Amending HMRC's Civil Information Powers

1 October 2018

INTRODUCTION

1. UK Finance is the trade association which was formed on 1 July 2017 to represent the finance and banking industry operating in the UK. It represents around 250 of the leading firms providing finance, banking, markets and payments-related services in or from the UK. UK Finance has been created by combining most of the activities of the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association.

2. Our objective is to work with our members to build a more customer-focused and innovative finance and banking sector, cementing the UK's role as a global leader in financial services for the benefit of the wider economy. The interests of our members' customers are at the heart of this work.

3. This paper comprises UK Finance's high-level response to HM Revenue & Customs' ('HMRC') Consultation Paper 'Amending HMRC's Civil Information Powers' (hereafter, 'the Consultation Paper'). The contents of this submission have been informed by discussions held with HMRC on 6 September 2018. We welcome continuing engagement with HMRC on this matter.

GENERAL COMMENTS

4. UK Finance and its members are fully supportive of measures to tackle tax evasion. We have been at the forefront of developing and implementing measures to improve tax transparency, with unprecedented programmes running in the past 8 or so years to implement the US Foreign Account Tax Compliance Act (FATCA) programme, the UK intergovernmental agreements with the Crown Dependencies and UK Overseas Territories, the OECD Common Reporting Standard (CRS), and the corporate offence of the failure to prevent the facilitation of tax evasion, in the Criminal Finances Act 2017. These regimes have imposed new standards on Financial Institutions (FIs) in the identification of customers and unparalleled transparency in reporting to tax authorities. Our comments below therefore draw on considerable experience in implementing those measures.

5. In helping to frame tax transparency initiatives, we have also been mindful of our role as guardians of our customers' confidential data. We note that at paragraph 1.3 in the Consultation Paper, HMRC states: "Third parties, in particular, may also require the use of a formal power as data security and other rules may prevent them voluntarily supplying the information." This statement does not reflect the limitations placed on FIs by the law. Under English Common Law, banks owe a duty of confidentiality to their customers, based on the decision of the Court of Appeal in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. In accordance with that decision, it is an implied term of the contract between a banker and a customer that the banker will keep the customer's information confidential except "(a) where disclosure is under compulsion of law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer". Banks are also bound by the Data Protection Act 1998 and the Data Protection Act 2018. In particular, s8 of the Data Protection Act 2018 regarding Lawfulness of processing specifically refers to the "processing of personal data that is *necessary* for ...(c) the exercise of a function conferred on a

person by an enactment or rule of law, (d) the exercise of a function of the Crown, a Minister of the Crown, or a government department". It should also be noted that the General Data Protection Regulation ('GDPR') itself will, beyond Brexit, continue to apply to UK companies conducting EU business regardless of any subsequent changes to UK domestic legislation. Under Article 6(3) of the GDPR, processing can only be lawful in compliance with a legal obligation to which the controller is subject or for "the performance of a task carried out in the (…) exercise of official authority vested in the controller" where the law in question is "proportionate to the legitimate aim pursued." The reasonableness requirement in Schedule 36, like the necessity requirement in the Data Protection Act 2018, ensures such proportionality.

6. As such, members can only share customer data where required by law to do so. The liability, penalties and reputational damage for a breach could be significant. For that reason, banks must only provide customer information to third-parties where it can be demonstrated that they are required to do so under a legal obligation. A bank must be able to demonstrate not only that a specific legislative obligation exists, but also that there is no ambiguity over the precise information required under that legislation. This requirement for no ambiguity would not be met by a situation in which there is an expectation that they exercise subjective judgment over what information may or may not be reasonably required for the purpose of checking a customer's tax position. This is not simply resolved by the fact that the request would be enshrined in a formal notice, as the FI would still have to ensure that the information requested is within the boundaries of what the HMRC is entitled to obtain, being both "reasonably required for the purpose of checking the taxpayer's tax position" under Paragraph 2 of Schedule 36 and "necessary" for that purpose under the Data Protection Act 2018. Confirmation of such reasonableness and necessity on a case by case basis is in effect what the tribunal approval achieves.

