STATES OF JERSEY

DRAFT DORMANT BANK ACCOUNTS (JERSEY) LAW 201- (P.25/2016): COMMENTS

Presented to the States on 24th June 2016
by the Economic Affairs Scrutiny Panel

STATES GREFFE

COMMENTS

Background

The Draft Dormant Bank Accounts (Jersey) Law 201- (P.25/2016) was lodged by the Chief Minister on 15th March 2016. The Panel received a briefing on the draft Law from the Assistant Chief Minister with responsibility for Financial Services (Senator P.F.C. Ozouf) and department officers on 5th April 2016, when the Panel indicated that it intended to review the matter. As the Assistant Chief Minister was reluctant to delay the debate, it was decided that the Panel would have to call it in to give themselves time to scrutinise its provisions. The principles were subsequently approved by the States on 26th April 2016, at which point the draft Law was called in for scrutiny.

Meetings

Further to the briefing from department officers and the Assistant Chief Minister on 5th April, the Panel held private meetings on 27th May 2016 with witnesses from the Jersey Bankers' Association (JBA); the Jersey Financial Services Commission (JFSC); and officers from Economic Development, Tourism, Sport and Culture (EDTSC) and the Chief Minister's Department. Subsequently, another detailed discussion took place with the Assistant Chief Minister and officers on 9th June 2016. Following that meeting, in response to comments made by the Panel, the Chief Minister lodged an amendment to the draft Law on 14th June (P.25/2016 Amd.).

Purpose of the review

The Panel's review considered a range of issues. Its terms of reference included consideration of[1]:

1. the appropriateness of the legislation in respect of unclaimed private assets;
2. the period applied for dormancy;
3. the need for a balance to be struck between the distribution of capital and income accruing to the Fund;
4. treatment of different classes of assets;
5. action to be taken by banks to identify owners of dormant accounts before funds are transferred to a Reclaim Fund;
6. the purposes to which funds should be put;
7. the administration of the Fund;
8. how to determine what causes should benefit from the Fund; and
9. whether the costs of the Charities Commission should be paid for out of the Fund.

The Panel questioned witnesses and the department on all of these matters, as well as identifying further issues in the course of discussions.

[1] Terms of reference are summarised here for convenience; full details are available on the Scrutiny website at www.scrutiny.gov.je

Rationale

Why bring in the Law?

The Panel was told that a number of years ago, there was a concern that dormant accounts in Jersey might be swept up into the new UK Reclaim Fund. While the UK law did not include Jersey or other Crown Dependencies, it was thought that Jersey could potentially be drawn into the UK scheme by default, if it could not demonstrate that it planned to bring in its own legislation. Local branches of major banks based in the UK could have been required to identify dormant accounts according to the UK rules and transfer funds back to the UK for eventual distribution. This would have meant that local charitable causes would not have been able to benefit to a large extent from locally-based dormant accounts.

Supporting charities and good causes

Reclaim Fund Ltd. was set up under equivalent legislation in the UK, and has been operated on a non-profit-making basis as a wholly-owned subsidiary of the Co-operative Banking Group Ltd. since 2011. Its rationale is '*to make it possible for money in dormant bank and building society accounts to be used to help good causes'.*[2] It does this by collecting unclaimed funds from dormant accounts (which would otherwise remain frozen and inaccessible) and transferring them to the Big Lottery Fund, which then reinvests them in the community.

The Reclaim Fund Ltd. website states that so far more than £277 million has been transferred in this way. Importantly, not all of the funds transferred are spent. Enough money must be retained to meet any potential future reclaims by bank customers who may have forgotten where they held accounts, or fallen out of touch with their bank for some reason, such as spending extended periods abroad.

While it is not intended that the Jersey Fund would use exactly the same mechanisms as in the UK, the aim of supporting good causes with unclaimed funds is essentially the same, and much of the present draft Law has therefore been based on UK provisions. The department has also drawn heavily on the experience of the UK scheme in putting together its proposals.

How much money will be raised by the new Law?

There is little certainty about the amounts that may be raised by a local Reclaim Fund. Due partly to differing timescales currently used by local banks to identify dormant accounts, it is hard for them to give a reliable estimate of how much money may eventually be transferred. Other issues arising from bank mergers and computer system changes can also create difficulties in identifying how long an account has been dormant. The Panel was informed that due to regulatory pressures in the last few years, some banks had not begun to look at dormant accounts yet, and would need to make use of the transition period provided in the Law to enable them to identify such accounts from their records.

