EXPLANATORY MEMORANDUM TO

THE OCCUPATIONAL PENSION SCHEMES (CROSS-BORDER ACTIVITIES) (AMENDMENT) REGULATIONS 2018

2018 No. 1102

1. Introduction

1.1 This explanatory memorandum has been prepared by Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 European Union (EU) Directive 2016/2341[1] on the activities and supervision of institutions for occupational retirement provision (IORPS), (commonly known as 'IORP II' must be transposed by the UK on 13 January 2019. This instrument will implement provisions relating to the EU's cross-border pension regime into domestic legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 Great Britain.

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 The Minister for Pensions and Financial Inclusion, Guy Opperman has made the following statement regarding Human Rights:

"In my view the provisions of the Occupational Pension Schemes (Cross-Border Activities) (Amendment) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 Until the UK withdraws from the EU, it remains a full member and all the rights and obligations of EU membership remain in force. The Directive has a transposition deadline of 13 January 2019. As the UK will still be a member of the EU at this time it has committed to implement the directive into UK law.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L2341

6.2 This instrument will transpose the new IORP II cross-border provisions into the Pensions Act 2004[2] using the power under section 2(2) of the European Communities Act 1972[3] and sections 60(2)(h), and 93(2)(q) of the Pensions Act 2004.

6.3 A cross-border authorisation regime for occupational pension schemes was introduced as a result of EU Directive 2003/41/EC[4] on the activities and supervision of institutions for occupational retirement provision , commonly known as "IORP I". The regime enables pension schemes in one Member State to accept pension contributions from employers and employees located in another Member State. This Directive was implemented into UK legislation by way of the Pensions Act 2004 and subsequent regulations (The Occupational Pension Schemes (Cross-border Activities) Regulations 2005[5]).

6.4 This instrument implements IORP II's provisions concerning cross-border activity by way of amendments to the Pensions Act 2004 and the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (these changes are outlined in the policy background section). For example, wherever current UK legislation governing that authorisation process refers directly to articles and definitions in the IORP I Directive, the references have been updated to refer to the relevant article or definition in the IORP II Directive.

6.5 This instrument revokes Regulation 11B of the Occupational Pension Schemes (Preservation of Benefits) Regulations 1991[6] which previously provided for transfers without consent to European pension schemes. This regulation is now redundant since the new IORP II requirements being implemented by this instrument will govern cross-border transfers.

6.6 This instrument also transposes a provision in IORP II requiring the Pensions Regulator (TPR) to communicate information held on its register to the European Insurance and Occupational Pensions Authority (EIOPA).

6.7 A Transposition Note and Scrutiny History are submitted with this Explanatory Memorandum.

7. Policy background

What is being done and why?

7.1 As a Member State of the EU, the UK currently participates in the EU's authorisation regime for occupational pension schemes wishing to accept pension contributions from employers and employees based in other European Economic Area (EEA) states.

7.2 This means that any UK scheme wishing to accept contributions from an employer in another EEA state must be authorised by The Pensions Regulator (TPR). Conversely, if a UK employer chooses to contribute to an occupational pension scheme in a different EEA state, TPR must monitor whether that scheme adheres to certain UK laws, in order to ensure sufficient protection for UK members.

[2] https://www.legislation.gov.uk/ukpga/2004/35/contents
[3] https://www.legislation.gov.uk/ukpga/1972/68/contents
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0041
[5] http://www.legislation.gov.uk/uksi/2005/3381/contents/made
[6] http://www.legislation.gov.uk/uksi/1991/167/contents/made

7.3 The Directive has a transposition deadline of 13 January 2019. The UK will still be a member of the EU at this time, and as such has committed to transpose the directive into UK law.

Authorisation for cross-border activity

7.4 This instrument provides a clearer definition of 'cross-border activity' and transposes new provisions outlined in "IORP II" which alter the authorisation process. This includes:

- reducing the timeframe that TPR has to communicate with equivalent authorities in other Member States
- requiring TPR to be clearer in its communication when rejecting a scheme's application for authorisation
- stipulating information that TPR must send to EIOPA with regards to cross-border schemes

7.5 These changes ensure that the UK maintains parity with other EEA Member States in order to effectively authorise and regulate schemes operating across UK-EEA borders, and ensure sufficient protection for any UK members of occupational pension schemes in other EEA states.

Authorisation for cross-border transfers

7.6 As part of the regulatory protection for members within the EU's cross-border market, IORP II introduces a new authorisation process for schemes wishing to undertake bulk transfers with a separate scheme located in another EEA state. This includes ensuring that the cross-border transfer is approved by a majority of members and a majority of the beneficiaries concerned or, where applicable, by a majority of their representatives.

7.7 This instrument transposes this new authorisation process into UK law. It is intended to facilitate cross-border bulk transfers and is not intended to impact member-initiated transfers across EEA borders; consequently any legislation pertaining to the latter has not been amended.

