

CONSULTATION DECISIONS

Legal establishment and location of awarding organisations

Decisions on the legal establishment and location of awarding organisations regulated by Ofqual

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Introduction

We consulted¹ on proposed change to our rules about the legal establishment and location of awarding organisations between 31 January and 21 February 2020.

The consultation covered:

- how our rules should reflect the UK's new relationship with the EU during the transition period following the UK's exit from the EU
- removing the possibility that we might recognise an awarding organisation which, although legally established in the UK, Gibraltar or in an EU or EFTA country, does not have a substantial presence in any of these countries

We have published a summary of responses to the consultation alongside this document.

Summary of decisions

We have decided to adopt all our consultation proposals unchanged.

This means that:

- awarding organisations can continue to be located in the UK and Gibraltar, as well as in EU and EFTA countries
- being legally established in the UK, Gibraltar, or an EU or EFTA country is no longer sufficient to meet our requirements for either new or existing awarding organisations. Awarding organisations must now be either ordinarily resident, or have a substantial presence, in one of those countries

¹ <https://www.gov.uk/government/consultations/legal-establishment-and-location-of-awarding-organisations>

Decisions in detail

We asked

We asked for your views on two proposed changes to our General Condition A2, and the associated Criterion for Recognition:

1. Updating them to reflect the UK's status following its exit from the EU, and continuing to allow awarding organisations to be based in the UK and Gibraltar
2. Amending them to prevent existing and prospective awarding organisations from having no substantial presence in the UK, Gibraltar, or in a member state of the EU or EFTA

You told us

Almost all (13 of 14) respondents agreed we should update both the Criteria and Conditions to reflect the UK's exit from the EU, noting this was a necessary step. The one respondent who disagreed did not provide further explanation in their response, but subsequent correspondence suggests they believed we should have made this change at an earlier date.

Your views were more mixed on our second proposal. Most of you agreed with our proposed approach, but 4 disagreed to some extent.

Some of you told us that the change was appropriate, or even necessary to mitigate the risk of unfair competition from organisations established outside the reach of our enforcement powers.

Where you had concerns, they related less to what we were trying to achieve through the changes, and more to how those changes would work in practice. Those of you who disagreed all felt the term "substantial presence" was not sufficiently well-defined, and that this could lead to undesirable outcomes such as:

- inconsistent approaches to recognition
- disproportionate impacts on smaller awarding organisations
- a lack of clarity about whether (and, if so, how) awarding organisations could evidence compliance with the revised Conditions

Several of you also asked for more clarity about the status of Crown Dependencies (Jersey, Guernsey and the Isle of Man) and British Overseas Territories (besides Gibraltar).

Our view

We agree with respondents' views about the need to update the Conditions and Criteria following the UK's exit from the EU, and have therefore decided to adopt our first proposal unchanged.

We acknowledge the concerns raised by some respondents about our second proposal, but on the whole think they can be addressed.

We do not intend the requirement to have a “substantial presence” in the UK, Gibraltar, or the EU or EFTA to indicate a need for a particular scale of operations in these countries, or to require particular functions to be located there. Rather, “substantial” here should be read more in alternative sense of “real and tangible”.

Taking account of this intended interpretation, we think many of the concerns raised by the minority of respondents, in particular those about impacts on smaller organisations, fall away. We also think it is noteworthy that no awarding organisation, of any size, has expressed concerns about its own ability to comply with the revised Conditions.

As a result, our view remains that our proposed approach is the best way to deal with the risk that we could be required to recognise an organisation we could not regulate effectively – and the resultant risk that organisation is able to compete unfairly with existing awarding organisations. We have therefore also decided to adopt our second proposal unchanged.

That said, we recognise that the fact that the wording of our Conditions and Criteria is open to more than one interpretation does mean more clarity may be required. We will consider whether we can provide more formal guidance to assist current and prospective awarding organisations in understanding these rules. We will do this alongside our work on the arrangements that will be needed following the end of the transition period.

