

Agenda Supplement – Legislation, Justice and Constitution Committee

Meeting Venue:

For further information contact:

Videoconference via Zoom

P Gareth Williams

Meeting date: 12 December 2022

Committee Clerk

Meeting time: 13.30

0300 200 6565

SeneddLJC@senedd.wales

Remote – Supplementary Pack

Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

2 Proposed negative instruments that raise no reporting issues under Standing Order 21.3B

13.30

2.1 pNeg(6)004 – The Marketing of Seeds and Plant Propagating Material (Wales) (Amendment) (EU Exit) (No. 2) Regulations 2022

(Page 1)

[Regulations](#)

[Explanatory Memorandum](#)

Attached Documents:

LJC(33-22 – Paper 34 – Draft report

6 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3 – previously considered

13.45–13.50

6.2 SL(6)291 – The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

(Pages 2 – 6)



[Regulations](#)

[Explanatory Memorandum](#)

Attached Documents:

LJC(6)-33-22 – Paper 35 – Report

LJC(6)-33-22 – Paper 36 – Welsh Government Response, 9 December 2022

9 Papers to note

14.00–14.05

9.9 Correspondence from the Minister for Climate Change: The Environmental Protection (Single-use Plastic Products) (Wales) Bill

(Pages 7 – 12)

Attached Documents:

LJC(6)-33-22 – Paper 37 – Letter from the Minister for Climate Change, 9 December 2022

LJC(6)-33-33 – Paper 38 – Letter to the Minister for Climate Change, 25 November 2022

12 Historic Environment (Wales) Bill: Consideration of Draft report

14.20–14.50

(Pages 13 – 154)

Attached Documents:

LJC(6)-33-22 – Paper 30 – Draft report

14 Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Online Safety Bill: Consideration of Draft Report

15.00–15.10

(Pages 155 – 159)

Attached Documents:

LJC(6)-33-22 – Paper 32 – Draft report

15 SICM(6)2 – The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022: Consideration of Draft Report

15.10–15.20

(Pages 160 – 163)

Attached Documents:

LJC(6)-33-22 – Paper 33 – Draft report

pN(6)004 – The Marketing of Seeds and Plant Propagating Material (Wales) (Amendment) (EU Exit) (No. 2) Regulations 2022

Background and Purpose

These Regulations correct errors identified by the Legislation, Justice and Constitution Committee in its [report](#) on the Marketing of Seeds and Plant Propagating Material (Wales) (Amendment) (EU Exit) Regulations 2022 (“the Original Regulations”). In particular, these Regulations:

- Revoke the Original Regulations, and
- Re-make the relevant operability amendments to the Seed Marketing (Wales) Regulations 2012 and the Marketing of Fruit Plant and Propagating Material (Wales) Regulations 2017.

These Regulations were laid for the purposes of sifting under the EU (Withdrawal) Act 2018 in accordance with Standing Order 27.9A.

Committee Recommendation as to Appropriate Procedure

We have considered the criteria set out in Standing Order 21.3C.

We recommend that the appropriate procedure for these Regulations is the negative resolution procedure.

Government response

No Welsh Government explanation is required in accordance with Standing Order 27.9B.

Legal Advisers

Legislation, Justice and Constitution Committee

9 December 2022



Agenda Item 6.2

SL(6)291 – The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

Background and Purpose

The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022 make amendments to subordinate legislation, which apply in relation to Wales, in the fields of food and feed safety and hygiene.

In particular, these Regulations:

- correct deficiencies in Welsh domestic legislation relating to food and feed hygiene and safety, removing cross-references to EU Directives and transposing certain Annexes to those Directives into domestic legislation;
- correct references within Welsh domestic legislation defining enforcement authorities in relation to animal feed.

Procedure

Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In the preamble on page 5, the European Union (Withdrawal) Act 2018 is incorrectly referred to as the European Union (Withdrawal) Act 2020 [*emphasis added*].

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

Regulation 2(4)(b) amends regulation 12(2) of the Materials and Articles in Contact with Food (Wales) Regulations 2012.

Prior to being amended, the relevant wording in the provision read:

*"...substances listed in the **first part** of Annex II and subject to the restrictions set out in that **part**." [*emphasis added*]*



Following the amendment the provision reads:

*"...substances listed in **table 1** of Schedule 6 and subject to the restrictions set out in that **part.**" [emphasis added]*

Given that the table in Schedule 6 is not split into parts (as opposed to Annex II which is), the remaining reference to "part" left in regulation 2(4)(b) should be replaced with "table".

3. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.

