ALLEN & OVERY

Basic banking service for undertakings – basic or baffling?

18 March 2021

In November 2020, the right for undertakings to a basic banking service was introduced into the Belgian Code of Economic Law. The adoption of this law follows more than 17 years after the adoption of the law of 24 March 2003 introducing the right for consumers to a basic banking service[1]. As a result, not only consumers but also certain professionals are now guaranteed several financial services, including the right to open a payment account, to deposit and withdraw cash, and to execute payment transactions.

The right to a basic banking service is strongly entwined with the applicable legal framework tackling money laundering and terrorism financing (**AML/CTF**). This article assesses whether granting undertakings improved access to financial services accords with the existing AML/CTF regime, and concludes that a number of important questions in this respect remain unaddressed.

That said, a Royal Decree will be adopted to further implement the right for undertakings to a basic banking service. It remains to be seen whether this Royal Decree will resolve the current concerns.

1 See Articles VII.56/1 to VII.59/3 of the Belgian Code of Economic Law.

1. Key elements

1.1 The right to a basic banking service

The Law of 8 November 2020, amending the Belgian Code of Economic Law, **grants undertakings established in Belgium the right to a basic banking service** if they do not already benefit from a similar basic banking service in Belgium or in another Member State (the **Law of 8 November 2020**). Under the Law of 8 November 2020, natural persons pursuing a profession in a self-employed capacity, legal persons, and certain organisations without legal personality qualify as 'undertakings'.

The right to a basic banking service includes[2]:

- the opening of a **payment account**;
- the making of **cash deposits** on or **cash withdrawals** from a payment account and related operations; and
- the execution of **payment transactions**, including transfers of funds, card or similar device payments, direct debits (including one-off direct debits) and credit transfers (including standing orders).

These services are in principle offered in euros. If requested by the undertaking, the execution of payment transactions may also be offered in US dollars, subject to additional conditions and restrictions to be established in a future Royal Decree.

The right to a basic banking service does **not include the provision of a credit facility**, which is in line with the right to a basic banking service that already exists for consumers. Any provision of credit therefore remains at the discretion of the bank providing the basic banking service.

1.2 Objectives of the Law of 8 November 2020

The Law of 8 November 2020 essentially aims to fulfil a **two-pronged goal**, which is to:

(i) ensure that undertakings may **open an account and carry out their commercial activities**, since undertakings in Belgium are legally required to possess an account to be able to commence their activities and to register with the Crossroads Bank for Enterprises. According to some members of parliament supporting the Law of 8 November 2020[3], practice shows that undertakings active in certain sectors (such as the diamond industry, the football sector, the catering sector, undertakings in the context of 'second-chance entrepreneurship' after bankruptcy, and also certain humanitarian organisations) are currently facing difficulties in opening an account in Belgium. In addition, some members of parliament refer to the COVID-19 crisis as a factor increasing the need for a basic banking service, as, for example, the need for liquidity becomes more important in times of economic hardship, and the number of bankruptcies is expected to rise.

(ii) **handle "*de-risking*"**, which is an approach that may be adopted by financial institutions to terminate or restrict business relationships with certain (categories of) clients in order to avoid, rather than manage, risks[4]. De-risking may be caused by a fear for hefty penalties or reputational risk, but may also be driven by profitability and efficiency. Steering clear of all risks goes against the risk-based approach that is considered to be the cornerstone of effective AML/CTF preventative systems.

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2 See Article 4 of the Law of 8 November 2020 (future Article VII.59/4 of the Belgian Code of Economic Law).

3 Other members of parliament and representatives of relevant organisations dispute in the parliamentary works of the Law of 8 November 2020 whether sectors other than the diamond industry are actually facing substantial difficulties in opening payment accounts in Belgium.

4 Again, the severity of this issue in Belgium is disputed by some members of parliament and representatives of relevant organisations in the parliamentary works of the Law of 8 November 2020.