Crown Dependencies and Overseas Territories

As a matter of law, none of the Crown Dependencies has ever been part of the EU or EFTA, even when the UK was a member of these organisations.

Similarly, with the sole exception of Gibraltar (which was part of the EU), none of the British Overseas Territories have ever been part of the EU or EFTA.

This means it has never been possible to meet either our Conditions or Criteria by virtue of residence, establishment, or a substantial presence in:

- any of the Crown Dependencies
- any British Overseas Territory (except Gibraltar)

We did not consult on changing this approach, and this is not something we are minded to change at this time.

At present, it is difficult for us to regulate organisations based in the Crown Dependencies or other Overseas Territories effectively. In some cases, this is because their location would make it difficult for us to carry out audit activity or impose entry and inspection conditions. In others, it is because they have separate legal systems which could restrict our ability to use our enforcement powers. Should this situation change, we would of course consider whether we could extend recognition to organisations in territories where we could regulate effectively.

Equalities impact assessment

We explained in the consultation that:

- we had not identified any equality impacts associated with our proposal to continue to allow awarding organisations to be based in the UK or Gibraltar
- removing the ability for an organisation to secure recognition without a substantial presence in a relevant territory might indirectly affect people who share protected characteristics, particularly race – as it would make it more difficult for such applicants to satisfy Criterion A.2
- in our view, this equality impact was proportionate and necessary to ensure we remain able to regulate all awarding organisations effectively

Eleven of 14 respondents either agreed or strongly agreed with this element of our proposals, with the remaining 3 all neutral. Very few (only 3) respondents provided comments to explain their views, and none suggested our assessment was inappropriate.

As a result, our view remains as set out in the consultation. We consider that:

- the only equality impacts will arise from our decision to require awarding organisations to have a substantial presence in the UK, Gibraltar, the EU or EFTA
- this might have an indirect impact on people who share protected characteristics (particularly race), but that any such impact is proportionate and necessary to ensure we can regulate all awarding organisations effectively

Regulatory impact assessment

We asked

We asked for views on our assessment of the regulatory impact of our proposals, specifically that the main impacts would be:

- from the proposed changes to the Criteria:
 - allowing us to continue recognising new awarding organisations located in the UK and Gibraltar
 - preventing us recognising new awarding organisations that had no substantial presence in the UK, Gibraltar, or a member state of the EU or EFTA, even if they were legally established in one of those countries
- from the proposed changes to the Conditions:
 - preventing the UK's exit from the EU making organisations based in the UK or Gibraltar to become non-compliant with Condition A2.1
 - requiring awarding organisations to maintain a substantial presence in the UK or Gibraltar, or in the EU or EFTA

We also explained that these impacts would be limited in practice because:

- we receive very few applications from organisations which might have satisfied the Criteria based on legal establishment, but would not satisfy the amended Criteria
- we believed all existing awarding organisations already met the revised Condition A2.1
- with the exception of some national qualifications, there is no requirement to be regulated in order to offer qualifications in England

You said

In the main, respondents who answered this question agreed with our assessment of the likely regulatory impact.

But 4 respondents (all organisations) told us they disagreed. Echoing their earlier comments, they expressed concerns about introducing additional subjectivity and uncertainty into the recognition process, and the potential impact of our proposals on smaller awarding organisations.

They also commented that it was unclear how the requirement for a 'substantial presence' might be interpreted, and how (and to what extent) awarding organisations might be expected to demonstrate compliance with this requirement.

Our view

We recognise that our proposed changes to the Criteria for Recognition will make the judgement on whether an applicant has satisfied Criterion A.2 more subjective. While this does slightly increase regulatory uncertainty for applicants, our view remains that this is necessary to ensure we are not obligated to recognise organisations we cannot regulate effectively.

We acknowledge the comments about potential impacts on smaller awarding organisations. But we think it is important that no awarding organisation of any size has expressed concerns (either in response to this consultation or via another route) that they may be unable to meet the revised Conditions. We would also note that not changing our approach also has potential consequences for smaller awarding organisations – as they would be less equipped to withstand unfair competition from an entrant we could not regulate effectively.



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