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NEW LAW ON BASIC BANKING SERVICES FOR BUSINESS IN BELGIUM: WHAT'S IN IT FOR THE FINTECH INDUSTRY?

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On 25 November 2020, the new law on basic banking services for businesses has been published in the Belgian Official Journal. It introduces a right to basic banking services for companies that will enter into force on 1 May 2021 (see our previous news here).

Up to now in Belgium, mandatory basic banking services were only available for consumers. The new law extends this type of services to companies (legal entities) and self-employed physical persons (in the document commonly referred to as "businesses).

This new law frames the Belgian legislator's intention to tackle issues faced by certain categories of businesses in Belgium that are being denied access to banking services. The preparatory works to the law specifically mention the diamond, hotel and catering sectors as typical examples.

AML/CTF CONTEXT

In preventing money laundering and terrorist financing ("AML/CTF"), banks risk hefty fines if they fail to meet strict requirements around on-boarding and ongoing monitoring of their clients (e.g. in 2018 Dutch Bank ING has been fined €775 million while its Belgian Branch has been fined €300,000 for having breached their AML/CTF obligations).

Hence, over the past years, banks have become more vigilant than ever and have invested significant resources to assess (the activities of) their customers. Despite their increased efforts, it remains difficult for certain banks to fully comply with all their legal AML/CTF obligations as these can be time-consuming and costly.

Banks are legally required to assess each new client before opening new accounts and monitor any transaction performed by these clients through their accounts with a level of scrutiny that varies in function of the clients' risk profile.

TACKLING DE-RISKING ISSUES

Therefore, some banks have adopted a zero-risk approach with certain categories of clients by either terminating existing relationships or denying access to their services to new customers with a potential higher risk profile. This approach is commonly described as “de-risking”. In practice, diamond dealers, foreign companies and certain FinTech companies are among the most affected business categories.

This prudent approach is perfectly feasible in Belgium as Banks have the right, at their discretion, to terminate a relationship or to deny access to their services, exception made of the basic banking services which until now only existed for consumers (and some other exemptions such as discrimination or abuse of right cases).

However, in Belgium all companies are legally required to open a bank account before starting their economic activities. In any case, businesses cannot operate their economic activities without a bank account. Hence, such de-risking causes a severe headache to businesses who see their relationship terminated or access to banking services denied.

In reaction to the above, the Belgian legislator has decided to introduce a right for basic banking services for businesses.

ALREADY SUBJECT TO AML OBLIGATIONS? NOT SO FAST.

One would think that this new law solves the whole problem, but unfortunately, the outcome is not that straightforward for all businesses. The Belgian legislator intended to tackle de-risking issues and offer all businesses the possibility to access (basic) banking services. It also added certain conditions for specific categories of businesses to benefit from these banking services.

The law sets additional conditions for businesses subject to the AML/CTF rules requirements such as diamond dealers, regulated financial companies, etc.: the so-called “obliged entities”. The basic banking services right will only apply to this type of businesses after the adoption of a dedicated Royal Decree which will either (i) implement additional risk mitigation measures regarding AML/CTF, or (ii) ratify a code of conduct agreed between the sector concerned and the organisation representing the financial sector (the Belgian Febelfin). In other words, until such a Royal Decree is adopted, these type of businesses will not have access to basic banking services. The law does not provide many details as to how and when we can expect this Royal Decree.

Next to this uncertainty, another key question remains as to whether a code of conduct for each relevant sector will and can be found or whether the legislator will simply decide on its own what risk mitigation measures will apply.

Finally, it remains to see whether such a code of conduct or risk mitigation rules will not lead to new ways for banks to restrict access to their services.

WHAT ABOUT THE PAYMENT / FINTECH INDUSTRY?

This is where things get really complicated. Even if the abovementioned Royal Decree were to be adopted in a not so distant future, the law would remain largely inefficient in certain categories of FinTechs such as payment and e-money institutions.

For many businesses, a guaranteed right to banking services would normally solve the whole de-risking issue as banks will be forced to provide a range of basic account and payment services to those businesses, allowing them to start or continue their economic activities.

Unfortunately for payment and e-money institutions, a regulatory status that is very popular among FinTech companies these days, the range of services included in the basic banking services scope does not cover so-called safeguarding accounts that are an absolute 'must-have' to perform their activities.

Among their multiple regulatory obligations, these institutions must safeguard the funds received from their clients by depositing them on a specific segregated client account (the safeguarding account) held in their own name with a credit institution and fully separated from the funds used by these companies for their own operational needs. These safeguarding accounts provide additional protection to customers' funds, i.e. funds deposited on those accounts are protected against any potential claim third parties could have on the FinTech companies.

In theory, Book VII of the Belgian Code of Economic Law (Article VII.55/12) is supposed to provide a solution by granting payment and e-money institutions access to credit institutions' payment account services that should be sufficiently extensive to allow them to provide payment services in an unhindered manner. However, such a provision has proven to be largely inefficient in practice. The wording used by the Code of Economic Law (directly transposed from the PSD2) remains somewhat vague: it says that access to payment service accounts should be objective, proportionate and non-discriminatory. This leaves room for discussions about the exact scope of the right that it grants to payment and e-money institutions and the extent of the banks' obligations.

So even if these payment or e-money institutions could open a bank account for their own operational needs thanks to the basic banking services law for businesses, the risk still exists that they would be excluded from opening safeguarding accounts. This type of accounts does not seem very attractive for banks as they result in an increased workload without being very profitable.

In practice, such restrictions will prevent these institutions from obtaining the necessary licence or from continuing their activities if they are already licensed.

While the new law on basic banking services for business aims at tackling a serious problem for numerous companies, it risks being inefficient for specific sectors such as the FinTech / Payments industry. Only time will tell how banks will react and whether further legislative initiatives are required to handle this issue.

This contribution is the second part of a series of two articles on basic banking services. This first part (available here) analysed the new law's main provisions while this article focuses on the issue of de-risking in the FinTech/payment industry.

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