Sales Culture and Misconduct in the Financial Services Industry: An Analysis of Cross-selling Practices

*Francesco De Pascalis**
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SUMMARY

Over the past decade, a series of malpractice incidents in the financial services industry have shown that the risk of misconduct is not a theoretical possibility. Accordingly, the promotion and implementation of new ethics, values, and behaviours in banks and other financial institutions are primary objectives in the international regulatory agenda. Recent cases of mis-selling of financial products widened the scope of discussion towards financial firms' sales practices. In particular, the widespread use of cross-selling techniques in the financial services industry caught regulatory attention, above all, among the European Supervisory Authorities. The ensuing debate was underpinned by the crucial question of how to guarantee a sustainable use of cross-selling by banks and financial institutions. This article addresses this question by analyzing cross-selling in relation to the specificities and risks posed by the financial services industry. Whilst it was possible to elaborate on regulatory solutions in relation to a distorted use of financial practices, such as securitization and interest rate benchmarks, now it is also desirable to discuss the optimal strategy to prevent cross-selling from being the 'tool' for financial misconduct. This is of significance given the recognized potential of misconduct cases to pose systemic threats to financial stability.

I INTRODUCTION

The financial services industry has undergone significant reforms since the 2007-2009 financial crisis. Among other things, the regulatory debate at the national, international and regional levels has focused on the prevention of misconduct.[1] This implied analyzing how financial institutions exploit their business practices. Within this context, regulators and policymakers raised the issue of

* Lecturer in law, Brunel Law School (BLS); associate research fellow Institute of Advanced Legal Studies (IALS) University of London (francesco.de.pascalis@brunel.ac.uk). The author is grateful to all the BLS Staff Research Seminar participants for their insightful comments on an early draft of this article. Special thanks also go to the anonymous reviewer for the very constructive suggestions that helped improve the article. All errors and omissions remain the author's responsibility.

[1] See A Resti, 'Fines for Misconduct in the Banking Sector-What is the Situation in the EU?' (2017) scrutiny paper on the single supervisory mechanism provided at the request of the Economic and Monetary Affairs Committee <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/587400/IPOL_IDA(2017)587400_EN.pdf> last accessed 18.01.2018.

tackling ‘securitization abuses’, which heavily undermined the trust in the banking system. Meanwhile, other misconduct cases became known: the mis-selling of financial products and LIBOR manipulation.[2] Whereas the former relates to a perverted use of sales techniques, the latter is concerned with a fraudulent use of global benchmark interest rates.

Strengthening disclosure requirements, imposing capital requirements, requiring risk-retention, and reforming credit rating agencies were the European and US regulatory responses to securitization abuses.[3] The LIBOR manipulation, in turn, triggered a series of reforms leading to the issue of a benchmark regulation at the EU level.[4]

Now financial firms’ sales practices are under the spotlight. Specifically, the mis-selling of Payment Protection Insurance products in the UK and the Wells Fargo account fraud case in the US brought more attention to a distorted use of cross-selling practices involving the sale of multiple products to existing customers.[5]

By focusing on the banking sector, this article reviews the use of cross-selling techniques in the financial services industry. In so doing, it shows how cross-selling may become the instrument through which a pernicious sales culture unfolds. This raises the issue of identifying the appropriate approach to curb the risk that these practices may be exploited for the purposes of misconduct. Such an analysis is particularly topical as the European Supervisory Authorities (ESAs) have recently underlined the necessity of guaranteeing a sustainable use of cross-selling in the financial services

[2] See J Treanor, ‘Barclays: from LIBOR to PPI, the Charges in Full’ (2012) *The Guardian* <https://www.theguardian.com/business/2012/oct/31/barclays-the-full-charges-libor-ppi> last accessed 25.01.2018.

[3] S L Schwarcz, ‘Securitization and Post-crisis Financial Regulation’ (2016) Cornell Law Review Online 101 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6249&context=faculty_scholarship> last accessed 25.01.2018.

[4] See ‘Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014’ (2016) OJEU L 171/1.

[5] K Mehrotra, ‘Wells Fargo Sued by Shareholders Over Cross-selling Scandal’ (2016) *Bloomberg* <https://www.bloomberg.com/news/articles/2016-09-26/wells-fargo-sued-by-shareholders-over-cross-selling-scandal> last accessed 25.01.2018.

industry.[6] The article addresses this objective by critically reviewing the current understanding of cross-selling by financial regulators. Within this context, it argues against the possibility of elaborating on a regulatory approach to cross-selling to be uniformly applied across the financial services industry as a whole. Accordingly, the scope of analysis is widened by considering the current international efforts, coordinated by the Financial Stability Board (FSB), to mitigate misconduct risk among financial institutions. In this respect, the article questions whether the disincentives to misconduct, discussed at the international level, may serve the purpose of a fair use of cross-selling.

The remainder of this article is organized as follows. The first part provides some background information on cross-selling practices. In particular, this part explains the rationale behind the use of cross-selling by banks, the exploitation of multiple product sales techniques, such as tying and bundling, as well as their benefits for both banks and their customers. The second part analyzes the dark side of cross-selling, that is, the escalation of a sales culture into misconduct through cross-selling. Finally, through an examination of the current US and EU regulatory debate on the use of cross-selling in the banking and finance industry, the paper draws some conclusions as to the optimal framework to address the risks posed by these business practices.

2 CROSS-SELLING PRACTICES IN THE BANKING INDUSTRY

2.1 Rationale

There is a growing consensus that 'profit through aggressive sales techniques' is currently the predominant culture among financial institutions, in particular, in the banking industry. This is the result of a liberalization and deregulation process between the 1970s and 1980s. Events such as the

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[6] European Supervisory Authorities (ESAs), 'ESAs Letter to the European Commission on Cross-selling of Financial Products' (2016) <https://www.eba.europa.eu/documents/10180/15736/ESAs+letter+to+European+Commission+on+cross-selling+of+financial+product.pdf> last accessed 25.01.2018.

Wall Street reforms of 1975 in the US and the Big Bang reforms of the London stock market in 1986 gave banks a greater amount of freedom as to the way they could conduct their businesses.[7] For banks, this was the beginning of an evolution towards the so-called ‘universal banking’ system, through which they are able to deliver a wide variety of financial services in addition to the traditional business of taking deposits and granting loans.[8] From a customer perspective, this marked a shift from an earlier ‘relationship culture’, that is, more value to the customer relationship vis-à-vis the individual transaction to a ‘sales culture’, that is, more value to transaction volumes vis-à-vis relationships.[9] Cross-selling was finally the mechanism that made possible such an approach.

Cross-selling is an established technique through which products are bundled or tied together and sold to customers. Such a technique is widespread in the financial industry, in particular, in the retail banking sector where a wide range of products and services (current accounts, mortgages, deposits, credit cards, insurance, asset management, and capital markets products) may be purchased from a single provider.[10] A cross-selling operation involves a primary or ‘core’ product, in other words, the product that a customer intends to purchase initially. This will be the ‘gateway’ for selling additional products or services. In this way, customers, from single-product buyers, become multi-product buyers.[11] By way of example, mortgage loans are usually

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[7] See UK Parliament, ‘Banking Standards-Submission from Which?’ (2012) Written Evidence to the Parliamentary Commission on Banking Standards, paras 61-69 <https://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/writev/banking/bs29.htm last accessed 15.02.2018>.

