THE INVESTING AND SAVING ALLIANCE, BUILDING SOCIETIES ASSOCIATION AND UK FINANCE – WRITTEN EVIDENCE (DFE0006)

Draft Finance Bill 2020-21 inquiry

Introduction

1. UK Finance is the collective voice for the banking and finance sector. Representing more than 250 firms, we act to enhance competitiveness, support customers and facilitate innovation.

2. The Building Societies Association represents all 43 UK building societies as well as six credit unions. Building societies have total assets of nearly £430 billion, and together with their subsidiaries, hold residential mortgages over £335 billion, 23 per cent of the total outstanding in the UK. They hold over £295 billion of retail deposits, accounting for 18 per cent of all such deposits in the UK. Building societies account for 39 per cent of all cash ISA balances. They employ approximately 42,500 full- and part-time staff and operate through approximately 1,470 branches.

3. The Investing and Saving Alliance's (TISA) ambition is to improve the financial wellbeing of UK consumers by bringing the financial-services savings industry together to promote collective engagement, to deliver solutions and to champion innovation for the benefit of people, our industry and the nation. TISA is a unique, rapidly growing body with over 200 members from across the financial-services industry.

General comments

4. We welcome the opportunity to provide evidence to the Finance Bill Sub-Committee's inquiry into the draft Finance Bill 2020-21 specifically in relation to the amendment to HM Revenue and Customs' (HMRC) civil information powers in schedule 36 to the Finance Act 2008 to introduce a new financial institution notice (FIN).

5. We are grateful to HMRC officials for their willingness to engage with the industry on the practical concerns and issues that we have flagged for their attention in relation to the draft legislation and its implications. We hope that we can continue to work together to ensure that the new FIN arrangements will operate as appropriately and smoothly as possible.

6. Although we are working with HMRC to ensure that the regime works in practice, we have residual concerns about the new FIN. While our organisations responded to HMRC's 2018 consultation on amending its civil information powers,[1] there was no further, intervening discussion of this change before the summary of responses and draft legislation were published on 21 July 2020. This gives rise to some issues in itself, such as a commencement date for which financial institutions (FIs) may struggle to be adequately prepared.

Specific questions

Q10. What is your view of the removal of the requirement to obtain tax tribunal approval before issuing a Financial Institution Notice? Are the safeguards promised instead adequate and, if not, what more should be done?

7. We are fully committed to assisting HMRC in its obligations to collect the taxes that pay for vital public services and support the country's economy and infrastructure. To do so, it is imperative that HMRC's powers are clearly defined in statute so our members do not, in attempting to assist HMRC, break the legal and fiduciary duties they owe to their customers. It is also important for everyone to have faith in both the fairness of the tax system and the security of their personal information within the financial-services industry, so HMRC's use of these powers must be proportionate and confined within the limits set by the UK parliament. The removal of tribunal approval and the replacement arrangements will not provide the current level of assurance.

8. Under the new rules, the suggested replacement for tribunal approval is approval by an authorised officer of HMRC. HMRC, therefore, needs only satisfy itself that the information it is seeking is within the boundaries of what it is entitled to obtain, being both "reasonably required for the purpose of checking the taxpayer's tax position" under paragraph 2 of schedule 36 to the Finance Act 2008 and "necessary" for that purpose under the Data Protection Act 2018. This gives the appearance of HMRC "marking its own homework." Should HMRC wish to give greater assurance of the rigour of the process, it could refer requests to an independent body, such as the Adjudicator's Office.

9. In the more asymmetrical arrangement currently proposed, FIs have no statutory rights of appeal. Instead, the HMRC officer will determine

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724048/Amending_HMRC_s_Civil_Information_Powers_consultation_document.pdf.

whether compliance with any such notice would be onerous for the FI. It appears that, as drafted, the legislation allows the officer to make such a determination without the FI itself having any legal right to make representations about whether compliance with a particular FIN would be onerous. It also appears that this remains the case even after the FIN has been served, subject to the FI being ultimately and belatedly able to appeal when a penalty notice has been issued if it fails to comply with the FIN.

10. The current schedule 36 process involves the issue of a precursor notice. Without this or some equivalent, we do not understand how the HMRC officer will have necessary knowledge or insight into what is or is not onerous for a particular FI. For example, we would expect the degree of onerousness to vary according to organisational size and complexity and the frequency and volume of information requests received. The precursor notice is also currently a helpful step in ensuring that the notice is appropriately targeted.

