Untying Payment Accounts from Mortgage Loans to Unleash Consumer Mobility.

Case Note to CJEU, C-778/18 Association française des usagers de banques

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I. Introduction

Bundling and tying practices are widespread in several market sectors, and are particularly common in the retail financial services industry.[2] In that context, they often involve the cross-selling of mortgage loans and payment accounts: the lender will offer a mortgage loan to a customer on the condition that the latter also agrees to open a payment or savings account with the lender and use it to deposit his salary or other regular income. The practice has more than just one economic purpose: among other things, it offers a chance for the credit institution to charge fees for the use of the payment account, but it is also and importantly aimed at risk reduction since the deposit account will be employed by the customer to accumulate money to be used for repaying the loan. This form of cross-selling remains nonetheless controversial due to its possible negative effects on competition and consumer protection: if the consumer is locked to the credit institution his mobility will be reduced. This might be problematic in an area, such as the one of payment accounts, where mobility is traditionally limited, since consumers do not tend to move all their savings from one institutions to another with the same ease with which they might switch between other service providers. What is more, the financial service provider will have an interest in binding the consumer for the longest period possible, so the latter might end up finding himself contractually bound to keep the account open for a lengthy period. The EU has already tried to increase consumer rights and mobility in the area of payment accounts through various initiatives, such as notably the Payment Services Directives (PSD,[3] now recast as PSD2)[4] and the Payment Accounts Directive (PAD).[5] In addition to that, bundling and tying practices with regard to

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[2] Centre for European Policy Studies, Tying and other potentially unfair commercial practices in the retail financial service sector, Final Report, submitted to the European Commission, DG Internal Market and Services ETD/2008/IM/H3/78, 2004.

[3] Directive 2007/64/EC on payment services in the internal market [2007] OJ L 319.

[4] Directive (EU) 2015/2366 on payment services in the internal market (recast) [2015] OJ L 337.

[5] Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257.

mortgages and accounts are regulated by the Mortgage Credit Directive (MCD),[6] which allows bundling - when the loan and the account are made available separately - but prohibits tying practices - when the loan and the account are not made available separately. Nonetheless, the MCD also makes some important yet problematic exceptions: Member States may authorise tying in two cases, i.e. when 'the only purpose' of the account is 'to accumulate capital to repay the credit, to service the credit, to pool resources to obtain the credit, or to provide additional security for the creditor in the event of default' (Article 12(2)(a)) and when the creditor can demonstrate that tying results 'in a clear benefit for the consumer taking due account of the availability and the prices of the relevant products offered on the market' (Article 12(3)). The MCD thus tolerates tying practices inasmuch as these operate as an instrument of risk reduction or result in an advantage for the consumer, rather than when they are just a commercial strategy for the credit institution to sell the consumer an additional and possibly unnecessary product.

But does this mean that in theory the lender could require the borrower to deposit all his income, regardless of the amount and duration of the loan? The exception is contentious and, as in the case noted, it lends itself to being disputed.

II. **Summary of the facts**

Cross-selling of mortgage loans and accounts has been hotly debated in France - where the practice is known as '*domiciliation des revenus*' - and has been the object of much criticism from consumer associations as well as of a convoluted legislative history. In 2016, the French Parliament had authorised[7] the Government to adopt by order any measures relating to the conditions for bundling mortgage loans and deposit accounts in accordance with the Monetary and Financial Code, which already established that 'the sale or offer for sale of bundled products or services is prohibited save when the products or services included in the bundle can be purchased individually or when they are inseparable'.[8] On the basis of that, the Government amended in 2017 the Consumer Code, which now provided that the offer for sale of bundled products shall include information such as the period for depositing salaries or other income, the fees for opening and maintaining the account, as well as the nature of the individual advantage conferred by the lender as consideration.[9] A new article was also introduced in the Consumer Code, pursuant to which the lender may make the loan offer conditional on the borrower's paying his salary or similar income into an account opened with the lender, for a period to be determined by Government decree, subject to the lender granting the borrower an individual advantage as consideration.[10] Such advantage might be enjoyed by the borrower until the expiry of the loan period but, if before the end of the period fixed by the agreement

[6] Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ L 60.

[7] Loi no 2016-1691, du 9 décembre 2016, relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, article 67, II (1).

