European Banking Industry Committee

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European Federation of Finance House Associations (Eurofinas)/European Federation of Leasing Company Associations (Leaseurope)
European Association of Public Banks (EAPB)

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# EUROPEAN BANKING INDUSTRY COMMITTEE'S RESPONSE TO EUROPEAN SUPERVISORY AUTHORITIES' JOINT COMMITTEE CONSULTATION PAPER ON GUIDELINES FOR CROSS-SELLING PRACTICES JC/CP/2014/05

## Key points

The European Banking Industry Committee (EBIC) welcomes the opportunity to respond to European Supervisory authorities' joint committee consultation paper on guidelines for cross-selling practices published on 22 December 2014.

- The EBIC members are convinced that it is vital to ensure high-level consumers' trust in the retail financial market and that consumers have access to financial services products they need. Particular consideration should also be given to preserve innovation and consumer choice.
- Importantly, we think that consistency should be ensured between the work of the Supervisory Authorities and the "level 1" legislations which respond to a strict legislative process involving the three EU institutions.
    - We understand that the ESAs has to comply with the third sub-paragraph of Article 24 (11) of MiFID II which requires ESMA, in cooperation with EBA and EIOPA, to develop guidelines for the assessment and the supervision of cross-selling practices. However, it is important to clarify that this requirement has not been included by the EU institutions in the other legislative instruments referring to cross-selling such as the Directive on credit agreements for consumers relating to residential immovable property (MCD)[1] or the Payment Accounts Directive (PAD)[2]. By adopting a single set of guidelines, the ESAs "stretch" the investment product regulation to all retail products which is not appropriate.

      In accordance with the objective of article 16.1 of the Regulation (EU) no 1093/2010, the guidelines should not go beyond the level 1 provisions and should respect the scope of application of the different sectorial legislations (e.g the prerogatives in MiFID II allocated by the EU institutions and the fact that the MCD and the PAD concern for natural persons' rights acting for purposes which are outside their trade, business, craft or profession).

[1] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, 28.2.2014, OJEU L 60, 34-85.
[2] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features Text with EEA relevance, 28.8.2014, OJ EU L 257/214-246.



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- The approach of the ESA's could appear premature due to on-going legislative negotiations on texts targeted by those guidelines, such as the Insurance Mediation Directive Recast (IMD II) and the Payment Services Directives (PSD) under review. Those texts have not been adopted yet and are still subject to discussion.
- In addition this approach should also comply with the European principle of proportionality and the European Commission's objective of "better regulation".
  - Indeed it is important to note that the existing Unfair Commercial Practices Directive[3] already sets a common framework against misleading and aggressive practices within the EU. The Article 4 of the UCPD, known as the 'Internal Market clause', embodies the full harmonisation effect of the Directive and prevents Member States from deviating from its rules. This general clause enables the directive to adapt to specific sectors (including the financial services sector) and represent a flexible tool to adapt to changing market reality. As stressed by the European Commission in its first report on the application of the UCPD[4] this feature was confirmed by the CJEU in the 'Total Belgium' case and in the context of other preliminary rulings[5]
  - More specifically for financial services, Member States have put in place national rules that provide consumers with safeguards which add to and complement those laid down in the UCPD.
  - The European Commission in its communication on the application of the UCPD published in 2013[6] mentioned that "*the results of the investigation reveal that it would not be appropriate, for the time being, to remove the ability, accommodated in the Directive, for Member States to go beyond the level of harmonisation set by it in financial services and immovable property*". In this context, the European Commission – to ensure that the Directive is applied in an appropriate and consistent manner – has developed a "Guidance on the implementation/application of the Directive" which is periodically updated to take into account the emergence of new practices and the development of EU and national case law.

- In the EBIC's view it is of paramount importance to remind that cross-selling practices are not *per se* detrimental to consumers and/or competitors in the retail financial services market. Indeed a clear distinction should be made between:

  i. aggressive commercial practices, misleading information and anti-competitive product-tying practices which are clearly not in the interest of consumers and are prohibited (it is notably aligned with the article 5 of the Directive on Unfair Commercial Practices[7]); and

[3] 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') (Text with EEA relevance)

[4] 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 – COM(2013) 139 final 14.03.2013 - See notably part 3 page 6 on the application of the directive.

