

**22 March 2015**

## **Consultation of the ESAs on guidelines for cross-selling practices**

### **The FBF's response**

**The French Banking Federation (FBF) is the professional body representing the interests of the banking industry in France. Its membership is composed of all credit institutions authorised as banks and doing business in France, i.e. more than 450 commercial and cooperative banks. FBF member banks have 40,000 permanent branches in France. They employ 400,000 people and serve 60 million customers.**

The French banking profession wishes to stress from the outset that directive 2005/29 on unfair commercial practices, which foresees the general rights of customers with respect to misleading or aggressive practices, does not in itself forbid tied selling. The latter is only prohibited if it is unfair, misleading or aggressive. The directive (article 3 § 9) does nevertheless allow for Member States to impose their own more restrictive regulations for the field of financial services. This is what France has done for the sale of bundled packages (article L.312-1-2 of the French Monetary and Financial Code).

The European Commission, having conducted several studies on the subject, came to the conclusion that new legislation concerning the financial sector would not be necessary. Indeed, it released a communication<sup>1</sup>, at the same time as a report<sup>2</sup>, on 14 March 2013, in order to proceed to a first appraisal of the application of the “Unfair Commercial Practices” directive. These two texts underline that the Commission does not intend to amend, in any way, the text of the directive and neither does it intend to draw up specific legislation for the financial services sector (above mentioned report, § 2.4, p 4-5).

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee relating to the application of the “Unfair Commercial Practices” directive - Achieve a high degree of consumer protection - Boost confidence in the internal market (COM(2013) 138 final).

<sup>2</sup> First report on the application of 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”) (COM(2013) 139 final).

Furthermore, while some of the recommendations submitted to us are in line with the continuity of the existing regulations (for example, the principles of *suitability* and *appropriateness*, taken from the MIF directive), the consultation calls for two observations, as European authorities assisted by national regulators have already carried out much work in fine tuning the content of the existing rules:

- on the one hand, the Paris marketplace has already taken virtuous steps forward, notably with regard to training and staff remuneration, to prevent excessive risk-taking and conflicts of interest with customers;
- on the other hand, the consultation, deviating from the specific mandate given to the ESAs by the MIFID2 directive that targeted solely the provision of an investment service along with another service or product within the framework of a bundled offering or as a condition to obtain the agreement or the bundled offering, covers the same fields as several European texts (MIF I / MIF II, UCITS, CRD 4 / CRR, MCD...) that already establish numerous professional obligations (rules of good conduct and/or organisational rules) for the providers. These provisions are clear. They have been negotiated over a period of time by all stakeholders in order to be adapted to each of the sectors concerned. Extra provisions do therefore not need to be drawn up on this regard.

Furthermore, in their present form, the guidelines would certainly establish common standards regarding cross-selling but they would apply *per se* to products and services, some of which are governed by basic texts (already in force or not yet transposed) that already set rules to follow concerning customer protection. Examples: directive 2008/48/CE on consumer credit, directive 2007/64/CE on payment services, new directive 2014/94/UE on UCITS.

New requirements cannot be added by the ESAs to the basic texts by way of guidelines. Indeed, ESAs establishing regulations<sup>3</sup> specify clearly that these authorities only implement guidelines to “establish coherent, efficient and effective supervisory practices within the ESFS” in order “to guarantee the shared, uniform and coherent application of EU law”. The guidelines are therefore not designed to go any further than the basic texts, particularly as the debates leading up to the adoption of these texts (for example, the directive on consumer credit) sometimes expressly rejected the addition of provisions relating to the sales of tied and bundled offering.

It does not therefore seem to us possible that the ESAs can create - by the means of guidelines - standard regulations for cross-selling, without overstepping the boundaries of their powers. Where a matter is not mentioned in the sector-specific basic texts, only directive 2005/29/CE relating to unfair commercial practices applies. Its field of application cannot be extended through guidelines, without infringing the provisions of the treaties and founding regulations of the ESAs.

Furthermore, from a legal security perspective, it is not acceptable for the institutions that could ultimately have to implement these standards that the ESA draft guidelines anticipate the implementation of basic texts whose provisions are either not yet established, such as MiFID 2, or not even adopted, as is the case with IMD 2 or PSD 2. This is particularly pertinent as, although it is indicated that practices outside the scope of the consultation are likely to comply with the regulatory framework, the consultation submitted to us contains (non-exhaustive) examples of practices and creates presumptions of both compliance and non-compliance with the regulatory framework, the burden of proof for which will be asymmetrical, increasing legal and judicial insecurity. Besides, the final version of the

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<sup>3</sup> Article 16 of regulation 1093/2010 establishing the EBA, of regulation 1095/2010 establishing the ESMA and of regulation 1094/2010 establishing the EIOPA.

guidelines must necessarily respect the different application dates of the sector-specific texts (in the case of MiFID 2, for example, 3 July 2017).

