. In fact, financial services are exempted from the maximum harmonisation clause included in the UCPD: accordingly, the countries that have enacted a general prohibition against combined sales (*e.g.* Belgium, France, Romania) may have to revise their legislation for all sectors, but not for retail financial services. Finally, what may provide a useful perspective for any future action, is a stronger integration of behavioural economics concepts in the legal analysis of unfair commercial practices in the retail financial services sectors, in line with a consolidated stream of literature and a mounting debate also in international organisations.

CONCLUSION: IS THERE A POLICY PROBLEM?

In conclusion, in our report we show that tying and other potentially unfair practices are widespread in the EU27, they are insufficiently addressed by both EU and national policies, and can be harmful to consumers and SMEs across Europe. The current situation affects mostly consumers and SMEs, and deprives them of product variety, low prices, and control of the consequences of their choices. Not surprisingly, recent empirical evidence collected in a survey by Eurobarometer has revealed very limited consumer confidence in the field of financial services in the 27 Member States.

However, this is not all. There is another negative consequence of the current situation, which is worth being highlighted, and is related to the achievement of the Internal Market for financial services. Regardless of the policy approach that should be adopted towards these practices, 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 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.

There may thus be scope for “acting in common”, as well as “acting at EU level” in order to make sure that financial service providers can face the same legal rules when operating across borders, and consumers and SMEs can profit from a broader availability of offers and a more competitive and integrated Internal Market in the European Union.

TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICES SECTOR

1 INTRODUCTION: SETTING THE SCENE

Financial services, encompassing the banking, insurance and securities sub-sectors, play a considerable role in the EU economy. The sector as a whole contributes to a significant extent to EU growth and employment³. Moreover, the size and the strength of the sector also allow a strong positioning of the EU in global financial markets⁴. These specific features of the market signal the potential of the sector as a real motor and driving force for growth and job enhancement in the EU. Accordingly, financial services represent a major policy area in the achievement of the EU internal market. Against this background, over the last two decades the sector has undergone a drive towards integrating the sector within one EU common market⁵, especially after the launch of the Financial Services Action Plan (FSAP) in 1999 and the Financial Services Policy for 2005–2010, where the goal to establish an integrated and consolidated internal market is clearly set as one of the policy priorities for financial services by 2010⁶. Actions undertaken to date have already yielded substantial benefits for consumers and society as a whole.

However, in order to reap the full advantages of integration, the financial services sector needs well-functioning, transparent and competitive markets,

³ As stated in the European Commission, Staff working document European Financial Integration Report 2007, SEC(2007) 1696, 10 December 2007: “In 2006 financial intermediation generated EUR 663 billion, which accounts for 5.8% of EU GDP. Moreover, in the period 2001-2006 growth rates of the economic output of the financial sector have been substantially higher than the overall growth rate in the EU (...). Wholesale finance expanded at three times the rate of the EU economy.”

⁴ As stated in the Financial Integration Report: “The EU is one of the main actors in international financial markets, together with the US and Japan. (...) Europe has a dominating position in the world foreign exchange markets, with a market share of 60% in 2006 (in terms of average daily turnover), while the US and Japanese market shares were 18% and 8% respectively. EU banking groups own 52% of all global banking assets, while EU insurance groups account for 38% of global premiums.”

⁵ As stated in the Financial Integration Report: “Progress of integration is reflected in the average annual growth of intra-EU trade in financial services, which stood at 14% in the period 2000-2005.”

⁶ As stated in the European Commission, White paper on financial services policy (2005-2010), COM(2005) 629, 5 December 2005: “The objectives of the Commission’s financial services policy over the next 5 years are to: consolidate dynamically towards an integrated, open, inclusive, competitive, and economically efficient EU financial market; remove the remaining economically significant barriers so financial services can be provided and capital can circulate freely throughout the EU at the lowest possible cost – with effective levels of prudential and conduct of business regulation, resulting in high levels of financial stability, consumer benefits and consumer protection; (...).”

where consumers can enjoy a wide variety of quality products at competitive prices. As testified by ample empirical evidence, retail financial services are considered as a market where the need to provide end consumers with adequate information, variety of choice and ease of mobility to alternative providers is key to the optimal realisation of competitive market outcomes⁷. In this respect, even if EU action has been successful so far, several challenges still remain pending. In particular, some of the commercial practices adopted by market players have the potential to distort or hamper consumer choice, and are being closely scrutinised by both EU institutions and some national policy-makers. However, the types of practices that are more likely to prove harmful for consumers and SMEs and the circumstances under which the detrimental effect may materialise have not been fully assessed and clarified to date. In this Report, we try to fill this gap by providing a classification of these practices as well as an assessment of their impact on customer mobility and cross-border trade.

Moreover, the current context characterised by an acute financial and economic crisis provides a new framework that justifies increased attention for market players' conduct. Against the background of tremendous losses faced by financial services providers, the emerging market environment provides them with new incentives and leads them to adjust and adapt their marketing and pricing strategies accordingly. In fact, there is an increased likelihood that players in the financial services market will tend to recast their attention on the retail markets and opt for a range of practices that would allow them to help restoring profitability. Amongst such strategies, the capture/retention of customers could certainly play a prominent role.

In light of the goal of enhancing the internal market in the financial services sector, the European Commission launched a sectoral inquiry on the retail financial services sector in June 2005, pursuant to Article 17 of Regulation (EC) No 1/2003⁸. The investigation focused on three main areas: payment cards, core retail banking and business insurance. Several indicators of market failures and distortions of competition stood at the origin of the inquiry, notably market separation altogether with entry barriers in the retail banking and distortions of competition in business insurance. The inquiry, opened in June 2005 and closed in 2007, reported a detailed picture of customer mobility in financial services, more particularly in the sphere of retail banking. The results highlighted a low level of mobility of European customers⁹. Amongst the main factors identified as reducing customer mobility in the sector's inquiry, were the cross-selling and conditioning of banking products. Tying practices were found to be widespread across EU Member States¹⁰.

⁷ For a detailed discussion, see *infra*, Section 2.2.

⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1-25. See Section 1.3 below for a detailed illustration of the scope and results of the sectoral inquiry.

⁹ Two types of indicators illustrate customer mobility. They are referred as “churn” and “longevity”. See European Commission, Interim report II : Current accounts and related services, Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 17 July 2006.

¹⁰ For instance nearly two third (63%) of European banks require SMEs seeking a loan to also open a current account. See Report on the Retail Banking Sector Inquiry.

Against this background, this study adopts a rather different perspective, and focuses on the identification and assessment of those practices that restrict customer mobility and increase customer switching costs in the retail financial services markets, by forcing customers into the purchase of combined products or services, or by conditioning sales terms to specific actions that should be undertaken by the customer. In addition, we look at aggressive commercial practices and identify practices that may emerge as a result of the informational asymmetry between financial advisors and their customers. Section 1.1 below lists the practices under scrutiny in more detail.

This study adopts a twofold perspective to the problem at hand, *i.e.* we analyse existing practices from a competition policy and a consumer policy perspective. As will be clarified in the next sections, these two approaches – often kept separate – are increasingly seen as complementary, especially in those sectors where consumer behaviour is likely to be distorted due to limited or asymmetric information, cognitive biases and other bounded rationality problems¹¹. While the competition rules relevant to this study aim at challenging conduct that can lead to anti-competitive foreclosure of rivals, consumer policy was recently defined as “*preventing sellers from increasing sales by lying about their products or by engaging in unfair practices such as unilateral breach of contract or unauthorized billing*”¹²; and chiefly aimed at preventing, curing or remedying: “*(i) duress and undue sales pressure; (ii) information problems pre-purchase; and (iii) undue surprises post-purchase*”¹³.

Accordingly, practices that fall under the scope of competition policy are only a subset of the practices that end up reducing customer choice and mobility in the retail financial services sector: for example, some tying practices do not lead to any foreclosure of equally efficient competitors, as they are perfectly replicable by rivals in the relevant market, but may still force customers into the purchase of products they did not want to buy; practices such as unsolicited offers can hardly be considered as relevant from an antitrust perspective, but still they prove detrimental for end customers, especially when the latter depend on the information provided by their financial advisors.

1.1 The practices under scrutiny

In this section, we introduce the practices that will be the subject of our analysis throughout this report. Section 1.1.1 introduces cross-selling strategies, and in

¹¹ See OECD (2008), *Roundtable on the Economics of Competition and Consumer Policy*, Seventh Global Forum on Competition, Introductory Note, available online at <http://www.oecd.org/dataoecd/24/24/40094392.pdf>. Bounded rationality refers to the fact that – contrary to what occurs in cases of rational ignorance – always take their decisions on the basis of imperfect information, limited capacity of the human mind, and limited amount of time. A cognitive bias, instead, refers to the distortions of the human mind that lead to perceptions that deviate from the reality. See Section 2.2.1.2 below.

¹² Timothy Muris, *The Interface of Competition and Consumer Protection*, Paper presented at Fordham Corporate Law Institute’s 29th Annual Conference on International Antitrust Law and Policy, New York (Oct. 31, 2002). See also Armstrong (2008). *Interaction between Competition and Consumer Policy*, a report for the OFT, OFT 991, April 2008.

¹³ J. Vickers, *Economics for Consumer Policy*, 125 Proc. Brit. Acad. 287-310, 289 (2004).

particular tying, mixed bundling and multi-product rebates (*i.e.*, bundling with financial advantage to the customer). Section 1.1.2 then discusses other potentially unfair practices, such as practices that lead to conditioning sales terms to specific actions undertaken by the customer¹⁴; and practices that materially distort customer choice by imposing unsolicited purchases to less informed counterparts.

1.1.1 Cross-selling practices

1.1.1.1 Tying and pure bundling

Tying occurs when two or more products are sold together in a package and at least one of these products is not sold separately¹⁵. Pure bundling occurs when none of the package components is available separately, and the components are offered in fixed proportions¹⁶. This implies that customers that would not buy all the tied goods may be forced to purchase extra products that they did not want: this element of coercion has raised the attention of policymakers particularly in the field of competition policy, but also in consumer policy¹⁷. In the legal and economic literature, the potential negative effects of tying and pure bundling can be summarised as follows¹⁸.

- *Tying and pure bundling can be a way to leverage market power.* When practiced by a dominant firm, tying can be seen as an anti-competitive practice since it allows dominant firms to leverage their market power from the tying into the tied markets. The industrial economics literature shows that, especially when the tied market is not perfectly competitive, firms may profitably engage in tying to expand their dominance into new markets (“offensive” leveraging) or to defend their dominant position in the tying market (“defensive” leveraging)¹⁹.
- *Tying and pure bundling can foreclose existing competitors and deter the entry of new players* in the relevant markets involved, especially when replicability of the combined offer is difficult, costly or impossible for rival

¹⁴ This means, for example, that we do not look at contractual conditions that obviously raise switching costs, but do not imply specific actions by the end customer – *e.g.* account closing charges or early payment fees.

¹⁵ See the European Commission Staff Working Document accompanying the Communication from the Commission – Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking (Final Report) [COM(2007) 33 final], SEC(2007) 106 of 31 January 2007, at 49.

¹⁶ See, *e.g.* O'Donoghue, R. and A. J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, Chapter 9, at 477. In the remainder of the report, we refer to tying practices for ease of reading. Our conclusions for tying in the case of retail financial services are valid also for pure bundling.

¹⁷ A detailed analysis of the potential efficiencies and negative consequences of tying practices in both fields of law is found below in Section 2 of this Report.

¹⁸ See Section 2 below for a more detailed discussion of the literature and caselaw.

¹⁹ A detailed explanation of these effects is provided in Sections 2.1.1.1 and 2.2.3.1.1 of this Report.

firms and potential entrants. This negative outcome can materialise especially when competitors and potential entrants are mono-line, *i.e.* they produce only one (or a subset of) the tied products, and have no possibility to market the other tied products within a reasonable timeframe²⁰.

- *Tying and pure bundling can lead to higher switching costs and lower customer mobility.* Since tying forces customers to purchase all the tied products from the same provider, when these products are durable goods or services customers will face an increased cost of switching to an alternative provider, since they would lose the products they have bought from that provider altogether, and would need to renegotiate the purchase of all the tied product with a different provider. Customers may thus be reluctant to move to competing providers: this may reduce customer mobility and distort customer choice.
- *Tying and pure bundling can reduce price transparency and the comparability of offers.* Tying and pure bundling practices make it difficult for customers to single out the price they pay for each product included in the bundled offer. Especially when competitors do not offer exactly the same bundle of products, customers will find it difficult to compare the price they are currently paying for the bundled products with alternative offers by competing providers. This, in turn, can distort customer choice and lead to reduced customer mobility.

As a preliminary statement, it is worth noting that some of these effects may materialise regardless of whether tying is practiced by a dominant firm or by a firm that does not hold significant market power. This is the case, in particular, for the last two effects (the impact on switching costs and customer mobility, and the reduction of transparency and comparability of offers). Accordingly, tying has become a source of concern also outside the antitrust field, and in particular in consumer policy, especially in the domain of unfair commercial practices²¹.

At the same time, tying can also bring certain benefits for both providers and consumers²². The economic literature stresses the beneficial as well as detrimental consequences of tying practices: “*tying results in efficiencies that benefit consumers although tying could be used, in particular situations, for anti-competitive purposes. There is no basis for singling tying out for per se condemnation from among the range of possible unilateral practices*”²³. The potential beneficial effects of tying practices include the following:

²⁰ See, e.g. the Report of the OECD Policy Roundtable on Bundled and Loyalty Discounts and Rebates, DAF/COMP(2008)29, at 22, stating that “anti-competitive foreclosure is more likely to occur if the loyalty discount raises the costs of entry for rivals (who have to compensate buyers for their switching costs) or if it prevents rivals from achieving the minimum viable scale required to compete effectively”.

²¹ See, for an early reference, Craswell, R. (1982), *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U.L.REV. 661.

²² See *infra* Section 2.1.1 for a more detailed illustration.

²³ As stated in Evans, D. S., *Tying: the Poster Child for Antitrust Modernization* (November 2005). Available at SSRN: <http://ssrn.com/abstract=863031>.

- *Tying can lead to cost savings through economies of scope.* In the financial services sector, tying can allow firms to reduce the cost associated with customer management by using the same information for the provision of more than one service. These savings can be also beneficial to customers, if market conditions lead financial service providers to pass on the efficiencies downstream to their clients in the form of lower prices.
- *Tying can reduce transaction costs and lead to “portfolio effects” (or “one-stop-shop” effects).* Customers having different needs often prefer to purchase one package of services and products from a single provider, instead of shopping around to find the best deal offered by different providers. This way, they can profit from a reduction in transaction costs, including search, information and negotiation costs. Available empirical evidence shows that consumers prefer to buy more than one service from a single provider for practical reasons, instead of shopping around for the best deal on all services²⁴.
- *Tying can lead the provider to more efficient pricing,* by avoiding the risk of double marginalisation, *and to efficient price discrimination,* through the capture of heterogeneous customer preferences by offering a wide range of products in a single package.

Overall, as will be clarified in Section 2.1 below, it is very difficult to anticipate whether the efficiencies generated by tying will be greater than the potential detrimental effects for end users. A recent report by the US Department of Justice (DOJ) simply argued that “*we still do not understand much about tying*”, mostly due to deficiencies in mainstream theories of anti-competitive harm used in competition cases²⁵. The specific product and market setting at hand are essential to reach a conclusion in this respect, as increasingly acknowledged in the literature and by institutions (including the European Commission)²⁶.

1.1.1.2 Mixed bundling and multi-product rebates

Mixed bundling occurs whenever two or more products are sold together in a package, although each of the products can also be purchased separately on the market²⁷. The difference between mixed bundling, tying and pure bundling is that only in the latter two practices there is an element of coercion. Mixed bundling can be associated with a rebate on the price of the bundled products,

²⁴ See Section 2.2 for an explanation based on empirical data.

²⁵ See Chapter 5 of the Report “Single Firm Conduct under Section 2 of the Sherman Act”, adopted by the US DOJ in 2008 (quoting Alden F. Abbott & Michael A. Salinger, *Learning from the Past: The Lessons of Vietnam, IBM, and Tying*, Competition Pol’y Int’l, Spring 2006, at 3). Available at http://www.usdoj.gov/atr/public/reports/236681_chapter5.htm.

²⁶ See the Commission’s Guidance Document on the Treatment of Exclusionary Abuses under Article 82 of the EC Treaty, in particular at §48 ff.

²⁷ Pure bundling, compared to mixed bundling, is more similar to tying, but none of the package components is available separately, and the components are offered in fixed proportions. See, *i.a.* O’Donoghue, R. and A. J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, Chapter 9, at 477.

i.e. purchasing the bundle is cheaper for the customer than purchasing all the products separately, as the price for the bundle is lower than the sum of the standalone prices of the bundled products. This variant of mixed bundling can also be referred to as “multi-product rebate”²⁸.

In many respects, the types of (positive and negative) effects that a mixed bundling practice can produce in a given market are the same as the ones generated by tying practices. However, given that there is no coercion of customers, the likelihood that a mixed bundling practice leads to anti-competitive foreclosure of competitors, greater switching costs and a reduction of customer mobility and choice is normally lower²⁹.

From the perspective of EC competition law, mixed bundling is currently considered as an exclusionary abuse only if the multi-product rebate by a dominant firm is such that equally efficient competitors would not be able to match the offer: the criterion applied by the European Commission is essentially a predation test³⁰.

From a consumer policy perspective, mixed bundling may be classified as a practice that does not directly force customers into the purchase of a package, but may exert a negative impact on customer choice, especially when there are high (actual and perceived) switching costs, *i.e.* substantial “barriers to exit” from the provider-customer relationship, due to both contractual and cognitive constraints. As will be explained in more detail in Section 2.2 of this Report, the peculiar nature of some economic sectors – including the retail financial services sector – is such that mixed bundling practices can often have a similar effect compared to contractual tying practices.

1.1.1.3 Other cross-selling practices

Other practices may differ from tying as the tied product is offered by a firm different from the tying product seller. This occurs, for example, whenever the financial service provider forces its customers to buy additional services from a specific provider, with which it has an exclusive agreement³¹. The impact of these practices on end customers is identical to that of a tie-in of products offered by a single seller/provider. A specific type of cross-selling practice that belongs to this category is observed when the customer is forced to buy the tied products from other providers within the same financial group.

Moreover, cross-selling practices include cases in which the customer spontaneously demands an additional product. In this case, a financial service provider that already has a contractual relationship with the customer may impose a third party, or offer better financial conditions if the customer chooses to purchase from a third party, with which the provider has a preferential

²⁸ In our empirical analysis in Section 5 below, we also use the term “bundling with financial advantage” to indicate cases of multi-product rebate.

²⁹ See below, Section 2.2.3.1.2.

³⁰ See Temple Lang, J. and A. Renda, *Treatment of Exclusionary Abuses under Article 82 EC Treaty*. Report of a CEPS Task Force, September 2009.

³¹ See *infra*, Section 2.1.3.3.

agreement. These cases of preferential/exclusive agreements can limit customer choice, but have a weaker element of coercion as opposed to tying and pure bundling, as customers spontaneously demand the good. In addition, especially in the case of preferential agreements, customers may profit from better conditions, especially if the preferential agreement allows the provider to better manage risk.

1.1.2 Other potentially unfair practices

Apart from tying and bundling, in this Report we also analyse the impact of other practices, which may be considered as potentially unfair under specific conditions. These include the following:

- Conditional sales practices where the customer is required to undertake specific actions, which raise switching costs and decrease both customer mobility and/or the replicability of the practice; and
- Aggressive commercial practices that materially distort customer choice by imposing unsolicited purchases to less informed counterparts.

1.1.2.1 Conditional sale of products and services

This group of practices can be further divided in two categories.

- *Practices where the service provision is subject to a specific condition, such as an action undertaken by the customer.* Without compliance with the specific condition, the product is not sold at all. A typical example of this type of practice is the obligation to have the salary paid into the customer's current account as a condition to obtain a mortgage loan. As recently stated by the European Commission, such practices “*not only have implications for customer mobility but can also reduce price and product competition in the markets for the tied and tying products and discourage the entry of new players, particular those providers specialising in the tied product*”³². Other practices that belong to this group include the obligation to provide loan guarantees; minimum initial deposit amounts; the obligation to keep a minimum balance on a current account; etc.
- *Practices that entail the provision of better contractual conditions to existing customers, subject to specific behaviour.* One example is banks that charge no credit card fee if the cardholder spends more than a given amount of money every year. Other examples include variable fees depending on usage, or on the number of products purchased, etc. We term these practices conditional rebates³³. As recently defined by the European Commission, “[c]onditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a

³² See European Commission, White Paper on the Integration of the EU Mortgage Credit markets, COM(2007)807, 18 December 2007.

³³ See *infra*, Section 2.1.3.1.

*conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates)*³⁴. The loyalty-enhancing impact of these rebate schemes has attracted the attention of competition authorities³⁵.

Like cross-selling practices, these practices are also not always to be considered as unfair to customers. On the contrary, some of them – especially rebates – could even be beneficial to end users. However, they may negatively affect consumer welfare if the particular characteristics of the market in which they are observed lead to a restriction of competition, or if they lead to reduced price transparency and comparability. For example, loyalty schemes in the retail financial services sector have been found to potentially enhance complexity, making it even more difficult for customers to compare products, prices and services³⁶. At the same time, loyalty discount schemes can increase switching costs, since alternative providers must compensate customers for the loss of the discount to entice them to switch.

1.1.2.2 Aggressive commercial practices

This group includes practices that are not related to specific contractual conditions offered to customers, but to the information flow between the service provider and the customer. For example, given one-stop-shop effects and the informational asymmetry between the seller/provider and the buyer/investor, the former's advice may end up leading the latter to choose a package of products from one single provider, instead of choosing "best deals" offered by all providers on the market³⁷. These practices can be identified as aggressive commercial strategies. These include:

- *Unsolicited offers (e.g. so-called "pressure selling" and/or "inertia selling" of products that were not requested)*, where a product or service offer is unsolicited when it is not expressly requested by customers and it involves a particular pressure on them to purchase a specific product. The term "pressure selling" is often used in the literature on consumer contracts. The European Commission used this term in a number of occasions, often coupled with misleading marketing practices. Pressure selling, in the Commission's definition, includes (i) implying that the consumer cannot leave the shop until they sign a contract; (ii) conducting personal visits to the

³⁴ See European Commission's Guidance paper on the treatment of exclusionary abuses under Article 82 EC Treaty, *cit.*, para. 37.

³⁵ See OECD; *cit.*; and the recent report by the International Competition Network, Unilateral Conduct Working Group, *Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws*, Presented at the 8th Annual Conference of the ICN Zurich, Switzerland, June 2009.

³⁶ See Section 2.2.3.2 below, where we refer to "confusopoly" as the situation in which prices and offers are difficult to compare for customers.

³⁷ For an analysis of one-stop-shop effects and the informational asymmetry between service providers and customers, please see *infra*, Section 2.2.1.

consumer's home and ignoring the consumer's request to leave or not to return; and (iii) demanding payment for products supplied by the trader, but which were not requested by the consumer (inertia selling)³⁸.

- *Churning*, consisting in an abuse by an intermediary of his or her fiduciary role with the customer. This practice entails, *i.a.*, the excessive use of the current account or the investment portfolio induced by the financial intermediary (agent) who exploits the informational gap of the other party (principal).
- *Steering*, defined as a practice, especially used in the mortgage market, consisting of stressing the credit risk of a potential borrower to steer him/her to higher cost loans.

Contrary to what occurs for cross-selling and conditional sales practices, most of these aggressive commercial practices are defined as *per se* entailing a deception of customers or an exploitation of their limited knowledge of the products at stake³⁹. Their potential to be welfare-enhancing for society as a whole is thus very limited.

1.2 The EC sector inquiry on financial services and related documents

In June 2005, the European Commission launched a sector inquiry into competition in financial services, pursuant to Article 17 of Regulation (EC) No 1/2003. The financial services sector inquiry focused on two main areas: retail banking (including payment cards) and business insurance. In what follows, we will focus on the issues and results that were highlighted in various phases of the retail banking sector inquiry. The final report of the sector inquiry was published on 31 January 2007.

1.2.1 Opening of the sector inquiry

The opening of the inquiry was initiated on the grounds that certain anti-competitive practices were suspected to distort the functioning of the Internal Market and paralyse the realization of the expected benefits. Two core indicators were identified to justify a sector inquiry. First, market fragmentation and entry barriers were believed to be present within the sector⁴⁰. Second, indicators of restrictions in customer choice in retail banking were based on the

³⁸ See, *i.a.*, the Press Release “EU law to ban pressure selling: Commission welcomes Council’s common position”, IP/04/1364 of 16 November 2004.

³⁹ See *infra* Section 2.2.2.1.

⁴⁰ This belief was based on the following observations: (i) the divergence of comparable price products in retail banking across the EU; (ii) the variation of the profitability of banks across Europe; (iii) the increasing level of domestic market concentration; and (iv) the numerous opportunities for coordination through networks and bilateral agreements between market participants. See European Commission, Communication by Commissioner Kroes in agreement with Commissioner McCreedy, Memorandum on sector inquiries in financial services (retail banking and business insurance), 13 June 2005.

evidence that prices for certain products were set above their competitive levels. The latter concern is of consequential interest since mobility is likely to be hampered when customers are 'locked-in' or forced to remain a customer of the financial services provider that they originally engage with. These distorting practices, which may originate from the imposition of high switching costs and bundling/tying conducts, were explicitly referred as the suspected roots for this harm. Accordingly, within the framework of the retail banking sector inquiry, tying practices were highlighted for further detailed investigation.

1.2.2 The Interim report

Following the launch of the inquiry, the preliminary results of the sector inquiry on the retail banking sector were compiled in one of the three interim reports addressing the broader financial services sector⁴¹. Tying practices were only emphasised in the retail banking inquiry⁴². The related interim report stressed the role of tying conducts in restricting customer choice and mobility. It also provided key facts and descriptions of tying.

Cross-selling strategies and more particularly bundling and tying of bank products were detected among other issues hampering competition in the sector⁴³, confirming the arguments that initiated the sector inquiry. The interim reports also recalled some of the undesirable consequences of these practices, including the reduction of price transparency, the leveraging of market power into adjacent markets, and entry deterrence.

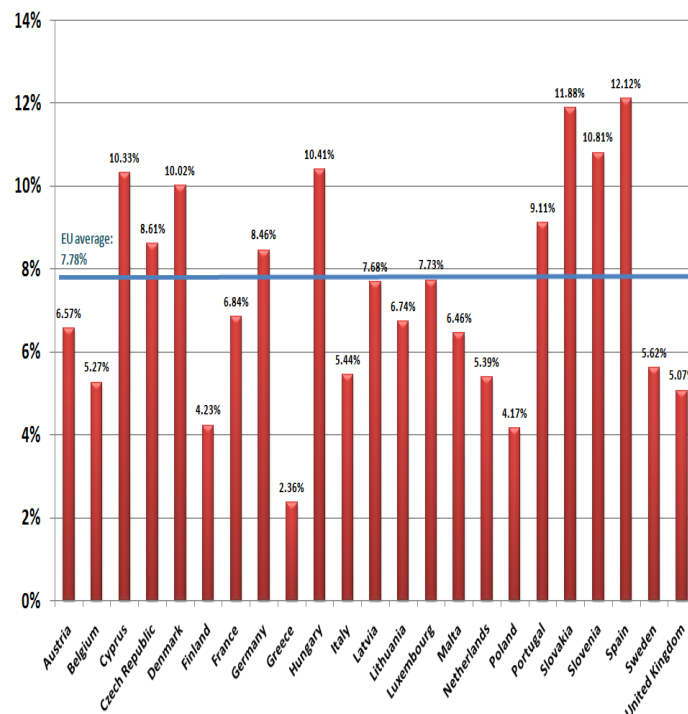
⁴¹ The three interim reports were Interim report I: Payment cards, Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 12 April 2006; Interim report II : Current accounts and related services, Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 17 July 2006; Interim report: Business insurance sector inquiry, Inquiry into the European business insurance sector pursuant to Article 17 of Regulation 1/2003, January 2007.

⁴² No evidence of tied practices have been emphasised on the insurance business side. See European Commission, Communication by Commissioner Kroes in agreement with Commissioner McCreedy, Memorandum on sector inquiries in financial services (retail banking and business insurance), 13 June 2005. The issue of tying and bundling has been emphasised as an accurate problem in the retail banking market (more specifically, as one of the indicators of lack of demand power in retail banking), but not in particular on the insurance business side. Indications of distortions in the business insurance put rather priority on other issues such as cooperation between economic actors, the setting of standard policy conditions, excessive cooperation within the framework of insurers' associations and in the context of coinsurance arrangements, and concerns about barriers to entry (in particular to cross-border entry). Nevertheless, product bundling and tying have not been identified there as one of the circumstances leading to distortion or restriction of competition in the business insurance market. In what follows, we will address the issue of tying and unfair commercial practices within the framework of retail banking area only and refer to the Commission's documents and results in this sphere.

⁴³ The other issues that were mentioned in the retail banking sector were administrative burden, information asymmetry and low price transparency, customers' preferences and choice, and account closing fees. See European Commission, Interim report II : Current accounts and related services, Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 17 July 2006.

The interim report also provided a deep analysis of customer mobility and tying practices in the EU. Customer mobility was measured by two indicators extracted from the Commission's "Retail Banking Survey: 2005-2006", 'churn' and 'longevity'. The findings show that consumers tend to engage in longer relationships with banks than SMEs. In particular, in EU-25 countries, an average consumer had a current account longevity of approximately 10 years, which is 2 years longer than SMEs. Moreover, the consumers in older Member States, i.e. the EU15 group, maintain a longer relationship with banks. Indeed, the longest durations of current accounts were reported in Northern European countries such as Finland, Denmark, Sweden, and the Netherlands. Not surprisingly, these countries were also the ones that exhibited some of the lowest switching rates, as reported in Figure 1 below.

Figure 1 – Switching rates in the EU25



Source: European Commission, Report on the Retail Banking Sector Inquiry, 31.1.2007 (data for Estonia not available)

The interim report also reported the recent findings on the extent of banks' cross-selling practices throughout the EU. The products considered in the survey covered current accounts, loans, mortgages, and life insurance.

The data displays two main features. On the one hand, tying is a widespread practice in retail banking across the EU. On average, there appears to be extensive tying of current accounts with other products. For example, in the EU25, over 40% of all banks have reported that they were tying current accounts with consumer and SME loans and mortgages. The figures are however different when it comes to new Member States, also due to differences in the business models adopted by banks in those countries (the so-called "bank-

insurance” model). In particular, in Hungary, Latvia, Lithuania, and Slovakia, almost all banks are reported to tie their current accounts with mortgages, consumer loans, and SME loans. In addition, current accounts are widely employed as tied products in the bundle, due to their open-ended nature and, unlike other products such as customer loans which expire after a given time-period, current accounts allow banks to develop cross-selling strategies and expand their sales.

1.2.3 The final report

In light of the results provided in the interim report, the Commission opened a public consultation gathering the stakeholders’ views to discuss its preliminary findings from its interim report and potential competition problems that may arise from product tying.⁴⁴ The findings from the public consultation have therefore been integrated within the final report on the retail banking sector inquiry⁴⁵. This final document builds up on the preliminary findings of the interim report by providing new insights and features depicting tying practices across the EU. Three main results can be drawn.

First, the patterns of tying at Member State level show similarities⁴⁶ with the findings of the interim report. In particular,

- (i) The product structure of tied bundles shows that *“the practice of current account tying appears to be widespread in the EU retail banking sector, whether purchased alongside a mortgage, consumer loan or SME loan. (...)The overall incidence of tying appears to be highest for SME loans.”*
- (ii) Tying practices are more spread within the group composed by new Member States. Several explanations are observed, such as *“banks’ response to higher credit risk (...) [or] the attitudes of financial regulators, [through] their desire to promote banking sector growth and development, (...) have thus far exerted less scrutiny on the possible anti-competitive effects of tying.”*

Second, smaller and foreign banks seem to be influenced by the conduct of tying by larger banks and mirror their practices.⁴⁷

⁴⁴ European Commission, Competition: Commission holds public hearing on competition in retail banking, (IP/06/999), 17 July 2006.

⁴⁵ European Commission, Staff working document, Report on the Retail Banking Sector Inquiry, SEC(2007) 106, 31 January 2007.

⁴⁶ Both interim and final reports communicate the percentages of sampled banks that reported conducting tying practices. However the figures slightly differ for the reason that percentages in the final report are weighted by banks’ combined share of customer numbers in the lead product market. Yet, the differences are weak and the same conclusions can be drawn out of the two datasets.

⁴⁷ To illustrate this, out of eleven Member States in which its largest mortgage banks tied a current account to its mortgage hook product, nine countries exhibit the case for smaller banks mirroring this practice. Other tied bundles (i.e. current accounts tied to personal loans) show a similar pattern. In addition and regarding the case for foreign banks, the final report states the following: *“the evidence also suggests that some foreign banks adapt their tying and bundling strategy according to domestic competitive conditions. Where*

Finally, during the public consultation, a set of explanations justifying the conduct of tying practices and their likely efficiencies has been provided by the industry:

- (i) Banks argued that tying allows them to reduce significantly their credit risks;
- (ii) Banks also stated that tying enables them to benefit from economies of scope, which could then be passed on to consumers through price reductions. The inquiry questioned the transmission of benefits to consumers to the extent that *“most customers seeking a mortgage or loan will already have a functioning current account; many held with another bank. The fact that the same consumer can now obtain an additional current account even fairly cheaply does not appear to create significant marginal benefit for the customer. In such cases the main effect of tying would not be to create economies of scope to pass on to consumers, but to capture any consumer surplus they may enjoy on the lead product.”*

1.2.4 The Public consultation following the EC Green Paper on Retail Financial Services in the Single market and other documents

1.2.4.1 Green Paper and stakeholder consultation

Following the sector inquiry, a Green Paper on Retail Financial Services in the Single Market⁴⁸ was adopted. It builds upon the sector inquiry’s results and on the policy objectives set within the Commission White Paper on Financial Services 2005–2010. The Green Paper aimed at reviewing the single market for retail financial services and considered future initiatives to address its current failures. The adoption of the Green Paper was accompanied by the launch of a public consultation. On the specific issue of tying, responses stressed the reduction of price transparency, making it more difficult for consumers to compare offers⁴⁹.

1.2.4.2 Report of the Expert Group on Customer Mobility in relation to Bank Accounts and stakeholders consultation

In addition to the responses to the consultation on the Green Paper, the European Commission published a report of the Expert Group on Customer

tying is widespread among domestic banks these foreign entrants tend to follow suit. This suggests that the commercial rewards to foreign entrants are greater from following this type of conduct (...). Thus a high proportion of product tying in a particular Member State is likely to be self-reinforcing, weakening the impact of new entrants on competition.”

⁴⁸ See European Commission, Green Paper on Retail Financial Services in the Single Market, COM(2007) 226 final, 30 April 2007.

⁴⁹ See European Commission, Summary of the written contributions received on the Green Paper on retail financial services, 18 September 2007. The full text is available at http://ec.europa.eu/internal_market/finservices-retail/docs/baeg/summary_consultation_en.pdf.

Mobility in relation to Bank Accounts and invited stakeholders to comment on its content⁵⁰. More specifically, the Report addressed current obstacles to customer mobility, amongst which tying and bundling practices. Stakeholder responses to the report gave two insights in relation to their perception and experience of tying practices. On the one hand, consumers highlighted the need to tackle the lack of price transparency, as in the consultation on the Green Paper, and favoured the prohibition of tying conduct. On the other hand, the banking industry stood unanimously against the prohibition of tying, by recalling that tying practices may only be harmful to consumers when used in anti-competitive manner; and that in many other instances tying generates efficiencies that serve the interests of both banks and customers, allowing banks to provide low-margin products, which could turn out to be uneconomic if provided separately. According to the industry, tying also benefits customers by reducing the purchase price and increasing choice.⁵¹

1.2.4.3 A single market for the 21st century Europe: Initiatives in the area of retail financial services

The overall results of this consultation were finally included in the Single Market Review adopted in November 2007⁵². The latter recalls the potential anti-competitive harm resulting from tying practices, issues raised within the sector inquiry and the Green Paper consultation. Several effects are likely to restrict customer choice, by altering price transparency and/or raising switching costs; in other cases, conducts may hamper competition on the market by discouraging the entry of new players.

The table below synthesizes the main findings of the Commission's activities described in this section.

⁵⁰ The Report and the consultation process can be found online at the following website: http://ec.europa.eu/internal_market/finservices-retail/baeg_en.htm

⁵¹ See Summary of the consultation, *supra* note 46, at 7.

⁵² See European Commission, Staff working document, accompanying the document 'A single market for the 21st century Europe', Initiatives in the area of retail financial services, SEC(2007) 1520, 20 November 2007.

Table 1 – Main findings from the EC documents on tying practices in the EU

Framework	Document	Results
EC sector inquiry in financial services (retail banking)	Opening of the sector inquiry	<i>Lack of demand power in retail banking through customers' freedom of choice and mobility.</i>
		<i>High switching costs and bundling/tying conducts, constitute suspected roots for this harm.</i>
	Interim report	<i>Customers were found to be rather immobile according to 'churn' and longevity indexes.</i> <i>Preliminary results on the descriptive use of tying practices:</i> <ul style="list-style-type: none"> • <i>tying is a widespread practice in retail banking across the EU;</i> • <i>tying is more common in the EU-10 new Member States;</i> • <i>'hook products' identified are mortgages and loans;</i> • <i>current accounts are widely employed as tied products.</i>
	Final report	<i>Additional evidence building on interim results: smaller and foreign banks seem to be influenced by the conduct of tying by larger banks and mirrors the leaders' behaviour.</i>
Green Paper	Consultation	<i>Tying is reported as reducing price transparency and increasing the difficulty for consumers to compare offers.</i>
Report of the Expert Group on Customer Mobility in relation to Bank Accounts	Consultation	<i>Consumers' representatives stressed the reduction of price transparency and favour tying conducts' prohibition.</i> <i>The banking industry stood unanimously against the prohibition of tying due to efficiencies serving the interests of both banks and customers.</i>
A Single Market for 21 st century	Initiatives in the area of retail financial services	<i>The effects are recalled to potentially restrict competition choice (altering price transparency, raising switching costs, discouraging the entry of new players).</i>

1.3 Methodology of the empirical analysis

In this section we briefly report the methodology used to collect empirical data, including the number of questionnaires sent and the response rate.

Little empirical evidence has been gathered to date on tying and other potentially unlawful practices in retail financial services. National studies have been carried out in Hungary, Ireland, The Netherlands, Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and the United Kingdom. These studies however do not follow a homogeneous approach (in the scope and method) and contain limited quantitative data. The same is true for a document issued by the OECD in 2006, which gathers national qualitative information issued from a roundtable on Competition and Regulation in Retail Banking⁵³.

⁵³ The document is available at <http://www.oecd.org/dataoecd/44/18/39753683.pdf>.

Therefore, to date the most comprehensive resources available are the interim and final reports on the retail banking sector inquiry of the European Commission. These reports focus on five main practices only: (i) mortgages and current accounts; (ii) mortgages and the obligation to pay salary into current accounts; (iii) mortgages and life insurance; (iv) loans (other than mortgages) and current accounts; and (v) loans (other than mortgages) and the obligation to pay a salary into a current account.

For the purposes of the present study, it was essential to collect all available information regarding the adoption of tying and other potentially unfair practices in the Member States, and to link empirical evidence with the legal provisions adopted under consumer protection laws, competition laws and specific regulations in the retail financial sector to tackle the specific issue at hand. Therefore, a significant part of our work entailed the circulation of questionnaires among financial institutions, regulatory bodies and consumer representations in the EU27.

In our data collection, we have followed three main steps.

First, we have planned and undertaken a set of exploratory interviews in selected Member States. The primary objectives of the interviews were:

- The validation of the categories of people interviewed as main potential data and information providers; and the identification of potential other categories;
- The identification of potential additional information providers, to be surveyed;
- The contribution to the setting up of a list of the most common tying and other practices;
- The identification of national specific practices, if any.

The attainment of these objectives was expected to significantly contribute to a standardized survey covering the 27 Member States. Exploratory interviews were carried out according to standard guidelines and allowed a first qualitative appraisal of the tying and other potentially unfair practices in the ten countries concerned. In order to gather sufficient information on different national context, and given time constraints, ten countries were selected according to the following criteria:

- Representation of countries with high, medium and low frequency of tying practices, according to the sector inquiry into competition in financial services carried out by the European Commission ⁵⁴;
- Geographical balance.

The application of these criteria resulted in the selection of the following countries: Belgium, Germany, Denmark, Spain, France, Hungary, Ireland, Italy, Poland and the UK.

⁵⁴ European Commission, Competition DG, Interim Report II, Current accounts and related services, 17 July 2006; and Report on the retail banking sector inquiry, Commission Staff Working Document, SEC (2007) 106, 31 January 2007.

Secondly, a set of questionnaires was developed and circulated among legal experts to collect information on the treatment of tying and other potentially unfair practices in all Member States. This information is reported in Section 4 below.

Finally, a survey was launched based on two questionnaires addressed to two target groups. One questionnaire was addressed to national organisations, i.e. central banks, ministries, consumer organisations, ombudsmen, competition authorities, regulatory bodies, financial associations; the aim was to collect data on tying and other potentially unfair practices habits in the specific country. Another questionnaire was addressed to a sample of financial institutions, including banking, insurance, consumer credit and investment institutions; the aim was to collect more detailed information on the tying and other potentially unfair practices applied, if any.

In identifying national contacts, in a first stage, central banks and ministries were listed. Then, central banks' websites were used in order to survey the links listed. This allowed collecting a number of national organisations, such as competition authorities, regulatory authorities and some financial associations. Parallel to this, websites of European associations were scanned for their members. This allowed in particular collecting information on ombudsmen, consumer associations and financial service provider associations. In a second stage, gaps in national coverage were completed by identifying other national associations thanks to links available on the websites of already identified associations or to own web search⁵⁵.

Financial institutions were identified through their membership to European and/or national associations. Indeed, financial associations present on their websites a list of their members. Also for national associations, these contact details were collected and controlled (adequacy, double entries, etc.).

Annex 4 to this report illustrates the distribution of the national institutions/associations and financial institutions targeted.

The survey was launched across 27 Member States to the national institutions and associations (430 targets, including regulators/supervisors) and financial institutions (6529 targets) on 20 and 21 January 2009. The deadline for responses was set at 2 March 2009. The overall distribution of financial institutions per sub-sector was 44% banks, 41% insurance companies and 15% investment companies. While some financial institutions belong to several sub-sector associations (e.g. bank and insurance), they received only one email regarding the survey. The proportions of sub-sector distribution reflect thus an overall proxy indication. The selection was controlled so as to include for each country the largest financial institutions.

⁵⁵ We did not send the questionnaire to the EU-level associations which might have been in a “politically” uncomfortable situation to express views on the situations in the Member States. We have involved instead these associations in two ways: (i) they could provide us with letters encouraging their members to participate in the survey; (ii) they might be contacted for interviews to communicate their views on the European-level issues.

1.3.1 Developing the questionnaire

The questionnaire was developed according to a “do it yourself” approach: the possible gateway and combined products were listed, while the respondent was expected to “build” the combinations relevant to his/her organization or country.

The questionnaire was structured as follows:

- Introduction explaining the study and the survey;
- Guide through the questionnaire;
- Identification data of the respondent;
- Section 1 on cross-selling practices (example and questions to be answered);
- Section 2 on conditioning and other practices (example and questions to be answered);
- Section 3 on additional not listed practices and overall comments;
- Five annexes were completing the questionnaire for information purposes.

The questionnaire was developed in English. The email addressed to survey targets was mentioning the possibility for the respondents to get support, in particular regarding languages.

The survey targets were proposed to complete the questionnaire as a Word protected document (to be sent back by email) or on-line, by completing a Qualtrics⁵⁶ questionnaire available at a web link.

The questionnaire development started in November; a first version was provided to the Commission on 3 December⁵⁷. Following receipt of the Commission’s comments, a second version was provided on 17 December, approved and submitted to trials.

1.3.2 Testing the questionnaire

During a meeting held at EBIC on 10 December, we presented the study and asked for testing the questionnaire and for a letter to encourage their members to participate in the survey. We transmitted the draft questionnaire for comments on 17 December after the Commission made their last comments.

We received draft EBIC comments on 19 January and final ones on 22 January. We adapted the questionnaire to the largest extent possible to the – sometimes in-depth – modifications suggested by EBIC in its comments. However, some comments, such as the complexity of the questionnaire, could not be addressed

⁵⁶ Qualtrics is a web survey platform (see <http://www.qualtrics.com/>) offering a very good quality-price ratio compared to competing products on the market.

⁵⁷ This is due to the fact that finalising a 1st draft of the questionnaire was depending on the finalisation of the list of practices which took more time than expected.

due to time constraints – the survey had to be launched urgently – and because the level of detail was a requirement set by the Commission for this study.

We received also suggestions from one financial institution that we integrated in the questionnaire.

1.3.3 Preparing the data processing including the data base

An Excel data base was designed in order to receive all information on cross-selling and conditioning practices collected with the questionnaire.

The database was structured along the following items.

- Respondent ID;
- Type of institution (national association or financial institution);
- Sector of respondents: banking, insurance, investment, multiple;
- Type of practice (cross-selling or conditioning or other);
- Gateway product;
- Combined product(s);
- Cross-selling or conditioning practice: tied, bundled with financial advantage, etc.;
- Supplier of combined product: same financial institution, same group, etc.;
- Effect of conditioning practice: access condition, financial or non-financial advantage, etc. ;
- Product other than gateway, affected by conditioning practice: this might concern all types of products;
- Share of institutions engaged in the practice (national associations/organizations survey);
- Share of financial institution's customers concerned by the practice (financial institutions survey);
- Reasons for providers to cross-sell /condition access to products;
- Reasons for customers to buy cross-sold / access conditioned products;
- Specific areas for statements (explanations and comments).

Regarding the processing of data, we proceeded along the following lines:

- Associations versus financial institutions;
- Overall frequencies of cross-selling and other practices⁵⁸:

⁵⁸ By “frequencies” we mean both the proportion of FIs engaging in the practices and the share of their customers concerned.

- cross-selling versus conditioning versus other;
- details in each category;
- Frequencies of tying and practices per country or group of countries (in particular depending on the number of responses);
- Frequencies per sub-sector of respondents (banking, insurance, investment, multiple);
- Reasons for the providers (for the non marginal practices);
- Reasons for the consumers (for the non marginal practices);
- Statements related to specific practices will complement the presentation of the frequencies;
- General statements will be separately analysed and summarized.

1.4 Structure of the report

The remaining part of this report is structured as follows.

Section 2 below illustrates the economics of tying and other potential unfair commercial practices from a competition policy and a consumer policy perspective. In particular, we analyse the potential for the practices under scrutiny to lead to an exclusionary abuse, as well as the behavioural economics approach to consumer protection in the retail financial services sector.

Section 3 describes the relevant EU consumer policy *acquis* and its applicability to tying and other potentially unfair practices in the retail financial services sector.

Section 4 describes national legislation addressing tying and other potential practices in the EU27. We divide Member States in groups of countries according to their treatment of tying and other practices.

Section 5 describes the results of our survey of tying and other potentially unfair practices. We also compare the findings of our survey of legal approaches (in Section 3) with the findings of the empirical analysis.

Section 6 relies on the legal, empirical and economic information provided in the previous sections to assess the potential unfairness of most common practices and develops a test to evaluate their potential impact. We develop and apply an antitrust impact test and a customer impact test, and apply them to our empirical results. This allows us to build a “virtual map” of Europe, which illustrates the emergence of different practices and their likely effects in the EU27. The results are further differentiated by gateway product and type of practice.

Several annexes are attached to this Report, containing the terms of reference for this Report; a glossary of terms; a brief description of the US approach to the practices under scrutiny; a list of European organisations contacted; our standard contact email; the interview support form; the two questionnaires disseminated; the list of interviewees; the addressees of the survey; the reactions to the survey; a matrix of cross-selling practices; a matrix of

conditioning practices; a matrix of suppliers; a methodological note on section 6; a sensitivity analysis aimed at testing the robustness of our results, and a methodological note explaining how we assessed the impact of the practices on cross-border trade, with specific emphasis on the likelihood of entry of foreign players..

2 AN ECONOMIC APPROACH TO TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES

Tying and other potentially unfair commercial practices in the retail financial services sector have been subject to attention in the economic theory, especially as far as competition policy is concerned. The findings of the economic literature have been also translated into legal rules, especially as far as antitrust law is concerned. Accordingly, in many countries around the world tying and an array of other cross-selling practices – including conditional rebates, exclusivity agreements, etc. – are considered to be potentially distorting competition and leading to anti-competitive foreclosure. This is reflected in the current policy of the European Commission on exclusionary abuses, as highlighted in the recent Guidance paper adopted on December 3, 2008.

Against this background, the analysis of the effects of tying and other potentially unfair commercial practices from the standpoint of consumer policy is substantially more fragmented and sparse in the literature. This is probably due to the fact that tying is universally considered to be a ubiquitous practice, and that only under certain circumstances can it be considered as detrimental to customers – the fact that the tying firm is dominant on its relevant market for the tying product is indeed one of these circumstances. Since the 1960s, increased attention to the need to protect consumers in contractual relations with firms has led to a better understanding of the behavioural and informational issues that emerge in these particular types of contracts. Specific legislation on standard form contracts (such as the *Loi Scrivener* adopted in 1978 in France, the *Gesetz über Allgemeine Geschäftsbedingungen* AGBG passed in 1976 in Germany, but also the Supreme Court decisions in *Henningsen v. Bloomfield Motors* and *Williams v. Walker-Thomas Furniture, Inc.* in the US) has marked the first step towards consumer protection in several countries, and culminated at EU level with the approval of Directive 93/13 on 5 April 1993 on unfair terms in consumer contracts⁵⁹. Subsequently, issues that

⁵⁹ See e.g. Willett, C., *Fairness in Consumer Contracts. The case of Unfair Terms*, Ashgate Publishing, 2007. On US cases, see *Williams v. Walker Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965); and *Henningsen v. Bloomfield Motor Inc.*, 161 A.2d 69 (N.J. 1960). In *Henningsen*, 22 the buyers of a car sued a carmaker for the consequential damages from an accident caused by a defective steering mechanism. The carmaker defended on the ground that the buyers waived any right to sue for consequential damages in fine print, but the court ruled in favor of the buyers, holding the waiver ineffective on the basis of “[t]he gross inequality of bargaining position”. In *Williams*, the plaintiff had bought several pieces of household furniture from Walker-Thomas for about \$1300 and had paid all but \$164 of this amount; she then bought a stereo from Walker-Thomas for \$514. The contract she signed included a cross-collateralization clause that gave Walker-Thomas a security interest in both the stereo and all the other furniture she bought from it over the years. The clause was held unconscionable by the Supreme Court – a finding that led to a shift from the “duty to read” rule in place since the 1860 judgment of the Court of Exchequer in *Lewis v. Great Western Railways*. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 (1983). And Baird, D., *The Boilerplate Puzzle*, Michigan L. Rev Vol. 104, 933, March 2006.

had been postponed during the debate on Directive 93/13 – such as, *i.a.* the sale of goods and associated guarantees – were addressed by other EU Directives⁶⁰.

More recently, also due to developments in the law and economics literature in this field, the attention of regulators has also focused on the pre-contractual phase of consumer contracts, *i.e.* to the moment in which consumers make up their mind on their willingness to purchase and accept the contractual conditions. In this phase, consumers are often dependent on the information that is provided by their counterpart, and for this reason legal rules must be devised to ensure that the communication of information is not misleading. Accordingly, unfair commercial practices have been tackled by legislators in a number of countries and at EU level, especially with the Unfair Commercial Practices Directive⁶¹.

In this section we illustrate the rationale for applying both antitrust and consumer protection legislation to the practices subject to analysis in this report, *i.e.* tying and other potentially unfair commercial practices observed in the retail financial services sector. Section 2.1 below explores the main findings of the legal and economic theory as regards the applicability of antitrust rules to the practices at hand. Section 2.2 illustrates the economics of tying and other unfair commercial practices from a consumer policy perspective, and reports empirical data on switching costs and patterns of consumer behaviour in retail financial services and in other sectors of the economy. We then draw conclusions on the potential impact of the practices under scrutiny on consumer welfare.

2.1 The competition policy dimension of tying and other potentially unfair commercial practices

This section deals with the identification of tying and other potentially unfair commercial practices in the economic theory and in the European and US case law. The following paragraphs give an overview of the historical evolution of the different legal and economic approaches, focusing on advantages and disadvantages of these practices. The final part defines four categories of potentially unfair commercial practices looking at the EU legislation and the common practices adopted in the retail financial services sector.

2.1.1 Cross-selling strategies

2.1.1.1 The antitrust economics of tying and bundling

Tying is a ubiquitous business practice, which occurs when two or more products are sold together in a package and at least one of these products is not

⁶⁰ See http://ec.europa.eu/consumers/rights/gen_rights_en.htm.

⁶¹ See Sections 3 and 4 below.

sold separately⁶². In this case, the consumer can buy the tied product alone, but not the tying product without the tied one. This implies that customers that would not buy all the tied goods may be forced to purchase extra products that they did not want (see figure 2 below).

Tying is usually distinguished from another similarly widespread cross-selling strategy, named pure bundling. Pure bundling occurs when none of the package components is available separately, and the components are offered in fixed proportions⁶³. Pure bundling is in fact the simultaneous sale of two or more products only as bundle, not individually. The main difference concerns the proportions requirement⁶⁴. Pure bundling implies fixed proportions, while tying involves variable proportions and – most often – two distinct sales (figure 2)⁶⁵. The incentives to bundle are higher when the number of items produced by a firm is high enough to achieve high costs savings (distribution, etc) and better price coordination (*i.e.*, internalization of complements cross-price effects) through the bundle⁶⁶.

If products are also sold on a stand-alone basis, the practice is defined as “mixed bundling”; in this case the bundle is usually sold at a discounted price (multi-product rebate) compared to the sum of the prices for the bundled goods when purchased separately.

From a competition policy perspective, several different variants of tying practices have been considered. For example, the purchase of a product with the requirement to buy consumables linked to that product from the same seller. Another typical example of tying is the cross-selling practice to tie the purchase of a “blockbuster” movie to the purchase of a less famous one (*i.e.* block booking)⁶⁷. In this case, although consumers can buy variable proportions of the tied product itself, they must buy the tying product with the tied movie (at least one copy). The variability of the quantity proportions is “complete” for the tied product (consumer can decide to take two or more copies of the tied product and one or none of the tying movie) and “fixed” for the tying product (one to one). Other examples are usually related to durable goods, which need consumables from the same supplier and so on.

⁶² See the European Commission Staff Working Document accompanying the Communication from the Commission – Sector Inquiry under Art 17 of Regulation 1/2003 on retail banking (Final Report) [COM(2007) 33 final], SEC(2007) 106 of 31 January 2007, at 49.

⁶³ See, *e.g.* O'Donoghue, R. and A. J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006, Chapter 9, at 477.

⁶⁴ Motta M., *Competition Policy. Theory and Practice*, Cambridge University Press, Cambridge, 2004, p. 460.

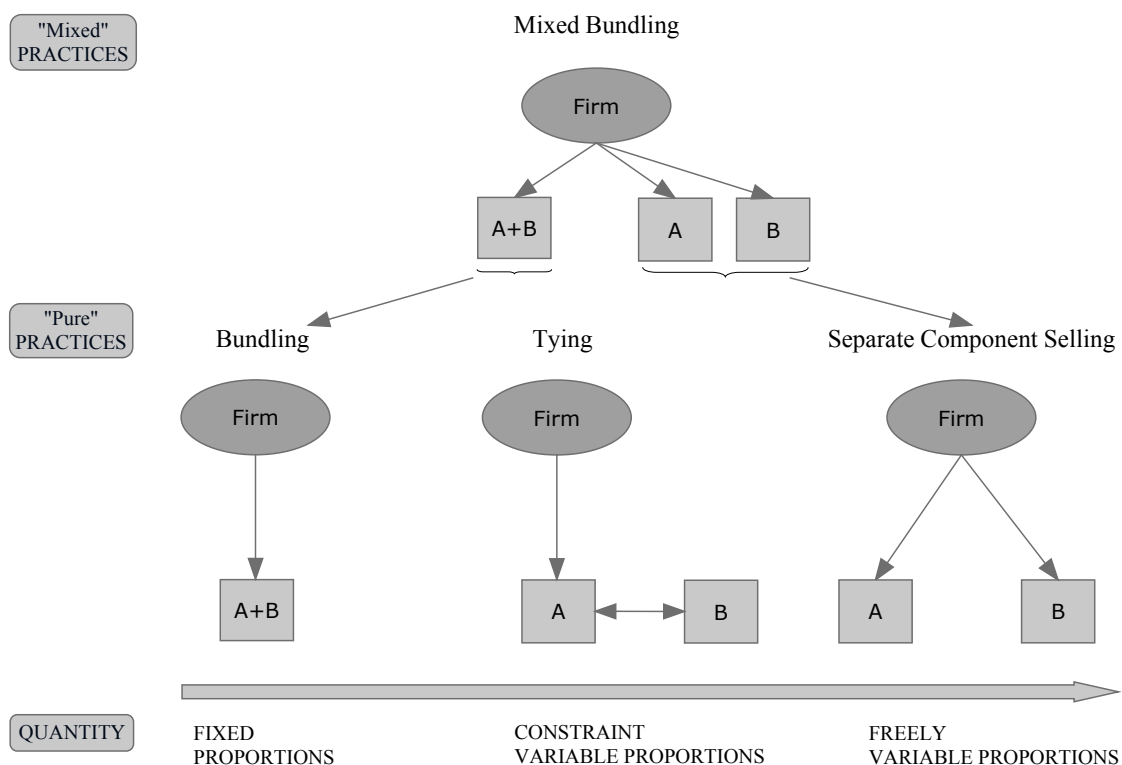
⁶⁵ In this text, it will be used indifferently the word tying to define every kind of packaged sale that is not bundling or mixed bundling, as described above.

⁶⁶ See Motta (2004), *cit.*

⁶⁷ Stigler, George J., *United States v. Loew's, Inc.: A Note on Block Booking*, 1963 Sup. Ct. Rev. 152 (1963); “A Note on Block Booking”, in Stigler, G. J., *The Organization of Industry*, The University of Chicago Press, Chicago, 1968, pp. 165–170. The argument was already known as “Full-line forcing”, Burstein N., “A Theory of Full-Line Forcing”, *Northwestern University Law Review*, 1960, Vol. 55, pp. 62–95.

On the contrary, a newspaper is a pure bundled product because consumers access different kinds of topic-specific news sold together, without any possibility to buy just the “sports” section or to decide how much “sport” they want in that specific newspaper (fixed proportions). There is a clear economical and practical justification to this solution, since selling a newspaper in different sections would generally be more costly for distributors and consumers. However, in other cases these justifications may be less clear, so raising legitimate objections on the impact of the practice on consumers and competition in general. Other bundled products are cars, radio, shoes and so on.

Figure 2 – Bundling, Tying and Separate Component Selling



Source: authors' elaboration.

Tying and bundling are widespread phenomena that permeate every single aspect of the consumers' daily life. From retail banking products (*e.g.* the common operation to tie the provision of a loan to the concurrent opening of a current account) to consumer goods (*e.g.* hotel room and breakfast, personal computers and operating systems, etc.), it is possible to list a huge number of cases. Moreover, a typical case of tying (contractual and technological) may likely come up in the so-called aftermarkets or in the market for consumables where simple reasons of technological efficiency or exclusionary behaviours (or

both) can increase the number of tie-in sales⁶⁸. Cross-selling strategies in the retail financial services sector occurs mainly through tying strategies (number 5 and 6 in Table 2), by offering only the bundle (n. 4), or offering the bundle at a discounted price (n. 7)⁶⁹.

Table 2 – Possible product combinations

Possible product combinations	X	Y	XY
1. Components Selling	X	Y	-
2. Component Selling	X		
3. Component Selling		Y	
4. Pure Bundling			XY
5. Tying (X to Y)	X		XY
6. Tying (Y to X)		Y	XY
7. Mixed Bundling	X	Y	XY

Source: authors' elaboration based on Evans (2006).

In terms of antitrust scrutiny, the insights of economic literature and the latest developments in the US case law have shown a tendency to move from a formalistic approach to tying – the so-called *per se* rule approach – to a “rule of reason” approach, in which proof of the likely anti-competitive effect is required, and efficiencies created by the conduct may redeem it under antitrust rules⁷⁰. As will be shown in the next paragraphs, the likelihood that a tying practice leads to anti-competitive foreclosure depends on a number of factors, including the structural features of the market and the characteristics of the product (e.g. fixed and marginal costs).

2.1.1.1.1 The leverage theory and the Chicago School criticism

Tying has been largely and heatedly debated during the last century and in recent years. The dispute between scholars on the likely anti-competitive and pro-competitive effects of this practice dates back to the beginning of the 20th

⁶⁸ See, e.g., Kaserman, D., *Efficient Durable Good Pricing and Aftermarket Tie-In Sales*, Economic Inquiry, Volume 45 Issue 3, 2007, at 533–537.

⁶⁹ U.S. Department of Justice (DOJ), Antitrust Division, Report on “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act”, Chapter 5, September 2008, <http://www.usdoj.gov/atr/public/reports/236681.htm>.

⁷⁰ In the US, a first move away from the *per se* rule was marked by the Supreme Court decision in *Jefferson Parish Hospital Dist. N. 2 et al. v. Hyde*, 466 U.S. 2, 16 (1984). Later, in the *Microsoft III* decision, the US Court of Appeals introduced a rule of reason approach, limited to “platform innovation for PCs, network computers and information appliances”, see *id.*

century with the recognition by the US Courts of the “leverage theory”⁷¹. The leverage theory states that “[t]ying provides a mechanism whereby a firm with monopoly power in one market can use the leverage provided by this power to foreclose sales in, and thereby monopolize, a second market”⁷².

Therefore, tying may be an exclusionary conduct that forecloses the tied market (through the tying market) to new potential competitors. This theory holds in many cases even though the criticisms coming from the Chicago School have strongly criticised it⁷³. Indeed, it is unquestionable that, under specific assumptions, the leverage theory may not hold. In particular, Chicago scholars have argued that tying cannot increase the monopolist’s profits if the tied market is competitive (the so-called “single monopoly profit theorem”), as this would eventually reduce the monopolist’s aggregate sales⁷⁴. The underlying assumptions are however very strong:

- There must be perfect competition in the tied-market (no barriers to entry, price-taker firms, etc.)⁷⁵;
- The tied products are sold in fixed proportions (as a bundle);
- The tied products are complementary, not substitutes.

Under these conditions, Chicago scholars observed that there would be no incentive for the monopolist to engage in tie-in practices, since it can extract only one monopolistic profit. Therefore, it is more plausible to justify tied sales

⁷¹ Tying was firstly analyzed in patent case, *Motion Pictures Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917); then under Section 1 of the Sherman Act and Section 3 of the Clayton Act (illegal trades), *International Salt v. U.S.*, 332 U.S. 392 (1947) and *Northern Pacific Railway Co. v. U.S.* 356 U.S. 1 (1958). Under Section 2 of the Sherman Act (for U.S.) and Article 82 ECT (for E.C.; abuse of dominant position) a more solid jurisprudence came up. For the U.S., *U.S. v. United Shoe Mach. Co. of N.J.*, 247 U.S. 32 (1918); *IBM v. U.S.* 298 U.S. 131 (1936); *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 156 (1948); *Jefferson Parish* (1984), *id.* For the European Community, *Case T-30/89 Hilti v Commission* [1991] ECR II-1439; *case IV/31.043 Elopak v. TetraPak* (1992) OJ L72/1 .

⁷² Whinston Michael D., “Tying, Foreclosure and Exclusion”, *The American Economic Review*, Vol. 80, N. 4, September 1990, pp. 837-859.

⁷³ See Director, A. and E. Levi, “Law and the Future: Trade Regulation”, *Northwestern University Law Review*, 1956, 51, pp. 281-296; W.S. Bowman, “Tying Arrangements and the Leverage Problem”, *Yale Law Review*, November 1957, pp. 19-36; Richard A. Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press, Chicago, 1976; Robert H. Bork, *The Antitrust Paradox*, New York, Basic Books, 1978.

⁷⁴ For an explanation, see Motta M. (2004), *cit.*

⁷⁵ A market is purely or perfectly competitive if each firm assumes that the market price is independent of its own level of output. The model of perfect competition is based on three assumptions: product homogeneity (when the products of all of the firms in a market are perfectly substitutable between each other); price taking (each individual sells a sufficiently small proportion of total market output that its decision have no impact on market price, so taken as given); free entry and exit (when there are no special costs that make it difficult for a firm to enter or exit the market [perfectly contestable market]). See Hal R. Varian, *Intermediate Microeconomics. A Modern Approach*, W.W. Norton & Company, New York, 7th ed., 2006, p. 384; Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics*, Pearson – Prentice Hall, 6th ed., 2005, p. 262-263; William Baumol, John Panzar and Robert Willig, *Contestable Markets and the Theory of Industry Structure*, New York: Harcourt Brace Jovanovich, 1982.

with a desire for price discrimination (increasing total surplus⁷⁶) and/or a search for other efficiencies. In fact, Nobel Laureate George Stigler was the first to show that this conduct can reduce the variance between consumers' reservation prices, allowing price discrimination with a larger extraction of the consumer's surplus and a reduced deadweight loss⁷⁷. The practice is particularly advantageous for the firm if the consumers' valuation of the products is inversely related.

Moreover, other Chicago scholars supported the single monopoly profit through their further formalizations around tie-in strategies. In a very famous article, Adams and Yellen (1976) showed that, with two separate products and a heterogeneous and independent demand, a mixed bundling solution seems to be optimal to increase the total surplus available⁷⁸. The classic example is that of two consumers, Adam and Bob, with different willingness-to-pay (*wtp*). Adam has a modest *wtp* for both products, while Bob has a high *wtp* just for one of the two products. In this case, mixed bundling is the only strategy that allows catching both consumers. In effect, the first consumer (modest *wtp* for the two products) will choose the bundle, while the second one (high *wtp* for one of the two products) will only choose one product.

In 1982, Richard Schmalensee extended the model to a monopolist in the tying market facing perfect competition in the adjacent tied market and independent demand for the two products (this time with a Gaussian demand, that is a joint normal distribution of reservation values), with non-negatively correlated valuations for separate components⁷⁹. He argued that, under these conditions, mixed bundling is an optimal strategy when the *wtp* for the two products in the

⁷⁶ See Bowman W.S. (1957), *cit.*; Burstein Meyer L., "The Economics of Tie-in Sales", *Review of Economics and Statistics*, February 1960, 42, pp. 68-73. Surplus represents a measure of welfare for consumers or firms in a specific transaction or market outcome; it is calculated as the area beneath the inverse demand curve, delimited by the price and such demand curve. The total surplus refers to consumers and suppliers' surpluses: the total surplus increases because the supplier can perfectly price discriminate, through specific tying solutions, between single consumers (increasing his own surplus and reducing the consumers' one). If the supplier fixes a price there will be part of the demand that does not want the product at those conditions: by price discriminating, the supplier will also serve that part of the demand but the consumer's surplus will be reduced in favour of the supplier, who will catch more surplus than the surplus lost by the consumers (people out of the market will now be served). Therefore, even though this transfer of surplus is questionable in a consumer's view, a mechanism of perfect price discrimination increases the total surplus and should be considered Kaldor-Hicks efficient, even though it involves distributional concerns. However, there is no unanimity on the increasing effect of the total surplus through perfect price discrimination, see for example Motta (2004), *cit.*

⁷⁷ Stigler George J. (1963), *cit.*

⁷⁸ Adams W. J. And Yellen J. L., "Commodity Bundling and the Burden of Monopoly", *Quarterly Journal of Economics*, 1976, 90, pp. 475-498. These results were further extended by McAfee, R. P.; McMillan, J. and Whinston, M. D., "Multiproduct Monopoly, Commodity Bundling, and Correlation of Values", *Quarterly Journal of Economics*, 1989, 114, pp. 371-384; Michael A. Salinger, "A Graphical Analysis of Bundling", 68 *J. BUS.*, 85 (1995); Yannis Bakos and Eric Brynjolfsson, "Bundling Information Goods, Pricing Profits & Efficiency", 45 *MGMT. SCI.*, 1613 (1999); Hanming Fang and Peter Norman, *An Efficiency Rationale for Bundling of Public Goods*, mimeo (2004).

⁷⁹ Schmalensee Richard, "Commodity Bundling by Single Product Monopolies", 25 *Journal of Law and Economics*, 1982, pp. 67-71.

monopoly tying market and the competitive tied market are negatively correlated. The price of the bundle should be lower than the sum of the price of the single components. In effect, this strategy reduces variation in customers' reservation prices and generally increases total welfare. An important corollary of this finding is however that suppliers will be able to capture a significant portion of consumer welfare: in a nutshell, also in Schmalensee's analysis bundling practices lead to expanded access to the market for consumers, and to an extraction of consumer surplus by the supplier – in economic terms, total welfare increases, but consumer welfare decreases compared to a situation of pure unbundled sales. This situation involves distributional concerns but, for an economic point of view, it may be considered efficient⁸⁰.

Even though the underlying assumptions are quite extreme, these theories have been largely sustained by Chicago school advocates and implemented until new scholars and Post-Chicago economists pointed out the weaknesses of this theory and the possibility, under certain conditions, that anti-competitive effects materialise.

2.1.1.1.2 *Anti-competitive effects and the revival of the leverage theory*

Looking at the developments in the law and economics theory of tying in the past two decades, a broad consensus seems to have emerged on the possibility that, under specific assumptions, this otherwise common practice proves harmful for competition and consumer welfare⁸¹. In a 1990 paper appearing in the *American Economic Review*, Michael Whinston pointed out the potential flaws of the Chicago School's "single monopoly profit" theorem⁸². In his revival of the leverage theory, the author correctly argued that the theorem fails to explain situations in which the proportions between products are variable (as in tying arrangements). Then, the strong assumptions of monopolistic setting in the tying market and perfect competition in the tied market further lessened the power of this general proposition. In particular, Whinston focused on the role of tying as a strategy to deter entry by new players by showing commitment to tie the sales of product should entry occur⁸³.

⁸⁰ It can be considered as "Kaldor-Hicks efficient" or "potentially Pareto-efficient", since the practice produces a net benefit to society, despite the fact that one group (consumers) is left worse-off.

⁸¹ Whinston M. D. (1990), *cit.*; Barry Nalebuff, "Bundling as a Way to Leverage Monopoly", *National Bureau of Economic Research*, WP N. 36, January 2004; Jay Pil Choi, "Antitrust Analysis of Tying Arrangements", *CESifo Working Paper*, N. 1336, November 2004; Tirole J. (2005), *cit.*; Carlton D. W. And Waldman M. (2005), *cit.*; Evans D. (2006), *cit.*

⁸² Whinston M. D. (1990), *id.*

⁸³ More in detail, Whinston illustrates a two-period model to show that the mere pre-commitment to bundle complementary products (tied product with variable proportions) at period 1 can result in less earnings in period 2 for potential entrants in the relevant markets. The bundle (or tie) thus becomes a tool to deter market entry. However, this threat may not be credible if the potential entrants know the final outcome. In turn, the monopolist will not choose to bundle if it would not successfully deter the entry: in fact, bundling may be an optimal strategy from an *ex-ante* perspective, but it is clearly sub-optimal when the firm decides to enter. It is thus a constraint to more aggressive behaviours in the period 2.

According to Whinston, the single monopoly profit theorem holds only when⁸⁴:

- The tied market is perfectly competitive;
- The tied products are complementary (not substitutes); and
- The tied products are consumed in fixed proportions.

When one or more of these conditions do not hold, tying can still be seen as strategy to leverage the firm's own market power in the tying market into another (tied) market. This occurs in particular when:

- The tied product is consumer in variable proportions; or
- The market exhibits economies of scale or network externalities.

The latter situation can imply high entry barriers since competitors may not be able to reach a minimum efficient scale – or, in the case of network effects, the critical mass that makes sale of the good viable – that is reached by the monopolist through its tying practice⁸⁵.

More recently, in a series of papers commissioned by the UK Office of Fair Trading, Barry Nalebuff (2004) argued that, under specific assumptions, it is possible to deter entry also without commitment if rivals can enter only one of the two markets⁸⁶. More in detail, Nalebuff showed that if the products are subject to independent demand by consumer, they are sold in variable proportions, and the demand for the tied product is inelastic⁸⁷, the incumbent may decide to charge customers less in the monopolistic market and to slightly increase the price in the tied market. In this way, the increased demand (marginally stronger in the monopolistic setting because already at supra-competitive price) will overcome the reduced income due to the discount. The same theoretical argument was then refined by other authors including Greenlee, Reitman e Sibley (2008), who apply the rationale to famous antitrust cases such as *3M Co v. LePage's*, *SmithKline Corp v. Eli Lilly & Co.*, and *Ortho Diagnostics Systems v. Abbot Labs*⁸⁸.

⁸⁴ Note that Whinston (1990) does not distinguish between tying and bundling. However, these assumptions are consistent with our previous definition of tying: as a matter of fact, in tying arrangements the tied product usually is in fixed proportion (you have to buy at least one tied product, while you can buy variable proportions of the tying product). See below, Section 2.1.1 for a more extensive explanation.

⁸⁵ On network effects, see *i.a.* M. L. Katz and C. Shapiro, "Network Externalities, Competition, and Compatibility," *American Economic Review* (June 1985); and Pardolessi, R- and A. Renda, *How Safe is the King's Throne? Network Externalities on Trial*, Cucinotta, Pardolessi and Van Den Bergh (Eds), "Post-Chicago Developments in Antitrust Law", Edward Elgar Publishing, February 1, 2003.

⁸⁶ Nalebuff B. (2004), *cit.*

⁸⁷ "Independent demand" means that the demand for the tying product is not related to the demand of the tied product; "inelastic demand" means that the demand is less reactive to a price increase, namely a producer can raise prices without heavily reducing the demand for its product.

⁸⁸ *3M Co v. LePage's*, 324 F.3d. 141 (2003), *SmithKline Corp v. Eli Lilly & Co.*, 427 F. Supp 1089 (1976), e *Ortho Diagnostics Systems v. Abbot Labs*, 920 F. Supp. 455 (SDNY 1996). See Greenman, Reitman and Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*,

Nalebuff's argument can be easily explained by means of two examples. First, let us assume that a firm A sells two goods, X and Y , and is dominant in the production of Y , while it faces actual or potential competition in X . Assume also that the two goods are not consumed in fixed proportions, and that the demand for the two products is independent (an increase in demand for one of the goods does not necessarily lead to an increase in demand for the other; and an increase in the price of one of the goods does not affect the demand for the other).

If this is the case, A will be able to set a price for Y (P_Y) in a way that maximises its profits, while the price for X (P_X) will be set by market forces and will thus equal the marginal cost of producing the good, c . Nalebuff shows that A can profitably engage in the following conduct:

- A offers the bundle ($X+Y$) at a price equal to $P_Y+P_X = P_Y+c$
- A then increases the price for Y (unbundled) by a small amount δ .

In this situation, consumers that need both products have to choose whether to buy Y at a higher price and X from a competitive supplier, or buy both products from A and get a discount from Y . This puts competitors in the X market at a disadvantage: they will not be able to replicate this offer by A . In addition, consumers that only need Y will be disadvantaged, as the price has increased to $P_Y+\delta$.

This type of strategy reduces consumer welfare, as consumers that buy the bundle are not affected (the price remains the same), but consumers that buy only Y will be disadvantaged. As stated by Greenlee, Reitman and Sibley (2008), a bundling strategy reduces social welfare if leads to a monopoly price for Y greater than would occur absent the strategy.

Assume, now, that A decides to sell Y at a discounted price equal to $P_Y-\varepsilon$, under the condition that consumers buy also X at a higher price, say $P_X+\delta$. For simplicity, assume that $\varepsilon=\delta$. The price for the bundle will still be equal to the sum of the prices for the two products separately. However, the monopolist's profits will increase alongside with total welfare. For example, assume the demand for Y is equal to $Q_Y = 100 - P_Y$, while the demand for X is inelastic and equal to 20 units. With Y and X sold separately, quantities demanded will be 50 and 20 and the prices for the two products will be €50 for Y and €10 for X . Finally, assume that $\varepsilon=\delta=1\text{€}$.

Table 3 – Bundling and foreclosure

		Y	X
No Bundle	Price	50	10
	Quantity	50	20
Bundle	Price	49	11
	Quantity	51	20
$\Delta \text{ profits}$ $= [(51 \cdot 49) - (50 \cdot 50)] + [(20 \cdot 11) - (20 \cdot 10)] = 2499 - 2500 + 20 = 19$			
$\Delta \text{ surplus}$ $= [(50 - 49) \cdot 50] + [(10 - 11) \cdot 20] = 50 - 20 = 30$			

Table 3 above shows that consumers who buy the bundle XY will save on the total price for Y as much as €50, but they will pay €20 more for X. This implies that consumer welfare will increase, A will have less profits from the sale of Y (from €2,500 to €2,499), but will be able to compensate the loss with additional sales of X (from €200 to €220). Total profits for firm A will thus be at least €19.

What is more important, this strategy can deter the entry of new competitors. As a matter of fact, if a new entrant B wanted to enter the X market it would have to offer consumers at least €30 to compensate for their loss if they decide not to purchase the XY bundle altogether from A. This means B should set a price between €7 and €8, hence below cost. Since this type of bundling is not replicable by an as-efficient competitor, it does not pass muster under Nalebuff's test and – despite increasing social welfare in the short run – should be considered as leading to anti-competitive foreclosure.

More generally, according to Nalebuff:

- When X and Y are consumed in fixed proportions, bundling can have an exclusionary nature whenever the incremental price of the XY bundle compared to the price of Y alone is lower than the Long-Run Average Incremental Cost (LRAIC) faced by A for producing X.
- When X and Y are consumed in variable proportions, bundling can be anti-competitive if the price for X minus the discount needed to retain A's own customers is higher than the LRAIC faced by A for producing X (so-called "Ortho test").

Nalebuff's analysis has been very influential on competition authorities and courts in the past few years. The "leveraging" conduct described by Nalebuff deters entry even though there is no clear pre-commitment, and mitigates the inefficiency of monopoly pricing (making many consumers better off without harming anybody else, namely a Pareto improvement⁸⁹). Of course, the foreclosure of competitors from the tied market X may lead to long-run

⁸⁹ A Pareto improvement is an action that harms no one but it makes at least one person better off.

inefficiencies due to lack of innovation, absence of product variety and choice for consumers, and ultimately even an increase in price, once *A* has obtained a large market share also in *X*.

However, Nalebuff's model was also subject to some criticism.

- First, the assumption of perfectly competitive *X* and monopolistic *Y* does not fit many of the tying and bundling cases observed in practice;
- The independence of the demand curves for *X* and *Y* is essential to reaching Nalebuff's result, and is difficult to reconcile with the assumption that the bundle will be bought by all purchasers of *Y*.
- Other background assumptions are questionable. For example, the fact that the demand for *X* is inelastic, though this can intuitively be explained by the condition that the monopolist is the only player in that market. In addition, the assumption that a perfectly competitive market exhibits an inelastic demand is quite extreme.

Accordingly, as acknowledged by both Nalebuff (2004) and Whinston (1990), the impact of tying and bundling strategies on the relevant market cannot be easily determined *a priori*, and a rule of reason appears more appropriate than a *per se* rule – as a matter of fact, these authors do not analyse in detail the pro-competitive reasons for engaging in tying and bundling, but focus mostly on the strategic ones.

A similar view was also expressed by Jean Tirole (2005), who offers a number of justifications for differentiating between tying practices according to the nature of the products and the markets at stake. Tirole points out that: (i) when marginal costs are low (and fixed costs are high, as for information goods), bundling can reduce the price to near its lowest level if there is also the ability by competitors to differentiate in the tied market⁹⁰. Moreover, the “multi-sidedness” of the tied product can be helpful to increase, in another way, the ability to differentiate in the market through the platform (as frequently happens in telecommunications markets). Bundling thus allows the metering of the demand and the market segmentation. Vice versa, when the marginal costs are high, the ability to differentiate is low and the product is not “multi-sided”, there is a high probability that the tie-in practice is going to harm competition excluding competitors from the tied market. This is mainly due to the fact that, in a market with huge fixed costs and almost-zero marginal costs (as markets for information goods), these fixed costs need to be recouped and the inability to differentiate can significantly harm competition deterring the entry or potentially leaving one player in the market who is going to recoup losses in the subsequent period.

Another view of the potential harmful effects of tying comes from an article published in 2002 by Carlton and Waldman⁹¹. The two authors further weakened the seemingly granitic statement of Chicagoans. Whinston's assertion that tying can harm competition only when the monopolist's primary good is

⁹⁰ Tirole J. (2005), *supra* note 80.

⁹¹ Dennis W. Carlton & Michael Waldman, “The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries”, 33 *RAND J. ECON.*, pp. 194-220 (2002).

not in fixed proportions can be false in a two-period model with upgrades and switching costs (for example, durables and consumables). It is convenient to tie also if there is a superior alternative complementary product whose use requires the primary product. In fact, an entrant, in period 1, with a superior complementary product can decide to enter, in the period 2, also in the primary market. For the monopolist, tying in the first period can increase the entry costs for both primary and complementary products. In this way, tying is a device to preserve the monopolistic setting in the primary market⁹².

Other strategic arguments come up from the economic literature to address a different approach for tying. Carbajo et al. (1990) and Chen (1997)⁹³ argue that (in different market settings; also in an oligopolistic market) tying can be a product differentiation device allowing market segmentation, hence restricting competition. The practice allows an increase in switching costs and marginal costs when products are homogeneous, eventually raising firms' profits in the market (avoiding perfect competition or a mechanism of competition *à la Bertrand*⁹⁴). These circumstances will thus force consumers to engage in a practice that will lock them into those products⁹⁵.

The figure below summarizes the features of the models described above by specifying the underlying assumptions on the market conditions assumed by the authors. The market's settings can be shaped through the effects of low or high marginal and fixed costs, switching costs (and lock-in effects), product multi-sidedness, information asymmetries, etc, in a way to adapt the analysis also to

⁹² Choi and Stefanidis extended this reasoning stating that tying reduces also the incentives for each entrant to innovate since the reduced probability of successful innovation in all of the markets (requirement to succeed the innovation project); Choi J. P. and C. Stefanidis, "Tying, Investment, and the Dynamic Leverage Theory", 32 *RAND J.ECON.*, 52-71 (2001).

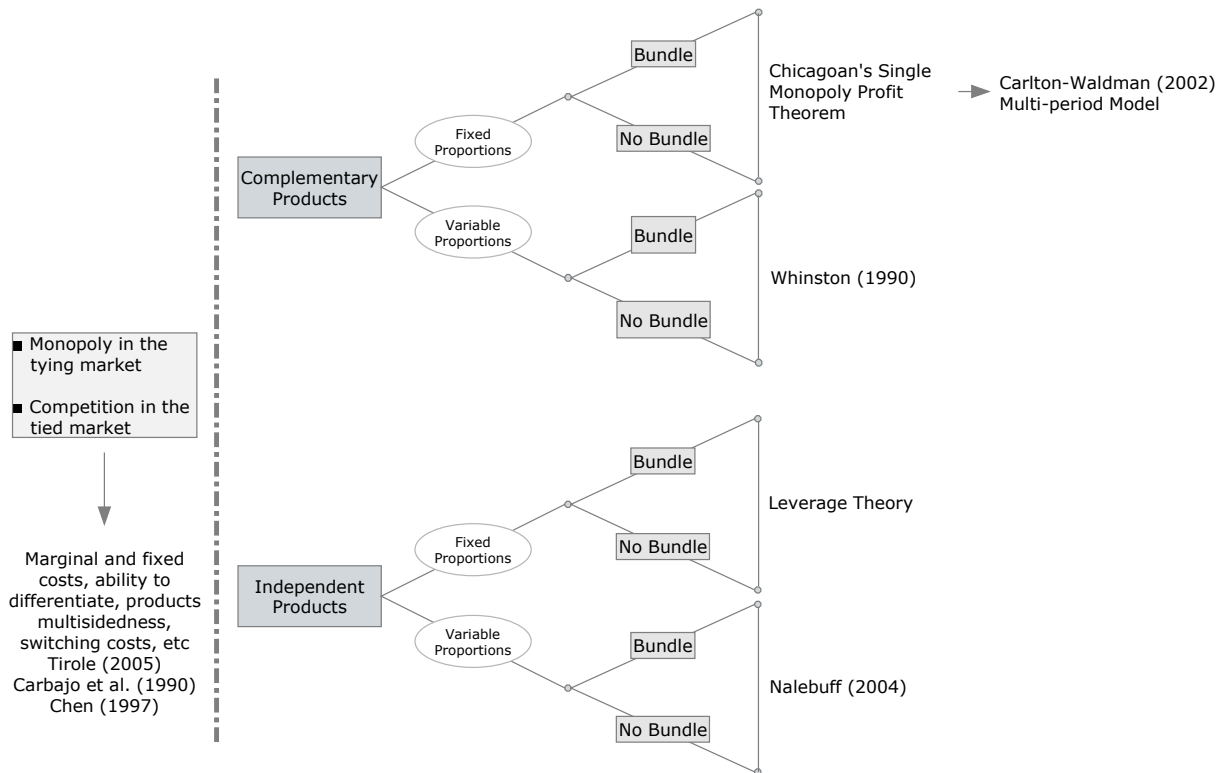
⁹³ Carbajo J., D. De Meza and D. J. Seidman, "A Strategic Motivation for Commodity Bundling", *Journal of Industrial Economics*, 1990, 38, pp. 283-298; Chen Y., "Equilibrium Product Bundling", *Journal of Business*, 1997, 70, pp. 85-103.

⁹⁴ A mechanism of competition *à la Bertrand* is a one-shot oligopolistic game in which two firms end up competing through independently and simultaneously choosing the selling price. Considering other assumptions - as products' homogeneity, no capacity constraints and identical marginal costs (no fixed costs) - the unique price of equilibrium is the price of the perfect competition, which is at marginal cost. Although there are two firms, with these conditions, the oligopolistic setting will end up to price at marginal cost, getting zero profits. See Motta (2004).

⁹⁵ While Tirole's analysis focused on the risk that the rivals' ability to differentiate in a low-marginal costs (high fixed costs) setting is low, Carbajo et al. (1990) and Chen (1997) mainly focus on a "standard" marginal costs setting which, deviating from the homogeneity of the product, can help to segment the market and restrict competition. In effect, following Tirole's view, the degree of foreclosure in the tied market is related to the dimension of marginal costs. A setting of high marginal costs increases switching costs, making harder to switch between products, unless the benefits of competitors' product is extremely high. Therefore, tying or bundling help competitors' foreclosure, potentially increasing barriers to competition. In a low-marginal costs setting (e.g. software products and so on), however, switching between products can be less expensive but competitors need to price over marginal costs to recover the high fixed costs. Tying, in this case, can be a way to sell close to the marginal cost (predatory strategy) and to finally reap the benefits of the following market monopolisation. It can also be a way to differentiate products and sustain a static competition between multiple firms (tacit collusion) as an alternative to market monopolisation strategies.

market settings in which there is not a monopolistic or perfectly competitive background but the effects of these features can almost recreate the same conditions of these two strong prepositions⁹⁶.

Figure 3 – Relevant Models



Source: authors' elaboration.

2.1.1.1.3 Post-Chicago theories and other efficiency-enhancing features of tying and bundling practices

The latest developments of economic literature on tie-in sales led the Chicagoans to rethink their theories and to find new insights about tying

⁹⁶ Although dominance or at least “economic power” (as in Kodak case) in one of the two markets seems still to prevail in the economic literature and in the current jurisprudence, there is also a growing literature performing models to analyze the anti-competitive effects of tying practices in a context of limited competition for the tied and tying markets, in Kobayashi, Bruce H., “The Economics of Loyalty Discounts and Antitrust Law in the United States”, *1 Competition Pol’y Int’l* 115 (2005). Economides, for example, examined bundling practices in this market setting (duopoly) and showed that, with perfect complements, the dominant strategy is a mixed bundling, while, with perfect substitutes, bundling brings an inefficient outcome due to a Prisoner’s Dilemma effect. See Economides Nicholas, *Mixed Bundling in Duopoly*, NYU Stern School of Business, WP EC 93-29 (1993); Matutes Carmen and Pierre Regibeau, “Compatibility and Bundling of Complementary Goods in a Duopoly”, *40 Journal of Industrial Economics*, pp. 37-54 (1992); Nalebuff B., “Competing Against Bundles”, in Peter Hammond & Gareth Myles, Eds., *Incentives, Organization, And Public Economics*, (Oxford U. Press 2000).

practices. This has led to a more flexible approach to these practices, which confirms the tendency of the economic theory toward the adoption of a rule of reason approach. For example, as recently explained by Choi (2004), “*the welfare implications of tying arrangements are in general ambiguous because tying could have efficiency effects even when it has harmful exclusionary effects*”.⁹⁷

Tying as a price discrimination mechanism is not the only likely efficient effect of these practices. In the last decade, many scholars⁹⁸ have focused on the efficiency and pro-competitive effects of bundling and tying strategies. There are (other than the price discrimination) four main areas on which tie-in sales can act as a way to improve efficiency:

- **Economies of scale and scope.** These economies can emerge in both distribution and production processes. In particular, tying can allow firms to cross-subsidise highly demanded products and “niche” products – as in block booking and full line forcing – or better managing sales. In addition, tying can reduce costs of packaging and distribution, leading to economies of scale. It involves savings also for consumers, especially those ones who have a high reservation price for both products. In this respect, tying can lead to demand-side advantages such as “one-stop-shop” effects.
- **Reduction of information and transaction costs.** For instance, a newspaper satisfies different consumer preferences (news on sports, politics, etc) involving a sort of “one-stop-shop” effect and reducing potential transaction costs that would come out if every single item would have to be purchased one by one. In many cases, producers are better informed than consumers on components to bundle. Moreover, tying can be also a way to signal the quality of the new product bundled to the old one, already known, to preserve the reputational capital with the new one⁹⁹. 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. For example, in a recent paper on investment services, Laux and Walz (2009) show that cross selling can increase underwriters’ incentives and even reduces rents in the underwriting business¹⁰⁰.

⁹⁷ Choi (2004), *cit.*

⁹⁸ Some of them are Bowman W.S. (1957), *cit.*; Stigler George J. (1963), *cit.*; Nalebuff, B., “Bundling, Tying and Portfolio Effects, Parts 1 and 2,” Department of Trade and Industry Economics Paper No. 1, 2003; Choi J. P., “Bundling New Products with Old to Signal Quality, With Application to the Sequencing of Products”, *21 International Journal of Industrial Organization*, 1179 (2003); Motta (2004), *cit.*; Tirole J. (2005), *cit.*; Evans (2006), *cit.*

⁹⁹ Choi (2003), *cit.*

¹⁰⁰ See, Laux and Walz, *Cross-Selling Lending and Underwriting: Scope Economies and Incentives*, *Review of Finance* (2009) 13: 341–367. And see also Sections 5 and 6 below for the results of our empirical analysis.

- **Avoiding double marginalization**¹⁰¹. A cross-selling strategy can also avoid the risk of double marginalization in two complementary markets. Already in 1838, Augustin Cournot showed that bundling could improve the profits of two monopolists selling complementary products¹⁰². In effect, the practice leads to an inefficient equilibrium in which the firms do not take into account the impact of the cross-price elasticity and so firms and consumers can be better off if price would be lower (as it happens in the bundle). For instance, in case of complementary goods and prices set independently, the two monopolists of the complementary products will set price too high (monopolistic prices). A cross-selling strategy leads the two monopolists to a common understanding through a price reduction to reap the benefits of a soaring demand. Therefore, both firms and consumers will be better off, avoiding the inefficient outcome.
- **Quality improvements**. When certain components are marketed together the risk of inefficient outcome due to the asymmetric information is drastically reduced. In effect, in some cases, the producer might know the best way to combine specific products in a way to increase the quality that the final consumer would enjoy. It can be a profitable practice for the firm, which increases the reputational capital, while the final consumer enjoys the highest possible level of quality¹⁰³.

On the other hand, recent literature has also highlighted that tying arrangements, besides creating a potential restriction of competition, can also lead to other disadvantages for producers and consumers¹⁰⁴. For example, combining products may increase the complexity and indirect costs for producers due, *i.a.*, to higher maintenance and support costs; or increased risk due to the combination of risky products in financial services, which may lead to weaker risk management and lower transparency. Consumers, instead, can be generally harmed by tying practices in their freedom of choice, restricting their preferences to mix and match components.

FINDING #2.1

Tying and bundling practices create both benefits and costs to society. This suggests a case-by-case approach to these practices, since the anti-competitiveness of the practice is strongly linked to the market context and the

¹⁰¹ The double marginalization problem refers to the situation where vertically integrated firms (e.g. producer and retailer) add a double mark-up on the final price of the product due to their relevant market power along the value chain. See Spengler J., “Vertical integration and antitrust policy”, *Journal of Political Economy*, 1950, Vol. 58, pp. 347-352; Motta (2004), *cit.*, p. 307; Rey P. and Vergé T., “Economics of Vertical Restraints”, in Buccirosi P. (eds.), *Handbook of Antitrust Economics*, MIT Press, 2008. See also Nalebuff (2004), *cit.*

¹⁰² Cournot, Augustin (1838). *Recherches sur les principes mathématiques de la théorie des richesses*, Paris: Hachette.

¹⁰³ See Motta (2004), *cit.*, p. 461.

¹⁰⁴ Evans D. S. (2006), *cit.*

characteristics of the products involved. Recent economic literature suggests that factors such as high marginal costs compared to fixed-costs and lack of product differentiation can increase the likelihood that tying harms consumers.

2.1.1.1.4 Tying and bundling under EC competition law

Tying and bundling constitute so-called “exclusionary” abuses under Community competition law. The main competition concerns in this respect are the potential for these practices to foreclose existing competitors and inhibit the entry of new players, leading to consumer harm. Under Community competition policy, tying is treated by case law mainly in case of single and collective dominance under Article 82 of the European Community Treaty (ECT). Based on the pre-Chicago rationale of the “leverage theory” illustrated above, the role of market power (“dominance”) in the tying or tied market is crucial in the analysis carried on by the European Commission and the EC Courts of these practices¹⁰⁵. This implies that the undertaking must be found to be dominant in at least one of the relevant markets involved.

Dominance is defined, under EC law, as “*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers*”¹⁰⁶. Therefore, the Commission defines a firm as “dominant”, with its “special responsibility”¹⁰⁷, taking into account the following three factors¹⁰⁸:

1. The market position of the dominant undertaking and its competitors;
2. The existence of barriers to entry or expansion by actual and potential competitors;
3. The absence of a countervailing buyer power of the dominant undertaking’s customers¹⁰⁹.

¹⁰⁵ A straightforward example is the famous merger GE\Honeywell prohibited by the Commission. The prohibition was principally based on the assessment of a potential “portfolio effect” that could result in non replicable bundles of complementary products, with a narrow definition of the relevant market See Case COMP/M.2220, General Electric/Honeywell, Commission decision of 3 July 2001; David S. Evans and Michael Salinger, “Competition Thinking at the European Commission: Lessons from the aborted GE-Honeywell Merger”, *10 George Mason Law Review* 489, 520 (2002).

¹⁰⁶ See Case 27/76 *United Brands Company and United Brands Continental v Commission* [1978] ECR 207, paragraph 65; Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, paragraph 38.

¹⁰⁷ This responsibility facilitates the finding of an abuse and makes easier that an efficient behaviour, if concerning a dominant firm, should be considered harmful for competition without “efficiency defence”; Case 322/81, *Michelin v. Commission*, § 10 [1983] ECR 3461.

¹⁰⁸ European Commission, “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings”, C(2009) 864 final, Brussels, 09/02/2009, p.8-11.

¹⁰⁹ See Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraphs 97-104.

Concerning market shares in *Akzo*¹¹⁰ the European Court of Justice established a 50% threshold to consider an undertaking to be dominant¹¹¹. In the 2008 Guidance document on the treatment of exclusionary abuses under Article 82, the Commission confirmed that it “*considers that low market shares are generally a good proxy for the absence of substantial market power*”; and that its experience suggests that “*dominance is not likely if the undertaking's market share is below 40% in the relevant market.*”

The likelihood of anti-competitive foreclosure of potential entrants or actual competitors relies on the analysis of several aspects¹¹²: the position of the dominant undertaking; the conditions of the relevant market; the position of the dominant undertaking's competitors; the position of the customers or input suppliers; the extent of the allegedly abusive conduct; the possible evidence of actual foreclosure.

Therefore, the formal analysis of tying is based on a five-step assessment¹¹³:

- Test of dominance (mainly based on market share held by the undertaking) in the tying market;
- Identification of two separate products (assessed on the basis of “commercial usage” or on the observation of the existence of a separate demand¹¹⁴);
- Assessment of the coercion factor (*i.e.* customers are forced to buy tied products);
- Assessment of the anti-competitive effects;
- Evaluation of any exceptional justification or efficiency (reducing transaction costs and so on) for tying to exist.

¹¹⁰ See Case *Akzo* C-62/86 (1991) ECR I-3359.

¹¹¹ In *Hilti*, the Commission narrowed the relevant market so much to split it into three different markets and it found *Hilti* dominant in every market, condemning the firm for unlawful bundling practice. See Case IV/30.787, *Eurofix-Bauco v. Hilti* (1988) OJ L65/19. Clearer situation for Tetra Pak II and Microsoft (*tipping* through windows media player), a typical case of leveraging through tying (technological tying for Microsoft); case IV/31.043 *Elopak v. TetraPak* (1992) OJ L72/1.

¹¹² European Commission (2009), *cit.*, p. 8-11.

¹¹³ See Christian Ahlborn, David S. Evans and A. Jorge Padilla, “The Antitrust Economics of Tying: A Farewell to Per Se Illegality”, *Antitrust Bulletin*, 2003, p. 31.

¹¹⁴ The Court defines commercial usage narrowly and, to establish it, it is not sufficient that the tied sales are not the “predominant business practice” in the markets in question: as long as some untied sales occur in the relevant markets the condition for commercial usage is not satisfied. See Tetra Pak II, *cit.* In the 2008 Guidance paper on the application of Article 82 to exclusionary abuses, the Commission proposes the following formulation of the distinct product test (para. 51): “*Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product*”. See, for a comment, N. Economides and I. Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, *Antitrust Law Journal* 76.3 (2009).

Tying can be also seen as a predatory pricing strategy (with many similarities with the vertical *price squeeze*). As clarified by the Commission in its recent Guidance paper on Article 82, a multi-product rebate can be anti-competitive on the tying and tied market if the competitors, producing just one component, cannot compete against the discounted bundle¹¹⁵. The long run average incremental cost¹¹⁶ (LRAIC) is the parameter to measure the predation's aim. As stated by the Commission's Guidance paper, *"If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the LRAIC of the dominant firm from including this product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle"*.¹¹⁷

Where firms compete "bundle against bundle", the attention is on the price of the bundle as a whole and on the effect of this price on the possibility to compete by sellers of one product. This "equally efficient competitor" test must be carefully applied, in order to avoid that firms are punished for having lower costs (and consequently prices) than its rivals. In general, a firm should not be punished for having lower costs and so prices than its rivals.¹¹⁸ However, as mentioned above, bundling can be a way to enforce exclusionary strategies, such as predatory pricing. Therefore, the legitimate aim to encourage efficient entrant should be balanced with the risk coming from exclusionary strategies.

In summary, a multi-product rebate¹¹⁹ may be found to infringe Article 82 if a firm holding a dominant position in at least one of the bundled products offers it. On one hand, if competitors offer a subset of the products included in the bundle or only one product, the LRAIC of these latter products will be compared with their price in the dominant firm's bundle. On the other hand, if competitors can replicate the bundle, the price-cost test will be run on the whole bundle instead of the individual products in the bundle¹²⁰.

FINDING #2.2

In Community competition law, tying and pure bundling are considered as exclusionary abuses whenever the firm that engages in these conducts is dominant in the tying market, the two products are separate, the conduct is

¹¹⁵ European Commission (2009), *cit.*, p. 19.

¹¹⁶ The LRAIC is a good proxy of the average total costs (ATC), since it represents the average of all the (variable and fixed) costs that a company incurs to produce a particular product.

¹¹⁷ European Commission (2009), *cit.*, p. 19 § 59.

¹¹⁸ See Posner Richard A., *Antitrust Law*, The University of Chicago Press, Chicago, 2nd ed., 2001 (stating that *"It would be absurd to require the firm to hold a price umbrella over less efficient entrant [...] because we want to encourage efficiency"*).

¹¹⁹ A multi-product rebate refers to the cross-selling strategy of giving a big discount on one product when the consumer buys a specific quantity of another product. The practice is harmful when firms with relevant market power and through a predatory rebate enact it. See Choi (2003), *cit.*

¹²⁰ In addition, if competitors can offer a sub-set of the bundled products, it makes sense to run the test on this subset of products. See, *i.a.* CEPS, *The Treatment of Exclusionary Abuses under Article 82 EC Treaty*, Report of a CEPS Task Force, forthcoming, July 2009.

likely to lead to anti-competitive foreclosure, and there are no significant efficiencies specific to the conduct.

A mixed bundling practice (or a multi-product rebate) may infringe Article 82 if applied by a firm holding a dominant position in at least one of the bundled products. If competitors offer only one (or a subset) of the products included in the bundle or only one product, the LRAIC of these latter products will have to be compared with their price in the dominant firm's bundle. If competitors can replicate the bundle, the price-cost test will be run on the whole bundle instead of the individual products in the bundle.

2.1.1.2 Preferential or exclusive agreements

Firms imposing an exclusive dealing arrangement require customers to buy a certain product or service from a specific supplier. This practice often involves the agreement on a contractual term under which the buyer commits not to purchase an additional product from the supplier's rival¹²¹. This obligation may be induced by a preferential or exclusive agreement between the supplier and a specific provider or because the firm is one of the same group. Such a practice is often observed in business-to-business contracts (B2B) to avoid dealer's risk of free riding¹²² but it is also observed in a business to consumers (B2C) framework. This contractual practice is helpful in presence of "free-rideable" investments¹²³ to assure high quality standards in the provision of the final product or economies of scale and scope. In effect, to guarantee investments in pre-sale services and an efficient provision of information, an exclusive agreement can help the seller to avoid that the buyer will free-ride on her investments, for instance, using the pre-sale services from a specific seller and purchasing the product or service from another one. This is usually a common practice in B2B frameworks (producer and distributor).

The antitrust economics of exclusivity suggest that sales conditional to exclusivity should not be considered as *per se* unlawful, as they can promote investment by making demand and supply more predictable and by reducing free-riding by rivals who may benefit from a firm's investments. Pro-competitive justifications for exclusive dealing include, for the demand side, supply assurance, protection against price fluctuations, and facilitating long term

¹²¹ Louis Kaplow and Carl Shapiro, *The Handbook of Law and Economics*, Shavell and Polinsky eds., Elsevier, 2008.

¹²² It usually happens when a dealer in the dominant undertaking's distribution channel agrees to sell also rivals' products, while it is using specific investments and the infrastructure built by the dominant firm; see Howard Marvel, "Exclusive Dealing", 25 *Journal of Law and Economics* 1, 1982; Benjamin Klein and Andres V. Lerner, "The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty", 72 *Antitrust Law Journal* 473, 2007, pp. 481-483.

¹²³ Jan B. Heide, Shantanu Dutta and Mark Bergen, "Exclusive Dealing and Business Efficiency: Evidence from Industry Practice", *The Journal of Law and Economics*, Vol. 41, N. 2, October 1998, pp. 387-408; Alden F. Abbott and Joshua D. Wright, "Antitrust Analysis of Tying Arrangements and Exclusive Dealing", forthcoming in *Antitrust Law and Economics*, Edward Elgar Publishing, Keith N. Hylton (ed.), George Mason University Law and Economics Research Paper Series, 08-37, p. 29.

planning by reducing risk; from the supply-side, the reduction of selling expenses, protection against price fluctuations, etc.

As reported by Gilbert (2000), the traditional “Chicago” view of exclusive dealing arrangements in antitrust implied that such practices do not pose a threat to competition because a buyer will agree to exclusivity only if the arrangement delivers more surplus than alternative arrangements, including non-exclusive deals. According to Judge Robert Bork, *“there has never been a case in which exclusive dealing or requirements contracts were shown to injure competition. A seller who wants exclusivity must give the buyer something for it. If he gives a lower price, the reason must be that the seller expects the arrangement to create efficiencies that justify the lower price. If he were to give the lower price simply to harm his rivals, he would be engaging in deliberate predation by price cutting, and that . . . would be foolish and self-defeating behavior on his part”*¹²⁴.

Nevertheless, they can also raise prices and lower consumer welfare by foreclosing a market to rival firms. For example, Rasmussen, Ramseyer, and Wiley (1991) show that the bargaining model that is the core of the Chicago analysis (i.e., that buyers will accept an exclusive relationship only if it is the most efficient) can break down if there are many uncoordinated buyers. Their model has been extended by Segal and Whinston (1997), who show that their reasoning applies with even greater generality when the seller can price discriminate and bargain sequentially with customers¹²⁵.

In our opinion, under EC competition law preferential and exclusive agreements – as we defined them for the purpose of our analysis – might be construed as falling into the category of abusive discrimination, and as such could potentially be subject to article Article 82(c), which prescribes that dominant undertaking should not apply dissimilar conditions to “equivalent transactions”. These types of practices would in any case fall outside the Commission Guidance paper, which explicitly focuses on exclusionary abuses. However, the application of Article 82(c) to cases of abusive discrimination has so far mostly concentrated on cases in which the dominant undertaking was a legal monopolist, or as a part of a broader series of abusive conducts by a dominant undertaking, as in the case of, *i.a. Irish Sugar*¹²⁶.

FINDING #2.3

Preferential or exclusivity agreements in the retail financial services sector could in principle be framed as abusive discrimination, but they are unlikely to be captured by Article 82(c).

¹²⁴ See Gilbert, R. J. (2000), Exclusive Dealing, Preferential Dealing, and Dynamic Efficiency, *Review of Industrial Organization* 16: 167–184.

¹²⁵ Aghion, P., and P. Bolton (1987) ‘Contracts as a Barrier to Entry’, *American Economic Review*, 77, 388–401. Rasmussen, E., J. M. Ramseyer, and J. Wiley (1991) ‘Naked Exclusion’, *American Economic Review*, 81, 1137–1145. Segal, I., and M. Whinston (1997), ‘Exclusive Dealing and Specific Investments’, Technical Report. Harvard University and University of California, Berkeley.

¹²⁶ T228/97, *Irish Sugar v. Commission*, [1999] ECR-II 2969, para. 188.

2.1.2 Other potentially unfair commercial practices as exclusionary abuses in competition law

Apart from tying and bundling, this Report looks also at other potentially unfair commercial practices such as conditional and loyalty rebates, preferential or exclusive agreements and aggressive commercial strategies (see Section 1.1.2 above). Of these practices, some may fall under the scope of antitrust law, besides being potential subject matter for consumer protection: this is undoubtedly the case of rebates and exclusive dealing agreements, but may also occur in the case of conditional sales.

Although the 2008 Guidance paper does not mention other potentially unfair practices that may be relevant for the purposes of this Report, in our opinion the paper provides a general test that may apply to all practices observed, whether alone or in combination with other conducts¹²⁷.

The test requires that the observed conduct led to (or is likely to lead to):

- Foreclosure of “*as efficient competitors*” or – under specific circumstances – even “*not yet as efficient competitors*”.
- An adverse impact on consumer welfare, “*whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice*”¹²⁸.

In this respect, the Commission clarifies that the main goal of the application of Article 82 to exclusionary abuses is indeed the protection of consumers, rather than competitors¹²⁹. Moreover, in the Guidance paper the Commission identifies a number of factors that might be considered relevant in the assessment of dominance¹³⁰; as well as factors that may be taken into consideration in assessing the likelihood that an observed conduct by a dominant undertaking is likely to lead to anti-competitive foreclosure¹³¹.

¹²⁷ This statement reflect the personal opinion of the authors of this report. We infer this from the statement in the Commission Guidance paper that “[f]or the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in particular certain specific types of exclusionary conduct which, based on its experience, appear to be the most common”. In our opinion, this means that the Commission considers the possibility of challenging exclusionary conducts other than those specifically addressed by the Guidance paper.

¹²⁸ See Guidance Paper, §19.

¹²⁹ *Id.*, para.6, stating that “the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market”.

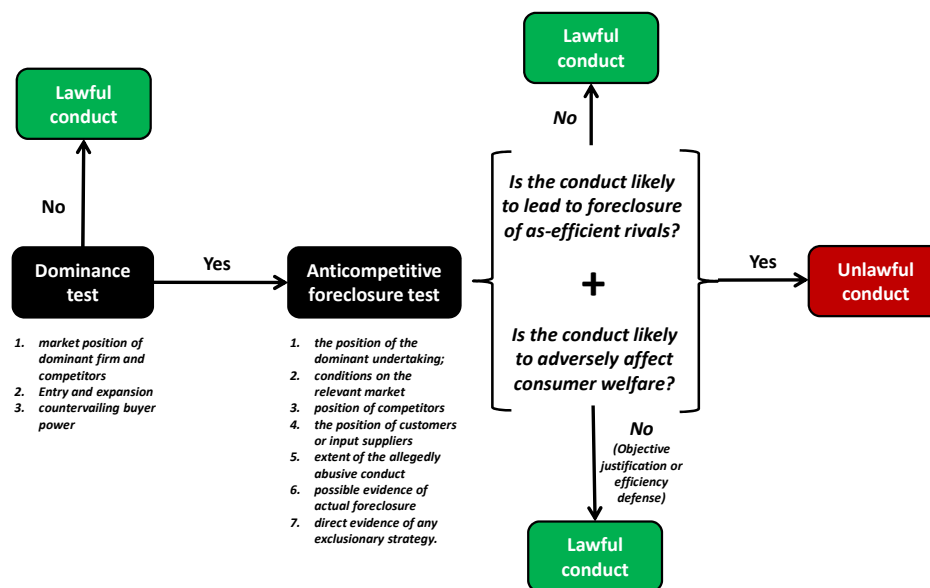
¹³⁰ *Id.*, para.12. These factors include: (i) the market position of the dominant undertaking and its competitors; (ii) constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors; and (iii) constraints imposed by the bargaining strength of the undertaking’s customers (countervailing buyer power).

¹³¹ *Id.*, para.20. These factors include: (i) the position of the dominant undertaking; (ii) the conditions on the relevant market; (iii) the position of the dominant undertaking’s competitors; (iv) the position of the customers or input suppliers; (v) the extent of the allegedly abusive conduct; (vi) possible evidence of actual foreclosure; and (vii) direct evidence of any exclusionary strategy.

In addition, while the Commission puts emphasis on a more sound economic approach to exclusionary abuses, it also clarifies that, depending on the circumstances, actual proof of anti-competitive foreclosure may not be needed, and that the mere “likelihood” that a conduct leads to anti-competitive foreclosure could form the basis for a finding of abuse. For example, the Commission states that “[t]here may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm”, and that “[i]f it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred”¹³². In other words, the standard of proof for a finding of abuse is likely to change according to the circumstances of the case: truncated analyses and presumption of anti-competitive behaviour will thus be important in the future treatment of exclusionary abuses under EC competition law.

The figure below illustrates in graphical terms the general approach adopted by the Commission in the Guidance Paper.

Figure 4 – The General approach adopted in the Guidance Paper



Finding #2.4

In our opinion, any commercial practice by a dominant firm may be configured as an anti-competitive practice under Article 82 of the EC Treaty if it leads to actual or likely foreclosure of rivals, harms consumers in the long run, and does not show sufficiently strong redeeming efficiencies.

¹³² *Id.*, para.22.

2.1.2.1 Conditional sales practices

2.1.2.1.1 *Conditions attached as essential for the conclusion of the contract*

A firm may decide to impose an essential condition for the purchase of a given service. Such conditions may relate, for example, to the payment of the salary into the current account that is linked to a mortgage loan. From the standpoint of competition policy, in principle conditional sales do not lead to an exclusionary abuse, especially when competitors can replicate the same practices, regardless of their scale.

However, under certain circumstances this type of practice can work in the same way as an exclusive dealing arrangement: for example, by requiring the customer to have the salary paid into a current account linked to a mortgage loan (the so-called “current account mortgage” practice), a mortgage lender is indeed limiting the attractiveness of competing offers by alternative current account providers, as the customer would not be able to fully profit from better contractual conditions, if the bulk of his savings are in the current account linked to the mortgage loan. Put differently, for many consumers there can only be one “main” current account: tying the “main” account to the mortgage loan also means requiring quasi-exclusivity in current account usage, and thus may foreclose as-efficient competitors in the market for current accounts. As a matter of fact, if a customer has committed to have the salary paid into a given current account, it may be impossible for a more efficient entrant to attract that customer to its own services: this is an example of cases in which contracts may act as barriers to entry.

In competition policy, an exclusive dealing agreement can have harmful effects on consumers especially when enacted by a dominant undertaking¹³³, since it can induce to pass on consumers the increased costs borne by the counterparty in the B2B framework. It may have the immediate effect of preventing the entry or the expansion of competing undertakings, once the following factors have been considered:

- The harm suffered by the customer (e.g., opportunity costs);
- The market structure (e.g. contestability, switching costs, etc);
- The extent of the foreclosure effect;
- The duration of the contract at the issue;
- The success in raising rival’s costs¹³⁴;
- The business justifications;
- The role of potential competitors¹³⁵.