[5] Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV, 23 April 2009; C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH, 14 January 2010; C-288/10 Wamo BVBA v JBC NV and Modemakers Fashion NV, order of 30 June 2011; C-126/11 Inno NV v Unizo and others, order of 15 December 2011.

[6] http://ec.europa.eu/justice/consumer-marketing/files/ucpd_communication_en.pdf



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ii. tying or bundling products that are common practices in many sectors, including financial services, which are intended to provide customers with better offers (more accessible, cost saving for customers). They are also commonly used by financial institutions to compete against each other and differentiate their products by making them more attractive to customer segments.

- Particular attention should be given to the principle of proportionality with regard to product complexity and potential risks. A one-size fits all approach will indeed not allow a distinction between product characteristics and could be to detrimental to the "tailored made" approach in favour of consumer needs. Only a case-by-case approach can allow a correct assessment of any unfairness vis-à-vis consumers and overload of information should be avoided.
- We believe that the ESAs' focus should be directed towards correct and swift enforcement of the existing frameworks, and efforts to aid consumers' understanding of the products.

## EBIC Responses to the questions

### Question 1: Do you agree with the general description of what constitutes the practice of cross-selling?

- The EBIC agrees with the following description of cross-selling practices proposed:
  - Bundled package is a package of products and/or services where each of the products offered to the customers is available separately and where the customers retains the choice to purchase each component of the package separately.
  - Tied package is a package of products and/or services where at least one of the products offered in the package is not available separately to the customer from the provider.
  - Component product is the separate product and/or service which constitute part of the bundled or tied package.

  However, to avoid confusion, and to provide certainty - because consumers would understand the term "cross-selling" to mean the practice of selling additional products of services to a customer at the point where a customer purchases, or intends to purchase, a core product - **the EBIC suggests that references to "tying", "bundling", and "cross-selling" should be used as separate and distinct terms.**
- The EBIC welcomes the clarification mentioned in the guidelines that "*Nothing in the guidelines is intended to prevent the offering of products which constitute an inherent or indivisible package (sectoral legislation permitting) which cannot by its nature be offered or sold separately because the components are a fully integrated part of the package*". For example, certain multi-risk insurance policies or a secured overdraft facility together with a current account.
- However, **in some cases, the proposed description of "cross-selling" practices could appear too broad and is capable of capturing situations where the customers acquires two or more products from the same firm, but where there is no intent of the firm to sell these products as a package** (e.g. products that are in some way connected and sold through different sale channels, or/and sold at different times, the customer has acquired connected products upon its own initiative, without the firm actually marketing the products as a distinct package, loyalty bonus for customers). The only fact that the customer acquires two or more connected financial products from the same firm should not be seen as a sufficient proof of existing practices falling within the scope of proposed guideline.


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- Furthermore, the EBIC would like to point out that the **definition of 'customer' mentioned in the guideline is unclear and should therefore be clarified**. The executive summary refers to "*customers*" as "*natural or legal persons to whom bundled or tied packages, as defined in the guidelines, are proposed*" but, according to the wording used, it seems to be more consumer oriented:
  **For example:** page 10 describes "*Potential consumer benefits*", pages 11-12 3b. "*they are unable to 'effectively process the information given to them by firms*' 3d. "*reluctant to spend the necessary time and cost to shop-around for alternative components*"; page.13 "*Consumer detriment*"; experiencing barriers such as limited mobility which "*can be incompatible both with fair competition and with other consumer rights such as rights to switch payment accounts or other products and services*"; page.17 footnote 6: pursuant to '*consumer behavior evidence*' not having '*the confidence to de-select a pre-ticked option' and they 'are reluctant to override the perceived 'authority' of a firm*'.).

  Using indifferently *"consumer"* and *"customer"* can lead to uncertainties in the application of the guidelines especially where a cross-selling occurs with one component covered by one piece of sectoral legislation adapted to *'customers'* while another one is covered by a different piece of sectoral legislation adapted to *'consumers'*. It could therefore add more confusion in practice.

