



HM Revenue  
& Customs

# Consultation: Internationally Mobile Employees (IMEs) and Employment-Related Securities (ERS)

**Summary of Responses**  
(February/2015)

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# 1. Introduction

## The consultation

1.1 Income tax and NICs are generally due where an employer awards employment-related securities (ERS) to employees. The tax rules in this area are designed to ensure that employment income paid in the form of ERS is subject to income tax and NICs where appropriate.

## Internationally mobile employees (IMEs)

1.2 In its final report on unapproved employee share schemes, the Office of Tax Simplification (OTS) recommended changes to the taxation of shares and share options awarded to IMEs. The report can be found at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/198440/ots\\_unapproved\\_employee\\_share\\_schemes\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198440/ots_unapproved_employee_share_schemes_final.pdf).

1.3 The Government introduced legislation in Finance Act 2014 to give effect to those recommendations in relation to income tax and corporation tax relief.

1.4 On NICs, the OTS pointed out that within the European Economic Area the consensus approach is to apply social security based on the economic activity in each country, which follows the Organisation for Economic Co-operation and Development (OECD) model. The OTS also referred to work done by HMRC and external stakeholders which had identified the desirability of moving to apportionment for NICs to align as closely as possible with tax treatment, but acknowledged this had to remain subject to international social security treaty requirements.

1.5 The Finance Act 2014 changes to the income tax rules for IMEs mean that, with effect from 6 April 2015, ERS income will be apportioned on a time basis: the part which relates to UK duties will be subject to income tax. However, complete alignment of the rules in this area between tax and NICs creates the risk of a NICs double-charge (for example, an employee chargeable for income tax on ERS in the UK may still be within a foreign social security scheme and not liable for UK NICs).

1.6 The proposed NICs measure is designed to ensure that any ERS income which is attributable to days when the individual was not in the UK social security system will be disregarded and not subject to a NICs liability. This introduces greater simplicity, and produces the best fit with international social security treaties.

1.7 The Government published a consultation document on 24 July 2014, which can be found at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/336741/140724\\_IME\\_ERS\\_condoc\\_v2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336741/140724_IME_ERS_condoc_v2.pdf)

## Consultation responses

1.8 The Government received 10 responses to the consultation: seven from professional advisers and three from representative bodies. Annex A contains a full list of respondents.

1.9 The Government is grateful to respondents for their contributions to the consultation and for taking the time to respond. These responses have contributed to a better understanding of the potential costs, impacts and benefits of these proposals.

## 2. Responses

### Consultation questions

2.1 The Government welcomed views and evidence on the:

- **draft regulations achieving their aim.**
- **impact of the proposed change for businesses and individuals, in terms of one-off or on-going NICs or administrative costs/savings.**
- **impact on businesses needing to track IMEs movement during the period between grant and vest, in different social security schemes, in order to assess liability to UK NICs from earned ERS income.**
- **lead-in period before any new rules take effect was sufficient to allow businesses to understand and implement the changes.**

2.2 The proposal was broadly supported by most respondents who recognised that this provides clarity and aligns the NIC treatment of IMEs to the income tax treatment as closely as possible.

### Draft Regulations

2.3 Most respondents felt the draft regulations achieved the aim as far as was practicable, aligning NICs and tax treatments where possible. One respondent told us:

*Overall, we believe the proposed changes provide much needed clarity to a challenging issue. Aligning the NIC position, as far as possible, to the income tax position should reduce confusion and assist businesses to manage their compliance obligations.*

2.4 One respondent felt that the draft regulations, although the intention is to align tax and NICs rules, is not achieved under the proposed new NIC measures.

2.5 Other respondents requested further clarity as to the extent of the new measures – for example:

- Would the new legislation cover payments such as cash bonuses (section 3 SSCBA 1992)? (see paragraph 2.9)
- Would there would be a NICs liability when an IME is in a ROW country and the ERS vest after the period of continuing UK NICs liability (under regulation 146 SSCR 2001) had expired? (see paragraph 2.10)
- Why is there no reference to EC Regulation 1408/71? (see paragraph 2.12)
- Would duties carried out in the UK by a UK national on assignment in a non-agreement country, considered incidental for income tax purposes under section 39 ITEPA 2003, give rise to a UK NICs liability in respect of ERS income? (see paragraph 2.13)

## HMRC's response

2.6 Where relevant international legislation or domestic rules are not a factor, then NICs treatment will align with that for tax.

2.7 The purpose of the legislation is to introduce a NIC disregard in respect of each day during the relevant period an IME is subject to foreign social security contributions. This recognises the UK's commitments under relevant international legislation (EEA Regulations and bi-lateral agreements) and appropriate domestic regulations (145 & 146 SSCR 2001); and ensures ERS employment income earned whilst subject to foreign legislation, and not enjoying the benefits derived from the payment of UK NICs, is disregarded.