[8] Code monétaire et financier, article L. 312-1-2, I., 1.

[9] Code de la consommation, article L. 313-25 (10).

[10] Code de la consommation, article L. 313-25-1.

the borrower ceases to satisfy the income deposit requirement, then the lender may terminate the individual advantage for the instalments remaining of the credit. A Government decree then established that the period during which the lender can require the borrower to deposit his income shall not exceed ten years and in any event not exceed that of the credit agreement.[11]

These amendments to the Consumer Code were introduced with a view to offering a clear legal framework to *domiciliation* clauses and ensure that these do not become an instrument through which banks bind consumers for long periods of time. The reform was nonetheless received negatively by consumer associations. These pointed out that, far from making the granting of advantages - such as, typically, a more favourable interest rate - easier, the reform might end up authorising banks, in a context in which interest rates are already low, to impose less advantageous conditions on the consumers who do not accept the *domiciliation*.[12] The new rules, it was feared, might normalise a practice[13] which usually did not get crystallised in an express term in the loan agreement - as the bank would just offer a loan on more advantageous conditions to a consumer who also promised to open an account - and which might have otherwise been more effectively tackled through unfair terms doctrines.[14] In that regard, it is crucial to note that, already before the reform, an express term requiring the consumer to deposit his income with the lender was suggested by the *Commission des clauses abusives* to be unfair if it was not also supported by a clearly defined benefit given as consideration,[15] while the issue did not appear to be litigated in court. The formalisation of the practice through the reform of the Consumer Code, and with the additional introduction of a ten years limit, was now feared to pose a constraint to consumer mobility. All these concerns were channelled through two routes, one political and one judicial.

Politically, the Ministry for the Economy and Finance gave a mandate to the *Comité consultatif du secteur financier* (CCSF) to look into the issue. In its report,[16] the CCSF eventually validated the concerns of the consumer associations, recognising that the rules might impact on the competition in the banking system, and possibly result in a negative treatment of some consumers. The recommendations of the CCSF were clear: either repealing the norms, or at least further limiting the period of time during which tying is permitted, bringing it from ten to five years. Following those developments, the issue was debated in Parliament and the dis-

[11] Code de la consommation, article R. 313-21-1.

[12] 'Mobilité bancaire : l'UFC-Que Choisir dénonce les pratiques des banques', *France24*, 20/09/2017 < https://www.france24.com/fr/20170920-mobilite-bancaire-lufc-choisir-denonce-pratiques-banques > (all websites last accessed 18 February 2021).

[13] Solenn Poullennec, 'Domiciliation des revenus : la justice appelée à se prononcer', *LesEchos* of 7 December 2018 < https://www.lesechos.fr/finance-marches/banque-assurances/domiciliation-des-revenus-la-justice-europeenne-appelee-a-se-prononcer-237155 >

[14] Nicolas Éréséo, 'Le nouvel encadrement légal des clauses de domiciliation des revenus', *Actu-Juridique.fr*, 1/6/2018, < https://www.actu-juridique.fr/affaires/bancaire-credit/le-nouvel-encadrement-legal-des-clauses-de-domiciliation-des-revenus/ >

[15] Commission des clauses abusives, Recommandation N 04-03, Prêt Immobilier BOCCRF du 30/09/2004

[16] Comité consultatif du secteur financier, Rapport du Président Corinne Dromer sur la domiciliation des revenus, Janvier 2019.

puted rules of the Consumer Code were ultimately repealed in 2019,[17] on the basis of the consideration that they posed a hindrance to consumer mobility and, as such, clashed with EU consumer law.[18]

Before the final repeal of the rules, the struggle against *domiciliation* also took a judicial route. The consumer association *Association française des usagers de banques* (French Association of Bank Users; henceforth: AFUB) lodged an application before the French Council of State seeking the annulment of the Government decree imposing the ten years limit. The new rules on which the decree was based, so claims the AFUB, would be in contrast, first, with the MCD as they would not fulfil the conditions under which tying practices are deemed lawful and, second, they would conflict with the provisions of the PSD and PAD on termination of accounts. On those grounds, the Council of State was requested to annul the Government decree on grounds of misuse of power.

Since dealing with those legal issues required an interpretation of previously unanswered questions of EU law, the highest administrative court in France decided to stay the proceedings and to refer two preliminary questions to the Court of Justice of the European Union (CJEU).

