

Explanatory Memorandum to the European Union (Regulated Professions Proportionality Assessment) (Wales) Regulations 2020

This Explanatory Memorandum has been prepared by the Education Directorate and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister/Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The European Union (Regulated Professions Proportionality Assessment) (Wales) Regulations 2020.

Kirsty Williams, MS
Minister for Education

17 September 2020

PART 1

1. Description

The European Union (Regulated Professions Proportionality Assessment) (Wales) Regulations 2020 (“this instrument”) transposes into domestic law Directive (EU) 2018/958 on the requirement to carry out a proportionality test before adopting new or amending provisions relating to the regulation of professions (the “Directive”).

Under Directive 2005/36/EU (transposed into UK law by the European Union (Recognition of Professional Qualifications) Regulations 2015 (S.I. 2015/2059)), member States are required to complete proportionality tests when regulating professions. The Directive goes further and establishes a detailed framework for conducting proportionality tests before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions (“a professional regulatory provision”).

The aim of the Directive is to provide a common framework for conducting proportionality tests with the view to ensuring the proper functioning of the internal market, while guaranteeing transparency and a high level of consumer protection.

The instrument applies to certain professions in Wales where the Senedd has legislative competence, namely:

- School teachers working in a school in Wales;
- Teachers at a further education institution in Wales;
- Social workers in Wales;
- Social Care Managers in Wales; and
- Other regulated social care workers in Wales

The terms of the withdrawal agreement require the Welsh Ministers to comply with their legal obligations under EU law for the duration of the implementation period. This includes transposition obligations. This instrument is therefore made to fulfil those obligations.

As the obligation to comply with transposition obligations only extends until the end of the implementation period, this instrument contains a mechanism time-limiting its effect for the duration of the implementation period.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

Section 58B of the Government of Wales Act 2006 offers a choice between negative and affirmative procedures. The negative procedure will be used in this case as the discretion of the Welsh Ministers is limited over the content of the SI because it is giving effect to EU provisions (see section 3 below).

As the UK's obligations to comply with transposition obligations only extends until the end of the implementation period, these Regulations are time-limited and will expire on implementation period completion day (see the definition in regulation 2). Whilst section 5A of the EU (Withdrawal) Act 2018 (c. 16) ("the 2018 Act") will provide that the fact that anything which continues to be, or forms part of, domestic law on or after IP completion day by virtue of section 2, 3 or 4 of the 2018 Act has an effect immediately before IP completion day which is time-limited by reference to the implementation period does not prevent it from having an indefinite effect on and after IP completion day by virtue of section 2, 3 or 4, there is no requirement for these Regulations to have such an indefinite effect, and they will not therefore continue to have effect after IP completion day.

3. Legislative background

This instrument is made using powers under section 2(2) of the European Communities Act 1972 and section 58B of the Government of Wales Act 2006. Section 58B of the Government of Wales Act 2006 provides that section 2(2) of the European Communities Act 1972 applies to the Welsh Ministers as if they were a Minister of the Crown or government department designated by Order in Council under that provision.

Under section 58B of GoWA 2006, Welsh Ministers have the right to make regulations under section 2(2) of the European Communities Act 1972 (as saved by the European Union (Withdrawal) Act 2018) during the implementation period to implement EU law, provided the provisions made are within the legislative competence of the Senedd. Paragraph 140 of Schedule 7A to the Government of Wales Act 2006 provides that the regulation of the social care and social work professions are devolved to Wales. Welsh Ministers also have the power to regulate the education workforce.

As stated above, Regulations made under section 58B of the Government of Wales Act 2006 may be made under either the affirmative or negative procedure. These Regulations are being made under the negative resolution procedure because they are technical in nature and go no further than fulfilling the Welsh Ministers' obligations under the withdrawal agreement. They do not make any significant policy changes and have no substantive effect to the delivery of policy in Wales.

4. Purpose and intended effect of the legislation

In accordance with the requirements under the withdrawal agreement, the Welsh Ministers must implement EU legislation with a transposition deadline before the end of the implementation period.

The Directive strengthens and extends requirements on member States to assess the proportionality of measures which restrict access to, or the pursuit of, regulated professions.

A general obligation to undertake proportionality tests already exists in EU law (under European Union Directive 2005/36 on the recognition of professional

qualifications). However, these tests were not applied consistently or transparently across the EU. The European Commission therefore proposed the adoption of a proportionality framework. The UK was supportive of this proposal.

The Directive establishes a common framework, and sets out criteria, for conducting proportionality assessments. Proportionality assessments are to be carried out before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting the access to, or pursuit of, a regulated profession¹. The assessment is to ensure that any new or amending measures do not go beyond what is necessary to meet the public interest objective of a measure.

Proportionality assessments will be conducted by the relevant regulatory body of each regulated profession. This is because they are best placed to understand and assess how new or amended measures will affect professions.

Proposed measures must be objectively justified by one or more of the following public interest objectives:

- Public policy;
- Public security;
- Public health; or
- Overriding reasons in the public interest.

The justification for a new or amended measure must fall in one of the above categories. A measure which has purely administrative or financial justifications will not satisfy this requirement.

Proportionality assessments are to be undertaken in an open and transparent manner and must be based on objective reasoning. This aims to ensure consistency and transparency of application across the single market.

The requirements imposed by the Directive will be unachievable following the end of the implementation period, as they would depend on EU mechanisms which will no longer be in place. This instrument will therefore cease to have effect at the end of the implementation period.

5. Consultation

No public consultation was undertaken as no significant impact is foreseen from what are in the main technical amendments.

The regulator and authority responsible for implementing this instrument in respect of regulated teachers in Wales, the Education Workforce Council ("EWC"), has been made aware of the obligations in the Directive and is content. Ongoing engagement with EWC will continue as required.

¹ A regulated profession is a profession which the access to, or pursuit of, is limited to those holding a specific professional qualification - defined in regulation 8(1) of the European Union (Recognition of Professional Qualifications) Regulations 2015.

In respect of social workers and social care workers, Social Care Wales as the regulator and authority responsible for implementing the regulations for these workers have been made aware of the amendments. Welsh Government officials will continue to engage with them as these progress.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been conducted. The Regulations are technical in nature and build upon the current legislative and policy framework. Under Directive 2005/36/EU (transposed into UK law by the European Union (Recognition of Professional Qualifications) Regulations 2015 (S.I. 2015/2059)), Welsh Ministers are already required to complete proportionality tests when regulating professions. The Directive simply establishes a detailed framework for conducting such proportionality tests when introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to, or the pursuit of, regulated professions. There is therefore no, or no significant, impact on business, charities or voluntary bodies.

Any direct costs would fall to government departments and regulators in Wales with responsibility for conducting proportionality tests. However, it is not anticipated that any new or amending professional regulatory provisions will be introduced between the date the instrument comes into force and the IP completion date. There are no identified costs to any Welsh businesses as a result of this instrument.

The legislation is technical in nature and has no impact on the statutory duties (sections 77 - 79 of the Government of Wales Act 2006) or statutory partners (sections 72-75 of that Act) and it would be disproportionate to conduct Impact Assessments where no policy changes are taking place.