TIE-IN SALES:
Consumer Issues

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The masculine is used generically in this report.

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UNION DES CONSOMMATEURS, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, regarding the issue of economic globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of *Consumers International* (CI), a United Nations recognized organization.

INTRODUCTION

Here is a scene that occurs many times each day in stores across Canada: a consumer goes to a department store to purchase a new computer. He has taken the time to compare on the Internet the prices offered by several merchants before going to the store offering the best price for the device that best meets his needs. As he is discussing with the salesperson, the latter informs him that the computer is already equipped with an operating system, computer peripherals and a lot of software, to make it easier for the consumer, who can use his new computer as soon as he turns it on at home. A consumer who already has the software in question or who does not plan to use it all then asks the salesperson if he can obtain a "bare-metal" computer to be able to install the software and operating system of his choice and add only the software he needs. The salesperson answers that no, computers are sold as they are, and the price of the software and operating system is included in the selling price.

What can the consumer do? Can he insist that the merchant sell him a "bare-metal" computer? Can he shop at another merchant to obtain a computer without an operating system or software? Is the consumer forced to purchase those products he has not requested and does not need? Will he be refunded for such software after he purchases the computer?

This practice of tying the purchase of a good or service desired by a consumer to the purchase of another good or service is known as tied selling. It may occur either at the moment of purchase, when a merchant makes the acquisition of the good or service conditional on the acquisition of another good or service, or after the contract is entered into, for example by forcing the consumer to acquire goods or services chosen exclusively by the merchant.

This practice is more and more widespread, and in various consumer sectors. A merchant may thus link a digital camera and a memory card, Internet service and a modem, cable TV and a decoder, a printer and ink cartridges, etc. This commercial practice appears to have spread rapidly with the tremendous rise in the sale of computer products. While tied selling is particularly widespread among computer products, it is not limited to this consumer sector. Provincial legislatures (except in Quebec) have been busy since early 2008 adopting legislation to regulate this practice in the sector of payday loans, where tied selling is deemed harmful to borrowers.[1]

There is much criticism of this practice: consumers are forced to purchase products they never requested, the price of what they want is distorted by the addition of unsolicited add-ons, competition is greatly affected by the near-monopoly of some of those add-ons, etc. As for the companies, they claim that such a practice is in the best interest of consumers and does not affect competition at all. These divergent viewpoints raise several questions: Do tie-in sales provide real advantages and disadvantages to consumers and companies? Does a consumer give his free and informed consent to the purchase of a second product or service imposed by the merchant? Are offers made to consumers clear and transparent? Can tied selling lead to abuses? What legislative safeguards protect consumers against abuses that tied selling may entail? Does a consumer who believes himself wronged by such a practice have any remedies? If so, are the latter accessible to consumers and do they offer quick and effective redress?

[1] As an example of new legislation with respect to tied selling related to payday loans, see sec. 154.2 of the *Consumer Protection Act*, C.C.S.M. v. C200, adopted in 2009 in Manitoba, or sec. 19 of the *Payday Loans Regulation*, B.C. Reg. 57/2009, adopted in July 2009 but not presently in effect.

The present study intends to determine the advantages and disadvantages of tie-in sales for consumers and to clearly determine the rights and remedies of consumers confronted with this practice. Our research, which will examine tied selling both while a consumer contract is being concluded and after that initial contract, will also lead us to analyse the legality of tied selling and its effects on consumer rights and the market.

The lack of specific consumer protection regulations regarding this practice in Canada, and the nebulous definitions found in certain Canadian laws, create a lot of uncertainty as to the circumstances when a tie-in sale in a consumer contract will be deemed illegal, but also as to how Canadian courts might interpret the practice during a lawsuit against a consumer contract. A clear legal framework for tie-in sales that carefully defines this practice and clearly specifies the circumstances under which it is illegal would appear of significant benefit to consumers.

A comparative analysis of legislation regarding tied selling in foreign jurisdictions will enable us to evaluate such legislation and measure how the level of protection offered to Canadian consumers compares.

Our research findings will enable us to formulate recommendations on the best ways to protect consumers and improve the effectiveness of legislation and remedies in Canada.

Although part of our study will present a summary analysis of *Competition Act* provisions and of the effects of tie-in sales on the market, our research will focus mainly on consumer protection rather than on competition. Moreover, we have chosen to focus our research on consumer products for the general public; thus, although securities and trust and loan corporations are regulated with regard to tie-in sales, these sectors of activity will not be addressed in our study, given that they concern a restricted public. In addition, this study does not present an economic analysis of tied selling.

1. TIE-IN SALES: GENERAL PRINCIPLES

1.1 DEFINITION AND CHARACTERISTICS OF TIE-IN SALES

The Organisation for Economic Co-operation and Development (OECD) defines tied selling as "situations where the sale of one good is conditioned on the purchase of another good."[2] This simple definition hides an economic transaction that has complex effects on the market and on consumer rights. How a consumer detect that a practice constitutes tied selling? Are tie-in sales allowed under certain circumstances? Which is the "tying" product and which is the "tied" product? What is the distinction between a tie-in sale and a combination sale? What are the pros and cons of tied selling? What remedies are available to consumers? In the present chapter, we will try to demystify tied selling by identifying the various components of a tie-in sale and its legislative framework.

Tied selling is not defined in consumer protection laws, but rather in the regulation of certain economic aspects, such as financing and competition. However, such regulation and the doctrine refer to similar elements. Tied selling implies the presence of a supplier and a customer. Second, there must be a "tying" product and a "tied" product. The former is desired by the consumer, and the latter is imposed by the merchant on the consumer so that the latter may acquire the "tying" product. The consumer may be compelled to acquire the "tied" product with or without his knowledge: acquiring the tying product remains conditional on acquiring the tied product.

As we will see, tied selling is most often handled through competition law. Fortunately, some authors focus on tied selling from the consumer's point of view. The reference author on consumer law in Quebec, Nicole L'Heureux, defines tie-in sales – which she also calls "conditional sales" ("vente subordonnée") – as a "selling method whereby a consumer is forced by clever means to purchase an unwanted good by a merchant aiming to promote its sale."[3] L'Heureux distinguishes between conditional sales and combination sales, which "consist of attracting consumers by offering two or more goods as a set."[4]

Although tied selling is criticized for having negative effects and unduly harming consumers, the practice is not explicitly prohibited by consumer protection laws in Canada. Other jurisdictions, estimating that such a practice is reprehensible, particularly in leading consumers to falsely believe they are obtaining an economic advantage, have regulated conditional selling strictly.

L'Heureux's distinction between tie-in sales and combination sales is of course highly relevant. Accordingly, we will distinguish between combination sales, commonly referred to as "bundling", and tie-in sales. Bundling consists of offering a discount if the consumer acquires from the same merchant or supplier a set of goods or services he could also obtain separately from the same

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[2] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Glossary of Statistical Terms*, p. 83. Available online on the OECD website. [Online:] http://www.oecd.org/dataoecd/8/61/2376087.pdf (document consulted on September 15, 2009).

[3] Tied selling is also covered in the *Competition Act*, RSC 1985, v. C-34, which provides a complete definition we will discuss below.
L'HEUREUX, N. *Droit de la consommation*, Éditions Yvon Blais, 5th edition, Cowansville, Quebec, 2000, p. 377. Our translation.

[4] *Op. cit.* note 3, p. 378.

merchant or supplier. The distinction is obviously based on the optional nature of bundling; while savings entailed by acquiring two goods or services are conditional on such bundling, the acquisition itself of a given good or service is not conditional on acquiring another one, as opposed to what occurs in tied selling. But we will examine bundling more closely below, given that this practice has been treated at times by Canadian and foreign legislators at the same time as tied selling.

As mentioned above, we find few definitions of tie-in sales in the various laws across Canada. The few available definitions will be analysed in the next chapter, which studies the legislative framework of tie-in sales in Canada.

While there are definitions of tie-in sales, this practice is still not easily identifiable by the consumer, who is not necessarily able, should he identify it, to assess its consequences. Are Canadian consumers actually protected against this practice and its negative effects? As we will see, this practice, although not prohibited, may be addressed in competition law. Other jurisdictions have prohibited it through consumer law. Why is tied selling allowed or tolerated in Canada?

All these issues raised by the practice of tied selling in the field of consumer affairs lead us to analyse the legal framework in place, so as to gain a better understanding both of the problems likely caused to consumers by this practice, and of measures taken by governments to remedy those problems.

2. CANADIAN LEGISLATION ON TIE-IN SALES

Tied selling is very rarely and sporadically regulated in Canada. Although it is regulated in certain sectors of activity (notably in matters of competition, in banking services, and in insurance, trust and loan corporations and payday loans), consumer protection laws of general intent usually ignore tie-in sales. In the present chapter, we will analyse Canadian legislation more closely by identifying provisions regulating tie-in sales and by examining provincial consumer protection laws in a search for provisions regulating tie-in selling in consumer contracts. We have consulted consumer protection laws in British Columbia, Quebec and Ontario. We will also mention a few relevant provisions in the laws of other Canadian provinces.

2.1 FEDERAL LEGISLATION

2.1.1 Competition Act

In Canada, the most precise and explicit definition of tied selling is found in section 77(1) of the Competition Act. The latter, in effect since 1986, aims to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets […]."[5] It also aims to "ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."[6] Historically, competition regulations in Canada have rather taken an approach focusing on criminal penalties.[7] Although the reform of 1986 maintains criminal sanctions, it also allowed for more-flexible measures to be added through provisions permitting civil remedies. This is notably the case for section 36 of the Competition Act, which provides the possibility for any competent court to award damages to anyone who has suffered damage as a result of "conduct that is contrary to any provision of Part VI » or of "the failure of any person to comply with an order of the Tribunal or another court under this Act"[8], and for section 103.1 of the *Competition Act*, which allows a private party to initiate proceedings before the Competition Tribunal against certain practices, such as tied selling.

Under sections 91 and 92 of the *Constitutional Act, 1867*, civil law is of exclusive provincial jurisdiction, so the federal government's adoption of provisions creating civil remedies has raised issues as to their validity. The Supreme Court considered such issues in the *General Motors of Canada Ltd. v. City National Leasing*[9] case, and ruled that Parliament could, under its jurisdiction in trade and commerce "generally,"[10] create a civil right of action in a regulatory framework of national scale. The Court also ruled that this is indeed an encroachment of an

[5] *Competition Act, RSC*, 1985, v. C-34, sec. 1.1.
[6] Ibid.
[7] GOLDMAN, C. and al. "*A Canadian Perspective on Tied Selling and Exclusive Dealing*," in the context of the 12th EUI Competition Law and Policy Workshop, Toronto, Canada, p. 2. [Online], http://www.blakes.com/pdf/njo/20081021134656_001.pdf (page consulted on March 4, 2010).
[8] Sec. 36, par. 1, *Competition Act, RSC*, 1985, v. C-34.
[9] *General Motors of Canada Ltd v. City National Leasing*, [1989] 1 S.C.R. 641 [*City National Leasing* decision].
[10] *The Constitutional Act, 1867* (U.K.), 30 & 31 Vict., v. 3, sec. 91(2).

exclusive provincial power provided by section 92(13) of the *Constitutional Act, 1867*, i.e. property and civil law in the province. However, this encroachment has a sufficient link with a valid legislative system for its constitutionality to be recognized.

Civil provisions pertain to "matters that are better dealt with outside the criminal law [and] which may have an ambiguous competitive impact."[11] These provisions concern mergers, abuse of a position of dominance, or tie-in sales, and are the object of civil measures, as opposed to criminal provisions, which pertain to cases that "are unambiguous in the harm they do to a well functioning marketplace,"[12] whereas the *Competition Act,* in Part VIII, titled "Deceptive Marketing Practices," identifies three types of practice as tied selling, which it defines as follows:

> *77. « ventes liées » "*tied selling*"*
>
> *a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to:*
> *acquire any other product from the supplier or the supplier's nominee, or*
> *refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee;*
>
> *b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.*[13]
>
> *(our emphasis)*

The same section defines the elements that must be analysed to prohibit a tie-in sale or attempt to eliminate its effects:

> *77. […]*
>
> *Exclusive dealing or tied selling*
>
> *(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to:*
>
> *a) impede entry into or expansion of a firm in a market,*
>
> *b) impede introduction of a product into or expansion of sales of a product in a market, or*
>
> *c) have any other exclusionary effect in a market,*

[11] ADDY, G. "The Canadian Competition Act as a model of flexible, forward-looking competition law," on the website of Competition Bureau Canada. Speaking notes for the Director of Investigation and Research, October 5, 1993. [Online], http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01062.html (page consulted on March 3, 2010).
[12] Ibid.
[13] *Competition Act, RSC*, 1985, v. C-34, sec. 77(1).

> *with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.*

Under the *Competition Act*, the Tribunal, to issue an order regarding tied selling, must first confirm the presence of the following four elements: (1) the existence of two separate products; (2) the existence of a practice that consists of linking two products; (3) the use of this practice by a major supplier or throughout the marketplace, and (4) proof of significant anticompetitive effects, i.e., a substantial, real or likely reduction of competition. In reading section 77, we thus note that tied selling itself is not illegal under all circumstances. Rather, the effect of tied selling, i.e., for example, a reduction of competition, constitutes a violation of section 77 and justifies the Tribunal's intervention.

Although the elements that the Tribunal will have to take into account may appear evident according to the Act, they have been the object of abundant caselaw clarifying their interpretation and application.

a) The Existence of Two Separate Products

It goes without saying that, where tied selling is concerned, two separate products are needed. According to caselaw, only by examining the market demand for those products can we determine if, under the Act, two distinct products are involved. The key decision on this matter is that of the Competition Tribunal in the *Canada v. Tele-Direct (Publications) Inc.* case,[14] one of the rare case of tied selling on which the Competition Tribunal has ruled. In that case, the Director of Investigation and Research stated that the defendants, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., made the customer's purchase of marketing and advertising services conditional on the availability of advertising space in telephone directories. In that decision, the Tribunal adopted the principle that the analysis requires two steps. To conclude to the existence of tied selling, it must first be established that there was sufficient demand for the two products separately. The second step is to know that separating the products would result in supplying them effectively.[15]

b) The Existence of a Practice Where Two Products are Tied

The second criterion concerns the existence of a practice whereby two products are tied. It will not be necessary that the link between the products implies the impossibility of acquiring the products separately elsewhere. To meet this second criterion, it will suffice that coercion forced the purchase of the tied products. The question raised when the facts are assessed in the light of this criterion is what constitutes a practice. In the *Nutrasweet* case, the defendant Nutrasweet Co., which produces aspartame, required that the customer requesting the authorization to use the trademark and logo NutraSuc, properties of Nutrasweet, also purchase aspartame. The defendant also required the customer to use only Nutrasweet aspartame with its NutraSuc trademark. The Tribunal concluded that a practice must be more than one or a few isolated

[14] *Canada v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Competition Tribunal) [*Tele-Direct* decision].
[15] *Op. cit.* note 7, p. 9.

acts.[16] According to author Brian Facey, "different anticompetitive acts or one anticompetitive act that is sustained or has a long-term impact on competition might constitute a practice [...]."[17]

c) Use of the Practice by a Major Supplier

The *Competition Act* does not define what a "major supplier" is. Once again, we must turn to Competition Tribunal caselaw to see how this term has been defined. To determine whether the practice of tied selling is executed by a major supplier, we can search for several indicators, such as: the supplier's market share, financial capacity and innovative knowledge, without forgetting that the actions of the supplier in question must have a significant impact on the marketplace.[18]

In the pivotal case on recognizing a company as a major supplier,[19] the Competition Tribunal found that Bombardier was indeed a major supplier, for the following reasons: as a supplier of snowmobiles, Bombardier held 30% of the market and was a leader in innovation. As a distributor, Bombardier held 40 to 60% of the provincial market, and as a retailer, the company had a solid network of vendors available to it. But although the Tribunal found that Bombardier was a major supplier, it did not think that its actions had the effect of impeding its competitors' expansion in the market, whether as a manufacturer, distributor or retailer.[20] However, as the Tribunal stated in the *Nutrasweet* case, although a merchant did not hold a substantial market share, it may still be considered a "major supplier" if the actions for which it is reproached had the effect of reducing competition on the market or affected all consumers.[21]

d) Anticompetitive Effects Leading to a Substantial Reduction of Competition and to the Exclusion of Market Competitors

Subsection 2 of section 77 of the *Competition Act* also requires proof that the practice reproached has or will likely have the effect of *significantly reducing* competition by hindering a firm's entry or development in the market, or a product's market launch, or a product's sales increase in the market.[22]

In the case of tied selling, the anticompetitive effects reside in the market share size aimed at by the reproached practice; they are subjected to a two-step test. This is the same test applied to abuses of dominant position, under section 79 of the Act. The Competition Tribunal performed this analysis in the *Tele-Direct* case. As mentioned above, the practice reproached in that case was that Tele-Direct (Publications) and Tele-Direct (Services) Inc. made the purchase of marketing and publication services conditional on purchasing publication spaces in telephone

[16] *Canada (Director of Investigation and Research v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Competition Tribunal) [*NutraSweet* decision].
[17] FACEY B. and ASSAF D. *Competition and Antitrust Law: Canada and the United States*, LexisNexis Buttersworth, 3rd edition, 2006, p. 350.
[18] *Director of Investigation and Research v. Bombardier Ltd.* (1980), 53, C.P.R. (2d) 55.
[19] This case concerned exclusive selling and not tied selling; but these two practices are covered by the criteria set forth in section of the Competition Act.
[20] CAMPBELL N. and al. *Non-price Vertical Restraints*, Insight, May 11, 1993, p. 8 and 9. [Online], http://www.mcmillan.ca/Upload/Publication/Vertical%20Non%20Price%20Restraints_Rowley_Campbell_0593.pdf (page consulted on March 26, 2010).
[21] *NutraSweet* decision.
[22] *Competition Act, RSC*, 1985, v. C-34, sec. 77(2)

directories. First the Tribunal had to define the market share available for the sale of the tied product. Second, the Tribunal had to assess the monetary value of market revenues affected by tied selling.[23] In the *Tele-Direct* case, the Tribunal found that the reproached practice led to a substantial reduction of competition, since "*the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market [and] in relative and absolute dollar terms, the amount of revenue affected by the tie is undoubtedly sufficient to conclude that there is a substantial lessening of competition*."[24] The Competition Tribunal established a direct link between the company's market share and the anticompetitive effects on the market.

e) Exceptions

Section 77, subsection 4 of the *Competition Act* nevertheless lists certain circumstances where tied selling cannot be the object of a court order. Those exceptions are:

1. Technological connectivity: tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies.[25]
2. Tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose.[26]
3. Affiliated entity: no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among entities that are affiliated.[27] One company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person.[28] If two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other.[29] A partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person.[30] When there is agreement between companies, partnerships or sole proprietorships whereby one party grants to the other party the right to use a trademark or trade-name to identify the business of the grantee, an affiliation is assumed.

Regarding the exemption applicable to affiliated entities, section 77 lists specifically, as can be observed, several situations where affiliation is assumed. It should also be noted that this exemption applies mainly to.[31]

As for the technological exemption, it was the object of a Competition Tribunal decision in 1981 that established its parameters. In the *Director of Investigation and Research v. BBM Bureau of Measurement* case, the Director of Investigation and Research applied for an court order to the

[23] In this case, the Tribunal referred to expert advice on this point.
Op. cit. note 17, p. 350.
[24] *Tele-Direct* decision, p. 251.
[25] *Competition Act, RSC*, 1985, v. C-34, sec. 77(4)b).
[26] *Competition Act, RSC*, 1985, v. C-34, sec. 77(4)c).
[27] Sec. 77(4)c), subsection 2, *Competition Act, RSC*, 1985, v. C-34.
[28] Sec. 77(5)a), *Competition Act, RSC* 1985, v. C-34.
[29] Sec. 77(5)b), *Competition Act, RSC* 1985, v. C-34.
[30] Sec. 77(5)c), *Competition Act, RSC* 1985, v. C-34.
[31] *Op. cit.* note 17, p. 357.

Restrictive Trade Practices Commission[32] to prohibit the *BBM Measurement Bureau* from practicing what he considers to be the tied selling of two products, i.e., the television ratings service and the radio ratings service. BBM pleaded the technological exemption: both services have common administrative and operating expenses, so linking the two products increased production cost efficiency. The Commission rejected BBM's argument by stating that the technological exemption did not apply when production cost efficiency is at issue, but rather when there is a reasonable need to sell two products together for technological reasons.[33]

2.1.2 Bank Act

A reform of the Canadian financial sector was undertaken during the nineties. According to studies and consultations, the priorities of consumers were the solvency of the financial sector, its transparency, remedial measures available to consumers, and the confidentiality of personal information.[34] The Task Force on the Future of the Canadian Financial Services Sector, created in 1996, was mandated to "examine public policies that apply to the financial services sector."[35] The Task Force's report, commonly called the "Mackay Report," which issued 124 recommendations, notably foresaw that the existence of choice, without effective or perceived coercion,[36] would be important to consumers. Among the amendments enacted in 1998 following those recommendations, we find in the Bank Act the new section 459.1, which expressly forbids tied selling. Section 459.1, which provides broader application than the previous tied selling provision – which only applied to loans –, now states:

> "*Restriction on tied selling*
>
> ***459.1*** *(1) A bank shall not impose undue pressure on, or coerce a person to obtain a product or service from a particular person, including the bank and any of its affiliates, as a condition for obtaining another product or service from the bank.*

Favourable bank product or service tied to other sale

> *(2) For greater certainty, a bank may offer a product or service to a person on more favourable terms or conditions than the bank would otherwise offer, where the more favourable terms and conditions are offered on the condition that the person obtain another product or service from any particular person.*

Favourable other sale tied to bank product or service

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[32] The Restrictive Trade Practices Commission is the predecessor of the Competition Tribunal.
[33] *Director of Investigation and Research v. BBM Measurement Bureau*, (1981), 60 C.P.R. (2d) 26 (R.T.P.C.) [*BBM* decision].
[34] KERTON, R. *Consumers in the Financial Services Sector*, *Vol. 3: Principles, Practice and Policy – the Canadian Experience*, research papers prepared for the Task Force on the Future of the Canadian Financial Services Sector, September 1998, p. 9. [Online] http://publications.gc.ca/collections/Collection/F21-6-1998-8-1E.pdf (page consulted on March 31, 2010).
[35] CARRON, C. and BEAUPRÉ G. "Les consommateurs- mieux protégés que jamais," in *Développements récents en droit bancaire,* Barreau du Québec, 2003, Les Éditions Yvon Blais, Cowansville, Canada, p. 154.
[36] Task Force on the Future of the Canadian Financial Services Sector, *Change, Challenge, Opportunity: Report of the Task Force*, September 1998, chapter 7.

(3) For greater certainty, an affiliate of a bank may offer a product or service to a person on more favourable terms or conditions than the affiliate would otherwise offer, where the more favourable terms and conditions are offered on the condition that the person obtain another product or service from the bank.

Bank approval

(4) A bank may require that a product or service obtained by a borrower from a particular person as security for a loan from the bank meet with the bank's approval. That approval shall not be unreasonably withheld.

Disclosure

(4.1) A bank shall disclose the prohibition on coercive tied selling set out in subsection (1) in a statement in plain language that is clear and concise, displayed and available to customers and the public at all of its branches where products or services are offered in Canada, on all of its websites through which products or services are offered in Canada and at all prescribed points of service in Canada.

Regulations

(4.2) The Governor in Council may make regulations for the purposes of subsection (4.1) defining "point of service" *and prescribing points of service.*

Regulations

(5) The Governor in Council may make regulations specifying types of conduct or transactions that shall be considered undue pressure or coercion."[37]

What motivated this amendment is "the special nature of the relationship between financial institutions and their customers."[38] In the nineties, consumers expressed their disarray regarding banks' requirement that they transfer, to the bank from which they desired credit, some of their assets, such as RRSPs or investments held in other institutions.[39] The amendment to section 459.1 thus aimed to end such practices.

