



HM Revenue
& Customs

Amending HMRC's Civil Information Powers

Summary of Responses

21 July 2020

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1. Introduction

- 1.1. This document summarises responses to the consultation document *Amending HMRC's Civil Information Powers*. The consultation sought views on a number of changes to HMRC's civil information powers contained in Schedule 36 to the Finance Act 2008 (Schedule 36).
- 1.2. The consultation document was published on 10 July 2018 and the consultation period closed on 2 October 2018. The government is grateful to those who responded in writing and those who participated in meetings.

Context for consultation

- 1.3. HMRC's civil information powers were last comprehensively reviewed over a decade ago as part of the "Review of Powers, Deterrents and Safeguards". However, most of the provisions are derived from 1970s legislation.
- 1.4. This consultation sought views on whether the current information-gathering powers and safeguards are still efficient and effective in a modern context.
- 1.5. A key driver for considering changes to the current information powers is the international standards for exchange of information on request which are overseen by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum). The UK is a leading member of the Global Forum and is committed to international tax transparency and to meeting the international standards.
- 1.6. The UK faces challenges in implementing an important part of the international minimum standard for exchange of information on request. Specifically, when HMRC needs to obtain information from third parties to answer a request for information from an overseas tax authority, a reply should be sent within 6 months. In the UK, on average, it takes 12 months when HMRC needs to use a third party information notice. A third party information notice is one that allows HMRC to obtain information from somebody other than the taxpayer – for example, a bank or other financial institution.
- 1.7. The latest Global Forum report on the UK's compliance with the international standards states that in cases where a third party information notice is required the process unduly delayed the effective

exchange of information.¹ Therefore, the UK must take action to ensure that the procedure for accessing third party information is compatible with effective international exchange of information in tax matters. The Global Forum's concerns include:

- The length of time it takes the UK to respond to exchange of information requests where a third party information notice is involved (on average 12 months),
- The undue burden placed on other jurisdictions who are sometimes required to provide considerable amounts of supplementary information to help support the UK legislative processes, and
- The fact that the UK cannot use its information powers to gather information to support debt collection processes.

1.8. The UK, and other jurisdictions, increasingly rely on exchange of information with international partners to support domestic tax compliance work. For the most globally mobile of HMRC's customers this mutually beneficial cooperation has become vital. The UK is out of step with other jurisdictions in that the approval of the First-tier Tribunal (FTT) or the consent of the taxpayer is needed before an HMRC notice requesting information from a third party can be issued.²

1.9. A number of proposals to reform Schedule 36 were explored in the consultation document, these included:

- An option to remove the requirement to seek FTT or taxpayer approval for all third party information notices.
- An option to introduce a new notice specifically for requesting financial information from financial institutions (a "financial institution notice"). Likewise, the issue of this notice would not need approval from the FTT.
- Extending the scope of Schedule 36 to allow its use for all of HMRC's tax functions.
- Correcting a drafting defect in the legislation on increased daily penalties for failing to comply with a third party information notice that concerns a person whose identity is not known.³

¹ <http://www.oecd.org/tax/transparency/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-united-kingdom-2018-second-round-9789264306189-en.htm>

² The FTT is an independent tribunal whose main role is to hear appeals against some decisions made by HMRC.

³ Paragraph 5 of Schedule 36

- Extending increased daily penalties to all notices in Schedule 36 to encourage the provision of information in cases of serious non-compliance.
- Introducing a requirement to prevent third parties from notifying taxpayers that they have received a notice where a FTT judge is satisfied that this may prejudice the assessment or collection of tax.

2. Summary of Responses

Overview of responses

- 2.1. HMRC received 29 written responses alongside comments made in meetings with respondents. There were a mix of respondents including accountancy representative bodies, industry bodies, businesses and individuals.
- 2.2. This section aims to set out some of the broad themes expressed by respondents. Section 3 looks at some of the more detailed responses to the questions that were set out in the consultation document.
- 2.3. A list of respondents, excluding individuals, is included in Annex A.

