

De-banking: Difficult decisions

Decisions to terminate customer accounts are often complex and involve a weighing of risk. Anthea Bowater and Piers Reynolds discuss the issues



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There are many reasons why a bank may wish to terminate customer accounts. It may have concerns about financial crime; the customer may have breached the terms of the account; or the bank may determine that the customer falls outside their current risk appetite, due, for example, to the nature of the customer's business or the reputational risks associated with the customer.

Given the consequences of de-banking for both firms and the customers affected, it is worth considering some of the recent developments in this area, the litigation and regulatory risks which can arise when a decision to terminate is made, along with the current guidance from the courts and practical tips for those employees making the decision to exit.

Recent developments

The closing of customer accounts without fair justification has received significant recent attention. This scrutiny has focused on the closure of personal accounts given the very high impact for individuals denied access to their bank account.

In response, the UK Financial Conduct Authority (FCA) conducted an initial review of the number of personal and business accounts terminated, suspended and/or declined by financial institutions in the UK, together with the reasons for those decisions and any associated complaints. This initial review focused on identifying any instances in which an account was terminated, suspended or declined because of a customer's political views or any other opinions.

The results were released in September.¹ The FCA found that the most common justification for firms terminating, suspending or declining accounts centred on suspicions of financial crime, due diligence concerns, or inactive/dormant accounts – all of which was to be expected. Across the personal and business accounts of the 34 firms surveyed, there were only four cases (and an additional four complaints) in which the reason for closure or complaint was identified as the “expression of political or any other opinions”, although when the FCA investigated further, it appeared that this was not in fact the primary reason for closure. For the majority of these cases the principal reason was in fact customer behaviour – such as racist language that had been directed at staff.

The FCA has explained that it will be conducting further analysis and supervisory work to be sure that banks are not closing accounts because of lawfully expressed political beliefs or views being expressed by customers. As part of its work, the FCA intends to scrutinise the accuracy of data reported by individual firms and the apparent high range of percentage declines for personal bank accounts across the firms surveyed.

The FCA also indicated that it would explore the issue of de-risking further, although it noted that a more strategic and cross-system approach led by the government might be needed in this area.²

In the meantime, the FCA has stressed that it expects firms terminating accounts to meet the requirements of the Consumer Duty by putting retail customers (including certain smaller businesses and charities) first and delivering good outcomes for them.

The British government is also planning reforms. In July it published a Policy Statement indicating that it will extend the notice period required for closure of personal accounts from 60 to 90 days, and mandate that banks and other payment services providers give customers a clear reason for termination (where it is lawful to do so).³ It is expected to publish draft legislation implementing these changes before the end of 2023.⁴

Litigation and regulatory risks

Bank representatives may feel more concerned about making decisions to terminate customer accounts in the current climate. A decision to terminate an account can expose a bank to litigation risk, even if the bank is exercising a contractual discretion and/or fulfilling its legal duties – such as under the Proceeds of Crime Act (POCA), for example – in making the decision to terminate.

If a customer considers that a bank has terminated (or suspended) an account wrongfully, or that it has not followed the correct process in doing so, the customer may bring a claim against the bank for breach of contract, negligence or discrimination. Certain eligible customers may also file a complaint to the Financial Ombudsman Service.

Claims might be particularly likely where the customer is unable to secure alternative banking arrangements, or where the customer is an organisation relying on its current banking arrangements to run its business. Further, where the bank has chosen to terminate a customer account because of financial crime concerns, there is the added challenge that banks will usually not be able to explain the reasons for the termination to the customer involved in light of the restrictions in POCA.

