

Explanatory Memorandum to The Invasive Alien Species (Enforcement and Permitting) Order 2019

This Explanatory Memorandum has been prepared by the Department for Environment and Rural Affairs and is laid before the National Assembly for Wales 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 Invasive Alien Species (Enforcement and Permitting) (Wales) Order 2019. I am satisfied the benefits justify the likely costs.

Lesley Griffiths

Minister for Environment, Energy and Rural Affairs

7 March 2019

PART 1

1. Description

This Invasive Alien Species (Enforcement and Permitting) Order 2019 (“the Order”) provides enforcement provisions, prescribes offences and penalties. It also introduces the permitting and licensing provisions needed to comply with the requirements of EU Regulation No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species (“the EU Regulation”).

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

This instrument is being made on a composite basis with the Secretary of State for DEFRA. As well as introducing enforcement provisions, prescribing the offences and penalties needed to comply with the requirements of the EU Regulation, the Order amends earlier England and Wales legislation (the Wildlife and Countryside Act 1981 (“the WCA 1981”). The policy approach to controlling invasive alien species in Wales and England is aligned as invasive alien species do not recognise borders. A composite SI, which applies simultaneously throughout Wales and England will assist with a consistent enforcement approach, and accessibility and understanding for members of the public and others.

The Animal and Plant Health Agency (APHA) currently delivers statutory functions in Wales (such as inspections and enforcement), on behalf of the Welsh Ministers, through a Concordat arrangement. A single Order will ensure that statutory functions under it are exercised in a consistent manner across England and Wales by APHA inspectors.

Section 80(1) GOWA 2006 provides that an EU obligation of the United Kingdom is also an obligation of the Welsh Ministers if and to the extent that the obligation could be implemented (or enabled to be implemented) or complied with by the exercise by the Welsh Ministers of any of their functions.

The Order is made using the powers designated to the Welsh Ministers under section 2(2) of the European Communities Act 1972 (“the ECA 1972”). The Welsh Ministers may rely on their power under section 2(2) of the ECA 1972, by way of their designation for those purposes, in relation to the prevention and remedy of environmental damage¹, in order to implement the substantive requirements of the IAS Regulation in relation to Wales.

In addition, devolved powers under section 22 of the Wildlife and Countryside Act 1981 may be used to, by order add or remove any animal or plant on the IAS Regulation list, from schedule 9 of the Wildlife and Countryside Act 1981.

¹ S.I. 2014/1890

The Order is subject to the negative resolution procedure in the National Assembly for Wales and in the UK Parliament. This is deemed the appropriate procedure because section 2(2) of the ECA 1972 offers a choice between negative and affirmative procedures. The negative procedure will be used in this case as the discretion of the Welsh Ministers to make the required provisions is limited due to the need to give effect to the provisions of the EU Regulation. Moreover the exercise of powers under section 22 of the WCA 1981 is subject to annulment by the motion of the Assembly (negative procedure).

As this Order will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually. The instrument is not amending earlier bi-lingual legislation.

3. Legislative background

The EU Regulation creates a list of species of Union concern whose adverse impacts are such that they require coordinated action across the EU. It applies strict restrictions on these species so they cannot be imported, kept, bred, transported, sold, used or exchanged, allowed to reproduce, or be grown, cultivated, or released into the environment. There are currently 49 species listed under the Regulation. The EU Regulation will be converted into UK law when we exit the EU.

The EU Regulation places a duty on Member States to “lay down the provisions on penalties applicable to infringements of the EU Regulation” and to “take all the necessary measures to ensure that they are applied”. The Welsh Ministers therefore make the Order to fulfil that duty by providing enforcement provisions, prescribing the offences and penalties and introducing permitting and licensing provisions. The Order also contains a number of consequential amendments and provisions to resolve/remove overlaps between existing domestic legislation and the controls set out in the EU Regulation.

This Order does not relate to withdrawal from the European Union. However, the Order contains known operability issues at the time of laying, including the need to ensure consistency with the parent EU Regulation which was corrected by The Invasive Non-native Species (Amendment etc.) (EU Exit) Regulations 2019. It is planned these operability issues will be corrected by means of a separate operability SI.