[8] X Vives, ‘Competition Policy in Banking’ (2011) 27 Oxford Review of Economic Policy 3, 479. See also D Rogers, ‘Universal Banking: Does it Work?’ in E L Melnick et al. (eds) *Creating Value in Financial Services: Strategies, Operations and Technologies* (Springer Science + Business 2000).

[9] See R Samuel, ‘Banks, Politics and the Financial Crisis: A Demand for Cultural Change ’ (2016) Part 2 Oxford University Press Blog <https://blog.oup.com/2016/05/culture-change-banks-law-finance/> last accessed 15.02.2018, the author underlines that profit in ‘relationship culture’ is measured over long cycle, while in ‘sales culture’ is measured over shorter-time cycle.

[10] European Commission, ‘Interim Report II Current Accounts and Related Services’ (2006) Competition DG Sector Inquiry under Article 17 Regulation 1/2003 on retail banking, 91.

[11] W A Kamakura, ‘Cross-selling: Offering the Right Product to the Right Customer at the Right Time’ (2007) 6 Journal of Relationship Marketing 3, 41.

gateways to long-term accounts; current accounts to credit, debit cards or life insurance, while consumer loans are gateways to current accounts or motor insurance.[12]

Recent studies have shown that since the late 1980s banks and insurance companies have relied on cross-selling practices as a means to increase revenue and build up customer loyalty.[13] These two aspects are the rationale behind the use of cross-selling strategies in the financial industry. As to the former, the economic literature recognizes that through cross-selling practices banks and other financial institutions can boost their profits with only limited costs in marketing and distribution. Put simply, selling additional products to existing customers costs less than searching or acquiring new customers. Consequently, the benefit to financial firms of engaging in cross-selling practices is twofold: profit increase and cost reduction.[14]

The latter, on the other hand, must be analyzed in relation to the 'customer relationship management' (CRM) concept. In today's highly competitive financial markets, customers have the opportunity to shop around and search for the most convenient deal. This means that they do not rely on a single financial services provider. If dissatisfied, they may turn to other providers. Accordingly, the ability to meet clients' demands effectively will increase the chance of having zero defections.[15] Significantly, strengthening relationship marketing is the main challenge for financial institutions, in particular, for retail banks offering a variety of products and services. In practice, marketing should not only be concerned with the design, sale and distribution of products and services, but also aim at building up, consolidating and maintaining long-term relationships with customers.[16] To this end, a sound CRM has become a priority among the business strategies that

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[12] See Centre for European Policy Studies (CEPS), 'Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Service Sector' (2009) Final Report Submitted to the European Commission DG Internal Market and Services ETD/2008/IM/H3/78, 54.

[13] M Kane, 'Why Most Cross-selling Efforts Flop and Seven Ways to Turn Disappointment into Success' (2005) 97 ABA Banking Journal 2, 64.

[14] S Bansal & B S Bathia, 'Cross-selling Strategies and Employees Stress: A Study of Commercial Banks' (2014) 3 Journal of Business Management and Social Sciences Research 9, 15.

[15] Y F Jarrar & A Neely, 'Cross-selling in the Financial Sector: Customer Profitability is Key' (2002) 10 Journal of Targeting, Measurement and Analysis for Marketing 3, 282.

[16] A Omarini, 'Retail Banking: The Challenge of Getting Customer Intimate' (2011) 6 Banks and Bank Systems 3, 78.

banks and other financial institutions put in place. This objective is better summarized in the definition of CRM elaborated by some scholars, describing it as a means for ensuring a permanent link with existing customers.[17] From this perspective, it is possible to identify three stages that the process of CRM involves: 1) customer acquisition, 2) customer retention and 3) customer development. Within these, cross-selling is regarded as an effective tool to enhance customer retention. Specifically, where new products are cross-sold with traditional ones, such as current accounts, saving accounts and loans, this operation will shape the customer's vision of a firm as a one-stop-shop in which a fully comprehensive package of solutions is available for their own financial needs.[18] One-stop shopping, in turn, decreases the likelihood that a customer will patronize other competitors.

From this analysis, it is clear that cross-selling plays a pivotal role for banks and other financial firms as a revenue-boosting tool and a valid strategy for CRM purposes, particularly, for retaining existing customers. In this regard, the economic and marketing literature underlines how the advent of CRM, as a business philosophy, has given cross-selling the connotation of a technique which helps expand banking business, reduce operational costs and provide more customer satisfaction.[19]

Nonetheless, the benefits are not exclusively for firms. Cross-selling creates value for customers as well. By purchasing cross-sold items, customers may avoid the transaction costs that would result had they purchased the items separately. Moreover, customers have the availability of additional services without engaging in extensive research. Thus, this aspect makes cross-selling a valuable tool for mitigating customers' search costs.[20] For these reasons, cross-selling is widely

[17] See D Kocoglu & S Kirmaci, 'Customer Relationship Management and Customer Loyalty: A Survey in the Sector of Banking' (2012) 3 International Journal of Business & Social Science 3, 282.
[18] 'The cross-selling of other products on to the existing customer base is destined to become the key battleground as each bank strives to become the one stop shop for all the personal finance needs of their customers', see L Warwick-Ching, 'Banks Strive to Become One-stop Shops' (London 2010) *The Financial Times*.
[19] A Omarini, 'Retail Banking: The Challenge of Getting Customer Intimate' (2011) 6 Banks and Bank Systems 3, 78.
[20] European Commission (n 10).

used among financial services providers and, as will be analyzed below, is currently receiving considerable regulatory and supervisory attention.

3 CROSS-SELLING TECHNIQUES: TYING AND BUNDLING

Successful cross-selling practices imply knowing and understanding customers' needs. Financial institutions deploy different cross-selling tactics in line with their customers' profile and business objectives. Nonetheless, to have an understanding of how cross-selling works in practice it is desirable to question the degree of choice that a customer has when additional products are offered. In other words, whether the customer has to buy the whole package or can select individual items from the package. These alternatives are the basis for contrasting two major cross-selling techniques: tying and bundling.

In *Northern Pacific Railway Co. v. United States*, the US court defined tying as 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier'.[21] By reviewing this definition, it can be noticed that the understanding of tying lies in the difference between a 'tying' product and a 'tied' product. Customers can buy the 'tied' product individually, while the 'tying' product is only in combination (and not separately) with the former. Clearly, the tying product is the one that a customer intends to purchase initially. This will be finally the gateway for purchasing another one (the tied product).[22] Tying is widely applied to core retail banking products. For instance, the most used combinations include the sale of current accounts to customers buying a mortgage or personal loans; tying payment protection insurance or

[21] See *Northern Pacific Railway Co. v. United States, 356 U.S. 1 [1958]* <https://supreme.justia.com/cases/federal/us/356/1/case.html> last accessed 26.02.2018.