III. Questions referred

The Council of State asked the CJEU one question involving the interpretation of the MCD, and one with regard to the PSD and the PAD. With the first question, the Council of State asked whether the MCD, inasmuch as it prescribes the purpose for which the account can be opened or maintained, precludes legislation which authorises a creditor to require the borrower to deposit all of his salary or income in the payment account irrespective of the amount, maturities and duration of the loan for a period of up to ten years or, if the duration of the loan agreement is shorter, for that period.[19]

With the second question, the Council of State asked whether Article 45 of the PSD, which establishes that the termination of a framework contract[20] after twelve months (brought to six by the PSD2)[21] shall be free for the payment service user, precludes the termination of the account opened by the borrower for the purposes of depositing his income, if this results in the loss of the individual advantage. Essentially, the question is whether the loss of the indi-

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[17] Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (Loi PACTE), art. 206, repealing Article L313-25-1 and paragraph 10 of Article L313-25 of the Consumer Code.

[18] With quotes from lawmakers and stakeholders, see Delphine Denuit, 'Prêts immobiliers : fini l'obligation de domicilier ses salaires' *LeParisien* (17 March 2019) <https://www.leparisien.fr/economie/prets-immobiliers-fini-l-obligation-de-domicilier-ses-salaires-17-03-2019-8033991.php >

[19] C-778/18, *Association française des usagers de banques* [2020] EU:C:2020:831, para 33.

[20] A payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account, PSD2, art 4(21).

[21] PSD2, Article 55.

vidual advantage (typically resulting in an increase in the interest rate) should be regarded as a 'fee' in the sense of the PSD and the PAD[22] and therefore whether it is prohibited.

IV. Judgment of the CJEU

The reasoning of the Court starts from restating the distinction between bundling and tying practices as laid down in the MCD. While the Court notes that French legislation appears to comply with that by obliging mortgage lenders to offer consumers loan agreements both with and without an income deposit clause,[23] the CJEU says that it is for the referring court to establish whether the legislation concerns bundling or tying practices more in particular. The point involves the interpretation of domestic law and as such it is for the referring court to determine while, in order to answer the question, the CJEU adopts the hypothesis that the disputed domestic rules concern tying practices.[24]

On the substantive question revolving around Article 12(2)(a) MCD, the CJEU decisively declares the necessity of considering not only the wording of the Article but also the context and 'the objective pursued by the legislation'.[25] The Court considers the rationales both of the Directive overall and of the exception established in regard to the otherwise prohibited tying practices. On the one hand, that prohibition is justified by the general objectives of the MCD: ensuring a high level of protection for consumer as well as protecting their mobility and ability to make informed decisions. The exception to such prohibition, on the other hand, is based on a different consideration: notably providing the creditor with additional security in the event of default.[26] Articles 12(2)(a), as well as Article 12(3) which is concerned with a demonstrable benefit for the consumer,[27] are therefore exceptions and as such they need to be interpreted restrictively.[28] But if tying is only allowed when this serves the purposes assigned by that Article - notably to provide additional security in the event of default - then the relatively loose way in which French legislation is framed becomes problematic, as this appears to authorise tying also in relation to payment accounts which will be used for further purpos-

[22] Article 12(3) of the PAD provides that 'Member States shall ensure that fees, if any, applied by the transferring payment service provider to the consumer for the termination of the payment account held with it are determined in accordance with Article 45(2), (4) and (6)' of the PSD.

[23] CJEU, *Association française des usagers de banques*, para 44.

[24] Ibid, para 48.

[25] Ibid, para 49.

[26] Ibid, para 50.

[27] The Court, para 63, does not pronounce itself on the question concerning Article 12(3). Since the individual advantage is offered as the consideration for the opening of the account, it falls under Article 12(2)(a) MCD, so it does not need to be addressed in light of Article 12(3). The AG had addressed the question, suggesting that 'the legislation at issue does not guarantee with the requisite specificity, precision and clarity that the individual advantage will result in a clear benefit to consumers vis-à-vis the prices of the relevant products offered on the market.' para 71.

