

STATES OF JERSEY



DRAFT BANKING BUSINESS (DEPOSITORS COMPENSATION) (AMENDMENT No. 2) (JERSEY) REGULATIONS 201- (P.81/2019): COMMENTS

**Presented to the States on 6th January 2020
by the Economic and International Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

Background

[P.81/2019](#) – Draft Banking Business (Depositors Compensation) (Amendment No. 2) (Jersey) Regulations 201- (the “draft Regulations”) was lodged by the Minister for External Relations on 14th August 2019. The matter was originally due to be debated on 22nd October; however, following a number of concerns raised by the Panel and the Information Commissioner, the Minister deferred the debate until 21st January 2020.

The draft Regulations

The draft Regulations seek to amend the [Banking Business \(Depositors Compensation\) \(Jersey\) Regulations 2009](#) (the “2009 Regulations”). The 2009 Regulations established a Bank Depositor Compensation Scheme (“the Scheme”) which exists to provide protection for certain bank deposits held in Jersey should a bank no longer be in a position to immediately return deposits to depositors.

The Scheme is governed by the Jersey Bank Depositors Compensation Board (“the Board”), which is an independent body. Currently, the Board does not have the power to collect information from banks regarding the deposits that they hold, or the profile of depositors. Therefore, the draft Regulations would grant the Board powers to collect information about deposits held by Jersey banks and include a standardised format for the collection of data. The purpose is to provide a system whereby, if the Scheme was triggered, information about protected deposits could automatically be processed, and deposits returned quickly, irrespective of which bank held them.

The draft Regulations would also reinstate offences in relation to banks withholding information from the Board or attempting to defraud the Scheme. The offences were originally covered by the [Banking \(Depositors Compensation Supplementary Provisions\) \(Jersey\) Regulations 2012](#); however, these have now lapsed. Under the draft Regulations, the offences would be placed on a permanent footing.

Concerns raised by the Panel

Shortly after the draft Regulations were lodged, the Panel requested a briefing to discuss the proposed changes in more detail. A briefing took place on 13th September with Officers from the Office of the Chief Executive (Financial Services and Digital Economy), during which the Panel raised a number of concerns primarily around the sharing of sensitive data –

- Regulation 7 would amend the 2009 Regulations by inserting Regulation 35B (Disclosure of information). The draft Regulations set out the instances in which the Board could disclose information it had collected for the purposes of administering the Scheme, as well as those individuals or organisations with whom it can share such information (i.e. the Minister, Jersey Financial Services Commission, or any person enabling or assisting the Board). The Panel questioned whether this would in fact allow access to individuals’ personal data by a wider range of entities than was strictly necessary or appropriate. The Officers explained that this was intended to assist the Board when expediting the Scheme.

- The wording of new Regulation 35B(2)(d) provides that any person could receive information, at the discretion of the Board, provided that they are carrying out a prescribed function such as a regulatory agency, the courts, investigating criminal proceedings, or assisting the Board in its legal functions, amongst others. The Panel notes that the Board commissions a Professional Services Team to assist the Board in administering the Scheme on its behalf, and they would be required to access the information for these purposes. However, this could still lead to a large number of people having access to highly sensitive personal data. The Officers explained that it was not expected that this would be an issue.

At the end of the session, the Officers agreed to consider the concerns raised by the Panel so that a resolution could be found as to the way forward. In that regard, the Panel received a follow-up briefing on 3rd October. At the meeting, Officers explained that the fundamental reason for granting the Board information-gathering powers was to ensure that the Scheme would be ready to pay out if it was triggered. The Panel was advised that the Board intended to test the Scheme with data from one or two banks to identify any issues and to inform the creation of a standardised format through which depositor data would have to be submitted by banks should they fail (known as a Single Customer View).

Officers also explained that the proposed gateways under the draft Regulations would allow the Board to share information under certain restricted circumstances with various bodies. These powers stem from Article 42 of the [Banking Business \(Jersey\) Law 1991](#). Article 42 provides that no person, which would include the Board and its agents, should disclose information without the consent of the person to whom it related and the person from whom it was received. It was noted that an offence would be committed should this happen, which was punishable by 2 years' imprisonment or a fine (or both).

The Panel was largely satisfied with the further detail and explanation provided by the Officers, but at the time considered whether it was appropriate to amend the legislation to provide extra safeguards for the transfer and storage of such sensitive data. In order to gain an informative opinion, the Panel wrote to the Information Commissioner to seek his views on the proposals.

