International tax information exchange: are UK financial institution notices a licence to fish?

*Financial institution notices (or '**FINs'**) are one of the civil information powers available to the UK tax authority (**HMRC**). First floated in 2018 in a consultation on amending those powers and then enacted by Finance Act 2021, FINs seem to have become HMRC's preferred method for obtaining information from financial institutions, especially information requested by overseas tax authorities using international information exchange mechanisms. However, just because a FIN is non-appealable, and so represents a greater power for HMRC, does not mean that tax managers' hands are tied.*

If HMRC wishes to obtain information from or about taxpayers it has a broad set of information powers it can use contained in Schedule 36 Finance Act 2008. One of those is a paragraph 4A information notice, also known as a 'Financial Institution Notice' or 'FIN', which is concerned specifically with obtaining information about taxpayers held by financial institutions. HMRC may, by written notice, require financial institutions to provide information or to produce documents that is 'reasonably required' by HMRC for checking the tax position of a third party whose identity is known to them and is not, in the reasonable opinion of the officer giving the notice, of a kind that it would be onerous for the financial institution to provide or produce (paras 4A(2) and (3) Schedule 36 Finance Act 2008).

Unlike other information notices in Schedule 36, there is no tribunal filter before their issue and no right of appeal to the tribunal once issued; if an authorising officer of HMRC considers the conditions are met, a FIN can be issued without the tribunal's prior approval. Once formally issued, the taxpayer must respond within the time period (reasonably) laid down in the notice and failure to comply runs the risk of penalties. There are also penalties if a response to a FIN contains inaccuracies, including those that are careless or deliberate. When a FIN lands on the financial institution's tax manager's desk it thus does so with a considerable thud.

FINs were first floated in the 2018 consultation, 'Amending HMRC's Civil Information Powers'. The consultation discussed that the Common Reporting Standard, which had taken effect in 2017, was expected to result in a rise in tax investigations by overseas tax authorities which in turn would place a greater resource burden on HMRC and the tribunal service. Without reform, it would be increasingly difficult for the UK to meet the international standards it had committed to in providing timely responses to information requests. As the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes in 2013 had found, the need to obtain prior tribunal approval before HMRC could exercise its information gathering powers was significantly adding to the time taken to respond to requests and discouraging overseas authorities from making requests for third party information (particularly where it related to banking information).

FINs were identified as one possible solution. Modelled on the power to obtain statutory records information, the idea was that FINs would allow specified banking information to be obtained without the tribunal's prior approval, where that information is reasonably required to check a taxpayer's tax position and so long as the issue of the notice had been approved by an authorising officer. There would be no right of appeal to the tribunal, but penalties could be appealed. The taxpayer whose position was being checked would be given notice that a FIN had been issued to a financial institution.

FINs were subsequently enacted by Finance Act 2021. The original idea that they would apply to specified financial information was dropped in favour of financial institutions being required to provide any information or documents reasonably required for the purposes of checking a known person's tax position, provided doing so would not be onerous for the financial institution. As trailed (despite some opposition), there is no tribunal oversight. Instead, an authorised HMRC officer would be responsible for approving the issue of a FIN. This and the requirements for international information exchange were described in the UK Government's consultation response published July 2020 as the safeguards against the improper use of FINs. There is no right of appeal (only a judicial review claim), either.

Are FINs a licence for overseas tax authorities to fish?

Since 2021, we have seen a sharp uptick in the number of FINs being issued to UK financial institutions. This plays out in HMRC's own data. HMRC is obliged to publish an annual report to the House of Commons on the use of FINs. In its most recent report, published in January 2024 covering the period from 1 April 2022 to 31 March 2023 (***HMRC's 2024 Report***), HMRC notes that between 1 April 2022 to 31 March 2023 the number of FINs issued increased by more than 80% (647 in total). This is partly explained by the extended reporting period, but also by 'increased awareness of the FIN process amongst case workers and increased capacity through training of additional FIN authorised officers'. The number of 'international' FINs make up one fifth of the FINs issued in the period.

We have seen FINs covering a wide variety of subject matters, including for example requests for information about foreign real estate held by EU-based persons who bank with the financial institution, information related to family estate planning and equities financing transactions in respect of which dividend withholding tax reclaims have been made.

Requests in that final category can be particularly difficult. We have seen (informal) requests for information giving effect to information requests from overseas tax authorities which are very broad, sometimes relating to hundreds of transactions and where the request seems to be without regard to what might be onerous on the financial institution and without explanation of why the information might be required or indeed whose tax position is actually being checked. Broad requests lead to concerns about speculation. If they do not imply that any sort of inquiry or investigation is being carried on by the requesting authority with any level of specificity, can the information sought be 'reasonably required'? It can also be onerous to identify potentially responsive information, let alone positively responsive information (which might run to thousands of pieces of information).