- Furthermore, the EBIC considers that **the description of "*components*" as '*products/services constituting the tied or bundled package*' risks to create unintended consequences**.

  **For example**: the EBIC anticipates that a regular 'free in credit' current account is not intended to be considered a package of products/services made up of components such as internet banking, cheque processing, direct debits). It would be extremely difficult for firms to cost out and allocate a price to such banking services, and there is no apparent benefit to the customer, although the risk of causing confusion is high.

- In addition, the EBIC believes that **the term "*product*" should be further defined and consistent with the existing legislation.**

  **For example:** a financial institution currently offers a mortgage product. A variation on that mortgage product (a reduced interest rate mortgage "*discount mortgage*") is available when purchasing a current account. If the generic mortgage product is defined as the "*product*", then activities carried out by the financial institution fall within the definition of bundling. If the "*discount mortgage*" is defined as the "*product*" then activities carried out by the financial institution fall within the definition of conditional offering but with clear benefit, in terms of cost-saving, for the informed consumer .

- **We suggest specifying definition of "*tied or conditional offering*"** The provided wording covers all kinds of "*tied package"*, saying that such package exist when at least one of the products/services offered in the package is not available separately to the customer from the provider. We propose to state that cases when the *'core'* (primary) product may not technically or legally exist without having other *'additional'* (secondary) product are not considered as tied package..

  **For example**, there might be some cases in some Member States where in order to get a loan from credit institution the customer might be obliged to have an account with this credit institution otherwise the loan cannot be provided and there is no technical option how to repay the loan. Such co-existing of products should not be considered as tying of products.

- **It should be expressly mentioned in the guidelines that the definition of "package or "packaged should not be understood as "Packaged retail and insurance-based investment products" (PRIIPs)** (as suggested by footnote 4 of the consultation) to avoid confusion and overlap with the definition of PRIIPs under Regulation (EU) No 1286/2014.


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- **More flexibility should also be provided to allow "*optional/extra structures*".**
- **The competences of the ESAs is limited to financial services, therefore the legal basis used by the ESAs to include requirements on non-financial services is unclear.** The following sentence should be therefore deleted "*firms should not cross-sell packages of products which include non-financial services or products for the purpose of circumventing these guidelines*".

## Question 2: Do you agree with the identified potential benefits of cross-selling practices?

- The EBIC generally agrees with the potential benefits of cross-selling practices identified such as financial benefits (reduced overall costs, superior financial conditions) and convenience benefits ("*one-stop shop*" for customers), as well as overall mitigation of default risks. In general consumers respond affirmatively to bundling offers where they can achieve cost savings or greater convenience, or both. The access to wider range of products (access to product that might not be otherwise available to them) is also another element. This wide choice offer enables competition, which in turn improves efficiency, lowers prices and drives product diversity and innovation.
- Bundling is a widely used practice, also in many other sectors and which pursues additional aims to the one presented in the guidelines such as:
  - meeting customers' needs with the provision of tailor-made products which are sometimes targeted to specific moment of life e.g "*student package*, "*senior package*" etc.;
  - making the relationship with the customer more efficient. Long-term relationship allow a financial institution to provide products that are more tailored and more accurately priced to a well-known customer. The consumer can in turn acquire additional products and services with greater ease in the process, avoiding the need for extensive searches or burdensome administrative procedures;
  - safeguarding and facilitating the provision of services; or
  - reducing the risks for the parties: for credit products, as the European legislator is already aware (i.e. article 12 of the MCD), a cross-selling practice helps: (i) Pooling resources to repay the credit (ii) increasing consumers' creditworthiness, (iii) providing additional security for the creditor in case of default.
    - One of the most beneficial offerings is the combination of insurance products linked to a loan. Such a package enables firms to provide consumers with better deals, while, at the same time, it reduces risks for all parties concerned. In the case of loan insurance, it allows consumers to protect themselves against payment/ financial difficulties in the case of unforeseen events, such as unemployment, relationship breakdown or illness.
    - Very often, cross-selling practices are based on interest rate discounts made on a mortgage credit when the consumer decides to contract additional products or services. Some of those products or services are often designed to enhance the protection of the consumers or of their heirs (home insurance/life insurance, etc).
    - See examples of possible packages:
      - Group A: Mortgage credit + payroll direct deposit + home insurance = certain percentage points discount on the annual interest rate;
      - Group B: Mortgage credit + products of Group A + life insurance or repayment insurance + credit card = certain percentage points discount on the annual interest rate;
      - Group C: Mortgage credit + products of Group A + products of Group B + Pension plan = certain percentage points discount on the annual interest rate.