[22] ICN Unilateral Conduct Working Group (UCWG), 'Report on Tying and Bundled Discounting' (2009) Presented at the 8th Annual Conference of the International Competition Network (ICN) Zurich-Switzerland, 4.

life insurance to a mortgage customer; and the sale of a current account to a small medium enterprise applying for a business loan.[23]

Product bundling is more complex than tying. In general, there is not a univocal definition. Product bundling is a technique applied in a variety of contexts and for different offerings. By taking position from the early definition of bundling as the 'practice of package selling', the literature has identified several subsets, such as pure and mixed bundling, mixed leader bundling, tie-in-sales, and so forth.[24] The present analysis will focus on pure and mixed bundling which, like product tying, are the most common and used cross-selling strategies in the financial services industry. In pure bundling, the provider will propose that customers buy the whole bundle of items. Again, there is no possibility of purchasing the single components of the bundle. Indeed, these are offered in fixed proportions as part of a bundle of products that cannot be bought separately. Differently, mixed bundling gives a customer the option to buy either the bundle or any of the single items grouped together.[25] Significantly, both tying and pure bundling have in common an element of coercion and are therefore defined as 'conditional transactions' in the US banking regulations.[26] As will be shown below, this element of coercion is decisive in developing cross-selling into an illegal aggressive sales tactic.

On the contrary, mixed bundling gives a customer freedom of choice. Furthermore, in mixed bundling, the purchase of the bundle is discounted vis-à-vis the price of the individual components. Significantly, it will be cheaper for the customer to buy the bundle since its price is lower than the sum resulting from each price of the individual products. For this reason, the economic literature

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[23] See Centre for European Policy Studies (CEPS), 'Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Service Sector' (2009) Final Report Submitted to the European Commission DG Internal Market and Services ETD/2008/IM/H3/78, 54; see also House of Commons Treasury Committee, 'Competition and Choice in Retail Banking' (2011) Ninth Report of Session 2010-2011 HC 612-I, 28.

[24] F Ceci & A Prencipe, 'Enablers, Outcomes and Effects of Product Bundling: Towards an Analytical Model' (2005) 10th Anniversary Conference on Dynamics of Industry and Innovation: Organization, Network and System, Copenhagen-Denmark; see also W J Adams & W L Yellen, 'Commodity Bundling and the Burden of Monopoly' (1976) 90 The Quarterly Journal of Economics 3, 475.

[25] P Chiambaretto & H Dumez, 'The Role of Bundling in Firms' Marketing Strategy: A Synthesis' (2012) 27 Recherche et Applications en Marketing 2, 91.

[26] See A M Pollard & J P Daly, *Banking Law in the United States* (Juris Publishing 2011).

defines mixed bundling as a multi-product rebate, in other words, 'bundling with financial advantage to the customer'.[27]

As explained, the choice between tying and bundling depends on a firm's marketing strategies in connection with consumers' preferences. In any case, such techniques help to explain how the cross-selling process is put in motion for achieving the purpose of increasing profits along with the customer retention objective.

3 FLAWS AND NEGATIVE IMPLICATIONS

According to the CMR literature, cross-selling practices are beneficial to both banks and their customers. However, if we analyse this context from a legal perspective it may be argued that the advantages are more on the side of financial firms.[28]

In general, products should meet the test of suitability and be adequately disclosed in their characteristics. Speaking of retail financial products, these are appropriate where they are 'suitable' for the customer's financial needs and objectives. According to the International Organization of Securities Commissioners (IOSCO), the word 'suitability' refers to any standard or requirements that financial intermediaries should observe while selling financial products. Consequently, a financial product may be regarded as 'suitable' when the financial institution carefully assesses, among others, the customer's investment knowledge and understanding of the products, as well as risk tolerance and investment objectives.[29] Suitability goes along with a firm's duty to assist a customer in their investment decisions. This implies disclosing all product details and risk

[27] See CEPS (n 23).
[28] For this reason, it is argued that a transition from a selling culture to an advisory one would rebalance the interests of customers vi-a-vis the interests of banks, see R Fleming & J Fielding, 'What Great Looks Like in Banking Sales Practices' (2016) <http://www.bain.com/publications/articles/what-great-looks-like-in-banking-sales-practices.aspx last> accessed 12.05.2018.
[29] International Organization of Securities Commissioners (IOSCO), 'Suitability Requirements with Respect to the Distribution of Complex Financial Products' (2013) FR01/13 <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD400.pdf> last accessed 12.05.2018.

characteristics that could be relevant to this end.[30] Therefore, suitability is strictly connected with the duty to act in the best interest of the customers.[31] Logically, if a financial product does not meet these requirements there cannot be benefits for customers. As to cross-selling practices, the suitability and disclosure tests are somehow delicate due to the tying or bundling of additional products to the desired one. As a bank customer will finally buy more products than initially expected, this raises the question of the extent to which banks can illegitimately exploit cross-selling practices. This goes beyond the test of product suitability because it implies assessing how banks use the element of coercion inherent to tying and bundling techniques to the detriment of their customers. For instance, if customers are advised that a loan or credit application is more likely to be accepted if they buy another product, which has finally no connection with the desired product, this is an unfair use of cross-selling. Moreover, if products are tied or bundled without customer awareness this gives cross-selling a fraud connotation.

These are not abstract examples. Two recent events in the retail financial world, the Payment Protection Insurance (PPI) mis-selling in the UK and the Wells Fargo (WF) fraud in the US revealed the 'dark side' of cross-selling practices in the banking industry. PPI is an insurance product aimed at covering the borrower's debt or credit repayment in the event of such impediments as death, illness, unemployment, etc. PPI was automatically bundled with unsecured and secured loans, mortgages, credit cards and store cards.[32] Then it became the 'PPI mis-selling scandal' in the aftermath of investigations that brought to light that PPI was expensive, ineffective, inefficient and, above all, mis-sold; that is, falsely presented as essential to obtain the desired loan or sold without the customer's knowledge.[33] The mis-selling of PPI is regarded as one of the most serious

[30] See Bank for International Settlement (BIS), 'Customer Suitability in the Retail Sale of Financial Products and Services' (2008) The Joint Forum.
[31] See IOSCO (n 29).
[32] UK Parliament, 'Panel on Mis-selling and Cross-selling' (2013) Written Evidence (SJ015) <https://www.publications.parliament.uk/pa/jt201213/jtselect/jtpcbs/writev/misselling/sj015.htm> last accessed 06.03.2018.
[33] See G Wearden, 'How the PPI Scandal Unfolded' (2011) *The Guardian* <https://www.theguardian.com/business/2011/may/05/how-ppi-scandal-unfolded> last accessed 06.03.2018.

wrongdoing in the history of retail financial services.[34] Indeed, it is estimated that the PPI business resulted in the sale of 45 million policies. These, in turn, generated over 16.5 million claims submitted by consumers through Claims Management Companies (CMCs), more than one million of which were finally converted into complaints before the UK Financial Ombudsman Service.[35] The bulk of the complaints closed by the ombudsman service emphasize how, through tying techniques, an unnecessary product (the PPI policy) became the condition for obtaining a loan.[36] Overall, thus far, the involved UK banks have paid £24.2 billion in fines, compensation and legal expenses.[37]

Similarly, in the WF case the bank employees created 2 million phantom accounts and credit cards through cross-selling techniques. Once again, this happened without any customer knowledge or consent.[38] Investigations, as well as civil and criminal proceedings are still ongoing. However, the fact that the WF case has so far cost $185 million in fines and resulted in more than 5,000 employees being fired gives evidence of abuses of an unprecedented magnitude in the retail financial services world.[39]

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[34] See A Georgosuli, 'Payment Protection Insurance (PPI) Misselling: Some Lessons from the UK' (2014) 21 Connecticut Insurance Law Journal 1, 262.