In the same way, we wish to draw the authorities' attention to the absolute necessity to expressly define the scope of the products, consumers and obligations concerned. Overall, there is also a quite striking imbalance in the "benefits/detriments" of cross-selling highlighted in the consultation, resulting in a quite negative vision of cross-selling that we contest.

Furthermore, and as already mentioned, the draft guidelines from the ESAs aim to establish a common standard on cross-selling, without differentiating between applicable rules in accordance with the products and the customer categories concerned. In our view, it is not correct that the specific nature of the products and the different classifications of customers have been ignored, as the same rules are applied to all products and all customers, whether they be consumers or professionals, in violation of the specifications made by the level 1 texts.

Finally, we believe it important to underline that the model of the universal bank is, by nature, one of a vehicle for *cross-commercialisation* of consumer products, whether they be products from the same sector (eg. two banking products) or from different sectors (eg. a banking product and a financial product) and that this model is by no means incompatible with the necessary and legitimate protection of the customers involved. The French Marketplace wishes to stress that it is not within the ESA consultation's remit to call, even indirectly, a banking structure model into question.

- **Question 1: definition of cross-selling**

We broadly agree with the definition of cross-selling established by the draft guidelines. However, the definition of cross-selling should take into account cases where the products or services sold together are inseparable, and insert an exception to certain recommendations (for example Guideline 1, which imposes a breakdown of costs for the component products, something that is difficult and of no real interest for inseparable products).

Examples of inseparable products and services: when a customer signs a patrimonial agreement, he/she may gain access to a series of services and products, some of which would have no meaning if they were marketed independently. A good example would be remote access devices (mobile or web applications, interactive voice servers) that are only useful when associated with the product for which they are designed.

The field of application of the guidelines should be specified, in accordance with the exclusion featured in the footnote n°4. The latter should be integrated into the main body of the guidelines in order to specify that structured products do not equate to cross-selling, since the underlying assets are not directly purchased by the client, and are not themselves part of a tied or bundled packages. Therefore, it should be clearly mentioned that the sale of a structured product is not a cross-selling practice.

Along these lines, French banks believe that all the "packages" expressly excluded from the level 1 texts should also be expressly excluded from these guidelines. For example, article 8 of the PAD directive excludes the payment account and the associated payment services, which cannot be considered together as a "package".

The handling of non-financial products (point 4, page 10) should be clarified. The ESAs guidelines should not mention packages that include non-financial products that do not fall within their competences, which are restricted to the banking and financial sector (as defined by the first articles of the regulations that establish them).

Point 6 (page 10) does not seem acceptable to us. The information burden for the client depends above all on the applicable regulation governing the particular product, and not on the tied or bundled character of the package including this product. We request that it be removed.

In any event, we do not understand why the distinction between bundled offering and tied offering is not subsequently taken up and used in the guidelines, even though the applicable rules should not be the same.

It is therefore essential that the authorities clearly and precisely define the scope of the products and customers concerned as well as the associated obligations, by modifying the definitions and the field of application in accordance with the content of the different level 1 texts.

- **Question 2: the benefits of cross-selling for the customer**

The French banks generally agree with the description of the benefits of cross-selling. However, they would prefer the details of each advantage to be explained in its own unique paragraph, as is the case for the detriments mentioned. For completeness, the following advantages must be taken into account:

- Simplicity for the customer: the latter may prefer to deal with just one person, who will suggest a package solution to meet his/her needs - there is only one contract to meet all his needs, and time is saved;
- Accounting benefits for businesses: accounting rules may differ between separate selling and tied selling, for example in the case of companies carrying out market transactions.
- Reduced costs for the customer: this should be explained using examples such as having only one contract and only one setting-up procedure, reducing the administrative fees involved.
- Added value for the customer, who is offered a solution entirely designed to meet the needs that he/she outlines. For example, a customer requiring an authorised overdraft facility may be interested in an alert service providing updates on the state of his/her account.
- The possibility for customers to learn about certain benefits and products that are new to them, yet that may meet their demands.