2.8 The aim is that there will only be a NICs liability on ERS employment income earned for days during the relevant period when the IME remained subject to UK NICs and from which associated benefit cover was obtained. The Government feels this is fair, and introduces simplicity and clarity for businesses and IMEs.

2.9 The new NICs apportionment measures will not relate to 'earnings' – for example, cash bonuses which are covered under section 3 SSCBA 1992.

2.10 Furthermore, in cases where an IME is in a ROW country and subject to a continuing UK NICs liability for the first 52 weeks (regulation 146 SSCR 2001) and the ERS vest after the 52 week period has expired, there will be a UK NIC liability (apportioned) on the ERS employment income gained during the period the IME remained subject to UK legislation (i.e. up to and including week 52).

2.11 The key to the way the draft legislation works is that each of the conditions refer to a situation in which the rules (domestic or international) prevent a NICs liability from arising in the first place. For example:

- an instalment allocated to a given day may not be liable for NICs because the EU Regulation provides that the earner is subject solely to the law of Switzerland on that day. In which case, the condition in paragraph (5) would be satisfied;
- equally, an instalment allocated to a given day may not be liable for NICs because the regulation 145 SSCR 2001 residence conditions aren't fulfilled. In which case, the condition in paragraph (4) would be satisfied.

There may be situations in which an instalment is made on a day when the regulation 145 residence conditions aren't fulfilled **but** on which regulation 146 would apply to treat the instalment as earnings from employed earner's employment, creating a NICs liability – as this instalment is not to be disregarded, no reference to regulation 146 is required. Regulation 146 is effectively an exception to regulation 145 which creates a liability for NICs when there otherwise would be none.

2.12 It is not felt necessary to incorporate EC Regulation 1408/71 (or its implementing regulation 574/72). This is because Third Country Nationals (TCNs) posted to the UK by other EEA countries will be covered by Regulation 883/04 (no

other Member States apply Regulation 1408/71 to TCNs; Denmark doesn't apply Regulation 883/04 to TCNs, but they didn't extend Regulation 1408/71 to TCNs either). As for TCNs posted from the UK - if there is a continuing UK NICs liability under Regulation 1408/71 (for a TCN), these would not be covered by the new disregard [which only relates to people not subject to UK NICs by virtue of relevant international social security legislation]. If a TCN seconded from the UK is not subject to Regulation 1408/71 he/she will instead be subject to the legislation of the 'host' country, in which case this would be under Regulation 883/04 which is the legislation applied to TCNs by all other Member States.

Individuals who come within the transitional provisions are also covered under Regulation 883/04 (Article 87(8)).

Further details (and examples) will be provided in guidance to be published before the new measures come into effect.

2.13 For each day during the period between grant and vest (the relevant period) the IME will be subject to the legislation of one country - if the individual is subject to UK legislation during the period the incidental duties are carried out then those days will count for UK NICs in the apportionment; but if subject to the legislation of another country, then they will not.

### **Double Charge**

2.14 The most significant issue emanating from this consultation was 'the double charge', with the majority of respondents pointing out that in certain scenarios there will be both a UK NIC liability and foreign social security liability arising on the same ERS income at the time of the chargeable event. One respondent said:

*There is also an increased potential for dual social security contributions liabilities in respect of ERS earned by IMEs moving between the UK and countries with which the UK has an international social security agreement.*

2.15 One respondent felt the proposed changes would see a NICs increase in some circumstances, and a decrease in others, whilst other respondents commented to the effect that this is a revenue generating measure – particularly in situations where HMRC's current practice is not to pursue a UK NICs liability.

### **HMRC response**

2.16 In its final report, the OTS made a number of comments regarding the NICs position of IMEs, including:

- a desirability to move to apportionment for NICs to align as closely as possible with the tax rules; however, OTS recognised complete alignment of tax and NICs treatment of IMEs is not possible due to international social security treaty requirements;
- to move to the OECD model to apply social security based on the economic activity in each country, recognising when the shares were earned between grant and vest/exercise. One of the aims being to align the NICs treatment of

assignment to the European Economic Area (EEA), Reciprocal Agreement (RA) / Double Convention Charge (DCC) and Rest of World (ROW) countries. The OTS recommended that the 52 week period covered by regulation 145 SSCR 2001 for consideration of UK NICs should be aligned with the NICs treatment of assignments to EEA and RA/DCC countries.

2.17 The proposed approach, which the Government believes is the most consistent with the alignment principle, is to update NICs legislation on all taxable UK ERS income relating to UK duties, irrespective of whether the person is abroad at the time of the chargeable event.

