




Welsh Government
Consultation – summary of response

Qualifications Wales (Monetary Penalties)
(Determination of Turnover) Regulations 2019

Date of issue: March 2019

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

Qualifications Wales (Monetary Penalties) (Determination of Turnover) Regulations 2019

Audience	Awarding bodies and other stakeholders in the education sector.
Overview	Summary of responses to the Welsh Government's consultation on Qualifications Wales' power to impose a monetary penalty where recognised awarding bodies are non-compliant with regulatory requirements.
Action required	None – for information only
Further information	<p>For further information please contact:</p> <p>Judith Askew Curriculum Division, Education and Public Services Welsh Government, Cathays Park, Cardiff CF10 3NQ</p> <p>Email: QualificationsWalesSponsorshipUnit@gov.wales</p> <p>Tel: 0300 062 8627</p> <div> @WG_Education</div> <div> Facebook/EducationWales</div>
Additional copies	<p>This document can be accessed from the Welsh Government's website at:</p> <p>https://gov.wales/?lang=en</p>
Related documents	Consultation Document Qualifications Wales (Monetary Penalties) Regulations.

<https://beta.gov.wales/qualifications-wales-monetary-penalties-regulations>

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Qualifications Wales (Monetary Penalties) Regulations consultation

Purpose of the consultation on the Qualifications Wales (Monetary Penalties) Regulations

The consultation set out proposals for Qualifications Wales' power to impose a monetary penalty where recognised awarding bodies are non-compliant with regulatory requirements.

Summary

The consultation exercise ran from 22 Oct 2018 - 7 Jan 2019. Thirteen responses were received. The consultation exercise aimed to seek views from stakeholders and other interested parties about proposed regulations being introduced by the Welsh Government regarding the setting of an upper limit of 10% of an awarding body's UK turnover in the event of an awarding body being in breach of conditions of recognition and Qualifications Wales deciding to impose a monetary penalty.

A proposal for determining turnover was also included in the consultation. The majority of responses to this consultation (61%) were from awarding bodies. There were responses from eight awarding bodies. However Qualifications Wales regulates 104 awarding bodies who operate in Wales; this was therefore a relatively low response rate. Responses comprised eight from awarding bodies, three from other organisations including the Federation of Awarding Bodies, and two from individuals.

All respondents agreed that the principle was correct and that Qualifications Wales should have the ability to impose monetary penalties as a regulator and that an upper limit should be defined. Any issue with the proposal appears to be concerned with the level of turnover which would determine the upper limit of a monetary penalty.

Proposal

Our proposal for an upper limit of 10% of an awarding body's UK turnover is not new but a long-established principle. 10% of an awarding body's UK turnover was the upper limit when the regulation of Qualifications was undertaken by the Welsh Government prior to Qualifications Wales being established in 2015. It is also the current upper limit used by Ofqual, the English regulator, and a series of other regulators.

Next steps

The consultation responses will be considered in making the regulations. Our response to the consultation responses will be outlined in the explanatory memorandum to the regulations.

It should be noted, however, that the proposed cap of 10% of an awarding body's UK turnover is an upper limit only and is not a guide to what is an appropriate level of monetary penalty.

A number of queries were raised in the consultation exercise which have been discussed with Qualifications Wales. Qualifications Wales will be giving additional clarity in their

Monetary Penalties policy which will implement the regulations. Qualifications Wales will publish their revised policy after the regulations have come into force.

Monetary penalties are a significant sanction that will only be considered if other actions to prevent or mitigate an adverse effect on learners have been insufficient. As long as awarding bodies remain compliant with regulatory requirements and protect the interests of learners, they should not consider themselves to be at risk of monetary penalties.

Questions

Introduction

Sector	Total Number of Responses
Awarding Bodies	8
Other Organisations	3
Individuals	2
Total	13

The majority of respondents to the consultation agreed that Qualifications Wales should be able to impose monetary penalties and that these should be capped at a maximum level. In support of this, the comment was made; ‘we agree that all Regulators should have the ability to use monetary penalties as part of their risk management and deterrent procedures...’

There was less agreement about the cap being 10% of UK turnover. However, no viable alternatives were presented in workable detail and the response rate was low from awarding bodies who may or may not be affected. Qualifications Wales regulates 104 awarding bodies in Wales and eight responded.

Question 1

Do you agree with the proposal for determining the maximum monetary penalty Qualifications Wales can impose as explained above?