“Package” selling therefore does not just have detriments, which the guidelines present in a disproportionate way.

- **Question 3: potential detriment associated with the practice of cross-selling**

The benefits and drawbacks of cross-selling are not presented in a balanced manner. Ultimately, certain drawbacks may exist such as those outlined relating to potential unfair practices (biased information or conflict of interest, oblique pricing) but the presentation here is too negative compared with the reality of the banking activities and the number of examples is disproportionate, compared with the examples of customer benefits.

Furthermore, the majority of these examples are not unique to tied selling and could also be cited for individual product sales. The detriment associated with tied sales described by the Joint Committee is not structurally linked to cross-selling. Rather, the examples outlined are of wrongful conduct that could just as easily manifest itself when products are sold separately (lack of customer information or non-respect for customer choice). Point 3 (pages 11 and 12), which criticises the information delivered for being too complex, relates to the specific obligations established by these very guidelines: as such, the guidelines create the

complexity being condemned. The overcrowding of information is, above all, the result of the specific rules for a particular product or service included in the offer, to which may be added specific rules for a particular type of customer or distribution channel; the complexity of the information is therefore not down to the fact that it is a package sale, but instead down to the multiple rules that apply to its constituent products or services.

Elsewhere, in point 4b (page 12) for example, the detriment described is in no way unique to cross-selling and remains true for products sold separately.

Finally, point 4e (page 12) strikes us as eminently questionable in the sense that, cross-referenced with the examples featured under guideline 8 (pages 26 and 27), it allows for an element of doubt over the existence of a suitability principle, a principle that was very clearly rejected when level 1 texts were adopted for certain products and services, such as credit for example.

- **Question 4: examples of potential detriment from cross-selling practices**

The examples cited could, in the majority of cases, be applied to the sale of individual products.

Furthermore, they do not seem fully applicable due to existing regulations, for example on mortgages (obligation of delinking, early repayment fees) and, more generally, not fully representative of banking products but rather of large-scale retail.

We do not share this strong insistence on costs. Pricing is not the only element that motivates the purchase of a bundled offer (flexibility, simplicity, etc.).

Examples 1 and 2: it is common practice to offer services at a better price as part of a package, but it cannot be considered that selling at a higher price is bad practice *ipso facto*. The practices described are only abusive in nature when they demonstrate poor consumer information about the price of the services (making customers mistakenly believe that they are paying less for services by purchasing a package) or in cases of forced selling (lack of respect for client choice).

Example 3: While returning the part of the premium is not required by law, the pricing methods remain within the domain of freedom of contract. Linking two products must not lead to additional rules being established. The pricing of insurance products may at times be designed in such a way as to spread risk in the event of damages. Allowing the termination of an insurance contract solely because it was sold as part of a tied sale can lead to annual insurance becoming insurance that may be cancelled at any moment, which would effectively make the insurance more expensive and would therefore be to the detriment of customers. On the other hand, it is important that the pricing is transparent and, where applicable, that the customer is informed of the consequences of terminating one product or another.

Example 4: The payment of early termination fees is regulated by the law, as is the capacity of a party to terminate the contract.

- **Question 5: comments on guidelines 1 and 5**

It would be useful, particularly in these guidelines, to distinguish between tied and bundled packages.

- *Guideline 1: key price and cost information*

The obligation to provide a breakdown of the costs is difficult to envisage if the products are inseparable (a complementary option for a service, for example).

Furthermore, the example of the interest rate swap does not seem relevant because, as a financial instrument resulting from investment services, it is already treated separately from credit, as per the MIFID regulations.

- *Guideline 5: Information on non-price features and risks*

The information displayed on the conditions and potential consequences of purchasing the package is already regulated by the MIFID provisions. This guideline merely repeats this obligation.

- **Question 6: comments on guidelines 2, 3, 4 and 6**

- *Guideline 3:* Here again, this overlaps with the MIF tools and regulations on credit advertising and pre-contractual information. In the example given, the ideas about how readable the information is appear quite complex. What about the possibility of a promotional offer?

We understand the requirement for information about the price and the product to be communicated in simple language. However, this contradicts the sector-specific basic texts that impose standardised information whose language, often technical in nature, is not that of the consumer.

Elsewhere, we question the relevance of the need to use the same font for all text. This demand goes beyond the sector-specific basic texts.

- *Guideline 4:* The example of loan insurance does not clarify which cases can be considered as presenting information in a misleading or distorting way. It should be reviewed or removed.

