

19th of March 2015

Final European Mortgage Federation Response to Joint Committee Consultation on Guidelines for Cross-Selling Practices

The European Mortgage Federation¹ (EMF) is pleased to provide herewith its comments on the Joint Committee Consultation on Guidelines for Cross-selling Practices.

As a first general remark, the EMF would like to underline that the mandate given by MIFIDII to the European Securities & Markets Authority (ESMA), which appears to constitute the basis for these draft guidelines, is extended to the financial services and products covered by the other European Supervisory Authorities (ESAs), even when there is not necessarily an equivalent mandate in a relevant legal text e.g. the Mortgage Credit Directive (MCD).

The concern here is that in addressing all financial products and services through one set of guidelines arguably conceived on the basis of one product/service type, in this case investment products, the **different characteristics** of the other products/services captured by the draft guidelines are not necessarily reflected, with the result that the appropriateness/applicability of the guidelines across the board is questionable.

The EMF is furthermore concerned that in many areas the guidelines extend beyond the level 1 texts – rather than explaining an existing article, the guidelines provide further prescription - or apply to products and services for which there is not a corresponding article in a legal text e.g. consumer credit. The result is that new rights and obligations are being created which were never discussed, negotiated or agreed by the EU institutions during the legislative process. This amounts to a kind of **level 1 policy-making at level 2**, which is a genuine source of concern for the Industry.

As a final general remark, the EMF believes that more consideration should be given to the definition of “customer” in the draft guidelines. The EMF would like to stress that the concepts of “customer” and “consumer” are not synonymous and that in the examples in the guidelines the distinction is not clear. The main focus of these guidelines is in our view to protect “natural persons”, as per the EU definition of consumer². In our view, it would be appropriate to limit the scope of the guidelines to “consumers”, since the relationship between credit institutions and “legal persons” e.g. SMEs is completely different and the type of protection required is not the same as for “natural persons”.

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

The EMF agrees with the general definitions of cross-selling practices, which reflect those now enshrined in several pieces of EU legislation, for example, the MCD.

The EMF welcomes the fact that the draft guidelines are not intended to prevent the offering of **‘inseparable’ products or services** i.e. products or services, which, when packaged together, constitute one ‘offering’, that would cease to exist in the absence of one element of the ‘package’. This is in line with

¹Established in 1967, the **European Mortgage Federation (EMF)** is the voice of the European mortgage industry, representing the interests of mortgage lenders and covered bond issuers at European level. The EMF provides data and information on European mortgage markets, which were worth over €6.7 trillion at the end of 2013. As of February 2015, the EMF has 18 members across 14 EU Member States as well as a number of observer members. In 2004, the EMF founded the **European Covered Bond Council (ECBC)**, which is a platform that brings together covered bond market participants. The EMF-ECBC is registered in the EU Transparency Register under ID Number 24967486965-09

²‘Consumer’ means a natural person who is acting for purposes which are outside his trade, business or profession.

Article 12 of the MCD, which provides for the exemption of a series of 'offerings' from the ban on tying. In fact, the EMF believes that these types of products should be entirely out of the scope of these guidelines.

The treatment of non-financial products requires clarification. The ESAs state that firms should not cross-sell packages which include "*non-financial products*", however the Industry believes that this prohibition potentially extends beyond the scope of activity and competence of the ESAs and should therefore be removed.

The EMF does not agree with the assumption in paragraph 6 that buying a tied or bundled package necessarily complicates purchase decisions for customers. This is a speculative assumption, which is contrary to the recognised benefits of tying and bundling.

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

The EMF agrees with the benefits of cross-selling practices as listed, but would suggest that there are other benefits, for example those recognised in the MCD through the exemption from the ban on tying including: (i) the promotion of the accumulation of resources to repay the credit, (ii) the enhancement of the borrower's creditworthiness and (iii) the provision of additional security for the creditor in case of default.

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

General remarks

As a general remark, the EMF would like to point out that the presentation of the potential benefits and potential detriment of cross-selling practices is unbalanced, with much more emphasis placed on the potential detriment. In a very basic sense, this suggests a presumption that cross-selling practices 'do more harm than good', which the Industry would contest.