Sector	Total Number of Responses to Question 1
Awarding Bodies	8
Other Organisations	3
Individuals	1
Total	12

Predominant view:

Although most respondents agreed with the principle that Qualifications Wales should be able to impose a monetary penalty in cases of non-compliance and that there should be an upper limit or cap on the monetary penalty, awarding bodies in particular felt an upper limit of 10% of their UK turnover was too high and therefore disproportionate. However, three of those responding (who were not awarding bodies) did not disagree with the 10% of UK turnover upper limit proposal.

All eight awarding bodies who responded felt the upper limit of 10% of their UK turnover was disproportionately high as many of them did not have significant activity in Wales. The point was made by four awarding bodies that in some cases 10% of their UK turnover was more than the volume of their business in Wales.

Question 1 Supporting comments

If you have any other suggestions for determining the limit on the maximum penalty Qualifications Wales may impose, please use the space below to state them.

A number of awarding bodies felt that determining the maximum penalty as 10% of their UK turnover would put significant risks on awarding organisations operating across the UK. One awarding body made the comment that it seemed 'unduly harsh' on awarding organisations that do not generate the majority of their regulated income from Wales.

The majority of awarding organisations believe that the maximum penalty should be 'related to 10% of Welsh Regulated Turnover, which would include qualification services as well as the qualifications themselves'. One awarding body said that the regulator may also wish to consider a 'plus remedial costs' clause if the intent is to keep the deterrent suitably high for awarding organisations not operating in any significant way in Wales.

As an argument for linking monetary penalties to turnover in Wales rather than the UK, a comment was made that 'despite suggestions to the contrary it is perfectly possible for an Awarding body to separate out the revenue generated from Qualifications Wales' regulated qualifications and centres'.

Awarding bodies believe the Welsh Government should aim to 'establish a cap that is based on the market in Wales; just as Qualification Wales has established regulations and other policies based on the needs of Wales'.

One awarding body stated that it does not support the suggested cap of 10% of UK turnover because it is a large academic institution with a large global turnover. Its awarding body constitutes a small business unit within the wider organisation with a lower turnover.

It felt it would be more appropriate to set a monetary penalty based on an awarding body's market share or scale of operations in Wales only. This would reflect the remit of Qualifications Wales in protecting learners who are 'wholly or mainly assessed in Wales'.

Question 2

Do you agree with the proposal for determining turnover as explained above?

Sector	Total Number of Responses to question 2
Awarding Bodies	8
Other Organisations	3
Individuals	2
Total	13

Of the thirteen respondents to Q2	
Agree with the proposal for determining turnover	3
Disagree with the proposal for determining turnover	8
Neither agree or disagree with the proposal	2
Total	13

Predominant view:

The majority of the awarding bodies and eight out of thirteen of the respondents felt it was unfair to use their total annual UK turnover as a means of determining a monetary penalty with regard to often much smaller operations within Wales. Generally, the awarding bodies also felt it was unfair to include their other activities, including non-regulated qualifications and support materials, when determining a percentage of turnover.

Question 2 Supporting Comments

If you have any other suggestions for factors to be taken into account when determining the turnover of an awarding body please let us know.

A number of points were made by respondents which can be discussed under the headings below.

Level of business in Wales

One awarding body made the comment, 'Some awarding bodies conduct a very small proportion of their UK business in Wales so a cap of 10% of UK turnover is disproportionate. We would, therefore, favour a cap based on 10% of an awarding body's turnover in Wales.'

Three awarding bodies felt it would be possible to reasonably accurately define activities in Wales through for instance quarterly returns to Qualifications Wales or 'the sum of all amounts' derived from customers based in Wales.

One awarding body was also not convinced that it would be 'too difficult a task to disaggregate the UK accounts of an awarding body in order to isolate turnover in Wales'.

Another awarding body felt that the principle that turnover should be based on 'the sum of all amounts derived by the body from the provision of goods and services falling within the body's ordinary activities' was reasonable providing the activities were 'limited to activities in Wales.'

Another awarding body stated that the consultation suggests that monetary penalties based on turnover in Wales could not be implemented because the accounts of awarding bodies cannot be disaggregated to separate turnover in Wales. The awarding body said it would 'welcome sight of the research that has been undertaken across the awarding body sector to evidence this position.'

One awarding body felt it would be beneficial for the Welsh Government to work with the sector to seek a solution that offers Qualifications Wales a clear approach but also provides a proportionate monetary penalties cap which does not present an undue level of risk to awarding bodies. The example was given that 'if an awarding body knew the proportion of its income that is generated in Wales (as a %), it could use the whole turnover as a starting point and then apply the % relating to the proportion of income from Wales (for example, if 20% of income is from Wales and the awarding body's UK turnover is £100,000 pa, then the amount that would be subject to a fine from the Welsh regulator would be £20,000 with the maximum fine being 10% of that i.e. £2,000.'