[35] See Richard Thomas, 'The Impact of the PPI Mis-selling on the Financial Ombudsman Service' (2016) Financial Ombudsman Service < http://www.financial-ombudsman.org.uk/publications/pdf/Impact-of-PPI-mis-selling-report.pdf> last accessed 10.03.2018.

[36] See Financial Ombudsman Service, 'Final Decision' (2008): It is hard not to conclude that the whole process that day, and subsequently, was designed to hide from Mr and Mrs B the true nature of the transaction they were recommended to enter in to. Mr and Mrs B say that they felt that accepting the PPI policy was necessary, if they were to obtain the loan they required. That was not the case – and that was confirmed at the time by the firm. But having listened to the phone call, I can see how Mr B formed the strong impression that accepting the PPI policy was, indeed, part of the assessment of whether or not the loan he wanted would be granted < http://www.financial-ombudsman.org.uk/publications/technical_notes/omb-decision-B.pdf> last accessed 10.03.2018.

[37] National Audit Office (NAO), 'Financial Services Mis-selling: Regulation and Redress' (2016) Report by the Comptroller and Auditor General Ordered by the House of Commons <https://www.nao.org.uk/wp-content/uploads/2016/02/Financial-services-mis-selling-regulation-and-redress.a.pdf> last accessed 10.03.2018.

[38] See Independent Directors of the Board of Wells Fargo & Company, 'Sales Practices Investigation Report' (2017) < https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> last accessed 10.03.2018; see also B Tayan, 'The Wells Fargo Cross-selling Scandal' (2016) Stanford Graduate School of Business, Stanford Closer Look Series.

[39] See US House of Representatives, 'Did the CFPB Let Wells Fargo "Beat the Rap"?: Second Interim Majority Staff Report on the Wells Fargo Fraudulent Account Scandal' (2017) <https://financialservices.house.gov/uploadedfiles/wf_report.pdf> last accessed 10.03.2018; see also P

Both cases show the potential for cross-selling to become the instrument for mis-selling purposes. The UK Financial Conduct Authority (FCA) generically defines mis-selling as the 'failure to deliver fair outcomes for customers'. Importantly, in the cross-selling context, the escalation into mis-selling may be caused through a variety of conducts, for instance, when another product is falsely presented as 'the condition' to obtain the desired product or when additional products are cross-sold behind a customer's back.[40]

4 REGULATORY APPROACHES

The PPI and WF facts bring to light a distorted use of cross-selling in the banking sector. Similar to the rigging of LIBOR or the mis-selling of US sub-prime mortgage backed securities, in the wake of the 2007-2009 financial crisis, they ignited the current global debate on promoting a sound corporate culture in the financial sector with a view to restoring public trust and strengthening financial stability.[41]

Even though PPI and WF are cases of misconduct carried through cross-selling practices, there is an important difference between them. While the former has always been regarded as the 'PPI mis-selling scandal', the latter is now referred to as the 'cross-selling scandal'.[42] This difference may open a new strand of analysis. If we discuss them as mis-selling cases, the main question to be addressed is how to prevent bank misconduct. On the other hand, if we label them as cross-selling scandals, the gist of analysis is how to address cross-selling. In other words, discussing a bank's misconduct not exclusively as a mis-selling case but as a cross-selling failure urges

Jenkins, 'Crimes, Misdemeanours and Cross-selling' (2016) *The Financial Times* <https://www.ft.com/content/9681aa7e-7e53-11e6-bc52-0c7211ef3198> last accessed 10.03.2018.

[40] See Financial Conduct Authority (FCA), 'Claim Back Money on the Sale of PPI' (2017) <https://www.fca.org.uk/consumers/payment-protection-insurance/claim-back-money-sale-ppi> last accessed 24.03.2018.

[41] See William Dudley, 'Enhancing Financial Stability by Improving Culture in the Financial Services Industry' (2014) speech at the Federal Reserve Bank of New York <http://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html> last accessed 24.03.2018.

[42] K Mehrotra, 'Wells Fargo Sued by Shareholders Over Cross-Selling Scandal' (2016) <https://www.bloomberg.com/news/articles/2016-09-26/wells-fargo-sued-by-shareholders-over-cross-selling-scandal> last accessed 24.03.2018.

consideration for how to tackle the risks deriving from this practice. The WF case paved the way for this specific visual angle and thus for a debate on the use of cross-selling by financial institutions. Current discussions examine the escalation of cross-selling into mis-selling and, from this base, question whether cross-selling practices are more beneficial to financial firms than their customers.[43] The PPI and WF cases may already provide an answer to this question. Nonetheless, their significance inevitably leads to investigating whether an appropriate regulatory framework exists as to the use of cross-selling in the financial services industry. To this end, a comparison between the US and European approaches offers interesting causes for reflection.

4.1 The anti-trust law perspective

Back in 2009, a report on the use of cross-selling (tying, bundling and preferential/exclusive agreements) and other commercial practices in the retail financial service sector was submitted to the European Commission. The report is based on the legal and economic theories supporting the applicability of antitrust law to the practices in question. In essence, tying and bundling are analyzed through the lens of their 'exclusionary effects', that is, their potential to foreclose existing competitors, increase entry barriers for new competitors, and ultimately harm consumers.[44] Tying has had closer scrutiny vis-à-vis bundling because of its characteristic to require the purchase of the desired product along with the tied product. This feature is deemed to increase the risk that firms with monopoly power in the tying market can foreclose sales in the tied market; thereby, they exclude new competitors. Accordingly, the report brings to attention that community competition

[43] See B S Fisher, 'Can Banks Still Cross-sell in 2017? Yes, But' (2016) American Banker <https://www.americanbanker.com/opinion/can-banks-still-cross-sell-in-2017-yes-but> last accessed 24.03.2018.