In addition to the litigation risks, a decision to exit can have regulatory risks, as foreshadowed above. While the FCA's role is generally limited to ensuring that firms comply with the relevant legislation and notice provisions, it will also be concerned if it considers that firms have made a decision in a way which breaches the Principles for Businesses (by, for example, not communicating with the affected customer in a fair, clear and not-misleading manner), or the Consumer Duty (by not providing the customer with reasonable notice, for instance, or potentially by not providing some assistance to find alternative banking arrangements or further support). ▶

Guidance from the courts

Although most cases brought in this context settle before trial, *N v The Royal Bank of Scotland* is an example of a reported case in which a bank exercised a contractual discretion to terminate, with the customer challenging that decision.⁵

In that case, the Royal Bank of Scotland (RBS) froze the customer’s accounts and terminated the banking relationship without notice when it suspected that the accounts were being used for money laundering purposes (whether innocently or otherwise). The customer, N, was an authorised payment institution which provided foreign exchange and payment services to its customers, had a turnover of around £700 million and approximately 60 active accounts with RBS. N commenced proceedings challenging the lawfulness of RBS’s decision.

The contract between the parties provided (among other relevant terms) that RBS would give N no less than 60 days’ written notice to close an account, unless RBS considered that there were exceptional circumstances.

N claimed that although RBS had a contractual discretion to terminate, that contractual discretion must be exercised in a reasonable manner, exercised sparingly and only where the circumstances fully justified such steps. It said that if the contract was not construed in this way, then the term would be unreasonable for the purposes of the Unfair Contracts Act 1977. It said that RBS did not exercise the discretion reasonably or with justification in this case. It also claimed that RBS was negligent in the way that it made its decision to terminate.

The court decided that it did not need to grapple with the legal question of whether reasonableness, rationality (or neither) was required, as it found that RBS’s decision was both reasonable and rational. It ruled that RBS was entitled to terminate the customer’s accounts in the way that it did. The court emphasised that different decisions could have been made by RBS on the day that the relationship was terminated which were also honest, rational and reasonable, but the availability of other decisions did not mean that RBS’s decisions fell outside the range of what was honest, rational and reasonable. N’s claim of negligence was unsuccessful for the same reasons.

Importantly, the court’s decision in this case was clearly influenced by evidence showing that N had serious failures in its regulatory compliance at the time, including its due diligence of its clients. On the other hand, RBS was able to demonstrate a clear rationale for its decision, including that it had formed a suspicion of financial crime.

Practical tips

The first step in making any decision to terminate is to identify the contractual term which allows the bank to do

so. At a high level, those involved in the decision should then identify what the contractual term requires the bank to demonstrate and check that the bank’s decision falls within the term. Does the bank, for example, need to show that it has decided not to pursue business in a particular area or that it has formed a suspicion of financial crime?

The bank should also identify whether a notice period is required and check, particularly in the context of personal accounts, whether this is consistent with the current law (noting the likely changes highlighted above). Similarly, if the customer involved is a consumer, the bank should consider how it will exercise its discretion in a way that is consistent with the Consumer Duty.

A bank should do two further things. First, document the decision carefully, ensuring that the bank’s record reflects an explanation for each element of the contractual term, and confirmation that the appropriate decision-makers have been involved. Then, it should consider how best to notify the customer of the decision, and whether the bank is legally able (or obliged) to explain the decision in detail, in light of current law (again, noting the likely changes highlighted above).

Decisions to terminate customer accounts are often complex and will involve an assessment of the bank’s legal obligations as well as a thoughtful balancing of risk. Where the bank has formed a suspicion of financial crime, the restrictions in POCA will be relevant to all of the matters listed above too. It may sometimes be helpful to seek external advice if the circumstances are not clear cut and/or there is the prospect of the customer challenging the decision. Overall, it seems likely that this area will continue to receive scrutiny from customers and regulators in the near term. ●



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1. <https://www.fca.org.uk/publication/corporate/uk-payment-accounts-access-and-closures.pdf>
2. See for example 7.11
3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172799/Payment_account_terminations_and_freedom_of_expression_-_200723__2147_.pdf
4. https://assets.publishing.service.gov.uk/media/651ab83f7c2c4a000d95e33c/Payment_service_contract_termination_rule_changes_-_implementation_timings_and_next_steps__002_.pdf
5. [2019] EWHC 1770 (Comm)