It is not always clear that the conditions for exchange under applicable international exchange mechanisms (usually a double tax treaty or the OECD Convention on mutual administrative assistance in tax matters (***MAATM***)) are met. Key is that neither can be used to conduct a 'fishing expedition' (see paragraph 5 of the OECD Commentary to Article 26 of the OECD Model and the 'foreseeably relevant' test in MAATM). Nor can they be used to request information from HMRC that the overseas authority would not be able to obtain under its own domestic law. Under MAATM, the requesting authority must have also pursued all reasonable measures available to it under its domestic laws to obtain the information (Articles 18(1)(f) and 21.2(g), MAATM).

It is not clear whether HMRC do analyse the international requests, but it does sometimes feel like they are just forwarding them on and leaving it to the taxpayer (at its cost) to work out whether the conditions for information exchange were met. Being resource-stretched and coming under pressure from its international partners to keep-up with the crowd, it is understandable that HMRC wants to get these international requests out the door as quickly as possible. But is this the right approach?

One of the driving forces for the introduction of FINs was the (perceived) need to give HMRC the means to quickly respond to international exchange of information requests. The March 2021 TIIN echoes the 2018 consultation document's focus on the need for speed: the new process for issuing FINs would 'speed-up' the time HMRC takes to deal with international exchange of information requests and 'bring the UK into line with international standards on tax transparency and on the quality and speed of exchange of tax information'. Speed also features in HMRC's 2024 Report: HMRC makes much of the fact that its average time to process requests had dropped from 197 to 175 days. They have achieved what they set out to do, with HMRC responding to requests quicker than the 180-day international standard, a 'considerable reduction' from the 2018 average response time of 365 days.

This focus on response times is concerning. It is notable too that HMRC's Report fails to mention anything of the *quality* of the requests and the responses. If HMRC's yardstick for measuring the success of FINs is all about its turnaround time, then it will come as no surprise that financial institutions are increasingly finding themselves on the receiving end of questionable FINs. Financial institutions may have deep pockets and can afford to take advice, but should they have to?

The HMRC 2024 Report also notes that HMRC has received no (informal or formal) complaints from taxpayers about the use of FINs and there have been no judicial review applications. We are aware of a number of financial institutions making the point in representations that requests they have received are fishing expeditions, not reasonably required, onerous to comply with and are disproportionate. If this is not a complaint, what is? It will be interesting to see what next year's report says on this.

Where does this leave the tax manager?

Just because a FIN is non-appealable and so represents a greater power for HMRC does not mean their hands are tied. HMRC tends to informally notify the financial institution in advance that it intends to issue a FIN and will normally outline the information that will be requested and invite comments. This can be a valuable opportunity for the financial institution

to have its voice heard before the FIN is (formally) issued and compliance becomes a legal requirement.

It should be assessed whether the request satisfies the paragraph 4A conditions and any conditions in the applicable international exchange mechanism. The latter may involve obtaining local law advice, for example to check what is in the realm of the possible under domestic law to ensure the overseas tax authority is not overreaching. The law on information notices and the use of HMRC's Schedule 36 powers, including the restrictions on the exercise of that power in Part 4 of Schedule 36, also apply and should therefore be considered. If a request seeks documents, it should be checked whether those are in the recipient's possession or power, noting that the case law in this area has established that this test is wider than one might expect. Privilege, data protection and the rules around what constitutes 'old' documents and statutory records should be thought about too. Establish what information the financial institution is (or is not) likely to have, and how long it would take to confirm this and respond to the request if it were formally issued. Applicable client confidentiality rules should be borne in mind, seeking advice from the internal legal function as needed.

If having done this work it is considered that the information is not reasonably required or there is a concern that the request is a fishing expedition by the overseas authority, it will be important to make representations to HMRC. These should be drafted with the legal tests in mind in order that it is clear to the HMRC authorising officer in what ways the request is non-compliant. If it seems reasonably clear that the wrong questions are being asked, such that a way to cut though the detail and get to a quicker answer has been missed, consider highlighting this and suggesting a pragmatic way forward. From experience, HMRC is often willing to work with the financial institution and adjust their approach.

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David Haworth
Partner
T +44 20 7832 7755
E david.haworth@freshfields.com

Rose Swaffield
Counsel
T +44 20 7716 4093
E rose.swaffield@freshfields.com

freshfields.com