However, this same section provides that the bank or an entity of the same group may offer a consumer a product or service with more-favourable terms if the consumer acquires another product or service from the bank.[40] According to authors Carron and Beaupré, by means of this new measure on tied selling, "the legislation thus establishes a balance between consumers'

[37] Article 459.1, *Bank Act*, S.C. 1991, v. 46. It should also be noted that subsection 5 of section allows the Governor in Council to specify by regulation what behaviours constitute undue pressure or not. Since this provision was adopted, no regulation has been adopted under it.
[38] CANADA, Department of Finance, *1997 Review of Financial Sector Legislation: Proposals for Change* (June 1996) p. 19. [Online] http://dsp-psd.pwgsc.gc.ca/Collection/F2-158-1996F.pdf (page consulted on April 4, 2010).
[39] LEATHERDALE, L. "Taking on the Banks Over Tied Selling," in *The Toronto Sun*, March 6, 1998; WHITTINGTON, Les. "Banks Accused of Coercive Selling," in *The Toronto Star*, March 12, 1998; LEATHERDALE L. "Bank Customers Fit to be Tied," in *The Toronto Star*, March 22, 1998.
[40] Sec. 459.1, subsection 2(2) and (3), *Bank Act*.

right to be protected against the excessive solicitations of banks and the latter's right to adopt competitive sales strategies."[41]

Accordingly, the legislation – rightly so, we think – distinguishes between combination sales and tie-in sales; it is the coercion or undue pressure that justifies prohibiting tie-in sales. So it is understood that economic pressures, such as a discount offer if the consumer acquires several services from the same financial institution, are not considered undue. However, as we will see below, foreign legislatures that have also drawn this distinction between tie-in sales and combination sales have specified conditions under which the latter would be acceptable, in order to prevent merchants from disguising tie-in sales as combination sales.

During the reform, some, such as the Liberal caucus committee on financial institutions, have also expressed the need to ensure that consumers have effective remedies available to them.[42] In 2001, the federal government established the Financial Consumer Agency of Canada (FCAC).[43] The mandate of this independent organization is to supervise financial institutions to ensure that they comply with consumer protection provisions; to induce them to adopt policies and procedures protecting consumers; to ensure that financial institutions adopt voluntary codes of conduct that protect the interests of customers and are accessible to the public; and to inform consumers about their rights and obligations.[44]

Substantial criminal penalties are provided for violations to section 459.1 of the *Bank Act*. Under section 985, any natural person who violates the Act faces a maximum fine $100,000 and up to 5 years in prison. An entity is subject to a fine of up to $500,000 on a summary conviction, or of $5,000,000 on a conviction by means of indictment. Moreover, the court has the power to order the perpetrator of the infraction to comply with the provisions of the Act. It may also impose an additional fine if the culprit, his or her spouse or any dependent has profited financially from the.[45] However, it appears that no lawsuit has ever been brought against a financial institution for an infraction to section 459.1.

Trust and loan corporations are also prohibited, in the field of insurance, from engaging in tied selling with undue pressure.[46]

[41] *Op. cit.* note 35, p. 164. Our translation.
[42] LIBERAL PARTY OF CANADA, *Report of the Caucus Task Force on Financial Institutions (1998)*, ch. 12, recommendations 71 to 75. [Online] http://www.telegdi.org/Task_Force/recommendations.htm (page consulted on July 31, 2009).
[43] *Financial Consumer Agency of Canada Act*, S.C. 2001, v. 9.
[44] Section 3, *Financial Consumer Agency of Canada Act*, S.C. 2001, v. 9.
[45] Section 985, par. 2 and 3, *Bank Act*, S.C. 1991, v. 46.
[46] *Trust and Loan Companies Act*, S.C. 1991, v. 45.

2.2 PROVINCIAL LAWS: QUEBEC, ONTARIO AND BRITISH COLUMBIA LEGISLATION

Although very sparingly, some provincial laws contain provisions to protect consumers against tied selling practices in certain sectors of activity. In this section, we will describe measures adopted in some Canadian provinces to regulate tied selling, either through provincial consumer protection laws or through laws specifically governing particular sectors of activity.

2.2.1 Provincial Consumer Provincial Laws and Tie-in Sales

Certain provisions of consumer protection laws, as well as provisions of certain laws governing particular sectors of activity, prohibit tied selling in some provinces. We will focus on such laws in Quebec, Ontario and British Columbia.

As we will see, there is a similarity in all the provisions of the provincial laws we will analyse: those provisions regulate tied selling only in cases where consumers are pressured to purchase a good or service and have no choice in the matter. This distinction is very important, because it explains why service bundles do not constitute tied selling and are thus not prohibited.

In the present section, we will omit insurance provisions contained in specific laws pertaining solely to insurance. Those provisions will be discussed in a subsequent section.

a) Quebec: the Consumer Protection Act and the Regulation of Specific Sectors

Quebec's *Consumer Protection Act* (CPA) does not contain any general provision prohibiting tie-in sales in all consumer contracts. However, collateral contracts entered into as part of a contract of lease involving sequential performance are regulated under section VI of Title I of the CPA. Section 206 states that "No merchant may make the entering into or the performance of the principal contract dependent upon the making of another contract between him and the consumer."[47] The merchant therefore cannot, to use Claude Masse's example in his analysis of the Act, impose on the consumer "the purchase of equipment that may be used in the performance of the main contract"[48] if the latter is a contract of lease involving sequential performance. If it proves necessary for the consumer to acquire equipment to benefit from sequential performance services that are the object of the contract, he must be entirely free to acquire such equipment from the merchant of his choice, under terms that may be more to his advantage. It should be noted that, as in the *Competition Act*, coercion and the absence of choice for the consumer are the criteria used to determine whether tied selling is present, i.e., the fact that the merchant compels the consumer to enter into a supporting contract with him in order to be able to enter into the main contract and benefit from the service. This provision thus does not bar the merchant from offering the consumer a discount for freely agreeing to conclude a supporting contract.

[47] Sec. 206, *Consumer Protection Act*, R.S.Q., v. P-40.1
[48] MASSE, C. *Loi sur la protection du consommateur : Analyse and commentaires, Cowansville*, Canada, les Éditions Yvon Blais, 1999, p. 816. Our translation.

This provision applies only to contracts of lease involving sequential performance; merchants therefore remain, to a certain extent, free to use tied selling in other types of contracts they are likely to offer consumers.

However, another CPA provision prohibits tied selling in another type of contract, i.e., credit agreements of a specific type – insurance. Section 111 states that "No merchant may refuse to enter into a contract of credit with a consumer on the pretext that the latter does not subscribe, through him, to an individual insurance policy or does not participate, through him, in a group insurance policy."[49] The lender may still require the borrower to be insured; but section 112 specifies that, if taking out insurance is a condition for concluding a credit agreement, the consumer may meet that condition by keeping insurance he already has.[50]

In the event that a Quebec consumer is the victim of tied selling prohibited under sections 111 and 206, he may avail himself of the civil remedies provided by the CPA, and demand the cancellation of the contract, a reduction of his obligation, damages and, if applicable, punitive damages.[51]

Because a person who contravenes the CPA may be convicted of a penal offence,[52] a complaint may also be filed with the Office de la protection du consommateur, which is responsible for applying the Act. Contravening the provisions of sections 111 and 126 prohibiting tie-in sales can cost a natural person a fine of $300 to $6,000, and a legal entity a fine of $1,000 to $40,000.[53]

Finally, the *Act respecting the distribution of financial products and services* governs insurance in Quebec. Section 18 stipulates that "No representative may make the making of a contract subject to the requirement that the client make an insurance contract."[54] This ban is therefore stricter than the CPA's, which does not bar this condition from being imposed on the contract, but rather prohibits the consumer from being obliged to take out insurance according to parameters imposed by the financial institution when the consumer already has insurance. Under the *Act respecting the distribution of financial products and services*, the representative is also barred from exercising undue pressure or using fraudulent tactics to induce a customer to acquire a financial product or service.[55] This provision, which applies to the main contract, would also apply of course to a supporting contract. It would thus have the effect, in practice, of banning tied selling in insurance, i.e., coercion binding a supporting contract to the main one.

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[49] Sec. 555, *Consumer Protection Act*, R.S.Q., v. P-40.1.

[50] It should be noted that not all Quebec consumers who enter into a credit agreement benefit from this safeguard. According to author Claude Masse, section 111 is a measure adopted to put an end to a practice observed mainly at the Desjardins Group, which "obliged debtors to subscribe, through the credit provider, to insurance coverage with an insurer designated by the creditor although their coverage may already have been largely sufficient to insure, for example, their life, health or property." *Op. cit.* note 48, p. 555. Our translation.
However, for reasons that seem unjustified to us, section 14 of the *Regulation respecting the application of the Consumer Protection Act* stipulates that "A financial services cooperative governed by the *Act respecting financial services cooperatives* (R.S.Q., c. C-67.3) is exempt from the application of sections 111 and 112 of the Act."[50], i.e., Caisses Desjardins.

[51] Sec. 272, *Consumer Protection Act*, R.S.Q., v. P-40.1

[52] Sec. 277, *Consumer Protection Act*, R.S.Q., v. P-40.1

[53] Sec. 279, *Consumer Protection Act*, R.S.Q., v. P-40.1.

[54] Section 1 of the Act defines the "representative" as an insurance representative, a claims adjuster or a financial planner.

[55] Sec. 18(2), *Act respecting the distribution of financial products and services*, R.S.Q., v. D-9.2.

A consumer victimized by the practice prohibited under section 18 of the *Act respecting the distribution of financial products and services* benefits from a power of termination for 10 days after signing the contract on which obtaining the main contract was conditional.[56]

b) Ontario: Regulation of Specific Sectors

As is the case in Quebec, Ontario's consumer protection law prohibits a lender from compelling a borrower, as a condition for concluding a credit agreement, to take out an insurance policy with the lender itself or an agent imposed by the lender. Section 72 of the *consumer Protection Act, 2002* provides the following:

> "***72.*** *(1) A borrower who is required under a credit agreement to purchase insurance may purchase it from any insurer who may lawfully provide that type of insurance, except that the lender may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower.*
>
> ***Disclosure by lender***
> *(2) A lender who offers to provide or to arrange insurance required under a credit agreement shall at the same time disclose to the borrower in writing that the borrower may purchase the insurance through an agent or an insurer of the borrower's choice*."

Although the practice is not prohibited as clearly by the Ontario provision as by the corresponding Quebec provision, the former has similar effects in establishing the borrower's right to choose his insurer and in obliging the lender, in subsection 2, to disclose to the borrower that he has this right. Ontario consumers also benefit from the right to terminate, within 30 days after the contract is signed, any optional contract concluded with the lender or an associated person.[57]

Section 38.1 of the *Funeral, Burial and Cremation Services Act, 2002* clearly prohibits (except under certain circumstances) tied selling: "No operator shall require, as a condition to selling certain licensed supplies and services to a purchaser, whether or not the condition is set out in a contract, that the purchaser also purchase other supplies and services from the same operator or from a person specified by the operator, unless the operator does so in the circumstances that are prescribed."[58] However, this Act is not yet in effect. As for the "circumstances that are prescribed," the 2004 regulations would have waived the prohibition against an operator imposing the acquisition of goods and services from him or a designated supplier if, for example, the consumer entered into a contract to lease a vehicle requiring a chauffeur; the merchant could then designate a chauffeur service and impose it on the consumer. Moreover, a consumer concluding a contract to use the operator's facilities could have been compelled by the merchant to use the services provided by the latter's personnel.[59]

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[56] Sec. 20, *Act respecting the distribution of financial products and services*, R.S.Q., v. D-9.2.
[57] Sec. 73, *Consumer Protection Act,* S.O. 2002, c.30, Sched. A.
[58] Sec. 38.1, *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, v. 33.
[59] MINISTRY OF CONSUMER AND BUSINESS SERVICES, *Draft Regulation under the Funeral, Burial and Cremation Services Act, 2002,* Ontario, Canada, Queen's Printer for Ontario, 2004, p. 13. [Online] http://www.mgs.gov.on.ca/stdprodconsume/groups/content/@mgs/@aboutmin/documents/resourcelist/053007.pdf (page consulted on April 10, 2010).

c) British Columbia and Consumer Protection

Like Quebec and Ontario, British Columbia has adopted, in the *Business Practices and Consumer Protection Act*, a provision regarding insurance tie-in sales as part of credit contracts. Section 71 of this Act provides the following, in terms very similar to those in the Ontario Act:

> "*71 (1) A borrower who is required by a credit grantor to purchase insurance may purchase it from any insurer authorized to provide that type of insurance in British Columbia, except that the credit grantor may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower.*
>
> *(2) A credit grantor who offers to provide or to arrange insurance referred to in subsection (1) must clearly disclose to the borrower in writing, at the time of that offer, that the borrower may, subject to subsection (1), purchase the required insurance through an insurance agent and insurer of the borrower's choice.*"[60]

As does the Ontario Act, the *Business Practices and Consumer Protection Act*, in section 73, also grants consumers the right, within 30 days of the conclusion of a collateral contract provided by the creditor or an associated person, to cancel that contract at no charge other than for services rendered until the cancellation date.

The three provinces studied thus explicitly grant borrowers the right to choose the insurers with whom they decide to take out insurance required by the lender. Again, this does not prevent the lender from making the consumer an attractive insurance offer. And it does not negate the convenience of obtaining from the lender insurance that must be acquired in any case, from the lender or elsewhere; by obtaining insurance from the lender, the borrower thus saves extra steps and time in concluding the loan agreement. So the Ontario and British Columbia provisions giving consumers the right to cancel that tempting collateral contract are welcome.

It is curious that Quebec law does not explicitly require the lender to advise the consumer of his right to obtain from the insurer of his choice the insurance that may be mandatory under the loan agreement. Indeed, in Quebec the mandatory disclosure only pertains to the consumer's right to meet this condition with insurance he already has. The Ontario and British Columbia laws are more complete, in requiring the lender to inform the consumer of his right to choose his insurer from the moment the lender offers such insurance.

There is another sector of activity that Canadian common law provinces have found necessary to regulate particularly: payday loans.

[60] Section 71, *Business Practices and Consumer Protection Act*, S.B.C. 2004, v. 2.

2.2.2 Other Legislation

a) "Payday Loans Regulations" and Tie-in Sales

In the 2000s, Canada's anglophone provinces decided to regulate the payday loans market, which was growing in popularity. The negative effects of this type of credit on consumers are substantial, so the majority of provinces adopted legislation to better regulate the practices of payday lenders.[61] Among measures to better protect consumers entering into a payday loan, we find provisions prohibiting a lender from making the loan conditional on the borrower's acquisition of other goods and services from the lender. Indeed, consumers wanting payday loans had often been forced to purchase other goods and services from lenders, such as insurance contracts of cheque cashing services.

Most Canadian provinces thus regulate tied selling related to payday loans. In 2009, British Columbia and Ontario adopted provisions specifically regulating tied selling in such contracts. First, section 112.08(1)i) of British Columbia's *Business Practice and Consumer Protection Act* bans the lender from requesting or requiring that the borrower insure the loan.[62] The payday loans regulation more specifically addresses tie-in sales. Section 19 now prohibits lenders from making a payday loan conditional on acquiring other goods and services.[63]

Similarly, Ontario specifically regulates payday loan agreements by means of the *General Regulation on Payday Loans. Ontario Regulation 98/09* stipulates that "A lender shall not require a borrower to transact in any good or service, other than a payday loan, as a condition of entering into a payday loan agreement,"[64] thus preventing the borrower from being forced to purchase other goods and services in order to obtain the loan.

In Quebec, the general provisions regarding credit (CPA, sections 66 to 114) regulate payday loan agreements, which are cash loan agreements. Sections 115 to 117, applicable to cash loan agreements, also apply to payday loan agreements. Accordingly, section 111, which applies to all credit agreements related to tied selling of insurance, also applies to payday loans concluded in Quebec.

Quebec's Act is thus much more restrictive than those of other provinces. Insurance tie-in sales were already also covered by the laws of Ontario and British Columbia. But those provinces have deemed it beneficial, in matters of payday loans, to ban any form of tied selling. The absence of specific legislation in Quebec may be explained by the different context in Quebec. Payday lenders are much less prevalent in Quebec than in the rest of Canada. The criteria for

[61] Canadian Payday Loan Association, *Press Releases for 2009*, [Online] http://www.cpla-acps.ca/english/mediareleases.php, (page consulted on April 12, 2010).
See: Alberta: *Payday Loans Regulations*, Alberta Reg. 157/2009, section 12; Manitoba: *Consumer Protection Act*, C.C.S.M. v. 200, section 154.2; Saskatchewan: *The Payday Loans Act*¸ S.S. 2007, section 29 (assented on May 17th 2007 and awaiting royal proclamation to come into effect); Nova Scotia: *Bill 87: An Act to Amend the Consumer Protection Act*, (enacted November 2006, not yet proclaimed); New Brunswick: *Bill 4: An Act Respecting Payday Loans*, section 37.33 (enacted April 2008, not yet proclaimed).
[62] Sec. 112.08(1)i), *Business Practices and Consumer Protection Act*, S.B.C. 2004, v. 2.
[63] Section 19, *Payday Loans Regulation*, B.C. Reg. 57/2009.
[64] Section 27(2), *Ontario Regulation 98/09.*

granting permits are much stricter in Quebec, so that type of business is quite rare there. For example, under section 325(b) of the *Consumer Protection Act*, the president may refuse to issue a permit if "there are reasonable grounds to believe that the permit must be refused to ensure, in the public interest, that the business activities contemplated in this chapter will be performed with honesty and competence."[65] It appears that the exorbitant interest rates charged by payday lenders justify the Office de la protection du consommateur in refusing to issue a permit. The absence of payday lenders on Quebec territory may justify legislators in not deeming it necessary to intervene more specifically in this type of business.

It is clear that tied selling in Canada is regulated very sparingly by the provinces. The sectors regulated and the measures adopted vary between provinces. In terms of consumer protection, a good number of consumer contracts thus escape regulation on tied selling. Before measuring the effectiveness of measures adopted in Canadian provinces, we will analyse the approaches adopted in foreign jurisdictions with regard to tie-in sales.

2.3 FOREIGN JURISDICTIONS: UNITED STATES AND EUROPE

2.3.1 American Regulations

As does Canada, the United States regulates tied selling by means of competition laws. Tie-in sales are addressed both by federal and state legislation. A good number of the American states' antitrust laws contain provisions regarding tied selling.[66] Given that the states' antitrust provisions reflect the federal *Sherman Antitrust Act*, the present section will focus on federal provisions.

Three main laws regulate competition in the United States: the *Sherman Antitrust Act*, 15 U.S.C. §§ 1-7; the *Federal Trade Commission Act,* 15 U.S.C. §§ 41-58; and the *Clayton Antitrust Act,* 15 U.S.C. §§ 12–27. Those laws codify common law and caselaw rules. According to its initiator, Republican Senator John Sherman, who wanted to restrict the power of certain quasi-monopolies constituted in trusts (Standard Oil, notably), the *Sherman Antitrust Act* was mainly intended to "federalize the common law of restraint of trade, with the innovation of mechanisms for third-party enforcement."[67] A founding law of modern competition law in the United States, the *Sherman Antitrust Act,* adopted in 1890, addresses tied selling in section 1 (*Trusts, etc., restraint of trade illegal; penalty*) and section 2 (*felony of trade monopolization*), while the *Clayton Antitrust Act*, adopted in 1914, does so in section 3:

[65] Sec. 325(b), *Consumer Protection Act*, R.S.Q., v. P-40.1.
[66] See California: *Cartwright Act*, Cal. Bus. & Prof. Code §§ 16720 and 16726; Arizona: *A.R.S*. § 44-1402; Florida: *Florida Antitrust Act of 1980*, § 542.18, Florida Statutes; Delaware: *6 Del*. C. § 2103; Indiana: *IC 24-1-2-1*. It should be noted that the federal decisions interpreting the federal *Sherman Act* are also applicable to the interpretation of the American states' antitrust laws: see *Mobile Magic*, 96 Cal. App. 3d at 10 (California); *Hackett v. Metropolitan General Hospital* (1985) 465 So. 2d 1246, 1254 (Florida); *Wedgewood Investment Corp. v. International Harvester Company* (1979) 126 Ariz. 157, 160 (Arizona).
[67] TREBILCOCK, Michael and al. *The Law and Economics of Canadian Competition Policy*, Toronto, Canada, University of Toronto Press, 2003, p. 6.

> "*Sale, etc., on agreement not to use goods of competitor*
> *It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.*" [68]

Although the *Federal Trade Commission Act*, according to the *Federal Trade Commission*, mainly pertains to the prohibition of unfair competition,[69] the Supreme Court has already declared that any violation of the *Sherman Antitrust Act* constitutes a violation of the *Federal Trade Commission Act*.[70] A practice involving tied selling may nevertheless be challenged under section 5 of the *Federal Trade Commission Act (Unfair methods of competition unlawful)*.

It should be noted that none of those provisions explicitly bans tied selling. However, under those sections, any practice that has the effect of restricting trade or monopolizing a market is reprehensible under each of those three federal laws. As with Canada's *Competition Act*, consumer protection is not the issue here, but competition. The authorities may thus intervene, as in Canada, if it is proved that such practices have an actual or foreseeable effect on the market.

The American courts have long deemed tied selling illegal by its very nature (*per se standard*)[71] and contrary to sections 1 and 2 of the *Sherman Antitrust Act* and to section 3 of the *Clayton Antitrust Act.* The *per se* rule adopted by the Americans[72] differs from the *rule of reason* favoured by Canadian courts. In 1984, the United States Supreme Court modified the *per se* rule in its *Jefferson Parish Hospital District vs. Hyde* ruling. That ruling, which introduced a modified *per se* analysis, would henceforth be the reference in matters of tied selling.

In that case, the hospital had a contract with a firm of anesthesiologists; patients using operating rooms were obliged to purchase anesthetic products chosen by the hospital, and the hospital did not allow anesthesiologists from outside the firm with which it had a contract to work among the staff of Jefferson Parish Hospital.

The United States Supreme Court declared that to reach the conclusion that a tie-in sale is illegal under the *per se* rule, the plaintiff has to prove the following: (1) the defender holds sufficient power on the market to force buyers to acquire the tied product; (2) tied products are

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[68] *Clayton Antitrust Act*, 15 U.S.C. § 14.
[69] *Federal Trade Commission Act*, 15 U.S.C. § 41-58.
[70] *Federal Trade Commission*, "An FTC Guide to The Antitrust Laws: Three Core Federal Antitrust Laws," [Online] http://www.ftc.gov/bc/antitrust/factsheets/FactSheet_AntiTrust.pdf, p.1 (page consulted on April 10, 2010).
[71] *Op. cit.*, note 17, p. 346.
[72] The first declaration of the *per se* rule dates to 1947: *International Salt Co. V. United States*, 332 U.S. 392, 3332 U.S. 396 (1947).

two separate products, sold in two different market; (3) the tie-in sale has had the effect of substantially reducing competition in the market by anticompetitive means.[73] Whereas tied selling used to be illegal by its very nature, henceforth the Court would require the complaining party to demonstrate that, given its effects on competition, the practice considered to be tied selling must be declared illegal (*rule of reason*).

To determine whether there is tied selling, it must first be proven that the merchant holds a certain power in the market. This power may prove sufficient for the consumer to be practically forced to purchase the tied product. In the *Jefferson Parish* ruling, the Court established that the analysis must pertain to the following issue: "whether the supplier has some special ability to force buyers to purchase the tied good, or stated another way, to do something that he could not do in a competitive market."[74] In that case, the Court ruled that the hospital does not hold sufficient power, since 70% of the region's patients had the services of other hospitals available to them. However, even in the absence of sufficient power in the market, under American caselaw a court may nevertheless consider this criterion to be met if the merchant holds substantial economic power, given that the tying product is highly desired by consumers or has unique attributes.[75]

The American test also requires a demonstration that the tie-in sale has had the effect of substantially restricting business in the tying product's market.[76] According to author Brian Facey, American caselaw is not clear on whether this analysis of substantial business reduction must pertain to the amount in dollars. However, the sales volume analysis must not be limited to the sales volume of the complaining party, but must include the sales volume of all purchasers.[77]

The second item of evidence required consists of a demonstration that there are indeed two distinct products. American caselaw favours an approach known as the "preferred two products test." For products to be considered distinct from one another, "the question is whether there is sufficient consumer demand so that it would be considered efficient for a business to offer them separately."[78] The most famous American case regarding the distinct nature of products in a case of tied selling is certainly the *Microsoft* case. That company is accused because of its practice of systematically bundling Internet Explorer with the Windows operating system. The ruling calls into question the possibility of using the analysis adopted in the *Jefferson Parish* ruling, in order to analyse more-sophisticated cases such as integrated products like software. Under those circumstances, it may be difficult, for technological reasons, to determine whether two products are separate or related.