The Panel was initially informed by the Assistant Chief Minister that it was his aim to put the Law (once approved by the States) to the Privy Council before the summer recess, with a view to commencing transfer of funds by 1st January 2017. JBA representatives seemed to feel that this could be ambitious; as there was little clear

[2] From Reclaim Fund Ltd. website: www.reclaimfund.co.uk

information regarding numbers of dormant accounts held by banks or the amounts that might be in them, they cautioned against expecting large sums in the first few years of the Law. However, at a subsequent meeting with the Assistant Chief Minister, it was stated that at least one bank had done much work on this already and a 'significant amount' might be expected, although a figure was not yet known.

Charities Commissioner

The Charities Commissioner role was originally hoped to be funded through the Medium Term Financial Plan (2), but only contingency funding over 2 years was then identified (a sum of £370,000, including some set-up costs). Subsequently, it was agreed that the Dormant Bank Accounts Law could provide for the costs of the Charities Commissioner to be met out of money transferred to the Reclaim Fund. The contingency money would be used to cover any gap until funds start to flow into the Reclaim Fund.

The Law is worded in such a way as to allow flexibility regarding paying the costs of the Charities Commissioner; so if an alternative source of funding is identified for this in future, more of the proceeds of the Dormant Bank Accounts Law could be used for charitable purposes. Nevertheless, it is understood that discussions are still ongoing concerning the possible risks of establishing the Charities Commissioner without a secure funding stream, given that the amounts that will be available from the Reclaim Fund are unknown. It is theoretically possible that funding could prove insufficient to meet these costs. Research carried out in Guernsey in 2013 into the creation of a similar fund indicated that the total amount it could be expected to make available for charitable distribution (and to cover the costs of administration) was likely to be no more than £300,000; the plans were subsequently dropped.

The Panel was also told that the Dormant Bank Accounts Law is effectively a 'cleaning up' exercise which is expected to be of limited duration. The scheme will only bring in funding until all existing dormant accounts have been identified, after which the application of current 'know your customer' (KYC) rules should ensure that there will be no recurrence of this 'windfall' opportunity; so it is expected that distribution of monies from the Reclaim Fund may only be possible for a few years before the source dries up.

As originally outlined in the Draft Charities (Jersey) Law 201- (P.108/2014), subsequently approved by the States, the role of the Charities Commissioner will be primarily one of guidance and regulation for charities in the Island. It would have no influence on the distribution of funds remaining in the Reclaim Fund after the Commissioner's costs are met.

Reputation and risk

In early meetings with the department, it was suggested that Jersey having no dormant account scheme of its own could potentially give a negative impression, whereas appropriate legislation and a successful scheme could help to improve the perception of the Island as a mature, independent jurisdiction with robust financial regulation. It was also suggested that, in an era when the application of strict KYC and anti-money laundering (AML) rules is expected of all financial institutions, banks would prefer to drive down the risk profile associated with holding funds on behalf of past clients who could no longer be identified or contacted.

However, subsequent talks with the JBA and JFSC indicated that there may be no particular drive for banks to get money 'off their books' for this reason. While an account declared dormant after 15 years was unlikely to be up-to-date in respect of KYC, the transfer of unclaimed accounts from a bank to the Reclaim Fund would not transfer any reputational risk; banks would still retain responsibility for their own clients.

Although it was recognised that it would be difficult to avoid all risks around due diligence and activities such as money laundering, if a bank had concerns about any funds, it should already have filed a suspicious activity report (SAR), and other laws could then prevent the transfer of such monies to the Reclaim Fund. The JFSC did not anticipate involvement in running the Fund or with oversight of it, which they considered would be matters for the Chief Minister's Department and the States' Internal Auditor respectively.

If a client emerged with a genuine claim to an account previously identified as dormant after the bank had transferred money to the Reclaim Fund, the bank would be expected to deal with its own client; there would be no contact between the Reclaim Fund and bank customers. Banks would be required to carry out their own (new) KYC due diligence and, if appropriate, repay clients directly. They could then apply to the Reclaim Fund up to 4 times per year for a refund of any transfers successfully reclaimed.