<https://www.legislation.gov.uk/ukdsi/2019/9780111176269/contents>

4. Extent and Territorial Application

This Order applies to England and Wales. The provisions also extend to Scotland and Northern Ireland in so far as – a) they relate to controls on import into and export from the United Kingdom; b) they relate to the offshore marine area; or c) they apply in relation to the provisions mention in a) and b).

5. Purpose and intended effect of the legislation

Invasive alien species challenge the survival of our rarest species, and damage some of our most sensitive ecosystems. The impacts of invasive alien species on our domestic and global biodiversity are severe and growing, and are estimated to cost the GB economy more than £1.7 billion per year. This cost is due to their effects across a wide range of industries and networks, from farming, to the building industry, and national waterways. They include threats to our natural ecosystems and crop pollinators from incursions of species such as the Asian Hornet, which is one of the 49 species listed under the regulation.

The Nature Recovery Plan sets out how the Welsh Government is committed to continue to improve biosecurity, including in respect to plant health and invasive non-native species. The introduction of invasive species, pests and diseases is leading to adverse impacts on native species and habitats and on productive capacity. The Welsh Government, in collaboration with DEFRA, is committed to improving biosecurity standards to minimise disease risk and spread of disease. The UK was instrumental in developing the EU Regulation, and the Order is required in order to meet Welsh Ministers' obligations to implement EU law and to ensure the EU Regulation is effectively enforced.

Part 1 of the Order sets out introductory provisions concerning commencement, extent, application and interpretation. The coming in to force date for this Order is 1 October 2019. This date has been chosen to allow for public consultation on management measures. This is a requirement under the EU Regulation, and as such is required before licences pertaining to management measure actions can be offered under the Order.

Part 2 contains criminal offences, which include breach of the main restrictions in the EU Regulation as well as ancillary offences, for example relating to false statements, attempts, and obstruction. It also contains provisions relating to offences by bodies corporate and partnerships. The Order reproduces a small number of existing offences contained in the Wildlife and Countryside Act 1981 that are dis-applied by Part 9 of the Order. The criminal offences are intended to back up the civil penalties regime contained in Part 6 of, and Schedule 3 to the Order. These take account of the views of stakeholders who responded to the England and Wales joint consultation. Criminal penalties will act as a major deterrent to potential offenders, and give regulators another option to enforce the most serious breaches.

Parts 3 and 4 contain defences and penalties respectively. Penalties are set to be consistent with similar penalties contained in existing legislation relating to wildlife crime and invasive non-native species. Welsh Government considers that the penalties set out in this Order should be set at a consistent level with existing penalties in the Wildlife and Countryside Act 1981 (see sections 14 and 14ZA). A summary conviction therefore carries maximum imprisonment of 6 months, a fine or both. Conviction on indictment carries a maximum imprisonment of 2 years, a fine (not exceeding the statutory maximum in Scotland or Northern Ireland) or both.

Part 5 contains enforcement powers available to enforcement officers and designated customs officials who will enforce the Order.

The Order provides powers for an enforcement officer to enter premises without a warrant, on strict justification, where there are grounds for suspicion that a specimen is being kept on those premises. Entry without a warrant in this way must take place at a reasonable time. Entry to private dwellings is only permitted with a warrant from a justice of the peace (sheriff or summary sheriff in Scotland or lay magistrate in Northern Ireland). Notice must be given before entry, whether under warrant or not, unless one of the listed exceptions applies.

The Order also ensures that the EU Regulation is effectively enforced at the UK border. It makes provisions for live specimens of invasive species to be seized at the UK border by Border Force officials. The Order contains provisions on cost recovery by our regulatory bodies, including the Police, for costs involved with dealing with animals and plants seized under the Order.

Part 6 provides for civil sanctions, the detailed provisions for which are set out in Schedule 3. These are broadly based on powers contained in Regulatory Enforcement and Sanctions Act 2008. Civil sanctions allow for a proportionate response to minor/accidental breaches, with the added deterrent of criminal sanctions available as a last resort for habitual/gross breaches of the prohibitions. The suite of sanctions available to the regulator consists of compliance, restoration and stop notices, fixed and variable monetary penalties, as well as the ability to accept third party undertaking and enforcement undertakings. There are provisions which allow regulators to recover their costs incurred when imposing civil sanctions, in order to facilitate effective action.