[28] CJEU, *Association française des usagers de banques*, para 53.

es such as effecting payment transactions.[29] Responding to a request for clarification from the CJEU, the French Council of State itself clarified that 'payment account' within the meaning of the Consumer Code is not limited to accounts intended exclusively for the repayment of the mortgage credit, but covers accounts used to execute and receive day-to-day payment transactions.[30]

In this regard, the CJEU deems that the option offered to the lender is disproportionate.[31] For the reason that the rules of the Consumer Code allow the lender to make the grant of the loan conditional on the borrower depositing his income without further limitations and irrespective of the amount, maturities and duration of the loan, the deposit that the lender may require is indeed 'likely to exceed, at least in certain cases, what is necessary to repay the loan, obtain the credit or provide the lender with additional security in the event of default'.[32] If on the contrary the deposit required by the lender did not exceed that requirement, then, as noted by Advocate General Saugmandsgaard Øe, consumers could invest their remaining available income in other credit institutions, and their mobility would be safeguarded.[33] What is precluded by the MCD is therefore an interpretation of national law which allows the lender to require the consumer to deposit his income to an extent which exceeds what is necessary to meet one of the purposes set out in Article 12(2)(a).

These considerations are relevant for answering the sub-question by the referring court concerning specifically the ten years time limit - an issue which was not separately analysed by the Advocate General but to which the Court pays specific attention instead. While it did not set limits relating to the amount or duration of the loan, French legislation did attempt to strike a balance between the goals of consumer mobility and risk reduction by limiting to ten the maximum number of years during which the account could be maintained. Is this specific limitation consistent with EU law? The MCD is silent in relation to the duration of the account. The Court notices nonetheless that, because of the (partial)[34] minimum harmonisation nature of the MCD, Member States may maintain or introduce more stringent provisions for the protection of the consumer,[35] and that the limit created in French legislation does appear to be a more stringent rule. Hence, the Court held that the time limit is not generally contrary to Article 12(2)(a) MCD.[36]

The second question revolves around the interpretation of the PSD and PAD. In order to promote consumer mobility, those Directives provide that consumers have under certain conditions the possibility of terminating a framework contract free of charge. But if the loss of the individual advantage amounts to a 'fee' for the purposes of those Directives, then such loss

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[29] This point is elaborated in CJEU, *Association française des usagers de banques*, Opinion AG Saugmandsgaard Øe, para 53.

[30] CJEU, *Association française des usagers de banques*, para 21.

[31] Ibid, para. 56

[32] Ibid, para 56.

[33] CJEU, *Association française des usagers de banques*, Opinion AG Saugmandsgaard Øe, para 62.

[34] MCD, Art. 2(2).

[35] CJEU, *Association française des usagers de banques*, para 62.

[36] Ibid, para 62.

should be prohibited. It must also be noted that Recital 12 of the PAD explicitly and in principle excludes accounts with more limited functions ‘such as accounts where funds are usually paid in for the sole purpose of repaying a credit card debt’ from the scope of application of the PAD but, to the extent that the French rules apply to accounts which also perform other functions, the rules of the Directive can in principle find application.

In this respect, nonetheless, the Court notes that those rules of the PSD and the PAD on the termination of accounts do not apply to the loss of the advantage. The reason is that while the Directives regulate the fees for the termination of an account, the loss of the individual advantage is a consequence of the borrower ceasing to deposit his income before the end of the *domiciliation* period instead of the end of the account itself.[37] As an illustration of the distinctness of the two situations, it can be noted that when the individual advantage comes to an end, the account may still remain open.[38] Hence, the second question has to be answered in the sense that EU law does not stand in the way of the French legislation on this aspect.

V. Analysis

The present case is of interest under different viewpoints. Notably, this is the first instance in which the CJEU has had an occasion to consider in depth the provisions of the MCD, although it is not the first instance in which the Court referred to that Directive. Since most CJEU rulings dealing with the consumer credit market have so far revolved around the Unfair Contract Terms Directive (UCTD),[39] which is still being employed in situations involving unfair terms in mortgage loan agreements, it appears that ‘horizontal’ consumer protection instruments have been more relevant than ‘vertical’ ones on consumer and mortgage credit.[40] Even in the facts of *Association française des usagers de banques*, the national rules on tying practices were challenged on the basis of the belief that unfair terms doctrines would be more effective in delivering consumer protection than sectorial rules authorising and regulating the practice. Lately, the CJEU has nonetheless more frequently had to consider those vertical instruments and shown a particular interest for the MCD. In *Schyns*, concerning the responsible lending requirements of the Consumer Credit Directive (CCD),[41] the Court referred to the MCD to stress that the EU legislator aims at making creditors responsible[42] in order to support more protective interpretations of the CCD while, in his Opinion in *Ibercaja*, Advocate General Saugmandsgaard Øe referred to the imperative nature of the MCD to underpin the

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[37] Ibid, para. 69

[38] Ibid, para 69. Here, the English version of the judgment is slightly confusing, as it suggests that the loss of the advantage is a consequence of ‘the end of that deposit requirement’ rather than, more correctly, of the borrower ceasing to deposit his income.

