



Llywodraeth Cymru  
Welsh Government

# **Guidance to the European Union (Regulated Professions Proportionality Assessment) (Wales) Regulations 2020**

# Guidance to the European Union (Regulated Professions Proportionality Assessment) Regulations 2020

## Audience

The regulators for teachers (including further education teachers) and certain social care professions in Wales; respectively, the Education Workforce Council (EWC) and Social Care Wales (SCW) and individuals within those professions.

## Overview

This guidance document aims to support EWC and SCW to conduct proportionality assessments with reference to the public interest objectives set out in the Regulations; the basis on which a measure can be considered proportionate and justified; and the considerations to take into account when assessing proportionality.

## Action required

EWC and SCW must have regard to this document.

## Information

Enquiries about this document should be directed to:

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Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.



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## Introduction

This document provides guidance on the European Union (Regulated Professions Proportionality Assessment) (Wales) Regulations 2020, referred to as “the Regulations”.

The Regulations implement the EU Directive on the requirement to carry out a proportionality test before adopting new or amending measures relating to the regulation of professions<sup>1</sup>. The Regulations provide a framework for conducting proportionality assessments of measures that restrict access to, or the pursuit of, regulated professions. They require that an assessment of any new or amending measure which restricts access to, or the pursuit of, a regulated profession is undertaken before it is introduced, to determine that the new measure is proportionate to its aims, and does not unduly restrict access to the relevant profession.

These Regulations apply to the professions of teacher (including further education teacher) and to certain social care professions in Wales. The regulators for these professions are, respectively, the Education Workforce Council (EWC) and Social Care Wales (SCW) (“the regulators”). As regulators, EWC and SCW will be responsible for conducting proportionality assessments in Wales on behalf of the Welsh Ministers.

This guidance sets out how the regulators in Wales should conduct a proportionality assessment with reference to the public interest objectives set out in the Regulations; the basis on which a measure can be considered proportionate and justified; and the considerations to take into account when assessing proportionality.

This guidance also explains how regulators should discharge their obligations in respect of making information available to the public and stakeholders, and in respect of consultation, as well as reporting obligations to the Commission.

In this guidance the words ‘assessment’ and ‘test’ are used interchangeably.

The UK Government has made the European Union (Regulated Professions Proportionality Assessment) Regulations 2020, which deal with the proportionality assessments which must be undertaken in relation to other regulated professions.

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<sup>1</sup> Directive (EU) 2018/958

# Background

## Mutual Recognition of Professional Qualifications

The EU Directive on recognition of professional qualifications<sup>2</sup> (“the MRPQ Directive”) provides a reciprocal framework for the recognition of professional qualifications which enables Member State nationals<sup>3</sup> to have their professional qualifications recognised and gain access to regulated professions in a Member State other than which their qualification was obtained.

The MRPQ Directive covers both the general and sectoral systems of recognition. The general system has been implemented into UK law by the European Union (Recognition of Professional Qualifications) Regulations 2015 (“the 2015 Regulations”)<sup>4</sup>. Guidance for regulators on MRPQ has previously been published by the Department for Business, Energy and Industrial Strategy and can be found at:

<https://www.gov.uk/government/publications/mutual-recognition-of-professional-qualifications-guidance-for-regulatory-bodies>.

In addition to the framework for recognition, the MRPQ Directive includes an obligation for Member States to assess the proportionality of their requirements restricting access to, or the pursuit of regulated professions, and to communicate that results of that assessment to the Commission<sup>5</sup>. Whilst the UK is no longer a Member State of the EU, the UK is still subject to EU law, including the MRPQ Directive and the Proportionality Test Directive, until the end of the Transition Period.

## The Proportionality Test Directive

Directive (EU) 2018/958 on proportionality tests (“the Proportionality Test Directive”) builds on the general obligation to regulate proportionally under the MRPQ Directive and establishes a common framework for how to conduct proportionality assessments before introducing new, or amending existing, legislative, regulatory or administrative provisions restricting access to or the pursuit of regulated professions.

Proportionality assessments are intended to avoid disproportionate burdens on individuals seeking access to a regulated profession. This is balanced alongside the need for regulatory authorities to safeguard access to professions. The Proportionality Test Directive is implemented by the Regulations in respect of teaching and social care professions in Wales. This guidance applies to the implementation of those Regulations.

These Regulations do not apply retrospectively and therefore only measures coming into effect whilst the Regulations are in force need to be assessed.