¹³³ European Commission (2009), *cit.*, §33-36.

¹³⁴ See Steven C. Salop & David T. Scheffman, “Raising Rivals’ Costs”, 73 *AM. ECON. REV.*, 1983, p. 267; Thomas G. Krattenmaker & Steven C. Salop, “Anti-competitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price”, 96 *YALE L. J.*, 1986, p. 209.

¹³⁵ European Commission (2009), *cit.*, §34.

This practice can be enacted - also by non-dominant undertakings - in the B2C relationship to further increase customers' switching costs and to exploit in a more efficient way lock-in effects. It may eventually reduce customers' mobility and freedom of choice, so objective justifications (as to preserve relevant pre-sale investments) need to be shown in order to consider this practice "fair" (not harmful for customers).

In the Guidance paper on the application of Article 82 to exclusionary abuses, the European Commission clarifies that "[t]he capacity for exclusive purchasing obligations to result in anti-competitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers"¹³⁶. This is the case in particular when competitors are unable to compete for an individual customer's entire demand since the dominant firm is an "unavoidable trading partner", for example because its brand is a "must stock item" preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier.

In effect, if competitors can compete on equal terms for each individual customer's entire demand, the Commission considers that "exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation". Finally, the Commission considers that the longer the duration of the obligation, the greater the likely foreclosure effect.

Against this background, under EC competition law a conditional sale agreement would be relevant only when it is likely to lead to anti-competitive foreclosure – i.e. both foreclosure of competitors and consumer harm. In the case of conditional sales such as current account mortgages, it all depends on a number of elements, such as: (i) whether the current account on which the salary has to be paid is offered by a dominant mortgage lender or by an affiliated body; (ii) whether the conduct creates or is likely to create efficiencies on the side of the lender; (iii) the likelihood that these efficiencies are shared with customers in the form of better contractual conditions such as i.a. lower interest rates; (iv) whether the combined sale of a mortgage loan and a current account would have been exclusionary even without the additional condition of having the salary paid into that account; (v) whether transporting the mortgage to another lender is feasible, etc.

FINDING #2.5

Conditional sale agreements, such as the obligation to have the salary paid into a current account, normally do not create concern for antitrust authorities. However, in certain circumstances they can have an effect similar to that of

¹³⁶ *Id.*, at §36.

exclusivity or preferential agreements, and as such may lead to the foreclosure of as efficient competitors, coupled with consumer harm.

2.1.2.1.2 Conditional rebates as an antitrust infringement

A supplier can induce consumers to purchase all or part of the sold products in different ways. In markets structurally affected by high switching costs, a discount system may help to capture new customers and subsequently charge them with higher prices (once locked-in or once competitors have left the market). A widespread discounting practice is the conditional rebate. They are “*granted to customers to reward them for a particular form of purchasing behaviour*”¹³⁷. The scheme consists of a rebate on customer’s purchases if he or she meets a set target volume. This target can be a percentage of the total volume, a standardised level or an individualised amount on a set reference period. In addition, this non-linear discount scheme can be calculated as:

- A price cut on the incremental products or services over the threshold bought by the customers (incremental rebates)
- A rebate granted on all purchases in the reference period after the targeted volume has been bought (retroactive rebates)¹³⁸.

The practice of granting single-product rebates is considered to be potentially very harmful for consumers, especially due to its loyalty-inducing effects and the consequent likelihood of anti-competitive foreclosure¹³⁹. The legal analysis of conditional rebates is usually carried out on the basis of article 82 ECT. It usually involves exclusionary and foreclosure effects similar to exclusive purchasing obligations whether enacted by dominant undertakings under specific conditions¹⁴⁰. The discount should be applied on a determined reference period. Three elements are relevant in a conditional rebate to assess the loyalty enhancing effect:

1. *The level of the threshold.* The granting of a rebate is related to the achievement of a specific threshold volume. This volume can be standardised or individualised. An individualised amount easily allows undertakings to define a level to make it more difficult for customers to switch suppliers, creating a strong loyalty-inducing effect¹⁴¹. The retroactive discounted basis involves a so-called suction effect¹⁴² around

¹³⁷ European Commission (2009), Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, *cit.*, §37.

¹³⁸ We will refer to retroactive rebates while incremental rebates, due to the lower harmful effect, will be generally treated in the next paragraph.

¹³⁹ See, *i.a.*, O’Donoghue, R. and A.J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, 2006.

¹⁴⁰ European Commission (2009), *cit.*, §34.

¹⁴¹ *Id.*, §45.

¹⁴² See F.P. Maier-Rigaud, “Switching Costs in Retroactive Rebates: What’s Time Got to Do with It”, *European Competition Law Review*, 2005, 272; in general, on retroactive rebates, see G. Faella, “The Antitrust Assessment of Loyalty Discounts and Rebates”, *Law and Economics Lab*, 2007 available at www.ssrn.com.

this targeted volume. In fact, when the threshold is set above the level that would be anyway purchased by the customers, it can induce them to buy a volume of products that they would not have bought in absence of retroactive rebates. Therefore, this loyalty-enhancing rebate (due to the suction effect) may be harmful, since it induces customers to make a level of purchases they do not want. It reduces the contested portion of the demand (“contestable share”)¹⁴³, with a likely foreclosure effect on actual and potential competitors.

2. *The reference period.* The length of the reference period is usually considered as a relevant factor for the efficacy of the rebate scheme¹⁴⁴. Rebates granted over a too short reference period are normally considered insufficient for the anticompetitive effect to materialise. However, such an aspect often cannot exclusively determine the loyalty-inducing effect and, according to the literature, in some cases the reference period may be irrelevant for the competition analysis¹⁴⁵.
3. *The size of the rebate.* The extent of the rebate defines the likely foreclosure effect of the practice. Essentially, the predatory impact of the practice depends on the level of the effective price. In retroactive rebates, the average price of the overall volume should be considered. To evaluate the potential foreclosing impact of the rebate, the effective price should be compared with two measures of cost (*Akzo* test¹⁴⁶): the long run average incremental costs (LRAIC) and the average avoidable costs (AAC)¹⁴⁷.

¹⁴³ European Commission (2009), *cit.*, §40-43.

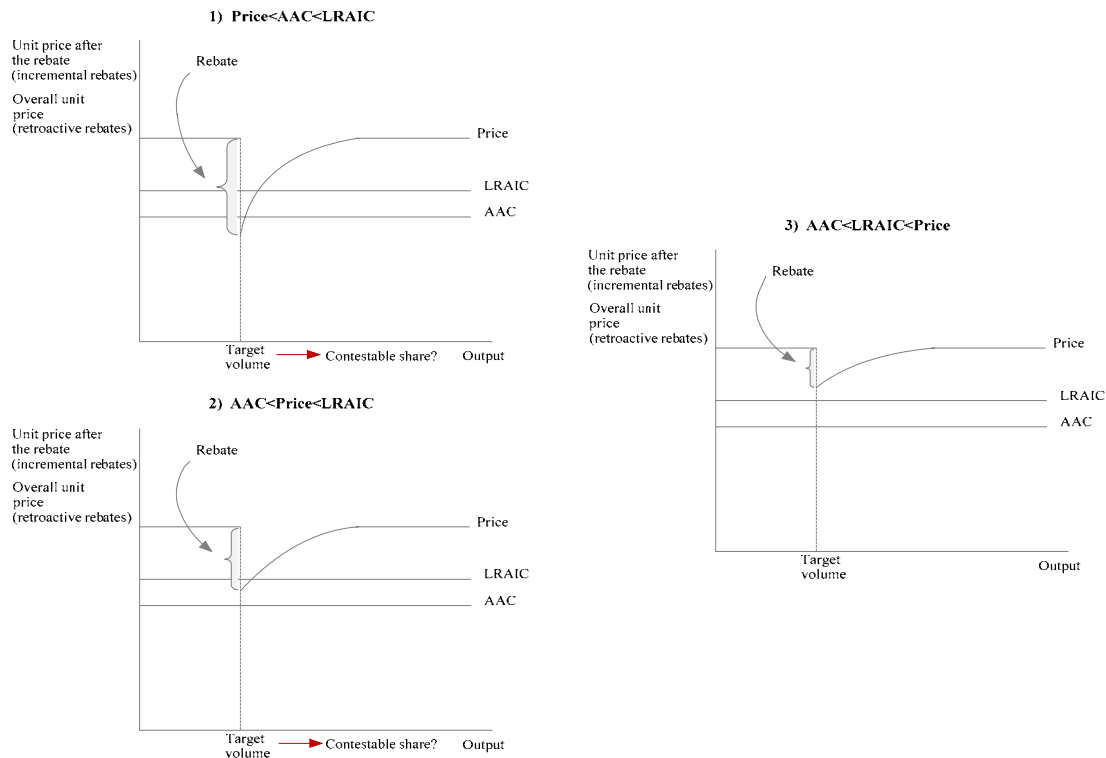
¹⁴⁴ See European Commission (2009), *cit.*, §37; the relevant case law, however, stated that a period of more than three months should be always considered as a requirement to consider the rebate *per se* unlawful; see Case T-203/01 *Michelin v. Commission (Michelin II)*, 2003 ECR II-4071.

¹⁴⁵ Maier-Rigaud (2005), *cit.*, pp. 272-276; G. Faella (2007), *cit.*, pp. 25-26.

¹⁴⁶ Case C-62/86 *AKZO v. Commission* [1991] ECR I-3359, [1993] 5 CMLR 215.

¹⁴⁷ The AAC, instead, is a good proxy of the average variable costs (AVC) if no fixed costs occur in the considered incremental products. In fact, the AAC is the average of the costs that could have been avoided if the company had not produced that amount of (extra) output; see European Commission (2009), *cit.*, §26; .

Figure 5 – The predatory impact of rebates



Source: European Commission (2009); authors' elaboration.

As shown in the figure above, the exclusionary effect of the rebate depends on the exclusionary impact of the practice. The third outcome can be considered totally lawful, since other competitors can replicate the practice without incurring in loss. When the price is between LRAIC and AAC, the potential harmful effect on competition depends also on other factors, such as the market structure (high fixed costs industry), the time length of the practice and competitors' likely counter strategies¹⁴⁸. Finally, in outcome 1, the practice can be considered extremely harmful for competitors, since it does not allow as-efficient competitors to offer services without incurring in losses, also in the short run. The rebate thus aims at foreclosing the market and charging higher prices when other competitors are excluded. In addition, in the long run (multi-period model) also consumers will be harmed by higher prices, charged by the firm to recoup the resources employed to enact the practice in the first period.

Conditional rebates may have also efficiency reasons¹⁴⁹. These include:

- Direct benefits for consumers (consistent price reduction);

¹⁴⁸ European Commission (2009), *id.*, §44.

¹⁴⁹ See Case C-95/04 P *British Airways v. Commission* [2007], ECR I-2331, §86; see also D. Spector, *Loyalty Rebates and Related Pricing Practices: When Should Competition Authorities Worry?*, in D.S. Evans and A.J. Padilla (eds.), *Global Competition Policy: Economic Issues and Impact*, 2004, 317; R. O'Donoghue and A.J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford 2006; European Commission (2009), *id.*, §46.

- Search for economies of scale (high fixed costs, need for greater consumption levels; e.g. trading fees' plan in investment services);
- Second-degree price discrimination¹⁵⁰;
- Reduction of inefficiencies;
- Protection of significant investments in the distribution channel, preventing free-riding by competing suppliers;
- Support to the firm recovering specific investments made to satisfy the needs of a particular customer (it helps to solve the hold-up problem)¹⁵¹.

The European Commission clarified in its recent Guidance paper on exclusionary abuses under Article 82 ECT that “[t]ransaction-related cost advantages are often more likely to be achieved with standardised volume targets than with individualised volume targets. Similarly, incremental rebate schemes are in general more likely to give resellers an incentive to produce and resell a higher volume than retroactive rebate schemes”¹⁵².

FINDING #2.6

Conditional rebates represent a diffused practice that can stimulate competition, economies of scale and provide benefits to consumer. However, these practices could be considered as anti-competitive when they lead to actual foreclosure of rivals, as well as consumer harm in the medium to long run.

2.1.2.1.3 Loyalty rebates

A system of loyalty rebates can be put in place by competing firms. It is directed to specific groups of customers, mainly new customers. In fact, it may be used as a tool to catch new customers and to reap, once locked-in, the benefits from charging higher prices, so hampering consumer welfare¹⁵³. Its potentially harmful impact increases with the market share. For example, the recent Commission case against *Intel*, which led to a fine of more than €1 billion, involved loyalty rebates conditional on quasi-exclusivity.

A loyalty discount scheme can be structured with more favourable contractual conditions (*e.g.*, a free credit card, a lower interest rate) without setting any threshold or target volume. It might be offered to customers with lower switching costs and more willing to move with a different supplier. In a multi-period model, in effect, it could be profitable for the firm to adopt a strategy “investing then harvesting”, also in a mature market. This is particularly true in

¹⁵⁰ Rebates can be a tool to efficiently price discriminate between consumers. In general, a second-degree discrimination occurs when “a firm offers different deals to everybody to let different customers to “self-select”, choosing one specific deal”. If correctly implemented this practice increases the total welfare in the market; see M. Motta (2004), *cit.*, p. 492.

¹⁵¹ Temple Lang, J. and R. O'Donoghue, “Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC”, *Fordham International Law Journal*, 2002, p. 83.

¹⁵² European Commission, Guidance paper, *cit.*, at #46.

¹⁵³ OFT (2003), *cit.*, p. 55.

specific situations: for example, when a firm – *e.g.* due to lack of sufficient information – cannot differentiate between new and existing (locked-in) customers for a given product or service, it can adopt rebates schemes aimed at attracting new potential customers and increasing the base of artificially inelastic customers (locked-in)¹⁵⁴. The emergence of these schemes is also related to other aspects, such as the aggressiveness of competitors and the elasticity of the demand. Increasing the locked-in customer base for all the firms can reduce competitors' aggressiveness in the following period. Vice versa, in a collusive framework a discount scheme can help to attract new customers and to deviate from the cartel agreement.

Finally, the elasticity of the demand may be a good tool to measure the likely impact of a rebate scheme and its efficiency to attract new customers. It may be used as third-degree price discrimination device to select between customers in relation to specific characteristics¹⁵⁵. This kind of price discrimination can potentially increase the total welfare if the strategy can be “perfectly” adopted (no arbitrage for consumers). Other efficiencies of a loyalty “unconditional” rebate scheme match with the list in the previous paragraph.

FINDING #2.7

The overall impact of loyalty rebates depends on firms' market shares, the competitive structure of the market and the characteristics of demand; incremental rebates often have a lower harmful impact than retroactive rebates, the size of the rebate being equal.

2.1.2.2 Aggressive commercial practices in competition law

Article 82 of the EC Treaty does not only cover exclusionary practices, but also so-called exploitative abuses, which are the result of the behaviour of a dominant firm that damages *in primis* its customers. The Treaty clearly indicates that these practices consist of “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. Accordingly, provided that the firm that applies the practice is dominant in its own relevant market, certain unfair practices could be conceived as exploitative abuses, which lead to lower consumer welfare and higher profit for the dominant firm. The impact of these practices on rivals, customer mobility and switching costs is normally only indirect: most often, the dominant firm is already shielded from

¹⁵⁴ It would be extremely costly to make an analysis in depth of every single customer's specific characteristics (e.g. individual's risk aversion), affection by switching costs, and potential locking-up effects. In effect, as described in the following paragraphs, switching costs have so many implications that it makes this analysis not pursuable. For instance, the huge number of customers and limited means to look into customers' idiosyncrasies enhance this difficulty in banking and investment services.

¹⁵⁵ A third-degree price discrimination refers to “the possibility that a firm charges different prices to consumers having different (observable) characteristics”; see Motta (2004), *cit.*, p. 492.

competitive pressure, and accordingly decides to adopt a profit maximising strategy to the detriment of downstream customers.

The most common exploitative abuse is the practice of excessive prices. In particular, since the famous 1976 case *United Brands*, the Commission has introduced a criterion that relates the “excessive” nature of the price applied by the dominant firm to the “economic value” of the product sold¹⁵⁶. Subsequent case law has broadly confirmed this approach, although some commentators have criticised it as leading, *i.a.* to legal uncertainty, as the standard used to assess whether a price is excessive or not is very difficult to define¹⁵⁷. So far, the antitrust treatment of excessive prices has focused on firms with a position of monopoly or very significant market power (the most famous cases being *British Leyland*, *General Motors*, *Port of Helsingborg* and others); in addition, prices can be considered to be “excessive” when there is evidence of a very large price-cost margin and/or the comparison with prices prevailing in more competitive markets suggests that the firm at hand is largely abusing its dominance.

In our opinion, the antitrust treatment of exploitative abuses under Article 82(a) is not limited to excessive prices, but extends to other conducts, including unfair contractual terms. Community case law in this respect ranges from cases (such as *BRT/SABAM* and *GEMA*, both related to copyright collection societies) in which contract terms were considered abusive since they (i) were not “absolutely necessary for attaining the object of the contract” and (ii) unnecessarily and disproportionately limited the counterparty’s freedom of choice (“equity test”); to cases in which the unfair contract terms were only part of a much broader set of abusive conducts, such as *Tetra Pak II*. Finally, in *DSD*, the Commission clarified that a contract term may be seen as abusive “*where an undertaking in a dominant position fails to comply with the principle of proportionality*”¹⁵⁸. Such criterion, according to two authoritative commentators, requires a balancing of “*the object of the contract, the terms of the contract, and the contractor’s justification for those terms*”¹⁵⁹.

The case law on exploitative contract terms under Article 82(a) EC Treaty never referred to practices such as unsolicited offers, churning and steering. The need to refer to clearly specified contract terms practiced by a dominant firm makes Article 82(a) difficult to apply to these practices. As will be explained in Section 2.2.1.1 below, the degree of competition is often unrelated with the emergence of these types of unfair commercial practices, especially in the case of services that are high on credence attributes, such as retail financial services. On the contrary, in some cases the increased cost pressure borne by financial advisors due to competition can lead them to adopt even more exploitative behaviour towards their customers.

FINDING #2.8

¹⁵⁶ Case 27/76, *United Brands Company v. Commission*, [1978] ECR 207.

¹⁵⁷ See, *i.a.* O’Donoghue and Padilla, *cit.*, at 603.

¹⁵⁸ *DSD*, OJ 2001 L166/1, para. 112.

¹⁵⁹ O’Donoghue and Padilla, *cit.*, at 654.

In our opinion, aggressive commercial practices such as unsolicited offers, churning and steering could in principle constitute an exploitative abuse under Article 82(a). However, the need to refer to clearly specified contract terms practiced by a dominant firm makes Article 82(a) very difficult to apply to these practices. As a result, it is unlikely that these practices can be adequately tackled by antitrust laws.

2.1.3 Main findings: tying and other potentially unfair practices as anti-competitive conduct

This section looked at the potential application of antitrust law to the practices that form the subject of our analysis. Our main findings are the following:

- *The economic literature on tying and bundling does not give an unequivocal answer about the trade-off between costs and benefits borne by society.* It suggests a case-by-case approach to analyze these practices because the anti-competitiveness of the practice is strongly linked to market and product settings in which the strategy is enacted. Recent economic literature suggests that factors such as high marginal costs compared to fixed-costs and lack of product differentiation can increase the likelihood that tying harms consumers.
- In Community competition law, *tying* can be considered as an exclusionary abuse whenever the firm that engages in this conduct is dominant in the tying market, the two products are separate, the conduct is likely to lead to anti-competitive foreclosure, and there are no significant efficiencies specific to the conduct.
- A *multi-product rebate* may infringe Article 82 if a firm holding a dominant position in at least one of the bundled products offers it. If competitors offer a subset of the products included in the bundle or only one product, the LRAIC of these latter products will have to be compared with their price in the dominant firm's bundle. If competitors can replicate the bundle, the price-cost test will be run on the whole bundle instead of the individual products in the bundle.
- *Preferential or exclusivity agreements* can hamper competition and lead to anti-competitive foreclosure especially when competitors are unable to compete for the full supply to customers. This is the case when the dominant firm supplies a "must stick item", such that even as-efficient competitors would not be able to match its offers.
- *Conditional rebates* represent a diffused practice that can stimulate competition, economies of scale and provide benefits to consumer. However, these practices can be considered as anti-competitive when they lead to actual foreclosure of rivals, as well as consumer harm in the medium to long run.
- The overall impact of *loyalty rebates* thus depends on firms' market shares, the market's competitive structure and the characteristics of customers'

demand, notwithstanding the fact that incremental rebates have basically a lower harmful impact than conditional-retroactive rebates.

Our analysis also reveals that there are many instances in which an unfair commercial practice may not be captured by antitrust laws. This is mostly due to the fact that Article 82 ECT requires that the undertaking that engages in the practice holds a dominant position in at least one of the relevant markets involved. In all other cases, the practice is considered not to lead to anti-competitive foreclosure, and as such is not relevant for the application of the Article 82 rule on exclusionary abuses.

At the same time, Article 82 also applies to so-called exploitative abuses by dominant undertakings. In our opinion, some of these practices potentially fit the definition of exploitative abuse, especially as regards the use of unfair contract terms. However, the case law on unfair contract terms as Article 82 offenses has remained very limited, and confined to IP-related cases such as *BRT/SABAM*, *GEMA II* and *DSD*, or to much broader cases where several anti-competitive conducts were found (*Tetra Pak II*). The reason for this relative underdevelopment is that Article 82 cannot be considered as a consumer policy tool, and specific legislation is more able to capture the problems that arise in consumer transactions.

More recently, a tendency to expand the reach of antitrust role to capture specific problems of consumer policy has emerged. For example, in the UK the Office of Fair Trading (OFT) has a dual competition and consumer mandate, and has increasingly been involved in sectoral investigations aimed at highlighting problems in specific markets¹⁶⁰. In the past few years, the OFT has examined and taken action in many financial services markets “*to address issues of transparency, unfairness, lack of competition and low confidence in the market*”. Examples include the markets for personal current accounts, store cards, payment protection insurance, payments systems for credit and debit cards and banking services for SMEs. On the consumer protection side, the OFT has examined, *i.a.*, debt collection issues, misleading advertising and unfair terms. The OFT has recently issued a consultation document on the financial services strategy, where it announces new initiatives aimed at pursuing its four overarching objectives of competition, choice, fairness and responsibility¹⁶¹.

Also in other countries, the need to expand competition advocacy and policy to develop a more consumer-oriented competition policy has emerged. Recent initiatives include the US Fair Trade Commission’s report on mortgage disclosures, which took a stance in favour of consumer information in a domain in which the restriction of competition is probably not the primary focus, and informed choice by consumers is the key goal¹⁶².

¹⁶⁰ Consumer protection responsibilities are shared between the OFT, the FSA and the Financial Ombudsman Service.

¹⁶¹ See the consultation document, OFT1077con, at http://www.offt.gov.uk/shared_offt/consultations/offt1077con.pdf.

¹⁶² See <http://www.ftc.gov/opa/2007/06/mortgage.shtm>.

In the past few years, contributions in the literature, including a dedicated section of the OECD Global Forum on Competition¹⁶³; and authoritative papers from Vickers (2004), Muris (2002), Armstrong (2008), Lande and Averitt (1998) and others highlighted the need to reconcile the two separate worlds of antitrust and consumer protection to more effectively pursue a good functioning of markets in the interest of consumers¹⁶⁴. This, in many cases, requires antitrust enforcement to take into account behavioural issues existing in some markets – most notably, the market for retail financial services.

¹⁶³ See the Seventh Global Forum on Competition, 21-22 February 2008, Paris (France), Section IV.

¹⁶⁴ See J. Vickers, *Economics for Consumer Policy*, 125 Proc. Brit. Acad. 287-310, 289 (2004); Timothy Muris, *The Interface of Competition and Consumer Protection*, Paper presented at Fordham Corporate Law Institute's 29th Annual Conference on International Antitrust Law and Policy, New York (Oct. 31, 2002); Armstrong (2008), *Interaction between Competition and Consumer Policy*, a report for the OFT, OFT 991, April 2008; Lande, Robert H. and Averitt, Neil W., *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*. Antitrust Law Journal, Vol. 65, p. 713, 1997.

Table 4 – Applicability of Article 82 of the EC Treaty to the practices under scrutiny

<i>Practices</i>	<i>Cross-selling</i>			<i>Conditional sale</i>	<i>Aggressive commercial practices</i>			
	<i>Tying and pure bundling</i>	<i>Mixed bundling and multi-product rebates</i>	<i>Preferential or exclusive agreements</i>	<i>Conditional sales and single-product rebates</i>	<i>Unsolicited offers and pressure selling</i>	<i>Inertia selling</i>	<i>Churning</i>	<i>Steering</i>
<i>Exclusionary abuse</i>	<i>If applied by a dominant firm and leading to anti-competitive foreclosure</i>	<i>If applied by a dominant firm and leading to anti-competitive foreclosure</i>	<i>If applied by a dominant firm with an affiliated firm and leading to anti-competitive foreclosure</i>	<i>If applied by a dominant firm and leading to anti-competitive foreclosure</i>				
<i>Abusive discrimination</i>			<i>If applied by a dominant firm (but very difficult)</i>					
<i>Exploitative abuses</i>					<i>Potential exploitative abuse, but very unlikely</i>	<i>Potential exploitative abuse, but very unlikely</i>	<i>Potential exploitative abuse, but very unlikely</i>	<i>Potential exploitative abuse, but very unlikely</i>

2.2 Tackling tying and other potentially unfair commercial practices in consumer policy

In this section, we provide an overview of the main reasons why the practices under analysis in this Report may be considered as potentially unfair and detrimental to consumers and SMEs in the retail financial services sector. As already recalled in Section 1.2 above, in the European Commission’s sectoral inquiry on retail financial services cross-selling strategies and more particularly bundling and tying of bank products were detected among other issues hampering competition in the sector. The interim reports also recalled some of the undesirable consequences of these practices, including the reduction of price transparency, the leveraging of market power into adjacent markets, and entry deterrence. As a general statement, the impact of the practices at stake on consumer choice and mobility may be high even absent a significant degree of market power on the side of the financial services provider.

Section 2.2.1 below describes the main reasons identified by the economic theory for protecting consumers and SMEs against unfair commercial practices. In particular, we identify the specific characteristics of the retail financial services sector, which warrant specific attention by the policymaker. These include informational asymmetries (including limited effort in “shopping around” and limited financial education of customers), transaction-specific investments and bounded rationality. Section 2.2.2 analyses more in detail the determinants of switching costs for consumers and the available evidence on customer mobility in retail financial services compared to other economic sectors. Section 2.2.3 describes how the practices under scrutiny – including cross-selling, conditional sales and aggressive commercial practices – can affect these market characteristics, and whether such impact is likely to prove unfair and detrimental to consumers and SMEs.

2.2.1 The rationale for protecting consumers and SMEs against unfair commercial practices

As is widely acknowledged in the law and economics literature, consumer transactions differ noticeably from the standard paradigm of contractual relations, where parties stand on an equal footing in terms of information and bargaining power. The law and economics literature initially focused mostly on situations in which consumers adhere to a standard form contract offered on a “take-it-or-leave-it” basis¹⁶⁵. However, the attention of scholars in the past few years has focused also on the pre-contractual level, especially in cases where the informational asymmetry between the seller and the customer is such that the latter heavily depends on information provided by the former; and on the phase that follows the conclusion of a contract, when providers can exploit

¹⁶⁵ See, for an early scholarly contribution, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 (1983); and see Baird, D., *The Boilerplate Puzzle*, Michigan L. Rev Vol. 104, 933, March 2006.

transaction-specific investments and customer lock-in in so-called neoclassical and relational contracts (as defined by Ian Macneil and later by Williamson (1975))¹⁶⁶.

As regards the pre-contractual phase, most of these situations may depend on the existence of an informational asymmetry between specialised players (*e.g.*, a financial services provider) and non-specialised customers (consumers or SMEs). A basic *tenet* of consumer policy is that in business to consumer (B2C) contracts, consumers are often likely to be less informed than their professional counterparts, since the cost associated with the collection of information and understanding of contract conditions is often very high. B2C commercial practices are potentially exposed to the strategic behaviour of the better-informed part in the contractual relationship. Firms normally have more resources to undertake a better-informed transaction, and can spread the cost of acquiring information over a large number of transactions – there are indeed economies of scale in the collection of information on the side of service providers. In these situations, relatively uninformed customers (both consumers and SMEs) are left in a situation in which they are not effectively able to make a precise and informed decision on their contractual behaviour as well as on the existence of alternatives, and include cases in which the price and other conditions associated with a given transaction are not transparent; cases in which the information provided by the counterpart is not reliable or misleading; and cases in which the customer's perception of the costs and benefits associated with the transaction are distorted.

Many of these problems are exacerbated whenever the quality of the good or service to be purchased by the customer is observable only after its use. This is the case of “experience” goods, as defined in the literature¹⁶⁷. When consumers and SMEs buy experience goods, they may realise too late that their valuation of the product or service was mistaken. This is too late especially when their effective ability to switch to alternative providers is limited. In these cases, the “barriers to exit” from an existing contractual relationship can be very high. As will be explained below in this section, cases in which exit barriers from a contractual relation are very high may occur both due to the inherent characteristics of the market, but also due to the existence of specific

¹⁶⁶ See the pioneering contributions of Klein, B., Crawford, R. e Alchian, A., 1978, *Vertical integration, appropriable rents, and the competitive process*, 21 Journal of Law and Economics, 21; Macneil, I.R (1974). “The Many Futures of Contracts”. Southern California Law Review, Vol. 47, pp. 691-816; Macneil, I.R. (1978). “Contracts Adjustments of Long Term Economic relations under Classical, Neo-Classical and Relational Contract Law”. Northwestern University Law Review, Vol. 72, n. 6. pp. 854-905. 13. Williamson, O. E. (1975): *Markets and Hierarchies: Analysis and Antitrust Implications*, The Free Press, New York, 286pp; Williamson, O. E. (1983): *Credible Commitments: Using hostages to support exchange*, American Economic Review, vol. 73 no. 4 (1983), p. 519-540; Williamson, O. E. (1985): *The Economic Institutions of Capitalism: Firms, Markets and Relational Contracting*, The Free Press, New York, 450pp. Literature on banking relationships that used this theoretical framework includes Paulin, M., Perrien, J., Ferguson, R. (1997). “Relational Contract Norms and the Effectiveness of Commercial Banking Relationships”. International Journal of Service Industry Management, Vol. 8, n. 5, pp. 435-452.

¹⁶⁷ See *infra*, note 168 and accompanying text.

commercial practices by sellers, which have the effect of increasing customer lock-in.

In addition, some retail financial services (*e.g.* financial advice on mortgage loans or investment products) are characterised by high credence attributes, and this further weakens the position of customers, as it leaves them with the practical impossibility to observe the quality of the service they are being provided.

All these factors are relevant to the retail financial services sector. In fact, in this sector specific market characteristics suggest that the need for policies protecting consumers and SMEs is particularly strong. These specificities include:

- Informational asymmetries between providers and customers, including limited financial education;
- Bounded rationality and “structural” decision-making biases when facing risky investments¹⁶⁸;
- Limited customers’ effort in “shopping around”;
- Customer lock-in and switching costs, including the existence of relationship-specific investments.

Below, we describe in detail each of these effects.

2.2.1.1 Informational asymmetry between providers and customers

The asymmetry of information between providers and customers in consumer contracts depends on what the economic literature refers to as “rational ignorance”, and is extensively studied in the consumer protection literature¹⁶⁹. As customers (both consumers and SMEs) are normally not specialised in financial services, they have to trust their financial service providers, especially when dealing with investment choices involving complex risk calculations. This does not necessarily imply that customers’ rationality is bounded or distorted¹⁷⁰:

¹⁶⁸ For a definition, see below, note 169-170.

¹⁶⁹ Rational ignorance occurs whenever an individual rationally chooses not to acquire all the information needed to conclude a contract. As was authoritatively observed, in a number of situations “*the costs of becoming informed may exceed the benefit, resulting in rational ignorance of hidden traps in contracts that competition may not dispel*”. See, *e.g.*, See, *e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Market*, 104 MICH. L. REV. 827, 827 (2006)

¹⁷⁰ Bounded rationality refers to the fact that human beings – contrary to what occurs in cases of rational ignorance – always take their decisions on the basis of imperfect information, limited capacity of the human mind, and limited amount of time. As a matter of fact, developments in economics and cognitive sciences have highlighted the fact that human beings take *satisficing* decisions (as Herbert Simon defined them) on the basis of imperfect information, and are often “path-dependent” in their choices, especially when individuals cannot fully appraise the value of something they already possess (or of a contract they have not signed yet). See Herbert Simon, “A Behavioral Model of Rational Choice”, in *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting*, New York: Wiley, 1957; Korobkin Russel B., Thomas S. Ulen, Law and

it simply means that the cost of acquiring full information on the features, alternatives and likely future values of today's investment products is greater than the benefit of acquiring such information.

In this respect, commentators normally distinguish between search, experience and credence elements of a given contractual relationship¹⁷¹. Search elements include those attributes of the relationship that are easily detected and understood by customers, also in the pre-contractual negotiation, and as such are visible to the customer also when deciding whether to switch to a competing provider. Experience elements, to the contrary, include those features that the customer learns only once the contract has been signed and performed. Finally, credence characteristics are the “grey area” where customers do not have any knowledge of what is in the contract, and what it means in terms of its relationship with the provider.

Financial services are normally considered to be inherently intangible and high on experience and credence qualities¹⁷². This is confirmed in the literature: for example, in a recent paper Oelehr and Kohlert (2009) state that “[f]rom the perspective of information economics, financial advice (as a service offered by banks) has all the typical characteristics of credence goods” and “most of the quality properties of financial advice—as the above suggests—can be considered credence characteristics whose quality—due to time or cost restrictions—can neither be inferred before nor after a decision has been made”. This is due, *i.a.* to the following factors:

- (i) financial advice is based exclusively on the advisor's promise to perform his service, but this is highly ambiguous for the client at the time he enters the corresponding contract;
- (ii) financial advice giving and taking is cognitively very demanding to the involved parties due to the multitude of factors an investment decision must be based on, and their strong interdependence; and
- (iii) due to its decisive role for the development of a client's future situation and the necessity to closely cooperate with the client in developing recommendations, financial advice can also be considered of high value and highly specific¹⁷³.

Behavioral Science: Removing the Rationality Assumption from Law and Economics]], *California Law Review*, Vol. 88, 2000; Sunstein Cass R., *Behavioral Law and Economics*, Cambridge University Press, 2000; Jolls Christine, –Behavioral Law and Economics]], *National Bureau of Economic Research*, WP No. 12879, January 2007; and – for path-dependency – Arthur, W. Brian. 1989. *Competing Technologies, Increasing Returns, and Lock-in by Historical Events*, *Economic Journal* 99: 116-31.

¹⁷¹ See Darby e Karni, *Free Competition and the Optimal Amount of Fraud*, 16 *Journal of L. and E.*, 69 (1973); and Nelson, *Information and Consumer Behaviour*, 78 *Journal of Pol. Econ.*, (1970).

¹⁷² See Paswan et al. (2004), *Search quality in the financial services industry: a contingency perspective*, *Journal of Services Marketing*, Volume 18, Number 5, 2004, pp. 324-338.

¹⁷³ See Oelehr, A. and D. Kohlert, *Financial Advice Giving and Taking—Where are the Market's Self-healing Powers and a Functioning Legal Framework When We Need Them?.*, *Journal of Consumer Policy* (2009) 32: 91-2116.

The greater the importance of experience and credence qualities, the more difficult is for customers to compare alternative offers and understand the value for money of a given contractual offer. In addition, the greater are experience and credence qualities, the lower is the interest for customers in shopping around for qualities they will never be able to appraise before actually signing a contract.

A typical example of “credence attribute” in retail financial services is the quality of customer service; in many cases, the competence of the personal advisor belongs to credence attributes, since customers will not be able to fully judge whether they are actually receiving high-quality advice or not. This opens up the possibility of unfair practices such as steering, as will be explained in Section 2.2.2 below. Credence attributes also pave the way to “push” behaviour such as aggressive commercial strategies or unsolicited offers (*e.g.*, “*we know what’s best for you*”).

In retail financial services, the information asymmetry between parties may raise two potential harmful common problems in retail markets (a typical principal-agent problem in fiduciary relationships¹⁷⁴): moral hazard and adverse selection.

- Moral hazard¹⁷⁵ is an informational problem related to the opportunistic behaviour of the more informed party, who tries to exploit the informational advantage and the scarce ability of less informed party to monitor the other’s activity.
- Adverse selection¹⁷⁶, instead, is an informational problem structurally related to the difficulty by one of the two parties to process some kind of information, such as the quality of the products¹⁷⁷. Furthermore, the

¹⁷⁴ See, in general, the seminal articles of S.A. Ross, “The Economic Theory of Agency: The Principal’s Problem”, *The American Economic Review*, 1973; E.F. Fama and M. C. Jensen, “Agency Problems and Residual Claims”, *The Journal of Law and Economics*, 1983.

¹⁷⁵ See Holmstrom Bengt, “Moral Hazard and Observability”, *The Bell Journal of Economics*, Vol. 10, No. 1, pp. 74-91, Spring 1979; Milgrom Paul and John Roberts, *Economics, Organization & Management*, Prentice Hall Inc., New Jersey, 1992.

¹⁷⁶ Akerlof G.A., “The market for ‘lemons’: qualitative uncertainty and the market mechanism”, *Quarterly Journal of Economics*, 84, pp. 488-500, August 1970.

¹⁷⁷ In Akerlof (1970), the classical example to explain this informational problem is the market for lemon cars. The adverse selection, in effect, arises when products of different quality (*e.g.* lemon and good cars; junk and good bonds and so on) are sold at a single price because of asymmetric information (inability of the buyer or lender to understand the real quality/risk of the cars/financial product or borrower), so that too much of the low-quality product and too little of the high-quality product are sold. In the market for lemon and good cars, for instance, the equilibrium will result in a market price (due to the inability of the buyer to understand *ex ante* the quality of the product) a bit higher than lemon cars’ real value and consistently lower than good cars’ real value. Hence, the market equilibrium, in the mid term, will determine that only lemon cars are sold in the market. This important issue can basically bring a market to the end, justifying mechanisms of signalling as third-party informational role (rating agencies, etc), regulatory interventions or just pre-sale services. See Pindyck and Rubinfeld (2005), *id.*, p. 616; Reinier H. Kraakman, “Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy”, *Journal of Law, Economics and Organization*, Vol. 2, No. 1, Spring 1986.

opportunistic behaviour of the party that is more informed about product quality helps to exclude virtuous practices from the market.

In addition, although the informational asymmetry does not necessarily lead to exploitation of the less informed party, there are situations in which the cost pressure to which financial advisors are increasingly exposed creates incentives for the providers to exploit their superior information to the detriment of their customers. In retail banking, for example, this is not only due to the current financial crisis, but also to other factors such as the fact that the majority of clients do not contribute to profits or are even characterized by a negative profit contribution, and that an average financial advisors in the retail segment have to take care of 850–2,000 clients¹⁷⁸. Furthermore, according to a study of the consultancy McKinsey and Company, only 13% of a financial advisor's working time is dedicated to advising and selling tasks, while the remaining 87% is spent on administrative duties¹⁷⁹. Another study interestingly shows that advisors allocate two-thirds of the time available for advising or selling to selling¹⁸⁰. Finally, since under the prevalent pricing model the actual service of advice giving is offered free of charge and then cross-subsidized by provisions and fees resulting from the sale of the products subsequent to the advice giving process (service model; e.g., Kaas and Severidt 2002), advisors are under enormous pressure to sell their products as efficiently as possible¹⁸¹.

Interestingly, a corollary of this finding is that increased competition does not eliminate the problem, and may even strengthen the incentive for financial advisors to exploit their customers, due to increased cost pressure. Advisors able to exploit unobservable (hidden) information may have a stronger incentive to recommend products with the highest commissions, or riskier investments, knowing that they will be able to justify any negative result by invoking exogenous, unpredictable shocks¹⁸².

In this respect, stronger competition policy alone is not likely to lead to any improvement in the quality of financial advice, since financial advisors compete on observable qualities, and normally economise on unobservable ones¹⁸³. Put differently, none of the oft-quoted self-healing properties of consumer markets (screening, signalling, self-selection, guarantees, alignment of interest, reputation-transfer, reputation-constraint¹⁸⁴) is observable and operational in retail financial advice. Improving the quality of information exchange is not profitable and thus not interesting for the financial service provider.

¹⁷⁸ Eichhorn 2004, p. 259; Haferbier 2004, p. 71; Hook and Ulrich 2003.

¹⁷⁹ Stiller 2003.

¹⁸⁰ Lucius et al. 2004, p. 95.

¹⁸¹ See Oelehr, A. and D. Kohlert (2009), *Financial Advice Giving and Taking*, cit.

¹⁸² *Id.*

¹⁸³ A similar rationale has led to concluding that competition does not necessarily solve the problem of unfair contract terms in the literature. See, *i.a.* Bebchuk, L.A. and R. A. Posner, *One-sided contracts in competitive consumer markets*, in Ben-Shahar, O. (Ed.), *Boilerplate. The foundation of market contracts*, Cambridge University Press, 2007.

¹⁸⁴ See Oelehr, A. and D. Kohlert (2009), *Financial Advice Giving and Taking*, cit., at 97.

Finding #2.9

The informational asymmetry that characterises most consumer contracts is particularly evident in retail financial services, and especially in complex and risky transactions such as investment services. Some retail financial services (*e.g.* investment services) exhibit significant experience and credence attributes: accordingly, customers are exposed to exploitative behaviour on the side of providers, which may abuse their superior information by pushing their customers into actions and purchases that are detrimental to them (*e.g.* steering practices).

The more significant are the experience and credence attributes of a given service, the greater the risk of moral hazard and strategic behaviour, and consequently of unfair practices on the side of the service provider.

More competitive markets do not necessarily solve this problem. Consumer policy is thus a needed complement to competition policy.

2.2.1.1.1 Financial education and customer effort in “shopping around”

As reported by the European Commission in its Communication on Financial Education in 2007, “*numerous international surveys have demonstrated consumers' generally low level of understanding of financial matters and of basic economics*”¹⁸⁵. The fact that individuals find financial matters difficult to understand, and often overestimate their understanding of these matters, constitutes a key obstacle to their ability to shop around for the best deal, when these opportunities exist. At the same time, the limited understanding of financial issues exposes customers to misleading information by their financial services providers, thus magnifying the scope for, and impact of, unfair commercial practices in this field¹⁸⁶.

The effect of the lack of information and financial education on the side of customers in the retail financial services sector is also combined and enhanced by the limited effort that customers seem to devote to the search for a better deal in this sector. As a matter of fact, many retail financial products (mortgage loans, current accounts, insurance products, etc.) are considered as a necessity, but hardly attract the curiosity of customers (also since they normally exhibit a low degree of differentiation): search costs are perceived as very high by the average customer. This is reflected in empirical analyses that show that customers exhibit a particularly low tendency to switch provider in current accounts, life insurance, etc.¹⁸⁷ The issue of habit and practical convenience in

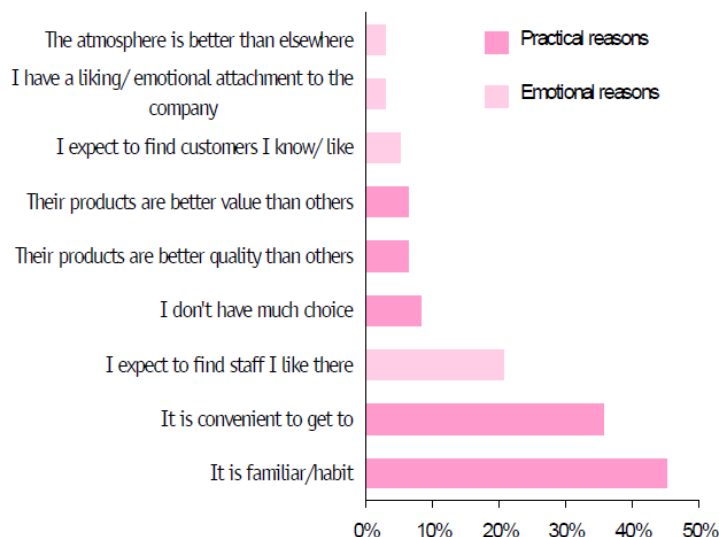
¹⁸⁵ See COM(2007)808 of 18 December 2007.

¹⁸⁶ See Commission Communication on Financial Education, COM(2008)808, 12 December 2008, http://ec.europa.eu/internal_market/finservices-retail/docs/capability/communication_en.pdf.

¹⁸⁷ Especially in some countries, there is ample evidence that consumers exhibit on average limited interest in shopping around. See, *i.a.*, *Better informed consumers*, FSA consumer research report 1 (2000); *Informed decisions?* FSA consumer research report 5 (2000);

dealing with financial providers is a particularly reason for remaining loyal to a given institution. For example, a survey by nVision in 2003 revealed that UK consumers remained loyal to their bank mostly for practical reasons.

Figure 6 – Motivations for loyalty to banks, UK, 2003



Source: nVision Research, out of a sample of 865 adults¹⁸⁸.

These findings are also supported at regional level by a recent study by the Nordic competition authorities on competition in Nordic Retail Banking.¹⁸⁹ This document reports interesting data on the switching behaviour of Danish (and in general, Nordic) consumers, showing that 70% of the customers would not consider switching banks even if it could be done without costs. Similar satisfaction can be observed in the other Nordic countries. Crucial factors in this connection seem to be:

- (i) the level of trust;
- (ii) tradition or path-dependency;
- (iii) good relationship with a personal banking advisor in the local branch – a Danish survey has shown that consumers value a personal banking advisor at as much as 10-15,000 DKK a year (up to approx. €2,000);
- (iv) customers believe that it will be easier to obtain a loan if suddenly in need;

Polarisation FSA consumer research report 9 (2002). See also Cook, Malcolm, Earley, Fionnuala, Smith, Sarah and Ketteringham, Jody, *Losing Interest: How Much Can Consumers Save by Shopping Around for Financial Products?* (October 2002). Financial Services Authority Occasional Paper No. 19.

¹⁸⁸ See <http://www.ginns.info/Retail%20banking.pdf>.

¹⁸⁹ The copy of this report can be downloaded at (in English): http://www.kilpailuvirasto.fi/tiedostot/Nordic_Retail_Banking.pdf (last visited on 17 February 2009).

(v) convenience and one-stop-shop effects.

In addition, as reported by the Nordic Competition Authorities, “*lack of interest seems to be a common feature among bank customers*”. The report quotes a survey performed by Berg and Borgeraas¹⁹⁰ among retail banking customers, which concluded that two of the reasons for low customer mobility relate to the facts that “*customers have an unconsidered relationship with the banking market*”, and that “*bank affairs are low interest areas*”. It seems that many customers do not compare prices and services and have a lack of interest and commitment when it comes to financial services¹⁹¹.

Other papers even report that clients often do not even want to be informed about the financial details, precisely because of the excessive cognitive demand that comes along with it¹⁹².

Finding #2.10

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.

2.2.1.1.2 Information asymmetry, relationship banking and switching costs

The asymmetry of information between providers and customers leads to the emergence of other market effects. For example, the fact that customers face important obstacles in appraising whether their counterpart is behaving correctly and providing a high-quality service also implies that customers that are already involved in a contractual relationship with a financial service provider may be discouraged from switching, as this would imply investing again in familiarising with a new service provider, with limited chance of being able to appraise the reliability of the counterpart before signing and executing a new contract. For this reason, experience and credence qualities may represent a transaction-specific investment for the customer, which makes it very difficult to switch to competing banks (so-called path-dependency or *status quo bias*)¹⁹³.

¹⁹⁰ Lisbet Berg & Elling Borgeraas (2003), *Hindrances for mobility in the bank market*, Paper presented at the 6th Conference of the European Sociological Association, Murcia, September 23-26, 2003.

¹⁹¹ See also the interesting analysis provided by Berg, L. (2008), *Loyalty, naivety and powerlessness among Norwegian retail bank customers*, International Journal of Consumer Studies Vol. 32, n. 3, at 222–232.

¹⁹² See Oehler and Kohlert (2009), *Financial Advice Giving and Taking*, cit., at 99 (quoting Jungermann 1999; Jungermann and Belting 2004; Oehler and Kohlert 2008).

¹⁹³ See *supra*, note 167 and accompanying text.

In financial services, the relationship between the provider and the customer is particularly important, mostly due to the trust-based relation that must be created in a situation of informational asymmetry. This also means that customers perceive the relationship as a long-term one, and build their relation with the service provider overtime¹⁹⁴. This can be qualified as a transaction-specific investment (TSI) as illustrated in the seminal contribution by Oliver Williamson (1975)¹⁹⁵. Faced with this “sunk” investment, customers perceive high switching costs: changing provider would indeed mean, at once, losing the previous TSI and having to face a new, equally “sunk” investment in familiarising with the new provider. This effect is particularly strong for investment products, where the fiduciary role of the service provider may be essential for retail investors.¹⁹⁶ The information and behavioural biases involved can lead to rather high “perceived” switching costs, difficulties in evaluating alternatives, and consequently low price transparency and customer mobility¹⁹⁷.

This leads customers to rely on proxies to establish the value of a given investment option – the proxy, in this case, being the advice received by their service provider. For this reason, the so-called “relationship banking” often attracted specific interest in the law and economics literature¹⁹⁸. Moreover, as will be explained in the next sections, rational ignorance is also one of the reasons why aggressive commercial practices and unsolicited offers can have very similar effects to contractual tying: accordingly, merely banning tying may lead to the emergence of other practices which *de facto* reach the same result by “inducing”, rather than “forcing” consumers to buy additional products. The turmoil induced by the financial and economic crisis has tended to result in pronounced disturbance and perturbation of the markets. The increased

¹⁹⁴ See data on the duration of relationship in this sector, as reported by the European Commission in the Sector Inquiry on Current accounts and related services (2006), *cit.* The literature on marketing is consistent in indicating the role of trust, satisfaction and average perceived cost (including switching costs) as determinants of loyalty. See, *i.a.*, Raoul Graf, Fabien Durif, Mario Belzile (2008), “Echo Generation”: switching costs and the relational approach in the banking industry, *Innovative Marketing* Vol. 4, Issue 1, at 77-86; and Graf, R., Perrien, J. (2005), “The Role of Trust and Satisfaction in a Relationship: the Case of High Tech Firms and Banks”, *Proceedings of the 34th EMAC Conference*, Milan, Italy.

¹⁹⁵ Williamson O.E. (1975), “Markets and Hierarchies: Analysis and Antitrust Implications – A Study in the Economics of Internal Organization, New York: Free Pr.

¹⁹⁶ See David T. Llewellyn, “Regulation of Retail Investment Services”, *Economic Affairs*, Vol. 15, N. 2, 1995, pp. 12-17.

¹⁹⁷ In this respect, the retail financial services sector can be said to differ noticeably from other economic sectors. For example, in telecommunications or energy sectors consumers are less likely to suffer from an information asymmetry, provided that they have visibility of the quality of service and relative price of the offer. At the same time, the elements of “trust”, “transaction specific investments” and “bounded rationality” are much less important in these fields. Finally, especially in the telecommunications sector consumers are more likely to shop around for better offers.

¹⁹⁸ See Office of the Comptroller of the Currency, *Today's Credit Markets, Relationship Banking, and Tying*, International and Economic Affairs Department Law Department, September 2003, at <http://www.occ.treas.gov/law/tyingwhitepaper.pdf>. See also Boot, Arnoud W. A., 2000, *Relationship Banking, What Do We Know?*, *Journal of Financial Intermediation* 9, 7-25; and Berry, L.L, Thompson, T.W. (1982). “Relationship Banking: the Art of Turning Customers into Clients”. *Journal of Retail Banking*, Vol. 4, n. 2, pp. 64-74.

volatility of financial indicators and proxies progressively blurred the information available¹⁹⁹. Therefore, the current context tends to amplify the specific characteristic of information asymmetry between providers and customers in the retail financial market.

More in detail, the provider-customer relationship can be described by two main dimensions, according to the literature: the “depth” of the relationship, stemming from the “off-contract” entrepreneur-banker relationship, and the thickness, defined as the information conveyed to the bank through the multiple financial contracts and services. In particular, the thickness of the provider-customer relationship offers customers a range of potential advantages, but is also associated with the possibility, for the more informed provider, to capture rents in the relationship by exploiting by engaging in hold-up behaviour and false representation of both market and contractual conditions.

Finding #2.11

The experiential, long-term and risky nature of provider-customer relationships in many retail financial markets leads to high switching costs for customers, due to the sunk investments associated with the contractual relationship. This, in turn, leaves customers in a weak position vis-à-vis their counterparts.

The more complex, deeper and thicker the relation between providers and customers, the higher the probability that providers can engage in exploitative behaviour, especially when customers cannot observe the quality of the service provided to them in the long run.

2.2.1.2 Behavioural economics and decision-making biases

In addition to market and product attributes, consumer choice may also be distorted due to purely structural factors, which do depend neither on the type of relationship, nor on the abusive behaviour of banks, but pertain to the sphere of bounded rationality and risk aversion. Where these cognitive biases are observed, markets may fail irrespectively of the behaviour of providers. Faced with these problems, legislators have the specific role of devising, where possible, rules that minimise the impact of cognitive biases on consumer choice. The behavioural law and economics literature, coupled with modern neuroeconomics, is advancing in the direction of identifying ways of “*debiasing*

¹⁹⁹ As recently observed by the OFT in its consultation document on the financial services strategy, adopted in April 2009, The financial crisis may change consumers' behaviour in many ways: (i) Prior to the crisis, competition in financial services took place on parameters such as price, rates offered, product range, quality and brand. Consumers may now place greater weight on factors such as security and soundness of financial institution. (ii) Customer behaviour based on these parameters may result in reinforcing the existing status-quo and reduced opportunities for small innovative players to enter the market. (iii) Consumer preferences may also change with regard to the type of products they seek. Consumers may move away from long-term savings and investment products in favour of shorter-term, more liquid, products. See the OFT document, 1077con, *cit.* at B27-B29.

*through law*²⁰⁰. This stream of literature is particularly relevant for the financial services sector, as testified by the emphasis put on financial services by recent reports both at OECD level and by the UK OFT²⁰¹.

Financial services are natural candidates for a policy intervention in this respect, given that customer decisions in these markets often involve risk, uncertainty and ambiguity²⁰². Important behavioural biases that surface in particular in retail financial services include choice/information overloads, endowment biases, overconfidence, framing effects, difficulty in handling uncertainty and risk, and misevaluation of future benefits and costs²⁰³. In the UK, for example, the Financial Services Authority (FSA) has analysed cognitive biases as one element of “financial capability” than can explain failures in decisions over uncertain investment options²⁰⁴. The OFT has proceeded along similar lines in its market study on personal current accounts²⁰⁵.

The box below shows the effects that are most likely to emerge when consumers deal with risky or ambiguous situations, as identified at OECD level during the 2008 Global Forum on Competition. The same report also highlights that many of these effects are particularly likely in the retail financial services sector. Two very relevant effects that should be taken into account in appraising the likely impact of observed practices are the over-estimation of risk and over-optimism. Individuals seem to make systematic errors in risk assessment overestimating certain risks that can be vividly recalled, and underestimating others. In more operational terms, the existence of structural cognitive biases can be included in

²⁰⁰ See Jolls, C. and Sunstein, C. R., “Debiasing through Law” (March 2005). U Chicago Law & Economics, Olin Working Paper No. 225; Harvard Law and Economics Discussion Paper No. 495. Available at SSRN: <http://ssrn.com/abstract=590929>.

²⁰¹ See *i.a.*, Tapia, W. and J. Yermo (2007), “Implications of Behavioural Economics for Mandatory Individual Account Pension Systems”, OECD Working Papers on Insurance and Private Pensions, No. 11, OECD Publishing; Ramsay, I. (2004), *Consumer credit regulation as “The third way”?*, available online at the following website: [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_SeminarsConferences_National_Credit_2004_November/\\$file/ramsay.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_SeminarsConferences_National_Credit_2004_November/$file/ramsay.pdf);

²⁰² See, *i.a.*, Camerer C. F., Loewenstein G. and Prelec D. (2005) *Neuroeconomics: How neuroscience can inform economics*, Journal of Economic Literature, Vol. XLIII (March 2005), pp. 9–64.

²⁰³ See also Ulen and Korobkin (2006), *cit.*; Jolls (2007), *cit.*

²⁰⁴ See <http://www.fsa.gov.uk/pubs/consumer-research/crpr69.pdf>.

²⁰⁵ Office of Fair Trading, *Personal Current Accounts in the UK*, Market Study, July 2008, available at http://www.oft.gov.uk/advice_and_resources/publications/reports/financial/. The OFT in particular looked at six factors: (i) Perceived behavioural control: People’s perceptions of their behavioural control of current account switching were high overall; (ii) Temporal myopia: People’s discounting of future events was not related to switching behaviour. (iii) Overconfidence: People were overconfident about the likelihood that they would encounter charges. (iv) Loss aversion: Concern about losses during switching was slightly lower for switchers, but the overall level of concern was not misplaced. (v) Cognitive engagement: The overall level of cognitive engagement was low: People do not spend much time or effort thinking about their current account. (vi) Fairness: Overall, charges were not perceived as unfair, though those who were charged rated charges less favourably than those who were not charged. Increased awareness of charges and warnings about charges were associated with a smaller difference in fairness ratings between those charged and those not charged.

the overall assessment of barriers to customer mobility, as well as in the overall assessment of the likelihood that providers exploit the risk attitude of their customers by imposing unfair commercial terms. For example, the literature on prospect theory explains that individuals' willingness to pay for a product is systematically lower than the compensation they would require to accept the loss of a product they are already consuming. This, in and of itself, explains part of the hesitation of customers when deciding whether to switch²⁰⁶.

Finally, for what concerns financial advice (both pre- and post-contractual), a very relevant effect to be taken into account is information overload. As recalled by Oehler and Kohlert (2009), *"The sheer amount of information the customer has to perceive and to process means a high grade of complexity on its own. The number of options and corresponding attributes inherent in this quantity of information clarifies that. If the individual investment types and products, respectively, are considered decision options, the client is confronted with about five options alone at the investment type level (e.g., liquidity, bonds, stocks, insurance, funds) with different subgroups each (e.g., money market funds, bond funds, equity funds, real estate funds) of which each again has a much higher number of corresponding attributes. The multiplicity of attributes can be clarified by considering different attribute levels (e.g., level 1: cost, level 2: purchase cost, level 3: indirect cost, level 4: kick-back payments). Furthermore, the information the client receives during an advising session are highly interrelated ... If we consider that humans cannot simultaneously process more than nine information units, even less in the case of complex problems ... it is unavoidable that the majority of the clients who have little or no knowledge and experience in the investment area will suffer from information overload"*²⁰⁷.

BOX – EXAMPLES OF BEHAVIOURAL BIASES, OECD

- **Choice/information overload:** economic models suggest that the benefits from extra choice and information are unbounded. Even the theory of "bounded rationality" does not suggest that extra choice and information is detrimental. Market research however, in products as diverse as jams and retirement savings, suggests that past a point, when provided with more choice and information, we either walk away from markets, choosing not to choose, or we choose randomly.
- **Endowment bias:** What one has is valued more than what one might have. Consumers are often reluctant to switch suppliers because of a loyalty, which may be misplaced, to existing suppliers. This is particularly evident in telecommunication and financial services.
- **Overconfidence:** in many situations, consumers are overconfident in their abilities and in their future fortunes. For example, many people invest, believing that they can beat the stock market, or they underestimate the risk that illness or unemployment may cause difficulty in repaying a loan. Again, this bias is important in financial services.

²⁰⁶ Kahneman, D. and Tversky, A. (1979) *Prospect Theory: An Analysis of Decision under Risk*, *Econometrica* 47(2), 263–292.

²⁰⁷ Oehler and Kohlert (2009), *Financial Advice Giving and Taking*, at 103.

- **Framing biases:** Consumers are influenced not only by the objective information provided by suppliers, but also by the “frame” of that information. For example, a claim “92% fat free” elicits a different response than “8% fat.”
- **Difficulty in handling uncertainty and risk:** The frame in which choices are considered influences consumer’s perceptions of the consequences of uncertain outcomes. When gambles (such as insurance choices) are considered in isolation, consumers tend to be irrationally risk averse. When consumers consider themselves to be in a loss situation (such as becoming heavily overcommitted on a credit card) they tend to behave recklessly. Furthermore, consumers often have difficulty in thinking rationally about possible outcomes with very low probability.
- **Mis-evaluation of future benefits and costs** (hyperbolic discounting, myopia): Consumers do not rationally weigh up present against future benefits and costs; rather they put too much weight on the immediate. This bias is manifest in outcomes such as low retirement savings in the absence of compulsion.

Source: OECD 7th Global Forum on Competition, Introductory Note, February 2008.

Finding #2.12

Financial services are characterised by widespread decision-making biases on the side of consumers, such as framing and endowment effects, the mis-evaluation of future benefits and costs as well as difficulties in handling uncertainty and risk. In particular, endowment and framing effects lead to high switching costs, as customers prefer a certain contractual relationship to a hypothetical improvement associated with switching.

The higher the endowment and framing effect, the lower the customer’s willingness to switch provider will be.

2.2.1.3 Summary

In this section, we have identified a number of relationships between market conditions and psychological factors, on the one hand, and the contractual weakness of customers in retail financial services. Below, we briefly summarise them:

- *Informational asymmetry*, The asymmetry of information that characterises most consumer contracts is particularly evident in retail financial services, and especially in complex and risky transactions such as investment services.
- *Experience and credence factors*. Some retail financial services exhibit significant experience and credence attributes: accordingly, customers are exposed to exploitative behaviour on the side of providers, which may abuse their superior information by pushing their customers into actions and purchases that are detrimental to them (e.g. steering practices). The more significant the experience and credence attributes of a given service are, the greater the risk of unfair practices on the side of the service provider.
- *Financial education and customer shopping effort*. Lack of financial education and limited effort 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.

- *Customer switching.* The experiential, long-term and risky nature of provider-customer relationships in many retail financial markets leads to high switching costs for customers, due to the sunk investments associated with the contractual relationship. This, in turn, leaves customers in a weak position vis-à-vis their counterparts.
- *Relationship finance.* The more complex, deeper and thicker the relationship between providers and customers, the higher the probability that providers can engage in exploitative behaviour, especially when customers cannot observe the quality of the service provided to them in the long run.
- *Decision-making biases.* Financial services are characterised by widespread decision-making biases on the side of consumers, such as framing and endowment effects, the mis-evaluation of future benefits and costs and difficulties in handling uncertainty and risk. In particular, endowment and framing effects lead to high switching costs, as customers prefer a certain contractual relationship to a hypothetical improvement associated with switching. The higher are endowment and framing effect, the lower will be the customer's willingness to switch provider.

All these factors lead to two main consequences in the retail financial services markets. First, depending on the characteristic of the service (or package of services), the weakness of the customer will vary. Second, all these factors potentially impact on customer (actual or perceived) switching costs, and thus on customer mobility. In the next section, we explore more in-depth the issue of switching costs.

2.2.2 A closer look at switching costs

As we explained in the previous section, the specific conditions observed in retail financial markets lead to the emergence of limited customer mobility and switching costs²⁰⁸. As will be shown below, in Section 2.2.3, the emergence and extent of such costs can be the consequence of practices such as cross-selling and some conditional sales practices. This impact depends *i.a.* on the products and services taken into consideration. In this section, we analyse more in detail the nature of switching costs and their emergence in different sectors.

Switching costs allow the firm to unilaterally increase the price of services and products higher than the rival, since customers are locked-in. The lock-in effect in a mature and oligopolistic market, such as financial services, ignites a competitive mechanism *à la Cournot*²⁰⁹, since few incentives exist to compete

²⁰⁸ OFT (2009), *cit.*

²⁰⁹ The presence of high switching costs artificially supports the perception of product's differentiation (by old customers) in the Cournot's model, although the outstanding

on price. In effect, firms should offer a price discount that should be higher than the switching costs, to attract rivals' customers and induce them to switch and bear the related costs. The final outcome thus is potentially more harmful than the monopolistic outcome due to the consumer lock-in effect, which will hamper customers' freedom choice and mobility and so even competition.

In fact, the artificial final equilibrium can strongly deter market entry, since an oligopolistic equilibrium at market level prevails, while at firm-consumer level the lock-in effect may induce firms to charge a supra-competitive price (up to the monopolistic price)²¹⁰. In addition, in a growing market with switching costs, firms are willing to price very low to attract new customers and then to reap benefits once locked-in, increasing market price ("bargain then rip-off"²¹¹).

In the retail financial services sector, the following costs are likely to impede switching by consumers:

- *Transaction costs*, e.g. documentation, time, fees, search costs, other information costs, learning costs, etc.;
- *"Exit" costs*, due to, i.a. loyalty programs, early repayment penalties (especially in the case of mortgages), etc.;
- *Uncertainty costs*, especially in financial services, since the quality or suitability of a product can only be observable after purchase (experience attributes), or can never be fully observed by the customer (credence attributes)²¹²;
- *Psychological costs*, mainly in case of goods with high significant credence attributes ("mutual trust"), e.g. investment advices, life insurance, etc.²¹³

There is ample evidence that customers in the retail financial services sector do not switch provider very often. For example, Pomp *et al.* (2005) report the results of a survey run by the Dutch Consumentenbond in 2002 on the switching behaviour of consumers in a number of different markets (1,091 respondents). As illustrated in the figures below, characteristics of the financial services included in the sample appear quite clearly. Very few customers in mortgage, current account and life insurance were planning to switch (Figure 7); and very few were aware of the existence of alternatives (Figure 8), especially for current and savings accounts.

assumption of product homogeneity has special validity for new customers (not locked-in yet). See Cournot (1838), *cit.*; Motta (2004), *cit.*, p. 556.

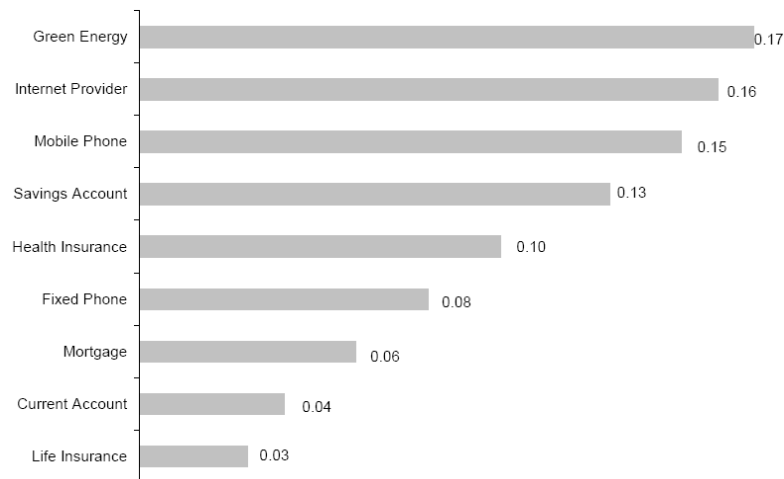
²¹⁰ This likely market outcome can be only seen as result of no-collusive firms' behaviours. In fact, markets with high switching costs undermine the severity of any retaliation for deviation from a collusive agreement (punishment very costly). The impact of switching costs on a collusive agreement is indefinable; see OFT (2003), *id.*, p. 4.

²¹¹ See Armstrong, OFT (2008), *id.*, p.28.

²¹² See *supra*, note 168 and accompanying text.

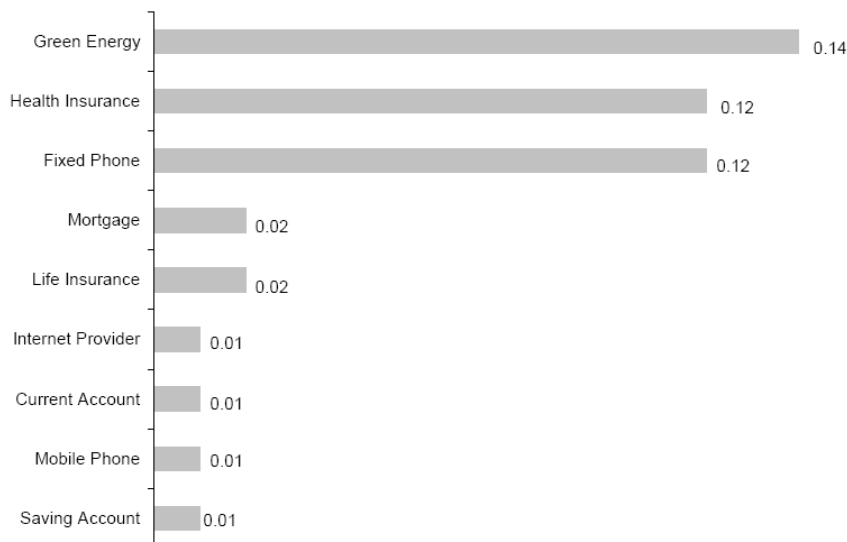
²¹³ See in general, P. Klemperer, "Competition When Consumers Have Switching Costs: An Overview with Applications to Industrial Organisation, Macroeconomics and International Trade", *Review of Economic Studies*, 62, pp. 515-539, 1995; OFT (2003), *id.*; OFT, "Assessing the effectiveness of potential remedies in consumer markets", OFT 994, April 2008.

Figure 7 – Percentage of customers that plan to switch



Source: Pomp *et al.* (2005)

Figure 8 – Customers that are aware of the possibility of choice



Source: Pomp *et al.* (2005)

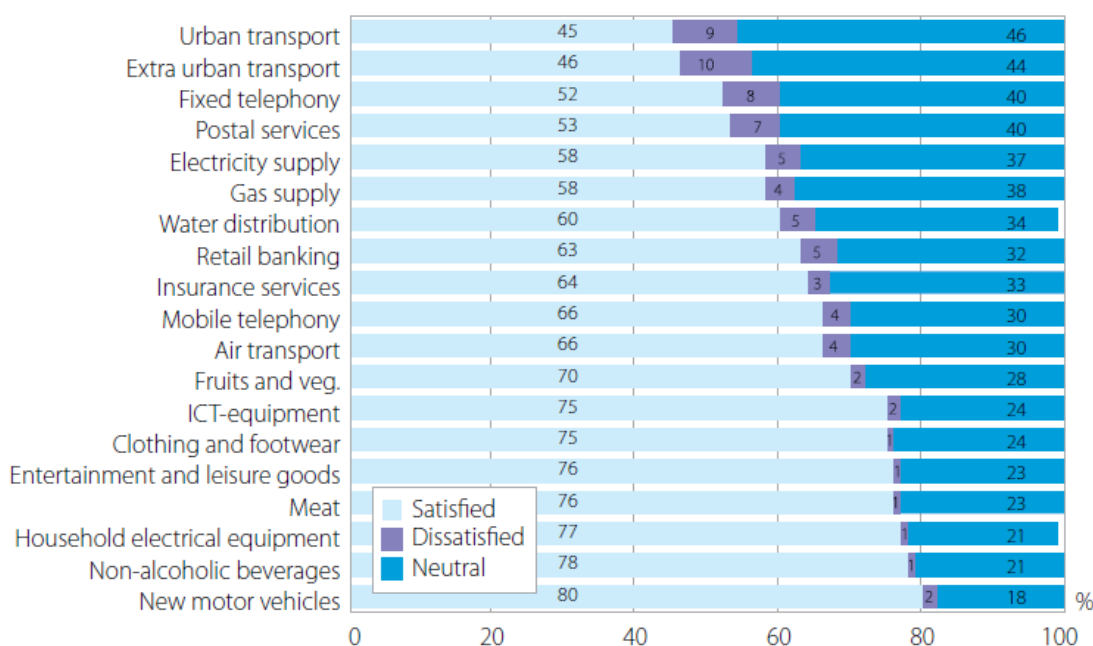
The results above are complemented by other surveys regarding the length of banking relationship. As reported by a recent study of the Nordic Competition Authorities, in Norway there is evidence that 85% of SMEs have had the same principal bank for three years or more. Two thirds of the SMEs have had the same principal bank for six years or more. The Danish Ministry of Economic and Business Affairs carried out a customer mobility survey in 2004, which showed that 82% of the respondents have not switched bank within the last 3 years. A survey by Juul (2006) concludes that 63% of consumers have been loyal to their bank for more than 10 years²¹⁴. Only 5% have switched bank

²¹⁴ Juul, H. (2006): *Mobiliteten i den nordiske finansielle sektor*, Nordic Council of Ministers TemaNord 2006:507

during the last year. In Hungary only 16% of the customers have ever switched banks. In UK the estimated annual switching rate is 4-6%, and in France it is roughly 5%.

More recently, the European Commission published its second Consumer Market Scoreboard, in which the satisfaction of consumers for a number of services is reported, based on IPSOS surveys conducted in 2006 and 2008²¹⁵. In addition, a Eurobarometer Flash was published in January 2009 based on a survey carried out in 2008 by the Gallup Organization upon the request of the European Commission on Consumers' views on switching service providers in a number of sectors²¹⁶. The results highlighted a high number of complaints in the services markets, especially transport, communication (telecommunications and postal services), and a group that includes banking services and insurance. Furthermore, evidence on switching shows that banking services (bank accounts) and energy (electricity and gas supply) are particularly problematic in terms of comparability of offers, ease of switching and actual switching. Only 9% of users of current accounts changed banks, 7% of consumers switched gas supplier and 8% electricity provider. These rates are low compared, *e.g.*, to the percentage of consumers that switched car insurance (25%).

Figure 9 – Consumer satisfaction/dissatisfaction, 2006 and 2008



Source: IPSOS Consumer Satisfaction Surveys. 2006 and 2008

At the same time, the Eurobarometer survey data showed the relationship between price changes and switching behaviour of consumers in a number of markets. As shown in Figure 10 below, third-party liability car insurance was

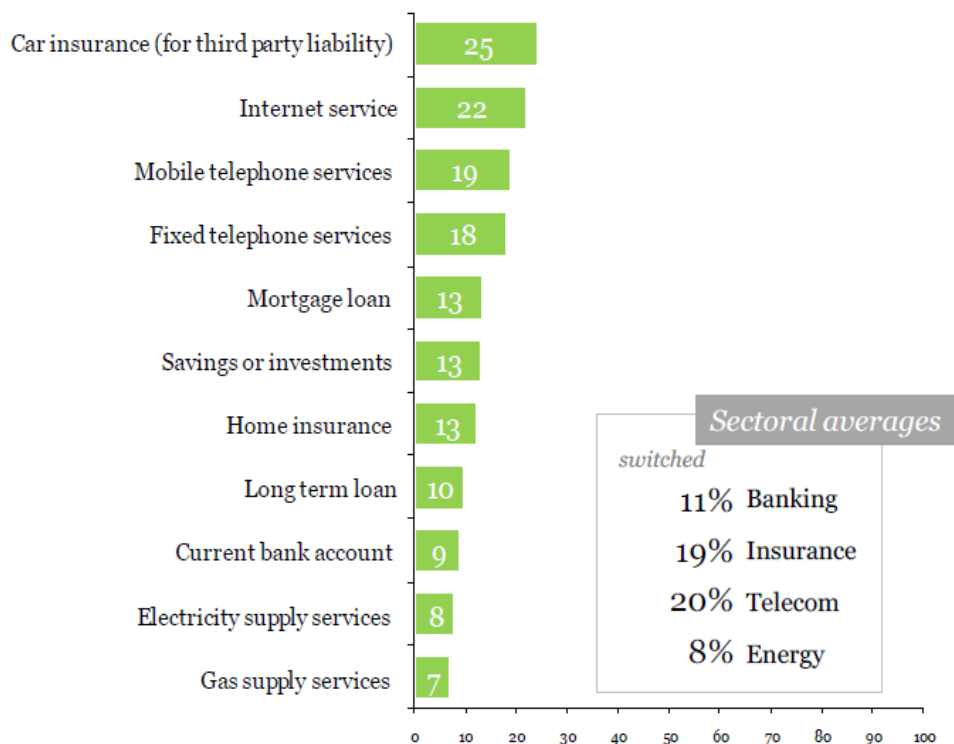
²¹⁵ See http://ec.europa.eu/consumers/strategy/docs/2nd_edition_scoreboard_en.pdf

²¹⁶ Available at http://ec.europa.eu/public_opinion/flash/fl_243_sum_en.pdf.

the service where most consumers switched: a quarter of all policyholders changed providers during the past two years. Next were telecommunication services: Internet (22%), mobile phone (19%) and fixed-line telephone services (18%). On average, only 11% of users of retail banking services changed providers or products during the past two years; those most likely to change were the holders of mortgage and investment products (both 13%), while only 9% changed their existing accounts and 10% their long-term credit arrangement. Energy was the sector least likely to switch: 7% switched gas supplier and 8% electricity provider.

Switching banking services was found to be difficult by 43% of those who did not want to stay with their current product or provider. The perceived difficulties that deter consumers from even trying to switch was stronger here: a quarter (27%) did not try to switch their long-term credit arrangements due to such difficulties, as did a similar number in regard to their current account, 21% regarding mortgages and 19% with respect to savings/investment products, possibly due to the expected extra costs. However, those who attempted to switch their service actually reported fewer difficulties than those who tried to do the same in the telecom sector (savings/investments: 10%, mortgages: 14%, current accounts: 10%, long-term credit arrangements: 11%).

Figure 10 – Switched service providers

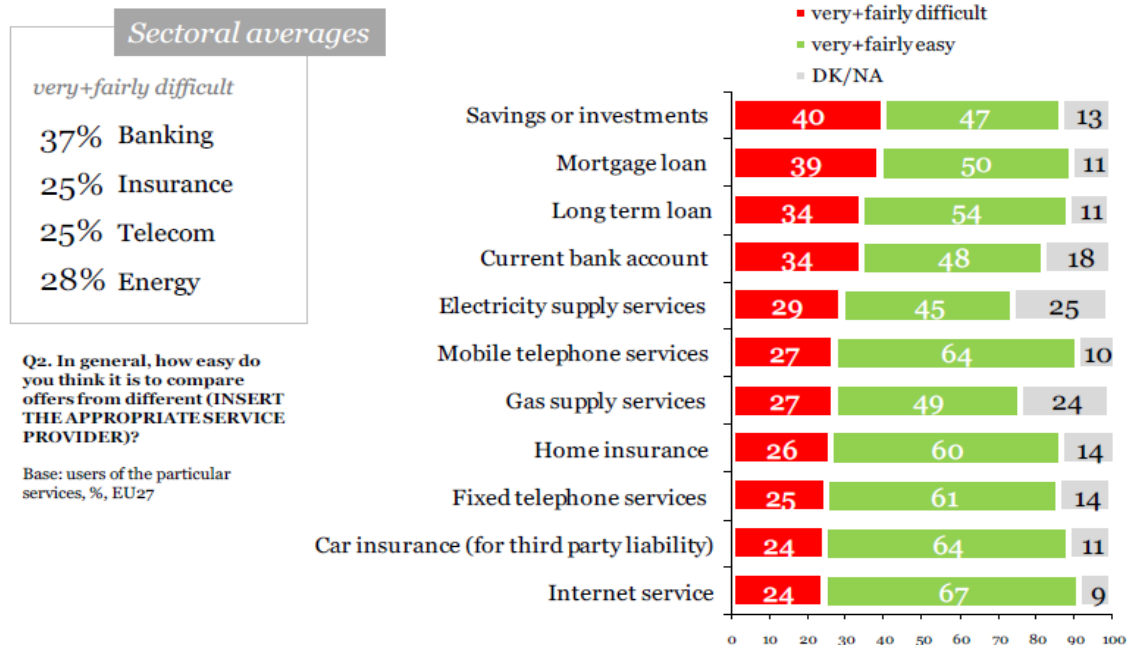


Source: Eurobarometer Flash 243, January 2009

The survey also found eloquent results as regards the consumers' perception of the comparability of offers, as shown in the figures below. In this respect, retail financial services dominate all other services as regards the difficulty of

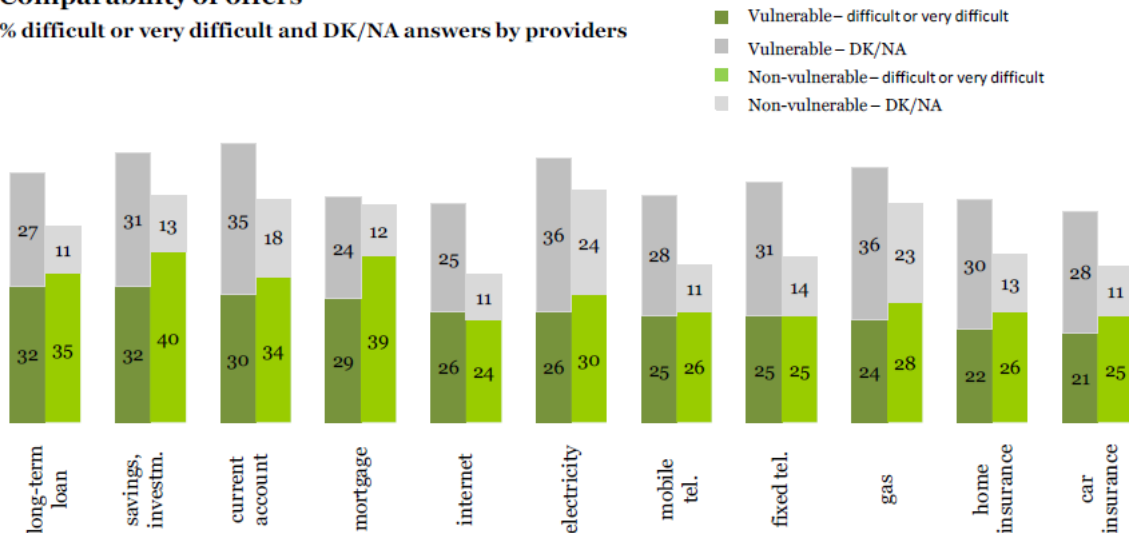
comparing alternative offers. European consumers find it quite difficult to compare offers in services such as savings or investments, mortgage loans, long term loans, and even current accounts. A breakdown between vulnerable and non-vulnerable consumers highlights that this problem is widespread, not confined to a specific category or group.

Figure 11 – Comparability of offers



Comparability of offers

% difficult or very difficult and DK/NA answers by providers



Source: Eurobarometer Flash 243, January 2009

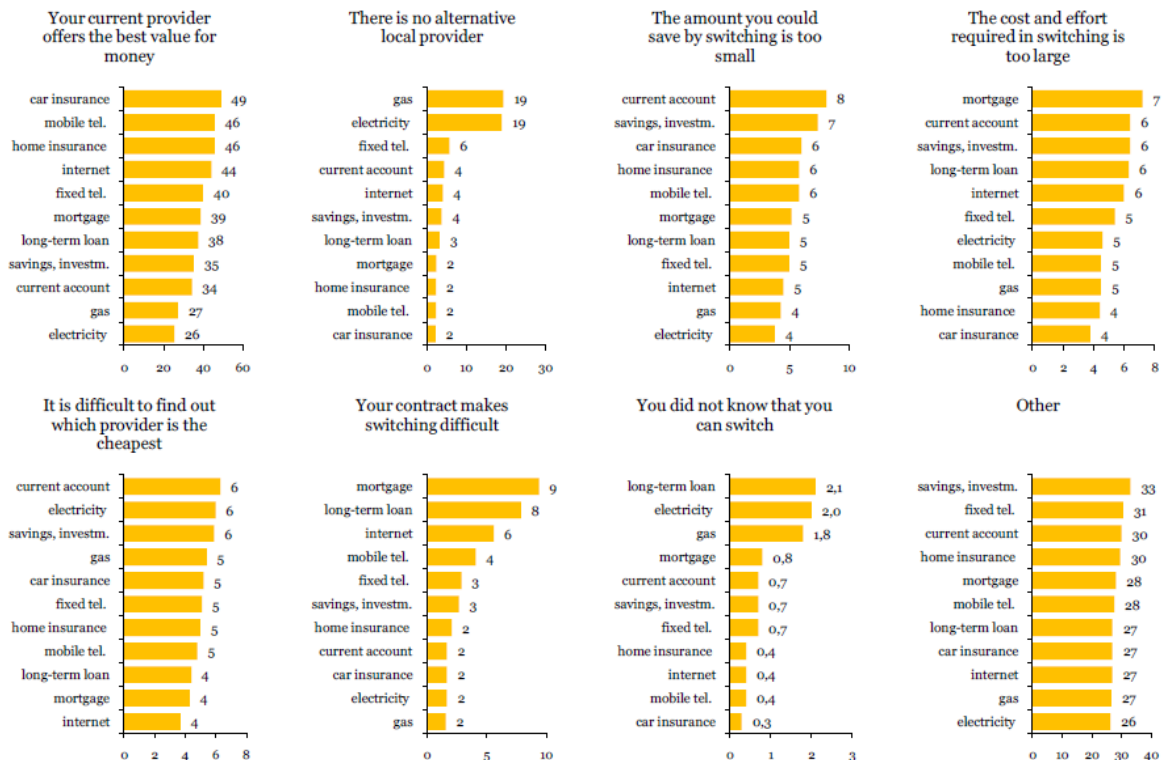
The results of the recent surveys are particularly interesting for the purposes of our report, as they suggest that European citizens consider it to be very difficult

to compare alternative offers. Accordingly, they do not switch provider very often, nor seem particularly eager to switch.

Looking more closely at the reasons why customers do not switch, Figure 12 reports very interesting findings. For example:

- Compared to other services, consumers consider that the cost and effort required in switching is too large for all retail financial services – a “hassle” factor that seems stronger than in all other surveyed sectors.
- For mortgages and long term loans, a relatively high number of consumers responded that “*their contract makes switching difficult*”. This suggests that contract terms may include penalties for early contract termination or rule it out entirely.
- In the case of long-term loans, a relatively high proportion of consumers declared that they did not know they could switch.
- The second most frequently cited reason, especially for savings and investment services, is “other”.

Figure 12 – Reasons for not switching



Source: Eurobarometer Flash 243, January 2009

Finding #2.13

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 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, many consumers considered that “*their contract makes switching difficult*”, and some even declared that they did not know they could switch.

2.2.3 Potentially unfair commercial practices in the retail financial services sector

In the financial services sector, also due to the particular features of the provider-customer relationship and the limited information often exhibited by customers, the practices under scrutiny could end up being detrimental to consumers even when they are not applied by a dominant firm. Under a consumer policy perspective, it is not the exclusionary impact of the practices, but rather its exploitative nature, that determines the unfairness of the conduct.

In this section, we analyse the potential impact of cross-selling practices (including tying, pure and mixed bundling, and preferential or exclusive agreements); conditional sales practices (such as single-product rebates or the obligation to have the salary paid into the current account as a condition to access a mortgage loan); and aggressive commercial practices (such as unsolicited offers, pressure/inertia selling, churning and steering) in the retail financial services sector.

2.2.3.1 Cross-selling practices

In this group of practices, we have included tying, pure and mixed bundling, and preferential or exclusive agreements. The potential for these practices to prove detrimental to customers is related to a number of factors listed above (see 2.1.1). Below, we analyse tying and pure bundling separately from mixed bundling and preferential/exclusive agreements.

2.2.3.1.1 Tying and pure bundling

As already explained in Section 1 of this report, tying occurs when two or more products are sold together in a package and at least one of these products is not

sold separately. Pure bundling occurs when none of the package components is available separately, and the components are offered in fixed proportions²¹⁷.

In the economics literature, the most significant negative effects that may be associated with tying from the viewpoint of consumer policy – *i.e.*, independently of the degree of market power of the financial service provider – are the following:

- *Tying and pure bundling can lead to higher switching costs and lower customer mobility.* Since tying forces customers to purchase all the tied products from the same provider, when these products are durable goods or services customers will face an increased cost of switching to an alternative provider, since they would lose the products they have bought from that provider altogether, and would need to renegotiate the purchase of all the tied product with a different provider. Customers may thus be reluctant to move to competing providers: this may reduce customer mobility and distort customer choice.

This effect depends also on what products or services are included in the bundle. For example, when products have different durations, the customer may be reluctant to switch to an alternative provider of a product with a shorter duration, even if this would be easy absent the tying or pure bundling practice. The lifespan of the contractual relationship thus tends to become equal to that of the product or service with the longest duration. For this reason, products such as mortgage loans are often used as “gateway” products by service providers wishing to retain their customers through cross-selling strategies.

Finally, the impact of tying and pure bundling on switching costs may depend on the thickness of the contractual relationship. As observed above, once the customer has invested in a relationship with a personal banker or financial advisor, he or she may find it beneficial to enter into multiple contracts and services with the same provider: at the same time, this also means that switching would be more complicated, as it would entail losing the investment associated with building a relationship with the service provider, and having to bear the additional cost of searching for an alternative one, and testing over time the quality of the new service provider.

These effects have various consequences on customers. On the one hand, tying products with different duration may lead to customer lock-in, which may be detrimental to end customers without providing potentially countervailing efficiencies; on the other hand, the “thickness” of a relationship exhibits both beneficial and detrimental effects to customers, although it may expose the latter to exploitative behaviour of their counterparts during the course of the relationship.

It could be objected that, if the market is sufficiently competitive and all the products in the bundle can be offered by other firms, customers may find it profitable to switch even if they have bought a large bundle of

²¹⁷ See Section 1.1.1.1 above.

goods. However, beyond offering a better deal to customers, these competitors would have to compensate them for the sunk investment they have borne to enter the current contractual relationship, as well as for the risk associated with entering a new contract or set of contracts. This can represent an important obstacle to customer mobility in the market.

- *Tying can reduce price transparency and the comparability of offers.* Tying practices make it difficult for customers to single out the price they pay for each product included in the bundled offer. Especially when competitors do not offer exactly the same bundle of products, customers will find it difficult to compare the price they are currently paying for the bundled products with alternative offers by alternative providers. This, in turn, can distort customer choice and lead to reduced customer mobility.

The economics of price comparability has shown interesting developments in the past few years, especially as behavioural economics is increasingly considered to play a role in devising consumer protection rules. In particular, Australian economist Joshua Gans (2005) elaborated on the concept of “confusopoly” by referring to the existence of competing providers with offers that are structured so differently that it is impossible for an average consumer to compare them²¹⁸.

At the same time, reducing price transparency can help financial service providers in introducing cross-subsidies between different products, in particular in the case of add-on contracts: for example, sellers may entice customers to buy a particular product through a low “introductory” price, knowing that they will be able to sell a number of additional products once the customer has entered the relationship²¹⁹. Sellers wishing to compete for only one of the bundled products may have to offer a product below their own cost in order to entice customers to switch.

- *Tying can force customers to purchase unwanted products, or force customers to renounce a better deal by “mixing and matching”.* An interesting example in this respect is that of payment protection insurance (PPI). As will be explained in Section 4 below, some legal systems in the EU27 consider it legitimate for a mortgage lender to force the borrower to also purchase PPI. In this way, the lender may better manage the risk associated with the borrower’s default, sickness or death, then possibly leading to lower interest rates on the loan. However, requiring that the borrower purchases PPI is different from forcing the customer to purchase PPI from the same provider. If the borrower could choose to buy PPI elsewhere, then he would be able to shop around to find the best deal. In the UK, this problem has led the OFT to propose new rules for the PPI

²¹⁸ Gans, *The Road to Confusopoly* (2005), available on the ACCC conference website (slides), <http://www.accc.gov.au/content/index.phtml/itemId/658141/fromItemId/>

²¹⁹ See Gans, J. (2005), ‘Protecting consumers by protecting competition’: Does behavioural economics support this contention?, 13 Competition & Consumer Law Journal. In the literature, this has been referred to as “acquisition pricing” or “introductory pricing”. See, i.a., Blattberg, Getz & Thomas (2001), *Customer Equity: Building and Managing Relationships as Valuable Assets*, Harvard business publishing, at pages 47 ff.

policies market. In France, the *Loi Lagarde* will prohibit this cross-selling practice from 1 January 2010²²⁰.

At the same time, there is widespread consensus that tying can also bring benefits for both providers and consumers²²¹. The potential beneficial effects of tying practices include the following:

- *On the supply side, tying can lead to cost savings through economies of scope.* In the financial services sector, tying can allow firms to reduce the costs associated with customer management by using the same information for the provision of more than one service. This also means that a service provider may economise on the investment needed to learn the average riskiness and reliability of their customers, and can apply this information to the provision of more than one service. These savings can be also beneficial to customers, if market conditions lead financial service providers to pass on the efficiencies downstream to their clients in the form of lower prices.
- *Tying can also lead the provider to more efficient pricing, by avoiding the risk of double marginalisation, and to efficient price discrimination,* through the capture of heterogeneous customer preferences by offering a wide range of products in a single package.
- *On the demand side, tying can reduce transaction costs and lead to “portfolio effects” (or “one-stop-shop” effects).* Customers having different needs often prefer to purchase one package of services and products from a single provider, instead of shopping around to find the best deal offered by different providers. This way, they can profit from a reduction in transaction costs, including search, information and negotiation costs. Available empirical evidence shows that consumers prefer to more than one service from a single provider for practical reasons, instead of shopping around for the best deal on all services²²².

Overall, it seems clear that tying does not always constitute an unfair practice for customers, as the effects that may be generated by this practice are often beneficial. At the same time, tying can harm consumers and SMEs in the retail financial services sector:

- (i) when it involves products of different duration;
- (ii) when it forces customers to buy products they did not demand; and
- (iii) when it does not produce demand-side efficiencies, or supply-side efficiencies that will be passed-on downstream to the customer in the form of lower prices or better quality.

²²⁰ See below, Sections 4.2.1.6 and 4.2.2.14 for details.

²²¹ See *infra* Section 2.1.1 for a more detailed illustration.

²²² See Section 2.2 for an explanation based on empirical data.

2.2.3.1.2 *Mixed bundling and multi-product rebates*

Compared to tying and pure bundling, mixed bundling is normally considered to be less problematic from the standpoint of customer mobility and switching, and accordingly also from the viewpoint of consumer protection. As a matter of fact, mixed bundling entails no coercion of customers, and the purchase of products from separate providers is always possible. In the case of multi-product rebates, customers even benefit from a discount on the overall price, and can freely choose whether to purchase the products individually from different providers, or to obtain the discount and choose one single provider. In addition, regardless of whether customers obtain a financial benefit, purchasing the bundle may benefit them in other ways, *e.g.* through one-stop-shop effects and accordingly a reduction of transaction costs.

From this viewpoint, when there are no competition policy concerns, mixed bundling and multi-product rebates should not create any concerns from a consumer policy perspective either. However, adding a behavioural economics perspective to our analysis, two additional factors may be taken into account.

- *Does coercion really make a difference?* It may be observed that, given the limited information of consumers and the high switching costs associated with the experiential nature of retail financial services and the need to “shop around”, the effect of mixed bundling may be very similar to that of tying or pure bundling, since customers would be enticed to purchase the package in order not to face the hassle of having to shop around for better deals. This result is confirmed, to some extent, by the fact that, as will be illustrated in Section 5 below, customer mobility remains uniformly low in the EU27 even though Member States have adopted a wide-ranging set of approaches to tying and bundling of retail financial services.
- *Why tie what could be sold through mixed bundling?* Because of the abovementioned characteristics of retail financial services, mixed bundling features the same potential benefits of tying for customers, without entailing coercion. In addition, from a consumer perspective, mixed bundling: (i) preserves the incentive for service providers to pass-on downstream the supply-side efficiencies generated by cross-selling, especially when specialised providers are able to offer comparable services and thus exert competitive pressure on the multi-product provider; and (ii) allows customers to compare the price of standalone products with the price of the bundle, in case the latter is offered at a discount. In a nutshell, mixed bundling is as beneficial as tying and pure bundling for customers, but may have a weaker impact on customer mobility. More specifically, mixed bundling preserves customer choice especially before the contract is concluded, as customers have an incentive to shop around and, if convenient, “mix and match” by purchasing products from different providers. However, mixed bundling can still affect customer mobility once the contract has been concluded.

2.2.3.1.3 *Preferential or exclusive agreements*

Compared to tying and bundling, preferential and exclusive agreements include: (i) case in which the provider forces the consumer to purchase an additional product from another provider, *e.g.* an affiliated body; and (ii) cases in which the customer spontaneously demands an additional product, and the service provider either offers a better deal conditional upon the choice of a designated provider (preferential agreement), or directly imposes a counterpart (exclusive agreement). In the former case, the rationale that applies is identical to the one we exposed for tying and bundling in the previous two sections, with the difference that the combined product is purchased from a different provider. Below, we focus on the latter case.

In line with the reasoning above, exclusive agreements are more likely than preferential agreements to lead to a reduction of customer mobility, and force customers into a contractual relationship with a provider they have not freely chosen. This, in turn, provides sellers with the possibility to exploit locked-in customers, although the magnitude of this effect is likely to be smaller due to the fact that the product has been spontaneously demanded by the customer.

None of these practices exerts a substantial impact on price transparency, whereas exclusive agreements affect the comparability of offers. At the same time, both types of practices can create supply-side efficiencies for providers, when the financial services involved are complementary. Providers may then be able to exploit economies of scale and scope by dealing with a preferred partner. In the case of preferential agreements, though, the provider has greater incentive to pass on these efficiencies downstream to the end customer, rather than keeping them as extra-profits.

Finding #2.14

Tying does not constitute always an unfair practice for customers, as the effects that may be generated by this practice can often be beneficial. At the same time, tying can harm consumers and SMEs in the retail financial services sector especially: (i) when it involves products of different duration; (ii) when it forces customers to buy products they did not want; and (iii) when it does not produce demand-side efficiencies, or supply-side efficiencies that will be passed-on downstream to the customer in the form of lower prices or better quality.

When they create no competition policy concerns, mixed bundling and multi-product rebates create no concern also from a consumer policy perspective. However, adding a behavioural economics perspective to our analysis, two additional factors should be taken into account: (i) given the limited information of consumers and the high switching costs associated with the experiential nature of retail financial services and the need to “shop around”, the effect of mixed bundling may be very similar to that of tying or pure bundling, since customers would be enticed to purchase the package in order not to face the hassle of having to shop around for better deals; (ii) Mixed bundling is as beneficial as tying and pure bundling for customers, but – contrary to the latter practices – has a weaker impact on customer choice.

Exclusive agreements are more likely than preferential agreements to lead to a reduction of customer mobility, and force customers into a contractual relationship with a provider they have not freely chosen. None of these practices exerts a substantial impact on price transparency, whereas exclusive agreements affect the comparability of offers. At the same time, both types of practices can create supply-side efficiencies for providers, when the financial services involved are complementary.

2.2.3.2 Conditional sale practices

2.2.3.2.1 *Practices where the service provision is subject to a specific condition, such as an action undertaken by the customer*

In these types of practices, without compliance with the specific condition, the product is not sold at all. A typical example of this type of practice is the obligation to have the salary paid into the customer's current account as a condition to obtain a mortgage loan²²³. From the standpoint of consumer policy, this practice creates concerns to the extent that it forces customers to undertake specific actions in order to access a given service. This also means that customers will be hampered in their freedom to choose where to have their salary paid, and will have problems in choosing, for example, an alternative personal current account that offers better contractual conditions (*e.g.* a higher interest rate).

At the same time, such a practice can create supply-side efficiencies related to better risk management, since the provider knows that the customer will keep a sufficient amount of money into the current account that is coupled with a mortgage loan. The extent to which these efficiencies could be converted into better contractual conditions for the customer depends on the competitiveness of the markets involved, as well as on the degree of customer lock-in. For example, in the UK the so-called "offset mortgage" and "current account mortgage" offers a number of advantages to borrowers, including lower interest rates and tax advantages (savings will not generate any investment income to be taxed. Instead, less interest will be payable on the mortgage)²²⁴.

Against this background, the potential for a conditional sale practice to be considered as unfair to consumers strongly depends on: (i) whether the latter has the possibility of choosing alternative contractual schemes – this includes the possibility, for competitors, to replicate the conditional sale arrangement;

²²³ See European Commission, White Paper on the Integration of the EU Mortgage Credit markets, COM(2007)807, 18 December 2007.

²²⁴ See FSA, *Lifting the Lid on Financial Services*, 2007. Offset mortgages are defined as those that combine savings with a mortgage to reduce the real value of the loan (offsetting). These mortgages allow customers to benefit from offsetting savings against borrowings but still keep all the elements of finance separate. Current account mortgages go one step further by combining all savings and debts into one account, *i.e.* combining a mortgage with a current account. This effectively acts like a single large overdraft into which salary payments are made and current expenditure deducted.

and (ii) whether the conditional sale allows better contractual conditions, *i.e.* the efficiencies generated are shared with the customer.

It must also be recalled that conditional sale agreements are probably the only practices, among the ones under scrutiny in this Report, that may end up being regularly included in a standard form contract. Other than by antitrust rules, they may thus be captured also by legislation on unfair terms such as the EU Directive on unfair terms in consumer contracts. An example of a conditional sale is the inclusion, in the standard contract terms, of clauses that impose heavy sanctions for the case of failure to perform on the side of the customer. One example is the so called “cross collateralization” clause, or “add-on” clause, which was at hand in the famous US Court of Appeals decision in *Williams v. Walker Thomas Furniture*²²⁵. In that case, besides the claim that the clause at hand was unknown to the plaintiff and unconscionable, another important question that arose was whether the cross-collateralization clause was essential for the seller to secure payment; and whether, absent that clause, the plaintiff would not have had any access to the goods purchased, due to excess risk of default. The main problem with the clause was the lack of information and possibility of choice on the side of the customer, not the clause in and of itself.

In summary, conditional sale practices such as the obligation to have the salary paid into the current account or cross-collateralization clauses may be detrimental to customers when they deprive consumers of their freedom to choose alternative products. However, when the practice is replicable by competitors and the “condition” specified in the conditional sale agreement leads to benefits for customers, there is no reason for concern from the standpoint of antitrust or consumer policy²²⁶.

²²⁵ Cross-collateralization is a term used when the collateral for one loan is also used as collateral for another loan. If a person has borrowed from the same bank a home loan secured by the house, a car loan secured by the car, and so on, these assets can be used as cross-collaterals for all the loans. If the person pays off the car loan and wants to sell the car, the bank may veto the deal because the car is still used to secure the home loan and other loans. Technically, cross-collateralization expires when the borrower has no outstanding loans with the bank. In *Williams v. Walker-Thomas Furniture*, Walker-Thomas extended credit from 1957 to 1962 to Mrs. Williams for a series of furniture purchases. The contract was written in such a way that no furniture could be paid off until all of it was. When Mrs. Williams defaulted on the contract in 1962, Walker-Thomas tried to repossess all the furniture sold since 1957. The District of Columbia Court of Appeals ruled that the lower court could rule the contract unconscionable and refuse to enforce it, and returned the case to the lower court to decide whether or not the contract was in fact unconscionable. See Korobkin, R. B. (2004), *A 'Traditional' and 'Behavioral' Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, UCLA School of Law, Law & Econ. Research Paper No. 03-24 and University of Hawaii Law Review, Vol. 26, p. 441, 2004.

²²⁶ In the case of the obligation to have the salary paid into the current account, the practice does not create antitrust concerns if it is replicable by an as-efficient competitor; in addition, it does not create concerns from a consumer policy perspective if it proves beneficial to the customer. For example, for the UCPD to be applicable, the latter should be detrimental to customers.

2.2.3.2.2 Practices that entail the provision of better contractual conditions to existing customers, subject to specific behaviour

One example of these practices is banks that charge no credit card fee if the cardholder spends more than a given amount of money every year. We term these practices conditional rebates²²⁷. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates)²²⁸. The loyalty-enhancing impact of these rebate schemes has attracted the attention of competition authorities²²⁸.

Like cross-selling practices, also these practices are not always to be considered as unfair to customers. On the contrary, some of them – especially rebates – could even be beneficial to end users. However, under certain conditions, they may negatively affect consumer welfare due to the particular characteristics of the market in which they are observed. For example, loyalty schemes in the retail financial services sector have been found to be potentially enhancing complexity, making it even more difficult for customers to compare products, prices and services, and thus leading to “confusopoly”. At the same time, loyalty discount schemes can increase switching costs, since alternative providers must compensate customers for the loss of the discount if to entice them to switch.

Finding #2.15

Conditional sale practices such as the obligation to have the salary paid into the current account or cross-collateralization clauses may be detrimental to customers only when they deprive them of their freedom to choose alternative products. However, when the practice is replicable by competitors and the “condition” specified in the conditional sale agreement leads to benefits for customers, there is no reason for concern from the standpoint of both antitrust and consumer policy.

Like cross-selling practices, also conditional rebates and loyalty schemes are not always to be considered as unfair to customers, and can often be beneficial to end users. However, they may negatively affect consumer welfare due to the particular characteristics of the market in which they are observed. This is the case, for example, of some loyalty schemes in the retail financial services sector, which may lead to information overload (“confusopoly”). At the same time, loyalty discount schemes can increase switching costs, since alternative providers must compensate customers for the loss of the discount to entice them to switch.

²²⁷ See *supra*, Section 1.1.2.1.

²²⁸ See OECD; *cit.*; and the recent report by the International Competition Network, Unilateral Conduct Working Group, *Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws*, Presented at the 8th Annual Conference of the ICN Zurich, Switzerland, June 2009.

2.2.3.3 Aggressive commercial strategies

As observed above, many features of the financial services sector call for the development of an *ad hoc test* to assess the potential impact of observed practices. Particular features include, most notably, the informational asymmetry between sellers and customers; the strong element of trust and path-dependency embedded in “relationship finance” (especially for some products such as personal current accounts); the limited interest and awareness of customers in “shopping around” for best deals; the importance of switching costs; and a series of cognitive biases such as choice/information overloads, endowment biases, overconfidence, framing effects, difficulty in handling uncertainty and risk, and misevaluation of future benefits and costs. In effect, these strategies frequently put pressure on consumers also through the use of misleading information or the exploitation of emotional states, to induce the customer to purchase the product or service.

In the universe of retail financial services markets, it is possible to identify some practices not related to specific contractual conditions offered to customers, but to the information flow between the service provider and the customer. In effect, the asymmetric information observed between the seller/intermediary and buyer/investor may induce the more informed party to pursue a set of aggressive commercial practices, potentially “unfair”. In retail financial services, as recalled above, the information asymmetry between parties may raise two potential harmful common problems in retail markets, moral hazard and adverse selection. In this scenario, three aggressive commercial practices can be recognized in retail financial services:

- Unsolicited offers (*e.g.* so-called “pressure selling” or “inertia selling” of products that were not requested²²⁹);
- Churning; and
- Steering.

The “unfairness” of these practices is essentially linked to the fiduciary relationship between service provider and the potential buyer/investor²³⁰.

²²⁹ The term “pressure selling” is often used in the literature on consumer contracts. The European Commission used this term in a number of occasions, often coupled with misleading marketing. Pressure selling, in the Commission’s definition, includes (i) implying that the consumer cannot leave the shop until they sign a contract; (ii) conducting personal visits to the consumer’s home and ignoring the consumer’s request to leave or not to return; and (iii) demanding payment for products supplied by the trader, but which were not requested by the consumer (inertia selling). Misleading advertising includes practices such as (i) claiming to be a signatory to a code of conduct when the trader is not; and (ii) describing a product as “gratis”, “free”, “without charge” etc. if the consumer has to pay anything other than unavoidable delivery or collection costs. See, *i.a.*, the Press Release “EU law to ban pressure selling: Commission welcomes Council’s common position”, IP/04/1364 of 16 November 2004.

²³⁰ A relationship is “fiduciary” when is based on confidence and trust between two or more parties. One party (agent) will act on behalf of another in circumstances in which the other party (principal) has not enough knowledge or means to unilaterally undertake a specific action. The fiduciary relationship exposes a beneficiary/principal to two distinct types of wrongdoing: first, the fiduciary may misappropriate the principal’s asset or some of its

Accordingly these practices are more likely to emerge for those retail financial services that require sophisticated financial advice. The asymmetric flow of information between parties involves a high potential risk of customers' exploitation and harm, with sliding effects also on market competition (increasing switching costs). One stop-shop effects and such informational problems may lead the buyer/investor to choose a package of products from a single provider and/or with "bad" contractual conditions, instead of choosing their "best deal" across a consistent range of services' providers.

Lastly, there are many other sector-specific practices, which are not included as general categories of potentially "unfair" practices, since they are related to niches of the broad market for financial services. These include "loan flipping"²³¹, "laddering"²³², "stuffing"²³³, "failure to execute"²³⁴ and other operations more related to the provision of misleading information and the violation of privacy, which are not specific subject of this report or do not have a broad impact on the retail financial services sector.

2.2.3.3.1 Unsolicited Offers

A product or service offer is unsolicited when customers do not expressly request it and it involves a particular pressure on them to purchase that specific offer²³⁵. Hence, this practice may be extremely harmful because, on the one hand, it increases switching costs and affects customers' freedom of choice; on the other hand, it does not entail any efficiency that can be shared by customers²³⁶.

In order to consider an offer "unsolicited", three aspects should be verified²³⁷:

value (negligence); and second, the fiduciary may neglect the asset's management (failure to perform). See Cooter R. and B. J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences", 66 *N. Y. U. Law Review*, pp. 1045-1075, 1991.

²³¹ In which a lender persuades homeowners to refinance their mortgages repeatedly and in short intervals; see Engel K. C. and P. A. McCoy, "A Tale of Three Markets: The L&E of Predatory Lending", *Texas Law Review*, Vol. 80, No. 6, May 2002, p. 1263.

²³² Banks involved in initial public offers can allocate initial shares to institutional investors, which commit to buy additional share in the secondary market to artificially increase prices, usually attracting retail buyers who are unaware of this private commitment; see Walter I., "Conflicts of Interest and Market Discipline Among Financial Service Firms", *European Management Journal*, Vol. 22, No. 4, 2004, p. 366.

²³³ Investment firms, which are high exposed with specific firms, can place unwanted securities on account where they have full discretion to reduce their exposure to losses; Walter I. (2004), *id.*, p.365.

²³⁴ It is potentially used in securities or payments transactions to increase the float conveying important benefits to the firm; Walter I. (2004), *id.*, p. 364.

²³⁵ Art. 15 EC Dir. 2005/29 on unfair business to consumer commercial practices in the internal market, amending art. 9 EC Dir. 97/7, expressly asks the national legislator "to exempt the consumer from any obligation in the event of unsolicited supplies".

²³⁶ "There should be no high-pressure selling, and adequate time should be allowed for the borrower to reflect on the terms and conditions of the loan and to obtain independent advice before signing", Office of Fair Trading, *Non-Status Lending. Guidelines for Lenders and Brokers*, OFT 192 (revised), November 1997, p. 7, §6.

²³⁷ See Annex I, N. 26, Unfair Commercial Practice Directive (UCPD), Dir. 2005/29/EC.

1. Service provider makes persistent and unwanted contact via personal relations or various forms of remote media, whereas
2. The consumer has not expressly requested such services or has given his/her consent to be contacted, unless
3. There is no prior contact between customer and bank on related financial services.

For instance, this kind of practice is widespread in the US mortgages market²³⁸. It may have an implicit impact on the over-indebtedness of customers (unsolicited credit). However, it can be also employed as a risk management tool in the limited set of cases 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.

2.2.3.3.2 Churning

“Churning” is a legal term used to define a practice imported from securities regulation. The Securities and Exchange Commission (SEC) defined it as an “*excessive buying and selling of securities in your account by your broker, for the purpose of generating commissions and without regard to your investment objectives*”²³⁹. However, the definition is basically broadened to cover other practices in disparate areas of the financial services sector (not only securities)²⁴⁰. Hence, this practice consists in the excessive use, for example, of the current account or the investment portfolio induced by the financial intermediary (agent) who exploits the informational gap of the other party (principal). It is a misuse of the fiduciary role between intermediary and customer²⁴¹, due to the lack of monitoring by the latter (*e.g.* due to information asymmetry)²⁴².

The unnecessary number of services should be assessed in the light of the investor experience and objectives. For instance, the excessive trading or the unnecessary services (in size and frequency) requested to generate extra commissions or fees may potentially affect the suitability of the investment

²³⁸ See Federal Trade Commission, *Statement on Consumer Protection in Financial Services*, before the House Committee on Financial Services, Washington D.C., 13 June 2007, p. 7.

²³⁹ See SEC at <http://www.sec.gov/answers/churning.htm>. It was firstly judicially defined in *Hecht v. Harris Upham & Co.*, 430 F.2d 1202 (2nd Cir. 1970); see also A.M. Paces, *Financial intermediation in the securities markets law and economics of conduct of business regulation*, International Review of Law and Economics, Vol. 20, 2000, pp. 479-510; Walter I., “Strategies in Banking and Financial Services Firms: A Survey”, December 2003, available at www.ssrn.com.

²⁴⁰ See Walter I. (2004), *id.*, pp. 361-376.

²⁴¹ See *ibid.*, p.362.

²⁴² Churning differs from other practices such as “loan flipping”, since the former is a result of misbehaviour of the agent due to the lack of control of the principal; to the contrary, loan flipping typically occurs when a borrower is unable to meet scheduled payments, or repeatedly consolidates other unsecured debts into a new, home-secured loan at the urging of a lender.

decision or the financial product or service in general²⁴³. Therefore, a case of churning can be considered “unfair” whenever it is not justified, *e.g.* by potential efficiencies for consumers such as quality improvements or better contractual conditions. The trade-off between the economic benefits of the excessive services or products and the extra-fees would certainly be negative in these cases²⁴⁴.