Part 7 and Part 8 contain permitting and licensing provisions respectively. Permits, which will be issued by the Animal and Plant Health Agency, and by the Centre for Environment and Aquaculture Science, provide for import, keeping and breeding (but not for sale or release) of specimens, for the purposes of research, ex-situ conservation or the production and use of products for the advancement of human health. Permits may also be granted in exceptional circumstances for reasons of compelling public interest, following the procedure set out in Article 9 of the EU Regulation. Specimens covered by a permit must be kept in contained holding. Licences, which will be issued by Natural England for England and the Natural Resources Body for Wales for Wales. The list of purposes for which such licences can be granted is limited, in order to meet the requirements of the EU Regulation.

Part 9 concerns related domestic legislation, making changes where existing provisions overlap with the controls set out in the EU Regulation. Of particular note are the amendments to the Wildlife and Countryside Act 1981 (contained in Part 1 of Schedule 4). These amendments remove the species of Union concern from the ambit of the provisions relating to invasive non-native species in sections 14 and 14ZA of the 1981 Act. This is to make the legislation more functional for enforcement purposes, bringing all the offences relating to invasive alien species into one instrument.

Schedule 9A of the 1981 Act, which relates to species control agreements and orders has been amended. This is to ensure these tools can be used for all species of Union concern including widely-spread invasive species.

Part 10 sets out the arrangements for review in England only. This relates to a requirement in the UK Government under their Better Regulation scheme. There is no equivalent programme in Wales.

6. Consultation

Details of consultation undertaken are included in the Regulatory Impact Assessment below.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Option 0

Do nothing. No statutory action taken to introduce the provisions on penalties applicable to infringements of EU Regulation 1143/2014 on the prevention and management of the introduction and spread of invasive alien species (“the EU Regulation”).

Option 1

Introduce civil penalties. Under this option, civil sanctions would be introduced to on penalties applicable to infringements of EU Regulation.

Option 2

Introduce civil and criminal penalties - Under this option, civil and criminal sanctions would be introduced on penalties applicable to infringements of EU Regulation. This is the preferred option.

7. Costs and benefits

Background

It is widely accepted that Invasive Alien Species (IAS) are one of the greatest threats to biodiversity across the globe. IAS, also known as Invasive Non-native Species (INNS), damage our environment, the economy, our health and the way we live. INNS have been estimated to cost the British economy more than £1.7 billion pounds annually, affecting farming, horticultural transport, construction, recreation, aquaculture and utilities.

Regulation (EU) No. 1143/2014 on the prevention and management of the introduction and spread of invasive alien species (“the EU Regulation”) came into force on 1 January 2015. The aim of the EU Regulation is to prevent, minimise or mitigate the adverse impact of the introduction and spread of invasive non-native species within the European Union.

A core provision of the EU Regulation is the creation of a list of species of Union concern which are those species whose adverse impact is such that they require coordinated action at an EU level. The list currently contains 49 species some of which are currently present in the UK. The Regulation applies strict restrictions on these species so they cannot be intentionally imported, kept, bred, transported, sold, used or exchanged, allowed to reproduce, grown or cultivated, or released into the environment. The Regulation requires Member States to introduce a system of penalties and sanctions to enforce these prohibitions.

The Invasive Non-native Species (Amendment ETC.) (EU Exit) Regulations 2019 ensure that legislation relating to the prevention and management of the introduction and spread of invasive non-native species remains operable after

we leave the EU and that the strict protections that are in place for these species are maintained.

This Order provides enforcement provisions, prescribes offences and penalties and introduces the permitting and licensing provisions needed to comply with the requirements of the EU Regulation.

Option 0

Do nothing. No statutory action taken to introduce the provisions on penalties applicable to infringements of EU Regulation 1143/2014 on the prevention and management of the introduction and spread of invasive alien species (“the EU Regulation”).

Benefits: No significant benefits identified.

Costs: No significant reduction in the costs of dealing with INNS, currently estimated to cost the British economy at least £1.7 billion pounds annually.

Conclusions: The EU requires all Member States to introduce a domestic enforcement and permitting regulation to support the EU Regulation. Failure to do so could lead to infraction proceedings and risk us not realising the potential benefits associated with the regulatory regime. This is not considered a valid option.

Option 1

Introduce civil penalties. Under this option, civil sanctions would be introduced applicable to infringements of EU Regulation.