[44] Centre for European Policy Studies (CEPS), 'Tying and Other Potentially Unfair Commercial Practices in the Retail Financial Service Sector' (2009) Final Report Submitted to the European Commission DG Internal Market and Services ETD/2008/IM/H3/78 <http://ec.europa.eu/finance/consultations/2010/tying/docs/report_en.pdf> last accessed 24.03.2018.

law, specifically, abuse of the dominant position under Article 82 of the EC Treaty, has always been the stance to discuss such cross-selling practices as bundling and tying in the EU. [45]

Similarly, in the US, the anti-competitive or pro-competitive effects of tying have always been under the regulatory spotlight. To have a clearer picture, reference is to be made to Section 1 of the Sherman Act of 1890,[46] Section 3 of the Clayton Act of 1914[47] and Section 106 of the Bank Holding Company Act of 1956 (BHCA).[48] These rules should not be analyzed separately because altogether they constitute what can be defined as 'the anti-tying framework'. This word refers to all the aspects these regulations have in common. First, curbing the anti-competitive effects of tying is their rationale. Second, they altogether set out a *per se* illegality threshold of tying whenever buying the tied product is the only condition to obtain the desired product. To this end, a *per se* illegality of tying arrangements arises by giving evidence of a sale of two separate products, coercion, market power and impact on a 'not insubstantial' amount of interstate commerce.[49]

However, the main difference is that while the anti-tying provisions of the Sherman and Clayton Acts are regarded as general anti-trust law, Section 106 of the BHCA specifically addresses anti-competitive conditions imposed by banks to their customers. Precisely, Section 1 of the Sherman Act deals with tying arrangements in trade or commerce, Section 3 of the Clayton Act prohibits tying arrangements in the sale or lease of goods, while Section 106 of the BHCA challenges tying arrangements in transactions conducted by bank holding companies and their subsidiaries. [50] Section 106 has, therefore, a more defined scope than the general anti-trust provisions incorporated in the Sherman and Clayton Acts. Another significant difference lies in the

[45] Ibid.
[46] The Sherman Antitrust Act (1890) 15 U.S.C. § Code 1 <http://www.stern.nyu.edu/networks/ShermanClaytonFTC_Acts.pdf> last accessed 04.04.2018.
[47] Clayton Antirust Act (1914) 15 U.S.C. § Code 14 <http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf> last accessed 04.04.2018.
[48] Bank Holding Company Act (1956) 12 U.S.C. §§ 1971-1978 <https://www.law.cornell.edu/cfr/text/12/225.2> last accessed 04.04.2018.
[49] See T D Naegele, 'The Anti-Tying Provision: Its Potential is Still There' (1983) 100 Banking Law Journal 138.
[50] Id, 'The Bank Holding Company Act's Anti-tying Provision: 35 Years Later' (2005) 122 Banking Law Journal 195, 214.

fact that market power, anti-competitive effects and negative effects on interstate commerce need not be proven.[51] Under Section 106, the bank's coercion is sufficient to make the tying arrangement *per se* illegal. Finally, the specificities of Section 106 must be traced back to the fact that they only prohibit tying transactions involving non-traditional banking products or services. Traditional banking products, on the other hand, will be subject to the Sherman and Clayton Acts' anti-tying provisions.[52] Consequently, there is a degree of intertwine between Section 106 and the Sherman and Clayton rules in the sense that the latter covers what the former, in its specificity, does not cover. In any case, Section 106 of the BHCA is an application of the Sherman and Clayton principles to the field of commercial banking. Altogether, these rules constitute anti-trust law and their main purpose is to promote competition in the economy.

4.2 A critical review

Both the EU and the US converge in their reference to antitrust law to address the negative effects associated to cross-selling techniques. However, there are also some detectable divergences in relation to the traditional notion of cross-selling as a sale of additional products through bundling and tying. While in the EU, the 2009 report qualifies bundling and tying as cross-selling techniques, in the US this identification is rather blurred. US scholars and practitioners argue that the WF cross-selling case should be an opportunity for regulators to re-scrutinize what they define as the 'cousin' of cross-selling, namely tying. In this respect, they distinguish between cross-selling as the sale of additional products to established customers and tying as the sale of two separate products.[53] Consequently, 'bad' cross-selling, as in the WF case, should be the platform to revisit and

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[51] Ibid.
[52] See Board of Governor of the Federal Reserve System, 'Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970' (2003) [Docket No. Op-1158] <https://www.federalreserve.gov/boarddocs/press/bcreg/2003/20030825/attachment.pdf> last accessed 08.04.2018.
[53] See A R Perron, 'Fed Deserves Some Blame for Aggressive Cross-Selling Tactics' (2016) *American Banker* <http://www.americanbanker.com/bankthink/fed-deserves-some-blame-for-aggressive-cross-selling-tactics-1091534-1.html> last accessed 08.04.2018.

strengthen the enforcement of anti-tying law.[54] Under this perspective, it appears that only bundling is under the umbrella of cross-selling. In fact, in his complaint against WF, Los Angeles City Attorney Feuer refers to the opening of accounts without customers' consent as a 'bundling operation'.[55] Based on this, it can be submitted that in the US there is not a specific regulation on the use of cross-selling in the financial industry. Nonetheless, even if the notion of cross-selling is de-linked from tying and mainly associated to bundling, the issue of which framework is more appropriate to deal with the use of cross-selling in the financial sectors remains open.

Differently from the US, the EU 2009 report not only included tying and bundling within the general notion of cross-selling, but also cast doubts on the sufficiency of the antitrust law to address the risk inherent to the use of cross-selling by banks and other financial institutions. In particular, the report discussed the applicability of the Unfair Commercial Practice Directive (UCPD) to tying, bundling and other commercial practices. As to tying and bundling, the report underlined that both these mechanism are not captured by the UCPD. Therefore, its applicability may create an excessively onerous burden of proof: claimants should demonstrate that the practices were contrary to professional diligence and customers were forced to buy products that they would not have purchased.[56]

Furthermore, the applicability of the UCPD to the use of cross-selling in the financial sectors is difficult because of the particularity, complexity and inherent serious risks that make finance more critical than any other sector. Notoriously, finance has market failures that can be highly disruptive to the real economy. The recent financial crisis gave evidence of this and taught the lesson that finance needs to be regulated 'over and above the way we regulate other industries'.[57]

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[54] See M Wiersun, 'Wells Fargo & The Bank Holding Company Act's Section 106: Exhuming § 1972 as the Antitrust Remedy to Impermissible Bundling and Tying' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913939> last accessed 08.04.2018.
[55] The text of the complaint can be accessed on <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rPxi_pVaKx2Y/v0 last accessed 14.04.2018>.
[56] CEPS (n 23).
[57] See The Warwick Commission, 'The Warwick Commission on International Financial Reform: In Praise of Unlevel Playing Fields' (2009) The University of Warwick

These peculiarities have been taken into consideration by the UCPD legislator. Article 3(9) of the UCPD limits the full harmonization purpose of the UCPD in relation to financial services. Within this area, member states are free to impose even more 'restrictive or prescriptive' requirements than those imposed by the UCPD. Therefore, the directive explicitly leaves to member states how to take action with regard to financial services.[58]

The Market in Financial Instrument Directive (MiFID I) was also discussed as a potential framework for disciplining the use of cross-selling in the financial industry. MiFID I aimed at strengthening investor protection by laying down a set of conduct rules for investment firms.[59] Its limit, however, was that it did not specifically address cross-selling practices. Notwithstanding, its conduct rules and organizational requirements were regarded as the milestone for elaborating new frameworks.[60]

All things considered, both the US and EU show the absence of an adequate framework to address the use of cross-selling by banks and other financial institutions. What is learned from this analysis is that there is a subtle difference between discussing cross-selling as a commercial practice and discussing it as a banking practice. The former identifies antitrust doctrines and antitrust law as the main visual angle, the latter urges to look beyond and toward a strategy dealing with all the incentives that make cross-selling escalate into bad cross-selling.