As regards efficiencies, it might be difficult to assess relevant market efficiencies for this widespread practice. The restriction to customer freedom of choice and mobility cannot be easily justified by economies of scale or scope, since through this practice consumers are systematically charged of unwanted commissions compromising their potential choice to use alternative products or services. However, especially in investment decisions, churning (activism) can be a mechanism of signalling of a more informed status for securities professionals²⁴⁵; and potentially increases market liquidity (often considered a “public good”) of financial markets, thus improving their efficiency²⁴⁶. In the long run, though, the performance of “over-active” funds does not hold²⁴⁷.

2.2.3.3.3 *Steering*

“Steering” is a practice, especially used in the mortgages market, consisting of stressing the credit risk of a potential borrower to steer him\her to higher cost loans²⁴⁸. The prospect of securing higher fees (and consequently profits) for brokers or intermediaries, who succeed to sell a more expensive financial product or service, may lead to the adoption of this practice. In general, steering can be construed as an intentional misjudgement of the individual’s risk by the financial intermediary, aimed at extracting a rent over a relatively long time period. It may consist of higher interest rates, worse contractual conditions, additional fees, higher closing fees, the imposition of specific requirements (higher collateral provision, etc), etc.

The risks linked to this practice are potentially high, taking into consideration the full discretion of intermediaries in the assessment of the risk and the financial situation of a retail buyer/investor. The fundamental role of this assessment for the transaction’s success needs to be guided by well defined and

²⁴³ In case of investment and ancillary services, suitability and appropriateness as well as best execution requirements are relevant investor protection rules included in the Markets in Financial Instruments Directive (MiFID) and implemented at national level in all the 27 countries; art. 19 and 21 EC Dir. 2004/39 and Annex 1, Section A and B.

²⁴⁴ S.B. Cohen, *The Suitability Rule and Economic Theory*, 80 Yale Law Journal, 1971, pp. 1604-1626.

²⁴⁵ See A.M. Paces (2000), *id.*, p. 495.

²⁴⁶ See J. Dow and G. Gorton, *Noise Trading, Delegated Portfolio Management, and Economic Welfare*, Journal of Political Economy, Vol. 105, N. 5, 1997.

²⁴⁷ See M.L. Detzler, *The Value of Mutual Fund Rankings to the Individual Investor*, University of Massachusetts, Boston, July 1999, available at www.ssrn.com.

²⁴⁸ Ernst Keith, Debbie G. Bocian and Wei Li, *Steered Wrong: Brokers, Borrowers and Subprime Loans*, Center for Responsible Lending, www.responsiblelending.org, 8 April 2008; “steering incentives” are officially prohibited by the new US Mortgage Reform and Anti-Predatory Lending Act, Sec. 103(c) H.R. 1728, May 2009.

clearly disclosed criteria of suitability and adequateness – as it is the case for investment services under MiFID - to avoid the widespread diffusion of the practice. However, the enforcement of these criteria may be difficult. In effect, complying with these principles involve relevant investments and the need to modify traditional business models and methods in this field. Therefore, potential failures in the implementation of these principles may affect the market efficiency through the imposition of ineffective burdens.

Finding #2.16

Aggressive commercial practices can be seldom justified in terms of supply-side efficiency such as economies of scale and scope, or the protection of “free-rideable” investment. To the contrary, they most often lead to a situation in which financial advisors can exploit their informational advantage to the detriment of customers.

2.2.4 Combinations of practices

In the previous sections, we have identified a number of practices that can prove unfair to customers in the retail financial services sector. These practices are often observed “in isolation”, but in other circumstances they are coupled with other practices. More in detail:

- In some cases, cross-selling practices involve more than two products: as will be observed in Section 5 below, our empirical analysis has identified cases in which three or four products are bundled or tied.
- In other cases, a cross-selling practice is coupled with a conditional sales practice: one key example is the so-called “current account mortgage”, in which the cross-selling of mortgage loans and current accounts is coupled with a conditional sales practice, *i.e.* the obligation to have the salary paid into the current account.
- Finally, more than one conditional sales practice may be applied by the same bank to the same customer. For example, the obligation to have the salary paid into the current account can be coupled with an obligation to keep a minimum balance in the account. In addition, loyalty schemes may be offered to customers in order to reduce the likelihood that the latter switches to a competing provider.

Combinations of practices are very important in the assessment of the potential impact of the conduct at hand on customer mobility and choice, and more generally on social welfare. For example, the fact that a lender ties a loan with a current account may be seen as only marginally affecting consumer choice, especially if the current account comes with no (excessive) expenses. Customers may still decide to keep more than one current account with different banks. However, the obligation to have the salary paid into the current account adds another element of coercion, which may limit the possibility for most customers to shop around for better deals. Depending on the specific circumstances, the

latter “combined” practice may be harmful for consumers, whereas the former could be considered as less detrimental.

As reported by the European Commission in its sectoral inquiry on retail banking, consumer cross-selling ratios are highest with mortgages: “*on average consumers purchasing a mortgage buy a total of three products, including the mortgage, from the same supplier*”²⁴⁹. This concentration of banking activities with a single supplier, according to the Commission, may result from two explanations: (i) mortgage customers are likely to be long-term customers and during this relationship they may purchase more services; and (ii) tying by banks may force the customers to purchase a product (e.g. a current account) which they would not otherwise have bought, and which may tie-in the customer further to their relationship with the bank.

Finally, the overlap between different practices may significantly reduce the transparency of prices and the comparability of alternative offers. In this respect, it represents an element of that “confusopoly” that we described above²⁵⁰.

2.3 On the economic impact of tying and other potentially unfair practices in the retail financial services sector

Tying and other potentially unfair practices represent a wide set of commercial strategies commonly used across industries and also in the retail financial services market. As mentioned above, a case-by-case approach is seemingly the best way to assess whether their potential harmful effect offset the benefits brought to the market and its users. Efficiency reasons can be found in most of the practices previously taken into consideration, with the exception of aggressive commercial practices.

This section looked at the reasons why commercial practices may end up being unfair to customers in the retail financial services sector, and whether competition law and consumer protection law can effectively address these situations. Our main findings are the following:

- **Competition law (Article 82 of the EC Treaty) can capture most of the practices under scrutiny, and in particular tying and bundling, exclusive dealing arrangements, conditional and loyalty rebates**, to the extent that they lead to anti-competitive foreclosure of competitors. The economic literature on tying and bundling uses a case-by-case approach to analyze these practices because the anti-competitiveness of the practice is strongly linked to market and product settings in which the strategy is enacted. Aggressive commercial practices in which a dominant firm engages could, in principle, be construed as exploitative abuses, although the case law under Article 82(a) EC Treaty

²⁴⁹ See Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, Interim Report II, http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_2.pdf.

²⁵⁰ See Section 2.2.3.2.2 above.

never referred to practices such as unsolicited offers, churning and steering. The need to refer to clearly specified contract terms practiced by a dominant firm makes Article 82(a) very difficult to apply systematically and fully effectively to these practices.

- **Our analysis also reveals that there are many instances in which an unfair commercial practice may not be captured by antitrust laws.** This is mostly because Article 82 ECT requires that the undertaking that engages in the practice holds a dominant position in at least one of the relevant markets involved. In all other cases, the practice does not lead to anti-competitive foreclosure, abusive discrimination or exploitation as defined in Community competition law, and as such is not relevant for the application of Article 82.
- **Many features of the financial services sector call for the development of an *ad hoc* test to assess the potential impact of observed practices.** Particular features include, most notably, the informational asymmetry between sellers and customers; the strong element of trust and path-dependency embedded in “relationship banking” (especially for some products such as personal current accounts); the limited interest and awareness of customers in “shopping around” for best deals; the importance of switching costs; and a series of cognitive biases such as choice/information overloads, endowment biases, overconfidence, framing effects, difficulty in handling uncertainty and risk, and misvaluation of future benefits and costs. In effect, these strategies frequently put pressure on consumers also through the use of misleading information or the exploitation of emotional states, to induce the customer to purchase the product or service.
- **Some practices may be detrimental to consumers since they reduce customer mobility by increasing switching costs, even if they are not relevant under a competition policy perspective.** The impact on switching costs depends on a number of factors, including the type of “gateway” products/services involved; the number and type of bundled services offered; the “exit cost” involved; the existence of switching facilities; and of course the characteristic of the demand, especially as regard the customer’s preference to stable relationships. Certainly, practices such as tying and pure bundling and conditional sales increase switching costs for customers, thus reducing their mobility.
- **Some practices can harm consumers by reducing price transparency and the comparability of offers.** Even practices that do not directly increase the cost of exit from an existing contract may reduce customer mobility. Mixed bundling, conditional and loyalty rebates and other practices related to “introductory” or “acquisition” pricing have this potential, as they may lead to a “confusopoly”, in which customers have difficulties in singling out the individual price of products they have purchased, and/or fail to fully calculate the price of alternative offers on the market.
- **Other practices do not affect directly switching costs or price transparency, but can prove unfair to customers as they result**

from a strategic behaviour of the financial advisor. This is the case of aggressive sales practices such as pressure and inertia selling, churning and steering, in which the financial advisor exploits his superior information and capitalises on the trust-based relationship with the customer, which characterises most retail financial services (especially mortgage, insurance and investment services).

- Depending on the specific conditions and the type of products involved, **most of these practices may also have efficiency justifications**, including better risk management, economies of scale and scope, and others. Accordingly, a case-by-case analysis (such as that performed *ex post*) seems to be more appropriate whenever these efficiency reasons appear non-negligible. There are two main categories in which potential efficiencies can be easily classified:
 - *Supply-side efficiencies*. In particular, cross-selling strategies are so widespread because they potentially increase the demand, reducing the variability of reservation prices, so favouring economies of scale and scope. For example, tying and multi-product rebates may reduce transaction costs and may avoid double marginalization (with complementary products and prices set independently). Some of these strategies can protect “free-rideable” investments (as pre-sale services) or transaction-related investments that create a hold-up problem.
 - *Demand-side efficiencies*. Consumers can potentially enjoy, at least in the short run, several efficiencies, which are mostly concentrated in tying, mixed bundling and multi-product rebates. Price reductions or better contractual conditions – such as a more favourable interest rate – are a common benefit for consumers in most of the practices mentioned above (with the exception of aggressive commercial practices); however, transaction cost savings and quality improvements are efficiency reasons commonly associated with tying and multi-product rebates, but also with “current account mortgage” practices. Finally, through the protection of investments in specific services (*e.g.*, pre-sale services), some of the arrangements described above can reduce information asymmetries and accordingly attenuate the uncertainty and the riskiness of the transaction from the customer’s perspective²⁵¹.

From a competition policy perspective, both types of efficiencies are relevant. However, Community competition law looks in particular at the impact of allegedly abusive practices on consumer welfare. Accordingly, even if a conduct generates important efficiencies for the firms that practice it, this efficiency is relevant as redeeming effect of an otherwise abusive conduct only if a significant share of it will be passed-on downstream in the form of lower prices or better contractual conditions. The approach to efficiencies adopted in the recent Guidance paper on the treatment of exclusionary abuses leads to importing into Article 82 (under defences) the four cumulative conditions of Article 81(3)

²⁵¹ Providing more information before the purchase reduces the risk that the consumer buys a product that is not suitable to his needs, or an undesirably risky product.

EC²⁵². These conditions imply that: (i) *The efficiencies have been, or are likely to be, realised as a result of the conduct.* They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution. (ii) *The conduct is indispensable to the realisation of those efficiencies:* there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies. (iii) *The likely efficiencies brought about by the conduct outweigh any likely negative effects* on competition and consumer welfare in the affected markets. (iv) *The conduct does not eliminate effective competition,* by removing all or most existing sources of actual or potential competition. Finally, (v) *consumers should be allowed a “fair share” of the benefits generated by the conduct.*

From a consumer policy perspective, the efficiencies that are taken into account are essentially the same. Both disciplines have now adopted a consumer-centric approach in the assessment of efficiencies. Accordingly, the unfairness of a given conduct (as well as the imbalance between rights and obligations arising under a contract) is measured as the sum of all demand-side efficiencies that accrue to a given consumer, plus the share of supply-side efficiencies that are passed-on downstream in the form of lower prices, better quality or better financial conditions.

Table 5 below summarise our findings as regards the negative and positive impacts of the conducts at hand.

²⁵² See the Commission’s Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97).

Table 5 – Main economic impacts of the practices under scrutiny

<i>Practices</i>	<i>Cross-selling</i>			<i>Conditional sale</i>	<i>Aggressive commercial practices</i>			
	<i>Tying and pure bundling</i>	<i>Mixed bundling and multi-product rebates</i>	<i>Preferential or exclusive agreements</i>	<i>Conditional sales and single-product rebates</i>	<i>Unsolicited offers and pressure selling</i>	<i>Inertia selling</i>	<i>Churning</i>	<i>Steering</i>
Switching costs	Strong increase <i>Potential reduction of customer mobility</i>	Increase <i>Customers still have the chance to “mix and match” in the pre-contractual phase</i>	Strong increase <i>Only for exclusive dealing arrangements</i>	increase <i>Especially in the case of loyalty rebates – rivals must compensate rebate during contractual phase</i>	Low/no impact <i>Related to pre-contractual phase</i>	Low/no impact <i>Related to pre-contractual phase</i>	Low/no impact <i>Related to pre-contractual phase</i>	Low/no impact <i>Related to pre-contractual phase</i>
Price comparability	Lower <i>Customers cannot easily single out the price/conditions of individual products</i>	Preserved <i>Customers still have the chance to observe individual prices/conditions</i>	Preserved <i>Customers still have the chance to observe individual prices/conditions</i>	Lower <i>Risk of “confusopoly” for loyalty programmes</i>	No impact <i>Related to pre-contractual phase</i>	No impact <i>Related to pre-contractual phase</i>	No impact <i>Related to pre-contractual phase</i>	No impact <i>Related to pre-contractual phase</i>
Customer freedom of choice	Reduced choice <i>May imply coercion of customers (mostly in non-competitive markets)</i>	Preserved <i>Customers still have the chance to “mix and match”</i>	Reduced choice <i>Only in the case of exclusive agreements</i>	Reduced choice <i>Especially in the case of “current account mortgage”</i>	Distorted <i>Pressure selling can distort consumer behaviour</i>	Distorted <i>Inertia selling can distort consumer behaviour</i>	Distorted <i>Exploitation of customer’s lack of information</i>	Distorted <i>Exploitation of customer’s lack of information</i>
Supply-side efficiencies	Potentially high <ul style="list-style-type: none"> • Economies of scale/scope • Reduction of inefficiencies • Better risk management • No double marginalization • First-degree price differentiation 	Potentially high <ul style="list-style-type: none"> • Economies of scale/scope • Reduction of inefficiencies • Better risk management • No double marginalization • First-degree price differentiation 	Moderate <ul style="list-style-type: none"> • Better risk management 	Potentially high <ul style="list-style-type: none"> • Economies of scale and scope • Reduction of inefficiencies • Better risk management • Protection of “free-rideable” investments • Solution to the hold-up problem • Second and third-degree price discrimination 	Low/none <ul style="list-style-type: none"> • Economies of scale/scope • Protection of “free-rideable” investment 	Low/none <ul style="list-style-type: none"> • Economies of scale/scope • Protection of “free-rideable” investment 	Low/none <ul style="list-style-type: none"> • Economies of scale/scope • Protection of “free-rideable” investment 	Low/none <ul style="list-style-type: none"> • Economies of scale/scope • Protection of “free-rideable” investment
Demand-side efficiencies	Potentially high <ul style="list-style-type: none"> • Lower transaction costs • Lower price or better conditions • Quality improvements 	Potentially high <ul style="list-style-type: none"> • Lower transaction costs • Lower price or better conditions • Quality improvements 	Moderate <ul style="list-style-type: none"> • Lower transaction costs (no search costs) • Lower risk 	Moderate <ul style="list-style-type: none"> • Lower transaction costs (“current account mortgage”) • Better contract conditions • Lower price (rebates) • Quality improvement 	None	None	None	None

3 EU CONSUMER PROTECTION LEGISLATION AND UNFAIR COMMERCIAL PRACTICES IN RETAIL FINANCIAL SERVICES

Article 3(t) of the Treaty establishing the European Community (EC) mentions the aim to protect consumers and was for the first time explicitly introduced by the Treaty of Maastricht. The general consumer policy objectives are specified in greater detail in Article 153(1) EC. Since the mid-1990s, several EC directives have been enacted, with the aim of harmonising particular aspects of business-to-consumer (B2C) relationships. In this section, we analyse the existing EU legislation on consumer protection and assess its applicability to the cross-selling, conditional sales and aggressive commercial practices in the retail financial services sector, which form the subject matter of this Report.

First, we consider the general framework of consumer protection legislation, namely the Unfair Terms Directive (UTD)²⁵³ and the Unfair Commercial Practices Directive (UCPD)²⁵⁴. These directives play a central role in creating “a level playing field” for consumer protection in all sectors, including retail financial services. Second, we refer to more specific consumer protection rules, such as directives on associated guarantees, distance contracts, doorstep selling and price indication. Finally, we look at the directives intended to protect consumers in the financial sector, such as the old and the new consumer credit directives and the Directive on distance marketing.

It is very important to note that this section does not aim to provide a complete analysis of these EU measures but rather to define their scope in order to assess if there are any possibilities to apply them to the commercial practices that are analysed in this Report.

At the very outset, it is important to note that, while this Report looks at tying and other potentially unfair commercial practices involving not only consumers but also SMEs, in this Section the analysis is limited to consumers. As a matter of fact, the EU consumer protection legislation defines the consumer as a *natural person* who is acting outside his trade, business or profession²⁵⁵. This implies that SMEs fall outside the EU consumer protection regime.

²⁵³ Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34.

²⁵⁴ 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 (‘Unfair Commercial Practices Directive’), OJ L 149, 11.6.2005, p. 22–39.

²⁵⁵ Art 2(b) UTD, Art 2(a) of UCPD, Art 2 of doorstep-selling directive, etc. The notion of consumer would not encompass SME acting not in its professional capacity. For more details see case C-541/99 Cape, [2001] ECR I-9049, para 16.

3.1 The EU Directive on unfair terms in consumer contracts

The EU consumer protection *acquis* evolved so as to challenge particular types of contract clauses in contracts concluded between professionals and consumers.²⁵⁶ Directive 93/13 on unfair terms in consumer contracts is one of the first and most important pieces of legislation in this field²⁵⁷. This section considers whether it could be possibly applied to the practices that are analysed in the Report. The scope of the UTD is very wide and not limited to particular types or aspects of consumer contracts, like time-sharing or distance sales.

Article 3 of the UTD lists three cumulative conditions for a particular contractual term to be unfair. In particular, it should be contrary to good faith, it should cause significant imbalance in parties' rights and obligations; and it should be detrimental to the consumer. The language of the test contained in Article 3 the UTD can be described as somewhat vague and, as observed by legal scholars, has not surprisingly resulted in a very divergent implementation in Member States²⁵⁸. In this respect, the ECJ stated in numerous occasions that Member States should ensure that consumers are given the effective protection which the directive seeks to achieve²⁵⁹. The result should be achieved through a systematic interpretation of national laws in conformity with the Community provisions protecting consumers (so-called "indirect effect" of EU law).

The UTD is applicable only to non-individually negotiated terms (so-called "contracts of adhesion" or standard form contracts). Article 3(2) UTD further specifies that terms are to be deemed not negotiated if they are "*drafted in advance and the consumer has not been able to influence the substance of the terms*". This may fit some of the standard practices in the financial sector, in cases where contract terms are not negotiated individually.

Moreover, the Annex of the UTD provides for a non-exhaustive list of clauses which may be regarded as unfair by their object (so-called "indicative list"). A close examination of these clauses leads to conclude that they do not directly address tying, bundling or other practices subject to this Report. Nevertheless, as will be shown below, an application of some of the provisions to tying or bundling might still be possible. Also, it must be borne in mind that existence of the indicative list does not preclude the application of the general test under Article 3 UTD.

In the present context, subparagraphs (g), (i), (j) and (l) of the Annex could be potentially relevant. These subparagraphs refer to contract terms, which: (g) enable the supplier to terminate a contract of indeterminate duration without reasonable notice; (i) irrevocably bind the consumer to terms with which he had

²⁵⁶ S.Weatherill, U.Bernitz, *Introduction*, in 'The regulation of unfair commercial practices under EC directive 2005/29: New rules and new techniques', ed. by S.Weatherill and U.Bernitz, 2007, Hart law publishing, p.1.

²⁵⁷ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

²⁵⁸ *Ibid.*, p.386.

²⁵⁹ In particular, see *Océano Grupo Editorial and Salvat Editores*, paragraph 26; *Cofidis*, paragraph 33; and *Mostaza Claro*, paragraph 29.

no real opportunity of becoming acquainted before the conclusion of the contract; (j) enable the supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract; or (l) provide for the price of goods to be determined at the time of delivery or allowing a supplier of services to increase their price. For example, sub-paragraph (i) of the Annex of the UTD may be a suitable tool to challenge those contract clauses that oblige consumers to conclude additional contracts with the financial service provider (be that a bank, an insurer or an investment advisor), especially when the information about the need to conclude subsequent contracts has not been communicated to the consumer beforehand²⁶⁰. However, it must be recalled that paragraph 2 of the Annex places some limitations on the application of the indicative list clauses to the financial services sector if these cases are considered as *objectively* justified due to specific nature of the financial sector²⁶¹.

However, an analysis of these provisions suggests that the UTD will in most cases not apply to the practices that are subject to analysis in this Report:

- Cross-selling practices (including tying and mixed bundling) do not necessarily create a “significant imbalance” between the parties, in the sense in which such formulation is used in the UTD. Also, the Annex to the UTD clarifies that this imbalance mostly refers to cases of limitation or exclusion of responsibility for failure to perform, unilateral changes in contract terms, etc. In the case of tying and mixed bundling, none of these cases seem to apply. This does not exclude the possibility of applying the UTD in some cases, but suggests that these practices are not the main “target” of the UTD.
- Practices that imply a financial advantage for consumers, such as mixed bundling or conditional rebates, are not captured by the UTD, to the extent that there is no “*significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*”. While the existence of a financial advantage for the consumer should be taken into

²⁶⁰ Sub-paragraph (i) in the Annex to the UTD refers to “*Terms which have the object or effect of (...) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract*”.

²⁶¹ As stated in the Annex to Directive 93/13, “Subparagraph (g) [*i.e., enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so*] is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Subparagraph (j) [*i.e., enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract*] is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

(c) Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract”.

account in the assessment of fairness of other terms, it does not automatically preclude the existence of a significant imbalance in the rights and obligations under the contract. Practices that reduce transparency and price comparability, such as tying and loyalty rebates, are potentially captured by the UTD provided that the resulting contract terms were not individually negotiated, lead to a “significant imbalance” and are contrary to good faith. However, the “significant imbalance” requirement would be hard to meet, since the imbalance refers to the “rights and obligations arising under the contract”, and as such address neither the transparency of price, nor the comparability of the price. In addition, even practices that lead to excessive prices are not tackled by the UTD, since as a matter of fact, Article 4(2) of the UTD specifies that the “[a]ssessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language”. However, even if excessive prices are not tackled by the UTD, it should be taken into account that if the price as such is not indicated in plain intelligible language, UTD would apply.

- Conditional sale practices such as the obligation to have the salary paid into the current account are potentially captured by the UTD, provided that they are applied as standard contract terms and create an imbalance between the rights and obligations arising under the contract. In many cases, however, a “current account mortgage” practice would not meet the second condition, also due to the advantages that customer obtain for subscribing to such an offer. As regards the potential restriction of competition that may be created by those practices, the UTD is not the appropriate instrument to capture it, as it only deals with contractual imbalances *inter partes*. In other cases, *e.g.* in case of a cross-collateralization clause described above (Section 2.2.3.2.1), the UTD may be invoked to avoid that customers are subject to contract terms they have not negotiated and that create a significant contractual imbalance to their disadvantage.
- More generally, the practices that are analysed in this Report normally do not create significant imbalances in contract conditions (seen in isolation), but can be harmful by either distorting customer behaviour in the pre-contractual phase, or by reducing customer mobility in the contractual phase. Unless such restrictions are reflected in a single contractual document, the UTD is not applicable.

A few years after the entry into force of the UTD, a Commission report analysed its implementation in the Member States, and found that one of the most problematic sectors was indeed that of financial services²⁶². However, the types of clauses that were considered to be unfair were mostly clauses that restrict or totally waive the liability of the service provider²⁶³. This confirms our

²⁶² See Report from the Commission on the implementation of Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, COM(200)248 of 27 April 2000.

²⁶³ *Id.*, at 40. The most frequently encountered unfair terms in financial services concerned the obligations imposed on the consumer by the professional (37%), on conclusion of the

impression that, without excluding *a priori* the possibility of applying it to the practices under scrutiny in this Report in a very narrow set of cases, the UTD will in most cases not be an adequate instrument to effectively tackle these practices.

FINDING #3.1

The unfairness test contained in the UTD is broad and its potential application to the practices under analysis in this Report would have to be assessed on a case-by-case basis.

In any event, we consider that potentially unfair practices such as tying and bundling, exclusivity or preferential agreements, conditional and loyalty rebates, unsolicited offers or “inertia selling”, churning and steering are unlikely to be systematically and effectively covered by the UTD.

Conditional sales practices that create a significant contractual imbalance are potentially captured by the UTD. However, even in this case some of the practices that we identified within this category (e.g. current account mortgage) are unlikely to meet the conditions for the application of the UTD.

3.2 The Unfair Commercial Practices Directive

After the adoption of various directives aimed at protecting consumers in the case of unfairness of the contractual relationship²⁶⁴, the need to protect consumers also during the pre-contractual phase emerged as a key necessity. The EU Unfair Commercial Practices Directive (UCPD) aims at ensuring a high level of protection during this phase. In contrast to the UTD, the UCPD lays down the concept of full harmonization (with a 6-year transitional period in case Member States want to keep their more stringent regulation)²⁶⁵. However, as stated in Recital 9 and prescribed in Article 3(9) specifically for financial services (as also for immovable property), the UCPD is “*without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers*”; accordingly, “*Member States may impose*

contract (17%), on presentation and enforceability of the terms in question (10%), on price and payment thereof (9%), and on termination of the contract (8%). These clauses were found to be particularly widespread in consumer credit, including in particular mortgages and bank accounts. In the insurance sector, unfair terms were mostly found in areas linked to the obligations imposed on consumers (25%), the professional's liability (20%), the presentation and enforceability of terms (16%), procedures concerning performance of the professional's obligation (12%) and procedures for terminating the contract (10%).

²⁶⁴ Such as directives on associated guarantees, distance contracts, doorstep and price indication.

²⁶⁵ 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. Although throughout the text the UCPD refers mostly to products, it certainly covers also the provision of services (Article 2(c)).

requirements which are more restrictive or prescriptive than this Directive in the field which it approximates”.

The UCPD is particularly relevant for the practices under scrutiny in this Report. As explicitly stated in Recital 10, the UCPD “*provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products*”.

As regards the specific provisions of the UCPD, Article 5(2) is of central importance as it contains an “unfairness test”. Under this provision, any practice is considered as unfair if two cumulative conditions are met:

- a) the practice is contrary to the requirements of professional diligence; and
- b) the practice materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed.

The Directive further specifies that practices are unfair if they are either misleading (Articles 6 and 7) or aggressive (Articles 8 and 9). Below, we focus in particular on the provisions that are more relevant for our analysis.

As regards misleading practices:

- Article 6 defines as misleading those practices that either contain false information and are therefore untruthful; or practices that deceive or are likely to deceive the average consumer, causing him to take a transactional decision that he would not have taken otherwise. Consumer deception is relevant to the extent that it falls on a number of contractual elements, such as, *i.a.* the main characteristics of the product, including the benefits, risks, composition or results to be expected from its use²⁶⁶; and/or the way in which the price is calculated, or the existence of a specific price advantage²⁶⁷.
- Article 7 defines as misleading practice also the omission of material information needed by the average consumer to take an informed transactional decision, which leads the consumer to “*take a transactional decision that he would not have taken otherwise*”. In the case of an invitation to purchase, material information that should not be omitted includes, *i.a.*, the price, or (where the nature of the product means that the price cannot reasonably be calculated in advance) the manner in which the price is calculated²⁶⁸.

For what concerns aggressive practices:

- Article 8 contains the definition of “aggressive” commercial practices, specifying that a practice is to be considered aggressive “*if, in its factual*

²⁶⁶ Article 6.1(b).

²⁶⁷ Article 6.1(d).

²⁶⁸ Article 7.4(c).

context, taking account of all its features and circumstances (...) it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise". The features and circumstances to be taken into account include, *i.a.* coercion and undue influence, which may be considered as relevant for the practices that are analysed in this Report.

- Article 9 contains a non-exhaustive list of factors that may be relevant in assessing the aggressive nature of the practice and the consequent applicability of the UCPD, including the "*timing, location, nature and persistence*" of the practice, the use of threatening language, the wilful exploitation of specific misfortunes that may impair the consumer's judgment, any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract (including termination rights), and threats to take legal actions that cannot legally be taken. The list does not seem to hint at practices such as tying, bundling or conditional sales. However, as already recalled it is a non-exhaustive list, and as such does not preclude the application of the UCPD to other practices not directly matching these circumstances.

Moreover, Annex I of the UCPD contains a black list of 31 practices which are considered unfair in all circumstances. Article 5(5) specifies that "*the same single list shall apply in all Member States*". Such a formulation and the general framework of the Directive presuppose that the black list should be introduced into national legislation alongside the material test of Article 5(2). As regards the practices under analysis in this Report, tying, bundling, conditional rebates, exclusivity or preferential agreements are not directly caught by the black list of the Annex to the UCPD. The only practice which might be contemplated is laid down in subparagraph 18 of the Annex, which states: "*passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions*". This provision may address the issue of information asymmetry between the provider of services and consumers, which is not the main concern in the case of tying and bundling, but becomes a key element in the case of other practices such as unsolicited offers, churning or steering. In addition, a number of specific aggressive commercial practices are listed in the Annex (subparagraphs 24-31), some of which may capture pressure or inertia selling (especially subparagraphs 26 and 29).

3.2.1 Assessing the applicability of the UCPD to the practices under scrutiny

Under the Directive, the examination of unfairness has a clear logic. First, the practices listed in the Annex (or corresponding national legislation) should be examined. If the practice is not caught by the black list, then it should be analyzed under the tests that specify which practices are misleading (Articles 6 and 7) and which ones are aggressive (Articles 8 and 9 of the UCPD). Finally,

even if the practice is still not captured by the definitions provided by Articles 6-9 of the UCPD, the general test provided in Article 5(2) can still be applied. As already recalled, this test can encompass a broad array of practices, not limited to an indicative list of misleading or aggressive practices. As in the case of the UTD, a very broad unfairness test suggests that each case would have to be considered individually. Authoritative legal professionals have pointed out that some practices might be found unfair in some Member States but not in others, due to diverging interpretations in national legislation²⁶⁹.

Based on this 3-step approach, our assessment of the applicability of the UCPD to tying and other potentially unfair practices in the retail financial services sector suggests the following:

- The Annex to the UCPD potentially covers only aggressive commercial practices such as unsolicited offers (pressure and inertia selling), churning and steering, depending on the circumstances. The crucial element in this respect is the misrepresentation of market conditions aimed at inducing the consumer to take a transactional decision he or she would not have taken otherwise.
- As regards the definitions of misleading and aggressive practices:
 - Article 6 and 7 may apply to tying and bundling, conditional sales and a number of aggressive commercial practices to the extent that these practices lead to insufficient price transparency (tying, bundling, conditional rebates, etc.), or deceive the consumer as regards the risk associated with a given transaction (*e.g.* steering). Moreover, the selling of services that are not tailored to the needs of particular consumer might apply in some situations to tying and bundling, if the products for whatever reasons are presented as one; or to “churning” whenever the need is generated by pressure put on customers by more informed advisors. In addition, these provisions (in particular, Article 7) may also tackle practices in which the financial services provider misleads the customer by inducing him or her to purchase a product package even if the packaged products were available for sale as standalone products.
 - Articles 8 and 9 may in principle tackle tying and pure bundling practices (through the “coercion” element) and aggressive commercial practices such as unsolicited offers, churning and steering (through the “undue influence” element. In some jurisdictions – for example, the UK –aggressive commercial strategies are qualified rather broadly, including aggressiveness towards consumers through conduct termed as “pressure selling”²⁷⁰. However, the elements listed at Article 9 do

²⁶⁹ Weatherill, S. and U. Bernitz, *Introduction*, in *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques*, Hart Law Publishing, 2007, p. 6.

²⁷⁰ See the speech by Mr. Jonathan May (CEO of the UK Office of Fair Trading), “The changing role of the OFT in consumer finance”, addressed to the British Bankers' Association annual retailing banking conference at http://www.offt.gov.uk/shared_offt/speeches/o7o6pdf on 15 November 2008, where the CEP of the OFT mentions the need to tackle “high pressure sales tactics that persuade consumers to buy products they don't want or are poorly suited

not refer to factors that are relevant for the practices under scrutiny in this Report, and in particular do not hint at situations that could be equated to churning or steering.

- Finally, the general unfairness test provided at Article 5(2) can in principle be applied to all the practices analysed in our Report, provided they: (a) are against professional diligence; and (b) materially distort the commercial behaviour of a consumer. The concept of professional diligence is explained in the Directive itself (Article 2(h)) as meaning “*the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity*”. In this respect, it is fair to state that aggressive commercial practices such as pressure/inertia selling, churning or steering are most likely to be captured by the unfairness test as being contrary to the professional diligence and likely to distort customer behaviour; however, practices such as cross-selling and conditional sales may also be the result of a wilful choice of the consumer, as they may prove beneficial in many respects.

However, a number of difficulties still exist as regards the applicability of the general test contained in Article 5(2). Various scholars have already observed that the main test is made very much dependent on the standard practices in a particular field²⁷¹. If a practice clearly deviates from industry standards, the consumer should not have much of a problem in proving his or her case. However, consumers would face much greater problems if the whole sector is engaging in similar practices: this issue is particularly acute in the financial sector, as potentially unfair practices applied by some banks are also applied by the others, and this makes it extremely difficult to set the right benchmark²⁷².

In order for unfair practices not to become an accepted norm, the UCPD correlates due diligence with “honest” market practice and/or the notion of good faith, which implies that breaching one of those would open the doors for application of Article 5(2). The use of alternative language could support the idea that professional diligence is aimed at ensuring fair dealing and honest relations in general. However, these key notions are not explained in great detail in the UCPD (especially in the case of ‘honest market practice’), which leaves them to the interpretation that will be given by national judges²⁷³.

to their needs, including their ability to repay”, and that “[t]he OFT will have stronger powers to tackle so-called ‘aggressive commercial practices’ when Unfair Commercial Practices Directive (UCPD) comes into force”.

²⁷¹ For example please refer to C. Poncibò and R. Incardona, *The EU Unfair Commercial Practices Directive: a Faltering First Step*, London Law Review, Vol1, Oct 2005, Issue 2, p. 321-322.

²⁷² See *supra*, Section 1.2.

²⁷³ This finding is at odds with maximum harmonization clause of the directive as leaving such important issue to national law seriously undermines the aim of aiding to create the Internal market, i.e. the main reason why the directive is based on Art 95 EC allowing the maximum harmonization.

3.2.1.1 The “good faith puzzle”

Because good faith is so important in this context, we focus shortly on it in the subsequent paragraphs. The very concept of good faith is found in national contract law²⁷⁴ with several documents of international private law²⁷⁵. Its introduction outside contract law, into the field of commercial practices, is very important, as presumably seller or service providers are bound by it not only as regards contractual terms (the domain of the UTD), but also in all actions that precede the actual conclusion of a contract. In other words, the good faith principle applies not only to formation and execution of a contract but also to all pre-contractual relations.

As already mentioned, good faith is not explained in great detail in the UCPD. It must be observed that the good faith principle exists in the majority of Member States²⁷⁶, although its application naturally changes in different national legal systems²⁷⁷. The EU consumer *acquis* (e.g., the UTD) contains several indications of what “good faith” means in the context of consumer (contract) law. Without any doubt the scope of the UTD and UCPD is different: however, there is no reason to believe that the substantial test of good faith under these two documents would also have to differ. This idea is largely supported by the fact that good faith is principally a notion embedded in national law, and in most cases it is applied to the formation of the contract as well (in pre-contractual liability cases).

Recital 16 of the UTD lists several (non-exhaustive) examples of cases in which a particular contractual term can be considered as unfair *vis-à-vis* consumers. Among others, it expressly refers to cases in which the goods or services were not sold or supplied to the special order of the consumer. Therefore, imposing combined services as in the case of tying, bundling, steering, churning or other similar practices might go against the principle of good faith when not supported by any evidence of efficiency gains that were at least partially passed on to the consumer: as a result, such conduct may be considered as an unfair commercial practice under the UCPD.

It should be noted that the UCPD is a rather new document, and it is not clear as of now which direction the practice will evolve. In this study, we interpret the provisions of the UCPD rather broadly. We are of the opinion that proving one’s

²⁷⁴ We refer to an extremely valuable comparative study by R. Zimmermann and S. Whittaker, *Good faith in European contract law*, Cambridge University Press, 1999. This book is one of the most comprehensive studies ever done on the subject. It examines in great detail the notion of good faith and analyzes 30 practical situations in a number of European legal systems (like Germany, France, England, Northern Europe etc.). Also, refer to Musy, Alberto M., *The Good Faith Principle in Contract Law and the Pre-contractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures*, Global Jurist Advances: (2001), Vol. 1: Iss. 1, Article 1.

²⁷⁵ UN Vienna Convention on International Sales of Goods (1980), Unidroit principles of International Commercial Contracts (2004) and Principles of European contract law (parts I and II).

²⁷⁶ Lando, O., *Is Good Faith Principle an Over-Arching General Clause in the Principles of European Contract Law?*, European Review of Private Law, 6-2007, p. 846

²⁷⁷ R. Zimmermann and S. Whittaker (1999), p. 653.

case, especially in connection with the fair dealing requirement, may often be extremely difficult. This is because good faith is mostly regulated by national law, with only limited examples provided by the UTD. The proposed new Directive on Consumer rights is not likely to change this situation, as will be explained below. Thus, absent policy initiatives in this field, only the European Court of Justice can provide a more ‘European’ spirit to the concept of good faith. So far, it refused to do so in cases related to the UTD²⁷⁸.

3.2.2 The compatibility of a ban on tying practices with the UCPD

One case recently decided by the European Court of Justice (ECJ) is very relevant in tackling the issue of the compatibility of a ban on tying with the UCPD and the provision on the free movement²⁷⁹. The case related to Belgian legislation, which prohibits combined offers²⁸⁰. Article 54 of Belgian law on trade practices and consumer information and protection is identical to the notion of tying and bundling in the present study. However, this universal prohibition applies to all sectors of economy with some material exceptions (*i.e.*, it is allowed to combine with the main product its accessories, packages etc). One of the interesting issues raised in this case is the compatibility of *per se* prohibition regimes with EU law.

This very broad scope of national legislation was found to run counter to the notion of full harmonization established by Article 3(5) of the UCPD, because national law is more prescriptive and limiting than the directive itself. The Advocate General Trstenjak in her analysis comes to the conclusion that Article 3(5) of the UCPD precludes a provision such as the one laid down in the Belgian legislation (para. 95)²⁸¹. This main finding was confirmed on 23 April 2009 when the ECJ ruled on the merits of the case.²⁸² The ECJ clarified that, since combined offers are not listed in Annex I of Directive 2005/29/EC 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. Since the Belgian prohibition on combined offers prohibits, generally and pre-emptively, bans combined offers without any verification of their unfairness in the light of the specific circumstances, it goes beyond Directive 2005/29/EC. Since Member States should refrain, according to Article 4 of the Directive, from maintaining

²⁷⁸ An analysis of existing case law is found in M.Schilling, *Equality of Bargaining power versus market for lemons: Legal Paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms*, ELR 2008, V.33, n.3, p. 354-366.

²⁷⁹ C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines NV*, applications published in the Official Journal C series No 199 of 25.08.2007, p.18.

²⁸⁰ See *infra*, Section 3.2.1.1.

²⁸¹ Opinion of Advocate General Trstenjak of 21 October 2008, paras. 78 – 89, not yet reported.

²⁸² The text of the judgment can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:141:0003:0004:EN:PDF>.

or adopting more restrictive national measures, the ECJ then decided that the Belgian legislation does not meet the requirements of Directive 2005/29/EC.

More recently, the Belgian Minister for Enterprise and Simplification clarified that the specific sales practice at hand – which concerned selling GSM phones at 1 Euro tied with a long-term subscription – is to be considered as lawful²⁸³.

Such a finding is very important for the fate of existing national provisions which might accidentally capture tying and bundling in the financial sector. This holds true, however, only if they do not specifically address the financial sector which under Article 3(9) due to its specific nature can be regulated in a more stringent way than the remaining sectors of economy. However, each case should be analyzed separately as wide ranging provisions might be contrary to freedom of service provision laid down in Article 49 TEC. This should prompt national administrations to act very carefully before adopting any type of measures which limit tying and bundling in their own right.

3.2.3 Conclusions: the applicability of the UCPD to tying and other potentially unfair commercial practices in retail financial services

Our analysis of 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).

In particular:

- The UCPD may apply to cases of churning and steering (as “misleading practices” under Articles 6 and 7 UCPD) as well as unsolicited offers, “inertia” or “pressure” selling (as “aggressive practices” ex Articles 8 and 9 UCPD), when these are contrary to professional diligence²⁸⁴. In this respect, it will be important to prove that the consumer would not have chosen to engage in the observed behaviour, had the conduct not taken place. This is evidence that the practice materially distorted or was likely to distort consumer behaviour.
- The UCPD potentially applies also to tying, bundling, rebates and preferential or exclusivity agreements, provided that: (i) the practice at hand is proven to be contrary to professional diligence; and (ii) it forces customers into the purchase of a product they would not have bought, or into a consumption pattern they would not have followed (in the case of conditional rebates). However, a problem exists here as regards the link between professional diligence and “honest market practices”, as these practices can normally be defined as honest and widespread, and can be motivated by efficiency reasons. Proving one’s case may be extremely

²⁸³ See *Nouvelle plainte contre la vente couplée*, Le Soir, 17 June 2009.

²⁸⁴ In the case of inertia selling, Article 15 UCPD replaces Article 9 of Directive 97/7/EC by providing that “Member States shall take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent”.

difficult here, absent a clear indication that a given practice is captured by the UCPD.

- The applicability of the UCPD to some types of conditional sales, such as the obligation to pay salary into the current account as a condition to access a mortgage loan, appears more difficult. As a matter of fact: (i) no provision in the UCPD seems to refer to cases in which the conclusion of a contract is made dependent on a condition that *per se* was not necessarily detrimental to the customer within the specific commercial relationship; (ii) the practice is normally “honest” and widespread, if communicated in a transparent way; (iii) its immediate effect of the practice is not the distortion of consumer behaviour, but the enhancement of switching costs and the emergence of customer lock-in, which are not captured by the UCPD; and (iv) proving one’s case under the UCPD may consequently be an uphill battle for consumers.

In addition, our analysis suggests that:

- Proving one’s case, especially in connection with the fair dealing requirement, may often be extremely difficult for consumers, especially since the requirement of good faith is mostly defined at national level, with only limited examples provided by the UTD.
- The UCPD is a rather new document, and it is not clear as of now which direction the practice would evolve. For example, Member States could tackle some of the unfair practices identified in this Report by implementing the UCPD in a way that covers also unsolicited offers, churning and steering – the Directive leaves the possibility for Member States to retain more prescriptive rules specifically in the financial services sector²⁸⁵. It would anyway be more difficult to cover other practices beyond unsolicited offers, churning and steering.
- The effective enforcement of the UCPD relies on a case-by-case assessment carried out by Member States’ authorities and courts, and there are some risks of divergent interpretations. Certain national authorities are already showing in their first period of enforcement that the rules can be applied effectively in different sectors and for different commercial practices. It should not take long for national authorities to gear up and use the new UCP concepts to tackle unfair practices in the financial sector.

FINDING #3.2

The UCPD is a rather new document, and it is not clear as of now which direction the practice would evolve. However, already at this stage it can be observed that:

²⁸⁵ Recital 9 and Article 3(9) UCPD.

- The Directive applies to unsolicited offers, “inertia” or “pressure” selling (as “aggressive practices” ex Articles 8 and 9 UCPD), when these are contrary to professional diligence.
- The UCPD can also be applied, depending on the interpretation that will be given by national courts, to cases of churning and steering (as “misleading practices” under Articles 6 and 7 UCPD).
- The UCPD potentially applies also to tying, bundling, rebates and preferential or exclusivity agreements, provided that: (i) the practice at hand is proven to be contrary to professional diligence; and (ii) it forces customers into the purchase of a product they would not have bought, or into a consumption pattern they would not have followed (in the case of conditional rebates). However, proving one’s case may be extremely difficult here, absent a clear indication that a given practice is captured by the UCPD.
- The applicability of the UCPD to some types of conditional sales, such as the obligation to pay salary into the current account as a condition to access a mortgage loan, appears more difficult.
- Generally, the effective enforcement of the UCPD relies on a case-by-case assessment carried out by Member States’ authorities and courts, and there are some risks of divergent interpretations. In particular, the *onus probandi* for consumers will depend on the national implementation of the UCPD, especially as regards the “good faith” principle.

3.3 Other EU consumer protection regulation

After adopting the UTD, which features a broad and comprehensive approach, the EU continued to harmonise particular aspects of consumer protection regulation. These efforts resulted in a number of legislative acts, namely:

1. Directive to protect the consumer in respect of contracts negotiated away from business premises²⁸⁶;
2. Directive on the protection of consumers in respect of distance contracts²⁸⁷;
3. Directive on consumer protection in the indication of the prices of products offered to consumers²⁸⁸; and
4. Directive on certain aspects of the sale of consumer goods and associated guarantees²⁸⁹.

²⁸⁶ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985.

²⁸⁷ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997.

²⁸⁸ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998.

In essence, these different pieces of legislation clarify certain important points of business-to-consumer relationships. However, in the present context, most of these Directives are of a very limited relevance. In fact:

- Due to specific nature of bank-to-consumer relationship, the Doorstep Selling Directive may be of limited practical importance, also since Article 3 rules out its applicability to insurance and sales of securities;²⁹⁰
- The Directive on distance contracts is not applicable to financial services, i.e. investment services, insurance and reinsurance operations, banking services, operations relating to dealings in futures or options, as listed in Annex I;
- The Directive on unit pricing is also not relevant as throughout the text it refers only to products which are tangible goods (prices of them should be indicated as “for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity”);
- Similarly, the Directive on the sale of consumer goods and associated guarantees is not applicable because by the virtue of Article 1(2)(b) the directive regulates only physical goods and as a result financial products are excluded completely from its scope.

On 8 October 2008, the Commission presented a proposal for a Directive on Consumer Rights.²⁹¹ This future legislation codifies the Directives on sale of consumer goods and guarantees (99/44/EC), unfair contract terms (93/13/EC), distance selling (97/7/EC), and doorstep selling (85/577/EC).

The new Directive will, *i.a.* fill some gaps in the regulation of retail financial services, as explicitly stated in the Preamble²⁹². Although Article 3(2) still considers financial services separately, a closer examination reveals that these services in most cases are not treated differently from any other services. The only exceptions relate to the rules on the provision and disclosure of information (Articles 5-7 of the Proposal) and on guarantees (Articles 21-29). In effect, it means that financial services would be regulated also as regards doorstep selling and distance selling situations. Unfair contract terms would remain largely unchanged.

The proposed Directive on Consumer Rights also follows the recent trend of maximum harmonization in the field of consumer protection. Therefore, the proposal represents a major shift from national consumer protection towards protecting consumer who acquires goods and services cross-border, as the proposal tends to create a true “level playing field”.

²⁸⁹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12–16.

²⁹⁰ Although the Doorstep selling directive pre-dates the UTD, for the purposes of systemic analysis, it would be analyzed in this section.

²⁹¹ COM(2008) 614 final.

²⁹² Such aim is also mentioned in the recital 11 of the Preamble of the Proposal for a Directive.

FINDING #3.3

The Doorstep Selling Directive, the Directive on distance contracts, the Directive on unit pricing and the Directive on guarantees are not applicable to tying and other unfair commercial practices in the retail financial services sector.

3.4 Specific consumer protection rules in the fields of consumer credit and distance marketing

Other very important EU measures are related to consumer protection in the fields of consumer credit and so-called cold-calling situations. The following legal texts are of crucial importance in this context:

- Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit²⁹³.
- Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC²⁹⁴, and
- Directive 2002/65/EC concerning the distance marketing of consumer financial services²⁹⁵.

3.4.1 The Directives on consumer credit

Directive 87/102 on consumer credit was the first attempt to protect consumer when dealing with personal credit issues. The Directive mainly relates to information requirements such as mandatory information regarding interest rates, renouncement of credit contract, repositioning of goods bought on credit etc. As most of the early consumer legislation, it lays down minimum standards in harmonizing national legislation and is intended to protect national consumers. This piece of legislation did not however have any ambition to regulate tying, bundling and other potentially unfair commercial practices.

At the beginning of this decade the consumer credit directive was considered out-dated. In particular, with the rise of new credit vehicles, there was a material need to update the EU legislation. This process began in 2002 and resulted in the enactment of Directive 2008/48/EC. Essentially, the new directive contains enhanced rules on providing particular information to

²⁹³ Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ L 42, 12.2.1987, p. 48–53

²⁹⁴ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66–92

²⁹⁵ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

consumers, especially focusing on pre-contractual relations, contractual clauses, contractual relations and other important miscellaneous provisions like an obligation for Member States to establish out-of-court dispute resolution bodies.

Directive 2008/48/EC addresses tying and bundling issues to a certain extent. Perhaps the most important provision is in recital 22 of the Preamble, which states that *“Member States should remain free to maintain or introduce national provisions prohibiting the creditor from requiring the consumer, in connection with the credit agreement, to open a bank account or conclude an agreement in respect of another ancillary service, or to pay the expenses or fees for such bank accounts or other ancillary services”* The Directive goes on to prescribe that *“In those Member States where such combined offers are allowed, consumers should be informed before the conclusion of the credit agreement about any ancillary services which are compulsory in order for the credit to be obtained in the first place or on the terms and conditions marketed. The costs payable in respect of those ancillary services should be included in the total cost of the credit; alternatively, if the amount of such costs cannot be determined in advance, consumers should receive adequate information about the existence of costs at a pre-contractual stage. The creditor must be presumed to have knowledge of the costs of the ancillary services which he offers to the consumer himself, or on behalf of a third party, unless the price thereof depends on the specific characteristics or situation of the consumer.”*

This provision leaves the main competence to Member States. As a result, Member States are allowed to maintain legislation that regulates tying, bundling or other forms of cross-selling in credit agreements. The Directive only attaches the conditions on the supply of information, i.e. informing the client in advance of any other services which must be purchased in order to obtain crediting facility²⁹⁶. Other provisions of the Consumer Credit Directive also mention combined provision of ancillary services. For example, Articles 3 (g) and 4(3) recognizes that consumer credit can in some cases be necessarily bundled with other services, especially insurance, yet not limited just to them. The provisions further say that the costs need to be included in the Annual Percentage Rate and any obligations to enter into ancillary relationship must be stated clearly with the necessary data. Article 14(4) of the Directive also states that in the case of withdrawal, the customer should not be locked-in by any other ancillary service.

It is also important to assess whether there are conflicts between the Consumer Credit Directive and the Unfair Commercial Practices Directive. Despite referring to it, the new Consumer Credit Directive is not concerned with tying and bundling as such. It seems that according to recital 18 of the Preamble of the present directive, there is room for advocating that current directive is without prejudice to the provisions of UCPD as citing: *“consumers should be protected against unfair or misleading practices, in particular with respect to the disclosure of information by the creditor, in line with Directive*

²⁹⁶ Another important provision on the disclosure of information in the pre-contractual phase is contained in the European Standardised Information Sheet for home loans (part of the Code of Conduct on Home Loans), which prescribes that borrowers must be clearly informed of the existence of an obligation to domicile bank account and salary with lender (Item 15 in the Standardised Information Sheet).

2005/29/EC". This view is further reinforced by Article 4(4) on standard information to be included in advertising, which clearly states that provisions dealing with combined offers are without prejudice to the UCPD. This also sits comfortably with the general structure of the consumer *acquis* where the UCPD constitutes more *lex generalis* whereas the Consumer Credit Directive clearly falls under the category of *lex specialis*. Therefore, even if Community consumer credit legislation confers powers for national legislatures to address tying, bundling and other potentially unfair practices, the UCPD still applies.

3.4.2 The Directive on the distance marketing of consumer financial services

Directive 2002/65/EC concerning the distance marketing of consumer financial services does not distinguish tying and bundling situation as it is more meant to deal with trans-border issues of trade in the financial services sector. Article 3(2) requires disclosing all relevant information on price structure of the product, or – where appropriate – on the way the price is calculated. Thus, it also does not adversely affect the provision of combined financial services or their offering.

In addition, Directive 2002/65/EC contains provisions on unsolicited services (Art. 9) and unsolicited communications (Art. 10), which may be applicable in the case of unsolicited offers (pressure selling) and inertia selling, respectively, of course limited to the case of distance marketing of financial services to consumers.

FINDING #3.4

The Consumer Credit Directive (2008/48/EC) addresses tying and bundling practices only partly, as far as costs of some ancillary services are concerned, and can be applied in combination with the UCPD. However, the Consumer Credit Directive (at Recital 22) leaves it to Member States whether to take action or not to challenge these practices.

Directive 2002/65/EC concerning the distance marketing of consumer financial services does not specifically address cross-selling and conditional sale practices, as it is mostly meant to deal with trans-border issues of trade in financial services. However, it covers unsolicited services and unsolicited communications.

3.5 The Markets in Financial Instruments Directive: laying out a new road for the investor protection

The Markets in Financial Instruments Directive (MiFID; Dir. 2004/39/EC) represents the most notable measure of the Financial Services Action Plan²⁹⁷.

²⁹⁷ European Commission, *Financial Services: Implementing the Framework for Financial Markets: Action Plan* (COM(1999) 232), 11 May 1999.

The Directive contains a set of business conduct rules and organisational requirements for investment firms that focus on ensuring investor protection. In fact, in case of investment and ancillary services, firms should act honestly, fairly and professionally in accordance with the best interest of the client and comply with more specific requirements such as suitability and appropriateness as well as best execution obligations. Such requirements are relevant investor protection rules provided by the MiFID and implemented at national level in the EEA ²⁹⁸. In addition, specific rules on transparency are also enacted to guarantee “safe” and smooth operations of investors in securities markets (e.g., pre-trade and post-trade transparency)²⁹⁹. Some of the practices mentioned above, such as churning, can clearly be treated under the business conduct rules of MiFID whether they concern investment and ancillary services, while tying, bundling and rebates are not directly addressed by the EC Directive. Therefore, MiFID revolutionises the regulatory framework for the legal relationship between the investment firm and its client³⁰⁰.

As regards churning, the Commission has clarified on its website dedicated to the MiFID that *“as provided by Article 19(1) of Directive 2004/39/EC (MiFID) an investment firm must act honestly, fairly and professionally in accordance with the best interest of its client. According to Article 19(4) of MiFID an investment firm providing portfolio management must obtain information to enable the firm to assess the suitability of an investment service (or a financial instrument) in relation to the client. Article 35 of Directive 2006/73/EC further provides that in order for an investment service to be suitable it must, among other things, meet the investment objectives of the client. In addition, Recital 57 of Directive 2006/73/EC, with reference to Article 19(4) of MiFID, specifically provides that a transaction may be unsuitable for a client because of the frequency of trading. It further states that a series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decision to trade are made with a frequency that is not in the best interest of the client. Accordingly, excessive buying and selling of securities by a broker is clearly a violation of MiFID”*³⁰¹.

FINDING #3.5

The MiFID Directive can be applied to some of the aggressive commercial practices subject to this Report, such as churning, when investment products are involved. However, the MiFID does not cover specifically cross-selling and conditional sale practices, although MiFID's general requirement to pursue the

²⁹⁸ See art. 19, 20 and 21, Dir. 2004/39/EC and Annex 1, Section A and B; then art.18 Dir. 2004/39/EC for conflicts of interest (organisational requirement).

²⁹⁹ See art. 27, 28, 29, 30, 44 and 45, Dir. 2004/39/EC.

³⁰⁰ See Peter O. Mühlert, *The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of MiFID on the Law of Contract from a German Perspective*, in Ferrarini G. and E. Wymeersch (eds), *Investor Protection in Europe*, Oxford University Press, 2006, p. 300.

³⁰¹ <http://ec.europa.eu/yqol/index.cfm?fuseaction=question.show&questionId=845>.

best interest of the client might serve as a basis for future work in the context of investment services.

3.6 Main findings: the applicability of the existing EU *acquis* to tying and other potentially unfair commercial practices

In this section, we have looked at the relevant EU consumer protection legislation seeking to evaluate if EU law has a potential to catch tying, bundling and similar practices. The main findings can be summarized as follows:

- The unfairness test contained in the UTD is broad and its potential application to the practices under analysis in this Report would have to be assessed on a case-by-case basis. In any event, we consider that potentially unfair practices such as tying and bundling, conditional rebates, exclusivity or preferential agreements, unsolicited offers or “inertia selling”, churning and steering are unlikely to be systematically and effectively covered by the UTD. Conditional sales practices that create a significant contractual imbalance are potentially captured by the UTD. However, even in this case some of the practices that we identified within this category (e.g. current account mortgage) are unlikely to meet the conditions for the application of the UTD.
- The UCPD is a rather new document, and it is not clear as of now which direction the practice would evolve. Generally, the effective enforcement of the UCPD relies on a case-by-case assessment carried out by Member States’ authorities and courts, and there are some risks of divergent interpretations. In particular, the *onus probandi* for consumers will depend on the national implementation of the UCPD, especially as regards the “good faith” principle. However, already at this stage it can be observed that the UCPD applies to cases of churning and steering (as “misleading practices” under Articles 6 and 7 UCPD) as well as unsolicited offers, “inertia” or “pressure” selling (as “aggressive practices” ex Articles 8 and 9 UCPD), when these are contrary to professional diligence. The UCPD potentially applies also to tying, bundling, rebates and preferential or exclusivity agreements, provided that: (i) the practice at hand is proven to be contrary to professional diligence; and (ii) it forces customers into the purchase of a product they would not have bought, or into a consumption pattern they would not have followed (in the case of conditional rebates). However, proving one’s case may be difficult here, absent a clear indication that a given practice is captured by the UCPD. Finally, the applicability of the UCPD to some types of conditional sales, such as the obligation to pay salary into the current account as a condition to access a mortgage loan, appears more difficult.
- The Consumer Credit Directive (2008/48/EC) addresses tying and bundling practices as regards information disclosure requirements, and can be applied in combination with the UCPD. However, the Consumer Credit

Directive leaves it to Member States whether to take action or not to challenge these practices.

- Directive 2002/65/EC concerning the distance marketing of consumer financial services does not specifically address cross-selling and conditional sale practices, as it is mostly meant to deal with trans-border issues of trade in financial services. However, it covers unsolicited services and unsolicited communications.
- Directive 2004/39/EC (MiFID) does not directly address specific practices, but it provides a valid framework of rules to tackle the “unfairness” of diffused practices in investment and ancillary services³⁰². It can potentially be applied to some of the aggressive commercial practices subject to this Report, such as churning, when investment products are involved. However, it does not specifically apply to cross-selling and conditional sale practices, although general requirements to act in the best interest of the client might provide a useful basis for sectoral action.

Our analysis of the existing EU *acquis* suggests that the potential for challenging tying and other potentially unfair commercial practices mostly relies on whether the Unfair Commercial Practices Directive can be interpreted as covering some or all of the practices at hand. Without any clarifications, especially from the ECJ, the provisions of EU consumer protection directives have limited possibilities to effectively tackle all the practices at hand.

The table below summarises our main findings in this section as regards the applicability of EU legislation in the fields of consumer protection. Green cells indicate practices that are not specifically regulated by the specific piece of legislation. Yellow cells indicate partly regulated practices, and red cells indicate practices that are directly addressed by the piece of legislation.

³⁰² See Section 2.3.5.

Table 6 – Applicability of EU consumer *acquis* to the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
UTD (93/13)	On a case-by-case basis, but very difficult	Not applicable	On a case-by-case basis, but very difficult	Applicable on a case by case basis, when the clause creates a significant imbalance	Not applicable	Not applicable	Not applicable	Not applicable
UCPD (2005/29)	Only if against professional diligence and distorts consumer choice	Only if against professional diligence and distorts consumer choice	Only if against professional diligence and distorts consumer choice	Only if against professional diligence and distorts consumer choice (very difficult to apply)	Yes	Yes	Yes, depending on national implementation	Yes, depending on national implementation
CCD (2008/48)	Limited to information disclosure	Limited to information disclosure	Limited to information disclosure	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
DMFS (2002/65)	Not applicable	Not applicable	Not applicable	Not applicable	Yes, limited to distance marketing	Yes, limited to distance marketing	Not applicable	Not applicable
MIFID (2004/39)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Yes (for investment services)	Yes (for investment services)
Directive 85/577	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Distance contracts (97/7)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Directive 98/6	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
Directive 1999/44	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

4 NATIONAL APPROACHES TO TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICES SECTOR

Tying and other potentially unfair commercial practices in the retail banking sector have also caught the attention of national regulators and competition authorities across the EU. On the one hand, as shown above, the EU *acquis* in the field of consumer protection seems difficult to apply and effectively implement as regards these practices. On the other hand, some Member States have introduced legal rules that more explicitly address these practices. In this section, we provide a comparative overview in order to assess whether the practices in question are prohibited, limited or otherwise regulated in Member States. In this exercise, we explore tying, bundling and other unfair practices. The information on the legal frameworks was gathered by surveying governmental authorities, practicing attorneys-at-law and experts in the regulation of the financial services sector and experts in consumer affairs.³⁰³ Our description is not limited to legal rules, but includes also recommendations of sectoral authorities and supervisors, self-regulatory measures, administrative practices and case-law as of August 2009. Annex 2 to this report contains individual country fact sheets with more detailed information on the applicable legal rules.

In our survey of national legislation, we highlight instances of non-implementation issues limited to the case of the Unfair Commercial Practices Directive,³⁰⁴ which we found to be the most relevant piece of EU legislation for the purposes of this Report.

4.1 Overview and classification of Member States

Concerns about the need to address tying and other potentially unfair commercial practices have emerged relatively recently in EU countries. The first

³⁰³ We would like to thank the following colleagues for helping us in mapping national legislation: Lih-Nuo Huang, Ewa Swoboda, Wauthier Robyns, Tanya Yaneva, Christy Kythreotou, Dušan Hradil, Lukáš Vacek, Emma Meersohn-Madsen, Natalja Rüütel, Silvia Ustav, Minna Aaltonen, Frank Schiwek, Michael Dietrich, Frederike Broehl, Maria Moustakali, Anna Horváth, Louise O'Mahony, Daniela De Pasquale, Sabrina Galmarini, Zane Ratniece, Jonathan Debono, R.de Rooij, René Smits, Krzysztof Budzich, Monika Kotrasinska, Grzegorz Komarnicki, Rita Lopes Tavares, Gabriela Guerreiro, Olivia Iordanescu, Tomaš Balint, Emilija Guštin, David Ramos Munoz, Rosa Castro, Ulrika Edlund, Pippa Hall, Petros Fassoulas and others who directly and indirectly helped with our comparative task.

³⁰⁴ 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 L 149, 11.6.2005, p. 22–39. Text available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_149/l_14920050611en00220039.pdf

measures specifically addressing tying and other potentially unfair practices in the retail financial services sector were adopted in 2005 and are still limited to a small portion of Member States (Ireland, France, Hungary, Portugal and Slovakia). Our survey of legal experts across the EU27 revealed that there might be various reasons why only a limited number of Member States has adopted specific legislation to curb tying and other unfair commercial practices. These include the fact that evidence that potentially unfair commercial practices are widespread in the retail financial services sector has become available only recently, and especially after the Commission's sectoral inquiry in this sector³⁰⁵. Even the results of the sectoral inquiry did not point at "always harmful" practices, which made it more difficult to Member States to take a regulatory action by declaring these practices *per se* illegal. In addition, the "neutral" position of EU legislation creates uncertainty on how such practices should be treated in national legislation. These issues have evident repercussions in legislative and enforcement actions by the responsible authorities in Member States.

As a preliminary remark, our analysis portrays a remarkable fragmentation in the legal approaches adopted by Member States to the issue at hand. Our findings reveal that legislation and other measures in one third of Member States directly addresses tying and bundling practices, although even among those countries the picture exhibits remarkable differences.

On the one hand, for example, in some EU countries national legislation has been enacted to address very specific types of practices (*e.g.*, forbidding tying of current accounts with other financial services or with particular payment instruments). On the other hand, in some countries general consumer protection legislation is in principle able to cover tying and other practices in a greater number of fields, despite the fact that the legal rules do not make specific reference to the practices that form the subject of this report.

More in detail:

- *Policy initiatives addressing tying and other potentially unfair commercial practices exist in 12 Member States* (Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Hungary, Ireland, Poland, Portugal, Romania and Slovakia). However, even in these Member States the situation is far from homogeneous:
 - Legislation directly addressing tying practices in the retail financial services sector exists in France, Ireland, Portugal and partly in Denmark (limited to payment instruments).
 - Other Member States (Belgium, Bulgaria, and Romania) have enacted legislation addressing "combined sales" in their general consumer protection and civil laws. These laws cover all sectors of the economy and in this way include also the retail financial services sector.
 - In Hungary, after an investigation from the national competition authority, a set of recommendations was adopted to discourage the use of tying and bundling in the field of financial services.

³⁰⁵ See Section 1.2 above for a description of the sectoral investigation.

- Poland exhibits an extensive administrative and judicial practice banning the tying of financial products by general civil law.
- In Cyprus, all cross-selling and conditional sale practices are generally allowed, but in one specific case (mortgage loans) tying, pure bundling, mixed bundling with financial advantage, preferential and exclusive agreements are prohibited.
- In Finland, tying, pure bundling and exclusivity agreements are prohibited by the law only if they result from a standard contract term.
- After an antitrust inquiry in Slovakia, banks agreed to adopt a self-regulatory scheme which invites its members not to practice tying.
- *In other countries, the problem has been carefully considered but did not lead to specific legislation.* In the United Kingdom, consumer mobility issues and the possible negative effects of tying, bundling and other unfair practices were under the microscope of competition authorities. The anti-trust actions of the Office of Fair Trading and the Competition Commission addressed issues such as the markets for personal current accounts, store cards, payment protection insurance, payments systems for credit and debit cards and banking services for SMEs. On the consumer protection side, the OFT has examined, *i.a.*, debt collection issues, misleading advertising and unfair terms. The OFT has recently issued a consultation document on the financial services strategy, where it announces new initiatives aimed at pursuing its four overarching objectives of competition, choice, fairness and responsibility³⁰⁶.
- *The remaining Member States have enacted legislation which regulates tying and other potentially unfair commercial practices only indirectly, i.e.* either by stating the consumers' freedom to choose services or similar provisions; or by transposing the Directive on Unfair Commercial Practices (2005/29/EC). These countries could be regarded as adopting a 'light-touch' approach to tying and bundling, and in the absence of relevant EU legislation appear unlikely to address the issue at all. However, one Member State (Luxembourg) does not provide even the most basic grounds for dealing with tying and bundling, and faces enforcement actions by the Commission for failure to transpose the relevant *acquis*.
- *Interestingly, the retail banking sector has been subject to antitrust probes in the majority of Member States*³⁰⁷. As already mentioned, in some countries (e.g. Ireland or Hungary) regulatory intervention followed antitrust investigations or sector inquiries. In the next sections, we provide information on antitrust enforcement actions where they are considered to be relevant in the present context.

The table below groups Member States based on their legal approach towards tying and other potentially unfair practices. Grouping Member States is a rather

³⁰⁶ See the consultation document, OFT1077con, at http://www.of.gov.uk/shared_of/consultations/of1077con.pdf.

³⁰⁷ To our best knowledge only the Greek, Lithuanian, Maltese, Romanian, Slovenian and Swedish authorities have not undertaken any enforcement action in the banking sector.

difficult task because of a very fragmented situation: accordingly, this classification is intended as purely indicative. As shown in the figure, we grouped Member States according to the extent to which regulatory measures directly address unfair commercial practices. We divided Member States into three groups:

- Group 1 includes Member States where specific policy initiatives are in place to ban or limit tying and other unfair practices in the retail financial services sector. We refer broadly to “policy initiatives” to encompass, besides legislation, also case law or actions from sectoral regulators. We also include in this group countries where only specific practices have been tackled by legislation (*e.g.* only cross-selling of mortgage loans).
- Group 2 includes Member States where no provisions on tying exist, and other potentially unfair practices are addressed by general consumer protection law (including the transposition of the UCPD). This means that – compared to group 2 – in these countries legal rules make no specific reference to practices identified in our report, such as tying, bundling, conditional rebates, loyalty rebates, exclusivity or preferential agreements, unsolicited offers or “inertia selling”, churning and steering.
- Group 3 includes the only Member State that neither enacted specific legislation addressing tying and other potentially unfair practice, nor has so far transposed the UCPD, *i.e.* Luxembourg. In this country, tying and other potentially unfair practices are currently not addressed either by national legislation, or by legislation transposing the UCPD.

Figure 13 – Legal approach in Member States

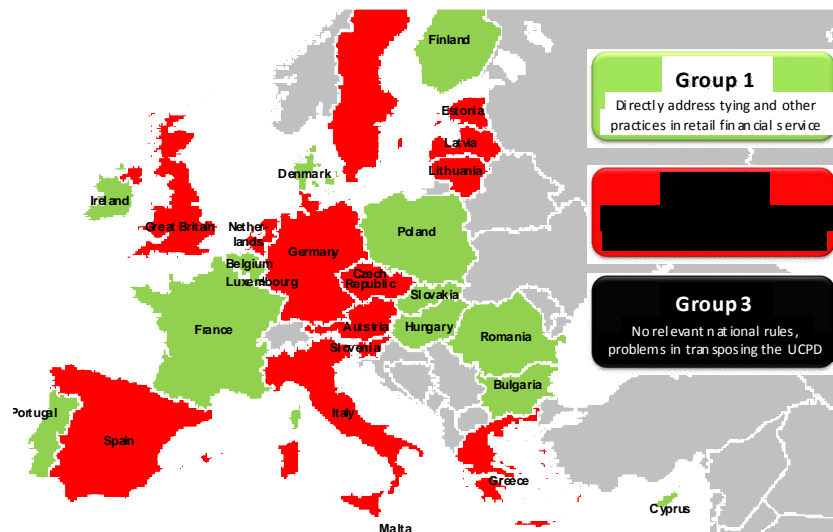


Figure 13 portrays the current situation in the EU. As shown in the picture and explained above, the legal approach, as well as the scope and form of legislations vary considerably and are far from representing the ‘level playing field’ that would be needed to trigger cross-border operation by financial service providers

and encourage consumers to shop across borders. Below, we describe the features of national legislation for countries included in each of these groups.

4.2 Country analysis

4.2.1 Group 1 – Countries that explicitly address tying and other commercial practices in the retail financial services sector

In the EU27, a limited number of Member States have enacted specific policy initiatives are in place to ban or limit tying and other unfair practices in the retail financial services sector. This group includes:

- countries that have enacted very far-reaching prohibitions (Belgium, France, Ireland, Portugal, Romania, Slovakia);
- countries that rely on “soft-law” schemes coupled with narrower legal prohibitions (Hungary, Poland);
- countries where prohibitions are narrower in scope or limited to very specific circumstances (Bulgaria, Cyprus, Denmark); and
- one country in which tying and bundling are generally allowed by virtue of legislation, recommendations and self-regulatory mechanisms (Finland).

4.2.1.1 Belgium

4.2.1.1.1 Combined sales in general consumer protection legislation

As regards general consumer protection legislation, Belgium has one of the most comprehensive bans on combined offers throughout the EU27. The main provision prohibiting combined offers is embodied in Article 54 of the Belgian Law on trade practices and consumer information and protection outlaws combined offers for the consumers. The Article prohibits any combined offer to consumers which is made by a seller, as well as any combined offer to consumers which is made by several sellers acting with a common purpose³⁰⁸. The Article also specifies that “*a combined offer exists where the acquisition, whether or not free of charge, of products, services or other advantages, or of vouchers with which they can be acquired, is tied to the acquisition of other, even identical, products or services.*” The wording of Article 54 thus encompasses both tying and bundling offers, and entails a very broad prohibition liable to capture nearly every kind of cross-selling practices, including mixed bundling.

³⁰⁸ The original text of the law (in French and Dutch) can be found at the following website: http://economie.fgov.be/protection_consumer/trade_practices/trade_law/law_on_protection_001.pdf.

However, Articles 55 and 56 of the Belgian Law provide for a number of exceptions to the prohibition contained in Article 54. Article 55 allows the combined offer of “*products or services which form a whole*”, and also “*identical products or services*”, provided that:

- (a) Each product and service can be acquired separately at the normal price in the same establishment. Thus, pure bundling and tying are not allowed.
- (b) The purchaser is informed clearly of that possibility and of the individual price of each product and service.
- (c) Any price reduction granted to the purchaser of the totality of the products or services does not exceed one third of the individual prices added together. This limits the possibility to offer single-product conditional (loyalty) rebates.

In addition, Article 56 allows the combined sale of products together with:

- (i) accessories, which the manufacturer of the product has specifically adapted to that product and which are supplied together with that product in order to extend or facilitate its use;
- (ii) the packaging or containers used for the protection and market preparation of products, taking into account the nature and value of those products;
- (iii) small products and services accepted as customary in trade, as well as the delivery, installation, control/regulation and maintenance of the products sold;
- (iv) samples from the product range of the manufacturer or supplier of the main product, provided that they are offered in the quantities or sizes strictly necessary for an assessment of the characteristics of the product;
- (v) colour photographs, stickers and other images with minimal commercial value;
- (vi) tickets for legally authorised lotteries; and
- (vii) objects with indelible and clearly visible advertising inscriptions, which are not found as such in the shops, provided that the cost price paid by the supplier does not exceed 5% of the retail price of the main product or service with which they are given away.

In summary, the main exemptions to the rule of Article 54 concern situations in which various products form a single product or identical items at the given conditions at all-inclusive price (Article 55), or ancillary products or services which are offered for free (Article 56).

The Article 54 rule has been recently addressed by the European Court of Justice in its judgment related to the *VTB-VAB* and *Sanoma* cases, as already explained above, at Section 2.3.2.3. The ECJ judgment of 23 April 2009 clearly states that combined offers should be deemed lawful except when they can be qualified, given the specific circumstances, as an unfair commercial practice. The consequence of the ECJ ruling is that until Belgium adapts its own national legislation to bring it in line with the UCPD, Belgian courts will have to decide

how to interpret Article 54 of the Act of 14 July 1991, as well as all other provisions contained in that same law.

4.2.1.1.2 *Legislation in the field of retail financial services*

The above described legislation applies to all sectors of economy, including the financial sector. However, some issues in the financial sector are regulated separately, and have the *status* of *lex specialis* if compared to the Belgian law on trade practices and consumer information and protection mentioned above. At the same time, the prohibitions that are described below may be compatible with the UCPD, which leaves Member States discretion in maintaining stricter provisions in this specific sector.

The most important provisions are the following:

- *Consumer Credit Law.* Article 31 of the Consumer Credit Law of 12 June 1991 limits the possibility to make the conclusion of a consumer credit contract conditional upon the conclusion of another contract³⁰⁹. More in detail, before the 2003 reform of the Consumer Credit Law, there was general consensus that Article 31 did not create a special regime for combined offers in the domain of consumer credit. On the contrary, Article 31 was specifically addressed at so-called “annexed contracts”, *i.e.* contracts that are imposed by the lender on the borrower after the conclusion of a first contract, regardless of whether they matched the definition of Article 55 of the 1991 Belgian Law on trade practices and consumer information. After the 2003 reform, the rule prohibits the imposition of a counterpart to the consumer, *i.e.* Article 31 tackles specifically preferential and exclusive agreements. The application of Article 31 also entails a number of exceptions, which are consistent with Art 55 of the Law on trade practices and consumer information. For example, it is allowed: (i) to sell a good together with the consumer credit contract needed to finance the purchase; (ii) to offer credit combined with current account; (iii) to sell insurance on the property which is bought on a credit; and (iv) to impose an obligation to have insurance on the outstanding debt (insurance which would cover the due amount in case of death of a borrower). As a result, while Belgian law allows selling a good and allowing consumers to pay in three instalments without additional charges (“3 + *sans frais*”), it prohibits doing so on the condition that consumers also activate a credit card linked to a credit account: Article 54 of the Law on trade practices and consumer information applies to this latter offer. The same applies to the possibility of paying in several instalments when buying at a department store, on the condition that purchasers also activate the store’s payment card.
- *Mortgage credit.* Another important provision as regards consumer contracts in the retail financial services sector is Law of 4 August 1992 on mortgage credit (as amended)³¹⁰. This law – in particular Article 6.2 –

³⁰⁹ The text of the law could be found at (in French): http://economie.fgov.be/protection_consumer/Credit/Credit_CD/LCC/cadre28_33bis.htm.

³¹⁰ *Wet van 4 Augustus 1992 op het hypothecair krediet.*

provides for legal rules in the field of payment protection insurance³¹¹. Under this law and relevant case-law, the mortgage lender can make the mortgage rates conditional upon having a particular type of insurance³¹²; however this must occur through an attached contract (*contrat annexé*), which can only take the form of: (i) an insurance on the outstanding debt to cover the risk of death, aimed at securing the repayment of credit; (ii) an insurance covering the risk of deterioration of the property offered as collateral; or (iii) an insurance bond. Such an offering of combined services was confirmed by the Belgian *Court de Cassation* in a judgment of 30 March 2001³¹³. The Court also ruled that only the (forced) imposition of a particular insurer is a violation of consumers' interests – a finding that suggests that exclusive (not preferential) agreements in this domain are banned.

Outside the case of “attached contracts” specified in Articles 5 and 6 of the Law on mortgage credit, Article 19 of the same law specifies that the granting of a mortgage loan cannot be directly or indirectly conditioned to any other contractual obligation or insurance contract or the opening of a savings account.

4.2.1.1.3 Other potentially unfair practices

Belgium implemented the UCPD by introducing a new section in the existing Belgian Law of 14 July 1991 on commercial practices, consumer information and protection. Accordingly, commercial practices such as unsolicited offers, pressure/inertia selling, churning and steering may be tackled by this new piece of legislation.

To our knowledge, no provision exists, which would address the practice of imposing the payment of the salary into the current account. It is also true, however, that such a practice is often associated with a tie-in of the mortgage loan and the current account – such tie-in is not possible in Belgium both under general law and Article 19 of the Law on mortgage credit.

The table below summarises the information for Belgium, distinguishing by type of potentially unfair commercial practice.

³¹¹ Payment protection insurance is an insurance product designed to cover a debt that is currently outstanding. This debt is typically in the form of a loan or an overdraft, and is most widely sold by banks and other credit providers as an add-on to the loan or overdraft product.

³¹² In its 2007 Economic Survey of Belgium, the OECD recommended that the authorities “reconsider the regulation allowing the tying of a mortgage interest rate reduction and the purchase of certain insurance products”. See the summary report at <http://www.oecd.org/dataoecd/51/14/38209638.pdf>.

³¹³ The Court attached two conditions to it: (1) such joint offer should not be made compulsory; (2) a particular insurer shall not be favoured especially if it is selected by the lender.

Table 7 – Belgian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Belgium	Banned with limited exceptions (only for consumers)	Banned with limited exceptions (only for consumers)	Exclusive agreements are prohibited (consumer law only)	Single-product rebates up to one third of standalone price (only consumer contracts)	Covered by the rules implementing the UCPD (only consumers)	Covered by the rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)

FINDING #4.1

Belgian consumer legislation contains a general ban on most cross-selling practices, including tying, pure and mixed bundling, exclusive agreements such as the imposition of a contractual party. The law also prohibits single product loyalty rebates when the discount exceeds one third of the sum of individual prices of the packaged goods. There are exceptions related *i.a.* to accessories and free samples. These provisions have however been found incompatible with the UCPD, and will have to be amended in the future.

The same ban is found in legislation related to retail financial services. However, exemptions exist in the Laws on consumer credit and mortgage credit for what concerns the joint offer of a consumer credit contract needed to finance the purchase; the offer of consumer credit combined with a current account; the sale of insurance on the property which is bought on a credit or used as collateral in a mortgage; and the obligation to have an insurance on the outstanding debt for the case of death of the borrower.

Belgian law does not specifically tackle the obligation to have the salary paid into the current account, although neither tying a mortgage loan with a current account, nor imposing a contract with a third party are allowed.

The 2007 Law that amended the 1991 consumer legislation and implemented the UCPD covers aggressive commercial practices in Belgium, including unsolicited offers (pressure and inertia selling), and potentially churning and steering, although this will depend on the implementation that will be given by the national courts.

In general, the provisions analysed only cover consumers, not SMEs.

4.2.1.2 Bulgaria

Bulgaria has addressed tying and other potentially unfair practices in national legislation, but adopted a more permissive approach than many other Member States that have tackled this issue. In November 2008, the Bulgarian Parliament adopted a new Competition Act³¹⁴. This law is not only an antitrust law, but also

³¹⁴ Published in State Gazette No. 102 of 28.11.2008.

covers unfair competition. Article 36(2) lays down the provision which prohibits the combined offering of goods and/or services, and in particular:

“Offering or giving of an additional product to the product or service being sold, free of charge or against the fictitious price of that other product or service shall be forbidden, except for:

- advertising products which have insignificant value ... where there is an explicit indication of which is the advertising company;*
- products or services which, according to the business practices, constitute accessories to the product or service being sold;*
- products or services, which constitute a rebate for the sale of bigger quantities”.*

This provision thus prohibits tying, pure bundling and mixed bundling (only when the bundled product is added free of charge or at a fictitious price), unless the tied products are free samples, or accessories. The provision allows single-product conditional (loyalty) rebates.

The provision is located in the Section of the Law dedicated to unfair competition, similarly to what happens in Hungary³¹⁵. The Section also contains rules on damaging of reputation, misleading practices, imitation of products. It could be argued that Article 36 (named “unfair attraction of clients”) protects competitors and in turn benefits consumers. It is important to note, in this respect, that these practices are banned only when they meet the unfairness element as defined in the same section. Therefore, the application of this provision requires an additional proof compared to other national provisions containing a general prohibition of combined offers (*e.g.*, Belgium)³¹⁶.

At the same time, as observed in a recent review by the World Bank, the Law on Consumer Credit (Article 7) implicitly recognizes that banks may be allowed to bundle products and even determine from whom the consumer will purchase the bundled products (preferential or exclusive agreement), when it provides that a credit agreement must include *“the required insurances and the expenses thereon when the choice of insurer is not left to the consumer”*³¹⁷. Actual practices vary among banks, with some allowing customers to choose where to purchase required insurance (*e.g.*, on collateral) and others selecting the insurer for the customer or requiring that the customer choose from a list.

The Consumer Protection Act provides for the prohibition of unfair commercial practices against consumers, including misleading advertising. Article 68d provides that *“A commercial practice, related to the supply of goods or services, shall be unfair if it is contrary to the requirements of professional*

³¹⁵ See Section 4.2.1.8.

³¹⁶ See Section 4.2.1.1.

³¹⁷ See World Bank, *Diagnostic Review of Consumer Protection and Financial Capability in Bulgaria*, March 2009, Vol. 2, available online at the following website: http://siteresources.worldbank.org/BULGARIAEXTN/Resources/305438-1224088560466/CP_Vol2_EN.pdf.

diligence” and defines “*professional diligence*” as “*the standard of special skill and care which a trader may be expected to possess and exercise towards a consumer, commensurate with honest market practices and/or the principle of good faith in the trader's field of activity*” (supplementary provisions). Moreover, the Law on Consumer Credit explicitly provides that Articles 143 – 148 (which define “unfair practices”) of the Consumer Protection Act shall also be applied to consumer credit agreements. The Ethical Code of the Association of Banks also prohibits members from engaging in misleading advertising and engaging in unfair conduct that runs counter to professional diligence³¹⁸.

Table 8 – Bulgarian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Bulgaria	Banned only if unfair and if tied product is sold at very low price	Banned only if unfair and if tied product is sold at very low price	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.2

The existing provisions in Bulgarian law apply to tying and bundling practices only when a combined product is sold at a very significant discount and the practices are considered as unfair to competition.

Conditional (loyalty) rebates are allowed, together with preferential agreements.

At the same time, tying, bundling, conditional sales practices and preferential/exclusive agreements are allowed under the Consumer Credit Act.

Aggressive commercial strategies are covered by the law that transposed the Unfair Commercial Practices Directive in Bulgaria.

4.2.1.3 Cyprus

4.2.1.3.1 Cross-selling and conditional sale practices

No legal rule can be found in Cyprus as regards tying, bundling, rebates and conditional sale practices, with the exception of Section 37 of the Consumer Credit Law, which states that mortgage lenders can require a borrower to insure the property³¹⁹. The same Section however states that the additional product

³¹⁸ However consumer associations have complained that advertisements in the mass media continue to make unrealistic offers, including loans at zero percent interest rates. See World Bank, *Review, cit.*

³¹⁹ The Consumer Credit Law governs the general conditions relating to consumer credit, as well as the main information consumers ought to be aware of and their obligations. The

may be bought by the borrower from any insurer. This means that in the case of mortgage loans, pure bundling and tying are actually prohibited, and mixed bundling of the two products with financial advantage for the customer, as well as preferential or exclusive agreements, are also prohibited: as such, the lender cannot make it more advantageous to buy insurance from itself rather than from a third party. To the contrary, this provision encourages the adoption of a conditional sale practice: lenders may require borrowers to buy insurance as a precondition for supplying credit, but cannot choose the insurer. Finally, the same Section also prohibits lenders from forcing the consumer to incur any additional costs which would not be incurred in the absence of security contract.

The wording of the provision is as follows:

(1) Any insurance which a mortgage creditor may require a borrower to affect and keep effected on property mortgaged to the lender may be concluded by the borrower with any insurer.

...

(3) It shall be prohibited to the mortgage creditor to impose heavier conditions regarding the nature and extent of the security of mortgaged property, in such a way that distinction is made between the security concluded through the mortgage creditor's agent and the security concluded otherwise.

4) It shall be prohibited to a mortgage creditor to impose to the borrower, in relation to security of mortgaged property, a condition forcing the borrower to pay the charges to the mortgage creditor or to suffer the cost which, in any case, would not be paid nor be due by the borrower who concludes a security in any other way except through the mortgage creditor's agent."

In addition, Article 46(1) of the same law also states that conclusion of mortgage could be made dependent upon conclusion of any other servicing contract.

4.2.1.3.2 Aggressive commercial practices

In Cyprus, the Unfair Business-to-consumer Commercial Practices Law of 2007 (hereinafter the "Unfair Commercial Practices Law") addresses other unfair commercial practices. The said law implements the Unfair Commercial Practices Directive 2005/29/EC. The Unfair Commercial Practices Law addresses commercial practices directly related to the influencing of transactional decisions of consumers in relation to products. It implements the Unfair Commercial Practices Directive strictly, adopting most of the time the same or very similar wording. It does not go any further than the requirements of the said Directive. All commercial practices listed in Annex I of the Unfair Commercial Practices Directive, are also considered as commercial practices which are in all circumstances considered unfair under Annex I of the Unfair Commercial Practices Law.

said law implemented the Council Directive 87/102/EEC (Consumer Credit Directive). However, the Consumer Credit Law is broader than the Consumer Credit Directive, covering also credit agreements that do not fall within the scope of the Consumer Credit Directive.

Table 9 – Cypriot legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Cyprus	Banned only in the case of mortgage loans	Banned only in the case of mortgage loans	Banned only in the case of mortgage loans	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.3

In Cyprus all cross-selling and conditional sale practices are generally allowed, but in one specific case (mortgage loans) tying, pure bundling, mixed bundling with financial advantage, preferential and exclusive agreements are prohibited.

The laws of Cyprus remain silent on all other potentially unfair commercial practices such as single-product rebates or the obligation to have salary paid into the current account.

The implementation of the UCPD potentially covers aggressive sales tactics such as pressure and inertia selling, and – depending on the interpretation that will be given by national courts – churning and steering.

4.2.1.4 Denmark

Denmark belongs to the group of Member States that directly banned tying and other potentially unfair practices in the retail financial services sector, although the Danish provisions have a rather narrow scope compared to the Belgian ones. The national measure which is relevant in the present context is the Act on certain payment instruments³²⁰. The Act regulated various consumer and business protection aspects in the field of payments. In particular, Section 16 of this Act forbids an entity issuing particular payment instruments to make their provision conditional upon the acquisition of any other payment instrument. The provision is applicable to consumers and to professionals acting outside their business, but is applicable only to tying of the specific payment instruments subject to the Consolidated Act n. 414 of 31 May 2000, but not to other practices or other products.

Moreover, Section 3 of the executive order No. 1222 of 19 of October 2007 reads as follows: “*A financial undertaking shall act honestly and loyally towards its customers*”. The provision is framed very broadly. If coupled with the legislation

³²⁰ For access to the document in English, please refer to the following website: http://www.forbrug.dk/fileadmin/Filer/FO_English/UK-betalingsmiddelov.pdf.

implementing the UCPD,³²¹ it might at least theoretically cover a number of practices including unsolicited offers, pressure or inertia selling, churning and steering. However, the necessary prerequisite of unfairness would be met and this might seriously deter possible litigants³²².

Table 10 – Danish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Denmark	Only for certain payment instruments	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	No provision	Covered by the rules implementing the UCPD (only consumers)	Covered by the rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)

FINDING #4.4

In Denmark, tying and pure bundling are prohibited only as regards payment instruments. No provisions prohibit mixed bundling, preferential or exclusive agreements, conditional rebates, or forms of conditional sale.

Unfair practices, such as unsolicited offers, pressure or inertia selling, churning and steering, are covered by national legislation as well as by the legislation transposing the UCPD. As regards churning and steering, however, a lot will depend on the specific interpretation that will be given by national courts.

4.2.1.5 Finland

Finland does not outlaw tying, bundling and similar practices of the financial services. Nonetheless, through consumer protection legislation, Finnish law imposes particular limitations on combined offers and selling.

Section 126 of the Finnish Law on Credit Institutions (*Laki luottolaitostoiminnasta*, 9.2.2007/121) on terms of contract stipulates:

“In its activities a credit institution may not apply a contract term which does not fall within the scope of activities of the credit institution or which is deemed unreasonable to the customer with regard to its contents or the positions or circumstances of the parties.

A contract term shall always be deemed unreasonable if the granting of a loan, the validity of an agreement or other contract terms are made dependent on the acquisition or use of goods falling outside the scope of activities of the credit institution to an extent that is inappropriate from the point of view of the customer on the whole or if the right of the customer to conclude contractual relations with another supplier is restricted.

³²¹ The text of law can be found at (in Danish): http://ec.europa.eu/consumers/rights/docs/transpos_laws2_da.pdf.

³²² See Section 2.3.2 above.

A credit institution shall submit to the Financial Supervision Authority the terms of standard contracts applied in its activities.”³²³

This provision does not explicitly prohibit the tying or bundling of financial products with any other products or services which are not provided by the same institution, unless the tied product is completely unrelated to the scope of activities of the institution concerned. In addition, the provision refers specifically to contract terms, and as such may be applicable only when the tying arrangement is explicitly referred to in the standard form contract.

Moreover, Chapter 2 Section 4 of the Consumer Protection Act³²⁴ more directly addresses situations of mixed bundling. The relevant provision reads:

“If several consumer goods or services are being marketed at one price or so that the purchase of a good or service entitles one to another good or service at a reduced price or to another specific benefit, the following information shall be clearly noted in the marketing:

- (1) the content and value of the offer and, for goods and services marketed at one price, their individual prices, unless the individual price of a good or service is less than EUR 10;*
- (2) the conditions of the offer, especially its duration and the volume restrictions and other restrictions applying to it.”*

As can be easily observed, combined selling is not prohibited but national legislation provides for clear disclosure requirements falling on the nature of products and services and their price composition. The law does not exclude financial services from its scope, therefore, this provision would be applicable to this sector. Government bill 79/2000 stated that this provision is intended to improve competition benefiting consumers and to increase the openness of marketing and the amount and level of the information that must be supplied to support consumers’ decisions³²⁵.

As regards related case law, in *KKO:2006:6*, the Supreme Court of Finland emphasised that in order to ensure healthy price competition and consumers’ possibility to make intelligent decisions, it is essential that pricing principles and costs resulting from using a product are expressed in a way that is as clear, transparent and as comparable as possible³²⁶. Although the case concerned the marketing of telecommunications services, there is no reason to believe that the reasoning could also not be applied to retail financial services.

³²³ Unofficial translation, the text of this Act can be found in Finnish at <http://www.finlex.fi/fi/laki/ajantasa/2007/20070121>.

³²⁴ Text in English can be found at <http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf>.

³²⁵ See Consumer Ombudsman Guidelines, Loyalty Marketing and Loyalty Programmes, at <http://www.kuluttajavirasto.fi/File/33ef0318-72dd-418e-966a-bbica8a27740/Loyalty+marketing+and+loyalty+programmes+2007+.pdf>.

³²⁶ The text of the judgment in Finnish can be found at: <http://www.finlex.fi/fi/oikeus/kko/kko/2006/20060006>.

Next to these provisions, there are other soft-law and self-regulatory measures which suggest that the Finnish authorities and business are well aware of possible dangers of combined offers and loyalty programmes.

Bundling of financial products from an antitrust perspective was addressed in the study by the Nordic competition authorities on competition in Nordic Retail Banking³²⁷. According to the Finnish Consumer Agency, loyalty discounts have peaked in Finland, and bundling still seems to be a problem for competition³²⁸. In 2007, the Consumer Ombudsman issued guidelines on loyalty marketing and loyalty programmes³²⁹. These guidelines are applicable to all sectors of economy, including the financial sector³³⁰. The document recognizes that loyalty marketing and programmes might be problematic from the viewpoint of competition and consumer protection, as they might not lead to the most efficient decisions by consumers. The document further tries to evaluate loyalty marketing from the viewpoint of fairness. It states that such programmes might infringe the Consumer Protection Act if they are complex enough to mislead consumer decisions. The document also analyzes loyalty programmes. The Consumer Ombudsman is mainly concerned by their misleading nature. It presents various examples when the presentation of the information should be deemed crucial for a consumer.

Another relevant document in this context could be Standard 2.2 of the Finnish Financial supervisory authority³³¹. This document summarized various regulations applicable to the provision of financial services. This document mainly addresses possible information deficiencies in marketing of financial services. The Recommendations in Section 5.2 sets the main principles for marketing activities such as honest and professional business conduct, avoiding aggressive commercial strategies, proper disclosure of all relevant data, etc. This document only marginally touches on tying and bundling practices in Section 6.4, which relates to investment services. Structured bonds and share-linked deposit are mentioned, although the Section does not discourage such a combination: it only requires providing impartial advice to consumers.

Moreover, a self-regulatory measure was adopted by the Finnish Bankers' Association (Good Banking Code).³³² This provision expressly states that the consumer is free to choose the services which he or she wishes to acquire and should not be hindered to change provider of banking services. However, the

³²⁷ A copy of this report can be downloaded at (in English): http://www.kilpailuvirasto.fi/tiedostot/Nordic_Retail_Banking.pdf (last visited on 17 February 2009).

³²⁸ The Report, p.89.

³²⁹ Id.

³³⁰ In the section on consumer mobility it even refers to two cases in the financial sector.

³³¹ The text in English can be found at: <http://www.rahoitustarkastus.fi/NR/rdonlyres/99484DA8-4A72-4813-8593-D5FF9DED14AF/o/22std1.pdf>.

³³² The text in English can be found at http://www.fkl.fi/asp/ida/download.asp?prm1=wwwuser_fkl&docid=11359&sec=&ext=.pdf.

Code does not specify if members of the Association must adhere strictly to these rules.

Finnish law contains two main legal instruments as regards unfair commercial practices.

The Consumer Protection Act applies to offering, selling and other marketing of consumer goods and services by business to consumers. It is aimed to prevent undue influence on the decisions of consumers to guarantee the provision of essential information by tradesmen.

The Unfair Trade Practices Act, however, aims at the protection of traders and of fair trading as a whole and thus to prevent commercial practices which may harm competition and competitors.

Each of the Acts contain a general clause prohibiting unfair commercial practices: however, in the Consumer Protection Act unfairness is assessed with respect to consumers; whereas in the Unfair Trade Practices Act unfairness is referred to other tradesmen. This way, both consumers and SMEs are potentially protected against aggressive commercial conduct.

Table 11 – Finnish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Finland	Only if resulting from a contract term	Only if price of individual products is not clearly indicated	Only exclusive agreements resulting from contract terms	Allowed	National rules and rules implementing the UCPD (consumers and SMEs)	National rules and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.5

In Finland, tying, pure bundling and exclusivity agreements are prohibited by the law only if they result from a standard contract term. Mixed bundling, preferential agreements and conditional sale practices are generally allowed. Nonetheless, legislation, recommendations and self-regulatory mechanisms attach specific requirements on these combined offers, resulting in better transparency and comparability.

Aggressive sales practices, pressure/inertia selling and – depending on judicial interpretation – churning and steering are covered by the Consumer Protection Act and in the Unfair Trade Practices Act: as such, they are not limited to consumers, but also protect SMEs.

4.2.1.6 France

4.2.1.6.1 Combined sales in general consumer protection legislation

France was one of the first Member States of the EU to adopt legislation to limit the use of tying and bundling practices. In particular, Article L 122-1 of the Consumer Code (which dates back to 1978) explicitly prohibits tied sales, stating that *“it is prohibited to refuse to sell a product, or supply a service, to a consumer without a legitimate reason and to make the sale of a product subject to the purchase of a minimum quantity or to the accompanying purchase of another product or another service as well as making the provision of a service subject to provision of another service or to the purchase of a product”*³³³. Moreover, the sales of services with free gifts are prohibited save for small gifts by the virtue of L 212-35 of the Consumer Code³³⁴.

Article L 122-1 addresses tying, pure bundling and exclusive agreements, but does not cover preferential agreements and – contrary to the Belgian rule – mixed bundling. Sales with rebates are allowed by the Consumer Code but are nevertheless strictly regulated by other pieces of legislation as to their advertisement, announcement or other aspects. The banking sector however benefits from particular exceptions to the above-mentioned prohibition (see section below).

Similar to what occurred in Belgium (see Section 3.2.1.1 above), in France too the compatibility of the ban on tied sales with the provisions of the UCPD has been subject to attention. On 14 May 2009, the Court of Appeals of Paris has overturned a judgment by the Commercial Court, which found Orange guilty of tied sale practices and unfair competition in its dispute with its competitors Free and SFR³³⁵. The latter complained that the operator was making subscription to its channel Orange Sports dependent on a subscription to Orange’s broadband Internet access. Having been ordered in the first instance to stop the practice, Orange referred before the Court of Appeal to the European Court of Justice judgment related to the *VTB-VAB* and *Sanoma* cases, (see Sections 2.3.2.3 and 3.2.1.1 above). In the light of this jurisprudence, the parties called on the Court of Appeals to interpret the national legislation, and more specifically Article L. 122-1 of the Consumer Code. The Court found that the ECJ decision of 23 April 2009 was applicable to the present dispute, and noted that Article L. 122-1 of the Consumer Code was incompatible with the scheme instituted by the UCPD in that it prohibits tied offers generally and preventively, regardless of any check on their unfair nature with regard to Articles 5-9 of the UCPD. The court, contrary to the claims made by SFR and Free, held that the

³³³ Text in English: <http://195.83.177.9/code/liste.phtml?lang=uk&c=61&r=2133>.

³³⁴ The text of English version reads: *“All sales or offers for sale of goods or any other provision or offer to a fixed period, to a bonus consisting of products, goods or services, if these are identical to those forming the subject of the sale or the service provision, are prohibited. This provision does not apply to small objects or low value services or samples”*.

³³⁵ Court of appeal of Paris (centre 5, chamber 5), 14 May 2009, France Telecom and Orange vs. Free, Neuf Cegetel-SFR and LFP

mere fact of the consumer having to take out a subscription to Orange broadband in order to have access to the Orange Sports channel did not meet the definition of constraint, also because all operators on the market use tied sales as a way to win customers. What was essential according to the Court, within the meaning of the UCPD, was that the subscriber was free to not take up the subscription, which was not contested in the present case. Since France Orange could not be held to have infringed Article L. 122-1 of the Consumer Code, as interpreted in the light of the 2005 Directive, the judgment was overturned.

4.2.1.6.2 *Legislation in the field of retail financial services*

In 2005, the Monetary and Financial Code was amended to incorporate Article L312-1-2.³³⁶ This provision directly addresses the issue of bundling and prohibits selling or offering “*for sale products or services in a bundle except when bundled products or services included in that bundle can be purchased individually or are inseparable.*” This provision is located in the section on current accounts and deposits, in this way prohibiting bundling of these products with other financial services. This prohibition is subject to a *de minimis* rule which is set by the Minister of Economy. Unfortunately, in the absence of administrative practice or case-law it is difficult to see if this provision could be given a broader reading possibly also covering other practices.

Although sales with rebates are allowed by the Consumer Code, the banking sector benefits from particular exceptions to the above-mentioned prohibition. According to L 321-9 of the Consumer Code, the lender can offer the borrower or ask the latter to take part in a group insurance policy that has been taken out with a view to guarantee uninterrupted payments (otherwise – payment protection insurance, PPI). However, this provision will be soon abolished. The new *Loi Lagarde*, which carries the name of current Minister for Economic Affairs, Finance and Employment, makes it illegal to bundle mortgages together with PPI from 1 January 2010³³⁷. The measure also tackles information deficiencies such as the cost of insurance policies, information of coverage in case of death, illness or unemployment. The main reason for such legislation is the fact that currently getting a mortgage is very dependent on subscribing to an insurance policy with the same bank.

4.2.1.6.3 *Other potentially unfair practices*

The French Consumer Code includes an extensive section on “Unsolicited goods or services” (Article L 122-3). The Article states that the provision of goods or services without a prior order from the consumer is forbidden if it is linked to a request for payment. No obligation may be imposed on a consumer who

³³⁶ For full-length text of the document, please refer to (in French): <http://195.83.177.9/code/liste.phtml?lang=uk&c=25>.

³³⁷ See <http://www.liberation.fr/economie/0101268544-credit-immobilier-les-emprunteurs-seront-libres-de-choisir-leur-assurance>.

receives goods or services in breach of this prohibition, and the professional must return any sums he has wrongfully received without the consumer's express prior consent.

Article L122-8 deals with “Abuse of weakness” and prescribes that “*Anyone who may have taken advantage of a person’s weakness or ignorance in order to get them to subscribe, by means of home visits, to cash or credit obligations in whatever form these may take, shall be punished by five year imprisonment and a € 9,000 fine or just one of these penalties, where circumstances indicate that this person was not in a position to assess the impact of the undertakings given or to detect the ruses or tricks employed to convince him/her to subscribe to them or show that said person has been subjected to duress*”. Article L122.9 specifies that the provisions of article L. 122-8 are applicable, under the same circumstances, to undertakings obtained (i) subsequent to canvassing by telephone or fax; (ii) subsequent to personalised soliciting, without said soliciting necessarily being by name, to visit a place of sale, taking place at home and accompanied by the offer of particular benefits; (iii) upon the occasion of meetings or excursions organised by the person committing the offence or to his advantage; (iv) when the transaction was carried out in places not intended for the marketing of the goods or services proposed or within the scope of fairs or shows; or (v) when the transaction was concluded in an emergency making it impossible for the victim of the offence to consult one or more qualified professionals, third parties or to the contract. This provision may be applicable to cases of pressure selling, churning and steering.

Conditional (single-product) rebates are tackled only as regards their advertising, and might be addressed by Consumer Code provisions that ban making the sale of a product conditional upon the purchase of a minimum quantity, although this would require an interpretation of the rule. To our knowledge, no provision exists as regards the obligation to have the salary paid into the current account, as a standalone obligation or as an obligation to access a mortgage loan.

Aggressive commercial practices may be covered by legislation transposing the UCPD, and in particular, churning and steering, depending on the interpretation that will be given by national courts. In particular, the new Articles L 122-12, L 122-13, L 122-14 and L 122-15 introduce severe fines for aggressive commercial practices, which range from the imprisonment for up to 2 years, a fine of up to €150,000, the interdiction from commercial activities for up to 5 years and criminal fines mentioned at Articles 131-139 of the Criminal Code.

Table 12 – French legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
France	Banned (only for consumers). Sectoral rules prohibit tying with current accounts and deposits, and mortgage with PPI	Allowed	Exclusive agreements are prohibited (consumer law only)	Rules on advertising. Possibly tackled also by Consumer Code	National law and rules implementing the UCPD (only consumers)	National law and rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)

FINDING #4.6

In France, the Consumer Code prohibits tying, pure bundling and exclusive agreements, but does not cover preferential agreements and mixed bundling. These provisions have been considered as incompatible with the UCPD. However, sectoral legislation prohibits the tying of current accounts and deposits with other financial services. In addition, the *Loi Lagarde* makes it illegal to bundle mortgages together with PPI from 1 January 2010.

Conditional (single-product) rebates are tackled only as regards their advertising, and might be addressed by Consumer Code provisions that ban making the sale of a product conditional upon the purchase of a minimum quantity, although this would require an interpretation of the rule.

No provision exists as regards the obligation to have the salary paid into the current account, as a standalone obligation or as an obligation to access a mortgage loan.

The Law of 5 August 2008 on the modernisation of the economy, by transposing the UCPD, strengthens national provisions that already covered aggressive and misleading commercial practices, including pressure and inertia selling, churning and steering.

In general, the provisions analysed only cover consumers, not SMEs.

4.2.1.7 Ireland

The case of Ireland merits particular attention as the Irish legal system contains provisions directly addressing tying and bundling practices in the financial sector. Before the adoption of the 2006 Consumer Protection Code for Financial Services, the 1995 Consumer Credit Act prohibited the tied offer of mortgage loans with other services as well as preferential and exclusive agreements with subsidiaries or associated businesses. Section 124 prescribes that “*A mortgage lender shall not impose a requirement in regard to the nature and extent of insurance on mortgaged property which differentiates as between insurance effected through the agency of the mortgage lender and insurance otherwise effected.*”

Section 126 of the same Code however requires mortgage lenders to arrange a life insurance policy for the event of the borrower’s death³³⁸.

Section 127 further provides that “*A mortgage agent shall not make or offer to make to any person, or arrange or offer to arrange for any person, a housing loan which would be subject to a condition that any financial services,*

³³⁸ “Subject to the provisions of this section, a mortgage lender shall arrange, through an insurer or an insurance intermediary, a life assurance policy providing, in the event of the death of a borrower before a housing loan made by the mortgage lender has been repaid, for payment of a sum equal to the amount of the principal estimated by the mortgage lender to be outstanding in the year in which the death occurs on the basis that payments have been made by the borrower in accordance with the mortgage, such sum to be employed in repayment of the principal”.

conveyancing services, auctioneering services or other services relating to land which that person may require, whether or not in connection with the loan, shall be provided by the agent or through a subsidiary or other associated body of such agent". In addition, "Where, in connection with the making or arranging of a housing loan, more than one service is made available by a mortgage agent or one or more of his subsidiaries, the agent shall not, and shall ensure that each of his subsidiaries does not, make the services available on terms other than terms which distinguish the consideration payable for each service so made available; nor shall any of the subsidiaries make the services available on terms other than terms which make that distinction".

Hence, this provision prohibits tying (with the exception of mortgage plus life insurance), bundling (if the price of each product is not specifically indicated), as well as preferential and exclusive agreements, when a housing loan is involved. The provision is limited to consumer credit, and thus does not cover SMEs.

In 2005, the Irish national competition authority conducted a sector inquiry into the Irish retail banking sector. The inquiry did not specifically address tying and bundling issues directly³³⁹; however, it identified a number of market structure deficiencies and possible associated problems. Some recommendations were made to financial regulation authorities, which had some influence in adopting a comprehensive set of consumer protection rules in the financial sector. As a result, in 2006 the Republic of Ireland adopted a new Consumer Protection Code for Financial Services³⁴⁰. Rule 4 of Chapter 2 in the Code reads: "*A regulated entity must not make the sale of a product or service contingent on the consumer purchasing another product or service from the regulated entity*". This single provision can be considered as the most comprehensive and far reaching legally enforceable direct ban on tying and bundling of financial services in the whole EU. It is important to recall that the application of this prohibition is not limited to particular types of services and in this sense it is very different from the French sectoral legislation. In addition, the General Principles of the Code apply to all 'customers', which means that not only consumer, but also SMEs, are covered by this rule³⁴¹. Also in the other provisions of the Code, consumer always includes incorporated bodies having an annual turnover of €3m or less in the previous financial year.

One of the main aims of this provision is to protect consumers from being bound to purchase another product or service with the same entity. This would without any doubt cover tying and bundling, while the provision would not cover other practices such as preferential agreements and rebates.

³³⁹ The relevant documents can be found at <http://www.tca.ie/templates/index.aspx?pageid=936>.

³⁴⁰ For access to the document, please refer to the following website: <http://www.financialregulator.ie/processes/consumer-protection-code/documents/consumer%20protection%20code.pdf>.

³⁴¹ See Financial Regulator, Consumer Protection Code clarifications, information paper, July 2007, available at <http://www.financialregulator.ie/processes/consumer-protection-code/Documents/Consumer%20Protection%20Code%20Clarifications%20Document.pdf>.

However, it was soon realized that not all forms of financial product tying are equally harmful. In June 2008, the Financial Regulator (the entity responsible for proper enforcement of the Code) clarified the requirements to open a feeder (or current) account with a mortgage lender.³⁴² The clarification applies solely in the context of the Consumer Protection Code and is without prejudice to any court ruling which might be taken while interpreting relevant provisions of Consumer Credit Act. The practices will not be considered as harmful for the consumer if the following set of conditions is met:

1. The consumer is not obliged to use the account for purposes other than facilitating payments to the product concerned,
2. There are no charges for using the account for the purpose for which it was established,
3. Where additional facilities are available on the account, they are optional and must be requested by the consumer, and
4. These conditions are communicated clearly to the consumer.

These recommendations narrow down the general prohibition contained in the Consumer Code for Financial Services, and generally lead to considering that the tying of current accounts with mortgages is allowed, if the above mentioned conditions are met.

In addition, the Consumer Code for Financial Services mandates that all service providers behave in good faith, and as such mirrors the provisions of the UCPD. Regulated financial services providers are expected to act honestly, fairly and professionally and with due skill, care and diligence in the best interests of their customers and the integrity of the market. The principles of good conduct are designed to ensure that financial services entities understand the requirement of customers, make full disclosure of all material information, avoid conflicts of interest, ensure that the product is appropriate for the customer and have proper procedures in place to ensure compliance with the Code. In this respect, the Code also addresses issues such as aggressive commercial strategies, and contains sections on unsolicited contact (Chapter 2, §§32-38) and unsolicited credit facilities (Chapter 4, §§1-2). The Consumer Code includes in addition a requirement of “suitability” of the offers to consumer needs, which can cover all these practices (Chapter 2, §30).

The Consumer Protection Code also deals with the combined offer of a mortgage loan and payment protection insurance. The Code specifies that where a regulated entity offers payment protection insurance in conjunction with a loan, the initial repayment estimate of the loan advised to the consumer must be exclusive of the payment protection premium; a combined application form can be used, provided that all information relating to payment protection insurance is contained in a separate section and this section also contains a requirement for the consumer to sign in order to apply for payment protection insurance; and a text box indicating that the payment protection insurance is optional must

³⁴² See <http://www.financialregulator.ie/processes/minimum-competency-req/Documents/Addendum%20to%20Minimum%20Competency%20Requirements.pdf>.

be included in the application form immediately above where the consumer is required to sign.

The Consumer Protection Act (n. 19 of 2007) implements the UCPD in Ireland, and thus covers aggressive commercial practices such as pressure and inertia selling, and possibly churning and steering, depending on the interpretation that will be given by national courts.

Table 13 – Irish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Ireland	Generally Banned. Tying mortgage loans with PPI and current accounts is allowed but regulated	Allowed (but price of each product must be clearly indicated)	Exclusive or preferential agreements are prohibited in the case of mortgage lenders	Allowed (but price of each product must be clearly indicated)	National law and rules implementing the UCPD (consumers and SMEs)	National law and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

FINDING #4.7

In Ireland, the Consumer Protection Code for Financial Services generally prohibits the tied sale (and pure bundling) of financial services, but allows mixed bundling, provided that the price of each product is clearly indicated. Some forms of tying are explicitly allowed and regulated: these include the joint offer of mortgage loans and current accounts; and mortgage loans with payment protection insurance, which is also explicitly required by the 1995 Consumer Credit Act. The latter Act also prohibits preferential and exclusive agreements when applied by mortgage lenders.

As regards conditional sales, we found no provision related to single product rebates (other than the need to clearly specify the price) and the obligation to pay salary in the current account.

Aggressive commercial strategies are covered by the Consumer Code (whereas the general principles are not limited to consumers) and also by the 2007 The Consumer Protection Act (n. 19 of 2007), which implements the UCPD in Ireland.

