

COMPLETION OF AN EXPLANATORY MEMORANDUM (INCLUDING REGULATORY IMPACT ASSESSMENT) TO ACCOMPANY AN ASSEMBLY MEASURE

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Introduction to guidance and template

1. The Standing Orders (23:18) of the National Assembly for Wales require that an Explanatory Memorandum (EM) must accompany all proposed Assembly Measures introduced to the Assembly. The Standing Order also sets out specific aspects that should be covered by an EM, including information covered by the Regulatory Impact Assessment (RIA) process.
2. As you will see, the EM template has been split into 2 halves. Part 1 deals with the majority of the considerations set out in the Standing Orders and Part 2 deals in more detail with the aspects that relate to the RIA. Part 1 is to be completed for all Assembly Measures. Part 2 will be completed in almost all cases, having been assessed against the criteria for determining whether a detailed RIA is necessary (and to what level). The criteria are set out below. In the majority of cases, the information required in the template will replicate information which may have been prepared as part of the **Policy Gateway** process.
3. In addition the Explanatory Notes, providing the detailed description of each provision within the Measure comes under Part 3 of the document, as required under Standing Order 23.18(v).
4. For ease of use, the guidance for the completion of the EM including the detail of what should be included in each section is set out in the template. Please delete the text boxes provided and insert the required text underneath the headings provided and ensure that each section starts on a new page.
5. In some sections of the template, you will see that sectoral considerations or detailed information is required. Where this is the case, there are relevant specialist sources of advice in the Welsh Assembly Government.

Completion of a Part 2: The Regulatory Impact Assessment

6. RIAs must be completed for proposed legislation which could affect the public or private sectors, charities, the voluntary sector and small businesses.
7. An RIA is needed whenever changes to the law are being considered and where costs or benefits could accrue. This includes changes made using both Measures and secondary legislation. So when the Measure will be followed by subordinate legislation, an RIA will need to be carried out for the Measure and for each subsequent piece of secondary legislation. This does not apply to Commencement Orders.
8. Please note that the RIA should be proportionate to the likely impact of the legislation. For example, if the proposal is likely to affect only a few firms, many firms to a very small degree, or if the costs and benefits are likely to be small, then the RIA can be quite short. Where the impact is likely to be substantial, more data and depth of analysis will be required.

9. Even in cases where there is no overall net change but some kind of redistribution (such as in cases where there is an exchange or 'transfer' of costs and benefits) the effects should be assessed through an RIA.
10. You do not need to do an RIA for a Measure that imposes no costs or no savings, or negligible costs or savings on the public, private or charities and voluntary sector. In such cases only Part 1 of the EM template need be completed along with an explanation (in section 6) of why a RIA was deemed not to be necessary. As specified in the introduction, Part 1 of the EM must be completed in all cases.
11. You should start your RIA as early as possible as it is an integral part of the legislative process. It is extremely important that you liaise with the relevant departmental contacts at the earliest possible stage. The RIA process is a continuous one and will assist in policy development, building on the Policy Gateway process.
12. You should seek advice from specialists such as economists, statisticians and scientists as early as possible in the RIA process. To gather enough evidence, you may even need to commission research. Thoroughly planning the RIA - including information on implementation and delivery will help ensure the success of your piece of legislation. You should also liaise with the relevant departmental contacts to discuss the potential impacts of your legislation on each sector and on the statutory duties as they apply to Welsh Ministers.

Completion of Part 3 – Explanatory Notes

13. This is a section by section explanation of each provision within the Measure and will form part of the composite EM/RIA/EN document. Once the Measure has been approved the EN element of composite EM will be published alongside the Measure on the Office of Public Sector Information website.

Consultation

14. If you are instructed to consult on the EM (alongside the draft Measure) then some sections may not be fully completed (for example the “Consultation” section). However, please note that the headings specified in this template should be included at all stages in the completion of an EM, it will only be the level of detail under each heading that will vary. All sections of the EM (Parts 1 & 2) will need to be completed in full before the proposed Measure is introduced to the Assembly.

Approval

15. Your EM/RIA/EN will need to be cleared (signed-off) internally. To facilitate this clearance/sign-off, it is important that you involve the relevant

departmental contacts at the earliest possible stage in the development of the policy and legislation.