[39] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95.

[40] Hans Micklitz and Norbert Reich, ‘The Court and sleeping beauty: The revival of the Unfair Contract Terms Directive (UCTD)’ [2014] 51 CML Rev. 771.

[41] Directive 2008/48/EC on credit agreements for consumers [2008] OJ L 133.

[42] Case C-58/18, *Schyns* [2019] EU:C:2019:467, para 46.

suggestion, later embraced by the Court,[43] that a consumer cannot waive *from the outset* the rights derived from the UCTD.[44] All that signalled the Court's preparedness to interpret the MCD in a proactive way.

The present case *Association française des usagers de banques* offered the chance to test the MCD as well as to clarify the significance of its rules on bundling and tying. This latter is a particularly relevant aspect. It should be noted that, while the problematic aspects of cross-selling were generally recognised by MiFID II[45] and the PAD, the MCD was the first instrument - later partly followed by the Insurance Distribution Directive[46] - to go as far as straightforwardly outlawing tying practices. The exception, however, allowed Member States to significantly decrease the impact of that prohibition, as it was noted with some concern by European consumer associations.[47] Additionally, while the ESMA produced Guidelines for the assessment and the supervision of cross-selling practices involving investment products[48] based on the mandate laid down in the MiFID II,[49] the further plan of creating joint guidelines[50] by all the European Supervisory Authorities (ESMA, EBA, EIOPA) was halted due to concerns as to the lack of an appropriate legal basis.[51] The joint guidelines were meant to cover all financial products, thus creating rules also for tying mortgage loans and payment accounts and aimed at 'improving the content of disclosure on price, costs and other non-price features when different products are cross-sold with one another'.[52] There was therefore a risk that, despite the peremptoriness of the general prohibition in the MCD, the exceptions and the lack of more precise rules of conduct for credit institutions would compromise the effectiveness of that ban.

Against this backdrop, the CJEU decision in the present case has a particular importance for the regulation of retail financial services. In general, it can be noted that the MCD was interpreted in a favourable sense to consumer interests.

At first glance, the Court achieves this objective based on a rather literal interpretation of the MCD. The Court considers that the disputed measure is an exception to the prohibition of tying practices and as such it must be interpreted restrictively. While the notion that excep-

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43 Case C-452/18, *XZ v Ibercaja Banco SA* [2020] EU:C:2020:536.

44 Opinion of Advocate General Saugmandsgaard Øe on Case C-452/18, *XZ v Ibercaja Banco SA*, para 43.

45 Directive 2014/65/EU on markets in financial instruments [2014] OJ L 173.

46 Directive (EU) 2016/97 on insurance distribution (recast) [2016] OJ L 26, Art 24(3).

47 Response by the BEUC to ESAs, Joint Committee Consultation Paper on guidelines for cross-selling practices, JC/CP/2014/05 22 December 2014 <https://www.eba.europa.eu/node/82076/submission/63617>

48 ESMA, Guidelines on cross-selling practices, 11/07/2016 ESMA/2016/574 EN

49 MiFID II, Art 24(11).

50 ESAs, Joint Committee Consultation Paper on guidelines for cross-selling practices, JC/CP/2014/05 22 December 2014.

51 ESAs letter to European Commission, ESAs 2016 07, 26 January 2016. See F. De Pascalis, 'Sales culture and misconduct in the financial services industry. An analysis of cross-selling practices', [2018] 39(5) *Business Law Review* 150.