5 NEW DEVELOPMENTS AT THE EU LEVEL

<https://www2.warwick.ac.uk/research/warwickcommission/financialreform/report/uw_warcomm_intfinreform_09.pdf> last accessed 14.04.2018.

[58] See article 3(9) and Recital 9 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) (2005) OJEU L 149/22.

[59] See Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

[60] See CEPS (n 23) 146.

In their warnings of the higher risks associated to the use of cross-selling in the financial industry and discussion of the MiFID I, as a suitable legislative framework, European scholars and policymakers were farsighted. By examining the post-crisis EU financial regulatory framework and its evolution, it is possible to notice that cross-selling practices have been receiving considerable attention in the law-making process. Specifically, the new MiFID II package[61] (which repealed MiFID I), the Mortgage Credit Directive (MCD),[62] the Payment Account Directive (PAD)[63] and the Insurance Distribution Directive (IDD)[64] include provisions on cross-selling. Among these, Article 24(11) of the MiFID II establishes a connection between the MiFID II and the mentioned directives through the involvement of the European Supervisory Authority (ESAs). This rule gives mandate to the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Authority (EIOPA) to issue joint guidelines for the assessment and supervision of cross-selling practices across the banking, insurance and investment services sectors. Overall, these directives represent an important sign of progression in comparison to the lack of frameworks on the use of cross-selling in financial sectors prior to the recent misconduct cases. The banking sector is not the only one targeted by the European regulators. The inclusion of rules on cross-selling in insurance and investment services directives shows the regulators' awareness of the criticality of cross-selling in the financial industry as a whole. This also clarifies the meaning of the joint work of the three European supervisory authorities (ESAs) under

[61] This consists of 'Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU' (2014) (recast) OJEU L 173/349; and 'Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012' (2014) OJEU L 173/84.

[62] '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' (2014) OJEU L 60/34.

[63] 'Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment account switching and access to payment accounts with basic features' (2014) OJEU L257/214.

[64] 'Directive EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on Insurance Distribution' (2016) OJEU L 26/19.

Article 24(11) of the MiFID II, that is, the creation of a high-level set of principles to be uniformly applicable to the sectors regulated by the four directives.

The ESAs should have issued their joint guidelines by January 2016. At present, however, there is only a set of guidelines issued by ESMA, addressing the practice of cross-selling in the investment services sector under the MiFID II.[65] The authorities' project to create guidelines applicable across banking, insurance and securities areas failed. The ESAs stressed that their policy objective could not be achieved because the four directives 'differ in terms of formal wording, scope, level of granularity and date of application of cross-selling provisions'.[66] Consequently, they asked the European Commission to assess such discrepancies to ensure a uniform regulation of cross-selling practices in the financial industry. Until now, there have been no inputs from the European Commission. This raises the question of the extent to which an adequate level of harmonization among pieces of legislation dealing with different financial sectors is attainable. An exegesis of the provisions on cross-selling set out in the MiFID II, MCD, PAD and IDD is worthwhile against the backdrop of the scarce details the ESAs gave in this respect.

5.1 Uniform approaches are not feasible

The initial consultation paper published by the joint Committee of the ESAs on cross-selling practices is a valuable source to this end. Firstly, the ESAs defined cross-selling as 'the practice whereby firms group together (and sell) two or more separately identifiable products or services in a package'.[67] As to this aspect, only the MiFID II has a specific provision. Article 4(1)(42) defines cross-selling as the practice of offering an investment service with another product or service as part of a package or as a condition for the same agreement or package.[68] On the contrary, the PAD and

[65] ESMA, 'Guidelines on Cross-selling Practices' (2015) Final Report ESMA/2015/1861.
[66] ESAs, 'The Cross-selling of Financial Products-Request to the European Commission to Address Legislative inconsistencies Between Banking, Insurance and Investment Sectors' (2016) ESAs/2016/07.
[67] Joint Committee of the European Supervisory Authorities, 'Joint Committee Consultation Paper' (2014) JC/CP/2014/05, 9.
[68] See Article 4(1)(42) Directive 2014/65/EU.

the MCD do not provide any definition of cross-selling, while the early draft of the IDD had a rule duplicating the wording of Article 4(1)(42) of the MiFID II.[69] Nonetheless, the final draft of the IDD, issued in 2016, lacks any definition of cross-selling. Article 24 of the IDD is entitled 'cross-selling' but sets out an insurance distributor's duty of disclosure to their customers when they offer insurance products together with products or services which are not insurance.[70] Consequently, the first issue to be addressed is a lack of harmonization among the directives with regard to a clear definition of cross-selling. In sum, only the MiFID II defines cross-selling. Indeed, the ESAs elaborated their own understanding of cross-selling drawing upon the definition set out in the MiFID II. Contrarily, the PAD and MCD only address bundling and tying practices and the IDD's focus is on the duty of disclosure. As a result, the ESAs' definition cannot apply consistently across the other three Directives. In this regard, the ESAs had asked consultation on their own definition. While the majority of the respondents agreed with the authorities, others argued that the definition was too generic because packaging products or services do not always constitute a cross-selling operation.[71] Therefore, such a discrepancy urges reaching a common understanding of cross-selling through a clearer definition, which can be adapted to the financial sectors regulated by the Directives.

The Directives have also evident differences as to the discipline of tying and bundling techniques. Only the MCD has specific rules on tying and bundling. The MiFID II and the PAD lack any provision. They only mention these cross-selling techniques in Recital 81 and Recital 24 respectively. Between them, Recital 81 focuses on both tying and bundling whereas Recital 24 on tying.[72] Finally, the IDD neither addresses tying and bundling in its recitals nor in its rules. Overall, only the MiFID II and the MCD refer to both the techniques. By limiting the comparative analysis

[69] See European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Insurance Mediation' (2012) COM (2012) 360 final.
[70] See Article 24 of 'Directive (EU) 2016/97.
[71] See European Fund and Asset Management Association (EFAMA), 'EFAMA's Comments on the Joint Consultation Paper on Guidelines on Cross-selling Practices' (2015).
[72] See Recital 81 Directive 2014/65/EU and Recital 24 Directive 2014/92/EU.

to these two pieces of legislation, it is possible to single out an interesting, but critical, aspect. Unlike the MiFID II, the MCD invites EU Member States to either prohibit tying practices or allow them only under specific conditions.[73] This ban is a strong element against any attempt of creating uniform guidelines applicable across sectors. In fact, beyond the absence of specific definitions or provisions on bundling and tying, the main difference between the MiFID II and the MCD is that the former acknowledges that tying is riskier than bundling, but does not state any prohibition. In essence, the MiFID II simply warns against unintended consequences related to tying practices vis-à-vis bundling.[74] Instead, the MCD sets out a clear ban. How this inconsistency should be tackled to ensure uniformity across the banking, insurance and securities sectors is a difficult dilemma: should tying be banned in line with the MCD rules or permitted under the softer MiFID II approach?