Benefits: The presumption will be that civil sanctions should be used except for the most serious of breaches. Civil sanctions allow for a proportionate response to minor/accidental breaches. The suite of sanctions available to the Regulator consists of compliance, restoration and stop notices, fixed and variable monetary penalties, as well as the ability to accept third party undertaking and enforcement undertakings. There are provisions which allow regulators to recover their costs incurred when imposing civil sanctions, in order to facilitate effective action.

Costs: The existence of the civil sanctions regime within the Order will impact on stakeholders in three ways:

- Familiarisation (first year only)
- Applying for permits and licences (ongoing)
- Enforcement costs

Familiarisation

Stakeholders who trade in, or keep plants and animals (such as plant nurseries, zoos or animal sanctuaries) will be affected as they will need to familiarise themselves with the new penalty regime. Included in this group are a handful of organisations who would seek to trade in or import the restricted species, but would only be allowed to do so under limited terms of a permit. The Welsh

Government with other UK administrations have updated an existing FAQ document for UK stakeholders regarding the requirements of the EU Regulation. It now additionally reflects the requirements of the Order and will help stakeholders in the familiarisation process.

A number of assumptions are used to estimate the overall impact on businesses of familiarisation with the new regime.

Data from the Inter-Departmental Business Register (IDBR)² has been used to estimate the population of affected businesses in Wales. Table 1 gives the relevant types of business activity, together with the population of those businesses in Wales.

Table 1: Population of private sector businesses possibly affected

| Activity (SIC) | Number of businesses |
|---|-----------------------------|
| Retail sale of flowers, plants, seeds, fertilisers, pet animals and pet food in specialised stores (4776) | 290 |
| Freshwater and marine aquaculture (0322 and 0321) | 20 |
| Agents involved in the sale of agricultural raw materials, live animals, textile raw materials and semi-finished goods (4611) | 55 |
| Wholesale of grain, unmanufactured tobacco, seeds and animal feeds (4621) | 60 |
| Wholesale of flowers and plants (4622) | 20 |
| Wholesale of live animals (4623) | 25 |
| Plant propagation (0130) | 20 |
| Botanical and zoological gardens and nature reserve activities (9104) | 25 |
| Total | 490 |

There will be a requirement for staff in the affected business to take time from their regular work to familiarise themselves with the new regime.

It is assumed each enterprise will allocate 2 hours of staff time to familiarise themselves with the regulation. The population of businesses affected is the

²

<https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/datasets/ukbusinessactivitysizeandlocation>

total in Table 1. This is likely to be at the high end of the range of possible values for affected businesses as it is expected only a proportion of the businesses listed will have any need to familiarise themselves with the new regime.

To estimate the value of the time taken in completing the familiarisation task, median gross weekly earnings for full-time employees for all local authorities by place of work, in Wales³ have been used. This equals £501.44 per week and has been divided by 37 to provide an hourly rate; £13.55 per hour. It is standard practise to add on 30% to this value (reflecting employer's NI and pension costs) to calculate the total cost. This equates to an hourly rate of £17.62.

Using the hourly rate and multiplying it by 2 hours and total number of business gives an estimated costs of £18,000 across Wales. These costs are anticipated in the first year of the regime. After that familiarisation costs would be much reduced.

Permits and licences

The Order sets out provisions relating to permits and licences, which allow derogations from the restrictions in the EU Regulation, and provisions for enforcing the conditions of permits and licences. Permits under the regime are already issued by the Animal and Plant Health Agency, and (in the case of fish and shellfish) by the Centre for Environment and Aquaculture Science, on behalf of the Secretary of State and the Ministers of the Devolved Administrations. Costs relating to permits are therefore not considered further in this document.

Licences, which will be issued by Natural Resources Wales (NRW), will be available for certain activities which would otherwise be prohibited by the EU Regulation. These purposes include; implementing an eradication measure for a newly arrived species; implementing a management measure for a widely spread species; or lower level purposes such as keeping an animal until the end of its natural life, for example where a zoo acquires an animal which appears on the EU IAS list after the species was listed

Licensing officers within Natural Resources Wales (NRW) will be involved in assessing and determining a licence application for specified activities relating to listed species. The first two categories of licence highlighted above ("higher level applications") are likely to require significantly more time input from NRW licensing and specialist staff than a licence issued under the third category above ("lower level application") which will mainly be administrative and straight forward. It is assumed NRW, as the principle environmental advisor and regulator in Wales, will be actively involved with the work to implement an eradication measure or management measure of the type for which a licence would be required as well as acting as the relevant licensing authority. Table 1 shows a breakdown of the estimated costs (staff time and wages) for NRW, to complete each task involved with reviewing an application to implement an

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<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2018>

eradication or management measure. These calculations are based on best estimates Welsh Government discussed with Natural Resources Wales.