7. The Consultation Paper comments that current processes for third-party information notices may be considered out of step with new innovative approaches for sharing information, such as the CRS. The Consultation Paper also comments that CRS reporting is completed without the need for an information notice or right of appeal and contrasts this with the process for Schedule 36 notices. However, a distinction should be drawn between bulk information reporting exchange and targeted third-party information notices which do not follow a prescribed format. The former has been developed over a number of years, narrowing the reporting data to a limited set which is capable of automated processing, where the reporting schemas are pre-defined in regulations and supported with comprehensive and published tax authority guidance, while the latter can potentially cover a wide range of data and personal information in the power and possession of the FI and can differ on a case by case basis.

8. UK Finance understands HMRC's concerns about its perceived performance by the Global Forum, and any potential criticism about the time taken to respond to requests for additional information, over and above that already provided through reciprocal annual automatic exchange of financial account information. HMRC could, however, assure other tax jurisdictions that it alone amongst its peers applies an extraterritorial obligation on FIs operating in the UK to prevent the facilitation of not only UK but foreign tax evasion, and that failure to prevent the facilitation of tax evasion is a criminal offence in the UK. As such the UK has gone further and faster than any jurisdiction in the world to tackle all tax evasion, regardless of which jurisdiction's tax is at stake.

9. We note that HMRC have listed 18 international comparators in the Consultation Paper, including China, Russia, Turkey, Saudi Arabi and Indonesia. We do not dispute that other jurisdictions may have lesser protections for the citizen vis a vis the State's powers, indeed we think it might be reasonable to assume that the UK has stronger protections than some of the chosen jurisdictions listed in the comparators. We are, however, uncertain of the relevance of the comparators when we are considering the context as it applies in the UK, which has laid out protections and arrangements in common law and statute that FIs operating in the UK must have regard to.

10. Additionally, we would note that many international practices will have been developed before the increased scrutiny and legislation around personal data privacy. Indeed, we believe recent European case law suggests HMRC should be securing safeguards around its information powers

rather than lessening them. For instance, the conclusions of the Court of Justice of the European Union in the joined cases of C-203/15 and C-968/15[1] stated:

> "118. In order to ensure that access of the competent national authorities to retained data is limited to what is strictly necessary, it is, indeed, for national law to determine the conditions under which the providers of electronic communications services must grant such access…That national legislation must also lay down the substantive and procedural conditions governing the access of the competent national authorities to the retained data…
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> 120. In order to ensure, in practice, that those conditions are fully respected, it is essential that access of the competent national authorities to retained data should, as a general rule, except in cases of validly established urgency, be subject to a prior review carried out either by a court of by an independent administrative body, and that the decision of that court or body should be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime."

While this case related to the use of communications data in the context of national security, it would seem perverse that a lower bar should be applied to tax authorities seeking to access bank customer information, which the common law holds should be treated as confidential, than in the case of national security where there may be a more urgent need to expedite access to data.

11. There are currently 5 key safeguards before HMRC can issue a third-party notice without agreement of the taxpayer:

    i. HRMC is required to make an (ex parte) application to tribunal for approval before issuing notice
    ii. The application must be made or approved by an authorised officer at HMRC
    iii. HMRC is required to give prior notification to the third-party of intended notice detailing information and documents required (unless the tribunal is satisfied that this would prejudice the assessment or collection of tax)
    iv. The taxpayer must be given a summary of the reasons why the information or documents are required (unless the tribunal is satisfied that this would prejudice the assessment or collection of tax)
    v. The third-party must have the opportunity to make representations to HMRC and these representations must be given to the tribunal at the ex parte hearing.

    The process includes important safeguards, designed to ensure that any information requests are not disproportionate, inappropriate or unnecessarily intrusive. The Consultation Paper puts forward at paragraph 4.2 a proposal to align the issue of third-party notices with the issue of notices directly to the taxpayer. This removes the first of the current safeguards. It also effectively removes the fifth safeguard as the right to make representations prior to the issue of the notice is replaced with a more limited right of appeal against the notice on the grounds that it is too onerous. This means that there is no opportunity for the third-party recipient to seek to ensure the notice is worded so that it is properly targeted and does not create a disproportionate burden on the third-party recipient. Given the usually short time limit given to the third-party to produce the information this will also greatly increase the chance of penalties for late compliance for FIs which are fully committed to comply with their obligations. Although we understand that the third and fourth safeguard could be inbuilt into the proposed process, regardless of tribunal approval, it is not yet clear how this would work. Would the intention be for the advance notification, summary of reasons and opportunity to make representations to HMRC be preserved, but this time without a carve-out for the risk of 'prejudice to the assessment and collection of tax'? The logic of this approach is that it would be highly unlikely that any prejudice to the assessment and collection of tax would result from following this procedure with a Bank which has signed up to the Code of Practice for the Taxation of Banks and established processes for the prevention of tax evasion.