As a result of these measures, there was probably no greater reputational risk to the Island through monies being transferred to the Fund, as compared to their remaining with banks.

What constitutes dormancy?

For the purposes of the Law, dormancy would be established where there are no transactions on an account or contact with the client for 15 years. This period was agreed collectively with the industry. It was considered important to have consistency with the UK law (especially for those banks with Head Offices there), although individual banks currently have different definitions for their own internal purposes, which could create some difficulty in identifying when the 15 year point is reached. Some banks have clients who particularly want to put money away for longer periods; in other cases accounts can be set up and simply not be touched for many years. This could create extra difficulties for banks that have merged over time (e.g. RBSI/NatWest) in checking through their records to determine dormancy. It can also be difficult to identify clients who may have multiple accounts, but the general principle will be that client contact regarding one account will result in all linked accounts being considered 'live'.

Requirements within the draft Law for banks to attempt to contact the client via their last-known address could be waived if the bank considered there may be a risk of fraud. In some parts of the world there can be valid reasons to contact clients by secure e-mail rather than in writing, for example to ensure personal security. If a bank could not make contact, lower-value accounts would normally be frozen; with higher-value accounts there would usually be more regular contact with account-holders in any case, possibly by means other than written correspondence.

Because of the potential complications involved, a 5 year transition period has been agreed for the new procedures to be put in place. This will allow banks to transfer funds from dormant accounts immediately if they can, but give time for others to adopt new systems. It was considered that smaller private banks may find it easier to adapt than

bigger clearing banks, although mirroring the UK law to some extent should help banks which are already familiar with those processes.

Consultation

The public consultation on dormant bank accounts officially closed on 30th September 2015, although the results were not published until 5th May 2016. The department amended its proposition in response to the findings of the consultation. The Panel discussed several areas raised in the consultation with witnesses.

Precious stones and precious metals

The consultation asked whether custody accounts for these types of asset should be included in the scheme, and reported that the answers were evenly split. The draft legislation includes the ability for banks to transfer the value of precious metal (including bullion and coins but not jewellery) and precious stones (but not jewellery) held in custody accounts to the Reclaim Fund as an option.

Discussion with JBA representatives indicated that some banks might be uncomfortable with the idea of having to sell such assets and transfer the value to the Fund. It was felt that this could bring additional risks for future claims (such as disputes over whether the full value of the assets had been realised in their sale, or claims based on loss of inheritance or sentimental value of material, as opposed to financial assets). The Panel was advised that because of the perceived risks, banks would probably not transfer the value of such assets as long as this remained voluntary, and might prefer to see the option removed altogether to reduce the risk of it being made compulsory in future.

In discussion with the department it was emphasized to the Panel that the inclusion of precious stones and metals would remain entirely optional; this could only be changed by a decision of the States, so there was little risk of a sudden change in policy in future. However, the Assistant Chief Minister was minded to keep the option open.

Foreign currency and exchange risks

The consultation report indicated that the overwhelming majority of responses were in favour of including non-sterling accounts. At the present time, the UK Reclaim Fund applies only to accounts held in sterling, although it is understood that consideration is being given to widening this to include other currencies. Because of the offshore nature of Jersey's business market there may be a higher proportion of dormant accounts held in foreign currencies by local banks.

This could provide a bigger pool of assets to benefit the Fund, but would require banks to sell the foreign currency before transfer, with a potential risk of higher claims based on loss of value due to exchange rate fluctuation. There was some speculation in discussions about whether it might be preferable to focus only on accounts held in commonly traded key foreign currencies such as US dollars, Euros and Swiss Francs, to avoid higher risks of claims over less stable currencies.

When asked whether the Fund, the banks or account-holders should bear the risk of currency fluctuation, the consultation result was not clear-cut. Ultimately the decision was taken that in order to maximise the benefit to good causes, the exchange risk should fall on the customer; the Law provides that in cases of apparent injustice, the Minister would be able to repay an appropriate sum to a deserving claimant.

Should interest be paid on monies subject to a claim?
The consultation report stated that an overwhelming majority of respondents agreed that no interest should be added to dormant accounts after transfer. It was felt this would reduce the likelihood of disputes by claimants, and be more practical than trying to fix an interest rate within the legislation.

