

Explanatory Memorandum to the Official Controls (Plant Health and Genetically Modified Organisms) (Wales) (Amendment) (No. 2) Regulations 2020

This Explanatory Memorandum has been prepared by the Economy, Skills and Natural Resources Department of the Welsh Government and is laid before the Senedd in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Official Controls (Plant Health and Genetically Modified Organisms) (Wales) (Amendment) (No. 2) Regulations 2020.

Lesley Griffiths,

Minister for Environment, Energy and Rural Affairs

18 November 2020

PART 1

1. Description

1.1. The Official Controls (Plant Health and Genetically Modified Organisms) (Wales) (Amendment) (No. 2) Regulations 2020 (“this instrument”) amends the Official Controls (Plant Health and Genetically Modified Organisms) (Wales) Regulations 2020 (S.I. 2020/206) (W. 48) (“the 2020 Regulations”). It provides for rules on penalties in relation to infringements of Regulation (EU) 2016/2031 on protective measures against pests of plants (“the EU Plant Health Regulation”) and Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products (“the EU Official Controls Regulation”), by making provision for civil sanctions in relation to the offences set out in Part 11 of the 2020 Regulations.

1.2. This instrument introduces a more targeted sanctioning regime for offences set out in Part 11 of the 2020 Regulations, which will help to increase compliance with the EU Plant Health Regulation and the EU Official Controls Regulation (“the EU Regulations”) and the 2020 Regulations and, in so doing, strengthen our biosecurity framework. The new regime will sit alongside the existing criminal sanctions regime, with criminal prosecution remaining as an option as a last resort for habitual/serious cases of non-compliance.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

2.1. Section 2(2) of the European Communities Act 1972 offers a choice between negative and affirmative procedures. The negative procedure will be used in this case as this instrument amends Regulations that were subject to the negative procedure.

3. Legislative Background

3.1. The EU Plant Health Regulation establishes controls and restrictions which apply to the import (from third countries), and movement within and between EU Member States, of certain plants, plant pests and other material (such as soil). The EU Official Controls Regulation provides for official controls and other official activities to ensure the application of rules in relation to various areas, including plant health.

3.2. The EU Regulations and the implementing legislation made under them are directly applicable in the United Kingdom. Domestic legislation is not needed to implement the substantive provisions in this EU legislation. However, supplementary domestic provisions are necessary to enable the plant health authorities to carry out their obligations under the EU Regulations, enforce those Regulations and

implement derogations to various provisions in the EU legislation that are available to Member States. The 2020 Regulations contain these supplementary domestic provisions. Separate but parallel legislation is in place in England, Northern Ireland, and Scotland.

3.3. This instrument amends the 2020 Regulations to make provision for civil sanctions in respect of offences set out in Part 11 of those Regulations.

4. Purpose and intended effect of the legislation

4.1. The EU Official Controls Regulation sets out the general obligations of the plant health and other authorities as regards enforcement action and identifies actions in the event of non-compliance. The EU Regulations require Member States to lay down the rules on penalties applicable to infringements and take measures necessary to ensure that they are implemented to provide effective, proportionate and dissuasive sanctions.

4.2. The 2020 Regulations, which replaced the Plant Health (Wales) Order 2018 and the Plant Health (Forestry) Order 2005 (as applicable in Wales) in January 2020, give effect to the EU Regulations. As a review of alternative sanctions was not possible at the time the 2020 Regulations were made, it was decided to maintain the previous approach to enforcement and include the same mechanisms and penalties for non-compliance that were set out in the Plant Health (Wales) Order 2018 and the Plant Health (Forestry) Order 2005 (as applicable to Wales) and to review this approach in 2020. In practice, the Animal and Plant Health Agency's ("APHA") Plant Health and Seeds Inspectors take action to prevent the import of pests and diseases and to ensure compliance by serving statutory plant health notices on consignments that do not comply with the 2020 Regulations. Serious breaches can lead to prosecution.

4.3. The historic lack of prosecutions in the plant health regime suggests that the current enforcement tools are inadequate for targeted and proportionate enforcement. Many offences have historically been dealt with by way of a statutory plant health notice where criminal prosecution is not pursued, whereas a broader range of options would allow a flexible and proportionate enforcement response and help create a level-playing field between those who routinely comply with regulatory requirements and those who do not.

4.4. The suite of civil sanctions introduced by this instrument consist of compliance, restoration and stop notices, fixed and variable monetary penalties, as well as the ability to accept third party undertakings and enforcement undertakings. There are provisions that will enable APHA to recover its costs when imposing civil sanctions, in order to facilitate effective action. This instrument creates, as part of the civil sanctions regime, an offence in relation to a failure to comply with a stop notice. Failure to comply with a restoration or compliance notice may result in the person being criminally prosecuted for the original offence, set out in Part 11 of the 2020 Regulations, provided a variable monetary penalty was not also imposed.

Alternatively, APHA may, irrespective of whether a variable monetary penalty was also imposed, serve a notice on that person imposing a non-compliance penalty.

4.5. During the transition period following the UK's exit from the EU, the Welsh Ministers are under a duty to implement and apply EU legislation. Introducing these sanctions strengthens our biosecurity framework.

4.6. Although a civil sanctions regime will be introduced by this instrument, it will not be immediately employed. Work will begin on developing detailed guidance on how the sanctions will be applied and the Welsh Government will seek wider views from industry on draft guidance in 2021. Following this, and consideration of the responses received, the guidance will be published so that APHA are able to begin applying civil sanctions by the end of 2021.

4.7. In addition to allowing Welsh Government officials the time to draft detailed guidance and to consult upon it, this approach will also allow industry time to familiarise themselves with the civil sanctions regime before it is employed.

5. Consultation

5.1. The UK Government carried out an initial engagement with stakeholders, representing interests in England and Wales, on the introduction of a civil sanctions regime and the range of sanctions, as well as the proposed thresholds for fixed and variable monetary penalties. The UK Government shared the responses they received with the Welsh Government. Stakeholders were in favour of the introduction of civil sanctions and the proposed phased implementation plan. Further engagement with stakeholders was conducted by the Welsh Government to, in part, ascertain whether there were any Wales-specific issues the stakeholders wished to raise. No further responses have been received.

5.2. As set out above, in 2021 the Welsh Government will consult on draft guidance regarding how the civil sanctions will be applied.

6. Regulatory Impact Assessment (RIA)

6.1. The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, it was not considered necessary to carry out a regulatory impact assessment as to the likely costs and benefits of complying with these Regulations.

6.2. There are no significant financial implications. The legislation applies equally to all businesses. The new measures apply to activities that are already subject to APHA inspection and surveillance programmes.

6.3. There is no, or no significant, impact on business, charities or voluntary bodies.

6.4. With regard to the Government of Wales Act 2006 this legislation has no impact on statutory partners (sections 72-75) or the statutory duties (sections 77-79).

6.5. A Justice System Impact Identification has been completed and no significant impacts were identified.