

EXPLANATORY MEMORANDUM TO
THE PENSION SCHEMES (QUALIFYING RECOGNISED OVERSEAS PENSION
SCHEMES) (GIBRALTAR) (EXCLUSION OF OVERSEAS TRANSFER CHARGE)
REGULATIONS 2021

2021 No. 89

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) on behalf of Her Majesty's Treasury and is laid before the House of Commons by Command of Her Majesty.
- 1.2 This memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument maintains the exclusion from the overseas transfer charge for recognised transfers of pension savings, and onward transfers of pension savings, to a qualifying recognised overseas pension scheme (QROPS) established in Gibraltar following the United Kingdom (UK) leaving the European Union.

3. Matters of special interest to Parliament

Matters of special interest to the Select Committee on Statutory Instruments

- 3.1 Regulation 1(2) provides that this instrument has retrospective effect from IP completion day. Section 90(3) of the Finance Act 2019 enables regulations that satisfy the conditions in subparagraphs (a) and (b) of the subsection to provide that they have effect from exit day. Exit day is defined in section 20(1) of the European Union (Withdrawal) Act 2018 as 31 January 2020 at 11.00 pm and IP completion day is defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020 as 31 December 2020 at 11.00 pm.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Pension Schemes (Qualifying Recognised Overseas Pension Schemes) (Gibraltar) (Exclusion of Overseas Transfer Charge) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 UK pension savings that have received tax relief can be transferred free of UK tax to pension schemes based outside the UK that meet the conditions to be a QROPS. Section 169 of the Finance Act 2004 (FA 2004) and the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (S.I. 2006/206) set out the conditions that pension schemes must meet to be QROPS. One of the main conditions is that a QROPS cannot be based in the UK.
- 6.2 Chapter 6 of Part 4 of FA 2004 sets out some of the tax rules that apply to QROPS. Schedule 4 to the Finance Act 2017 amended that chapter to introduce the overseas transfer charge in sections 244A to 244N of FA 2004, that applies a charge so that certain transfers of pension savings to QROPS can no longer be made free of UK tax.
- 6.3 With effect from 9 March 2017, the 25% overseas transfer charge is deducted from transfers of UK pension savings to QROPS except where the circumstances set out in sections 244B to 244G apply:
- section 244B: the individual and the pension scheme receiving the transfer are in the same country;
 - section 244C: the individual and the pension scheme receiving the transfer are both in a country within the European Economic Area (EEA);
 - section 244D: the individual is an employee of the employer that operates the pension scheme;
 - section 244E: the individual is an employee of an international organisation and the pension scheme is operated by that international organisation;
 - section 244F: the individual is in public service and the pension scheme meets the definition of being an overseas public service scheme;
 - section 244G: the funds have already been subject to overseas transfer charge, were transferred or a request to transfer had been made before 9 March 2017.
- 6.4 If a transfer has been subject to the overseas transfer charge, section 244M provides for a repayment of that charge if, within five tax years of the transfer, the circumstances have changed so that the charge would not now apply under sections 244B to 244F.
- 6.5 Prior to 31 December 2020 (end of the transition period), section 244C provided for transfers free of overseas transfer charge where the QROPS was in an EEA state and the individual was resident in an EEA state. After 31 December 2020 neither the UK nor Gibraltar is, or is part of, an EEA state, so a transfer to a QROPS in Gibraltar will no longer be excluded from the overseas transfer charge where the individual is resident in the EEA or UK and none of the other exclusions in sections 244B to 244G of FA 2004 apply.
- 6.6 The Taxes (Amendments) (EU Exit) Regulations 2019 (S.I. 2019/689) ensured section 244C subsections (2) to (6) continue to work for individuals resident in the UK and, by virtue of regulation 39 of those regulations, this includes Gibraltar after 31 December 2020.

- 6.7 But that instrument did not include an amendment to section 244C subsection (1) to include a reference to the UK, as QROPS cannot be based in the UK. Therefore, section 244C only applies to transfers to QROPS established in an EEA state, of which Gibraltar is no longer one.
- 6.8 This instrument inserts ‘Gibraltar’ into the heading at section 244C. This instrument also inserts ‘Gibraltar’ into section 244C(1) alongside the reference to ‘an EEA state’ to maintain the previous exclusion to the overseas transfer charge for recognised transfers, or onward transfers, of pension savings to a QROPS in Gibraltar.
- 6.9 Section 90 (1)(a), (2)(a) and (3) of the Finance Act 2019 allows the Treasury to make minor amendments in consequence of the UK leaving the European Union.
- 6.10 The instrument will have effect from the end of the transition period (31 December 2020 at 11pm).
- 6.11 The procedure for free issue of this instrument has been applied and this instrument is being issued free of charge to all known recipients of the Taxes (Amendments) (EU Exit) Regulations 2019.