Finally, as to possible detrimental effects to customers deriving from cross-selling practices, the four directives appear to focus on different issues. Once again, it is worth comparing the risks dealt with by the four directives against the risks underlined by the ESAs in their proposed guidelines. The ESA's concern was on the potential of cross-selling practices to exacerbate the information asymmetries between the firms and their customers. In other words, financial firms distributing tying or bundled packages do not always give transparent and timely information on the additional products at the point of sale. Often, additional products' details are available only when the customer has agreed to purchase the core or gateway product. This may have the effect of making a customer's research and comparison for alternative products quite demanding, if not impossible. Lack of disclosure also includes relevant cost/price information about bundled or tied products, as well as essential details on the non-price features of the additional items. Furthermore, firms may neglect to provide customers with information on the suitability or appropriateness of a particular package and on the risk profiles of the components of the package. Consequently, customers will be unable to factor in the impact that additional items can have on their purchase. If

[73] See Article 12 of Directive 2014/17/EU.
[74] See Recital 81 Directive 2014/65/EU.

relevant information is unclear, insufficient or omitted, the customers will find it difficult to understand whether the purchase of additional products is optional or compulsory vis-à-vis the (primary) product they intend to buy.[75] The ESA's recommendations are hence to increase a firm's duty of disclosure when cross-selling operations take place so that customers can be aware of what they are buying and whether their purchase is advantageous. Among the four directives, the MiFID II is the legislation covering most of the detrimental effects highlighted by the ESAs. First, it considers investment firms' duty of information when investment services or products are cross-sold. In particular, Article 24(11) prescribes to inform clients as to the possibility of purchasing products separately when these are proposed as part of a package or as a condition for the same agreement or package. In this context, investment firms must also provide a detailed description of the different components of the package and related risk, in particular, whether buying the whole package is riskier that purchasing single items.[76] Moreover, the MiFID II deals with the investment firms' duty to evaluate the suitability and appropriateness of the package to the client's investment needs. To this end, the firm is required to assess the client's knowledge and experience in the investment field relating to the specific products or services being cross-sold.[77] This framework allowed the ESMA to develop a set of guidelines substantially aligned to the set proposed by the ESAs Joint Committee.[78] The other directives do not have the same coverage. For instance, the IDD only addresses (with the same wording as the MiFID II) the duty to inform the clients of the risks and of the opportunity to buy the items separately from the whole package.[79] The PAD provides for the same possibility. However, it mainly focuses on the duty to inform clients as to different costs and fees associated with buying the products separately or in a package.[80] As opposed to the MiFID II and the IDD, it does not deal with the duty to disclose risks to clients. The MCD, in turn, does not

[75] See Joint Committee of the ESAs (n 67).
[76] See Article 24(11) of Directive 2014/65/EU.
[77] See Article 25(3) of Directive 2014/65/EU.
[78] See ESMA (n 65).
[79] See Article 24 of Directive 2016/97/EU.
[80] See Article 8 of Directive 2014/92/EU.

cover any of these risks. It has only provisions on tying and bundling techniques. As explained, its main focus is on prohibiting, if not limiting, the use of tying practices and, more generally, on the distortive effects that these can have on competition, customer's mobility and the ability to make an informed choice.

To summarize, only the MiFID II and the IDD have specific provisions on cross-selling. In comparison, the MCD and the PAD have a more general and reduced scope. These inconsistencies prevented the development of uniform guidelines on cross-selling practices in different financial sectors. Overall, they give evidence of how the scope of the ESA's proposed joint guidelines was ultimately too broad vis-a-vis how the directives regulate cross-selling in their respective sectors. In other words, each sector (banking, insurance and investment services) shows different understandings and applications of cross-selling, which make any attempt of harmonization a tricky riddle.

This also implies that Article 24(11) of the MiFID II could not be an adequate legal basis for issuing cross-selling guidelines covering the banking, insurance and investment services sectors altogether. As mentioned above, only the ESMA was finally able to issue guidelines.[81] However, these relate only to the investment services sector. Significantly, this means that the ESAs will not be pursuing the joint guidelines project any further. Consequently, a uniform regulation of cross-selling across different financial sectors is not workable. Rather, regulatory interventions can only be discussed on a case-by-case basis, that is, in relation to the way each financial sector exploits cross-selling techniques.

6 FURTHER REFLECTIONS

6.1 Cross-selling as a financial firm cultural problem

[81] See ESMA (n 65).

The EU experience brings to attention the ubiquitous nature of cross-selling. The sale of multiple products through cross-selling techniques is common in many financial sectors. As witnessed by the PPI and WF facts, the banking industry is the sector with the most pervasive use. This is the area on which the present analysis has been developed. Against the outcome of the absence of a specific legislation, this sector gives the opportunity to reflect on other strategies to prevent the distorted use of cross-selling. These can be introduced by referring to a phrase describing the rationale behind the above-mentioned wrongdoings: ‘a toxic sales-based culture fostered by flawed remuneration arrangements’.[82] Staff remuneration and incentives have been under close scrutiny since the outbreak of the 2007-2009 financial crisis. As known, mortgage bankers’ compensation depended on the volume of loans they generated, rather than on their quality. Similarly, WF frontline employees were compensated based on the volume of accounts opened, while in the UK an FCA investigation brought to light how a PPI sales penetration of 80% was the target to be achieved to earn the PPI bonus.[83] Clearly, compensation packages are flawed whenever they are used to exercise unfair pressure on employees to meet business targets set at the top. This, in turn, leads to selling strategies that may be regarded as ‘toxic’ any time they escalate into mis-selling to the detriment of customers. Unquestionably, cross-selling is the engine of this perverse process. It is the instrument through which a sales-based culture, inputted by ‘flawed’ remuneration arrangements becomes ‘toxic’. Such an escalation is traced back to serious deficiencies in the governance of conduct of financial institutions. These, in turn, are part of a broader theme currently discussed by regulators and policymakers in the international financial arena, that is, ‘misconduct risk’.