Translation

16. The EM/RIA document will be translated in all cases and the translation request should be sent to the Translation Service. Please ensure that you contact the translation team at a very early stage so that they can forward plan their workloads.

-----The template begins here-----

Title [*Insert*]

Explanatory Memorandum to [*Enter the title of the proposed Measure*]

This Explanatory Memorandum has been prepared by [*enter name of department*] of the Welsh Assembly Government and is laid before the National Assembly for Wales.

Member's Declaration

In my view the provisions of the [*insert name of proposed Measure*] Proposed Measure, introduced by me on the [*insert date*], would be within the legislative competence of the National Assembly for Wales.

[*Insert Minister's name*] AM

Minister for [*insert*]
Assembly Member in charge of the Proposed Measure

[*Insert date*]

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PART 3 - EXPLANATORY NOTES

1. Description

Please provide a concise outline (no more than a paragraph) to explain to the lay reader what the instrument does and why. Please use plain language. Please do not outline in too much detail here as more in depth information is requested later on in the template.

2. Legislative background

Please include here the details of the enabling power(s) - i.e. the 'Matters' in Schedule 5 of the Government of Wales Act 2006 that give the National Assembly for Wales the legislative competence to pass this Assembly Measure.

3. Purpose & intended effect of the legislation

This section is where the policy objective(s) of the Measure must be set out clearly, including an assessment of why government intervention is considered necessary. You will need to:

- specify the problem or issue the Measure is seeking to address;
- describe, and where possible quantify the scale of the issue.
- identify who or what is affected.
- provide a clear brief statement of the objectives. Where there are multiple objectives, these should be prioritised and any conflicts or trade-offs identified.
- set out a detailed implementation and delivery plan
- set out any instances of market failure that have led to government intervention e.g. where the market has not and cannot deliver efficient outcomes for citizens, consumers and producers. A more detailed explanation of market failure can be found in the Treasury's Green Book via this link:
http://www.hm-treasury.gov.uk/data_greenbook_index.htm .

Please also consider the following:

- what are/will be the risks/hazards if legislation is not made
- how will the legislation enable sectors to operate more efficiently?
and/or
- will the legislation improve access or outcomes for disadvantaged or excluded sections of society?
- if the proposed Measure has a specific territorial extent please outline here (i.e. it affects just certain areas of Wales)
- if there is any need for the proposed Measure to be passed within a certain timescale or by a particular date, please specify so here and give reasons.

This information should be a broad summary only if an RIA is completed. More detailed information can be provided on these points in Part 2, when considering the detail of the costs and benefits of the options considered.

To note: This section should reflect the analysis that was carried out as part of the Policy Gateway process.

As part of this EM you are required (under Standing Order 23.18 (v)) to provide an explanation of each individual provision. Please provide this information under Part 3 - Explanatory Notes.

4. Consultation

Summarise the details of any the consultation on the policy objectives that has been undertaken.

- Who has been consulted?
- Why were these organisations/individuals being consulted?
- How long did the consultation/s last?
- Please provide a summary of the outcome of the consultation (where appropriate, please provide a detailed analysis as a link to where it is published or as an annex to this document)
- Were any changes/amendments made to the legislation as a result of the consultation?

Please carefully consider the impact on statutory sectors (business, local government and voluntary sector) and statutory duties (Welsh language, equality of opportunity and sustainable development) when deciding who to consult. This will be reflected in your RIA if completed.

5. Power to make subordinate legislation

Set out in relation to each provision (to make subordinate legislation) in the proposed Measure:

- the person upon whom, or the body upon which, the power is conferred;
- the form (*what type of subordinate legislation*) in which the power is to be exercised;
- the appropriateness of the delegated power (*why is it appropriate to give discretion to Ministers to regulate and not for provision to be made in the Measure itself*);
- the applied procedure (*affirmative, negative, no procedure*), if any, together with the reasons why it is considered appropriate;

To assist you in the completion of this section, it may be useful to refer back to any legal drafting instructions.

6. Regulatory Impact Assessment (RIA)

As a minimum (and as a requirement of Standing Order 23.18 (vi)) you will need to specify the following:

- whether there are any administrative, compliance and/or other costs to which the provisions of the proposed Measure would give rise;
- the timescales over which such costs would be expected to arise; and
- where the costs would fall.