Summary of responses

- 2.4. The consultation document sought views on proposed changes to HMRC's civil information gathering powers which largely concerned third party information notices. Generally, respondents recognised the importance of HMRC's information gathering powers and the need for them to remain effective and efficient. Respondents also noted the importance of having safeguards that remain robust and proportionate.
- 2.5. A large proportion of respondents felt that the current process of obtaining FTT approval provided a robust safeguard and raised questions around the ability of internal HMRC safeguards alone to replace it.
- 2.6. On the option of removing the requirement to seek FTT or taxpayer approval before issuing any third party information notice, many respondents felt the proposed change was wider than that required to tackle the identified problem (responding in good time to requests for information from other jurisdictions).
- 2.7. Respondents preferred the option of introducing a financial institution notice over the option of removing the need for FTT or taxpayer approval of all third party notices.
- 2.8. A number of respondents who favoured the financial institution notice suggested that this should only be available for exchange of information requests received by HMRC from other tax authorities.

- 2.9. More generally, some respondents expressed their concern about the breadth of HMRC's existing powers and how they are used. This led them to question whether any further powers were needed.
- 2.10. Respondents were generally comfortable with the idea of HMRC using information powers for debt collection purposes. However, respondents raised concerns about extending the scope of information powers to cover all HMRC's tax functions.
- 2.11. The vast majority of respondents who commented on correcting the drafting in the increased daily penalties legislation were either in favour of a change or neutral.
- 2.12. Responses were generally mixed on whether to extend the increased daily penalties to all notices within Schedule 36.
- 2.13. Most respondents agreed, or were neutral, about introducing a provision to prevent a third party from notifying a taxpayer that it had received an information notice where the FTT had decided HMRC did not need to notify the taxpayer.

Government Response

- 2.14. The government is committed to ensuring that HMRC has the necessary tools to ensure the right tax is paid at the right time. It is important that these powers are reviewed and updated regularly to ensure they remain functional in a modern context. At the same time, it is important to ensure that the powers are proportionate and contain appropriate safeguards.
- 2.15. The UK government is a leading proponent of the use of international collaboration in tackling cross-border tax evasion and avoidance. It is right that the UK meets its international obligations and complies with international standards.
- 2.16. The government will legislate to introduce a new financial institution notice that will bring the UK's rules into line with the rest of the G20 group of major economies and allow us to meet international minimum standards for exchange of tax information on request. The government also recognises that powers need appropriate safeguards and that the public need to be able to trust that they are used appropriately. The new legislation contains a number of safeguards and, additionally, will require that HMRC reports to Parliament annually on the implementation of the new power and its use.

2.17. Draft legislation is issued with this document. Comments are welcome in the next 8 weeks. At the end of this technical consultation, and after consideration of the comments, the legislation will be included in the next Finance Bill.

2.18. The full government response is provided in Section 3 below.

3. Responses to specific questions

Aligning Third Party Notices with Taxpayer Notices

3.1. These questions explored the option of moving the process for issuing a third party notice closer to that of a taxpayer notice. This would see the removal of the requirement to seek approval from the FTT or the taxpayer before a third party notice could be issued.

Q1: Do you have any views on the suggested change to align third party notices with taxpayer notices?

3.2. Almost all respondents did not agree with this proposal. Some of the points raised included:

- This change was much wider and goes much further than the identified problem required.
- It was not a true alignment with the taxpayer notice as it did not offer an appeal right for the taxpayer on the substance of the notice.
- The removal of the requirement for FTT or taxpayer approval would lead to more notices being issued.

3.3. Some respondents felt that, were this change to be brought in, then it should be a mandatory requirement that a taxpayer notice had been issued first. Only where that notice had been issued, and not appealed by a taxpayer, should a third party notice be issued without FTT approval.

3.4. Some respondents, particularly in stakeholder meetings, felt the current role of an authorised officer in overseeing the use of information powers is not clearly defined.

Q2: Do you think any further internal processes, or safeguards, prior to issuing the notice, would be required?

- 3.5. Some respondents did not answer this question as they felt the proposal of alignment with taxpayer notices should not be pursued.
- 3.6. Those that did respond felt that internal safeguards were not an adequate replacement for the independent oversight of the FTT.

Q3: Should there be any further restrictions on the type of information that could be requested under this notice?

- 3.7. Once again, a large number of respondents did not give an answer to this as they did not agree with the basic principle of the proposal.
- 3.8. It was suggested that the removal of FTT approval should be restricted to international cases only.
- 3.9. It was also suggested that HMRC should consider setting a minimum time-limit for response to the notice in legislation. One suggestion was that this could be 30 days though this should be extended for requests for more complex information.