In regulation 3(2)(a)(ii), in the Welsh text, the corresponding English definition was included in brackets and italics of the existing definition of "*Rheoliadau'r UE*".

However, the amendment made by regulation 3(2)(a)(ii) does not amend the English definition that appears in brackets and italics after the amended definition in the Welsh text. As a result, the new amended Welsh definition will still have the original English definition in brackets afterwards ("*the EU Regulations*") rather than the new English definition ("*the retained EU Regulations*"). This will confuse rather than aid the reader by linking the new Welsh definition with the old English definition.

4. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.

In regulation 3(8), in the Welsh text, the description of the amendment fails to precisely identify where to insert the new text - it states that the new text should be inserted after "*Rheoliadau'r UE*" [emphasis added] in regulation 19(2) of the 2013 Regulations.

However, it should say "*Reoliadau'r UE*" [emphasis added] as the words appear in a mutated form in paragraph (2) of regulation 19. The (unmutated) words "*Rheoliadau'r UE*" do not appear anywhere in regulation 19(2) of the 2013 Regulations.

5. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.

In Schedule 3, in Table 1 in the new Schedule 1B, in the Welsh text, "*feed materials*" has been incorrectly translated as "*deunyddiau blawd*" [emphasis added] which means "*meal materials*" in each place the words corresponding to "*seaweed meal and feed materials derived from seaweed*" appear in the second column for entry no. 1, Arsenic.

The correct translation for "*feed materials*" is "*deunyddiau bwyd anifeiliaid*" [emphasis added] as found elsewhere in that Table, and in the existing regulation 15(7)(c) of the Animal Feed (Composition, Marketing and Use) (Wales) Regulations 2016.



Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is required.

Committee Consideration

The Committee considered the instrument at its meeting on 5 December 2022 and reports to the Senedd in line with the reporting points above.



Senedd Cymru

Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

—

Welsh Parliament

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Legislation, Justice and Constitution Committee

Government Response: *The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022*

Technical Scrutiny point 1

The Government accepts the point.

The Government does not consider that the minor typographical error affects the validity of the instrument. The error and correct reference are clear from the context and the footnote.

The Government does consider correction to be appropriate, for clarity – and will seek for this to be done as soon as possible by correction slip.

Technical Scrutiny point 2

The Government accepts the point.

The Government considers that, despite the error, the legislative intention is clear that the restrictions applicable to the substances listed in the new Schedule 6 to S.I. 2012/2705 (W. 291) are to be found in that Schedule.

The Government proposes to correct the error at the next available opportunity. It is anticipated that there will likely be a suitable statutory instrument for the correction taken forward in the first half of 2023.

Technical Scrutiny point 3

The Government accepts the point.

The Government considers that there is no real risk of confusion despite the error. The amendment to the defined Welsh term itself is correct. There is no other definition in the English text of regulation 2(1) of S.I. 2013/2591 (W. 255) with which the Welsh definition could be confused.

The Government proposes to correct the error in the Welsh text at the next available opportunity. It is anticipated that there will likely be a suitable statutory instrument for the correction taken forward in the first half of 2023.

Technical Scrutiny point 4

The Government accepts the point.

The minor typographical error appears in the text identifying the location of the proposed amendment to regulation 19(2) of S.I. 2013/2591 (W. 255). The Government does not consider that this clear typographical error gives rise to a risk of confusion as to intended location for the insertion of the amendment.

The Government will seek for this error to be corrected by correction slip.

Technical Scrutiny point 5

The Government accepts the point.

The Explanatory Notes confirm that the new Schedule 1B to S.I. 2016/386 (W. 120) is a transposed copy of Annex 1 to Directive 2002/32/EC as that Directive had effect immediately prior to implementation period completion day. It is clear that there is no substantive change being made. The text in question “*seaweed meal and feed materials derived from seaweed*” has been an established aspect of that Annex since 2003, so stakeholders will be familiar with the correct coverage. The Government considers that, when interpreting the legislation, it is clear that there is an error in the Welsh text, and that the English text contains the correct intended wording to be applied.

The Government proposes to correct the error in the Welsh text at the next available opportunity. It is anticipated that there will likely be a suitable statutory instrument for the correction taken forward in the first half of 2023.

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/JJ/3676/22

Huw Irranca-Davies, MS
Chair, Legislation, Justice and Constitution Committee

9th December 2022

Dear Huw Irranca-Davies

Thank you for your letter of 25 November 2022 regarding the Climate Change, Environment and Infrastructure Committee's concerns about The Environmental Protection (Single-use Plastic Products) (Wales) Bill.

