
Spain-UK Tax Agreement on Gibraltar published

Brexit has not changed the situation in terms of sovereignty over Gibraltar, but it has led to Spain and the UK reaching agreement on specific issues, including tax matters.

Legal flash

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- > This international agreement addresses two essential issues: tax residence criteria for individuals and companies and a specific procedure for administrative cooperation.
- > It also includes a commitment to preserve European Union regulations in Gibraltar on certain matters.
- > Special attention must be paid to the different dates of material effect contained in the agreement.
- > No specific mention is made to Gibraltar's status as to the Spanish blacklist.



Signature and entry into force of the Agreement

The status of Gibraltar has been one of the most concerning issues for the Spanish government within the complex process of the United Kingdom's exit from the European Union. Although the idea that Brexit was not going to fulfill Spain's historical claim of sovereignty over Gibraltar was accepted early on, it did represent an opportunity for Spain, now with the support of its European partners, to try to introduce reforms in the legal regime governing its relationship with Gibraltar.

Brexit included a specific protocol on Gibraltar whose article 3 mandated Spain and the United Kingdom to establish the forms of cooperation necessary to achieve full transparency in tax matters and in relation to the protection of the financial interests of all interested parties.

This international agreement on taxation and protection of financial interests between Spain and the UK (the "Agreement"), signed in March 2019 and published in the Official Gazette of the Spanish State on March 13, 2021 embodies their commitment to cooperate. Although the Agreement came into force on March 4, 2021, for taxes configured around tax periods (e.g., personal income tax and corporate income tax), it will take effect in subsequent periods (if they accrue during the calendar year, from January 1, 2022). Below we highlight other relevant dates included in the Agreement.

Content of the Agreement

The Agreement begins by ensuring that the non-application of EU law in Gibraltar will be compensated by maintaining equivalent legislation on transparency, administrative cooperation, harmful tax practices and the fight against money laundering.

Next, it regulates the criteria for determining the tax residence of individuals and legal persons, which can be summarized as follows.

For individuals:

- Conflicts that arise when a person is a tax resident in both jurisdictions will be resolved in favor of Spain (i) if the individual spends more than 183 overnight stays in Spanish territory; (ii) if the spouse (or partner in a similar relationship), ascendants and descendants that are economically dependent have their habitual residence in Spain; (iii) if the individual's only permanent home is in Spain; or (iv) if at least two-thirds of the individual's net assets are located in Spain.
- Spanish nationals who transfer their residence to Gibraltar after March 4, 2019 (date of the signing of the Agreement) will be considered tax resident only in Spain.



- > For non-Spanish nationals, the tax quarantine rule provided for Spanish nationals will apply (they keep Spanish tax residence in the year they change residence and the following four years), excluding those who spend less than a full tax year in Spain and registered Gibraltarians who spend less than four years in Spain.

For legal persons:

- > Companies and other legal forms incorporated and managed in Gibraltar or regulated under its laws will be exclusively considered resident of Spain when (i) most of their assets are located or most of their rights are enforceable in Spanish territory; (ii) most of their income is Spanish-sourced; (iii) most of the individuals in charge of effective management are tax residents in Spain; or (iv) residents of Spain politically or financially control the company, entity or other instrument or legal form.
- > Cases (iii) and (iv) will not apply to entities incorporated in Gibraltar before November 16, 2018, under certain circumstances with reference to December 31, 2018 that they must prove. Among them, they must have a fixed place of business in Gibraltar they must be subject to corporate tax in Gibraltar, a qualified percentage of their income must be sourced in Gibraltar and a reduced percentage must be Spanish-sourced.
- > Legal persons, entities and other legal instruments or forms whose residence is transferred to Gibraltar after March 4, 2021 will maintain their tax residence exclusively in Spain.

As to the consequences of the application of these criteria, the Agreement does not provide any specific double taxation relief regime but simply a reference to domestic regulations of each territory.

On a separate note, the Agreement also provides a regime for administrative cooperation and exchange of information on tax matters. It includes:

- > Measures equivalent to those provided in Directive 2011/16/EU on administrative cooperation (DAC) and Directive 2010/24/EU on mutual assistance for recovering claims relating to taxes.
- > Full application of the OECD Multilateral Agreement on Mutual Assistance.
- > A specific regime for the exchange of information between the administrative authorities of Spain and Gibraltar, including (i) information on workers registered in one territory but resident in adjacent locations of the other territory; and (ii) information on ships, aircraft and motor vehicles registered in one territory in relation to tax residents of the other territory. All of this with effect for tax periods beginning on January 1, 2014. Also, the Spanish authorities are ensured direct access to Gibraltarian public records on tax obligations accrued from January 1, 2011.



Finally, the Agreement does not include any specific mention to the status of Gibraltar in relation to the list of tax havens under Spanish regulations (as opposed to other agreements signed by Spain in the past). Therefore, according to the wording of the regulations currently in force, apparently Gibraltar maintains its status as a black-listed jurisdiction.

In any case, The Spanish Parliament is currently in the process of passing a new law on measures to prevent and fight tax fraud whose article 14 provides substantive changes to the regulations on the Spanish blacklist. This proposed bill (i) amends the criteria for classifying territories, (ii) replaces the term “tax haven” by “non-cooperative jurisdiction” and (iii) adopts the Ministerial Order as the normative instrument for updating the list of such jurisdictions.

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