Banking & Payments Federation Ireland

Banking & Payments Federation Ireland

Submission to the Joint Oireachtas Committee on Social Protection, Community and Rural Development, and the Islands regarding the Safety Deposit Boxes and Related Deposits Bill 2022

22 May 2023

www.bpfi.ie

Banking and Payments Federation Ireland (BPFI) and its members welcome the opportunity to present the Joint Oireachtas Committee on Social Protection, Community and Rural Development, and the Islands (the Joint Committee) with the industry position regarding the *Safety Deposit Boxes and Related Deposits Bill 2022* (the Bill). This submission is made at an industry level on behalf of AIB, Bank of Ireland, permanent tsb and Ulster Bank.

BPFI and its members have an important role to play in the management of the dormant accounts process, with each member responsible for customer engagement regarding dormant accounts, while BPFI has responsibility to publish the annual notification required under the Dormant Accounts Act 2001 (as amended) on behalf of the sector.

BPFI and its members also engaged with the Department of Rural and Community Development (the Department) in 2019 on matters related to the consideration of additional assets for inclusion in the Dormant Accounts Fund and we met with Deloitte at the time, who was retained by the Department to carry out investigative work in this regard. During those meetings, we discussed the inclusion of such assets as items held in safekeeping and submitted a summary of the position to the Department. We since note the findings outlined in the Deloitte report published as part of that work.

In relation to the Bill, we welcome the Joint Committee's interest in understanding the sector's position and ask that the points raised below are given due consideration as part of the process. In summary, any attempt to legalise a process for the review and assessment of items held in safe custody should avoid being overly prescriptive, giving due consideration to the distinction between items held in "*safekeeping*" and "*safety deposit boxes*", and ensure full indemnification for institutions against any potential challenge in the future.

BPFI and members are keen to have the Joint Committee note that we remain available to work with the Joint Committee and the Department to agree a workable and pragmatic approach to dealing with the issues raised below and the legacy arrangements that exist regarding items held by members in safekeeping and in safety deposit boxes.

General observations regarding the holding of items in safe custody

Members no longer offer a service to hold items in safe custody. Some members stopped offering the service in 2002, while others withdrew the service more recently in 2014.

The current arrangement of holding items in safe custody also differs between members. Some continue to hold items in branches throughout the country and the process of distributing items in safe custody is typically managed by the branches where the items are held. Others have worked to centralise the holding of items; however, the process of arranging access to items is still managed at branch level with the customer's request sent to the central team to arrange access to the items.

Currently, when customers wish to access or collect items, they must provide the original receipt that they received when depositing the item(s) in safe custody, and members also obligated to apply appropriate Customer Due Diligence (CDD) measures in line with EU Directive 2015/849 (the 4th AML Directive), which requires:

"*Member States shall, in any event, require that the owners and beneficiaries of existing anonymous accounts, or anonymous passbooks or anonymous safe-deposit boxes be subject to customer due diligence measures no later than 10 January 2019 and in any event before such accounts, or passbooks or deposit boxes are used in any way.*"

The above CDD measures include persons purporting to act on behalf of customers or their Beneficial Owners i.e., for deceased customers, CDD measures are applied to the Executor/s or equivalent.

Engagement at industry level on the transposition of EU Directive 2015/849 (the 4th AML Directive) and the resulting regulations (the *European Union (Anti-Money Laundering: Central Mechanism for Information on Safe-Deposit Boxes and Bank and Payment Accounts) Regulations 2022*) (the Regulations) led to clarification by the Central Bank of Ireland (CBI) as the National Competent Authority that the Regulations refer to safe deposit boxes held by a Credit Institution. The clarification confirmed that the Ireland Safe Deposit Box, Bank and Payment Accounts Register (ISBAR) focuses only on safe deposit boxes, with safekeeping being out of scope. We ask the Joint Committee to consider that the scope of the Bill aligns with the agreed ISBAR approach, given the work already undertaken at industry level to meet these obligations, with perhaps a phased approach being the most effective way to implement the legislation, allowing for full consideration of any legacy issues and the distinction that exists in some members in relation to "*safekeeping*" and "*safety deposit boxes*".

Observations on the Bill

Commencement of the Act
Section 1 – Commencement

The timeline afforded for the Bill coming into effect is noted in Section 1 (3) as "*… 3 years after the date of its passing or on such earlier date than the said 3 years as the Minister may by order appoint."*

On assessment of the requirements set out in the Bill, it is noted that the process would demand a considerable amount of human and financial resources, and presents a logistical challenge as currently drafted. The requirements of the Bill would necessitate the implementation of several new processes and operational changes that institutions would have to put into effect to comply with the Bill. We therefore support the 3-year timeline proposed before the requirements are effective. If a shorter timeframe for enactment were to be considered, we believe this should necessitate engagement between institutions, the Central Bank of Ireland and the Minister to confirm institutions are in a position to proceed and to avoid any unintended consequences arising as a result of early enactment.