If the proposed Measure contains any provision charging expenditure on the Welsh Consolidated Fund (WCF), you must attach a report from the Auditor General setting out his or her views on whether the charge is appropriate. If there is no charge, a reference should be included in the EM stating this.

Further information will be required in Part 2 where a Regulatory Impact Assessment is completed.

In cases where an RIA is not needed, you must state here the reasons for this; in particular stating that the legislation has no impact on the statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 73-75 GOWA 06).

If an RIA is required, please complete Part 2 of this document and make a statement under this section stating that an RIA has been completed.

Please also see paragraphs 5 – 11 of the introduction to this guidance.

PART 2 – REGULATORY IMPACT ASSESSMENT

7. Options

Please set out the detail of the options available that could achieve the policy objective/s you have set out in the *'Purpose and intended effect of the legislation'* section in Part 1.

Please include an outline for 'do minimum' and 'do nothing' options.

8. Costs & benefits

Please set out here a detailed analysis of the costs and benefits of compliance with each of the options set out under Section 7 (Options).

In doing so, you should in the first instance assess whether the costs and/or benefits of compliance with the identified options are direct or indirect (or both).

Please then set out who would benefit and/or bear the cost of the options. *The costs and/or benefits may fall to a specific group of workers, to a specific sector (e.g. the voluntary sector, local government or business), to consumers or to society in general. For costs please quantify.* Costs should also, if possible, be expressed in terms of relevant opportunity costs. Further guidance on this can be found in the Treasury's Green Book via this link: http://www.hm-treasury.gov.uk/data_greenbook_index.htm.

When identifying the benefits of the options, please be aware that these can be economic, environmental and social benefits. Where possible please quantify the outlined benefits, these can be expressed in monetary terms or in terms of harm avoided (i.e. to reduce risk).

Please state whether costs will be recurring (i.e. additional annual costs) or non-recurring costs (one-off costs). If it is expected that the costs will be recurring then these costs will need to be discounted (or adjusted)

You will need to provide a detailed explanation of how you estimated the costs and on what assumptions are they based. It may be appropriate to give a range of costs, depending on any uncertainties. Any impact on small businesses (under-50 employees) should be specifically assessed.

If the outlined options could result in additional costs, please identify and (as far as possible) quantify these costs and state who or what will bear them. Additional costs may fall on, for example, consumers or the public in general. Detailed calculations and/or statistics should be provided as an annex to the EM.

(continued...)

(8. Costs & Benefits continued)

If relevant please calculate the cost to government – including local government – of developing, monitoring and enforcing any regulatory option.

Where the impact of the proposed legislation is considered to have a significant effect on the outputs or activities of the sectors affected, appropriate consultation with the relevant affected sectors must be carried out and this section needs to cover the consultation details that relate to any significant compliance costs. For example, bear in mind that a cost which is relatively small to a multi-national company, may be significant to small businesses.

Please consider the impact of the proposed legislation on the statutory duties/sectors of Welsh Ministers (as set out in GOWA 2006) and liaise with relevant contacts where impact is considered significant. These are:

Sectors

- Local government
- Voluntary Sector
- Business sector

Duties

- Equality of opportunity
- The Welsh language
- Sustainable development

Please provide a summary at the end of this section that sets out which option is chosen and why.

9. Competition Assessment

Please apply the competition filter (at [Appendix A](#)) if the proposed Measure affects business, charities and/or the voluntary sector. This consists of 9 yes/no questions which should be applied to each policy option. It should be done as early as possible to help identify any effects, adverse or beneficial, on competition.

10. Post implementation review

If appropriate, please explain how the effect of the proposed Measure and any subsequent subordinate legislation is to be monitored and how it will be reviewed.

PART 3

Explanatory Notes

Please provide a detailed explanation of each individual provision in the Measure.