4.2.1.8 Hungary

At the end of 2005, the Hungarian competition authority (GVH) concluded a sector inquiry into the Hungarian retail banking sector. The GVH found that one bank had a 52% market share of the mortgage market. However, in view of considerable market entry, intense competition and the leading bank's declining market share, the GVH found that the bank did not hold a dominant position in the Hungarian mortgage market. However, the GVH found that tying was a common practice which often lacked economic or commercial justification, and was mainly meant to raise the profits of the banks. The GVH thus recommended the financial supervision authority to adopt *ex ante* rules which would tackle these issues.

In 2006, the Hungarian Financial Supervision Authority (HFSA) adopted the Recommendation on the principles of retail crediting provision of preliminary advice to clients and consumer protection (No. 9 of 2006 (XI. 7))³⁴³. It is very important to note that this document does not legally bind financial service providers, and as a result tying and bundling practices are not prohibited in Hungary.

Paragraph 13 of the Recommendation states that *“Financial institutions shall not attach any other product or service to the contracted loan product as being mandatory, which by its nature does not belong to the given loan product, furthermore, the use of which cannot be justified with fair and rational market reasons (such as bank card with an annual fee). The financial institution should leave the use of such linked products / services to the clients’ discretion and should not force clients to undertake unnecessary obligations. Exceptions are when financial institutions make the use of some linked product mandatory proportionately to and as a prerequisite of providing certain benefits or discounts”*.

As can be seen, the provision covers a very broad array of services. At the same time, the document recognizes that in certain instances tying and bundling can be objectively justified, as in the case of clearly mentioned discounts or other benefits. Accordingly, this recommendation challenges tying and pure bundling unless justified with fair and rational market reasons, and allows mixed bundling with a financial advantage to the client.

Although this provision is not legally binding, the HFSA does supervise and monitor whether the financial organizations follow the principles of the recommendation. However, the HFSA cannot impose fines to the service providers if the Authority gets information about such an activity.³⁴⁴ Nonetheless, the HFSA aims to transpose the principles embodied in the Recommendation into the Hungarian legally binding body of law (by preparing new or amending existing laws). There are reasonable grounds to believe that in the future the above-mentioned non-binding provision of the Recommendation might be transposed into legally binding legislation.

In addition, the Hungarian Competition Act dedicates a chapter to the unfair manipulative activities, and in general it prohibits deceiving consumers in the context of economic competition³⁴⁵. The Act specifies two behaviours that should not be allowed in any circumstances: (i) deception of consumers; and (ii) unjustified business methods that restrict the freedom of consumers’ choice. In 2007 the Competition Council of the Hungarian Competition Authority conducted altogether 158 processes. More than 50% of these cases were in connection with the deception of consumers, and more than 50% of the cases were related to the banking sector.

³⁴³ For more information please refer to (in English): http://www.pszaf.hu/en/left_menu/regulation/pszafen_recommendations/pszafen_recommendations_20061204_1.html.

³⁴⁴ None of the HFSA cases are related to tying and bundling practices.

³⁴⁵ See Horváth, *Consumer Protection in the Hungarian Competition Law*, at http://www.law.muni.cz/edicni/sborniky/cofola2008/files/pdf/civil/horvath_szofia.pdf.

Finally, the Hungarian Parliament implemented the UCPD in 2008, and consequently practices such as unsolicited offers, pressure/inertia selling, churning and steering are addressed implicitly in Hungarian law.

Table 14 – Hungarian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Hungary	Banned, but only through soft law. Allowed only if there are fair and rational market reasons	Allowed (with financial benefit)	Allowed	Allowed (subject to misleading advertising rules)	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

FINDING #4.8

In Hungary, tying and pure bundling are discouraged through soft law, unless justified with fair and rational market reasons. Mixed bundling with a financial advantage to the client is indeed allowed. Preferential and exclusive agreements are possible (if they provide a benefit or discount), provided that the customer has wilfully selected those offers.

Rebates and promotions are allowed, subject to the provisions on misleading advertising and deception of consumers existing in the Competition Act.

Finally, aggressive commercial strategies are covered by the transposition of the UCPD.

4.2.1.9 Poland

4.2.1.9.1 General civil law

In Poland, tying and other potentially unfair practices are regulated under general civil law. However, we included Poland in the group of countries directly regulating tying and other potentially unfair practices because the practices in question have attracted a particular interest of market supervisory authorities, and it is evident that cross-selling in the financial sector is directly discouraged by various administrative and judicial bodies. In numerous instances, Polish authorities have addressed tying and bundling in the financial sector which shows that, even in the absence of specific legislation, these practices are addressed directly and rigorously discouraged.

According to the Polish Civil Code (the Act of 23 April 1968 – the Civil Code; Journal of Laws of 1968 No.16, item 93 with further amendments), making the conclusion, content or performance of one contract conditional upon the conclusion of another contract, not directly connected with the former one, is a prohibited contract clause. The relevant provision in the Code reads:

“Article 3851. § 1. Provisions of a contract concluded with a consumer which have not been individually agreed upon shall not be binding if, contrary to good practices, they set forth the consumer’s rights and obligations in a way that is flagrantly infringing his interest (prohibited contract terms). The above does not apply to provisions defining the main obligations of the parties, including price or remuneration, if they were formulated in an unequivocal way. (...)”

Article 3853. In the event of doubt, it shall be deemed that unfair contract terms are in particular provisions which:

(...)

7) make the conclusion, content or performance of the contract conditional upon the conclusion of another contract, which is not directly connected with the contract containing the provisions under review”.

It should be noted that the provision contained in Article 3853(7) is applicable only when the contract is not individually negotiated, as individual negotiations of contractual terms would waive the possibility to rely on the above-mentioned provision.

There is also case-law in enforcing the above-mentioned provision. In particular the ruling of the District Court in Warsaw – Court of Competition and Consumer Protection (file no. XVII AmC 101/04) declaring contract clauses tying obtaining a (students) loan and possessing a bank account as prohibited. Such a type of clause is now incorporated in the Register of Prohibited Clauses.³⁴⁶ According to procedural rules, once District Court of Warsaw has ruled that a particular clause is unfair it is entered in the Register and cannot be practiced. The OCCP then can pursue undertakings practicing such clauses and impose an administrative fine of up to 10% of undertakings’ revenue.

We observe that because of very wide prohibition established in the Polish civil code, some of the practices can be dealt with on a case by case basis through judicial scrutiny. However, in our opinion this should not pose much of a problem because the Polish authorities already showed serious engagement in challenging clauses containing tying and bundling (including mixed bundling).

4.2.1.9.2 Initiatives in the field of financial services

The Office of Competition and Consumer Protection (OCCP) recently probed the banking sector and gave particular recommendations *inter alia* in the case of tying practices. The enquiry carried out by OCCP in 2008³⁴⁷ screened standard contracts concerning mortgage loans. As a result, based on the OCCP recommendations, the banks concerned voluntarily decided to abandon clauses

³⁴⁶ Register of Prohibited Clauses, items no. 1140-1146.

³⁴⁷ See http://www.uokik.gov.pl/en/press_office/press_releases/art116.html.

tying obtaining a mortgage loan and possessing a bank account in a given bank. As reported to us, a verification of the banks' compliance is in progress.

The Polish Financial Supervision Authority was also active in this field. This institution has the competence to deal with individual cases and can issue "soft" recommendations. In one of its cases the Authority had to deal with practices of Nordea Bank which bundled time deposits together with current accounts (paid account). The authority in this case discovered that tying and bundling are widely practiced in the retail banking sector. In particular, the Authority voiced its concerns about:³⁴⁸

- tying in the banking sector (such as bank deposit with current account, bank deposit with debit card or current account together with pension account (so-called pension scheme).
- tying of banking and investment services (*e.g.*, bank deposit plus investment funds, current account plus securities account, current account plus investment funds).
- tying of banking and insurance products (*e.g.*, credit card with compulsory card insurance, mortgage loan plus house/flat insurance as an obligation, current account plus insurance available by bank internet platform).

However, to date no legal rule has been enacted to specifically address these practices.

4.2.1.9.3 Aggressive commercial practices

Aggressive commercial practices were already partly tackled by the Act of 16 April 1993 on Combating Unfair Competition in Poland. In particular, misleading and an aggressive advertising are considered to be 'acts of unfair competition' (czyny nieuczciwej konkurencji). Article 16.1 mentions advertising misleading the customer and thus capable of influencing his decision on whether to acquire a particular product or service, exploiting the feelings of the customers by causing fear, exploiting superstitions or naivety of children, making an impression of neutral information while in fact encouraging acquiring goods or services.

In any event, the Law on prevention of unfair market practices of 23 August 2007 implemented the UCPD in Poland: accordingly, both misleading and aggressive commercial practices, when addressed to consumers will be covered by this piece of legislation. This also implies that pressure or inertia selling, and – depending on the courts' interpretation – churning and steering may be challenges under these new provisions.

³⁴⁸ See http://www.uokik.gov.pl/en/press_office/press_releases/art72.html.

Table 15 – Polish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Poland	Banned by Civil Code only if products are unrelated	Allowed	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

FINDING #4.9

In Poland, tying and pure bundling are prohibited, unless the tied product is “related” to the tying one (as provided in the Civil Code). These practices are seen with disfavour by financial regulators and the competition authority.

However, practices such as mixed bundling, preferential or exclusivity agreements and rebates are not directly covered by Polish legislation, nor by policy initiatives of the FSA.

As regards aggressive commercial practices, the UCPD was transposed in 2007 in Poland with the law on the prevention of unfair market practices. Accordingly, aggressive commercial strategies such as unsolicited offers, pressure/inertia selling, churning and steering may be tackled by the transposing legislation.

Depending on the interpretation of the word “consumer” in Polish law – which is currently broader than the EU one³⁴⁹ – SMEs may also be covered.

4.2.1.10 Portugal

Portugal is another country that exhibits a rather strict legislative attitude towards tying, bundling and other potentially unfair commercial practices. First, general consumer protection legislation exists which prohibits the tying and bundling of goods and services in all sectors of economy. Second, tying is explicitly addressed by specific legislation relating to mortgage credit and insurance intermediation. Finally, the UCPD might play an important role in tackling aggressive commercial practices in the retail financial services sector.

³⁴⁹ See Sengayen, M. (2008), National Report on Poland, in the international survey on unfair commercial practices by the British Institute of International and Comparative Law, 2008, at http://www.biicl.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf.

4.2.1.10.1 General consumer law

The Portuguese consumer protection law (Law no. 24/96, of 31 July 1996, as amended by the Decree-Law no. 67/2003) features a very broad provision discouraging tying. This provision is found at Article 9(6) and reads as follows:

*“It is forbidden to the supplier or service provider to make the supply of goods or the rendering of a service dependent of the acquisition or the rendering of any other goods or services.”*³⁵⁰

It appears that this provision does not have any qualifying exemptions which would make some types of combinations possible. In this way, the provision is quite similar to Article 54 of the Belgian law on trade practices and consumer information and protection (see Section 3.2.2.1 below). This provision can possibly capture tying and pure bundling (but not mixed bundling).

4.2.1.10.2 Legislation in the field of financial services

Portuguese legislation prohibits making conditional the acquisition of mortgage upon acquisition of other types of financial services. Article 9 of the Decree-Law no. 51/2007, of 7 March (as amended by Decree-Law no. 88/2008, of 28 May) deals with tying and bundling situations in regard of mortgage credit. The provision is worded as follows:

*“Credit institutions are forbidden to make the conclusion of contracts under Article 1st of this Decree-Law dependent of the acquisition of other financial services or products.”*³⁵¹

By the virtue of Article 1, this Decree-Law is applicable to mortgages for acquiring, constructing and completing the works in permanent housing, or for rental and acquisition of land for construction of housing. The combination of these two provisions ensures very wide coverage and virtually would cover the most common mortgage types. Another provision of the same law aims to ensure that consumers are not locked-in to a particular service provider.

Article 3(2) potentially covers also mixed bundling with financial advantage (multi-product rebates) and reads as follows:

*“Credit institutions are forbidden to make the renegotiation of the credit dependent of the acquisition of other financial services or products.”*³⁵²

³⁵⁰ The provision in Portuguese is as follows: “É vedado ao fornecedor ou prestador de serviços fazer depender o fornecimento de um bem ou a prestação de um serviço da aquisição ou da prestação de um outro ou outros”

³⁵¹ The translation in unofficial, for precise wording please refer to the Portuguese version of this provision: “As instituições de crédito está vedado fazer depender a celebração dos contratos referidos no artigo 1.º deste decreto-lei da aquisição de outros produtos ou serviços financeiros”.

Another provision is found in Decree-Law no. 144/2006, of 31 July (as amended by Decree-Law no. 359/2007, of 2 November) which deals with insurance issues. This national measure sets out the conditions governing the taking up and pursuit of the insurance mediation activities. Article 31(g) prohibits for insurance intermediaries to tie consumers to particular insurance providers. This provision would successfully tackle also exclusive (not preferential) dealing. In particular, insurance intermediaries are expected:

*“not to impose the obligation to sign an insurance contract with a specific insurance undertaking as a condition in order for the customer to gain access to another good or service supplied.”*³⁵³

The above-listed provisions explicitly tackle tying, pure bundling, rebates and preferential or exclusive agreements in specific areas of financial services.

4.2.1.10.3 Aggressive commercial practices

The Decree-Law no. 57/2008, of 26 March 2008 implemented the UCPD in Portugal³⁵⁴. The Decree-law has a slightly different structure if compared to the UCPD, although the logic of the directive is followed very closely. Article 13 of this law prohibits the unsolicited provision of services. In case services are provided when they are not requested, the consumer might refuse to pay for them and the service provider would not be entitled to any form of restitution.

Table 16 – Portuguese legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Portugal	Banned by Civil Code. Also sectoral legislation on mortgage and insurance	Multi-product rebates are tackled in the case of renegotiation of credit	Only exclusive agreements in insurance	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

FINDING #4.10

In Portugal tying and pure bundling are prohibited by the general consumer legislation. In addition, sectoral legislation prohibits tied sales of mortgage loans and insurance products. Other provisions in sectoral legislation may be

³⁵² The provision in Portuguese is as follows: “Às instituições de crédito está vedado fazer depender a renegociação do crédito da aquisição de outros produtos ou serviços financeiros”.

³⁵³ The provision in Portuguese is as follows: “Não impor a obrigatoriedade de celebração de um contrato de seguro com uma determinada empresa de seguros como condição de acesso do cliente a outro bem ou serviço fornecido”.

³⁵⁴ The text of the law can be found at (in Portuguese): <http://dre.pt/pdfisdirp/2008/03/06000/0174701754.pdf>.

applied to mixed bundling with financial advantage (mortgage) and exclusive agreements (insurance).

The law transposing the UCPD explicitly bans unsolicited offers, and potentially covers pressure/inertia selling and – depending on the interpretation that will be provided by national courts – also churning and steering.

4.2.1.11 Romania

In Romania, Government Ordinance no. 99/2000 regarding the sale and advertising of products and services on the market expressly prohibits the “conditional sale”, defined as conditioning the sale of one product upon the purchase of a certain quantity of that product or the simultaneous purchase of a different product or service³⁵⁵. The provision of a service conditioned upon the provision of a different service or the purchase of a different product is assimilated to a conditional sale. The authority competent to investigate tying practices and apply sanctions under the aforesaid legal provisions is the National Authority for Consumer Protection. Additionally, the Competition Council has the possibility to apply Article 6 of the Competition Law, should the selling company be dominant, and impose fines if the conduct is abusive.

Therefore, tying is prohibited *per se* irrespective of the market share of the company involved into tying; on the other hand, bundling is normally permitted as it is a mere inducement rather than a compulsion to buy a product/service along with another product/service.

In addition, consumer protection legislation has some relevant provisions when goods and services are bought on credit: regardless of the solicited credit (consumer, mortgage, personal needs, etc.), professionals have the obligation to give consumers all the necessary information regarding the type of credit they demand. Second, the practices in question might be caught by the act that transposed the UCPD.

Article 15 of Law No.289/2004 regarding the legal framework of consumption credit contracts for consumers-natural persons separates the performance of borrower and seller of goods or services when the latter are bought on credit³⁵⁶. However, this law does not ban tying and bundling as such, nor they address other cross-selling, conditional sale or aggressive commercial practices.

Romania transposed the directive 2005/29/EC into its national legal system by adopting the Law on combating unfair practices of traders in relation to consumers and harmonizing regulations with the European legislation on consumer protection³⁵⁷. The basic test of unfairness is contained in Article 4 of this law. As in the case of most countries, this provision can potentially tackle tying and bundling practices, to the extent that they are found to be unfair to

³⁵⁵ See Musat (2009), *Romania*, in “international Legal Guide to Dominance”, available online at <http://www.iclg.co.uk/khadmin/Publications/pdf/2987.pdf>.

³⁵⁶ Republished in the Official Journal (Romania), 1st Part no.319/23.04.2008.

³⁵⁷ The text of the law can be found at (in Romanian): http://ec.europa.eu/consumers/rights/docs/transpos_laws_romania.pdf.

consumers according to the test of the UCPD. The same law, as already mentioned throughout this Section of the Report, can tackle aggressive commercial practices such as pressure and inertia selling and – depending on judicial interpretation – churning and steering.

Table 17 – Romanian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Romania	Prohibited <i>per se</i>	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.11

In Romania tying is prohibited *per se*, whereas mixed bundling is allowed, together with preferential and exclusive agreements, conditional rebates and other conditional sales practices provided they do not infringe competition rules and cannot be captured by the general test of the UCPD as transposed into national legislation. Aggressive commercial practices pressure/inertia selling, churning and steering are potentially dealt with by the national rules that transposed the UCPD in the Romanian legal system.

4.2.1.12 Slovakia

Tying and bundling practices are addressed in a very comprehensive manner in Slovakia. The regulation of tying and bundling is embodied in the general consumer protection law. Moreover, particular attention was devoted to the banking sector, where a self-regulatory scheme currently exists.

4.2.1.12.1 General consumer law

The relevant part of Article 4(3) of the Consumer Protection Act No. 250/2007 Coll. as amended implements the UCPD but also contains specific provisions on tying³⁵⁸. The provision specifies that the provider of a service in the financial sector “*must not tie the provision of a service to the provision of another service*”.

This provision is explained in greater detail in the position of the Ministry of Economy of the Slovak Republic and the Slovak Trade Inspection with regard to

³⁵⁸ The wording at hand was adopted on 9 May 2007 and has been effective since 1 July 2007. Article 4(3) was subject to amendment by Act No. 397/2008 Coll., adopted on 18 September 2008, effective since 1 November 2008. However, the cited part of the Article remained unaffected by the amendment.

tying goods and services in terms of the Consumer Protection Act No. 250/2007 Coll.³⁵⁹ The position makes it clear – in line with the definition adopted by the European Commission in its sectoral inquiry on retail financial services – that the bundling of products/services is not considered as tying if the product/service is available to consumers also separately³⁶⁰. The wording of this provision makes it perfectly applicable to the retail financial services sector.

The provisions listed above mainly address tying and bundling (but not mixed bundling). Arguably this would also include exclusive agreements, as the rule does not specify whether the tied product or service should be provided by the same seller.

4.2.1.12.2 Self-regulation in the retail banking sector

Under the exercise of its own competition advocacy, in 2007 the Slovak Anti-monopoly Office investigated the area of retail banking, held informal negotiations and warned banking institutions of negative impacts of the practice of tying banking products on the competitive environment³⁶¹. As a result, the banking industry agreed to be bound by a self-regulatory Code of Conduct. The Slovakian Code of Conduct, though non-binding, is strictly observed and as such comes very close to producing the effects of binding legislation.³⁶²

In particular, Article 3.8 of the Code of Ethics of the Slovak Banking Association, which was added to the Code of Ethics with effect from 1 January 2008, reads as follows: “[The member banks] will not tie the provision of a financial service to the provision of another financial service.” This rule has one exemption. Offering of the financial services in a package would be allowed if it is convenient for the customer. Accordingly, it could be possibly argued that consumers should be duly informed that they are being offered a combination of services. This provision potentially covers tying and pure bundling, but not mixed bundling.

4.2.1.12.3 Aggressive commercial practices

Other unfair practices such as unsolicited offers, pressure/inertia selling, churning and steering are potentially covered by the Slovak Law that implemented the UCPD in 2007. They were only partly covered by previous legislation, as consumer protection from unfair practices in Slovakia has been

³⁵⁹ This position is undated, located on the website of the Slovak Trade Inspection (in Slovak): <http://www.soi.sk/files/documents/poradna/rady-podnikatelom/viazanie-tovarov-a-sluzieb.rtf> (last accessed on 17 February 2009).

³⁶⁰ The prohibition of Art 4(3) is nonetheless limited by some exemptions: “a) when the service provider provides the services concerned also severally and b) tying of the services is caused by technical impossibility of the provision of a single service.”

³⁶¹ Please, see the yearly report of Slovak national competition authority (in particular – Chapter 6.2 for reasoning (in English)): <http://www.antimon.gov.sk/files/30/2008/VS2007.pdf>.

³⁶² M.Gerhardt, Codes of conduct in the European banking sector, ECRI Survey, October 2008, the text can be downloaded on: http://www.ecri.be/new/system/files/ECRI_Survey_CodesOfConduct.pdf.

inserted in a general framework of competition protection, and accordingly covered practices that could harm competitors as well as consumers. As a matter of fact, Slovak Commercial Code (like the Czech one) does not demand the violation of *bonos mores* in general, but of the *bonos mores* of competition. This has been reportedly been interpreted in the caselaw as covering potentially relevant practices, such as boycott and economic discrimination, price advantages and other consumer-catching methods³⁶³.

Table 18 – Slovak legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Slovakia	Banned by Civil Code. Also by the Code of Ethics in the banking sector	Allowed (with financial benefit to customers)	Exclusive agreements	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

FINDING #4.12

In the Slovak Republic, tying, pure bundling and exclusive agreements are prohibited by the general consumer law.

Mixed bundling with financial advantage to the customer is allowed both by general consumer law and by the Code of Ethics adopted by the Banking sector.

Preferential agreements are allowed, together with single-product rebates and other conditional sale practices.

Aggressive commercial practices such as pressure and inertia selling are now covered by the Law that implemented the UCPD.

As regards churning and steering, the treatment of these practices will depend on the interpretation that will be given by national courts.

4.2.2 Group 2 – Countries where no provision on tying exists, and other unfair commercial practices are addressed through general consumer legislation and/or the transposition of the UCPD

Member States that belong to this group have not addressed tying and bundling as specific problems either in general consumer protection laws, or in legislation on retail financial services. Therefore, for the purposes of the present study it is considered that potentially unfair commercial practices are addressed only indirectly, through enforcement of legislation which implements a number of

³⁶³ See Malacka, M. (2008), *Slovak Republic*, in the international survey on unfair commercial practices by the British Institute of International and Comparative Law, 2008, at http://www.biiicl.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf.

EU legislative measures, and in particular the UCPD, as explained in Section 4 above.

This is why we will pay especially close attention to the UCPD, which – as already argued – potentially addresses aggressive commercial practices. Implementation of other EU legislation if needed is analysed as well, where appropriate. Moreover, where available we look also at the enforcement of basic consumer protection principles such as consumer freedom of choice. Such principles might have an influence for tying and bundling practices as they would ensure that consumers can choose one service even if they have been offered a bundle of services.

Countries in this group include Austria, the Czech Republic, Estonia, Germany, Greece, Italy, Malta, Latvia, Lithuania, the Netherlands, Slovenia, Spain, Sweden and the UK.

4.2.2.1 Austria

Austria does not have specific legislation which tackles tying, bundling and other potentially unfair commercial practices. In more general terms, unfair competition is regulated by the Federal Act Against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb 1984 – UWG*).

Several provisions of this Act are relevant for our analysis. First, Article 1(1) of the Act defines which terms must be considered as unfair. Namely, it prohibits exercising any actions which would impair competition in a non-negligible way and hurt competitors (para. 1 of Article 1(1)) or would distort the commercial behaviour of the average consumer and go against professional diligence (the main test of the UCPD). The law further specifies what should be regarded as misleading practices (Article 2(1)). Another very important provision of *UWG* is embodied in Article 9 which prohibits promising gifts (give-aways) when dealing with consumers and other entrepreneurs which reads as follows:

“9a (1) An injunction or compensation can be sought against anyone

1. who, for the purposes of competition in commercial dealings, announces in proclamations or other communications which are destined for a wider group of people that he will provide consumers with give-aways along with goods or services, or offers, announces or provides with give-aways next to periodical print work, or

2. who, for the purposes of competition in commercial dealings, offers, announces or provides give-aways to entrepreneurs.

This applies as well to cases in which the fact that the give-away is free of charge is disguised by lump sum prices for goods or services, by a disguised price for the give-away or is disguised in any other way.”

The provision is also applicable when the gratuitous nature of such gifts is disguised by inclusive prices of goods and services, by fictitious prices for bonus

or by other ways and means. However, the Law in the next chapter also specifies what should not be considered as bonus (accessories of goods, merchandise samples, advertising articles, low-value gifts etc). Anyone engaging in the practices of Article 9 can be sued for a cease-and-desist order and payment of damages.

In addition, under Article 879 of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) any contract infringing *boni mores* will be deemed void. If general terms and conditions which form part of a contract contravene a statutory provision or are contrary to public policy, the claimant can sue for injunction under Article 28a of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz*).

Finally, in 2007 Austria transposed the UCPD with the *Bundesgesetz, mit dem das Bundesgesetz gegen den unlauteren Wettbewerb 1984 - UWG geändert wird (UWG-Novelle 2007)*. This law is codified in the UWG, which contains a general clause (§ 1 UWG) and provisions on specific issues (§§ 2 onwards UWG) as well as an authorization of more detailed regulations (§§ 31 (2) and 3 2 UWG). The UWG protects fairness in competition as a whole. Although it is not specifically aimed at protecting consumers, the modern view of this statute is that it has a protective function in B2C relationships, at least if they have an implication on competition between businesses³⁶⁴.

Table 19 – Austrian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Austria	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	National rules and rules implementing the UCPD (consumers and SMEs)	National rules and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.13

In Austria, tying and bundling, preferential or exclusive agreements and conditional sale practices are allowed unless they can be challenged under the legislation implementing the UCPD.

Aggressive commercial practices are tackled by the legislation implementing the UCPD, including pressure and inertia selling and – depending on future judicial interpretation – churning and steering.

³⁶⁴ See Budaite and Van Dam (2008), *The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation*, in: Christian Twigg-Flesner a.o. (eds), *The Yearbook of Consumer Law 2008* (Ashgate, 2008), p. 107-139.

4.2.2.2 Czech Republic

In the Czech Republic, no specific rules on tying or other cross-selling or conditional sale practices are found. There is, as in many other legal systems, a general provision in the Czech Civil Code, which ensures fair dealing in civil relationships. According to Article 3(1), “*The execution of rights and obligations which flow from civil relationship must not interfere without a lawful cause into the rights and lawful interests of persons concerned and must not be contrary to the good manners (boni mores)*”³⁶⁵. This provision is very broad and protects not only consumers (natural persons) but also undertakings.

The Act on consumer protection (n. 64/1992) bans (i) the discrimination between consumers; and (ii) misleading the consumer. Special provisions regulating aggressive practices do not exist in Czech law. Protection against such practices is possible only by applying the general clause (§ 44(1) ComC) or general provisions of the CC setting the essential requirements for contracts (§ 37(1) CC) or conflict with *boni mores* (§ 39 CC).

The Czech Republic fully transposed directive 2005/29/EC by changing the Law for the protection of consumer.³⁶⁶ Article 4 of the law transposes the main unfairness test of the UCPD. It establishes two elements for qualifying particular practice as unfair and specifies, in line with the UCPD, that practices can be misleading (Article 5) or aggressive (Article 5(a)). Under the Czech legal system these provisions could possibly be construed as protecting consumers’ freedom of choice. In addition, Article 6 of the same law prohibits discriminating between consumers. In separate annexes, the law also contains the black listed practices. However, no relevant case-law or other practices were reported.

Table 20 – Czech legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Czech Republic	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

³⁶⁵ Unofficial translation, Act No. 40/1964 Coll. Civil Code, the text in Czech can be found at: http://portal.gov.cz/wps/portal/_s.155/701.cmd/ad/.c/313/.ce/10821/.p/8411/_s.155/701?PC_8411_number1=40/1964&PC_8411_p=3&PC_8411_l=40/1964&PC_8411_ps=10#10821

³⁶⁶ The text of law of 17 January 2008 can be found at (in Czech) http://ec.europa.eu/consumers/rights/docs/transpos_laws_cz.pdf.

FINDING #4.14

In the Czech Republic, tying and pure bundling, mixed bundling, preferential or exclusive agreements, single-product rebates and other conditional sale practices are allowed, to the extent that they cannot be framed as unfair commercial practices under the law that implemented the UCPD.

Aggressive commercial practices such as pressure selling, inertia selling, and – depending on court interpretation – churning and steering may be addressed by the national law that implemented the UCPD.

4.2.2.3 Estonia

In Estonia, no specific legislation exists, which potentially addresses tying and bundling practices. The main legislative measure regulating consumer issues is the Consumer Protection Act³⁶⁷. This piece of legislation also transposes a number of EU consumer protection directives, including the UCPD. These practices are regulated in the Division 2 of the Act. Article 12²(1) transposes the main test of the UCPD.

In addition, the Law of Obligations Act (*Võlaõiguseadus*) entered into force on 1 July 2002 and replaced a number of instruments, including the Civil Code which partly dated back to the Soviet era. The LOA contains a number of consumer oriented specific provisions, but also general provisions such as clauses regarding consumer contracts and transactions that are made with consumers. The principle of good faith is stated in the general part of the LOA. Article 6 states that “*obliged and obligors shall act in good faith in their relations with one another*” and that “Nothing arising from law, a usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.” The good faith principle has been used in Estonian legal practice in the absence of specific laws, therefore it could also be applies to unfair commercial practices³⁶⁸.

Estonian authorities also reported one interesting antitrust case from 2006³⁶⁹ which concerned tying of investment services together with loans and other banking products. The antitrust investigation related to both the alleged abuse of a dominant position and alleged conclusion of anti-competitive agreements. The Estonian national competition authority did not find any abuses and as a result terminated the proceedings without finding an infringement³⁷⁰.

³⁶⁷ The text of this Act can be found at (in English):
<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X70046K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=Tarbijakaitseadus>.

³⁶⁸ See Käsper, K. (2008), *Estonia*, in the international survey on unfair commercial practices by the British Institute of International and Comparative Law, 2008, at
http://www.biicl.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf.

³⁶⁹ The can be downloaded at (in Estonian):
<http://www.konkurentsiamet.ee/public/Otsused/2006/o200658.pdf>

³⁷⁰ See pages 7-9 of the decision.

Table 21 – Estonian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Estonia	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Allowed unless covered by the legislation implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.15

In Estonia, tying and pure bundling, mixed bundling, preferential or exclusive agreements, single-product rebates and other conditional sale practices are allowed, to the extent that they cannot be framed as unfair commercial practices under the law that implemented the UCPD.

Aggressive commercial practices such as pressure selling, inertia selling, and – depending on court interpretation – churning and steering may be addressed by the national law that implemented the UCPD.

4.2.2.4 Germany

Tying and bundling practices are usually allowed in Germany. The exceptions to this general rule are confined to a specific sector (pharmaceuticals).

Unfair commercial practices, directed either towards consumers or competitors, fall under the scope of the Unfair Competition Act (*Gesetz gegen unlauteren Wettbewerb*, abbr. UWG) and count as civil law. In 2004 a new Act against Unfair Competition entered into force. § 3 of the Act provides a general clause prohibiting unfair commercial practices. This clause is supplemented by a list of unfair acts of competition in § 4 UWG, such as regarding unreasonably manipulating or exploiting consumers, surreptitious advertising, sales promotions, competitions, draws and prizes, and so on. To a great extent the new Act codifies and systematizes the case law of the German court decided under the old Act.

Section 3 of the UWG contains a general principle which prohibits: (1) acts of competition that are (2) unfair and (3) capable of materially distorting competition (4) by harming competitors, consumers or other market participants (5). With its reliance on an “act of competition” Sec.3 UWG maintains that the new law does not protect against ordinary torts in business. The term “materially distorted” points out that the new UWG provides no protection against irrelevant nuisances.

Sec 4(4) UWG prohibits sales promotions, such as rebates, premiums, and free gifts, if the seller does not state the conditions of participation in a clear and unambiguous manner.

The UWG addresses a detailed list of instances that may be construed as unfair commercial practices. These include:

- Section 5 of the UWG declares that deceptive advertisement is unfair. It states that the standard for deceptive behaviour is the recognition of a reasonable and consumer possessing average information. Moreover, it introduces two new sections, which specifically address advertising with price reductions and advertising by bait. The new section concerning price advertisement establishes the important presumption that advertising with a reduced price is a deceptive method, provided that the prior price was only offered for an inadequately short period. Given this presumption, the burden of proof of the non-deceptiveness of the price reduction lies with the advertiser. Other price reductions (including rebates) are generally allowed, unless the claimant can establish their deceptiveness. Similarly, Sec.5 UWG 2004 declares advertising by bait to be an improper method when the advertiser is incapable of satisfying the expected demand from the outset. The advertiser must prove that he/she had a sufficient quantity of goods available.
- Section 6 of the UWG provides that comparative advertisement is unfair when, for example, it refers to goods and services that have a different purpose, or when the comparison might lead to confusion among the market about the origin of goods and services.
- Section 7 declares unambiguously that “unacceptable nuisance” is an unfair practice. This provision thoroughly grants protection to any market participant from advertising by e-mail, fax, phone or automatic solicitation machines where it is obviously contrary to his will and occurs without prior consent. This provision encompasses both entrepreneurs and consumers³⁷¹.

Finally, in terms of general civil law, in Germany if a contract is *contra bonos mores* or contrary to public policy, the contract is void (§138 BGB). Thus, if a contracting party abuses circumstances and imposes a contract on another party that is unable to protect itself, the contract may be void. Moreover, in case of a standard contract form, any unreasonable disadvantage to consumers created by the incorporation of the terms is prohibited (§307 BGB).

³⁷¹ More in detail, Sec 7(1) UWG declares that “unacceptable nuisances” (*unzumutbare Belästigungen*) are regarded to be unfair competitive practices within the meaning of sec 3 UWG. The requirement of the nuisance being “unacceptable” is meant to exclude minor disturbances from the prohibition. Sec 7(2) UWG contains four examples of unacceptable nuisances, particularly in relation to electronic communications. Accordingly, direct marketing activities are considered to be unacceptable nuisances and thus unfair: (i) where it is apparent for the advertiser that the recipient does not wish to receive advertisements (sec 7(2)(1) UWG); (ii) where telephone calls are directed at consumers who have not given their explicit consent to receive such communications (opted in) or where they are directed at other market participants without at least their assumed consent (sec 7(2)(2) UWG); (iii) in cases of automatic calling machines, fax machines or electronic mail being used where the recipients have not given their prior consent; this applies both to consumers and to other market participants, so even if the recipient is not a consumer an assumed agreement will not suffice in this case (sec 7(2)(3) UWG); where the identity of the sender on whose behalf the communication is made is disguised or concealed (anonymous communications) or where no valid address is given to which the recipient may send a request that such communications cease, without incurring costs other than the transmission costs based on the basic tariff (sec 7(2)(4) UWG).

Table 22 – German legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Germany	Allowed unless unfair to competition under the UWG	Allowed unless unfair to competition under the UWG	Allowed unless unfair to competition under the UWG	Allowed unless misleading under the UWG	Covered by the revised UWG ("unacceptable nuisance")	Covered by the revised UWG	Depends on court interpretation of national rules	Depends on court interpretation of national rules

FINDING #4.16

In Germany, tying and bundling are generally allowed, and preferential/exclusive agreements, as well as conditional sale practices, are not regulated outside the scope of competition laws. However, when these practices result in a deception of consumers *contra bonos mores*, they may be captured by the UWG.

As regards aggressive commercial practices, the UWG tackles in particular unsolicited offers and pressure/inertia selling. In any event, depending on the interpretation that will be given by national courts, also practices such as churning and steering may be covered, if they can be construed as misleading or aggressive.

4.2.2.5 Greece

In Greece, no legislation directly outlaws tying, bundling or similar unfair practices. Greece has transposed the UCPD and the financial industry is restrained by self-imposed rules.

The main consumer protection act is the Law on consumer protection 2251/1994 as it was amended by the law 3587/2007³⁷² in order to implement directive 2005/29/EC on unfair business-to-consumer commercial practices. Articles 9c(2)-9c(4) of this law is the most relevant as it transposes the main test of the UCPD. Moreover, Article 9c(1) states that “*unfair business-to-consumer practices that are adopted before, during or after the commercial transaction are prohibited.*” However, this provision does not go as far as condemning combinations of services as such. Greek Courts are entitled to enforce the above mentioned legislation. However, a consumer can beforehand file a complaint before an independent Consumer Ombudsman, which will try to reach a compromise between the consumer and the commercial company/trader. Otherwise, a consumer can run both (administrative and judicial) procedures at the same time.

There are reportedly a number of cases of unfair practices in the financial services sector. Basically, the case-law focuses on unfair contractual practices by

³⁷² The text of this law can be found (in Greek) on http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/transpos_laws_el.pdf.

banks, for example unfair charges for financial products. An illustrative list of cases is provided below:³⁷³

1. *Case 961/2007 of the Multi-Chamber Court of Athens*: concerning unfair clauses in credit card contracts and especially the backward projection of interests and other interest issues, the charges for the examination of a loan request and for the existence of a bank account without any transactions.
2. *Case 711/2007 of the Multi-Chamber Court of Athens*: concerning unfair clauses in loan contracts and especially the calculation of interest for an amount of money blocked in a holding account after the grant of the loan by the bank and not at the disposal of the consumer.
3. *Case 430/2005 of the Greek Supreme Court*: concerning an unfair clause in loan contract obliging the consumer to pay a penalty for the prior repayment of a loan.
4. *Case 147/2004*: concerning the obligation of the banks to protect the personal data of their clients.

In addition, self-regulatory practices exist. The main document in this respect is the Code of Bank Ethics issued by Hellenic Bank Association (1997). The Code does not contain any rules which would directly address tying or bundling practices. However, some general principles of this Code oblige banks to act in good faith with regard to their customers. Paragraph 2 of the Code states that “*the transactions (...) are guided by the spirit of mutual trust and (...) honest and systematic exchange of information ...*” Paragraph 3(g) further identifies that all necessary costs for optional procedures should be disclosed. Moreover, paragraphs 14(b) and 14(d) oblige financial service providers to act in good faith while advertising their services and not to engage in unsolicited advertising. Finally, paragraph 22 does not allow forbidding a customer to deal with other banks. Despite their obviously useful nature, these provisions are mainly aimed at remedying possible information deficiencies between banks and customers and could be applied to tying and bundling only marginally.

Table 23 – Greek legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Greece	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

³⁷³ However, it was made clear to us that much more comparably similar case-law exist. We do not report it here because it is related to the UTD.

FINDING #4.17

In Greece tying, bundling, preferential and exclusive agreements, as well as conditional sales such as single-product rebates and the obligation to have salary paid into the current account are generally allowed, provided that they are not challenged as contrary to professional diligence and considered unfair under the rules that implemented the UCPD. Self-regulation might limit cases of unfair practices, despite evidence that a number of these practices were dealt with in courts.

The fact that Greece transposed the UCPD also potentially opens the possibility of challenging conducts such as aggressive sales practices, pressure/inertia selling, churning or steering, if the relative proof is given that these practices materially distorted consumer behaviour and were contrary to professional diligence.

4.2.2.6 Italy

Under Italian Law, there are no specific provisions that address tying and bundling practices, neither in general law, nor in sectoral legislation. The Italian Competition authority (*Autorità Garante della Concorrenza e del Mercato, AGCM*) completed a sectoral investigation into the retail banking system in February 2007³⁷⁴. Among other issues, tying and other similar practices were considered to be an important constraint to competition in the retail banking sector. The AGCM concluded that:

- When current accounts are closed, banks normally terminate all linked services, including the restitution of the debit and credit cards activated with the account. This can be a major dissuasive factor for customers wishing to switch.
- 63.6% of Italian banks do not allow customers to maintain administered funds (typically, pension funds); approximately 18% do not allow customers to keep a mortgage loan after closing the current account; 21% do not allow keeping personal loans and over 4% terminate also life insurance. These links, according to AGCM, enormously increase exit costs.

Tying and bundling were seen as: (i) distorting the customer choice to switch, especially as they reduce price transparency; (ii) consequently reducing customer mobility; and (iii) discouraging entry of new players in the market. In this respect, more than 64% of banks analysed by AGCM – representing 59% of Italian bank customers holding a current account – tie investment services to a current account; more than 42% tie mortgage loans to current accounts; and more than 90% tie credit cards with current accounts.

Legislative Decree of 2 August 2007, n. 146 transposed *i.a.* the UCPD in the Italian legal system. The Decree maintains the basic approach of the UCPD and

³⁷⁴ See AGCM, IC32, available at (in Italian): [http://www.agcm.it/agcm_ita/DSAP/DSAP_IC.NSF/bcfo799f25d242c6c12564ac004bf2a5/433do3578b6ec238c12570ff00527a13/\\$FILE/IC32.pdf](http://www.agcm.it/agcm_ita/DSAP/DSAP_IC.NSF/bcfo799f25d242c6c12564ac004bf2a5/433do3578b6ec238c12570ff00527a13/$FILE/IC32.pdf).

potentially covers deceptive and aggressive sales practices, including pressure/inertia selling, churning and steering.

Finally, self-regulatory practices have been launched in Italy, with the specific aim to facilitate customer mobility and improve the relationship between financial intermediaries and their customers. In particular, in the banking sector the “Patti Chiari” initiative promoted by the Italian Banking Association ABI has led to an agreement on a number of quality commitments, which include easy switching of current accounts and mortgage loans.

Table 24 – Italian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Italy	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.18

In Italy tying, bundling, preferential/exclusive agreements and conditional sale practices are not prohibited by law, and may be tackled only by interpreting the Law that transposed the UCPD accordingly.

Aggressive commercial practices are potentially covered by the national law that transposed the UCPD in 2007.

4.2.2.7 Malta

In Malta, no specific legislation addresses tying and bundling or conditional sales practices. However, these practices could possibly be addressed by the virtue of Consumer Affairs Act as unfair commercial practices by virtue of provisions which transpose the UCPD³⁷⁵. However, the legislation is rather new and there is no practice which could prove that Consumer Affairs Act can be applied to tying and bundling. Furthermore, the Maltese Financial Services Authority would expect license holders to act fairly with their clients.

According to Article 51B of the 2008 law that amended the Consumer Affairs Law and transposed the UCPD³⁷⁶, “A commercial practice shall be unfair if (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product, of the average consumer whom it reaches or to

³⁷⁵ The text of law can be found at (in English):

http://ec.europa.eu/consumers/rights/docs/transpos_laws_malta.pdf.

³⁷⁶ See http://ec.europa.eu/consumers/rights/docs/transpos_laws_malta.pdf.

whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers”.

In addition, Article 51C prescribes that a commercial practice shall be regarded as misleading if (a) it contains false information; or (b) in any way, including its overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. This applies also if the practice involves, *i.a.* any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor.

According to Article 51E, a commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise. This provision includes “any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader”³⁷⁷.

Table 25 – Maltese legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Malta	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.19

In Malta tying, bundling, preferential/exclusive agreements and conditional sale practices are not prohibited by law, and may be tackled only by interpreting the Law that transposed the UCPD accordingly. Aggressive commercial practices are potentially covered by the national law that transposed the UCPD in 2007.

4.2.2.8 Latvia

In Latvia, tying and bundling, preferential/exclusive agreements and conditional sale practices are not directly addressed by legislation. Besides the

³⁷⁷ Article 51E(2)(d).

law which implements the Directive 2005/29/EC³⁷⁸, other legal provisions are thus difficult to apply to the practices under scrutiny in this Report. As reported by Grebe (2008), there is no general clause on unfair commercial practices included in the normative acts in Latvia³⁷⁹. There are general clauses on some specific unfair commercial practices, for example, Article 8 of Advertising Act prohibits misleading advertising and Article 18 of Competition Act prohibits unfair competition.

Latvian legislation stresses quite strongly the consumer freedom of choice as an overarching principle. According to Article 3 1) of the Law on Protection of Consumer Rights: *“Consumer rights are violated, if: upon purchase of goods or receipt of a service, freedom of choice and the expressed will of the consumer are not observed.”* This provision is further specified in Article 4(1) of the above mentioned law: *“When entering into contractual obligations with a manufacturer, seller or service provider, the consumer shall be provided an opportunity to fully exercise his or her choice and will, purchasing exactly the type of goods or receiving exactly the service the consumer wishes, except for restrictions prescribed by law. It is the duty of a manufacturer, seller or service provider to respect such will. Choice and will shall be expressed in the terms of contract, or it shall be apparent from the circumstances”*³⁸⁰.

This broad consumer right could be possibly evoked in defending the consumer from unfair commercial practices by financial service providers. In the Law on Protection of Consumer Rights exceptions to the freedom of choice and will of the consumer are not listed. Thus, the only limitation to this freedom would be prescribed by imperative legal rules (*“... except for restrictions prescribed by law ...”*) and could be derived from other legislative acts³⁸¹. However, neither enforcement practices nor case-law exist in this area, and the application of such terms as average consumer, professional diligence, material distortion of the economic behaviour of consumers etc. could reportedly cause difficulties for the enforcing agencies and the courts³⁸².

³⁷⁸ The text of law can be found at (in Latvian):

http://ec.europa.eu/consumers/rights/docs/transpos_laws_latvia.pdf.

³⁷⁹ See Grebe, S. (2008), *Estonia*, in the international survey on unfair commercial practices by the British Institute of International and Comparative Law, 2008, at http://www.biicl.org/files/883_national_reports_unfair_commercial_practices_new_member_states%5Bwith_dir_table_and_new_logo%5D.pdf

³⁸⁰ Emphasis added.

³⁸¹ For example, according to the Law on the Handling of Weapons a person may purchase a certain weapon only if he or she has received the relevant permission. Accordingly, the seller is not allowed to sell a weapon to a person, who does not have the necessary permission, even if the person expresses his or her will to purchase the weapon.

³⁸² Grebe (2008), *cit.*, at 112.

Table 26 – Latvian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Latvia	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.20

In Latvia there are no legal provisions addressing tying, bundling, preferential or exclusive agreements, conditional rebate schemes or other conditional sale practices. The only possibility tackle these practices is thus related to the law that transposed the UCPD, provided that the practices are found to be misleading or aggressive under the wording of the Directive.

Moreover, the transposition of the UCPD and the emphasis on consumer freedom of choice in national legislation should open the possibility for challenging aggressive sales practices, pressure/inertia selling, churning and steering, as they may turn out being deceptive or misleading for customers. However, the application of such terms as average consumer, professional diligence, material distortion of the economic behaviour of consumers etc. could reportedly cause difficulties for the enforcing agencies and the courts.

4.2.2.9 Lithuania

In Lithuania tying and bundling of financial services is not expressly prohibited by law, although the existing legal framework could be possibly construed as prohibiting these practices.

In general terms, unfairness in contractual relations is mainly dealt within the Civil Code (Book 6, Chapter XII). Article 6.353 establishes relevant rules regarding sellers' obligations towards consumers. Paragraph 1 obliges the seller *"to provide the buyer with the necessary, accurate and comprehensive information about the goods offered for sale"*. In particular, paragraph 3 makes it mandatory to indicate the selling price of every good or of the goods of one kind and the price of a suitable standard unit of the good. This provision could possibly be invoked to tackle practices that reduce the transparency of prices and the comparability of offers.

Article 3(1) of Law on consumer protection embodies the freedom of choice of a consumer (*"Consumers shall have the right to [...] acquire and use goods or services according to their own discretion"*). This provision arguably allows a consumer to choose the particular service which he/she wishes to acquire. The imposition of undesired products through tying, *i.e.* the coercion of consumers wishing to buy only one of the packaged goods could be tackled by this provision. Moreover, Article 4(2) states that the rules of Civil Code (in particular

the above-mentioned Article 6.353) should apply *mutatis mutandis* to provision of remunerable services.

Therefore, even if the current regulation does not deal directly with tying and bundling situations, general rules on unfair commercial practices, civil code and general consumer protection law allow at least in theory (there is no practice of administrative bodies or national courts on tying) the establishment that such practices are contrary to the interest of consumer. In addition, in 2008 a new Law on the prohibition of unfair commercial practices transposed the UCPD into the Lithuanian legal system.³⁸³ Article 3(2) of the Law transposes Article 5 of the UCPD and is perfectly in line with it. These provisions could also be invoked to address cross-selling, conditional sale and especially aggressive practices that prove unfair according to the test introduced at Article 3(2) of the transposing law.

Table 27 – Lithuanian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Lithuania	Allowed unless challenged under the rules implementing the UCPD or found to restrict consumer choice	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD or (exclusive agreements only) found to restrict consumer choice	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.21

Lithuanian legislation can possibly tackle tying and pure bundling practices and exclusive agreements if they unduly restrict the consumer's freedom of choice.

Lithuanian legislation allows mixed bundling (if the price is clearly specified), preferential agreements and conditional sale practices, provided that they cannot be tackled by the law that transposed the UCPD in 2008.

Aggressive sales practices, pressure/inertia selling and – depending on judicial interpretation – churning and steering can be tackled both by general provisions in Lithuanian legislation, and even more directly by the law transposing the UCPD.

4.2.2.10 The Netherlands

In the case of the Netherlands, the problem of tying and bundling in the financial sector has been under the spotlight in the past years. The *Nederlandse Mededingingsautoriteit* (NMa, the Dutch Competition Authority) regularly receives complaints related to the financial sector, and published a Financial

³⁸³ Official Gazette, 2008-01-15 Nr.6-212. The text of the law can be found at (in English): http://www3.lrs.lt/pls/inter3/dokpaieska.susije_l?p_id=312619&p_rys_id=14.

Sector Monitor until 2005. The OECD, among others, published an extensive review of competition in the Dutch retail banking sector in September 2007. As reported by the OECD in 2007, in the retail banking sector the three biggest players have larger shares than in any other segment; however, banks do not seem to be taking advantage of this, for example, via tying arrangements. As stated by the OECD report, “*So far ... this is not observed. Bank accounts are accessible without consumers being forced into tying arrangements. Many Dutch consumers also have multiple accounts, in part, because of the low cost.*” However, cross-selling in the form of bundling practices seems widespread, often in the “soft” form of price inducements³⁸⁴.

As regards the legal framework, in the Netherlands there is no general structure of legislation on unfair competition or unfair trade practices. Unfair competition rules can be found in a variety of legal and self-regulatory instruments, whereas the general principles of unfair competition are derived from the general clause in the Civil Code concerning the law of tort (Article 6:162 *Burgerlijk Wetboek*). The case law regarding unfair commercial practices is developed on the basis of the violation of ‘unwritten law’ as provided for in the general clause (Article 6:162(2)).

The Netherlands implemented the UCPD in September 2008.³⁸⁵ The main test of the UCPD is transposed into Article 193b of the Dutch Civil Code (*Burgerlijk Wetboek*).

Table 28 – Dutch legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Netherlands	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

³⁸⁴ See OECD, *Review of competition in the Dutch retail banking sector*, available online at <http://www.oecd.org/dataoecd/16/54/39347699.pdf>. The relevant findings for the purposes of our analysis are the following: (i) *No evidence of link between market concentration and of tying practices*. The Dutch market exhibits a high concentration ratio: however, tying arrangements are not widespread. One of the possible reasons is the low cost associated with account holding, and the consequent fact that customers may hold multiple accounts. (ii) *Bundling, rather than tying*. In the Netherlands, banks seek profits through cross-selling practices, which take mostly the “softer” form of price inducements to accept a bundle of services rather than exclusive tying arrangements. (iii) *Consumer loans/current account and mortgage/life insurance* are the two most common types of bundling. The latter is mostly due to fiscal reasons, due to the favourable treatment of the ‘*spaarhypotheek*’, a standardized, very popular life-insurance linked mortgage in the Netherlands. Neither forms of bundling appear problematic, as consumers are given the choice to buy individual products, and the practices are fully replicable by competitors.

³⁸⁵ The texts can be found on http://ec.europa.eu/consumers/rights/index_en.htm.

FINDING #4.22

In the Netherlands tying and bundling are allowed, together with preferential or exclusive agreements, single-product rebate schemes and other conditional sale practices, provided they do not infringe competition rules and they are not unfair according to the laws that transposed the UCPD in 2008, by introducing Article 193b of the Dutch Civil Code.

Aggressive commercial practices such as pressure or inertia selling and – depending on the future interpretation that will be given by the courts – churning or steering – are potentially dealt with by the national rules that transposed the UCPD in the Dutch legal system.

4.2.2.11 Slovenia

Slovenian authorities did not report any specific legislation, administrative practice or case-law which would address tying, bundling and other cross-selling or conditional sale practices. Tying, bundling and other unfair commercial practices could in principle be addressed by applying the Consumer protection against unfair commercial practices Act³⁸⁶, which transposes the UCPD, provided that they are found to be unfair, *i.e.* contrary to professional diligence and materially distorting consumer behaviour. Article 4 of this law prohibits exercising unfair commercial practices in regard of the consumer. The wording of the Act is totally in line with the directive.

On the one hand, as no other legislative measures were reported it must be concluded that Slovenian legal system provides for very limited possibilities to tackle tying, bundling, preferential/exclusive agreements and conditional sales other than through the legislation transposing the UCPD.

On the other hand, aggressive commercial practices pressure/inertia selling, churning and steering are potentially dealt with by the national rules that transposed the UCPD in the Romanian legal system.

Table 29 – Slovenian legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Slovenia	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

³⁸⁶ The text can be found at (in Slovenian):
http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/transpos_laws_sl.pdf

FINDING #4.23

In Slovenia tying and bundling are allowed, together with preferential and exclusive agreements, conditional rebates and other conditional sales practices provided they are captured by the general test of the UCPD as transposed into national legislation.

Aggressive commercial practices pressure/inertia selling, churning and steering are potentially dealt with by the national rules that transposed the UCPD in the Slovenian legal system.

4.2.2.12 Spain

General consumer protection legislation which prohibits, *i.a.* tying and bundling practices exists in Spain. The 26/1984 Act on the General Law for the Defence of Consumers and Users, which outlaws some specific practices, prohibits, in Additional Provision I (no. 23), “*the seller/services provider from imposing the consumer unsolicited complementary or ancillary goods or services*”³⁸⁷. The provision is very broadly framed and can in principle be applied to tying and pure bundling, as other cross-selling practices subject to this Report do not entail coercion³⁸⁸. However, the administrative practice and case-law so far have not attached significance or put emphasis on this provision when applying it to financial services.

One of the main institutions which deal with consumer protection issues in the banking sector is the Bank of Spain and its “*Servicio de Reclamaciones*” (equivalent of banking Ombudsman). Its decisions are not binding, but have strong moral authority, and in a high percentage of cases, banks adjust their practice as a result of notification from the Bank of Spain³⁸⁹. Regarding, for example, the concession of credit, the Bank of Spain allows banks to compel the consumer to purchase payment protection insurance. However, it required that the bank includes an express reference to this obligation in the credit agreement³⁹⁰.

When turning to the case law of Spanish courts, case 462/2007 decided by the Appellate Court of Madrid the 18th September 2007 (AC 2008/815) is worth being mentioned. In this case, the Court challenged a contract term for the purchase of real estate property by consumers. The contract compelled consumers to satisfy a first payment of the property by means of subscribing a loan contract with a specified credit entity (*Banco Santander*). This was an ingenious system by which the developer saved its own interest payment in a

³⁸⁷ Spanish version of this provision reads as follows: “*La imposición al consumidor de bienes servicios complementarios o accesorios no solicitados*”.

³⁸⁸ Exclusive agreements entail coercion, but entail the imposition of a counterpart in case the customer decides to demand an additional service. In this respect, the coercion falls on the choice of the counterpart, not on the purchase of a good or service.

³⁸⁹ For more on the service, see (in Spanish) <http://www.bde.es/servicio/reclama/reclama.htm>.

³⁹⁰ See, in this sense (in Spanish), http://www.bde.es/servicio/reclama/criterios/cred_seg.htm.

loan subscribed to finance the construction of the property, by shifting the burden to the consumers. Strangely, the court did not refer to the aforementioned no. 23 of Additional Provision I of the Law 26/1984 for the Defence of Consumers and Users, which precludes the provider from imposing the consumer ancillary or complementary goods or services not requested by the consumer. Rather, the Court referred to the bad faith of the clause, and lack of adequate consideration on the side of the consumer. Another case relevant in the present context regards a sale of real estate property when the seller required the purchasers that, if willing to lease the property acquired, they should do so through the real estate agency designated by the developer³⁹¹. In this case, the court found in favour of the consumers.

On July 14, 2009, the Spanish Council of Ministers approved the draft bill (*Proyecto de Ley*) which will lead to the transposition of the UCPD in Spain. The draft bill also deals with misleading advertising. Given the existence of a pre-existing legal rule addressing cross-selling of unsolicited products, the applicability of the new law to tying and pure bundling could be more likely than in other countries, where cross-selling practices have never been addressed by legislation. However, this will have to be seen once the law is in place and fully implemented. The new law may also tackle aggressive sales practices such as pressure and inertia selling, and – depending on judicial interpretation – churning and steering.

Table 30 – Spanish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Spain	Potentially challenged by Law 26/1984 (only theoretical) and if unfair under the law transposing the UCPD. Mortgage plus PPI allowed	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Challenged by the UCPD (to be implemented soon)	Challenged by the UCPD (to be implemented soon)	Depends on court interpretation of the future Law implementing the UCPD (consumers)	Depends on court interpretation of the future Law implementing the UCPD (consumers)

FINDING #4.24

In Spain, the application of Law 26/1984 to tying and pure bundling practices in the retail banking sector presently remains only a theoretical possibility. These practices may be challenged in the future if they are found to be unfair under the proposed law that will transpose the UCPD in the Spanish legal system.

The same law transposing the UCPD may also tackle aggressive commercial practices such as unsolicited offers, pressure and inertia selling and – depending on judicial interpretation – churning and steering.

³⁹¹ Appellate Court of Alicante no. 298/2005, of 5th July, AC 2005/1430.

4.2.2.13 Sweden

No special legislation was reported to exist in Sweden which directly addresses the issue of tying and bundling. However, tying, bundling and similar practices could in principle be assessed under legislation transposing EU *acquis*. The UTD is transposed in the Act of Unfair Commercial Terms (1994:1512). The UCPD has been transposed into the Swedish legal system by the Marketing Practices Act (2008:486). The legislation reportedly does not foresee any exemptions for the financial sector.

Section 5 and 6 of the Marketing Practices Act (containing the unfairness test) state that marketing practices shall be consistent with generally accepted marketing practices. Marketing practices which contravene generally those practices shall be deemed unfair if they noticeably effect or are likely to affect the recipient's ability to take a well-founded commercial decision. Regardless of the wording used, the main test should be considered as fully reflecting the contents of the UCPD. On the other hand, the Swedish consumer protection law does not embody any specific principles that protect consumers' freedom of choice.

Table 31 – Swedish legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Sweden	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

FINDING #4.25

In Sweden tying and bundling are allowed, together with preferential/exclusive agreements and conditional sales practices, provided they do not infringe competition rules, and unless they can be framed as unfair under legislation transposing the UCPD.

Aggressive commercial practices, pressure/inertia selling, churning and steering are potentially dealt with by the national rules that transposed the UCPD in the Swedish legal system.

4.2.2.14 United Kingdom

The situation in the UK is also rather interesting as there are no regulatory measures, despite the fact that tying and similar practices have been extensively addressed through antitrust investigations.

As a preliminary remark, it bears mentioning that the UK transposed the UCPD in its national legislative system by adopting the Consumer Protection from

Unfair Trading Regulations 2008³⁹². The wording of Article 4 (Section II) of this document is identical to the one of the UCPD. Therefore, according to our reasoning in the Section analyzing EU consumer legislation, it could be at least theoretically construed as covering tying and bundling, provided that they comply with the main unfairness test. Moreover, as was mentioned, the CEO of the OFT sees a possibility to apply the Regulations for aggressive sales tactics (which does not exclude the financial sector)³⁹³.

Even if the level of cross-selling in the UK was found to be the lowest in Europe, the issue of tying and bundling of retail financial services has been subject to debate and scrutiny in the past years in the UK, mostly by competition authorities. In particular:

- In 2002, the Competition Commission (CC) investigated the supply of banking services to SMEs and found evidence of "complex monopoly" among the main UK clearing banks³⁹⁴. In order to strengthen competition and improve the ability of SMEs to switch, the CC recommended several shorter-term transitional undertakings along with longer-term behavioural measures. The latter included measures to limit the tying of products such as loans and current accounts.
- The OFT has a dual competition and consumer mandate, and has increasingly been involved in sectoral investigations aimed at highlighting problems in specific markets³⁹⁵. In the past few years, the OFT has examined and taken action in many financial services markets "*to address issues of transparency, unfairness, lack of competition and low confidence in the market*". Examples include the markets for personal current accounts, store cards, payment protection insurance, payments systems for credit and debit cards and banking services for SMEs. On the consumer protection side, the OFT has examined, *i.a.*, debt collection issues, misleading advertising and unfair terms. The OFT has recently issued a consultation document on the financial services strategy, where it announces new initiatives aimed at pursuing its four overarching objectives of competition, choice, fairness and responsibility³⁹⁶.
- In particular, the OFT market study on personal current accounts (PCAs) revealed interesting findings:
 - *PCAs are used as a 'gateway' product leading to sales of other products.* This arises from the regular contact the customer has with the bank and the level of customer specific information the bank has. For

³⁹² The text of the law can be found at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/transpos_laws_uk1.pdf

³⁹³ Speech given by Mr. Jonathan May (CEO, the OFT), http://www.of.gov.uk/shared_of/speeches/o706pdf.

³⁹⁴ See http://www.competition-commission.org.uk/rep_pub/reports/2002/462banks.htm.

³⁹⁵ Consumer protection responsibilities are shared between the OFT, the FSA and the Financial Ombudsman Service.

³⁹⁶ See the consultation document, OFT1077con, at http://www.of.gov.uk/shared_of/consultations/of1077con.pdf.

example, customers applying for a PCA may be encouraged to take additional products, based on the information gathered during the application process. One bank commented that a customer opening a PCA is encouraged to take out a credit card too. The bank claimed that 70 to 80% of new customers did so, although this is not a general trend. Most banks considered the gateway role of accounts to be significant. Data gathered during the course of the market study suggested that *the strongest links were between loan products and PCAs, with banks' data showing that 85% of consumers with a bank's loans have an account with the same bank.*

- *Relationship banking is very strong.* PCAs are suitable gateway products as customers have, generally, more regular ongoing contact through the branch network, telephone or internet than would be the case with many other financial services products. This interaction offers further opportunities for banks to sell additional products to their PCA customers, helped by what the bank might learn about its customers over time. Consumers have a close bond of trust with their banks. One bank told the OFT that customers see them as 'their bank' and the first port of call for financial needs even if they have other products with alternative financial service providers, and the information obtained on the application, together with actual account information, is used to help with assessments such as credit risk, and enables the bank to be selective about which products it chooses to offer and at what rates. This makes banks better able to target products at customers.
- *One-stop-shop effects.* Consumers may find the possibility of purchasing additional products from their bank beneficial. It may save time (for instance the bank already has most of the details it needs to process a new application for an additional product) and therefore be more convenient. Back in 2000, The Cruickshank Report³⁹⁷ noted that consumers often select additional financial products from a bank with whom they already have a relationship, without shopping around. In particular, the Report identified a trade-off between convenience and value for money.
- *Some evidence of tying with PCAs as the tying or "gateway" product.* One interviewed bank stated that it would not offer customers personal loans unless they had a PCA. Therefore, in some cases, customers will be able to get access to other products only if they have an account with the bank.
- *Other "gateway" products.* Some banks noted that other retail banking products also act as a gateway to sales of other financial services products. For example, mortgage loans may lead customers to open a personal current account.

³⁹⁷ See the Cruickshank Report, "Competition in UK Banking", August 2000, available at <http://www.hm-treasury.gov.uk/d/66.pdf>

Interestingly, the OFT market study revealed important aspects of the psychology of personal current account holders and their (lack of) interest for the conditions that apply to their PCA agreements.³⁹⁸

- Next, the Competition Commission in 2006 completed its enquiry into store cards. The Competition Commission among other things criticized excessive annual percentage rates and bundling of cards together with payment protection insurance and purchase protection. As a result, store cards providers were ordered remedies addressing identified competitive deficiencies. Where store card providers offer insurance packages containing payment, price and purchase protection, they must also offer, as separate items:
 - payment protection cover alone, and
 - a package of price and purchase protection.

Where store card providers offer a package of payment and price protection or payment and purchase protection, they must offer payment protection alone as a separate item. There will be no requirement, in those circumstances, to offer either price or purchase protection as separate elements.³⁹⁹ Such remedies effectively disassociated payment and purchase protection insurance, albeit in a very limited field. The next enquiry on personal protection insurance gave these issues far broader scope.

- Most recently, on 29 January 2009, the Competition Commission published the findings of its inquiry into Personal Protection Insurance (PPI).⁴⁰⁰ The CC concluded that a prohibition should be imposed on distributors and intermediaries from selling PPI to their credit customers “*within seven days of a credit sale, unless the customer has proactively returned to the seller at least 24 hours after the credit sale*”. In addition, selling single-premium PPI policies (where the premium is paid in one upfront payment, generally by adding the premium to the credit borrowed) should be prohibited. And retail PPI distributors should be required to offer retail PPI separately when they also offer retail PPI bundled with merchandise cover; and to provide specified information in marketing materials, at the points of sale of credit and PPI, and each year after the PPI policy has entered into force.

³⁹⁸ See Annexes D and E to the Report, at http://www.of.gov.uk/advice_and_resources/resource_base/market-studies/current/personal/pca/ (last visit on 22 February 2009).

³⁹⁹ The summary could be found at: http://www.competition-commission.org.uk/press_rel/2006/mar/pdf/11-06.pdf.

⁴⁰⁰ As defined by the Competition Commission, PPI covers repayments on the insured credit product if the borrower suffers an insured event—usually accident (A), sickness (S), unemployment (U) or death (referred to as life (L) cover). Nearly 95% of PPI sold in the UK in 2007 was either personal loan PPI (PLPPI), credit card PPI (CCPPI), mortgage PPI (MPPI) or second-charge mortgage (also known as secured loan) PPI (SMPPPI). The Competition Commission looked at two other forms of PPI during our investigation, motor finance PPI (motor PPI) where the credit is given for the specific purpose of buying a car; and retail finance PPI (retail PPI), distinguished in ‘personal loan’ retail finance PPI and ‘credit account’ retail finance PPI.

In the inquiry, the Competition Commission identified significant barriers to switching, which included, *i.a.*, the rebate policy on single-premium policies. In this respect, the CC noted that “*rebates are not given on a pro-rata basis; they take account of the higher risks [...] underwriters face earlier in the life of a PPI policy. As a result, if a consumer cancels a PPI policy, the rebate given is not enough to take out an identical policy to cover the remaining balance for the rest of the term of the loan*”. The CC calculated that the shortfall could be significant, amounting to between 50% and nearly 80% of the cost of an identical replacement policy.

On 8 July 2009, the CC published a draft order for consultation setting out how measures to introduce competition into the PPI market will be implemented⁴⁰¹.

In conclusion, the UK system portrays a rather unique experience in the European landscape, and as such it is also difficult to classify it in any of the groups we identified. Certainly, tying and bundling are not banned through specific legal rules, nor are considered always to be detrimental to consumers – of course, provided they do not fall under the scope of competition law. At the same time, several retail financial markets have been periodically and extensively monitored and scrutinised in the past few years: this testifies of a strong attention towards potential cases in which consumers may be overly exposed to unfair practices.

In addition, the fact that the UK transposed the UCPD into national legislation should give customers the possibility of challenging aggressive commercial practices, pressure/inertia selling, churning and steering if they can prove their case. In this respect, churning is often mentioned by the FSA as a main source of concern, especially in the mortgage market⁴⁰².

Table 32 – UK legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
United Kingdom	Allowed unless challenged under the rules implementing the UCPD. Upcoming rules on PPI and current accounts	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD. Loyalty rebates in the PPI sector	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

⁴⁰¹ Although the CC's decision and proposed measures have since been appealed to the Competition Appeal Tribunal (CAT) by Barclays PLC (BCS), the CC has started consultation on the detailed implementation of the changes to enable it to move quickly once the appeal is finalised and it has considered the CAT's judgment.

⁴⁰² See, *e.g.* the recent speech by Dan Waters, Director of Retail Policy & Conduct Risk, FSA at the FSA Mortgage Conference of 12 May 2009, at http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0512_dw.shtml.

FINDING #4.26

In the UK, tying and bundling are not banned through specific legal rules, nor are considered always to be detrimental to consumers – of course, provided they do not fall under the scope of competition law or the legislation transposing the UCPD. At the same time, several retail financial markets – most recently, personal current accounts and PPI policies – have been periodically and extensively monitored and scrutinised in the past few years.

In addition, the fact that the UK transposed the UCPD into national legislation should give customers the possibility of challenging aggressive commercial practices, pressure/inertia selling, churning and steering if they can prove their case. In this respect, churning is often mentioned by the FSA as a main source of concern, especially in the mortgage market.

4.2.3 Group 3 – Member States that have no specific provisions and face problems in transposing relevant EU Directives

In this last group of countries we include Member States that have no specific legislation and which face court proceedings for failure to implement directive 2005/29/EC on unfair commercial practices.

The data on defaulting Member States was taken from the database of the ECJ (*curia.eu*) and from the Official Journal, thus it reflects a formal situation in the proceedings. According to these sources the Commission has taken legal action against Germany, Hungary, Luxembourg, Netherlands, Spain and the UK for failure to transpose the directive or for failure to notify the transposition measures.

However, for the purposes of this study, the situation of non-implementation would not be relevant in the case of Hungary (Group 1 country) and Spain (Group 2 country)⁴⁰³. The study would not also be concerned about the situation in Germany, Netherlands and the UK as reportedly those countries already transposed the provisions of this directive. Therefore, the only country which remains is Luxembourg.

4.2.3.1 Luxembourg

No specific legislation was reported in Luxembourg, which would tackle directly or indirectly the issue of tying, bundling and other potentially unfair practices in the retail financial services sector. In addition, Luxembourg is temporarily experiencing problems in transposition of the UCPD and the infringement case C-282/08 for non-implementation of the UCPD is still pending.⁴⁰⁴

The only relevant provisions in national legislation is Grand Ducal Regulation of 29 July 2004 on the display of prices of products and services, which mandates that all professionals must inform consumers of the sale price (including VAT

⁴⁰³ See sections 3.2.1.6 and 3.2.2.4 above.

⁴⁰⁴ OJ C 209 of 15.08.2008, p.36.

and any additional taxes) of the products they sell and the unit price based on quantity, and that all professionals who provide services to consumers must inform them of the unit prices (including taxes) for the most common services they provide. However, even this provision does not seem sufficient to address any of the potentially unfair commercial practices that form the subject matter of this Report.

Table 33 – Luxembourg’s legislation on the practices under scrutiny

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling	Mixed bundling and multi-product rebates	Preferential or exclusive agreements	Conditional sales and single-product rebates	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Luxembourg	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed

FINDING #4.27

In Luxembourg no legal provision exists, which could address tying and other potentially unfair business practices in the retail financial services sector.

4.3 Conclusions

Our analysis of legal rules in the EU27 portrays a very fragmented landscape in the EU27, with different solutions being devised by a number of countries to fully or partly address the practices that form the subject to this study; and many other countries that have taken no action to date. As a matter of fact, this situation leads to the following conclusions:

- Regardless of the policy approach that should be adopted towards these practices, ***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 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. Besides the need for providers to comply with different legal rules, also consumers may find it difficult to shop around for individual financial products if these are included in packages, offered with specific access conditions or subject to practice that may reduce price transparency and comparability of offers.
- As regards the specific solutions adopted by Member States, our analysis reveals that *12 Member States have adopted policy initiatives addressing tying and other potentially unfair commercial practices*. These are

Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Hungary, Ireland, Poland, Portugal, Romania and Slovakia. Of these, 8 countries have decided to take specific action to restrict tying and cross-selling behaviour in the financial services sector. This latter group of countries include Member States that have enacted very far-reaching prohibitions (Belgium, France, Ireland, Portugal, Slovakia); countries that rely on “soft-law” schemes couples with narrower legal prohibitions (Hungary, Poland); and one country where prohibitions are narrower in scope (Denmark).

- ***15 countries have no specific provisions on tying and bundling practices.*** Again, these include also legal systems in which the issue of cross-selling practices has been extensively debated, such as the Netherlands and the United Kingdom; countries where there is evidence that tying creates high switching costs in the financial services (in particular, banking) sector, but no initiative has been undertaken to date on cross-selling practices (Italy); countries where there is a general ban on tying in the consumer legislation, but application is non-existent (Spain); and countries where the issue of tying in the retail financial services sector has barely surfaced in the debate so far (Austria, Czech Republic, Estonia, Germany, Greece, Malta, Latvia, Lithuania, Luxembourg, Slovenia, Sweden).
- ***As regards rebate schemes and preferential/exclusive agreements, only 3 countries have specific rules in place that concern these practices even in cases that fall outside the scope of competition rules.*** Belgium, France and (to a lesser extent) Ireland have enacted rules that can tackle (though often not entirely) the problem of rebates, discounts, and the imposition of providers for specific additional services.
- ***For what concerns aggressive sales practices such as unsolicited offers, pressure and inertia selling, only France and Germany have introduced specific bans.*** In all other countries, these practices can potentially be tackled through consumer legislation, including provisions implementing the UCPD (with the exception of Luxembourg). The same can be said for churning and steering.
- ***Although it is possible to challenge a number of unfair commercial practices through the UCPD, there seems to be limited prospects for this to occur absent a clarification on the applicability of this directive and the relative transposing legislation.*** This is certainly the case for tying, rebates, preferential/exclusive agreements, churning⁴⁰⁵ and steering. This is even more important for the purposes of our Report since, as reported by Budaite

⁴⁰⁵ It is worth noting that, in the case of churning in the provision of investment and ancillary services, suitability requirements under MiFID (and the consequent national implementing measures) are relevant.

and Van Dam (2008), Member States differ noticeably as regards their regulatory framework and legal tradition on unfair commercial practices⁴⁰⁶.

- ***As the UCPD does not apply to SMEs, only countries where a general clause applying to B2B and B2C relationships exists will be able to protect SMEs against unfair commercial practices***, whereas other countries where legislation focuses exclusively on consumers will not be able to address this problem⁴⁰⁷. However, national general clauses generally do not refer to the standard of professional diligence as the UCPD does. When defining unfair commercial practices most general clauses refer to good trading practice – in particular, to *boni mores* of the competition (Austria, Czech Republic, Germany, Greece and Slovakia); to good business, trade and marketing practice, fairness, honesty and good morals (Denmark, Estonia, Finland, Germany, Luxembourg, Portugal, Slovenia, Sweden), to the principle of good faith (Poland, Italy and Spain) and to business integrity (Hungary). In countries in which the general rules of the Civil Code apply, the standard is, for example, ‘*faute*’ in France and ‘*onrechtmatigheid*’ (unlawfulness) in the Netherlands⁴⁰⁸.

Table 6 below summarises our findings.

⁴⁰⁶ See Budaite and Van Dam (2008), *The Statutory Frameworks and General Rules on Unfair Commercial Practices in the 25 EU Member States on the Eve of Harmonisation*, in: Christian Twigg-Flesner a.o. (eds), *The Yearbook of Consumer Law 2008* (Ashgate, 2008), p. 107-139.

⁴⁰⁷ As reported by Budaite and Van Dam (2008), 14 Member States had a general clause that applies to both consumers and SMEs before the implementation of the UCPD, whereas another 4 Member States had two clauses (one for B2B and one for B2C relations).

⁴⁰⁸ *Id.*

Table 34 – Summary of findings – Country analysis

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling*	Mixed bundling and multi-product rebates*	Preferential or exclusive agreements*	Conditional sales and single-product rebates*	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Austria	Allowed	Allowed	Allowed	Allowed	National rules and rules implementing the UCPD (consumers and SMEs)	National rules and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Belgium	Banned with limited exceptions (only for consumers)	Banned with limited exceptions (only for consumers)	Exclusive agreements are prohibited (consumer law only)	Single-product rebates up to one third of standalone price (only consumer contracts)	Covered by the rules implementing the UCPD (only consumers)	Covered by the rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)
Bulgaria	Banned only if unfair and if tied product is sold at very low price	Banned only if unfair and if tied product is sold at very low price	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Cyprus	Banned only in the case of mortgage loans	Banned only in the case of mortgage loans	Banned only in the case of mortgage loans	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Czech Republic	Allowed	Allowed	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Denmark	Only for certain payment instruments	Allowed	Allowed	No provision	Covered by the rules implementing the UCPD (only consumers)	Covered by the rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)
Estonia	Allowed	Allowed	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Finland	Only if resulting from a contract term	Only if price of individual products is not clearly indicated	Only exclusive agreements resulting from contract terms	Allowed	National rules and rules implementing the UCPD (consumers and SMEs)	National rules and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
France	Banned (only for consumers). Sectoral rules prohibit tying with current accounts and deposits, and mortgage with PPI	Allowed	Exclusive agreements are prohibited (consumer law only)	Rules on advertising. Possibly tackled also by Consumer Code	National law and rules implementing the UCPD (only consumers)	National law and rules implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)	Depends on court interpretation of the Law implementing the UCPD (only consumers)
Germany	Allowed unless unfair to competition under the UWG	Allowed unless unfair to competition under the UWG	Allowed unless unfair to competition under the UWG	Allowed unless misleading under the UWG	Covered by the revised UWG ("unacceptable nuisance")	Covered by the revised UWG	Depends on court interpretation of national rules	Depends on court interpretation of national rules
Greece	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Hungary	Banned, but only through soft law. Allowed only if there are fair and rational market reasons	Allowed (with financial benefit).	Allowed	Allowed (subject to misleading advertising rules)	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD
Ireland	Generally Banned. Tying mortgage loans with PPI and current accounts is allowed but regulated	Allowed (but price of each product must be clearly indicated).	Exclusive or preferential agreements are prohibited in the case of mortgage lenders	Allowed (but price of each product must be clearly indicated)	National law and rules implementing the UCPD (consumers and SMEs)	National law and rules implementing the UCPD (consumers and SMEs)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD

*UCPD potentially applies to all practices to the extent that they are found to be contrary to professional diligence and detrimental to consumers. UCPD certainly applies to aggressive commercial practices such as unsolicited offers, pressure and inertia selling. MiFID also applies in the case of churning.

Legenda

Not allowed
Allowed in some circumstances
Allowed

Practices	Cross-selling			Conditional sale	Aggressive commercial practices			
Directive	Tying and pure bundling*	Mixed bundling and multi-product rebates*	Preferential or exclusive agreements*	Conditional sales and single-product rebates*	Unsolicited offers and pressure selling	Inertia selling	Churning	Steering
Italy	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Latvia	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Lithuania	Allowed unless challenged under the rules implementing the UCPD or found to restrict consumer choice	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD or (exclusive agreements only) found to restrict consumer choice	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Luxembourg	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Malta	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Netherlands	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Poland	Banned by Civil Code only if products are unrelated	Allowed	Allowed	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD
Portugal	Banned by Civil Code. Also sectoral legislation on mortgage and insurance	Multi-product rebates are tackled in the case of renegotiation of credit.	Only exclusive agreements in insurance.	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD	Depends on court interpretation of the Law implementing the UCPD
Romania	Prohibited per se	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Slovakia	Banned by Civil Code. Also by the Code of Ethics in the banking sector	Allowed (with financial benefit to customers).	Exclusive agreements	Allowed	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Slovenia	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
Spain	Potentially challenged by Law 26/1984 (only theoretical) and if unfair under the law transposing the UCPD. Mortgage plus PPI allowed	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Challenged by the UCPD (to be implemented soon)	Challenged by the UCPD (to be implemented soon)	Depends on court interpretation of the future Law implementing the UCPD (consumers)	Depends on court interpretation of the future Law implementing the UCPD (consumers)
Sweden	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)
United Kingdom	Allowed unless challenged under the rules implementing the UCPD. Upcoming rules on PPI and current accounts	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD	Allowed unless challenged under the rules implementing the UCPD. Loyalty rebates in the PPI sector	Rules implementing the UCPD (consumers)	Rules implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)	Depends on court interpretation of the Law implementing the UCPD (consumers)

*UCPD potentially applies to all practices to the extent that they are found to be contrary to professional diligence and detrimental to consumers. UCPD certainly applies to aggressive commercial practices such as unsolicited offers, pressure and inertia selling. MiFID also applies in the case of churning.

Legenda

Not allowed
Allowed in some circumstances
Allowed

5 AN EMPIRICAL ANALYSIS OF TYING AND OTHER POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE EU²⁷

5.1 Introduction

In accordance to the terms of reference (see Annex 1), the empirical analysis of this study responds to two main objectives:

First, to present a comprehensive inventory of tying and other potentially unfair practices in retail financial services (banking, insurance and investment services), in all 27 EU Member States. In particular, this should include the identification of the main tied/tying products and potentially unfair practices in all 27 EU Member States.

Second, to describe and analyse the market by:

- Providing quantitative information on the use of tying and other identified potentially unfair practices by financial services providers and financial services users;
- Identifying and explaining why financial services providers engage in product tying and other identified potentially unfair practices;
- Identifying and explaining why consumers may purchase tied products or acquiesce to other potentially unfair practices.

The empirical analysis was implemented in two phases:

Exploratory interviews allowed identifying the most frequent practices in ten test countries⁴⁰⁹, preparing the survey questionnaire and perceiving how sensitive and little evidence based the subject was and still is. The difference of attitude vis-à-vis tying and other practices, among the countries considered, was also remarkable. Besides the interviews, the review of the economic theory was used as a baseline for setting-up the survey questionnaire. The structure of the questionnaire, i.e. the categorisation of practices among tying and pure bundling, mixed bundling, and conditional sales, the definitions of financial products and practices, as well as the various reasons for cross-selling and conditional sales, as included in the survey questionnaire, were largely inspired from the theory (see questionnaires in Annex 7). The survey was prepared, tested and launched over the period November 2008-January 2009.

The survey concerned 6529 financial institutions and 430 national organisations and associations, including ministries, central banks, competition authorities, consumer associations, ombudsmen, regulators and business associations⁴¹⁰. The survey was launched on 20 and 21 January. The 2 March was set as deadline for

⁴⁰⁹ These countries were: BE, DE, DK, ES, FR, IE, IT, HU, PL and UK.

⁴¹⁰ See Annex 9 for a detailed overview of the addressees of the survey.

responses in order to allow for approximately 6 weeks to respond. A first reminder was sent on 17 February, i.e. two weeks before the deadline. A second was sent on 3 March and a third and last one on 12 March 2009.

Directorate General Internal Market and Services sent an email to the Financial Services Consumer Group on 5 March in order to increase the number of responses from consumer organizations. On 19 March, this Directorate General sent a similar email to FIN-NET, the European network of ombudsmen. Fifty three additional reminder phone calls were given in the week preceding the last deadline of 20 March, in order to directly ask organisations to complete the questionnaire; these included 18 regulatory and supervisory authorities, 20 banking federations and 15 insurance federations. Of these 53 organisations, 17 could not be reached by phone, after several trials. We spoke to the 36 other ones:

- 6 declared themselves uninterested or unable to answer;
- we sent an email with the questionnaire and other required information to the 30 others;
- 9 promised to complete the questionnaire; as of 23 June 2009, 3 did;
- From the 21 other ones, we got no further news.

The sample of survey respondents includes 66 completed questionnaires, which represents a particularly low rate of responses, despite the several reminders sent. Thirteen emails with qualitative inputs were also received and used in the analysis.

The following table presents the reactions to the survey.

Table 35 – Reactions to the survey

Reactions	From national organizations and associations	Number of reactions	
		From financial institutions	Total
Completed the questionnaire	49	17	66 (32%)
No more news after acknowledging reception of the questionnaire or requesting additional information	22	22	44 (21%)
Declared not to intend to participate	57	40	97 (47%)
Total reactions	128	79	207 (100%)
% (out of total invitations sent)	29,8	1,2	3
Total questionnaires received	49	17	66
% (out of total invitations sent)	11	0,3	0,9
% (out of total received questionnaires)	75	25	100

Overall, this table suggests two reflections based in particular on our experience of surveys:

- The rate of response is very low, especially for financial institutions; the rate of response for national organisations and associations (11%) is within the usual range of 10-15%⁴¹¹;
- The proportion of refusals to respond (47%) is particularly important compared to the one of completed questionnaires (32%) and more neutral reactions (21%); the proportion of explicit refusals to respond is usually in the range 10-20% of all reactions received (in terms of refusals and questionnaires completed).

To explain this low rate of responses, in particular from the financial institutions, we rely on an EBIC note of 23 April 2008⁴¹², EBIC comments on the draft survey questionnaire of the present study, various reactions we received from addressees of the survey, in particular business associations, and our own experience and reflections.

A first explanatory factor is that the sector appeared extremely insecure about the present study. Insecurity seemed in particular related to uncertainty (and related fears) about which initiatives would be launched by the Commission as a follow-up of the study and based on the gathered data. This was reflected in the reluctance of EBIC and some national business associations to support the participation of the sector in the survey. The context of the financial crisis has also played a role: financial institutions and the agenda of their priorities were strongly affected; many people motivated the non completion of the questionnaire by being too busy. Lack of data was expressed by several national organisations and associations to motivate the non response to the survey: lack of data means insecure feelings about completing a complex questionnaire in a responsible way. This asserted lack of data points to the critical need to build a knowledge base on the topic. Finally, the complexity and exhaustiveness of the questionnaire were also arguments presented for not responding to the survey. But the complexity did not prevent a number of respondents to complete the questionnaire very correctly and the exhaustiveness was a key aspect since one of the purposes of the study was precisely to carry out an inventory of practices as exhaustive as possible.

Our view is that the two first factors mentioned above i.e. the insecurity of the sector and the financial crisis context played a major role in the response to the survey. While we made the best possible use of the questionnaires received, it can be regretted to have missed an opportunity to create a broad knowledge basis usable by all stakeholders involved.

This section devoted to the empirical analysis is structured as follows:

- Sub-section 5.2 presents the sample of respondents.

⁴¹¹ Such range is usual when surveying stakeholders that are relatively neutral with regard to the object of the study, e.g. that are not direct beneficiaries of a programme.

⁴¹² This note, entitled “Product Tying – Preliminary Considerations & methodology”, was given to us during a meeting with EBIC on 12 December 2008.

- Sub-section 5.3 deals with the inventory of the practices.
- Sub-section 5.4 gives the shares of financial institutions and consumers concerned by the practices.
- Sub-section 5.5 presents the reasons for the practices, from provider and consumer points of view.
- Sub-section 5.6 draws the conclusions from the survey analysis.
- Sub-section 5.7 looks into the correlation between empirical and legal findings.
- Sub-section 5.8 relates legal information and empirical data on the EU27 and potential impacts on cross-border trade.

5.2 The sample of survey respondents

5.2.1 Sample characterisation

The sample of 66 survey respondents is characterised according to the categories of respondents, their countries and the financial products offered or concerned.

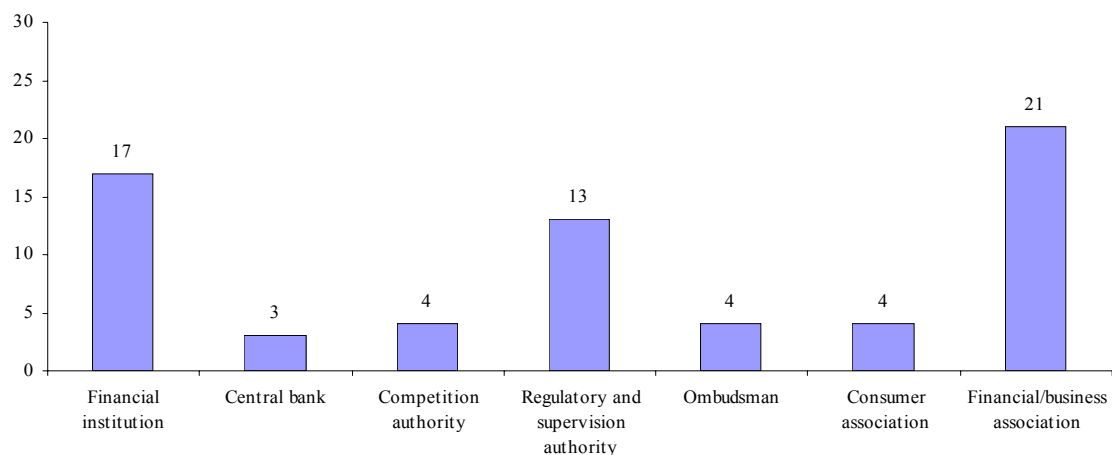
Regarding the **categories of respondents**, there are 75% of national organisations and associations and 25% of financial institutions. This means that most of the information gathered does not come from the market operators (financial institutions) but from regulators and associations of financial service providers: if some data might be less accurate (e.g. share of consumers concerned), there might be a benefit from the fact that regulators and business associations have a broad view on the markets.

Among financial institutions, 14 are banks, 2 are insurance companies and the remaining one is an investment company. Among national organizations and associations, a majority of responses come from financial service providers associations (21) and financial regulators (13) what contributes to the reliability of data collected. The weak response rate of consumer organizations is also observed (4 responses)⁴¹³.

This is illustrated by the graph below.

⁴¹³ However, we received a summary qualitative response from a 5th organisation.

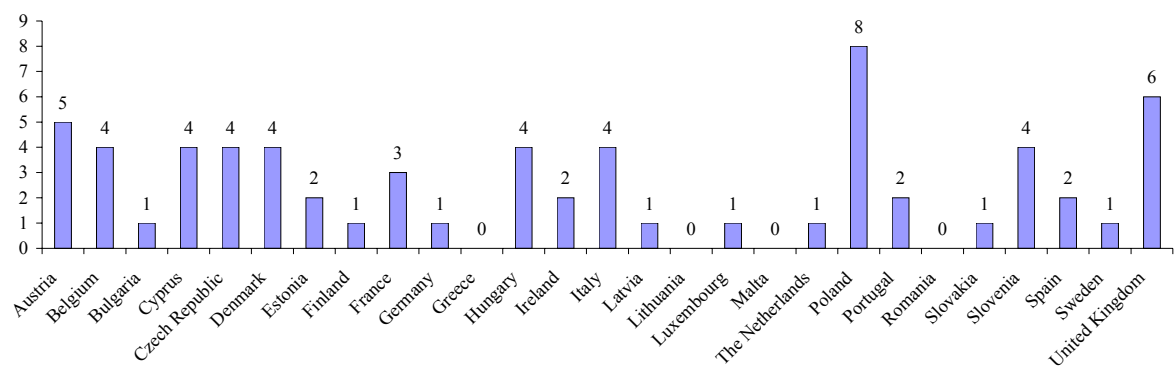
Figure 14 – Distribution of responses per category of respondent (N=66)



The financial service providers associations represent the insurance sector (7), the banking sector (6), investment (1), bank, insurance and investment (3), bank and insurance (3), and bank and investment (1). The majority of financial regulators cover the three sub-sectors together (7); others concern the insurance sector (6).

The distribution of **responses per country** shows the following profile.

Figure 15 – Distribution of responses per country of respondent (N=66)



Such distribution is clearly not statistically representative and does not allow an analysis per country. However, it shows that responses originated from 23 countries, which gives a reasonable information basis, if taken globally.

The responding financial institutions and national associations/organizations declared the **financial products** they were offering or they were involved with⁴¹⁴. On a total of 125 products, there is a balance between banking products

⁴¹⁴ National associations (e.g. business federations) or organisations (e.g. regulators) do not offer financial services but are involved with them.

(42%), insurance products (39%) and investment products (19%) reflecting the sector distribution of the survey targets⁴¹⁵.

As shown by the three figures below, more than half the respondents offer or are involved with the whole range of respectively banking, insurance, or investment products, rather than specific ones. By contrast, regarding the insurance and investment products, the responses from the financial sector⁴¹⁶ mention more frequently specific products (e.g. life insurance) than the whole ranges of products.

Figure 16 – Distribution of banking products concerned (N=52)

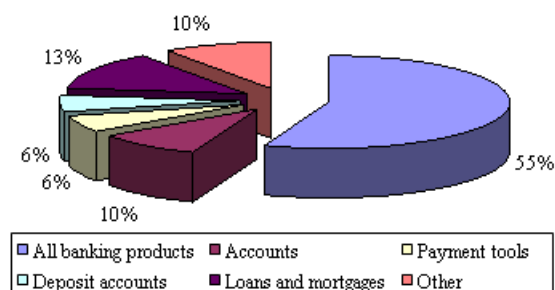


Figure 17 – Distribution of insurance products concerned (N=49)

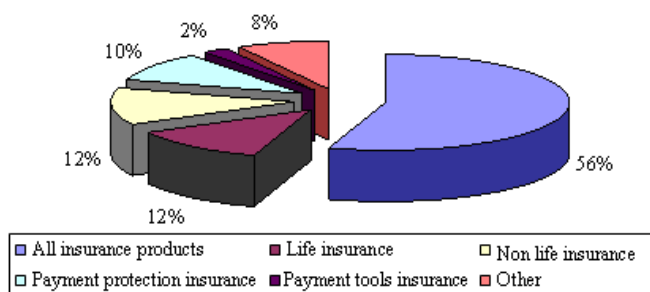
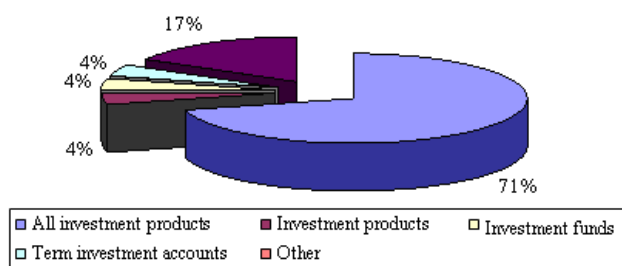


Figure 18 – Distribution of investment products concerned (N=24)



⁴¹⁵ The survey targets consisted of 53% of institutions offering banking services, 34% offering insurance services and 13% offering investment services.

⁴¹⁶ The financial sector includes the financial institutions and the associations of financial service providers.

5.2.2 Use of the responses from the sample

The sample provides a reliable information basis even if its size does not allow the expected representativeness, in particular regarding the country coverage and the financial service providers. The information collected contributes to the process of evidence gathering and building of a knowledge base.

One respondent rightly and clearly stated the status of the individual responses of associations to the survey:

“The answers given in the questionnaire are exclusively qualitative in nature since we cannot provide quantitative figures we are not in possession of.”

“We answered only to those sections of the questionnaire for which the underlying knowledge about the sector is sufficiently widespread to ensure the information provided is accurate even if not based on first-hand knowledge.”

By aggregating and processing such pieces of mainly qualitative information, it has nevertheless been possible to produce quantitative information on the frequencies of the practices, the products concerned, the ranges of financial service providers and consumers concerned, and the reasons for those practices.

Regarding the information provided in the survey by groups of respondents, we identified some differences. On average, each respondent mentioned 10.2 cross-selling practices and 2.5 conditional sales practices. Financial institutions responded by providing average figures. Business associations were below this level with an average of respectively 5.9 and 1.7 answers, while other national associations were above with respectively 13.0 and 2.6 practices reported. Financial institutions seemed to have more information available since they informed on shares (of financial institutions concerned by the practices) for over 90% of the practices they listed. For business associations, the corresponding figure was 65% while associations other than business ones provided the information for half the practices listed.

We also systematically checked whether the overall (whole sample) figures were representative i.e. whether there were no significant deviations with the figures for the sub-sample financial sector grouping financial institutions and the associations of financial service providers⁴¹⁷. In the following sub-sections, any significant deviation is explicitly mentioned, account having been taken that the deviation concerns a sufficiently large number of responses.

⁴¹⁷ No checks were operated with other categories of respondents due to the limited number of responses making any check statistically not significant.

5.3 Inventory of the practices

5.3.1 Introduction

The respondents to the survey identified 615 cross-selling practices and 159 conditional sales practices. Detailed information on these practices is presented in the following sections 5.3.2 and 5.3.3 and in Annexes 11 and 12.

5.3.2 Cross-selling

5.3.2.1 Overview

The distribution of cross-selling practices identified is shown in the table below⁴¹⁸. In the present empirical analysis, we distinguish between:

- Tying and pure bundling, i.e. two or more products are sold together in a package, and at least one of these products is not sold separately;
- Mixed bundling with no (dis)advantage, i.e. buying the bundle does not imply for the consumer any particular financial or non-financial (dis)advantage compared to buying products separately;
- Mixed bundling with financial advantages, which implies financial advantages for the consumer when purchasing products in a bundle instead of separately (“multi-product rebates”).

All the tables presenting the survey results are based on the 66 questionnaires completed. However, several questions allowed respondents to provide more than one response. This explains that in the following tables the number of answers, referred to as N products or combinations, might exceed 66.

In the table below, mixed bundling with financial advantage groups the categories preferential tariff, preferential rate, and combined product(s) free of charge.

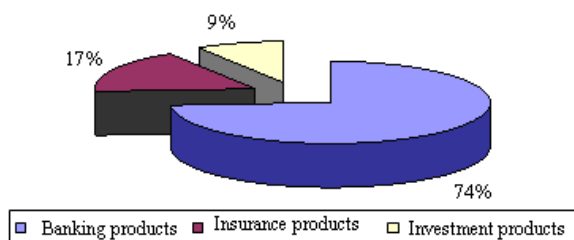
Table 36 – Distribution of cross-selling practices

Distribution of cross-selling practices	Nbr of answers	%
Tying and pure bundling	195	33
Mixed bundling with financial advantages	242	41
Preferential tariff for gateway product	64	11
Preferential tariff for combined product(s)	76	13
Preferential rate for gateway product	44	7
Preferential rate for combined product(s)	17	3
Combined product(s) free of charge	41	7
Mixed bundling with no (dis)advantages	157	26
Total	594	100

⁴¹⁸ On 615 cross-selling practices, 594 could be allocated to the categories presented in Table 36.

Tying and pure bundling represents one third of these practices. Then come mixed bundling practices offering preferential tariff or rate, for the gateway product or the combined one, including free of charge combined product(s); altogether these practices represent 41% of the cross-selling. Mixed bundling with no financial or other (dis)advantage represents 26% of the practices. The financial sector, in particular the financial institutions, mentions more frequently mixed bundling with no (dis)advantage (36% versus 26%) and less frequently mixed bundling with financial advantage (32% versus 41%). On the one hand, these differences can originate from the fact that the responses of the financial sector including associations are based on reliable and representative figures we may not be aware of. On the other hand, it can also be that the sector is reluctant to publicise too much the financial advantages granted. Further on, our analysis of the empirical results will investigate more in-depth the potential benefits from financial advantages, and will be put in perspective with those not allowing any advantage (therefore potentially less beneficial for consumers).

Figure 19 – Distribution of gateway products (N= 671 products)



Given that the considered practices are not limited to tying, we prefer using in what follows the word “gateway” product⁴¹⁹. This wording is currently used by the Office of Fair Trading and the Competition Commission in the UK, and appears reasonably “neutral” to represent more than one type of practice.

Gateway products consisted principally of banking products (74%), and to a lesser extent insurance products (17%) and investment products (9%). Among banking products, mortgage loans (28%), current accounts (23%) and consumer loans (14%) are the most frequent gateway products. Other products such as cards, deposits, etc, have a frequency lower than 10% (see table below).

⁴¹⁹ We propose to use the word “gateway” rather than the word “hook” product, as the former is more neutral, whereas the latter seems to indicate a strategic intention of the financial service provider to lock in the customer in the contractual relationship.

Table 37 – Distribution of banking gateway products

Banking products	Nbr. of answers	%
Mortgage loan	140	28
Current account	115	23
Consumer loan	68	14
Credit card	44	9
Debit card	29	6
Bank deposits	27	5
Savings account	26	5
Corporate banking loan	20	4
Credit line / overdraft	13	3
Equity release loan	8	2
Fund transfers	3	1
Operations on foreign currencies	2	0
Means of payment excluding debit/credit cards	0	0
Total	495	100

The leading insurance gateway product is life insurance (23%) followed by motor insurance (21%), home insurance (18%) and pension products (16%). The other products have a frequency lower than 10%.

Table 38 – Distribution of insurance gateway products

Insurance products	Nbr. of answers	%
Life insurance	27	23
Motor insurance	24	21
Home insurance	21	18
Pension product	19	16
Payment protection insurance	7	6
Health/disability insurance	7	6
Other non-life insurance	6	5
Fire insurance	5	4
Business/commercial insurance	0	0
Insurance on payment tools	0	0
Insurance on investments	0	0
Total	116	100

Portfolio management is the leading investment gateway product (frequency of 32%), followed by investment advice (23%) and the reception and transmission of orders (18%). The other products have a frequency below 10%.

Table 39 – Distribution of investment gateway products

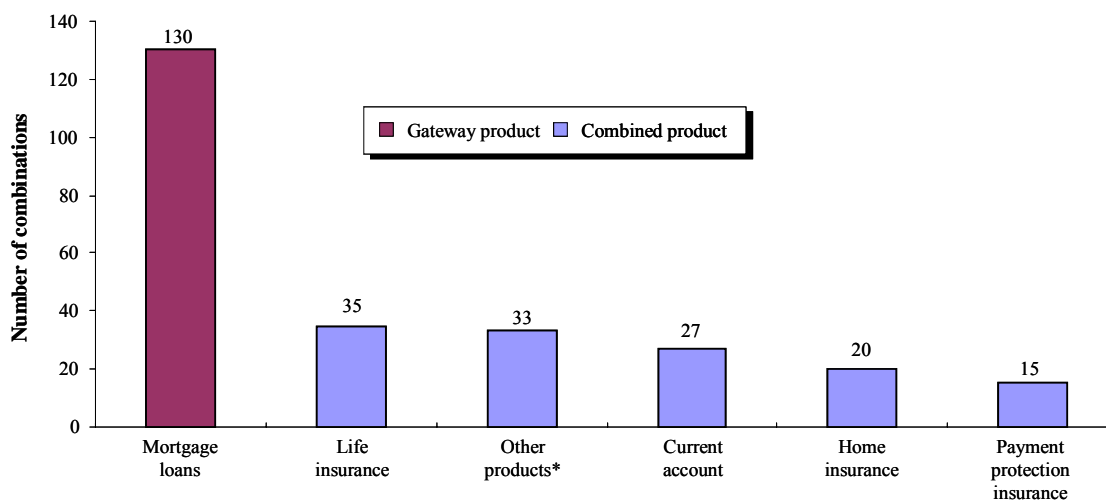
Investment products	Nbr. of answers	%
Portfolio management	19	32
Investment advice	14	23
Reception and transmission of orders	11	18
Placing without firm commitment	5	8
Underwriting or placing with firm commitment	4	7
Term investment account	4	7
Execution of orders on behalf of clients	3	5
Dealing on own account	0	0
Total	60	100

5.3.2.2 Combinations of products

The following figures present the most frequent combinations (all cross-selling practices considered) for the three most frequent gateway products, i.e. mortgage loans, current accounts and consumer loans. They illustrate also the distribution of these combinations over the major cross-selling practices. Respondents from the financial sector⁴²⁰ share this view on the three most frequent combinations.

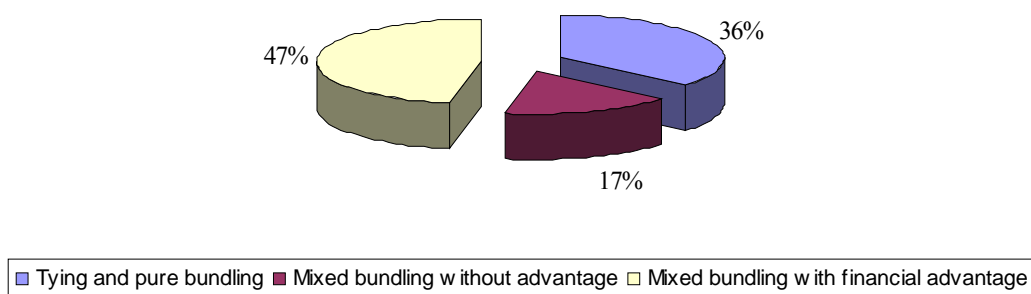
- **MORTGAGE LOANS AND THEIR COMBINED PRODUCTS (N=130 combinations)**

Figure 20 – Products combined with mortgage loans



* Other products are banking products (17 of which are credit cards (6), credit line/overdraft (3), debit cards (2) consumer loans (2) and others mentioned once). There are also 15 mentions of insurance products of which fire insurance (8), health and disability insurance (3), other non-life insurance (3) and motor insurance (1). Term investment account was mentioned once.

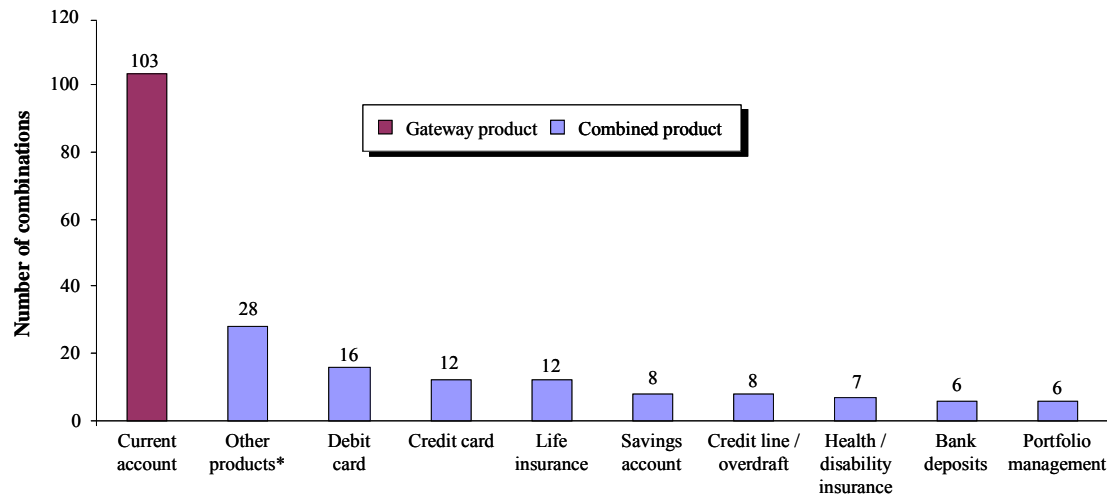
Figure 21 – Types of cross-selling for mortgage loans



⁴²⁰ i.e., the financial institutions and the business associations.

- **CURRENT ACCOUNTS AND THEIR COMBINED PRODUCTS (N=103 combinations)**

Figure 22 – Products combined with current accounts



* Other products refer to banking products (16 of which are fund transfers (4), reception/transmission of orders (3), mortgage loans (2), consumer loans (2), pension products (2), and 3 others mentioned once). There are also insurance products (5 of which other non-life insurances (3) and home insurances (2)) and investment products (7 of which investment advice (2) and others mentioned once).

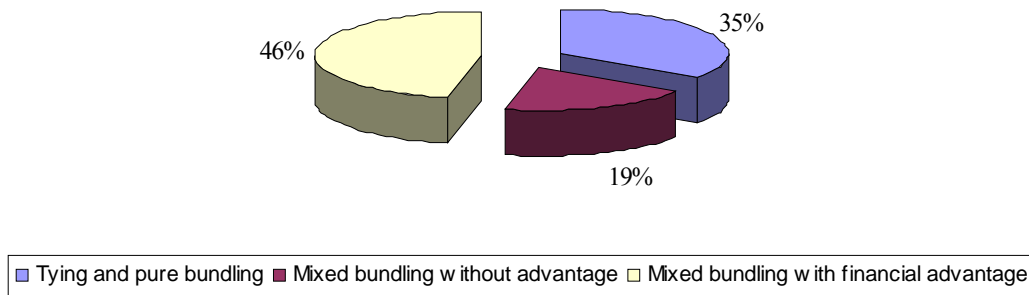
Considering the figure above, it might look strange that current accounts are considered as gateway products, for some combined products like insurances.

First, this reflects the responses to the survey that we received and some respondents might have confused between gateway products and combined ones.

Further, the figure below shows that mixed bundling practices for which consumer might have found a financial advantage or some convenience, account for two thirds of these combinations while tying and pure bundling itself account for one third.

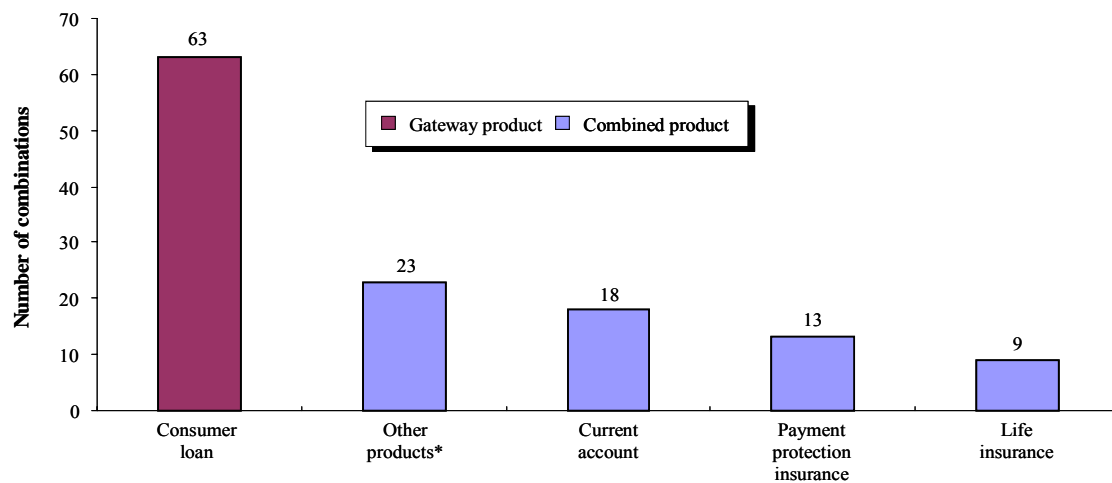
Finally, we received confirmation that some mortgage banks only accept to open a current account if the consumer engages in a mortgage loan.

Figure 23 – Types of cross-selling for current accounts



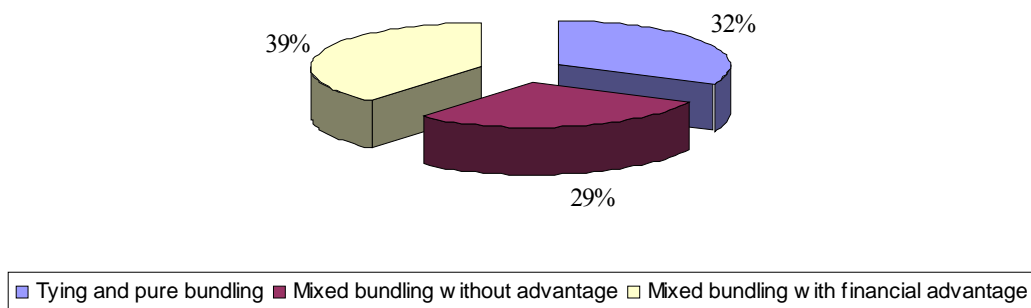
- CONSUMER LOANS AND THEIR COMBINED PRODUCTS (N=63 combinations)**

Figure 24 – Products combined with consumer loans



* Other products include banking products (9 of which are credit cards (4), savings account (2), credit line/overdraft (2) and two others mentioned once. They include also insurance products (14 of which motor insurance (6), health/disability insurance (5) and other non-life insurance (3)).

Figure 25 – Types of cross-selling for consumer loans



With some nuances, the distribution of the three cross-selling practices (tying and pure bundling, mixed bundling with financial advantage and mixed bundling without (dis)advantage), for these three products confirms their overall distribution presented above.

5.3.2.2.1 *Most frequently combined products*

Considering all cross-selling practices, the products that are most frequently combined with gateway products are presented below.

For the sample as a whole, the most frequently combined products are:

- Current accounts (19%);
- Life insurance (15%);
- Health disability insurance (7%);
- Payment protection insurance (6%);
- Other non-life insurance (6%);
- Home insurance (5%).

For the financial sector⁴²¹, the most frequently combined products are:

- Current accounts (19%);
- Life insurance (19%);
- Payment protection insurance (6%);
- Savings accounts (5%);
- Credit line/overdraft (5%);
- Home insurance (5%).

⁴²¹ The financial sector includes the financial institutions and the associations of financial service providers.

Compared to the sample, the financial sector mentions more frequently life insurance, savings accounts and credit line/overdraft.