Concerns raised by the Information Commissioner

The Panel received a [letter](#) from the Information Commissioner on 7th October. Although the Commissioner supports protecting the bank balances of depositors as being in the public interest, he raises a number of concerns about the data-sharing elements of the proposals –

Information Commissioner:

“I do have concerns about the discrepancy between the limited purposes for which the Government indicates the Board requires the personal data and the broader powers for collecting personal data included in the proposition. The Board would have many of the same powers for the collection of personal data that the Jersey Financial Services Commission has under article 26 of the Banking Law. This includes the power to compel the production of all information that an officer or agent reasonably requires for the purpose of the performance of the Commission's functions under that Law.”

I acknowledge that it is clear that the Board must have access to certain personal data of depositors in the event of a bank failure in order to process requests for compensation (as per article 2 of the 2009 Regulations). However, it is less clear the extent to which the Board would reasonably require the data of depositors in normal circumstances where there is no reason to expect that any banks would fail. My understanding is that bank failures in Jersey are rare and that Jersey has created the Scheme out of an abundance of caution.

My concern relates to one of the data protection principles in article 8 of the Data Protection Law (Jersey) 2018 (Data Protection Law). This is the principle of data minimisation, which requires that the processing of data be limited to what is necessary in relation to the purposes for which it is processed. While the plan, as the Government has described to me, meets the principle of data minimisation, the powers granted to the Board in the proposition permit the Board to require further personal data from banks that may be over and above what is required to administer the Scheme.

I have no reason to doubt the good faith and commitment of the Board to the Data Protection Law, but I believe it would be prudent to incorporate into the proposition additional checks and balances or accountability requirements. My primary concern relates to unconfirmed reports of depositor protection schemes in other countries that involve the creation of amalgamated databases of all current account balances within the jurisdiction in personally identifiable form. I suspect that this would pose an attractive target for hackers and others seeking unauthorised access to a large volume of sensitive and valuable data.”

The Commissioner’s concerns were shared with Officers from Financial Services and Digital Economy. In response, the Lead Policy Advisor said –

Lead Policy Advisor, Financial Services:

“The most important point to address is the concern that the proposition allows the collection of data beyond what is necessary to administer the scheme. As [redacted] advised the panel this is not the case, and any collection of data beyond what is necessary to operate the scheme would be unlawful.

The fundamental reason behind this proposition is that without the ability to test the scheme with depositor data and build a standardised format, the Board is concerned that it cannot repay depositors within 90 days, as required by the regulations passed by the States in 2009. Our position has been that it is preferable to give the Board these powers rather than extend the period for which people might not be able to access their money if their bank fails to, say, 180 days. I should also emphasise that there is no intention to build an amalgamated database of depositor data – this is not necessary for the scheme to function and hence would not be permitted by these regulations.”

The Panel would like to emphasise that the Officers have been very helpful in working with the Panel to reach a consensus as to the way forward. Further to the Information Commissioner’s concerns, the Panel was advised that Government officials have been in contact with the Commissioner in order to find a way forward to address his concerns. The Panel understands that the Information Commissioner is content should there be a

commitment by the Jersey Bank Depositors Compensation Board to consult with him prior to implementing a new Scheme.

Amendments

After considering the legislation in further detail towards the end of 2019, the Panel instructed that an amendment be drafted to remove the Minister from the information-sharing powers (as mentioned in the bullet point above) as the Panel sees no reason as to why a Minister should be included. The amendment also includes an insistence that sensitive data is held in an encrypted format. Further justification can be found in the report accompanying the [Panel's amendment](#).

The Panel [wrote](#) to the Minister informing him of the Panel's intentions to amend the legislation and to seek his views on the proposed changes. The Minister [said](#) –

Minister for External Relations:

“... I fully support the principles underlying the amendments, which I hope to support. I agree that it is not appropriate for Ministers to receive information comprising personally identifiable bank deposits from the Board, and note that your amendment offers an additional layer of assurance in this respect. Similarly, I agree that information security is paramount, and requiring encryption is an additional safeguard. It is envisaged that data would be encrypted in-flight, and would only be decrypted where it is necessary to allow the data to be used for its purpose in accordance with the Board's functions under law”.

Conclusion

The Panel accepts that any collection of data beyond what is necessary to operate the Depositors Compensation Scheme would be unlawful. However, in light of its concerns and those raised by the Information Commissioner, the Panel has lodged an amendment which will provide extra safeguards for the transfer and storage of such sensitive data. In that regard, the Panel welcomes the Minister's support for the amendments.

In addition, the Panel recommended to the Minister that the Jersey Bank Depositors Compensation Board should engage with the Information Commissioner in implementing any powers. The Minister shared the Panel's concerns for the importance of data protection, and confirmed that the Board has agreed to liaise with the Commissioner ahead of receiving any personal bank deposit data in advance of a bank failure, should they be given the powers to receive such information.