EXPLANATORY MEMORANDUM TO

THE EUROPEAN UNION (REGULATED PROFESSIONS PROPORTIONALITY ASSESSMENT) REGULATIONS 2020

2020 No. 689

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The European Union (Regulated Professions Proportionality Assessment) Regulations 2020 ("this instrument") transposes the European Union Directive 2018/958 on a proportionality test before adoption of new regulation of professions ("the Directive") into domestic law.

2.2 The aim of the Directive is to provide a common 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. This is with the view to ensuring the proper functioning of the internal market, while guaranteeing transparency and a high level of consumer protection.

2.3 This instrument is made using powers under Section 2(2) of the European Communities Act 1972 for the purpose of implementing an EU obligation of the United Kingdom. This instrument will cease to have effect at the end of the transition period.

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 this instrument is not subject to parliamentary 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.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument transposes the Directive. The Directive was adopted by the European Parliament and the Council on 28 June 2018, with a transposition deadline date of 30 July 2020. This instrument is made under powers in section 2(2) of the European Communities Act 1972. These powers were saved with modifications for the Transition Period by the European Union (Withdrawal) Act 2018.

6.2 The Directive was scrutinised and cleared by the House of Commons European Scrutiny Committee on 18 April 2018 and the House of Lords European Union Committee on 15 September 2017.

6.3 A transposition note is submitted with this explanatory memorandum.

7. Policy background

What is being done and why?

7.1 In accordance with the UK's obligations under the Withdrawal Agreement, the UK must implement EU legislation with a transposition deadline before the end of the Transition Period.

7.2 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.

7.3 A general obligation to undertake proportionality tests already exists in EU law (under European Union Directive 2005/36 on the recognition of professional qualifications ("the 2005 Directive"). However, these tests were not applied consistently or transparently across the EU. The European Commission therefore proposed the adoption of a proportionality test framework. The UK was supportive of this proposal.

7.4 The Directive establishes a common framework, and sets out criteria, for conducting proportionality assessments which will be implemented in UK law by this instrument. The instrument provides that 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, most regulated professions[1]. 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.

7.5 Proportionality assessments must be conducted by the body which introduces the measure, referred to as the "relevant authority" in this instrument.

7.6 Proposed measures must be objectively justified by public interest objectives of public policy, public security, public health or overriding reasons in the public interests. This instrument sets out examples of what this could entail. A measure which has purely administrative or financial justifications will not satisfy this requirement.

7.7 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.

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

7.8 The aim of the Directive is to apply a common framework for proportionality assessments across EU Member States to ensure consistency and transparency of application. As there would be limited benefit to retaining this instrument once the UK is not functioning as part of the single market at the end of the Transition Period, this instrument will cease to have effect at that time.

Scope

7.9 This Instrument applies to all of the UK, but there are some areas which have been specifically excluded from the scope of the instrument. This instrument does not apply to measures:

- in respect of professions that are outside the scope of the 2005 Directive including statutory auditors and notaries appointed by an official act of government;
- that implement EU legislation concerning the regulation of a profession, where there is no choice to the exact way in which those measures are implemented;
- in respect of specific teaching and social care professions in Wales[2] which are being legislated for separately by the Welsh Government.

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.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 The Department conducted informal stakeholder engagement with regulators, who were directly informed of the legislation and are most affected by the provisions. A questionnaire was issued to approximately 100 stakeholders between 5 November 2019 and 6 December 2019. In total, 19 responses were received. In December 2019, the Department held a workshop where it provided a wider explanation of the obligations created by the Directive. The Government will publish guidance for relevant authorities.

10.2 The Department has also engaged with its counterparts in the Devolved Administrations to agree the approach to implementation of the Directive.

11. Guidance

11.1 Guidance for relevant authorities will be published, explaining how this instrument operates.

[2] Qualified teacher at a school in Wales, head teacher at a school in Wales, teacher at a further education institution in Wales, and professions regulated under Part 4 of the Regulation and Inspection of Social Care (Wales) Act 2016.

12. Impact

12.1 There is some expected impact on businesses, charities or voluntary bodies. The Proportionality Test Directive is intended to provide a common 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, with the view to ensuring the proper functioning of the internal market, while guaranteeing a high level of consumer protection.

12.2 The impact on the public sector is limited to where government departments act as relevant authorities.

12.3 An Impact Assessment has not been prepared for these Regulations because the equivalent annual direct cost to business falls below the £5m threshold as detailed in the Business Impact Target (BIT). However, a De Minimis assessment has been carried out and has concluded that direct costs would fall on a small number of businesses (competent authorities). Whilst we cannot quantify the total impact of the provision precisely, we have concluded that competent authorities are unlikely to introduce more than one or two provisions that would be in scope of the Regulations per year. We estimate that, in order to breach the £5m de minimis threshold, every competent authority constituting a "business" would be required to incur significantly more additional work than the responses from our stakeholder engagement suggest is reasonable to expect.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by regulatory bodies, some of which may be classed as small businesses (employing up to 49 people). There is no evidence to suggest there will be a disproportionate impact on small businesses compared to larger businesses.

13.2 To minimise the impact of the requirements on small businesses, the approach taken is to produce guidance for relevant authorities to assist them in undertaking proportionality tests.

14. Monitoring & review

14.1 This instrument does not include a statutory review clause as the annualised impact of the instrument is under the £5million threshold and therefore is not appropriate for review. Additionally, this instrument will cease to have effect at the end of the Transition Period.

14.2 Relevant authorities are under an ongoing duty to monitor whether new or amended measures continue to be proportionate to their aims following implementation. Relevant authorities must consider whether developments since the measure came into effect affect its proportionality.

15. Contact

15.1 Lewis Aldous at the Department for Business, Energy and Industrial Strategy (Telephone: 020 7215 3981 or email: lewis.aldous@beis.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Tim Courtney, Deputy Director, Trade and Investment Negotiations (Services), at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Nadhim Zahawi, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy, can confirm that this Explanatory Memorandum meets the required standard.