The point was also made that all awarding organisations operating in Wales 'submit quarterly data returns to Qualifications Wales to provide information on the number of registrations and certifications issued to centres in Wales'. They felt this would be a 'source of information for estimating the level of activity undertaken by an awarding organisation in Wales.'

One of the awarding bodies who disagreed with the proposal for determining turnover; made the point they were a global organisation and UK 'income and turnover is also derived from people outside the UK' but is designated as UK income. They felt the proposal 'would

create a disproportional risk' when the potential amount of monetary penalty was compared with income generated from the Welsh market.

Turnover of whole awarding body organisation?

A comment was made that it was not made clear whether the proposal was for the turnover that would be the basis for the penalty was 'the turnover of the awarding body or the turnover of the whole organisation of which the awarding body may be a part'.

The point was made that 'the awarding body may be part of a charity, with the awarding activity representing a very small percentage of the overall activity and turnover. A fine of 10% of UK turnover for an organisation like this would be difficult to bear and is likely to be too great a risk to carry'.

The consultation proposes that turnover is determined according to whole financial years and a number of organisations believed this was reasonable. The proposal is that where an awarding body had not yet operated for a full financial year that Qualifications Wales would estimate the full year turnover for the purpose of calculating the monetary penalty.

One awarding body asked 'what forecasting model would be used to estimate the full year turnover and what right an awarding body would have to challenge/appeal the forecast by the regulator?'.

Regulated qualification business only?

One awarding body made the point that factors for determining turnover should be 'regulated qualification' business only and confined to that undertaken in Wales under the jurisdiction of the Welsh Regulator. Such turnover would include revenue derived from ancillary services related to the qualifications and that the range of services could be defined through joint agreement.

'The term 'all ordinary relevant activities' is unspecific and requires clarification'. It was stated, 'a list of activities considered as relevant must be provided as a minimum.'

A further comment was that 'all ordinary relevant activities' could be defined in more detail and that 'this seems to imply that non-regulated activity will be taken into account too.'

A number of the eight awarding organisations who responded believe that the maximum monetary penalty should be '10% of Welsh regulated turnover'. As an argument for linking monetary penalties to turnover in Wales rather than the UK; a comment was made that 'despite suggestions to the contrary it is perfectly possible for an awarding body to separate out the revenue generated from QW regulated qualifications and centres'.

Question 3

We would like to know your views on any likely effects or impacts that capping the maximum monetary penalty that Qualifications Wales could impose at 10% of an awarding body's turnover, would have on the awarding body and on qualifications in Wales more generally.

Sector	Total Number of Responses to Question 3
Awarding Bodies	8
Other Organisations	2
Individuals	2
Total	12

Predominant View:

The majority view from the eight awarding bodies who responded was that the proposal could present a risk to some of the awarding bodies, especially those who award low volumes of qualifications in Wales and have a more significant footprint in England. It could also present a threat to those awarding bodies operating as part of a larger parent company, with the majority of the organisation's activity being in non-awarding activity.

Question 3 Supporting comments:

Five of the eight awarding bodies who responded to this question expressed concern about the effects of an event occurring which affected qualifications in both England and Wales, which meant the involvement of both Ofqual and Qualification Wales. They were concerned that if both regulators decided to impose financial penalties (which could be up to 10% of turnover), an organisation could face a fine of up to 20% of its turnover.

The point was made by five of the eight awarding bodies who responded that the imposition of a cap on monetary penalties of 10% of UK turnover 'could lead to an increase in the number of awarding bodies who may surrender their recognition in Wales and operate only in the other countries of the UK'. One of them felt that the 'risk of surrender is likely to be higher amongst smaller, sector specific awarding bodies with low volumes of business in Wales'.

One awarding body made the point that the proposed upper limit could lead to gaps in regulated qualification provision across Wales if awarding bodies withdraw from the market because the risk of remaining is too severe. Learners could then find they are unable to access the comprehensive range of regulated qualifications that is currently available.

How could positive effects be increased, or negative effects be mitigated?

One awarding body stated that it was difficult to identify the 'positive effects of the proposed 10% cap on UK turnover as an upper limit'. They said that a monetary penalty on this basis would be disproportionate to the amount of business conducted in Wales.

