

## **ENVIRONMENT - NOTIFICATION TO THE SCOTTISH PARLIAMENT**

### **The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018**

#### **1. Name of the instrument and summary of proposal**

The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018 transfers a series of legislative functions that are currently conferred by EU legislation upon the European Commission to various UK administrations. This will ensure those functions can continue to be exercised at national level after the UK leaves the EU.

This instrument brings together a number of provisions relating to various policy areas, which need to be considered under the affirmative procedure at Westminster. The proposals in this notification should be read alongside the notifications already sent to the Scottish Parliament which relate to:

- The Persistent Organic Pollutants (EU EXIT) Regulations 2018
- The Control of Mercury (EU EXIT) Regulations 2018
- The Air Quality (Amendment etc.) (EU Exit) (No. 1) Regulations 2018.
- The Air Quality (Amendments) (EU Exit) (No. 2) Regulations 2018.
- The Nagoya Protocol (Compliance) (EU Exit) Regulations 2018
- The Leghold Traps (Amendment) (EU Exit) Regulations 2018

It should also be considered alongside the correspondence sent in relation to The Trade in Endangered Species of Wild Flora and Fauna (Amendment) (EU Exit) Regulations 2018.

#### **2. Explanation of law that the proposals amend and summary of proposals**

The proposed regulations deal with retained, directly applicable EU legislation relating to persistent organic pollutants; timber; the European Pollutant Release and Transfer Register; transfrontier shipments of waste; the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits; mercury; the Convention on the International Trade in Endangered Species; and leghold traps. The proposed regulations also transfer one legislative function from a Directive, the Industrial Emissions Directive.

#### *Reserved Areas*

In relation to transfrontier shipment of waste, the proposed regulations in EU Regulation 1013/06 transfer functions from the Commission to the Secretary of State. The transfrontier shipment of waste is wholly reserved as it is concerned with the regulation of the import and export of goods and the regulation of international trade, and it is therefore appropriate that these functions are transferred to the Secretary of State.

The EU Forest Law Enforcement, Governance and Trade regime (FLEGT) is an internationally focused initiative aimed at tackling illegal logging and associated trade. It involves a series of measures including Regulation (EC) No 2173/2005, which establishes a licensing regime and supports bilateral trade agreements with timber-producing countries (primarily tropical timber producers) like Indonesia, known as

Voluntary Partnership Agreements (VPAs). The regime also encompasses, among other measures, Regulation (EU) No 995/2010, which aims to ensure that no illegal timber or timber products can be traded in the EU. These measures are implemented in the UK by the Secretary of State through the Forest Law Enforcement, Governance and Trade Regulations 2012 and the Timber and Timber Products (Placing on the Market) Regulations 2013.

### *Devolved Areas*

A summary of the law with identified devolved elements or potential devolved impacts in each area, and the proposed corrections, is provided below.

#### *a. Persistent Organic Pollutants (POPs)*

Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants (the POPs Regulation) aims to phase out as soon as possible, or restrict the production, placing on the market and use of POPs; to minimise releases of POPs; and to establish provisions regarding POPs waste. This is the mechanism by which the EU and its Member states have implemented the provisions of the Stockholm Convention on Persistent Organic Pollutants.

The Commission has the power, for the purpose of adapting to scientific and technical progress, to amend POPs waste concentration limits in the Annexes to the POPs Regulation and to amend Annexes to the POPs Regulation to ban/restrict/modify the use of POPs in accordance with international agreements.

The functions which relate to amending waste concentration limits and to amending the Annexes in the POPs Regulation to ban/restrict/modify the use of POPs are transferred to Scottish Ministers. The effect is that retained EU law can be amended to keep pace with international standards as agreed at the Stockholm convention.