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- **Another benefit that must be highlighted in this context is that cross-selling packages often make consumers aware of the existence and advantages of certain products which the consumer was not familiar with before but might suit to their needs.**

- **As a general comment, we believe the guidelines should adopt a more balanced approach with regards to potential consumer benefits and potential consumer detriment associated with cross-selling practices**. Indeed consumer benefits are described shortly (half a page) when consumer detriments are analysed in details (two pages and a half).

**Question 3: Do you agree with the identified potential detriment associated with cross-selling practices?**

- **In the EBIC's view it is important to remind that cross-selling practices are not *per se* detrimental to consumers and/or competitors in the retail financial services market**. Only a case-by-case approach can allow a correct assessment of unfairness vis-à-vis consumers. A clear distinction should be made between:

  i. aggressive commercial practices, misleading information and anti-competitive product-tying practices which are clearly not in the interest of consumers and are prohibited (it is notably aligned with the article 5 of the Directive on Unfair Commercial Practices); and

  ii. tying or bundling products that are common practices in many sectors, including financial services, which are intended to provide customers with better offers (more accessible, cost-saving for the customer). They are also commonly used by banking and financial institutions to compete against each other and differentiate their products by making them more attractive to customer segments.

  **As a general remark, the EBIC believes that the examples of potential consumer detriment described in the guidelines are not specific to cross- selling practices (information overload, "*withdrawal from market*" because of negative experience).** Those examples correspond to mis-selling practices already prohibited by the UCPD and relevant national laws based on the UCPD. As such, those examples do not seem to provide for a proper and proportionate introduction to the topic.

  The EBIC would therefore welcome further information on the evidence on which the ESAs base their analysis when it is stated in paragraph 12 that "*the UCPD does not contain provisions specific to cross-selling. Rather it sets high-level standards of conduct, such as requiring that commercial practices are not unfair to customers. These are very general and not specifically designed for the financial sector. However, relevant principles and some practices have merited consideration in developing this consultation paper*".

- It is also important to stress that **buying tied or bundled products does not represent a more complex purchasing decision. The EBIC therefore disagrees with the conclusion provided at point 2.**

- We believe that **providing clear and transparent information on both the product characteristics and pricing allow customers to effectively understand and select the offer they find most attractive or in line with their expectations. In this respect, existing and forthcoming legislation guarantee those requirements**, for example:


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- The Consumer Credit Directive[8] requires clear information on ancillary products related to a credit agreements to be included in both advertising and pre-contractual information where these ones are compulsory to obtain the credit or to obtain it on the terms and conditions marketed. In addition, this Directive provides for clear rules on how the total costs for a credit, including costs for ancillary products, are to be presented.
- The Mortgage Credit Directive includes an article 7 on "*Conduct of business obligations when providing credit to consumers*" and an entire chapter dedicated to "*information and practices preliminary to the conclusion of the credit agreement*" (Chapter 4 including article 12 on "tying and bundling practices") which includes notably several articles ensuring that clear and comprehensible information about credit agreements is made available by creditors or, where applicable, by tied credit intermediaries or their appointed representatives. See notably article 11 on "*Standard information to be included in advertising*", article 13 "*general information*" and article 16 "*adequate explanations*".
- The Payment Accounts Directive provides detailed rules on bank account fees comparability, as well as for an obligation upon payment services providers to inform customers whether a payment account packaged with another product or service can be purchased separately.