The *Microsoft* case raised a question of monopolization under section 2 of the *Sherman Antitrust Act* as well as a question of tied selling under section 1 of that law. Although the Circuit Court refused to examine allegations of tied selling under section 1, it noted that there was overlapping between tied selling declared illegal by sections 1 and 2 of the *Sherman Antitrust Act*.[79] The test of section 1 of the Act aimed at demonstrating that the negative effects of tied

[73] *Jefferson Parish Hospital District v. Hyde*, 466 U.S. 2 on p.16 [*Jefferson Parish* ruling].
[74] *Op. cit.,* note 17, p. 352.
[75] *United States v. Lowe's Inc.* 371 U.S. 38 (S.Ct. 1962).
[76] *Jefferson Parish*, p. 16.
[77] KAISER, G., *Reviewable Marketing Practices: The New Jurisdiction of the Restrictive Trade Practices Commission.*
[78] *Op. cit.,* note 17, p. 347.
[79] *Op. cit.,* note 17, p. 349.

selling exceeded its benefits. Under section 2, the analysis pertained more to the effects[80] on competition in the market of Internet browsers than in the market of operating systems. According to the analysis under section 2, the Court of Appeal found that the tied selling practiced by Microsoft was indeed illegal.

Finally, the American test required in all cases evidence of anticompetitive effects on the market. To declare that a tie-in sale is illegal, it must be demonstrated not only that the supplier holds sufficient power on the market to affect the tied product's market,[81] but also that the supplier has exercised pressure or coercion to compel the acquisition of the tied product.[82]

American caselaw has developed the same exceptions as in Canada to the power to intervene in cases of tied selling, i.e., technological exceptions and the exception of affiliation. The technological exception was debated in *Microsoft* case. In recent years, the applicability of the *per se* rule to tie-in sales of technologies such as software has been debated in the United States. In the *Microsoft* case, the Circuit Court of the District of Columbia (New York) cautioned that the simplistic *per se* approach risked having major negative consequences and that it would be wiser to apply the *rule of reason*, which requires proof of certain elements. In the Court's view, it is therefore necessary to prove that tying the two products constituted a practice aiming to tie the sale of those two products and that its main purpose was not to improve technological outcomes to make them more beneficial.[83]

As in Canada, the affiliation exception in the United States applies mainly to franchises. The pivotal case in this matter is *Siegel v. Chicken Delight*. The franchisor imposed on franchisees the acquisition of cooking equipment and of a dry mix for cooking chicken if the franchisees wanted to obtain the right to use the trademark.[84] The Circuit Court ruled that "*Chicken Delight*" was a product distinct from the other products imposed by the franchisor. In addition, the fact that the franchise contract required the franchisee to purchase the goods and services of the franchisor or a supplier designated by the latter constituted an illegal tie-in sale, given that less-coercive means would have enabled the franchisor to protect his trademark. American courts have also developed a doctrine known as "*individual coercion*": using coercive sales methods to compel a tie-in sale is not what would make the practice illegal in a relation between franchisor and franchisee. If the franchisee freely consents, the tie-in sale is legal.

Other than antitrust provisions of general application, the Americans have enacted specific regulations for tied selling done by financial institutions. Introduced in 1970, section 106 of the *Bank Holding Act of 1956 (12 U.S.C. § 1841 and seq.)* is intended to protect American consumers against the anticompetitive practices of banks. In paragraph b) of section 106, the Act prohibits banks from compelling the consumer, as a condition or prerequisite for obtaining credit or selling or renting a home, to acquire additional credit or purchase or rent additional property from the bank or one of its affiliates. The Act also makes it illegal to offer, when granting those services, more-favourable conditions to consumers agreeing to conclude an additional contract. The Act provides that certain exceptions to this prohibition will allow tied selling practices. Some of those exceptions may be determined by the *Federal Reserve Board,* under section 160, subsection 2, which states that it may "by regulation or order permit such exceptions to the foregoing prohibition and the prohibitions of section 4(f)(9) and 4(h)(2) of the

[80] *United States v. Microsoft Corp.*, 253 F. 3d 34 (U.S. App. D.C. 2001), p. 59.
[81] *Op. cit.,* note 17, p. 351.
[82] *Jefferson Parish*, p. 14.
[83] *Op. cit.,* note 17, p. 356.
[84] *Siegel v. Chicken Delight Inc.*, 448F. 2d 43.

Bank Holding Company Act of 1956 as it considers will not be contrary to the purposes of this section." The Act also provides specific exceptions in section 225.7.

We find there a notable exception, called "*safe harbour for combined balance discount*,"[85] which allows banks to require a consumer to maintain a minimum balance in his accounts in order to benefit from certain advantages. Of course, certain other conditions must be present for the bank to be able to tie the sale of some of its products, in order to protect consumers against certain possible abuses.

As we can see, in North America, Canada and the United States have opted to regulate tied selling, whether by competition laws or by regulating very specific sectors of activity. What about consumer contracts that do not belong to the regulated sectors, or cases where tied selling, without affecting the market, would still affect consumers? European countries, particularly France, have chosen, as we will see, a different regulatory method, which protects consumers in all consumer contracts involving tied selling.

2.3.2 European Regulations

Cases of consumption involving tied selling in Europe are more often in the news than in North America[86]. Individuals and consumer associations are not intimidated when challenging multinational corporations in order to have a business practice declared illegal if it constitutes tied selling.[87] Are remedies easier and courts more accessible for handling such matters in Europe because of Europeans' choice to regulate tied selling by adopting general application provisions integrated to their consumer protection laws?

The European Community has regulated tied selling by means 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*. The purpose of this directive is to harmonize the legislation of member States on unfair commercial practices, in order to facilitate transborder trade and promote internal markets.[88] The directive also aims to "protect the interests of the consumer from trade malpractices.[89]" *Directive 2005/29/EC* contains in its

[85] Art. 255.7, par. 2, *Bank Holding Act of 1956,* 12 U.S.C.
[86] SOUFRON, J.-B. *HP condamné à rembourser un Microsoft Windows en Italie*, on the website ZDnet.fr, France, October 29, 2007, [Online] http://www.zdnet.fr/blogs/ils-ont-blogue/hp-condamne-a-rembourser-un-microsoft-windows-en-italie-39601464.htm (page consulted on April 20, 2010); ROBIN A. *La fin des ventes liées en Europe?*, on the website www.indextel.net, France, March 11, 2009, [Online] http://www.indexel.net/actualites/la-fin-des-ventes-liees-en-europe-2845.html (page consulted on August 5, 2009).
[87] See for example: *Order VTB-VAB NV/Total Belgium NV and Galatea BVBA/Sanoma Magazines Belgium NV* (ECJ, April 23, 2009); *Commission v. Microsoft* (CFICJEC, September 17, 2007); *UFC v. Auchan* (TGI-Bobigny, May 15, 2009); *Proc. v. Dell* (TGI-Montpellier, June 17, 2008); *Proc. v. Dell* (TGI-Montpellier, May 2009), appeal rejected; *UFC v. Darty* (TGI-Paris, June 24, 2008) and order (July 18, 2008); *Cresp v. Asus*, Rennes, (July 6, 2006); *Cresp Order* (CC Civ, June 5, 2008), appeal rejected; *T. v. MSI* (Metz, November 12, 2009); *Magnien v. Asus (*Lorient, August 27, 2009). Under certain circumstances, merchants reach an out-of-court settlement before the case is heard by European courts: see *Baratte v. MSI* (Annecy, January 18, 2010); *W. v. Acer* (Gonesse, November 19, 2009); *Magnien v. Asus* (Lorient, November 12, 2009); *Hengy v. Dell* (August 2008).
[88] Article 1, *Directive 2005/29/EC*.
[89] *Ibid.*

Schedule 1 a list of thirty (30) practices deemed unfair under all circumstances.[90] But this list provides no explicit ban on tied selling. Irrebuttable presumption does not apply to this practice, so a consumer who feels wronged by a tie-in sale must establish its unfair nature. Indeed, although the Directive does not include this practice in the list of those considered unfair, it still deems tied selling to be a fraudulent and unfair commercial practice under articles 6, 7, 8 and 9 of the Directive.

It is therefore essential to define what an "unfair commercial practice" is in European law. According to authors Amandine Garde and Michael Havaron, an unfair commercial practice may be defined as any "practice contrary to the requirements of professional diligence and altering or likely to alter substantially the economic behaviour of the consumer it affects or is addressed to."[91] This definition reprises the essential elements of article 5, paragraph 2 of *Directive 2005/29/EC.*

Under *Directive 2005/29/EC*, an unfair commercial practice may be qualified as fraudulent under articles 6 and 7 or as an aggressive practice under articles 8 and 9. For example, a fraudulent practice under article 6 consists of the merchant providing false information about the product's main characteristics – information likely to lead the consumer to make a commercial decision he would not have made without those representations.[92] Article 8 of Directive 2005/29/EC stipulates that a practice is considered aggressive "if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct."[93] In addition, this practice deemed aggressive must lead or likely lead the consumer to make a commercial decision he would not have made otherwise. Finally, article of the Directive describes the elements to take into account in order to determine whether the merchant resorts to harassment, coercion or unjustified influence under article 8 of the Directive.

Among the elements to take into account, we find "its timing, location, nature or persistence [and] the use of threatening or abusive language or behaviour."[94] The Member States have, since Directive 2005/29/EC took effect, justified the existence of national provisions regarding tied selling by qualifying that practice as among "unfair and fraudulent commercial practices under articles 6 and 7 of the Directive," since tied selling has the effect of leading consumers to purchase a good or service they would not have purchased otherwise or would have purchased in another way. Since the objectives of *Directive 2005/29/EC* in prohibiting certain practices such as tied selling are clear, what effect has it had on the legislation of Member States? Has the Directive resulted in better protection of European consumers against unfair commercial practices such as tied selling?

Contrary to all expectations, *Directive 2005/29/EC* may, in some cases, have diminished consumer rights. As we will see below, in the section on decisions rendered by foreign courts regarding tied selling *Directive 2005/29/EC* has affected legislation on tied selling in certain

[90] Article 5, par. 5, Directive *2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market* [*Directive 2005/29/EC*].
[91] GARDE, A. and HAVARON, M., *Pratiques commerciales déloyales : Naissance d'un concept européen*. In Petites Affiches Placard 21/06. No. pa 174704.sgm-5, p. 1. [Online] http://www.milbank.com/NR/rdonlyres/518A84CE-3BF3-470C-8CCD-68AB71A44CAF/0/060714_haravon.pdf (page consulted on April 21, 2010). Our translation.
[92] Article 6, paragraph 1(b), *Directive 2005/20/EC*.
[93] Article 8, *Directive 2005/29/EC*.
[94] Article 9, *Directive 2005/29/EC*. Our translation.

countries. This is notably the case for France's *Code de la consommation* and Belgium's *Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur*.

The European Commission has always submitted national consumer legislation to the principle of minimum harmonization, which allows Member States to adopt measures offering greater protection than provided in the corresponding directive. *Directive 2005/29/EC* is, however, a full harmonization directive.[95] Full harmonization, also called "maximum harmonization," requires Member States to adopt legislation offering the same level of protection as *Directive 2005/29/EC*, and prohibits them from providing greater protection than in the Directive. It gives member States until June 12, 2013 to harmonize internal laws with the Directive's requirements.[96] This will likely result in a reduction of protective measures in some European countries whose national laws protected consumers more broadly than does the Directive.

a) France and Belgium: Tied Selling and Regulation through General Provisions

Various French laws contain provisions banning tied selling or whose application results in preventing consumers from suffering the negative effects of tied selling. The ban on tied selling in consumer contracts is found in article L122-1 of the *Code de la consommation*. The adoption of article L122-1 results from the appearance of a commercial practice that consisted of denying consumers the possibility of acquiring certain goods or services otherwise than from a batch that merchants refused to dissociate, thus forcing consumers to make useless or undesired purchases.[97]

The order of June 30, 1945 prohibited tie-in sales in a competitive context; this prohibition was later reprised in article L122-1 of the *Code de la consommation,* which prohibits "de refuser à un consommateur la vente d'un produit ou la prestation d'un service, sauf motif légitime, et de subordonner la vente d'un produit à l'achat d'une quantité imposée ou à l'achat concomitant d'un autre produit ou d'un autre service ainsi que de subordonner la prestation d'un service à celle d'un autre service ou à l'achat d'un produit."[98] The French legal text is one of the most precise in Europe on the subject. Care is taken to specify the ban against tying the sale of goods as well as the provision of services. The fact that this article allows tied selling that takes place for legitimate reasons has the effect of putting the burden of proof on the merchant; the latter must establish that the tie-in sale was motivated by legitimate reasons.

This ban on tied selling covers products of the same nature as well as those of a different nature.[99] According to author Guy Raymond, the reference to tied selling in article L122-1 in fact covers conditional selling, i.e., cases where the consumer can acquire the desired good or

[95] Preamble, whereas clauses 11 to 15, *Directive 2005/29/EC*.
[96] Article 3, paragraph 5, *Directive 2005/29/EC*.
[97] CALAIS-AULOY, J. and STEINMETZ F. *Droit de la consommation*, 6e éd., Paris, France, Dalloz, 2003, p. 165.
[98] *C. consom.*, Article L 122-1, par. 1.
[99] FERRY-MACCARIO, N. and al. *Gestion de l'entreprise*, Paris, France, Pearson Education, 2006, p. 60.

service only if he purchases another good or service.[100] To determine whether tied selling occurs according to the *Code de la consommation*, products and services offered together must be taken in consideration, as well as the possibility for the consumer to acquire goods and services singly elsewhere.[101] Author Raymond also draws a list of circumstances under which there is no question of tied selling: (i) when the consumer can buy singly, in the same store, the goods that the merchant offers him in a batch; (ii) products usually sold in a "pack," such as beer and yogurt; (ii) finally, French caselaw tolerates tied selling of certain products called complementary. This is notably the case for a set of pots and pans.[102] To avoid absurdities, other products are exempted from the tie-in sale ban provided in article L122-1 of the *Code de la consommation*: for instance, the unit sale of matches.

The law also provides a duty to inform that enables a consumer offered a tie-in or batch sale to have the necessary information to make an informed decision. As we will see below in the sections on decisions rendered by European courts and on the use of tied selling, those provisions regarding price prove enormously important. Article 7 of the *Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix* reads as follows: "Les produits vendus par lots doivent comporter un écriteau mentionnant le prix et la composition du lot ainsi que le prix de chaque produit composant le lot." As mentioned above, a merchant may engage in tied or batch selling so long as products sold in batches can also be acquired separately inside the same store by the consumer. This measure ensures that the consumer will be adequately informed of the price of each of those products.

Moreover, article L113-3, paragraph 1 of the *Code de la consommation* states the following:

> "*Tout vendeur de produit ou tout prestataire de services doit, par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié, informer le consommateur sur les prix, les limitations éventuelles de la responsabilité contractuelle et les conditions particulières de la vente, selon des modalités fixées par arrêtés du ministre chargé de l'économie, après consultation du Conseil national de la consommation.*"

French merchants are thus compelled to display the price of any product or service sold in their store, including the price of the product that would be the object of a tie-in, conditional or batch sale. Article L441-3 of the *Code de commerce* also provides that every business must provide an invoice containing, notably, "le prix unitaire hors TVA des produits vendus et des services rendus,"[103] thus including the price of the tied product.

Finally, two other provisions regulate tied selling in specific sectors of activity. First, article L121-84-6 of the *Code de la consommation,* which applies to providers of electronic communications services, prohibits, in its second paragraph, a provider from making conditional "la conclusion ou la modification des termes du contrat qui régit la fourniture d'un service de communications électroniques à l'acceptation par le consommateur d'une clause imposant le respect d'une durée minimum d'exécution du contrat de plus de vingt-quatre mois à compter de la date de conclusion du contrat ou de sa modification." The legislation thus assimilates this practice to conditional selling, given that the conclusion of the contract is conditional to the latter being of a

[100] RAYMOND, G. *Incidences de la loi MURCEF (Loi no. 2001-1168, 11 déc. 2001) sur le marketing des établissements de crédit*, In *Apprendre à douter : Questions de droit, questions sur le droit. Études offertes à Claude Lombois*, Limoges, France, PULIM, 2004, p. 426.
[101] *Op. cit.,* note 100, p. 426.
[102] *Op. cit.,* note 100, p. 431.
[103] *Code de commerce*, Article L441-3.

specific term. In matters of financial services, article L312-1-2-1 regulates the tied selling of banking products and services. This provision prohibits financial institutions from selling or offering to sell bundled products or services, unless the products and services sold together can be purchased individually or are inseparable.

The regulation of commercial practices in the European Community also had a major effect on Belgium's *Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur* [hereinafter LPCC].[104] Article 54 of the LPCC first defines the joint offer, and then prohibits it (with a few exceptions). An offer is said to be joint "lorsque l'acquisition, gratuite ou non, de produits, de services, de tous autres avantages, ou de titres permettant de les acquérir, est liée à l'acquisition d'autres produits ou services, même identiques."[105] Also banned is an offer of this type that would be "effectuée par plusieurs vendeurs agissant dans une unité d'intention." The Belgian law thus bans not only joint offers requiring the purchase of other products or services, but also prohibits the merchant from making the acquisition of a product or service free of charge, or making any other advantage, conditional on the purchase of other goods or services. All joint offers are therefore prohibited in Belgium, with exceptions specified in the law, as we will see below.[106]

This regulation of tied selling is much more restrictive than in other jurisdictions. It results in fines levied against a good number of merchants[107]. Since the law took effect, offers of free cell phones in exchange for a subscription contract with an operator, and offers of "packs" including a mobile phone, "SIM" card and call credit, have disappeared from the Belgian market.[108]

A joint offer involves the following three (3) elements: (1) a main offer and a subsidiary offer; (2) a mandatory link between the two offers; and (3) an advantage to the consumer in comparison with separately purchasing the goods and services that are part of the offer.[109] The main offer is the product or service desired by the consumer, while the subsidiary offer is imposed on the consumer who wants to obtain the good or service in the main offer. As the lawyer Maxime LeBorne mentions, the advantage to the consumer – the third element constituting the joint offer – is broadly interpreted by the Belgian courts,[110] which went so far as to consider that a subjective advantage met this criterion. A joint offer that does not offer the consumer an objective advantage (that would only consist, for example, of adding the prices of each good and/or service that is part of the joint offer) will nevertheless be deemed to offer the consumer an advantage if he perceives one.[111]

[104] See Chapitre III, section C: *Les recours and décisions judiciaires étrangères,* du présent rapport.
[105] Art. 54, *Loi du 14 juillet 1991 sur les pratiques du commerce and sur l'information and la protection du consommateur* [hereinafter *LPCC*].
[106] Art. 54, par. 2, *LPCC*.
[107] STIBBE BRUXELLES. *La cour de justice sonne le glas de l'interdiction de la vente conjointe*. In *Bulletin d'information – pratiques de commerce and protection du consommateur*, No. 2009/01, April 23, 2009. [Online] http://www.stibbe.be/assets/publications/newsletters/bulletin%20d%27information%20pratiques%20du%20commerce%20et%20protection%20des%20consommateurs_2009_01_website.htm (page consulted on April 20, 2010).
[108] *Ibid*.
[109] LEBORNE M. *La loi belge*, June 2004. [Online] http://detaxe.be/doku.php?id=aspects_juridiques:start (page consulted on April 22, 2010).
[110] *Ibid*.
[111] Comm. Bruxelles, Prés., February 15, 1993, R.D.C., 1994, pp. 713 to 718.

As mentioned above, the Belgian law provides, in articles 55 to 57, a few exceptions to the ban on joint offers. Article 55 provides two exceptions:

> "*55. Il est permis d'offrir conjointement, pour un prix global:*
>
> *1. des produits ou des services constituant un ensemble;*
>
> *Le Roi peut, sur proposition des Ministres compétents et du Ministre des Finances, désigner les services offerts dans le secteur financier qui constituent un ensemble;*
>
> *2. des produits ou des services identiques, à condition:*
> *a) que chaque produit et chaque service puisse être acquis séparément à son prix habituel dans le même établissement;*
> *b) que l'acquéreur soit clairement informé de cette faculté ainsi que du prix de vente séparé de chaque produit et de chaque service;*
> *c) que la réduction de la totalité des produits ou des services n'excède pas le tiers des prix additionnés.*"

The lawyer LeBorne defines the overall price as any price, minimum or not, required by the merchant for the subsidiary product.[112] The notion of a set ("ensemble") found in the first exception is not defined in the law. When drafting the Act, the Chambre des représentants specified that the notion of a set would be taken in consideration by the courts on a case-by-case basis.[113] However, caselaw understands that a set includes items that cannot be sold separately.[114] Tied selling of the following products was deemed to contravene article 54 of the LPCC, since they did not constitute a set: a videocassette and a video recorder[115]; bedroom furniture and living or dining room furniture;[116] a cell phone at a reduced price when the consumer signs a subscription.[117]

Finally, articles 56 and 57 of the LPCC allow merchants to make Belgian consumers joint offers when the subsidiary offers are free of charge. For example, a merchant may offer free of charge and jointly with a main offer "les accessoires d'un produit principal, spécialement adaptés à ce produit par le fabricant de ce dernier et livrés en même temps que celui-ci en vue d'en étendre ou d'en faciliter l'utilisation." Also allowed are subsidiary offers pertaining to packaging, maintenance, samples, certain promotional items of minimal value that are not found as such in the business, etc.[118] Moreover, the merchant is allowed, under certain conditions, to offer vouchers ("titres") free of charge for an identical product or service, or a discount, etc.[119]

In conclusion, regulation of tied selling varies greatly from one jurisdiction to another. Canada and the United States have opted, basically, for regulation through laws governing competition, while regulating, rarely and in a scattered way, certain problematic sectors of activity, such as banking service or contracts of lease involving sequential performance. For their part, France

[112] *Op. cit.,* note 109.
[113] *Ibid*.
[114] Comm. Hasselt, Prés., January 20, 1992, Credoc, 07/93, p. 22 ; Comm. Mons., Prés., Feb. 10, 1995, Credoc, 05/95, p. 8.
[115] Comm. Bruxelles, Prés., January 6, 1989, Ann. Prat. Comm., 1989, p. 143.
[116] Comm. Mons., Prés., Feb. 10, 1995, Credoc, 05/95, p. 8; res. Comm. Mons. Feb. 10, 1995, Ann. Prat. Comm., 1995, 273.
[117] Pres. Comm. Termonde, Sept. 20, 2000, Ann. Prat. Comm. and Conc., 2000, p. 356.
[118] Article 56, paragraph 1, *LPCC*.
[119] Article 57, paragraph 1, *LPCC*.

and Belgium have adopted legislation of general application, as seen in their consumer protection laws. We will not study the remedies available to consumers for implementing the measures that protect them.

3 REMEDIAL MEASURES: EFFECTIVENESS OF REMEDIES AND COURT DECISIONS

3.1 COMPETITION TRIBUNAL

The federal *Competition Act* is one of the only laws in Canada to define tied selling. Since the *Competition Act* amendments made in 2002, which added section 103.1, private parties wronged by tied selling may, in theory, initiate legal proceedings before the Competition Tribunal. Although a remedy for private parties has existed since 1976, remedies in damages were allowed only for criminal offences under the *Competition Act.*[120] Prior to 2002, section 36 of the *Competition Act* was the only way for a private party to go to court.