UK schemes receiving cross-border bulk transfers

7.8 In accordance with the IORP II Directive, this instrument requires that when a UK pension scheme seeks to receive a bulk transfer across EEA borders, that scheme must seek authorisation from TPR by providing information such as:

- a description of the characteristics of the receiving scheme;
- information pertaining to the transferring scheme and sponsoring employer;
- a description of the technical provisions, liabilities, obligations, rights, or cash equivalent to be transferred;
- written agreement with the transferring scheme setting out the conditions of the transfer;
- proof of prior consent from either the majority of beneficiaries and the majority of members concerned or the majority of trustees and managers;
- proof of prior consent from the sponsoring employer

7.9 Additionally, neither the members remaining in the transferring scheme, nor the incumbent members of the receiving scheme are to bear the cost of the transfer.

7.10 This authorisation process is overseen by the mutual cooperation of TPR and the equivalent competent authority in the relevant EEA Member State. TPR must assess the application to check that the value of the transfer is adequate and that members will be sufficiently protected. TPR must also forward the application on to the relevant competent authority in the corresponding EEA member state, who will also assess the application. If either competent authority does not approve the transfer, the transfer cannot be authorised. TPR must communicate this decision to the receiving scheme within three months of receiving the application.

UK schemes making cross-border bulk transfers

7.11 Currently, UK legislation governs schemes wishing to make a bulk transfer to a European pensions institution without member consent by ensuring that schemes can only make a bulk transfer if they meet certain conditions. One of the main conditions is that schemes must provide an actuarial certificate to ensure that members are being transferred at the right value, and the employers participating in the occupational pension schemes must be linked in a certain way.

7.12 The new process for cross-border transfers replaces this by providing a clear process for bulk transfers, requiring approval from a majority or members and beneficiaries of the transferring scheme who will become members of the receiving scheme, or their representatives, and which ensures that regulators in both EEA states have the power to assess the transfer and deny authorisation. Consequently, this has made the existing legislation incompatible with the EU law, which is why this instrument revokes it.

7.13 Under the new regulations, when a UK scheme wishes to make a bulk transfer to an EEA occupational pension scheme, that EEA scheme must seek authorisation from their regulator – providing the same information outlined in paragraph 7.8 – who will in turn send the authorisation application to TPR.

7.14 TPR must then assess the EEA scheme's authorisation application to ensure that the long-term interests of the UK members and beneficiaries being transferred are adequately protected.

7.15 Since current UK legislation ensures that the value of a members' transfer from a UK scheme to a European scheme is corroborated by an actuarial certificate, this requirement has been retained for members being transferred from 'Defined Benefit' schemes. It is not relevant or pertinent to members of 'Defined Contribution' schemes, whose pension pots will already have a defined monetary value. If TPR believes the transfer does not adequately serve or protect members they can refuse consent, and the transfer cannot be authorised.

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

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 No further consolidation of the regulations is planned.

10. Consultation outcome

10.1 Regulation 20(10) of the Occupational Pension Schemes (Cross-border Activities) Regulations 2005 (S.I. 2005/3381), as inserted by regulation 3(7), and regulation 5 of these regulations, which are the only elements that attract the general requirement to consult, have not been subject to public consultation. As the Directive needs to be transposed by 13th January 2019 and the changes are uncontroversial and technical in nature as they only relate to certain cross-border authorisation procedures concerning The Pensions Regulator (TPR), it is Government's view that in the circumstances, it is not practical to issue a public consultation. We have, however, worked closely with and sought from views from a range of stakeholders and affected parties:

10.2 **Industry Stakeholder Group - s**ince March 2017, we have been working with influential representatives from across the pensions industry to develop our approach to the transposition of IORP II. Industry has viewed this targeted consultation approach positively.

10.3 **European Commission –** Department for Work and Pensions (DWP) and TPR officials were closely involved in the negotiation of the IORP II Directive. Since its publication in 2016 officials have continued to engage with the European Commission, including attending transposition workshops in January 2018 and June 2018 to help inform our transposition approach.

10.4 **TPR** - we have held ongoing official level meetings with TPR to discuss the transposition of the cross-border articles. The regulator is supportive of our intention to legislate and has provided input on the detail of the regulations and how they will be used in practice.

10.5 **Key Industry Stakeholders** – in order to ensure we have input from across the pensions industry we have had bilateral meetings with those key stakeholders who have a particular interest in Europe. These included meetings with the Pensions and Lifetime Savings Association, leading administrative firms such as Willis Towers Watson, and the Association of Pensions Lawyers.

11. Guidance

11.1 TPR will update and produce guidance for UK pension schemes wishing to participate in cross-border activity or cross-border transfers.

12. Impact

12.1 There is no, or no significant impact on business, charities or voluntary bodies. This is because it is entirely voluntary for schemes to participate in cross-border activity or cross-border transfers, and to seek the necessary authorisation. To date, there has been little market interest in the cross-border authorisation regime, with fewer than 25 UK occupational pension schemes seeking authorisation in a market of approximately 40,000.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has been submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The regulation does not include a statutory review because it is estimated that there will be virtually nil direct cost to business as a result of this legislation.

15. Contact

15.1 Nada Balasingham at the Department for Work and Pensions Telephone: 0207 449 5276 and email: Nada.Balasingham@dwp.gsi.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Fiona Walker, Deputy Director for Private Pensions and Arm's Length Bodies at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Guy Opperman, Parliamentary Under Secretary of State for Pensions and Financial Inclusion, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.