- Financial services industry has always expressed its support for a more competitive environment, where consumers shop around to compare products and providers and thereby forces the latter to improve the quality of their offer. Indeed banking and financial institutions aim naturally at keeping their customers by providing good service and targeted products tailored to their needs. However, **customer mobility does not per se reveal whether or not customers are given full choice of products/services and therefore cannot be an aim in itself.** As a consequence, the EBIC strongly rejects the assumption that the lack of, or the "*low*" level of, mobility is synonymous of lack of choice for customers or their ability to switch; nor can the EBIC subscribe to the finding that low customer mobility equates a lack of competition or originates from an unfair treatment of the consumer.
- **It is also important to stress that long-term contractual relationship should not be seen as a limitation of consumer's mobility.** As expressed above in question 2 it could have many benefits for the consumer such as products more tailored to their needs, reduction of administrative burdens, more tailored risk assessment and pricing benefits etc. Moreover, there are many reasons - not necessarily price or competition-related - that motivate customers to stay with their reference bank (for example, the relationship of trust, geographical proximity of the branch and satisfaction, etc.).

  As regards point 4. e (page12), **the guidelines introduce a sort of personal/individual suitability assessment on the adequacy of the components of bundle products which is not appropriate: the guidelines should not go beyond what has been agreed at "level 1" in other legislations.** The issue of suitability assessment was analysed in depth by the EU Parliament, the Council and the European Commission which rejected it since it was considered not appropriate for products such as mortgage and consumer credit. This is even more true for payment accounts and any other payment service that are considered by European legislation as a fundamental prerequisite for financial inclusion, and whose offer is mandatory according to Directive 92/2014. The EBIC considers that "the stretching" of the investment product regulation to all retail financial services products is not appropriate.
- **The focus should therefore be on proper enforcement of national and European existing rules**.

[8] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, 22.5.2008, OJEU L 133/66.


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- In this context, it is important to underline that **financial education plays also a crucial role as stressed in the "EBA Consumer Trends Report 2014[9]", to help consumers to make informed choices.** It would be useful to continue developing existing financial literacy programs at national level.
- In addition, as a general comment, we believe **the guidelines should adopt a more balanced approach with regards potential consumer benefits and potential consumer detriment associated with cross-selling practices.** Indeed consumer benefits are described shortly (half a page) when consumer detriments are analysed in details (two pages and a half).

**Question 4: Please comment on each of the five examples in paragraph 13, clearly indicating the number of the example to which your comment(s) relate.**

In general, the EBIC agrees that the examples all demonstrate detrimental behaviour. However, we do not see the examples of monetary detriment (1 – 3) or reduced mobility (4) applying for example to packaged accounts.

**Example 1:**
We do not believe this example reflects the practice of the financial institutions and could be interpreted as a mis-leading practice prohibited by the UCPD as it would contain information that can deceive or is likely to deceive the average consumer, even if the information is factually correct (see article 6 of the UCPD). Where the customer is provided with adequate and accurate pre-contractual information, the customer would not choose the package, without other clear non-financial advantages.

**Example 2:**
We consider this example as an unfair commercial practice which is clearly prohibited (see article 6 of the UPCD). We believe that appropriate processes within firms should prevent detriment to customers, such as internal governance to ensure customers are being treated fairly, appropriate communication of changes to the customer in a timely manner, and the right for the customer to cancel the agreement. It is important to consider that in some cases costs may change over time due to rising exploiting costs, and will be reflected in monthly or annual fees for the product.

**Example 3:**
The example requires clarification. In some cases the insurance may subsist despite the cancellation of the main product (e.g in case of mortgage credit, the home insurance might be kept).Furthermore, some insurance products even when provided separately, may include terms that provide for partial non-refund of pre-paid premiums in case of early cancellation.

**Example 4:**
The example makes sense for long-term commitments, but less for a short term credit. This example clearly demonstrated the need to assess practices on a case-by-case basis. For example, in the case of packaged bank accounts, customers can cancel at any time and would only be charged a pro-rata fee for the duration that they have enjoyed the benefits. Any charges that a customer needs to pay are determined by recognised actuarial calculation methods. The EBIC therefore believes that the terminology '*disproportionate […] charges*' is not appropriate.