#### *b. Mercury*

Regulation EU 2017/852 of the European Parliament and of the Council on mercury (the Mercury Regulation) governs the use, storage, trade, manufacture and waste management of Mercury, in various forms, in order to ensure a high level of protection of human health and the environment from anthropogenic emissions and releases of Mercury and its compounds. The Mercury Regulation also enables the EU and its Member States, including the UK, to ratify the Minamata Convention on Mercury.

The Commission has the power to specify forms to be used for export and import restrictions; set out technical requirements for environmentally-sound interim storage of mercury, mercury compounds and mixtures of mercury; authorise new mercury-added products or manufacturing processes; extend the period allowed for temporary storage of mercury waste; and amend Annexes I, II, III and IV to the Mercury Regulation in line with international agreements.

The power in the Mercury Regulation to specify forms to be used for export and import restrictions is transferred to the Secretary of State on the basis that it is reserved. Due to the mix of reserved and devolved responsibilities, the function to amend Annexes 1 and 2 of the Mercury Regulation is transferred to the Secretary of State but can only be exercised with the consent of the Devolved Administrations. The remaining

functions (to set out technical requirements for environmentally-sound interim storage of mercury, mercury compounds and mixtures of mercury; authorise new mercury-added products or manufacturing processes; extend the period allowed for temporary storage of mercury waste; and amend Annexes III and IV to the EU Mercury Regulation in line with international agreements) are transferred to Scottish Ministers. In this way, retained EU law can be amended to keep pace with international standards as agreed at the Minamata convention.

*c. European Pollutant Release and Transfer Register*

Regulation (EC) No 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (the EPRT Regulation) establishes an integrated pollutant release and transfer register in the form of a publicly accessible electronic database and lays down rules for its functioning, in order to implement a UNECE Protocol, and to facilitate public participation in environmental decision-making.

The Commission has the power to: take measures to initiate reporting on releases of relevant pollutants from diffuse sources, where no data exists; adopt guidelines for the monitoring and reporting of emissions; submit a proposal for a questionnaire for reporting by Member States; and amend technical Annexes to the EPRT Regulation in light of scientific and technical progress or international agreements.

The functions in the EPRT Regulation are transferred to the Secretary of State. However, these functions can only be exercised with the consent of the Devolved Administrations. The consent provision maintains the current system whereby the UK reports information that is provided by SEPA. This avoids the need for an extra administrative exercise by the Scottish Government or SEPA.

SEPA is also responsible for the compilation of the Scottish Pollutant Release Inventory, which Scottish Ministers consider is a more comprehensive dataset than is provided in the EPRTR. As such, the EPRTR information is a subset of that which is already separately available in Scotland and this will continue.

*d. Industrial Emissions Directive*

The instrument transfers one legislative function from Directive 2010/75/EU on industrial emissions. This relates to setting Best Available Techniques for the sectors covered by the EU integrated pollution prevention and control regime, which form the basis for setting permit conditions for, and limits on emissions from installations.

The legislative function establishes pollution prevention and control requirements for activities listed in Annex I to the Industrial Emissions Directive. Article 13 of Chapter II of the Directive gives the Commission the power to determine Best Available Techniques (BAT) for these activities, and BAT is then required to be used as the basis for the conditions subject to which these activities are permitted.

The BAT determination function for Scotland is transferred to the Scottish Ministers and, to the extent that the devolved administrations consent, to the Secretary of State for the whole of the UK. The consent provision allows for a simplified process whereby one single UK wide BAT can be produced where there is agreement to do so. However, should Scottish Ministers reach a different decision on what should be used

as BAT in Scotland, then they are able to set separate Scottish-only BAT which would be the basis of the permit conditions enforced by SEPA.

*e. Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits*

Regulation (EU) No 511/2014 establishes rules governing compliance with access and benefit-sharing for genetic resources and traditional knowledge associated with genetic resources, in accordance with the provisions of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (the Nagoya Regulation). The Commission has the power and a duty to establish a register of collections; establish procedures for monitoring user compliance; and establish procedures for recognising best practice.