When the Government wrote to the Business Committee about this in July, there was a twofold reason why it should be expedited:

- Firstly, there was an urgent need to implement the ban in Wales on the most commonly littered single use plastics, and to keep up with equivalent bans in the rest of the UK.
- Secondly, the Counsel General's application in the legal proceedings in relation to the United Kingdom Internal Market Act 2020 (UKIMA) that were before the Supreme Court at the time.

The Business Committee agreed that, in order to enable the Bill to provide the practical example requested by the Court, it would need to be passed by the Senedd as soon as possible. This was the basis on which the Business Committee granted approval for an expedited timetable.

Since then, the Supreme Court Judgment set out in the Counsel General's Written Statement of 18 August closed off the particular avenue of litigation being pursued at the time. However, it left the door open for the arguments to be considered in a future case. The government's rationale for the expedited timetable has therefore not changed.

Our determination (and the Llywydd's) that the Bill is within the Senedd's legislative competence does not preclude it from providing an example of Senedd legislation against which arguments about UKIMA can be tested in future litigation. In the meantime, given that we have determined the Bill is within competence, our position remains it is fully effective and enforceable.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The expedited timetable, while shorter in duration, has allowed the Bill to complete all the necessary steps. To aid the scrutiny process, on the 15 August, I published a draft of the Bill to give Senedd Members and interested stakeholders an opportunity to see the proposed scope and direction of the Bill. It also gave the Climate Change, Environment and Infrastructure Committee an opportunity to consult on the proposal. Similarly, in advance of the Stage 2 debate, I wrote to you to set out the changes we intended to propose.

The Bill has enjoyed support from across the Senedd and I have been pleased to work with the Committees and members of different political parties to enhance it. This has been a true example of collaboration and joint-working. I am pleased the Bill was approved by the Senedd on Tuesday evening and that its legacy will be something we can all be proud of.

Yours sincerely



Julie James AS/MS

Y Gweinidog Newid Hinsawdd
Minister for Climate Change

Julie James MS

Minister for Climate Change

25 November 2022

Dear Julie

The Environmental Protection (Single-use Plastic Products) (Wales) Bill

Thank you for your [letter](#) of 25 October 2022 responding to our [report](#) on the above Bill.

It is not our normal practice to comment on government responses to our Bill reports but your response raises a number of important issues of principle that we believe need to be addressed.

The effect of the United Kingdom Internal Market Act 2020 (UKIMA)

Our report acknowledged that:

"... UKIMA cannot limit the Senedd's competence to legislate on matters that are devolved and within its legislative competence. However, our concern is that once law is made by the Senedd, UKIMA can impact on how effective that law is because of the market access principles it introduces across the UK." (paragraph 73).

Our evidence session and report sought to seek your views on the impact of UKIMA on the Bill should it become an Act. Your response has been to say that the Bill's provisions are within legislative competence, a position with which we agree but which does not directly address the key issue of concern to us.

The response being used continues to conflate two separate issues: whether or not the Bill is within legislative competence and the impact of UKIMA on the effectiveness of the Bill once it becomes an Act. In our view the fundamental point is that UKIMA could impact on the law once it is made; it does not prevent the law being made by the Senedd in the first place.

By not acknowledging and addressing these issues, the Welsh Government is creating confusion and blurring understanding of what the Bill could achieve and therefore its effectiveness as a piece of law made by the Senedd. We have some concerns that this approach could also have had an impact on the amendments Members considered tabling during the amending stages of the legislative process, which is regrettable.

Expedited Scrutiny and legal challenges

We note your response to recommendation 5 in our report which sought information about when you intend to commence all the provisions of the Bill so that it is fully operational.

In our view, given that the Bill was subject to an expedited scrutiny process on grounds of urgency, we would have expected to have been provided with a more precise implementation timetable, rather than being advised that “the earliest provision can be commenced is autumn 2023” and that the intention is “for all commencement dates to be within this Senedd term i.e. by April 2026”. These comments do not suggest that the legislation is so urgent that it needed an expedited scrutiny process.

Also, during the Climate Change, Environment, and Infrastructure Committee’s Stage 2 proceedings, we note you did not accept the need to include a commencement date (1 January 2024) on the face of the Bill. In doing so, one of the arguments you advanced was that the Welsh Government may need longer to develop guidance, consult with stakeholders and promote the change in law. Again, this does not suggest the urgency you have been advocating.

It is also worth repeating that if the situation was urgent, and the intention was not to fall behind the position in England and Scotland (where broadly the same policy outcome was achieved through regulations in 2020 and 2021), then Regulations could have been used to ban single-use plastics, with a Bill following at a later date to make provision for more plastic types (see paragraph 66 of our report).