5.3.2.2.2 Additional information

Qualitative information gathered from experts close to consumer organizations indicates the following:

- In France and Spain, combining the selling of loans and insurance is a widespread practice but not presented openly or in a transparent way;
- In Spain, particular complaints have been reported, concerning in particular the combination of loans (mortgage) and insurance (life and non-life); loans (consumer loans) and investment products; and loans and current accounts.
- In Finland, the trend for tying banking and insurance products is increasing; although currently it does not constitute a particularly acute or wide issue. Over-indebtedness and the grant of quick loans are more problematic.
- In Germany, the combination of credit loans and credit insurances is regarded as a restrictive practice by consumer protection agencies, academics and the law. Complaints reported by consumers or national courts concern loans and insurances, and investments and accounts;
- In Italy, consumer organisations stressed that tying practices include mortgages with current account and insurance; and personal credit with bank account and life insurance.
- In the UK, recently, concerns have been raised by consumer groups about insurance plans sold when taking out a mortgage. Compulsory tying was prohibited some time ago but this seems not to have stopped banks from selling mortgage and payment protection insurance, at the point of sale during the mortgage completion process.
- Moreover, a business association reported that in Portugal, it is common for banks to require their clients to open an account in that specific bank, prior to the subscription of an investment fund or a pension product.
- In Romania, it is reported that the banks compel their clients to open a current account each time they ask for a loan. Approximately 11% of the financial/loan institutions impose to their clients who apply for a mortgage loan, to conclude a life insurance policy as well. The major role of mortgage loans as gateway product is also confirmed by the fact that in Romania holders of a mortgage loan would buy on average four products from the same financial services' provider.

This information is in line with the findings of the sector inquiry⁴²² for other EU countries (see the table below). It also confirms other findings from our survey, such as the role of mortgage loans as leading gateway product.

Table 40 – Cross-selling ratio in the EU-25

Country	Gateway product: current accounts	Gateway product: deposits accounts	Gateway product: mortgage loans	All gateway products
Austria	2,25	2,16	3,29	2,27
Belgium	2,99	2,33	4,53	2,71
Cyprus	2,18	1,76	4,01	2,01
Czech Republic	1,48	1,46	1,91	1,49
Denmark	1,97	2,3	2,83	2,17
Finland	1,97	2,74	3,54	2,27
France	3,15	2,16	4,27	2,63
Germany	2,1	1,42	2,22	1,63
Greece	1,42	1,56	2,82	1,55
Hungary	1,7	1,99	2,3	1,81
Ireland	1,97	1,96	2,95	2,03
Italy	1,99	1,79	2,54	2,01
Latvia	1,41	2,22	3,01	1,55
Lithuania	1,71	2,09	2,58	1,87
Luxembourg	2,25	2,33	3,83	2,33
Malta	2,56	1,78	3,03	2,05
Netherlands	2,29	2,17	3,41	2,31
Polands	1,61	1,33	2,5	1,5
Portugal	1,81	2,21	3,42	2,03
Slovakia	1,68	1,41	2,68	1,56
Slovenia	1,79	1,81	1,92	1,8
Spain	1,89	1,98	3,63	2,07
Sweden	2,65	2,7	3,55	2,79
United Kingdom	2,08	1,7	2,65	1,94
EU-15 average	2,24	1,86	3,07	2,07
NMS average	1,62	1,54	2,45	1,58
EU-25 average	2,14	1,81	2,97	1,99

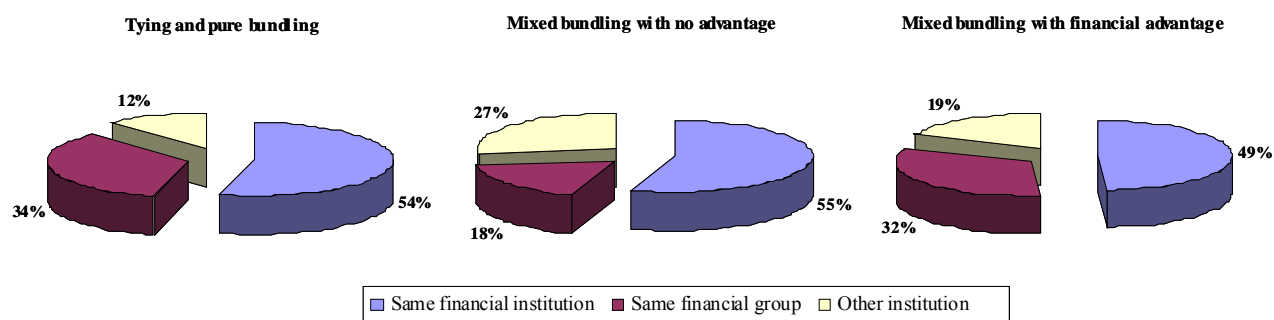
Source: European Commission, Competition DG, Interim Report II, Current accounts and related services, 17 July 2006

5.3.2.3 Supply of cross-sold products

The graph below shows the sources of supply of the three main cross-selling practices (see Annex 13 for details).

⁴²² European Commission, Competition DG, Interim Report II, Current accounts and related services, 17 July 2006.

Figure 26 – Suppliers of cross-selling practices (N=570 mentions)



First, **tying and pure bundling** occurs mostly within the same financial institution (54%) or within the same financial group (34%). Altogether, within the same financial institution or group, tying and pure bundling represents 88%. Second, **mixed bundling without advantage** occurs also mostly within the same financial institution (55%) or with the same financial group (18%). Altogether, within the same financial institution or group, it represents 73%. Third, **mixed bundling with financial advantage** occurs also mostly within the same financial institution (49%) or with the same financial group (32%). Altogether, within the same financial institution or group, it represents 81% while with another institution it represents 19% which is not insignificant. Tying and pure bundling appears thus as the practice which most frequently occurs within the financial institution or within the financial group. The financial sector' responses indicate that tying and pure bundling would occur at 94% within the financial institution or within the financial group. Concerning mixed bundling practices, the financial sector' responses are rather similar to the ones of the whole sample.

When looking for geographical differences, cross-selling within the same financial institution or group tends to have more importance in Belgium (100% for tying and pure bundling, 96% for mixed bundling with financial advantage and 98% for mixed bundling without advantage), Cyprus (100% for all categories), Czech Republic (86% for mixed bundling with financial advantage), Estonia (100% for tying and pure bundling), Portugal (95% for mixed bundling without advantage) and the Netherlands (100% for tying and pure bundling). In the following countries, cross-selling occurs more often with a partner or any other financial institution: Denmark (67% for mixed bundling without advantage), Finland (48% for mixed bundling with financial advantage), Ireland (100 % for mixed bundling without advantage), Italy (24% for tying and pure bundling, and 23% for mixed bundling without advantage) and Poland (21% for tying and pure bundling, 25% for mixed bundling with financial advantage and 30% for mixed bundling without advantage).

It is also worth stressing, for all cross-selling practices considered together, the predominance of a domestic strategy for supplying products -i.e. when the financial group or the other institution, as the main supplying institution, are located in the same country. Such domestic strategy concerns 92% (99.7%

according to the financial sector) of the practices while a cross-border approach - i.e. when the two supplying institutions are not located in the same country-, concerns at maximum 8%, either through the location of a branch of the same financial group in another country (4%) or through a partner institution located in another country (4%). This means that the linked suppliers are most frequently from the same country⁴²³.

5.3.3 Conditional sales practices

5.3.3.1 Overall view

Conditional sales practices are presented in the table below.⁴²⁴

Table 41 – Distribution of conditional sales

Conditional sales practices	Type of practice	Nbr of answers	%
Salary paid into current account	Conditioned access	35	22
Obligation to provide loan guarantees	Conditioned access	17	11
Minimum initial deposit amount	Conditioned access	15	9
Repayment of loan through automated direct debit	Conditioned access	12	8
Loyalty programs and product upgrades	Preferential rates / tariffs	11	7
Minimum time period	Conditioned access	9	6
Minimum balance on account	Conditioned access	8	5
Minimum time period to access other products	Conditioned access	7	4
Variable fee depending on number of products purchased	Preferential rates / tariffs	6	4
Tying with online banking services	Non-financial advantage	6	4
Minimum income in first period	Conditioned access	4	3
Variable fee depending on deposit amount	Preferential rates / tariffs	4	3
Non-financial product(s) included free of charge	Non-financial advantage	4	3
Restricted access to residents	Conditioned access	4	3
Variable fee depending on usage	Preferential rates / tariffs	3	2
Tying with non-financial product(s)	Non-financial advantage	3	2
One-off fee for early closure	Conditioned access	3	2
Rebates on non-financial product(s)	Non-financial advantage	2	1
One-off fee	Conditioned access	2	1
Preferential fee/interest rate in first period	Preferential rates / tariffs	1	1
Automatic periodical transfer to savings account	Conditioned access	1	1
Obligation to select an option for pay out	Conditioned access	1	1
Variable fee depending on usage of electronic channels	Preferential rates / tariffs	1	1
Total		159	100

Practices were grouped in three mutually exclusive categories:

⁴²³ The cross-border dimension will be further investigated in the presentation of our results, in relation to preferential agreements (see section 6.2.3.5.3 of this Report). Moreover, and as discussed more in-depth below, evidence from other empirical evidence revealed that cross-border shopping remains a marginal feature of consumers' behaviour in their purchase of financial services.

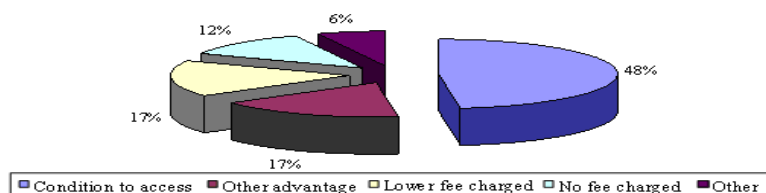
⁴²⁴ In our approach toward respondents, we have employed the locution 'conditioning and other practices'. It has been used for the purposes of the survey conduct and the empirical analysis. Further on in this Report, we will refer to them as 'conditional sales'.

- Conditioned access, i.e. access to a financial product or to financial advantages linked to the purchase are conditioned to the respect by the consumer of a preliminary condition;
- Granting of preferential rates/tariffs, in function of a specific behaviour adopted by the consumer;
- Granting of non-financial advantages, i.e. the consumer benefits from additional advantages of non-financial nature while purchasing a financial product, e.g. non-financial products free of charge or rebates on non-financial products.

The single practices most frequently reported are the salary paid into current account (22%), the obligation to provide loan guarantees (11%), the minimum initial deposit amount (9%), and the repayment of loan through automated direct debit (8%)⁴²⁵, which are conditioned access practices. It is also obvious that these practices refer in their majority to current accounts and to loans.

The extent to which such other practices may be beneficial, or to the contrary, restrictive, for consumers, is voiced throughout respondents' perception of effects induced by practices. These entail the imposition of a condition to access or purchase the product, and the grant of financial and non-financial advantages. The major perceived effects of these practices, according to survey respondents, are presented in the graph below.

Figure 27 – Major effects of the conditional sales practices (N=109 practices)



Conditioned access to a product represents nearly half of the practices considered here, followed by financial advantages (lower or no fee charged) and other (non-financial) ones, such as wine club discounts, mp3 player free of charge, petrol card, etc. The category “other, presented in the graph above, groups a few marginal effects which are financially advantageous to the consumer, such as refund or higher deposit rates. Section 5.5.3 which is devoted to the reasons to engage in these practices shows that for consumers the reason communicated ‘no choice’ concerns nearly exclusively conditioned access practices. This tends to indicate the potential or expected detrimental effects⁴²⁶.

⁴²⁵ These practices are described in Annex 2 Glossary of terms, 2. Considered practices.

⁴²⁶ They will be further investigated throughout Section 6.

5.3.3.2 Products concerned

The products concerned by the reported conditional sales are mostly banking products (75%); insurance and investment products accounting respectively for 21% and 4%. This distribution is very similar to the one regarding products concerned by cross-selling. The following table details the importance of the different products concerned.

Table 42 – Distribution of products concerned by conditional sales practices

Product affected by the practice	Nbr. of answers	%
Banking products		
Mortgage loan	31	25
Current account	28	22
Consumer loan	25	20
Credit card	12	10
Bank deposits	11	9
Savings account	8	6
Credit line / overdraft	7	6
Fund transfers	1	1
Debit card	1	1
Corporate banking loan	1	1
Operations on foreign currencies	0	0
Means of payment excluding debit/credit cards	0	0
Equity release loan	0	0
Total	125	100
Insurance products		
Life insurance	10	29
Motor insurance	9	26
Payment protection insurance	4	11
Home insurance	4	11
Pension product	3	9
Health/disability insurance	3	9
Fire insurance	2	6
Other non-life insurance	0	0
Business/commercial insurance	0	0
Insurance on payment tools	0	0
Insurance on investments	0	0
Total	35	100
Investment products		
Portfolio management	2	29
Investment advice	2	29
Reception and transmission of orders	1	14
Underwriting or placing with firm commitment	1	14
Term investment account	1	14
Execution of orders on behalf of clients	0	0
Dealing on own account	0	0
Placing without firm commitment	0	0
Total	7	100

Mortgage loans, current accounts and consumer loans are the most frequent products involved in conditional sales. For the insurance and investment products, the sample and consequently the figures are too small to draw definitive conclusions. However, we observed that life insurance and motor insurance are the most frequent products, likewise cross-selling practices.

5.3.3.3 Most frequent combinations of conditional sales with gateway products

The most frequently mentioned conditioned access practices are:

- Salary paid into account (N=35) (conditioned access practice), combined in particular with: (i) a consumer loan (29%); (ii) a mortgage loan (26%); (iii) a current account (20%); and (iv) a credit line/overdraft (14%);
- Obligation to provide loan guarantee (N=17) (conditioned access practice), combined in particular with a mortgage loan (35%) and a consumer loan (35%);
- Minimum initial deposit amount (N=15) (conditioned access practice), combined in particular with a savings account (20%), a current account, bank deposits, life insurance policy and portfolio management (13% each);
- Repayment of loan through automated direct debit (N=12) (conditioned access practice), combined in particular with a mortgage loan (50%) and a consumer loan (25%).

The most frequently mentioned other conditional sales practice is:

- Loyalty programs and product upgrades (N=11) (preferential rates/tariffs), combined in particular with a credit card (45%).

5.3.4 Conclusions of the inventory of practices

The inventory of cross-selling and conditional sales practices reveals the following major conclusions:

- For both categories of practices, gateway products are much more frequently banking products (75%) than insurance and investment ones.
- Cross-selling practices (tying and bundling) tend to be more widespread than conditional sales, since their respective shares are 79% and 21%.
- When considering cross-selling practices alone, the most frequently reported practices are first mixed bundling with financial advantage, then tying and pure bundling and finally mixed bundling without (dis)advantage.
- Imposing a condition to access products (such as the obligation to have a salary paid into a current account or to provide guarantees on loans) represents close to half of the conditional sales practices identified;

- In both categories of practices, the same banking and insurance products are repeatedly employed as gateway products. They are the following: current accounts, mortgage loan and consumer loans in the banking sector, life and motor insurances in the insurance sector;
- The most frequently combined products are current accounts and life insurance.

5.4 Shares of consumers and financial institutions concerned

This section is based on information provided by two different groups of respondents who received specific versions of the questionnaire:

- Financial institutions which estimated the shares of consumers concerned by the different practices;
- National associations/organisations which estimated the shares of financial institutions concerned by the different practices.

Data was collected in this way for the following reasons:

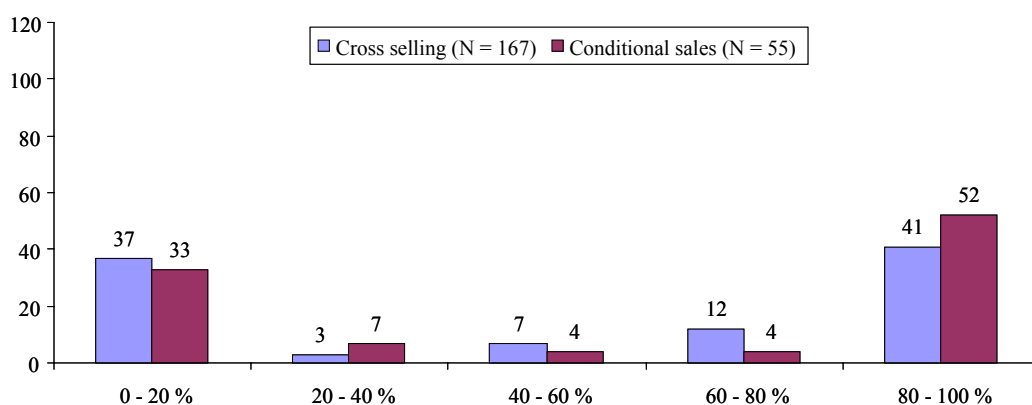
- The questionnaire was judged already complex enough, which prevented us from asking the two groups mentioned above to provide two series of estimates (i.e. shares of consumers concerned and shares of financial institutions concerned);
- Individual financial institutions would have been in a sensitive position to provide figures on their competitors' involvement with such practices. It was therefore considered that asking national associations/organisations to do so would provide more neutral and more reliable figures;
- Due to their knowledge of their market, financial institutions were considered as knowing better than national associations/organisations the shares of consumers concerned.

The part of the survey related to shares of consumers and shares of financial institutions concerned was not completed by all respondents, some of them arguing about the lack of reliable data to do so. Due to the number of responses to the survey, it was possible to provide estimates at a rather aggregated level, i.e. tying and pure bundling, mixed bundling with no (dis)advantage, mixed bundling with preferential price and conditional sales practices. Presentation of more disaggregated data would not have been safe.

5.4.1 Consumers concerned

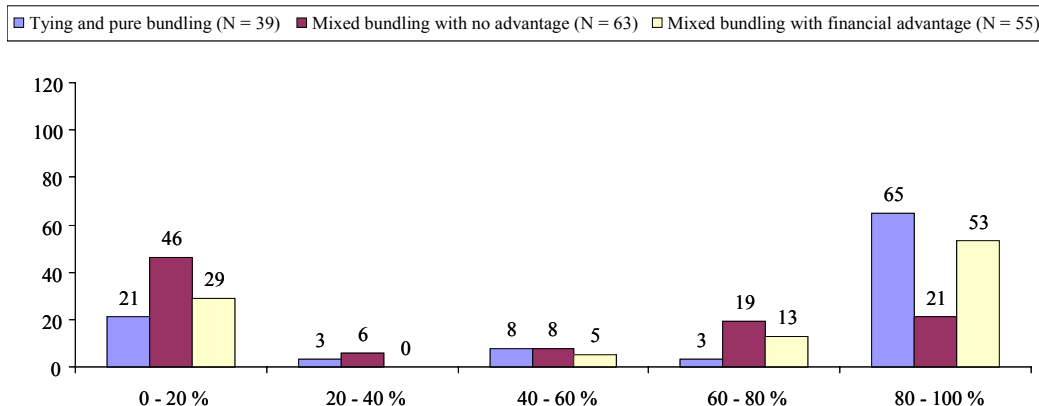
In this sub-section, data was collected solely from financial institutions for the reasons explained above. The graph below shows that for both cross-selling and conditional sales, one third of financial institutions consider that less than 20% of consumers are concerned; while 41 to 52% of them consider that more than 80% of consumers are concerned. This polarization can be explained by the different national contexts of the respondents which are reflected in Section 4 of this report.

Figure 28 – Financial institutions estimates of the ranges of consumers concerned (N=14 institutions)



Referring to the three major cross-selling practices, the profiles of responses for tying and pure bundling and mixed bundling with preferential price or rate are quite similar, while the one of mixed bundling with no (dis)advantage indicates a smaller proportion of respondents (21% instead of 53-65%) who consider that more than 80% of consumers are concerned. This would mean that consumers would be more particularly involved in tying and pure bundling, and mixed bundling with financial advantages.

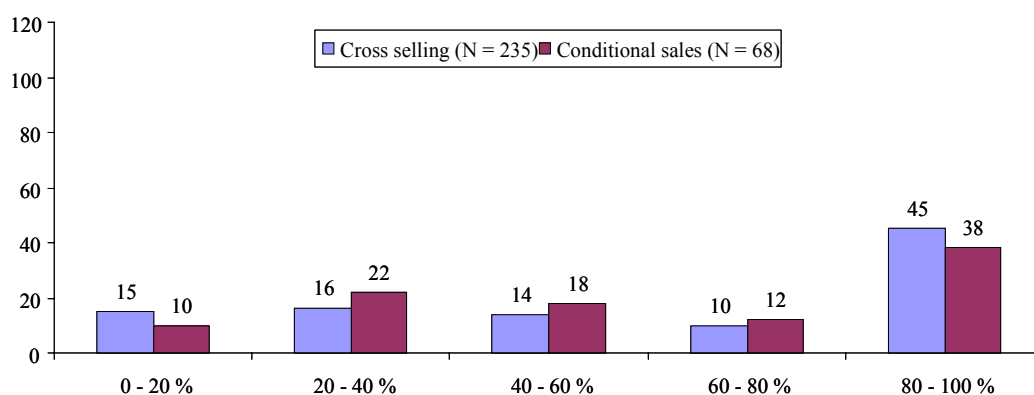
Figure 29 – Financial institutions estimates of the ranges of consumers concerned by cross-selling (N=14 institutions)



5.4.2 Financial institutions concerned

In this sub-section, data was collected solely from national associations/organisations for the reasons explained above. The figure below provides national associations/organizations estimates of the ranges of financial institutions concerned by cross-selling as well as conditional sales practices.

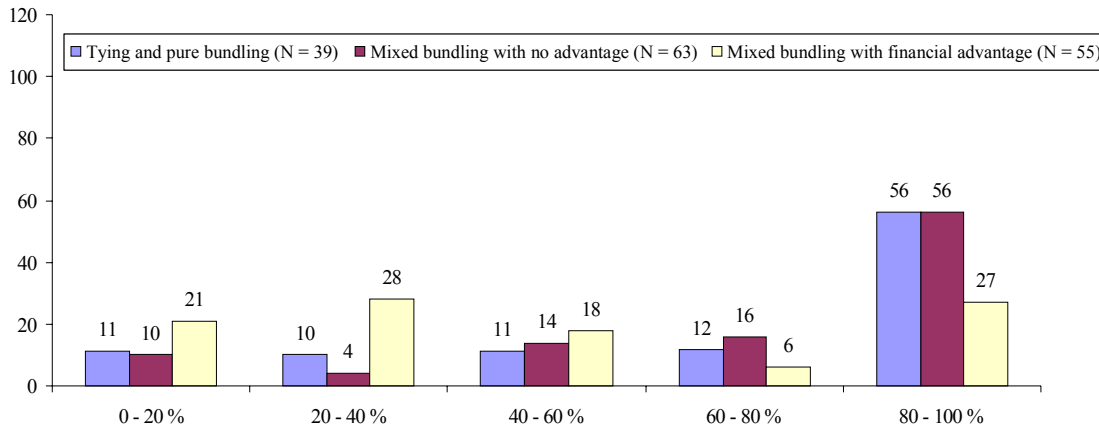
Figure 30 – National associations/organizations estimates of the ranges of financial institutions concerned (N=31 associations/organizations)



Respectively 45% and 38% of respondents consider that more than 80 % of financial institutions are concerned by cross-selling and conditional sales respectively, while the others are nearly evenly distributed over the four other ranges. Respondents from business associations are even more frequently considering that more than 80% of institutions are concerned: comparable figures are respectively 75% and 47%. This finding reinforces the view that cross-selling practices in particular are operated by a large majority of financial

institutions. As a result, and despite the low number of responses, we can infer that a rather sizeable share of consumers is concerned by the set of practices investigated in this study. Referring to the three major cross-selling practices, the profiles of responses for tying and pure bundling and mixed bundling with no (dis)advantage are quite similar, with 56% considering that more than 80% of institutions are concerned. The profile of mixed bundling with preferential price indicates a smaller proportion of respondents (27% instead of 56%) who consider that more than 80% of institutions are concerned. Due to the small number of mixed bundling practices with financial advantage mentioned by business associations (N=46), it is difficult to find the rationale of these figures.

Figure 31 – National associations/organizations estimates of the ranges of financial institutions concerned by cross-selling (N=31 associations/organizations)



5.5 Reasons for the practices

The reasons identified during the development of the survey questionnaires were taken from economic and legal research. In the analysis carried out below, it was possible to identify some practices as potentially detrimental to consumers. However, as stated in the conclusion of section 2.1.4. above, the effective harmful character of practices is dependent on the market and product setting in which they take place.

5.5.1 Link with economic theory and legal findings

The reasons identified during the development of the survey will serve in our assessment of practices under study; and will be developed further in Section 6 of this Report. Their formulation originates from the economic and legal research, as follows in the two tables below.

Table 43 – Reasons for providers: economic theory and legal findings

Reason	Definition	Corresponding underlying economic theory	Reference in the Report
1) Commercial strategy	Consists in the differentiation from competitors, as regards the <u>products</u> and packages/bundles offered, their <u>prices</u> (discounts), advertising effects, etc.	<p>Such strategy responds to two underlying economic concepts developed in previous sections of this Report:</p> <p>i) <i>Product differentiation and market segmentation</i>:</p> <p>Tying and bundling can be used as a product differentiation device. Carbajo <i>et al.</i> (1990) and Chen (1997) provide a strategic motive for bundling as a product-differentiation device. In particular, bundling is used to segment the market and relax competition, effectively increasing all firms' profits.</p> <p>ii) <i>Price discrimination</i></p> <p>The practice allows firms to capturing heterogeneous customer preferences by offering a wide range of products in a single package. It sorts consumers into groups and extracts a greater portion of the consumer surplus by profitably discriminating.</p> <p>(Stigler, 1963; Adams and Yellen, 1976; Schmalensee, 1982).</p>	<p><i>Section 1.1.1.1</i></p> <p><i>Section 2.2.3.1.1.</i></p>
2) Risk reduction	Consists in coupling products for a better monitoring of the risks associated with customers	<p>Selling multiple products and services together allow firms to reduce the cost associated with customer management by using the same information for the provision of more than one service. 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</p> <p>(Laux and Walz , 2009; European Commission, Interim report II : Current accounts and related services, Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 17 July 2006.)</p>	<p><i>Section 1.1.1.1</i></p> <p><i>Section 2.1.1.1.3</i></p>
3) Cost efficiency	Where sales, administrative or other costs are distributed over several bundled products	<p>Cost savings may arise through economies of scope and scale (Ahlborn et al., 2004, Evans and Salinger, 2008). These economies can emerge in both distribution and production process. In particular, tying can allow firms to cross-subsidise highly demanded products and "niche" products – as in block booking and full line forcing – or better managing sales. In addition, tying can reduce costs of packaging and distribution, leading to economies of scale.</p>	<i>Section 2.2.3.1.1.</i>
4) Technical reasons	Where the purchase of a single component is meaningless or not functional (e.g. a debit card or online banking without a current account); or when supplying the two products separately is technically difficult.	<p>The practices considered may repeatedly involve complementary products. Classical examples include shoes and shoe laces, different car parts and the stripped-down automobile, operating systems and related software, etc. A cross-selling strategy can also avoid the risk of double marginalization in two complementary markets and may result in mutual gains for consumers and producers</p> <p>(Cournot, 1838).</p>	<i>Section 2.1.1.1.3</i>
5) Specific market conditions	e.g following the conduct of competitors	<p>Evidence from the European Commission suggests that smaller and foreign banks seem to be influenced by the conduct of tying by larger banks and mirrors the leaders' behaviour. (European Commission, Staff working document, Report on the Retail Banking Sector Inquiry, SEC(2007) 106, 31 January 2007.)</p>	<i>Section 1.2.3 and Table 1</i>

Table 44 – Reasons for consumers: economic theory and legal findings

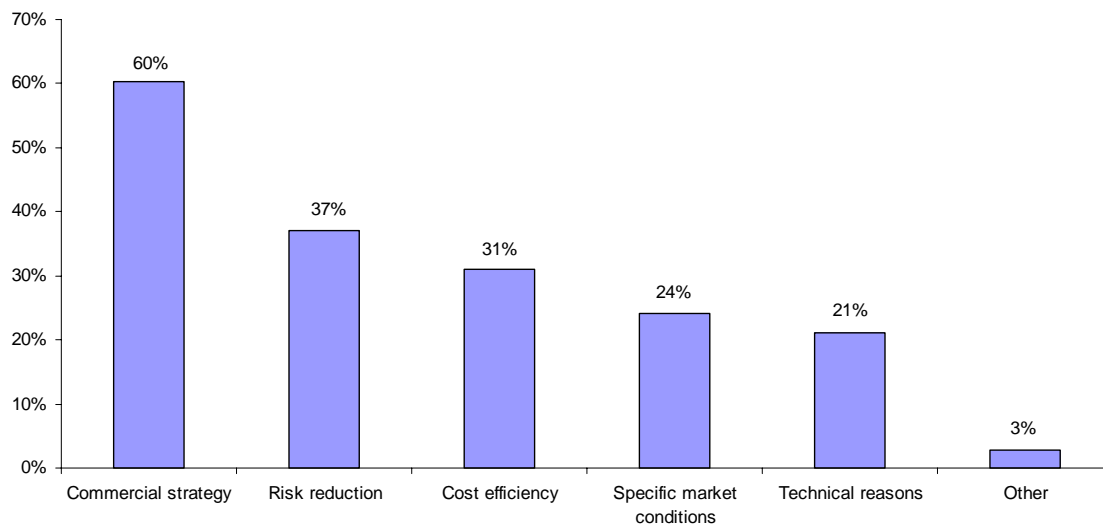
Reason	Definition	Corresponding underlying economic theory	Reference in the Report
1) Convenience	When consumers find it convenient to have several financial services in a package at one single institution	The simultaneous purchase of several products leads to a reduction of transaction costs and to “portfolio effects” (or “one-stop-shop” effects). Customers having different needs often prefer to purchase one package of services and products from a single provider, instead of shopping around to find the best deal offered by different providers. This way, they can profit from a reduction in transaction costs, including search, information and negotiation costs.	<i>Section 1.1.1.1</i> <i>Section 2.2.3.1.1</i>
2) Financial or other advantage	Buying cross-sold products allows the consumer to benefit from a financial advantage, or from other non financial advantages	These savings can be also beneficial to customers, if market conditions lead financial service providers to pass on the efficiencies downstream to their clients in the form of lower prices. Empirical evidence from Evans and Salinger (2005) shows that the reductions are partially transmitted to consumers	<i>Section 1.1.1.1</i> <i>Section 2.2.3.1.1</i>
3) No choice	Consumers engage in the purchase given they have had “no choice”	When purchasing a single component is not possible, and two or more products are only sold as a single one and cannot be separated: this can be particularly likely for practices such as pure bundling and tying.	<i>Section 1.1.1.1</i> <i>Section 2.2.3.1.1</i>

The results of the survey confirm that these reasons are the main ones.

Regarding reasons to sell products, commercial strategy, risk reduction and cost efficiency were mentioned for respectively 60%, 37% and 31% of the combination practices listed by respondents⁴²⁷. Specific market conditions (24%) and technical reasons (21%) were relatively less frequently mentioned. This finding is consistent with economic literature, which points at cross-selling practices as a way to reduce costs by exploiting economies of scale and scope, achieve product differentiation and reduce the risk associated with certain transactions (see Section 2.1.1.1.3 above).

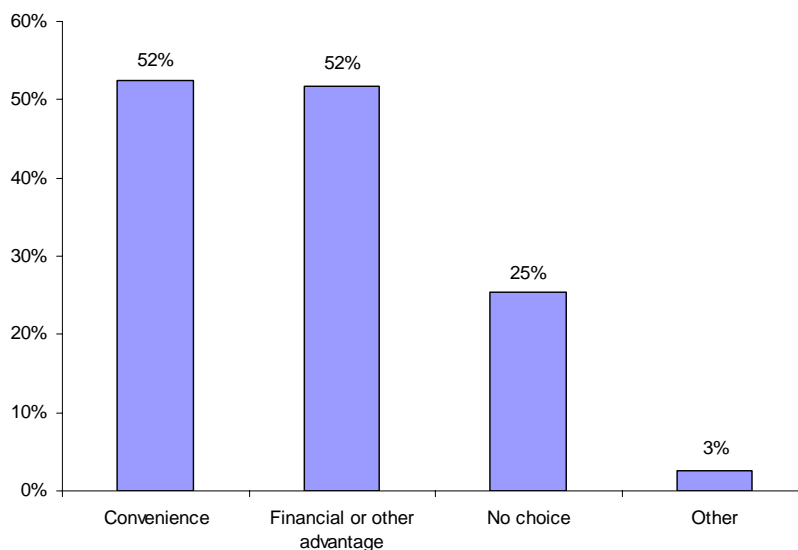
⁴²⁷ The percentages rates in this sub-section were calculated based on the number of practices listed by respondents. These rates are different from the percentages in the sub-sections 5.5.2 and 5.5.3, which are based on the total number of reasons given by respondents.

Figure 32 – Reasons for selling (N = 774 practices)



Regarding reasons to buy products, convenience and financial advantages were both mentioned for 52% of the practices listed. No choice was mentioned for 25% of the cases. Again this mirrors our findings in Section 2, where we emphasised the potential for some cross-selling practices to create one-stop-shopping effects for customers, as well as (in the case of multi-product rebates) direct financial advantages in the purchase of bundled products (see Section 2.1.1.1.3 above).

Figure 33 – Reasons for buying (N = 774 practices)



Finally, the very low percentages of other reasons (3%) attributed by respondents confirm that the reasons identified through the review of the economic theory are the main ones.

5.5.2 Reasons for cross-selling: empirical evidence

The following table indicates the reasons for providers to cross-sell and for consumers to buy cross-sold products.

Table 45 – Reasons for cross-selling and buying cross-sold products

Reasons reported	Nbr. of answers	%
Reasons for providers to cross-sell products		
Commercial strategy	386	35
Risk reduction	216	20
Cost efficiency	196	18
Specific market conditions	148	13
Technical reasons	143	13
Other	18	2
Total	1107	100
Reasons for consumers to buy cross-sold products		
Convenience	357	43
Financial or other advantage	328	39
No choice	135	16
Other	19	2
Total	839	100

For providers, the scope of reasons to cross-sell is quite clear. In first position comes “*commercial strategy*” (35% of reasons), i.e. the differentiation from competitors, as regards the products and packages/bundles offered, their prices (discounts), advertising effects, etc. This reason is also the first one for each category of cross-selling, namely tying and pure bundling (45% of the reasons), mixed bundling with no (dis)advantage (30%) and mixed bundling with financial advantage (40%).

A second group of reported reasons for cross-selling includes:

- (i) “*Risk reduction*” (20%) (e.g. coupling a current account to a mortgage allows for a better monitoring of the risks associated with the customers); and
- (ii) “*Cost-efficiency*” (18%) (where sales, administrative or other costs are distributed over several bundled products).

Finally, two reasons lag a bit behind:

- (i) “*Technical reasons*” (13%) i.e. purchase of a single component is meaningless or not functional, like debit card or online banking without a current account; and
- (ii) “*Specific market conditions*” (13%) (e.g. following the conduct of competitors).

Other reasons mentioned (2%) include: increasing sales, binding consumers for a long period, products commonly sold together because consumers prefer so, tax benefits, regulatory reasons and creation of loyalty relation with consumers.

Two groups of respondents present some specificities compared to this overall view:

- **Financial institutions** give less importance to commercial strategy (27%) and a bit more importance to risk reduction (24%) and cost efficiency (25%);
- **Business associations** give less importance to cost efficiency (13%) and more importance to technical reasons (19%).

Regarding the reasons for cross-selling, an expert close to a consumer organization stressed that in his view, the problem is not tying as such, despite its significance. The actual cause of most of detrimental practices can be traced back to the use of aggressive remuneration practices such as commissions and bonuses which lead sales advisers to recommend products that reward them for volume of sales rather than quality of sales. The mentioned reasons for cross-selling are quite diversified and the different stakeholders have different views as to the predominant ones. What emerges from the survey is that commercial strategy is the major reason, followed by risk reduction.

From the **consumers' perspective**, three main reasons to buy cross-sold products emerge:

- (i) “*Convenience*” (43% of answers), when the consumer finds it convenient to have several financial services in a package at one single institution (signalling ‘one-stop-shop’ effects);
- (ii) “*Financial or other advantage*” (39%): buying cross-sold products allows the consumer to benefit from a financial advantage (e.g. rebate on the price of the financial products, lower interest rate, or financial advantages on non-financial services/products), or from other non financial advantages (e.g. wine club discounts, mp3 player free of charge, petrol card, etc.).
- (iii) The fact that consumers engage in the purchase given they have had “*no choice*” represents 16% of answers. This refers to situations where purchasing a single component is not possible: two or more products are only sold as a single one and cannot be separated.

Other reasons mentioned (2%) include tax benefits, inertia and lack of knowledge of consumers, and the fact that consumers receive a reduction on the rate but the combined product is not necessarily the best choice. Overall, there is a consensus among the different groups of respondents regarding the major reasons for consumers to buy cross-sold products.

It is worth noting that the major reasons for consumers to engage in cross-selling differ according to category of cross-selling, i.e.:

- For tying and pure bundling, the main reason is “*no choice*” (47% of the reasons);
- For mixed bundling with no (dis)advantage, it is “*convenience*” (56%);
- For mixed bundling with financial advantage, it is “*financial or other advantage*” (52%).

This data is important in that it shows that tying and pure bundling is potentially detrimental to consumers since tying and pure bundling is often imposed to them (“no choice”) while the two other practices are mainly considered as convenient or bringing advantages.

Finally, our empirical evidence mirrors the findings of the economic literature as regards cross-selling practices. As shown in Section 2 above, these practices may create advantages both on the supply and the demand side, but may in some cases prove detrimental for customers. Financial service providers find the adoption of these practices beneficial both to generate efficiencies (which may, or may not, be passed on downstream to customers), differentiate their product offering and create long-term relationships with their customers. At the same time, in some cases customers may find these practices attractive due to one-stop-shop effects, but they may in other cases be forced to accept packaged offers due to lack of alternatives, and even if they did not really demand some of the products included in the package.

5.5.3 Reasons for conditional sales: empirical evidence

The reasons for these practices are shown by the table below.

Table 46 – Reasons for conditional sales practices

Reasons reported	Nbr. of answers	%
Reasons for providers to sell products		
Commercial strategy	80	31
Risk reduction	70	27
Cost efficiency	44	17
Specific market conditions	38	15
Technical reasons	21	8
Other	3	1
Total	256	100
Reasons for consumers to buy products		
Financial or other advantage	73	40
No choice	61	33
Convenience	49	27
Other	1	1
Total	184	100

Regarding **providers**:

- “*Commercial strategy*” remains the principal reason with 31%;
- “*Risk reduction*” is more important than for cross-selling (27% instead of 20%);
- “*Technical reasons*” are less important than for cross-selling (8% instead of 13%).

The differences compared with cross-selling practices might originate from the fact that a majority of these practices condition access to the products: for these practices “*risk reduction*” is the main reason with a share of 31% of reasons

mentioned. For the other conditional sales practices (granting of financial and non-financial advantages), “*commercial strategy*” is the major reason with a share of 54%. Moreover, the groups of respondents’ specificities compared to the overall sample’s view are:

- **Regulators** give more importance to “*commercial strategy*” (42% instead of 31%) and less importance to “*risk reduction*” (12% instead of 27%);
- **Financial institutions** give much less importance to “*commercial strategy*” (14% instead of 31% for the sample) and more to “*risk reduction*” (32% instead of 27% for the sample) which is by far the main reason for them;
- **Business associations** give more importance to “*risk reduction*” (42% instead of 27%) and less to “*cost efficiency*” (6% instead of 17%).

Regarding **consumers**:

- “*Financial or other advantage*” remains the principal reason for purchasing conditional sales products, with 40% of answers;
- “*No choice*” becomes the second main reason with 33% of answers, (versus 16% for cross-selling);
- “*Convenience*” is less important (27%) compared to 43% for cross-selling.

The groups of respondents’ specificities compared to this overall view show that:

- **For financial institutions**, “*convenience*” is more predominant than having “*no choice*”;
- **Business associations** emphasized the reason “*no choice*” (44% of answers).

The split between conditioned access practices and other conditional sales practices⁴²⁸ reveals the following:

- The main reason for consumers to engage in conditioned access practices is “*no choice*” (42% of the reasons); consumers who do not qualify to the imposed requirements would thus be restrained and excluded from accessing financial products;
- For the other conditional sales practices, the main reason is “*financial or other advantage*” (62%).

The reasons for offering conditional sales practices actually differ from those justifying cross-selling practices:

- For sellers, risk reduction takes more room, as reflected by the answers of the financial institutions;
- For consumers, “*no choice*” is becoming important and concerns nearly exclusively conditioned access practices and not the other conditional sales practices.

⁴²⁸ These other practices are described under section 5.3.3 above. They consist of granting financial and non-financial advantages for the consumers.

Overall, there are therefore two practices that are potentially detrimental to consumers' choice i.e. tying and pure bundling and conditioned access practices, since they would have no choice to engage in those practices.

5.6 Conclusion from the survey analysis

- The reactions to the survey are characterised by a lower than expected rate of responses, in particular from financial institutions, and a relatively high rate of explicit refusals to answer. This might be explained by the context of the financial crisis with which financial institutions had to cope, as well as the sector insecurity.
- The data forms a reliable informative and indicative basis even if they should not pretend to be fully representative, due to the lower than expected number of questionnaires completed. However, their uneven distribution over countries makes it difficult to reflect fully the diversity of national situations.
- The data presented confirms the findings of the sector inquiry⁴²⁹, especially regarding the leading role of mortgages, consumer loans and current accounts as gateway products for cross-selling practices, and of salary paid into current account for conditional sales practices. This also validates the reliability of the data presented.
- The empirical analysis allowed for an inventory of practices which can be summarised as follows:
 - Among all practices identified, cross-selling practices account for 79% whereas conditional sales practices account for 21%;
 - Tying and pure bundling represents about one third of cross-selling practices, to be compared to one quarter for mixed bundling with no (dis)advantage and 40% for mixed bundling with financial advantage;
 - Bank products represent three quarters of gateway products of cross-selling and conditional sales;
 - The top three gateway products are mortgage loans, current accounts and consumer loans;
 - Loans (especially mortgages), insurances (especially life), and current accounts, are part of the most frequently identified combinations of products;
 - The requirement of having a salary paid into account is the most frequent conditional sales practice;
 - Cross-selling practices are supplied by a single financial institution in 50% of the cases, amongst the same financial group in 30%, and

⁴²⁹ European Commission, Competition DG, Interim Report II, Current accounts and related services, 17 July 2006.

with another institution in 20%. The supply of combined products rarely involves a branch or institution located in another country (7% of the cases).

- The shares of consumers concerned by these practices were estimated by financial institutions: one third of them estimates that maximum 20% of consumers are concerned, while 50% estimate that more than 80% of consumers are concerned.
- The shares of financial institutions using these practices were estimated by the national associations/organisations: half of them estimate that more than 60% of financial institutions are concerned.
- The leading reasons for financial institutions to engage in these practices are commercial strategy, followed by risk reduction, and cost efficiency. It is worth noting that the main reason to engage in conditional sales practices is risk reduction.
- Leading reasons for consumers to engage in these practices differ according to the practice, but for two of them, namely tying and pure bundling and conditioned access, the reference for having ‘no choice’ is the main justification. They are thereby potentially detrimental to consumers and constitute candidates to be further investigated. Concerning other cross-selling and conditional sales practices, convenience, as well as financial and other advantages, are the leading reasons.

The present data collection and analysis can be considered as a feasibility exercise: it is possible to start a knowledge basis on the practices concerned even if many addressees of the survey claimed that they lacked of data. The condition for carrying out this project toward a wider scale, and in order to reach the critical mass effectively allowing portraying the national situations, is obviously to have more stakeholders on board.

5.7 Correlation between empirical and legal findings

All Member States for which empirical data exists show some degree of cross-selling practices and conditional sales practices⁴³⁰. As these practices are subject to a wide variety of legal approaches in the EU27, in this Section we compare the findings of our empirical analysis with the findings of the analysis of the legal framework in Member States.

As in Section 4 above, we highlight three different groups.

- Group 1 includes Member States where specific policy initiatives are in place to ban or limit tying and other unfair practices in the retail financial services sector. We refer broadly to “policy initiatives” to encompass, besides legislation, also case law or actions from sectoral regulators.

⁴³⁰ No questionnaires were returned from Greece, Lithuania, Malta, Romania.

- Group 2 includes Member States where no provisions on tying exist, other potentially unfair practices are addressed by general consumer protection law (including the transposition of the UCPD). This means that – compared to group 1 – in these countries legal rules make no specific reference to practices identified in our report, such as tying, bundling, conditional rebates, loyalty rebates, exclusivity or preferential agreements, unsolicited offers or “inertia selling”, churning and steering.
- Group 3 includes the only Member State that neither enacted specific legislation addressing tying and other potentially unfair practice, nor has so far transposed the UCPD, *i.e.* Luxembourg. In this country, tying and other potentially unfair practices are currently not addressed either by national legislation, or by legislation transposing the UCPD.

Below, we analyse whether, depending on the overall legal approach adopted, the use of tying and other potentially unfair commercial practices changes. This will help us explain whether the attempts to regulate the issue at national level have been effective to date.

5.7.1 Group 1 – Countries that explicitly challenge tying and other commercial practices in the retail financial services sector

Group 1 includes those countries that have explicitly taken action to address tying and (in some cases) other commercial practices in the retail financial services sector. Accordingly, in these countries, we should observe a lower incidence of tying practices – or no practices at all. These countries include:

- Three Member States (Belgium, Bulgaria, and Romania) that have enacted legislation addressing “combined sales” in their general consumer protection and civil laws. These laws cover all sectors of the economy and in this way include also the retail financial services sector. In some of these countries, certain tying practices are explicitly exempted from the general prohibition stated in the law (*e.g.*, Belgium in the case of mortgage loans).
- Four countries where legislation directly addresses tying practices in the retail financial services sector (France, Ireland, Portugal and partly Denmark, limited to payment instruments).
- Three countries that rely on “soft-law” or self-regulatory schemes coupled with narrower legal prohibitions (Hungary, Poland, Slovakia).
- One country (Cyprus) where cross-selling and conditional sale practices are generally allowed, but in one specific case (mortgage loans) tying, pure bundling, mixed bundling with financial advantage, preferential and exclusive agreements are prohibited.
- One country (Finland) where tying, pure bundling and exclusivity agreements are prohibited by the law only if they result from a standard contract term.

5.7.1.1 Countries with far-reaching provisions

This is the group of countries where tying has been subject to comprehensive provisions banning it altogether. This group includes Belgium, Bulgaria, and Romania. Unfortunately, our survey obtained no response from Romania: accordingly, we show the results from Belgium and Bulgaria below.

5.7.1.1.1 *Belgium*

In the case of Belgium, the main provision prohibiting combined offers is embodied in Article 54 of the Belgian law on trade practices and consumer information and protection outlaws combined offers for the consumers. In addition, Article 31(1) of the Consumer credit law contains prohibitions to tying consumer loans with other financial services.

However, this general provision has at least 4 important exceptions, *i.e.* it is allowed

- (i) to sell a good together with the consumer credit contract needed to finance the purchase;
- (ii) to offer credit combined with current account;
- (iii) to sell insurance on the property which is bought on a credit; and
- (iv) to impose an obligation to have insurance on the outstanding debt (insurance which would cover the due amount in case of death of a borrower).

As observed by the OECD (2007) in its Economic Survey of Belgium, “a defining feature of the Belgian financial system is its concentration in the hands of four large “bancassurance” conglomerates, which offer customers a mix of insurance, banking and financial services ... These institutions ... tend to capture customers by the use of cross-selling strategies, which as such raise switching costs and reduce price transparency, leading to lower competitive pressures”. The OECD more specifically addressed the exemption from the general prohibition on combined sales introduced for “the tying of a mortgage interest rate reduction and the purchase of certain insurance products”. This practice seems to create important obstacles to competition in Belgium, increasing switching costs and reducing price transparency.

Against this background, empirical data for Belgium was obtained from 4 respondents. The combinations of products reported are illustrated below, in Table 47

Table 47 – Results of the empirical analysis for Belgium

BELGIUM	Combined product																		Grand Total
Hook Product	Consumer loan	Credit card	Credit line / overdraft	Current account	Debit card	Execution of orders on behalf of clients	Fire insurance	Home insurance	Insurance on payment tools	Investment advice	Life insurance	Motor insurance	Other non-life insurance	Payment protection insurance	Pension product	Savings account	Term investment account		
Bank deposits			1	1						1	1						1	5	
Consumer loan		1		1									1		2			6	
Corporate banking loan				1											1			2	
Credit card				2														3	
Credit line / overdraft				1										1				1	
Current account		1			2							1						4	
Debit card				1						1								2	
Health/disability insurance				1														1	
Life insurance				1													1	2	
Mortgage loan				1				1	2			1			1			6	
Motor insurance	1			1														2	
Operations on foreign currencies				1														1	
Other non-life insurance				1									1					2	
Payment protection insurance	1			1														2	
Pension product											1						1	2	
Placing without firm commitment											1	1					1	3	
Portfolio management							1				1	1						4	
Savings account					1						1	1				1		4	
Term investment account											1	1					1	3	
Underwriting or placing with firm commitment												1						3	
Total Count of Hook Product	2	2	1	15	2	1	1	2	1	7	8	2	1	4	1	6	2	58	
Total Count of Combined product 1	2	2	1	15	2	1	1	2	1	7	8	2	1	4	1	6	2	58	

In line with the OECD findings, the combined sale of financial services appears to be quite common (with 58 instances in our survey). More in detail:

- We found no reported cases of tying of mortgage loans with other products; on the contrary, mortgage loans are reportedly bundled together with a current account (with no financial advantage for customers); and bundled with various types of insurance (property insurance, fire insurance and life insurance) with financial advantage for customers, consisting in a preferential rate for the gateway product (*i.e.* the mortgage loan).
- Current accounts are combined with several other products in Belgium (overall 16 instances). They serve as gateway product tied with life insurance, and as tied product with consumer loans and portfolio management services as gateway products. In all other cases, current account is bundled, not tied.
- Consumer loans are very often combined with other products. They are tied with the current account and with life insurance, and bundled with insurance products (motor insurance, life insurance, payment protection insurance) or credit/debit cards.

The most widespread practices we found in Belgium (*i.e.* those reportedly involving at least 80% of customers) include the following:

- All the practices involving mixed bundling of mortgage loans – with current accounts, home insurance, life insurance, and credit/debit card. Some of these (3 out of 8) involve a preferential agreement offered for the purchase of the combined product from a provider belonging to the same group, in the same country;
- The tying of current accounts and life insurance (purchased from another provider belonging to the same group, in the same country); and
- Tying of home insurance with other non-life insurance.

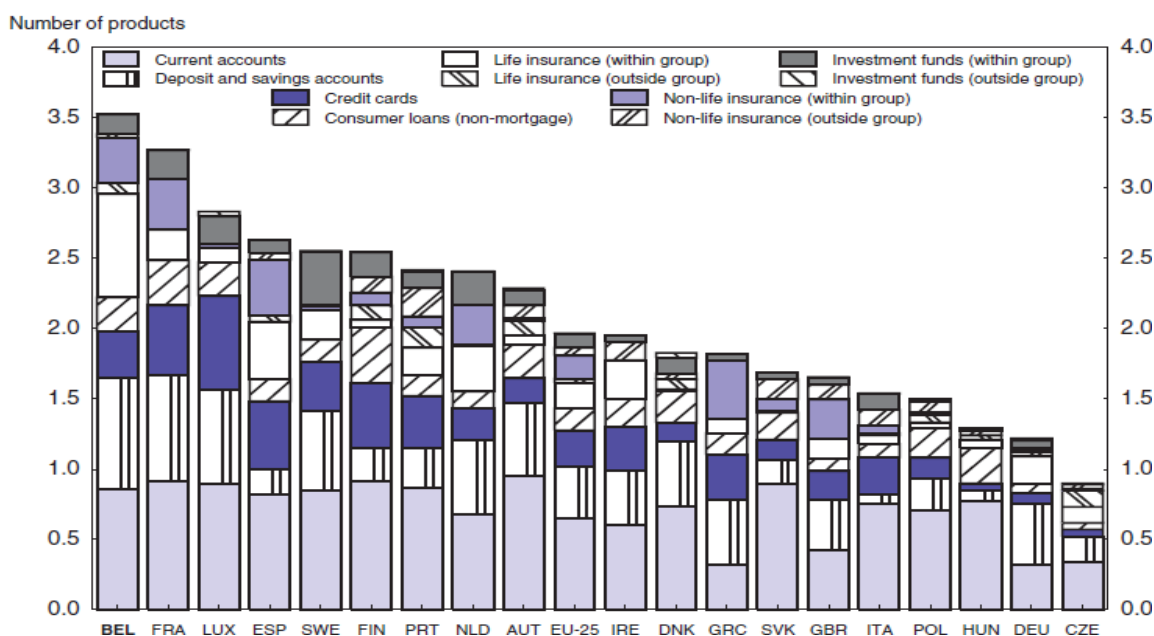
In addition, our survey shows that the most widespread conditional sales practices in Belgium (*i.e.* those reportedly involving at least 80% of customers) are the following:

- Mortgage loan with the obligation to have the salary paid into the current account;
- Mortgage loan coupled a minimum income condition in the first period;
- Consumer loan coupled with a minimum income in the first period.

The fact that these practices are reportedly widespread could be associated with the Bancassurance model that dominates the market in Belgium, as well as with the existence of specific legislative exemptions from the general rule of Article 54 of the Belgian law on trade practices and consumer information and protection and Article 31(1) of the Consumer Credit law. To some extent, some combinations (such as current accounts and life insurance) seem to go beyond these exemptions.

In conclusion, the situation in Belgium highlights that, despite the fact that there is a very robust legislation addressing combined offers or combination of services, tying and bundling are widely practiced. In particular, the mortgage market seems characterised by a widespread use of mixed bundling, which may increase switching costs for consumers, at the same time providing them with financial advantages. This finding also confirms the results of the European Commission's retail banking survey, which had shown that Belgium is the country with more widespread mortgage cross-selling (see Figure 32 below) and one of the lowest switching rates in some sectors, including banking and mortgage loans (Eurobarometer, 2009). Finally, the obligation to have salary paid into a current account or a minimum income further reduces customer mobility.

Figure 34 – degree of mortgage cross-selling



Source: European Commission retail banking survey, 2005

5.7.1.1.2 Bulgaria

In Bulgaria, legislation clearly prohibits giving products away when the sole purpose of such give-aways is to attract consumers. Relevant provisions are framed as protecting fair competition and not consumers directly. The existing provisions in Bulgarian law apply to tying and bundling practices only when a combined product is sold at a very significant discount and the practices are considered as unfair to competition. Conditional (loyalty) rebates are allowed, together with preferential agreements. At the same time, tying, bundling, conditional sales practices and preferential/exclusive agreements are allowed under the Consumer Credit Act. Aggressive commercial strategies are covered by the law that transposed the Unfair Commercial Practices Directive in Bulgaria.

, empirical data shows that tying and similar practices are common in Bulgaria, and were recorded in 12 instances from one respondent only. As shown below, in Table 48, current accounts were the most common gateway product (5 cases). In conclusion, the “soft” approach adopted by Bulgaria on tying and bundling seems to have led the market to widely adopt these practices.

Table 48 – Results of the empirical analysis for Bulgaria

BULGARIA		Combined product						
Hook Product	Current account	Execution of orders on behalf of clients	Fire insurance	Health/disability insurance	Home insurance	Other non-life insurance	Reception and transmission of orders	Grand Total
Execution of orders on behalf of clients	1							1
Home insurance			1			1		2
Motor insurance				1	1			2
Placing without firm commitment							1	1
Portfolio management	2	1						3
Reception and transmission of orders	2	1						3
Total Count of Hook Product	5	2	1	1	1	1	1	12

More in detail, in Bulgaria the most widespread tying practices reported by our respondent were the tying of portfolio management services with the execution of orders on behalf of clients, and the latter with the reception and transmission of orders from clients. These two rather uncommon combinations suggest that in Bulgaria customers enter into multiple contracts with their financial advisors, thus exposing themselves to potentially unfair practices such as steering and churning.

Another tying practice observed in Bulgaria is the combined sale of home insurance with other forms of non-life insurance.

As regards mixed bundling practices, on the one hand, current account is normally offered with other services (reception, transmission and execution of orders, portfolio management) with no financial advantage for the customer. On the other hand, when offering insurance products, service providers typically

engage in multi-product rebates: this occurs with home and fire insurance, motor insurance and health/disability insurance and motor insurance with home insurance.

Finally, no conditional sale practices have been reported in Bulgaria.

5.7.1.2 Countries where legislation directly addresses tying practices in the retail financial services sector

5.7.1.2.1 *France*

In France, the Consumer Code prohibits tying, pure bundling and exclusive agreements, but does not cover preferential agreements and mixed bundling. In addition, sectoral legislation prohibits the tying of current accounts and deposits with other financial services. The *Loi Lagarde* will also make it illegal to bundle mortgages together with PPI from 1 January 2010. Conditional (single-product) rebates are tackled only as regards their advertising, and might be addressed by Consumer Code provisions that ban making the sale of a product conditional upon the purchase of a minimum quantity, although this would require an interpretation of the rule. No provision exists as regards the obligation to have the salary paid into the current account, as a standalone obligation or as an obligation to access a mortgage loan.

In our survey, three respondents sent information on cross-selling and conditional sale practices in France. The results showed three forms of tying practices in the insurance sector (home insurance plus other non-life insurance; life insurance plus portfolio management; and motor insurance plus home insurance); in addition, four types of tying involve products that are not sold by the same company, but by partner institutions located in France: these involve three forms of tying with payment protection insurance (with consumer loans, health and disability insurance and mortgage loans). In compliance with legal provisions, no combinations involving current accounts were reported.

The most widespread cross-selling practices – affecting more than 80% of the respondents' customers – are the tying of home insurance with other (non-life) insurance and the tying of mortgage loans and PPI, which will not be possible anymore from 2010.

As regards multi-product rebates, one case involved savings account bundled together with motor insurance. This might be explained by the fact that the Monetary and Financial Code actually allows bundling of services when these services can be sold separately. Another case of multi-product rebate involved mortgage loans and non-life insurance. Another reported practice involved rebates on non-financial products in case of combined sale with motor insurance.

For what concerns conditional sales, practices involving various types of insurance products were reported, including home insurance coupled with free alarm protection.

Table 49 – Results of the empirical analysis for France

France	Combined product				
Hook Product	Home insurance	Motor insurance	Other non-life insurance	Payment protection insurance	Grand Total
Consumer loan				1	1
Credit card			1		1
Health/disability insurance				1	1
Home insurance			1		1
Mortgage loan			1	1	2
Motor insurance	1				1
Savings account			1		1
<i>Total Count of Hook Product</i>	1	1	3	3	8
<i>Total Count of Combined product 1</i>	1	1	3	3	8

5.7.1.2.2 Ireland

In Ireland, the Consumer Protection Code for Financial Services generally prohibits the tied sale (and pure bundling) of financial services, but allows mixed bundling, provided that the price of each product is clearly indicated. Some forms of tying are explicitly allowed and regulated: these include the joint offer of mortgage loans and current accounts; and mortgage loans with payment protection insurance (PPI), which is also explicitly required by the 1995 Consumer Credit Act. The latter Act also prohibits preferential and exclusive agreements when applied by mortgage lenders. As regards conditional sales, we found no provision related to single product rebates (other than the need to clearly specify the price) and the obligation to pay salary into the current account.

Available empirical data (obtained from two questionnaires) shows that cross-selling practices actually exist in Ireland, but do not take the form of tying practices. Instead, mixed bundling and multi-product rebates are widespread. In particular, the most common forms of (non-coercive) cross-selling include the mixed bundling of mortgage loans with life insurance, motor insurance, pension products and payment protection insurance; mixed bundling of pension products with life insurance; and mixed bundling of investment advice with a number of other services (term investment account, pension products, fund transfers, and execution of orders on behalf of clients). This latter category of cross-selling practice could potentially be relevant as regards the probability that unfair commercial practices emerge in thick relationships, including churning and steering.

Table 50 – Results of the empirical analysis for Ireland

IRELAND	Combined product												Grand Total
Hook Product	Business/commercial insurance	Consumer loan	Equity release loan	Execution of orders on behalf of clients	Fund transfers	Insurance on payment tools	Investment advice	Life insurance	Mortgage loan	Other non-life insurance	Pension product	Term investment account	
Home insurance			1							1			2
Investment advice				1	1						1	1	4
Life insurance	1								2				3
Motor insurance										1			1
Payment protection insurance		1				1			1				3
Pension product							1	2	1				4
<i>Total Count of Hook Product</i>	1	1	1	1	1	1	1	2	4	2	1	1	17
<i>Total Count of Combined product 1</i>	1	1	1	1	1	1	1	2	4	2	1	1	17

Another interesting result of our survey is that tying practices have not only been replaced by mixed bundling, but also by conditional sales practices. Our survey identified a number of widely applied examples of conditional sales practices, such as the obligation to pay salary into the current account applied to consumer loans, the imposition of minimum time periods for access to other products when opening a personal current account and when obtaining investment advice, the obligation to obtain loan guarantees coupled with life insurance and payment protection insurance and others.

5.7.1.2.3 Portugal

In Portugal, tying and pure bundling are prohibited by the general consumer legislation. In addition, sectoral legislation prohibits tied sales of mortgage loans and insurance products. Other provisions in sectoral legislation may be applied to mixed bundling with financial advantage (mortgage) and exclusive agreements (insurance). Accordingly, the results of our empirical analysis should show a limited use of tying and bundling practices.

Evidence from our survey (2 respondents) shows that cross-selling is widespread, although tying is less common than mixed bundling and multi-product rebates. In particular,

- The tying practices reported by our respondents include consumer loans plus motor insurance, and the tying of mortgage loans with current accounts and with fire insurance. As recalled in Section 5.3.2.2 above, a business association reported that in Portugal it is common for banks to require their clients to open an account in that specific bank, prior to the subscription of an investment fund or a pension product.
- Mixed bundling practices (with no discount on the bundle) involved mostly current accounts) with credit cards, other payment instruments and fund transfers); and credit cards (with several forms of insurance);
- Multi-product rebates are much more common than the two previous practices: in particular, current accounts are bundled with bank deposits, credit cards and debit cards, other means of payments, life insurance and pension products. Consumer loans were bundled with various forms of insurance products, including life insurance and PPI). Corporate banking loans and fire insurance were also involved in mixed bundling as gateway products. But the most common gateway product, in line with other countries, was the mortgage loan, especially if coupled with various insurance products (including PPI) and current accounts.

As regards conditional sale practices, our survey retrieved evidence that mortgage loans are coupled with the obligation to have the salary paid into the current account linked to the mortgage loan. In addition, minimum balances are imposed on current accounts and savings accounts. Finally, one instance of variable fees

depending on usage was reported for what concerns fund transfers: in all these cases, no fee is applied beyond a given threshold, which qualifies this practice as a conditional rebate.

Table 51 – Results of the empirical analysis for Portugal

PORTUGAL	Combined product																
Hook Product	Bank deposits	Business/ commercial insurance	Credit card	Current account	Debit card	Fire insurance	Fund transfers	Health/ disability insurance	Home insurance	Insurance on payment tools	Life insurance	Means of payment, excluding debit/credit cards	Motor insurance	Other non-life insurance	Payment protection insurance	Pension product	Grand Total
Consumer loan				2				1			2		1	2	1		9
Corporate banking loan		1		2													3
Credit card								1		1	2			1			5
Current account	2		1		2		1				1	2				1	10
Fire insurance								1	1					1			3
Health/disability insurance				1													1
Mortgage loan				3		1		1	2		3			1	2		13
Motor insurance						1		2						1			4
Total Count of Hook Product	2	1	1	8	2	2	1	6	3	1	8	2	1	6	3	1	48

5.7.1.2.4 Denmark

In Denmark, tying and pure bundling are prohibited only as regards payment instruments. No provisions prohibit mixed bundling, preferential or exclusive agreements, conditional rebates, or forms of conditional sale. The results from the questionnaires answered by 4 respondents reveal that tying and bundling are practiced (20 instances reported), and current accounts are the most common gateway product.

One tying practice was reported in Denmark – between mortgage loan and current accounts, involving two sellers from the same financial group and located in the same country.

As regards other cross-selling practices, several instances of mixed bundling (with no financial advantage for customers) were reported, involving current accounts (with credit lines, home insurance, pension products and savings accounts); mortgage loans (with current accounts, home insurance, and consumer loans; pension products (with current account and savings account); and savings accounts (with reception and transmission of orders and with investment advice).

Multi-product rebates are also quite common in Denmark, with several instances reported, involving mostly current accounts (with mortgage loans and home insurance), home insurance (with motor insurance) and investment advice and portfolio management (with bank deposits).

Finally, only one case of conditioning practice was reported for Denmark, involving the obligation to have the salary paid into the current account.

Table 52 – Results of the empirical analysis for Denmark

DENMARK	Combined product													
Hook Product	Bank deposits	Consumer loan	Credit card	Credit line / overdraft	Current account	Dealing on own account	Home insurance	Investment advice	Mortgage loan	Motor insurance	Pension product	Reception and transmission of orders	Savings account	Grand Total
Current account			1	1			2		1		1		1	7
Home insurance											1			1
Investment advice		1												1
Mortgage loan			1		2		1							4
Motor insurance							1							1
Pension product					1								1	2
Portfolio management		1												1
Savings account						1		1				1		3
Total Count of Hook Product	2	1	1	1	3	1	4	1	1	1	1	1	2	20
Total Count of Combined product 1	2	1	1	1	3	1	4	1	1	1	1	1	2	20

5.7.1.3 Countries that rely on “soft-law” or self-regulatory schemes coupled with narrower legal prohibitions

5.7.1.3.1 Hungary

After the largest Hungarian bank was under investigation for abuse of dominance in providing particular combinations of services, the Hungarian financial supervisory authority issued recommendations in which it discourages financial institutions to practice tying and bundling. The text of the recommendations especially mentions loans but it aims at broader set of financial services combinations. Loyalty schemes must be deemed as justified commercial behaviour. As a result, in Hungary, tying and pure bundling are discouraged through soft law, unless justified with fair and rational market reasons. Mixed bundling with a financial advantage to the client is indeed allowed. Preferential and exclusive agreements are possible (if they provide a benefit or discount), provided that the customer has wilfully selected those offers. Rebates and promotions are allowed, subject to the provisions on misleading advertising and deception of consumers existing in the Competition Act.

Our 4 respondents revealed that financial services were tied or bundled in 11 cases, with current accounts being the most common gateway product (4 instances). The low number of instances where combinations of services were reported (11 cases) suggests that the recommendations had an impact on market practices. In any event, tying was observed in 8 cases, with mortgage loans being the most common gateway product: the most widespread tying practice involving mortgage loans entailed the tying with current accounts (more than 80% of the respondent’s customers were subject to this practice); however, mortgage loans are also tied with PPI and life insurance.

As regards mixed bundling practices, these involved mostly current accounts and life insurance products. Multi-product rebates were also observed, mostly in the insurance sector, and in particular involving motor insurance.

Finally, a number of conditional sales practices were also reported in Hungary. These included the obligation to have the salary paid into the current account, but also loyalty programs linked to credit cards; and minimum income requirements as well as variable interest rates according to usage, linked to current accounts.

Accordingly, notwithstanding the recommendations by the Hungarian competition authority, cross-selling and conditional sales practices seem to be still practiced in Hungary, especially concerning current accounts and mortgage loans.

Table 53 – Results of the empirical analysis for Hungary

HUNGARY	Combined product						
Hook Product	Debit card	Life insurance	Motor insurance	Other non-life insurance	Savings account	Term investment account	Grand Total
Current account	1	1		1	1		4
Debit card				1			1
Home insurance			1				1
Life insurance						1	1
Mortgage loan		1					1
Motor insurance			2				2
Pension product	1						1
<i>Total Count of Hook Product</i>	2	2	3	2	1	1	11
<i>Total Count of Combined product 1</i>	2	2	3	2	1	1	11

5.7.1.3.2 Poland

As we saw in Section 4 above, in Poland tying and pure bundling are prohibited, unless the tied product is “related” to the tying one (as provided in the Civil Code). These practices are indeed seen with disfavour by financial regulators and the competition authority. However, practices such as mixed bundling, preferential or exclusivity agreements and rebates are not directly covered by Polish legislation, nor by policy initiatives of the FSA.

Even though courts and national sectoral authorities have actively monitored the market and discouraged players from engaging in cross-selling, empirical data retrieved from 8 respondents revealed 62 instances of tying and bundling in Poland. The most common combinations involve mortgages (18 cases), current accounts (13 cases) and life insurance (9 cases). The wide extent to which tying and bundling are practiced can actually be explained by the specificity of the consumer law enforcement process in Poland. This is mainly because the clause which is ruled by the court as unfair enters a register and is then prohibited from practicing. If such clause is not on the list, there would be a general presumption of legality which might be rebutted by the court in particular cases. In any event, despite emphasis placed by national authorities on the need not to tie or bundle products, these practices appear to be widespread.

More in detail, tying practices are widespread and include several combined sales of current accounts (with investment advice, life insurance, health/disability insurance, portfolio management services, debit and credit cards, credit line/overdraft, etc.). Mortgage accounts are the most used gateway products (several instances of tying with, *i.a.*, life insurance and PPI).

Similarly, several cases of mixed bundling were reported, mostly involving current accounts, mortgage and consumer loans. Interestingly, the combined sale of loans with PPI appears widespread, but also other insurance products are frequently bundled with mortgage and consumer loans.

For what concerns conditional sales practices, several instances were reported in which the financial service provider imposes the obligation to have the salary paid into the current account as a condition to access consumer or mortgage loans. In addition, three cases of conditional rebates were reported: in one case, the interest rate on a deposit is higher beyond a given balance threshold; in another case, there is no cardholder fee for credit cards if a minimum amount is spent yearly; finally, in another case a lower fee is charged for home insurance depending on the number of additional products bought.

Table 54 – Results of the empirical analysis for Poland

POLAND		Combined product																		Grand Total		
Hook Product	Bank deposits	Credit card	Credit line/ overdraft	Current account	Debit card	Fire insurance	Health/ disability insurance	Home insurance	Insurance on payment	Investment advice	Life insurance	Motor insurance	Other non-life insurance	Payment protection insurance	Portfolio management	Reception and transmissi	Savings account	Term investment account	Undefined combined product			
Bank deposits	2																		1	3		
Consumer loan	3						2					1	1	1	3				2	13		
Credit card							1					1	1	1							4	
Current account	2	3	2	2		4			1			5	2		2		4		27			
Debit card	1				2			1													1	5
Health/disability insurance	1																		1			
Home insurance	2																			2		
Life insurance	1						1									1		1	1	1	6	
Mortgage loan	3			7		1		3	7			5						2	28			
Motor insurance							1		2	2										5		
Payment protection insurance							1															1
Pension product	1							1													2	
Portfolio management	1																			1		
purchase of investment fund units																			1	1		
Reception and transmission of orders	1																			1		
Savings account																			1	2	3	
Total Count of Hook Product	3	9	3	12	2	2	13	5	1	1	15	1	7	9	3	1	5	3	8	103		

5.7.1.3.3 Slovakia

In the Slovak Republic, tying, pure bundling and exclusive agreements are prohibited by the general consumer law. However, mixed bundling with financial advantage to the customer is allowed both by general consumer law and by the Code of Ethics adopted in the banking sector. Preferential agreements are allowed, together with single-product rebates and other conditional sale practices.

However, the two practices that were reported by our survey (1 respondent) respondents are both tying practices, which are supposed to be banned by general

consumer protection legislation and by the Code of Ethics in the banking sector. Indeed, these practices involved the tied sale of mortgage and consumer loans with the current account. These practices are among the ones that can affect more significantly competition and consumer choice.

No conditional sale practices were reported.

Table 55 – Results of the empirical analysis for Slovakia

Slovakia	Combined product	
Hook Product	Current account	Grand Total
Consumer loan	1	1
Mortgage loan	1	1
Total Count of Hook Product	2	2
Total Count of Combined product 1	2	2

5.7.1.4 Countries with narrow provisions

5.7.1.4.1 Cyprus

In Cyprus all cross-selling and conditional sale practices are generally allowed, but in one specific case (mortgage loans) tying, pure bundling, mixed bundling with financial advantage, preferential and exclusive agreements are prohibited. On the other hand, the law allows a conditional sale practice, according to which a mortgage lender can require that borrowers purchase insurance, although it cannot choose the insurer or make its insurance product more convenient than rival ones. The laws of Cyprus remain silent on all other potentially unfair commercial practices such as single-product rebates or the obligation to have salary paid into the current account. Empirical data was extracted from 4 respondents and show that tying, bundling and other practices are quite widely practiced (overall 69 instances). Most common gateway products are mortgage loans (21 cases) and bank deposits (12 cases). Life insurance constitutes the most common combined product (found in 18 cases). We find these data to be consistent with the rather permissive approach adopted in Cyprus.

Table 56 – Results of the empirical analysis for Cyprus

CYPRUS	Combined product																				
Hook Product	Credit card	Credit line/ overdraft	Current account	Dealing on own account	Debit card	Fire insurance	Fund transfers	Health/disability insurance	Home insurance	Investment advice	Life insurance	Means of payment, excluding debit/credit cards	Motor insurance	Operations on foreign currencies	Other non-life insurance	Payment protection insurance	Pension product	Portfolio management	Savings account	Undefined combined product	Grand Total
Bank deposits			1	1				1		1	1						1	1		5	12
Consumer loan		2	4								3					1			1		11
Corporate banking loan	1	1									1								1		4
Credit card		1									3								1	3	8
Credit line / overdraft					2		1				3		1			1					8
Current account	1				1							1								5	8
Debit card			2																	1	3
Equity release loan	1	2	1		1	1			1		1										8
Mortgage loan	1	3				2			3		5			1	1					5	21
Operations on foreign currencies											1										2
Savings account																					2
Total Count of Hook Product	4	9	8	1	4	3	1	1	4	1	18	1	1	1	1	2	1	1	3	21	86

More in detail, one interesting finding of our survey is that mortgage loans are widely used as gateway product even in tied sales – something that is prohibited by law – and in particular in combination with insurance products. To the contrary, current accounts are not commonly used as gateway products, and in only three cases we found tied sales of current accounts (in two cases with consumer loans, in one case with equity release loans).

Other cross-selling practices such as mixed bundling and multi-product rebates are also quite common in Cyprus. Here too, it is interesting to note that, although cross-selling with mortgage products is in principle forbidden, we found several cases of multi-product rebates involving mortgage loans, especially coupled with (home and fire) insurance. As a result, in Cyprus the existing ban on cross-selling of mortgage loans with other products seems ineffective.

But where Cyprus really stands as an outlier is in the data retrieved on conditional sales practices. A large number of these practices were reported by our respondents, including the obligation to have the salary paid into the current account (for bank deposits, mortgage loans, consumer loans) as well as various obligations to provide loan guarantees and fees for early closure. Mortgage loans seem to be almost always coupled with obligations to provide guarantees and provisions for the repayment through automated direct debit.

5.7.1.4.2 Finland

In Finland tying, pure bundling and exclusivity agreements are prohibited by the law only if they result from a standard contract term. Mixed bundling, preferential agreements and conditional sale practices are generally allowed. Nonetheless, legislation, recommendations and self-regulatory mechanisms attach specific requirements on these combined offers, resulting in better transparency and comparability.

Our survey (1 respondent) shows that current practice in Finland is consistent with the legal framework. No instances of tying have been reported, but there are

cases of mixed bundling and multi-product rebates. In particular, the only case of mixed bundling (with no financial advantage or disadvantage for customers) is the tied sale of term investment accounts with pension products. Other than this practice, all other practices are multi-product rebates: these include cases of respondents that apply to all or almost all their customers a rebate on the combined purchase of mortgage loans with current accounts and with PPI; and several cases of multi-product rebates on insurance products.

Conditional sales practices were also reported in Finland. Here too, as in many other countries, the obligation to have the salary paid into the current account is very commonly imposed in the case of consumer loans. In addition, minimum initial deposit amounts are quite common, as is the case for minimum time periods imposed on customers opening a current account before they can access other products.

Table 57 – Results of the empirical analysis for Finland

FINLAND	Combined product															Grand Total
Hook Product	Bank deposits	Business/ commercial insurance	Consumer loan	Credit card	Current account	Health/ disability insurance	Home insurance	Life insurance	Motor insurance	Payment protection insurance	Pension product	Portfolio management	Reception and transmission of orders	Term investment account		
Bank deposits	1															1
Consumer loan	1															2
Corporate banking loan	1															1
Credit card	1															2
Current account	1															2
Health/disability insurance	1															1
Home insurance	1															1
Investment advice	1															3
Life insurance	1															1
Mortgage loan	1															2
Pension product	2															4
Portfolio management	1															3
Reception and transmission of orders	1															1
Total Count of Hook Product	2	1	2	1	2	2	2	2	1	1	3	1	2	2	24	

FINDING #5.1 – GROUP 1 COUNTRIES

Our findings for countries included in Group 1 show a significant fragmentation between Member States. In particular, in some countries where tying is banned no such practices have been observed. At the same time, in countries such as Slovakia and Portugal tying was reported despite the existence of a legal prohibition. As regards other cross-selling practices, mixed bundling seems widespread in all these countries, and tends to replace tying where a legal prohibition on tying exists (*e.g.* Bulgaria, France, Ireland, Finland).

- In Belgium, where the retail financial market is highly concentrated, cross-selling and conditional sales practices are widespread despite the existence of a general prohibition of combined sales in general and sectoral legislation. Exemptions to this general rule have led to the emergence of common cross-selling practices such as the tying of current accounts and life insurance (purchased from another provider belonging to the same group, in the same

country); the tying of home insurance with other non-life insurance; and mixed bundling of mortgage loans with a variety of insurance products and current accounts. Common conditional sale practices include the combination of mortgage and consumer loans with the obligation to have the salary paid into the current account, or the obligation to keep a minimum balance in the account.

- In Bulgaria the retail financial services market seems to have adopted some forms of combined sales, but consumer choice is preserved due to the widespread adoption of mixed bundling and multi-product rebates, rather than tying. The latter is practiced with respect to financial advice to customers, a feature that may pave the way towards unfair commercial practices such as steering and churning. Finally, no conditional sale practices have been reported in Bulgaria.
- In France the use of cross-selling and conditional sale practices seems limited, and this is consistent with the regulatory framework. Moreover, the ban on tying does not seem to have led to a broad adoption of mixed bundling practices or conditional sale arrangements, although some cases have been reported. The most widespread cross-selling practices – affecting more than 80% of the respondents' customers – are the tying of home insurance with other (non-life) insurance and the tying of mortgage loans and PPI, which will not be possible anymore from 2010. The current adoption of these practices can at least explain why France has not achieved a higher rate of customer mobility, and stands more or less with the European average in this respect. Apart from Belgium, France was in 2005 the country where mortgage cross-selling was most practiced in the EU25.
- In Ireland legislation prohibiting tying seems to have led to a substitution of tying practices with mixed bundling and conditional sale practices. The mixed bundling of investment advice with a number of other services, and in particular with the execution of orders on behalf of clients, could potentially be relevant as regards the probability that unfair commercial practices emerge in investment advice to the detriment of customers.
- Portugal is a country where the legislation banning tying and limiting other cross-selling practices starkly contrasts with the practices observed in the market for retail financial services. Tying practices have been reported by our survey respondents, although mixed bundling and – most importantly – multi-product rebates are more widespread. Also conditional sales practices such as the obligation to have the salary paid into the current account are common.
- In Denmark, where only tying of payment instruments is forbidden, cross-selling and conditional sale practices appear widespread. Mixed bundling is however more common than tying, according to the results of our survey. The obligation to have the salary paid into the current account is also reported.
- In Hungary, notwithstanding the recommendations of the competition authority, cross-selling and conditional sales practices appear quite common.

- In Poland, cross-selling and conditional sales practices appear widespread notwithstanding the attention devoted to these practices by the financial regulator and the competition authority over the past years. In particular, even if tying is seen with disfavour compared to mixed bundling and conditional sales practices, several instances of tying have been reported by our respondents.
- In Slovakia, despite a general ban on tying practices, two such practices were spotted by our survey. This shows that, even if tying is not widespread, the general ban imposed by legislation is not fully effective.
- In Cyprus, cross-selling and conditional sale of retail financial services appear to be the norm. This occurs also for mortgage loans, notwithstanding a legal provision banning cross-selling of this specific product.
- In Finland, the practice mirrors the legal approach: tying is not observed, but mixed bundling widely replaced it, together with several types of conditional sales practices.

5.7.2 Group 2 –Member States where no provisions on tying exist, and other potentially unfair practices are addressed by general consumer protection law

Countries in this group include Austria, the Czech Republic, Estonia, Germany, Greece, Italy, Malta, Latvia, Lithuania, the Netherlands, Slovenia, Spain, Sweden and the UK. We can distinguish between the following groups:

- Legal systems in which the issue of cross-selling practices has been extensively debated, such as the Netherlands and the United Kingdom;
- Countries where there is evidence that tying creates high switching costs in the financial services (in particular, banking) sector, but no initiative has been undertaken on cross-selling to date (Italy);
- Countries where there is a general ban on tying in the consumer legislation, but application is non-existent (Spain);
- Countries where the issue of tying in the retail financial services sector has barely surfaced in the debate so far (Austria, Czech Republic, Estonia, Germany, Greece, Malta, Latvia, Lithuania, Slovenia, and Sweden).

Below, we comment on empirical results for each of those four groups.

5.7.2.1 Legal systems in which the issue of potentially unfair practices in the retail financial services sector has been extensively debated

5.7.2.1.1 *The Netherlands*

In the Netherlands tying and bundling are allowed, together with preferential or exclusive agreements, single-product rebate schemes and other conditional sale

practices, provided they do not infringe competition rules and they are not unfair according to the laws that transposed the UCPD in 2008, by introducing Article 193b of the Dutch Civil Code.

Empirical data was extracted from only one questionnaire, which mentioned 10 instances of cross-selling, all of which are tying practices. The main gateway products were corporate banking loans and mortgage loans (respectively 5 and 5 instances), which are sold in combination with a number of insurance products (commercial insurance, current accounts, disability insurance, life insurance and motor insurance), with no choice for customers.

No instances of conditional sale practices were reported.

Overall, our results expand on those reported by the OECD in its review of competition in the Dutch retail banking sector, published in September 2007. There, the OECD had found that banks do not seem to be taking advantage of the limited degree of competition observed in the Netherlands via tying arrangements, and that cross-selling in the form of bundling practices seems widespread, often in the “soft” form of price inducements. In addition, we found a number of tying practices not related to current accounts, with loans being the most widely used gateway product to allow lenders to extend their reach to insurance products.

Table 58 – Results of the empirical analysis for the Netherlands

THE NETHERLANDS	Combined product							
Hook Product	Business/ commercial insurance	Current account	Fire insurance	Health/ disability insurance	Life insurance	Motor insurance	Pension product	Grand Total
Corporate banking loan	1	1		1	1	1	1	6
Mortgage loan	1	1	1	1	1	1		6
Total Count of Hook Product	2	2	1	2	2	2	1	12

5.7.2.1.2 The United Kingdom

In the UK, tying and bundling are not banned through specific legal rules, nor are considered to be always detrimental to consumers – of course, provided they do not fall under the scope of competition law or the legislation transposing the UCPD. At the same time, several retail financial markets – most recently, personal current accounts and PPI policies – have been periodically and extensively monitored and scrutinised in the past few years.

Empirical data were extracted from 6 questionnaires, which showed 19 instances of cross-selling – a low number of cases per respondent compared to other countries. In particular, the tying conducts reported included the following: savings account together with current accounts, debit cards and consumer loans; and the tying of investment advice with life insurance, other investment advice services and pension products. In line with what we observed above, in Section 2.2, the tying of investment advice with other product is of particular concern, as it may lead to cases of churning or steering in “thick” relationships.

Other cases of cross-selling (with no indication of whether the practice is tying or mixed bundling) include the combined sale of mortgage loans and PPI, or mortgage loans and home insurance. Consumer loans and credit card are also bundled with PPI (with no financial advantage for customers). Multi-product rebates were reported only in two instances, and imply the offer of better contractual conditions for home or motor insurance if the insured party also has a savings account at an institution belonging to the same financial group.

Other conditional sale practices involved the imposition of a minimum initial deposit amount for savings accounts and life insurance; and the restriction of access to current accounts to residents in the UK.

The United Kingdom is a typical example of country in which the emphasis on good practices vis-à-vis consumers in the retail financial services sector has led to pressure on financial institution in adopting ethical codes and behaving responsibly with customers. The implementation of the UCPD may strengthen this feature in the future, together with the legal provisions that may be adopted following the recent investigations of the OFT and the Competition Commission on personal current accounts and PPI.

Table 59 – Results of the empirical analysis for the UK

UNITED KINGDOM	Combined product								
Hook Product	Consumer loan	Home insurance	Investment advice	Life insurance	Motor insurance	Payment protection insurance	Pension product	Savings account	Grand Total
Consumer loan				1		1		1	3
Credit card						1			1
Current account								1	1
Debit card								1	1
Investment advice			1	2			1		4
Mortgage loan		1				1			2
Savings account	1	1		2	1				5
Total Count of Hook Product	1	2	1	5	1	3	1	3	17

5.7.2.2 Countries where there is evidence that tying creates high switching costs in the financial services (in particular, banking) sector, but no initiative on cross-selling has been undertaken to date

5.7.2.2.1 Italy

In Italy tying, bundling, preferential/exclusive agreements and conditional sale practices are not prohibited by law. Data was extracted from 4 respondents, retrieving 47 reported cases. Mortgages appear to be the most commonly tied product with 12 instances shown. Also, current accounts were bundled with other financial products in 21 cases. The Italian Competition Authority AGCM confirmed in 2007 that this practice is widespread in the country, and also creates competition concerns. Our results confirm this trend.

More in detail:

- Tying accounts for the majority of cross-selling practices observed. The most frequent product involved in tied sales is the current account with is combined with bank deposits, credit and debit cards, consumer loans, execution of orders on behalf of clients, fund transfers, life insurance, mortgage loans, portfolio management, reception and transmission of orders and term investment accounts. In particular, tying current accounts with investment advice may lead to practices such as steering or churning, and should be looked at with particular attention.
- All cases of mixed bundling (with no advantage for customers) involve insurance products. They are combined with banking products, but also with mortgage loans (fire and motor insurance).
- The same occurs with the four cases of multi-product rebates reported: insurance products (fire and life insurance) are offered at preferential prices if combined with credit cards, current accounts and mortgage loans. Motor insurance is sold at preferential price if coupled with other, non-life insurance.
- As regards conditional sale practices, also in Italy the obligation to have the salary paid into the current account appears widespread. In addition, conditional rebates are offered on current accounts conditions, and loans (both consumer and mortgage) are coupled with obligations to provide guarantees and to repay the loan through automated direct debit.

As a result, in Italy cross-selling practices and conditional sale practices are quite common, including heavily debated practices such as tying of investment advice with current accounts and PPI with mortgage and consumer loans, and the obligation to have the salary paid into the current account. Legislation does not seem to have played a role in this country, nor the competition authority's observation of the limited customer mobility induced legislators to take action to ban or regulate tying practices.

Table 60 – Results of the empirical analysis for Italy

ITALY	Combined product										
Hook Product	Business/ commercial insurance	Current account	Fire insurance	Health/ disability insurance	Home insurance	Insurance on payment tools	Life insurance	Other car insurance	Other non- life insurance	Payment protection insurance	Grand Total
Bank deposits		1									1
Consumer loan		2		2						1	5
Credit card		3				1			2		6
Credit line / overdraft		1									1
Current account				2							2
Debit card		3									3
Execution of orders on behalf of clients		1									1
Fire insurance	1										1
Fund transfers		1									1
Health/disability insurance									1		1
Home insurance				1							1
Life insurance		1		2							3
Means of payment, excluding debit/credit cards		1									1
Mortgage loan		3	3		1		5				12
Motor insurance								1	2		3
Pension product								1			1
Placing without firm commitment		1									1
Portfolio management		1									1
Reception and transmission of orders		1									1
Term investment account		1									1
Total Count of Hook Product	1	21	4	6	1	1	6	1	5	1	47

5.7.2.3 Countries where there is a general ban on tying in the consumer legislation, but application is non-existent

5.7.2.3.1 Spain

In Spain, the application of Law 26/1984 to tying and pure bundling practices in the retail banking sector presently remains only a theoretical possibility. Data was obtained from 2 questionnaires and retrieved 12 cases overall. The results from the questionnaires show that life insurance is mainly used as a combined product (4 instances), whereas mortgage is by far the most common gateway product (10 cases out of 12).

Although data for Spain are not sufficient to draw real conclusions on the effectiveness of the legal system, we can confirm that financial institutions seem to follow the rule included since 1984 in the 26/1984 Act, on the General Law for the Defence of Consumers and Users, which prohibits, in Additional Provision I (no. 23), “the seller/services provider from imposing the consumer unsolicited complementary or ancillary goods or services”. As a matter of fact, no instance of tying was reported by our respondents. To the contrary, mixed bundling is practiced, and reported cases include most often mortgage loans, coupled with current accounts, debit and credit cards, life insurance, home insurance, PPI and pension products.

Table 61 – Results of the empirical analysis for Spain

SPAIN	Combined product							
Hook Product	Credit card	Current account	Debit card	Home insurance	Life insurance	Payment protection insurance	Pension product	Grand Total
Credit card						1		1
Current account						1		1
Mortgage loan	1	1	1	2	2	2	1	10
Total Count of Hook Product	1	1	1	2	4	2	1	12

5.7.2.4 Countries where the issue of tying in the retail financial services sector has barely surfaced in the debate

This sub-group of countries includes Austria, Czech Republic, Estonia, Germany, Greece, Malta, Latvia, Lithuania, Slovenia, and Sweden. Data on these countries is briefly summarised below.

- In **Austria**, 5 respondents reported a total of 21 instances. Tying and bundling was found to occur in various types of combinations of financial products. The most common combinations occur in regard of current accounts (6 cases). Interestingly, current accounts are tied with investment advice, portfolio management and execution of orders on behalf of clients, a combination that may pave the way for unfair conduct such as churning and steering. In addition, one respondent reported that mortgage loans are tied with home insurance. Mixed bundling involves mostly current accounts, but also a variety of insurance products (*e.g.* bundling of motor and home insurance). Multi-product rebates are observed with savings and current accounts being the most recurrent gateway products. Also conditional sale practices are widespread, although the practice that is most common in many other member states – *i.e.* the obligation to have the salary paid into the current account – was not reported in Austria. Observed practices include conditional rebates, with variable fees and interest rates being made dependent on the usage of the product (current or savings account), and on the number of products purchased (life insurance).
- In the **Czech Republic**, empirical data extracted from 4 questionnaires show that combination of financial services is quite widely practiced, with a total of 40 reported cases. Current accounts appear to be the product most commonly used as gateway (11 cases), followed by mortgage loans (6 instances), debit cards (5 instances) and consumer loans (4 cases). Tying practices exist alongside with mixed bundling and multi-product rebates. Some players seem to be offering combinations of products by leaving customers freedom of choice as regards whether to buy the whole package or only some products, whereas other service providers opted for tying or pure bundling. This is the case, for example, of the combined sale of mortgage loans and current

accounts. The most common conditional sale practice was the obligation to have the salary paid into the current account.

- In **Estonia**, empirical data was retrieved from 2 responses, and reported 27 cases in which financial products were tied or bundled. The most common gateway product is the current account, which is combined with savings accounts, bank deposits, fund transfers, credit lines/ overdraft, debit card, mortgage loans and consumer loans, corporate banking loans and equity release loans. Current accounts are also tied with the reception and transmission of orders, the execution of orders on behalf of clients, dealing on own account, portfolio management, placing without firm commitment, underwriting or placing with firm commitment and term investment accounts. This gives a snapshot of the centrality of the banking account in this country, as well as the potential for these tying practices to lead to a distortion of consumer choice, both in terms of coercion, and in terms of potential distortion of customers' freedom of choice. Common mixed bundling practices involved the combination of consumer loans with motor insurance, corporate banking loans with business/commercial insurance, credit cards with PPI, current accounts with debit cards, and mortgage loans with home insurance and savings accounts. A number of cases were reported, where having insurance coverage (life or non-life) is an essential precondition to access consumer or mortgage loans. Another interesting mixed bundling combination is that between underwriting or placing services and life insurance. Finally, conditional sales practices in Estonia include several cases of obligations to have the salary paid into the current account as a precondition to access various types of loans.
- In **Germany**, data is available only from one respondent, which reported 6 instances, half of which related to current accounts as gateway product. Although the available data is probably insufficient to draw any conclusion, it seems that cross-selling and conditional sale practices are not widespread in Germany: this may also be due to the greater degree of competition observed in the retail financial services sector in this country as opposed to other Member States. In particular, three tying practices involving current accounts were observed, though these practices do not create particular concerns in terms of consumer choice (current accounts are tied with debit cards, fund transfers and credit lines/overdrafts). In addition, mixed bundling of consumer loans with PPI and credit cards with health/disability insurance were reported. Finally, credit cards are associated with loyalty programs and other conditional rebates; the obligation to have the salary paid into the current account was also reported by one respondent, but as a condition to have no fee charged on the account rather than an additional obligation to access a mortgage or consumer loan.
- In **Latvia** one respondent reported 7 cases in total, of which only one is a tying case (between savings accounts and bank deposits). Mixed bundling of mortgage and life insurance was also observed, together with a limited number of practices involving credit and debit cards. The obligation to have the salary paid into the current account was mentioned as the only conditional sale

practice in Latvia, applied as a condition to access consumer loans, mortgage loans and credit lines/overdrafts.

- In **Slovenia**, data was obtained from 4 respondents, which reported 32 cases. As in the case in many countries, current accounts appear to be the most common gateway product (10 combinations). Combining financial services is a quite widely applied practice in this country. Of the several instances of tying reported, the most interesting is probably the tied sale of consumer loans and PPI. Mixed bundling practices range from the sale of insurance on payment tools bundled with credit and debit cards, to combination of insurance products (life insurance and PPI, life with non-life insurance, etc.); and mortgage loans with life insurance. Reported multi-product rebates include the award of preferential rates for mortgage loans in case the customer purchases life or home insurance; better conditions for life insurance, reception and transmission of orders, portfolio management, and debit cards if the customer holds a current account at the same institution. The obligation to have the salary paid into the current account was mentioned as the most frequent conditional sale practice, both as a condition to access a service (credit card, debit card) or a condition to have better contractual conditions, i.e. lower fees (in the case of mortgage and consumer loans). Finally, various loyalty programs and conditional rebates were mentioned in the insurance sector.
- Empirical data for **Sweden** was extracted from only one questionnaire, which reported only 2 cases, none of which was a tying case. If confirmed in further analysis, the low rate of tying and bundling is surprising if compared to other countries having a similar number of answered questionnaires and legislation. As a matter of fact, the already mentioned study by the Nordic competition authorities confirmed that in Sweden “banks appear to have reduced the level of bundling”⁴³¹. The two reported cases include a multi-product rebate for combining mortgage loans with PPI. Conditional sales practices did not include the obligation to have the salary paid into the current account: to the contrary, the respondent mentioned the granting of variable fees on the current account depending on the amount of the balance; and loyalty programs related to the purchase of home insurance and other, non-life insurance.

FINDING #5.2 – GROUP 2 COUNTRIES

Countries included in Group 2 widely include Member States where the issue of cross-selling and conditional sales practices was heavily debated, such as the Netherlands and the UK, and to some extent also Italy; and countries where the debate on this issue has barely surfaced so far.

- In the Netherlands, our survey reported that lenders tie the offer of loans to a variety of insurance products. These practices are coupled with “softer” price

⁴³¹ See http://www.kilpailuvirasto.fi/tiedostot/Nordic_Retail_Banking.pdf, at 89.

inducements to customers in the case of current accounts. In the UK, cross-selling and conditional sales of financial products do not seem to be widespread. However, some practices (such as tying of savings account and investment advice with other products) can raise concerns and lead to potentially unfair conduct. At the same time, PPI is required in a number of instances, which justifies the attention that has been devoted to this specific product lately.

- In Italy, where the competition authority has found cross-selling to be a source of concern, legislation allows tying and other cross-selling and conditional sales practices in the retail financial services sector. Empirical evidence reveals that such practices are widespread, and include combined sales and conditions that may raise concern as regards the emergence of unfair conduct.
- In Spain, mixed bundling and multi-product rebates have replaced tying, subject to a general ban since 1984. The most used gateway product for combined sales is mortgage loans.
- In all other countries, no specific legislation deals with cross-selling and conditional sales practices in the retail financial service sector. These countries differ noticeably: for example, in Sweden and Latvia little or no tying was observed, together with a low number of practices overall. On the other hand, in Slovakia only tying practices and no other cross-selling or conditional sales practices were reported.

5.7.3 Group 3 - Luxembourg

Luxembourg is the only country which currently experiences problems in the UCPD implementation process. Tying, bundling and other unfair practices are not addressed in any other national legislation. This fact leads to conclude that there is not even a theoretical possibility to tackle tying, bundling and similar unfair practices. Empirical data in the case of Luxembourg was extracted from one questionnaire, which showed that combination of services was practiced in 9 instances, all related to mixed bundling with no (dis)advantage for customers. Various forms of insurance were among the most bundled services. Of the various combinations reported, perhaps the most interesting – from the perspective adopted in this Report – is the mixed bundling of life insurance with investment advice, which can lead to benefits as well as potential distortions of customer behaviour, especially in “thick” relations.

FINDING #5.3 - LUXEMBOURG

In Luxembourg, in the absence of legal provisions, several instances of mixed bundling with no (dis)advantage for customers were spotted. Various forms of insurance are among the most bundled services.

5.8 Main findings: legal information and empirical data on the EU27 and potential impacts on cross-border trade

Our survey of the EU27 led to a number of interesting findings, which allow some conclusions as regards the effectiveness of legal provisions in the EU27 and the potential impact of the current fragmentation of legal rules on the Internal Market for retail financial services.

- First of all, *cross-selling and conditional sales practices are widespread in the EU27*. This is in line with previous findings, *i.a.* of the European Commission's sectoral inquiry on retail financial services⁴³². In addition, *the relative weight of tying on other cross-selling practices varies across countries, and does not seem strongly dependent on the existence of a legal framework that bans tying of retail financial services*. As shown in Figure 33 below, the average percentage of banks that engage in selected cross-selling and conditional sales practices in the three groups we identified is not significantly different in group 1 countries compared to group 2 countries. Figure 34 compares 7 large EU countries and shows that the intensity of cross-selling varies noticeably. In addition, as shown in Figure 35, in Sweden, Ireland, Luxembourg, Finland and Spain no tying practices were reported. These countries include group 1 countries (Ireland), Group 2 countries (Sweden, Finland, Spain) and group 3 countries (Luxembourg).

Compared to the results of the sector inquiry, which reported the percentage of banks engaging in given cross-selling practices, our survey revealed that the share of the market affected by cross-selling and conditional sales is often quite big. For example, the offer of multi-product rebates for the joint purchase of mortgage loans and current accounts reportedly affects more than 80% of the market in Belgium and Slovenia⁴³³. In Spain, the use of mixed bundling (with no (dis)advantage for customers) for these two products affects more than 80% of the market. The two products are reportedly tied in the Netherlands and in Hungary in more than 80% of the transactions, and in 60% to 80% of the transactions in Italy.

- *In Member States that have prohibited tying, the practice either survives or was replaced by mixed bundling*. Tying survived despite a legal prohibition in Belgium, Portugal and Slovakia and has been replaced by other practices *i.a.* in Ireland and Spain.
- *Soft law initiatives seem to have been ineffective in a number of countries*: apart from the case of the UK, in countries such as Ireland, Hungary and Poland the existence of Codes of Ethics or recommendations from competition authorities or financial regulators does not seem to have stopped

⁴³² See above, Section 1.2 for a detailed illustration of the sectoral inquiry.

⁴³³ In the Czech Republic, Poland and Portugal the same practice was reported, but the percentage of the market affected was not declared by the respondents.

financial service providers from practising cross-selling and conditional sales practices.

- *In countries that have a general ban on tying, whenever exceptions are available financial service providers engage in this form of binding cross-selling practice* (e.g. Belgium, France). For example, our data on France confirm that the mortgage and PPI markets – where no prohibition currently exists as regards tying practices – are the ones that deserve more careful attention, as they affect more than 80% of the market. This confirms the direction taken by the *Loi Lagarde* that will ban the combined sale of mortgages and PPI policies from 1 January 2010. Similar situations exist in Slovenia and Finland.
- *Some conditional sales practices are widespread and systematically applied.* The most frequently observed conditional sales practice is the obligation to have the salary paid into the current account. In most countries this clause is used as a necessary condition to access a given service (normally, a mortgage loan), and is thus associated with a cross-selling practice (current account plus mortgage loan). These countries include Denmark, Cyprus, Ireland, Italy, Estonia, Poland, Slovenia, Latvia, Hungary, Belgium and the Czech Republic⁴³⁴. In some of these countries, there are also cases in which this practice is used as a condition to obtain a more favourable service (e.g. lower interest rate on a loan). In Germany and Portugal, the practice was observed only in this latter form.

⁴³⁴ The obligation to have the salary paid into the current account as a condition to access a mortgage loan was found to affect more than 80% of the market in Belgium, Poland and Slovenia; between 60% and 80% of the market in Latvia; and between 20% and 40% in Hungary. In Ireland and Finland, this condition is imposed for access to consumer loans to more than 80% of the customers.

Figure 35 – Groups of countries and percentage of selected cross-selling and conditional sales practices



Figure 36 – Selected countries and percentage of selected cross-selling and conditional sales practices

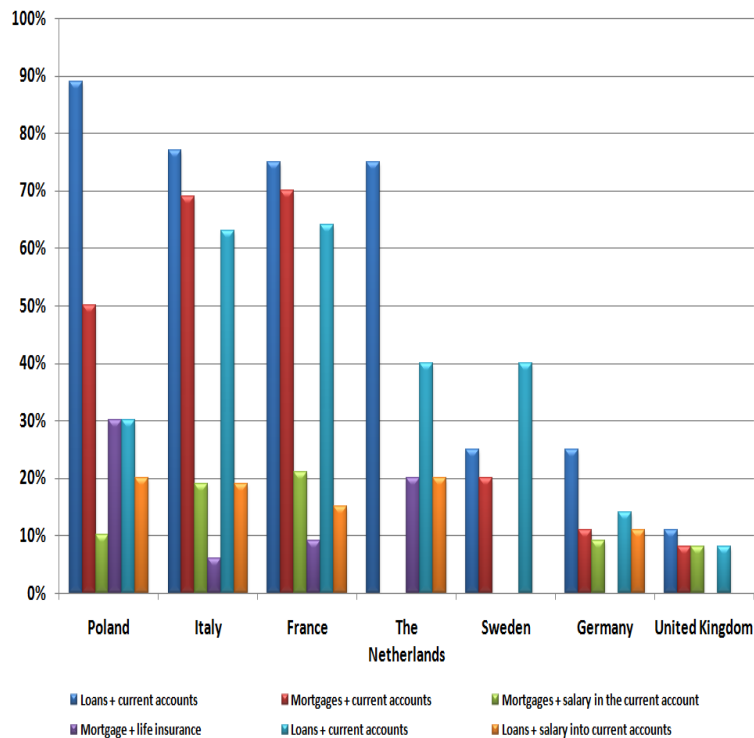
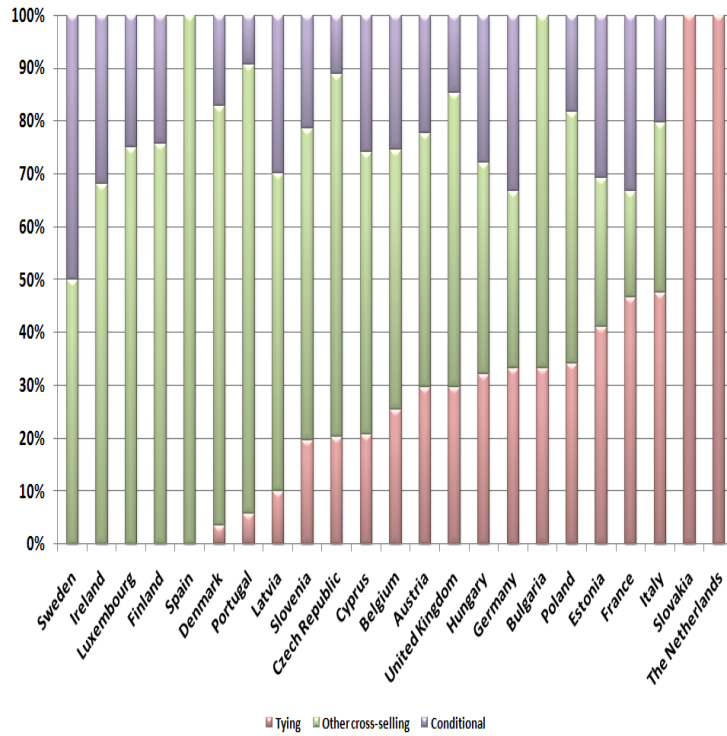


Figure 37 – percentage of tying, other cross-selling and conditional practices in 23 Member States



6 DEVELOPING AND IMPLEMENTING A TEST FOR ANALYSING POTENTIALLY UNFAIR COMMERCIAL PRACTICES IN THE RETAIL FINANCIAL SERVICES SECTOR

This section aims at developing a comprehensive test based upon the findings of our theoretical analyses at sections 2, of our legal analysis at Section 3 and 4, as well as the empirical analysis contained at Section 5. In the following pages, we map the various practices that have been observed in the EU27 and provide an assessment of their potential to harm consumers through restrictions of competition or by leading to unfair commercial relationships. Accordingly, Section 6.1 below starts by illustrating the main features of our tests, and describes in detail the main steps and methodology we have followed to design this complex tool - the need to account for both the competition policy and the consumer policy dimensions suggested the creation of a multi-stage test, in which the antitrust and the customer impact test can be run separately, or jointly. Annex XII to our report explains our choices of data sources in more detail.

Section 6.2 applies the test to our empirical results, by showing the results of both our antitrust scrutiny and the consumer policy scrutiny of observed cross-selling practices. Section 6.3 reports the results of a similar exercise carried out for other potentially unfair commercial practices. This allows us to build a “virtual map” of Europe, which portrays the emergence of different practices and their likely effects in the EU27. The results are further differentiated by gateway product and type of practice. We run our test separately for tying and bundling and for other potentially unfair commercial practices, given the different set of variables that have to be taken into account in running the test. Section 6.4 concludes by describing our main findings and comparing them to the findings of the legal and economic analysis contained in Section 2, as well as the comparative legal analysis of the EU27 in Sections 3 and 4.

6.1 Overview of the test

6.1.1 Selected features of our test

Our test consists of an overall assessment of how anti-competitive and/or unfair the practices under study may be in practice. To reach this result, three broad steps can be distinguished: a preliminary scrutiny, an antitrust test and finally a customer impact test⁴³⁵. The process and dynamics of the test rely precisely on the interaction and the simultaneous consideration of findings provided at each of the three stages. Among the main features of the test, it bears explaining why we decided for the joint use of micro-data and industry-level data, the adoption of

⁴³⁵ In this section, we deliberately use the term ‘customer’ since our empirical survey and data collection refer to both consumers and SMEs. Accordingly, the word “customer” appears more correct.

a scorecard approach, how we selected weights to be attributed to the different impacts, and the way in which we produced results.

6.1.1.1 Micro- and macro-data

Data collected at each stage of the test originate from two main sources.

- First, we relied on the information drawn from the data that emerged from our empirical analysis described in Section 5 above⁴³⁶. Such information allows for the adoption of a ‘micro’ perspective, which provides information on the costs and benefits that may be associated with the practice regardless of the context in which it is adopted.
- Second, we have collected additional national ‘macro’ data portraying the conditions observed in each Member State, both on the antitrust and the consumer sides. The underlying idea is that the actual impact of many practices on consumers heavily depends on market conditions and other contextual variables. For example, all things equal, a practice conducted in an oligopolistic market might result in different outcomes than in a more competitive market. Previous studies have shown that Member States differ noticeably as regards competitive levels, profitability or mobility of customers⁴³⁷.

We consider that different national circumstances would influence our diagnosis of how potentially anti-competitive or unfair a given practice may be. The test thus ends up with reflecting a two-dimensional analysis, both elaborated at the product and at national levels.

6.1.1.2 A scorecard approach

Throughout the diverse stages of the test, our aim is to evaluate to what extent a given practice may prove anti-competitive or unfair. Given the difficulty generated from a purely quantitative exercise and the risk that a purely quantitative would lack the necessary robustness⁴³⁸, we decided to opt for a *scorecard analysis*. This exercise aims at assessing the intensity of costs and benefits yielded by each of the practices identified. This methodology, often used

⁴³⁶ Where possible, we use additional data from existing surveys to interpret the results of our test. Given the difference in the level of data aggregation, it was not possible to use other data directly in the multi-screen test proposed in this section.

⁴³⁷ See the Sector inquiry into competition in financial services, pursuant to Article 17 of Regulation (EC) No 1/2003.

⁴³⁸ Quantifying the impacts of individual practices on each category of costs and benefits is a complex exercise, which can be accomplished only based on key information such as, *e.g.*, demand elasticity, which varies across different relevant markets. A reliable quantification will end up being difficult, especially for costs and benefits that cannot be quantified directly (*e.g.* consumer confidence, better risk management, comparability of providers, etc.). For this reason, we proceeded in an alternative way for building a scorecard analysis of observed practices.

in impact assessments at EU level and elsewhere, can provide a useful framework for *comparing and ranking* practices according to their likely cost-benefit ratio⁴³⁹. Based on the data collected and on the elaboration of proxies capturing costs and efficiencies encountered in the legal and economic literature, the test evaluates each reported practice in each country by attributing ‘scores’ or ‘ranks’, following a comparative analysis. Through our scorecard, we build a comprehensive framework for comparing different practices according to the full range of their likely (or, where data are available, actual) impacts. Hence, the information provided by the final results allows for a comparison of the practices, and a relatively easy disaggregation of the result for the purposes of isolating specific impacts.

The choice of a scorecard analysis provides both advantages and disadvantages:

- On the one hand, a scorecard is the only way to account for several dimensions and at the same time to ensure that situations observed at national level can be compared, as it allows the comparison of heterogeneous indicators and the simulation of a cost-benefit analysis based on several variables. This allows us to highlight where consumers are likely to be better-off and worse-off across the Internal Market as a result of a given practice or set of practices.
- On the other hand, the picture provided by the scorecard only relates to the relative position of each Member State from one another. Expected effects

⁴³⁹ See the Communication on rail noise abatement measures addressing the existing fleet; European Commission, Directorate General Energy and Transport, Impact assessment study on rail noise abatement measures addressing the existing fleets, 10 December 2007, available at: http://ec.europa.eu/transport/rail/studies/doc/2007_rail_noise.pdf; and the “Impact Study” coordinated by CEPS in support of the White Paper on private antitrust damages actions, available on the website of the European Commission, DG Competition, at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

Scorecards typically attempt to summarize the impact of different regulations based on a number of indicators. For a thorough discussion of the pros and cons of using a scorecard methodology, see Hahn, R. W., *In Defense of the Economic Analysis of Regulation* (February 1, 2005). Available at SSRN: <http://ssrn.com/abstract=1409906> (in particular, Chapter IV). Applications of scorecard approaches to public policy include *i.a.* Robert W. Hahn and Patrick M. Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, Working Paper No. 04-01, AEI-Brookings Joint Center for Regulatory Studies, Washington, D.C., January 2004; Renda, A. (2006), *Impact Assessment in the EU. The State of the Art and the Art of the State*, CEPS. For a recent comparison of scorecards for US and EU, Robert W. Hahn and Robert E. Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, *Journal of International Economic Law*, Vol. 8, No. 2, 2005, pp. 473-508; and Cecot, C., Hahn, R. W., Renda, A. and L. Schrefler, *An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the U.S. and the EU* (December 2007). AEI-Brookings Joint Center Working Paper No. 07-09..

On cost-benefit analysis, see *i.a.* Adler, M.D. and E.A. Posner, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, Chicago, IL: University of Chicago Press, 2001; A.E. Boardman, *Cost-benefit Analysis: Concepts and Practice*, Upper Saddle River, NJ: Prentice Hall, 1997; and M. Munger, *Analyzing Policy: Choices, Conflicts and Practices*, New York, NY: W.W. Norton & Co., 2000;

have been drawn from a qualitative approach and have not been ‘measured’ in absolute terms. Therefore, one main *caveat* for this approach resides in its reliance of assumptions and presumptions for expected effects.

6.1.1.3 The attribution of weights

As already mentioned, our scorecard contains both an antitrust test and a customer impact test. Each of them is composed by sub-elements that we call “screens”. All screens are necessary in order to provide adequate information on the antitrust and customer impacts. The scorecard analysis has been formulised throughout a quantification exercise aimed at assessing the intensity of costs and benefits. As in all scorecards, the quantification has been based on a *scoring* exercise that systematically consist of assigning points (for instance 0, 1 and 2) to each parameter at each stage of the test.

The final scores were obtained following a two-stage approach.

- In a first stage, the ‘raw’ scores of each individual screen composing the antitrust and the consumer scrutinise are computed. Some screens may be composed of one or more parameters. When more than one sub-indicator composes a given screen, we have derived ‘raw’ scores for each sub-indicator and then computed their *average* score. The average score is representative for the global information associated with production-side efficiencies. For instance, (as explained more in details below), production-side efficiencies, resulting from practices reported, are composed of several sub-indicators such as technical facilities, cost efficiencies, and risk reduction. In this case, we cannot aggregate each individual score given the over-representativeness it would generate in comparison to other scores of screens. The raw average score attribution scheme follows the formula:

$$Raw(average)score_j = \frac{1}{m} \sum_{i=1}^m Individual\ scores_i$$

Where:

j = the screen considered (concentration, profitability, regulatory barriers...);

i = the parameter composing the screen considered (ex: concentration ratios for the screen ‘concentration’);

m = number of selected parameters composing each screen.