Government response

- 3.10. The government has carefully considered the responses to this consultation and how to address the issues raised in the consultation document most appropriately. The government has decided not to pursue this option.

Financial Institution Notice

- 3.11. This part of the consultation explored whether, given that most third party notices are issued to financial institutions, it would be appropriate to introduce a new notice specifically for that purpose.

Q4: Do you think there should be a separate rule for third party notices for banking information?

3.12. Respondents preferred this option, though support for it was predicated on appropriate definitions of “banking information” and “financial institution”.

3.13. Those who preferred this option highlighted some of the following reasons:

- This was a more targeted response to the identified problem with a narrower scope for the information that can be requested.
- It was reasonable to expect financial institutions to provide information efficiently and comprehensively.

3.14. There were some respondents who were not in favour of this option and their views were:

- The need for FTT or taxpayer approval should be retained for all notices.
- The same process should exist for all types of third party notice.
- Concerns about the impact on taxpayers’ privacy from the lack of oversight of the process by the FTT.

Q5: Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.

3.15. Respondents suggested a variety of different safeguards and restrictions which should be attached to the new notice. These included:

- Introducing a right of appeal for the taxpayer and/or the third party.
- Restricting the use of this notice to overseas requests only.
- Enshrining within legislation that the taxpayer must be approached first for the information before this notice would be issued.

- A restriction on using this notice where a taxpayer notice had been issued for the same information and was currently under appeal.
- A restriction on using this notice where the information is readily available through the common reporting standard (CRS) data.⁴

Government response to questions 4 and 5

- 3.16. After considering the responses to this proposal, and the other options in the consultation document, the government has decided to legislate for a financial institution notice. This will provide HMRC with a modern notice that is in line with the processes used in all other major economies and allow the UK to meet its international obligations.
- 3.17. The government recognises the importance of safeguards in ensuring HMRC's powers are used appropriately and proportionately whilst still allowing HMRC to operate efficiently and effectively. The new financial institution notice contains the following safeguards:
- An authorised officer trained in the application of civil information powers must approve all notices. The authorised officers are experienced staff who are not personally involved in the cases they review.
 - The notice may only be issued where the information is reasonably required to check a known person's tax position,
 - For international requests it has to be shown that the information is foreseeably relevant to the administration or collection of tax.
 - The taxpayer will receive a copy of the notice and a summary of reasons why the information is required. This notification can only be disapplied by asking the FTT to waive the requirement.
 - The taxpayer may make an application to the courts for judicial review of HMRC's decision to issue a notice.
 - The numerous restrictions on the use of information notices in Part 4 of Schedule 36 FA 2008 will apply to this new notice. For example, this includes the rule preventing notices being used to obtain documents covered by legal professional privilege.

⁴ The common reporting standard is an international standard for the automatic exchange of financial account information.

- 3.18. The government acknowledges that it is important to be clear about the scope of the information covered by the new notice, and the definition of “financial institution”.
- 3.19. In the draft legislation the definition of “financial institution” is based on the definition in the CRS which is already widely understood by financial institutions. The CRS definition is amended in two important ways to be suitable for the financial institution notice:
- All credit card issuers are included, and
 - Certain “investment entities” are excluded. This ensures that family trusts and charities who should not be included within the scope of the financial institution notice are excluded.
- 3.20. The government has also carefully considered how to define the information that should be within scope of the financial institution notice. It is difficult to define such information in the form of a list as the institutions involved have numerous types of financial products and arrangements. Therefore a different approach has been adopted. An important factor when considering what should be within scope of the financial institution notice is the ease with which the financial institution can access the information and provide it in response to a notice – the financial institution notice is intended to cover information which can be obtained relatively easily. It is not intended to cover information which could only be provided after laborious analysis or research had been undertaken. The draft legislation only allows a financial institution notice to be used where it would not be onerous for the financial institution to provide the information or documents.
- 3.21. A number of respondents suggested having a new notice only for international information requests from other tax authorities. We are not able to have a different notice for international requests. UK law, and some international treaties, requires us to obtain information in the same way for both domestic and international requests. Therefore, the government has decided not to pursue that option.
- 3.22. The government recognises that there is legitimate public interest in how HMRC uses its powers and in seeing that they are used appropriately. The government will introduce a requirement for HMRC to report annually to Parliament on how it has used the financial institution notice. This will allow any problems with the operation of the new notice to be identified and addressed.

Q6: Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?