[9] http://www.eba.europa.eu/documents/10180/534414/EBA+Consumer+Trends+Report+2014.pdf


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**Example 5:**
The EBIC believes that example 5 can occur but it is not specifically linked to cross-selling practices. Specifically, firm sales processes will highlight to customers where they may hold duplicate cover. Similarly, firms will encourage customers to review the products they hold, to ensure they are not holding cover which is not needed.
We believe that there is a need to distinguish between eligibility and redundancy. We would like to emphasise that products should not be sold to people who cannot claim the benefits. Customers should be informed about their eligibility to make an informed decision as whether the product is suitable to their needs. Financial institutions may remind consumers to control their current coverage, but further requirements would be disproportionate in our view.

**Question 5: Please comment on the proposed guidelines 1 and 5 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

**Guideline 1, paragraph 13 and 14:**

- The EBIC considers crucial that consumers are provided with comparable, understandable and complete - but not overwhelming – information prior to signing a contract. Appropriate pre-contractual information is a prerequisite for the consumers to be enabled to make the right choice when buying financial services. Knowing the components of a bundle or of a package and the related contractual terms is key for the consumer to evaluate the costs and benefits of his/her choice.
  The choice should be left to consumers based on competition between financial services providers. Consumers always have the possibility to refuse a packaged offer that does not seem to correspond to their needs and choose another providers' offer, instead or in addition.

- In the EBIC's views, further clarifications should be provided as regards the definition of cost/prices which should be understood as "*the cost for the customer*" and "*the price paid by the customer*".

- In the current guideline 1, it is unclear how the combined price of each separate component in the package will be calculated. Further we believe that such a combined cost could be confusing for the customer. As with the above example of a combined current account and discount mortgage, there are fees and credit interest associated with the current account, and fees and debit interest associated with a discounted mortgage. It is unclear how the debit and credit interest can be combined.

- It should be added that the wording "*when available separately*" in paragraph 14 should be clarified. It is not always possible to separate products and their prices or provide products separately and to provide a price for all the components of the package (for instance interest rate protection to a mortgage loan or payment transactions made via on-line banking).

- Moreover, the example of the interest rate swap does not seem relevant because as a financial instrument relating to investment services, it is already regulated separately from credit (MiFID).

**Guideline 5, paragraph 19:**

- The proposed guideline appears to be mainly directed to investment products. If wider application is foreseen, further illustrative examples would be useful to achieve greater clarity.


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- More clarity is also required regarding the requirements surrounding "*key non price features and risks*". It is unclear what "*key*" is. It could be interpreted very differently by the diverse financial institutions and national competent authorities. We also would like to stress that the risks of single products should be described – as stated in existing legislations - rather than the risk of a single package.
- In addition, as explained above, information provisions should not lead to an information overload for the consumer.
- It is also important to stress that a financial institution cannot know what components the customer would buy and from whom. The example illustrates a case where the customer decides not to buy one component from the firm. This is a different thing.

**Question 6: Please comment on the proposed guidelines 2, 3, 4 and 6 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

- As expressed above, the EBIC considers crucial that consumers are provided with understandable and complete - but not overwhelming – information prior to signing a contract. Appropriate pre-contractual information is a prerequisite for the consumers to be enabled to make the right choice when buying financial services.

**Guideline 2, paragraph 15:**

- The provision of pre-contractual information in relation to price, relevant cost, in good time before the customer is bound to the agreement, is clearly required for by existing sectoral legislation such as MiFID 2, UCITS PRIIPs or for example in relation to the distribution of credit[10]. Such requirement could even create contradictions. Also, unlike the existing regulation, the guideline does not take into account distance selling.
- However, it is important to note that difficulties might occur in practice: For example in case of current account and discounted mortgage: it takes significantly longer to finalise the mortgage process than to open a current account. The consumer should not be prohibited from opening his/her current account, while waiting for his/her mortgage to be finalised.

**Guideline 3:**

- **As regards guideline 3 paragraph 16:** We understand the intention of the ESAs to avoid technical language but we would like to draw the ESAs attention to the fact that technical terms may be required by law and/or supervisory rules. Therefore technical and legal jargon cannot therefore always be avoided or simplified. Furthermore, terminology '*in a simplified or jargon-free language*' might lead to different interpretations in the Members States instead of adding clarifications.
- **As regards guideline 3 paragraph 17 and guideline 4 paragraph 18**: Existing legislation, such as the CCD, contains clear provisions on the advertising of products.[11] The information should be provided "*in a clear, concise and prominent way*".