2.18 The Government's aim is to produce as close a fit as possible whilst minimising the risk of double charging by disregarding NICs for days when the IME was in another social security scheme (under EU rules, a bi-lateral treaty, or was exempt for 52 weeks under domestic rules). This approach reduces the chances of double-charging, and prevents a NICs charge for periods when the IME was not entitled to UK social security benefits.

2.19 The Government recognises that if the IME is covered by foreign social security legislation at the time that a tax charge arises, that the same ERS employment income could be subject to a double-charge (UK NICs and foreign social security contributions). This already occurs under the current rules; and such scenarios could only be avoided if all countries adopted the same apportionment approach in their respective legislation.

2.20 Whilst acknowledging that some concerns have been expressed about the potential for double charging if another country also claims social security contributions on the same sum, the Government thinks this rare occurrence can be significantly mitigated without the need for amending legislation. Guidance will be published explaining how EU legislation and bi-lateral agreements can be relied upon in most cases and when it will give unilateral relief.

### **Administration costs to business**

2.21 Respondents were split 50/50 on the impacts on businesses needing to track IMEs movement between grant and vest. One respondent told us:

*We are of the opinion that whilst the proposed rules would require additional administration, as the tax and NIC rules will be aligned, the records needed in order to ensure an employee's tax position is correctly calculated will therefore be the same records required for NIC purposes and as such should not create any significant additional burden.*

Whilst other respondents told us that:

*Businesses are already required to track IMEs movement during the period between grant and vest for income tax purposes and will now need to extend their tracking processes to identify the social security system to which the IME is contributing. This adds another level of information gathering to what is already a fairly onerous administrative task, which is made more difficult and time consuming due to the significant period of time that can lapse between grant and vest.*

*As existing ERS awards/options are not grandfathered, employers would have to determine IMEs status for existing arrangements where a chargeable event occurs from 6 April 2015. This information may not be readily available and could result in a considerable one-off cost in completing this exercise.*

### **HMRC's response**

2.22 Although a lot of businesses do already have systems in place to track the movement of IMEs, the Government recognises that in some cases this change in rules could increase business costs by requiring updates to payroll and other record keeping processes – and may require additional monitoring or tracking of IMEs/ERS awards in some cases. These costs will depend upon the particular circumstances of the business and the relevant IMEs. However, it is also anticipated that long-term savings for businesses could arise from the increased consistency, clarity and simplicity these changes will provide.

2.23 During consultation on the income tax legislation, the predominant view was that there should be a single set of rules for all awards from the date of implementation – which was postponed to 6 April 2015. The Government proposes to take the same approach with NICs.

### **Lead in time**

2.24 The majority of respondents felt that employers of IMEs would already have robust tracking measures for IMEs in place, and that it would be feasible, and preferable, for the NICs measures to be implemented from 6 April 2015 in line with the date from which the new tax rules for IMEs will apply.

2.25 Alternative views from other respondents suggested that:

- the implementation date of 6 April 2015 would be challenging for employers, but achievable;
- HMRC should operate a light touch policy during 2015/16 to allow employers to come to terms with the new measures;
- the implementation date should be deferred to 6 April 2016.

### **HMRC's response**

2.26 The aim of introducing the new NICs measures from 6 April 2015 is to apply these rules alongside the new income tax rules for IMEs. The Government believes it will be more appropriate for businesses to implement these changes simultaneously.

### **Guidance**

2.27 A recurring theme throughout the responses was a recommendation that HMRC provide guidance on the NIC changes in advance of the implementation date of 6 April 2015.

### **HMRC's response**

2.28 Detailed guidance covering the new NICs measures in advance of the implementation date will be made available. This will be contained in the National Insurance Manual which is accessible to all on-line.

## 3. Next steps

3.1 Chapter 2 outlines points made in the consultation and the Government's response in more detail.

3.2 The Government will engage with stakeholders in further on-going informal discussions with a view to enhancing understanding of this measure.

3.3 The Government intends to proceed with the changes proposed in the consultation. Legislation will be published in advance, with a view to implementation for the start of the 2015/16 tax year. The changes would apply to all transactions on or after 6 April 2015 (irrespective of the date of acquisition of the ERS).

3.4 The Government will continue to monitor the impacts of the changes following introduction of the legislation.

# Annex A: List of stakeholders consulted

The following representative bodies and professional advisers responded formally to the consultation:

- Association of Accounting Technicians
- BDO LLP
- Chartered Institute of Taxation
- Deloitte LLP
- Ernst & Young LLP
- Grant Thornton
- Mazars LLP
- PricewaterhouseCoopers LLP
- Quoted Companies Alliance
- The Yuill Consultancy