Moreover, whilst de-risking may rule out risks at the level of the individual financial institution, it may increase risks at the level of the global financial system, as it drives persons and entities into less regulated or unregulated channels, which are more opaque and informal and, therefore, more difficult to monitor.

1.3 Procedure before the Chamber to appoint a banking service provider

The undertaking must have been **denied access to the basic banking services at least three times** by one or more banks before the undertaking may exercise the right to be appointed a basic banking service provider. The undertaking may then **file an application with the chamber** for basic banking services (the **Chamber**), to be set up within the Federal Public Service Economy. The application is made using a specific form made available by the credit institution and which must include, among other things, evidence that the undertaking has been denied access at least three times to a basic banking service. The specific content of this form will be determined in a future Royal Decree.

Once the request has been received, the Chamber will contact the Belgian Financial Intelligence Unit (the **CTIF-CFI**) to obtain a **confidential opinion** on the undertaking. Following a favourable opinion by the CTIF-CFI or absent any response from the CTIF-CFI within 60 days, the Chamber will then **appoint a basic banking service provider** from among the Belgian credit institutions that qualify as systemically important institutions[5]. One may question why the scope is **limited to systemically important institutions** and whether this may leads to an unjustified difference in treatment. The parliamentary works refer in this respect to the necessary compliance capacity which is required for providing basic banking services under the Law of 8 November 2020.

Based on the above, the undertaking is **not able to choose the basic banking service provider**. The Chamber will appoint the basic service provider within a month of the moment that the file relating to the request is completed, including the information and documents necessary for the basic banking service provider to identify and verify the identity of the undertaking, in accordance with the Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash (the **AML Law**). The rules governing the appointment of a basic banking service provider and the monitoring of compliance with the identification and identity verification obligations will be further laid down in a future Royal Decree.

1.4 Transparency requirements

A basic banking service provider appointed by the Chamber may only **refuse** to offer a basic banking service if[6]:

(i) a member of the board, an effective leader or, if any, a member of the executive committee of the undertaking has been convicted of fraud, breach of trust, fraudulent bankruptcy or forgery;

(ii) after filing its request, the undertaking has been able to open a payment account that gives access to the payment services in Belgium or in another Member State.

During the lifetime of the banking service relationship, the basic banking service providers appointed by the Chamber may **terminate** the provision of the basic banking service if:

(i) a member of the board, an effective leader or, if any, a member of the executive committee of the undertaking has been convicted of fraud, breach of trust, fraudulent bankruptcy or forgery; or the undertaking has used its payment account for illegal purposes;

(ii) no transaction has taken place on the account opened by the undertaking for more than twelve consecutive months;

(iii) the undertaking has provided incorrect information to benefit from the basic

5 The most recent list of systemically important institutions in Belgium is available at: **https://www.nbb.be/en/articles/annual-list-systematically-important-institutions-belgium-1**.

6 See Article 6, §3 of the Law of 8 November 2020 (future Article VII.59/6, §3, of the Belgian Code of Economic Law).

banking service or in response to the questions from the basic banking service provider performing due diligence checks;

(iv) the undertaking already benefits from a basic banking service in Belgium or in another Member State; or

(v) the termination complies with the AML Law.

A termination must be **notified** to the undertaking at least **two months in advance**, unless the service is terminated for one of the reasons listed under (i), (iii) or (v), in which case the termination is immediate.

A credit institution offering a basic banking service on a voluntary basis, ie outside the procedure before the Chamber, may only **refuse** to offer a basic banking service if[7]:

(i) the refusal complies with the AML Law; or

(ii) any termination ground set out above applies.

A refusal must be communicated to the applicant in writing, and, with respect to the procedure outside the Chamber, within ten business days after receipt of the request and with reference to the complaints and alternative dispute resolution procedures.