Panel discussion with JBA representatives revealed that banks might need to alter their terms and conditions to make it clear that no interest would be paid on accounts once transferred to the Fund, which could perhaps also be notified to the Public via a notice in the Gazette. It was suggested that some banks might choose to pay interest anyway to treat their clients fairly; comparison was drawn with high levels of interest being paid on historic Payment Protection Insurance (PPI) claims. The Panel noted that there would be increased running costs for the Fund, and in consequence less money available for distribution to charitable causes, if interest were to be paid to claimants out of the Fund.

Legislation

During the meeting with the Assistant Chief Minister on 9th June, the Panel raised concerns over a lack of detail in the draft legislation concerning arrangements for the distribution of monies, and also queried to what extent capital transferred to the Fund (as opposed to interest gained on the capital) should be distributed until a track record had been established showing trends in income from transfers, and claims from returning bank customers.

It was noted that the principles of allocation would include safeguards against distribution of excessive amounts of capital. Depending on the amount and size of individual dormant accounts transferred to the Fund, parameters would be established to ensure that any claims against the Fund (from 'returning' clients) could be met without risk to the overall Fund. The department has been able to draw on the experience of the UK Fund in respect of the likely proportion of claims which might arise, and a cautious approach would be anticipated.

Amendment: the States' agreement to allocation principles
Following discussion, the Assistant Chief Minister agreed with the Panel's view that States Members should have more detail as to how money from the Fund would be distributed, and offered to prepare an amendment to Article 20 of the draft Law to establish the policies and procedures for allocation of funding by Order. This would enable States Members to challenge the arrangements before any funding could be released. The amendment would include a requirement for the Chief Minister to consult with the Minister for Treasury and Resources before putting forward proposals.

The Panel had initially queried whether the funding and allocation principles should be the subject of a proposition to be voted on by the States, but accepted that if this were to be amended by individual Members, it could potentially risk unforeseen complications for the Fund. It is anticipated that the relevant Order setting out the principles would be the subject of further scrutiny.

Members also queried the inclusion in Article 20 of clauses permitting the Minister to make loans, and pay out money for the purpose of endowments. The Panel was told that these appeared in the UK legislation on which the draft was based, and while there was no intention to use these abilities at present, they might increase flexibility under some circumstances.

Arrangements for distributing monies by third party agency

It was agreed that the amendment would also introduce (again by Order) a requirement to appoint an independent third party agency to decide upon the charitable causes to be supported and actual amounts to be distributed. This would ensure that the Minister had no influence over payments to specific causes, which was felt to be an important concern for Members. In particular, it was noted that there would be no potential for the dormant bank accounts scheme to be used to substitute for any existing States spending, unlike in some other jurisdictions where dormant account/unclaimed asset schemes are simply added to general government revenue. In this case it is intended that the third party agency would have full control over the distribution of funds, subject to the charitable purposes defined in Article 20 of the draft Law (as amended) and the terms of the agency to be agreed.

For clarity, it is not intended that the States would approve individual arrangements or amounts to be distributed each year; once appointed the third party agency would be required to produce an annual report on its activities. The Panel would look to scrutinise the terms of appointment and agreement with the third party agency before this was finally put in place. A further agency agreement would need to be drafted to finalise the arrangements by which banks will act as agents of the Jersey Reclaim Fund under Article 19 of the draft Law. The department stated that this could be done once the Law is in force.

Conclusion

The changes introduced by amendment following these discussions were shared with the Panel at the law drafting stage and lodged by the Chief Minister on 14th June. The Panel accepts the principle of making arrangements for the allocation principles and procedures and appointment of the third party agency by Ministerial Order, although it would need to further scrutinise the contents of the Orders in due course to ensure that the terms were appropriate.

The dormant bank accounts scheme would result in some additional costs for banks. It is believed that the banks are prepared to accept these costs, provided that the Fund is well run, and delivers the desired benefits to charitable causes. There would also be some administrative costs for departments involved in setting up and maintaining arrangements for the Fund. The Panel has been assured that these would not result in any significant extra costs to the States, and there is provision for the Minister's expenses in the performance of his or her functions under the Law to be recovered from the Fund.

Accordingly, based on the evidence received and subject to the safeguards highlighted in these comments, the Panel supports the proposition as amended.