

## UK MINISTERS ACTING IN DEVOLVED AREAS

### **75 - The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019**

*Laid in the UK Parliament: 8 January 2019*

#### **Sifting**

Subject to sifting in UK Parliament?	No
Procedure:	Affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	N/A
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	21/01/2019
Date sifting period ends in UK Parliament	N/A
Written statement under SO 30C:	Paper 9
SICM under SO 30A (because amends primary legislation)	Not required

#### **Scrutiny procedure**

Outcome of sifting	N/A
Procedure	Affirmative
Date of consideration by the Joint Committee on Statutory Instruments	Not known
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	Not known

#### **Commentary**

These Regulations are proposed to be made by the UK Government pursuant to section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018.

These Regulations transfer legislative functions from the EU Commission to public authorities in the UK. The functions relating to devolved policy areas are currently set out in EU Regulations (and one EU Directive) covering persistent organic pollutants, timber, the European Pollutant Release and Transfer Register, mercury and industrial emissions. As regards devolved policy areas in Wales, certain functions are conferred on the Welsh Ministers.

Legal Advisers make the following comments in relation to the Welsh Government's statement dated 10 December 2018 regarding the effect of these Regulations:

1. The Nagoya Protocol relates to access to genetic resources (EU Regulation 511/2014). The Welsh Government states that it is not practically possible for the Welsh Ministers to exercise functions relating to the Nagoya Protocol independently from the UK Government. Therefore, functions are conferred solely on the Secretary of State. The Welsh Government offers no explanation as to why this is the case. **We invite the Welsh Government to give further detail.**
2. As regards the remaining EU Regulations (and the one Directive) which relate to devolved policy areas, namely–
  - Persistent Organic Pollutants (EC Regulation 850/2004);
  - European Pollutant Release and Transfer Register (EC Regulation 166/2006);
  - Mercury (EU Regulation 2017/852); and
  - Industrial Emissions (EU Directive 2010/75 (described in the Welsh Government's statement as "adopting BAT conclusions"))the Welsh Government states that there is "no impact on the Assembly's legislative competence". However, it is not clear whether this assertion is correct and **we invite further explanation.** Our reasoning is as follows.
3. Where a function is conferred on the Secretary of State in an area which falls within the legislative competence of the National Assembly for Wales, this may have the effect of restricting the Assembly's ability to legislate in this area.
4. An Assembly Act cannot remove or modify a function of a Minister of the Crown that relates (among other things) to control of pollution of water resources unless the Minister consents (see paragraph 11(1)(c) of Schedule 7B to the Government of Wales Act 2006).
5. If these Regulations confer functions on the Secretary of State that relate to control of such pollution, then the Assembly will not have competence to remove that function without the consent of the UK Government. This is despite the fact that the function will operate in a devolved area.
6. **We request further detail from the Welsh Government** as to whether any of the functions conferred on the Secretary of State relate to the control of pollution of water resources (or any other matter listed in paragraph 11(1) of Schedule 7B to the Government of Wales Act 2006). Without further detail, we are not able to confirm the accuracy of the Welsh Government's assertion that there is no impact on the Assembly's legislative competence.

7. Additionally, there is a very small error in paragraph 10 of the Welsh Government's statement: it should read Council Regulation (EC) No 338/97 (not 338/1997).
8. Save for the points made above in paragraphs 3–6, the above summary and the content of the Explanatory Memorandum to these Regulations confirm their effect. We are satisfied that the Regulations are making corrections rather than new policy in devolved areas.
9. To confirm the position as regards points 3–6 above, we would need the additional information described above.
10. Legal Advisers do not consider that any significant issues arise under paragraph 8 of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks in relation to these Regulations.