3.1.1 Section 36 of the Competition Act

The introduction of this section in the *Competition Act* in 1996 prompted animated discussions.[121] The issue of the constitutionality of this provision introducing a civil remedy was raised in the *General Motors of Canada v. National Leasing*[122] case, and the Supreme Court ruled that section 36 of the *Competition Act* was constitutional. Section 36 allows any person to initiate proceedings to seek damages before any competent court, under two specific circumstances: (i) conduct that is contrary to any provision of Part VI, or (ii) the failure of any person to comply with an order of the Tribunal or another court under this Act.[123]

Part VI of the Act pertains to, among other things, conspiracies,[124] bid-rigging[125] and false or misleading representations[126], i.e., attacks on competition. It should be noted that the remedy provided in section 36 is limited to Part VI of the Act and thus does not apply to tied selling, found in Part VIII. We will nevertheless discuss the criteria for allowing private parties to initiate proceedings under section 36.

A plaintiff going to court under section 36 – remedy must be sought within two years after the date of the disputed conduct or on any other date decided by the court[127] – must prove that he has suffered real damage from the defendant's conduct.[128] For damages, the plaintiff may require an amount equal to that of the loss or damages suffered, and the court may grant him an additional amount not exceeding the total cost of any investigation it conducts in the case and of all proceedings launched.[129] Such a tort remedy is usually filed after criminal proceedings

[120] ROACH, K. and TREBILCOCK, M. *Private Enforcement of Competition Laws*, Osgood Hall Law Journal, Vol. 34, January 1, 1996, p. 462.
[121] The text of authors Roach and Trebilcock gives a full presentation of the pros and cons of introducing private party remedies in a law whose application used to be reserved for public authorities.
[122] *City National Leasing* decision.
[123] Sec. 36, *Competition Act, RSC*, 1985, v. C-34.
[124] Sec. 45, *Competition Act, RSC*, 1985, v. C-34.
[125] Sec. 47, *Competition Act, RSC*, 1985, v. C-34.
[126] Sec. 52, *Competition Act, RSC*, 1985, v. C-34.
[127] Sec. 36, subsection 4, *Competition Act, R.S.C.*, 1958, v. C-34.
[128] STIKEMAN ELLIOT, *Competition Act & Commentary*, Toronto, LexisNexis, 2008, p. 30.
[129] Sec. 36, subsection 1, *Competition Act, RSC*, 1985, v. C-34.

are initiated by the Commissioner of Competition. To facilitate the plaintiff's proof, section 36, subsection 2 stipulates that the minutes of a court declaring the defendant guilty of a violation of Part VI of the Act constitute admissible evidence as part of the tort remedy under section 36.

3.1.2 Section 103.1 of the Competition Act: Remedies in Cases of Tie-in Sales

Introduced in 2002, this provision ends the monopoly exercised by the Commissioner of Competition regarding remedies to violations of Part VIII of the Act, by allowing private parties henceforth to launch proceedings before the Competition Tribunal. This remedy is reserved under section 75 of the Act for cases of refusal to sell, and under section 77 for practices of exclusive dealing, tied selling and market restriction.

To limit proceedings that would only be strategic or frivolous, a private party that wants to appear before the Competition Tribunal must first apply to the Tribunal for leave to make an application;[130] the application for leave must be accompanied by an affidavit setting out the facts in support of the person's application; the applicant must serve a copy of the application for leave to the Commissioner and any person against whom the order is sought.[131] The purpose of this measure, proposed by authors Roach and Trebilcock, was to mitigate some of the negative effects of the private action and maintain, when an application is filed by a private party, the values upheld by the exclusive application of the Act by the public authorities.[132] The Commissioner then has 48 hours to tell the Tribunal if the question raised in the application is or has been the object of an investigation by the Commissioner;[133] in that event, or if the Commissioner has already requested the Tribunal for a ruling on that question, the Tribunal cannot hear the case.[134]

The Tribunal may sustain an application for leave against a tied selling practice if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under [sections 75, 76 and 77]."[135]

In matters of tied selling, the applicant must, to obtain leave, first establish that he is directly and substantially affected in his business by tied selling, and secondly that the practice may be subject to an order under section 77. Although the necessary test for accepting an application for leave is mentioned in the Act, the Tribunal recalled them in a first decision, in 2002, rendered in the *National Capital News v. Canada* case.[136] However, in 2004, in the *Barcode* case, the Federal Court introduced some clarifications to applicable test during an application for leave, particularly by specifying that the level of proof required is less than the balance of probability that will apply to the substantive dispute.[137] Moreover, the applicant must also provide sufficient

[130] Sec. 103.1, *Competition Act, RSC*, 1985, v. C-34.
[131] Sec. 103.1, subsection 2, *Competition Act, RSC*, 1985, v. C-34. See also section 103.2, which allows the Commissioner to intervene in a case filed by a private party.
[132] *Op. cit.*, note 120, p. 503.
[133] Sec. 103.1, subsection 3, *Competition Act, RSC*, 1985, v. C-34.
[134] Sec. 103.1, subsection 4, *Competition Act, RSC*, 1985, v. C-34.
[135] Sec. 103.1, subsection 7, *Competition Act, RSC*, 1985, v. C-34.
[136] *National Capital News Canada* v. *Canada (Speaker of House of Commons)*, [2002] C.C.T.D. No. 38, 23 C.P.R. (4th) 77 (Comp. Trib.), [2004] Federal Court No. 83.
[137] *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, [2004] F.C.J. No. 1657, 2004 FCA 339 [*Barcode* decision].

evidence that all necessary elements for deciding on the existence of the disputed practice can be established.[138]

Under section 103.1, the applicant may request, essentially, the same remedial measure as that to which the Commissioner is entitled, i.e., an order prohibiting the defendant from engaging in the practice in question or ordering him to cease the disputed practice.[139] While this remedial measure may seem paltry, it should be noted that the Tribunal reserves the right, at its discretion, to take any other necessary measure to re-establish or promote competition for the product in question.[140] Granting damages is not provided as a remedial measure, given that the Act explicitly excludes it in section 77.1, subsection 3.1: "the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7)." Subsection 4 of section 103.1 again adds to the limits of this remedy, by specifying a series of circumstances under which the Tribunal may not issue an order, i.e., certain special situations involving tied selling:[141] tied selling justified by technological connectedness between the tied products,[142] tied selling practiced by a person operating a money-lending company or between affiliated persons.[143]

How to evaluate, from the consumer's viewpoint, the accessibility and effectiveness of such a remedy? Incidentally: how many consumers have turned to the Competition Tribunal since section 103.1 was adopted?

In consumer law, consumer access to justice has always posed a major challenge. It would be useless to grant consumers rights if means to have them asserted were not also provided. It is useless to provide consumers with remedies if consumers cannot avail themselves of the latter or if such remedies provide no effective redress. This is why the authors insist that, to facilitate consumer access to justice, the proximity of courts of justice to consumers' place of residence should be ensured and that procedures be provided of which consumers can easily avail themselves. It must be admitted that the remedy under section 103.1 does nothing to facilitate consumers' access to justice. The Tribunal is located in Ottawa, where the hearings are held except under special circumstances,[144] and without holding a hearing, the Tribunal cannot render a decision on an application of section 103.1 of the Act.[145] In addition, the process involves two steps: the application for leave and then the remedy itself. There are also the reporting obligations, which add to the procedural burden on consumers considering such a remedy. In particular, given the prohibition imposed on the Tribunal to grant damages, and the necessary assessment of the harm done by the disputed practice to the applicant's "business," the conclusion is obvious: this remedy, this private parties' access to the Tribunal, is not a remedy intended for consumers.

Cases filed by private parties under this section will emanate from the defendant's competitors or from company operators who perceive themselves as wronged by a refusal to sell, a tie-in

[138] *Op. cit.,* note 128, p. 36.
[139] Art. 77, subsection 3, *Competition Act, RSC*, 1985, v. C-34.
[140] *Ibid*.
[141] See pages 13 and 14 of the present report on exceptions to tied selling: technological relationship, person operating a money lending company and affiliate.
[142] Sec. 77, subsection 4, par. b), *Competition Act, RSC*, 1985, v. C-34.
[143] Sec. 77, subsection 4, par. c) and subsection 5, *Competition Act, RSC*, 1985, v. C-34.
[144] COMPETITION TRIBUNAL. *Competition Tribunal: Frequently Asked Questions*. Ottawa, Canada, December 14, 2008, [Online], http://www.ct-tc.gc.ca/Procedures/FAQs-eng.asp, (page consulted on March 2, 2010).
[145] Rule 121, *Competition Tribunal Rules*, SOR/2008-141.

sale or exclusive dealing. In 2004, the Tribunal authorized its first two cases since the legislative amendment of 2002:[146] the *Symbol Technologies Canada ULC v. Barcode Systems Inc.* case and the *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited* case,[147] both of which concerned the defendant's refusal to sell.

We think it would be very difficult for a consumer to win his case in a proceeding against a tied selling practice; the very leave to launch such proceedings appears to pose insurmountable obstacles for the consumer. First, the success of an application for leave before the Competition Tribunal requires the consumer to have what he does not have: specific knowledge of the *Competition Act* and of very complex procedures. A very complex legislative text is involved here, which is not written with the same concern for clarity as are consumer protection acts, which tend to favour plain language and clear legal rules that are easily understandable to consumers. Second, the disputed amounts in the consumer contracts of an individual consumer are usually minimal, so it is difficult to imagine that consumers, with no economic incentive, would find it worthwhile to invest in such a remedy resources that would largely exceed the amount of their claim. In addition, a victorious consumer would still not have a right to receive damages, while an unsuccessful one might be condemned to pay expenses;[148] so we may conclude that this remedy is not intended for consumers.

What should a consumer expect should he still initiate such proceedings? For the Tribunal to accept his application for leave, he must prove that he is substantially and directly harmed in his business by the disputed practice – tied selling – and that this practice may be subject to an order under the Act. Section 2(1) of the Act defines a "business" as: "manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and; *b*) acquiring, supplying and otherwise dealing in services." Also considered as a "business" is "the raising of funds for charitable or other non-profit purposes."[149] As we can see, nothing there enables consumers to meet their first requirement – to establish that they are harmed in their "business." The Competition Tribunal's position in the *Annable* case appears to confirm that a consumer will never be able to obtain leave to initiate a remedy if he does not prove that he owns a company. In our view, the following sentence of authors Osborne and Wilson is a good indication of consumers' perception of access to justice in matters of competition: "Hockey fans take note: the Tribunal is not the appropriate forum for expressing discontent with your team's ticket sales practices, management or performance. Best stick to call-in radio shows."[150]

As opposed to the predictions of many academics and detractors regarding the private party remedy, the introduction of section 103.1 s not led to an avalanche of lawsuits filed by private parties. On the contrary, proceedings launched by consumers are almost nonexistent.[151] We have identified a few applications for leave to seek a remedy for an infraction of section 77 of

[146] OGILVY RENAULT. *Le tribunal de la Concurrence accepte d'entendre deux demandes présentées par des parties privées*, Montreal, Canada, March 30, 2004, [Online], http://www.ogilvyrenault.com/fr/centredeResources_1394.htm, (page consulted on August 13, 2009).
[147] *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited*, CT 2003-009, [Online], http://www.ct-tc.gc.ca/CasesAffaires/AffairesDetails-fra.asp?CaseID=145, (page consulted on May 3, 2010).
[148] *Op. cit.,* note 146.
[149] Sec. 2(1), *Competition Act, RSC*, 1985, v. C-34.
[150] OSBORNE, W. Michael and WILSON, Donna N. *Competition Tribunal Cases: A Two Year Review*, Recent Developments in Civil Matters under Canadian Competition Law, Spring Forum 2009, 2009, [Online]: http://www.thelitigator.ca/archive/agm_Competition-Tribunal-2-Year-Review_2009.pdf, (page consulted on May 5, 2010).
[151] *Op. cit.* note 7, p. 23.

the Act that have been filed in recent years.[152] Those remedies are not directly related to consumer rights and did not obtain the necessary leave. The first case was *Steven Olan v. Her Majesty the Queen as represented by the Correctional services of Canada*.[153] Mr. Olan, a former inmate at the Fenbrook Institute, alleged that the Canadian government imposed on inmates the purchase of merchandise exclusively from the Home hardware company and that inmates were obliged to purchase certain products along with certain tying products, in violation of the ban in section 77. Leave was not granted: although the *Competition Act* applies to agents of the Crown, it does not apply to the Crown itself. In addition, Mr. Olan did not prove that he himself was substantially and directly harmed in his business.[154]

The only case initiated by a consumer that we have identified is the *Annable v. Capital Sports and Entertainment Inc*. case. Mr. Annable filed an application for leave to seek a remedy related to tied selling by Capital Sports and Entertainment Inc., which sold batches of tickets to several Ottawa Senator hockey games. Mr. Annable considered that the obligation to purchase a ticket not only to the game he wanted to attend, but also to future games, constituted a reprehensible practice. The Competition Tribunal rejected Mr. Annable's application for leave because the two essential elements – that Mr. Annable's business was directly and substantially affected by tied selling practiced by Capital Sports and Entertainment Inc. and that this was a practice that could be subject to an order – were not present. The Tribunal insisted on the fact that the applicant had not proven the effects of the practice on his business, or even that he owned a business.[155]

Consumers and the *Competition Act* do not seem to have the same interests. The Act aims to preserve and promote competition in Canada, ensure that small and medium-size businesses have a chance to participate in the Canadian economy, and simply ensure that Canadian consumers face competitive prices and a wide choice of products.[156] The *Competition Act* is not a law that protects consumers. It contains no measure facilitating consumer access to the Tribunal by enabling consumers to easily use its remedies so that they may obtain reparation for damages suffered from unfair commercial practices, such as tied selling.

3.2 SMALL CLAIMS COURT AND OTHER PROVINCIAL COURTS OF LAW

Regarding consumer contracts, the courts of law that offer consumers the greatest access remain the provincial small claims courts. To the extent that a dispute pertains to a claim within the limits prescribed by law or that the Tribunal is competent to hear the dispute, consumers are able to file a claim before the small claims courts for any infraction to the law and may thus attempt to obtain reparation for harm suffered. Of course, only under circumstances where tied selling would violate the provision of a consumer protection law or of any law governing this practice in a given sector can a consumer assert his rights before the courts. As mentioned above, very few provincial legal provisions prohibit tied selling. The specific provisions do not generally apply to consumer contracts, but rather to certain sectors of activity. The large majority of consumer contracts involving tied selling – such as contracts to purchase computers equipped with software – cannot therefore be subject to a remedy under existing specific legal provisions. The fact that only the tied selling of certain sectors of activity may be subject to a

[152] *Op. cit.* note 150, p. 13.
[153] *Steven Olah v. Her Majesty the Queen as represented by the Correctional services of Canada,* 2008. Comp. Trib. 29.
[154] *Op. cit.* note 150, p. 12.
[155] *Op. cit.* note 150, p. 13.
[156] Sec. 1.1, *Competition Act, RSC*, 1985, v. C-34.

civil remedy before small claims courts enormously limits the scope of consumer protection from this practice.

Evidently, consumers making their case before provincial small claims courts face certain difficulties: a long wait to obtain a hearing date, a congested court system, costs, etc. But they remain a key component of consumer protection. The accessibility of small claims courts, the less formal approaches of their judges, and the simplicity and clarity of procedures make it easier for consumers. The small claims courts could therefore be the ideal forum for consumers wanting to obtain reparation against a tied selling practice. Still, provinces must adopt legal provisions banning tied selling in consumer contracts generally. As mentioned above, provincial laws contain certain prohibitions against tied selling in very restricted areas such as contracts of lease involving sequential performance, credit agreements and, in Ontario, funeral service contracts.

Moreover, any consumer may also file a complaint before the authorities assigned to apply and monitor the observance of consumer protection laws that ban tied selling. As mentioned above, for instance in Quebec, a company found guilty of a tied selling infraction during the signing of a credit agreement may face a fine of $1,000 to $40,000.

Absent access to the Competition Tribunal, a consumer may try the civil courts on the basis of contractual law of general application, by invoking, for example, the merchant's failure to meet his good faith obligation. The consumer may also invoke infractions of the Competition Act before the civil courts. As we have seen, recourse to the Competition Tribunal against practices covered by section 77 of the *Competition Act* is reserved for the Commissioner and businesses.

Evidence of anticompetitive practices can be quite complex, and such practices are likely to affect a great many consumers, so it was predictable that this type of remedy would use the procedural vehicle of class actions. For example, the sale of computers equipped with the Microsoft software and operating system was the object of three applications for authorization to institute class actions in Canada,[157] for remedy based not on consumer protection laws but on allegations of anticompetitive practices. Of those three applications for authorization to institute class actions, only one has been accepted to date, six years after the application was filed. On March 5, 2010, Judge Myers of the British Columbia Supreme Court certified the class action in the *Pro-Sys Consultant Ltd v. Microsoft Corp* case.[158] The applicant alleges that, as an indirect purchaser of Microsoft's operating system, it has suffered prejudice – Microsoft's anticompetitive practices intended to limit, if not eliminate, any market competition, so that Microsoft could impose inflated prices for its software and operating system; Microsoft would not have been able to do so had the market truly been competitive. Given the individual remedy provided in section 36 of the *Competition Act*, the door is open to eventual class actions. Since section 103.1 does not allow actions under section 77 of the Act with regard to tied selling, the applicant filed an application alleging anticompetitive practices involving conspiracy and false or misleading representations,[159] which would allow it to file a class action under section 30 of the

[157] BROUSSEAU-POULIOT, V. "Un premier recours collectif contre Microsoft au Canada," in *La Presse*, March 10, 2010, Montreal, Canada, [Online], http://lapresseaffaires.cyberpresse.ca/economie/technologie/201003/09/01-4258939-un-premier-recours-collectif-contre-microsoft-au-canada.php, (page consulted on March 11, 2010).
[158] *Pro-Sys Consultant Ltd.* v. *Microsoft Corp.*, 2010 BCSC 2858 (CanLII) [*Pro-Sys Consultant Ltd.* decision].
[159] Sections 45 and 52, *Competition Act, RSC*, 1985, v. C-34. See the *Pso-Sys Consultants Ltd*. decision, par. 4.

Competition Act. It should be noted that the defendant has suggested that it would appeal this decision.

The application for authorization filed in Quebec on September 5, 2007, *Marc Lefrançois v. Microsoft Corporation,* contains allegations very similar to the plaintiff's in the *Pro-sys Consultant Ltd v. Microsoft* case in British Columbia.[160] Over the years, the applicant has purchased several computers for personal use. He alleges that, due to Microsoft's anticompetitive conduct, he was forced to purchase computers already equipped with Microsoft operating software, and to pay for that software at an artificially high price.[161] Although the application's allegations mention tied selling,[162] it is mainly a question of conspiracy, false and misleading representations, and abuse of dominant position, since tied selling is not a reason for instituting a class action.[163]

As we will see below, selling computers already equipped with Microsoft operating software has been, in a good many jurisdictions, qualified as tied selling and has been the object of lawsuits. A civil remedy that would pertain explicitly to this practice is, as we have seen, generally impossible in Canada (except in areas where this practice is explicitly regulated). This explains the detours that consumers must make (pleading anticompetitive practices, proof of which will certainly be more arduous than of an evident practice). Access to the courts against this practice, which several jurisdictions have already recognized as reprehensible, is thus very limited in Canada.

Some foreign jurisdictions, whose regulations have been analysed in the present report, have regulated this practice by means of competition laws, while other have integrated into their consumer protection laws a general prohibition of such a practice. Of these two approaches, which better protects consumers and effectively gives them access to the courts?

3.3 FOREIGN REMEDIES AND LEGAL DECISIONS

In the present section, we will examine tied selling remedies in the United States and Europe, as well as certain decisions rendered in those jurisdictions. Tied selling practices are treated differently in Europe and the United States, given the type of legislation chosen to regulate them. In the United States as in Europe, the sale of computers equipped with the Windows operating system and other Microsoft software is among the tied selling practices that have most angered consumers; so the large majority of court decisions that we report concern this practice.

3.3.1 A Few American Lawsuits and Rulings with regard to Tie-in Sales

In the last 20 years, tied selling remedies have multiplied in the United States. As opposed to Canadian consumers, Americans can launch, under competition laws, an individual or class action against a tied selling practice. Whether against the anticompetitive practices of giants such as Microsoft, or against the tied selling practices of certain companies holding a near-

[160] *Op. cit.* note 157.
[161] *Marc Lefrançois v. Microsoft Corporation*., (September 5, 2007), Montreal, 200-06- 000087-075, (C.S.).
[162] *Op. cit.* note 161, par. 40.1.
[163] *Op. cit.* note 161, par. 2 and 19.

monopoly in a riven sector of activity, tied selling remedies are much more prevalent there than in Canada.

Many actions have been launched against Microsoft Corporation in the United States for violation of competition rules and for tied selling. The Justice Department's competition division itself launched an action against Microsoft in 1998, while alleging that the company violated competition rules and abused its dominant position. Several class actions have also been instituted against Microsoft, and some have led to settlements for substantial amounts. In the *United States v. Microsoft* case, the United States Justice Department was a plaintiff, along with some twenty American states, including New York, Ohio, Kentucky, Louisiana, Michigan and North Carolina. The lawsuit reproached Microsoft for tying its Web browser, Internet Explorer, to its Windows operating system. This practice of tying the two products would have resulted in ensuring Microsoft a dominant position in the field of Web browsers. In its defence, Microsoft replied that innovation and competition had made Windows and Internet Explorer had become one and the same product over the years. On April 3, 2000, Judge Jackson of the U.S. District Court of the District of Columbia ruled that Microsoft was guilty of monopolizing, attempt to monopolize and tied selling, and that the company thus violated sections 1 and 2 of the *Sherman Act*. He ordered the company to split into two distinct and competing companies – one focusing on the operating system and the other on software applications.[164]

The case was of course appealed. Without overruling in fact or in law the decision under appeal, the Federal Court of Appeal sent the case back for judgement at trial, while reproaching Judge Jackson for apparent bias and unethical conduct, because the judge having spoken very harshly against the defendant in the media before rendering a decision[165], had erred in his appreciation of appropriate remedies he could legally order.

Set before Judge Colleen Kollar-Kotelly, the case nevertheless reached a settlement on November 2, 2001 between Microsoft and the Justice Department; the latter dropped its allegations of tied selling. In particular, the agreement included Microsoft's commitment to give a three-person panel access for five years to Microsoft's systems, archives and source codes. Completely absent from that agreement was any obligation for Microsoft to end the tied selling practice of its operating system and software applications.[166] Moreover, Microsoft pledged not to conclude restrictive contracts or price-fixing agreements aimed at using its near-monopoly to unduly harm the competition. Nine states (California, Connecticut, Iowa, Florida, Kansas, Minnesota, Utah, Virginia and Massachusetts) and the District of Columbia opposed this settlement, and considered that it did not go far enough to restrict Microsoft's anticompetitive practices. However, on June 30, 2004, the American Courts of Appeal unanimously approved the agreement reached with the Justice Department, and rejected the argument that the sanctions were inadequate.