Misconduct risk is an umbrella term capturing a wide (non-exhaustive) list of wrongdoings, ranging from the mis-selling of financial products to retail and professional clients to market

[82] E Saint-Smith, ‘UK Insurance Scandal-could it Happen Here?’ (2014) <http://magazine.riskinfo.com.au/16/uk-insurance-scandal-could-it-happen-here/> last accessed 26.04.2018.
[83] Ibid.

manipulation. [84] At the international level, the Financial Stability Board (FSB) has been coordinating efforts to mitigate misconduct risk. Indeed, such misconducts as the LIBOR manipulation and mis-selling have the potential to create systemic risk and thus undermine financial stability. As mentioned, these cases have resulted in heavy financial penalties imposed on banks. It is submitted that *ex post* sanctions are useful tools for discouraging bad behaviours. Nonetheless, their deterrence functions needs to be supplemented through a robust system of *ex ante* tools.[85] Accordingly, the FSB elaborated a work programme to address this within the financial services industry. A firm's conduct, culture and governance framework are central to the FSB programme.[86] In other words, the mitigation of misconduct risk is linked to the creation of a toolkit of measures aimed at improving the conduct, culture and governance framework of financial institutions. Such measures are also intertwined with the post-crisis FSB principles to promote sound compensation practices among financial institutions.[87] Under this perspective, a sustainable use of cross-selling depends on the promotion and embedment of new values within a financial institution. Specifically, as to the use of cross-selling by banks, this would imply the return to a more relational, customer-oriented business vis-à-vis a sales-centered-business model.

However, what is currently envisaged at the international level is surrounded by great vagueness. To begin with, there is not any clear definition of misconduct risk. By way of comparison, at the EU level, the European Systemic Risk Board defines misconduct risk as the risk relating to the way in which a firm and its stuff conduct themselves,[88] while the EBA refers to it as

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[84] See European Systemic Risk Board (ESRB), 'Report on Misconduct Risk in the Banking Sector' (2015) <https://www.esrb.europa.eu/pub/pdf/other/150625_report_misconduct_risk.en.pdf> last accessed 26.04.2018.
[85] See Resti (n 1).
[86] See Financial Stability Board (FSB), 'Building a Resilient and Open Global Financial System to Support Sustainable Cross-border Investment' (2016) <http://www.fsb.org/wp-content/uploads/FSB-Chair%E2%80%99s-letter-to-G20-Leaders-in-advance-of-their-meeting-in-Hangzhou-on-4-5-September.pdf> last accessed 30.04.2018.
[87] See FSB, 'FSF Principles for Sound Compensation Practices' (2009) <http://www.fsb.org/wp-content/uploads/r_0904b.pdf> last accessed 12.05.2018; see also FSB, 'Implementing the FSB Principles for Sound Compensation Practices and their Implementation Standards' (2017) Fifth Progress Report <http://www.fsb.org/wp-content/uploads/P040717-6.pdf> last accessed 12.05.2018.
[88] ESRB (n 84).

the risk of losses to institutions deriving from inappropriate (willful or negligent) provision of financial services.[89] On the other hand, the FSB broadly defines misconduct as 'conduct that falls short of expected standards, including legal, professional and ethical standards'.[90] Significantly, there are general and more sophisticated definitions of misconduct risk, which finally increase the complexity of the concept and make it unclear what it should encompass and exclude. In a similar way, this applies to 'governance framework'. In its recent stocktake review, the FSB underlined that some jurisdictions do not have any 'formal and explicit' definition of governance framework.[91] The understanding of 'culture' is also problematic. Within the context at stake, some scholars define it as the 'set of attitudes, beliefs, practices, and values that mitigate or enhance misconduct risk'.[92] Nonetheless, this concept has an inherent high level of subjectivity. For instance, banks have different visions and missions. These ultimately determine different (if not competing) cultures.[93] Consequently, it is difficult to assess or measure a financial firm's culture. In essence, there is not a universal 'good' or 'bad' culture to be used as a template against which a firm culture can be evaluated.[94]

Furthermore, roles and responsibilities of key actors are still to be properly clarified. On the one hand, it is accepted that board and senior management have responsibilities for setting the 'tone at the top' and instilling ethical values. On the other hand, this raises the question of the degree of involvement of regulators and supervisors in this issue. This is a controversial matter, particularly in

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[89] EBA, 'EU-wide Stress Test: Methodological Note' (2016) <https://www.eba.europa.eu/documents/10180/1259315/2016+EU-wide+stress+test-Methodological+note.pdf last accessed 12.05.2018> last accessed 12.05.2018.

[90] FSB, 'Stocktake of efforts to strengthen governance frameworks to mitigate misconduct risks' (2017) <http://www.fsb.org/2017/05/stocktake-of-efforts-to-strengthen-governance-frameworks-to-mitigate-misconduct-risks/> last accessed 12.05.2018.

[91] Ibid.

[92] S Chaly et al. 'Misconduct Risk, Culture and Supervision' (2017) Federal Reserve Bank of New York White Paper < https://www.newyorkfed.org/medialibrary/media/governance-and-culture-reform/2017-whitepaper.pdf> last accessed 12.05.2018.

[93] T Frankel, 'Bank's Culture Problem: You Can't Have Just One' (2016) <https://www.americanbanker.com/opinion/banks-culture-problem-you-cant-have-just-one> last accessed 12.05.2018.

[94] See Banking Standard Board, 'Annual Review 2016-2017' (2017) <https://www.bankingstandardsboard.org.uk/pdf/banking-standards-annual-review-2016-2017.pdf> last accessed 12.05.2018.

the UK after the FCA decided to shelve a review into banking culture.[95] Therefore, the question of who holds the key to a firm culture is somehow contentious. Overall, cross-selling may have a collocation within the broad international debate on curbing misconduct risk among banks and other financial institutions. Where the reduction of this risk depends on a change in the firms' culture and organization, it is not hard to theorize some benefits to the practices through which financial institutions realize their business objectives. However, the perimeter around the concepts this debate intends to address is still to be properly set.

7 CONCLUSION

Cross-selling practices may be the instrument through which bank sales operations may degenerate into mis-selling. This article explores the use of cross-selling by banks and underlines the need to discuss appropriate regulatory interventions in the aftermath of recent cases of abuse. These approaches should go beyond the traditional anti-trust law perspective through which cross-selling has been so far addressed. In other words, it is necessary to scrutinize the nexus between cross-selling and mis-selling in the financial services industry, and thus discuss how to make the former more beneficial to customers.

Based on the ESAs' efforts, this article argues that the ubiquitous nature of cross-selling prevents, at the moment, the creation of a harmonized set of rules for a sustainable use of such practices. Furthermore, the US and EU comparative analysis shows a different understanding of bank cross-selling. Given this regulatory impasse, discussing cross-selling in the context of the current international debate on misconduct risk in the financial services industry is sensible. This is supposed to be mitigated by way of intervention on the conduct, culture and governance framework of financial institutions. Under this perspective, cross-selling is an internal bank issue, that is, to be

[95] See Financial Times, 'Culture is a Matter for Banks not UK Regulators' (2016) <https://www.ft.com/content/26150484-b928-11e5-bf7e-8a339b6f2164> last accessed 12.05.2018.

mainly addressed from the inside. Nonetheless, the values and actors surrounding the concept of misconduct risk and its fundamentals are still to be fully shaped.

Consequently, the issue of how to address cross-selling in the aftermath of the PPI and WF cases is in a state of limbo between measures or guidelines against misconduct risk and hard-law approaches. Whereas the former faces a number of uncertainties, shifting to the latter raises the question of identifying the optimal framework. Nonetheless, given the risks associated with cross-selling, there is more than one reason to keep a significant level of attention on how banks and other financial institutions exploit these practices.[96]

[96] See ESAs (n 6).