7. Policy background

What is being done and why?

- 7.1 This instrument adds a reference to Gibraltar when setting out the countries in which a pension scheme can be based in order for the exemption in section 244C of FA 2004 to apply.
- 7.2 This additional reference means that from the end of the transition period, a recognised transfer, or onward transfer, of pension savings to a QROPS in Gibraltar will continue to be excluded from the overseas transfer charge where the individual is resident in the UK or the EEA, even though the UK has left the European Union.
- 7.3 Without this instrument such transfers will be chargeable to the overseas transfer charge if none of the other exclusions in Part 4 of FA 2004 apply and would represent an unintended policy change.
- 7.4 If a transfer is made between the end of the transition period and the regulations taking effect, the pension scheme should withhold the overseas transfer charge amount from the transfer. The pension scheme can then make a further transfer of this amount to the QROPS in Gibraltar once the regulations take effect, as the reporting and payment due dates do not fall until April 2021. If the overseas transfer charge is reported and paid prior to the due date, the scheme will be able to apply for a repayment of the charge once the regulations take effect.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union because prior to the end of the transition period, transfers to QROPS established in Gibraltar were excluded from the overseas transfer charge. The Taxes (Amendments) (EU Exit) Regulations 2019 omitted the exclusion for transfers to QROPS established in Gibraltar. This was unintentional, as the exclusion that existed prior to the end of the transition period was to be maintained.

8.2 Now the end of the transition period has passed, and the UK, and therefore Gibraltar, is no longer in the EEA, QROPS in Gibraltar are no longer within scope of the overseas transfer charge EEA exclusion. This was not the policy intent, and the Taxes (Amendments) (EU Exit) Regulations 2019 overlooked this point.

9. Consolidation

9.1 This instrument amends section 244C of FA 2004. The changes are minor and do not require consolidation.

10. Consultation outcome

10.1 A consultation on this instrument in respect of the exclusion from the overseas transfer charge for transfers to QROPS in Gibraltar has not taken place because transfers to QROPS established in Gibraltar were already included within the EEA exclusions introduced in 2017.

10.2 The draft regulations have not been published for a technical consultation because this instrument does not reflect a change in policy and also because of time pressures to correct the position for Gibraltar. The oversight in The Taxes (Amendments) (EU Exit) Regulations 2019 was not noticed early enough in the transition period to allow for a technical consultation on the draft instrument. This instrument provides for the exclusion from the overseas transfer charge in respect of QROPS established in Gibraltar, provided for in FA 2004, to continue after the end of the transition period.

11. Guidance

11.1 Existing guidance already reflects the overseas transfer charge EEA exclusion for QROPS in Gibraltar. No amendments are required.

11.2 Overseas transfer charge guidance is published in the Pensions Tax Manual at <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm102200>.

12. Impact

12.1 There is no, or no significant, impact on business because some individuals already choose not to transfer their pension savings overseas and this instrument maintains the exclusion that has been in place since 2017.

12.2 There is no, or no significant impact on charities or voluntary bodies, as historically they have not been connected to transfers to QROPS.

12.3 There is no, or no significant, impact on the public sector, as since April 2015 many schemes have not been able to make transfers to pension schemes that provide different benefits to the ones provided in public sector schemes.

12.4 There is no, or no significant impact on HMRC costs, as the process is already part of business as usual for HMRC.

12.5 A Tax Information and Impact Note covering this instrument was published on 8 March 2017 and is available at

<https://www.gov.uk/government/publications/qualifying-recognised-overseas-pension-schemes-charge-on-transfers/qualifying-recognised-overseas-pension-schemes-charge-on-transfers>.

It remains an accurate summary of these impacts that apply to this instrument.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses as pension transfers subject to overseas transfer charge can be made to any size pension scheme.
- 13.2 No specific action is proposed to minimise the impact of the requirements on small businesses (employing up to 50 people).
- 13.3 The basis for the final decision on what action to take to assist small businesses was that it would not be appropriate for the policy to apply differently according to the size of the pension scheme as the same regime has always applied to all registered pension schemes.

14. Monitoring & review

- 14.1 This instrument will be monitored through communications with taxpayer groups including, for example, industry representatives on the Pension Forum.
- 14.2 The regulation does not include a statutory review clause due to the tax exemption in section 28(3)(a) of the Small Business, Enterprise and Employment Act 2015.

15. Contact

- 15.1 Karen Bishop at HMRC, telephone: 03000 512336 or email: pensions.policy@hmrc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Andrew Edwards, Deputy Director for Pensions Policy, at HMRC can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 John Glen, Economic Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.