In addition, basic banking service providers are required to **justify any decision to refuse or terminate** the provision of a basic banking service to an undertaking unless providing such a justification is contrary to (i) the objectives of public policy or public security or (ii) the prohibition of disclosure established by Article 55 of the AML Law (the so-called '*tipping-off*' prohibition).

It is worth noting that the Law of 8 November 2020 does not expressly exclude the **possibility to recommence the procedure after a refusal or a termination**. Nothing therefore prevents an undertaking from resubmitting a request to gain access to an essential banking service after such a refusal or termination.

1.5 Reporting requirements

Credit institutions must send an **annual report** to the **Federal Public Services Economy and the CTIF-CFI** disclosing (i) the number of accounts opened following their appointment to provide a basic banking service, (ii) the number of refusals and terminations, and (iii) the reasons for such refusals or terminations.

The draft law **initially** provided for a reporting obligation **towards the NBB** and the inclusion of such reported information in the NBB annual reports. This obligation was then deleted from the draft law during the parliamentary procedure so as not to add to the supervisory burden of the NBB.

1.6 Alternative dispute resolution

The **Ombudsfin** is the competent alternative dispute resolution body to hear disputes regarding the basic banking service. Opinions issued by Ombudsfin are in principle not binding on the parties[8]. When the Ombudsfin rules on the credit institution's decision of refusal or termination of the provision of a basic banking service, its decision is **legally binding on the credit institution** as an exception to this rule[9].

1.7 Entry into force and review period

The Law of 8 November 2020 will enter into force on **1 May 2021**, but a number of its provisions and requirements must be further specified in a Royal Decree, which has not been published at the time of publication of this article.

The Law of 8 November 2020 will be reviewed by the Ministry of Economy in May 2022.

7 See Article 6, §1 of the Law of 8 November 2020 (future Article VII.59/6, §1, of the Belgian Code of Economic Law).
8 That said, the financial sector has committed to participate actively to the process set up by the Ombudsfin.
9 See Article 7 of the Law of 8 November 2020 (future Article VII.59/7, §1, of the Belgian Code of Economic Law). See also Article VII.59/2, §1, of the Belgian Code of Economic Law with respect to the decisions of the Ombudsfin on the provision of a basic banking service to consumers.

2. Interaction with anti-money laundering rules

As testified to by the parliamentary works of the Law of 8 November 2020, the introduction of a basic banking service is **strongly entwined with the existing AML/CTF regime**.

Whilst the Law of 8 November 2020 does aspire to fit into the existing AML/CTF framework, several **concerns as to its conformity** with the AML Law remain unaddressed. It remains to be seen whether the future Royal Decree will resolve these concerns.

2.1 The Law of 8 November 2020 as an instrument strengthening the AML/CTF framework

The Law of 8 November 2020 emphasises that it applies **without prejudice to the AML Law,** which is of Belgian public order.

Firstly, and as described above, the Law of 8 November 2020 attempts to **tackle so-called "*de-risking*"** and is therefore **in line with the risk-based approach** that is considered to be key for effective AML/CTF regimes. Introducing a basic banking service should prevent undertakings from being driven into less regulated or unregulated channels, and increase transparency.

In addition, the parliamentary works stress the fact that the Law of 8 November 2020 **furthers the use of payment accounts**, as opposed to cash transactions, which may – again – **favour transparency and reduce money laundering and terrorist financing risks**. However, it should be noted that the right to a basic banking service also includes the right to deposit or withdraw cash, which is nevertheless limited by the AML Law's general prohibition against cash transactions above EUR 3,000.00.

Finally, in an effort to further reduce money laundering and terrorist financing risks, the Law of 8 November 2020 foresees that the Chamber may **only appoint undertakings that are listed under Article 5 of the AML Law** (ie obliged entities that are themselves subject to the requirements of the AML Law) to a basic banking service provider, after the adoption of a Royal Decree. This Royal Decree will either (i) adopt further risk-reduction measures, or (ii) ratify a code of conduct concluded between the relevant sectors and the federation representing the Belgian financial sector (Febelfin). As this condition is only foreseen in the context of the procedure before the Chamber, nothing currently prevents obliged entities from being offered the basic banking service on a voluntary basis (ie outside of the procedure before the Chamber), without these additional safeguards.