  In this regard, the example in the draft guidelines suggesting harmonizing the font (bigger or bolder) to be used to communicate the relevant price and cost information of each component

[10] The Consumer Credit Directive, art. 5.
[11] The Consumer Credit Directive, art. 4.


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products intended to be sold as a package, is disproportionate. It should only be stated that the relevant features of the product should be presented in a way which facilitate the good understanding of the prices by the customers. The guidelines should not be more restrictive than the "level 1" regulations.

We believe that the focus should be on clear and relevant information instead. Firms should be allowed to highlight certain aspects, in particular for marketing purposes, as long as it does not lead to mis-leading commercial practices. To prevent such behaviours, existing legislation provides adequately detailed rules as well as the UCPD.

Advertising and marketing should not be confused with pre-contractual information. A too stringent framework will just lead firms to advertise on the basis of their brand or the generic product rather than their offers. This could hurt smaller firms and recent market entrants who can only compete on the merits of their actual deals.

In addition, it is also important to explain that the requirement might fit to MiFID II products but would not be convenient for simpler retail product such as student package with a debit card and on-line financial services products.

**Guideline 4:**

The illustrative example as provided does not clarify which cases may be considered to fall under information to be presented in a misleading way/ distorting or obscuring real costs vs. the presentation of information in an attractive way so as to underline the consumer benefits resulting from the package deal. In other words: to what extent is it still possible to come with promotional offers?

**Guideline 6, paragraph 20**:

As mentioned above, we want to draw the ESAs attention to the fact that technical terms may be required by law. Therefore, technical and legal jargon cannot therefore always be avoided or simplified.

As mentioned for guideline 5, more clarity is required regarding the requirements surrounding "*key non price features and risks*". It is unclear what "*key*" is. It could be interpreted very differently by the diverse financial institutions and national competent authorities. In addition, as explained above, information provisions should not lead to an information overload for the consumer.

**Question 7: Please comment on the proposed guideline 7 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

- The approach of the ESAs should comply with the European principle of proportionality and the European Commission's objective of "*better regulation*". Indeed as already mentioned above, it is important to note that the existing UCPD [12] already sets a common framework for misleading and aggressive practices within the EU. The Article 4 of the UCPD, known as the 'Internal Market clause', embodies the full harmonisation effect of the Directive and prevents Member States from deviating from its rules. This general clause enables the directive to adapt to specific sectors (including the financial services sector) and represent a flexible tool to adapt to changing market reality.

[12] 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') (Text with EEA relevance)



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As stressed by the European Commission in its first report on the application of the UCPD[13] this feature was confirmed by the CJEU in the 'Total Belgium' case and in the context of other preliminary rulings[14] .

- We therefore believe that there are already sufficient requirements regulating the selling of products and that focus should be on proper enforcement of existing legislation, including the UCPD.

  We also consider that the provision proposing firms to design their internet default option is excessive. The market operators should be able to design their own webpage in accordance with the relevant legislation. We disagree with the preference for opt-in choices. It is also important to note that opt-in and op-out choices can be offered not only on the internet but also in case of face-to-face interaction with the customer. Both opt-in and opt-out choices must be possible, depending on the kind of products and services offered in the package.

  For example when bank provides to the customer secondary products or services that are free and do not imply or increase the level of risk to the client, those services could be better offered using an opt-out choice: a consumer would like to contract a current account and can benefit, as an additional service, for free, of on-line services to use internet banking to access and manage his/her account. Often, when these options are provided as an opt-in the client focuses on the most relevant products and "forgets" to tick the box for internet banking, which is clearly not in the interest of the consumer.

- It is also important to clarify that "*package*" and "*purchase option*" have different meaning.

**Question 8: Please comment on the proposed guideline 8 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

- **Suitability assessment:** The guidelines introduce a sort of personal/individual suitability assessment on the adequacy of the components of bundled products which is not appropriate. The issue was analysed in depth by the EU Parliament, the Council and the European Commission which rejected the suitability assessment since it was considered not appropriate for products such as mortgage and consumer credit. This is even more true for payment accounts and any other payment service that are considered by European legislation as a fundamental prerequisite for financial inclusion, and whose offer is mandatory according to Directive 92/2014. The EBIC considers that "the stretching" of the investment product regulation to all retail financial services products is not appropriate.
  The guidelines should not go beyond what has been agreed at "level 1" in other legislations than MiFID II.