This entire affair prompted Andrew Chin, a competition law professor at the University of North Carolina, to state that the agreement reached with the Justice Department had granted "a

[164] *United States of America v. Microsoft Corporation*, 87 F. Supp. 2d 30 (D.D.C. 2000), [Online], http://www.justice.gov/atr/cases/f3800/msjudgex.htm, (page consulted on May 10, 2010), [*United States v. Microsoft* decision, District Court of the District of Columbia]. For the order that Microsoft divide into two distinct companies, consult the final decision of June 7, 2000: http://www.justice.gov/atr/cases/f219700/219728.htm (page consulted on May 10, 2010).
[165] McCULLAGH, D. "*Microsoft Judge Ripped in Court*," February 28, 2001. [Online], http://www.wired.com/politics/law/news/2001/02/42071 (page consulted on May 13, 2010).
[166] *United States of America v. Microsoft*, (D.D.C. 2002), [Online], http://www.justice.gov/atr/cases/f245100/245110.htm, (page consulted on May 10, 2010).

special antitrust immunity to license Windows and other 'platform software' under contractual terms that destroy freedom of competition."[167]

Fortunately for American consumers, the class actions proved more successful than the case of the United States Justice Department. In some twenty cases, Microsoft reached settlements and compensated consumers and companies having purchased Microsoft products and alleging damages because Microsoft was charging exorbitant prices for its operating system and application software.[168]

Consumer remedies in the United States with regard to tied selling are not limited to Microsoft. In 2007, an American consumer launched a class action against Apple. The tied selling practice reproached concerned the fact that the *iPhone* could be purchased and used only through the service provider AT&T. As the complaint alleged, "the sale of the iPhone (the tying product) is linked to the purchase of a two year wireless service account with AT&T (the tied product). The sale of the iPhone (the tying product) is also linked to the purchase of music, videos, and ringtones from Apple's iTunes Music Store (the tied products)."[169] In this case, still pending, the plaintiff alleges that by tying the purchase and use of the *iPhone* exclusively to the signing of a service contract with AT&T, Apple's conduct constitutes an infraction of sections 1 and 2 of the *Sherman Act.*[170]

Apple was the target of another class action in the United States for another tied selling practice. In 2007, a California resident launched a class action against Apple for tying music and video sales on its *iTunes* website to the *iPod* music player. In fact, music purchased on *iTunes* could be listened to only by using the *iPod* player*,* which in turn could only play music purchased on Apple's *iTunes* website. The plaintiff alleges that this practice had the effect of guaranteeing Apple a monopoly by imposing useless technological restrictions on consumers. This practice thus restricted consumers' choice and eliminated any competition on the market, thus leading to exaggerated price inflation.[171] In this case, the plaintiff alleges that Apple controls 83% of the online music market, 75% of the online video market, and over 90% of the market of digital music players. The plaintiff also alleges that Apple's practice of tying the player and available contents on its *iTunes* website violates sections 1 and 2 of the *Sherman Antitrust Act*. No final decision has yet been rendered in this case.[172] However, the judge rejected the

[167] CHIN, A. "*A case of insecure browsing - Exploring missed opportunities in the Microsoft antitrust suit*," September 30, 2004, in Newsobserver.com. [Online] http://www.unclaw.com/chin/scholarship/nando.pdf (page consulted on May 10, 2010).
[168] MICROSOFT. *Consumer Class Action Settlement Information*, on the Microsoft website, United States, May 5, 2007, [Online], http://www.microsoft.com/About/Legal/EN/US/ConsumerSettlements/Default.aspx#head1, (page consulted on May 10, 2010).
[169] The proceedings are available online. See "*First Amended Complaint for Damages and Injunctive Relief*." [Online], https://www.appleiphonelawsuit.com/uploads/2007-11-02__1st_Amended_Complaint_Endorsed.pdf, (page consulted on June 21, 2010). p. 27 motion.
[170] *Ibid.*, page 41 of the motion.
[171] *Somers vs. Apple Inc.*, (D.C. of California 2007), [Online], http://docs.justia.com/cases/federal/district-courts/california/candce/5:2007cv06507/198939/1/, par. 12, (page consulted on May 10, 2010) [*Somers vs. Apple* decision].
[172] http://dockets.justia.com/docket/court-candce/case_no-5:2007cv06507/case_id-198939/, (page consulted on May 10, 2010).

application for leave regarding a violation of the provisions of the *Sherman Antitrust Act,* while stating that there was no proof of common damages suffered by the group of consumers.[173]

3.3.2 Remedies and Rulings in Europe

In Europe, the remedies available to consumers are very different. While certain Member States, such as Italy, allow class actions, others allow consumer associations to institute certain proceedings to end an illegal practice or to eliminate an abusive clause in a consumer contract. Moreover, the European Commission may also impose fines on merchants violating competition or consumer protection Directives.

As mentioned above, tied selling lawsuits brought by consumers are much more frequent in Europe than in Canada. This is easily explained by the fact that in the majority of European countries, a tied selling ban of general application is provided in consumer protection laws and that those laws aim to facilitate consumer access to justice. In addition, consumer associations, such as the French association UFC-Que choisir, have initiated many proceedings against merchants engaging in tied selling. Consumer rights associations also play a crucial part in guiding consumers in their individual claims before the courts.

a) Individual Remedies

The Association Francophone des Utilisateurs de logiciels libres (AFUL) is a French organization that has produced the website Racketiciel.info, which informs consumers about tie-in sales of computers and Microsoft's operating system and application software. Since 2006, AFUL as identified over 20 European and French court decisions on the tied selling of computers and software in cases brought by consumers and consumer associations.[174] In all cases of tied selling identified by AFUL, the question was either to condemn a tied selling practice or simply to reimburse the software and operating system pre-installed on computers purchased by consumers. The tied selling prohibition under article L122-1 of the *Code de la consommation* may indeed lead to such a reimbursement obligation. Consumers also invoke merchants' price display obligations in order to be reimbursed amounts paid for software and operating systems,[175] when a single price was displayed.

In France, the Direction générale de concurrence, de la consommation et de la répression des fraudes also requires merchants to make a reimbursement procedure available to consumers as soon as the consumer does not accept the end-user licence agreement (*contrat de licence utilisateur final* – CLUF) for software installed on computers (since this refusal of licence terms

[173] THEODORE, R. "*Class Action Denied in Apple Musi Monopoly Case*," August 12, 2009. [Online] http://news.findlaw.com/andrews/bf/atr/20090812/20090812_somers.html (page consulted on June 18, 2010). One source seems to indicate that a decision has also been rendered on the injunction application. [Online] http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=7001513-207283-228375&SessionID=SYs-HjneTZeIhX7 (page consulted on June 18, 2010). However, this is an unverifiable source.

[174] ASSOCIATION FRANCOPHONE DES UTILISATEURS DE LOGIELS LIBRES, http://racketiciel.info/documentation/droit/#jugements-proximite-et-amiable, (page consulted on May 11, 2010).

[175] Art. 7 of the Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix; Art. L113-3, paragraph 1 of the C. consom.; L441-3 of the Code de commerce.

prohibits use of the software). Consumers who demand such reimbursement from the merchant or manufacturer and who do not obtain it may file an application with the competent court. As AFUL mentions on its website, in the majority of cases, the manufacturers offer an out-of-court settlement when such an application is filed.

b) Remedies Sought by Consumer Associations

Article L 421-1 of the *Code de la consommation* allows certified consumer associations to ask the courts to order a merchant to cease an illicit practice or suppress an abusive clause contained in a consumer contract.[176] The French association UFC-Que choisir brought several lawsuits on that basis against tied selling practices. In 2007, the organization won its case against Sony; UFC-Que choisir had alleged that the company engaged, by tying the purchase of its music player to the acquisition of music on its *Connect* website*,* in a practice prohibited under article L 122-1 of the *Code de la consommation,* i.e., a conditional sale[177], since only files downloaded from the *Connect* website could be played by the Sony reader. The Nanterre Court ordered Sony to pay UFC-Que Choisir the amount of €10,000 in damages to the collective interest of consumers, and also ordered the company to display the decision on its website for three months.

In 2008, UFC-Que Choisir brought a lawsuit against the distributer Darty: it requested that the Tribunal de Grande Instance de Paris acknowledge the illicit practice of tied selling and the merchant's infraction in not separately displaying the price of the computer and that of the pre-installed operating system and application software. The Tribunal de Grande Instance de Paris rendered a mitigated decision in this case. It declared that it is in consumers' interest to purchase computers already containing an operating system, but recognized that this is tied selling, i.e., an illicit practice. The Tribunal therefore ordered Darty to display henceforth all software prices.[178]

For its part, the Italian association *Associazione per i Diritti degli Utenti e Consumatori* (ADUC) instituted a class action in January 2010 to end the tied selling of computers and Microsoft operating systems. Contrary to French associations, which do not have access to class actions since group action is prohibited in France, Italian consumer associations can launch class actions to compensate wronged consumers. However, the Italian procedure does not allow consumer associations to require a guilty company to change its practices.[179]

[176] *C. cons.*, art. L 421-2.
[177] EUROPEAN DIGITAL RIGHTS. *Sony Loses DRM Case in France*, on the website European Digital Rights, (taken from: EDRI-gram: No. 5.1: January 17, 2007), [Online], http://www.edri.org/edrigram/number5.1/drm_sonyfr, (page consulted on April 22, 2010).
[178] ASSOCIATION FRANCOPHONE DES UTILISATEURS DE LOGICIEL LIBRE, http://aful.org/media/document/Jugement-QueChoisir-Darty-20080624.pdf, (page consulted on May 10, 2010).
[179] JARILLON P. "*Un recours collectif en Italie contre la vente liée des systèmes d'exploitation*," on the website of Linux France, January 6, 2010, [Online], http://linuxfr.org/2010/01/06/26320.html (page consulted on January 16, 2010).

c) European Community

In addition to remedies available to consumers and consumer associations under national laws, merchants engaging in tied selling are also subject to fines and lawsuits under European Community laws. For example, in 2004, Microsoft, found guilty of abuse of dominant position for having tied its multimedia program *Windows Media Player* to the Windows operating system, was fined €497.2 million (almost CAN$625 million at the current exchange rate). Although this amount may seem phenomenal, it is equivalent, according to the Commission, only to 1.62% of Microsoft's global sales figure for the fiscal year ended on June 30, 2003.[180]

Microsoft quickly appealed this fine imposed by the European Commission. On September 17, 2007, the Court of First Instance of the Court of Justice of the European Communities ruled in favour of the European Commission. In the Tribunal's judgement, "il ressort, en effet, de l'appréciation effectuée dans le cadre de la problématique du refus de fournir les informations relatives à l'interopérabilité et d'en autoriser l'usage ainsi que de la problématique de la vente liée du système d'exploitation Windows pour PC clients et de Windows Media Player que c'est à bon droit que la Commission a constaté que Microsoft avait enfreint l'article 82 CE en adoptant ces deux comportements." The Tribunal thus maintained the fine levied by the Commission.[181]

A second important ruling on tied selling was made in the *VTB-VAB v. Total* case. This April 23, 2009 decision will doubtless have a major impact on European countries regulation of tied selling. The decision is based on article 54 of Belgium's *Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur* [hereinafter LPCC], which prohibits joint offers (tie-in sales). The company Total "offrait aux consommateurs détenteurs d'une carte Total-Club trois semaines gratuites de service d'aide au dépannage pour leur propre véhicule ou vélomoteur, lors de chaque passage à la pompe à l'achat d'une quantité minimale de carburant."[182] The question raised before the Court of First Instance of the Court of Justice of the European Communities (CFICJEC) concerned the apparent contradiction between Belgian law and several European directives, notably *Directive 2005/29/EC* and *Directives 97/7/EC, 98/27/EC* and *2002/65/EC*.

The internal legislation of Member States must in principle be harmonized with European directives. However, *Directive 2005/29/EC* is one of maximum harmonization, which means that Member States cannot offer protections greater than those provided in the Directive.[183] Member States may therefore only prohibit, under all circumstances, unfair practices under article 5, paragraph 5 of the Directive, i.e., practices mentioned in Schedule I of the Directive. Tied selling not being one of the practices prohibited under Schedule I, the prohibition provided in article 54 of the LPCC would contravene *Directive 2005/29/EC.* The Court ruled that given the content of the European directives, particularly *Directive 2005/29/EC*, "the answer to the questions referred for a preliminary ruling are that the Directive must be interpreted as precluding national legislation, such as that at issue in the disputes in the main proceedings, which, with certain

[180] *Commission v. Microsoft* (CFICJEC, September 17, 2007), par. 1317, [Online], http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=fr&num=79929082T19040201&doc=T&ouvert=T&seance=ARRET, (page consulted on May 10, 2010) [*Commission v. Microsoft*].
[181] *Commission v. Microsoft*, par. 1330.
[182] *Op. cit.,* note 107.
[183] *Order VTB-VAB NV/Total Belgium NV and Galatea BVBA/Sanoma Magazines Belgium NV* (ECJ, April 23, 2009), par. 52 [*Order VTB-VAB v. Total*].

exceptions, and without taking account of the specific circumstances, imposes a general prohibition of combined offers made by a vendor to a consumer."[184]

According to the principle of a hierarchy of norms, European law supplants the internal legislation adopted by Member States. This CFICJEC decision has the effect of questioning the validity of many of the Member States' national legal provisions that protected consumers against tied selling.

However, we should not conclude too rapidly that the L122-1 provisions of France's *Code de la consommation* and article 54 of Belgium's LPCC are prohibited by European Community law. Although tied selling is not specifically banned in Schedule I of *Directive 2005/29/EC*, it may still be argued that tied selling is an unfair practice under, for instance, article 6 of the Directive, by demonstrating that tied selling is a misleading commercial practice by meeting the criteria set forth in article 6:

> "*it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:*
>
> *a) the existence or nature of the product;*
>
> *b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;*
>
> *c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;*
>
> *d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;*"

Thus, article 6 of the Directive may ban the tied selling of computer software, operating systems and computers. Other European directives may also allow consumers to demand sanctions against tied selling practices engaged in by certain merchants.

Accordingly, the effects of this decision on the internal legislation of European States are not yet definite. However, we note that the Cour d'appel de Paris, in a case opposing Orange to various competitors, thought itself obliged to comply with the *VTB-VAB v. Total* decision of the Court of First Instance of the European Communities and to *Directive 2005/29/EC*. The Cour d'appel de Paris did not go so far as to declare article L122-1 of the *Code de la consommation*

[184] *Order VTB-VAB v. Total*, par. 68.

inapplicable, but stated its obligation to interpret the law in a manner that complies with *Directive 2005/29/EC* and with the *VTB-VAB v. Total* decision.[185]

In that case, concerning the exclusive broadcasting of soccer games by the supplier Orange, certain competitors opposed the fact that games broadcast on the Orange Foot channel were available only to Orange subscribers who held a high-speed Internet contract with the company, although no technical reason justified the channel not also being broadcast through other media. The Tribunal de Commerce heard the application of Orange's competitors, while qualifying Orange's practice as tied selling and issuing an injunction against Orange to cease making Orange Foot subscriptions conditional on signing a high-speed Internet contract. The Court of Appeal concluded that article L 122-1 of the *Code de la consommation* "se heurte au régime institué par la Directive en ce qu'il prohibe, de manière générale et préventive, les offres subordonnées indépendamment de toute vérification de leur caractère déloyal au regard des critères posés aux articles 5 à 9 de la directive."[186] After making a full analysis of article L 122-1 of the *Code de la consommation* in the light of various provisions of *Directive 2005/29/EC*, i.e., articles 5 to 9, which would have allowed the conclusion that the tied selling practiced by Orange was an unfair commercial practice, the Court of Appeal opined that "dans ces conditions, il ne peut être fait grief à France Télécom et Orange d'avoir enfreint l'article L. 122-1 du Code de la consommation, tel qu'interprété à la lumière de la Directive 2005/29/CE du Parlement européen et du Conseil, du 11 mai 2005, relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs dans le marché intérieur ; qu'il suit de là que le jugement doit être infirmé en toutes ses dispositions."[187]

d) Foreign Public Authorities Responsible for Applying Competition and Tied Selling Laws

Tied selling does not escape the attention of foreign government agencies assigned to apply national anticompetitive laws. Again, the Microsoft giant was fined and reprimanded for selling computers already equipped with its operating system and its other software. On that basis, in 2005, the *Fair Trade Commission* (FTC) of South Korea fined it $32 million (CAN$26.5 million at today's exchange rate) for violating national antitrust laws.[188] Microsoft appealed the FTC decision before Seoul's High Court.[189] Microsoft asked the latter to suspend the FTC's fine while the decision rendered was being challenged; the High Court decided in July 2006 that there was

[185] TAILLANDIER, G. and SOFFER, R., *La Cour d'appel de Paris sonne le glas de l'interdiction de la vente liée*, on the website of Hammonds Hausman Avocats, Paris, France, August 25, 2009, (taken from *La Revue*), [Online], http://larevue.hammonds.fr/La-Cour-d-appel-de-Paris-sonne-le-glas-de-l-interdiction-de-la-vente-liee_a1064.html, (page consulted on May 11, 2010).
[186] *Arrêt du 14 mai 2009*, RG n°09/03660, C.A. de Paris, p. 10. [Online] http://www.arcep.fr/fileadmin/reprise/textes/recours/ca-arr-140509-orange.pdf (page consulted on June 10, 2010) [*Arrêt du 14 mai 2009*].
[187] *Arrêt du 14 mai 2009*, p. 12.
[188] DUMOUT, E. *Après l'Europe, la Corée du Sud condamne Microsoft pour abus de position dominante*, on the ZDNet France website, France, December 7, 2005, [Online], http://www.zdnet.fr/actualites/informatique/0,39040745,39293478,00.htm, (page consulted on September 9, 2009).
[189] DUMOUT, E., *Microsoft fait appel de sa condamnation en Corée*, on the ZDNet France website, France, March 27, 2006, [Online], http://www.zdnet.fr/actualites/informatique/0,39040745,39334258,00.htm, (page consulted on September 9, 2009).

no justification for suspending the fine and that Microsoft was obliged to pay forthwith.[190] Following its conviction in Korea, however, Microsoft attempted to maintain its dominant position on the Korean market, by reaching agreements with two of its competitors and paying Real Networks $760 million and Daum Communications $90 million.[191]

Some jurisdictions give consumers the possibility of having this practice condemned and of being compensated for products involved in tied selling. Canadian consumers benefit, under the *Competition Act*, only from very limited protection against tied selling and from remedies to which they do not have access and that prove ineffective, while other consumers in foreign jurisdictions, may institute class actions for violation of the provisions of national competition laws banning tied selling, and benefit from the protection of a provision of general application. The ease with which French consumers can go to court through individual proceedings is certainly evidence of the effectiveness of provisions of general application under consumer protection laws. The fact that consumers can also seek remedy from a nearby court facilitates the application of protection measures offered to them. The variety of European corrective measures – individual remedies, the possibility of consumer associations to go to court, the imposition of fines by the European Community or government agencies charged with applying competition laws – assures European consumers of additional protection.

Although throughout our analysis, we have used the examples of tied selling as practiced by Microsoft and Apple Inc., the time has come to examine, through a field study, the various facets of tied selling. In the following section, we will analyse the nature of consumer complaints about tied selling, as well as the particularly problematic sectors. We will also discuss the use of tied selling and the legal and practical issues thus raised. Finally, we will end our analysis by focusing on the justifications given by those who use tied selling, as well as on the latter's advantages and disadvantages for consumers.

[190] OLSEN, K. *South Korea: South Korea Court Rejects Microsoft's Request for Stay of Antitrust Sanctions*, July 5, 2006. Available on the Corpwatch website, [Online] http://www.corpwatch.org/article.php?id=13848 (page consulted on June 11, 2010).
[191] *Op. cit.,* note 188.

4 FIELD STUDY: TIE-IN SALES IN CANADA

4.1 NATURE OF COMPLAINTS AND PROBLEMATIC SECTORS

To complete our study, we proceeded, after reviewing the literature, to make a request for information from the provincial and territorial government entities assigned to consumer protection, and to send a questionnaire to consumer rights associations likely to receive complaints about tie-in sales. First we consulted the annual reports of various government organizations charged with applying consumer protection laws. This consultation did not prove conclusive, so we made requests for information directly from government agencies in August 2009. The majority of government bodies answered us by e-mail or telephone. To complete that field study, we also sent a[192] to consumer associations in Canada and abroad in March 2010.

Apart from sectors of activity that are specifically regulated in Canada,[193] Canadian consumers do not seem to make a lot of complaints about tied selling practices. While in Internet forums we find comments by consumers deploring the impossibility of acquiring computers not already equipped with software and operating systems at the moment of purchase,[194] consumers do not seem to depend on the services of government consumer protection agencies or consumer associations to complain about those tied selling practices.

Unfortunately Canadian consumer associations that answered our questionnaire were rare. Among those who did answer it, only one, the Consumer Council of Canada, reported having received about 100 consumer complaints in the last five years on issues related to tied selling.

Government consumer protection agencies also report very few complaints on this subject. In the common law provinces, the government bodies say they have received in the past a large number of complaints about tied selling related to payday loans. As mentioned above, this is one of the sectors of activity that have been regulated in recent years. In Quebec, the Office de la protection du consommateur reports a single complaint filed in the last ten years for the tied selling of computers and software.

The absence of legislation of general application that would prohibit tied selling is certainly not unrelated to this lack of complaints; the fact that the practice is tolerated and is not explicitly banned or regulated certain gives Canadian consumers the impression that this widespread practice is not reprehensible.

We also sent the questionnaire to the Association francophone des utilisateurs de logiciels libres (AFUL) to find out how many complaints that association receives on average about tied selling. As mentioned above, the AFUL's activities indeed focus on conditional sales of computers with pre-installed Microsoft software and operating systems. The AFUL informs us that it receives on average three or four weekly contacts from consumers wanting additional information or wanting to know the reimbursement process for software sold to them without their request.

[192] See Annex I: Questionnaire sent to consumer rights associations in Canada and abroad.
[193] See Chapter 2: Canadian Legislation and Foreign Jurisdictions.
[194] Jean-François Bédard's blog, http://francoisbedard.ca/2010/01/06/la-vente-liee-en-informatique/, (page consulted on May 10, 2010).

Despite the absence of complaints from consumers, tie-in sales do exist in Canada.[195] To determine whether certain practices may be identified as tied selling, we rely on the definition of given of this practice by the *Competition Act* – since the latter contains the only definition of general application – and to elements retained in certain laws that apply to specific sectors of activity, such as financial products and services. Given that we focus on this practice in the light of consumer protection and not competition, we do not take into account the criteria developed in caselaw in our determination of practices that may be considered tied selling.

In the computer sector, we have identified two practices equivalent to tied selling. There is of course the sale of computers already equipped with the Windows operating system and application software at the time of the sale.[196] The second practice we have identified consists of selling computer "kits" containing several accessories such as a mouse, monitor and keyboard, which the consumer does not necessarily want.

In the electronics sector, we have identified two practices equivalent to tied selling. Some manufacturers of electronics, such as digital cameras, bind their products to technological barriers prohibiting consumers from using their devices with certain accessories produced by those manufacturers but also by other manufacturers (memory cards compatible with the digital cameras, for example). This is notably the case for Sony, whose photo devices only accept the memory cards it produces. The same practice is found among printer manufacturers: by equipping their ink cartridges with electronic chips, some manufactures prevent the use of other cartridges made by competitors but otherwise compatible.

We have also identified in the automotive, retail sales and telecommunications sectors, practices we think could be considered tied selling. For example, there is the sale and supply of "smart" phones, such as the *iPhone*, from a single service provider. When that device was launched in Canada, the manufacturer, Apple, announced that it would only be available from the Rogers service provider, although the latter is not the only one to offer compatible service.

It could also be argued that the practice used by all mobile service providers in Canada, and consisting of a free or discounted telephone offer if the consumer signs with them a one, two or three year subscription, could be considered to constitute tied selling.

This way of considering the practice has in fact been adopted abroad: Finland, considering it to be tied selling, has prohibited tying service subscriptions to offering a free or discounted

[195] See Annex 1.

[196] We are aware that the sale of Apple's MAC computers, without specifying the price of their OS operating system and other preinstalled software, involves an identical practice. (FERRAN, Benjamin. *Détail des prix : "Apple ne doit faire exception,"* June 25, 2008, [Online] http://www.macgeneration.com/news/voir/130764/detail-des-prix-apple-ne-doit-pas-faire-exception (page consulted June 20, 2010)). Apple is not the object of complaints or lawsuits – particularly in Europe – regarding this practice for several reasons. First, Apple's market share is far from equivalent to that of PCs. Second, the MAC OS operating system is designed solely for MAC computers and not for a panoply of computers made by various manufacturers. The fact that the MAC OS operating system costs much less than the Windows operating system, and that the MAC is perceived and sold as an integrated system, should also be taken into consideration. Still, technically, the sale of MAC computers equipped with the operating system and other software, whose price and installation cost are not known to consumers, also constitutes tied selling, and to the same extent.

phone.[197] Such tied selling is all the more evident because the phones are locked and thus cannot be used with another service provider.

We also think that tied selling is present in the obligation imposed on a consumer wanting Internet service to acquire from the service provider, by purchase or rental, a specific modem whereas an identical or other compatible model is also available.