[1] https://www.documentcloud.org/documents/3245181-C-203-15-amp-C-698-15-Arre-T-En.html

12. The Consultation Paper also puts forward at paragraph 4.7, an alternative arrangement to have a special process for third-party information notices relating to banking information (in the same way as requests for 'statutory information' can be made under Schedule 36 at present). The notices would not have to be approved by the tribunal and there would be no right of appeal for the third-party. Banking information would include bank statements, information about transactions on the account and information held about the legal and beneficial ownership of the account (e.g. Know Your Customer ('KYC') information). This notice would be available for use in both domestic cases and those where information was requested by an overseas tax authority. The definition of banking information is very broadly drafted. The Consultation Paper is vague on the extent of KYC information that would be caught by the proposal, for example would it extend to the KYC information on parties to a joint account? The fact that more financial records are held electronically, as noted in paragraph 3.3 of the Consultation Paper, does not necessarily mean that collation of information can be easily automated in all cases. For example, many banks will hold customer records across multiple systems and will need to manually collate responses. A banking systems' ability to produce information automatically will depend on the particular information requested and also the time period the information relates to. Certain legal relationships mean that banks will have to determine whether all the information requested is within their 'possession or power' (Paragraph 18 of Schedule 36). Systems vary from bank to bank so there is unlikely to be a standardised information request which is equally easy and quick for all FIs to produce. In relation to overseas information requests there is likely to be even less standardisation in the information requested.

13. We are concerned that HMRC, in removing independent oversight and appeal rights from the process, are simply inclining toward a convenient and easy fix to their timing issues, at the expense of a marginally harder path of fixing the current process, which has appropriate and necessary safeguards. Indeed, if HMRC had included more detail in the Consultation Paper about the process and its delays, many more respondents could have advised on measures to improve the current process. The removal of the requirement for tribunal or taxpayer approval to be sought in particular represents a significant increase to HMRC's civil information powers. In effect it would remove the requirement for HMRC to demonstrate that the information requested is reasonably required, which a tribunal would have expected HMRC to demonstrate. In our recent meeting HMRC officials sought to provide assurance that the HMRC officer approving notices would undertake necessary checks but they were unable to explain what the officer would do differently to expedite the process of performing the necessary checks. As such, we are concerned that these proposals can only improve timing by watering down safeguards and because HMRC's own internal reviewer may not be as rigorous or assiduous as the tribunal.

14. In particular, we think it important that information requests from overseas tax authorities should be subject to a higher degree of scrutiny, to ensure that the conditions of the Tax Information Exchange Agreement ('TIEA'), as well as the data protection requirements for necessity and proportionality which must be observed by HMRC when processing data which it has obtained, are met. In particular, the requesting tax authority should confirm:

    i. that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;
    ii. that the applicant has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

    Applying the same process for overseas requests for banking information as for statutory information requests risks diluting this requirement.

15. HMRC have not clearly or consistently indicated the demand for these notices and the possible volumes that are anticipated. At paragraph 3.5 of the Consultation Paper, HMRC indicates that as a result of the CRS, it anticipates a rise in the number of requests for additional information from international tax authorities. HMRC notes this will place a 'larger burden' on HMRC and tribunal resources. At paragraph 3.16 HMRC states that there were 215 requests for tribunal approval of a

third-party notice in 2016/2017 which apparently 'shows that third-party notices are not issued in large numbers'. It then says, 'Even after a possible increase due to the CRS, the numbers of third-party notices issued is expected to remain low' and that 'HMRC do not anticipate that third-parties will see a material increase in administrative burdens as a result of any changes'. If HMRC are anticipating only hundreds of such requests, it is even less clear why a process to fast track these claims through the tribunal cannot be introduced. If it is the case that volumes will be larger, then HMRC has failed to acknowledge that an increased volume of third-party information notices and any associated changes in approach by HMRC will have an impact on the operational procedures and resources required by FIs to respond to these notices. The impact on FIs should be proportionate to the benefits obtained by the tax authorities, particularly in light of the volume and range of other regulatory demands on them.