Table 2 - application to implement an eradication or management measure (higher level application)

| Activity | Time taken to complete (days: assume 7.24 working hours per day) | Grade of employee and wage (£ per hour – rounded down) | Total cost (£) |
|--|---|---|--|
| Processing application in Permitting team | 0.5 | B3 (£19) | 68 (3.62 x 19) |
| Dealing with initial enquiries/proposal/discussions | 1 | C2 (£24) | 173 (7.24 x 24) |
| Site visits or meetings | 1 | C2 (£24) | 173 (7.24 x 24) |
| Background research / consultations | 1 | C2 (£24) | 173 (7.24 x 24) |
| Placing application notice (for comment) on website and collating/analysing comments | 1 | C2 (£24) | 173 (7.24 x 24) |
| Detailed proposal/application assessment | 1 | C2 (£24) | 173 (7.24 x 24) |
| Authorising application | 0.5 | D1 (£32) | 115 (3.62 X 32) |
| Drafting licence / rejection / notifying decision | 0.5 | B3 (£19) | 68 (3.62 x 19) |
| Total | 6.5 | | £1,116 (round up to nearest pound). |

Table 3 - application for a basic application (lower level application)

| Activity | Time taken to complete (days: assume 7.24 working hours per day) | Grade of employee and wage (£ per hour – rounded down) | Total cost (£) |
|--|---|---|--|
| Processing application in Permitting team | 0.25 | B3 (£19) | 34 (1.81 x 19) |
| Dealing with initial enquiries /proposal/discussions | 0.25 | C2 (£24) | 43 (1.81 x 24) |
| Application assessment | 0.5 | C2 (£24) | 86 (3.62 x 24) |
| Authorising application | 0.25 | D1 (£32) | 57 (1.81 X 32) |
| Drafting licence / rejection / notifying decision | 0.25 | B3 (£19) | 34 (1.81 x 19) |
| Total | 1.5 | | £254 (round up to nearest pound). |

Estimated costs for a higher level application are £1,116 and for a lower level application £254. On the best guess scenario it is assumed there might be between 1 - 3 applications per year for a higher level application and 10-15 applications per year for lower level applications. This amounts to between £3656 - £7,158 pa. It is standard practise to add on 30% to this value (reflecting

employer's NI and pension costs) to calculate the total cost to the licensing authority in delivering a service, so that actual total will be approximately between **£4,750 - £9,300 per annum**.

The above figures do not take account of any monitoring of licence conditions or enforcement action where licence conditions are not complied with. It would be difficult to make assumptions on unknown future individual events such as a breach of any number of possible licence conditions. However, the process involved in pre-licence discussions and planning should, to a great extent, reduce the likelihood of potential adverse impacts, and where there are any there should be procedures in place to mitigate these included in the detailed proposal submitted with an application. Investigation of a complicated case however could include costs for senior office time, confiscation and keeping of a specimen and disposal of a specimen.

Costs of any required mitigation and enforcement should be far less under a licences regime than a non-licensed regime.

There is an additional anticipated one-off cost to NRW for setting up the licensing system. This might include costs around online guidance, drafting new application forms and licence templates and making these available on the NRW website. NRW already undertake wildlife licensing functions on behalf of Welsh Ministers and as such are familiar with the requirements of a licensing process and have a templates which could be modified and a licensing area on their website. The costs of set up are therefore estimated to be minimal and might include 2 weeks of a B£ officer and 4 days of a C2 officer. This would amount to a total set up costs of approximately **£2,800**. Calculated by £19 x 74 hours, £24 x 30 hours x130%.

Estimated costs to a licence applicant

An applicant will need to provide supporting information with any application and potentially, for higher level applications, carry out public engagement and / or consultation exercises. An application would likely take an organisation several weeks, to produce. Assuming the application process is condensed into a single block of work, we estimate the process would take between 20 - 30 days of staff time. An applicant may wish to seek additional professional guidance / advice in order to complete the application. Applicants would be expected to comply with existing regulations and any available recognised INNS guidance.