- In a second stage, we have considered for the possible heterogeneous scales of ‘raw’ scores, some ranging from 0 until 2, other ranging only from 0 to 1 for example. To ‘neutralise’ the different scales and to work on a comparable basis, we have *normalised* each raw score. This last application provides with final and comparable scores of each individual screens composing each stage

of the test. To normalize them, the scores are divided by the maximum score of the series considered and multiplied by 100:

$$\text{Normalised score}_j = \frac{\text{Raw (average) score}_j}{\text{Maximum score obtained}_j}$$

We end up with final and comparable scores, included between 0 and 1.

The table below provides an overview of each individual screen employed across the multi-stage test, their associated scoring and respective interpretation.

Table 62 – Pair wise scale interpretation and screens covered

Type of impact	Screen considered	Score	Scale Interpretation
Data in absolute values: absolute numbers, percentages, indexes)			
Cost	Concentration, Regulatory barriers, Lack of transparency	0	Neutral weight: Lowest importance in data
		1	Medium weight: Moderate importance amongst the other data
		2	Outstanding weight: Strong to very strong importance amongst the other data
Efficiency	Profitability	0	Neutral weight: Lowest importance in data
		-1	Medium efficiency: Moderate importance amongst the other data
		-2	Outstanding efficiency: Strong to very strong importance amongst the other data
Binary data: data responding to yes or no			
Cost	Switching costs	0	Neutral weight: The cost considered has not been reported
		1	Existence of a weight: The cost considered has been reported
Efficiency	Production-side efficiencies, Consumer-side efficiencies	0	Neutral weight: The efficiency considered has not been reported
		-1	Existence of a weight: The efficiency considered has been reported

Importantly, assessing the potential unfairness of the reported practices requires a ‘balanced’ test that accounts both for positive and negative impacts – *e.g.* efficiencies versus costs. As a result the final scores represent a ‘net’ effect both for the antitrust test and for the customer impact test. The computation of weights is presented more in detail in Annex 14 of the Report and is illustrated for each individual screens composing the antitrust and consumer tests.

6.1.1.4 Caveats

Before presenting the results of our tests, it is worth recalling that several caveats apply, and in particular the following:

- *Dependence upon available data and information:* the test does not provide a complete and exhaustive assessment, precisely because of the scarcity of available parameters investigated in each step. This led to two major restrictions in our approach. First, in some cases we had to choose one proxy out of several that are commonly used – for example, we used the CR5 to proxy market concentration, and not other concentration indicators, ranging from the Herfindhal Hirschman Index (HHI) to the Index to the Panzar-

Rosse H-statistics⁴⁴⁰, because of lack of data for each service and each Member State. Second, due to the lack of available information and existing data, we could not always cover all retail financial services, encompassing all retail banking, insurance and investment sub-segments. For example, available information on regulatory barriers in financial services have only been found for the banking and investment sectors.

- *Financial turmoil*: the volatile conditions observed during the last year led us to prefer relying on data prior to the financial and economic crisis (2007 and before). The major disadvantage lies in the reliance on past data, which may not fully represent the current situation. Yet, such data have the advantage of being free from any possible effects of the financial turmoil, which led to general turbulence and instability amongst the sector, and may have significantly affected our indicators employed in the test, specifically those characterising market conditions, such as profitability or concentration⁴⁴¹.
- *Overall purpose of the exercise*. In real life, the anti-competitiveness and unfairness of observed practices is normally assessed *ex post* by competition authorities and judges. This depends on the fact that the appraisal of these practices depends on a number of elements concerning the market situation and the specific features of the conducts observed. Both the antitrust scrutiny and judicial assessment of potentially unfair practices are lengthy and complex procedures, which cannot be replaced by a single test run *ex ante* on the basis of empirical data. Accordingly, an exercise such as the one presented in the next pages cannot be taken as a precise indication of which practices should be considered as unfair. To the contrary, our test provides a mapping of the types of practices that are more likely to prove harmful for customers in the EU27, and should be approached by the reader as such.

6.1.2 The multi-screen test

As already mentioned in Section 6.1 above, our test is composed of a number of screens. In designing the test, we have imagined a logically consequential number of steps that resulted in different screens of the test.

⁴⁴⁰ If indicators such HHI are relative to traditional Industrial Organisation empirical approaches, the Panzar-Rosse one refers to the New Empirical Industrial Organisation method. These indicators and others will be further discussed below.

⁴⁴¹ As stated in European Commission, Staff working document European Financial Integration Report 2008, SEC(2009) 19 final, 9 January 2009; pp 32 and 59: “As expected, the financial turmoil had a significant negative impact on the profitability of EU banks. (...) The financial turmoil has also impacted on the global structure of the financial services sector; mergers and acquisitions have been carried out between weak and strong firms, which have led to increased market consolidation.” Consulted at: http://ec.europa.eu/internal_market/finances/docs/cross-sector/fin-integration/efir_report_2008_en.pdf

Step 1 of the test is common to the antitrust and the customer impact test of the observed cross-selling practices. In this phase, the essential characteristics of the observed practice have to be analysed.

- First of all (screen 1), the type of gateway product is important, as the likelihood that practices lead to, *i.a.*, customer lock-in and reduced mobility crucially depends on the financial services product that is used as “gateway” or – as sometimes termed – “hook” for end customers. In this phase, we rely mostly on the empirical results obtained in Section 5 above, in order to select the gateway products that are most often used by financial services providers.
- Second, in screen 2 we look at the type of practice. For different gateway products, the same type of practice is likely to lead to different results. For example, bundling mortgage loans with another product may have a different impact than tying it; and of course some potentially unfair practices do not even require combined sales. As a matter of fact, having different combinations of gateway products and practices can help us later in the test, *e.g.* by evaluating the production and demand-side efficiencies associated with each specific practice observed.

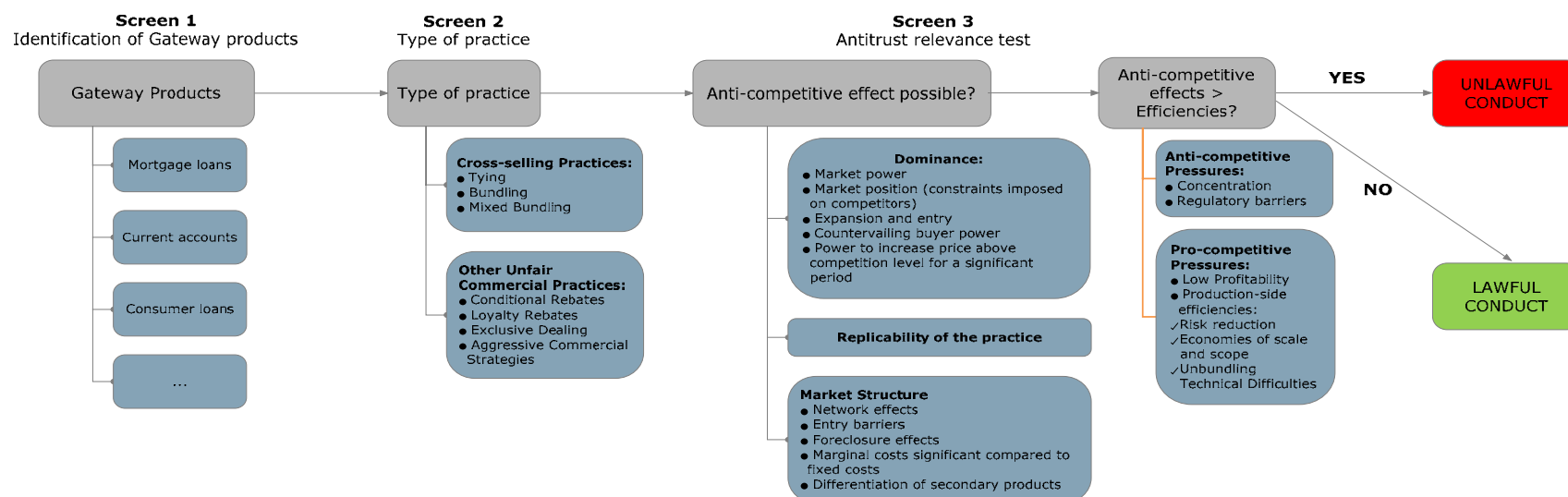
In the antitrust assessment of the practice (top areas in the graph), we identified the following steps: (i) we check whether the anti-competitive effect is possible – this depends on whether the firm is dominant and whether the practice is likely to lead to anti-competitive foreclosure; (ii) then, following the Commission’ 2008 Guidance paper on exclusionary abuses under Article 82, we ask whether the practice features redeeming efficiencies, which are likely to be shared with customers.

An overall balance of harmful effects and efficiencies leads to determining whether the conduct is likely to be found anti-competitive, and thus unlawful.

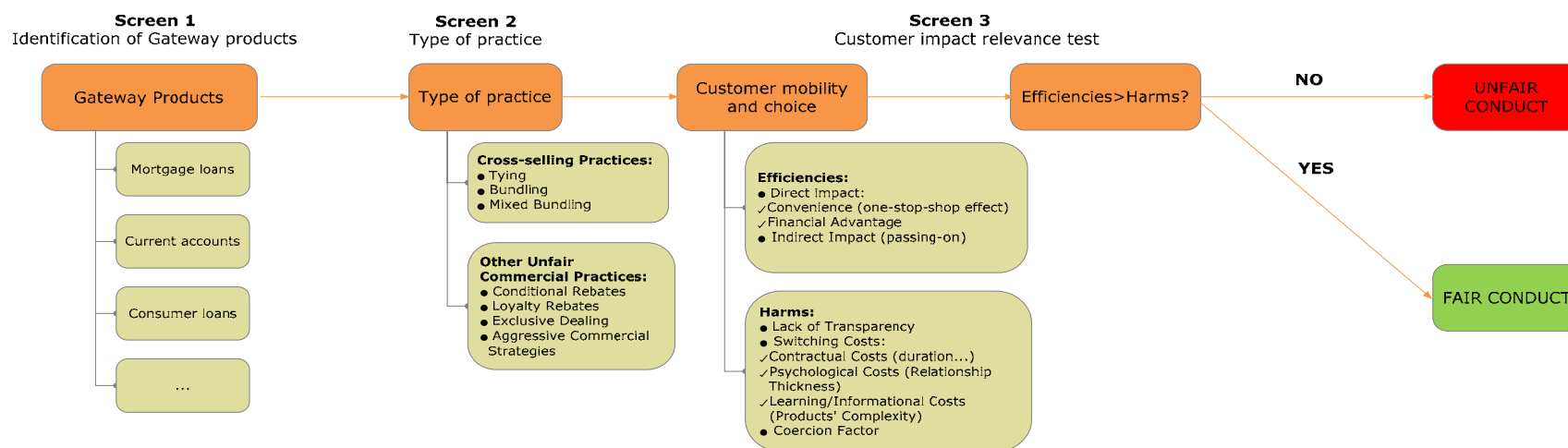
In the customer impact test, the steps are different, and mirror to the extent possible the unfairness test of the UCPD. In our test, we consider the likelihood that the practice reduces customer mobility and choice. In such cases, the results of the test may provide an indication of whether a practice is likely to materially distort the economic behaviour of an average consumer, as required under the UCPD test, and whether the practice is objectively justified. This latter test includes an assessment of demand-side efficiencies generated by the practice. If the practice overall is found to be beneficial for consumers, we consider it to be lawful. Practices that restrict customer choice and mobility without producing efficiencies for consumers are considered to be potentially unfair, since they cannot be justified by the existence of efficiencies. Compared to the unfairness test of the UCPD, it was not possible for us to perfectly mirror the extent to which the practice is contrary to professional diligence: this assessment is normally performed by the judge on an *ex post* basis, and referred to an individual practice under scrutiny. In our case, we must rely on the qualitative interpretation of the results of our test to infer whether the practice can be considered in line with, or contrary to, professional diligence.

The graph below presents the overall architecture that will guide our assessment.

— Antitrust Test



— Customer Impact Test



Source: Authors' elaboration.

6.2 Cross-selling practices: empirical results and application of the test

In this section, we illustrate the results obtained from the application of the test described in the previous section. We structure our presentation of results in three steps. Section 6.2.1 below shows the results of our antitrust test, presenting them by type of gateway product, by type of practice and by Member State. We finally reach a comparative analysis of types of practices and countries and an indication of countries where the practices observed raise more important antitrust concerns.

Section 6.2.2 runs the customer impact test and provides results by type of gateway product, by type of practice and by Member State. Here too, we develop a comparative analysis of types of practices and countries and an indication of countries where the practices observed are more likely to prove unfair. Finally, we develop an inventory of practices exhibiting the greatest potential for unfairness, and the countries in which these practices can (or do) materialise.

6.2.1 Preliminary test

6.2.1.1 Screen 1: identification of gateway product

The empirical analysis in Section 5 of this Report reported that mortgage loans (28%), current accounts (23%) and consumer loans (14%) are the most frequent gateway products amongst the overall combinations reported⁴⁴². We thus focused our analysis on these three products. In what follows, the presentation of the results obtained from respectively the antitrust test and the customer impact test will thus be presented for each of these major gateway products.

6.2.1.2 Screen 2: identification of the type of practice

This step of the analysis requires that we select the most frequent types of practices associated with gateway products identified in screen 1. In this respect, our empirical analysis at Section 5 revealed the following features.

- (i) *Bundling with financial advantages as the principal type of conduct.* Tying represents one third of cross-selling practices in our sample, closely followed by bundling with no financial or other (dis)advantage (26%). Then, different practices offering preferential tariff or rate, for the gateway product or the combined one, including free of charge combined product(s) altogether represent 41% of cross-selling practices⁴⁴³. Attractive pricing of cross-sold

⁴⁴² See Section 4.3.2, table 9.

⁴⁴³ See Section 4.3.2, Table 8.

products suggests that the practices resulted in increased efficiencies (such as economies of scale and scope, reduction of information and transactional costs or removal of the double marginalisation problem⁴⁴⁴), which have been partly or fully passed-on to consumers, leading to lower prices⁴⁴⁵.

- (ii) *Predominance of domestic supply of combined products*. The provision of combined products may be supplied by a partner (financial group or institution) established in the same country that the one offering the gateway product. In this case, the supply of combined product is made ‘domestically’. Alternatively, the partner supplying the combined product may also operate from another country. This situation will refer to a ‘cross-border’ supply of combined products. Empirical results presented in section 5 highlighted the relative predominance of domestic supply of combined products. Indeed, the choice of a domestic strategy concerns 93% (and even reaches 99.7%, according to the financial sector) of all reported cross-selling practices. The restricted cross-border strategy occurs throughout the location of a branch of the same financial group in another country (4%) or through a partner institution located in another country (3%). This has no particular impact on cross-border shopping since it just means that the linked suppliers are most frequently from the same country. These patterns found in our empirical results are consistent with trends observed in markets for retail financial services more broadly. Despite the growth of distribution channels that facilitate the cross-border sale of retail financial service provision (notably, the internet), consumers still prefer to buy products distributed through local branches, subsidiaries and intermediaries. To the extent that this occurs, access to non-domestic markets is typically achieved through establishment or the merger of service providers, rather than cross-border purchases from a foreign provider⁴⁴⁶. European Commission surveys suggest that only 1% of EU consumers currently buy financial services cross-border through distance selling⁴⁴⁷. In Section 6.5 below, we will revert to this issue by commenting on the potential impact of the observed practices on cross-border trade.

⁴⁴⁴ See Section 2.1.1.3.

⁴⁴⁵ At this stage we can already emphasise for further developments of the study that such indication would tend to validate the presumption that production-side efficiencies are passed on consumers. This is particularly important in ulterior stages of the test, and particularly for the consumer scrutiny one. The latter is addressing two possible scenarios (see Section 5.4); this evidence would tend to designate the one incorporating the potential for production-side efficiencies transferred to consumers (scenario 2).

⁴⁴⁶ See European Commission, “Public Opinion in Europe on Financial Services”, Special Eurobarometer No 230, August 2005; available at: http://ec.europa.eu/consumers/cons_int/fina_serv/cons_experiences/report_eurobarometer63-2_en.pdf

⁴⁴⁷ See European Commission, “Commission staff working document accompanying the Communication from the Commission on Packaged Retail Investment Products”, SEC(2009) 556, 30.4.2009; available at: http://ec.europa.eu/internal_market/finances-retail/docs/investment_products/29042009_impact_assessment_en.pdf

6.2.2 Antitrust test

6.2.2.1 The overall index

Our antitrust test relies on the consideration of several sub-elements, or ‘*screens*’, as explained in the previous section⁴⁴⁸. Each screen has been subject to an individual assessment and scoring. We present here all the information and associated scores issued from each individual screen. In particular, every single normalised score can be aggregated, providing one global index representing quantified overall information extracted from the antitrust scrutiny exercise.

The overall index of the antitrust scrutiny is composed by a first set of proxies that quantify conditions conducive to potentially weaker competitive conditions (screen A1 – market concentration, and screen A2 – regulatory barriers to competition) and which come as *positive scores*, meaning that high scores in these screens point at increased likelihood that the conduct leads to anti-competitive foreclosure⁴⁴⁹. These are balanced by a second set of proxies that quantify in contrast those conditions positively influencing competition (screen A3 – profitability and screen – A4 production-side efficiencies), delivering *negative scores*, meaning that high scores in these screens reduce the likelihood that the conduct leads to anti-competitive foreclosure. The figure below describes the use of individual screens, according to their positive or negative influence on competition:

Figure 38 – Screens and results in the antitrust test

Screen	
A1 - Concentration	} ‘Anti’- competitive (costs) → Positive scores allocated
A2 - Regulatory barriers	
A3 - (restricted) Profitability	} ‘Pro’-competitive (benefits) → Negative scores allocated
A4 - Production-side efficiencies	

The assessment of the ‘net’ overall antitrust index can be described by the following formula:

$$\begin{aligned}
 \text{Overall antitrust index} = & \text{Normalised Score}_{A1}(\text{concentration}) + \text{Normalised Score}_{A2}(\text{regulatory barrier}) \\
 & + \text{Normalised Score}_{A3}(\text{profitability}) \\
 & + \text{Normalised Score}_{A4}(\text{production – side efficiencies : (i)technical reasons} \\
 & \quad \quad \quad \text{(ii) cost efficiencies} \\
 & \quad \quad \quad \text{(iii) risk reduction})
 \end{aligned}$$

⁴⁴⁸ See Annex 14 to this Report.

⁴⁴⁹ Please note that our assessment of regulatory barriers includes the assessment of switching costs. See Annex 14 for a detailed explanation. Section 6.5 below shows the individual scores per country obtained for switching costs only.

The overall sum can yield a positive or a negative result. If the overall index is positive, we consider the conduct as potentially harmful for competition. On the other hand, if the overall index is negative, the conduct is potentially justified in terms of efficiencies, as pro-competitive effects more than-compensate anti-competitive ones.

The overall score provides key information by characterising each practice in each country and by informing us of the related competitive conditions to be considered in the next stages of the test. More specifically, such score is useful since it highlights the most “extreme” practices, as it signals which type of product, practice and country are likely to be associated with disadvantageous competitive conditions.

The overall antitrust indexes obtained are ranked from -2.00 (minimum value) to 1 (maximum value). The table below summarises the main statistical information relating to the overall antitrust indexes:

Table 63 – Overall antitrust index

Average	Median	Max	Min
-0.25	-0.33	1.00	-2.00

This result implies that on average, cross-selling practices reported in the retail financial services sector leads to pro-competitive effects that compensate for anti-competitive ones. Below, we illustrate more in detail our findings by distinguishing between main gateway products.

6.2.2.2 Mortgages as gateway products

Our empirical analysis returned 131 cases in which mortgage was used as a gateway product⁴⁵⁰. The table below presents the average overall antitrust scores obtained considering only for mortgages as gateway product, displaying the related combined product and the frequency of cases.

⁴⁵⁰ In total, 140 practices having mortgage as their gateway product have been reported by respondents. However, we only selected those where information on the combined product was communicated (i.e. 127 cases presented here).

Table 64 – Overall antitrust scores: average scores for mortgage as gateway product

Gateway Product	Combined product	Average antitrust scores	Number of cases	Frequency*
Mortgage loan	Term investment account	0.50	1	1%
	Motor insurance	0.50	1	1%
	Business/commercial insurance	0.50	1	1%
	Consumer loan	0.42	2	2%
	Savings account	0.33	1	1%
	Credit line / overdraft	0.28	3	2%
	Operations on foreign currencies	0.17	1	1%
	Debit card	0.17	2	2%
	Bank deposits	0.00	1	1%
	Pension product	0.00	1	1%
	Other non-life insurance	-0.22	3	2%
	Credit card	-0.22	6	5%
	Fire insurance	-0.23	8	6%
	Home insurance	-0.30	20	15%
	Life insurance	-0.32	35	27%
	Health/disability insurance	-0.39	3	2%
	Current account	-0.39	27	21%
	Payment protection insurance	-0.58	15	11%
Grand Total		-0.28	131	100%

*The frequency of cases within the considered population (combinations with mortgage as gateway product). The overall average provided here takes into account the different frequencies of each score.

NB: The number of total cases (with mortgage as the gateway product) is 131 here. Out of the 140 cases identified⁴⁵¹, we removed those exhibiting blank information for gateway and combined products reported in the database.

Several results can be highlighted from Table 64.

- (i) First, scores range from negative (-0.28) to positive scores (0.50). While scores above 0 signal that the conduct is potentially harmful for competition, negative scores to the contrary highlight the predominance of positive conditions in terms of competition. The combinations that are more likely to prove anti-competitive in our test are the combined sale of mortgage loans and savings accounts, and mortgage loans with consumer loans. 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.
- (ii) The right column in the table provides information on the frequency of the observed practices. As seen in the table, *the most frequent combinations with mortgages are life insurance and current account*. Both types of combinations have been associated with negative scores obtained for this specific group (respectively -0.32 and -0.39). This means that such

⁴⁵¹ See Section 5.3.2, Table 37.

combinations are associated with pro-competitive conditions, and as such are not likely to be found anti-competitive due to redeeming efficiencies.

- (iii) *The combined product associated with the highest scores can be grouped into a broad category of “long term accounts”, which includes savings accounts, consumer loans and term investment account.* Cross-selling practices involving these products led respectively to 0.33, 0.42 and 0.50. These combinations have a rather low frequency. In addition, it is worth observing that other long-term products, such as pension products, are associated with a lower score in our database (0.00): this is due to the fact that the observed practice (in Spain) is a multi-product rebate, which leaves consumers the choice of either purchasing the bundle at a favourable price, or purchase the two products separately from different providers⁴⁵².
- (iv) *High scores have been obtained also for certain insurance products, such as business/commercial (0.50) and motor insurance (0.50).* These practices are not frequent in our sample, as shown in Table 64. Also credit lines (0.28), operation on foreign currencies (0.17) and debit cards (0.17) yielded positive scores in our test.

Table 65 below shows in detail the steps followed and the results of our test for cross-selling practices in which mortgage loans were the gateway product.

⁴⁵² Multi-product rebates are normally considered less anti-competitive than tying practices exactly because they leave consumers the choice to purchase the products separately. Accordingly, the practice is less likely to lead to anti-competitive foreclosure, unless “as efficient” competitors would not be able to match the price offered by the dominant firm. See above, Section 2.1.1.1.

Table 65 – Antitrust scores broken down scores for mortgage as gateway product

Gateway Product	Combined product	A1. Concentration Normalised score [1]	A2. Profitability Normalised score [2]	A3. Regulatory barriers Normalised score [3]	A4. Production-side efficiencies Normalised score [4]	Average antitrust scores	Number of cases
Mortgage loan	Term investment account	0.5	0	0	0.0	0.50	1
	Motor insurance	1	-0.5	0	0.0	0.50	1
	Business/commercial insurance	1	-0.5	0	0.0	0.50	1
	Consumer loan	0.5	0	0	0.0	0.50	1
		1	0	0	-0.7	0.33	1
	Savings account	1	na	na	-0.7	0.33	1
	Credit line / overdraft	0.5	na	na	-0.7	-0.17	1
		0.5	na	na	0.0	0.50	2
	Operations on foreign currencies	0.5	na	na	-0.3	0.17	1
	Debit card	0	0	0	0.0	0.00	1
		1	0	0	-0.7	0.33	1
	Bank deposits	0	na	na	0.0	0.00	1
	Pension product	0	0	0	0.0	0.00	1
	Other non-life insurance	0	0	0	-0.3	-0.33	1
		0.5	-1	0	-0.3	-0.83	1
		0.5	na	na	0.0	0.50	1
	Credit card	0	-0.5	0	-0.7	-1.17	1
		0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	1
		0	0	0	0.0	0.00	1
		0.5	na	na	0.0	0.50	1
		1	0	0	-0.3	0.67	1
	Fire insurance	0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	2
		0.5	-1	0	-0.3	-0.83	1
		0.5	na	na	-0.7	-0.17	1
		0.5	na	na	-0.3	0.17	1
		1	-0.5	0	0.0	0.50	1
		1	0	0	-0.7	0.33	1
	Home insurance	0	-1	0	-0.7	-1.67	1
		0	-0.5	0	-0.7	-1.17	2
		0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	1
		0	0	0	-0.3	-0.33	2
		0	na	na	-0.7	-0.67	1
		0.5	-1	0	-0.3	-0.83	2
		0.5	0	0	-0.7	-0.17	1
		0.5	0	0	0.0	0.50	1
		0.5	na	na	-0.7	-0.17	2
		0.5	na	na	-0.3	0.17	1
		1	0	0	-0.7	0.33	1
		1	0	0	0.0	1.00	2
		1	na	na	-0.3	0.67	1
	Life insurance	0	-1	0	0.0	-1.00	1
		0	-0.5	0	-1.0	-1.50	1
		0	-0.5	0	-0.7	-1.17	2
		0	-0.5	0	-0.3	-0.83	5
		0	-0.5	0	0.0	-0.50	4
		0	0	0	-0.3	-0.33	2
		0	0	0	0.0	0.00	2
		0	na	na	-0.7	-0.67	2
		0	na	na	-0.3	-0.33	1
		0.5	-1	0	-0.3	-0.83	3
		0.5	0	0	0.0	0.50	1
		0.5	na	na	-0.7	-0.17	1
		0.5	na	na	-0.3	0.17	3
		0.5	na	na	0.0	0.50	2
		1	-0.5	0	0.0	0.50	1
		1	0	0	-0.7	0.33	1
		1	0	0	0.0	1.00	1
		1	na	na	-0.7	0.33	1
		1	na	na	-0.3	0.67	1
	Current account	0	-0.5	0	-1.0	-1.50	1
		0	-0.5	0	-0.7	-1.17	3
		0	-0.5	0	-0.3	-0.83	3
		0	-0.5	0	0.0	-0.50	3
		0	0	0	-0.3	-0.33	2
		0	na	na	-0.7	-0.67	1
		0	na	na	0.0	0.00	1
		0.5	-1	0	-0.7	-1.17	3
		0.5	0	0	-0.7	-0.17	1
		0.5	0	0	0.0	0.50	4
		1	-1	0	-0.7	-0.67	1
		1	-0.5	0	0.0	0.50	1
		1	0	0	-0.7	0.33	2
		1	0	0	0.0	1.00	1
	Health/disability insurance	0	-0.5	0	-0.3	-0.83	1
		0.5	-1	0	-0.3	-0.83	1
		1	-0.5	0	0.0	0.50	1
	Payment protection insurance	0	-0.5	0	-1.0	-1.50	1
		0	-0.5	0	-0.7	-1.17	2
		0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	1
		0	0	0	-0.7	-0.67	1
		0	0	0	-0.3	-0.33	3
		0	0	0	0.0	0.00	1
		0.5	-1	0	-0.3	-0.83	2
		1	0	0	-0.7	0.33	2
Mortgage loan Total		1	0	0	-0.7	-0.28	131

NB: Cells displaying 'na' (i.e. 'not available') stand for unreported or unavailable data in the sources consulted. For means of clarity they are displayed in the table shown above as 'na'; however in the practical result computation, 'na' values have been systematically restored with the neutral value 0.

FINDING #6.1 – ANTITRUST TEST WHEN MORTGAGE IS THE GATEWAY PRODUCT

Our test revealed that a number of common practices where mortgage loans are used as gateway products are unlikely to create concerns from an antitrust perspective (89% of the total); to the contrary, a number of less frequent practices may create antitrust concerns.

If mortgage is used as a gateway product, the strongest antitrust concerns are created by the tying of mortgage loans with long-term accounts.

Frequent practices that may create restrictions of competition include the cross-selling of mortgage loans plus (i) term investment accounts and (ii) business/commercial and motor insurance.

6.2.2.3 Current accounts as gateway products

In our empirical analysis, there have been 107 cases in which current accounts were reportedly used as a gateway product⁴⁵³. The table below presents the average overall antitrust scores obtained considering current account as gateway product, displaying the related combined product and the frequency of cases.

⁴⁵³ In total, 115 practices having current account as their gateway product have been reported by respondents. However, we only selected those where information on the combined product was communicated (i.e. 107 cases presented here).

Table 66 – Average antitrust scores for current account as gateway product

Gateway Product	Combined product	Average antitrust scores	Number of cases	Frequency*
Current account	Underwriting or placing with firm commitment	0.67	1	1%
	Term investment account	0.67	1	1%
	Placing without firm commitment	0.67	1	1%
	Corporate banking loan	0.67	1	1%
	Execution of orders on behalf of clients	0.67	1	1%
	Equity release loan	0.67	1	1%
	Dealing on own account	0.67	1	1%
	Consumer loan	0.58	2	2%
	Mortgage loan	0.58	2	2%
	Home insurance	0.50	2	2%
	Pension product	0.00	2	2%
	Current account	0.00	1	1%
	Debit card	-0.01	16	15%
	Credit card	-0.10	12	11%
	Savings account	-0.21	8	7%
	Credit line / overdraft	-0.27	8	7%
	Reception and transmission of orders	-0.33	3	3%
	Other non-life insurance	-0.33	3	3%
	Fund transfers	-0.42	4	4%
	Means of payment, excluding debit/credit cards	-0.42	4	4%
	Life insurance	-0.42	12	11%
	Portfolio management	-0.44	6	6%
	Bank deposits	-0.50	6	6%
	Health/disability insurance	-0.52	7	7%
	Investment advice	-0.92	2	2%
Grand Total		-0.17	107	100%

*The frequency of cases within the considered population (combinations with current account as gateway product). The overall average provided here takes into account the different frequencies of each score.

NB: The number of total cases (with current accounts as the gateway product) is 107 here. Out of the 115 cases identified⁴⁵⁴, we removed those exhibiting blank information for gateway and combined products reported in the database.

Several results are worth being highlighted from Table 66:

- (i) The scores range between -0.92 and 0.67. Here too, the majority of scores are negative: 87% of this group have been associated with zero or negative scores (thus, with efficiencies being equal to, or greater than, restrictions of competition). This suggests that cross-selling of current accounts with other products is likely to create antitrust concerns in some cases, depending on whether the firms that engage in these practices are dominant or not.
- (ii) The products that are most frequently combined with current accounts are debit cards, credit cards and life insurance. For the case of cross-selling of current accounts and credit/debit cards, technical reasons were reported as justification by our respondents. In any event, the antitrust score reported

⁴⁵⁴ See Section 5.3.2, Table 37.

for these practices is negative (-0.01 and -0.10), and the antitrust relevance of the practice would have to be tested against the possibility that these practices lead to anti-competitive foreclosure in specific cases. In the case of life insurance, the antitrust score is negative (-0.42), as only 3 of the 12 observed practices are tying practices, whereas the other reported cases involve mixed bundling or multi-product rebates.

- (iii) *Several combined products were associated with very high scores. These include specific investment services – such as underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients – and loans – consumer and corporate banking loans, mortgage loan. The association of current account with investment services yields a score of 0.67 (for all the services referred above), while its combination with corporate banking, consumer and mortgage loans feature respectively 0.67, 0.58 and 0.58. These practices are not very frequent, as they account only for 11% of this sample: however, when they are observed, they create potential antitrust concern, provided that the firms that engage in those practices are dominant and the practice at hand is likely to lead to anti-competitive foreclosure.*
- (iv) *Positive scores were obtained also for home insurance, which is associated with a rather high score (0.50).*
- (v) *Finally, all other combinations yielded negative scores.*

Table 67 below shows in detail the steps followed and the results of our test for cross-selling practices in which current accounts were the gateway product.

Table 67 – Overall antitrust scores for current account as gateway product

Gateway Product	Combined product	A1. Concentration Normalised score [1]	A2. Profitability Normalised score [2]	A3. Regulatory barriers Normalised score [3]	A4. Production-side efficiencies Normalised score [4]	Average antitrust scores	Number of cases
Current account	Underwriting or placing with firm commitment	1	na	na	-0.3	0.67	1
	Term investment account	1	na	na	-0.3	0.67	1
	Placing without firm commitment	1	na	na	-0.3	0.67	1
	Corporate banking loan	1	na	na	-0.3	0.67	1
	Execution of orders on behalf of clients	1	na	na	-0.3	0.67	1
	Equity release loan	1	na	na	-0.3	0.67	1
	Dealing on own account	1	na	na	-0.3	0.67	1
	Consumer loan	0.5	0	0	0.0	0.50	1
		1	na	na	-0.3	0.67	1
	Mortgage loan	0.5	0	0	0.0	0.50	1
		1	na	na	-0.3	0.67	1
	Home insurance	0.5	0	0	0.0	0.50	2
	Pension product	0.5	-1	0	0.0	-0.50	1
		0.5	0	0	0.0	0.50	1
	Current account	0	na	na	0.0	0.00	1
	Debit card	0	-1	0	-0.7	-1.67	1
		0	-0.5	0	-0.3	-0.83	2
		0	0	0	-0.3	-0.33	1
		0	na	na	-0.3	-0.33	1
		0.5	-1	0	-0.7	-1.17	2
		0.5	0	0	0.0	0.50	4
		0.5	na	na	0.0	0.50	1
		1	0	0	0.0	1.00	2
		1	na	na	-0.3	0.67	1
		1	na	na	0.0	1.00	1
	Credit card	0	-1	0	-0.3	-1.33	1
		0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	1
		0.5	-1	0	-0.7	-1.17	1
		0.5	0	0	0.0	0.50	4
		0.5	na	na	0.0	0.50	1
		1	0	0	-0.7	0.33	1
		1	0	0	-0.3	0.67	1
	Savings account	0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	4
		0	0	0	0.0	0.00	1
		0.5	0	0	0.0	0.50	1
		1	na	na	-0.3	0.67	1
	Credit line / overdraft	0	-1	0	-1.0	-2.00	1
		0	-1	0	0.0	-1.00	1
		0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	1
		0.5	0	0	0.0	0.50	3
		1	na	na	-0.3	0.67	1
	Reception and transmission of orders	0	-1	0	-0.3	-1.33	1
		0	na	na	-0.3	-0.33	1
		1	na	na	-0.3	0.67	1
	Other non-life insurance	0	-0.5	0	0.0	-0.50	2
		0	0	0	0.0	0.00	1
	Life insurance	0	-1	0	-0.3	-1.33	1
		0	-0.5	0	-0.7	-1.17	1
		0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	3
		0	0	0	-0.3	-0.33	1
		0	0	0	0.0	0.00	1
		0	na	na	-0.3	-0.33	1
		0.5	-1	0	0.0	-0.50	1
		1	0	0	-0.7	0.33	1
		1	0	0	-0.3	0.67	1
	Fund transfers	0	-1	0	-0.7	-1.67	1
		0.5	-1	0	-0.7	-1.17	1
		0.5	0	0	0.0	0.50	1
		1	na	na	-0.3	0.67	1
	Means of payment, excluding debit/credit cards	0.5	-1	0	-0.7	-1.17	2
		0.5	na	na	-0.3	0.17	1
		0.5	na	na	0.0	0.50	1
	Portfolio management	0	-1	0	-0.3	-1.33	1
		0	-0.5	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	1
		0	na	na	-0.3	-0.33	2
		1	na	na	-0.3	0.67	1
	Bank deposits	0	-0.5	0	-0.3	-0.83	2
		0.5	-1	0	-0.7	-1.17	2
		1	0	0	-0.7	0.33	1
		1	na	na	-0.3	0.67	1
	Health/disability insurance	0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	4
		0	na	na	0.0	0.00	1
	Investment advice	0	-1	0	-0.3	-1.33	1
		0	-0.5	0	0.0	-0.50	1
Current account Total						-0.17	107

NB: Cells displaying 'na' (i.e. 'not available') stand for unreported or unavailable data in the sources consulted. For means of clarity they are displayed in the table shown above as 'na'; however in the practical result computation, 'na' values have been systematically restored with the neutral value 0.

FINDING #6.2 – ANTITRUST TEST WHEN CURRENT ACCOUNT IS THE GATEWAY PRODUCT

When a current account is used as a gateway product, the strongest antitrust concerns are created by the combination of current accounts with (i) specific investment services (underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients); and (ii) loans (consumer and corporate banking loans, mortgage loan).

Other more frequent practices that may create competitive restrictions are the cross-selling of current account with home insurance.

87% of observed practices create no antitrust concern.

6.2.2.4 Consumer loans as gateway products

Our empirical analysis retrieved 63 reported cases in which consumer loans are used as a gateway product⁴⁵⁵.

The table below presents the average overall antitrust scores obtained considering only for consumer loans as gateway product, displaying the related combined product and the frequency of cases:

Table 68 – Average antitrust scores for consumer loan as gateway product

Gateway Product	Combined product	Average antitrust scores	Number of cases	Frequency*
Consumer loan	Credit line / overdraft	0.33	2	3%
	Motor insurance	0.03	6	10%
	Bank deposits	0.00	1	2%
	Current account	-0.04	18	29%
	Savings account	-0.17	2	3%
	Payment protection insurance	-0.44	13	21%
	Life insurance	-0.50	9	14%
	Credit card	-0.54	4	6%
	Health/disability insurance	-0.70	5	8%
	Other non-life insurance	-0.72	3	5%
Grand Total		-0.29	63	100%

*The frequency of cases within the considered population (combinations with current account as gateway product). The overall average provided here takes into account the different frequencies of each score.

NB: The number of total cases (with mortgage as the gateway product) is 61 here. Out of the 68 cases identified⁴⁵⁶, we removed those exhibiting blank information for gateway and combined products reported in the database.

⁴⁵⁵ In total, 68 practices having consumer loan as their gateway product have been reported by respondents. However, we only selected those where information on the combined product was communicated (i.e. 63 cases presented here).

⁴⁵⁶ See Section 5.3.2, Table 37.

Several results are worth being highlighted here:

- (i) *The results tend to be more concentrated than for previous results for mortgage and current account.* The combinations considered here range from -0.72 until 0.33. Most combinations (87%) yielded a negative score
- (ii) *The most frequent combination, namely consumer loan and current account has been associated with a negative score for the sample considered (-0.04).* The second most repeated combination (consumer loan and payment protection insurance) also scored negatively (-0.44). Finally, consumer loan and life insurance, composing 11% of the reported combinations considered here, feature a negative score (-0.50).
- (iii) *Credit lines/overdrafts obtained the highest score (0.33),* although this score is lower than the highest scores obtained when mortgage loans and current accounts are used as gateway products. Motor insurance purchased with consumer loan yielded the only other positive score (0.03).

Table 69 below shows in detail the steps followed and the results of our test for cross-selling practices in which consumer loans were the gateway product.

Table 69 – Detailed antitrust scores for consumer loan as gateway product

Gateway Product	Combined product	A1. Concentration Normalised score [1]	A2. Profitability Normalised score [2]	A3. Regulatory barriers Normalised score [3]	A4. Production-side efficiencies Normalised score [4]	Average antitrust scores	Number of cases
Consumer loan	Credit line / overdraft	0.5	na	na	-0.3	0.17	1
		0.5	na	na	0.0	0.50	1
	Motor insurance	0	-0.5	0	-0.7	-1.17	1
		0.5	-1	0	0.0	-0.50	1
		0.5	0	0	0.0	0.50	1
		1	0	0	-0.7	0.33	2
		1	na	na	-0.3	0.67	1
		0	na	na	0.0	0.00	1
	Bank deposits	0	na	na	0.0	0.00	1
		Current account	0	-0.5	0	0.0	-0.50
	0		na	na	0.0	0.00	3
	0.5		-1	0	-0.7	-1.17	2
	0.5		0	0	0.0	0.50	2
	0.5		na	na	-0.3	0.17	4
	1		-1	0	-0.7	-0.67	1
	1		0	0	-1.0	0.00	1
	1		0	0	-0.7	0.33	1
	1		0	0	-0.3	0.67	2
	Savings account		0	-0.5	0	-0.3	-0.83
		0.5	na	na	0.0	0.50	1
	Payment protection insurance	0	-1	0	0.0	-1.00	1
		0	-0.5	0	-0.7	-1.17	1
		0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	2
		0	0	0	-0.7	-0.67	1
		0	na	na	-0.3	-0.33	1
		0.5	-1	0	-0.3	-0.83	1
		0.5	0	0	0.0	0.50	1
		0.5	na	na	-0.7	-0.17	1
		1	0	0	-0.7	0.33	2
	Life insurance	0	-1	0	-0.7	-1.67	1
		0	-0.5	0	-1.0	-1.50	1
		0	-0.5	0	0.0	-0.50	1
		0.5	-1	0	-0.3	-0.83	2
		0.5	na	na	-0.7	-0.17	1
		0.5	na	na	-0.3	0.17	2
	Credit card	1	0	0	-0.3	0.67	1
		0	-0.5	0	-0.7	-1.17	1
		0	-0.5	0	0.0	-0.50	2
	Health/disability insurance	1	0	0	-1.0	0.00	1
		0	-0.5	0	-0.3	-0.83	2
		0	-0.5	0	0.0	-0.50	2
	Other non-life insurance	0.5	-1	0	-0.3	-0.83	1
		0	-0.5	0	0.0	-0.50	1
0.5		-1	0	-0.3	-0.83	2	
Consumer loan Total						-0.29	63

NB: Cells displaying 'na' (i.e. 'not available') stand for unreported or unavailable data in the sources consulted. For means of clarity they are displayed in the table shown above as 'na'; however in the practical result computation, 'na' values have been systematically restored with the neutral value 0.

FINDING #6.3 – ANTITRUST TEST WHEN CONSUMER LOANS ARE THE GATEWAY PRODUCT

When consumer loans are used as a gateway product, the strongest antitrust concerns are created by; (i) the combination of consumer loans with credit line/overdraft; and by (ii) the cross-selling of consumer loan with motor insurance. 89% of the observed practices do not create antitrust concerns.

6.2.2.5 Antitrust test: analysis per type of practice

Our empirical analysis did not only look at one specific practice, but mapped a wide range of practices in which gateway products are associated with the purchase of other products, or specific consumer behaviour (as in the case of conditional sales practices).

Considering all gateway products reported in our database altogether, overall antitrust scores can also be obtained by reviewing the type of practices associated with them. The table below provides with the categories of cross-selling practices related to the observed practices, per country.

Table 70 – Types of cross-selling practices and average antitrust scores

Type of practice	Average antitrust scores	Number of cases	Frequency*
Preferential rate for gateway product	0,00	45	7,1%
Bundled products with no (dis)advantage	-0,15	169	26,6%
Combined product(s) free of charge	-0,18	48	7,6%
Preferential tariff for combined product(s)	-0,19	84	13,2%
Preferential rate for combined product(s)	-0,36	19	3,0%
Tied products	-0,36	201	31,7%
Preferential tariff for gateway product	-0,42	69	10,9%
Overall average/total nbr of cases	-0,25	635	100%

*The frequency of cases within the considered population (all cross-selling practices). The overall average provided here takes into account the different frequencies of each score.

Table 70 leads to the following observations:

- As already reported in section 6.2.2.1 above, the overall antitrust index (considering for all types of practices altogether), is negative (-0.25), which indicates that pro-competitive effects more than-compensate anti-competitive ones. Besides the specific case for preferential rate for gateway products which bears a score of 0, all other practices show a negative score.
- Tying is the most common cross-selling practice, and accounts for 31.7% of our sample. Tying was reported in Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Latvia, Poland, Portugal, Slovakia, Slovenia, the Netherlands, and United Kingdom.
- Bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. This practice was reported in Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Poland, Portugal, Slovenia, Spain, and United Kingdom. Then, the offer of a preferential tariff or rate for the gateway or combined product has been reported in Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Italy, Latvia, Poland, Portugal, Slovenia, Spain and United Kingdom.

- In another 18% of the cases (7.1% plus 10.9%), service providers offer preferential conditions (tariffs or rates) for the gateway product only. Antitrust scores for both practices widely differ, given that while a preferential *tariff* for the gateway product bears pro-competitive conditions (-0.42), preferential *rates* (for the gateway product only) scored 0. This deviation results from the variable ‘A3-Profitability’ which constitutes one of the additive components of the overall antitrust score (details regarding the presentation and score computation relative to this variable are presented in Annex 14 of this Report). More specifically, the normalised score of ‘A3-Profitability’ reaches -0.54 for preferential tariff for the gateway product, but only -0.16 for preferential rate for the gateway product. This gap explains the one observed in the corresponding overall antitrust scores (see table below).

Table 71 – Focus on profitability scores for preferential rate and tariff for the gateway product

Type of practice	A3 Profitability	Number of cases	Frequency*
Preferential rate for the gateway product	-0,16	45	39,5%
Preferential tariff for the gateway product	-0,54	69	60,5%
Overall average score for A3-Profitability	-0,40	114	100%

**The frequency of cases within the considered population (practices with preferential rate and tariff for the gateway product) The overall average provided here takes into account the different frequencies of each score.*

- In another 16.2% of the cases (13.2% plus 3%), financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products. Interestingly, these two types of cross-selling practices diverge in terms of antitrust scoring, as preferential *tariffs* for the combined product leads to a score of -0.19, whereas preferential *rates* for the combined product allows for a lower score of -0.36. This result can be explained by two elements, which are directly connected to the collected database. First, the variable ‘A1-Concentration’, composing for one of the sub-elements in the overall antitrust score (details regarding the presentation and score computation relative to this variable are presented in Annex 14 of this Report), resulted in a higher score for preferential *tariffs* (0.35) than for preferential *rates* for the combined product (0.17). This divergence of concentration scores is induced by countries where the two types of practices have been reported. More specifically, the presence of Belgium and Finland (both respectively associated with high concentration normalised scores of 1 and 0.8) and only found in the sample for reported practices with a preferential tariff for combined product explains the gap. Second in the sample collected, preferential tariffs for the combined product have been more frequently reported (in exactly 84 cases, i.e. 13.2% of the sample of all cross-selling practices) than preferential rates for the combined product (in 19 cases, i.e. 3% of the sample of all cross-selling practices) which amplifies the influence of the high score of the sub-element ‘A1-Concentration’ (see table below).

Table 72 – Focus on concentration scores for preferential rate and tariff for the combined product (per country)

Practice	Country	A1 Concentration	Count of Gateway Product
Preferential rate for combined product(s)	Bulgaria	na	3
	Cyprus	0.50	3
	Denmark	0.50	1
	Estonia	0.00	1
	Poland	0.00	6
	Portugal	0.50	1
	Slovenia	0.00	3
	Spain	0.00	1
	Sweden	0.00	1
Overall average score for 'A1-Concentration'		0.35	20
Preferential tariff for combined product(s)	Austria	0.00	2
	Belgium	1.00	4
	Cyprus	0.50	7
	Czech Republic	0.50	13
	Denmark	0.50	4
	Finland	0.80	13
	France	0.00	2
	Hungary	0.00	6
	Italy	0.00	2
	Poland	0.00	12
	Portugal	0.50	6
	Slovenia	0.00	11
	United Kingdom	0.00	2
Overall average score for 'A1-Concentration'		0.16	84

- Although tying is often considered to be the most potentially anti-competitive practice in the set of conducts under scrutiny, the market conditions in which the practices are observed leads to a different conclusion: as a matter of fact, all practices scored negatively, therefore signalling the existence of pro-competitive conditions, and the highest score is observed for forms of multi-product rebates. This does not mean that such practices are indeed more likely to distort competition *per se*: ours is a collection of actual practices reported by our respondents, and the data we retrieved suggest that mixed bundling is more likely to emerge in market contexts that are potentially conducive to smaller competitive outcomes.

Available evidence confirms the concerns expressed by the European Commission in its sectoral inquiry on retail financial services (see Section 1.2 above), and points at tying and bundling as the most widespread cross-selling practices adopted by financial institutions.

FINDING #6.4 – MOST COMMON POTENTIALLY ANTI-COMPETITIVE CROSS-SELLING PRACTICES

- Tying is the most common cross-selling practice, and accounts for 31.7% of our sample. Mixed bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. In another 18% of the cases, service providers offer preferential conditions (tariffs or rates) for the gateway product only. In another 16.2% of the cases, financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products.

- All cross-selling practices score negatively in our antitrust test, which suggests that on average they are potentially leading to pro-competitive effects.
- Although tying is often considered to be the most potentially anti-competitive practice in the set of conducts under scrutiny, the market conditions in which the practices are observed leads to a different conclusion: as a matter of fact, the highest score is observed for forms of multi-product rebates.

6.2.2.6 Antitrust test: country analysis

The antitrust test also allows for a comparison between countries, aimed at identifying legal systems in which observed practices are more likely to produce anti-competitive results. This analysis can be usefully compared with our findings at the end of Section 5 above, where we compared the results of our legal analysis with the data collected through our empirical analysis.

Table 73 reports, per country, the average values of our overall antitrust index, which considers all product combinations (all gateway products and all combined products). Looking at the table, it is possible to identify three different groups.

- *Highly competitive countries.* Negative scores were obtained for Portugal (-0.03), Spain (-0.08), Luxembourg (-0.09), Bulgaria (-0.10), France (-0.13), Italy (-0.23), United Kingdom (-0.31), Germany (-0.63), Austria (-0.80).
- *Intermediate countries.* These include Latvia (0.42), Denmark (0.41), Cyprus (0.40), Poland (0.37), Hungary (0.28), Ireland (0.19), Slovenia (0.10), and Sweden (0.00).
- *Countries with weaker overall competition in retail financial services.* A third group composed of Estonia (0.85), Czech Republic (0.80), Slovakia (0.78), Belgium (0.69), Finland (0.59) and The Netherlands (0.50) present the most outstanding (positive) scores.

Table 73 – Average overall antitrust index per country

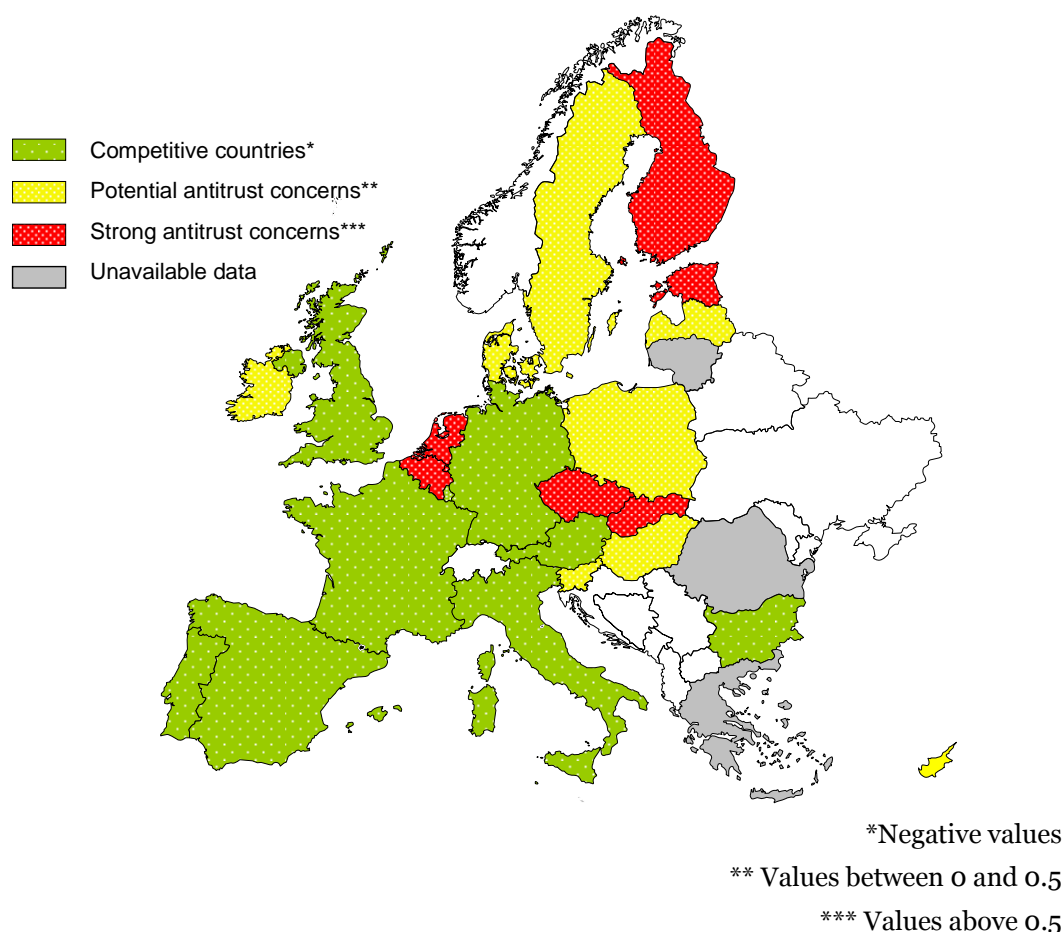
Countries	Average antitrust scores All products
Austria	-0.80
Belgium	0.69
Bulgaria	-0.10
Cyprus	0.40
Czech Republic	0.80
Denmark	0.41
Estonia	0.85
Finland	0.59
France	-0.13
Germany	-0.63
Hungary	0.28
Ireland	0.19
Italy	-0.23
Latvia	0.42
Luxembourg	-0.09
The Netherlands	0.50
Poland	0.37
Portugal	-0.03
Slovakia	0.78
Slovenia	0.10
Spain	-0.08
Sweden	0.00
United Kingdom	-0.31
<i>Average</i>	<i>0.28</i>
<i>Average countries EU-15*</i>	<i>0.01</i>
<i>Average countries EU-12**</i>	<i>0.43</i>
<i>Median: x1/2</i>	<i>0.19</i>
<i>Third/75% quartile</i>	<i>0.46</i>
<i>First/25% quartile</i>	<i>-0.1</i>

* Answers provided by respondents cover 14 countries out of the EU15 group; (Greece not available)

** Answers provided by respondents cover 9 countries out of the EU-12 group; (Lithuania, Malta and Romania not available),

In addition, Figure 37 below shows the results graphically on a map of Europe.

Figure 39 – Map 1 EU Member States per categories of antitrust scores



6.2.2.7 Antitrust test: results

The influence of country-specific conditions is substantial in our antitrust index – among the four variables composing the index, three relate to conditions on national markets (concentration, regulatory barriers and profitability). Therefore, the antitrust score presented here is significantly expressing the particular conditions characterising a country. Moreover, the information conveyed by this index regarding *combinations of products*, allow us to find out to what extent combinations yield efficiencies for producers, given national specificities and characteristics.

Table 74 below shows the results of our simulation for the antitrust test.

Table 74 – Scores per gateway product, antitrust scrutiny

High positive scores (above 0.25)	
Mortgage	+ Long term account (term investment account, saving account) + Motor and business insurances
Current account + Investment services (underwriting or placing with firm commitment...)	
Consumer loan + Motor insurance	
Intermediate positive scores (between 0 and 0.25)	
Mortgage	+ Diverse banking products (credit lines, debit cards, operation on foreign currencies)
Current account + Insurance (pension product) + Banking product (current account)	
Consumer loan + Motor insurance, bank deposits	
Negative scores (below 0)	
Mortgage	+ Insurances (life, home, payment protection insurances)
Current account + Banking (debit-credit cards, saving accounts, credit lines, fund transfer,...) + Specific investment services (reception and transmission of orders, portfolio management, investment advice)	
Consumer loan + Insurances (payment protection, health/disability, life insurances) + Deposits (current accounts, saving accounts)	

The overall antitrust scores yielded a range of competitive conditions associated with combinations of products, from the ‘best’ to the ‘worst’. Tables 75, 76 and 77 below show our results for the three main gateway products, broken down per country, and highlight a number of interesting tendencies.

- *The group of new Member States tends to show weaker competitive conditions associated to the combination of products studied, and specifically Estonia, Czech Republic and Slovakia. In the EU15, the ‘worst’ performers are Belgium, Finland and the Netherlands. This is in part due to the fact that the latter markets are particularly concentrated, and firms have on average a greater degree of market power. However, as already explained, the anti-competitive potential of the practices observed must be appraised on the basis of whether the firm engaging in the practice is dominant or not.*
- *The results of our analysis are broadly consistent with the findings of the previous sections of this report. For example, in Belgium the high score obtained matches our finding that the exception to the general rule prohibiting tying has led to the proliferation of cross-selling practices, including the combination of mortgage loans and current accounts, and that of home insurance with other non-life insurance. In Finland, the high score is due to the fact that mixed bundling widely replaced tying. In the Netherlands, contrary to previous findings by the OECD, we found that tying practices exist and are widespread. In Estonia, we found the current account to be absolutely central as a gateway product for customers: our results in the antitrust test confirm this finding, by showing extremely high scores for this country, reaching 0.90 in the case of current accounts as gateway product.*

Table 78 at the end of this Section contains all antitrust scores per practices per country.

Table 75 – Antitrust overall scores per country for mortgages as gateway product

Country	Combined product	Average antitrust scores	Number of cases
Austria	Home insurance	-1.67	1
<i>Austria Total</i>		<i>-1.67</i>	<i>1</i>
Belgium	Home insurance	0.78	3
	Life insurance	0.67	2
	Credit card	0.67	1
	Current account	0.56	3
	Payment protection insurance	0.33	1
	Debit card	0.33	1
	Fire insurance	0.33	1
<i>Belgium Total</i>		<i>0.58</i>	<i>12</i>
Cyprus	Other non-life insurance	0.50	1
	Credit card	0.50	1
	Credit line / overdraft	0.28	3
	Life insurance	0.23	5
	Operations on foreign currencies	0.17	1
	Fire insurance	0.00	2
	Home insurance	-0.06	3
<i>Cyprus Total</i>		<i>0.19</i>	<i>16</i>
Czech Republic	Term investment account	0.50	1
	Current account	0.50	3
	Home insurance	0.50	1
	Life insurance	0.50	1
<i>Czech Republic Total</i>		<i>0.50</i>	<i>6</i>
Denmark	Consumer loan	0.50	1
	Current account	0.17	2
	Home insurance	-0.17	1
<i>Denmark Total</i>		<i>0.17</i>	<i>4</i>
Estonia	Home insurance	0.67	1
	Life insurance	0.50	2
	Savings account	0.33	1
<i>Estonia Total</i>		<i>0.50</i>	<i>4</i>
Finland	Payment protection insurance	0.33	1
	Consumer loan	0.33	1
<i>Finland Total</i>		<i>0.33</i>	<i>2</i>
France	Other non-life insurance	-0.33	1
	Payment protection insurance	-0.67	1
<i>France Total</i>		<i>-0.50</i>	<i>2</i>
Germany	Life insurance	-1.00	1
<i>Germany Total</i>		<i>-1.00</i>	<i>1</i>
Hungary	Life insurance	0.00	2
	Payment protection insurance	-0.33	1
	Current account	-0.33	1
<i>Hungary Total</i>		<i>-0.17</i>	<i>4</i>
Italy	Fire insurance	-0.61	3
	Life insurance	-0.63	5
	Current account	-0.72	3
	Home insurance	-0.83	1
<i>Italy Total</i>		<i>-0.67</i>	<i>12</i>
Latvia	Life insurance	0.17	1
<i>Latvia Total</i>		<i>0.17</i>	<i>1</i>
Poland	Health/disability insurance	-0.83	1
	Credit card	-0.83	3
	Life insurance	-0.98	7
	Current account	-0.98	7
	Home insurance	-1.06	3
	Payment protection insurance	-1.10	5
<i>Poland Total</i>		<i>-0.99</i>	<i>26</i>

Country	Combined product	Average antitrust scores	Number of cases
Portugal	Payment protection insurance	-0.83	2
	Other non-life insurance	-0.83	1
	Fire insurance	-0.83	1
	Health/disability insurance	-0.83	1
	Home insurance	-0.83	2
	Life insurance	-0.83	3
	Current account	-1.17	3
<i>Portugal Total</i>		<i>-0.91</i>	<i>13</i>
Slovakia	Current account	-0.67	1
<i>Slovakia Total</i>		<i>-0.67</i>	<i>1</i>
Slovenia	Bank deposits	0.00	1
	Current account	-0.33	2
	Life insurance	-0.56	3
	Home insurance	-0.67	1
<i>Slovenia Total</i>		<i>-0.43</i>	<i>7</i>
Spain	Pension product	0.00	1
	Credit card	0.00	1
	Debit card	0.00	1
	Current account	-0.33	1
	Home insurance	-0.33	2
	Life insurance	-0.33	2
	Payment protection insurance	-0.33	2
<i>Spain Total</i>		<i>-0.23</i>	<i>10</i>
Sweden	Payment protection insurance	0.00	1
<i>Sweden Total</i>		<i>0.00</i>	<i>1</i>
The Netherlands	Motor insurance	0.50	1
	Business/commercial insurance	0.50	1
	Current account	0.50	1
	Fire insurance	0.50	1
	Health/disability insurance	0.50	1
	Life insurance	0.50	1
<i>The Netherlands Total</i>		<i>0.50</i>	<i>6</i>
United Kingdom	Payment protection insurance	-0.50	1
	Home insurance	-0.50	1
<i>United Kingdom Total</i>		<i>-0.50</i>	<i>2</i>
Grand Total		-0.28	131

NB: 1) Countries presented in the table have reported combinations with the considered gateway product. 2) When two or more lines for the same combinations are presented in the table, this means that in this specific country, the same combination has been reported on several occasion and data collected (for instance production-side efficiencies) reported was different.

Table 76 – Antitrust scores per country for current account as gateway product

Country	Combined product	Average antitrust scores	Number of cases
Austria	Credit line / overdraft	-1.00	1
	Reception and transmission of orders	-1.33	1
	Credit card	-1.33	1
	Investment advice	-1.33	1
	Life insurance	-1.33	1
	Portfolio management	-1.33	1
<i>Austria Total</i>		<i>-1.28</i>	<i>6</i>
Belgium	Debit card	1.00	2
	Credit card	0.67	1
	Life insurance	0.50	2
<i>Belgium Total</i>		<i>0.73</i>	<i>5</i>
Cyprus	Means of payment, excluding debit/credit cards	0.50	1
	Credit card	0.50	1
	Debit card	0.50	1
<i>Cyprus Total</i>		<i>0.50</i>	<i>3</i>
Czech Republic	Fund transfers	0.50	1
	Consumer loan	0.50	1
	Credit card	0.50	3
	Credit line / overdraft	0.50	2
	Debit card	0.50	4
<i>Czech Republic Total</i>		<i>0.50</i>	<i>11</i>
Denmark	Savings account	0.50	1
	Credit card	0.50	1
	Credit line / overdraft	0.50	1
	Home insurance	0.50	2
	Mortgage loan	0.50	1
	Pension product	0.50	1
<i>Denmark Total</i>		<i>0.50</i>	<i>7</i>
Estonia	Debit card	0.83	2
	Underwriting or placing with firm commitment	0.67	1
	Consumer loan	0.67	1
	Corporate banking loan	0.67	1
	Credit line / overdraft	0.67	1
	Dealing on own account	0.67	1
	Bank deposits	0.67	1
	Equity release loan	0.67	1
	Execution of orders on behalf of clients	0.67	1
	Fund transfers	0.67	1
	Mortgage loan	0.67	1
	Placing without firm commitment	0.67	1
	Portfolio management	0.67	1
	Reception and transmission of orders	0.67	1
	Savings account	0.67	1
	Term investment account	0.67	1
<i>Estonia Total</i>		<i>0.69</i>	<i>17</i>

Country	Combined product	Average antitrust scores	Number of cases
Finland	Credit card	0.33	1
	Bank deposits	0.33	1
<i>Finland Total</i>		<i>0.33</i>	<i>2</i>
Germany	Fund transfers	-1.67	1
	Debit card	-1.67	1
	Credit line / overdraft	-2.00	1
<i>Germany Total</i>		<i>-1.78</i>	<i>3</i>
Hungary	Savings account	0.00	1
	Other non-life insurance	0.00	1
	Life insurance	0.00	1
	Debit card	-0.33	1
<i>Hungary Total</i>		<i>-0.08</i>	<i>4</i>
Italy	Health/disability insurance	-0.50	2
<i>Italy Total</i>		<i>-0.50</i>	<i>2</i>
Latvia	Means of payment, excluding debit/credit cards	0.17	1
<i>Latvia Total</i>		<i>0.17</i>	<i>1</i>
Poland	Savings account	-0.50	4
	Other non-life insurance	-0.50	2
	Investment advice	-0.50	1
	Portfolio management	-0.67	2
	Credit line / overdraft	-0.67	2
	Health/disability insurance	-0.67	4
	Life insurance	-0.70	5
	Credit card	-0.72	3
	Bank deposits	-0.83	2
	Debit card	-0.83	2
<i>Poland Total</i>		<i>-0.66</i>	<i>27</i>
Portugal	Pension product	-0.50	1
	Life insurance	-0.50	1
	Bank deposits	-1.17	2
	Debit card	-1.17	2
	Fund transfers	-1.17	1
	Credit card	-1.17	1
	Means of payment, excluding debit/credit cards	-1.17	2
<i>Portugal Total</i>		<i>-1.03</i>	<i>10</i>
Slovenia	Health/disability insurance	0.00	1
	Current account	0.00	1
	Reception and transmission of orders	-0.33	1
	Debit card	-0.33	1
	Life insurance	-0.33	1
	Portfolio management	-0.33	2
<i>Slovenia Total</i>		<i>-0.24</i>	<i>7</i>
Spain	Life insurance	-0.33	1
<i>Spain Total</i>		<i>-0.33</i>	<i>1</i>
United Kingdom	Savings account	-0.83	1
<i>United Kingdom Total</i>		<i>-0.83</i>	<i>1</i>
<i>Grand Total</i>		<i>-0.17</i>	<i>107</i>

NB: 1) Countries presented in the table have reported combinations with the considered gateway product. 2) When two or more lines for the same combinations are presented in the table, this means that in this specific country, the same combination has been reported on several occasion and data collected (for instance production-side efficiencies) reported was different.

Table 77 – Antitrust scores per country for consumer loan as gateway product

Country	Combined product	Average antitrust scores	Number of cases
Austria	Life insurance	-1.67	1
<i>Austria Total</i>		<i>-1.67</i>	<i>1</i>
Belgium	Life insurance	0.67	1
	Current account	0.44	3
	Payment protection insurance	0.33	2
	Motor insurance	0.33	1
	Credit card	0.00	1
<i>Belgium Total</i>		<i>0.38</i>	<i>8</i>
Cyprus	Savings account	0.50	1
	Credit line / overdraft	0.33	2
	Current account	0.17	4
	Life insurance	0.06	3
	Payment protection insurance	-0.17	1
<i>Cyprus Total</i>		<i>0.17</i>	<i>11</i>
Czech Republic	Payment protection insurance	0.50	1
	Current account	0.50	2
	Motor insurance	0.50	1
<i>Czech Republic Total</i>		<i>0.50</i>	<i>4</i>
Estonia	Motor insurance	0.67	1
<i>Estonia Total</i>		<i>0.67</i>	<i>1</i>
Finland	Motor insurance	0.33	1
	Current account	0.33	1
<i>Finland Total</i>		<i>0.33</i>	<i>2</i>
France	Payment protection insurance	-0.67	1
<i>France Total</i>		<i>-0.67</i>	<i>1</i>
Germany	Payment protection insurance	-1.00	1
<i>Germany Total</i>		<i>-1.00</i>	<i>1</i>
Italy	Payment protection insurance	-0.50	1
	Current account	-0.50	2
	Health/disability insurance	-0.67	2
<i>Italy Total</i>		<i>-0.57</i>	<i>5</i>
Poland	Other non-life insurance	-0.50	1
	Life insurance	-0.50	1
	Health/disability insurance	-0.67	2
	Credit card	-0.72	3
	Payment protection insurance	-0.83	3
	Motor insurance	-1.17	1
<i>Poland Total</i>		<i>-0.74</i>	<i>11</i>
Portugal	Motor insurance	-0.50	1
	Payment protection insurance	-0.83	1
	Health/disability insurance	-0.83	1
	Life insurance	-0.83	2
	Other non-life insurance	-0.83	2
	Current account	-1.17	2
<i>Portugal Total</i>		<i>-0.87</i>	<i>9</i>
Slovakia	Current account	-0.67	1
<i>Slovakia Total</i>		<i>-0.67</i>	<i>1</i>
Slovenia	Current account	0.00	3
	Bank deposits	0.00	1
	Payment protection insurance	-0.33	1
<i>Slovenia Total</i>		<i>-0.07</i>	<i>5</i>
United Kingdom	Savings account	-0.83	1
	Payment protection insurance	-0.83	1
	Life insurance	-1.50	1
<i>United Kingdom Total</i>		<i>-1.06</i>	<i>3</i>
<i>Grand Total</i>		<i>-0.29</i>	<i>63</i>

NB: 1) Countries presented in the table have reported combinations with the considered gateway product. 2) When two or more lines for the same combinations are presented in the table, this means that in this specific country, the same combination has been reported on several occasion and data collected (for instance production-side efficiencies) reported was different.

Table 78 – Antitrust overall scores for all products

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases	
Austria	Consumer loan	Life insurance	Tied products	-1.67	1	
	Current account	Credit card	Bundled products with no (dis)advantage	-1.33	1	
		Credit line / overdraft	Tied products	-1.00	1	
		Investment advice	Tied products	-1.33	1	
		Life insurance	Preferential tariff for hook product	-1.33	1	
		Portfolio management	Tied products	-1.33	1	
		Reception and transmission of orders	Bundled products with no (dis)advantage	-1.33	1	
	Execution of orders on behalf of clients	Current account	Tied products	-1.33	1	
	Fire insurance	Fire insurance	Bundled products with no (dis)advantage	-0.33	1	
	Home insurance	Home insurance	Bundled products with no (dis)advantage	-0.33	1	
	Mortgage loan	Home insurance	Tied products	-1.67	1	
	Other non-life insurance	Other non-life insurance	Bundled products with no (dis)advantage	-0.33	1	
	Portfolio management	Current account	Tied products	-1.33	1	
	Reception and transmission of orders	Current account	Tied products	-1.33	1	
		Portfolio management	Preferential tariff for hook product	-1.33	1	
	Savings account	Current account	Preferential rate for hook product	-1.33	1	
			Preferential tariff for combined product(s)	-1.33	1	
			Reception and transmission of orders	Preferential rate for hook product	-1.33	1
Austria Total					18	
Belgium	Bank deposits	Credit line / overdraft	Bundled products with no (dis)advantage	0.33	1	
		Current account	Combined product(s) free of charge	0.00	1	
		Investment advice	Combined product(s) free of charge	0.33	1	
		Life insurance	Bundled products with no (dis)advantage	0.33	1	
		Savings account	Bundled products with no (dis)advantage	0.33	1	
	Consumer loan	Credit card	Bundled products with no (dis)advantage	0.00	1	
		Current account	Bundled products with no (dis)advantage	0.00	1	
			Tied products	0.67	2	
		Life insurance	Tied products	0.67	1	
		Motor insurance	Bundled products with no (dis)advantage	0.33	1	
	Corporate banking loan	Payment protection insurance	Bundled products with no (dis)advantage	0.33	2	
		Current account	Bundled products with no (dis)advantage	0.33	1	
	Credit card	Payment protection insurance	Preferential rate for hook product	0.33	1	
		Current account	Bundled products with no (dis)advantage	0.67	1	
	Credit line / overdraft		Combined product(s) free of charge	0.33	1	
		Other non-life insurance	Preferential tariff for combined product(s)	0.67	1	
		Current account	Bundled products with no (dis)advantage	0.33	1	
	Current account	Term investment account	Bundled products with no (dis)advantage	0.33	1	
		Credit card	Preferential tariff for combined product(s)	0.67	1	
		Debit card	Preferential tariff for combined product(s)	1.00	2	
	Debit card	Life insurance	Bundled products with no (dis)advantage	0.33	1	
			Tied products	0.67	1	
		Current account	Bundled products with no (dis)advantage	0.33	1	
	Health/disability insurance	Current account	Bundled products with no (dis)advantage	-1.17	1	
	Home insurance	Other non-life insurance	Tied products	-1.17	2	
	Life insurance	Current account	Bundled products with no (dis)advantage	-1.17	1	
		Term investment account	Bundled products with no (dis)advantage	-1.17	1	
	Mortgage loan	Credit card	Preferential rate for hook product	0.67	1	
		Current account	Bundled products with no (dis)advantage	0.33	1	
				Preferential rate for hook product	0.33	1
				1.00	1	
		Debit card	Preferential rate for hook product	0.33	1	
		Fire insurance	Preferential tariff for hook product	0.33	1	
		Home insurance	Preferential rate for hook product	1.00	1	
			Preferential tariff for hook product	0.33	1	
			1.00	1		
		Life insurance	Preferential rate for hook product	1.00	1	
			Preferential tariff for hook product	0.33	1	
		Payment protection insurance	Preferential rate for hook product	0.33	1	
		Motor insurance	Consumer loan	Bundled products with no (dis)advantage	-0.50	1
	Current account		Bundled products with no (dis)advantage	-0.83	1	
	Operations on foreign currencies	Current account	Bundled products with no (dis)advantage	1.00	1	
	Other non-life insurance	Current account	Bundled products with no (dis)advantage	-0.50	1	
		Motor insurance	Bundled products with no (dis)advantage	-0.50	1	
	Payment protection insurance	Consumer loan	Bundled products with no (dis)advantage	-0.83	1	
		Current account	Bundled products with no (dis)advantage	-0.83	1	
	Pension product	Investment advice	Combined product(s) free of charge	-0.83	1	
		Life insurance	Tied products	-0.83	1	
		Savings account	Bundled products with no (dis)advantage	-0.83	1	
	Placing without firm commitment	Investment advice	Combined product(s) free of charge	-0.33	1	
		Life insurance	Bundled products with no (dis)advantage	-0.33	1	
		Savings account	Bundled products with no (dis)advantage	-0.33	1	
	Portfolio management	Bank deposits	Tied products	0.00	1	
		Current account	Tied products	0.00	2	
		Execution of orders on behalf of clients	Tied products	0.00	1	
		Investment advice	Combined product(s) free of charge	0.00	1	
		Life insurance	Bundled products with no (dis)advantage	0.00	1	
	Savings account	Savings account	Bundled products with no (dis)advantage	-0.33	1	
		Current account	Combined product(s) free of charge	0.67	1	
		Investment advice	Combined product(s) free of charge	1.00	1	
		Life insurance	Bundled products with no (dis)advantage	1.00	1	
		Pension product	Bundled products with no (dis)advantage	1.00	1	
	Term investment account	Investment advice	Combined product(s) free of charge	0.00	1	
		Life insurance	Bundled products with no (dis)advantage	0.00	1	
		Savings account	Bundled products with no (dis)advantage	0.00	1	
	Underwriting or placing with firm commitment	Investment advice	Combined product(s) free of charge	0.00	1	
		Life insurance	Bundled products with no (dis)advantage	0.00	1	
		Savings account	Bundled products with no (dis)advantage	0.00	1	
	Belgium Total					73

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases
Bulgaria	Execution of orders on behalf of clients	Current account	Bundled products with no (dis)advantage	-0.33	1
	Home insurance	Fire insurance	Preferential rate for combined product(s)	-0.33	1
		Other non-life insurance	Tied products	0.00	1
	Motor insurance	Health/disability insurance	Preferential rate for combined product(s)	-0.33	1
		Home insurance	Preferential rate for combined product(s)	-0.33	1
	Placing without firm commitment	Reception and transmission of orders	Tied products	-0.33	1
	Portfolio management	Current account	Bundled products with no (dis)advantage	-0.33	2
		Execution of orders on behalf of clients	Tied products	-0.33	1
Reception and transmission of orders	Current account	Bundled products with no (dis)advantage	-0.33	2	
	Execution of orders on behalf of clients	Tied products	-0.33	1	
Bulgaria Total					12
Cyprus	Bank deposits	Current account	Preferential tariff for combined product(s)	-0.17	1
		Dealing on own account	Tied products	-0.50	1
		Health/disability insurance	Preferential rate for combined product(s)	-0.17	1
		Investment advice	Tied products	-0.50	1
		Life insurance	Preferential tariff for hook product	-0.17	1
		Pension product	Preferential tariff for combined product(s)	-0.17	1
		Portfolio management	Tied products	-0.50	1
	Consumer loan	Credit line / overdraft	Bundled products with no (dis)advantage	0.17	1
			Preferential rate for hook product	0.50	1
		Current account	Bundled products with no (dis)advantage	0.17	2
			Tied products	0.17	2
		Life insurance	Bundled products with no (dis)advantage	0.17	1
			Tied products	-0.17	1
		Payment protection insurance	Tied products	-0.17	1
	Savings account	Preferential tariff for hook product	0.50	1	
	Corporate banking loan	Credit card	Bundled products with no (dis)advantage	0.50	1
		Credit line / overdraft	Bundled products with no (dis)advantage	0.50	1
		Life insurance	Tied products	0.50	1
		Savings account	Preferential rate for hook product	0.50	1
	Credit card	Credit line / overdraft	Tied products	0.17	1
			Life insurance	Bundled products with no (dis)advantage	0.17
				0.50	1
		Savings account	Tied products	0.17	1
	Credit line / overdraft	Debit card	Bundled products with no (dis)advantage	0.17	2
		Fund transfers	Preferential tariff for combined product(s)	0.17	1
		Life insurance	Bundled products with no (dis)advantage	0.17	2
			Preferential rate for hook product	0.17	1
		Motor insurance	Bundled products with no (dis)advantage	0.50	1
		Payment protection insurance	Tied products	-0.17	1
	Current account	Credit card	Bundled products with no (dis)advantage	0.50	1
		Debit card	Bundled products with no (dis)advantage	0.50	1
		Means of payment, excluding debit/credit cards	Bundled products with no (dis)advantage	0.50	1
	Equity release loan	Credit card	Bundled products with no (dis)advantage	0.50	1
		Credit line / overdraft	Tied products	0.50	2
		Current account	Tied products	0.50	1
		Debit card	Bundled products with no (dis)advantage	0.50	1
		Fire insurance	Tied products	0.50	1
		Home insurance	Tied products	0.50	1
		Life insurance	Tied products	0.50	1
		Mortgage loan	Credit card	Bundled products with no (dis)advantage	0.50
	Credit line / overdraft		Combined product(s) free of charge	0.50	1
			Preferential tariff for hook product	-0.17	1
			Tied products	0.50	1
	Fire insurance		Preferential tariff for combined product(s)	-0.17	1
			Tied products	0.17	1
	Home insurance		Preferential rate for combined product(s)	-0.17	1
			Preferential tariff for combined product(s)	-0.17	1
Tied products			0.17	1	
Life insurance	Bundled products with no (dis)advantage		0.50	1	
	Preferential rate for hook product		-0.17	1	
			0.50	1	
	Tied products	0.17	2		
	Operations on foreign currencies	Tied products	0.17	1	
	Other non-life insurance	Preferential rate for hook product	0.50	1	
Operations on foreign currencies	Life insurance	Preferential rate for hook product	0.17	1	
Cyprus Total					61

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases	
Czech Republic	Bank deposits	Dealing on own account	Preferential tariff for hook product	0.17	1	
		Debit card	Combined product(s) free of charge	0.50	1	
	Consumer loan	Current account	Preferential rate for hook product	0.50	1	
			Tied products	0.50	1	
		Motor insurance	Preferential tariff for combined product(s)	0.50	1	
		Payment protection insurance	Bundled products with no (dis)advantage	0.50	1	
	Corporate banking loan	Current account	Bundled products with no (dis)advantage	0.50	1	
	Credit card	Consumer loan	Preferential tariff for combined product(s)	0.50	2	
		Life insurance	Combined product(s) free of charge	0.50	1	
	Credit line / overdraft	Current account	Tied products	0.17	1	
	Current account	Consumer loan	Preferential tariff for combined product(s)	0.50	1	
		Credit card	Bundled products with no (dis)advantage	0.50	1	
			Combined product(s) free of charge	0.50	1	
			Preferential tariff for hook product	0.50	1	
		Credit line / overdraft	Preferential tariff for combined product(s)	0.50	2	
		Debit card	Preferential tariff for combined product(s)	0.50	2	
			Preferential tariff for hook product	0.50	2	
		Fund transfers	Preferential tariff for combined product(s)	0.50	1	
	Debit card	Current account	Tied products	0.17	1	
				0.50	1	
		Health/disability insurance	Preferential tariff for combined product(s)	0.50	2	
		Insurance on payment tools	Bundled products with no (dis)advantage	0.50	1	
		Other non-life insurance	Bundled products with no (dis)advantage	0.50	2	
	Fund transfers	Current account	Tied products	0.50	1	
	Health/disability insurance	Other non-life insurance	Bundled products with no (dis)advantage	0.00	1	
	Home insurance	Other non-life insurance	Preferential tariff for combined product(s)	0.00	1	
	Means of payment, excluding debit/credit cards	Current account	Tied products	-0.33	1	
	Mortgage loan	Current account	Bundled products with no (dis)advantage	0.50	1	
			Preferential rate for hook product	0.50	1	
			Preferential tariff for hook product	0.50	1	
		Home insurance	Tied products	0.50	1	
		Life insurance	Preferential rate for hook product	0.50	1	
		Term investment account	Bundled products with no (dis)advantage	0.50	1	
	Other non-life insurance	Credit card	Tied products	-0.33	1	
		Debit card	Tied products	-0.33	1	
	Payment protection insurance	Consumer loan	Tied products	-0.33	1	
	Portfolio management	Execution of orders on behalf of clients	Combined product(s) free of charge	0.00	1	
	Reception and transmission of orders	Current account	Tied products	0.00	1	
		Investment advice	Combined product(s) free of charge	0.00	1	
	Czech Republic Total					45
	Denmark	Current account	Credit card	Combined product(s) free of charge	0.50	1
			Credit line / overdraft	Bundled products with no (dis)advantage	0.50	1
			Home insurance	Bundled products with no (dis)advantage	0.50	1
				Preferential tariff for combined product(s)	0.50	1
			Mortgage loan	Preferential tariff for combined product(s)	0.50	1
Pension product			Bundled products with no (dis)advantage	0.50	1	
Savings account			Bundled products with no (dis)advantage	0.50	1	
Home insurance		Motor insurance	Preferential tariff for hook product	0.00	1	
Investment advice		Bank deposits	Preferential tariff for hook product	0.00	1	
Mortgage loan		Consumer loan	Bundled products with no (dis)advantage	0.50	1	
		Current account	Bundled products with no (dis)advantage	-0.17	1	
			Tied products	0.50	1	
		Home insurance	Bundled products with no (dis)advantage	-0.17	1	
Motor insurance		Home insurance	Preferential tariff for hook product	0.00	1	
Pension product		Current account	Bundled products with no (dis)advantage	0.00	1	
		Savings account	Bundled products with no (dis)advantage	0.00	1	
Portfolio management		Bank deposits	Preferential tariff for hook product	0.00	1	
Savings account		Dealing on own account	Bundled products with no (dis)advantage	0.50	1	
		Investment advice	Bundled products with no (dis)advantage	0.50	1	
		Reception and transmission of orders	Bundled products with no (dis)advantage	0.50	1	
Denmark Total					20	

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases
Estonia	Consumer loan	Motor insurance	Bundled products with no (dis)advantage	0.67	1
	Corporate banking loan	Business/commercial insurance	Bundled products with no (dis)advantage	0.67	1
	Credit card	Payment protection insurance	Bundled products with no (dis)advantage	0.33	1
	Current account	Bank deposits	Tied products	0.67	1
		Consumer loan	Tied products	0.67	1
		Corporate banking loan	Tied products	0.67	1
		Credit line / overdraft	Tied products	0.67	1
		Dealing on own account	Tied products	0.67	1
		Debit card	Bundled products with no (dis)advantage	1.00	1
			Tied products	0.67	1
		Equity release loan	Tied products	0.67	1
		Execution of orders on behalf of clients	Tied products	0.67	1
		Fund transfers	Tied products	0.67	1
		Mortgage loan	Tied products	0.67	1
		Placing without firm commitment	Tied products	0.67	1
		Portfolio management	Tied products	0.67	1
		Reception and transmission of orders	Tied products	0.67	1
		Savings account	Tied products	0.67	1
		Term investment account	Tied products	0.67	1
		Underwriting or placing with firm commitment	Tied products	0.67	1
	Mortgage loan	Home insurance	Bundled products with no (dis)advantage	0.67	1
		Life insurance	Bundled products with no (dis)advantage	0.33	1
			Preferential rate for hook product	0.67	1
		Savings account	Bundled products with no (dis)advantage	0.33	1
		Payment protection insurance	Preferential rate for combined product(s)	-0.33	1
	Underwriting or placing with firm commitment	Life insurance	Bundled products with no (dis)advantage	-0.33	1
Estonia Total					26
Finland	Bank deposits	Pension product	Preferential rate for hook product	0.33	1
	Consumer loan	Current account	Preferential tariff for combined product(s)	0.33	1
		Motor insurance	Preferential tariff for combined product(s)	0.33	1
	Corporate banking loan	Business/commercial insurance	Preferential tariff for combined product(s)	0.33	1
	Credit card	Current account	Preferential tariff for combined product(s)	0.33	1
		Health/disability insurance	Preferential tariff for combined product(s)	0.33	1
	Current account	Bank deposits	Preferential rate for hook product	0.33	1
		Credit card	Preferential tariff for combined product(s)	0.33	1
	Health/disability insurance	Home insurance	Preferential tariff for hook product	-1.67	1
	Home insurance	Health/disability insurance	Preferential tariff for hook product	-1.67	1
	Investment advice	Bank deposits	Preferential tariff for hook product	0.00	1
		Pension product	Preferential tariff for hook product	-0.33	1
		Reception and transmission of orders	Preferential tariff for combined product(s)	-0.33	1
	Life insurance	Home insurance	Preferential tariff for hook product	-1.67	1
	Mortgage loan	Consumer loan	Preferential tariff for combined product(s)	0.33	1
		Payment protection insurance	Preferential tariff for combined product(s)	0.33	1
	Pension product	Life insurance	Preferential tariff for combined product(s)	-1.67	1
			Preferential tariff for hook product	-1.67	1
		Portfolio management	Preferential tariff for combined product(s)	-1.33	1
		Term investment account	Bundled products with no (dis)advantage	-1.67	1
	Portfolio management	Consumer loan	Preferential rate for hook product	0.00	1
		Pension product	Preferential tariff for hook product	-0.33	1
		Reception and transmission of orders	Preferential tariff for combined product(s)	-0.33	1
	Reception and transmission of orders	Term investment account	Preferential tariff for combined product(s)	-0.33	1
Finland Total					24
France	Consumer loan	Payment protection insurance	Tied products	-0.67	1
	Credit card	Other non-life insurance	Tied products	-0.67	1
	Health/disability insurance	Payment protection insurance	Tied products	-0.33	1
	Home insurance	Other non-life insurance	Tied products	-0.67	1
	Life insurance	Portfolio management	Tied products	-0.67	1
	Mortgage loan	Other non-life insurance	Preferential tariff for combined product(s)	-0.33	1
		Payment protection insurance	Tied products	-0.67	1
	Motor insurance	Home insurance	Tied products	0.00	1
	Savings account	Motor insurance	Preferential tariff for combined product(s)	0.00	1
France Total					9

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases
Germany	Consumer loan	Payment protection insurance	Bundled products with no (dis)advantage	-1.00	1
	Credit card	Health/disability insurance	Combined product(s) free of charge	-1.00	1
	Current account	Credit line / overdraft	Tied products	-2.00	1
		Debit card	Tied products	-1.67	1
		Fund transfers	Tied products	-1.67	1
	Mortgage loan	Life insurance	Bundled products with no (dis)advantage	-1.00	1
Germany Total					6
Hungary	Current account	Debit card	Combined product(s) free of charge	-0.33	1
		Life insurance	Bundled products with no (dis)advantage	0.00	1
		Other non-life insurance	Preferential tariff for combined product(s)	0.00	1
	Debit card	Other non-life insurance	Tied products	-0.33	1
	Home insurance	Motor insurance	Preferential tariff for combined product(s)	-0.83	1
	Life insurance	Current account	Preferential tariff for combined product(s)	-0.50	1
		Term investment account	Bundled products with no (dis)advantage	-0.50	1
			Tied products	-0.50	1
	Mortgage loan	Current account	Tied products	-0.33	1
		Life insurance	Tied products	0.00	2
		Payment protection insurance	Tied products	-0.33	1
	Motor insurance	Motor insurance	Preferential tariff for combined product(s)	-0.83	2
				-0.50	1
	Pension product	Debit card	Tied products	-0.83	1
	Savings account	Current account	Tied products	-0.33	1
Hungary Total					17
Ireland	Home insurance	Equity release loan	Preferential rate for hook product	-0.33	1
		Other non-life insurance	Bundled products with no (dis)advantage	-0.33	1
	Investment advice	Execution of orders on behalf of clients	Bundled products with no (dis)advantage	0.00	1
		Fund transfers	Bundled products with no (dis)advantage	-0.33	1
		Pension product	Bundled products with no (dis)advantage	0.00	1
		Term investment account	Bundled products with no (dis)advantage	-0.33	1
	Life insurance	Business/commercial insurance	Bundled products with no (dis)advantage	-0.33	1
		Mortgage loan	Bundled products with no (dis)advantage	-0.67	1
				-0.33	1
	Motor insurance	Other non-life insurance	Bundled products with no (dis)advantage	0.00	1
		Payment protection insurance	Consumer loan	Preferential rate for hook product	-0.33
	Insurance on payment tools		Bundled products with no (dis)advantage	-0.67	1
	Mortgage loan		Bundled products with no (dis)advantage	-0.33	1
	Pension product	Investment advice	Bundled products with no (dis)advantage	-0.33	1
		Life insurance	Bundled products with no (dis)advantage	-0.33	2
Mortgage loan		Bundled products with no (dis)advantage	0.00	1	
Ireland Total					17
Italy	Bank deposits	Current account	Tied products	-0.50	1
	Consumer loan	Current account	Tied products	-0.50	2
		Health/disability insurance	Bundled products with no (dis)advantage	-0.83	1
		Payment protection insurance	Tied products	-0.50	1
	Credit card	Current account	Tied products	-1.17	1
				-0.83	1
				-0.50	1
		Other non-life insurance	Bundled products with no (dis)advantage	-0.50	1
			Preferential rate for hook product	-0.50	1
	Credit line / overdraft	Current account	Tied products	-0.83	1
		Current account	Health/disability insurance	Bundled products with no (dis)advantage	-0.50
				Preferential rate for hook product	-0.50
	Debit card	Current account	Tied products	-0.83	2
				-0.50	1
	Execution of orders on behalf of clients	Current account	Tied products	-1.17	1
	Fire insurance	Business/commercial insurance	Bundled products with no (dis)advantage	-0.50	1
	Fund transfers	Current account	Tied products	-0.83	1
	Health/disability insurance	Other non-life insurance	Bundled products with no (dis)advantage	-0.50	1
	Home insurance	Fire insurance	Bundled products with no (dis)advantage	-0.50	1
	Life insurance	Current account	Tied products	-0.50	1
		Health/disability insurance	Bundled products with no (dis)advantage	-0.50	2
	Means of payment, excluding debit/credit cards	Current account	Tied products	-0.83	1
	Mortgage loan	Current account	Tied products	-1.17	1
				-0.50	2
		Fire insurance	Bundled products with no (dis)advantage	-0.50	1
			Tied products	-0.83	1
				-0.50	1
		Home insurance	Tied products	-0.83	1
		Life insurance	Bundled products with no (dis)advantage	-0.83	1
			Preferential tariff for combined product(s)	-0.50	1
		Tied products	-0.83	1	
			-0.50	2	
	Motor insurance	Other non-life insurance	Bundled products with no (dis)advantage	-0.50	1
			Preferential tariff for combined product(s)	-0.50	1
	Pension product	Life insurance	Bundled products with no (dis)advantage	-0.50	1
	Placing without firm commitment	Current account	Tied products	-1.17	1
	Portfolio management	Current account	Tied products	-1.17	1
Reception and transmission of orders	Current account	Tied products	-1.17	1	
Term investment account	Current account	Tied products	-0.83	1	
Italy Total					45

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases	
Latvia	Credit card	Credit line / overdraft	Bundled products with no (dis)advantage	0.17	1	
		Other non-life insurance	Combined product(s) free of charge	0.17	1	
	Current account	Means of payment, excluding debit/credit cards	Bundled products with no (dis)advantage	0.17	1	
	Debit card	Credit line / overdraft	Bundled products with no (dis)advantage	0.17	1	
	Mortgage loan	Life insurance	Preferential rate for hook product	0.17	1	
	Savings account	Bank deposits	Tied products	0.50	1	
		Portfolio management	Combined product(s) free of charge	0.50	1	
Latvia Total					7	
Luxembourg	Home insurance	Fire insurance	Combined product(s) free of charge	-0.33	1	
		Motor insurance	Combined product(s) free of charge	0.00	1	
	Life insurance	Health/disability insurance	Combined product(s) free of charge	-0.33	1	
				0.00	1	
		Investment advice	Combined product(s) free of charge	-0.33	1	
		Placing without firm commitment	Combined product(s) free of charge	-0.33	1	
	Pension product	Portfolio management	Combined product(s) free of charge	-0.33	1	
		Health/disability insurance	Combined product(s) free of charge	-0.33	1	
Life insurance		Combined product(s) free of charge	-0.33	1		
Luxembourg Total					9	
Poland	Bank deposits	Current account	Preferential tariff for hook product	-0.83	1	
				-0.50	1	
	Consumer loan	Term investment account	Tied products	-0.50	1	
		Credit card	Preferential rate for combined product(s)	-0.50	1	
			Tied products	-1.17	1	
				-0.50	1	
		Health/disability insurance	Preferential tariff for combined product(s)	-0.50	1	
			Preferential tariff for hook product	-0.83	1	
		Life insurance	Preferential tariff for combined product(s)	-0.50	1	
		Motor insurance	Bundled products with no (dis)advantage	-1.17	1	
		Other non-life insurance	Preferential tariff for combined product(s)	-0.50	1	
		Payment protection insurance	Bundled products with no (dis)advantage	-0.83	1	
				-0.50	1	
			Tied products	-1.17	1	
		Credit card	Health/disability insurance	Preferential tariff for combined product(s)	-0.50	1
			Life insurance	Preferential tariff for combined product(s)	-0.50	1
	Other non-life insurance		Tied products	-1.17	1	
	Payment protection insurance		Tied products	-1.17	1	
	Current account	Bank deposits	Bundled products with no (dis)advantage	-0.83	1	
		Credit card	Bundled products with no (dis)advantage	-0.50	1	
			Tied products	-0.83	1	
		Credit line / overdraft	Tied products	-0.83	1	
		Debit card	Tied products	-0.83	1	
		Health/disability insurance	Preferential rate for combined product(s)	-0.83	1	
			Tied products	-0.83	1	
				-0.50	1	
		Investment advice	Tied products	-0.50	1	
		Life insurance	Bundled products with no (dis)advantage	-1.17	1	
			Preferential tariff for combined product(s)	-0.50	2	
			Tied products	-0.83	1	
				-0.50	1	
		Other non-life insurance	Preferential tariff for combined product(s)	-0.50	1	
			Tied products	-0.50	1	
		Portfolio management	Tied products	-0.83	1	
				-0.50	1	
		Savings account	Bundled products with no (dis)advantage	-0.50	1	
			Combined product(s) free of charge	-0.50	2	
			Preferential tariff for combined product(s)	-0.50	1	
	Debit card	Current account	Tied products	-0.83	1	
		Health/disability insurance	Tied products	-1.17	1	
		Insurance on payment tools	Tied products	-1.17	1	
	Health/disability insurance	Other non-life insurance	Tied products	0.00	1	
	Home insurance	Fire insurance	Tied products	-1.00	1	
				-0.67	1	
	Life insurance	Bank deposits	Preferential tariff for combined product(s)	-0.33	1	
		Health/disability insurance	Tied products	-1.00	1	
		Portfolio management	Preferential rate for combined product(s)	0.00	1	
		Reception and transmission of orders	Preferential rate for combined product(s)	-0.33	1	
		Savings account	Bundled products with no (dis)advantage	-0.33	1	
		Term investment account	Bundled products with no (dis)advantage	0.00	1	
		Credit card	Bundled products with no (dis)advantage	-1.17	1	
	Mortgage loan		Preferential tariff for combined product(s)	-0.50	1	
			Tied products	-0.83	1	
		Current account	Combined product(s) free of charge	-0.83	1	
			Preferential tariff for hook product	-0.83	1	
					-0.50	1
			Tied products	-1.50	1	
				-1.17	2	
				-0.83	1	
		Health/disability insurance	Bundled products with no (dis)advantage	-0.83	1	
		Home insurance	Bundled products with no (dis)advantage	-0.83	1	
			Preferential rate for hook product	-1.17	1	
			Tied products	-1.17	1	
		Life insurance	Preferential rate for hook product	-0.83	1	
			Tied products	-1.50	1	
				-1.17	2	
				-0.83	2	
		Payment protection insurance	Bundled products with no (dis)advantage	-1.17	1	
			Tied products	-1.50	1	
				-1.17	1	
				-0.83	2	
		Motor insurance	Health/disability insurance	Bundled products with no (dis)advantage	-0.33	1
	Home insurance		Tied products	-0.33	1	
				0.00	1	
	Other non-life insurance		Bundled products with no (dis)advantage	-0.33	1	
			Preferential tariff for combined product(s)	-1.00	1	
	Payment protection insurance	Health/disability insurance	Tied products	-1.00	1	
	Pension product	Current account	Bundled products with no (dis)advantage	0.00	1	
		Life insurance	Tied products	-0.67	1	
	Portfolio management	Credit line / overdraft	Preferential rate for combined product(s)	-0.83	1	
	Reception and transmission of orders	Current account	Preferential rate for hook product	-0.83	1	
	Savings account	Term investment account	Bundled products with no (dis)advantage	-0.50	1	
	Poland Total					88

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases	
Portugal	Consumer loan	Current account	Preferential tariff for hook product	-1.17	2	
		Health/disability insurance	Preferential tariff for hook product	-0.83	1	
		Life insurance	Preferential tariff for hook product	-0.83	1	
		Motor insurance	Tied products	-0.50	1	
		Other non-life insurance	Preferential tariff for hook product	-0.83	2	
	Corporate banking loan	Payment protection insurance	Preferential tariff for hook product	-0.83	1	
		Business/commercial insurance	Preferential tariff for hook product	-0.83	1	
		Current account	Preferential tariff for hook product	-1.17	2	
		Credit card	Health/disability insurance	Combined product(s) free of charge	-0.50	1
			Insurance on payment tools	Combined product(s) free of charge	-0.50	1
	Life insurance		Combined product(s) free of charge	-0.50	1	
	Other non-life insurance		Combined product(s) free of charge	-0.50	1	
	Current account		Bank deposits	Preferential rate for combined product(s)	-1.17	1
			Preferential tariff for combined product(s)	-1.17	1	
		Credit card	Preferential tariff for combined product(s)	-1.17	1	
		Debit card	Bundled products with no (dis)advantage	-1.17	1	
			Preferential tariff for combined product(s)	-1.17	1	
		Fund transfers	Bundled products with no (dis)advantage	-1.17	1	
		Life insurance	Preferential tariff for combined product(s)	-0.50	1	
		Means of payment, excluding debit/credit cards	Bundled products with no (dis)advantage	-1.17	1	
			Preferential tariff for combined product(s)	-1.17	1	
		Pension product	Preferential tariff for combined product(s)	-0.50	1	
		Fire insurance	Health/disability insurance	Preferential tariff for hook product	0.00	1
			Home insurance	Preferential tariff for hook product	0.00	1
			Other non-life insurance	Preferential tariff for hook product	0.00	1
	Health/disability insurance	Current account	Preferential tariff for hook product	-0.67	1	
	Mortgage loan	Current account	Preferential tariff for hook product	-1.17	2	
			Tied products	-1.17	1	
		Fire insurance	Tied products	-0.83	1	
		Health/disability insurance	Preferential tariff for hook product	-0.83	1	
		Home insurance	Preferential tariff for hook product	-0.83	2	
		Life insurance	Preferential tariff for hook product	-0.83	2	
		Other non-life insurance	Preferential tariff for hook product	-0.83	1	
		Payment protection insurance	Preferential tariff for hook product	-0.83	2	
		Motor insurance	Fire insurance	Preferential tariff for hook product	0.00	1
			Health/disability insurance	Preferential tariff for hook product	0.00	2
	Other non-life insurance		Preferential tariff for hook product	0.00	1	
	Portugal Total					45
	Slovakia	Consumer loan	Current account	Tied products	-0.67	1
		Mortgage loan	Current account	Tied products	-0.67	1
	Slovakia Total					2
	Slovenia	Bank deposits	Current account	Preferential rate for hook product	0.00	1
			Pension product	Preferential tariff for combined product(s)	-0.33	1
		Consumer loan	Bank deposits	Preferential tariff for hook product	0.00	1
			Current account	Preferential rate for hook product	0.00	2
			Preferential tariff for hook product	0.00	1	
Payment protection insurance			Tied products	-0.33	1	
Corporate banking loan		Current account	Preferential rate for combined product(s)	-0.33	1	
Credit card		Current account	Tied products	0.00	1	
		Health/disability insurance	Tied products	0.00	1	
		Insurance on payment tools	Bundled products with no (dis)advantage	-0.33	1	
			Preferential rate for combined product(s)	0.00	1	
Credit line / overdraft		Current account	Tied products	-0.33	1	
Current account		Current account	Preferential tariff for combined product(s)	0.00	1	
		Debit card	Preferential tariff for combined product(s)	-0.33	1	
		Health/disability insurance	Tied products	0.00	1	
		Life insurance	Preferential tariff for combined product(s)	-0.33	1	
		Portfolio management	Preferential tariff for combined product(s)	-0.33	2	
		Reception and transmission of orders	Preferential tariff for combined product(s)	-0.33	1	
Debit card		Current account	Tied products	-0.67	1	
				0.00	1	
		Health/disability insurance	Preferential rate for hook product	0.00	1	
			Tied products	0.00	1	
		Insurance on payment tools	Bundled products with no (dis)advantage	-0.33	1	
Fund transfers		Current account	Tied products	0.00	1	
Home insurance		Fire insurance	Preferential tariff for combined product(s)	-0.33	1	
			Preferential tariff for hook product	-0.33	1	
		Life insurance	Preferential rate for combined product(s)	-0.33	1	
		Motor insurance	Preferential tariff for combined product(s)	-0.33	1	
Life insurance		Health/disability insurance	Bundled products with no (dis)advantage	-0.33	1	
			Preferential tariff for combined product(s)	0.00	1	
Mortgage loan		Payment protection insurance	Bundled products with no (dis)advantage	-0.33	1	
		Bank deposits	Preferential tariff for hook product	0.00	1	
		Current account	Preferential tariff for hook product	-0.67	1	
				0.00	1	
		Home insurance	Preferential rate for hook product	-0.67	1	
		Life insurance	Bundled products with no (dis)advantage	-0.67	1	
			Preferential rate for hook product	-0.67	1	
			Preferential tariff for hook product	-0.33	1	
Motor insurance		Health/disability insurance	Bundled products with no (dis)advantage	-0.33	1	
Reception and transmission of orders		Current account	Tied products	-0.33	1	
Savings account		Current account	Tied products	0.00	1	
		Pension product	Preferential tariff for combined product(s)	-0.33	1	
Slovenia Total					44	

Country	Gateway Product	Combined product	Cross-selling practice	Average antitrust scores	Number of cases
Spain	Credit card	Life insurance	Combined product(s) free of charge	-0.33	1
	Current account	Life insurance	Combined product(s) free of charge	-0.33	1
	Mortgage loan	Credit card	Preferential rate for combined product(s)	0.00	1
		Current account	Bundled products with no (dis)advantage	-0.33	1
		Debit card	Bundled products with no (dis)advantage	0.00	1
		Home insurance	Bundled products with no (dis)advantage	-0.33	1
			Preferential rate for hook product	-0.33	1
		Life insurance	Preferential rate for hook product	-0.33	2
		Payment protection insurance	Preferential rate for hook product	-0.33	2
	Pension product	Preferential rate for hook product	0.00	1	
Spain Total					12
Sweden	Debit card	Other non-life insurance	Combined product(s) free of charge	0.00	1
	Mortgage loan	Payment protection insurance	Preferential rate for combined product(s)	0.00	1
Sweden Total					2
The Netherlands	Corporate banking loan	Business/commercial insurance	Tied products	0.50	1
		Current account	Tied products	0.50	1
		Health/disability insurance	Tied products	0.50	1
		Life insurance	Tied products	0.50	1
		Motor insurance	Tied products	0.50	1
		Pension product	Tied products	0.50	1
	Mortgage loan	Business/commercial insurance	Tied products	0.50	1
		Current account	Tied products	0.50	1
		Fire insurance	Tied products	0.50	1
		Health/disability insurance	Tied products	0.50	1
		Life insurance	Tied products	0.50	1
		Motor insurance	Tied products	0.50	1
The Netherlands Total					12
United Kingdom	Consumer loan	Life insurance	Combined product(s) free of charge	-1.50	1
		Payment protection insurance	Bundled products with no (dis)advantage	-0.83	1
		Savings account	Tied products	-0.83	1
	Credit card	Payment protection insurance	Bundled products with no (dis)advantage	-0.83	1
	Current account	Savings account	Tied products	-0.83	1
	Debit card	Savings account	Tied products	-0.83	1
	Investment advice	Investment advice	Tied products	-0.83	1
		Life insurance	Tied products	-0.83	2
		Pension product	Tied products	-0.83	1
	Savings account	Home insurance	Preferential tariff for combined product(s)	-0.50	1
		Life insurance	Combined product(s) free of charge	-1.17	1
		Motor insurance	Preferential tariff for combined product(s)	-0.50	1
United Kingdom Total					13
Grand Total					607

FINDING #6.5 – ANTITRUST TEST RESULTS

- Tying is the most common cross-selling practice, and accounts for 31.7% of our sample. Bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. In another 18% of the cases, service providers offer preferential conditions (tariffs or rates) for the gateway product only. In another 16.2% of the cases, financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products.
- If a mortgage is used as a gateway product, the strongest antitrust concerns are created by the combination of mortgage loans with long-term accounts. Frequent practices that may create restrictions of competition include the cross-selling of mortgage loans plus (i) life insurance or (ii) current account. Very harmful practices are found in our test in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.
- When a current account is used as a gateway product, the strongest antitrust concerns are created by the combination of current accounts with (i) specific investment services (underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients); and (ii) loans (consumer and corporate banking loans, mortgage loan). Other more frequent practices that may create competitive restrictions are the cross-selling of current account with (i) credit and debit cards, and (ii) life insurance. Here too, examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.
- When consumer loans are used as a gateway product, the strongest antitrust concerns are created by; (i) the combination of consumer loans with current accounts; and by (ii) the cross-selling of consumer loan with motor insurance. Examples of very harmful practices are found in Belgium, Czech Republic, Cyprus, Estonia and Finland.

6.2.3 Customer impact test

6.2.3.1 Customer impact test: our overall index

The customer impact test responds to one key objective: assessing the unfairness of practices under study. Particularly, the purpose of the customer impact test is to set out conditions for proving a practice to be actually unfair. Several features of the test change compared to the antitrust test. Unfairness has been appraised based on the comparison of two elements: on the one hand, scores for situations potentially leading to consumer detriment (expressed in positive figures) and on the other hand those that account for potentially beneficial effects (expressed in negative figures). This allows the determination of the ‘net’ overall effect, which will help us concluding in unfairness.

In this respect, a difference between the antitrust test and the customer impact test is the relevance of production-side as opposed to demand-side efficiencies. When assessing the impact on competition, the existence of production-side efficiencies can prove relevant to explain the rationality of the practice. As a matter of fact, the anti-competitive foreclosure effect is normally measured with reference to an “as efficient” competitor, and thus practices that help dominant firms achieve superior efficiency may lead to difference in the assessment, provided that they are replicable by competitors. On the other hand, when assessing the unfairness of the practice, it is quite obvious that the only efficiencies 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 the form of lower prices⁴⁵⁷. To account for this difference, two possible scenarios have been defined:

- Scenario 1 only addresses the direct effects benefitting consumers; it is assumed there that production-side efficiencies are not passed on to consumers;
- Scenario 2 considers both direct effects and indirect effects benefitting consumers; it is assumed here that a portion (p) of production-side efficiencies can be passed on consumers.

After having established unfairness by comparing costs and benefits, we will also assess the *magnitude* of the problem, by considering the shares of customers

⁴⁵⁷ In Annex 15 below, we modify this assumption to provide a sensitivity analysis of our results.

In our survey, the share of customers affected by each combination and practice has been reported in the database. We distinguish between five ranges: (i) up to 20%, (ii) between 20 and 40%, (iii) between 40 and 60%; (iv) between 60 and 80%; and (v) over 80%. We then use this information in a final stage in order to apprehend the amplitude of unfairness, when evidenced.

The ‘customer impact test’ , measured in each of the two scenarios proposed, relies on the analysis of several sub-elements, again called ‘screens’ (see Section 6.1 above and Annex 14 for their individual detailed presentation). Each screen has been subject to an individual assessment that yielded scores. Every single normalised score can be aggregated, providing one global index that represents the information extracted from the customer impact test. This index is expressed as a balance of efficiencies and harms. The higher the scores, the most likely it is that the practice is unfair to customers.

The figure below synthesises the use of individual screens, according to their positive or negative impact on consumers:

Figure 40 – Screens and results in the customer impact test

Screen	
B1 - Switching costs	} Harm on consumers (costs) → Positive scores
B2 - Lack of transparency	
B3 - Consumer-side efficiencies	} Benefit for consumers (benefits) → Negative scores
P*A4 - Production-side efficiencies passed on consumers (scenario 2 only)	

The evaluation of unfair practices can be applied to two scenarios. They are represented by the following formulas:

$$\begin{aligned} \text{Scenario 1: Overall customer index} &= \text{Score}_{B1}(\text{switching costs}) + \text{Score}_{B2}(\text{lack of transparency}) \\ &+ \text{Score}_{B3}(\text{customer – side efficiencies : (i) "one – stop shop effects" and reduced transactions costs,} \\ &\quad \text{(ii) financial advantage}) \end{aligned}$$

$$\begin{aligned} \text{Scenario 2: Overall customer index} &= \text{Score}_{B1}(\text{switching costs}) + \text{Score}_{B2}(\text{lack of transparency}) \\ &+ \text{Score}_{B3}(\text{customer – side efficiencies : (i) "one – stop shop effects" and reduced transaction costs} \\ &\quad \text{(ii) financial advantage} \\ &+ p * \text{Score}_{A4}(\text{production – side efficiencies : (i) technical reasons} \\ &\quad \text{(ii) cost efficiencies} \\ &\quad \text{(iii) risk reduction}) \end{aligned}$$

In both scenarios, the potential unfairness of the practice is made dependent on its impact on switching costs (thus, on customer mobility) and on the transparency of the offer. On the other hand, consumer side efficiencies include financial advantages for customers due to the offer, as well as the reported

convenience of the offer for customers (including, *e.g.* one-stop-shop effects, lower transaction costs, etc.)⁴⁵⁸.

In both scenarios, if the overall index is positive, the practice is more likely to be unfair, as detrimental impacts for customers outweigh positive one borne by consumers; on the other hand, if the overall index is negative, the practice is less likely to be unfair, as it exhibits significant customer-side efficiencies. This overall score is essential for our analysis. It provides the crucial information that, absent any exogenous factors or conditions in the market, some identified practices can be singled out since there is evidence that they may harm consumers. The collection of such practices provides us with a list of practices that are likely to be unfair to customers. The full list of unfair practices, including all gateway products is provided in Annexes 11 and 12 to this Report.

As a preliminary remark, our main findings include the following:

- 332 and 326 cases of unfair practices in total have been found following respectively scenario 1 and 2. The two scenarios provide with almost identical results: in only 8 cases the consideration of production-side efficiencies passed-on to customers prevent a practice from falling into unfairness⁴⁵⁹.
- The overall customer impact test indexes obtained are ranked from -1 and -1.33 (minimum value) to 2 (maximum value), respectively in scenarios 1 and 2. Scores resulting from the second application are systematically smaller for the straightforward reason that Scenario 2 considers also a share of production-side efficiencies. Obviously, scenario 2 retrieves a subset of the unfair practices identified by Scenario 1⁴⁶⁰.
- On average, the overall sample of practices collected during our study tends to indicate a global trend toward unfairness: both averages of scores computed under scenarios 1 and 2 are positive (0.15 and 0.08), therefore indicating that costs would tend to outweigh benefits for consumers. This result is particularly interesting: in what follows we will study more in depth the practices at stake, in which conditions and where unfairness materializes.

The two tables below briefly summarise the main statistical information relating to the overall customer impact test, considering for the first and second scenarios:

⁴⁵⁸ See Annex 14 for a more detailed explanation.