Another awarding body commented that the proposal could pose a significant risk as the majority of its annual turnover is generated out of its awarding body function as evidenced by its quarterly registration and certification data regularly provided to Ofqual and Qualifications Wales. If the proposals were introduced the awarding body may consider surrendering its recognition in Wales.

Question 4

Please also explain what, if any, impact you believe the proposed Qualifications Wales (Monetary Penalties) Regulations would have on the Welsh Language as required by the Welsh Language Standards?

Sector	Total Number of Responses to Question 4
Awarding Bodies	7
Other Organisations	3
Individuals	1
Total	11

Predominant View

The predominant view was that the proposals outlined did not offer any particular incentives for awarding bodies to offer Welsh medium qualifications. One respondent, however, felt the proposed monetary penalties regulations would assist Qualifications Wales in ensuring qualifications were available through the medium of Welsh and should have a positive effect on the Welsh Language.

Question 4 Supporting comments

There was a view amongst four of the awarding bodies who responded that there may be a risk that if awarding bodies withdraw from the market, provision that is currently available to learners in the Welsh language would no longer be available.

Four awarding bodies made the point that if an awarding body felt there was any risk that an error in translating materials or assessments, for instance, into the Welsh Language, this could lead to a financial penalty and would be likely to impact on their willingness to expand Welsh language provision across an increased number of qualifications.

One large awarding body stated that 'Qualification assessment in the language of Welsh presents a number of challenges for most awarding bodies. The difficulties in recruiting Welsh speaking subject experts, and subsequent need to rely on translation services, increases the likelihood that there will be errors in the assessment process if assessment is offered in Welsh language.' They felt that 'Errors in the assessment process could be a type of incident for which Qualifications Wales judges it appropriate to issue a monetary penalty' this could 'act as a deterrent to awarding bodies maintaining or increasing their provision of assessment in the Welsh Language.'

Of the eight awarding bodies responding to the consultation exercise, all eight operated from Wales and from elsewhere in the UK.

Question 5

We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to state them.

Sector	Total Number of Responses to Question 5
Awarding Bodies	5
Other Organisations	2
Individuals	2
Total	9

Supporting comments:

The point was made by two of the awarding bodies that awarding bodies 'understood that any monetary penalties would be paid into the Wales Consolidated Fund.' They said they would 'appreciate some consideration being given to the proceeds of any monetary penalties being assigned to a fund that is used to support the technical and vocational education sector.'

A number of the awarding bodies mentioned a 'lack of clarity' around what would be considered 'non-co-operative behaviour' by an awarding body. This is a factor referred to in Qualifications Wales' policy document on monetary penalties and will be clarified by them in their response to their consultation exercise once published.

Remedial costs

Another awarding body made the point that 'in last year's Qualification Wales consultation exercise, Qualifications Wales proposed 17 factors to be taken into account when determining the amount of a monetary penalty. Although it felt that all 17 factors were important, it felt the following were particularly relevant to the current consultation:

- The seriousness of the breach, taking account of the impact on learners and/or on the qualifications system in Wales;
- The extent of the awarding body's business in Wales;
- Whether any financial sanctions have been imposed in relation to the same breach by another regulatory body (such as Ofqual).

The awarding body felt that it was important that these factors were finalised and adopted. They said the factors must be part of the formal decision-making process about the size of any financial penalty and, potentially, inform any grounds for appeal. These comments have been passed to Qualifications Wales who are taking them into account.

Five of the eight awarding bodies who responded expressed concern over the potential for monetary penalties of 10% to be imposed by both Ofqual and Qualifications Wales.

The point was made that the 'impact of a monetary penalty needs to be considered within the overall regulatory powers that also allow for the recovery of costs of investigation activity. It is therefore possible that, under these proposals, an awarding body could have a monetary penalty imposed that is 10% of UK turnover and, in addition, also be required to pay costs to Qualifications Wales'.

Fragmentation was raised as a potential issue 'the Government Departments and Agencies cannot continue with the fragmentation policy without recognising the wider system implications of such an approach.'

Annex: Respondents

Awarding bodies

Chartered Institute of Procurement and Supply, CIPS, (Chantal Rogers)

AQA, (Helen Pownall)

Pearson Education, (Chris Harvey)

Anon awarding body

Anon awarding body

OCR, (Paul Steer)

University of the Arts, London, UAL, (Peter Herman)

Association of Certified Chartered Accountants, ACCA, (Martin Paull)

Organisations

Federation of Awarding Bodies, FAB, (Ailin O'Cathain)

Aneurin Bevan University Health Board, (Sharon Cooke)

Coleg Cymraeg, (D Trystan)

Individuals

Tony Sawyer

Anon individual