- We also would like to stress that the risks of single products should be described – as stated in existing legislations - rather than the risk of a single package.

- **Advice:** The EBIC would like to stress that providing advice should be considered as a service that is distinct from the provision of information and explanations on the products.

[13] 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 – COM(2013) 139 final 14.03.2013 - See notably part 3 page 6 on the application of the directive.

[14] Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium, and Galatea BVBA v Sanoma Magazines Belgium NV, 23 April 2009; C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH, 14 January 2010; C-288/10 Wamo BVBA v JBC NV and Modemakers Fashion NV, order of 30 June 2011; C-126/11 Inno NV v Unizo and others, order of 15 December 2011.



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- In addition, in the illustrative example number 1 it is stated that the provider has to always consider whether a customer is likely to benefit from the various component products. We do not recognise this kind of requirement anywhere on level 1 regulation. Benefit is a very subjective issue, and it is unclear how this kind of requirement could be implemented for instance in internet sales. The example should be modified.

**Question 9: Please comment on the proposed guidelines 9 and 10 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

**Guideline 9, paragraph 26:**

- The reference to 'plain language' (Guideline 9, paragraph 26) is ambiguous and could lead to different interpretations in the Members States.
- It is important to stress again that the guideline corresponds to provisions provided by already existing legislation such as the UCPD which has voluntarily been designed as a general framework to act as a "safety net" to prevent any unfair commercial practices.

  We certainly share the view that relevant staff in charge of distribution should be adequately trained to fulfil the requirements set out in existing legislation (to ensure that staff understand the components within a package and can communicate the relevant information to the customers in an appropriate way). However, any training requirements should be proportionate to the products sold.

  It is also important to note that those training requirements are already included in the recently adopted legislation (e.g in the MCD - article 9 related to knowledge and competence requirements for staff).

**Guideline 10, paragraph 27:**

- We support sales practices that are fair and reflect responsible business conduct which include, by definition, sales remuneration structures and incentives which are "suitable" to the specific markets and specific periods. These remuneration models and levels (already regulated at level 1) should remain at the discretion of market operators, and incentives to sell more should not, by definition, be treated as inadequate sales remuneration structures. However, even if we consider that those remuneration models and levels should be approved by the market operators, we consider that the monitoring obligation by the "senior management" is not always appropriate and is too detailed, they usually do not monitor directly remuneration, risk management/compliance etc. Monitoring by the senior management should only be applicable when provided for in the level 1 regulations.
- Also, there should be a clear distinction between advisory functions on behalf of a customer and execution only function – i.e. distribution. As previously stated, we want to emphasise the difference between advised and non-advised sales.


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**Question 10: Please comment on the proposed guideline 11 as well as the corresponding examples, stating clearly in your response the guideline paragraph number to which your comment relates.**

**Guidelines 11, paragraphs 28 and 29:**

The proposed guideline is in line with the consumer's right of withdrawal from existing legislation. Customers must be able to exercise their rights where 'cooling-off periods' or post-sale cancellation rights apply to one or more components of a package.

However, the EBIC has potential concerns relating to the wider context. The products in a bundled or tied package are normally designed to be sold together and the possibility for the consumer to cancel parts of the package during the duration of the contract may prove both complicated and costly. In fact, it may lead firms to withdraw certain products entirely.

Moreover, in certain cases, if the package component do not exist as a stand-alone products (it is specifically designed as part of the package), it may not be possible for the customer to split the products or at least terminating one agreement will necessarily impact the other product. A fee is generally charged for a package as a whole and firms cannot accurately assess the cost or price for the individual components of the package. **The EBIC considers that such a requirement is likely to result in fewer firms offering packages, which should be detrimental to customers.**

**Question 11: Please provide any specific evidence or data that would further inform the analysis of the likely cost and benefit impacts of the guidelines.**

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