EXPLANATORY MEMORANDUM TO

THE PLANT HEALTH (AMENDMENT) (ENGLAND) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 The Plant Health (Amendment) (England) (EU Exit) Regulations 2019 correct deficiencies in domestic legislation which implement EU Directives protecting plant health arising as a consequence of the United Kingdom's exit from the EU in a 'no deal' scenario. It also transposes provisions in certain Council Directives in relation to the planting of certain *solanaceous* species and the control of relevant plant pests.

Explanations

What did any relevant EU law do before exit day?

2.2 Council Directive 2000/29/EC on protective measures against the introduction into the EU of organisms harmful to plants or plant products and against their spread within the EU[1] ("the Plant Health Directive") establishes the EU plant health regime. Whilst protecting against plant health risks, the Plant Health Directive also provides for the trade and movement of plant material within and between EU Member States, thereby creating an internal EU market for this material.

2.3 The Plant Health Directive is implemented in England by the Plant Health (England) Order 2015 (S.I. 2015/610) and, in relation to forestry matters, by the Plant Health (Forestry) Order 2005 (S.I. 2005/2517) which extends to Great Britain. The Orders set out obligations for the control and management of plant health risks from the import of plant material from third countries and the movement of such material within the EU single market, in order to protect biosecurity and the value of plant material to the economy and society. Similar but separate legislation operates in Scotland, Wales and Northern Ireland.

Why is it being changed?

2.4 Under the EU single market, plant material may move freely between and within member states and between member states and Switzerland. Material which hosts the most serious pests and diseases requires an EU plant passport to facilitate its movement. The Plant Health (Amendment) (England) (EU Exit) Regulations 2019 introduce changes in relation to the import of plant health material from EU member states and Switzerland and the movement of such material within England, to ensure that the current legislation continues to operate effectively after the United Kingdom has left the EU in the event of a 'no deal' scenario.

[1] This Directive can be found at http://europa.eu.int/eur-lex/en/search/index.html.

2.5 The Plant Health (Amendment) (England) (EU Exit) Regulations 2019 also make consequential minor amendments to the existing fees set out in the Plant Health etc. (Fees) (England) Regulations 2018 (S.I. 2018/289) and the Plant Health (Fees) (Forestry) (England and Scotland) Regulations 2015 (S.I. 2015/350) to remove inappropriate references to EU legislation and ensure legal operability post EU Exit.

What will it now do?

2.6 The instrument will ensure that plant health legislation in England, which implements current EU protective measures against the introduction and spread of organisms harmful to plants or plant products, remains effective after the UK leaves the EU in a 'no deal' scenario.

2.7 Plants and plant products currently managed under the EU plant passport regime when moving to England from EU member states and Switzerland ("the EU member states") will be subject to import controls which will replace the assurance and traceability which the EU plant passport regime offers, maintaining biosecurity and border flow whilst minimising the impact on businesses. Consignments of these plants and plant products entering the UK will require a phytosanitary certificate issued in the country of export in accordance with International Plant Protection Convention obligations. However, in order to maintain the flow of goods, consignments of plants and plant products from EU member states will not be stopped at the border. The relevant UK plant health authority will carry out documentary and identity checks for those consignments remotely, thereby ensuring future traceability of the material should that need arise. Recognising that biosecurity risks associated with EU goods do not change immediately on EU Exit, physical checks will not be carried out on material imported from EU member states.

2.8 Under the Plant Health Directive checks on material imported from third countries are normally carried out at the first point of entry into the EU, so material arriving in England from a third country via the EU will already have been subject to the required plant health checks. Following the UK's exit from the EU consignments transiting the EU on their way to England will not be checked when they enter the EU and so will require checking on arrival in England. Many such consignments arrive via fast moving roll-on, roll-off (Ro-Ro) ports, where stopping goods for checks at the border would create significant disruptions to the flow of traffic. Therefore, in order to ensure frictionless trade, businesses wishing to bring third country regulated goods into England via the EU at Ro-Ro ports will be required to facilitate plant health checks inland at their own premises. Premises will need to be authorised by Defra and provide specified inspection facilities. They will need to pre-notify arrival of such consignments to Defra and specify where the consignment will be held awaiting checks. The consignments will not be permitted to be moved from the authorised premises until the plant health authority has carried out the necessary checks.

2.9 The amendments outlined in paragraphs 2.7 and 2.8 are covered in Part 3, regulations 11 to 29 (in relation to forestry material) and Part 5, regulations 66 to 80 (in relation to plant material) of the Plant Health (Amendment) (England) (EU Exit) Regulations 2019.

2.10 These amendments include a new offence in relation to the new import requirements described in paragraph 2.8 to provide the ability to enforce and prosecute serious cases of non-compliance.

2.11 In order to facilitate the monitoring of plant material moving within the UK, a system of UK plant passports is to be introduced to replace the EU plant passports required for the movement of material between and with member states under the EU single market.

2.12 A new criminal offence is also added to enforce any failure to comply with any requirement in a general notice issued under the Plant Health (England) Order 2015 or the Plant Health (Forestry) Order 2005 in respect of a demarcated area. The provisions in EU emergency plant health decisions, which require demarcated areas to be established in the event of an outbreak, will be retained direct EU legislation and are being amended by the Plant Health (Amendment) (England) (EU Exit) Regulations 2019. The EU decisions, as amended, will require the Secretary of State and the Forestry Commissioners (in relation to forestry matters in England) to demarcate areas around a pest outbreak and take measures to eradicate and contain the outbreak. It has not been necessary for any demarcated areas to be established in the United Kingdom under any of the EU decisions to date, but the new powers to issue general notices in respect of any demarcated area that is established under these provisions will ensure that the Secretary of State and the Forestry Commissioners are able to meet their obligations under this retained direct EU legislation.