16. The volume of notices will not simply be dependent on the demand from CRS jurisdictions, however, but the use HMRC make of the notices too. HMRC note in the Consultation Paper, at paragraph 3.17, that only one foreign tax authority's request has been rejected by the tribunal. It failed to include, and couldn't provide when asked, the number of rejections for HMRC's applications on its own account. The Consultation Paper also fails to acknowledge that the existence of the requirement for tribunal approval acts as its own check and filter for HMRC applications.

RESPONSES TO SPECIFIC QUESTIONS

Question 1: Do you have any views on the suggested change to align third party notices with taxpayer notices?

17. As detailed above, UK Finance is not supportive of the proposal to align third-party notices with taxpayer notices.

18. Whilst we recognise HMRC's concerns regarding the timescale for satisfying foreign tax authority requests, we do not believe the proposed solution is proportionate or necessary. We fear HMRC is opening itself to the charge of being a judge in its own cause, and even if HMRC's officers can apply a necessary level of objectivity to dispassionately judge the merits of its own requests, the suspicion from taxpayers and third-parties alike may result in legal challenge[2] or, at the very least, will force the checking process currently undertaken by the tribunal (that HMRC has satisfied the requirements of the law etc.) onto the FI and that the time taken for that check will not be removed but displaced from tribunal to FI, with no additional time provided for such comfort to be reached.

19. We consider that any proposal to remove the requirement for tribunal approval must introduce equivalent independent safeguards which should involve consideration of the justification for requesting the information and why that information cannot be obtained from other sources, including the taxpayer.

Question 2: Do you think any further internal processes, or safeguards, prior to issuing the notice, would be required?

20. As detailed above, UK Finance is not supportive of the proposal to align third-party notices with taxpayer notices.

21. One of the drivers for these reforms is the expectation that FATCA and the CRS will increase the number of requests for additional information from international partners. As such we suggest that HMRC encourage its international partners to agree a standard format and evidence-base for additional information requests, so that HMRC has the necessary information to present to a tribunal, rather than wait for the tribunal to request it.

[2] We note reports that the Information Commissioner's Office have received a complaint about infringement of privacy and data protection rights against HMRC in relation to the CRS. https://www.theguardian.com/money/2018/aug/02/mishcon-de-reya-complains-about-anti-tax-evasion-measures

22. However, we would also note that where additional information is prompted by a tax authority receiving information via AEOI and is required due to the specifics of an individual taxpayer's arrangements, HMRC should follow their guidance on "Minor Errors". The order of events would therefore be as follows:
    - Overseas tax authority approach HMRC in respect of a specific taxpayer;
    - HMRC contact UK Reporting FI to confirm validity of customer within AEOI Report;
    - UK Reporting FI provide HMRC with rationale for inclusion in report (e.g. self-certificate, relevant indicia) or otherwise; and
    - HMRC provide information to overseas tax authority; and
    - HMRC (or if necessary the overseas tax authority) contact relevant taxpayer directly for information.

Only as a last resort would HMRC need to issue a third-party information notice to UK Financial Institution.

Question 3: Should there be any further restrictions on the type of information that could be requested under this notice?

23. As noted above, a bank is only able to provide customer information to third-parties where it can demonstrate it is required to do so under a legal obligation. Banks are not able to exercise subjective judgment over what information may or may not be required by HMRC and so any information required must be clearly specified in the notice.

24. At present, members report that not all the notices they receive are straightforward in nature and some are time consuming to collate within the current Service Level Agreements (SLA), especially where there are large volumes of transactional information requested.

Question 4: Do you think there should be a separate rule for third party notices for banking information?

25. HMRC have defined 'banking information' as including i) bank statements ii) transaction information and iii) beneficial ownership information. These information types are vastly different in terms of relevance to assessing a taxpayer's position and ease at which it can be provided by the bank. In addition, such broad spectrum of information can reveal details on not only taxpayer but also third persons which needs to be carefully considered.

26. As above, we consider that information required on financial accounts should in the first instance be obtained as part of the CRS reporting regime and then via notices to individual taxpayers.

27. It is not clear that a case can be made for separate rules for third-party banking information and given the importance of customer confidentiality and associated data protection obligations, it is critical that equivalent safeguards and standards are applied to third-party notices for banking information as for notices for any other third-party providers. Specifically, a bank should retain the right to appeal a notice on the grounds that it is too onerous.

28. Additionally, where the information requested is banking information that does not constitute statutory records, a bank should retain the right to appeal a notice where information requested extends beyond standard KYC data.