⁴⁵⁹ As mentioned earlier, scenario 2 can be considered as the best alternative for consumers as it considers a larger range of benefits, namely *direct* and *indirect* ones (considering additional production-side efficiencies passed on consumers). Therefore, unfair practices found under the second scenario constitute a ‘core’ of unfair practices, given that these have been highlighted, even in the ‘best’ scenario. For that reason, they require a particular and thorough attention in this study. In the case of mortgage as gateway product, one additional unfair case has been reported in scenario 1 in comparison to scenario 2; they are reported in the table 80.

⁴⁶⁰ This section displays all results computed from our test. Further details concerning the underlying methodology and its application by a practical example are presented in Annex 14 of this report.

Table 79 – Main statistical information on the overall customer impact test in our two scenarios
(scenario 1)

Average	Median	Max	Min
0.15	0.1	2.00	-1.00

(scenario 2)

Average	Median	Max	Min
0.08	0.00	2.00	-1.80

6.2.3.2 Mortgages as gateway products

As for the antitrust test (see Section 6.2.2.2 above), the empirical analysis returned 131 cases in which mortgage is used as a gateway product. The table below presents the *average* overall customer impact test scores (for scenario 1 and 2) obtained for these cases involving mortgages as gateway product displaying the related combined product and the frequency of cases. When scores are positive, unfairness can be established, and is reported in the table with a cross ('X'). We note at this point that scores computed here are *averages* of all individual scores obtained for identical combinations in different countries: however, the same combination may prove unfair in one country but not in another: accordingly, in the next Sections we also provide a cross-country analysis.

Table 80 – Customer impact test: average scores and unfair cases for mortgage as gateway product

Gateway Product	Combined product	Average consumer scores		Unfairness		Number of cases	Frequency*
		Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Mortgage loan	Term investment account	1.30	1.30	X	X	1	0.8%
	Life insurance	0.62	0.60	X	X	35	26.7%
	Business/commercial insurance	0.60	0.60	X	X	1	0.8%
	Motor insurance	0.60	0.60	X	X	1	0.8%
	Fire insurance	0.50	0.46	X	X	8	6.1%
	Bank deposits	0.40	0.40	X	X	1	0.8%
	Other non-life insurance	0.40	0.38	X	X	3	2.3%
	Payment protection insurance	0.35	0.33	X	X	15	11.5%
	Current account	0.35	0.35	X	X	27	20.6%
	Consumer loan	0.35	0.29	X	X	2	1.5%
	Pension product	0.30	0.30	X	X	1	0.8%
	Home insurance	0.15	0.10	X	X	20	15.3%
	Health/disability insurance	0.13	0.13	X	X	3	2.3%
	Operations on foreign currencies	0.10	-0.01	X		1	0.8%
	Credit line / overdraft	-0.10	-0.17			3	2.3%
	Credit card	-0.18	-0.18			6	4.6%
	Debit card	-0.60	-0.60			2	1.5%
	Savings account	-0.60	-0.60			1	0.8%
Overall average/total nbr of cases		0.35	0.33	X	X	131	

*The frequency of cases within the considered population (combinations with mortgage as gateway product). The overall average provided here takes into account the different frequencies of each score.

NB: The number of total cases (with mortgage as the gateway product) is 131 here. Out of the 140 cases identified⁴⁶¹, we removed those exhibiting blank information for gateway and combined products reported in the database.

Results presented in the table above allows for identifying three types of combinations: (i) mortgages and insurance products, (ii) mortgages and banking products, and (iii) the specific case of mortgages and term investment account.

- Cross-selling mortgages with insurance products exhibits unfairness to customers, given that in almost all cases, positive scores signal a ‘net’ harm. Insurance products concerned are: life insurance (0.62 and 0.60), business and commercial insurance (0.60 in both scenarios), motor insurance (0.60 in both scenarios), fire insurance (0.50 and 0.46), payment protection insurance (0.35 and 0.33) and other non-life insurance (0.40 and 0.38). Others, such as home insurance (0.15 and 0.10) and health disability insurance (0.13 in both cases) remain unfair to consumers but scored lower. When considering for the range of customers purchasing the reported cross-selling practice, it comes out that several insurance products result in ‘net’ harm and are widespread. More specifically, cross-selling practices involving mortgage loans and insurance products affect a large share of customers: some of them, such as practices involving business and commercial insurance, motor insurance, payment protection insurance and health disability insurance, tend to affect a large customer base (over 80% of customers).
- The cross-selling of mortgage loans with bank deposits, even if observed in only one case, appears to be unfair to customers (score 0.40). The observed case relates to a Slovenian practice in which a preferential tariff is offered for the gateway product. As presented in section 1.1.1.2 above, mixed bundling and multi-product rebates may exhibit the same types of positive and negative effects generated by tying practices. Unlike tying, they do not directly force customers into the purchase of a package, but may nevertheless exert a negative impact on customer choice, when there are high switching costs, i.e. substantial “barriers to exit” from the provider-customer relationship, due to both contractual and cognitive constraints. Furthermore, the peculiar nature of the retail financial sector (already presented in Section 2.2 of this Report), is such that mixed bundling can often have a similar effect compared to contractual tying practices. Empirically, the reporting of cross-selling of mortgage loans with bank deposits as provided by our respondent in the survey presents switching costs, which have been reflected accordingly as a detrimental score in the computation of the overall consumer index. The presence of switching costs and the consideration of their associated score explains why practices allowing for a preferential tariff or rate can end up being unfair to consumers.

⁴⁶¹ See Section 5.3.2, Table 37.

- The cross-selling of mortgage loans with term investment accounts, even if relatively uncommon, appears as the most unfair to customers. The only case reported refers to a multi-product rebate on the packaged sale of these two products in the Czech Republic.

Table 81 below shows more detailed results broken down by the different steps of our test.

At national level, we observe that the combination of mortgage to life and non-life insurance (business, fire, health/disability, home, motor and payment protection insurances) is observed in Cyprus, Estonia, Finland, France, Italy and the Netherlands; the cross-selling of mortgages with banking products is practiced in Hungary, Poland, Slovakia, The Netherlands, Slovenia and Slovakia (with current accounts and deposits); in Finland (with consumer loans); and in Cyprus (operation on foreign currencies).

The practices found to be unfair are *tying* (in Cyprus, France, Hungary, Italy, Poland, the Netherlands and Slovakia), *preferential rate or tariff for the gateway or combined product*⁴⁶² (Cyprus, the Czech Republic, Estonia, Finland and Slovenia), and *bundling with no (dis)advantage* (Estonia).

Finally, the discrepancy between consumer scores observed for the same practice can be explained by two elements. First, the table groups together all combinations reported in the survey with an identical composition (i.e. with identical gateway and combined products). However, they have been reported by different respondents, located in different countries. As a result, the first source of variation between figures originates from the possible differences related by each respondent to the survey and their own subjective views on combinations' specificities. In practical terms, in the computation of the overall consumer score, such characteristics are evidenced throughout the influence of variables 'B1-Switching costs' and 'B3-Customer-side efficiencies' (details regarding the presentation and score computation relative to this variable are presented in Annex 14 of this Report). Second, variations in overall consumer scores are also influenced by country characteristics. The latter source of variation is detected throughout the variable 'B2-Lack of transparency', composing the overall consumer score. More specifically, the combination of mortgages with different categories of insurances presents the widest score variation in the table below. Considering for the country factor, results have been affected by the presence of countries such as Italy, Hungary, Czech Republic, France, Austria, and Slovakia, which all feature a maximum positive normalised score for the variable 'B2-Lack of transparency'. Likewise, other countries such as Belgium, Cyprus, Spain, Poland, Slovenia, Estonia and United Kingdom, systematically relate to lower

⁴⁶² The peculiar finding that preferential rate or tariff for the gateway or combined product can lead to unfairness have been presented in section 1.1.1.2. and in the case of cross-selling mortgage loans with bank deposits, in the preceding paragraph.

scores within the same combination, which is explained by the fact that they obtained the minimum normalised score for this same variable⁴⁶³.

Table 81 – Customer impact test: average scores unfair cases and range of customers, when mortgage is the gateway product

Gateway Product	Combined product	Share of customer concerned	Country	Average consumer		Unfairness		Number of cases	Frequency
				Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Mortgage loan	Term investment account	-	Czech Republic	1.30	1.30	X	X	1	0.8%
	Life insurance	between 20% and 40%	Italy	2.00	2.00	X	X	1	0.8%
			Hungary	2.00	2.00	X	X	1	0.8%
			Latvia	0.30	0.30	X	X	1	0.8%
			Slovenia	0.30	0.13	X	X	1	0.8%
		-	Czech Republic	2.00	2.00	X	X	1	0.8%
			Italy	1.53	1.53	X	X	3	2.3%
			Germany	0.80	0.80	X	X	1	0.8%
			Portugal	0.53	0.53	X	X	3	2.3%
			Poland	0.49	0.49	X	X	7	5.3%
			Slovenia	0.30	0.30	X	X	1	0.8%
			Spain	0.05	-0.12	X		2	1.5%
		between 40% and 60%	Italy	1.30	1.30	X	X	1	0.8%
			Slovenia	-0.20	-0.53			1	0.8%
		up to 20%	Hungary	2.00	2.00	X	X	1	0.8%
			Cyprus	-0.20	-0.53			2	1.5%
		between 60% and 80%	Cyprus	0.30	0.30	X	X	1	0.8%
			The Netherlands	1.00	1.00	X	X	1	0.8%
		over 80%	Estonia	0.30	0.30	X	X	2	1.5%
			Belgium	-0.20	-0.20			2	1.5%
			Cyprus	0.05	-0.28	X		2	1.5%
	Motor insurance	over 80%	The Netherlands	0.60	0.60	X	X	1	0.8%
	Business/commercial insurance	over 80%	The Netherlands	0.60	0.60	X	X	1	0.8%
	Fire insurance	-	Italy	1.25	1.25	X	X	2	1.5%
			Portugal	1.10	1.10	X	X	1	0.8%
		between 40% and 60%	Italy	0.90	0.90	X	X	1	0.8%
			The Netherlands	0.60	0.60	X	X	1	0.8%
		over 80%	Cyprus	-0.25	-0.75			2	1.5%
			Belgium	-0.60	-0.60			1	0.8%
	Bank deposits	over 80%	Slovenia	0.40	0.40	X	X	1	0.8%
	Other non-life insurance	up to 20%	France	0.90	0.73	X	X	1	0.8%
		-	Portugal	0.40	0.40	X	X	1	0.8%
		between 60% and 80%	Cyprus	-0.10	-0.10			1	0.8%
	Payment protection insurance	up to 20%	Hungary	1.80	1.80	X	X	1	0.8%
			United Kingdom	0.10	0.10	X	X	1	0.8%
			Belgium	0.10	0.10	X	X	1	0.8%
		between 20% and 40%	Sweden	0.60	0.60	X	X	1	0.8%
			France	1.30	0.97	X	X	1	0.8%
		over 80%	Finland	0.10	-0.23	X		1	0.8%
			Portugal	0.35	0.35	X	X	2	1.5%
		-	Poland	0.28	0.28	X	X	5	3.8%
			Spain	-0.40	-0.57			2	1.5%

⁴⁶³ For example, in Italy, characterised by the highest (positive) score for variable ‘B2-Lack of transparency’, mortgages combined to a life insurance scored (2.00) in scenario 1 when the share of customer is between 20% and 40%; (1.53) when the share of customer is not reported; and (1.30) when the share of customer is between 40% and 60%. Conversely, and considering for the same identical combination in low profile countries, Belgium scored (-0.20) when the share of customer is over 80%; Cyprus (-0.02) when the share of customer is up to 20%; (0.05) when the share of customer is over 80%; and (0.30) when the share of customer is between 60% and 80%.

Gateway Product	Combined product	Share of customer concerned	Country	Average consumer		Unfairness		Number of cases	Frequency
				Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Mortgage loan	Current account	between 40% and 60%	Italy	1.60	1.60	X	X	1	0.8%
			Belgium	-0.10	-0.10			1	0.8%
		-	Czech Republic	1.13	1.13	X	X	3	2.3%
			Italy	0.90	0.90	X	X	1	0.8%
			Denmark	0.90	0.90	X	X	1	0.8%
			Portugal	0.13	0.13	X	X	3	2.3%
			Poland	-0.08	-0.08			6	4.6%
		between 60% and 80%	Italy	1.60	1.60	X	X	1	0.8%
			Denmark	0.40	0.40	X	X	1	0.8%
			Slovenia	-0.60	-0.93			1	0.8%
		over 80%	Slovakia	1.60	1.60	X	X	1	0.8%
			Hungary	1.60	1.60	X	X	1	0.8%
			The Netherlands	0.60	0.60	X	X	1	0.8%
			Poland	0.10	0.10	X	X	1	0.8%
			Belgium	-0.60	-0.60			2	1.5%
			Slovenia	-0.60	-0.60			1	0.8%
			Spain	-0.60	-0.77			1	0.8%
	Consumer loan	up to 20%	Denmark	0.60	0.60	X	X	1	0.8%
		over 80%	Finland	0.10	-0.23	X		1	0.8%
	Pension product	-	Spain	0.30	0.30	X	X	1	0.8%
	Home insurance	between 40% and 60%	Denmark	0.40	0.40	X	X	1	0.8%
			Austria	0.90	0.23	X	X	1	0.8%
		-	Czech Republic	1.60	1.60	X	X	1	0.8%
			Poland	0.27	0.27	X	X	3	2.3%
			Portugal	0.15	0.15	X	X	2	1.5%
			Spain	-0.60	-0.77			1	0.8%
		over 80%	Italy	1.60	1.60	X	X	1	0.8%
			Estonia	0.60	0.60	X	X	1	0.8%
			Spain	-0.10	-0.10			1	0.8%
			Belgium	-0.60	-0.60			2	1.5%
			Cyprus	-0.20	-0.76			3	2.3%
		up to 20%	United Kingdom	-0.10	-0.10			1	0.8%
			Belgium	-0.60	-0.60			1	0.8%
		between 20% and 40%	Slovenia	-0.10	-0.43			1	0.8%
	Health/disability insurance	over 80%	The Netherlands	0.60	0.60	X	X	1	0.8%
		-	Portugal	0.40	0.40	X	X	1	0.8%
			Poland	-0.60	-0.60			1	0.8%
	Operations on foreign currencies	over 80%	Cyprus	0.10	-0.23	X		1	0.8%
	Credit line / overdraft	between 60% and 80%	Cyprus	-0.10	-0.10			1	0.8%
		over 80%	Cyprus	-0.10	-0.43			2	1.5%
	Credit card	-	Poland	0.07	0.07	X	X	3	2.3%
			Spain	-0.60	-0.60			1	0.8%
		between 60% and 80%	Cyprus	-0.10	-0.10			1	0.8%
		over 80%	Belgium	-0.60	-0.60			1	0.8%
	Debit card	over 80%	Belgium	-0.60	-0.60			1	0.8%
		-	Spain	-0.60	-0.60			1	0.8%
	Savings account	between 40% and 60%	Estonia	-0.60	-0.60			1	0.8%
Overall average				0.35	0.28	X	X		
Total nbr of cases						76	81	131	100%

Note: (1) Several respondents omitted communicating the share of customers concerned by the practice; unavailable data are reported in the table above ('-').

(2) Different customer's shares corresponding to the same identical products' combinations may appear simultaneously for a same country in the table above. This is due to the fact that each reported shares correspond to different financial providers.

FINDING #6.6 – CUSTOMER IMPACT TEST WHEN MORTGAGE IS THE GATEWAY PRODUCT

- Approximately 90% of the cross-selling practices involving mortgage loans as a gateway product were found to be unfair in our customer impact test. The most unfair practices involved term investment accounts, bank deposits and a variety of insurance products.
- The practices found to be unfair are *tying* (in Cyprus, France, Hungary, Italy, Poland, the Netherlands and Slovakia), *preferential rate or tariff for the gateway or combined product* (Cyprus, the Czech Republic, Estonia, Finland and Slovenia), and *bundling with no (dis)advantage* for customers (Estonia).

6.2.3.3 Current accounts as gateway products

As for the antitrust test, we base our test on the empirical findings in Section 5, which retrieved 107 cases in which current account is used as a gateway product. The table below presents the average overall customer impact test scores obtained considering only current account as gateway product, displaying the related combined product and the frequency of cases.

Table 82 – Customer impact test: average scores and unfair cases for current account as gateway product

Gateway Product	Combined product	Average consumer scores		Unfairness		Number of cases	Frequency*
		Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Current account	Mortgage loan	0.65	0.65	X	X	2	1.9%
	Home insurance	0.50	0.50	X	X	2	1.9%
	Consumer loan	0.45	0.45	X	X	2	1.9%
	Execution of orders on behalf of clients	0.40	0.40	X	X	1	0.9%
	Term investment account	0.40	0.40	X	X	1	0.9%
	Placing without firm commitment	0.40	0.40	X	X	1	0.9%
	Pension product	0.40	0.40	X	X	2	1.9%
	Investment advice	0.25	0.25	X	X	2	1.9%
	Reception and transmission of orders	0.23	0.23	X	X	3	2.8%
	Credit line / overdraft	0.21	0.21	X	X	8	7.5%
	Corporate banking loan	0.20	0.20	X	X	1	0.9%
	Dealing on own account	0.20	0.20	X	X	1	0.9%
	Underwriting or placing with firm commitment	0.20	0.20	X	X	1	0.9%
	Fund transfers	0.13	0.13	X	X	4	3.7%
	Portfolio management	0.07	0.07	X	X	6	5.6%
	Equity release loan	0.00	0.00			1	0.9%
	Savings account	-0.04	-0.04			8	7.5%
	Health/disability insurance	-0.04	-0.04			7	6.5%
	Life insurance	-0.06	-0.07			12	11.2%
	Debit card	-0.16	-0.16			16	15.0%
	Credit card	-0.19	-0.19			12	11.2%
	Means of payment, excluding debit/credit cards	-0.33	-0.33			4	3.7%
	Other non-life insurance	-0.33	-0.33			3	2.8%
	Bank deposits	-0.38	-0.38			6	5.6%
	Current account	-1.00	-1.00			1	0.9%
Overall average/total nbr of cases		-0.02	-0.02			107	

As a preliminary remark, the same number of unfair cases has been found under both scenarios, therefore no additional information is provided by the most 'restrictive' alternative (scenario 1). Moreover, results presented in the table above allows for identifying three types of combinations: (i) current account and banking products, (ii) current account and insurance products, and (iii) current account and investment products or services.

The most unfair cross-selling practice is the combination between current accounts and mortgage loans (score 0.65). In addition, cross-selling of current accounts proves unfair when the combined product is home insurance (0.50) and consumer loans (0.45). These practices were observed in a limited number of cases in our sample: one case of multi-product rebate was reported in Denmark, whereas one case of tying was reported in Estonia. This latter practice reportedly affects over 80% of the market.

Other practices that score highly in terms of unfairness are the combination of current accounts with the execution of orders on behalf of clients, term investment accounts, placing without firm commitment and pension products (all scored 0.40). Other practices associated with a positive score include the cross-selling of current accounts with investment advice, the reception and transmission of orders and dealing on own accounts (0.25, 0.23 and 0.20, respectively). In particular, the cross-selling of current accounts with investment advice may signal the potential for other unfair commercial practices, such as unsolicited offers, churning and steering.

More generally, the cross-selling of current accounts with investment products (execution of orders on behalf of clients, term investment account, placing with and without firm commitment, investment advice, reception and transmission of orders, dealing on own account, and portfolio management) almost systematically lead to unfairness. Only 5 cases out of 14 (for the type of combinations considered here) have been found to be beneficial for customers. In the other 13 cases where 'net' harm prevails for customers, such result can be explained by the absence of reported consumer-side efficiencies ('convenience' and the provision of financial advantage).

Once unfairness is observed, its intensity can be also investigated by considering the percentage of consumers concerned by the practice in order to apprehend the amplitude of unfairness, when evidenced. The additional information provided by the range of customers purchasing the combination is reported in the table below.

As regards the frequency of the practices, 65.3% of them are associated with a zero or negative scores. More in detail, the most common practices (*i.e.* the cross-selling of current accounts with debit and credit cards, and with savings accounts) all score negatively. The most frequent combination that yields a positive score is that between current accounts and credit line/overdraft, which accounts for 7.5% of our sample.

One country in which unfair combinations were particularly observed is Estonia, where current accounts are reportedly tied with mortgage loans, the execution of orders on behalf of clients, term investment accounts, placing without firm commitment, the reception and transmission of orders and dealing on own accounts. All these practices reportedly affect more than 80% of the market.

Finally, the table below shows that consumer scores computed for the same practice may exhibit a relative volatility. Similarly to the case when mortgage is the gateway product (see Section 6.2.3.2 of this Report) the gap can be explained by two elements: (i) the possible related differences attributed to respondents of the survey, and (ii) country-related features. Concerning the latter, one should bear in mind that identical combinations (composed by the same gateway and combined products) are observed in different countries. The volatility of the scores is due to the presence of different sets of countries. On the one hand, some countries (such as Italy, Hungary, Czech Republic, France, Austria, and Slovakia) present a marked profile in terms of lack of products' transparency (variable 'B2-Lack of transparency'_ details regarding the presentation and score computation relative to this variable are presented in Annex 14 of this Report_) which amplifies positive scores. On the other hand, those to the contrary, for which this feature is not prevalent (such as Belgium, Cyprus, Spain, Poland, Slovenia, Estonia and United Kingdom) relate to lower consumer scores. For example, the scores' gap observed for the combination of a current account with portfolio management (from 0.90 to -0.35 in both scenarios) is due to the presence of Austria on the one hand (characterised by a particularly high positive score of variable 'B2-Lack of transparency'), and of Slovenia on the other hand (bearing amongst the lowest levels of product' lack of transparency).

Table 83 – Customer impact test: average scores unfair cases and range of consumers, for current account as gateway product

Gateway Product	Combined product	Share of customer concerned	Country	Average consumer		Unfairness		Number of cases	Frequency
				Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Current account	Mortgage loan	-	Denmark	0.90	0.90	X	X	1	0.9%
		over 80%	Estonia	0.40	0.40	X	X	1	0.9%
	Home insurance	-	Denmark	0.50	0.50	X	X	2	1.9%
	Consumer loan	between 20% and 40%	Czech Republic	0.70	0.70	X	X	1	0.9%
		over 80%	Estonia	0.20	0.20	X	X	1	0.9%
	Term investment account	over 80%	Estonia	0.40	0.40	X	X	1	0.9%
	Placing without firm commitment	over 80%	Estonia	0.40	0.40	X	X	1	0.9%
	Execution of orders on behalf of clients	over 80%	Estonia	0.40	0.40	X	X	1	0.9%
	Pension product	-	Denmark	0.90	0.90	X	X	1	0.9%
			Portugal	-0.10	-0.10			1	0.9%
	Investment advice	between 20% and 40%	Austria	0.40	0.40	X	X	1	0.9%
		-	Poland	0.10	0.10	X	X	1	0.9%
	Reception and transmission of orders	over 80%	Estonia	0.40	0.40	X	X	1	0.9%
		between 20% and 40%	Austria	0.40	0.40	X	X	1	0.9%
		up to 20%	Slovenia	-0.10	-0.10			1	0.9%
	Credit line / overdraft	between 40% and 60%	Austria	0.50	0.50	X	X	1	0.9%
		between 20% and 40%	Czech Republic	0.50	0.50	X	X	1	0.9%
		-	Denmark	0.50	0.50	X	X	1	0.9%
			Czech Republic	0.50	0.50	X	X	1	0.9%
			Germany	0.00	0.00			1	0.9%
			Poland	-0.15	-0.15			2	1.9%
		over 80%	Estonia	0.00	0.00			1	0.9%
	Underwriting or placing with firm commitment	over 80%	Estonia	0.20	0.20	X	X	1	0.9%
	Dealing on own account	over 80%	Estonia	0.20	0.20	X	X	1	0.9%
	Corporate banking loan	over 80%	Estonia	0.20	0.20	X	X	1	0.9%
	Fund transfers	-	Czech Republic	0.50	0.50	X	X	1	0.9%
			Portugal	0.00	0.00			1	0.9%
		over 80%	Germany	0.00	0.00			1	0.9%
			Estonia	0.00	0.00			1	0.9%
	Portfolio management	up to 20%	Austria	0.90	0.90	X	X	1	0.9%
		over 80%	Estonia	0.40	0.40	X	X	1	0.9%
		-	Poland	-0.10	-0.10			2	1.9%
		between 20% and 40%	Slovenia	-0.35	-0.35			2	1.9%
	Equity release loan	over 80%	Estonia	0.00	0.00			1	0.9%
	Savings account	over 80%	United Kingdom	0.20	0.20	X	X	1	0.9%
			Estonia	0.00	0.00			1	0.9%
		-	Hungary	1.00	1.00	X	X	1	0.9%
			Denmark	0.50	0.50	X	X	1	0.9%
			Poland	-0.50	-0.50			4	3.7%

Gateway Product	Combined product	Share of customer concerned	Country	Average consumer		Unfairness		Number of cases	Frequency
				Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Current account	Health/disability insurance	between 40% and 60%	Italy	0.50	0.50	X	X	1	0.9%
		between 60% and 80%	Slovenia	0.20	0.20	X	X	1	0.9%
		-	Italy	1.00	1.00	X	X	1	0.9%
		-	Poland	-0.50	-0.50			4	3.7%
	Life insurance	up to 20%	Hungary	0.90	0.90	X	X	1	0.9%
			Austria	0.40	0.40	X	X	1	0.9%
			Slovenia	-0.60	-0.60			1	0.9%
		-	Portugal	-0.10	-0.10			1	0.9%
			Poland	-0.10	-0.10			5	4.7%
			Spain	-0.10	-0.43			1	0.9%
		over 80%	Belgium	-0.35	-0.35			2	1.9%
	Debit card	between 40% and 60%	Czech Republic	0.50	0.50	X	X	1	0.9%
		between 60% and 80%	Hungary	0.50	0.50	X	X	1	0.9%
		-	Cyprus	-0.50	-0.50			1	0.9%
		-	Czech Republic	0.50	0.50	X	X	3	2.8%
		-	Portugal	-0.15	-0.15			2	1.9%
		-	Poland	-0.15	-0.15			2	1.9%
		-	Germany	-0.50	-0.50			1	0.9%
		-	Belgium	-1.00	-1.00			2	1.9%
		over 80%	Estonia	-0.25	-0.25			2	1.9%
		up to 20%	Slovenia	-1.00	-1.00			1	0.9%
	Credit card	over 80%	Czech Republic	0.50	0.50	X	X	1	0.9%
		between 60% and 80%	Austria	0.00	0.00			1	0.9%
		-	Denmark	0.50	0.50	X	X	1	0.9%
		-	Czech Republic	0.50	0.50	X	X	2	1.9%
		-	Poland	-0.43	-0.43			3	2.8%
		-	Portugal	-0.50	-0.50			1	0.9%
		-	Belgium	-1.00	-1.00			1	0.9%
		between 20% and 40%	Finland	-0.50	-0.50			1	0.9%
		between 40% and 60%	Cyprus	-1.00	-1.00			1	0.9%
	Means of payment, excluding debit/credit cards	-	Portugal	-0.15	-0.15			2	1.9%
		over 80%	Cyprus	-0.50	-0.50			1	0.9%
		between 40% and 60%	Latvia	-0.50	-0.50			1	0.9%
	Other non-life insurance	between 20% and 40%	Hungary	0.50	0.50	X	X	1	0.9%
		-	Poland	-0.75	-0.75			2	1.9%
	Bank deposits	over 80%	Estonia	0.00	0.00			1	0.9%
			Finland	-0.50	-0.50			1	0.9%
		-	Portugal	-0.40	-0.40			2	1.9%
			Poland	-0.50	-0.50			2	1.9%
	Current account	between 20% and 40%	Slovenia	-1.00	-1.00			1	0.9%
Overall average				-0.02	-0.02				
Total nbr of cases								107	100%

Note: (1) Several respondents omitted communicating the share of customers concerned by the practice; unavailable data are reported in the table above ('-').

(2) Different customer's shares corresponding to the same identical products' combinations may appear simultaneously for a same country in the table above. This is due to the fact that each reported shares correspond to different financial providers.

FINDING # 6.7 – CUSTOMER IMPACT TEST WHEN CURRENT ACCOUNT IS THE GATEWAY PRODUCT

- The most unfair cross-selling practice is the combination between current accounts and mortgage loans. In addition, cross-selling of current accounts proves unfair when the combined product is home insurance and consumer loans.
- Other unfair practices that score highly in terms of potential unfairness are the combination of current accounts with the execution of orders on behalf of

clients, term investment accounts, placing without firm commitment and pension products. Other practices associated with a positive score include the cross-selling of current accounts with investment advice, the reception and transmission of orders and dealing on own accounts.

- The countries in which unfair combinations were observed include most notably Estonia, where current accounts are reportedly tied with mortgage loans, the execution of orders on behalf of clients, term investment accounts, placing without firm commitment, the reception and transmission of orders and dealing on own accounts. All these practices reportedly affect more than 80% of the market.

6.2.3.4 Consumer loans as gateway products

As occurred for the antitrust test, our analysis is based on the 63 cases in which respondents in our empirical analysis reportedly use consumer loans as a gateway product. The table below presents the average overall customer impact test scores obtained considering for consumer loans as gateway product, displaying the related combined product and the frequency of cases.

Table 84 – Customer impact test: average scores and unfair cases for consumer loan as gateway product

Gateway Product	Combined product	Average consumer scores		Unfairness		Number of cases	Frequency*
		Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Consumer loan	Life insurance	0.48	0.43	X	X	9	14.3%
	Payment protection insurance	0.35	0.32	X	X	13	20.6%
	Health/disability insurance	0.30	0.29	X	X	5	7.9%
	Motor insurance	0.22	0.20	X	X	6	9.5%
	Bank deposits	0.20	0.20	X	X	1	1.6%
	Savings account	0.05	0.05	X	X	2	3.2%
	Current account	0.05	0.02	X	X	18	28.6%
	Other non-life insurance	0.03	0.01	X	X	3	4.8%
	Credit card	-0.18	-0.22			4	6.3%
	Credit line / overdraft	-0.20	-0.20			2	3.2%
Overall average/total nbr of cases		0.19	0.16	X	X	63	

As a preliminary remark, in the case of consumer loan as gateway product, two additional unfair cases have been established in scenario 1 with respect to scenario 2, given that the total number of unfair cases under scenario 1 and 2 are respectively 37 and 35 in table 85 below.

As shown in Table 84 above, most of the combinations when consumer loan is the gateway product tend to result in unfairness for consumers (*i.e.*, 0.19 and 0.16 for scores obtained respectively in scenarios 1 and 2). Furthermore, results presented in the table above allows for identifying two main types of combinations: (i) consumer loan and banking products, and (ii) consumer loan and insurance products. The latter group is clearly more unfair than the former. As a matter of fact, the cross-selling of consumer loans with credit cards and overdraft score negatively (-0.18 and -0.22 for credit card, and -0.2 respectively

in the two scenarios), while the combinations of bank deposit, saving account and current account, to consumer loan score positively but low. On the other hand, high scores were obtained for the combination of consumer loans with life insurance, PPI, health/disability insurance and motor insurance.

As regards the share of customers affected by the practices, Table 85 below shows that the unfairness resulting from the combination with bank deposits and savings accounts tends to show a very high intensity (over 80% of consumers). Rather, unfairness evidenced with current account concern a low to a medium share of consumers. A practice that appears particularly unfair to customers and tends to be quite widespread is the combination of consumer loans with PPI. The same can be said about health/disability insurance and life insurance.

Finally, a remark can be made concerning the differences of the scores observed for given product combinations. As already specified in Sections 6.2.3.2 and 6.2.3.3 of this Report, the difference is due to variations in the related answers from respondents of the survey; as well as to the variable 'B2-Lack of transparency' (a composing sub-element of the overall consumer score, detailed and presented in Annex 14 of this Report), which incorporates country-specific features. More specifically, concerning the influence of this variable on scores, it can be observed from the table below that in the specific example of the combination of a consumer loan to a payment protection insurance, the highest and lowest computed scores (respectively 1.60 and -0.60 in scenario 1) are associated with France and Italy on the one hand (both characterised by low transparency of financial products), and Belgium and United Kingdom on the other hand (which do not exhibit significant lack of product transparency, compared to other Member States).

Table 85 – Customer impact test: average scores unfair cases and range of consumers, for consumer loan as gateway product

Gateway Product	Combined product	Share of customer concerned	Country	Average consumer		Unfairness		Number of cases	Frequency
				Scenario 1	Scenario 2	Scenario 1	Scenario 2		
Consumer loan	Life insurance	up to 20%	Cyprus	0.60	0.60	X	X	1	1.6%
		over 80%	Cyprus	0.60	0.60	X	X	1	1.6%
		-	Poland	0.60	0.60	X	X	1	1.6%
		-	Cyprus	0.60	0.60	X	X	1	1.6%
		-	Portugal	0.45	0.37	X	X	2	3.2%
		-	United Kingdom	0.30	-0.20	X		1	1.6%
		between 60% and 80%	Austria	1.10	0.77	X	X	1	1.6%
		-	Belgium	-0.40	-0.57			1	1.6%
		between 40% and 60%	France	1.60	1.60	X	X	1	1.6%
		between 20% and 40%	Italy	1.60	1.60	X	X	1	1.6%
	Payment protection insurance	-	Czech Republic	0.90	0.90	X	X	1	1.6%
		-	Poland	0.50	0.50	X	X	2	3.2%
		-	Portugal	0.40	0.40	X	X	1	1.6%
		-	Germany	0.40	0.40	X	X	1	1.6%
		over 80%	Cyprus	0.40	0.40	X	X	1	1.6%
		-	Slovenia	0.10	-0.07	X		1	1.6%
		-	United Kingdom	-0.60	-0.77			1	1.6%
		-	Belgium	-0.60	-0.93			1	1.6%
		up to 20%	Poland	-0.10	-0.10			1	1.6%
		-	Belgium	-0.60	-0.93			1	1.6%
	Health/disability insurance	between 40% and 60%	Italy	0.70	0.70	X	X	1	1.6%
		-	Italy	0.70	0.70	X	X	1	1.6%
		-	Portugal	0.20	0.20	X	X	1	1.6%
		-	Poland	-0.05	-0.13			2	3.2%
	Motor insurance	-	Portugal	0.90	0.90	X	X	1	1.6%
		-	Czech Republic	0.20	0.20	X	X	1	1.6%
		over 80%	Estonia	0.40	0.40	X	X	1	1.6%
		between 40% and 60%	Poland	0.40	0.40	X	X	1	1.6%
		-	Finland	0.20	0.20	X	X	1	1.6%
		up to 20%	Belgium	-0.80	-1.13			1	1.6%
	Bank deposits	over 80%	Slovenia	0.20	0.20	X	X	1	1.6%
	Savings account	over 80%	United Kingdom	0.40	0.40	X	X	1	1.6%
	-	-	Cyprus	-0.30	-0.30			1	1.6%
	Current account	between 20% and 40%	Italy	1.40	1.40	X	X	1	1.6%
		-	Slovenia	-0.30	-0.30			1	1.6%
		-	Czech Republic	1.30	1.30	X	X	2	3.2%
		-	Portugal	-0.30	-0.63			2	3.2%
		over 80%	Slovakia	1.40	1.40	X	X	1	1.6%
		-	Cyprus	-0.30	-0.30			1	1.6%
		-	Finland	-0.30	-0.63			1	1.6%
		-	Slovenia	-0.80	-0.80			1	1.6%
		between 60% and 80%	Italy	1.40	1.40	X	X	1	1.6%
		-	Belgium	-0.80	-0.97			2	3.2%
		between 40% and 60%	Slovenia	-0.30	-0.30			1	1.6%
		-	Cyprus	-0.30	-0.30			1	1.6%
		up to 20%	Cyprus	-0.30	-0.30			2	3.2%
		-	Belgium	-0.80	-1.30			1	1.6%
	Other non-life insurance	-	Poland	0.20	0.20	X	X	1	1.6%
		-	Portugal	-0.05	-0.13			2	3.2%
	Credit card	up to 20%	Poland	0.20	0.20	X	X	1	1.6%
		-	Poland	-0.05	-0.05			2	3.2%
		between 20% and 40%	Belgium	-0.80	-1.30			1	1.6%
	Credit line / overdraft	over 80%	Cyprus	-0.20	-0.20			2	3.2%
Overall average				0.19	0.11	X	X		
Total nbr of cases								63	100%

Note: (1) Several respondents omitted communicating the share of customers concerned by the practice; unavailable data are reported in the table above ('-').

(2) Different customer's shares corresponding to the same identical products' combinations may appear simultaneously for a same country in the table above. This is due to the fact that each reported shares correspond to different financial providers.

FINDING # 6.8 – CUSTOMER IMPACT TEST WHEN CONSUMER LOAN IS THE GATEWAY PRODUCT

- Most of the cross-selling practices in which consumer loan is the gateway product tend to result in unfairness for consumers. Practices that most often result as unfair are the ones involving insurance products, including life insurance, PPI, health/disability insurance and motor insurance.
- Practices that appear particularly unfair to customers and are also widespread are the combination of consumer loans with PPI, health/disability insurance and life insurance.

6.2.3.5 Cross-selling practices: analysis per type of practice

In this Section, we analyse our sample of practices by breaking down results per type of cross-selling conduct, including (i) tying and pure bundling, (ii) mixed bundling and multi-product rebates, and (iii) other cross-selling practices (preferential or exclusive agreement)⁴⁶⁴.

6.2.3.5.1 *Tying and pure bundling*

The table below focuses on results obtained for *tying* practices, by showing, on the one hand the number of unfair cases found under scenarios 1 and 2 (*i.e.* all cases where a positive customer impact test score has been obtained); and on the other hand the number of cases that proved to be beneficial for customers (*i.e.* all cases where a negative customer impact test score has been obtained), in each country.

⁴⁶⁴ All practices referred to here have already been defined in other Sections of this Report (see Section 1.1 and Annex 1 Glossary of terms).

Table 86 – Tying practices: potential unfairness per country

Cross-selling practice	Country	Total cases reported	Number of unfair cases under		Number of beneficial cases for consumers	Frequency*		
			Scenario 1	Scenario 2		Unfair cases Scenario 1	Unfair cases Scenario 2	Beneficial cases
Tied products	Austria	8	8	8	0	6%	6%	0%
	Belgium	11	5	5	6	3%	4%	11%
	Bulgaria	4	3	3	1	2%	2%	2%
	Cyprus	24	9	6	15	6%	4%	27%
	Czech Republic	11	11	11	0	8%	8%	0%
	Denmark	1	1	1	0	1%	1%	0%
	Estonia	16	10	10	6	7%	7%	11%
	France	7	7	6	0	5%	4%	0%
	Germany	3	0	0	3	0%	0%	5%
	Hungary	8	8	8	0	6%	6%	0%
	Italy	28	28	28	0	19%	20%	0%
	Latvia	1	1	1	0	1%	1%	0%
	Poland	43	24	23	19	17%	17%	34%
	Portugal	3	3	3	0	2%	2%	0%
	Slovakia	2	2	2	0	1%	1%	0%
	Slovenia	11	6	5	5	4%	4%	9%
	The Netherlands	12	12	12	0	8%	9%	0%
	United Kingdom	8	7	7	1	5%	5%	2%
Total number of cases		201	145	139	56	72%	69%	28%

* The frequency is defined by the ratio of each country's number of cases (i.e. unfair case under scenarios 1 and 2, beneficial cases) divided by the total number of cases in all countries. This explains why the table above shows that, even if the absolute number of unfair cases found under scenario 1 and 2 are identical in Belgium, Italy and the Netherlands, in relative values however, the frequency of unfair cases found under scenario 1 is lower than in scenario 2. This result comes from the fact that the total absolute number of unfair cases, aggregating for all countries, is higher in scenario 1 than in scenario 2 (the latter includes a wider range of efficiencies and therefore produces fewer unfair cases). When computing the frequencies of unfair cases for each country, we have divided each country's absolute number of unfair cases for scenario 1 and 2 by their respective total number of cases in all countries (145 and 139 respectively for scenario 1 and 2).

NB: Countries presented in the tables are only those where the practice has been reported in our survey.

According to the results shown in Table 86 above, on average and in the EU27, tying results in unfairness in approximately 70% of the cases (72% of all scores obtained for tying practices in scenario 1 and 69% in the 'best case' scenario 2). However, this result should be balanced by the fact that 28% of tying practices proved to provide with 'net' benefits for consumers⁴⁶⁵.

6.2.3.5.2 Mixed bundling and multi-product rebates

Following the presentation of practices under study in this Report, mixed bundling refers to the reported practice "Bundled products with no

⁴⁶⁵ The table presented here also reports available information per country. The latter shows that unfairness has been more repeatedly evidenced in Italy (in 19% and 20% of all unfair cases found in scenario 1 and 2) and Poland (in 17% of all unfair cases found in both scenarios). To the contrary, beneficial cases have been more recurrently reported in our survey in Poland (34% of all reported beneficial cases), Cyprus (27%), followed by Belgium (11%) and Estonia (11%). However, given that the analysis was run on a sample, information relative to Member State individually should be considered with reservation.

(dis)advantage”, while multi-products rebates group the categories “preferential tariff (for the gateway or combined product)”, “preferential rate(for the gateway or combined product), and “combined product(s) free of charge”.

The table below provides with the total number of cases reported in our survey corresponding to the practice mixed bundling (*i.e.* the category “Bundled products with no (dis)advantage” in our survey). In addition, they are broken down according to:

- the number of cases with positive customer impact test scores (*i.e.* potential unfairness) for scenario 1 and 2,
- the number of cases where scores are negative (*i.e.* signalling ‘net’ benefits for customers).

Table 87 – Mixed bundling: potential unfairness per country

Cross-selling practice	Country	Total cases reported	Number of unfair cases		Number of beneficial cases for consumers	Frequency*		
			Scenario 1	Scenario 2		Unfair cases Scenario 1	Unfair cases Scenario 2	Beneficial cases
Bundled products with no (dis)advantage	Austria	7	3	1	4	4%	1%	4%
	Belgium	36	11	11	25	15%	16%	26%
	Bulgaria	5	0	0	5	0%	0%	5%
	Cyprus	25	2	2	23	3%	3%	24%
	Czech Republic	9	9	9	0	12%	13%	0%
	Denmark	12	12	12	0	16%	17%	0%
	Estonia	8	5	5	3	7%	7%	3%
	Finland	1	1	0	0	1%	0%	0%
	Germany	2	2	2	0	3%	3%	0%
	Hungary	2	2	2	0	3%	3%	0%
	Ireland	15	5	4	10	7%	6%	11%
	Italy	13	13	13	0	18%	19%	0%
	Latvia	3	1	1	2	1%	1%	2%
	Poland	17	6	6	11	8%	9%	12%
	Portugal	3	0	0	3	0%	0%	3%
	Slovenia	6	2	2	4	3%	3%	4%
	Spain	3	0	0	3	0%	0%	3%
	United Kingdom	2	0	0	2	0%	0%	2%
Total number of cases		169	74	70	95	44%	41%	56%

* The frequency is defined by the ratio of each country's number of cases (*i.e.* unfair case under scenarios 1 and 2, beneficial cases) divided by the total number of cases in all countries.

NB: Countries presented in the tables are only those where the practice has been reported in our survey.

According to the results presented in Table 87 above, mixed bundling with no financial (dis)advantage leads to unfairness in almost half of the cases in the EU27 (74 and 70 unfair cases found in scenario 1 and 2 out of 169 total cases with bundling practices reported). Furthermore, bundling provides ‘net’ benefits to consumers in 56% of reported cases. In comparison to tying, our evidence suggests that bundling is therefore less likely to lead to unfairness.⁴⁶⁶

⁴⁶⁶ Likewise, results displayed for tying practices, the table presented here also reports available information per country. The latter shows that unfairness has been more repeatedly evidenced in Italy (in 18% and 19% of all unfair cases found in scenario 1 and 2), Denmark

As regards multi-product rebates, the table below provides the total number of cases reported in our survey corresponding to this practice (*i.e.*, categories “preferential tariff (for the gateway or combined product)”, “preferential rate(for the gateway or combined product), and “combined product(s) free of charge” in our survey). In addition, they are broken down according to:

- the number of cases with positive customer impact test scores (*i.e.* potential unfairness) for scenario 1 and 2,
- the number of cases where scores are negative (*i.e.* signalling ‘net’ benefits for customers).

Table 88 – Multi-products rebates: potential unfairness per country

(in 16% and 17%) and Belgium (15% and 16%) To the contrary, beneficial cases have been more recurrently reported in our survey also in Belgium (26% of all reported beneficial cases), and Cyprus (24%). However, given the lack of representativity of our sample, information relative to Member State individually should be considered with reservation.

Cross-selling practice	Country	Total cases reported	Number of unfair cases under		Number of beneficial cases for consumers	Frequency*		
			Scenario 1	Scenario 2		Unfair cases Scenario 1	Unfair cases Scenario 2	Beneficial cases
Preferential rate								
Preferential rate for gateway product	Austria	2	1	1	1	6%	6%	2%
	Belgium	8	1	1	7	6%	6%	15%
	Cyprus	8	1	1	7	6%	6%	15%
	Czech Republic	3	3	3	0	17%	17%	0%
	Estonia	1	1	1	0	6%	6%	0%
	Finland	3	1	1	2	6%	6%	4%
	Ireland	2	0	0	2	0%	0%	4%
	Italy	2	2	2	0	11%	11%	0%
	Latvia	1	1	1	0	6%	6%	0%
	Poland	3	1	1	2	6%	6%	4%
	Slovenia	6	0	0	6	0%	0%	13%
Spain	6	2	2	4	11%	11%	9%	
Preferential rate for combined product(s)	Bulgaria	3	0	0	3	0%	0%	6%
	Cyprus	3	0	0	3	0%	0%	6%
	Denmark	1	1	1	0	6%	6%	0%
	Estonia	1	0	0	1	0%	0%	2%
	Poland	6	2	2	4	11%	11%	9%
	Portugal	1	0	0	1	0%	0%	2%
	Slovenia	3	0	0	3	0%	0%	6%
	Spain	1	0	0	1	0%	0%	2%
	Sweden	1	1	1	0	6%	6%	0%
Total number of cases preferential rate		65	18	18	47	28%	28%	72%
Preferential tariffs								
Preferential tariff for gateway product	Austria	2	2	0	0	4%	0%	0%
	Belgium	4	0	0	4	0%	0%	5%
	Cyprus	7	0	0	7	0%	0%	8%
	Czech Republic	5	5	0	0	9%	0%	0%
	Denmark	4	4	0	0	7%	0%	0%
	Finland	7	0	3	4	0%	27%	5%
	Poland	5	0	0	5	0%	0%	6%
	Portugal	28	11	0	17	20%	0%	19%
	Slovenia	7	3	0	4	6%	0%	5%
Preferential tariff for combined product(s)	Austria	2	1	1	0	2%	9%	0%
	Belgium	4	0	0	4	0%	0%	5%
	Cyprus	7	0	0	7	0%	0%	8%
	Czech Republic	13	13	0	0	24%	0%	0%
	Denmark	4	3	0	1	6%	0%	1%
	Finland	13	1	7	5	2%	64%	6%
	France	2	2	0	0	4%	0%	0%
	Hungary	6	3	0	3	6%	0%	3%
	Italy	2	2	0	0	4%	0%	0%
	Poland	12	4	0	8	7%	0%	9%
	Portugal	6	0	0	6	0%	0%	7%
	Slovenia	11	0	0	11	0%	0%	13%
United Kingdom	2	0	0	2	0%	0%	2%	
Total number of cases preferential tariffs		153	54	11	88	35%	7%	58%

* The frequency is defined by the ratio of each country's number of cases (i.e. unfair case under scenarios 1 and 2, beneficial cases) divided by the total number of cases in all countries.

NB: Countries presented in the tables are only those where the practice has been reported in our survey.

According to the results presented in Table 88 above, preferential rates and tariffs, whether offered on the gateway or the combined products are more beneficial for consumers (47 cases out of 65 for all cases with preferential rates, and 88 cases out of 153 for all cases with preferential tariffs). However, preferential rates resulted in a greater occurrence of 'net' beneficial outcome for consumers (in 72% of cases) than preferential tariffs (in 58% of cases). Moreover, we note that in the specific case of preferential tariffs, scores computed in scenario 1 and 2 tend to diverge: this reveals that in production-side efficiencies passed on consumers proved to be significant for this type of cross-selling practices. Indeed, when preferential tariffs are offered (on the gateway or

combined product), 54 cases are found to be unfair under scenario 1, but this figure drops at 11 under scenario 2⁴⁶⁷. This suggests that these practices produce efficiencies that are likely to be passed-on downstream to customers: taking into account these additional effects on customers, the practice appears less unfair. This finding is in line with the economic theory on multi-product rebates, as explained in Section 2.2.3.1.2 above.

6.2.3.5.3 Other cross-selling practices: Preferential or exclusive agreements

The empirical analysis has highlighted one particular feature regarding suppliers' behaviour, namely their preference for dealing with the same financial institution or group⁴⁶⁸. Cross-selling most frequently occurs within the financial institution or within the financial group, for almost 80% of reported cases within our sample (*i.e.*, 469 out of 581). The reliance on the same financial institution or group for supplying products would tend to indicate the possibility of profiting from economies of scale and scope, and increasing efficiencies for providers. However, the supply of combined product throughout a partnership with other institutions constitutes another possible channel, which accounts for slightly more than 10% of the sample collected (70 cases reported), and is mainly involving domestic partner providers.

⁴⁶⁷ Likewise, results displayed for other cross-selling practices above, the table presented here also reports available information per country. The latter shows that unfairness for preferential rates has been more repeatedly evidenced in Czech Republic (in 17% in both scenarios), Spain and Poland (in 11% in both scenarios). Concerning preferential rates, unfairness has more repeatedly concerned Finland (64% and 37% in scenario 2). To the contrary, beneficial cases for preferential rates have been more recurrently reported in our survey also in Belgium (15% of all reported beneficial cases) Cyprus (15%), and Slovenia (13%). Concerning preferential rates, Portugal (19%) and Slovenia (13%) related the most numerous number of beneficial cases. However, given the lack of representativity of our sample, information relative to Member State individually should be considered with reservation.

⁴⁶⁸ See *supra*, Section 2.1.3.3.

Table 89 – Providers of combined products

Provider of combined product	Nbr of cases	Frequency
<i>Same financial group or institution</i>		
Domestic and abroad	21	3.6%
Domestic	446	76.8%
Abroad	2	0.3%
<i>Total</i>	<i>469</i>	<i>80.7%</i>
<i>Preferential agreement with partner institution</i>		
Domestic and abroad	4	0.7%
Domestic	51	8.8%
Abroad	15	2.6%
<i>Total</i>	<i>70</i>	<i>12.0%</i>
<i>Any provider</i>		
Domestic and abroad	0	0%
Domestic	38	6.5%
Abroad	4	0.7%
<i>Total</i>	<i>42</i>	<i>7.2%</i>
<i>Grand Total</i>	<i>581</i>	<i>100%</i>

As explained above in Section 2.2.3.1.3, preferential and exclusive agreements may lead to foreclosure effects, raising rivals' cost and increased switching and opportunity costs for consumers. Nevertheless, these contractual practices can be also beneficial for suppliers⁴⁶⁹. Therefore, we suggest examining the set of cases where preferential or exclusive agreements are at stake, by considering whether efficiencies occur and with which intensity.

As already mentioned, two types of efficiencies are examined: on the one hand, production-side efficiencies are composed by the reporting of the following reasons in the survey: (i) technical reasons, (ii) cost efficiency, and (iii) risk reduction; on the other hand, consumer-side efficiencies refer to the following justification of the purchase: (i) convenience (*i.e.* one-stop-shop effects, reduction of transaction costs due to the search of a counterpart), and (ii) the granting of a financial advantage⁴⁷⁰.

The table below lists practices characterised by preferential/exclusive agreements with partner institutions and their associated scores for production and consumer-side efficiencies.

⁴⁶⁹ The review of expected effects on producers and consumers has been approached in Section 2.2.3.1.3.

⁴⁷⁰ The full description of production and consumer-side efficiencies is detailed in Annex 14 ("Screen 2a Antitrust test" and "Screen 2b Customer impact test").

Table 90 – Preferential/exclusive agreements: scores of consumer and production-side efficiencies

Provider of combined product	Production-side efficiencies	Consumer-side efficiencies	Sum of efficiencies	Nbr of cases	Frequency
Preferential agreement with partner institution					
Domestic and abroad	0.0	-0.5	-0.5	4	5.7%
<i>Average efficiencies/total cases</i>	<i>0</i>	<i>-0.5</i>	<i>-0.5</i>	<i>4</i>	<i>5.7%</i>
Domestic	0.0	0.0	0.0	6	8.6%
	-0.1	0.0	-0.1	6	8.6%
	-0.2	0.0	-0.2	1	1.4%
	0.0	-0.5	-0.5	15	21.4%
	-0.1	-0.5	-0.6	7	10.0%
	-0.2	-0.5	-0.7	4	5.7%
	-0.3	-0.5	-0.8	1	1.4%
	0.0	-1.0	-1.0	4	5.7%
	-0.1	-1.0	-1.1	5	7.1%
	-0.2	-1.0	-1.2	2	2.9%
<i>Average efficiencies/total cases</i>	<i>-0.1</i>	<i>-0.5</i>	<i>-0.6</i>	<i>51</i>	<i>72.9%</i>
Abroad	0.0	-0.5	-0.5	4	5.7%
	-0.2	-0.5	-0.7	1	1.4%
	-0.1	-1.0	-1.1	4	5.7%
	-0.2	-1.0	-1.2	6	8.6%
<i>Average efficiencies/total cases</i>	<i>-0.1</i>	<i>-0.8</i>	<i>-0.9</i>	<i>15</i>	<i>21.4%</i>
<i>Grand Total</i>				<i>70</i>	<i>100%</i>

The scores displayed in the table above range from zero (*i.e.* no consumer and no production-side efficiencies associated to the practices) to negative values (signalling to the contrary the presence of consumer and or production-side efficiencies). Scores are shown here when partners supplying the combined product are established domestically ('domestic'), in another country ('abroad') or in any country ('domestic and abroad'). Each line presented here refers to scores obtained, all countries taken altogether.

On average, more efficiencies are found when the partner institution is established abroad (-0.9) than domestically (-0.6). The gap is principally due to greater consumer-side efficiencies found when partners are established abroad. In other words, in our survey, customers have more repeatedly reported having purchased the combinations, either because they found it convenient to deal with a single institution, or because they benefited from a financial advantage. The latter reasons have been evenly reported regardless of whether the partner institution is established domestically or in another country⁴⁷¹. Therefore, we are not able to tell if one of the reason in particular explain the greater amount of consumer-side efficiencies obtained in the case when partners are established abroad; they have simply being both more frequently reported.

Concerning production-side efficiencies, average values of 'domestic' and 'abroad' partnership are identical (-0.1 in both cases). However, the structure of production-side efficiencies differs. On the one hand, domestic agreements

⁴⁷¹ More in detail, when the partner institution is established domestically, the reasons evoked in the survey are 'convenience' and 'financial advantage' in respectively 24 and 25 cases. When the partner institution is established abroad, the reasons 'convenience' and 'financial advantage' have been respectively evoked 15 and 10 times.

principally provide producers with risk reductions, followed by costs savings⁴⁷². On the other hand, production-side efficiencies in case of preferential agreements with a foreign institution are principally driven by costs savings, rather than risk reductions⁴⁷³. This finding may suggest that agreements made domestically respond to the need of sharing common information and better monitoring of consumers' preferences; while partnering with foreign companies may aim to a more efficient cost structure or cost savings.

Results presented above allow detecting critical cases where no efficiencies (whether benefiting producers or consumers) are found. These correspond to situations where the computed sum of efficiencies is zero, i.e. when counterbalancing positive effects to the expected detrimental effects on consumers are non-existent. They have been found in 6 cases in our survey, all corresponding to preferential/exclusive agreements with a domestic partner. The table below details those cases where no production or consumer-side efficiencies were reported.

Table 91 – Preferential agreements: cases with no reported efficiencies

Provider of combined product	Country	Gateway product	Combined product	Nbr of cases
Preferential agreement with partner institution -Domestic only-	Italy	Consumer loan	Payment protection insurance	1
		Debit card	Current account	1
		Mortgage loan	Life insurance	1
	Italy Total			3
	Latvia	Savings account	Bank deposits	1
	Latvia Total			1
	Slovenia	Credit card	Insurance on payment tools	1
		Debit card	Health/disability insurance	1
	Slovenia Total			2
	Total			6

Critical cases belong to three specific countries (Italy, Latvia and Slovenia) and to specific types of products' combinations:

- in Italy, for the combinations of consumer loan and payment protection insurance, debit card and current account, mortgage and life insurance;
- in Slovenia, for the combinations of credit card and insurance on payment tools, and debit card and health/disability insurance; and
- in Latvia, for the combination of saving account and bank deposits.

Even if the narrow number of cases does not allow for a clear-cut trend, two comments can be made. First, 3 cases out of 6 involve debit/credit cards as the gateway product in Slovenia and Italy. They are combined with insurances (insurance on payment tools and health/disability insurance) and a current

⁴⁷² In this case (i.e. domestic preferential agreements), risk reductions and cost savings have respectively being reported 19 and 10 times in our survey.

⁴⁷³ In this case (i.e. preferential agreements made with a foreign partner), risk reductions and cost savings have respectively being reported 7 and 11 times in our survey.

account. Second, in Italy, 2 other cases (out of 6), relate to loans as gateway products (consumer loan and mortgage). the combined product responding to a preferential agreement made with a domestic partner involve insurances providers (payment protection insurance and life insurance).

FINDING #6.9 –PREFERENTIAL/EXCLUSIVE AGREEMENTS

- Preferential agreements are widely negotiated with domestic partners (72.9% of all cases with preferential agreements).
- On average partnering with a foreign financial institution or group allows producing greater efficiencies.
- Although domestic preferential agreements are mainly providing consumer and/or production side efficiencies, 11% of domestic preferential agreements do not provide any efficiency. These have been reported in Italy (for the combinations of consumer loan and payment protection insurance, debit card and current account, mortgage and life insurance); in Slovenia, (for the combinations of credit card and insurance on payment tools, and debit card and health/disability insurance); and in Latvia (for the combination of saving account and bank deposits).

6.2.3.6 Customer impact test: results

The customer impact test allows us to draw a list of practices corresponding to the circumstances we defined as unfair. We first computed the overall customer impact scores, to find out if consumers faced more harm than benefit; second we observed whether a sizeable share of customers were deemed to be harmed by such practices. The fact that a practice involves a substantial share of the market is, of course, not a necessary condition for its unfairness; to the contrary, a practice can be unfair to a customer even if very rarely observed. However, assessing the extent to which a practice is widespread in a given national market will allow us to quantify the impact of the practice on customer mobility and cross-border trade, in Section 6.5. below.

The results presented above highlight three main findings.

- First, *there are recurrent combinations of products*, as shown in table 92. The findings reported in this Section and in table 92 focus only, for illustrative purposes, on the cases of mortgages, current account and consumer loans as gateway product. A full list of unfair practices, encompassing for all combinations reported, is available in Tables 95 and 96 below.

Table 92 – Unfair practices: combinations per main gateway product and country

Gateway Product	Combined product	Country
Mortgage	Insurances (business, fire, health/disability, home, motor and payment protection insurances)	Cyprus, Estonia, Finland, France, Italy, the Netherlands
	Current account and deposits	Slovenia, Slovakia
	Consumer loans	Finland
	Operation on foreign currencies	Cyprus
Current account	Investment services (dealing on own account, execution of orders on behalf of clients...)	Estonia
	Loans (consumer, corporate and mortgage loans)	Estonia
	Saving account	United Kingdom
	Credit card	Czech Republic
Consumer loan	Insurances (life, motor and payment protection insurances)	Cyprus, Estonia, Slovenia
	Accounts (current account, bank deposits and saving account)	Slovenia, Slovakia, United Kingdom
	Credit lines	Cyprus

- *Second, particular cross-selling practices tend to lead to unfairness in the cases illustrated.* More specifically, preferential rate or tariff for the gateway or combined product, bundling without advantage, and to a greater extent tying have been stressed in a majority of countries amongst the list of unfair practices. Findings for each type of gateway products presented in this Section are summarised in the table below.

Table 93 – Unfair practices: summary of cross-selling practices per main gateway product and country

Gateway Product	Cross-selling practice	Country
Mortgage	Tying	Cyprus, France, Hungary, Italy, Poland, the Netherlands, Slovakia
	Preferential rate or tariff for the gateway or combined product	Cyprus, Estonia, Finland, Slovenia
	Bundling without advantage	Estonia
Current account	Tying	Estonia, the Netherlands
	Bundling without advantage	Czech Republic
Consumer loan	Tying	Cyprus, Slovenia, Slovakia, United Kingdom
	Preferential rate or tariff for the gateway or combined product	Cyprus, Slovenia
	Bundling without advantage	Estonia

Note: The peculiar finding that preferential rate or tariff for the gateway or combined product can lead to unfairness have been presented in section 1.1.1.2. and in the case of cross-selling mortgage loans with bank deposits, presented in the preceding paragraph.

- Finally, a country pattern has emerged from the customer impact test, independent of the gateway product considered. According to the scenarios considered, three groups emerge.
 - In 18 countries unfair cross-selling practices have been found under scenario 1. This scenario is the most ‘restrictive’ as it considers only direct benefit for customers and excludes the additional indirect ones generated by production-side efficiencies passed-on to customers. Out of the 23 Member States present in our database, 18 proved the existence of unfair practices according to this first scenario (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Italy, Latvia, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands and United Kingdom).

- *In 12 countries unfair cross-selling practices have been found under scenario 2.* In this scenario we calculated also the potential production-side efficiencies that are likely to be passed-on downstream to end customers. Therefore, unfairness highlighted under this second scenario points at a subset of particularly unfair practices compared to scenario 1. Even in this more restrictive scenario, 12 countries still exhibited unfair practices (Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Latvia, Slovakia, Slovenia, The Netherlands and United Kingdom).
- *In 5 countries, no 'unfair' cross-selling practices were found.* These are Germany, Luxemburg, Portugal, Spain and Sweden. This is an interesting result, especially if compared to the results of our legal analysis in Section 4, as well as the results of the European Commission's sector inquiry on the retail financial services sector. As a matter of fact, these countries include countries where a ban on tying is in force (Portugal), countries where no specific provisions are in place (Germany, Spain, Sweden); and countries where even the UCPD has not been implemented yet (Luxembourg)⁴⁷⁴.

These groups of countries are summarised in the table and in the map below.

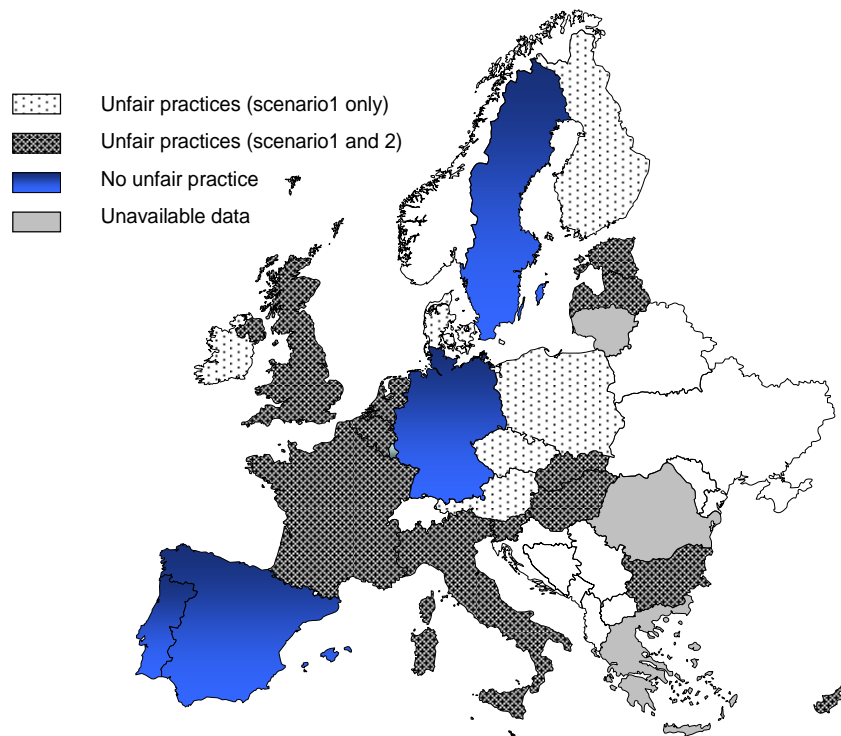
Table 94 – Unfair cross-selling practices per country

Country	Unfair practices under scenario 1	Unfair practices under scenario 2
Austria	X	
Belgium	X	X
Bulgaria	X	X
Cyprus	X	X
Czech Republic	X	
Denmark	X	
Estonia	X	X
Finland	X	
France	X	X
Germany		
Hungary	X	X
Ireland	X	
Italy	X	X
Latvia	X	X
Luxembourg		
Poland	X	
Portugal		
Slovakia	X	X
Slovenia	X	X
Spain		
Sweden		
The Netherlands	X	X
United Kingdom	X	X

NB: Results reported here are expressed on average per country.

⁴⁷⁴ In Section 4 above, we referred to these countries as Group 1, 2 and 3 countries.

Figure 41 – Map 2 Unfair cross-selling practices in EU Member States



Tables 95 and 96 below show the detailed results of our test based on scenarios 1 and 2.

Table 95 – List of unfair cross-selling practices found under both scenarios

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases
				Scenario 1	Scenario 2	
Austria	Consumer loan	Life insurance	Tied products	1.1	0.8	1
	Current account	Credit line / overdraft	Tied products	0.5	0.5	1
		Investment advice	Tied products	0.4	0.4	1
		Life insurance	Preferential tariff for hook product	0.4	0.4	1
		Portfolio management	Tied products	0.9	0.9	1
		Reception and transmission of orders	Bundled products with no (dis)advantage	0.4	0.4	1
	Execution of orders on behalf of clients	Current account	Tied products	0.4	0.1	1
	Mortgage loan	Home insurance	Tied products	0.9	0.2	1
	Portfolio management	Current account	Tied products	0.4	0.1	1
	Reception and transmission of orders	Current account	Tied products	0.4	0.1	1
		Portfolio management	Preferential tariff for hook product	0.8	0.5	1
	Savings account	Current account	Preferential tariff for combined product(s)	0.5	0.2	1
Reception and transmission of orders		Preferential rate for hook product	0.9	0.6	1	
Austria Total						13
Belgium	Life insurance	Term investment account	Bundled products with no (dis)advantage	0.3	0.3	1
	Mortgage loan	Payment protection insurance	Preferential rate for hook product	0.1	0.1	1
	Pension product	Investment advice	Combined product(s) free of charge	1.0	1.0	1
		Life insurance	Tied products	1.0	1.0	1
	Placing without firm commitment	Investment advice	Combined product(s) free of charge	0.3	0.3	1
		Life insurance	Bundled products with no (dis)advantage	0.3	0.3	1
		Savings account	Bundled products with no (dis)advantage	0.6	0.6	1
	Portfolio management	Bank deposits	Tied products	0.6	0.6	1
		Current account	Tied products	0.4	0.4	2
		Execution of orders on behalf of clients	Tied products	0.8	0.8	1
		Investment advice	Combined product(s) free of charge	0.8	0.8	1
		Life insurance	Bundled products with no (dis)advantage	0.8	0.8	1
		Savings account	Bundled products with no (dis)advantage	0.6	0.6	1
	Savings account	Investment advice	Combined product(s) free of charge	0.4	0.4	1
		Life insurance	Bundled products with no (dis)advantage	0.6	0.6	1
		Pension product	Bundled products with no (dis)advantage	0.6	0.6	1
		Term investment account	Investment advice	Combined product(s) free of charge	0.8	0.8
	Underwriting or placing with firm commitment	Life insurance	Bundled products with no (dis)advantage	1.0	1.0	1
		Savings account	Bundled products with no (dis)advantage	0.6	0.6	1
		Investment advice	Combined product(s) free of charge	0.8	0.8	1
		Life insurance	Bundled products with no (dis)advantage	0.8	0.8	1
		Savings account	Bundled products with no (dis)advantage	0.4	0.4	1
Belgium Total						23
Bulgaria	Placing without firm commitment	Reception and transmission of orders	Tied products	0.3	0.3	1
	Portfolio management	Execution of orders on behalf of clients	Tied products	1.0	1.0	1
	Reception and transmission of orders	Execution of orders on behalf of clients	Tied products	1.0	1.0	1
Bulgaria Total						3
Cyprus	Consumer loan	Life insurance	Bundled products with no (dis)advantage	0.6	0.6	1
			Tied products	0.6	0.6	1
		Payment protection insurance	Tied products	0.4	0.4	1
	Corporate banking loan	Life insurance	Tied products	0.8	0.8	1
	Credit card	Credit line / overdraft	Tied products	0.2	0.2	1
		Savings account	Tied products	0.2	0.2	1
	Credit line / overdraft	Payment protection insurance	Tied products	0.2	0.2	1
	Mortgage loan	Life insurance	Bundled products with no (dis)advantage	0.3	0.3	1
			Preferential rate for hook product	0.3	0.3	1
Cyprus Total						9

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases	
				Scenario 1	Scenario 2		
Czech Republic	Bank deposits	Dealing on own account	Preferential tariff for hook product	0.7	0.5	1	
		Debit card	Combined product(s) free of charge	0.5	0.5	1	
	Consumer loan	Current account	Preferential rate for hook product	1.2	1.2	1	
			Tied products	1.4	1.4	1	
		Motor insurance	Preferential tariff for combined product(s)	0.2	0.2	1	
		Payment protection insurance	Bundled products with no (dis)advantage	0.9	0.9	1	
	Corporate banking loan	Current account	Bundled products with no (dis)advantage	1.4	1.4	1	
	Credit card	Consumer loan	Preferential tariff for combined product(s)	0.7	0.7	2	
		Life insurance	Combined product(s) free of charge	0.9	0.9	1	
	Credit line / overdraft	Current account	Tied products	1.2	1.2	1	
	Current account	Consumer loan	Preferential tariff for combined product(s)	0.7	0.7	1	
		Credit card	Bundled products with no (dis)advantage	0.5	0.5	1	
				Combined product(s) free of charge	0.5	0.5	1
				Preferential tariff for hook product	0.5	0.5	1
		Credit line / overdraft	Preferential tariff for combined product(s)	0.5	0.5	2	
		Debit card	Preferential tariff for combined product(s)	0.5	0.5	2	
			Preferential tariff for hook product	0.5	0.5	2	
		Fund transfers	Preferential tariff for combined product(s)	0.5	0.5	1	
	Debit card	Current account	Tied products	1.2	1.2	1	
			Tied products	0.5	0.5	1	
		Health/disability insurance	Preferential tariff for combined product(s)	0.5	0.5	2	
		Insurance on payment tools	Bundled products with no (dis)advantage	0.5	0.5	1	
		Other non-life insurance	Bundled products with no (dis)advantage	0.5	0.5	2	
		Current account	Tied products	1.2	1.2	1	
	Health/disability insurance	Other non-life insurance	Bundled products with no (dis)advantage	0.5	0.5	1	
	Home insurance	Other non-life insurance	Preferential tariff for combined product(s)	0.5	0.5	1	
	Means of payment, excluding debit/credit	Current account	Tied products	1.2	1.2	1	
	Mortgage loan	Current account	Bundled products with no (dis)advantage	1.6	1.6	1	
				Preferential rate for hook product	0.9	0.9	1
				Preferential tariff for hook product	0.9	0.9	1
		Home insurance	Tied products	1.6	1.6	1	
		Life insurance	Preferential rate for hook product	2.0	2.0	1	
		Term investment account	Bundled products with no (dis)advantage	1.3	1.3	1	
	Other non-life insurance	Credit card	Tied products	1.2	1.2	1	
		Debit card	Tied products	1.2	1.2	1	
	Payment protection insurance	Consumer loan	Tied products	1.6	1.6	1	
	Portfolio management	Execution of orders on behalf of clients	Combined product(s) free of charge	1.3	1.3	1	
	Reception and transmission of orders	Current account	Tied products	1.6	1.6	1	
		Investment advice	Combined product(s) free of charge	1.3	1.3	1	
	Czech Republic Total						45
Denmark	Current account	Credit card	Combined product(s) free of charge	0.5	0.5	1	
		Credit line / overdraft	Bundled products with no (dis)advantage	0.5	0.5	1	
		Home insurance	Bundled products with no (dis)advantage	0.5	0.5	1	
				Preferential tariff for combined product(s)	0.5	0.5	1
		Mortgage loan	Preferential tariff for combined product(s)	0.9	0.9	1	
		Pension product	Bundled products with no (dis)advantage	0.9	0.9	1	
		Savings account	Bundled products with no (dis)advantage	0.5	0.5	1	
	Home insurance	Motor insurance	Preferential tariff for hook product	0.5	0.5	1	
	Investment advice	Bank deposits	Preferential tariff for hook product	0.9	0.9	1	
	Mortgage loan	Consumer loan	Bundled products with no (dis)advantage	0.6	0.6	1	
		Current account	Bundled products with no (dis)advantage	0.4	0.4	1	
			Tied products	0.9	0.9	1	
		Home insurance	Bundled products with no (dis)advantage	0.4	0.4	1	
	Motor insurance	Home insurance	Preferential tariff for hook product	0.5	0.5	1	
	Pension product	Current account	Bundled products with no (dis)advantage	0.9	0.9	1	
		Savings account	Bundled products with no (dis)advantage	0.9	0.9	1	
	Portfolio management	Bank deposits	Preferential tariff for hook product	0.9	0.9	1	
	Savings account	Dealing on own account	Bundled products with no (dis)advantage	0.7	0.7	1	
		Investment advice	Bundled products with no (dis)advantage	0.9	0.9	1	
		Reception and transmission of orders	Bundled products with no (dis)advantage	0.9	0.9	1	
Denmark Total						20	

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases
				Scenario 1	Scenario 2	
Estonia	Consumer loan	Motor insurance	Bundled products with no (dis)advantage	0.4	0.4	1
	Corporate banking loan	Business/commercial insurance	Bundled products with no (dis)advantage	0.4	0.4	1
	Current account	Consumer loan	Tied products	0.2	0.2	1
		Corporate banking loan	Tied products	0.2	0.2	1
		Dealing on own account	Tied products	0.2	0.2	1
		Execution of orders on behalf of clients	Tied products	0.4	0.4	1
		Mortgage loan	Tied products	0.4	0.4	1
		Placing without firm commitment	Tied products	0.4	0.4	1
		Portfolio management	Tied products	0.4	0.4	1
		Reception and transmission of orders	Tied products	0.4	0.4	1
		Term investment account	Tied products	0.4	0.4	1
		Underwriting or placing with firm commitment	Tied products	0.2	0.2	1
	Mortgage loan	Home insurance	Bundled products with no (dis)advantage	0.6	0.6	1
		Life insurance	Bundled products with no (dis)advantage	0.3	0.3	1
			Preferential rate for hook product	0.3	0.3	1
	Underwriting or placing with firm commitment	Life insurance	Bundled products with no (dis)advantage	0.6	0.6	1
Estonia Total						16
Finland	Consumer loan	Motor insurance	Preferential tariff for combined product(s)	0.2	0.2	1
	Portfolio management	Consumer loan	Preferential rate for hook product	0.1	0.1	1
Finland Total						2
France	Consumer loan	Payment protection insurance	Tied products	1.6	1.6	1
	Credit card	Other non-life insurance	Tied products	0.7	0.7	1
	Health/disability insurance	Payment protection insurance	Tied products	0.9	0.9	1
	Life insurance	Portfolio management	Tied products	0.8	0.1	1
	Mortgage loan	Other non-life insurance	Preferential tariff for combined product(s)	0.9	0.7	1
		Payment protection insurance	Tied products	1.3	1.0	1
	Motor insurance	Home insurance	Tied products	1.2	1.2	1
	Savings account	Motor insurance	Preferential tariff for combined product(s)	0.5	0.5	1
France Total						8
Germany	Consumer loan	Payment protection insurance	Bundled products with no (dis)advantage	0.4	0.4	1
	Mortgage loan	Life insurance	Bundled products with no (dis)advantage	0.8	0.8	1
Germany Total						2
Hungary	Current account	Debit card	Combined product(s) free of charge	0.5	0.5	1
		Life insurance	Bundled products with no (dis)advantage	0.9	0.9	1
		Other non-life insurance	Preferential tariff for combined product(s)	0.5	0.5	1
	Debit card	Other non-life insurance	Tied products	0.5	0.5	1
		Current account	Preferential tariff for combined product(s)	0.9	0.9	1
		Term investment account	Bundled products with no (dis)advantage	2.0	2.0	1
	Mortgage loan		Tied products	1.3	1.3	1
		Current account	Tied products	1.6	1.6	1
		Life insurance	Tied products	2.0	2.0	2
		Payment protection insurance	Tied products	1.8	1.8	1
	Motor insurance	Motor insurance	Preferential tariff for combined product(s)	0.5	0.5	1
	Pension product	Debit card	Tied products	0.9	0.9	1
	Savings account	Current account	Tied products	1.2	1.2	1
Hungary Total						14
Ireland	Investment advice	Execution of orders on behalf of clients	Bundled products with no (dis)advantage	0.5	0.5	1
		Pension product	Bundled products with no (dis)advantage	0.3	0.3	1
	Life insurance	Mortgage loan	Bundled products with no (dis)advantage	0.3	0.3	1
	Pension product	Investment advice	Bundled products with no (dis)advantage	0.3	0.1	1
Ireland Total						4

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases	
				Scenario 1	Scenario 2		
Italy	Bank deposits	Current account	Tied products	1.2	1.2	1	
	Consumer loan	Current account	Tied products	1.4	1.4	2	
		Health/disability insurance	Bundled products with no (dis)advantage	0.7	0.7	2	
		Payment protection insurance	Tied products	1.6	1.6	1	
		Credit card	Current account	Tied products	1.2	1.2	2
			Tied products	0.5	0.5	1	
	Other non-life insurance		Bundled products with no (dis)advantage	1.0	1.0	1	
			Preferential rate for hook product	0.5	0.5	1	
	Credit line / overdraft	Current account	Tied products	1.2	1.2	1	
	Current account	Health/disability insurance	Bundled products with no (dis)advantage	1.0	1.0	1	
			Preferential rate for hook product	0.5	0.5	1	
	Debit card	Current account	Tied products	1.2	1.2	3	
	Execution of orders on behalf of clients	Current account	Tied products	0.9	0.9	1	
	Fire insurance	Business/commercial insurance	Bundled products with no (dis)advantage	0.5	0.5	1	
	Fund transfers	Current account	Tied products	0.5	0.5	1	
	Health/disability insurance	Other non-life insurance	Bundled products with no (dis)advantage	0.5	0.5	1	
	Home insurance	Fire insurance	Bundled products with no (dis)advantage	0.5	0.5	1	
	Life insurance	Current account	Tied products	1.6	1.6	1	
		Health/disability insurance	Bundled products with no (dis)advantage	0.9	0.9	2	
	Means of payment, excluding debit/credit	Current account	Tied products	1.2	1.2	1	
	Mortgage loan	Current account	Tied products	1.6	1.6	2	
				Tied products	0.9	0.9	1
			Fire insurance	Bundled products with no (dis)advantage	0.9	0.9	1
				Tied products	1.6	1.6	1
				Tied products	0.9	0.9	1
		Home insurance	Tied products	1.6	1.6	1	
			Life insurance	Bundled products with no (dis)advantage	1.3	1.3	1
					Preferential tariff for combined product(s)	1.3	1.3
				Tied products	2.0	2.0	2
			Tied products	1.3	1.3	1	
		Motor insurance	Other non-life insurance	Bundled products with no (dis)advantage	0.5	0.5	1
				Preferential tariff for combined product(s)	0.5	0.5	1
	Pension product	Life insurance	Bundled products with no (dis)advantage	1.3	1.3	1	
	Placing without firm commitment	Current account	Tied products	0.9	0.9	1	
	Portfolio management	Current account	Tied products	0.9	0.9	1	
	Reception and transmission of orders	Current account	Tied products	0.9	0.9	1	
	Term investment account	Current account	Tied products	1.6	1.6	1	
	Italy Total						45
Latvia	Credit card	Credit line / overdraft	Bundled products with no (dis)advantage	0.2	0.2	1	
	Mortgage loan	Life insurance	Preferential rate for hook product	0.3	0.3	1	
	Savings account	Bank deposits	Tied products	0.2	0.2	1	
		Portfolio management	Combined product(s) free of charge	0.6	0.6	1	
Latvia Total						4	
Luxembourg	Life insurance	Health/disability insurance	Combined product(s) free of charge	0.4	0.4	2	
		Investment advice	Combined product(s) free of charge	0.8	0.8	1	
		Placing without firm commitment	Combined product(s) free of charge	0.8	0.8	1	
		Portfolio management	Combined product(s) free of charge	0.8	0.8	1	
	Pension product	Health/disability insurance	Combined product(s) free of charge	0.4	0.4	1	
		Life insurance	Combined product(s) free of charge	0.8	0.8	1	
Luxembourg Total						7	

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases	
				Scenario 1	Scenario 2		
Poland	Consumer loan	Credit card	Tied products	0.2	0.2	2	
		Health/disability insurance	Preferential tariff for combined product(s)	0.2	0.2	1	
		Life insurance	Preferential tariff for combined product(s)	0.6	0.6	1	
		Motor insurance	Bundled products with no (dis)advantage	0.4	0.4	1	
		Other non-life insurance	Preferential tariff for combined product(s)	0.2	0.2	1	
		Payment protection insurance	Bundled products with no (dis)advantage	0.4	0.4	1	
	Credit card		Tied products	0.6	0.6	1	
		Other non-life insurance	Tied products	0.2	0.2	1	
		Payment protection insurance	Tied products	0.4	0.4	1	
	Current account	Credit card	Tied products	0.2	0.2	1	
		Credit line / overdraft	Tied products	0.2	0.2	1	
		Debit card	Tied products	0.2	0.2	1	
		Investment advice	Tied products	0.1	0.1	1	
	Debit card	Insurance on payment tools	Tied products	0.2	0.2	1	
	Health/disability insurance	Other non-life insurance	Tied products	0.2	0.2	1	
	Life insurance	Portfolio management	Preferential rate for combined product(s)	0.3	0.3	1	
		Reception and transmission of orders	Preferential rate for combined product(s)	0.8	0.8	1	
		Savings account	Bundled products with no (dis)advantage	0.6	0.6	1	
		Term investment account	Bundled products with no (dis)advantage	0.8	0.8	1	
	Mortgage loan	Credit card	Preferential tariff for combined product(s)	0.4	0.4	1	
		Current account	Tied products	0.6	0.6	1	
				Tied products	0.1	0.1	2
		Home insurance	Preferential rate for hook product	0.6	0.6	1	
			Tied products	0.6	0.6	1	
		Life insurance	Tied products	1.0	1.0	2	
				Tied products	0.5	0.5	1
				Tied products	0.3	0.3	1
		Payment protection insurance	Bundled products with no (dis)advantage	0.1	0.1	1	
				Tied products	0.8	0.8	2
			Tied products	0.1	0.1	1	
Motor insurance	Home insurance	Tied products	0.2	0.2	1		
Savings account	Term investment account	Bundled products with no (dis)advantage	0.4	0.4	1		
Poland Total						36	
Portugal	Consumer loan	Health/disability insurance	Preferential tariff for hook product	0.2	0.2	1	
		Life insurance	Preferential tariff for hook product	0.6	0.6	1	
		Motor insurance	Tied products	0.9	0.9	1	
		Other non-life insurance	Preferential tariff for hook product	0.2	0.2	1	
		Payment protection insurance	Preferential tariff for hook product	0.4	0.4	1	
	Credit card	Life insurance	Combined product(s) free of charge	0.4	0.4	1	
	Mortgage loan	Current account	Tied products	0.6	0.6	1	
		Fire insurance	Tied products	1.1	1.1	1	
		Health/disability insurance	Preferential tariff for hook product	0.4	0.4	1	
		Home insurance	Preferential tariff for hook product	0.4	0.4	1	
		Life insurance	Preferential tariff for hook product	0.8	0.8	1	
			Preferential tariff for hook product	0.3	0.3	1	
		Other non-life insurance	Preferential tariff for hook product	0.4	0.4	1	
		Payment protection insurance	Preferential tariff for hook product	0.6	0.6	1	
			Preferential tariff for hook product	0.1	0.1	1	
Portugal Total						15	
Slovakia	Consumer loan	Current account	Tied products	1.4	1.4	1	
	Mortgage loan	Current account	Tied products	1.6	1.6	1	
Slovakia Total						2	
Slovenia	Consumer loan	Bank deposits	Preferential tariff for hook product	0.2	0.2	1	
	Credit card	Health/disability insurance	Tied products	0.2	0.2	1	
	Current account	Health/disability insurance	Tied products	0.2	0.2	1	
	Debit card	Current account	Tied products	0.2	0.2	1	
		Health/disability insurance	Tied products	0.2	0.2	1	
	Life insurance	Payment protection insurance	Bundled products with no (dis)advantage	0.1	0.1	1	
	Mortgage loan	Bank deposits	Preferential tariff for hook product	0.4	0.4	1	
		Life insurance	Bundled products with no (dis)advantage	0.3	0.3	1	
			Preferential tariff for hook product	0.3	0.1	1	
	Savings account	Current account	Tied products	0.2	0.2	1	
Slovenia Total						10	

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases	
				Scenario 1	Scenario 2		
Spain	Mortgage loan	Life insurance	Preferential rate for hook product	0.3	0.1	1	
		Pension product	Preferential rate for hook product	0.3	0.3	1	
Spain Total						2	
Sweden	Mortgage loan	Payment protection insurance	Preferential rate for combined product(s)	0.6	0.6	1	
Sweden Total						1	
The Netherlands	Corporate banking loan	Business/commercial insurance	Tied products	0.4	0.4	1	
		Current account	Tied products	0.4	0.4	1	
		Health/disability insurance	Tied products	0.4	0.4	1	
		Life insurance	Tied products	0.8	0.8	1	
		Motor insurance	Tied products	0.4	0.4	1	
		Pension product	Tied products	0.8	0.8	1	
	Mortgage loan	Business/commercial insurance	Tied products	0.6	0.6	1	
		Current account	Tied products	0.6	0.6	1	
		Fire insurance	Tied products	0.6	0.6	1	
		Health/disability insurance	Tied products	0.6	0.6	1	
		Life insurance	Tied products	1.0	1.0	1	
		Motor insurance	Tied products	0.6	0.6	1	
		The Netherlands Total					12
		United Kingdom	Consumer loan	Savings account	Tied products	0.4	0.4
Current account	Savings account		Tied products	0.2	0.2	1	
Debit card	Savings account		Tied products	0.2	0.2	1	
Investment advice	Investment advice		Tied products	0.3	0.3	1	
	Life insurance		Tied products	0.3	0.3	2	
	Pension product		Tied products	0.3	0.3	1	
United Kingdom Total					7		
Total of unfair cases in the EU-27						300	
Total average of Scenario 1						0.69	
Total average of Scenario 2						0.67	

Table 96 – Unfair cross-selling practices found in scenario 1 but not in scenario 2

Country	Gateway product	Combined product	Cross-selling practice	Consumer score		Nbr of cases
				Scenario 1	Scenario 2	
Cyprus	Mortgage loan	Fire insurance	Tied products	0.1	-0.2	1
		Home insurance	Tied products	0.1	-0.2	1
		Operations on foreign currencies	Tied products	0.1	-0.2	1
Cyprus Total						3
Finland	Investment advice	Pension product	Preferential tariff for hook product	0.3	-0.03	1
		Reception and transmission of orders	Preferential tariff for combined product(s)	0.3	-0.03	1
	Mortgage loan	Consumer loan	Preferential tariff for combined product(s)	0.1	-0.2	1
		Payment protection insurance	Preferential tariff for combined product(s)	0.1	-0.2	1
	Pension product	Life insurance	Preferential tariff for combined product(s)	0.3	-0.4	2
		Portfolio management	Preferential tariff for combined product(s)	0.3	-0.03	1
		Term investment account	Bundled products with no (dis)advantage	0.3	-0.4	1
	Portfolio management	Pension product	Preferential tariff for hook product	0.3	-0.03	1
		Reception and transmission of orders	Preferential tariff for combined product(s)	0.3	-0.03	1
	Reception and transmission of orders	Term investment account	Preferential tariff for combined product(s)	0.3	-0.03	1
Finland Total						11
France	Home insurance	Other non-life insurance	Tied products	0.2	-0.1	1
France Total						1
Ireland	Life insurance	Mortgage loan	Bundled products with no (dis)advantage	0.5	-0.2	1
Ireland Total						1
Poland	Pension product	Life insurance				1
Poland Total						1
Slovenia	Consumer loan	Payment protection insurance	Tied products	0.1	-0.1	1
Slovenia Total						1
United Kingdom	Consumer loan	Life insurance	Combined product(s) free of charge	0.3	-0.2	1
	Savings account	Life insurance	Combined product(s) free of charge	0.1	-0.57	1
United Kingdom Total						2
Total of cases in the EU-27						20

FINDING #6.10 – RESULTS OF THE CUSTOMER IMPACT TEST

- Approximately 90% of the cross-selling practices involving mortgage loans as a gateway product were found to be unfair in our customer impact test. The most unfair practices involved term investment accounts, bank deposits and a variety of insurance products.
- When current accounts are the gateway product, the most unfair cross-selling practice is the combination with mortgage loans. In addition, cross-selling of current accounts proves unfair when the combined product is home insurance and consumer loans. Other cross-selling practices that prove particularly unfair are the combination of current accounts with various forms of investment advice, which may pave the way towards additional aggressive commercial practices such as unsolicited offers, churning and steering.
- Most of the cross-selling practices in which consumer loan is the gateway product tend to result in unfairness for consumers. Practices that are most unfair are the ones involving insurance products, including life insurance, PPI, health/disability insurance and motor insurance.
- As regards specific practices and countries, tying was found to be unfair in Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands, the United Kingdom and (under scenario 1 only) Austria); mixed bundling was found to lead to unfair outcomes in Austria, Belgium, Estonia, Latvia and (under scenario 1 only) the Czech Republic and Ireland. Unfair multi-product rebates are observable in Cyprus, Denmark, Estonia, Finland, Slovenia and (under scenario 1 only) Italy.

6.3 Testing for other potentially unfair practices

Section 6.2 above presented a general framework for the antitrust and the customer impact tests. The latter more specifically aimed at identifying cases of unfairness. However, the proposed assessment above only considered cross-selling practices. In parallel to the latter, other types of practices have been approached throughout this study. Indeed, the preceding Sections of this Report have presented an inventory of other potentially unfair practices, affecting both competition and consumer protection issues. More explicitly, two principal categories of other potentially unfair practices have been reviewed in light of the literature⁴⁷⁵:

- Conditional sales practices where the customer is required to undertake specific actions, which raise switching costs and decrease both customer mobility and/or the replicability of the practice; and
- Aggressive commercial practices that materially distort customer choice by imposing unsolicited purchases to less informed counterparts.

⁴⁷⁵ See Section 1.1.2.

The empirical analysis reported in Section 5 of this Report collected significant information on numerous practices, in addition to cross-selling. Such information can be processed by using adequate indicators, such as those which have been employed in our multi-stage test presented above⁴⁷⁶. Empirical evidence and indicators will help us investigating whether the existence of the two specific categories of practices can be justified by efficiencies. If not, then we might infer that the practices are strictly unfair.

Using available information, the existence of other potentially unfair practices can be appraised as follows⁴⁷⁷.

- Conditional sale of products and services
 - a. *Conditional access* are defined by those practices reported in our survey where the service provision is subject to a specific condition, such as an action undertaken by the customer. The expected restrictive effect on customer choice and mobility needs to be appraised by the possible counter-balancing efficiencies reported.
 - b. *Single-product (conditional and loyalty) rebates* have the effect of providing financial advantage to customers. These cover fee-free offers, lower fees or interest rates charged, higher remunerated interest rates, and refunds. Rebates can also be attributed under the condition of reaching a target threshold in quantity or in time (*conditional rebates*).
- *Aggressive commercial strategies* group three types of practice: unsolicited offers, churning, and steering.
 - a. *Unsolicited offers* are defined as products or services that have not been expressly requested by customers and involve a particular pressure on them to purchase that specific offer⁴⁷⁸. Within our database, several reasons have been reported and justify why consumers purchased the product considered. Amongst these reasons, the consideration for whether consumers have had ‘no choice’ would possibly inform us of unsolicited offers. However, if unsolicited offers could potentially lead to this outcome, we do not have enough broken down data explaining the reasons why consumers reported they have had no choice during the purchase. In fact many other reasons, besides unsolicited offers could motivate why consumers lacked of freedom of choice. The role for unsolicited offers cannot be clearly established and we therefore are not in the position to single out such practices upon the available evidence.
 - b. *Churning* has been defined as the excessive use of a product or a service by the financial service provider in order to generate extra commissions, without regard to the consumers’ financial objectives (also called *activism*). To assess it, the excessive trading requested or the inclusion of

⁴⁷⁶ See Section 5.2 and Annex 2.

⁴⁷⁷ Other potentially unfair practices are defined and their expected positive and negative effects reviewed in Section 2.2.3.2.

⁴⁷⁸ See Section 2.2.2.1.1.

unnecessary services (in size and frequency) should be considered. As churning may potentially affect the suitability of customers' decision, as well as restrict their freedom of choice, justifications should be carefully considered. To help identify such practices, in our database, we have focused on non-financial products which are sometimes included *de facto* during the purchase. We justify this assumption by the following: in the context of the relevant market studied here (i.e. financial services), customers reveal their 'first best' choice by the initial request of purchasing a given financial service. Other non-financial products (such as bonus points on airplane flights, or an alarm protection) repeatedly included in the initial purchase diverge from the optimal choice expressed by consumers. Hence, given the absence of complementarity between the ranges of products, non-financial services included may not necessarily match consumers' preferences and distort their actual choice. However, consumers may also obtain an additional degree of utility from the consumption of an incremental unit of good, given that it is for free, and regardless of its nature or usage. In contrast, providers may rather be incentivised to distribute such services, according to the underlying terms of agreements between the financial institution and non-financial partner (e.g. possible commission or extra remuneration per service sold). Those cases constitute candidates for churning practices; and both consumer and production-side efficiencies should be carefully considered to justify their existence.

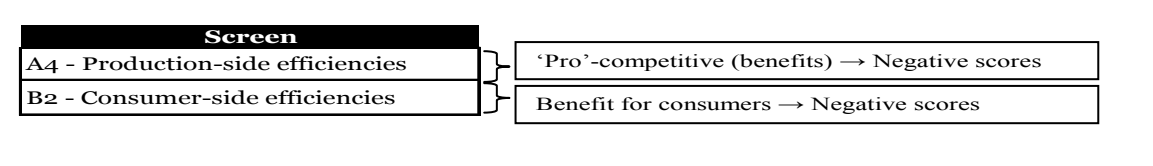
- c. *Steering* refers to practices, especially used in mortgages and loans market, consisting of stressing the credit risk of a potential borrower to steer him /her to a higher cost loan. It can be seen as an intentional misjudgement of the individual's risk by the financial intermediary to extract a rent in a specific period. It may consist of imposing specific requirements, additional fees or increased interest rates. To investigate their existence, the specific focus and examination upon mortgage, consumer and corporate banking loans would have been opportune. However, we cannot pursue such analysis given that the related information on conditioning and other practices is not provided. We dispose in fact of information relating to the pricing of offers, but these only concerns financial advantages (such as rebates). Respondents have not delivered information characterising to what extent 'worse' conditions can be imposed on consumers. In particular, the limited response received from consumer associations makes it difficult to appraise these practices in our analysis, as these practices are unlikely to be reported by financial services providers, and are on the contrary typically reported by consumers. In addition, we are not in the position for observing directly their dynamics across time and conclude if specific requirements or prices have been raised on purposes. For this reason, we unfortunately decided not to perform an examination of steering practices.

The other potentially unfair practices introduced above may lead to detrimental effects for consumers, such as a restriction in freedom of choice and mobility. Such negative expected outcomes should be counter-balanced by the careful consideration of potential efficiencies⁴⁷⁹. In order to analyse other potentially unfair practices, we will make use of two indicators which are identical to those presented in the multi-stage test methodology. Moreover, we will also rely on additional data related to the effects induced by conditioning and other practices, and expressed by respondents of the survey. The expected efficiencies from other potentially unfair practices will signal the magnitude of positive counter-balancing effects to expected consumer harm. We suggest employing two types of efficiencies, already introduced and used to assess cross-selling practices: production and consumer side efficiencies. Production-side efficiencies (also referred as ‘*Screen A4*’) consist of advantages reported by suppliers in our survey and have been used in the antitrust scrutiny⁴⁸⁰. Consumer-side efficiencies (also referred previously as ‘*Screen B2*’) consist of direct benefits for consumers and have been used in the customer impact test⁴⁸¹. They have been suggested as reported reasons advantaging customers⁴⁸².

Like in the test developed for cross-selling practices (see Sections 6.1 and 6.2 above), the two screens considered here have been subject to an individual assessment that yielded scores. Every single normalised score can be aggregated, providing one global index that represents the overall positive counter-balancing effects to expected unfairness. The greater the efficiencies, the most likely would the potentially unfair practice be counter-balanced.

The figure below synthesises the use of individual screens, which in this case provide with efficiencies, and are therefore associated with negative scores:

Figure 42 – Testing for other potentially unfair practices: screens and outcomes



⁴⁷⁹ See Sections 2.2.3.2 and 2.2.3.3 of this Report.

⁴⁸⁰ They entail the following reasons: technical reasons, cost efficiency, and risk reduction. The full description of production-side efficiencies is detailed in Annex 14 (“Screen 2a Antitrust test”).

⁴⁸¹ In the specific case, and unlike the methodology proposed for cross-selling practices (presented in Section 5.2 and in Annex 14 of this Report), we deliberately left out consumer’s indirect benefits in our assessment of other potentially unfair practices. We did so in order to avoid a problem of multi-collinearity: the direct benefits are of two kinds: (i) production-side efficiencies; and (ii) customer-side efficiencies. Adding up indirect benefits means considering the portion of production-side efficiencies assed on consumers, and this information is already contained in the first variable. Such problem did not occur in the assessment of cross-selling practices, as production-side efficiencies have been used ‘separately’ in the antitrust test, whereas customer-side efficiencies along with the portion of production-side efficiencies have been used together in the customer impact test (scenario 2).

⁴⁸² They entail the following reasons: convenience and financial advantage. The full description of customer-side efficiencies is detailed in Annex 14 (“Screen 2b Customer impact test”).

The evaluation of counter-balancing efficiencies for other potentially unfair practices is represented by the following formula:

$$Efficiencies = Score_{A4}(production - side efficiencies) + Score_{B2}(customer - side efficiencies)$$

The overall sum outcomes necessarily in zero or a negative global figure, given that its components are defined by efficiencies and therefore negative scores. Hence, the more negative is the overall score, the more sizeable are efficiencies. Likewise, the overall sum may end up being zero. This specific case would arise when no efficiencies whatsoever have been reported in the survey. This overall score is essential for our analysis. It provides the crucial information that, absent any exogenous factors or conditions in the market, some practices can be singled out in the specific case where the overall sum is zero: there is evidence that no efficiencies prevail and counter-balance the expected detrimental effects on consumers.

6.3.1 Conditional sale of products and services

6.3.1.1 Conditional access

Practices where the service provision is subject to a specific condition, such as an action undertaken by the customer, can generate both harm and efficiencies. On the one hand, from the standpoint of consumer policy, this practice creates concerns to the extent that it forces customers to undertake specific actions in order to access a given service. At the same time, such a practice can create supply-side efficiencies related to better risk management. The extent to which these efficiencies could be converted into better contractual conditions for the customer depends on the competitiveness of the markets involved, as well as on the degree of customer lock-in⁴⁸³.

In order to assess whether conditioning the access to a service may end up providing benefits for customers, we derive overall scores (for each practice), by combining individual ones for customer- and production-side efficiencies ('Screen B2' and 'Screen A4'). Their definitions and respective score allocation is detailed in Annex 14 of this Report. The score computation of production and customer-side efficiencies, for all reported practices having the effect of obliging customers to undertake a specific action in order to access the product or the service, is provided in the table below.

⁴⁸³ The principal reported effects of other conditioning practices, as voiced by the respondents of our survey, have been presented in the Section related to the empirical analysis; see Section 5.4.3.

Table 97 – Conditioning access: production and customer-side efficiencies

Practice	Product affected by the practice	Obligation	Country	A4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Condition to access	Investment advice	Minimum time period to access other product	Ireland	0.00	0.00	0.00	1	1%
	Credit card	Loyalty programs and product upgrades	Cyprus	0.00	0.00	0.00	1	1%
		Minimum time period to access other product	Belgium	-0.33	0.00	-0.33	1	1%
		Salary paid into account	Estonia	0.00	0.00	0.00	1	1%
			Slovenia	-0.33	-0.50	-0.83	1	1%
	Underwriting or placing with firm commitment	One-off fee	Estonia	-0.33	0.00	-0.33	1	1%
	Payment protection insurance	Minimum time period	Belgium	-0.33	0.00	-0.33	1	1%
	Motor insurance	Minimum time period	Belgium	-0.33	0.00	-0.33	1	1%
	Credit Line/Overdraft	Obligation to provide loan guarantees	Cyprus	-0.33	0.00	-0.33	1	1%
	Current account	minimum income in first period	Hungary	0.00	0.00	0.00	1	1%
		Minimum initial deposit amount	Czech Republic	0.00	0.00	0.00	1	1%
		Minimum time period	Belgium	-0.33	0.00	-0.33	1	1%
		Minimum time period to access other product	Belgium	-0.33	0.00	-0.33	1	1%
			Cyprus	-0.33	0.00	-0.33	1	1%
			Finland	-0.33	0.00	-0.33	1	1%
			Ireland	-0.33	0.00	-0.33	1	1%
		Repayment of loan through automated direct debit	Cyprus	-0.33	0.00	-0.33	1	1%
		Salary paid into account	Czech Republic	0.00	0.00	0.00	1	1%
			Denmark	0.00	0.00	0.00	1	1%
			Slovenia	-0.67	-1.00	-1.67	1	1%
		Variable fee depending on usage	Hungary	-0.33	0.00	-0.33	1	1%
	Health/disability insurance	Minimum time period	Belgium	-0.33	0.00	-0.33	2	2%
	Credit line / overdraft	Minimum balance on account	Poland	-0.33	0.00	-0.33	1	1%
		Repayment of loan through automated direct debit	Belgium	-0.33	0.00	-0.33	1	1%
		Salary paid into account	Cyprus	0.00	0.00	0.00	1	1%
			Estonia	-0.33	0.00	-0.33	1	1%
			Italy	-0.33	0.00	-0.33	1	1%
			Latvia	-0.33	-0.50	-0.83	1	1%
	Savings account	Minimum initial deposit amount	Portugal	-0.33	-0.50	-0.83	1	1%
			United Kingdom	0.00	0.00	0.00	1	1%
		Restricted access to residents	United Kingdom	-0.33	0.00	-0.33	2	2%
	Life insurance	Minimum initial deposit amount	Luxembourg	-0.67	-0.50	-1.17	1	1%
		Minimum time period	Belgium	-0.33	0.00	-0.33	1	1%
		Restricted access to residents	Belgium	0.00	0.00	0.00	1	1%

Practice	Product affected by the practice	Obligation	Country	A4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Condition to access	Consumer loan	Loyalty programs and product upgrades	Cyprus	0.00	0.00	0.00	1	1%
		minimum income in first period	Belgium	-0.33	0.00	-0.33	1	1%
		Minimum initial deposit amount	Belgium	-0.67	-0.50	-1.17	1	1%
		Obligation to provide loan guarantees	Belgium	-0.44	-0.33	-0.78	3	4%
			Italy	-0.33	0.00	-0.33	1	1%
		Repayment of loan through automated direct debit	Belgium	-0.67	-1.00	-1.67	1	1%
		Salary paid into account	Cyprus	-0.33	0.00	-0.33	1	1%
			Estonia	0.00	0.00	0.00	1	1%
			Finland	-0.33	0.00	-0.33	1	1%
			Ireland	-0.33	0.00	-0.33	1	1%
			Italy	-0.17	0.00	-0.17	2	2%
			Latvia	-0.33	-0.50	-0.83	1	1%
	Portfolio management	Minimum initial deposit amount	Belgium	-0.33	0.00	-0.33	1	1%
			Poland	-0.33	-0.50	-0.83	1	1%
	Mortgage loan	Loyalty programs and product upgrades	Denmark	-0.33	-1.00	-1.33	1	1%
		minimum income in first period	Belgium	-0.33	0.00	-0.33	1	1%
			Denmark	-0.67	0.00	-0.67	1	1%
		Minimum initial deposit amount	Denmark	-0.67	0.00	-0.67	1	1%
		Obligation to provide loan guarantees	Belgium	-0.33	0.00	-0.33	1	1%
			Cyprus	0.00	-0.50	-0.50	2	2%
			Italy	-0.33	0.00	-0.33	1	1%
		Repayment of loan through automated direct debit	Cyprus	0.00	-0.50	-0.50	2	2%
			Poland	-0.67	-0.50	-1.17	1	1%
			Slovenia	-0.67	-0.50	-1.17	1	1%
			Salary paid into account	Belgium	-0.67	0.00	-0.67	1
		Estonia		-0.33	-0.50	-0.83	1	1%
		Hungary		-0.33	0.00	-0.33	1	1%
		Italy		0.00	0.00	0.00	1	1%
		Latvia		-0.33	-0.50	-0.83	1	1%
		Poland		-0.67	-0.50	-1.17	1	1%
	Pension product	Minimum initial deposit amount	Finland	-0.67	-1.00	-1.67	1	1%
		Obligation to select an option for pay out	Ireland	0.00	-0.50	-0.50	1	1%
		Restricted access to residents	Belgium	0.00	0.00	0.00	1	1%
	Debit card	Salary paid into account	Slovenia	-0.33	-0.50	-0.83	1	1%
	Bank deposits	Automatic periodical transfer to savings account	Cyprus	-0.67	-1.00	-1.67	1	1%
		Minimum balance on account	Cyprus	-0.67	-1.00	-1.67	1	1%
		Minimum initial deposit amount	Cyprus	-0.67	-1.00	-1.67	1	1%
			Poland	-0.33	0.00	-0.33	1	1%
		Minimum time period	Cyprus	-0.67	-1.00	-1.67	1	1%
		Obligation to provide loan guarantees	Cyprus	-0.67	-1.00	-1.67	1	1%
		One-off fee for early closure	Cyprus	-0.67	-1.00	-1.67	1	1%
		Repayment of loan through automated direct debit	Cyprus	-0.67	-1.00	-1.67	1	1%
		Salary paid into account	Cyprus	-0.67	-1.00	-1.67	1	1%
		Total number of cases				-0.33	-0.26	-0.60

6.3.1.1.1 Overall scores

Throughout the overall database of conditioning practices, conditional access practices compose slightly more than 50% (84 practices out of the sample composed of 159 total cases). On average, such practices tend to provide the target groups of consumers and producers with efficiencies, given that the average of all efficiencies (producer-side and customer-side altogether) accounts for -0.60. Furthermore, it seems that producers extract a greater amount of efficiencies than customers (respectively -0.33 and -0.26 for the whole sample of practices studied). More specifically, the absence of customer-side efficiencies (24 cases in the table above) has been more frequently encountered than the absence of production-side efficiencies.

When considering more specifically those obligations that do not provide customers with any kind of efficiencies (reported 0 in the table above), it appears that all categories of financial products (*i.e.*, banking, insurance and investment) are affected. In the banking segment current accounts, bank deposits and savings accounts are particularly concerned and are associated to repeated types of obligations requiring consumer to withhold a certain amount of money (minimum initial deposit), during a threshold period of time (minimum income in first period, minimum time period, and minimum time period to access other products). Other banking products necessitating obligations that do not provide any consumer efficiencies concern loans (loyalty programs, minimum income withheld in the first period and minimum initial deposit amount, conditioning the access to mortgage and consumer loans), credit card (loyalty programs and product upgrades) and overdraft (obligation to provide with loan guarantees). Obligations imposed on insurance products (payment protection insurance, motor insurance, health/disability insurance, life insurance and pension products) relate exclusively to contracting for a minimum time period.

8 cases provide with no production-side efficiencies and concerns restricted access to banking products, such as credit card, current account and consumer loan, one insurance product (life insurance), and one investment service (investment advice).

Cases where no efficiencies (whether originating from consumers' or producers' side) have been reported by respondents of our survey are particularly critical and require a more in-depth attention. The table below reports those critical cases.

Table 98 – Conditional access: cases with no efficiencies

Practice	Product affected by the practice	Obligation	Country	A4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Condition to access	Savings account	Minimum initial deposit amount	United Kingdom	0	0	0	1	7%
	Consumer loan	Loyalty programs and product upgrades	Cyprus	0	0	0	1	7%
		Salary paid into account	Estonia	0	0	0	1	7%
			Italy	0	0	0	1	7%
	Credit card	Loyalty programs and product upgrades	Cyprus	0	0	0	1	7%
		Salary paid into account	Estonia	0	0	0	1	7%
	Credit line / overdraft	Salary paid into account	Cyprus	0	0	0	1	7%
	Current account	Minimum income in first period	Hungary	0	0	0	1	7%
		Minimum initial deposit amount	Czech Republic	0	0	0	1	7%
		Salary paid into account	Czech Republic	0	0	0	1	7%
			Denmark	0	0	0	1	7%
	Investment advice	Minimum time period to access other product	Ireland	0	0	0	1	7%
	Life insurance	Restricted access to residents	Belgium	0	0	0	1	7%
	Mortgage loan	Salary paid into account	Italy	0	0	0	1	7%
	Pension product	Restricted access to residents	Belgium	0	0	0	1	7%
Total number of cases				0	0	0	15	100%

Out of 84 cases of conditional access practices, 15 (i.e. 17%) provide no efficiencies at all. These are mostly related to banking products. More in detail:

- Requirements to have a salary paid into the account, withholding an initial amount or a minimum income during the first period have been imposed on the purchase of current and saving accounts in the United Kingdom, Estonia, Hungary, Czech Republic and Denmark.
- The conditional access to loans mortgage and consumer loans, credit card, and overdraft has been imposed in Cyprus and Italy.
- Conditional access in the insurance and investment sectors are found in two countries, Belgium and Ireland. In Belgium, evidence shows that imposing a restricted access to residents for the purchase of a life insurance and a pension product does not produce any efficiency. Likewise, in Ireland, the fact that consumers seeking an investment advice and bound to a minimum time period to access other products reportedly produces no efficiency.

FINDING #6.11 – CONDITIONAL ACCESS

Restrictions on access to products or services are imposed in all segments of financial services (banking, insurance and investment). However, they concern principally banking products (accounts, loans, credit card and overdraft); some insurance products (payment protection insurance, motor insurance, health/disability insurance; life insurance and pension product); and more exceptionally investment services (investment advice and underwriting with firm commitment). Such practices tend to provide consumers and producers with efficiencies, but producers extract a greater amount of efficiencies than consumers.

Critical cases can however be identified where no efficiency is generated for customers and producers, and conditioning the access to financial products and services may prove unfair, given the lack of counter-balancing effects provided by the absence of efficiencies. In our sample, 17% of the observed practices led to no efficiency and were observed in nine countries.

6.3.1.2 Conditional rebates

In our database of conditional sales practices, single-product rebates represent 46% (74 practices present rebates, out of the sample composed of 159 total cases). In our survey, single-product (conditional and loyalty) rebates have the effect of providing financial advantage to customers. These cover fee-free offers, lower fees or interest rates charged, higher remunerated interest rates, refunds, bonus points and other advantage. Rebates can also be attributed under the condition of reaching a target threshold in quantity or in time.

Previous Sections of this Report highlighted that single-product rebates may lead to both exclusionary and foreclosure effects (if enacted by dominant undertaking under specific conditions), as well as increased switching costs and lock-in effects for consumers. However, they may also lead to efficiencies, such as economies of scale and price-discrimination for producers, and direct benefits for consumers⁴⁸⁴. Therefore, we suggest examining the set of cases where rebates are offered, by considering whether efficiencies occur and in which intensity. In order to assess whether single-product rebates may benefit consumers, we derive scores for each practices, by combining those individual scores for consumer and production-side efficiencies (*Screen B2* and *Screen A4*). Their definitions and their respective score allocation is detailed in Annex 14 of this Report.

The table below lists practices characterised by the existence of rebates and their associated scores from production and consumer-efficiencies.

⁴⁸⁴ The review of expected effects on producers and consumers as provided by the theoretical literature has been approached in Section 2.2.3.2 above.