Definition of *"deposited property"*
Section 2 (1) – Interpretation

The definition of "*deposited property*" is "*... any article, item, asset or other property, or any collection of such property, deposited in an institution in a safe deposit box*", while a "*safe deposit box" means any box, vault, or other safe keeping arrangement maintained by an institution for the safe storage of deposited property".*

In the context of the definitions provided, it is important to note that, for some members, a distinction exists in relation to how items are stored currently, and the use of the two terms interchangeably in the Bill may give rise to confusion in relation to interpretation of its scope. Currently, items are either stored in "*safekeeping*" or "*safe custody*" - held securely by an institution on behalf of a customer in an envelope/box/suitcase etc. - or stored in a "*safety deposit box*" - held in a locked facility, to which a customer holds a key as does the institution and both of which are required to open the box, and for which a customer may pay a fee.

Owing to the potential challenge presented because of this, we propose that the Joint Committee considers whether the Bill should apply to safety deposit boxes only, to avoid misinterpretation and to ensure alignment with the existing ISBAR requirements resulting from transposition of the AML Directive, or if a phased approach would be more appropriate.

Proposed date of deposit and dormancy period
Section 2 (4) – Interpretation and Section 6 – Register of Deposited Property, subsection (7)

The Bill requires that where a record of the date of deposit does not exist, an institution is to presume that the item was deposited on or before 31 December 1850.

In addition, Section 6 (7) defines "*unclaimed property*" as having been in an institution for a period of not less than 80 years; has not been accessed since deposited or has not been accessed in 80 years or more i.e., since 1942.

> *For the purpose of subsection (3), deposited property shall be considered to be unclaimed property where—*
>
> *a) the property is deposited in an institution for a period of not less than 80 years, and*
>
> *b) (i) the property has not been accessed by the depositor since the date on which it was deposited in the institution concerned, or*
>
> *(ii) a period of not less than 80 years has passed since the date on which the property was most recently accessed by the depositor.*

Considerations that arise in this regard include:

- Records of items held by members may not be complete and the date of deposit and/or the date of the most recent access by the customer may not be known.

  In those instances, the Bill would require an institution to assume that items have not been accessed, which cannot be taken to be the case. It may be that items have been accessed in that period, but a record of same was not taken. This raises concerns for members regarding the potential for challenge when customers learn that their items have been accessed, transferred and potentially sold without their knowledge. Members require assurances in this regard in relation to the inclusion of indemnification within the Bill, as expanded on below.

- Further clarification on the definition of "unclaimed property" is necessary e.g., should limits be applied in relation to the number of attempts made to contact the customer? There may have been legally bound terms and conditions that the customer agreed to when placing the items with the bank initially. If an institution is subsequently obligated to comply with the requirements of the Bill, the institution could potentially be breaking the terms and conditions agreed with the customer. In this regard, we believe that institutions will need clarification from the Joint Committee that the Bill, when it is enacted, will have the effect of taking precedence over any Terms and Conditions, as well as over any bank assurances/confirmations given to customers. The effect of the Act should be clarified by those drafting the Act. A further consideration on this point is the need for broader indemnification, which is expanded on below.

Requirement to establish and maintain registers
Section 6 (1) & (2) – Register of deposited property & Section 8 – Publication of notice

Section 6 requires institutions to establish and maintain a register of items, listing the details for inclusion. However, it may be the case that not all the information required will be available to an institution, given the extent to which information is currently held about items in safe custody, along with their owners who may now be deceased. The process set out in the Bill would require significant effort and customer communications to ensure the requirements could be met.

In addition, individuals who deposit items in safe custody may not expect an institution to access and create a record of the items held, which may create privacy and data protection risks.

Requirement to notify customers
Section 7 – Notification Procedure

Under this section, an institution is required to notify each person in writing, based on the information available, that they appear to be a *depositor* of *unclaimed property*. Section 7 (2) requires that notifications be sent by ordinary post to the last known address. Given the definition of *unclaimed property*, which is read in accordance with Section 6 (7) , there is a concern regarding a risk of breaching customer confidentiality and potential fraud - it is likely that the customer will no longer be at the last known address, given the time that will have lapsed, and that some historic addresses may no longer exist given the substantial redevelopment of urban areas in the subsequent decades. Where the depositor of unclaimed property is alive, there will be a risk of a personal data breach in writing to a last known address, which may no longer be accurate given the passage of time.

In addition, it may be during the process of contacting customers that an institution needs to consider instances where post has previously been returned from the last known listed address or the C/O address, and any other such anomalies which may factor in relation to this cohort of customers.

Requirements relating to examinations
Section 9 – Examination of unclaimed property

The requirements proposed regarding the examination of unclaimed property are noted in Section 9 of the Bill, in particular Section 9 (5) which specifies an examination to be conducted by not less than two persons, one of whom must be a *statutory auditor* and one to be independent of the institution.