2.2 The Law of 8 November 2020 as a challenge to the AML/CTF framework

The Law of 8 November 2020 poses several **concerns as to its conformity** with the AML Law.

Firstly, in the procedure before the Chamber, if the CTIF-CFI issues a favourable advice or if it issues no advice within 60 days, the Chamber must[10] appoint a basic banking service provider. For the Chamber to do so, the Law of 8 November 2020 specifies that the undertaking in question must provide the necessary information under the identification and identity verification obligations[11] in the AML Law.

However, **the AML Law also requires other types of information**, ie information with regard to the customer's characteristics and the purpose and nature of the business relationship[12], to be obtained when a business relationship is established. **The Law of 8 November 2020 remains silent** with regard to these other categories of information, and therefore appears to imply that the gathering of such information is not a prerequisite for the Chamber's appointment of a basic banking service provider.

This appears to be a **discrepancy with the AML Law**, which expressly sets out that (i) information

10 From the text of the Law of 8 November 2020, it appears that the Chamber does not have the possibility to decide against appointing a basic banking service provider.

11 In this regard, the Law of 8 November 2020 expressly refers to Book II, Title 3, Chapter 1, Section 2 of the AML Law.

12 These obligations are included in a different section of the AML Law as the identification and identity verification obligations.

with regard to the customer's characteristics and the purpose and nature of the business relationship must be received at the latest at the moment when the business relationship is entered into and (ii) in the absence of such information, the business relationship may not be entered into and no transactions may be carried out[13].

As such, under the Law of 8 November 2020, **a financial institution may be 'forced' to enter into a relationship** with an undertaking **even if** not all of the required information under the AML Law is obtained, and/or if the institution itself continues to have money laundering and/or terrorist financing related concerns (which is especially problematic in the hypothesis that the CTIF-CFI did not issue an advice). This is striking, as it will be the financial institution itself, and not the Chamber or the CTIF-CFI, which will ultimately bear the risk of, among other things, having to pay significant penalties under the AML Law.

That said, **the grounds on which the basic banking service may be terminated include the AML Law**. The Law of 8 November 2020 does not provide any minimum time period during which the basic banking service has to be provided, and the termination based on the AML Law has immediate effect. As a result, the procedure through which the banking service provider may be 'forced' to enter into a relationship with an undertaking is even more questionable, as **nothing seems to prevent the provider from terminating the business relationship immediately** after its appointment by the Chamber.

Finally, other questions may be raised, including over the **role imposed on the CTIF-CFI** by the Law of 8 November 2020. The CTIF-CFI is primarily an independent administrative authority tasked with analysing money laundering and terrorist financing related suspicions. In the parliamentary works of the Law of 8 November 2020, the representative of the CTIF-CFI emphasises this fact and the fact that the CTIF-CFI is not an authority competent of monitoring or supervising compliance with the AML Law.

As described above, under the Law of 8 November 2020, the CTIF-CFI is nevertheless **given a crucial advisory function** which may force financial institutions to enter into relationships with certain undertakings that have been previously denied access to banking services, possibly for money laundering and/or terrorist financing related reasons.

Institutions also have an **annual obligation to send information to the CTIF-CFI** with regard to (i) the number of accounts opened following their appointment to provide basic banking services, (ii) the number of refusals and terminations, and (iii) the reasons for such refusals or terminations.

It may be noted that the legislator should be careful to impose such supplementary tasks upon the CTIF-CFI, which have not been foreseen in the laws establishing and governing the CTIF-CFI. These tasks will necessarily require additional resources and manpower that must not compromise the CTIF-CFI's main assignment, which is the fight against money laundering and terrorist financing.

13 See Article 34 of the AML Law.

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