Table 99 – Conditional rebates: production and customer-side efficiencies

Product affected by the practice	Obligation	Country	A.4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Purchase of investment fund units	Lower fee charged	Poland	0.00	0.00	0.00	2	3%
	Higher interest rate	Poland	0.00	0.00	0.00	2	3%
Investment advice	No fee charged	Ireland	0.00	0.00	0.00	1	1%
Bank deposits	Higher interest rate above certain threshold	Poland	0.00	0.00	0.00	1	1%
		Belgium	0.00	-0.50	-0.50	1	1%
Credit Line/Overdraft	Other advantage	Cyprus	-0.33	0.00	-0.33	1	1%
Credit card	No fee charged	Poland	0.00	0.00	0.00	1	1%
	bonus points	Finland	0.00	0.00	0.00	1	1%
	Other advantage	Hungary	0.00	-0.50	-0.50	2	3%
		Germany	0.00	-0.50	-0.50	2	3%
	Lower fee charged	Poland	0.00	-0.50	-0.50	1	1%
Payment protection insurance	Lower interest rate	Poland	-0.33	0.00	-0.33	1	1%
	Other advantage	Ireland	0.00	-0.50	-0.50	1	1%
Motor insurance	Lower fee charged above certain threshold	Poland	0.00	0.00	0.00	1	1%
	Other advantage	France	0.00	-0.50	-0.50	1	1%
		Cyprus	0.00	-0.50	-0.50	1	1%
		Finland	0.00	-0.50	-0.50	1	1%
	Lower fee charged	Slovenia	0.00	-0.50	-0.50	1	1%
	No fee charged	Luxembourg	0.00	-0.50	-0.50	1	1%
		Estonia	-0.33	-0.50	-0.83	1	1%
Fire insurance	Lower fee charged	Slovenia	0.00	-0.50	-0.50	2	3%
Health/disability insurance	Lower fee charged	Slovenia	0.00	-0.50	-0.50	1	1%
home insurance	No fee charged	Luxembourg	0.00	-0.50	-0.50	1	1%
	Lower fee charged	Poland	0.00	-0.50	-0.50	1	1%
	Other advantage	Sweden	-0.33	-0.50	-0.83	1	1%
Consumer loan	Other advantage	Cyprus	-0.33	0.00	-0.33	2	3%
		Poland	-0.33	-0.50	-0.83	1	1%
	No fee charged	Italy	-0.33	-0.50	-0.83	1	1%
	Lower interest rate	Slovenia	0.00	0.00	0.00	1	1%
		Cyprus	-0.33	-0.50	-0.83	1	1%
		Finland	-0.67	-1.00	-1.67	1	1%
Savings account	Refund	Belgium	0.00	-0.50	-0.50	1	1%
	Higher interest rate above certain threshold	Sweden	0.00	-0.50	-0.50	1	1%
	Higher interest rate	Austria	0.00	-1.00	-1.00	1	1%
	Lower fee charged	Belgium	0.00	-1.00	-1.00	1	1%
Current account	Higher interest rate	Italy	0.00	-0.50	-0.50	1	1%
	No fee charged	Hungary	0.00	0.00	0.00	1	1%
		Germany	0.00	-0.50	-0.50	1	1%
		Czech Republic	0.00	-0.50	-0.50	2	3%
		Poland	-0.33	-0.50	-0.83	1	1%
		Austria	-0.33	-1.00	-1.33	1	1%
	Lower fee charged	Italy	-0.17	-0.50	-0.67	2	3%
		Poland	-0.33	-0.50	-0.83	1	1%
		Czech Republic	-0.33	-0.50	-0.83	1	1%
		Slovenia	-0.33	-1.00	-1.33	1	1%
	No fee charged above certain threshold	Portugal	-0.33	0.00	-0.33	1	1%
		Finland	-0.67	-1.00	-1.67	1	1%
	Other advantage	Czech Republic	-0.33	-0.50	-0.83	1	1%
		Poland	-0.67	-1.00	-1.67	1	1%
Life insurance	Lower interest rate	Poland	-0.33	0.00	-0.33	1	1%
	Lower fee charged	Slovenia	0.00	-0.50	-0.50	1	1%
		Austria	0.00	-1.00	-1.00	1	1%
		Poland	-0.50	-0.75	-1.25	2	3%
	Other advantage	Ireland	-0.67	-0.50	-1.17	1	1%
Fund transfers	No fee charged	Portugal	0.00	-1.00	-1.00	1	1%
Mortgage loan	No fee charged	Italy	-0.33	-0.50	-0.83	1	1%
	Lower interest rate	Slovenia	0.00	0.00	0.00	1	1%
		Portugal	-0.33	-1.00	-1.33	2	3%
	Other advantage	Cyprus	-0.67	-0.50	-1.17	3	4%
	Higher interest rate	Belgium	-0.33	-1.00	-1.33	1	1%
Term investment account	No fee charged	Finland	-0.33	-1.00	-1.33	1	1%
Reception and transmission of orders	No one-off fee	Austria	-0.33	-1.00	-1.33	1	1%
Total number of cases			-0.18	-0.48	-0.66	74	100%

6.3.1.2.1 Overall scores

On average, conditional and loyalty rebates provide benefits to customers (-0.66 for all efficiencies), and tend to advantage more consumers (-0.48) than producers (-0.18). More specifically, 84% of such practices (62 cases with a negative overall score out of 74 in total) lead to net efficiencies; below, we focus on those practices that have not proved to be beneficial to consumers or producers in order to identify recurrent patterns of products or countries. These are shown in Table 100 below.

Table 100 – Conditional rebates: cases with no efficiencies

Product affected by the practice	Obligation	Country	A4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Purchase of investment fund units	Higher interest rate	Poland	0	0	0	2	17%
	Lower fee charged	Poland	0	0	0	2	17%
Bank deposits	Higher interest rate above certain threshold	Poland	0	0	0	1	8%
Consumer loan	Lower interest rate	Slovenia	0	0	0	1	8%
Credit card	bonus points	Finland	0	0	0	1	8%
	No fee charged	Poland	0	0	0	1	8%
Current account	No fee charged	Hungary	0	0	0	1	8%
Investment advice	No fee charged	Ireland	0	0	0	1	8%
Mortgage loan	Lower interest rate	Slovenia	0	0	0	1	8%
Motor insurance	Lower fee charged above certain threshold	Poland	0	0	0	1	8%
Total number of cases			0	0	0	12	100%

Single-product conditional rebates with no efficiencies are observed in a wide group of countries in the banking sector (namely in Poland, Hungary, Slovenia and Finland). More specifically, conditional rebates with no efficiency-generating impact involve: (i) current accounts and bank deposits in Poland and Hungary, (ii) consumer and mortgage loans in Slovenia, and (iii) credit cards in Finland and Poland. The absence of potential advantages generated from rebates in the insurance sector specifically concern Poland, and affect motor insurance. Finally, in the investment sector, critical cases only concern Poland and Ireland and relate to the purchase of investment fund units and investment advice. In all three sectors, Poland tends to evidence repeatedly critical cases.

The table above delivers three principal findings.

FINDING #6.12 – CONDITIONAL AND LOYALTY REBATES

Conditional Rebates are offered on all types of financial services, but more frequently on banking products (current and saving accounts, bank deposits, mortgage and consumer loans, credit card, credit line/overdraft and fund transfers) as opposed to insurance products (motor insurance, life insurance, health/disability insurance, home insurance, payment protection insurance and fire insurance) or investment products (purchase of investment funds, investment advice, term investment account and reception and transmission of orders).

Conditional and loyalty rebates tend to advantage customers more than producers. While 84% of such practices generate efficiencies, practices that produce no efficiencies were found in the banking sector in Poland, Hungary, Slovenia, Finland and Poland; in the insurance sector in Poland; and in the investment sector in Poland and Ireland.

6.3.2 Offer of non-financial products

Our analysis revealed the existence of a limited number of practices in which financial products are coupled with non-financial products. The table below groups these 10 practices and scores them according to production-side and customer-side efficiencies. As shown in the table, these practices include cases of tying and bundling and mostly involve insurance products.

Table 101 – Offer of non-financial products: production and consumer-side efficiencies

Practice	Product affected by the practice	Country	A4. Production-side efficiencies Normalised score [4]	B.3 Consumer-side efficiencies Normalised score [7]	Sum of efficiencies	Nbr of cases	Frequency
Bundled with non-financial product(s)	Motor insurance	France	0.00	0.00	0.00	1	10%
	Health insurance	France	0.00	0.00	0.00	1	10%
	Home insurance	France	0.00	0.00	0.00	1	10%
Tying with non-financial product(s)	Motor insurance	Cyprus	0.00	-0.50	-0.50	1	10%
		Finland	0.00	-0.50	-0.50	1	10%
		Poland	0.00	0.00	0.00	1	10%
Non-financial product(s) included free of charge	Home insurance	Luxembourg	0.00	-0.50	-0.50	1	10%
	Motor insurance	Estonia	-0.33	-0.50	-0.83	1	10%
		Luxembourg	0.00	-0.50	-0.50	1	10%
	Reception and transmission of orders	Austria	-0.33	-1.00	-1.33	1	10%
Total number of cases			-0.07	-0.35	-0.42	10	100%

On average, the inclusion of non-financial products appears beneficial (-0.42 for all efficiencies), especially for customers (-0.35 against -0.07 for producers). There are no production-side efficiencies reported, except for the practices observed in Estonia and Austria. According to reasons provided by respondents, the inclusion of free non-financial product is explained in terms of commercial strategy, risk reduction (in Estonia) and cost savings (in Austria). Customer-side efficiencies have been reported in 6 cases, when non-financial products are included free of charge (in Austria, Estonia and Luxembourg), and when they are tied (in Cyprus and Finland). The underlying justifications provided by respondents in our survey show that: (i) in the case of non-financial products included free of charge, convenience constitutes the driving factor for consumer efficiencies. (ii) In contrast, tying with non-financial products benefit consumers from a financial or other advantage.

Two main remarks can be made concerning cases where no efficiencies (from the customer or the producer side) are reported. First, unlike in the case of tying,

bundling with non-financial advantage does not provide any efficiencies. Second, critical cases exclusively deal with insurance products (motor, health and home insurances) in France and Poland.

FINDING #6.13 – OFFER OF NON-FINANCIAL PRODUCTS

Our analysis retrieved a limited number of cases in which non-financial products are included in the offer of retail financial services. These cases almost exclusively involve insurance products. Of these, two critical cases that may lead to detrimental impact for customers were spotted in France and Poland.

6.3.3 Aggressive commercial practices

Given the specific nature of aggressive commercial practices, it is very difficult to identify instances of such practices through an empirical analysis. As a matter of fact, whether a practice is aggressive depends on the context in which the practice emerges; furthermore, industry players are unlikely to report themselves that they are engaging in aggressive commercial conduct. Accordingly, our test cannot map the existence of aggressive commercial practices throughout the EU27.

One possible way of detecting the situations in which aggressive commercial practices may emerge is to look to cases in which investment advice is tied with long-term products that are often used as gateway products, such as mortgage and consumer loans or current accounts. In our empirical analysis, we found a number of situations in which these conditions may occur. In particular, two cases of investment advice tied with current accounts were spotted in Poland and Austria. In addition, in Estonia current accounts are tied with reception and transmission of orders, execution of orders on behalf of clients, dealing on own account, placing without firm commitment, underwriting or placing with firm commitment and investment advice.

6.4 Conclusions: main results of our test

The test we developed returned interesting results as regards the assessment of the potential anti-competitive concerns and the likely unfairness of practices observed in the retail financial services sector in the EU27. Of course, given the limited dataset available, these results must not be taken at face value, but provide a first indication of countries in which the practices at hand can particularly harm consumers.

6.4.1 Main findings

- Tying is the most common cross-selling practice, and accounts for 31.7% of our sample. Bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. In another 18% of the cases,

service providers offer preferential conditions (tariffs or rates) for the gateway product only. In another 16.2% of the cases, financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products.

- All cross-selling practices score positively in our antitrust test, which suggests that on average they are potentially leading to anti-competitive effects. Although tying is often considered to be the most potentially anti-competitive practice in the set of conducts under scrutiny, the market conditions in which the practices are observed leads to a different conclusion: as a matter of fact, the highest score in terms of anti-competitiveness is observed for forms of multi-product rebates.
- Potentially anti-competitive tying was reported in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands and United Kingdom. Bundling with no financial (dis)advantage was reported in Belgium, Czech Republic, Estonia, Ireland and Latvia. The offer of preferential tariffs or rates for the gateway or combined products lead to potential anti-competitive outcomes in Cyprus and Denmark.
- Tying was found to be unfair in our test in Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands, the United Kingdom and (under scenario 1 only) Austria. Mixed bundling was found to lead to unfair outcomes in Austria, Belgium, Estonia, Latvia and (under scenario 1 only) the Czech Republic and Ireland. Unfair multi-product rebates are observable in Cyprus, Denmark, Estonia, Finland, Slovenia and (under scenario 1 only) Italy.
- Preferential agreements are widely negotiated with domestic partners (72% of all cases with preferential agreements). Although domestic preferential agreements are mainly providing efficiencies, 11% of domestic preferential agreements (i.e. 6 cases) do not provide any efficiency. They have been reported in Italy, Slovenia and Latvia. Cases of conditional practices that reportedly produced no efficiencies emerged in ten Member States: Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Italy and United Kingdom. Some of these practices refer to products (like current accounts) that usually do not require any guarantees from consumers. Nevertheless, they have been found in the Czech Republic, Denmark and Hungary.

6.4.2 Findings per gateway product

When a mortgage is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of mortgage loans with long-term accounts. Frequent practices that may create restrictions of competition also include the cross-selling of mortgage loans plus (i) life insurance or (ii) current account. Very harmful

practices of this type are found in our test in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.

- *From a consumer policy perspective*, approximately 90% of the cross-selling practices are unfair. The most unfair practices involved term investment accounts, bank deposits and a variety of insurance products.

When a current account is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of current accounts with (i) specific investment services (underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients); and (ii) loans (consumer and corporate banking loans, mortgage loan). Other more frequent practices that may create competitive restrictions are the cross-selling of current account with (i) credit and debit cards, and (ii) life insurance. Here too, examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.
- *From a consumer policy perspective*, the most unfair cross-selling practice is the combination with mortgage loans. In addition, cross-selling of current accounts proves to be unfair when the combined product is home insurance and consumer loans. Other cross-selling practices that prove particularly unfair are the combination of current accounts with various forms of investment advice, which may pave the way towards additional aggressive commercial practices such as unsolicited offers, churning and steering.

When consumer loans are used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by; (i) the combination of consumer loans with current accounts; and by (ii) the cross-selling of consumer loan with motor insurance. Examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Estonia and Finland.
- *From a consumer policy perspective*, most of the cross-selling practices in which consumer loan is the gateway product tend to result in unfairness for consumers. Practices that are most unfair are the ones involving insurance products, including life insurance, PPI, health/disability insurance and motor insurance.

6.4.3 Other potentially unfair practices

As concerns other potentially unfair commercial practices:

- *Restrictions on access to products or services are imposed in all segments of financial services. However, they concern principally banking products.* Such practices tend to provide consumers and producers with efficiencies, but producers extract a greater amount of efficiencies than consumers. Critical cases can however be identified where no efficiency is generated for customers and producers, and conditioning the access to financial products

and services may prove unfair, given the lack of counter-balancing effects provided by the absence of efficiencies. In our sample, 17% of the observed practices led to no efficiency and were observed in nine countries.

- *Conditional and loyalty rebates tend to advantage customers more than producers.* While 84% of such practices generate efficiencies, practices that produce no efficiencies were found in the banking sector in Poland, Hungary, Slovenia, Finland and Poland; in the insurance sector in Poland; and in the investment sector in Poland and Ireland.
- There are a limited number of cases (10) in which non-financial products are included in the offer of retail financial services. These cases almost exclusively involve insurance products as gateway products. Of these, two critical cases that may lead to detrimental impact for customers were spotted in France and Poland.
- Given the specific nature of aggressive commercial practices, it was very difficult to identify instances of such practices through an empirical analysis. One possible way of detecting the situations in which aggressive commercial practices may emerge is to look to cases in which investment advice is tied with long-term products that are often used as gateway products, such as mortgage and consumer loans or current accounts. In our empirical analysis, we found a number of situations in which these conditions may occur. In particular, such cases have been identified in Poland and Austria, and most notably in Estonia.

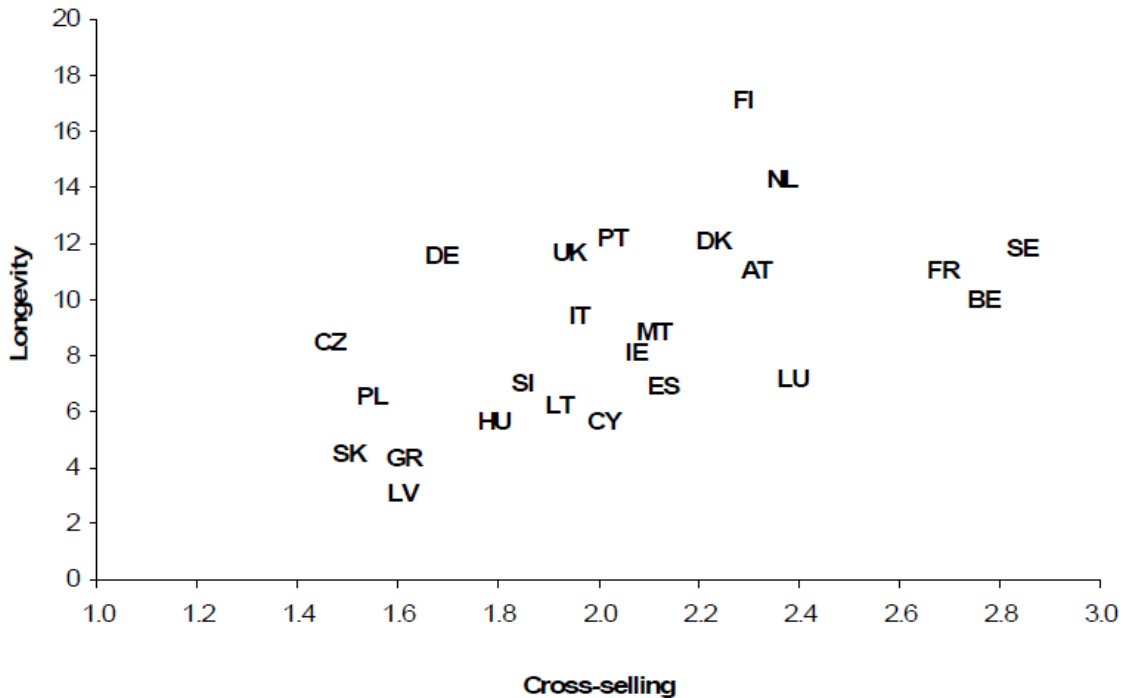
6.5 Assessing the impact of tying and other potentially unfair commercial practices on customer mobility and cross-border trade

The results of the test run in this Section, coupled with our findings in Sections 2 and 5 above allow for some reflections as regards the potential impact of the existing cross-selling, conditional sale and aggressive commercial practices on customer mobility in the retail financial services sector. First of all, it is worth recalling that one of our main findings in Section 2.3 above was that tying and pure bundling, exclusive agreements and some conditional sales practices (such as the obligation to have the salary paid into the current account) are more directly affecting switching costs and customer mobility than other practices. In addition, mixed bundling, multi-product rebates and single-product conditional and loyalty rebates can hamper customer mobility by affecting price transparency and the comparability of offers. To the contrary, aggressive commercial practices do not seem to directly affect customer mobility, but prove detrimental to customers within a give commercial relationship. Accordingly, below we focus mostly on cross-selling and conditional sales practices in order to comment on their potential impact on customer mobility.

One way to measure the impact of the practices at hand on customer mobility is to look at whether the countries in which these practices emerge are also those

countries in which switching is reportedly more difficult. The European Commission has collected data on consumer switching in retail financial markets in a number of occasions, including the Retail Banking Survey 2005-2006 and the second interim report of the Sectoral inquiry into retail financial services. There, the Commission already found a clear negative relationship between mobility and cross-selling, with higher average longevities correlated with higher levels of cross-selling, both for consumers and SMEs, and is shown in Figure 41 below.

Figure 43 – Mobility v. cross-selling in the Commission’s retail banking inquiry



However, the actual extent of this relationship depends on a number of different factors, such as:

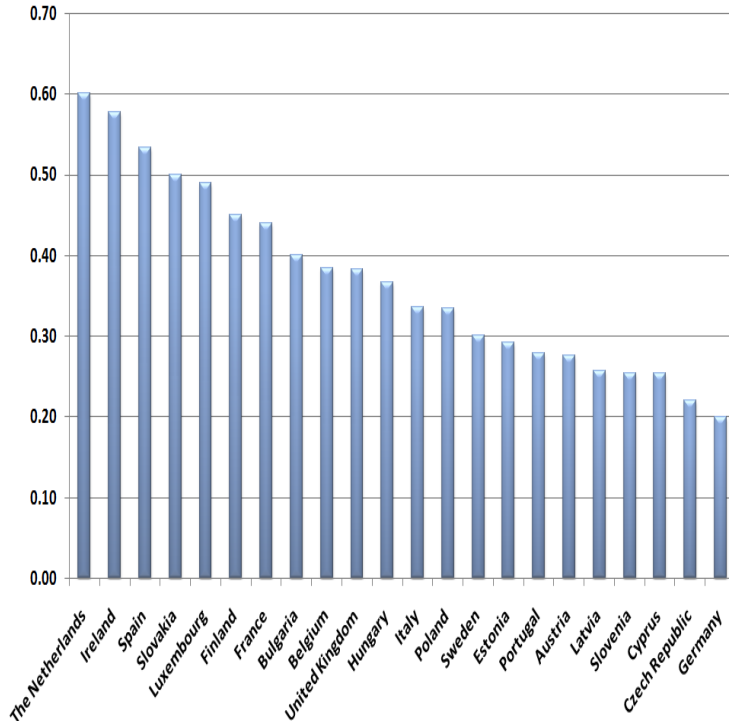
- The availability of switching facilities/programmes⁴⁸⁵;
- The degree of financial education of the average customer;
- The price elasticity of the customer’s demand;
- The availability of alternative offers on the market;
- The extent to which alternative offers are comparable and more advantageous than the incumbent firm’s one.

Accordingly, it is very difficult to measure the actual impact that each practice exerts on customers. Figure 42 below shows our average scores or switching costs

⁴⁸⁵ For example, switching facilities are available in the Netherlands, the UK, Ireland and Austria. See the Second Interim Report of the Sector Inquiry on Retail financial Services, at http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_2.pdf.

as emerging from our model above. The values are average scores obtained for the different practices reported by our respondents in the survey⁴⁸⁶.

Figure 44 – Scores on switching costs in our model



One possible way to account for the impact of the practices at hand on customer mobility is to represent the correlation between the data reported by the European Commission in the second interim report of the sector inquiry on retail financial services as regards customer mobility with our scores in the customer impact test. As shown in Figures 43 and 44 below (24 countries only), there is a negative relationship between the degree of mobility in the Commission's retail banking sector inquiry and our customer impact test scores. From this finding, we can infer that the existence of unfair conducts is negatively associated with customer mobility. However, the level of statistical significance of the correlation does not allow us to draw definitive conclusions from this analysis. In the next section, we adopt a different methodology to assess the impact of these practices on customer mobility.

⁴⁸⁶ However, the model cannot be considered as fully explanatory in this case, as it does not account, *i.a.* for the existence of switching facilities. For example, in the Netherlands switching has reportedly been made easier by the existence of a self-regulatory code that facilitates account switching. Our model, conceived for the purposes of mapping anti-competitive and unfair practices, does not take this into account.

Figure 45 – Mobility v. scores in our customer impact test (mortgage loans as gateway product)

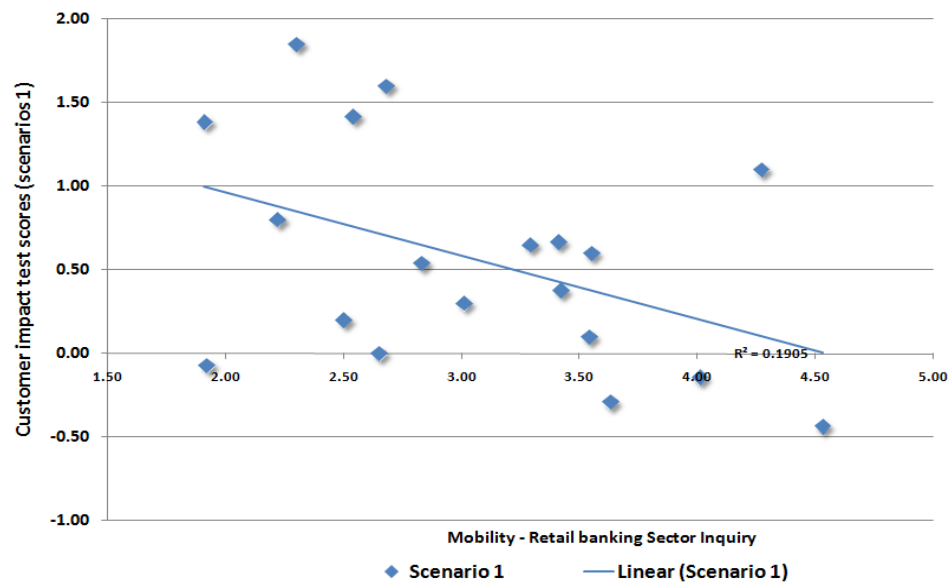
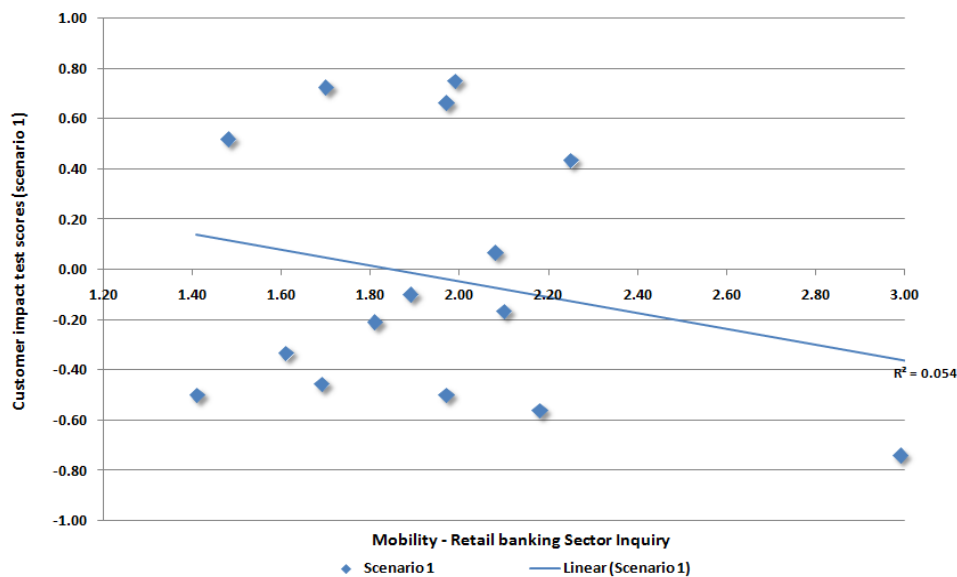


Figure 46 – Mobility v. scores in our customer impact test (current accounts as gateway product)



6.5.1 The impact of tying and other potentially unfair practices on customer mobility and cross-border supply/demand

Below, we illustrate our proposed method to assess the impact of tying and other potentially unfair commercial practices on customer mobility and the cross-

border supply and demand of retail financial services. Before we illustrate our methodological steps, it is worth clarifying the following issues.

- *Isolating the impact of the practices under scrutiny is very difficult.* As widely acknowledged, the impact on the practices under scrutiny on customer mobility and cross-border supply/demand can be the consequence of a number of converging aspects, only some of which are due to the practices *per se*. For example, closing charges, the lack of adequate financial education, problems in porting services, absent of switching facilities and sufficient redress mechanisms and the thickness of the contractual relationship may all affect the limited mobility of customers in retail financial services compared to other sectors, as we also showed in Section 2.2 above. The challenge in our case is to isolate the impact of the commercial practices at hand from the other elements. For example, even if tying is prohibited, part of the customers may still continue to shop from the same provider since they find it convenient, or simply because they lack awareness of the existence of alternatives (see *e.g.* the findings of the 2009 Consumer Market Scoreboard). A Danish survey also showed that 70% of the customers would not shift banks even if switching could be done without difficulties or costs. In summary, the willingness to switch is highly influenced by the personal relationship with a customer's financial service provider. What portion of the current lack of customer mobility is actually due to tying and other potentially unfair practices, is therefore very difficult to assess with precision. This explains also why, to our knowledge, this assessment has never been provided in previous reports, studies or scholarly papers.
- *Retail financial products differ in terms of their potential for enhanced customer switching to domestic or foreign providers.* For example, current accounts and mortgage loans seem to exhibit different features: first, the former is more subject to "multi-homing" (*e.g.* customer holding more than one account), whereas the second is normally unique and should therefore be ported (*i.e.* the relation with a provider has to be terminated contextually with the switch)⁴⁸⁷. The same could be said for many insurance products, such as health, car or life insurance. Investment services are obviously better candidates for switching and also shopping cross-border, if they can be separated from gateway products such as loans.
- *The impact of cross-selling practices on mobility and cross-border demand/supply must be estimated with a view to both gateway and combined products.* As a matter of fact, if combined products are unbundled from gateway products, a portion of the related markets would be now opened to competition both in terms of choice (at the pre-contractual level) and mobility (during the contractual phase). Likewise, during the contractual phase, customers may decide not to switch gateway product despite the availability of more convenient offers, if they are bound by a packaged sale,

⁴⁸⁷ For example, as reported by the Commission's Interim report II on current accounts and related services, 17 July 2006., in the UK the number of current accounts reported by banks was higher than the UK population.

since switching would mean losing all other contracts. This is likely to be the case for products not subject to multi-homing (*e.g.* mortgage and consumer loans) that for other products, such as current accounts.

- *The impact of cross-selling strategies is stronger whenever there is an element of coercion.* The impact on customer mobility is highest in the case of tying: there, the elasticity of demand is very low as switching one product requires switching all products (at least, those that the customer really demanded). This produces a “weakest link” effect: in the case of tying a product A with high price elasticity of demand and a product B with low elasticity, the elasticity of switching for the whole package would be close to the elasticity of B.
- *The impact of non-binding cross-selling practices and conditional sales practices depends on the availability of better conditions on the market.* For example, in the case of multi-product rebates, the existence of financial advantages (the rebate) and non-financial advantages (one-stop-shop effects, etc.) for customers may make it very difficult for competitors to really offer better conditions for one of the packaged products alone. If the competitor can offer all products, then the lack of mobility does not depend on the fact that the incumbent practices multi-product rebates. We thus include in our analysis of the impact on switching only cases in which a multi-product rebate has an impact on competition (positive score in the Antitrust Test) and do not produce significant net benefits for customers (positive score in the Consumer Impact Test).
- *We assume that customers are rational.* This means that customers would decide to switch if the costs associated with the practices are greater than the corresponding benefits. Given the biases in customer behavior in the retail financial services sector (see Section 2.2. above), this assumption may lead to an over estimation of the degree of switching that would be observed if the practices at hand were not observed in the market. We keep this as a *caveat* related to our final results.
- *What do we mean by cross-border supply and demand in retail financial services.* In what follows, we assume that the likely impact of the practices at hand on cross-border trade would have to include: (i) the likelihood that consumers decide to shop abroad for products and services that are currently being offered as part of a package (in the case of cross-selling, and most notably tying); as well as (ii) the likelihood that consumers decide to shop abroad for products and services that are included in conditional sales practices, such as the obligation to have the salary paid into the current account⁴⁸⁸. To assess the impact of the practices at hand, we consider:

⁴⁸⁸ Cross-border retail financial services can be provided in one of the following modes: (i) Cross-border service provision: crossing borders during provision (*e.g.*, cross-border internet banking); (ii) Consumption abroad: consumers who travel to another member state to use the services provided there; (iii) Commercial presence: FDI in terms of establishing local presence (M&As; de novo investments; branches of providers; representative offices);

- *A demand-side component*, represented by the likelihood that switching customers decide to purchase their products from a foreign provider. This implies a static analysis, since it considers the existence of alternative suppliers on the basis of existing market data.
- *A supply-side component*, which accounts for the increased likelihood of entry of foreign players from other EU countries in other Member States. This requires a dynamic, forward looking analysis.

Below, we illustrate a five-step assessment to assess the impact of the practices under scrutiny on customer mobility and cross-border trade. The idea behind the five steps is to first assess the impact of the practices at hand on customer mobility. Enhanced mobility then would lead to greater cross-border demand for financial services. As a result, entry of new players (cross-border supply) may be possible.

6.5.1.1 Step 1: identification of the types of practices that may affect customer mobility

In line with Table 5 above, some practices have a significant potential impact on switching costs, transparency and price comparability, whereas other practices have a less significant impact. In particular:

- *Tying, exclusive agreements and the obligation to have salary paid into the account are the practices that have the most significant impact on switching*, as they entail coercion. However, in some cases, rational customers would decide not to “mix and match” (i.e., buy from different providers) even if they were not subject to a coercive practice, as they may find it convenient to shop from one provider only. Accordingly, a rational customer would decide to mix and match only if the benefits of doing so more-than-compensated the corresponding cost. In Section 6 above, these are the practices that score positively in our Customer Impact Test.
- *Mixed bundling, multi-product rebates, preferential agreements and single-product loyalty discounts can be beneficial for customers*: they are likely to exert an impact on customer mobility only when the negative impacts (such as lack of transparency) outweigh the positive ones (e.g. one-stop-shop effects). We assume that for these practices, the impact on customer mobility would be observed only if the offer is not easily replicable by a competitor: otherwise, customers may always decide to “mix and match” or purchase an entire package from a competing provider. In Section 6 of our report, these are the practices that score positively both in our Antitrust Test and in the Customer Impact test: for these practices, customers are currently not switching even though the practices applied to them are potentially unfair, also due to competition problems.

and (iv) Presence of natural persons: individuals that travel abroad to offer a service in another country (e.g. consultants, agents or credit brokers).

- *The impact of aggressive commercial practices on customer mobility is much less evident.* These practices pertain to the domain of misleading and deceptive practices, and are likely to distort customer behavior (*i.e.* “choice”), but not necessarily to affect mobility. In addition, it is possible that, due to the aggressive behavior of domestic financial services providers, foreign suppliers decide not to enter the market, for fear of being unable to capture a significant portion of customers. However, this impact is very difficult to predict and quantify, also since large foreign providers may decide themselves to adopt pressure selling practices to make sure they reach a significant customer base in the short-term. We therefore exclude these from our analysis of the impact on customer mobility and cross-border trade.

In summary, the list of practices that are likely to affect customer mobility are: (i) tying and pure bundling practices, exclusive agreements and practices entailing the obligation to have salary paid into the account, if they score positively in our Customer Impact Test; (ii) Mixed bundling, multi-product rebates, preferential agreements and single-product loyalty discounts, if they score positively both in our Antitrust Test and in the Customer Impact test.

6.5.1.2 Step 2: estimate of the share of the market affected by the identified practices

Based on the list of practices identified in Step 1 above, we:

- Step 2.1 Consider the maximum share of customers affected, as reported by respondents to our survey (*e.g.*, if 20% to 40%, indicate 40%).
- Step 2.2 If the share has been reported by a national bank, competition authority, consumer or business association, we take this as an indication of the share of market affected.
- Step 2.3 If the respondent is an individual firm, then the response cannot be taken as representative of the whole market. We solve this problem by extrapolation, by building two scenarios: the low-end scenario represents the share declared by the firm, the high-end scenario is built under the assumption that all other firms in the market adopt the same strategy.

6.5.1.3 Step 3: estimate the “switchers” for each product and country

Once we have identified the share of customers affected by all practices, we need to identify the share of customers that would be willing to switch if they were not subject to those practices. As explained above, we assume that customer are rational and assume that all customers would switch since the costs of their current package are higher than the benefit (*i.e.* a rational customer would switch if given the possibility).

Step 3.1 Once we have isolated the share of customers affected by the potentially anticompetitive or unfair practices, we still need to find out how many of these customers would actually decide to move to another supplier if the practice at hand did not exist. A difficulty here is that we know only the portion of customers buying the gateway product that buy also the combined product. We still don't know the portion of the market for the combined product that is affected by the practice. The only way to solve this problem was to isolate the three main gateway products (mortgage, current accounts, consumer loans) and assess the customers involved in each of the EU27⁴⁸⁹.

Solving this step requires that we: (i) identify the number of customers at least for the three main gateway products (current accounts, mortgage loans, consumer loans)⁴⁹⁰; and (ii) convert the shares of customers affected for each practice into actual figures on the number of customers affected, and thus the number of potential switchers.

We thus reach a result that no one has reported so far, *i.e.* how many customers would switch, per gateway product, combined product and country. This represents the impact of the practices on customer mobility.

6.5.1.4 Step 4: identifying what part of the demand would flow to foreign service providers

As already explained above, in order to assess the impact on cross-border demand and supply, we need to look at different variables that affect cross-border trade. This requires a two-step approach.

⁴⁸⁹ As an example, if we find that the tying of mortgage + life insurance in country X affects 40% of the customers, this does not mean that 40% of the customers in the life insurance sector would be able to switch if there were no tying. To the contrary, it means that 40% of those that purchased mortgage are currently forced to purchase also life insurance from the same provider. If, for example, there are 1 million life insurance policies and 500,000 mortgage loans in country X, our figure would tell us that 40% of the 500,000 customers is affected by the tying. This would mean that 20% of the life insurance market is currently locked-in and could be opened up to competition absent the tying practice.

⁴⁹⁰ Data on the number of mortgage, current account and consumer loan users per country have been collected in two steps. First, we have relied on the *percentage* of mortgage, current account and consumer loans users per country, reported in the survey Eurobarometer, 2009, "Consumers' views on switching service providers", Annex tables to the analytical report, at http://ec.europa.eu/consumers/strategy/docs/FL243_Annex%20tables_Final.pdf. Second, we have collected data on population per country, from Eurostat. We then derived the numbers of mortgages, current account, and consumer loan *users* by multiplying the share of users by the total population in each country. Data on the number of current accounts per country are available at http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD0000000000224371.pdf (Appendix). The ECRI statistical package contains information on consumer lending and household lending in Europe. Finally, data on the mortgage market can be taken from European Mortgage Market: An Overview 1992-2003 (June 2004). IESE Business School Working Paper No. 562. Available at SSRN: <http://ssrn.com/abstract=673249>.

Step 4.1 *Static Analysis.* Portion of contestable demand that would flow to existing foreign service providers (based on their current market share). Knowing the number of potential switchers per practice, we are able to assess the potential for cross-border shopping. Data on this are not abundant: however a recent issue of the Special Eurobarometer reported the percentage of consumers in the EU25 that have obtained financial services abroad (see Table 102 below). We use these values to assess the impact on cross-border demand.

Table 102 - Percentage of respondents that obtained the following financial service from a firm located in another Country of the European Union

	Bank account	Credit card	Car insurance	Life assurance	Stocks/ shares	Collective investments	A private pension plan	Mortgage	None of them (SPONTANEOUS)	Other (SPONTANEOUS)	DK
EU25	5%	2%	2%	1%	1%	1%	0%	0%	85%	1%	6%
LU	19%	8%	2%	3%	3%	1%	1%	1%	71%	3%	5%
BE	11%	7%	2%	1%	1%	1%	1%	1%	77%	1%	7%
AT	11%	6%	4%	3%	1%	1%	1%	0%	74%	1%	8%
IT	9%	1%	2%	1%	1%	0%	-	-	78%	1%	9%
MT	9%	3%	4%	2%	2%	1%	2%	-	81%	0%	6%
FI	7%	2%	3%	1%	2%	2%	0%	0%	86%	1%	2%
SK	7%	1%	2%	4%	0%	0%	1%	0%	74%	1%	13%
EE	6%	1%	1%	1%	0%	0%	1%	0%	85%	0%	7%
PL	6%	2%	4%	3%	0%	0%	1%	0%	83%	0%	6%
SI	6%	2%	1%	1%	0%	0%	-	0%	88%	1%	2%
NL	5%	2%	1%	0%	2%	0%	0%	1%	89%	0%	2%
UK	5%	2%	2%	0%	1%	0%	0%	0%	88%	1%	4%
DK	4%	2%	2%	1%	1%	0%	1%	0%	89%	1%	3%
DE	4%	1%	1%	1%	1%	3%	0%	0%	89%	0%	2%
ES	4%	2%	1%	0%	0%	0%	0%	0%	87%	0%	6%
FR	4%	1%	1%	1%	1%	-	0%	0%	82%	1%	12%
IE	4%	3%	2%	0%	1%	1%	0%	0%	83%	2%	7%
CY	4%	2%	1%	1%	0%	0%	-	-	89%	1%	4%
HU	4%	1%	1%	3%	0%	-	1%	0%	86%	1%	5%
PT	3%	0%	1%	0%	-	-	-	0%	90%	2%	4%
SE	3%	3%	0%	1%	3%	5%	1%	0%	81%	1%	6%
CZ	3%	0%	1%	1%	0%	0%	0%	0%	89%	0%	6%
EL	2%	1%	1%	1%	-	0%	0%	-	96%	-	1%
LV	2%	6%	3%	1%	-	-	0%	0%	81%	0%	10%
LT	1%	1%	0%	-	0%	-	0%	-	85%	0%	13%

Source: European Commission, “Public Opinion in Europe on Financial Services”, Special Eurobarometer No 230, August 2005; available at:
http://ec.europa.eu/consumers/cons_int/fina_serv/cons_experiences/report_eurobarometer63-2_en.pdf

Step 4.2 *Dynamic analysis.* In order to assess the likelihood of entry, we consider the entry of foreign players in the markets for gateway or combined products may be triggered by the absence of cross-selling or conditional sales practices as a function of the following variables⁴⁹¹:

- (i) *Profitability.* The greater the profitability of the sector at hand, the higher the likelihood of entry. (profitability indexes in our database already);

⁴⁹¹ The detailed presentation of variables listed here and their score computation is presented in Annex 16 of this Report.

- (ii) *Barriers to entry.* The greater the barriers to entry in that sector, the lower the likelihood of entry (we have OECD data on barriers to entry for each country);
- (iii) *Portion of contestable customers.* The greater the number of customers that would be “freed up” by the absence of the practice, the higher the likelihood of entry (we will reach this information through steps 1-3 above);
- (iv) *Churn.* The greater is customer churn, the higher the likelihood of entry (data on churn before control are available from the sector inquiry second interim report Table 36);
- (v) *Growth.* The greater is customer growth, the higher the likelihood of entry (data on customer growth are available from the sector inquiry second interim report Table 36);
- (vi) *Financial education.* The higher the degree of financial education, the greater the likelihood that customer will engage in cross-border shopping (EU or OECD data⁴⁹²).

On the basis of indicators for each of those variables, we assess, for each country and product, the expected increase in cross-border supply, by reaching a (high, medium, low) classification based on the variables above.

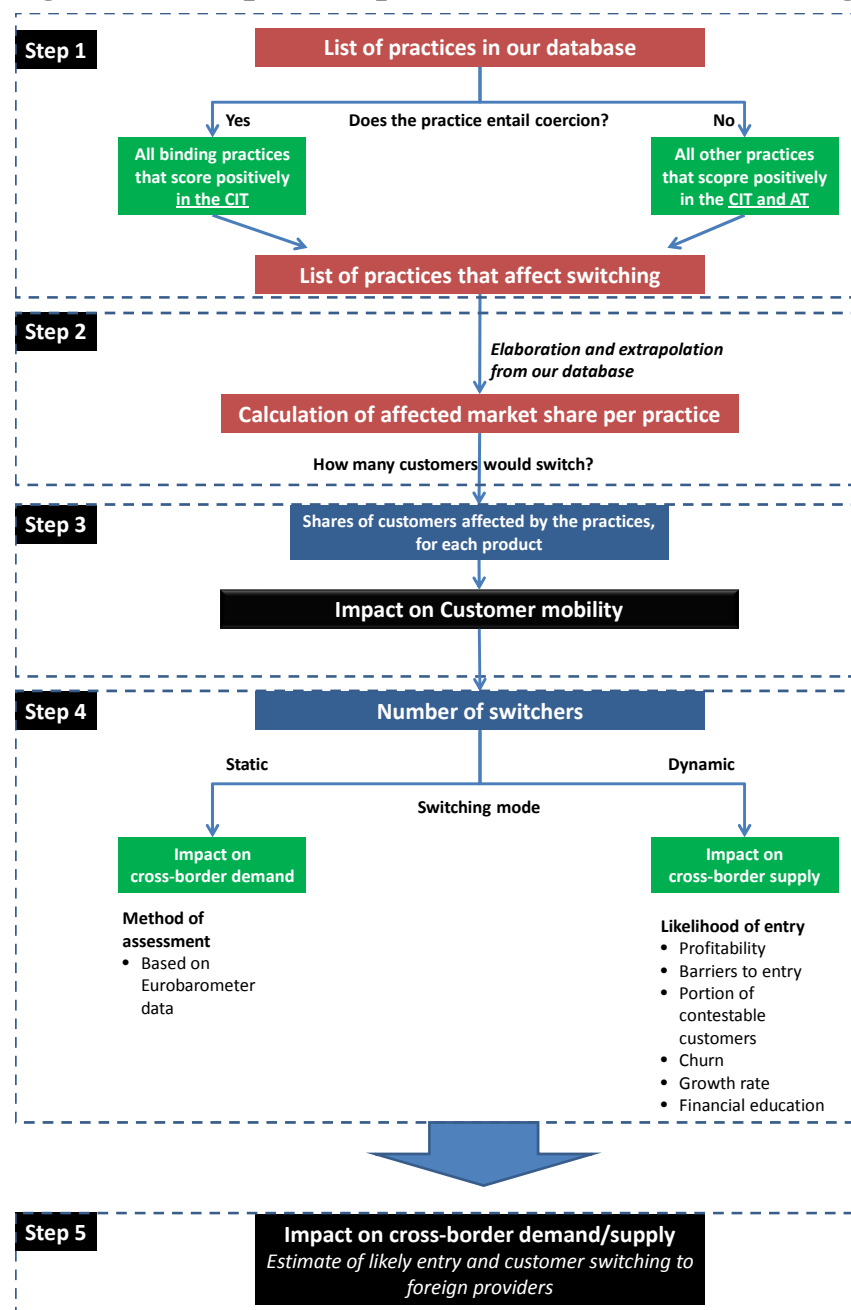
6.5.1.5 Step 5: assessing the impact on cross-border trade

Starting from the results of Step 4, we then associate standard increases for the variables (high, medium, low) and measure:

- The estimated number of customers that may switch to a foreign provider, per country and product.
- The estimated total number of switchers to a foreign provider in the Eu27.

⁴⁹² <http://browse.oecdbookshop.org/oecd/pdfs/browseit/2108071E.PDF>

Figure 47 – Graphical representation of our methodology



6.5.2 Results of our test

The application of our methodology led us to identifying a list of 241 practices that are likely to affect switching (*i.e.*, 39% of the overall sample of 607 reported practices). In line with the definition of step 1 of our methodology, this list more specifically groups: (i) tying and pure bundling practices, exclusive agreements and practices entailing the obligation to have salary paid into the account, if they score positively in our Customer Impact Test; and (ii) mixed bundling, multi-

product rebates, preferential agreements and single-product loyalty discounts, if they score positively both in our Antitrust Test and in the Customer Impact test. Starting from the list of the 241 identified practices, we are able to provide results for the three main gateway products: mortgages, current accounts, and consumer loans. In Table 103 below, we provide results for all the steps of our analysis.

The main results of our model are the following:

- **The total number of contestable contracts in the EU27 reaches 572 million.** We refer to contracts to account for the fact that, as a result of the elimination of tying, some customers could switch more than one product from their existing contracts with financial services providers. For example, customer *x* may wish to switch to a different provider both its life insurance linked to a consumer loan, and its payment protection insurance linked to a mortgage loan. For this reason, in some countries the total amount of contracts switched is higher than the corresponding population, and the total amount of contracts is higher than the population of the EU.
- **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)⁴⁹³.** This is an interesting result, as it also shows that in Italy the amount of switching would be much greater, compared to the national population, than in the UK. In fact, the contracts switched are approximately three times higher than the population in Italy, whereas they are lower than the UK population.

As regards the impact on cross-border demand and supply:

- **The number of contracts that would be switched to foreign providers ranges between 30 and 33 million,** according to the scenario chosen (low- or high-end).
- **The countries where the impact on cross-border demand would be greater are Italy (12% of overall switching), Austria (7%) and Estonia (6%).** In these countries, a significant percentage of switching customers would move to foreign financial service providers.
- **The countries where entry of new players is most likely are Cyprus, Hungary, and Spain.** In these countries, foreign providers are most likely to find it profitable to enter the market within a reasonable timeframe. This

⁴⁹³ While on average some countries, such as Germany or Portugal, are not characterised by unfairness (see table 41 of this Report), a very restricted number of unfair cases may however exist in those countries (their number is sufficiently small enough not to influence the *average* result of the customer impact test). In such countries, even if the number of unfair cases is very small, it is possible that the associated number of potential contracts switched is very large (as it is the case for instance in Germany where 128 million contracts may potentially be switched). This is due to the fact that we have used the percentage of users of products and applied it to the overall national population figures. Therefore, even if only one or two practices are at stake, we may end up with a very high number of potential contracts switched and a large mobility impact.

would boost cross-border supply of financial products in these member states. Other countries in which this effect may materialise – though with a lower intensity – are Belgium, Czech Republic, Denmark, France, Germany, Latvia, Poland, Slovakia, Sweden, and the UK.

Regarding individual gateway products:

- **The most substantial impact on mobility concerns contracts in which the current account is the gateway product (411 million).** This result is not surprising, given that nine EU customers out of 10 hold current accounts. They constitute in that sense a basic and necessary product held by nearly the entire population of each country. Combined products consist mainly of other banking products, such as credit and debit cards, credit line/overdraft, other bank deposits, and fund transfers, as evidenced in Austria, Belgium, Czech Republic,, Estonia, Germany, Italy, Poland, Slovenia and the United Kingdom. In several restricted cases (Belgium, Estonia, and Italy), investment products are also combined with current accounts.
- **Other gateway products leading to an important numbers of potential switchers are mortgage loans** (78 million contracts), **home insurance** (43 million contracts), and **consumer loans** (29 million contracts). We also found lower numbers of switching contracts for motor insurance (7 million) and corporate banking loans (2 million contracts).
- **The impact on cross-border demand would affect mostly contracts that have as gateway product the current account** (97% of the practices having an impact on cross-border demand).

Regarding combined products:

- **The combined product for which switching occurs most often are credit line/overdraft** (106 million contracts), **fund transfers** (101 million contracts), **savings accounts** (57 million contracts), **other non-life insurance** (45 million contracts), **bank deposits** (37 million contracts) **debit cards** (39 million contracts), **execution of orders on behalf of clients** (43 million contracts) **and payment protection insurance** (28 million contracts).
- **The combined products that would be switched most often to foreign providers are investment advice, bank deposits, debit cards and the execution of orders on behalf of clients.** In all these cases, the degree of switching falls in the range between 11% and 12% of total switched contracts.

Regarding individual practices:

- **The practices that exert the greatest impact on cross-border demand are found in Austria, Belgium, Czech Republic, Estonia, Germany, Hungary, Italy, the Netherlands, Slovenia and the UK.**

Table 103 below shows our results per country. Tables 104 and 105 show results per gateway and combined products, respectively. Table 106 shows the practices that affect cross-border demand. Finally, Figures 48 and 49 show the distribution of switching behaviour per gateway and per combined product.

Table 103 – Impact on mobility and cross-border trade

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
AT	Consumer loan	Life insurance	1,612,114	na	na	Low
	Current account	Credit line / overdraft	3,722,398	37,327	436,064	Low
		Execution of orders on behalf of clients	6,203,996	62,212	726,773	Low
		Investment advice	2,481,599	24,885	290,709	Low
		Portfolio management	3,722,398	12,442	145,355	Low
		Reception and transmission of orders	6,203,996	na	na	na
	Mortgage loan	Home insurance	400,386	0	0	Low
Austria Total			24,346,887	136,866	1,598,900	Low
BE	Current account	Portfolio management	7,300,836	na	na	na
	Mortgage loan	Payment protection insurance	582,148	2,759	16,538	Medium
Belgium Total			7,882,985	2,759	16,538	Medium
CY	Consumer loan	Life insurance	97,716	na	na	High
		Payment protection insurance	162,860	na	na	High
	Mortgage loan	Fire insurance	207,438	na	na	High
		Home insurance	207,438	na	na	High
		Life insurance	186,694	na	na	High
		Operations on foreign currencies	207,438	na	na	High
Cyprus Total			1,069,583			High
CZ	Consumer loan	Current account	504,724	na	na	Medium
		Motor insurance	504,724	na	na	Medium
		Payment protection insurance	504,724	na	na	Medium
	Current account	Consumer loan	2,837,725	99,453	99,453	Medium
		Credit card	2,364,770	82,877	82,877	Medium
		Credit line / overdraft	1,418,862	49,726	49,726	Medium
		Debit card	1,064,147	37,295	37,295	Medium
Czech Republic Total			9,199,675	269,352	269,352	Medium

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
DK	Mortgage loan	Consumer loan	356,981	0	0	Medium
		Current account	892,452	0	0	Medium
Denmark Total			1,249,433			Medium
EE	Consumer loan	Motor insurance	209,217	na	na	Low
	Current account	Bank deposits	1,020,597	63,721	63,721	Low
		Consumer loan	1,020,597	63,721	63,721	Low
		Corporate banking loan	1,020,597	63,721	63,721	Low
		Credit line / overdraft	1,020,597	63,721	63,721	Low
		Dealing on own account	1,020,597	63,721	63,721	Low
		Debit card	1,020,597	63,721	63,721	Low
		Equity release loan	1,020,597	63,721	63,721	Low
		Execution of orders on behalf of clients	1,020,597	63,721	63,721	Low
		Fund transfers	1,020,597	63,721	63,721	Low
		Mortgage loan	1,020,597	63,721	63,721	Low
		Placing without firm commitment	1,020,597	63,721	63,721	Low
		Portfolio management	1,020,597	63,721	63,721	Low
		Reception and transmission of orders	1,020,597	63,721	63,721	Low
		Savings account	1,020,597	63,721	63,721	Low
		Term investment account	1,020,597	63,721	63,721	Low
		Underwriting or placing with firm commitment	1,020,597	63,721	63,721	Low
		Mortgage loan	Home insurance	141,248	0	0
	Life insurance		141,248	0	0	Low
	Estonia Total			16,821,271	1,019,535	1,019,535
FI	Consumer loan	Motor insurance	579,812	na	na	Low
	Mortgage loan	Consumer loan	1,332,335	0	0	Low
		Payment protection insurance	1,332,335	0	0	Low
Finland Total			3,244,482	0	0	Low

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
FR	Consumer loan	Payment protection insurance	7,053,209	na	na	Medium
	Home insurance	Other non-life insurance	43,054,568	na	na	Medium
	Mortgage loan	Payment protection insurance	13,158,250	0	0	Medium
	Motor insurance	Home insurance	7,449,892	na	na	na
France Total			70,715,918			Medium
DE	Current account	Credit line / overdraft	64,200,663	2,683,413	2,683,413	Medium
		Fund transfers	64,200,663	2,683,413	2,683,413	Medium
Germany Total			128,401,325	5,366,827	5,366,827	Medium
HU	Current account	Other non-life insurance	2,443,558	128,608	128,608	High
	Mortgage loan	Current account	1,334,311	0	0	High
		Life insurance	400,293	0	0	High
		Payment protection insurance	266,862	0	0	High
Hungary Total			4,445,025	128,608	128,608	High
IT	Consumer loan	Current account	1,802,251	na	na	Low
		Payment protection insurance	1,201,500	na	na	Low
	Current account	Bank deposits	35,851,220	4,360,284	4,360,284	Low
		Credit line / overdraft	35,851,220	4,360,284	4,360,284	Low
		Debit card	35,851,220	4,360,284	4,360,284	Low
		Execution of orders on behalf of clients	35,851,220	4,360,284	4,360,284	Low
		Fund transfers	35,851,220	4,360,284	4,360,284	Low
	Mortgage loan	Current account	2,519,275	na	na	Low
		Fire insurance	94,473	na	na	Low
		Home insurance	3,149,094	na	na	Low
		Life insurance	545,843	na	na	Low
Italy Total			188,568,537	21,801,418	21,801,418	Low
LV	Mortgage loan	Life insurance	76,652	0	0	Medium
Latvia Total			76,652			Medium
LU	Home insurance	Motor insurance	63,240	na	na	Low
Luxembourg Total			63,240			Low

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
PL	Consumer loan	Credit card	585,961	na	na	Medium
		Payment protection insurance	1,757,884	na	na	Medium
	Mortgage loan	Current account	1,403,118	0	0	Medium
		Life insurance	473,552	0	0	Medium
		Payment protection insurance	789,254	0	0	Medium
Poland Total		5,009,769			Medium	
PT	Consumer loan	Life insurance	566,151	na	na	Low
		Motor insurance	566,151	na	na	Low
	Mortgage loan	Current account	2,378,430	0	0	Low
		Life insurance	1,022,725	0	0	Low
Portugal Total		4,533,457			Low	
SK	Consumer loan	Current account	635,095	na	na	Medium
	Mortgage loan	Current account	399,563	0	0	Medium
Slovakia Total		1,034,659			Medium	
SI	Consumer loan	Bank deposits	309,153	na	na	Low
		Payment protection insurance	309,153	na	na	Low
	Current account	Debit card	1,444,348	98,144	98,144	Low
		Savings account	866,609	na	na	na
	Mortgage loan	Bank deposits	57,250	0	0	Low
Slovenia Total		2,986,512	98,144	98,144	Low	
ES	Mortgage loan	Pension product	798,490	0	0	High
Spain Total		798,490			High	
SE	Mortgage loan	Payment protection insurance	1,126,499	0	0	Medium
Sweden Total		1,126,499			Medium	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
NL	Corporate banking loan	Business/commercial insurance	413,972	na	na	Low
		Current account	413,972	na	na	Low
		Health/disability insurance	413,972	na	na	Low
		Life insurance	413,972	na	na	Low
		Motor insurance	413,972	na	na	Low
		Pension product	413,972	na	na	Low
	Mortgage loan	Business/commercial insurance	7,017,123	125,981	125,981	Low
		Current account	7,017,123	125,981	125,981	Low
		Fire insurance	7,017,123	125,981	125,981	Low
		Health/disability insurance	7,017,123	125,981	125,981	Low
		Life insurance	7,017,123	125,981	125,981	Low
		Motor insurance	7,017,123	125,981	125,981	Low
The Netherlands Total		44,586,571	755,884	755,884	Low	
UK	Consumer loan	Savings account	10,364,959	na	na	Medium
	Current account	Savings account	45,071,158	190,884	2,345,013	Medium
United Kingdom Total			55,436,117	190,884	2,345,013	Medium
EU-27 Total			571,597,210	29,770,400	33,400,343	Medium

Table 104 – Impact on mobility and cross-border trade – per gateway product

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
SI	Consumer loan	Bank deposits	309,153	na	na	Low
PL	Consumer loan	Credit card	585,961	na	na	Medium
CZ	Consumer loan	Current account	504,724	na	na	Medium
IT	Consumer loan	Current account	1,802,251	na	na	Low
SK	Consumer loan	Current account	635,095	na	na	Medium
AT	Consumer loan	Life insurance	1,612,114	na	na	Low
CY	Consumer loan	Life insurance	97,716	na	na	High
PT	Consumer loan	Life insurance	566,151	na	na	Low
CZ	Consumer loan	Motor insurance	504,724	na	na	Medium
EE	Consumer loan	Motor insurance	209,217	na	na	Low
FI	Consumer loan	Motor insurance	579,812	na	na	Low
PT	Consumer loan	Motor insurance	566,151	na	na	Low
CY	Consumer loan	Payment protection insurance	162,860	na	na	High
CZ	Consumer loan	Payment protection insurance	504,724	na	na	Medium
FR	Consumer loan	Payment protection insurance	7,053,209	na	na	Medium
IT	Consumer loan	Payment protection insurance	1,201,500	na	na	Low
PL	Consumer loan	Payment protection insurance	1,757,884	na	na	Medium
SI	Consumer loan	Payment protection insurance	309,153	na	na	Low
UK	Consumer loan	Savings account	10,364,959	na	na	Medium
Total consumer loan			29,327,357			
NL	Corporate banking loan	Business/commercial insurance	413,972	na	na	Low
NL	Corporate banking loan	Current account	413,972	na	na	Low
NL	Corporate banking loan	Health/disability insurance	413,972	na	na	Low
NL	Corporate banking loan	Life insurance	413,972	na	na	Low
NL	Corporate banking loan	Motor insurance	413,972	na	na	Low
NL	Corporate banking loan	Pension product	413,972	na	na	Low
Total corporate banking loans			2,483,835			

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
EE	Current account	Bank deposits	1,020,597	63,721	63,721	Low
IT	Current account	Bank deposits	35,851,220	4,360,284	4,360,284	Low
CZ	Current account	Consumer loan	2,837,725	99,453	99,453	Medium
EE	Current account	Consumer loan	1,020,597	63,721	63,721	Low
EE	Current account	Corporate banking loan	1,020,597	63,721	63,721	Low
CZ	Current account	Credit card	2,364,770	82,877	82,877	Medium
AT	Current account	Credit line / overdraft	3,722,398	37,327	436,064	Low
CZ	Current account	Credit line / overdraft	1,418,862	49,726	49,726	Medium
EE	Current account	Credit line / overdraft	1,020,597	63,721	63,721	Low
DE	Current account	Credit line / overdraft	64,200,663	2,683,413	2,683,413	Medium
IT	Current account	Credit line / overdraft	35,851,220	4,360,284	4,360,284	Low
EE	Current account	Dealing on own account	1,020,597	63,721	63,721	Low
CZ	Current account	Debit card	1,064,147	37,295	37,295	Medium
EE	Current account	Debit card	1,020,597	63,721	63,721	Low
IT	Current account	Debit card	35,851,220	4,360,284	4,360,284	Low
SI	Current account	Debit card	1,444,348	98,144	98,144	Low
EE	Current account	Equity release loan	1,020,597	63,721	63,721	Low
AT	Current account	Execution of orders on behalf of clients	6,203,996	62,212	726,773	Low
EE	Current account	Execution of orders on behalf of clients	1,020,597	63,721	63,721	Low
IT	Current account	Execution of orders on behalf of clients	35,851,220	4,360,284	4,360,284	Low
EE	Current account	Fund transfers	1,020,597	63,721	63,721	Low
DE	Current account	Fund transfers	64,200,663	2,683,413	2,683,413	Medium
IT	Current account	Fund transfers	35,851,220	4,360,284	4,360,284	Low
AT	Current account	Investment advice	2,481,599	24,885	290,709	Low
EE	Current account	Mortgage loan	1,020,597	63,721	63,721	Low

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
HU	Current account	Other non-life insurance	2,443,558	128,608	128,608	High
EE	Current account	Placing without firm commitment	1,020,597	63,721	63,721	Low
AT	Current account	Portfolio management	3,722,398	12,442	145,355	Low
BE	Current account	Portfolio management	7,300,836	na	na	na
EE	Current account	Portfolio management	1,020,597	63,721	63,721	Low
AT	Current account	Reception and transmission of orders	6,203,996	na	na	na
EE	Current account	Reception and transmission of orders	1,020,597	63,721	63,721	Low
EE	Current account	Savings account	1,020,597	63,721	63,721	Low
SI	Current account	Savings account	866,609	na	na	na
UK	Current account	Savings account	45,071,158	190,884	2,345,013	Medium
EE	Current account	Term investment account	1,020,597	63,721	63,721	Low
EE	Current account	Underwriting or placing with firm commitment	1,020,597	63,721	63,721	Low
Total current account			411,133,384	29,011,633	32,627,797	
LU	Home insurance	Motor insurance	63,240	na	na	Low
FR	Home insurance	Other non-life insurance	43,054,568	na	na	Medium
Total home insurance			43,117,808			
SI	Mortgage loan	Bank deposits	57,250	0	0	Low
NL	Mortgage loan	Business/commercial insurance	7,017,123	125,981	125,981	Low
DK	Mortgage loan	Consumer loan	356,981	0	0	Medium
FI	Mortgage loan	Consumer loan	1,332,335	0	0	Low
CZ	Mortgage loan	Current account	0	0	0	Medium
DK	Mortgage loan	Current account	892,452	0	0	Medium
HU	Mortgage loan	Current account	1,334,311	0	0	High
IT	Mortgage loan	Current account	2,519,275	na	na	Low
PL	Mortgage loan	Current account	1,403,118	0	0	Medium
PT	Mortgage loan	Current account	2,378,430	0	0	Low
SK	Mortgage loan	Current account	399,563	0	0	Medium
NL	Mortgage loan	Current account	7,017,123	125,981	125,981	Low
CY	Mortgage loan	Fire insurance	207,438	na	na	High

Types of practice						
Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
IT	Mortgage loan	Fire insurance	94,473	na	na	Low
NL	Mortgage loan	Fire insurance	7,017,123	125,981	125,981	Low
NL	Mortgage loan	Health/disability insurance	7,017,123	125,981	125,981	Low
AT	Mortgage loan	Home insurance	400,386	0	0	Low
CY	Mortgage loan	Home insurance	207,438	na	na	High
EE	Mortgage loan	Home insurance	141,248	0	0	Low
IT	Mortgage loan	Home insurance	3,149,094	na	na	Low
CY	Mortgage loan	Life insurance	186,694	na	na	High
EE	Mortgage loan	Life insurance	141,248	0	0	Low
HU	Mortgage loan	Life insurance	400,293	0	0	High
IT	Mortgage loan	Life insurance	545,843	na	na	Low
LV	Mortgage loan	Life insurance	76,652	0	0	Medium
PL	Mortgage loan	Life insurance	473,552	0	0	Medium
PT	Mortgage loan	Life insurance	1,022,725	0	0	Low
NL	Mortgage loan	Life insurance	7,017,123	125,981	125,981	Low
NL	Mortgage loan	Motor insurance	7,017,123	125,981	125,981	Low
CY	Mortgage loan	Operations on foreign currencies	207,438	na	na	High
BE	Mortgage loan	Payment protection insurance	582,148	2,759	16,538	Medium
FI	Mortgage loan	Payment protection insurance	1,332,335	0	0	Low
FR	Mortgage loan	Payment protection insurance	13,158,250	0	0	Medium
HU	Mortgage loan	Payment protection insurance	266,862	0	0	High
PL	Mortgage loan	Payment protection insurance	789,254	0	0	Medium
SE	Mortgage loan	Payment protection insurance	1,126,499	0	0	Medium
Total mortgage loan			78,084,811	758,643	772,422	
FR	Motor insurance	Home insurance	7,449,892	na	na	na
Total motor insurance			7,449,892			
EU-27 Total			571,597,210	29,770,400	33,400,343	Medium

Table 105 – Impact on mobility and cross-border trade – per combined product

Types of practice		Mobility impact		Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
EE	Current account	Bank deposits	1,020,597	63,721	63,721	Low
IT	Current account	Bank deposits	35,851,220	4,360,284	4,360,284	Low
SI	Consumer loan	Bank deposits	309,153	na	na	Low
SI	Mortgage loan	Bank deposits	57,250	0	0	Low
Total Bank deposits			37,238,221	4,424,005	4,424,005	
NL	Corporate banking loan	Business/commercial insurance	413,972	na	na	Low
NL	Mortgage loan	Business/commercial insurance	7,017,123	125,981	125,981	Low
Total business/commercial insurance			7,431,095	125,981	125,981	
CZ	Current account	Consumer loan	2,837,725	99,453	99,453	Medium
DK	Mortgage loan	Consumer loan	356,981	0	0	Medium
EE	Current account	Consumer loan	1,020,597	63,721	63,721	Low
FI	Mortgage loan	Consumer loan	1,332,335	0	0	Low
Total Consumer loan			5,547,637	163,174	163,174	
EE	Current account	Corporate banking loan	1,020,597	63,721	63,721	Low
Total corporate banking loan			1,020,597	63,721	63,721	
CZ	Current account	Credit card	2,364,770	82,877	82,877	Medium
DK	Current account	Credit line / overdraft	0	0	0	Medium
PL	Consumer loan	Credit card	585,961	na	na	Medium
Total credit card			2,950,732	82,877	82,877	
AT	Current account	Credit line / overdraft	3,722,398	37,327	436,064	Low
CZ	Current account	Credit line / overdraft	1,418,862	49,726	49,726	Medium
EE	Current account	Credit line / overdraft	1,020,597	63,721	63,721	Low
DE	Current account	Credit line / overdraft	64,200,663	2,683,413	2,683,413	Medium
IT	Current account	Credit line / overdraft	35,851,220	4,360,284	4,360,284	Low
Total credit line/overdraft			106,213,741	7,194,471	7,593,208	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
CZ	Consumer loan	Current account	504,724	na	na	Medium
DK	Mortgage loan	Current account	892,452	0	0	Medium
HU	Mortgage loan	Current account	1,334,311	0	0	High
IT	Consumer loan	Current account	1,802,251	na	na	Low
IT	Mortgage loan	Current account	2,519,275	na	na	Low
PL	Mortgage loan	Current account	1,403,118	0	0	Medium
PT	Mortgage loan	Current account	2,378,430	0	0	Low
SK	Consumer loan	Current account	635,095	na	na	Medium
SK	Mortgage loan	Current account	399,563	0	0	Medium
NL	Corporate banking loan	Current account	413,972	na	na	Low
NL	Mortgage loan	Current account	7,017,123	125,981	125,981	Low
Total current account			19,300,314	125,981	125,981	
EE	Current account	Dealing on own account	1,020,597	63,721	63,721	Low
Total dealing on own account			1,020,597	63,721	63,721	
CZ	Current account	Debit card	1,064,147	37,295	37,295	Medium
EE	Current account	Debit card	1,020,597	63,721	63,721	Low
IT	Current account	Debit card	35,851,220	4,360,284	4,360,284	Low
SI	Current account	Debit card	1,444,348	98,144	98,144	Low
Total debit card			39,380,312	4,559,443	4,559,443	
EE	Current account	Equity release loan	1,020,597	63,721	63,721	Low
Total equity release loan			1,020,597	63,721	63,721	
AT	Current account	Execution of orders on behalf of clients	6,203,996	62,212	726,773	Low
EE	Current account	Execution of orders on behalf of clients	1,020,597	63,721	63,721	Low
IT	Current account	Execution of orders on behalf of clients	35,851,220	4,360,284	4,360,284	Low
Total execution of orders on behalf of clients			43,075,814	4,486,216	5,150,777	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
CY	Mortgage loan	Fire insurance	207,438	na	na	High
IT	Mortgage loan	Fire insurance	94,473	na	na	Low
NL	Mortgage loan	Fire insurance	7,017,123	125,981	125,981	Low
Total fire insurance			7,319,033	125,981	125,981	
EE	Current account	Fund transfers	1,020,597	63,721	63,721	Low
DE	Current account	Fund transfers	64,200,663	2,683,413	2,683,413	Medium
IT	Current account	Fund transfers	35,851,220	4,360,284	4,360,284	Low
Total fund transfers			101,072,480	7,107,418	7,107,418	
NL	Corporate banking loan	Health/disability insurance	413,972	na	na	Low
NL	Mortgage loan	Health/disability insurance	7,017,123	125,981	125,981	Low
Total health/disability insurance			7,431,095	125,981	125,981	
AT	Mortgage loan	Home insurance	400,386	0	0	Low
CY	Mortgage loan	Home insurance	207,438	na	na	High
EE	Mortgage loan	Home insurance	141,248	0	0	Low
FR	Motor insurance	Home insurance	7,449,892	na	na	na
IT	Mortgage loan	Home insurance	3,149,094	na	na	Low
Total home insurance			11,348,057			
AT	Current account	Investment advice	2,481,599	24,885	290,709	Low
Total investment advice			2,481,599	24,885	290,709	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
AT	Consumer loan	Life insurance	1,612,114	na	na	Low
CY	Consumer loan	Life insurance	97,716	na	na	High
CY	Mortgage loan	Life insurance	186,694	na	na	High
EE	Mortgage loan	Life insurance	141,248	0	0	Low
HU	Mortgage loan	Life insurance	400,293	0	0	High
IT	Mortgage loan	Life insurance	545,843	na	na	Low
LV	Mortgage loan	Life insurance	76,652	0	0	Medium
PL	Mortgage loan	Life insurance	473,552	0	0	Medium
PT	Consumer loan	Life insurance	566,151	na	na	Low
PT	Mortgage loan	Life insurance	1,022,725	0	0	Low
NL	Corporate banking loan	Life insurance	413,972	na	na	Low
NL	Mortgage loan	Life insurance	7,017,123	125,981	125,981	Low
Total life insurance			12,554,084	125,981	125,981	
EE	Current account	Mortgage loan	1,020,597	63,721	63,721	Low
Total mortgage loan			1,020,597	63,721	63,721	
CZ	Consumer loan	Motor insurance	504,724	na	na	Medium
EE	Consumer loan	Motor insurance	209,217	na	na	Low
FI	Consumer loan	Motor insurance	579,812	na	na	Low
LU	Home insurance	Motor insurance	63,240	na	na	Low
PT	Consumer loan	Motor insurance	566,151	na	na	Low
NL	Corporate banking loan	Motor insurance	413,972	na	na	Low
NL	Mortgage loan	Motor insurance	7,017,123	125,981	125,981	Low
Total motor insurance			9,354,240	125,981	125,981	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
CY	Mortgage loan	Operations on foreign currencies	207,438	na	na	High
Total operations on foreign currencies			207,438			
FR	Home insurance	Other non-life insurance	43,054,568	na	na	Medium
HU	Current account	Other non-life insurance	2,443,558	128,608	128,608	High
Total other non-life insurance			45,498,126	128,608	128,608	
BE	Mortgage loan	Payment protection insurance	582,148	2,759	16,538	Medium
CY	Consumer loan	Payment protection insurance	162,860	na	na	High
CZ	Consumer loan	Payment protection insurance	504,724	na	na	Medium
FI	Mortgage loan	Payment protection insurance	1,332,335	0	0	Low
FR	Consumer loan	Payment protection insurance	7,053,209	na	na	Medium
FR	Mortgage loan	Payment protection insurance	13,158,250	0	0	Medium
HU	Mortgage loan	Payment protection insurance	266,862	0	0	High
IT	Consumer loan	Payment protection insurance	1,201,500	na	na	Low
PL	Consumer loan	Payment protection insurance	1,757,884	na	na	Medium
PL	Mortgage loan	Payment protection insurance	789,254	0	0	Medium
SI	Consumer loan	Payment protection insurance	309,153	na	na	Low
SE	Mortgage loan	Payment protection insurance	1,126,499	0	0	Medium
Total payment protection insurance			28,244,677	2,759	16,538	
ES	Mortgage loan	Pension product	798,490	0	0	High
NL	Corporate banking loan	Pension product	413,972	na	na	Low
Total pension product			1,212,462			
EE	Current account	Placing without firm commitment	1,020,597	63,721	63,721	Low
Total placing without firm commitment			1,020,597	63,721	63,721	
AT	Current account	Portfolio management	3,722,398	12,442	145,355	Low
BE	Current account	Portfolio management	7,300,836	na	na	na
EE	Current account	Portfolio management	1,020,597	63,721	63,721	Low
Total portfolio management			12,043,831	76,163	209,076	

Types of practice			Mobility impact	Cross-border demand		Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (low end)	Number of new cross-border switchers (high end)	Likelihood of entry of foreign players
AT	Current account	Reception and transmission of orders	6,203,996	na	na	na
EE	Current account	Reception and transmission of orders	1,020,597	63,721	63,721	Low
Total reception and transmission of orders			7,224,594	63,721	63,721	
EE	Current account	Savings account	1,020,597	63,721	63,721	Low
SI	Current account	Savings account	866,609	na	na	na
UK	Consumer loan	Savings account	10,364,959	na	na	Medium
UK	Current account	Savings account	45,071,158	190,884	2,345,013	Medium
Total savings accounts			57,323,323	254,605	2,408,734	
EE	Current account	Term investment account	1,020,597	63,721	63,721	Low
Total term investment account			1,020,597	63,721	63,721	
EE	Current account	Underwriting or placing with firm commitment	1,020,597	63,721	63,721	Low
Total underwriting or placing with firm commitment			1,020,597	63,721	63,721	
EU-27 Total			571,597,210	29,770,400	33,400,343	

Table 106 – Practices that affect cross-border demand

Types of practice			Mobility impact	Cross-border demand	Share of cross-border demand	Cross-border supply
Country	Gateway Product	Combined product	Number of potential contracts switched	Number of new cross-border switchers (high end)		Likelihood of entry of foreign players
IT	Current account	Bank deposits	35,851,220	4,360,284	12.16%	Low
IT	Current account	Credit line / overdraft	35,851,220	4,360,284	12.16%	Low
IT	Current account	Debit card	35,851,220	4,360,284	12.16%	Low
IT	Current account	Execution of orders on behalf of clients	35,851,220	4,360,284	12.16%	Low
IT	Current account	Fund transfers	35,851,220	4,360,284	12.16%	Low
AT	Current account	Credit line / overdraft	3,722,398	436,064	11.71%	Low
AT	Current account	Investment advice	2,481,599	290,709	11.71%	Low
AT	Current account	Execution of orders on behalf of clients	6,203,996	726,773	11.71%	Low
SI	Current account	Debit card	1,444,348	98,144	6.80%	Low
EE	Current account	Bank deposits	1,020,597	63,721	6.24%	Low
EE	Current account	Consumer loan	1,020,597	63,721	6.24%	Low
EE	Current account	Corporate banking loan	1,020,597	63,721	6.24%	Low
EE	Current account	Credit line / overdraft	1,020,597	63,721	6.24%	Low
EE	Current account	Dealing on own account	1,020,597	63,721	6.24%	Low
EE	Current account	Debit card	1,020,597	63,721	6.24%	Low
EE	Current account	Equity release loan	1,020,597	63,721	6.24%	Low
EE	Current account	Execution of orders on behalf of clients	1,020,597	63,721	6.24%	Low
EE	Current account	Fund transfers	1,020,597	63,721	6.24%	Low
EE	Current account	Mortgage loan	1,020,597	63,721	6.24%	Low
EE	Current account	Placing without firm commitment	1,020,597	63,721	6.24%	Low
EE	Current account	Portfolio management	1,020,597	63,721	6.24%	Low
EE	Current account	Reception and transmission of orders	1,020,597	63,721	6.24%	Low
EE	Current account	Savings account	1,020,597	63,721	6.24%	Low
EE	Current account	Term investment account	1,020,597	63,721	6.24%	Low
EE	Current account	Underwriting or placing with firm commitment	1,020,597	63,721	6.24%	Low
HU	Current account	Other non-life insurance	2,443,558	128,608	5.26%	High
UK	Current account	Savings account	45,071,158	2,345,013	5.20%	Medium
DE	Current account	Credit line / overdraft	64,200,663	2,683,413	4.18%	Medium
DE	Current account	Fund transfers	64,200,663	2,683,413	4.18%	Medium
AT	Current account	Portfolio management	3,722,398	145,355	3.90%	Low
CZ	Current account	Debit card	1,064,147	37,295	3.50%	Medium
CZ	Current account	Consumer loan	2,837,725	99,453	3.50%	Medium
CZ	Current account	Credit card	2,364,770	82,877	3.50%	Medium
CZ	Current account	Credit line / overdraft	1,418,862	49,726	3.50%	Medium
BE	Mortgage loan	Payment protection insurance	582,148	16,538	2.84%	Medium
NL	Mortgage loan	Business/commercial insurance	7,017,123	125,981	1.80%	Low
NL	Mortgage loan	Current account	7,017,123	125,981	1.80%	Low
NL	Mortgage loan	Fire insurance	7,017,123	125,981	1.80%	Low
NL	Mortgage loan	Health/disability insurance	7,017,123	125,981	1.80%	Low
NL	Mortgage loan	Life insurance	7,017,123	125,981	1.80%	Low
NL	Mortgage loan	Motor insurance	7,017,123	125,981	1.80%	Low

Figure 48 – Distribution of switching per gateway product

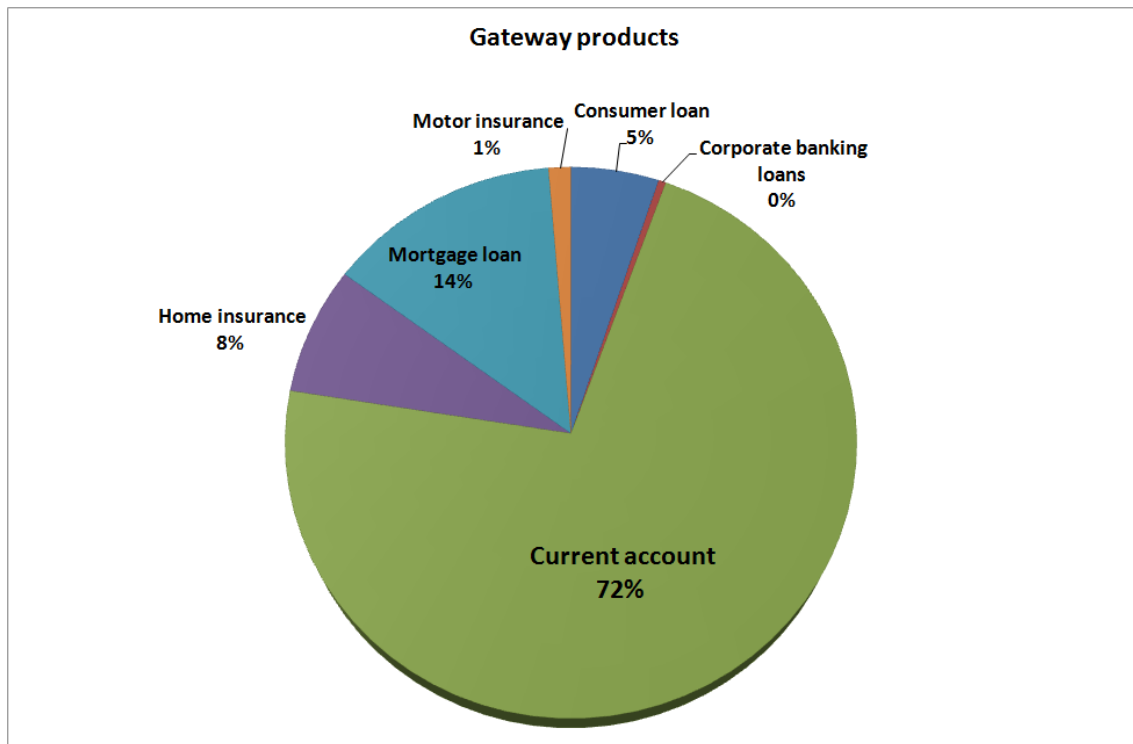
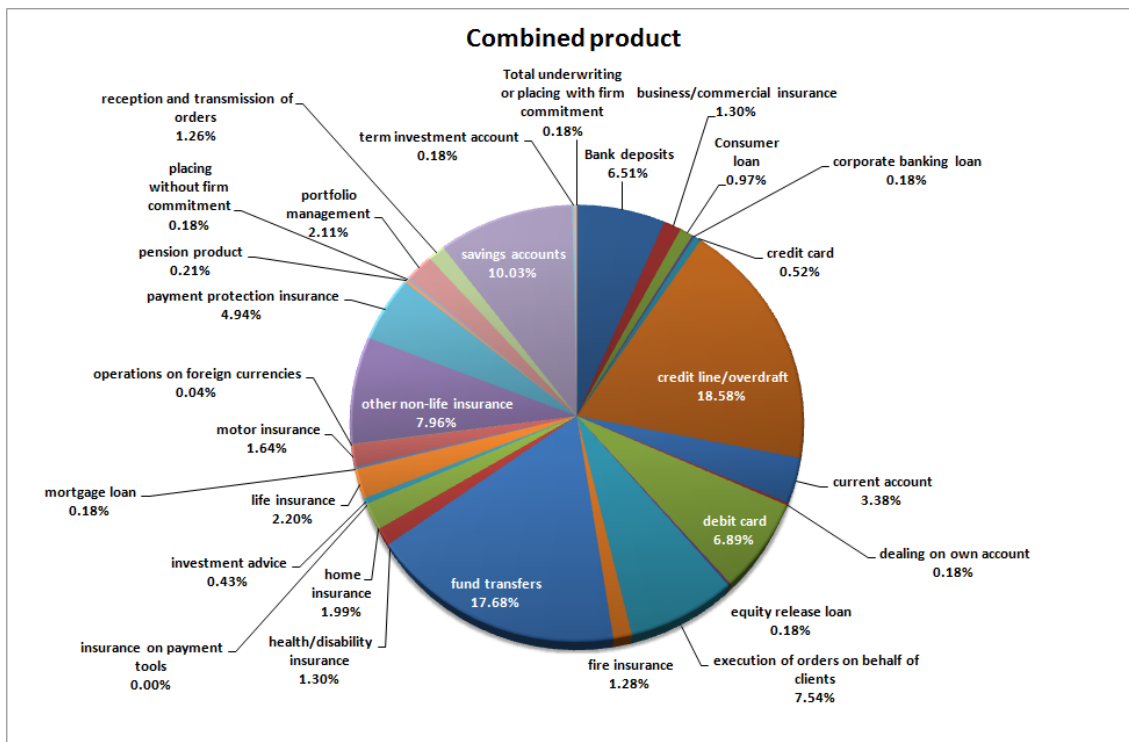


Figure 49 – Distribution of switching per combined product



FINDING #6.14 – IMPACT ON MOBILITY AND CROSS-BORDER TRADE

The practices under scrutiny, and in particular cross-selling and conditional practices, negatively affect customer mobility. The fragmentation in the national legal systems and the legal uncertainty surrounding the interpretation of some parts of the EU *acquis* (such as the UCPD) to the practices at hand (in particular to cross-selling and conditional sales practices) may be an obstacle for both providers wishing to operate across borders, and customers ready to engage in cross-border shopping.

In our simulation:

- The total number of contracts that would be switched in the EU27 if the practices at hand were not applied by financial service providers is 572 million. This effect would be felt mostly in Italy, Germany and the United Kingdom.
- The number of contracts that would be switched to foreign providers reaches 33 million, mostly located in Italy, Austria and Estonia. The countries where entry of new players is most likely are **Cyprus, Hungary, and Spain**. In these countries, foreign providers are most likely to find it profitable to enter the market within a reasonable timeframe, boosting the cross-border supply of financial products. Other countries in which this effect may materialise – though with a lower intensity – are Belgium, Czech Republic, Denmark, France, Germany, Latvia, Poland, Slovakia, Sweden, and the UK.
- The most substantial impact on mobility concerns contracts in which the current account is the gateway product. Other gateway products leading to an important numbers of potential switchers are mortgage loans, home insurance, consumer loans and – to a lesser extent – motor insurance and corporate banking loans.
- The impact on cross-border demand would affect mostly contracts that have as gateway product the current account (97% of the practices having an impact on cross-border demand).
- The combined product for which switching occurs most often are credit line/overdraft, fund transfers, savings accounts, other non-life insurance, bank deposits, debit cards, execution of orders on behalf of clients and payment protection insurance.
- The combined products that would be switched most often to foreign providers are investment advice, bank deposits, debit cards and the execution of orders on behalf of clients. In all these cases, the degree of switching falls in the range between 11% and 12% of total switched contracts.
- The practices that exert the greatest impact on cross-border demand are found in Austria, Belgium, Czech Republic, Estonia, Germany, Hungary, Italy, the Netherlands, Slovenia and the UK.

7 CONCLUSION: MAIN FINDINGS

This Report looks at the issue of tying and other potentially unfair commercial practices in the retail financial services sector. The first task we have been assigned by the European Commission was preparing an inventory of the main tied/tying products in all the EU27. We consider this to be a first major result of this study, as a comprehensive list of potentially unfair practices had not been developed to date.

Our inventory includes the following practices, as defined at Section 1.1 above:

- *Cross-selling practices include tying and pure bundling, mixed bundling, multi-product rebates and preferential/exclusive agreements.* Tying occurs when two or more products are sold together in a package and at least one of these products is not sold separately. Pure bundling occurs when none of the package components is available separately, and the components are offered in fixed proportions. Mixed bundling occurs whenever two or more products are sold together in a package, although each of the products can also be purchased separately on the market. Mixed bundling can be associated with a rebate on the price of the bundled products, *i.e.* purchasing the bundle is cheaper for the customer than purchasing all the products separately, as the price for the bundle is lower than the sum of the standalone prices of the bundled products. This variant of mixed bundling can also be referred to as “multi-product rebate”. Finally, preferential and exclusive agreements refer to cases in which a financial service provider already has a contractual relationship with the customer and imposes a third party for an additional service, or offers better financial conditions if the customer chooses to purchase from a selected third party, with which the provider has a preferential agreement.
- *Conditional sales practices include:* (i) practices where the service provision is subject to a specific condition, such as an action undertaken by the customer; and (ii) practices that entail the provision of better contractual conditions to existing customers, subject to specific behaviour. An example of the former type of practice is the obligation to have the salary paid into the customer’s current account as a condition to obtain a mortgage loan; an example of the latter is banks that charge no credit card fee if the cardholder spends more than a given amount of money every year, or variable fees depending on usage, or on the number of products purchased. We term these latter practices conditional rebates.
- *Aggressive commercial strategies* are practices which may not relate to specific contractual conditions offered to customers, but to the exploitation of the information flow between the service provider and the customer in the pre-contractual and contractual phases. We basically define three aggressive commercial strategies:
 - (i) “Unsolicited offers” (*e.g.* so-called “pressure selling” or “inertia selling” of products that were not requested), where a product or service offer is

unsolicited when it is not expressly requested by customers and it involves a particular pressure on them to purchase that specific offer;

- (ii) “Churning”, consisting in a misuse of the fiduciary role between the intermediary and its customer. This practice entails for example the excessive use of the current account or the investment portfolio induced by the financial intermediary (agent) who exploits the informational gap of the other party (principal).
- (iii) “Steering”, defined as a practice, especially used in the mortgage market, consisting of stressing the credit risk of a potential borrower to steer him\her to higher cost loan.

As regards the main potentially unfair practices, we have run several tests to reach a conclusion. The main difficulty in this exercise was related to the fact that the criteria to determine the unfairness of commercial practices in the retail financial services sector have not been specified in any comprehensive piece of legislation, and the main reference in the EU *acquis* is the overall definition of unfair commercial practices contained in the UCPD. We have initially relied on that definition, based on the assessment of whether the practice at hand is contrary to professional diligence and likely to materially distort consumer choice. In addition, we analysed the practices that were identified by our empirical analyses through the lens of economic analyses, by focusing on the efficiencies that may accrue to end customers as a result of the practice (expressed in terms of convenience and financial advantage), as opposed to the costs that customers may bear (expressed as increased switching costs and reduced transparency and comparability of offers). After a comparative analysis of the EU *acquis* and the legal regimes in the EU27, we have compared our findings with the results of the empirical analysis, and were then able to run a simulation to identify the most potentially unfair practices per product and country.

First of all, our empirical analysis has revealed that the practices at hand are widespread. In particular, our sample of respondents reported that tying and pure bundling are the most common cross-selling practices, and account for 31.7% of our sample. Mixed bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. In another 18% of the cases, service providers offer preferential conditions (tariffs or rates) for the gateway product only. In another 16.2% of the cases, financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products. In addition, the legal and empirical analyses and our survey of legal experts hints at the existence of other potentially unfair commercial practices, especially as regards preferential agreements and cases in which providers exploit their informational advantages against their customers, such as steering.

We have analysed those practices from both a competition policy and a consumer policy perspective. In addition, we have analysed the practices from the perspective of economic theory (Section 2), through a legal analysis (Sections 3 and 4) and a dedicated survey (Section 5). Below, we summarise our results.

- From a competition policy angle*, the economic literature on tying and bundling does not give an unequivocal answer about the trade-off between costs and benefits borne by society. The key concept in Community competition law in this respect is that of “anti-competitive foreclosure”, defined by the European Commission as a joint finding of actual or likely foreclosure of competitors, and the likelihood that the conduct creates consumer harm. As recently clarified by the Commission in its Guidance paper on the treatment of exclusionary abuses under Article 82 of the Treaty, this concept applies to all conducts, including not only tying and bundling, but also single-product (conditional or loyalty) rebates. In addition, preferential or exclusivity agreements can hamper competition and lead to anti-competitive foreclosure especially when competitors are unable to compete for the full supply to customers. This can be the case when the dominant firm supplies a “must stock item”, such that even as-efficient competitors would not be able to match its offers. Any other aggressive commercial practice in which a dominant firm engages vis-à-vis consumers may be configured as an anti-competitive practice under Article 82 ECT if it leads to actual or likely foreclosure of rivals, harms consumers in the long run, and does not portray sufficiently strong redeeming efficiencies. Finally, conditional sale agreements such as the obligation to have the salary paid into a current account normally do not create concern for antitrust authorities. However, in certain circumstances they can have an effect similar to that of exclusivity or preferential agreements, and as such may lead to the foreclosure of as-efficient competitors, coupled with consumer harm.
- As regards the consumer protection perspective*, the practices at hand relate both to the contractual and pre-contractual phase of the relationship between the provider and its customer. A very important element in our approach is the consideration of the factors that make the retail financial services sector different as opposed to many other sectors, and as such potentially warranting a different treatment in terms of policy. These factors include, most notably, the behavioural patterns of consumers, that suffer from a structural information asymmetry vis-à-vis their providers, and as such are exposed to exploitation by their counterparts. Practices such as unsolicited offers, churning and steering are the consequence of this structural situation. This issue becomes even more relevant the “thicker” is the type of relationship at hand, and thus whenever the role of the financial service provider becomes crucial in the provision of advice on consumer choice. Finally, we report ample evidence that the features of this sector – including often limited degrees of financial education on the side of customers – leads consumers and SMEs in a position in which they choose what they are offered, and are not in a suitable condition to compare offers, understand the consequences of their decisions, fully appraise the price of what they purchase, as well as compare their current contract with available comparable offers.

At the same time, some of these practices can also create important efficiencies both for financial service providers and their customers. These include *i.a.*

economies of scale and scope, better risk management and more efficient pricing from the supply side, and financial advantages, one-stop-shop effects and reduction of transaction costs on the demand side. Appraising the balance between potential costs and benefits of the practice under scrutiny was one of the main challenges of this Report.

Against this background, we found tying and other potentially unfair commercial practices to have important consequences:

- Tying practices, when not leading to efficiencies that are passed on to consumers, may reduce customer mobility, price transparency and the comparability of providers on the market, increase switching costs and negatively affect consumer confidence. The results of our test reported in Section 6 above suggest that tying can be harmful to consumers in several instances, and point at types of combinations that emerge more frequently in a number of Member States, including Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands and United Kingdom. In addition, for tying and pure bundling, as well as for conditional sales practices, the main justification reported in our survey is that customers simply have “no choice”. This suggests that the practices that entail coercion of customers lead to a significant distortion of customer behaviour.
- Mixed bundling practices, especially when providing a financial advantage to customers (*i.e.* multi-product rebates), are often considered to be less anti-competitive and unfair than tying, as products are anyway available separately on the market. However, from a consumer protection perspective, there may often be little difference between the effect of the two practices, as consumers are often put in a situation where they have to trust the advice of their counterpart, and find it costly to shop around for alternatives. This finding is supported by:
 - (i) Evidence that in countries where tying is officially banned, bundling replaces with practically the same effects. Bundling with no (dis)advantage was found to be unfair in Austria, Belgium, Czech Republic, Estonia, Ireland and Latvia; whereas the offer of a preferential tariff or rate for the gateway or combined product was found to be unfair in Cyprus, Denmark, Estonia, Finland, Italy, and Slovenia. Some of these countries presented less concerns as regards tying, but witness widespread bundling practices that are unfair.
 - (ii) Evidence from our antitrust test, which shows that the most frequent cross-selling practices that may create antitrust concerns in the EU27 are mixed bundling practices, rather than tying ones.
- Amongst the other potentially unfair practices, some are unlikely to provide efficiencies to customers, and are construed as being almost *per se* unfair. This is the case for all practices in which the financial service provider exploits its superior information to extract more surplus from the relationship with the customer, as is the case for churning and steering. This is also the case of unsolicited offers and pressure/inertia selling, as the

financial service provider can induce customers to purchase unnecessary or unwanted products, materially distorting the customer's choice. These are the practices that are most difficult to capture in an empirical analysis, especially if consumers do not report them in practice: limited participation of consumers and consumer associations was indeed one of our major problems in collecting data for our empirical analysis. In the future, our results will have to be validated also with more input on that side.

7.1 Main potentially unfair practices, per gateway product, per country

As regards the types of potentially unfair practices most commonly observed in the EU27, as well as the reasons stated by respondents for engaging in these conducts, we have reached the following findings:

- Cross-selling (tying and bundling) on the one hand, and conditionals sales practices on the other hand, are in a proportion of 79% to 21% in our sample. Cross-selling practices are supplied by a single financial institution in 50% of the cases, amongst the same financial group in 30%, and with another institution in 20%. The supply of combined products rarely involves a branch or institution located in another country (7% of the cases). The leading reasons for financial institutions to engage in these practices are commercial strategy, followed by risk reduction, and cost efficiency. It is worth noting that the main reason to engage in conditional sales practices is risk reduction.
- Tying and pure bundling are the most common cross-selling practice, and accounts for 31.7% of our sample. Mixed bundling with no financial (dis)advantage is the second most common, accounting for 26.6% of our sample. In another 18% of the cases, service providers offer preferential conditions (tariffs or rates) for the gateway product only. In another 16.2% of the cases, financial institutions engage in mixed bundling by offering preferential conditions (tariffs or rate) if customers purchase a combination of products ("multi-product rebates").
- As emerges from the results of our survey, the most common reasons for consumers to engage in these practices differ according to the type of practice. For tying and pure bundling, as well as for conditional sales practices, the main justification reported in our survey is that customers simply have "no choice". This suggests that the practices that entail coercion of customers lead to a significant distortion of customer behaviour. Concerning other cross-selling and conditional sales practices, convenience, as well as financial and other advantages, are the leading reasons.
- All cross-selling practices score positively in our antitrust test, which suggests that on average they are leading to anti-competitive effects. Although tying is often considered to be the most potentially anti-competitive practice in the set of conducts under scrutiny, the market conditions in which the practices are observed leads to a different conclusion: as a matter of fact, the highest

score in terms of anti-competitiveness is observed for forms of multi-product rebates. The top three gateway products are mortgage loans, current accounts and consumer loans.

- Anti-competitive tying was reported in Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands and United Kingdom. Bundling with no financial (dis)advantage was reported in Belgium, Czech Republic, Estonia, Ireland and Latvia. The offer of preferential tariffs or rates for the gateway or combined products lead to anti-competitive outcomes in Cyprus and Denmark.
- Tying was found to be unfair in Belgium, Bulgaria, Cyprus, Estonia, France, Hungary, Italy, Slovakia, Slovenia, the Netherlands, the United Kingdom and (under scenario 1 only) Austria). Mixed bundling was found to lead to unfair outcomes in Austria, Belgium, Estonia, Latvia and (under scenario 1 only) the Czech Republic and Ireland. Unfair multi-product rebates are observable in Cyprus, Denmark, Estonia, Finland, Slovenia and (under scenario 1 only) Italy.
- Preferential agreements are widely negotiated with domestic partners (72% of all cases with preferential agreements). Although domestic preferential agreements are mainly providing efficiencies, 11% of domestic preferential agreements (i.e. 6 cases) do not provide any efficiency. They have been reported in Italy, Slovenia and Latvia. Cases of conditional practices that reportedly produced no efficiencies emerged in ten Member States: Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Italy and United Kingdom. Some of these practices refer to products (like current accounts) that usually do not require any guarantees from consumers. Nevertheless, they have been found in the Czech Republic, Denmark and Hungary.

When a mortgage is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of mortgage loans with long-term accounts. Frequent practices that may create restrictions of competition also include the cross-selling of mortgage loans plus (i) life insurance or (ii) current account. Very harmful practices of this type are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.
- *From a consumer policy perspective*, **approximately 90% of the cross-selling practices are found to be unfair in our test**. The most unfair practices involved term investment accounts, bank deposits and a variety of insurance products.

When a current account is used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by the combination of current accounts with (i) specific investment services

(underwriting or placing with firm commitment, term investment account, dealing on own account, placing without firm commitment, execution of orders on behalf of clients); and (ii) loans (consumer and corporate banking loans, mortgage loan). Other more frequent practices that may create competitive restrictions are the cross-selling of current account with (i) credit and debit cards, and (ii) life insurance. Here too, examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Hungary and Latvia.

- *From a consumer policy perspective*, and unlike the case when mortgage is the gateway product, **in our test nearly two-third (i.e. 65.3%) of combinations with current accounts as gateway product proved beneficial or neutral to consumers** (through zero and negative scores). Consequently, nearly 35 % of such combinations resulted in unfairness. Amongst the latter, the most unfair cross-selling practice is the combination with mortgage loans. In addition, cross-selling of current accounts proves unfair when the combined product is home insurance and consumer loans. Other cross-selling practices that prove particularly unfair are the combination of current accounts with various forms of investment advice, which may pave the way towards additional aggressive commercial practices such as unsolicited offers, churning and steering.

When consumer loans are used as a gateway product:

- *From an antitrust perspective*, the strongest concerns are created by; (i) the combination of consumer loans with current accounts; and by (ii) the cross-selling of consumer loan with motor insurance. Examples of very harmful practices are found in Belgium, Cyprus, Czech Republic, Estonia and Finland.
- *From a consumer policy perspective*, **90.5% of cross-selling practices in which consumer loan is the gateway product resulted in consumer unfairness in our test**. Practices that are most unfair are the ones involving insurance products, including life insurance, PPI, health/disability insurance and motor insurance.

For what concerns other potentially unfair commercial practices:

- *Restrictions on access to products or services are imposed in all segments of financial services. However, they concern principally banking products*. Such practices tend to provide consumers and producers with efficiencies, but producers extract a greater amount of efficiencies than consumers. Critical cases can however be identified where no efficiency is generated for customers and producers, and conditioning the access to financial products and services may prove unfair, given the lack of counter-balancing effects provided by the absence of efficiencies. In our sample, 17% of the observed practices led to no efficiency and were observed in nine countries.

- *Conditional and loyalty rebates tend to advantage customers more than producers.* While 84% of such practices generate efficiencies, practices that produce no efficiencies were found in the banking sector in Poland, Hungary, Slovenia, Finland and Poland; in the insurance sector in Poland; and in the investment sector in Poland and Ireland.
- There are a limited number of cases (10) in which non-financial products are included in the offer of retail financial services. These cases almost exclusively involve insurance products. Of these, two critical cases that may lead to detrimental impact for customers were spotted in France and Poland.

On aggressive commercial practices:

- Given the specific nature of aggressive commercial practices, it was very difficult to identify instances of such practices through an empirical analysis. One possible way of detecting the situations in which aggressive commercial practices may emerge is to look to cases in which investment advice is tied with long-term products that are often used as gateway products, such as mortgage and consumer loans or current accounts. In our empirical analysis, we found a number of situations in which these conditions may occur. In particular, such cases have been identified in Poland and Austria, and most notably in Estonia.

7.2 Analysis of legal approaches at Member State level

The fact that tying and other commercial practices are widespread and potentially unfair has called for the attention of some national legislators. However, our survey of legal approaches throughout the EU27 portrays a situation of extreme fragmentation.

- *8 countries have decided to take specific action to restrict tying and cross-selling behaviour in the financial services sector.* These countries include countries that have enacted very far-reaching prohibitions (Belgium, France, Ireland, Portugal, Slovakia); countries that rely on “soft-law” schemes coupled with narrower legal prohibitions (Hungary, Poland); and one country where prohibitions are narrower in scope (Denmark).
- *16 countries have no specific provisions on tying and bundling practices.* Again, these include also legal systems in which the issue of cross-selling practices has been extensively debated, such as the Netherlands and the United Kingdom; countries where there is evidence that tying creates high switching costs in the financial services (in particular, banking) sector, but no initiative has been undertaken to date on cross-selling practices (Italy); countries where there is a general ban on tying in the consumer legislation, but application is non-existent (Spain); and countries where the issue of tying in the retail financial services sector has barely surfaced in the debate so far (Austria, Czech Republic, Estonia, Germany, Greece, Malta, Latvia, Lithuania, Luxembourg, Romania, Slovenia, Sweden).

- *As regards rebate schemes and preferential/exclusive agreements, only 3 countries have specific rules in place that concern these practices even in cases that fall outside the scope of competition rules.* Belgium, France and (to a lesser extent) Ireland have enacted rules that can tackle (though often not entirely) the problem of rebates, discounts, and the imposition of providers for specific additional services.
- *For what concerns aggressive sales practices such as unsolicited offers, pressure and inertia selling, only France has introduced specific bans.* In all other countries, these practices can potentially be tackled through consumer legislation, including provisions implementing the UCPD (with the exception of Luxembourg). The same can be said for churning and steering.
- *Although it is possible to challenge a number of unfair commercial practices through the UCPD, there seems to be limited prospects for this to occur absent a clarification on the applicability of this directive and the relative transposing legislation.* This is certainly the case for tying, rebates, preferential/exclusive agreements, churning and steering. This is even more important for the purposes of our Report since Member States differ noticeably as regards their regulatory framework and legal tradition on unfair commercial practices.
- *As the UCPD does not apply to SMEs, only countries where a general clause applying to B2B and B2C relationships exists will be able to protect SMEs against unfair commercial practices,* whereas other countries where legislation focuses exclusively on consumers will not be able to address this problem. In addition, national general clauses generally do not refer to the standard of professional diligence as the UCPD does. When defining unfair commercial practices most general clauses refer to good trading practice – in particular, to *boni mores* of the competition (Austria, Czech Republic, Germany, Greece and Slovakia); to good business, trade and marketing practice, fairness, honesty and good morals (Denmark, Estonia, Finland, Germany, Luxembourg, Portugal, Slovenia, Sweden), to the principle of good faith (Poland, Italy and Spain) and to business integrity (Hungary). In countries in which the general rules of the Civil Code apply, the standard is, for example, *'faute'* in France and *'onrechtmatigheid'* (unlawfulness) in the Netherlands⁴⁹⁴.

In any event, only some of the policies implemented in Member States seem to have reached the desired goal of tackling these practices when they are unfair to customers or to competitors. Also evidence from the US anti-tying restrictions introduced in the 1970 Bank Holding Act suggests that banning tying alone is very unlikely to prove effective, as several other practices (*e.g.* bundling, or rebates) can easily replace contractual tying by reaching similar effect without showing actual evidence of coercion. Comparing the legal approaches with the available empirical evidence, what emerged is the following:

⁴⁹⁴ *Id.*

- *Cross-selling and conditional sales practices are widespread in the EU27..* In addition, the relative weight of tying on other cross-selling practices varies across countries, and does not seem strongly dependent on the existence of a legal framework that bans tying of retail financial services. Compared to the results of the sector inquiry, which reported the percentage of banks engaging in given cross-selling practices, our survey revealed that the share of the market affected by cross-selling and conditional sales is often quite big. For example, the offer of multi-product rebates for the joint purchase of mortgage loans and current accounts reportedly affects more than 80% of the market in Belgium and Slovenia. In Spain, the use of mixed bundling (with no (dis)advantage for customers) for these two products affects more than 80% of the market. The two products are reportedly tied in the Netherlands and in Hungary in more than 80% of the transactions, and in 60% to 80% of the transactions in Italy.
- *In Member States that have prohibited tying, the practice either survives or was replaced by mixed bundling.* Tying survived despite a legal prohibition in Belgium, Portugal and Slovakia and has been replaced by other practices *i.a.* in Ireland and Spain.
- *Soft law initiatives seem to have been ineffective in a number of countries:* apart from the case of the UK, in countries such as Ireland, Hungary and Poland the existence of Codes of Ethics or recommendations from competition authorities or financial regulators does not seem to have stopped financial service providers from practising cross-selling and conditional sales practices.
- *In countries that have a general ban on tying, whenever exceptions are available financial service providers engage in this form of binding cross-selling practice* (e.g. Belgium, France). For example, our data on France confirm that the mortgage and PPI markets – where no prohibition currently exists as regards tying practices – are the ones that deserve more careful attention, as they affect more than 80% of the market. This confirms the direction taken by the *Loi Lagarde* that will ban the combined sale of mortgages and PPI policies from 1 January 2010. Similar situations exist in Slovenia and Finland.
- *Some conditional sales practices are widespread and systematically applied.* The most frequently observed conditional sales practice is the obligation to have the salary paid into the current account. In most countries this clause is used as a necessary condition to access a given service (normally, a mortgage loan), and is thus associated with a cross-selling practice (current account plus mortgage loan). These countries include Denmark, Cyprus, Ireland, Italy, Estonia, Poland, Slovenia, Latvia, Hungary, Belgium and the Czech Republic. In some of these countries, there are also cases in which this practice is used as a condition to obtain a more favourable service (*e.g.* lower interest rate on a loan). In Germany and Portugal, the practice was observed only in this latter form.

7.3 Applicability of the EU consumer *acquis*

Another important finding of our report is that the potential for challenging tying and other potentially unfair commercial practices mostly relies on whether the Unfair Commercial Practices Directive (UCPD) can be interpreted as covering some or all of the practices at hand, including especially unsolicited offers, pressure/inertia selling, churning and steering. It is also worth noting that, focusing on specific sectors, other pieces of legislation may have a potential to catch the practices covered by this study⁴⁹⁵. More specifically on the UCPD, as explained in Section 2.3 of this report, the UCPD is a rather new document, and it is not clear as of now which direction the practice would evolve. However, already at this stage it can be observed that:

- The Directive applies to unsolicited offers, “inertia” or “pressure” selling (as “aggressive practices” ex Articles 8 and 9 UCPD), when these are contrary to professional diligence.
- The UCPD can also be applied, depending on the interpretation that will be given by national courts, to cases of churning and steering (as “misleading practices” under Articles 6 and 7 UCPD).
- The UCPD potentially applies also to tying, bundling, rebates and preferential or exclusivity agreements, provided that: (i) the practice at hand is proven to be contrary to professional diligence; and (ii) it forces customers into the purchase of a product they would not have bought, or into a consumption pattern they would not have followed (in the case of conditional rebates). However, proving one’s case may be extremely difficult here, absent a clear indication that a given practice is captured by the UCPD.
- The applicability of the UCPD to some types of conditional sales, such as the obligation to pay salary into the current account as a condition to access a mortgage loan, appears more difficult.

Generally, the effective enforcement of the UCPD relies on a case-by-case assessment carried out by Member States’ authorities and courts, and there are some risks of divergent interpretations. In particular, the *onus probandi* for consumers will depend on the national implementation of the UCPD, especially as regards the “good faith” principle. What emerges from our analysis is that retail financial services should be approached with particular attention when defining the concept of unfairness, due to the specific problems these products pose to customers in terms of rational ignorance and decision-making biases. In addition, clarifications would be needed about the possibility to apply the UCPD also to cross-selling and conditional sales practices, where appropriate. As a matter of fact, financial services are exempted from the maximum harmonisation clause included in the UCPD: accordingly, the countries that have enacted a

⁴⁹⁵ For example, this is the case of the Market in Financial Instruments Directive (MiFID) that already covers practices such as churning in the context of the provision of investment services and also contain high level principles concerning the obligation of investment firms to act in the best interest of the clients.

general prohibition against combined sales (*e.g.* Belgium, France, Romania) may have to revise their legislation for all sectors, but not for retail financial services. Finally, what may provide a useful perspective is a stronger integration of behavioural economics concepts in the legal analysis of unfair commercial practices in the retail financial services sectors, in line with a consolidated stream of literature and a mounting debate also in international organisations.

7.4 The impact of the observed practices on customer mobility and cross-border demand/supply

The practices under scrutiny, and in particular cross-selling and conditional practices, negatively affect customer mobility. The fragmentation in the national legal systems and the legal uncertainty surrounding the interpretation of some parts of the EU *acquis* (such as the UCPD) to the practices at hand (in particular to cross-selling and conditional sales practices) may be an obstacle for both providers wishing to operate across borders, and customers ready to engage in cross-border shopping.

In our simulation:

- The total number of contracts that would be switched in the EU27 if the practices at hand were not applied by financial service providers is 572 million. This effect would be felt mostly in Italy, Germany and the United Kingdom. This result depends on the assumption that customers act rationally, *i.e.* they switch to another provider whenever the benefits associated with their current contract are more than compensated by the costs.
- The number of contracts that would be switched to foreign providers reaches 33 million (6% of total switching), mostly located in Italy, Austria and Estonia. In addition, entry of new players would be likely especially in Austria, Cyprus, Germany, Hungary, Portugal and Slovakia. In these countries, foreign providers are most likely to find it profitable to enter the market within a reasonable timeframe, boosting the cross-border supply of financial products. Other countries in which this effect may materialise – though with a lower intensity – are Denmark, Estonia, Italy, Latvia, Poland, Spain, and the UK.
- The most substantial impact on mobility concerns contracts in which the current account is the gateway product. Other gateway products leading to an important numbers of potential switchers are mortgage loans, home insurance, consumer loans and – to a lesser extent – motor insurance and corporate banking loans.
- The impact on cross-border demand would affect mostly contracts that have as gateway product the current account (97% of the practices having an impact on cross-border demand).
- The combined product for which switching occurs most often are credit line/overdraft, fund transfers, savings accounts, other non-life insurance,

bank deposits, debit cards, execution of orders on behalf of clients and payment protection insurance.

- The combined products that would be switched most often to foreign providers are investment advice, bank deposits, debit cards and the execution of orders on behalf of clients. In all these cases, the degree of switching falls in the range between 11% and 12% of total switched contracts.

The practices that exert the greatest impact on cross-border demand are found in Austria, Belgium, the Czech Republic, Estonia, Germany, Hungary, Italy, the Netherlands, Slovenia and the UK.