Table 4 - application to implement an eradication or management measure (higher level application)

| Activity | Time taken to complete (days: assume 7.24 working hours per | Time taken to complete (days: assume 7.24 working hours | Wage of employee (£ per hour – rounded down) | Total cost (£) (20 days) | Total cost (£) (30 days) |
|----------|---|---|--|--------------------------|--------------------------|
| | | | | | |

| | day) | per day) | | | |
|--|-------------|-----------------|-----|--|--|
| Administration associated with coordination of licence application | 10 | 13 | £19 | 1,368 (72 x 19) | 1,788 (94 x 19) |
| Background research / consultations with stakeholders | 5 | 10 | £24 | 864 (36 x 24) | 1,737 (72 x 24) |
| Detailed proposal/licence application and internal sign-off | 5 | 7 | £32 | 1,152 (36 x 32) | 1,621 (50 x 32) |
| Total | 20 | 30 | | £3,384 (round up to nearest pound). | £5,148 (round up to nearest pound). |

It is standard practise to add on 30% to the calculated value (reflecting employer's NI and pension costs) to calculate the total cost to the organisation in submitting a licence application. For 20 days of work, the total cost will be approximately **£4,400**. For 30 days of work, the total cost will be approximately **£6,700**.

It is anticipated to prepare and submit a lower level application would take no more than 1 day of staff time.

There is currently no fee charged for wildlife licence applications. However, this is a matter that will be considered in the future. The Welsh Government requires NRW to recover the cost for their regulatory work from those who they regulate as set out in Welsh Government's Managing Welsh Public Money policy. In England, Natural England already have the ability to recover costs in certain circumstances for example under the powers in the new Wildlife Licence Charges (England) Order 2018. Charging for INNS licences would not be introduced before a public consultation was undertaken and responses were fully considered.

NRW view cost recovery as important because it protects the grant in aid money they receive for use delivering other outcomes that cannot be funded from charges. Charging also enables NRW to provide a professional permitting service for our customers and help ensure NRW have resources to gather evidence about risk and adopt a preventative approach.

We estimate that there will be between 10 and 30 applications made to NRW for higher level licence applications, over the next 10 years therefore amounting to between £44,000 and £201,000 between the organisations applying. The majority of these organisations are likely to be government agencies, utility companies or conservation organisations using grant monies.

Enforcement costs

The enforcement regime includes issuing of warning letters as the first course of action in most circumstances to seek to bring an individual or business into compliance with the Order. Once a civil sanction is served, this will provide an opportunity to seek to resolve issues between the parties without the need for further action. It is estimated 0 – 3 civil penalties issued in Wales per annum.

The civil sanctions regime within the Order is broadly based on powers contained in Regulatory Enforcement and Sanctions Act 2008. However, the regime deviates from the RES model with regard to:

- Fixed Monetary Penalties - penalty levels set at £1,000 for individuals and £3,000 for a body corporate;
- Standard of proof - a balance of probability rather than a criminal standard approach has been adopted.

The Order allows for the use of Fixed Monetary Penalties, Variable Monetary Penalties and Restoration Notices to be used for all businesses, irrespective of size, and not just businesses with over 250 employees.

Conclusions: The Welsh Government believes civil sanctions are a useful tool to enforce against breaches of wildlife law. However, we want to highlight the serious risk that INNS pose to the environment and economy and believe it is necessary to create criminal offences to cover the prohibitions contained in the EU Regulation. There is case law setting out the requirements in EU law for equivalence between EU and national penalties. Specifically, penalties for breach of EU law need to be equivalent, both procedurally and substantively, to those applicable to infringements of national law of a similar nature and importance. The Wildlife and Countryside Act 1981 contains provisions of a similar nature and importance with regard to the sale and release of protected and non-native species (NNS), namely those found in (species listed in Schedule 9, and offences contained in s.14 and s.14ZA of the Wildlife and Countryside Act 1981 as amended). It would be difficult to argue that the prohibitions set out in the Regulation were significantly less serious than the sale and release of NNS, and in fact the release of INNS is significantly more serious.

Option 2

Introduce civil and criminal penalties - Under this option, civil and criminal sanctions would be introduced for penalties applicable to infringements of the EU Regulation.

