

# Payment Accounts Directive: the AML challenges for banks

The Payment Accounts Directive ('PAD') aims to guarantee access to basic bank accounts for consumers resident in the EU who do not currently have access to the banking system. Rachpal Thind and Grace Wyatt of Sidley Austin LLP examine what practical challenges the PAD may present to banks in the context of their anti-money laundering and counter terrorist financing controls ('AML/CTF controls').

The PAD<sup>1</sup> came into force on 17 September 2014 and Member States ('MS') are required to transpose its provisions into national law by 18 September 2016. In the UK, HM Treasury and the Financial Conduct Authority have been consulting with the banking industry on the implementing legislation. One of the PAD's key aims is to ensure that bank accounts with basic features are available to all consumers in the EU, regardless of their country of residence and financial circumstances. Under the PAD, all consumers who are legally resident in the EU have a right to a payment account with certain basic features<sup>2</sup> ('Basic Accounts' or 'BA') with a credit institution located in the MS in which they are then resident, including asylum seekers and those consumers who have no fixed address or residence permit but who may not be expelled for legal or factual reasons.

## Rights of access

Part IV of the PAD sets out various prohibitions MS are required to implement in an attempt to eliminate the barriers for access to BAs, including measures to ensure:

- credit institutions (i.e., banks and building societies)<sup>3</sup> do not

discriminate against consumers by reason of their nationality, place of residence or any other of the protected grounds under EU law, such as sex, race, ethnic or social origin, for example;

- the conditions applicable to holding a BA are not discriminatory in any way;

- the right of access to a BA is not made too 'difficult or burdensome' for the consumer; and

- access to a BA is not made conditional by a bank on the purchase of additional services or shares in the bank, unless the latter is conditional for all customers.

On reading these provisions, one immediately begins to see potential clashes with AML/CTF controls. By way of an example, persons without a fixed address will not be able to provide the standard documentation that banks typically rely on to complete the due diligence process upon account opening, such as utility bills as proof of address. An application from a prospective account holder with no fixed address will, therefore, require enhanced customer due diligence and possibly escalated approval requirements within a bank, given that the information provided will have to be capable of providing a sufficient level of confidence that the consumer seeking to open an account is who they claim to be. This, in turn, raises the question as to whether requests for additional identification information and/or subjecting the application to a more stringent approval process would render access to a BA 'too difficult or burdensome' under the PAD.

## Grounds for refusal of a BA

The PAD does allow for certain circumstances in which a bank may refuse an application for a BA, including where opening such an

account would result in an infringement of the provisions of the EU Money Laundering Directive ('MLD')<sup>4</sup>. However, given that the starting position under the PAD is that asylum seekers and persons without a fixed address or residence permit should not be excluded from the banking system, as a practical matter, a bank would have to have strong AML/CTF grounds for refusing an application. Moreover, in the UK, the Joint Money Laundering Steering Group ('JMLSG') guidance<sup>5</sup> specifically states that staff should be discouraged from citing AML legislation as a reason for not opening an account where an applicant produces non-standard documentation, and that proper consideration of the evidence available should be undertaken<sup>6</sup>.

## Customer due diligence

As a consequence, banks may be required to undertake comprehensive due diligence in relation to applicants who request a BA in order to determine the level of AML/CTF risk and whether taking on such a customer would potentially breach the MLD. Conducting due diligence on potential customers who do not have a fixed address or standard documentation can present a number of challenges, and the MLD does not provide any detail on what constitutes an acceptable evidence of identity.

However, the JMLSG guidance on the financially-excluded sets out various points for consideration for due diligence purposes. These include:

- a requirement for a proportionate and risk-based approach in determining whether the evidence available gives reasonable confidence as to the identity of a customer;
- the financially-excluded are

not a homogeneous category of uniform risk and some financially-excluded may represent a higher risk of money laundering, regardless of whether they provide standard or non-standard documents to confirm their identity; and

- even where the available evidence of identity is limited, a firm may still be able to take the position that the customer cannot reasonably be expected to provide more evidence and choose to proceed with the business relationship. However, the firm should consider instituting enhanced monitoring in relation to the consumer's account and to consider whether it is appropriate to place restrictions on the consumer's ability to access other higher-risk products or services.

### Increased regulatory burden

It is clear that undertaking due diligence for the purposes of account opening where a consumer does not have standard documentation is time-consuming and resource-intensive, more so if enhanced monitoring of the account is required. A considered evaluation of non-standard documentation requires expertise, escalation and training that may not currently be available to credit institutions in branches where consumers are looking to open accounts. This may also require credit institutions to invest in more specialised members of staff resulting in an increase in costs to meet the requirements of the PAD.

It seems UK banks to date have had little appetite to onboard consumers with non-standard identity documentation, despite there being industry guidance on dealing with such customers and a voluntary agreement having been in place in the industry since 2014 to improve access to BAs. According to the UK Refugee

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Council<sup>7</sup> persons without standard identity documentation are being left unable to access bank accounts and UK banks in practice are not accepting the Biometric Residence Permit ('BRP') as sufficient proof of identity. This, despite the fact that the BRP is a document issued by the Home Office and evidence of a legal right to remain in the UK, and is intended to serve as a form of identification including name, date and place of birth, nationality, biometric information, photo and signature of the holder.

In view of the prohibition on discrimination and the limited other grounds for refusal, going forward it may be difficult in practice for a bank to refuse a BA to a consumer, including consumers who only have a BRP, given that the PAD now provides a route to challenge a bank's decision not to open a BA.

Under the PAD, a bank must determine whether to accept or decline an application within 10 days of receiving a completed application. Where the bank is declining an application, the bank will be required to inform the applicant in writing of its decision immediately, citing the specific reason for the refusal, free of charge. However, the PAD provides a carve-out from these notification requirements in circumstances where the provision of any such information would amount to tipping-off under the MLD.

Even when acting in accordance with the law, banks will still be exposed to potential challenges by consumers who feel they have not been treated fairly, given that in the event of a refusal, the bank must advise the applicant of the procedure to submit a complaint against the refusal and provide contact details for the relevant competent authority and the designated alternative dispute resolution body. There is no

exclusion to this information requirement for applications suspected of being requested in connection with money laundering or terrorist financing, nor is it clear that the banks could share such information, in particular with alternative dispute resolution bodies, in order to defend themselves.

### Practical impact

Currently, banks have little or no incentive to offer banking services to the financially excluded. However, it is clear that there will need to be further change in relation to AML/CTF due diligence procedures, with the possibility for an increase in costs for banks. At the very least, banks should be able to expect that their regulators will not put them in a regulatory whipsaw by pitting their compliance with PAD against their AML/CTF obligations.

The details of MS' implementation of the PAD may provide further clarity as to the proposed sanctions for non-compliance and how regulators will monitor compliance with the implementing legislation. The weight of the sanctions and compliance regime will no doubt drive the level of resources banks apply to their compliance efforts on both PAD and AML/CTF.

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1. Directive 2014/92/EU of 23 July 2014.
2. See Article 17 of the PAD for the characteristics of a Basic Account.
3. 'Bank' and 'credit institution' are used interchangeably in this article.
4. Directive 2005/60/EU. See Article 16(4) of the PAD.
5. JMLSG guidance, Part II, Retail Banking - 'financial exclusion,' [www.jmlsg.org.uk](http://www.jmlsg.org.uk)
6. Ibid.
7. [http://www.refugeecouncil.org.uk/assets/0003/1769/28\\_days\\_later.pdf](http://www.refugeecouncil.org.uk/assets/0003/1769/28_days_later.pdf)