29. In the majority of cases we believe bank statements should be sufficient for HMRC to assess a taxpayer's position or should at least provide the relevant information to determine whether further investigation is required. Therefore, should HMRC pursue this option, contrary to our views, we would suggest such notices should be restricted to bank statements only, with further detailed information requiring tribunal approval.

Question 5: Should this power be subject to any restrictions or safeguards? If so, please state the restrictions or safeguards.

30. Any proposal to remove the requirement for tribunal approval must introduce equivalent independent safeguards which should involve consideration of the justification for requesting the information and why that information cannot be obtained from other sources, including the taxpayer.

31. If specific FI notices are introduced, efforts should be made to standardise the information requested and, as far as possible, specify the precise information required. Those with responsibility within FIs for actioning HMRC notices are not specialists in the interpretation of tax treaties, which creates a risk that an ultra vires request that HMRC has passed on without proper scrutiny, could be complied with as a matter of process unless the bank introduces new checks into the process, which would slow down the processing of the information request.

32. It is imperative that a recipient has the right of appeal on wider grounds than that the compliance would be unduly onerous to ensure there is appropriate challenge where the data requested by HMRC is unreasonable in the context of checking a taxpayer's position or where the information is neither in its possession nor power to obtain. The "opportunity letter" mechanism should be retained to allow HMRC and the FI to determine what information it is realistic to request and obtain and avoid a formal notice and corresponding appeal where impracticable.

Question 6: Do you have any other ideas for options that could deliver both the objective of speeding up the process and providing appropriate safeguards?

33. In addition to the standardisation of information requests, safeguards will be required in respect of the transmission of notices and responses from a data protection and data security perspective. It is recommended that a secure portal (similar to that which is in place for Direct Recovery of Debt (DRD) regime) would be required. Notices sent in the post are at risk of not reaching the correct teams responsible to investigate and respond back to HMRC. Given that there is a possibility for a daily penalty regime to be in place, HMRC needs to ensure notices are served in an efficient and secure way so that third-parties have reasonable time to investigate and respond.

34. As detailed above, should this option be pursued it should be limited to bank statements only.

Question 7: What are your views on extending information powers in this way?

35. We note that the Consultation Paper makes reference to obtaining information for other functions, for example debt collection. For UK tax debt, processes are already in place under the DRD regime and it is important that the safeguards incorporated into this regime are adhered to. Equivalent legislative basis and safeguarding measures would be required for any extension to non-UK tax debt.

Question 8: Do you have any views on amending the legislation in this way?

36. It is important that the recipient has the right of appeal to ensure there is appropriate challenge where the data requested by HMRC is not reasonably required to collect a tax debt.

Question 9: Should the increased daily penalties apply to all Schedule 36 information notices?

37. No. Delays in providing information often result from the wide-ranging information requested by HMRC and the required internal processes and systems required to collect and maintain information. In addition, current safeguards under data protection laws have introduced additional layers of internal approvals.

38. As a result, delays in providing information do not result from negligence or lack of cooperation which, we believe should be penalised, but from addressing legal and regulatory requirements. Increased daily penalties may, potentially, adversely affect decision making process in respect of following rules on disclosing information and could bring harm to a bank's regulatory position and their clients' rights.

39. The introduction of new third-party notices on any scale will require banks to provide a dedicated resource, with sufficient lead time to ensure staff receive appropriate training and to implement

processes, to ensure a response is sent back to HMRC as required. To the extent that new processes and procedures are required to meet these obligations, a degree of leniency on penalties would be necessary, as these are rolled out.

40. As noted above, if penalties are to be applied on a daily basis, HMRC must ensure that appropriate mechanisms are implemented for secure and timely serving of notices and responses.

41. A proposed timeframe of 30 days to respond prior to penalties being applied may be insufficient depending on the nature and extent of information requested.

Question 10: Do you have any views on making amendments to prevent the third party from notifying the taxpayer in this way?

42. We believe that the proposed amendment should not have any effect as FIs do not seek to tip-off their customers in the case of investigations. This is a requirement under the Proceeds of Crime Act 2002, which banks apply across the board, including in cases of suspected tax evasion as well as under the DRD regime.

Question 11: What form of sanction should be imposed on the third party for a breach of this rule?

43. The sanctions imposed on the third-party should be no greater than those imposed for other similar initiatives (e.g. DRD) and sanctions should not be imposed where reasonable steps have been taken by a bank to prevent the third-party from making the taxpayer aware of the notice.