

## Response of the IFS Tax Law Review Committee to the HMRC consultation: Amending HMRC's Civil Information Powers published in July 2018 ("the Consultation")

1. The Tax Law Review Committee ("TLRC")<sup>1</sup> welcomes the publication of the Consultation.
2. The TLRC's role is to keep under review the state and operation of tax law in the UK. This response does not attempt to work through each of the questions raised. We are aware that there are plenty of other bodies and organisations, some of which include TLRC members, which are making such responses, including on such matters as the practical problems caused to third parties who would not be able to rely on court involvement as an exclusion to their confidentiality or contractual obligations. With that in mind the comments below seek to address the issues raised by the Consultation which are at the heart of the TLRC's activity.
3. The TLRC particularly identifies matters of concern regarding **the proposal to remove reference to the First Tier Tribunal ("FTT") for third party notices.**
4. The Consultation sets out the underlying rationale for the proposal in paragraphs 3.8 and 3.9, in particular, where in essence it is stated that the FTT approval process adds significantly to the time taken to implement third party notices; discourages some jurisdictions from requesting third party information; and means that the UK cannot meet globally agreed standards even with additional resources devoted to the process.
5. Yet the wide range of international practices in this area referred to in paragraph 3.12 and Annex A to the Consultation calls into question the reference to a globally agreed standard. As far as we are aware there is no such standard.
6. While we recognise that changes which may make it easier for some countries who are otherwise deterred by cost or complexity to make applications for information are to be welcomed, enabling them to do so must be expected to increase the number of requests. The statement in paragraph 3.16 that a material increase in the administrative burden on third parties is not expected as a result of the change therefore does not sit comfortably with the statement that the current process deters some countries from asking for notices to be issued.
7. In addition, if a step in the process which is currently seen as burdensome is removed - the application to the FTT- the system will be easier and cheaper for HMRC to operate and must reasonably be expected to result in the ease of the process encouraging the issue of more notices.

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<sup>1</sup> The IFS created the TLRC in 1994. Its remit is to keep under review the state and operation of tax law in the UK. Further information about the TLRC can be found at: <https://www.ifs.org.uk/research/TLRC>

8. This leads to the heart of the concern about removal of FTT approval for third party notices. We refer you to the case of R (on the application of Derrin Brothers Properties Ltd and others) v. A Judge of the First Tier Tribunal and the Commissioners for Her Majesty's Revenue and Customs [2016] EWCA Civ 15. In that case it was stated that:

“Schedule 36, like its predecessor scheme in section 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community....

Parliament has deliberately chosen a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve...

Parliament has balanced those extensive rights of HMRC to obtain documents and information from third parties, at the investigatory stage of checking possible tax avoidance or evasion, with a number of protections against abuse and excessive intrusion by the executive. “

9. In other words, the involvement of the FTT is an important part of that carefully designed balance put in place by Parliament, recognising that the powers to obtain information could otherwise be exercised with little restraint; and that the powers are, of their nature, intrusive and demanding. It is clearly for Parliament therefore to decide how the powers and their safeguards should be balanced, but we would urge that such a decision is exercised with caution.
10. As such we submit that it is inappropriate to remove that part of the design of the powers. It may only be that the FTT refuses to grant approval in a small number of cases, but approval is refused at times and that in itself reinforces the need for such a system to operate. The checks and balances built into the powers currently work, recognising, as noted in Derrin, that Parliament designated the HMRC inspector as the decision-maker and a presumption of regularity applied to the HMRC inspector's decisions.
11. Finally, we note that the Court of Appeal in the Derrin case relied, in part, on the existence of the judicial monitoring framework to conclude that the powers in Schedule 36 comply with the provisions in Articles 6 and 8 of the European Convention on Human Rights (“ECHR”). Sir Terence Etherton in the leading judgment states that:

“Parliament has laid down a scheme in schedule 36 which serves a legitimate economic public purpose, and which balances in a proportionate way in accordance with Article 8(2) the interests of the wider community and private interests... The combination of judicial monitoring and judicial review provides, in the context of schedule 36, proportionate access for the adjudication of any claim that the Article 8 rights of a non-taxpayer entity have been infringed.”

12. Removal of the judicial monitoring fundamentally alters that balance and as such the proportionality of the Schedule 36 scheme is undermined. The consultation document does

not address this issue or set out HMRC's analysis to conclude that the Schedule 36 powers would remain ECHR compliant.

13. Therefore while we recognise that the FTT approval process may appear cumbersome and costly to HMRC, it serves an important role and should be maintained. Without this referral process, there is little effective safeguard against excessive use of the power and burdensome or vexatious applications by tax authorities, recognising, as the Consultation does, that the powers to obtain information benefit not only HMRC but also other tax authorities.
14. Instead of removing the referral to the FTT we would encourage work to be undertaken to find ways to streamline and simplify the process as much as possible.