Regarding the drivers of consumer detriment, in every industry and with respect to every product and service, whether packaged or not, there will always be **consumer behavioural drivers** of consumer detriment. In the specific case of cross-selling and mortgage credit, the EMF believes that the financial education, conduct of business (including remuneration policies), pre-contractual information, explanation and tying & bundling provisions in the MCD mentioned above go a long way in addressing these concerns for mortgage credit.

Regarding **firm behavioural drivers** of consumer detriment, the potential drivers and examples of practices provided in the consultation document are in our view examples of unfair or misleading commercial practices which are already addressed by the Unfair Commercial Practices Directive (UCPD), the MCD and national legislation, and are in any case not representative of the behaviour of the vast majority of financial institutions – it is key here that proportionality is ensured so that 'the majority are not punished for the sins of the minority' and that consumers are not prevented from benefiting from cross-selling practices as a result.

Regarding the different examples of potential detriment described in the consultation paper, the EMF would like to insist that cross-selling practices, including tying practices, are not *per se* detrimental to consumers, either in financial terms or with regard to mobility. In practice, consumers always have a choice, both before the signature of the contract and during the contract, regardless of whether or not a lender practices tying or bundling:

- If consumers do not wish to purchase a 'tied' product, the competitive environment in the financial services sector means that separate products are available from the wider market place if not from the same lender.
- Furthermore, in none of the Member States which the EMF has explored in the past in responses to the European Commission on this subject³ is there a requirement that any mandatory product or service e.g. an insurance contract, be taken out with the same lender.
- Finally, if the consumer does choose to take out an additional product or service with the same lender, they are in all cases free to change providers afterwards as they wish, in which case their mobility is not hampered.

Specific Remarks

With regard to the specific behavioural drivers and the potential consumer detriment:

- **Point 2:** As above, the EMF does not agree with the conclusion that buying a tied or bundled product package necessarily represents a more complex purchasing decision, which may distort or limit consumer choice. The EMF believes that, in line with existing financial services legislation including the MCD, provided consumers receive clear and comprehensive information and explanation in good time before the conclusion of the contract, they have the opportunity to seek and compare different product offers and make the decision as to which individual or packaged products best suit their needs.
- **Point 3b:**
 - Linked to point 2 above, the EMF is also concerned about the statement that consumers are unable to effectively process the information given to them by credit institutions. If product information is complex, then this is the result of multi-layered regulatory requirements, a concern that the Mortgage Industry has repeatedly raised in the past. Furthermore, any complexity applies also to the purchase of a single product or service and should not be considered specific to cross-selling practices. With this in mind, the EMF is concerned that the information requirements in the draft guidelines have the potential to complicate the situation even more.
 - It is furthermore not clear how these information requirements are intended to interact with existing information requirements in the MCD for example, and whether they are intended to be provided in addition to or as part of the European Standardised Information Sheet (ESIS), the format of which was the subject of extensive discussion between the EU Institutions and which, furthermore, has not yet been implemented (deadline is March 2016).
- **Point 4e:** The EMF would welcome confirmation that reference to explanations regarding the suitability or appropriateness of particular packages assessment is not relevant for mortgage credit. The requirement that credit institutions should consider and adequately explain the suitability or appropriateness of particular packages for particular consumers is contrary to the requirements in the MCD. The EU Institutions took the deliberate decision not to introduce a requirement on lenders to assess the suitability of a product, notably for reasons of potentially increased lender liability and litigation risk, and the inherent overlap with the provision of advice. Instead, lenders are required to provide adequate information and explanation to enable the consumer to take decision as to which product best suits his/her needs.
- **Point 10:** The EMF contests the suggestion that long-term contractual relationships are specifically linked to cross-selling arrangements, that they are negative and/or detrimental and are an indication of a lack of mobility. Long-term relationships can be beneficial to the consumer as a result of the enhanced service the credit institution can provide as a result of better risk assessment and this

³ See EMF website, www.hypo.org

can be reflected in preferential pricing. There are many reasons why contractual relationships between a credit institution and a consumer may be long-term, not least of which could be customer satisfaction with the products and services provided.