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<sup>2</sup> Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU

<sup>3</sup> And EEA EFTA state nationals (Norway, Iceland, Liechtenstein and Switzerland)

<sup>4</sup> and earlier by the European Communities (Recognition of Professional Qualifications) Regulations 2007 which remain in force in respect of Switzerland

<sup>5</sup> Article 59 Directive 2005/36/EC

## **The Proportionality Assessment**

This section explains terms used in the Regulations, outlines specific obligations and sets out how to conduct the assessment.

### **Definition of a regulated profession for the purposes of the Regulations**

The Regulations only apply to professional regulatory provisions in respect of specific teaching and social care professions, as set out at regulation 3 of the Regulations. For clarity these are:

- A qualified teacher (within the meaning of section 132 of the Education Act 2002) in Wales
- A head teacher (within the meaning of section 135 of the Education Act 2002) in Wales
- A teacher at a further education institution (within the meaning of section 140 of the Education Act 2002) in Wales
- A any profession regulated under Part 4 of the Regulation and Inspection of Social Care (Wales) Act 2016

### **Definition and role of regulators**

The regulators are responsible for introducing the measure which restricts access to, or the pursuit of, a regulated profession as defined above. The Regulations do not use the term “the regulators”, instead the obligation to conduct a proportionality assessment of professional regulatory provisions is stated to rest with Welsh Ministers. However, Welsh Ministers have delegated their obligations to regulate teaching and social care professions to the regulators, and it is therefore the regulators which will conduct proportionality assessments that apply professional regulatory provisions for the professions as stated above.

The regulators are responsible for: undertaking proportionality assessments of the “professional regulatory provisions” that they introduce in accordance with the Regulations; ensuring that they meet the public information and consultation requirements; and forwarding the final assessment to the Commission.

These ‘measures’ are referred to in the Regulations as “professional regulatory provisions” and can be either new or amending measures.

### **Definition of professional regulatory provision**

For the purposes of the Regulations, a “professional regulatory provision” is:

- a new legislative, regulatory or administrative provision; or
- an amendment to an existing legislative, regulatory or administrative provision

which restricts access to or the pursuit of a regulated profession.

Regulators will need to make a judgement as to whether a measure could, even inadvertently, lead to a restriction of access.

Whilst not an exhaustive list, the following measures are illustrative examples of the types of measures that could potentially have this effect:

- The introduction of a new regulated profession (making a profession not currently regulated subject to regulation);
- Provisions amending existing requirements, for example mandatory minimum education or experience requirements, or the introduction or amendment of aptitude tests;
- Compulsory registration or membership of an organisation;
- Provisions introducing or increasing any fees charged;
- Provisions introducing or altering a requirement to provide documentation;
- Requirements specific to temporary and occasional provision of services, such as mandatory prior declarations when the service provider first moves into the country; or
- Introduction of or change to language requirements.

There are certain measures that may meet the definition of professional regulatory provisions but are not in scope of the Regulations. These are outlined in the following section.

## **Scope**

The Regulations (and therefore the requirement to conduct a proportionality assessment) apply to “professional regulatory provisions” as set out above; professional regulatory provisions in respect of the specific teaching and social care professions provided for in regulation 3 of the Regulations. The exceptions to this are set out below.

The Regulations do not apply to professional regulatory provisions where EU legislation gives no choice as to how those provisions are applied in the UK. For example, where EU law sets minimum training requirements for a profession, there would be no obligation to assess the proportionality of these requirements.

They also do not apply to professional regulatory provisions (in respect to those professions) which implement EU legislation requirements concerning the regulation of a profession, where there is no choice how those requirements are applied in UK law.

## **The assessment**

Before a professional regulatory provision is introduced the regulators must assess the proportionality of that provision to ensure it does not disproportionately restrict access to or pursuit of a regulated profession. The Regulations set out a detailed framework for how to assess whether a measure is proportionate.

To ensure proportionality the professional regulatory provision must meet the following principles:

- it must be non-discriminatory;
- it must be justified by public interest objectives; and
- it must be suitable for achieving the objective pursued and must not go beyond what is necessary to achieve that objective

The assessment must be carried out in an objective and independent manner and should be substantiated by qualitative and wherever possible and relevant quantitative elements. The extent and detail of the assessment should be proportionate to the nature and extent of the professional regulatory provision that is being assessed.