The practice of new car manufacturers and dealers to force a consumer who wants certain additional options to purchase a higher-class, more expensive vehicle that necessarily includes additional undesired options also likely constitutes tied selling. For instance, a consumer who wants a Mazda 3 GS 2010 cannot have the retractable roof as an option; if he wants this option, he must acquire the "comfort package," which, in addition to the "power glass sunroof," also includes "automatic stability control and traction as well as dynamic stability control."[198] If he wants leather seats, he must opt for a GT class Mazda 3, which includes the "luxury package" (leather seats, memory setting driver's seat, 8-way power driver's seat, sliding leatherette console cover), but must also buy the retractable roof, which does not belong to the "luxury package," but is mandatory for purchasing that package.[199]

Obviously, though it is regulated by the *Competition Act*, tied selling is still tolerated, and practiced shamelessly in sectors of activity not regulated for tied selling. Some think that tied selling offers advantages to consumers as well as companies, while others see it only as a way for companies to impose on consumers the purchase of goods and services they do not require or could acquire elsewhere. In the following section, we will study the effects of tied selling, the arguments pro and con, and the advantages and disadvantages it represents for consumers.

4.2 USE AND EFFECTS OF TIE-IN SALES: JUSTIFICATIONS, PROS AND CONS

A company's decision to tie two products is likely motivated by its desire to prosper. It may be assumed that the company does not so decide because the practice will reduce its profits. Some, such as Belgium's Institut Économique Molinari, even opine that the practice may have real advantages for consumers and that in many cases, a company that decides to tie certain products does so in the best interests of consumers.[200]

[197] CONSUMER AGENCY. *New Tie-In Sale Legal Provisions as of 2 April 2009- Steps Forward and back for Consumers*, Finland, March 31, 2009, [Online], http://www.kuluttajavirasto.fi/Page/d1bc11a7-7371-4140-8681-eb744f0400c8.aspx?groupId=fc5a839d-cc80-41a9-ad40-65e6a50d16a8&announcementId=13978360-dc03-483f-ae5f-1ab6aed7bc23, (page consulted on August 5, 2009).
[198] See the Mazda Lévis website (in the province of Quebec): http://www.levismazda.com/main+fr+01_110+Levis_Mazda-Mazda3_2010.html?ModeleID=33, (page consulted on May 10, 2010).
[199] *Ibid.*
[200] INSTITUT ÉCONOMIQUE MOLINARI. *DG Competition Discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses – A Comment*, date unknown, [Online], http://ec.europa.eu/competition/antitrust/art82/024_en.pdf, (page consulted on May 10, 2010).

4.2.1 Tie-in Sales Pros and Cons for Companies

For the merchant, tied selling appears to offer nothing but advantages. He is thereby assured of penetrating the market of the tying product he forces the consumer to purchase. The economic theory of "leverage," mainly developed by the Chicago School, argues that tied selling enables the company holding a monopoly in a market (the tying product's market) to extend its monopolistic power to another market, that of the tied product.[201] To the extent that the merchant holds a dominant position on the tying product's market, tied selling also enables him to beat out his competitors for the tied product. Microsoft, by tying its Internet Explorer application software to its operating system, succeeded for several years in beating out its competitors – such as Netscape, which dominated the market in the mid-nineties, but whose slow agony began with Microsoft's integration of Internet Explorer into the Windows 95 operating system. Tied selling by a company occupying a dominant position is even likely to enable a tied product of lesser quality to acquire a greater market share than competing products. In addition, by tying a less desired product to one coveted by consumers, companies increase their sales and their sales figures as though demand had suddenly risen.

Companies justify tied selling in various ways. Some authors think it may be a way for merchants to control the quality of products and services that will in many cases be required with a tying product. Under circumstances where a merchant ties the purchase of his product to his after-sales service, for example, he ensures the quality of the service provided.[202] By tying its own ink cartridges to its printer, a company also protects his reputation, by controlling the quality of after-sales service, and assuring consumers that they can be confident about their product… while the company may denigrate competing products or services. The quality control argument is particularly used by automotive manufacturers that, to protect their automobiles' reputation, require dealers to sell only parts provided by the manufacturers themselves.[203]

Finally, merchants and manufacturers use tied selling to be able to determine the highest price they can require from major users of the tying product. The author Trebilcock gives the following example of this practice:

> "*When IBM sold adding machines that required punch cards, it required its customers to use IBM cards, which it supplied at a variable price in excess of marginal cost. The sale of cards was effectively a means of monitoring the intensity of a buyer's use. It is reasonable to assume that the more intense users of the product had the highest willingness to pay for the product.*"[204]

Merchants also thereby attempt to reduce transaction costs (for consumers as well as themselves), by tying certain complementary products. For example, shoes are sold with laces, and an MP3 player with earphones. As mentioned by Trebilcock, this type of sale tying complementary products together is indeed very efficient[205] for both merchant and consumer. Can we then claim that the practice of tying products from two distinct markets also benefits consumers?

[201] *Op. cit*., note 67, p. 473.
[202] *Op. cit*., note 67, pp. 464-465.
[203] *Ibid*.
[204] *Op. cit*., note 67, p. 466.
[205] *Op. cit*., note 67, p. 463.

4.2.2 Pros and Cons of Tie-in Sales for Consumers

While consumer rights associations have difficulty detecting the benefits of tied selling for consumers, Belgium's Institut Économique Molinari is of the opposite view, and maintains that the practice offers consumers several consumers: (1) they obtain what they want at lesser cost; (2) they purchase a ready-to-use product; (3) they benefit from a product that operates adequately, because the seller is often best positioned to ensure that complementary products allow the tying product to operate optimally.[206]

While at first sight these arguments may appear seductive, it is easily retorted that: (1) tied selling often forces the consumer to acquire, along with a good or service, a tied product he would not have purchased (or could have purchased at lesser cost) and whose addition increases the price of the target product; (2) the consumer may be forced to purchase a good that is ready for some use other than the desired use, or that includes uses he does not need, which entails costs for a useless tied product; (3) while we may, under certain circumstances, admit that the seller is best placed to ensure which complementary products will make the tying product operate optimally (if we consider, for example, the real technological constraints presented by certain products), we find it naïve to believe that merchants, profit-motivated as they are, would not in any case set aside compatible complementary products from competitors (or from companies with no business ties to those merchants), but would do so with the sole purpose of ensuring that the tying product operates optimally. It thus appears very difficult to accept the advantages claimed by the Institut Économique Molinari.

It seems clear – and this is why tied selling is regulated by competition laws – that through tied selling, companies try to exclude their competition from the market and thus limit consumers' choice of products provided by other merchants – a choice that might prove more advantageous or satisfying.

Consumers' obligation, when purchasing a tying product, to acquire something he does not want, or for which he will lose, though the tie-in sale, any control over price, features or quality, does not appear to benefit consumers in any way. The tied product's inclusion without a clear indication of how much is thereby added to the total price also does not seem to benefit the consumer: how can he, under those conditions, benefit from the advantages of competition and compare the prices of products – particularly of the tying product or the tied one?

If tied selling truly were in consumers' interest, we think this practice would be transparently represented by merchants, who would thereby see an excellent sales pitch, a benefit in addition to those of tied selling. But in reality, the Canadian consumer purchases goods or services tied without his knowledge or following erroneous information provided by merchants or manufacturers, with no indication of the surcharge entailed by the tied product. In the best of cases, such transparency would practically end tie-in sales, since merchants would thus be offering to tie products, by presenting to the consumer the benefits he would thereby obtain.

Rather than benefiting consumers, tied selling reinforces the imbalance between consumer and merchant, since it makes the former even more vulnerable by forcing him, to have access to the good or service he wants, to obtain a good or service he does not want – and without telling him the additional cost entailed by that addition. We observe the very real nature of that vulnerability in the practices of many merchants in jurisdictions where the law requires them to reimburse consumers for the amounts represented by undesired tied products: in France, a consumer who

[206] *Op. cit.* note 206, pp. 1-3.

wants to be reimbursed for software pre-installed in the computer he purchases must return the computer to the manufacturer and wait at times several weeks for the undesired software and operating system to be removed and the computer to be returned to him.

It therefore appears to us that the disadvantages of tied selling far outweigh the advantages for consumers.

4.3 LEGAL ISSUES WITH REGARD TO TIE-IN SALES

While information obligations are imposed on merchants by a good number of Canadian consumer protection laws, merchants engaging in tied selling appear to take those obligations lightly, when they do not ignore them altogether. For example, merchants are required to inform a consumer of contract terms before he signs. Consumer protection laws impose on merchants a panoply of obligations and prohibitions that are neglected during tie-in sales: obligation to display unit prices, ban on false representations or misleading advertising.

Given that the provisions of consumer protection laws are more or less similar from one Canadian province to another, and that we will focus on provisions generally applying to all consumer contracts, our analysis will pertain to the legal effects of tied selling, on the basis of the legal provisions of Quebec's *Consumer Protection Act.*

One of the essential elements of contract formation, in civil and common law alike, is the parties' consent.[207] For there to be a contract, the parties' consent must be free and informed.[208] It is difficult to conceive that a consumer give his free and informed consent if, when purchasing a product, he does not know that he is being forced to purchase another product (or that he is being forced to so although he does not want to acquire the tied product), without being advised that the price of the tying product he is purchasing is thereby increased, or by how much. We can therefore question whether tie-in sales even constitute validly formed contracts.

The *Consumer Protection Act* (CPA) requires the merchant to display clearly and visibly the sale price of each product sold in his establishment.[209] During the tie-in sale of computers pre-equipped with an operating system and application software, the price of those tied products is of course not indicated – the only price displayed is the "all included" price of the computer with the software. The consumer thus does not know the price he is paying for the operating system and application software he may well not desire or plan to use. Because the consent necessary to contract formation – at least regarding essential considerations – must be free and informed, and because price is certainly one of those essential considerations, tied selling, in addition to contravening the information obligations binding the merchant, may therefore be considered a practice that hinders the very conclusion of the contract.

As for online sales, CPA provisions on distance contracts require the merchant to give the consumer, before the contract is concluded, certain important items of information[210]. Among the latter is "a detailed description of goods or services that are to be the object of the contract,

[207] Civil Code of Québec, sec. 1386.
[208] Sec. 1399, subsection 1 C.C.Q. Whereas civil law refers to "free and informed consent," the common law uses the term "consensus ad idem."
[209] Sec. 223, *Consumer Protection Act*, ch. P-40.1.
[210] Sec. 54.4, *Consumer Protection Act*, ch. P-40.1.

including characteristics and technical specifications [and] an itemized list of the prices of the goods or services that are to be the object of the contract, including associated costs charged to the consumer and any additional charges payable under an Act."[211] Failure to inform the consumer that the object of the contract includes one or more tied products, and failure to mention their price, thus appears to contravene this information obligation.
The absence of such information, either during a distance sale or during an in-store sale, also suggests that the merchant is violating the provisions prohibiting him from omitting an important fact during a representation.[212]

It should be noted that software pre-installed in a computer requires the consumer to accept a licence agreement before using such software, and that the latter is unusable if he refuses that agreement. Should not this fact and the ability, if he refuses the licence agreement, of being reimbursed for those tied products be considered important, if not essential?

This begs the question: "What can the consumer do?" If he accepts the tie-in sale, it is because he wants the main product. Despite the contract's questionable validity, he certainly does not want to cancel it. The lack of caselaw makes it delicate to presume what a court might decide if a legal remedy is sought.

We may briefly examine examples of legal provisions of general application that a Quebec consumer could invoke before the courts if a tie-in sale is forced on him. First, the merchant claiming that computers pre-equipped with operating systems such as Windows is implying that the practice is widespread and that the use of Windows is the standard in the computer industry; section 221(c) of the *Consumer Protection Act* (CPA) prohibits any false representation (statement, behaviour or omission) on a so-called standard.

During the sale of certain tied products, particularly in the computer field, merchants often claim that products are manufactured "as is" and that tied products cannot be dissociated; those two representations contravene section 222(d) of the *Consumer Protection Act*, which bans merchants from falsely claiming that a product has a determined method of manufacture.

In addition to the merchant's obligation to indicate the price of each product, section 225 of the CPA prohibits him from falsely claiming that a price is advantageous. In the case of tie-in sales of computers pre-equipped with operating systems and application software included in the price demanded for a computer, for example, the merchant, by not disclosing the price of the operating system and application software included in the price demanded for the computer, forces the consumer to believe that the computer's price is advantageous because of such software being included. Without being informed that he is in reality paying for the software, the consumer is led to believe that he is benefiting from its inclusion, whereas he is paying for it.

Given that the consumer did not ask the tied product to be sold to him – the operating system and application software, in the example that concerns us here –, the merchant is also violating section 230(a) of the CPA by requiring payment for a good or service that the consumer has not requested.[213]

Finally, we think that merchants engaging in tie-in sales also violate provisions to ban misleading or deceptive advertising. For example, section 41 of Quebec's *Consumer Protection*

[211] *Ibid*, paragraphs d and e.
[212] Sec. 228, *Consumer Protection Act*, ch. P-40.1.
[213] Sec. 230(a), *Consumer Protection Act*, ch. P-40.1.

Act states that “The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer. The statements or advertisements are binding on that merchant or that manufacturer.” In many cases where tied selling has taken place, the advertising does not indicate the existence of tied products. That fact is thus often concealed.

As mentioned above, all those apparent violations of the law have not, to our knowledge, been subjected to caselaw interpretation. And yet, the simple fact that tie-in sales appear so contrary to the spirit and letter of the law indicates, in our view, the seriousness of the issue.

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Tied selling is a widespread practice in many consumer contracts. Because this practice likely affects competition, the *Competition Act,* the only Canadian law that defines tied selling – very fully, in fact –, can be invoked to attack such a practice. As we have seen, it can prove very difficult to sue a merchant, given the necessary elements of proof for the Competition Tribunal to grant leave. But this remedy is not accessible to consumers, because the application for leave must allege the damage caused to the applicant's company.

However, only in that law is there a specific provision of general application to tie-in sales.

Only in cases of tied selling where consumers have complained in great numbers are federal and provincial legislatures deigned to intervene: this is notably the case in the field of financial services. As for provincial provisions regulating tied selling, they are very rare and apply, depending on the provisions and their laws, only to certain consumer contracts: credit agreements tied with insurance contracts, contracts of lease involving sequential performance, funeral service contracts and payday loan agreements.

In addition to being prevalent, the practice is thus not subject in Canada to specific regulation or prohibition of general application. Some measures provided in provincial consumer protection laws could likely be invoked by a consumer challenging a tie-in sale: the obligation to acquire an additional good or service or to acquire the one chosen by the merchant; the price paid for the tying product, which has likely increased that of the tied products; etc. For example, some measures pertain to the display of prices and to the ban on false representation. A consumer could also invoke general provisions with regard to good faith, or even to contract formation rules. It is difficult to presume how the courts would handle applications based on such arguments in matters of tied selling.

In fact, according to provincial and other consumer protection organizations, tied selling is not among the motives for Canadian consumers' complaints. Is this because Canadian consumers are used to it and find it to their advantage? Indeed, some authors state that tied selling offers consumers indisputable advantages: a consumer purchases a product ready for use, he benefits from a product that operates adequately, since the merchant ensures that the complementary products result in optimum performance, and finally, the consumer benefits from the purchase of a desired good at lower cost. As we have seen, lauding all those so-called advantages only reveals a great deal of naivety.

Moreover, according to the present research it appears that those advantages are not all real for the consumer, who does not always obtain the benefit of having a product ready for use. In fact, a product ready for use would rather correspond to the use intended by the consumer, and not to the use that the merchant supposes to suit the consumer. In the example of computers sold with pre-installed software, what if the consumer does not want that software and must uninstall it afterward and add the software he wants? In addition, the product's adequate operation also depends on the use intended by the consumer. Again, if some other application software or operating system better suits a consumer's needs than those already installed in the computer, he will have to uninstall the application software and operating system whose sale is tied to the

computer, and then he will have to add the desired software. Finally, it is not true that the consumer obtains at lower cost the product he wants. First, it is difficult for Canadian consumers to know the price of goods tied to the products they want to acquire, since the prices of the various products are not displayed. And how is it assumed that the price is really more advantageous to the consumer obliged to pay for tied products he does not necessarily want?

If Canadian consumers do not complain openly about tie-in sales, could it simply be because the practice is not banned, so that they assume it is not reprehensible? It is interesting to note that, in jurisdictions where tied selling is prohibited, consumers challenge contracts and movements are organized to end certain tied selling practices.

For example, France and Belgium have adopted specific provisions for tied selling and related practices, and consumers there unhesitatingly initiate legal proceedings to ensure the observance of those provisions, to benefit from the protections therein, or to require that merchants reimburse amounts estimated to have been paid in excess because of a tie-in sale.

Given the proliferation of this practice, and the uncertainty of a consumer who would want to challenge it, provincial legislatures concerned with protecting consumers should consider, as do many foreign jurisdictions, adopting specific provisions for tied selling. Banning this practice would also promote competition that would in turn benefit consumers.

Provisions regulating or even banning tied selling that would be contained in consumer protection legislation, and would be written more clearly than, for example, competition laws, would remove the inconveniences imposed on consumers by this practice and, as the case may be, would facilitate legal remedies, since this type of law would give them access to courts better suited to consumer disputes than the Competition Tribunal can be.

5.1.1 Actions to Be Taken

Canadian provinces and territories should therefore, we think, adopt provisions of general application that specifically govern tied selling in consumer contracts. Such a measure should ideally indicate clearly that tied selling is a banned practice under all circumstances. It will also obviously be necessary for government entities charged with applying consumer protection laws to take necessary measures to inform consumers of the existence of this new protective measure.

To define this newly banned practice, provincial legislatures might be inspired by the definition in the *Competition Act* or in French or Belgian laws. As do foreign legislations, the law banning tie-in sales as an essential condition of a contract should establish the conditions under which a merchant may offer to combine certain sales (displaying the price of each item offered, making each of those items available separately in the store, etc.). It would also be reasonable to provide that any tie-in sale made by a merchant is unenforceable against consumers and to establish, in order to lighten the consumer's burden of proof, the factual circumstances leading to an assumption of tied selling.

Provisions banning tie-in sales should ideally ensure that all the ways of tying sales are covered (for example, technological barriers preventing consumers from using competitors' accessories). They should also specify, after the French model, the circumstances under which the sale of certain products would not constitute tied selling, in order to prevent absurd results (such as shoes with laces, or packaging) or prohibitions of legitimate practices (such as usually selling

matches or chocolates by the batch). In the event that the law contains certain exceptions to the ban on tied selling, regulations should of course still ensure optimum consumer protection.

Because we think it essential that consumers be better protected against tied selling, and that an attempt should be made to establish some balance of power in this regard between merchants and consumers, we find that legislation is necessary to regulate tied selling adequately. To that end, we are making the following recommendations.

5.2 RECOMMENDATIONS

- Whereas tied selling is prevalent in many consumer sectors;
- Whereas general regulation of tied selling in Canada only covers hindrances to competition;
- Whereas such regulation proves deficient with regard to consumer contracts and that the remedies provided are not open to consumers;
- Whereas tied selling in consumer contracts is specifically regulated by provincial legislatures only in a few sectors;
- Whereas the legislatures of several provinces and the federal legislature have decided to intervene in certain problematic areas such as financial products and services, credit agreements, payday loans and funeral services;
- Whereas existing legal provisions do not allow consumers to directly institute proceedings against a tied selling practice, except in sectors specifically regulated;
- Whereas tied selling involves more disadvantages than actual advantages for consumers;
- Whereas the consumer should be able to choose not only the goods and services he wants to purchase, but also the merchant with whom he wants to do business, for each of the products he wants to acquire;
- Whereas tied selling tends to increase the contractual imbalance between merchant and consumer;
- Whereas legislators have a duty to intervene to establish a balance between merchant and consumer with regard to reprehensible practices;
- Whereas tied selling is reprehensible in many ways;
- Whereas the absence of clear regulation of tied selling likely leads consumers to believe that this practice is not reprehensible;
- Whereas foreign jurisdictions where a ban on tied selling has been provided in consumer protection laws allow consumers to assert their rights before merchants when a tie-in sale is proposed and to use available remedies effectively;
- Whereas the ban on tied selling is likely to promote competition and thus to benefit consumers as well as companies;

Union des consommateurs recommends the following to provincial legislatures:

1. To adopt legislation specifically regulating tie-in sales in all consumer sectors, by prohibiting it under all circumstances and declaring it unenforceable against consumers;
2. That measures banning tied selling be found in consumer protection laws to facilitate the application of those measures;
3. To require that merchants establish simple, quick and effective systems to reimburse consumers for amounts they have paid in tie-in sales imposed on them;
4. To specify in consumer protection laws that tied selling of both goods and services is prohibited.

- Whereas the absence of coercion distinguishes batch selling and service bundles from tie-in sales;
- Whereas batch selling and service bundles may benefit consumers;
- Whereas consumers have a right to be correctly informed of a bundle's composition and of the advantages of acquiring such a bundle;

Union des consommateurs recommends the following to provincial legislatures, as part of the regulation of tied selling:

5. To provide in consumer protection laws a definition of tied selling and model that definition not only on the *Competition Act*, but also on French and Belgian provisions regulating tied selling;
6. To allow batch selling only if a batch's composition and the price of each product comprising the batch are indicated, and if a consumer can acquire separately from the same merchant the products comprising the lot and if he is so informed adequately.

- Whereas tied selling in certain sectors of activity is specifically regulated;

7. Union des consommateurs recommends that the federal government and provincial governments harmonize the regulation of specific sectors of activity with provisions of general application regarding tied selling, in order to ensure legislative coherence.

MEDIAGRAPHY

LAWS AND REGULATIONS

Europe
- *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.*

France
- *Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix.*
- *Code de la consommation.*
- *Code de commerce.*

Belgium
- *Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur.*

United States
- *Bank Holding Act of 1956* 12 U.S.C.
- *Clayton Antitrust Act,* 15 U.S.C. §§ 12–27.
- *Federal Trade Commission Act,* 15 U.S.C. §§ 41-58.
- *Sherman Antitrust Act*, 15 U.S.C. §§ 1-7.

  California
  - *Cartwright Act*, Cal. Bus. & Prof. Code §§ 16720 and 16726

  Arizona
  - *A.R.S*. § 44-1402

  Florida
  - *Florida Antitrust Act of 1980*, § 542.18, Florida Statutes

  Delaware
  - *6 Del*. C. § 2103

  Indiana
  - *IC 24-1-2-1*.

Canada
- *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9
- *Bank Act*, S.C. 1991, c. 46.
- *Competition Act*, R.S., 1985, ch. C-34.
- *The Constitutional Act, 1867* (U.K.), 30 & 31 Vict., c. 3.
- *Trust and Loan Companies Act*, S.C. 1991, c. 45.
- *Competition Tribunal Rules*, SOR/2008-141.

  Quebec
  - *Civil Code of Québec*, L.Q. 1991. C. 64.
  - *Act respecting the distribution of financial products and services*, R.S.Q., c. D-9.2.
  - *Consumer Protection Act*, R.S.Q., c. P-40.1.
  - *Regulation respecting the application of the Consumer Protection Act*, R.Q. 1981, c. P-40.1, r 1.

Ontario
- *Consumer Protection Act, 2002*, S.O. 2002, c.30, ann. A.
- *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, c. 33.
- *Ontario Regulation 98/09*

British Columbia
- *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.
- *Payday Loans Regulation*, B.C. Reg. 57/2009.

Alberta
- *Payday Loans Regulations*, Alberta Reg. 157/2009, section 12.

Manitoba
- *Consumer Protection Act*, C.C.S.M. c. 200, section 154.2.

Saskatchewan
- *The Payday Loans Act*, S.S. 2007, section 29 (assented on May 17th 2007 and awaiting royal proclamation to come into effect).

Nova Scotia
- *Bill 87: An Act to Amend the Consumer Protection Act*, (enacted November 2006, not yet proclaimed); New Brunswick: *Bill 4: An Act Respecting Payday Loans*, section 37.33 (enacted April 2008, not yet proclaimed).

CASELAW

Europe
- *Order VTB-VAB NV/Total Belgium NV and Galatea BVBA/Sanoma Magazines Belgium NV* (CJCE, April 23, 2009).
- *Commission v. Microsoft* (CFICJEC, September 17, 2007).