In response to recommendation 4, you said:

*“Our position - that the Bill is within competence and is fully enforceable and effective - is not incompatible with our view the Bill is capable of providing the context which would assist the Court in testing the arguments about UKIMA in a future case. Those two positions are not mutually exclusive. **Expediting the Bill preserves all the options in terms of how that issue may be brought before the Court.**”[Our emphasis].*

It is not clear why taking a Bill through the full Stage 1 Bill process would have prejudiced options available to the Welsh Government to bring a matter to Court, or how those options are preserved by expediting the Bill. Your response links expediting scrutiny to preserving all options in relation to

possible Court action. However, your response to recommendation 11, which sought information about the grounds on which the Welsh Government could make a legal challenge in relation to UKIMA, only made reference to making a legal challenge in relation to legislative competence and not the impact of UKIMA should the Bill become an Act, which highlights again our point above about conflating two separate issues.

As such we do not believe that your response to recommendation 11 addresses the issue because it does not list all the options for legal challenge available; there is no reference to the grounds on which you would test UKIMA in the Courts which we assume, based on your previous legal challenge, is an option that would be covered under "all the options" you refer to in your response to recommendation 4.

In your response to recommendation 4 you acknowledged one of "two good reasons as to why the Bill should be expedited" was "the Court of Appeal's request for a legislative context in which to consider the arguments being advanced by the Counsel General in the (then ongoing) application for judicial review of UKIMA." We do not believe that it is possible to hold the view that UKIMA "does not bite on the Bill" and then to pursue action on the impact of UKIMA on the legislation through the Courts (save in relation to matters of legislative competence, although this would seem unlikely given the widely held view, including that of the Welsh Government, that the Bill is within the Senedd's legislative competence). If the view of the Welsh Government changed between July 2022 and September 2022 such that it no longer considered the Bill was a suitable vehicle in relation to the Court of Appeal's request referred to above, and therefore one of its reasons to expedite scrutiny no longer applied, it remains unclear why this has not been stated clearly in your response to recommendation 4.

We are therefore drawing your responses to recommendations 4, 5 and 11 and this letter to the attention of the Business Committee.

Case study

Recommendation 8 of our report asked you to provide a detailed assessment of our case study on oxo-degradable plastic. Your response said that it did not accurately represent the position, stating:

"The case study deals with business-to-business supply whereas the Bill prohibits the supply of prohibited single-use plastic products to a consumer in Wales."

We acknowledge that the Bill only prohibits the supply of prohibited single-use plastic products to a consumer in Wales; it does not prohibit business-to-business supply. However, in our view the Explanatory Memorandum does not make it clear or explicit that the Bill is not intended to cover business-to-business supply in this particular case. As such we do not believe that it is clear to the public that the farmer in our case study would still be able to purchase the mulch film and use it on their farm. The Bill's Explanatory Memorandum (at paragraph 7.7.31) identifies mulch film as one of

the biggest sources of plastic in agriculture. However, the Bill in its current form seems unlikely to do much to decrease the “2-3 million tonnes” of plastics used in agriculture every year.

The Bill’s Explanatory Memorandum does not in our view explain sufficiently the degree to which the items prohibited by the Bill are used by consumers or by businesses and therefore to what extent the Bill’s provisions would reduce the use of the prohibited single-use plastic items, particularly in relation to oxo-degradable plastic.

This again highlights that a full Stage 1 scrutiny process would have helped provide a greater depth of understanding of what the Welsh Government is seeking to achieve with the Bill and the impact it will have in reducing the single-use plastic items, covered by the Bill, in Wales. In turn, this would have provided Senedd Members with more information to assist them in considering amendments that could be tabled to potentially improve the Bill and contribute to reducing the impact of single-use plastic in Wales.

Recommendation 12

We are concerned at the language used to justify your position on recommendation 12 and in particular the phrase: “Legislative drafting often involves a trade-off between ease of understanding and absolute certainty”.

Despite the Committee highlighting that one of the underlying principles of the rule of law is certainty (at paragraph 79) and therefore expressing concern at the use of this phrase in your evidence session, we are disappointed to see you repeat these words. We acknowledge that guidance for Welsh Government drafters recognises the need for a judgement to be taken around simplicity, clarity and precision but in our view this is different from “a trade-off between ease of understanding and absolute certainty”.

I am copying this letter to the Chair of the Climate Change, Environment and Infrastructure Committee.

Yours sincerely,

A handwritten signature in black ink that reads "Huw Irranca-Davies". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Huw Irranca-Davies
Chair



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Agenda Item 15

By virtue of paragraph(s) vi of Standing Order 17.42

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