- 3.23. A variety of different ideas were suggested to speed up the process for providing information whilst still including appropriate safeguards for the taxpayer and third party. The ideas ranged from small changes to the current powers to more radical ideas.
- 3.24. One respondent favoured HMRC exploring the system used by the Mexican tax authority, whereby that authority can automatically access banking information.
- 3.25. Some respondents felt that representations to the Global Forum should be made to increase the time period allowed for responses to information exchange requests.
- 3.26. Another respondent suggested legislating to explicitly list banking information as a statutory record.
- 3.27. Several respondents felt that efficiencies could be achieved by increasing resources and developing streamlined processes for exchange of information requests.
- 3.28. Finally, there was a view that an internal review panel could replace the FTT.

Government response

- 3.29. The government welcomes, and is grateful for, the suggestions for new ideas to solve the problem set out in the consultation document.
- 3.30. It is not possible to change the time period allowed for responses to information exchange requests. The standards of the Global Forum apply to more than 100 countries and have been developed by consensus over a number of years. As far as we are aware the UK is alone in requiring judicial (or taxpayer) approval of third party notices and it has not been possible to persuade other countries to agree to this.
- 3.31. Making banking information into a specific statutory record would help in some cases but not all. In particular, records are only statutory records whilst they have to be retained; usually for a period of around 2

or 6 years, depending on whether the taxpayer is in business.⁵ Once records are older than this they are no longer statutory records. It is therefore unlikely that making all banking information statutory records would cover all relevant information, in particular some “know your customer” information collected when accounts were opened. This information is sometimes required to establish beneficial ownership of the account.

- 3.32. As explained in the consultation document, since the first peer review in 2012, HMRC has made significant improvements to the process for answering exchange of information requests. This has included more than doubling the number of staff involved in this work, and working with the Ministry of Justice to decrease the time taken to allocate a FTT hearing date. Any remaining efficiencies in this area are likely to be marginal.
- 3.33. The government considers that the use of authorised officers in HMRC to approve every financial institution notice means that an internal review panel is not required. These authorised officers are trained in the use of civil information powers. In addition, the annual report to parliament will identify any issues with the operation of the new power and allow them to be addressed.
- 3.34. The introduction of the financial institution notice is the appropriate and proportionate way to ensure HMRC can access the information that is needed whilst providing appropriate safeguards for taxpayers.

Obtaining Information for Other Functions of HMRC

- 3.35. An important part of HMRC’s core function is to ensure the right amount of tax is paid at the right time, and this includes ensuring all tax that is payable is collected.
- 3.36. The UK received a specific recommendation in its 2018 Global Forum peer review to ensure that HMRC can process exchange of information requests that relate to debt. Currently, HMRC is restricted to using Schedule 36 to require information that is reasonably required to check a person’s tax position. This part of the consultation document explored whether that remit should be expanded to include access to information reasonably required for all HMRC’s tax functions, including the collection of tax debts.

⁵ For example, see section 12B Taxes Management Act 1970

Q7: What are your views on extending information powers in this way?

- 3.37. Widening Schedule 36's remit to include debt collection was explored explicitly in the consultation. Currently HMRC cannot require information that may help in the collection of tax debt.
- 3.38. There was a small number of positive responses and a similar number who had concerns. There were concerns from respondents about how far this widening of the remit of Schedule 36 would go. It was not clear that HMRC would need to obtain information about all its wide variety of functions.
- 3.39. This level of concern led some to suggest that a major change to extend Schedule 36 to all HMRC's tax functions deserves a full consultation in its own right. This would allow the issues to be fully explored.

Government response

- 3.40. The government noted respondents' concerns in this area. The government will legislate to allow Schedule 36 to be used to require information needed for tax debt collection purposes. However, the concerns about extending Schedule 36 to cover all HMRC's tax functions were noted and no further extension of Schedule 36 is proposed at this time.

Schedule 36 Penalties

- 3.41. HMRC had discovered a drafting error in the legislation that governs the issuing of increased daily penalties for failure to comply with an identity not known information notice. This part of the consultation sought views on correcting that drafting error.
- 3.42. The consultation also asked whether increased daily penalties should apply to all information notices under Schedule 36.

Q8: Do you have any views on amending the legislation in this way?

- 3.43. The majority of respondents saw no issue with amending the legislation to correct the drafting error concerning increased daily penalties. Only three respondents expressed negative views.