Benefits: The EU requires all Member States to introduce a domestic enforcement and permitting regulation to support the EU Regulation. This option is likely to be the most effective in terms of tackling the threats caused by INNS and is the most likely option to reduce the costs of dealing with INNS, currently estimated to cost the British economy at least £1.7 billion pounds annually.

Costs: Costs under Option 1 are similar to those outlined under Option 2 other than higher fines relating to criminal penalties.

The fines and custodial penalties are set out below. They are based on equivalent penalties in the Wildlife and Countryside Act:

A person guilty of an offence under the proposed legislation would be liable:

- a) on summary conviction to imprisonment for a term not exceeding six months or to a fine, or to both:
- (b) on conviction on indictment, to a imprisonment for a term not exceeding two years or to a fine, or to both.

Whilst low levels (between 0 – 3 per annum) of criminal prosecutions are anticipated Welsh Government's view is that criminal penalties will act as a suitable deterrent.

Conclusions: Welsh Government want to highlight the serious risk that INNS pose to the environment and economy and believe it is necessary to create criminal offences to cover the prohibitions contained in the EU Regulation. These have been put in place to act as a backstop to the civil penalties, and as a final step in preventing extreme/persistent breaches of the prohibitions. They would also place penalties for breach of the Regulation at an equivalent level to existing domestic legislation on non-native species (sections 14 and 14ZA of the Wildlife and Countryside Act 1981, relating to release and sale of non-native species).

This approach is in line with legislation being put in place by Northern Ireland and the Scottish Government. Although in the case of Scotland, they are proposing not to offer the option of civil penalties.

Having a joined up approach across the whole of the UK is essential to maintaining a universal strategy for INNS management and control. Alongside our obligation to implement the Regulation, the UK as a whole has committed to numerous international agreements, such as the Convention on Biological Diversity.

8. Consultation

Between 9 January and 3 April 2018, Defra and Welsh Government undertook a joint public consultation via Citizen Space. The consultation sought views on proposed penalties in respect of restrictions outlined at Article 7 of the EU Regulation which prohibit the intentional: (a) importing; (b) keeping; (c) breeding; (d) transporting; (e) selling; (f) using or exchanging; (g) permitting to reproduce, grow or cultivate or (h) releasing into the environment of any live specimens of the species on the Union list.

It also sought views on penalties in respect of permits which allow derogations from the above restrictions. Proposed penalties related to: making a false statement to obtain a permit; falsifying or altering a permit; or using a specimen otherwise than in accordance with a permit; knowingly contravening a condition or requirement of a permit; intentionally obstructing an authorised enforcement officer; impersonating an enforcement officer, with intent to deceive; attempting to commit any of the offences above.

128 responses were received from a wide range of interests. 42 of those were from individuals clearly representing organisations and 86 from individuals presenting their own views.

The proposed civil penalties regime was well received with two thirds of those consulted content with the proposal. Half of those who were not content believed penalties should be higher or stronger (criminal) sanctions are required.

Regarding the level at which penalties should be set, 66% of respondents supported new penalties being in line with, or higher than, existing penalties as set out in the Wildlife and Countryside Act 1981.

As the majority of the prohibitions contained in the Order cover Wales and England, Welsh Government has worked closely with Defra colleagues to prepare the Order. Scotland and Northern Ireland are putting in place their own equivalent regulations to enforce the EU Regulation. The Devolved Administrations and Defra have liaised closely through regular meetings. Policy colleagues have not raised any particular concerns.

A summary of the consultation responses is available at:
<https://www.gov.uk/government/consultations/invasive-non-native-species-regulations-enforcement>

9. Competition Assessment

See Appendix A

10. Post implementation review

The review clause at section 43 relates to the Secretary of State only. The UK Government requires review provisions in all new legislation which imposes a regulatory burden. There is currently no similar requirement in Wales.

APPENDIX A

The Competition Assessment

| 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? | No |
| Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share? | No |
| Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share? | No |
| Q4: Would the costs of the regulation affect some firms substantially more than others? | No |
| Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation? | No |
| Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q8: Is the sector characterised by rapid technological change? | No |
| Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products? | Yes – it may restrict the ability of organisations to purchase species which are listed under the EU IAS Regulation. Alternatives are available. |