The final assessment must:

- set out how the professional regulatory provision is justified by the public interest objective, and how it complies with the principle of proportionality;
- be published prior to introduction of the professional regulatory provision; and
- be submitted to the European Commission in accordance with the procedure set out below.

There is no prescribed template for regulators to use to complete the assessment: regulators may use existing policy assessments to fulfil the requirements of the Regulations, providing they cover all the required areas.

### **Public Interest Objective**

The following sections set out the factors regulators should consider when conducting a proportionality assessment. Professional regulatory provisions must be justified by a legitimate public interest objective, in accordance with the principles of proportionality set out in the Regulations, and must not go beyond what is necessary to meet that objective.

### **Justification**

The proposed professional regulatory provision 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.

Regulators will need to explain why the proposed professional regulatory provision falls into one of these categories and how it meets that objective. Examples of the types of objectives which would qualify as public interest objectives include (but are not limited to):

- preserving the financial equilibrium of the social security system;

- the protection of consumers, of recipients of services and of workers;
- the safeguarding of the proper administration of justice;
- ensuring the fairness of trade transactions;
- the combating of fraud and the prevention of tax evasion and avoidance, and the safeguarding of the effectiveness of fiscal supervision;
- transport safety;
- the protection of the environment and the urban environment;
- the health of animals;
- the protection of intellectual property;
- the safeguarding and conservation of the national historic and artistic heritage;
- social policy objectives; or
- cultural policy objectives.

These examples are listed in Regulations at regulation 6(3).

A measure that addresses purely economic or administrative reasons will not satisfy the public interest objective test; however, a measure can have economic or administrative purposes if it is also justified by one or more of the objectives described above.

### **Non-discrimination**

The professional regulatory provision must not directly or indirectly discriminate against EU citizens on the basis of nationality or residence. This means that EU citizens must be treated no less favourably than UK nationals in respect of the effect of a professional regulatory provision. Regulators should carefully assess whether a provision could indirectly discriminate on this basis. For example, regulators should not introduce measures which a national or resident of a particular EU Member State would be unable, or would find more difficult, to comply with than a UK national.

### **Principles of proportionality**

In addition to the assessment setting out how the professional regulatory provision is justified by one or more public interest objectives, the assessment must ensure that the provision is suitable for achieving that objective and does not go further than is necessary to achieve that objective (e.g. that the provision is proportionate to its aim).

In assessing whether a professional regulatory provision is proportionate, regulators should explain how the provision complies with each of the following principles of proportionality (set out in more detail in regulation 7 of the Regulations):

- the nature of the risks to the public objectives pursued, and whether the proposed professional regulatory provision addresses these risks;
- whether existing rules are sufficient to achieve the objective, rendering a new measure excessive;
- appropriateness of the professional regulatory provision to achieve the objective, and whether the professional regulatory provision genuinely reflects that objective in a consistent and systematic manner;

- impact on the free movement of persons, consumer choice and quality of service;
- the possibility of using less restrictive means to achieve the objective;
- the effect of the professional regulatory provision when combined with other provisions;
- the scope of activities reserved to a profession and the link between qualifications and the activities;
- specific requirements related to temporary or occasional provision of services; and
- protection of human health, where professional regulatory provisions concern regulation of healthcare professionals.

For the regulation of healthcare professions and provisions that have patient safety implications, regulators should place particular emphasis on the principle of ensuring a high level of human health protection.

### **Timing**

The assessment must be undertaken before the introduction of the professional regulatory provision. Relevant stakeholders must be given the opportunity to comment on the measure prior to its introduction.

There is an ongoing duty to monitor whether professional regulatory provisions continue to be appropriate to their aims following implementation. Regulators must therefore consider whether developments following implementation affect a provision's proportionality. For example, a change in legislation relating to a particular regulated profession might affect a provision's proportionality. In such an instance, the regulator would need to revise its assessment and consider whether the provision is still proportionate in view of the new legislation.

### **Extent of assessment**

The extent of the assessment must be proportionate to the nature, content and impact of the proposed provisions. A measure that has a significant impact on access to or pursuit of a regulated profession will therefore require a more extensive assessment than a measure introducing a minor change.