- **Point 12:** The suggestion that as a result of a negative experience with cross-selling a consumer may withdraw from the market is speculation.

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.

As a general comment, the EMF would welcome concrete, 'real life' examples and evidence of detrimental cross-selling practices.

- **Example 1:** In our view, this practice does not reflect the common practice of financial institutions, but would in any case be prohibited under Article 6 the UCPD as a misleading practice.
- **Example 2:** As above, this practice would be prohibited under Article 6 the UCPD as a misleading and unfair commercial practice.
- **Example 4:** This example does not relate specifically to cross-selling; sanctions for early termination may be imposed in relation to any contract.
- **Example 5:** The EMF agrees that consumers should not be sold products from which they cannot derive any benefit. However, the EMF believes there is a difference between a 'redundant product' in terms of features and a redundant product in terms of overlap with existing products 'owned' by the consumer, the existence of which the lender may not necessarily be aware. Further requirements in relation to the latter situation would be inappropriate and disproportionate.

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:**
 - It is not clear how credit institutions should provide consumers with the price of the package and its component parts, when the component parts are not available/do not exist separately, for example in the case of a tied package.
 - The swap example is not relevant as it is already addressed by MIFIDII. It cannot be compared with a fixed or capped rate because the risk is not the same (the bank assumes the interest rate risk).
- **Guideline 5:** This requirement appears to be specific to investment products, and is accordingly already addressed by MIFIDII. It does not appear to be - and in our view should not be - applicable to other financial products and services, including mortgage products, where there is no such mandate in the level 1 text to prescribe requirements in this area.

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.

- **Guideline 2:** This requirement is already provided for in existing legislation, including the MCD.

- **Guideline 3, paragraphs 16 & 17:** As above, these requirements are already largely provided for in existing legislation. In fact, the language used in and format of pre-contractual information relating to mortgage credit is heavily prescribed in the MCD by way of the ESIS. This being said, the MCD does not go as far as to prescribe the size of font - the EMF believes that this is a disproportionate level of detail and prescription – and does not provide a mandate for such further prescription.
- **Guideline 4:** This requirement and the example are not clear.
- **Guideline 6:** See responses to guideline 5 and guideline 3.

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.

- **Paragraph 24:** A clear distinction needs to be made between 'bundled package' and 'purchase options'.

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.

- As indicated above, the EMF would welcome confirmation that the suitability assessment in guideline 8 is not intended to apply to mortgage credit. The requirement that credit institutions should consider and adequately explain the suitability or appropriateness of particular packages for particular consumers is contrary to the requirements in the MCD. The EU Institutions took the deliberate decision not to introduce a requirement on lenders to assess the suitability of a product, notably for reasons of potentially increased lender liability and litigation risk, and the inherent overlap with the provision of advice. Instead, lenders are required to provide adequate information and explanation to enable the consumer to take decision as to which product best suits his/her needs. This requirement refers in our view to the suitability assessment in MIFIDII and should be limited to those products and services.
- The EMF would like to underline that there is no duty to advise in the MCD. Advice is considered to be a separate service from the granting of the credit which must be requested and paid for separately by the consumer.

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:** Extensive knowledge and competence requirements are provided for in Article 9 of the MCD.
- **Guideline 10:** Similarly, the MCD also provides for rules in Article 8 relating to conduct of business, including the remuneration of a credit institution's staff. The monitoring requirement by senior management is not reflected in the MCD and is inappropriate. It is not necessary to enter into this level of detail; the way in which credit institutions monitor this kind of compliance should be left entirely to their own discretion according to the product/service and market in question.

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.

- **Paragraph 28:** The requirement with regard to 'cooling-off periods' is consistent with existing legislation, including the MCD.
- **Paragraph 29:**
 - However, the EMF would like to point out that the possibility for consumers to split the products grouped in a package should not be unconditional but rather include a clear exemption for packages which consist of elements which are inseparable.
 - The EMF would welcome a discussion on the extent to which the splitting of products grouped in a package should entail a corresponding change in the price of the remaining product(s), as this is an element not considered in the draft guidelines from a credit institution perspective.

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.
