

SL(5)374 – The Plant Health (Forestry) (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019

Background and Purpose

Council Directive 2000/29/EC (“the Plant Health Directive”) establishes the EU plant health regime. The Plant Health Directive contains measures to be taken in order to prevent the introduction into, and spread within, the EU of serious pests and diseases of plants and plant produce.

These Regulations correct deficiencies in the following domestic legislation which implements EU Directive 2000/29/EC on measures to protect (forestry) plant health arising in consequence of the UK’s withdrawal from the EU in a ‘no deal’ scenario:

- Plant Health (Forestry) Order 2005
- Forest Reproductive Material (Great Britain) Regulations 2002
- Plant Health (Fees) (Forestry) (Wales) Regulations 2019

Procedure

Affirmative.

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.

- The preamble to these Regulations does not correctly cite the enabling powers. The first power cited is Section 8(1) of the European Union (Withdrawal) Act 2018 which is a Secretary of State power, the citation is therefore incorrect. The second power cited is Schedule 2 to the European Union (Withdrawal) Act 2018, however for the sake of clarity this citation should be more precise in referencing the specific power within that Schedule.

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

- In the words preceding Regulation 2, “Material” has been left out of the reference to the Forest Reproductive *Material* (Great Britain) Regulations 2002 [*emphasis added*].

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

- Regulation 4(a) of these Regulations revokes the definitions of “solid fuel wood” and “OPM protected zone” from Article 2(1) of the Plant Health (Forestry) Order 2005. However, these terms only apply in relation to England and Scotland (they were inserted into the 2005 Order by the Plant Health (Forestry) (Amendment) (England and Scotland) Order 2016 and the Plant Health (Forestry) (Amendment) (England and Scotland) Order 2018 respectively).



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

- Regulation 4(e) of these Regulations revokes Article 2(5) of the Plant Health (Forestry) Order 2005. However, paragraph (5) only applies in relation to England and Scotland (it was inserted into the 2005 Order by the Plant Health (Forestry) (Amendment) (England and Scotland) Order 2016).

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

- In Regulation 18(c) there should be an “or” included as part of the words being inserted. The wording of the Regulation should read “in paragraph (B1)(a) *or*” [*emphasis added*].

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

- Regulation 30 contains two references to Article 6(1) of the Plant Health (Forestry) Order 2005. However, Article 6(1) is revoked by Regulation 10(c) of these Regulations. It is therefore not clear which provision is being referred to.

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

- Regulation 30 contains two references to Article 12(1) of the Plant Health (Forestry) Order 2005. However, Article 12(1) is revoked by Regulation 18(b) of these Regulations. It is therefore not clear which provision is being referred to.

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

- Regulation 50(b) contains a typographical error. The second line should start with “place” rather than “pace”.

Merits Scrutiny

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

Implications arising from exiting the European Union

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

Government Response

We acknowledge that the reference to section 8(1) of the European Union (Withdrawal) Act 2018 (‘the Act’) is an error. We do not believe that this alters the effect of the instrument, which remains *intra vires* even in light of the decision in *Vibixa Ltd v Komori UK Ltd* [2006] EWCA Civ. 536 (see, also, page 132 of Craies 10th ed.) by dint of having referred, correctly if not with complete clarity, to the powers conferred by Schedule 2 to the Act (see below). Nonetheless, since this is an obvious error (section 8(1) not being a power that is available to the Welsh Ministers) with a clear remedy (removing the reference to section 8(1)), and since it does not occur in the text of the instrument itself, we propose to rectify this by means of a correction slip.



We acknowledge, too, that the reference to powers in Schedule 2 to the Act ought properly to specify the power in paragraph 1(1). Again, we do not believe this alters the effect of the instrument – it is, again, readily apparent which power in Schedule 2 is being relied on and, indeed, the scrutiny provision identified in the preamble (paragraph 1(8) of Schedule 7 to the Act) corresponds only to that power. This seems to be the tenor of your report, which says that the reference should be more precise ‘for the sake of clarity’, rather than because it gives rise to any question of vires. Likewise, then, since this is an obvious error with a clear remedy, not occurring in the text of the instrument itself, we propose to rectify this by means of a correction slip.

The correction slip for each of these errors, then, will replace the words ‘section 8(1) of, and Schedule 2 to,’ with the words ‘paragraph 1(1) of Schedule 2 to’.

The second reporting point relates to the omission of the word “Material” from the heading of regulation 2. This is also a clear error, for which there is an unambiguous remedy. Regulation 2 immediately cites, correctly, the Forest Reproductive Material (Great Britain) Regulations 2002 in full, and it is readily apparent that this should also be included in the heading. We therefore propose to address this by way of a correction slip, adding the missing word ‘Material’ to the title of the regulations referred to in the heading to ensure that the heading published within online resources is correct, particularly given the reliance on the headings of individual regulations by users of the regulations who are viewing them online.

As to the third reporting point, the definition of “OPM protected zone” was inserted by The Plant Health (Forestry) (Amendment) (Wales) Order 2019 (in force from 28th March 2019) article 3(a)(v) and so is properly revoked. In respect of the reference to “solid fuel wood” whilst it revokes a definition that never existed in the original order we accept that its inclusion may cause a person with a specific interest in “solid fuel wood” to be caused confusion and this will be removed by way of wash up SI.

Likewise, in respect of the fourth reporting point, article 2(5) was also inserted by The Plant Health (Forestry) (Amendment) (Wales) Order 2019 article 3(c) and so is properly revoked by these regulations.

By way of explanation the unusual method of amendment and then immediate revocation is as a result of DEFRA’s decision to restructure the relevant legislation through the medium of its EU Exit SI causing the urgent necessity for Wales to bring our domestic forestry pests regime in to line with the English and Scottish regime in the places where it had fallen behind.

Reporting point five will be rectified by way of a wash up SI. It is accepted that this is necessary because the context of the provision allows for the missing item to be ‘and’ or a comma which would change the intended meaning.

Reporting points six and seven can be dealt with together. The reference to 6(1) should read simply 6. The reference to 12(1) should read 12. It is proposed to amend these by way of wash up SI.

Reporting point eight is accepted but given that the context of the provision makes it clear the word should be “place” we would not ordinarily amend this. However, given there will be the need for a wash up SI in any event this will also be amended.

Committee Consideration

The Committee considered the instrument along with the Government response at its meeting on 18 March 2019 and reports to the Assembly in line with the technical reporting points above