The functions in the Nagoya Regulation are transferred to the Secretary of State. The Secretary of State is the agreed single competent authority for Nagoya Protocol compliance within the UK and transfer of these functions ensure effective continued operation of the law. In practical terms, the number of transactions falling within the scope of the Protocol is very small (one transaction only in the UK thus far). The legislation is enforced in the UK by the Office for Product Safety and Standards (Safety & Standards).

Should the Protocol become more significant for trade or research in Scotland, Defra and the Scottish Ministers recognise that increased involvement of the Scottish Ministers and the Scottish Parliament in this area of regulation could be called for.

*f. Convention in International Trade in Endangered Species (CITES)*

Council Regulation (EC) No 338/1997 on the protection of species of wild fauna and flora by regulating trade therein, aims to protect species of wild fauna and flora and to guarantee their conservation by regulating their trade (the CITES Regulation). The following functions are transferred from the Commission to the Secretary of State -

- establish general restrictions, or restrictions relating to certain countries of origin, on the introduction into the EU of species listed in Annex A;
- grant derogations from completion of the checks and presentations of import documents at the border customs office at the point of introduction;
- recommend restrictions on exports of certain species;
- set criteria for authorising imports and exports through non-designated customs offices;
- establish derogations from certain provisions of the Regulation;
- establish restrictions on the holding or movement of live specimens; and
- establish time limits for the issuance of permits and certificates.

As the CITES regime is currently governed and implemented on a UK-wide basis, the proposed corrections do not alter policy or the way CITES legislation currently operates in the UK, outside of limiting the scope of the territorial application of the legislation to the United Kingdom.

*g. Leghold Traps*

Council Regulation (EEC) No 3254/91 prohibits the use of leghold traps in the Community, and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards. The Commission has the power to grant derogations from the ban on the import of pelts and other products listed in Annexes I and II to the Regulation; and to determine the appropriate forms for certification of imported goods incorporating pelts of listed species. These functions in Council Regulation (EEC) No 3254/91 are transferred to the Secretary of State.

EU Commission Regulation (EC) No 35/97 lays down provisions on the certification of pelts and goods covered by Council Regulation (EEC) No 3254/91 on leghold traps. Article 2 provides that the form set out in the Annex to the Regulation must be used. The proposed Regulations also amend Article 2 in EU Commission Regulation (EC) No 35/97 to give the Secretary of State the power to prescribe a different form from that set out in the Annex from time to time.

Scottish Ministers have agreed for the above functions to be transferred to the Secretary of State on the basis that the control of importation of pelts is essentially implemented at UK level.

### **3. Why are these changes necessary?**

These changes are necessary to allow the continuation of the effective functioning of this legislation. In each policy area, legislative functions are transferred to the authority who will exercise that function after EU exit. This is to ensure that the regimes continue to function smoothly, without the need for amendments to the legislation by Parliament every time a change in the technical details is required.

### **4. Scottish Government categorisation of significance of proposals**

Category B. These Regulations are wholly concerned with the transfer of functions which previously rested with EU entities to the relevant authority within the UK.

### **5. Impact on devolved areas**

The policy areas impacted by these Regulations engage a complex mixture of reserved and devolved competence. Our primary objective in working with UKG on these has amendments has been to ensure that, Scottish Ministers can continue to effectively manage these policy areas and that the devolution settlement is respected.

In particular:

- Chemicals policy engages a complex mixture of reserved and devolved competence. Environmental protection, waste management and public health are devolved while product standards, trade and Health and Safety at Work are reserved. Reserved and devolved interests are therefore intertwined in the above provisions, although the Scottish Government takes the view that POPs and Mercury are predominantly concerned with areas of devolved competence.
- As regards leghold traps, the functions being transferred to the Secretary of State relate to the importation of pelts. The Scottish Ministers are content with

the proposal to transfer the functions to the Secretary of State. However, it should be noted that the extent of the import/export reservation in section C5 of schedule 5 of the Scotland Act 1998 (including the exceptions to it, which include an animal health and welfare element) has not been precisely ascertained in practice, and is the matter of ongoing discussion between the Scottish Government and the UK Government.