11. We consider that some form of ability for the FI to appeal against the scope of the information request or challenge whether the "reasonably required" piece of Condition B is met is necessary. We would urge either amending the existing paragraph 30 of schedule 36 or introducing a new paragraph specifically allowing the FI to appeal against a FIN, ideally well before any penalty-notice situation is reached. We consider the appeal should be to an independent body—if not the tax tribunal then the Adjudicator's Office, for example.

12. Although HMRC has indicated in preliminary discussions about the draft legislation that some sort of process for the FI to have the opportunity to make representations might be covered in its guidance, this would not give the same level of comfort to our members as a statutory right. Similarly, HMRC has suggested there will be scope in the guidance for extensions to deadlines and amendment to/issuance of fresh notices with new dates for compliance where complicated or particularly onerous cases are identified by FIs. Again, FIs would welcome formalisation of such mechanisms within the legislation.

13. Under the new arrangements, it is proposed that HMRC will produce an annual report to parliament on the operation of the FIN regime. We note from previous experience with the Direct Recovery of Debts (DRD) regime that a requirement to report to parliament does not necessarily mean HMRC will consult with relevant stakeholders and ensure their experience is also captured in the report. We would like to see a firmer requirement for HMRC to consult with stakeholders in producing the report to ensure this.

14. We note that the draft legislation will allow a FIN to be used to request information needed for tax-debt collection purposes. We are unclear how the DRD regime and FINs will interact and, in particular, how the DRD safeguards will operate. This needs to be set out clearly.

15. We note that the commencement of the legislation is from the date of enactment. FIs would appreciate at least one month of lead time to implement any change processes required. As outlined above, the proposed changes will displace the checking undertaken by the tribunal onto FIs. New procedures and training will have to be established so FIs can be assured the FINs are appropriately targeted in order not to disclose information to which HMRC is not legally entitled. We note that there is precedent for such a lead time, with the introduction of the DRD regime taking place at a later date than it was enacted.

Q11. Is the scope of the new power in terms of the information to be reported to HMRC appropriate and sufficiently clear?

16. Based on the decision of the Court of Appeal in Tournier v National Provincial and Union Bank of England [1924] 1 KB 461, it is an implied term of the contract that an FI will keep a 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." FIs are also bound by the Data Protection Acts 1998 and 2018. In particular, section 8 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." Under article 6(3) of the General Data Protection Regulation, 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."

17. For legal and reputational reasons, FIs must only provide customer information to third-parties where it can be demonstrated that they are required to do so under a specific legal obligation. The FI 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 FIs 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 the information requested was within the boundaries of what 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 tribunal approval currently achieves.

18. From a data-protection and customer-confidentiality perspective, it is critical that the information requested in a FIN align to the information-gathering powers conferred on HMRC in those provisions. We would anticipate that a FIN would be considerably narrower in scope than the current standard schedule 36 requests given these require tribunal approval. We are happy to work with HMRC to ensure there is sufficient clarity about what HMRC intends to include within the FIN information requests, and we consider it would be helpful to agree a "standard" set of information (e.g. bank-account statements) that could be covered by a FIN as well as "non-standard" information (e.g. correspondence) that should still require tribunal approval.

Q12. How can the need for adequate taxpayer safeguards and timely international exchange of information be balanced? What steps should be taken to ensure that taxpayer safeguards are not treated as dispensable when they make it more difficult to meet other obligations?

19. We acknowledge that HMRC's international obligations are driving changes to its civil information powers. We appreciate that the OECD Global Forum may consider the UK's process to be at the limits of an acceptable timetable for the satisfaction of information requests. We are, however, unconvinced that removing the taxpayer and third-party safeguards of the existing schedule 36 regime strikes the right balance. In particular, we are concerned that a streamlined FIN process would not be appropriate to deal with varied requests from other jurisdictions without the opportunity for the FI to make representations about the practicalities of complying with such a request.

20. In its 2018 consultation document, HMRC noted that, "From 1 April 2016 to 31 March 2017 there were 215 requests for tribunal approval of a third-party notice. This shows that third-party notices are not issued in large numbers." If HMRC anticipates that the numbers of FINs will be in the hundreds rather than thousands, it seems it may be possible to introduce independent oversight of requests through some

kind of fast-track process involving an independent body, such as the Adjudicator's Office, that is experienced in investigating and adjudicating on HMRC's decision-making.

Tuesday 6th October 2020