The definition of a "*statutory auditor*" is noted as per the Companies Act 2014 as:

> *"statutory auditor" means an individual or a firm (within the meaning of those Regulations) that stands approved as a statutory auditor or statutory audit firm, as the case may be, under the European Communities (Statutory Audits) (Directive 2006/43/ EC) Regulations 2010 (S.I. No. 220 of 2010);*

Considerations that arise in this regard include:

- We propose that a wider range of professionals should be allowed for in this provision, in addition to approved statutory auditors. For example, the provision could be extended to include accountants holding appropriate qualifications, practicing solicitors, and barristers. Each such professional is supervised by their respective professional bodies.

- The fact that many items are stored at branch level by some institutions adds to the complexity of this process, necessitating access to items in branches across the country involving the scheduling of examinations, security arrangements, potential secure transfer of documents to alternate branch locations to facilitate collection, the impact on branch resources etc.
- The prescriptive nature of the process as outlined in the Bill would incur significant costs.

Provision of Indemnification
Section 10 - Indemnification in respect of examinations

Section 10 provides an indemnification in the case of an institution, an officer of the institution and a person referred to in Section 9 (5) i.e., a statutory auditor, in relation to the examination of unclaimed property as set out in Section 9. We believe that this indemnification must be expanded in respect of all parts of the Bill relating to an institution providing items to the Director and selling or disposing of items, to address the concerns that currently exist regarding legal challenge by customers or their representatives.

This concern is also addressed below in relation to Section 23.

Requirements to sell items deemed not to be of historical interest
Section 23 – Disposal of unclaimed property

Section 23 (2) requires that the institution "*shall sell*" any item deemed not to be of historical interest. While this requirement might benefit an institution and the State by including a statutory duty to sell/dispose of items i.e., by freeing up space in institutions and requiring the transfer of the proceeds of such sales to the National Treasury Management Agency (NTMA), there needs to be careful consideration of the impact of the sale of such items on the customer - many items held may be of emotional or sentimental value to customers. In addition, there could be implications for an institution if they were to dispose of certain documents that are held in safekeeping e.g., wills and property deeds.

We propose that sufficient notice and fair opportunity for customers or executors/administrators to claim the property is very important, noting that the customer left the property with the bank on the understanding that the item(s) would not be opened by anyone other than the customer. A further consideration is the fact that customers may be paying insurance cover for these items, the terms and conditions of which would be unknown to the institution.

If Section 23 (2) is retained in its current drafting, we support the requirement under Section 23 (3) which states that "*If an institution considers that any individual article, item, asset or other property is, by reason of its intrinsic value, not suitable for sale, it may, with the consent of the Central Bank, dispose of it in such manner as the Central Bank considers appropriate*." [emphasis added].

Overall, Section 23 raises concerns for members regarding the privacy and property rights of customers and the potential for subsequent litigation against an institution taken by a customer or their personal representatives. If these requirements are to remain, we believe an indemnification must be provided in relation to these sections, as provided in relation to the examination of items under *Section 10 – Indemnification in respect of examinations*, to provide assurances in the event of potential legal challenge. As above in relation to Section 10, we propose the Bill includes a general indemnity by the State in respect of any claim against an institution from a depositor, where the institution dealt with the items as set out in the Bill under Parts 2 to 5 as relevant. Recognising other aspects of the Bill that can be considered as balances and safeguards for owners (e.g. the 80 year

rule, the ability of a depositor to claim back property from a museum, the ability of a depositor to reclaim proceeds of sale from NTMA (via an institution)), if an alternative is to be considered we propose that the Bill could instead provide for immunity from legal challenge for an institution, insofar as the action concerns dealings by the institution with unclaimed property pursuant to the Bill and in a manner that complies with it.

Process to transfer money to the Dormant Accounts Fund

Section 24 – Transfer of unclaimed moneys to Fund

Section 24 outlines the process for the transfer of unclaimed money to the National Treasury Management Agency (NTMA) for inclusion in the Dormant Accounts Fund. It should be noted that the requirements in the Bill would necessitate the development of additional processes that would be separate to the process currently in place regarding dormant accounts. The current process to identify and transfer funds from Dormant Accounts leverages off a Business As Usual (BAU) customer-closing account process.

Unlike dormant accounts where money is transferred to the NTMA, items held in safekeeping are physical envelopes, storage boxes etc. Most items held by members currently are in paper format and can include wills, birth and marriage certificates, passports, insurance documents, prize bonds and physical items, and in the case of the latter, these may not hold any historical or financial significance. The transfer of funds following the sale of items, the requirement to track the sale and the number of items held in safe custody will require new processes and controls to be built, which is not an insignificant project.

Closing remarks

While we have outlined several issues with the Bill as currently drafted, BPFI and members remain available to work with the Joint Committee and the Department to agree an approach that is in the best interests of the State, customers and the institutions impacted.