- 3.44. Negative comments were largely restricted to concerns about the number of penalties that may be issued.

Government response

- 3.45. The government will legislate to correct the drafting error in respect of daily penalties. Proportionate and effective penalties are needed to ensure compliance with Schedule 36.

Q9: Should the increased daily penalties apply to all the Schedule 36 information notices?

- 3.46. Responses to this question were balanced; of the 24 who provided a response to this question 12 gave positive responses.
- 3.47. There was concern around the lack of evidence available on whether increased daily penalties generate compliance. Concern was also expressed about the impact the higher level of penalties may have on vulnerable taxpayers.
- 3.48. Those who agreed with the proposal thought this would act as a bridge between daily penalties and the potentially very large tax-related penalty.

Government response

- 3.49. Information gathering provisions are a key tool used by HMRC to establish a person's correct tax liability. Where taxpayers or third parties persistently fail to comply with an information notice there should be effective and proportionate sanctions to encourage taxpayers and third parties to provide the required information.
- 3.50. The government will continue to monitor the effectiveness of the information powers regime, but has decided not to extend the increased daily penalties to all Schedule 36 notices at this time.

Third Party Notices – The Requirement to Notify the Taxpayer

- 3.51. The final part of the consultation document explored the provisions requiring a taxpayer to be notified that a third party notice, of which they are the subject, has been issued.

- 3.52. HMRC must currently notify a taxpayer that a third party notice has been issued unless the FTT has decided to disapply that requirement. This will apply to the new financial institution notice as well as the existing notice. The FTT disapplies the requirement when satisfied that notifying the taxpayer might prejudice the assessment or collection of tax. A slight anomaly in this part of the legislation is that there is nothing to prevent the third party from notifying the taxpayer once the FTT has decided the taxpayer should not be informed. This part of the consultation questioned whether this is the right approach.

Q10: Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?

- 3.53. Around 20 respondents had either positive or neutral responses in respect of this idea. Many felt that, where a FTT had already agreed that a taxpayer should not be notified, the suggested change was a logical step.
- 3.54. Some questioned whether this could damage the commercial relationship between third parties and taxpayers. There were also concerns that preventing the third party from notifying the taxpayer may put the third party in contravention of other legal requirements.

Q11: What form of sanction should be imposed on the third party for a breach of this rule?

- 3.55. A number of different frameworks for a sanction were suggested. These included basing the penalty amount on the motivation of the third party in telling the taxpayer or mirroring the anti-money laundering penalties.

Government response

- 3.56. The government's view is that, where a FTT judge has decided that HMRC notifying the taxpayer of a third party notice might prejudice the assessment or collection of tax, it is logical that the actions of the third party should not bring about that same risk of prejudice.
- 3.57. The government will legislate to prevent third parties informing the taxpayer of the third party information notice (including the new financial institution notice) where the FTT has decided that this might prejudice the assessment or collection of tax. The sanction for failing to comply with this requirement will be £1000 and the third-party will be able to appeal to the FTT against the penalty.

3.58. As part of this process HMRC will make clear to the third party the obligations placed on them and the sanction they may be liable to should they fail to meet those obligations.

4. Next steps

Technical consultation

- 4.1. Please provide comments on the draft legislation within 8 weeks of the issue of this summary of responses to eo.policy@hmrc.gov.uk
- 4.2. At the end of this technical consultation, after consideration of the comments, the legislation will be included in the subsequent Finance Bill.

Annexe A: List of stakeholders consulted

The following representative bodies and firms responded to the consultation either in writing or through meetings.

Association of Chartered Certified Accountants (ACCA)

Association of Accounting Technicians (AAT)

Association of Taxation Technicians (ATT)

BDO

Building Societies Association (BSA)

Carter Backer Winter LLP

Certified Public Accountants Association

Chartered Institute of Taxation (CIOT)

Deloitte LLP

DWF LLP

Everton FC

Grant Thornton UK LLP

Herbert Smith Freehills LLP

Institute of Chartered Accountants of Scotland (ICAS)

KPMG LLP

Low Income Tax Reform Group (LITRG)

Lubbock Fine

M&G Prudential

Mazars LLP

Pinsent Masons LLP

PwC LLP

Tax Incentivised Savings Association (TISA)

Tax Investigation Practitioners Group (TIPG)

Tax Law Review Committee

The Law Society of Scotland

Travers Smith LLP

UK Finance