-----The template ends here-----

Appendix A

The Competition Assessment

1. There are two stages to the Competition Assessment. The first is a quick filter that assesses whether there is a risk of a significant detrimental effect on competition. If the test results show that the risk is low (and there are no anticipated significant benefits for competition) you will only need to record the results of the filter test in the EM (including a brief description of any competition effects that are anticipated). If, on the other hand, the test results show that the risk is high further consideration must be given to whether a more detailed assessment and possible further action is needed.
2. You should consider the market that will be affected, i.e. the firms that compete against one another to sell the same or similar products or services. A regulation or proposal may impact directly on just one sector or on several, and some regulations may have indirect effects on other, linked, sectors which either supply goods or services to the affected sectors or buy products from them. (e.g. the recreational craft directive affects the engines needed for boats used for leisure purposes. Within this though there are two distinct markets: engine manufactures that make standard engines, and boat builders who modify them for use on leisure boats.) Some regulations impact almost universally on a very wide range of sectors (e.g. the national minimum wage).
3. For a meaningful competition assessment you must ensure that affected markets are correctly identified. Help and /or advice can also be obtained from the OFT, which has published guidance on markets, entitled "Market definition" OFT403)
http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft403.pdf

The competition filter test

4. This has nine straightforward questions. Where the regulation is likely to have an impact directly on more than one sector (whether directly or indirectly) the competition filter test should be carried out for each sector affected. Where a regulation might impact on many sectors, you will need to identify those sectors that might be affected to the greatest extent.
5. The competition filter test is set out below, together with points to consider in answering the questions. Further detail is contained in the OFT's published Guidelines for Competition Assessment (OFT 876) together with examples and references
http://www.of.gov.uk/advice_and_resources/resource_base/guidelines/

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	
Q4: Would the costs of the regulation affect some businesses/organisation substantially more than others?	
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	
Q8: Is the sector characterised by rapid technological change?	
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	

6. Each “yes” answer indicates a possible competition concern.
- “Yes” answers to less than half the questions suggest that the regulation is unlikely to have a significant detrimental effect on competition. As new information comes to light, this result should be re-affirmed by re-applying the filter test.
 - “Yes” answers to more than half of the questions indicate that there is some risk that the regulation may have a significant effect on competition and a detailed assessment is necessary.

Questions 1 to 3: the market

7. Where there are a few large firms in the market, or it is difficult to establish a new firm, competition concerns are more likely.

Question 4: substantially different effect on businesses/organisation

8. Will the costs fall differently on different businesses/organisation? This is relevant where the costs of complying with a regulation are not proportional to output.

Question 5: changes to market structure

9. If regulations are likely to penalise certain firms, then this may affect whether those firms stay in business. This could then alter the number or size of firms in the market. The most likely case is where small firms are affected more than large ones are.
10. Consider whether firms that face a greater impact will be able to stay in the market given the additional costs they face. If they have to raise prices as a result of the regulation will customers move to other suppliers?

Questions 6 and 7: penalising new suppliers

11. Consider whether new suppliers to the market would be affected differently from existing suppliers. An example would be where new firms must meet higher standards immediately, while established firms have a longer period in which to meet them. This could make it harder for the new firms to compete. However, such an effect might be offset by new firms not having to face the costs of changing existing equipment and/or processes, or where existing suppliers have already, voluntarily, decided to carry out the actions required under the regulation.

Question 8: technological change

12. New technologies may advantage some companies over others who may be driven out of the market. Consider whether technological change will affect the number or size of firms in the market. Where only small changes in technology are happening continuously, this question should be answered "no".

Question 9: restrictions on suppliers

13. Will the regulation stop suppliers providing products or services that they would otherwise provide? An example would be a regulation imposing minimum standards, thus preventing suppliers from selling lowest cost or quality options. Further examples would be regulations imposing price restrictions or restrictions on what firms use to make their products. If locations are restricted, customers may suffer, especially if there are local markets.

Presenting the results of the competition filter test

14. The findings of the competition filter test should be written up as part of the draft regulatory impact assessment (and should also be included in the final impact assessment if no detailed assessment is required). You should include a clear statement setting out whether there is likely to be any detrimental effects on competition, with reasoning and evidence presented to support this conclusion. If you anticipate any beneficial effects, you should assess these and include them in the write-up. This will improve internal and external consultation and inform Ministers.

The detailed assessment

15. The aim of the detailed assessment is to understand in more depth the potential competition impacts identified whilst carrying out the competition filter test. The Office of Fair Trading's (OFT) "Guidelines for Competition Assessment" (OFT 876) http://www.offt.gov.uk/advice_and_resources/resource_base/guidelines/ provide detailed guidance on how to approach the detailed assessment. The OFT publication "Market Definition" (OFT 403) http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft403.pdf provides guidance on how to identify the relevant markets.