### **Public information and consultation**

#### **Public information**

Regulators must publish information about the proposed professional regulatory provision before its introduction. This information should be accompanied by an explanation which summarises the purpose and effect of the proposed regulatory provision and which is sufficient to assess the proportionality of the professional regulatory provision. This should be accessible by the public as well as service recipients and relevant stakeholders.<sup>6</sup>

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<sup>6</sup> <https://www.gov.uk/service-manual/helping-people-to-use-your-service/making-your-service-accessible-an-introduction>

## **Consultation**

Regulators are required to consult stakeholders (although this does not extend to a general obligation to consult the public). It is good practice to engage with stakeholders and service recipients to understand the true impact on those affected of the proposed measure, and to consider how any unintended consequences may be mitigated.

## **Temporary and occasional provision of services**

The Regulations require that where a professional regulatory provision includes specific requirements relating to temporary and occasional provision of services, these requirements also comply with the principle of proportionality. However, this does not necessitate a full proportionality assessment of the specific requirement.

Instead, regulators simply need ensure that requirements such as providing a declaration, pro forma membership of a professional organisation or body, prior declarations and document requirements, as well as the payment of a fee or any charges in relation to the provision of temporary and occasional services in a regulated profession, are proportionate. These requirements should not lead to a disproportionate burden on the service provider, or hinder or render less attractive the provision of services.

Accordingly, when introducing a professional regulatory provision, the regulators should consider whether this includes any specific requirements in respect of the temporary and occasional provision of services, and if so, ensure that those requirements comply with the principle of proportionality. For example, regulators should ensure that requirements to provide certain documents and information (even if in accordance with the Regulations) are proportionate and consider whether the possibility of obtaining further details by way of administrative cooperation between Member States through IMI instead are sufficient.

## **Reporting**

### **Domestic reporting requirements**

Although not required by the Regulations, regulators which introduce professional regulatory provisions within the scope of the Regulations are encouraged to report to the relevant Minister.

Annex 1 contains a template checklist for reporting to the Minister.

### **European Commission notification**

Regulators under the Regulations must notify the European Commission when they carry out proportionality assessments by uploading the assessment to the EU Internal Market Information (“IMI”) database via a standard form accessible from the database.

## **Additional Information**

### **Effective remedy**

An effective remedy must be available in respect of the matters covered by the Regulations including for members or prospective members of a regulated profession contesting the proportionality of a new or amended measure.

This can be the regulator's existing complaints process, or the regulators may choose to establish a separate process. In either circumstance, the process must be fair and impartial, and easy for the complainant to access.

If all other avenues have been exhausted judicial review may also be available.

### **European Case Law**

Any Court of Justice of the European Union case law relevant to the interpretation of these Regulations will continue to have relevance to the extent set out in the European Union (Withdrawal) Act 2018.

### **Effective duration**

These Regulations are given time-limited effect. They take effect from the date of entry into force until the end of the Transition Period and do not have retrospective application. A professional regulatory provision coming into force either before the Regulations take effect or after the end of the Transition Period will therefore not require a proportionality assessment.

### **Statutory Instruments**

A copy of these 2020 Regulations can be found here:

<http://www.legislation.gov.uk/wsi/2020/696/made>

# ANNEX 1 Template for Reporting

Regulators may use this template for the purposes of domestic reporting requirements.

**Identity of Regulator:**

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**What is the new or amending professional regulatory provision:**

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**What is the purpose of the new or amending professional regulatory provision:**

.....

.....

**Who is affected by the new or amending professional regulatory provision:**

.....

.....

**Date on which the new or amending professional regulatory provision comes into force:**

.....

.....

**Public Interest Objective(s) justifying the new or amending professional regulatory provision (please tick):**

- Public policy
- Public security
- Public health
- Overriding reasons in the public interest (please specify)

**How does the professional regulatory provision meet the Public Interest Objective(s):**

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**Principles of Proportionality considered:**

*Please detail how each principle has been addressed*

- Nature of the risks to the public objectives pursued

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- Whether existing rules are sufficient to achieve the objective

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.....

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- Appropriateness of the professional regulatory provision to achieve the objective  
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- Impact on the free movement of persons, consumer choice and quality of service  
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- The possibility of using less restrictive means to achieve the objective  
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- The effect of the professional regulatory provision when combined with other provisions  
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- The scope of activities reserved to a profession and the link between qualifications and the activities  
.....  
.....
- Specific requirements related to temporary or occasional provision of services  
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- Protection of human health  
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**How does the professional regulatory provision comply with the principles of proportionality:**

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**Has an Impact Assessment been conducted? If so, what are the outcomes? If not, why not?**

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**Please give details of stakeholder consultation and its outcomes**

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