There are a number of areas where the approach to date has been based on a consistent and coherent UK-wide approach and where we see a continuing value in such an approach following EU Exit. In these areas we have agreed a mechanism based on the Secretary of State being able to act for the UK as a whole, but only with the consent of Scottish Ministers.

In relation to the proposed amendments to CITES, as previously advised to the Committee, the import and export of endangered species is reserved by the Scotland Act 1998 (Schedule 5, Part II, section C5). The Scottish Ministers consider that there are devolved elements within the CITES regime, which the proposed Regulations may touch upon.

In the view of Scottish Ministers, the domestic implementation of CITES is a reserved matter only so far as it concerns the prohibition and regulation of the import and export of endangered species. The prohibition and regulation of transactions which do not involve export or import measures are not, in the Scottish Ministers' view, reserved matters.

The UK Government does not agree with that analysis and considers the whole of CITES to be a reserved matter. However, Scottish Ministers are content with the proposed Regulations on the basis that they properly reflect how responsibility for CITES presently operates in practice as regards Scotland.

## **6. Stakeholder engagement/consultation**

We have written to our stakeholders setting out the general approach we are taking to correcting deficiencies in environmental legislation and we are in regular contact with all our stakeholders regarding the move towards leaving the EU. However, these measures are aimed solely at preserving the functioning of the law as it stands at present and, therefore, we have not undertaken any engagement, or any formal consultation, about these specific amendments.

## **7. Any other impact assessments?**

On the basis that these amendments do not result in any policy changes, no impact assessment has been prepared.

## **8. Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation**

The provisions were made at the UK level to reflect the mix of reserved and devolved responsibilities and the UK wide approach taken in the subject matter dealt with in the Regulations. Scottish Ministers consider that consenting to the Regulations is the most effective and transparent way to make changes to address deficiencies at the same level. Officials have worked with UKG to ensure the drafting delivers for our

interests and respects devolved competence in Scotland, noting that there are some areas where the extent of reserved and devolved competence remains a matter of debate.

**9. Do the proposed changes adhere to the environment and animal principles?**

Yes. The guiding principles on the environment as set out in Articles 13 and 191(2) in Titles II and XX respectively of the Treaty on the Functioning of the European Union are relevant to these proposals. The legislation modified by the Regulations is already in line with these principles, and as no policy changes are being introduced, it is considered that these amendments are in adherence with these principles.

**10. Are there governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?**

Later this year, Scottish Ministers will consult on the governance gaps that will be created once the UK leaves the EU, with a view to bringing proposals back to the Scottish Parliament on environmental governance arrangements once the future relationship is clear.

We have been engaged in framework discussions in many of the policy areas covered by this SI with all the administrations of the UK and the relevant regulators. These framework discussions are progressing. The Scottish Government's position is that these arrangements should be based on staying closely aligned with the existing EU regimes and maintaining existing standards of protection for human health and the environment.

Any particular governance requirements needed in the context of the specific policy areas in this submission have been set out in the notifications for policy specific SIs already sent to the Scottish Parliament and as detailed in section one.

**11. Intended UK laying date**

8 January 2019

**12. Does the Scottish Parliament have 28 days to scrutinise Scottish Ministers' proposal to consent?**

Yes

**13. Information about any time dependency associated with the proposal**

Industry across the UK are likely to be considering significant investment and improvement decisions on a rolling basis in line with the EU BAT process. These decisions are centred around the extent to which they need to comply with Best Available Techniques determined at the European level. It is therefore vital that decisions are reached and processes put in place in advance of exit day to ensure that industry can continue to forecast and invest and that we have confidence existing environmental standards are met.

**14. Any significant financial implications**

There are no financial implications associated with the proposals.

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