France
- *Arrêt Cresp* (CC Civ, June 5, 2008) Appeal rejected.
- *Arrêt du 14 mai 2009*, RG n°09/03660, C.A. de Paris.
- *Baratte c. MSI* (Annecy, January 18, 2010).
- *Cresp c. Asus*, Rennes, (July 6, 2006).
- *Hengy c. Dell* (August 2008).
- *Magnien c. Asus (*Lorient, August 27, 2009).
- *Magnien c. Asus* (Lorient, November 12, 2009).
- *Proc. c. Dell* (TGI-Montpellier, June 17, 2008).
- *Proc. c. Dell* (TGI-Montpellier, May 2009) Appeal rejected.
- *T. c. MSI* (Metz, November 12, 2009).
- *UFC c. Auchan* (TGI-Bobigny, May 15, 2009).
- *UFC c. Darty* (TGI-Paris, June 24, 2008) and order (July 18, 2008).
- *W. c. Acer* (Gonesse, November 19, 2009).

Belgium
- Comm. Bruxelles, Prés., January 6, 1989, Ann. Prat. Comm., 1989.
- Comm. Bruxelles, Prés., February 15, 1993, R.D.C.

- Comm. Hasselt, Prés., January 20, 1992, Credoc, 07/93.
- Comm. Mons., Prés., Feb. 10, 1995, Credoc, 05/95.
- Prés. Comm. Mons. Feb. 10, 1995, Ann. Prat. Comm., 1995, 273.
- Prés. Comm. Termonde, Sept. 20, 2000, Ann. Prat. Comm. and Conc., 2000.

United States

- *Hackett v. Metropolitan General Hospital* (1985) 465 So. 2d 1246, 1254 (Florida)
- *International Salt Co. v. United States*, 332 U.S. 392, 3332 U.S. 396 (1947).
- *Jefferson Parish Hospital District v. Hyde*, 466 U.S. 2.
- *Mobile Magic*, 96 Cal. App. 3d at 10 (California)
- *Siegel v. Chicken Delight Inc*., 448F. 2d 43.
- *Somers vs. Apple Inc.*, (D.C. of California 2007): http://docs.justia.com/cases/federal/district-courts/california/candce/5:2007cv06507/198939/1/
- *United States c. Lowe's Inc.*371 U.S. 38 (S.Ct. 1962).
- *United States v. Microsoft Corp.*, 253 F. 3d 34 (U.S. App. D.C. 2001).
- *United States of America v. Microsoft Corporation*, 87 F. Supp. 2d 30 (D.D.C. 2000).
- *Wedgewood Investment Corp. v. International Harvester Company* (1979) 126 Ariz. 157, 160 (Arizona).

Canada

- *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited*, CT 2003-009.
- *Canada v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.).
- *Canada (Director of Investigation and Research v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).
- *Director of Investigation and Research v. BBM Measurement Bureau*, (1981), 60 C.P.R. (2d) 26 (R.T.P.C.).
- *Director of Investigation and Research v. Bombardier Ltd.* (1980), 53, C.P.R. (2d) 55.
- *General Motors of Canada Ltd v. City National Leasing*, [1989] 1 R.C.S. 641.
- *Marc Lefrançois v. Microsoft Corporation*., (September 5, 2007), Montreal, 200-06- 000087-075, (C.S.).
- *National Capital News Canada v. Canada (Speaker of House of Commons)*, [2002] C.C.T.D. No. 38, 23 C.P.R. (4th) 77 (Comp. Trib.), [2004] Federal Court No. 83.
- *Pro-Sys Consultant Ltd. v. Microsoft Corp.*, 2010 BCSC 2858 (CanLII).
- *Steven Olah v. Her Majesty the Queen* as represented by the Correctional services of Canada, 2008 Comp. Trib. 29.
- *Symbol Techonologies Canada ULC v. Barcode Systems Inc.*, [2004] F.C.J. No. 1657, 2004 FCA 339.

LITERATURE AND MISC.

ADDY, George N. "The Canadian Competition Act as a model of flexible, forward-looking competition law," on the website of Competition Bureau Canada. Speaking notes for the Director of Investigation and Research, October 5, 1993.

BROUSSEAU-POULIOT, Vincent. "Un premier recours collectif contre Microsoft au Canada," in *La Presse*, March 10, 2010, Montreal, Canada: http://lapresseaffaires.cyberpresse.ca/economie/technologie/201003/09/01-4258939-un-premier-recours-collectif-contre-microsoft-au-canada.php

CALAIS-AULOY Jean and STEINMETZ Frank. *Droit de la consommation*, 6th ed., Paris, France.
CAMPBELL A. Neil et al. *Non-price Vertical Restraints*, Insight, May 11, 1993: http://www.mcmillan.ca/Upload/Publication/Vertical%20Non%20Price%20Restraints_Rowley_Campbell_0593.pdf.

CANADA, Department of Finance, *1997 Review of Financial Sector Legislation: Proposals for Change* (June 1996): http://publications.gc.ca/collections/Collection/F2-158-1996E.pdf

CARRON Christine A. and Guillaume Beaupré. "Les consommateurs- mieux protégés que jamais," in *Développements récents en droit bancaire,* Barreau du Québec, 2003, Les Éditions Yvon Blais, Cowansville, Canada.

FACEY A. Brian and ASSAF Dany H. *Competition and Antitrust Law: Canada and the United States*, LexisNexis Buttersworth, 3rd edition, 2006.

FERRY-MACCARIO, Nicole et al. *Gestion de l'entreprise*, Paris, France, Pearson Education, 2006.

GARDE, Amandine and HAVARON, Michael. *Pratiques commerciales déloyales : Naissance d'un concept européen*. In Petites Affriches Placard 21/06. No. pa 174704.sgm-5, p. 1: http://www.milbank.com/NR/rdonlyres/518A84CE-3BF3-470C-8CCD-68AB71A44CAF/0/060714_haravon.pdf

GOLDMAN, Calvin S. et al. "*A Canadian Perspective on Tied Selling and Exclusive Dealing*," as part of the 12th EUI Competition Law and Policy Workshop, Toronto, Canada.
TASK FORCE ON THE FUTURE OF THE CANADIAN FINANCIAL SERVICES SECTOR, *Change, Challenge, Opportunity: Report of the Task Force*, September 1998.

INSTITUT ÉCONOMIQUE MOLINARI. *DG Competition Discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses – A Comment*, date unknown: http://ec.europa.eu/competition/antitrust/art82/024_en.pdf

KAISER, G., *Reviewable Marketing Practices: The New Jurisdiction of the Restrictive Trade Practices Commission.*

KERTON, Robert. *Consumers in the Financial Services Sector, Vol. 3: Principles, Practice and Policy – the Canadian Experience*, research papers prepared for the Task Force on the Future of the Canadian Financial Services Sector, September 1998, p. 9. [Online] http://publications.gc.ca/collections/Collection/F21-6-1998-8-1E.pdf (page consulted on March 31, 2010)

L'HEUREUX, Nicole. *Droit de la consommation*, Cowansville, Quebec, Les Éditions Yvon Blais, 5th edition, 2000.

LEATHERDALE, Linda. "Taking on the Banks Over Tied Selling," in *The Toronto Sun*, March 6, 1998.

LEATHERDALE Linda. "Bank Customers Fit to be Tied," in *The Toronto Star*, March 22, 1998.

MASSE, Claude. *Loi sur la protection du consommateur : Analyse et commentaires, Cowansville*, Canada, les Éditions Yvon Blais, 1999.

MINISTRY OF CONSUMER AND BUSINESS SERVICES, *Draft Regulation under the Funeral, Burial and Cremation Services Act, 2002,* Ontario, Canada, Queen's Printer for Ontario, 2004: http://www.mgs.gov.on.ca/stdprodconsume/groups/content/@mgs/@aboutmin/documents/resourcelist/053007.pdf

OGILVY RENAULT, *Le tribunal de la Concurrence accepte d'entendre deux demandes présentées par des parties privées*, Montreal, Canada, March 30, 2004: http://www.ogilvyrenault.com/fr/centredeResources_1394.htm

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Glossary of Statistical Terms.*

OSBORNE, W. Michael and WILSON, Donna N. *Competition Tribunal Cases: A Two Year Review*, in Recent Developments in Civil Matters under Canadian Competition Law, Spring Forum 2009, 2009]: http://www.thelitigator.ca/archive/agm_Competition-Tribunal-2-Year-Review_2009.pdf

LIBERAL PARTY OF CANADA, *Report of the Caucus Task Force on Financial Institutions (1998)*, ch. 12: http://www.telegdi.org/Task_Force/recommendations.htm

RAYMOND, Guy. *Incidences de la loi MURCEF (Loi no. 2001-1168, 11 déc. 2001) sur le marketing des établissements de crédit*, In *Apprendre à douter : Questions de droit, questions sur le droit. Études offertes à Claude Lombois*, Limoges, France, PULIM, 2004.

ROACH, Kent and TREBILCOCK, Michael. *Private Enforcement of Competition Laws*, Osgood Hall Law Journal, Vol. 34, January 1, 1996.

STIBBE BRUXELLES. *La cour de justice sonne le glas de l'interdiction de la vente conjointe*. In *Bulletin d'information- pratiques de commerce et protection du consommateur*, 23 avril 2009, No. 2009/01 : http://www.stibbe.be/assets/publications/newsletters/bulletin%20d%27information%20pratiques%20du%20commerce%20et%20protection%20des%20consommateurs_2009_01_website.htm

STIKEMAN ELLIOT, *Competition Act & Commentary*, Toronto, LexisNexis, 2008.

TREBILCOCK, Michael et al. *The Law and Economics of Canadian Competition Policy*, Toronto, Canada, University of Toronto Press, 2003.

WHITTINGTON, Les. “Banks Accused of Coercive Selling,” in *The Toronto Star*, March 12, 1998.

WEBSITES

APPLEIPHONELAWSUITE.COM, *First Amended Complaint for Damages and Injunctive Relief* https://www.appleiphonelawsuit.com/uploads/2007-11-02__1st_Amended_Complaint_Endorsed.pdf

ASSOCIATION FRANCOPHONE DES UTILISATTEURS DE LOGIELS LIBRES http://racketiciel.info/documentation/droit/#jugements-proximite-et-amiable

BÉDARD, Jean-François: http://francoisbedard.ca/2010/01/06/la-vente-liee-en-informatique/
Canadian Payday Loan Association, *Press Releases for 2009* http://www.cpla-acps.ca/english/mediareleases.php

CHIN, Andrews, *A case of insecure browsing - Exploring missed opportunities in the Microsoft antitrust suit*, September 30, 2004, in Newsobserver.com http://www.unclaw.com/chin/scholarship/nando.pdf

CONSUMER AGENCY. *New Tie-In Sale Legal Provisions as of 2 April 2009- Steps Forward and back for Consumers*, Finland, March 31, 2009 http://www.kuluttajavirasto.fi/Page/d1bc11a7-7371-4140-8681-eb744f0400c8.aspx?groupId=fc5a839d-cc80-41a9-ad40-65e6a50d16a8&announcementId=13978360-dc03-483f-ae5f-1ab6aed7bc23

DUMOUT, Estelle, *Après l’Europe, la Corée du Sud condamne Microsoft pour abus de position dominante*, on the website of ZDNet France, France, December 7, 2005 http://www.zdnet.fr/actualites/informatique/0,39040745,39293478,00.htm

DUMOUT, Estelle, *Microsoft fait appel de sa condamnation en Corée*, on the website of ZDNet France, France, March 27, 2006 http://www.zdnet.fr/actualites/informatique/0,39040745,39334258,00.htm

EDGAR-ONLINE.COM http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=7001513-207283-228375&SessionID=SYs-HjneTZeIhX7

EUROPEAN DIGITAL RIGHTS. *Sony Loses DRM Case in France*, on the website European Digital Rights, (taken from: EDRI-gram: No. 5.1: January 17, 2007) http://www.edri.org/edrigram/number5.1/drm_sonyfr

FERRAN, Benjamin. *Détail des prix :* “*Apple ne doit faire exception*,” June 25, 2008 http://www.macgeneration.com/news/voir/130764/detail-des-prix-apple-ne-doit-pas-faire-exception

JARILLON PIERRE. *Un recours collectif en Italie contre la vente liée des systèmes d’exploitation*, on the Linux France website, January 6, 2010 http://linuxfr.org/2010/01/06/26320.html.

LEBORNE Maxime. *La loi belge*, June 2004
http://detaxe.be/doku.php?id=aspects_juridiques:start

MAZDA LÉVIS (Quebec)
http://www.levismazda.com/main+fr+01_110+Levis_Mazda-Mazda3_2010.html?ModeleID=33

MICROSOFT. *Consumer Class Action Settlement Information*, on the Microsoft website, United States, May 5, 2007
http://www.microsoft.com/About/Legal/EN/US/ConsumerSettlements/Default.aspx#head1

MCCULLAGH, Declan, *Microsoft Judge Ripped in Court*, February 28, 2001
http://www.wired.com/politics/law/news/2001/02/42071

OLSEN, Kelly. *South Korea: South Korea Court Rejects Microsoft's request for Stay of Antitrust Sanctions*, July 5, 2006. Available on the Corpwatch website
http://www.corpwatch.org/article.php?id=13848

ROBIN, Antoine. *La fin des ventes liées en Europe?*, on the website www.indextel.net, France, March 11, 2009
http://www.indexel.net/actualites/la-fin-des-ventes-liees-en-europe-2845.html

SOUFRON, Jean-Baptiste. *HP condamné à rembourser un Microsoft Windows en Italie*, on the ZDnet.fr website, France, October 29, 2007
http://www.zdnet.fr/blogs/ils-ont-blogue/hp-condamne-a-rembourser-un-microsoft-windows-en-italie-39601464.htm

TAILLANDIER, Guillaume and SOFFER, Raphael, *La Cour d'appel de Paris sonne le glas de l'interdiction de la vente liée*, on the website of Hammonds Hausman Avocats, Paris, France, August 25, 2009, (taken from *La Revue*)
http://larevue.hammonds.fr/La-Cour-d-appel-de-Paris-sonne-le-glas-de-l-interdiction-de-la-vente-liee_a1064.html

THEODORE, Rae. *Class Action Denied in Apple Music Monopoly Case*, August 12, 2009
http://news.findlaw.com/andrews/bf/atr/20090812/20090812_somers.html

COMPETITION TRIBUNAL. *Competition Tribunal: Frequently Asked Questions*. Ottawa, Canada, December 14, 2008
http://www.ct-tc.gc.ca/Procedures/FAQS-fra.asp#q10

ANNEX 1: QUESTIONNAIRE SENT TO CONSUMER ASSOCIATIONS

Questionnaire – Tied Selling 2009-2010
Organizations and Associations

Presentation of the organization:

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (Associations coopératives d'économie familiale), l'Association des consommateurs pour la qualité dans la construction (ACQC), as well as individual members. Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

A. Presentation of the project:

Our research project, as indicated by its title, *Tie-in Sales: Consumer Issues*, essentially pertains to the identification of consumer issues raised by tie-in sales. In our research, we will assess the legality and the effects of tie-in sales on consumer rights in Canada, and will attempt to clearly determine the remedies available to consumers confronted with tied selling practices. As part of our research, we will also attempt to identify the various commercial practices related to tied selling. To that end, we are soliciting consumer rights organizations and other associations likely to be interested in the issue.

In Canada, section 77(1) of the *Competition Act* defines tied selling as any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to: (i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee. Or any practice whereby a supplier of a product induces a customer to meet one of those conditions, by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet one of those conditions. However, no provincial consumer protection law defines this practice of tied selling.

C. The questionnaire:

(i) Identification of your organization:
Name:
Address:
Person to contact:
Occupation:
E-mail:

(ii) In the last five (5) years, have you received complaints from consumers about commercial practices involving tied selling? If so, please indicate the number of complaints received.

(iii) Please describe briefly the type of complaints you have received about tied selling, by indicating the consumer sector involved (e.g., telecommunications, furniture sales, vehicle purchase or leasing, purchase of computer products, computers/operating system and software, payday loans, etc.).

(iv) Have you yourself detected tied selling practices? If so, please describe them briefly.

(v) What measures and actions did take after detecting or learning about commercial practices involving tied selling?

(iv) What advice do you give consumers who complain about tied selling practices (possible actions, applicable law, available remedies, etc.)?

(v) In your view, do existing measures protect consumers adequately against the effects of tie-in selling?

(vi) Other comments:

Thank you for taking the time to fill out this questionnaire.
Please return it to Yannick Labelle, Consumer Protection and Commercial Practices Analyst, at the following address: labelle@consommateur.qc.ca by **March 21, 2010** at the latest.

ANNEX 2: CANADIAN LEGISLATION

CANADIAN (FEDERAL) LEGISLATION WITH RESPECT TO TIE-IN SALES		
CANADA (FEDERAL JURISDICTION)		
ACT	**SECTION**	**CONTENT OF LEGISLATION**
Competition Act, RSC 1985, c. C-34	Sec. 1.1	**1.1** The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.
	Sec. 36	Recovery of damages **36.** (1) Any person who has suffered loss or damage as a result of *a*) conduct that is contrary to any provision of Part VI, or *b*) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section. Proof of prior proceedings (2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action. Jurisdiction of Federal Court (3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction. Limitation (4) No action may be brought under subsection (1), *a*) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from (i) a day on which the conduct was engaged in, or (ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the latter ; and *b*) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

CANADIAN (FEDERAL) LEGISLATION WITH RESPECT TO TIE-IN SALES		
CANADA (FEDERAL JURISDICTION)		
ACT	**SECTION**	**CONTENT OF LEGISLATION**
		(i) a day on which the order of the Tribunal or court was contravened, or (ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the latter.
	Sec. 77(1)	**77.** (1) For the purposes of this section, "exclusive dealing" « exclusivité » *a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to (i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and *b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs; "market restriction" « limitation du marché » *"*market restriction*"* means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; "tie-in sales" « ventes liées » *a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to (i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and *b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs. Exclusive dealing and tied selling (2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to *a*) impede entry into or expansion of a firm in a market, *b*) impede introduction of a product into or expansion of sales of a product in a market, or *c*) have any other exclusionary effect in a market,

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CANADA (FEDERAL JURISDICTION)		
ACT	**SECTION**	**CONTENT OF LEGISLATION**
		with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market. Market restriction (3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product. Damage awards (3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7). Where no order to be made and limitation on application of order (4) The Tribunal shall not make an order under this section where, in its opinion (*a*) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market, (*b*) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or (*c*) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose, and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated. Where company, partnership or sole proprietorship affiliated (5) For the purposes of subsection (4), *a*) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person; (*b*) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other; (*c*) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and (*d*) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement

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ACT	**SECTION**	**CONTENT OF LEGISLATION**
		between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if (i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and (ii) no one product dominates the business. When persons deemed to be affiliated (6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated. Inferences (7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
	Sec. 103.1	**103.1** (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section. Notice (2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought. Certification by Commissioner (3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought *a*) is the subject of an inquiry by the Commissioner; or *b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought. Application discontinued (4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

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ACT	**SECTION**	**CONTENT OF LEGISLATION**
		Notice by Tribunal (5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave. Representations (6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2). Granting leave to make application under section 75 or 77 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section. Granting leave to make application under section 76 (7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section. Time and conditions for making application (8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased. Decision (9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2). Limitation (10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77. Inferences (11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it. Inquiry by Commissioner (12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the

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ACT	**SECTION**	**CONTENT OF LEGISLATION**
		Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.
	Sec. 124(2)	**124.2** (1) The Commissioner and a person who is the subject of an inquiry under section 10 may by agreement refer to the Tribunal for determination any question of law, mixed law and fact, jurisdiction, practice or procedure, in relation to the application or interpretation of Part VII.1 or VIII, whether or not an application has been made under Part VII.1 or VIII. Reference by Commissioner (2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX. Reference by agreement of parties to a private action (3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77 may by agreement refer to the Tribunal for determination any question of law, or mixed law and fact, in relation to the application or interpretation of Part VIII, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings. Reference procedure (4) The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.
Competition Tribunal Act, RSC 1985, c. 19	Sec. 8	**8.** (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act. Powers (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. Power to penalize (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.
Bank Act, S.C. 1991, c. 46	Sec. 459.1	Restriction on tied selling **459.1** (1) A bank shall not impose undue pressure on, or coerce, a person to obtain a product or service from a particular person, including the bank and any of its affiliates, as a condition for obtaining another product or service from the bank.

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CANADA (FEDERAL JURISDICTION)		
ACT	**SECTION**	**CONTENT OF LEGISLATION**
		Favourable bank product or service tied to other sale (2) For greater certainty, a bank may offer a product or service to a person on more favourable terms or conditions than the bank would otherwise offer, where the more favourable terms and conditions are offered on the condition that the person obtain another product or service from any particular person. Favourable other sale tied to bank product or service (3) For greater certainty, an affiliate of a bank may offer a product or service to a person on more favourable terms or conditions than the affiliate would otherwise offer, where the more favourable terms and conditions are offered on the condition that the person obtain another product or service from the bank. Bank approval (4) A bank may require that a product or service obtained by a borrower from a particular person as security for a loan from the bank meet with the bank's approval. That approval shall not be unreasonably withheld. Disclosure (4.1) A bank shall disclose the prohibition on coercive tied selling set out in subsection (1) in a statement in plain language that is clear and concise, displayed and available to customers and the public at all of its branches where products or services are offered in Canada, on all of its websites through which products or services are offered in Canada and at all prescribed points of service in Canada. Regulations (4.2) The Governor in Council may make regulations for the purposes of subsection (4.1) defining *"point of service"* and prescribing points of service. Regulations (5) The Governor in Council may make regulations (*a*) specifying types of conduct or transactions that shall be considered undue pressure or coercion for the purpose of subsection (1); and (*b*) specifying types of conduct or transactions that shall be considered not to be undue pressure or coercion for the purpose of subsection (1).

PROVINCIAL LEGISLATION WITH RESPECT TO TIE-IN SALES	
QUEBEC	
ACT	**CONTENT OF LEGISLATION**
Consumer Protection Act, R.S.Q., c. P-40.1.	Insurance 111. No merchant may refuse to enter into a contract of credit with a consumer on the pretext that the latter does not subscribe, through him, to an individual insurance policy or does not participate, through him, in a group insurance policy.
	Subscription to insurance 112. If subscription to an insurance policy is a condition of the making of a contract of credit, the consumer may fulfil this condition by means of an insurance policy he already holds. Merchant's notice The merchant must inform the consumer of such right in the manner prescribed by regulation.
	Accessory contracts 206. No merchant may make the entering into or the performance of the principal contract dependent upon the making of another contract between him and the consumer.
	224. No merchant, manufacturer or advertiser may, by any means whatever, *(a)* lay lesser stress, in an advertisement, on the price of a set of goods or services than on the price of any goods or services forming part of the set; *(b)* subject to sections 244 to 247, disclose, in an advertisement, the amount of the instalments to be paid to acquire goods or to obtain a service without also disclosing the total price of the goods or services and laying the greater stress on such total price; *(c)* charge, for goods or services, a higher price than that advertised.
	235. No person may, directly or indirectly, in a contract made with a consumer, make the grant of a rebate, payment or other benefit dependent upon the making of a contract of the same nature between that person or consumer and another person.
Regulation respecting the application of the Consumer Protection Act, R.Q., c. P-40.1, r.1	14. A financial services cooperative governed by the Act respecting financial services cooperatives (R.S.Q., c. C-67.3) is exempt from the application of sections 111 and 112 of the Act.