52 ESAs, Joint Committee Consultation Paper on guidelines for cross-selling practices, JC/CP/2014/05 22 December 2014. Ibid., 6.

tions should be interpreted restrictively should not be taken as a self-evident absolute rule,[53] the choice for the criterion seems appropriate considering the wording of Article 12(2)(a): a broadly-interpreted exception might have ended up cannibalising the prohibition, essentially liberalising tying practices. This choice is also and more importantly justified by the Court's preference for teleological interpretations. This is, of course, a common and well-known interpretative canon of the CJEU,[54] which also understands purposes at a high level of generality.[55] The Court highlights what it regards to be the objectives of the MCD and places the emphasis specifically on consumer protection and mobility. Mobility in particular is an objective predominantly underlying the regulation of payment accounts, where the EU intends to promote switching and more competition;[56] but an effective regulation of the mortgage credit market has also been regarded by the EU Commission as necessary to promote customer mobility.[57] The CJEU can thus find in Recital 24 a reference to consumers mobility and it infers from it a criterion in light of which the Directive shall be interpreted,[58] in the interest of consumers who, as the Court says, might wish 'to conclude a number of loan agreements with different lenders'.[59]

With these two objectives in mind, the CJEU offers a fruitful interpretation of the relevant rules. The purpose of Article 12(2)(a) is to allow tying in relation to 'payment or savings accounts' created to accumulate capital and offer additional security to the lender while excluding payment accounts to be used by the consumer for ordinary purposes, consistent with the PAD which also draws a distinction in principle between payment accounts and accounts 'with more limited functions'.[60] In this sense, the MCD first of all precludes a national measure allowing the opening of an account 'in so far as that account may be used by the borrower to effect day-to-day payment transactions such as placing, transferring and withdrawing funds'.[61] This means that an account where the consumer is required to deposit *all* his income would be one which in fact serves the function of placing or transferring funds, thus purposes which are not authorised by the Article. Hence, as articulated by the Advocate General, 'it follows in practice' that 'creditors are required to limit the income to be deposited in the payment account to the portion of income corresponding to the amounts necessary to repay the credit, to obtain the credit or to provide additional security for the creditor in the event of default'.[62] The rule is therefore interpreted as precluding the opening of payment ac-

53 Karl Larenz, Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (Springer, 1995) 174.

54 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice. Towards a European Jurisprudence* (Clarendon, 1993).

55 See the discussion in Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge, 2012).

56 PAD, recitals 5, 9, 24.

57 EU Commission, White paper on the integration of EU mortgage credit markets, COM(2007) 807 final, 3.4.

58 CJEU, *Association française des usagers de banques*, para 51.

59 Ibid, para 57.

60 PAD, recital 12.

61 CJEU, *Association française des usagers de banques*, Opinion AG Saugmandsgaard Øe, para 92 (1)

62 Ibid, para 62.

counts to be used for withdrawing funds and performing day-to-day transactions, but more fundamentally income deposit requirements which are disproportionate in relation to what is necessary to repay the loan or provide security. Thus, as the Court concludes, the lender cannot require the borrower to deposit all his salary on the payment account, irrespective of the amount, maturities and duration of the loan.[63]

The ruling further clarifies the minimum harmonisation character of the Directive. Coherently with the objective of consumer protection, the Court did not declare the incompatibility with EU law of the contested ten years limit. The MCD does not impose any time limit, implying that the account might be maintained for the whole duration of the loan provided that the deposit requirement is limited to what is necessary in order to achieve its aims,[64] but Member States are allowed to introduce more stringent provisions. This is indeed the case of the French limit which is seen by the CJEU as an instrument of additional consumer protection. It might perhaps seem curious that a requirement which was challenged as being a hindrance to consumer mobility was described by the CJEU as an instrument of consumer protection instead, but this should be considered against the background of the dispute and the domestic legislative framework, where the reform on which the disputed decree was based ultimately authorised tying practices. In any case, the French legislator took a more radical approach deciding, even before the CJEU gave its ruling, for a swift repeal of the contested rules of the Consumer Code, while the Council of State eventually annulled the disputed Government decree as it was based on a rule incompatible with EU law.[65]

Overall, the CJEU offered a generally protective interpretation of the MCD, clarifying the extent of the exception to the prohibition of tying practices and recognising its possibly relevant role for testing income deposit clauses.

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[63] CJEU, *Association française des usagers de banques*, para 64.

[64] Ibid, para 61.

[65] Conseil d'État - 6ème - 5ème chambres réunies, 4 février 2021 / n° 413226.