- *Guideline 6: clear and, in good time, useful information on non-price factors and relevant risks*

The examples do not shed light on the notion of “non-price factors”.

From a general perspective, these measures must be proportionate to the product’s level of risk.

The assertion made in point 10 (page 16), pertaining to guidelines 2, 3, 4 and 6, has no basis in objective reality.

- **Question 7: comments on guideline 7 – Information on “optional purchases”**

The approach of the ESAs should comply with the principle of proportionality and the “better regulation” objective set by the European Commission. It must be noted that the current directive on unfair commercial practices already covers misleading and aggressive commercial practices in the EU. Financial services being “minimum harmonised”, the directive enables member states to adapt their legislation to market developments by foreseeing measures that better protect consumers in this sector.

For us, the application of the current provisions applying to the sale of financial products therefore seems sufficient. The attention of the authorities should be more focused on strengthening the existing legislation and not on a complex increase of the legal framework at a European level that, what’s more, oversteps the boundaries of ESAs competences.

Example 2: French regulations already recommend ‘opt-in’.

Pre-ticking “No” seems to us to be inappropriate, as it presumes that the consumer does not need the product being sold as part of a cross sale. Rather, it seems necessary to us to steer clear of pre-ticking of any sort, to leave the consumer with the freedom to choose.

- **Question 8: comments on guideline 8 – Assessment of demands and needs or suitability/appropriateness of the product**

This ties in with the principle of assessing the client's situation and needs, and therefore the duty to provide advice or warnings, depending on the type of product. Such obligations already exist for financial products (MIF) and insurance (ACD). With respect to mortgages (MCD) there is a duty to provide a warning, but not to assess the suitability of the product nor to provide advice, which were both left out following the debates leading up to the MCD directive being adopted. With regard to credit, advice is a different service to that of granting credit, and therefore also to that of providing information and adequate explanations. The guidelines must not go further than these texts.

The example featured is too broad, it concerns the assessment of product suitability and advice, notions that do not apply to all products, particularly not in the case of mortgages. In a more general sense, this guideline is not specific to tied package sales and must, in our opinion, be removed.

- **Question 9: comments on guidelines 9 and 10**

- *Guideline 9: Adequate training for relevant staff*

If a bundled package is put on the market, each of its component parts must be sold in accordance with their own applicable rules. There is no grounds for applying additional restrictions regarding the training of the sales staff, beyond those already requested for the sale of each of the individual products that make up the total package.

- *Guideline 10: Conflicts of interest in the remuneration structures of sales staff.*

The level of detail of this last phrase is striking and its implementation will be complex, if not impossible. "Monitoring by senior management": it does not always seem appropriate to intervene to this extent in the organisation of institutions, in order to ensure that distribution fits with the realities of the product and the market. Such a framework must only be put in place if it is foreseen by the level 1 texts.

The regulation of conflicts of interest is not unique to sales of tied packages, which do not merit specific attention on this regard. Consequently, this consultation should not deal with rules relating to conflicts of interest.

Neither is this point specific to cross-selling.

- **Question 10: comments on guideline 11 – cooling off periods and withdrawal rights**

The legislation applicable to each of the products sold is not overruled in the case of a tied sale of these products.

Concerning splitting the different components of the package, returning to "stand-alone" pricing can be justified, without this being considered to be a penalty. If customers no longer wish to take advantage of the bundled package, they may lose the advantageous pricing that was associated with it.

The periods and fees for withdrawal or cancellation (cooling-off period for mortgages) seem to correspond to the measures outlined by the directives.

The examples in 3) do not appear adapted because they are inherent to rate-hedging products and, notably for the last phrase, because market operations are founded on this

principle, particularly for companies. In this way, this guideline would prohibit any tied transaction in this sector, despite the fact that in certain cases the latter reduces the level of risk for the customer, which is his/her aim.

Furthermore, if the possibility is left to unexceptionally split the components of a package without a disproportionate penalty, derogations must be allowed because there are certain circumstances under which it is not possible to split a package (e.g. a loan guaranteed by an insurance contract). *See our comments on the definition of tied selling.*

- **Question 11 – Analysis of the cost and impact of these guidelines**

The implementation of these guidelines for all customers (from private individuals to very large companies) and all products would necessarily entail significant costs for the rewriting of documentation, the change of sales procedures and the development of IT.

This is why it would be appropriate to reduce the field of application by excluding certain markets, like for example those of large companies and of very simple products.