Act respecting the distribution of financial products and services, R.S.Q., ch. D-9.2, art.18	Prohibited practice 18. No representative may make the making of a contract subject to the requirement that the client make an insurance contract. Undue pressure No representative may exert undue pressure on a client or use fraudulent tactics to induce a client to purchase a financial product or service.
	Notice of rescission of contract 19. Representatives who, at the time a contract is made, cause a client to make an insurance contract must give the client a notice, drawn up in the manner prescribed by regulation of the Authority, stating that the client may rescind the insurance contract within 10 days of signing it.
	Period 20. A client may rescind an insurance contract made at the same time as another contract, within 10 days of signing it, by sending notice by registered or certified mail. Effects Where such an insurance contract is rescinded, the first contract retains all its effects.
ONTARIO	
ACT	**CONTENT OF LEGISLATION**
Consumer Protection Act, S.O. 2002, c. 30, S.C.hed. A	Required insurance 72. (1) A borrower who is required under a credit agreement to purchase insurance may purchase it from any insurer who may lawfully provide that type of insurance, except that the lender may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower. 2002, c. 30, S.C.hed. A, s. 72 (1). Disclosure by lender (2) A lender who offers to provide or to arrange insurance required under a credit agreement shall at the same time disclose to the borrower in writing that the borrower may purchase the insurance through an agent or an insurer of the borrower's choice. 2002, c. 30, S.C.hed. A, s. 72 (2).
Funeral, Burial and Cremation Services Act, 2002, S.O. 2002, c. 33	Tied selling 38.1 No operator shall require, as a condition to selling certain licensed supplies and services to a purchaser, whether or not the condition is set out in a contract, that the purchaser also purchase other supplies and services from the same operator or from a person specified by the operator, unless the operator does so in the circumstances that are prescribed. 2006, c. 34, S.C.hed. D, s. 23.
Ontario Regulation 98/09	27. [...] (2) A lender shall not require a borrower to transact in any good or service, other than a payday loan, as a condition of entering into a payday loan agreement. O. Reg. 98/09, s. 27 (2).

BRITISH COLUMBIA	
ACT	**CONTENT OF LEGISLATION**
Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2.	71 (1) A borrower who is required by a credit grantor to purchase insurance may purchase it from any insurer authorized to provide that type of insurance in British Columbia, except that the credit grantor may reserve the right to disapprove, on reasonable grounds, an insurer selected by the borrower. (2) A credit grantor who offers to provide or to arrange insurance referred to in subsection (1) must clearly disclose to the borrower in writing, at the time of that offer, that the borrower may, subject to subsection (1), purchase the required insurance through an insurance agent and insurer of the borrower's choice
	Other prohibited payday lender practices 112.08 (1) A payday lender must not do any of the following: (a) grant rollovers; (b) issue a new payday loan to a borrower who already has a payday loan issued by the lender; (c) issue a payday loan in excess of a prescribed portion of a borrower's net pay or other net income to be received during the payday loan term; (d) require or request from a borrower any payment in excess of a prescribed portion of the borrower's net pay or other net income to be received during the payday loan term; (e) discount the principal amount of a payday loan by deducting or withholding from the initial advance an amount representing any portion of the total cost of credit; (f) require, request or accept any undated cheque; (g) require, request or accept any post-dated cheque, pre-authorized debit or future payment of a similar nature, for any amount exceeding the amount to repay the payday loan by the due date, including interest and permissible charges; (h) require or request any payment from the borrower before it is due under the loan agreement; **(i) require or request that the borrower insure a payday loan;** (j) require, request or accept an assignment of wages from the borrower of a payday loan; (k) require, request or accept from the borrower or any other person, as security for a payday loan, any personal property or real property; (l) require, request or accept from the borrower or any other person¸ as security for a payday loan, any documentation that may be used to transfer title in the borrower's personal property or real property; (m) engage in any other practice prohibited by regulations under section 197.1. (2) An assignment of wages is not valid if it is given in consideration of a payday loan or an advance under a payday loan, or to secure or facilitate a payment in relation to a payday loan.
Payday Loans Regulation, B.C. Reg. 57/2009.	Prohibited practices — tied selling 19 (1) A payday lender must not make a payday loan contingent on the supply of other goods or services. (2) A payday loan agreement must not include a term or condition relating to the supply of other goods or services. (3) A payday loan agreement must include a statement that the supply of other goods or services is separate and optional.

MANITOBA	
ACT	**CONTENT OF LEGISLATION**
Consumer Protection Act, C.C.S.M. c. C200	154.2 Tied selling restricted No payday lender shall make a payday loan contingent on the purchase of another product or service, unless the borrower's cost of it is included in the borrower's cost of credit for the payday loan.
ALBERTA	
ACT	**CONTENT OF LEGISLATION**
Payday Loans Regulation, Alberta Regulations 157/2009	Art.12 **Tied selling prohibited** **12(1)** A payday lender shall not make a payday loan contingent onthe supply of other goods or services. **(2)** A payday loan agreement shall not include a term or condition relating to the supply of other goods or services. **(3)** A payday loan agreement must include a statement that the supply of other goods or services is separate and optional. **(4)** The statement referred to in subsection (3) must be initialled by the borrower.
Fair Pratices Regulation, Alberta Regulations 128/2001	**Prohibited tied selling practices** 4 For the purpose of section 509(1)(b) of the Act, the following tied selling practices are prohibited: (a) where an insurer or insurance agent other than the holder of a restricted certificate is asked to sell insurance to a person, informing the person that the person must purchase another product or service, including an insurance policy, from the insurer or insurance agent, as the case may be, before the insurance requested will be undertaken; (b) where an insurer is asked to make a loan to a person, informing the person that the person must purchase a product or service, including an insurance policy, from the insurer before the loan will be made.

ANNEX 3: FOREIGN LEGISLATION

FOREIGN LEGISLATION WITH RESPECT TO TIE-IN SALES	
UNITED STATES	
ACT	**CONTENT OF LEGISLATION**
Sherman Antitrust Act	**Section 1** **Trusts, etc., in restraint of trade illegal; penalty** Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
	Section 2 **Monopolizing trade a felony; penalty** Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
Clayton Antitrust Act	TITLE 15 CHAPTER 1 § 14 § 14. Sale, etc., on agreement not to use goods of competitor It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
Federal Trade Commission Act	§ **45. Unfair methods of competition unlawful; prevention by Commission** (Sec. 5) (a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. [...]
Bank Holding Company Act of 1970, 12 U.S.C. 1971.	**Section 106** (a) […]. (b)(1) A bank shall not in any manner extend credit, lease or sell property of any

	kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement— (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service; (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company; (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit. The Board may by regulation or order permit such exceptions to the foregoing prohibition and the prohibitions of section 4(f)(9) and 4(h)(2) of the Bank Holding Company Act of 1956 as it considers will not be contrary to the purposes of this section. (2) […] (c) The district courts of the United States have jurisdiction to prevent and restrain violations of subsection (b) of this section and it is the duty of the United States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. The proceedings may be by way of a petition setting forth the case and praying that the violation be enjoined or otherwise prohibited. When the parties complained of have been duly notified of the petition, the court shall proceed, as soon as possible, to the hearing and determination of the case. While the petition is pending, and before final decree, the court may at any time make such temporary restraining order or prohibition as it deems just. Whenever it appears to the court that the ends of justice require that other parties be brought before it, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and subpenas to that end may be served in any district by the marshal thereof. (d) In any action brought by or on behalf of the United States under subsection (b), subpenas for witnesses may run into any district, but no writ of subpena may issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the prior permission of the trial court upon proper application and cause shown. (e) Any person who is injured in his business or property by reason of anything forbidden in subsection (b) may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee. (f) Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of subsection (b), under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted

	and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue. (g)(1) Subject to paragraph (2), any action to enforce any cause of action under this section shall be forever barred unless commenced within four years after the cause of action accrued. (2) Whenever any enforcement action is instituted by or on behalf of the United States with respect to any matter which is or could be the subject of a private right of action under this section, the running of the statute of limitations in respect of every private right of action arising under this section and based in whole or in part on such matter shall be suspended during the pendency of the enforcement action so instituted and for one year thereafter: Provided, That whenever the running of the statute of limitations in respect of a cause of action arising under this section is suspended under this paragraph, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within the four-year period referred to in paragraph (1). (h) Nothing contained in this section shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this section. No regulation or order issued by the Board under this section shall in any manner constitute a defense to such action.
	Section 225.7 (a) Purpose. This section establishes exceptions to the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971, 1972(1)). These exceptions are in addition to those in section 106. The section also restricts tying of electronic benefit transfer services by bank holding companies and their nonbank subsidiaries. (b) Exceptions to statute. Subject to the limitations of paragraph (c) of this section, a bank may: (1) Extension to affiliates of statutory exceptions preserving traditional banking relationships. Extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement that a customer: (i) Obtain a loan, discount, deposit, or trust service from an affiliate of the bank; or (ii) Provide to an affiliate of the bank some additional credit, property, or service that the bank could require to be provided to itself pursuant to section 106(b)(1)(C) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(1)(C)). (2) Safe harbor for combined-balance discounts. Vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the bank (eligible products), if: (i) The bank offers deposits, and all such deposits are eligible products; and (ii) Balances in deposits count at least as much as nondeposit products toward the minimum balance. (3) Safe harbor for foreign transactions. Engage in any transaction with a customer if that customer is: (i) A corporation, business, or other person (other than an individual) that: (A) Is incorporated, chartered, or otherwise organized outside the United States; and (B) Has its principal place of business outside the United States; or (ii) An individual who is a citizen of a foreign country and is not resident in the United States. (c) Limitations on exceptions. Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anticompetitive practices. The eligibility of a bank to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anticompetitive practices.

	(d) Extension of statute to electronic benefit transfer services. A bank holding company or nonbank subsidiary of a bank holding company that provides electronic benefit transfer services shall be subject to the anti-tying restrictions applicable to such services set forth in section 7(i)(11) of the Food Stamp Act of 1977 (7 U.S.C. 2016(i)(11)). (e) For purposes of this section, bank has the meaning given that term in section 106(a) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971), but shall also include a United States branch, agency, or commercial lending company subsidiary of a foreign bank that is subject to section 106 pursuant to section 8(d) of the International Banking Act of 1978 (12 U.S.C. 3106(d)), and any company made subject to section 106 by section 4(f)(9) or 4(h) of the BHC Act.
EUROPE	
ACT	**CONTENT OF LEGISLATION**
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	Chapter 2 *Article 5* **Prohibition of unfair commercial practices** 1. Unfair commercial practices shall be prohibited. 2. A commercial practice shall be unfair if: a) it is contrary to the requirements of professional diligence, and b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. 3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally. 4. In particular, commercial practices shall be unfair which: a) are misleading as set out in Articles 6 and 7, or b) are aggressive as set out in Articles 8 and 9. 5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.
	Article 6 **Misleading actions** 1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: a) the existence or nature of the product; b) the main characteristics of the product, such as its availability, benefits, risks,

	execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product; (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage; (e) the need for a service, part, replacement or repair; (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions; (g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [8], or the risks he may face. 2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves: (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.
	Article 7 **Misleading omissions** 1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. 2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. 3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

	4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context: (a) the main characteristics of the product, to an extent appropriate to the medium and the product; (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting; (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right. 5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.
	Article 8 **Aggressive commercial practices** A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.
	Article 9 **Use of harassment, coercion and undue influence** In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of: (a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behaviour; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken.
FRANCE	
ACT	**CONTENT OF LEGISLATION**
Arrêté du 3 décembre 1987 relatif à l'information du consommateur sur les prix	Art.7 Les produits vendus par lots doivent comporter un écriteau mentionnant le prix et la composition du lot ainsi que le prix de chaque produit composant le lot.

Code de la consommation	Article L113-3 Modifié par Ordonnance n°2009-866 du 15 juillet 2009 - art. 16 Tout vendeur de produit ou tout prestataire de services doit, par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié, informer le consommateur sur les prix, les limitations éventuelles de la responsabilité contractuelle et les conditions particulières de la vente, selon des modalités fixées par arrêtés du ministre chargé de l'économie, après consultation du Conseil national de la consommation. Cette disposition s'applique à toutes les activités visées au dernier alinéa de l'article L. 113-2. Les règles relatives à l'obligation de renseignements par les établissements de crédit, les établissements de paiement et les organismes mentionnés à l'article L. 518-1 du code monétaire et financier sont fixées par l'article L. 312-1-1 et les sections 3 et 4 du chapitre IV du titre Ier du livre III du même code.
	Article L122-1 Modifié par Ordonnance n°2009-866 du 15 juillet 2009 - art. 16 Il est interdit de refuser à un consommateur la vente d'un produit ou la prestation d'un service, sauf motif légitime, et de subordonner la vente d'un produit à l'achat d'une quantité imposée ou à l'achat concomitant d'un autre produit ou d'un autre service ainsi que de subordonner la prestation d'un service à celle d'un autre service ou à l'achat d'un produit. Cette disposition s'applique à toutes les activités visées au dernier alinéa de l'article L. 113-2. Pour les établissements de crédit, les établissements de paiement et les organismes mentionnés à l'article L. 518-1 du code monétaire et financier, les règles relatives aux ventes subordonnées sont fixées par le 1 du I de l'article L. 312-1-2 du même code.
	Article L121-84-6 Le présent article est applicable à tout fournisseur d'un service de communications électroniques, au sens du 6° de l'article L. 32 du code des postes et des communications électroniques, proposant au consommateur, directement ou par l'intermédiaire d'un tiers, une offre de services de communications électroniques. Les fournisseurs de services ne peuvent subordonner la conclusion ou la modification des termes du contrat qui régit la fourniture d'un service de communications électroniques à l'acceptation par le consommateur d'une clause imposant le respect d'une durée minimum d'exécution du contrat de plus de vingt-quatre mois à compter de la date de conclusion du contrat ou de sa modification. Tout fournisseur de services subordonnant la conclusion ou la modification des termes d'un contrat qui régit la fourniture d'un service de communications électroniques à l'acceptation par le consommateur d'une clause contractuelle imposant le respect d'une durée minimum d'exécution du contrat de plus de douze mois est tenu : 1° De proposer simultanément la même offre de services assortie d'une durée minimum d'exécution du contrat n'excédant pas douze mois, selon des modalités commerciales non disqualifiantes ; 2° D'offrir au consommateur la possibilité de résilier par anticipation le contrat à compter de la fin du douzième mois suivant l'acceptation d'une telle clause moyennant le paiement par le consommateur d'au plus le quart du montant dû au

	titre de la fraction non échue de la période minimum d'exécution du contrat. Les alinéas précédents s'appliquent à la conclusion ou l'exécution de tout autre contrat liant le fournisseur de services et le consommateur dès lors que la conclusion de ce contrat est subordonnée à l'existence et à l'exécution du contrat initial régissant la fourniture du service de communications électroniques, sans que l'ensemble des sommes dues au titre de la résiliation anticipée de ces contrats avant l'échéance de la durée minimum d'exécution de ces contrats puisse excéder le quart du montant dû au titre de la fraction non échue de la période minimum d'exécution du contrat.
Code du commerce	Article L441-3 Modifié par Loi n°2001-420 du 15 mai 2001 - art. 53 JORF 16 mai 2001 Tout achat de produits ou toute prestation de service pour une activité professionnelle doivent faire l'objet d'une facturation. Le vendeur est tenu de délivrer la facture dès la réalisation de la vente ou la prestation du service. L'acheteur doit la réclamer. La facture doit être rédigée en double exemplaire. Le vendeur et l'acheteur doivent en conserver chacun un exemplaire. La facture doit mentionner le nom des parties ainsi que leur adresse, la date de la vente ou de la prestation de service, la quantité, la dénomination précise, et le prix unitaire hors TVA des produits vendus et des services rendus ainsi que toute réduction de prix acquise à la date de la vente ou de la prestation de services et directement liée à cette opération de vente ou de prestation de services, à l'exclusion des escomptes non prévus sur la facture. La facture mentionne également la date à laquelle le règlement doit intervenir. Elle précise les conditions d'escompte applicables en cas de paiement à une date antérieure à celle résultant de l'application des conditions générales de vente ainsi que le taux des pénalités exigibles le jour suivant la date de règlement inscrite sur la facture. Le règlement est réputé réalisé à la date à laquelle les fonds sont mis, par le client, à la disposition du bénéficiaire ou de son subrogé.
Code monétaire et financier	Article L312-1-2 I.-1. Est interdite la vente ou offre de vente de produits ou de prestations de services groupés sauf loR.S.Q.ue les produits ou prestations de services inclus dans l'offre groupée peuvent être achetés individuellement ou loR.S.Q.u'ils sont indissociables. 2. Est interdite toute vente ou offre de vente de produits ou de prestations de services faite au client et donnant droit à titre gratuit, immédiatement ou à terme, à une prime financière ou en nature de produits, biens ou services dont la valeur serait supérieure à un seuil fixé, en fonction du type de produit ou de service offert à la clientèle, par un règlement pris par arrêté du ministre chargé de l'économie, pris après avis du comité consultatif institué à l'article L. 614-1. Ces dispositions s'appliquent également aux services de paiement mentionnés au II de l'article L. 314-1.
BELGIUM	
ACT	**CONTENT OF LEGISLATION**
Loi du 14 juillet 1991 sur les pratiques du commerce et sur	Art. 54 Il y a offre conjointe au sens du présent article, loR.S.Q.ue l'acquisition, gratuite ou non, de produits, de services, de tous autres avantages, ou de titres permettant de les acquérir, est liée à l'acquisition d'autres produits ou services, même identiques.

l'information et la protection du consommateur, chapitre 6, section 5.	Sauf les exceptions précisées ci-après, toute offre conjointe au consommateur effectuée par un vendeur est interdite. Est également interdite toute offre conjointe au consommateur effectuée par plusieurs vendeurs agissant dans une unité d'intention.
	Art. 55 Il est permis d'offrir conjointement, pour un prix global : 1. des produits ou des services constituant un ensemble; Le Roi peut, sur proposition des Ministres compétents et du Ministre des Finances, désigner les services offerts dans le secteur financier qui constituent un ensemble; 2. des produits ou des services identiques, à condition : a) que chaque produit et chaque service puisse être acquis séparément à son prix habituel dans le même établissement; b) que l'acquéreur soit clairement informé de cette faculté ainsi que du prix de vente séparé de chaque produit et de chaque service; c) que la réduction de prix éventuellement offerte à l'acquéreur de la totalité des produits ou des services n'excède pas le tiers des prix additionnés.
	Art. 56 Il est permis d'offrir à titre gratuit, conjointement à un produit ou à un service principal : 1. les accessoires d'un produit principal, spécialement adaptés à ce produit par le fabricant de ce dernier et livrés en même temps que celui-ci en vue d'en étendre ou d'en faciliter l'utilisation; 2. l'emballage ou les récipients utilisés pour la protection et le conditionnement des produits, compte tenu de la nature et de la valeur de ces produits; 3. les menus produits et menus services admis par les usages commerciaux ainsi que la livraison, le placement, le contrôle et l'entretien des produits vendus; 4. des échantillons provenant de l'assortiment du fabricant ou du distributeur du produit principal, pour autant qu'ils soient offerts dans des conditions de quantité ou de mesure strictement indispensables à une appréciation des qualités du produit; 5. des chromos, vignettes et autres images d'une valeur commerciale minime; 6. des titres de participation soit à des tombolas dûment autorisées en application de la loi du 31 décembre 1851 sur les loteries, soit aux formes de loteries organisées en application de la loi du 6 juillet 1964 relative à la Loterie nationale, modifiée par la loi du 12 juillet 1976; 7. des objets revêtus d'inscriptions publicitaires indélébiles et nettement apparentes qui ne se trouvent pas comme tels dans le commerce, à condition que leur prix d'acquisition par celui qui les offre ne dépasse pas 5 p.c. du prix de vente du produit ou du service principal avec lequel ils sont attribués.
	Art. 57 Il est également permis d'offrir gratuitement, conjointement à un produit ou à un service principal : 1. des titres permettant l'acquisition d'un produit ou service identique, pour autant que la réduction de prix résultant de cette acquisition n'excède pas le pourcentage fixé à l'article 55, 2;

	2. des titres permettant l'acquisition d'un des avantages prévus à l'article 56, 5 et 6; 3. des titres donnant exclusivement droit à une ristourne en espèces, à la condition : a) qu'ils mentionnent la valeur en espèces qu'ils représentent; b) que, dans les établissements de vente de produits ou de fourniture de service, le taux ou l'importance de la ristourne offerte soit clairement indiqué, de même que les produits ou services dont l'acquisition donne droit à l'obtention de titres; 4. des titres consistant en des documents donnant droit, après acquisition d'un certain nombre de produits ou de services, à une offre gratuite ou à une réduction de prix lors de l'acquisition d'un produit ou d'un service similaire, pour autant que cet avantage soit procuré par le même vendeur et n'excède pas le tiers du prix des produits ou services précédemment acquis. Les titres doivent mentionner la limite éventuelle de leur durée de validité, ainsi que les modalités de l'offre. LoR.S.Q.ue le vendeur interrompt son offre, le consommateur doit bénéficier de l'avantage offert au prorata des achats précédemment effectués.
	Art. 58 Toute personne qui émet les titres visés à la présente section se constitue, de plein droit, débiteur de la créance que ces titres représentent. En cas de cessation de l'émission ou de modification de l'émission en cours des titres visés à l'article 57, 3, leur remboursement en espèces peut être exigé, quel que soit le montant total de leur valeur nominale, pendant un an à partir de l'accomplissement de la publicité prévue à l'article 62, § 1er, 2.
	Art. 59 Toute personne qui émet des titres visés à l'article 57, 1 à 3, doit être titulaire d'une immatriculation délivrée par le Ministre ou le fonctionnaire désigné par lui à cet effet. La demande d'immatriculation doit être faite par lettre recommandée à la poste introduite auprès du Ministre ou du fonctionnaire désigné par lui à cet effet. Les requérants doivent s'engager à permettre aux agents qualifiés, désignés par le Ministre, de contrôler sur place l'observation des prescriptions des articles 57 à 61, de prendre connaissance sans déplacement, de tous documents, pièces ou livres susceptibles de faciliter l'accomplissement de leur mission.
	Art. 60 Les titres émis en application de l'article 57, 1 à 3, doivent porter le numéro d'immatriculation de la personne physique ou morale qui les émet. Ce numéro, le nom, la dénomination et l'adresse du titulaire ainsi que les conditions d'échange ou de remboursement, fixées conformément aux dispositions de l'article 57, 1 à 3, doivent être mentionnés de façon apparente sur les carnets collecteurs des titres ou sur le titre même, ainsi que sur toute publicité se rapportant à ces titres.
	Art. 61 Les personnes immatriculées sont tenues de demander immédiatement leur radiation loR.S.Q.u'elles désirent cesser l'émission de titres, loR.S.Q.u'elles sont en état de cessation de paiement ou loR.S.Q.u'elles se trouvent dans les cas prévus au deuxième alinéa du présent article.

	Ne peuvent être titulaires d'une immatriculation, directement ou par personne interposée, les personnes visées par l'arrêté royal n° 22 du 24 octobre 1934 portant interdiction pour certains condamnés et pour les faillis de participer à l'administration et à la surveillance des sociétés par actions, des sociétés coopératives et des unions de crédit et d'exercer la profession d'agent de change ou l'activité de banque de dépôts, et par l'arrêté royal n° 148 du 18 mars 1935 relatif à l'usure, ainsi que les personnes qui ont été condamnées par une décision coulée en force de chose jugée et rendue en application de l'article 29 de la loi du 9 juillet 1957 réglementant les ventes à tempérament et leur financement.
	Art. 62 § 1er. Le Roi peut : 1. prescrire un format minimum et des signes distinctifs pour les titres visés à l'article 57, 1 à 3; 2. prescrire, en cas de cessation de l'émission ou de modification de l'émission en cours de ces titres, une publicité spéciale et définir les modalités de celle-ci; 3. fixer le montant minimum à partir duquel le remboursement en espèces des titres visés à l'article 57, 3, petit être exigé; 4. subordonner l'émission des titres visés à l'article 57, 3, à la constitution de garanties de solvabilité et la tenue d'une comptabilité spéciale et imposer des mesures de contrôle; 5. modifier, pour certains produits ou services qu'Il détermine, les pourcentages prévus par les articles 55, 2, c) et 57, 1 et 4, fixer le montant maximum que peut atteindre la valeur des produits, services ou avantages offerts en application de ces dispositions et limiter la fréquence et la durée des ventes et prestations qui font l'objet de l'article 55, 2; 6. subordonner l'offre à la condition que les produits ou services offerts conjointement aient été vendus ou fournis par le vendeur pendant un an au moins; 7. exclure certains produits et services qu'Il détermine des dérogations prévues par les articles 55, 56 et 57; 8. étendre l'interdiction portée par l'article 54 aux offres conjointes faites à des revendeurs. § 2. Avant de proposer un arrêté en application des points 5, 6, 7 et 8 du § 1er, le Ministre consulte le Conseil de la Consommation et le Conseil supérieur des Classes moyennes et fixe le délai dans lequel l'avis doit être donné. Passé ce délai, l'avis n'est plus requis.