2.13 Regulations 61 and 62 (Part 4) and regulations 114 to 120 (Part 6) of the Plant Health (Amendment) (England) (EU Exit) Regulations 2019 also make consequential minor amendments to the existing fees set out in the Plant Health (Fees) (Forestry) (England and Scotland) Regulations 2015 and the Plant Health etc. (Fees) (England) Regulations 2018 respectively to remove inappropriate references to EU legislation and ensure legal operability post EU Exit.

2.14 The Plant Health (Amendment) (England) (EU Exit) Regulations 2019 also amend the provisions at articles 39 and 40 of the Plant Health (Forestry) Order 2005 and articles 40 and 41 of the Plant Health (England) Order 2015 on the issue of licences for activities prohibited by the orders to ensure that they remain operable after EU Exit.

2.15 The Plant Health (Amendment) (England) (EU Exit) Regulations 2019 also transpose provisions in Council Directives 69/464/EEC, 93/85/EEC, 98/57/EC and 2007/33/EC that apply to competent authorities in relation to the planting of certain *solanaceous* species and the control of relevant plant pests, so that following the UK's exit from the EU in a 'no deal' scenario, the UK will be able to demonstrate to third countries that it continues to maintain the same control over the production of potatoes. This is important in terms of any future trading arrangements the UK may enter into with third countries. These amendments are covered at Part 2, regulations 3 to 22 and the amendments relating to the deficiencies in these provisions that will arise on the UK's withdrawal from the EU, in Part 5, regulations 110 to 112.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 This entire instrument applies to England only and is a financial instrument for the purposes of Standing Order No. 83T of the Standing Orders of the House of Commons relating to Public Business.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is set out in Section 3 under "Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)".

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity, Lord Gardiner of Kimble has made the following statement regarding Human Rights:

"In my view the provisions of the Plant Health (Amendment) (England) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 The key legislative context for the instrument is set out at paragraph 2.2 above.

7. Policy background

What is being done and why?

7.1 The changes made by this instrument are necessary to ensure that current plant health legislation continues to operate effectively after the UK leaves the EU in a 'no deal' scenario.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21 of Schedule 7 of the Withdrawal Act 2018. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

8.2 Alongside the EU (Withdrawal) Act 2018 powers the instrument is also being made under section 2(2) of the European Communities Act 1972.

9. Consolidation

9.1 Not applicable to this instrument.

10. Consultation outcome

10.1 The Scottish, Welsh and Northern Irish devolved administrations have been consulted about the proposed amendments and are content.

11. Guidance

11.1 The Animal and Plant Health Agency are the relevant delivery body and are developing an implementation plan and associated guidance for publication. A Technical Notice, describing how imports and exports of plants and plant products to/from the EU will change in a 'no deal' EU exit scenario was published in September 2018.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 The impact on business results from additional phytosanitary requirements when importing plants and plant products from the EU into the UK which currently require a plant passport. This is associated with the requirement to: provide a certificate; pre-notify imports from the EU; undergo document and identity checks; use UK rather than EU plant passports for intra-UK movements of plant passported commodities and third country phytosanitary certificates transiting through the EU. These direct costs on businesses overall are expected to be below the de minimis threshold for requiring an impact assessment and could affect around 900 businesses (based on those registered for plant passporting currently in England and Wales) and businesses importing third country commodities via the EU.

Additional Direct Costs – on Day 1 the main additional direct costs are expected to be:

12.4 Requirement to provide phytosanitary certificates for regulated EU commodities imported to the UK - this will represent an additional administrative burden and incur costs which are likely to be passed on to importers and potentially the customer. The burden of providing the phytosanitary certificate will fall on the National Plant Protection Organisation in the member state exporting the consignment, as well as the exporter. This is expected to affect a small proportion of plants/plant products only (i.e. those where plant passports are currently required for trade deemed to have a high biosecurity risk) from total annual imports of regulated plants/plant products from the EU to the UK.

12.5 There may also be additional time requirements to businesses of applying for and providing the required information to get the certificate.

12.6 Requirement to pre-notify imports of regulated EU commodities – this will represent an additional administrative burden. Importers will need to register onto the PEACH IT system and provide consignment details and scanned copies of import documentation and phytosanitary certificates. However, there are no charges to use this system and businesses who already trade in regulated third country plants and plant products will be familiar with this process, so the additional costs are expected to be negligible.

12.7 Requirement to undergo documentary and identity checks on regulated EU commodities – this will represent an additional cost burden on importers, who will be subject to a fee for the checks carried out. However, the checks will take place after entry to the UK and consignments will not be held awaiting checks. This avoids an additional time-related burden on businesses. EU imports will also not be subject to, or charged for, physical checks.

12.8 Requirement to use UK rather than EU plant passports for intra-UK movements of plant passported commodities – this will require businesses moving plant passported commodities within the UK to modify the reference code that they use when issuing plant passports, replacing 'EU' with 'UK'. The process for authorising businesses for plant passporting will not change and businesses who will need to use the system on Day 1 are likely to already be registered. Therefore, we expect no extra impact on business from this change.

12.9 Third Country consignments of regulated plant material arriving in the UK via the EU would incur some small additional costs, as importers entering plants and plant products from third countries through Ro-Ro ports will be able to have checks carried out at authorised trade premises inland to avoid impacts at the border. The costs associated with checks and issue of the phytosanitary certificate will simply be a transfer of what previously took place in the EU, assuming that the cost is passed through already then no additional impacts are created. However, there is an additional potential indirect time delay cost for this small proportion of third country goods that transit through the EU to the UK, associated with checks now happening inland instead of at the border. There may also be costs for storage while carrying out checks and any additional transport/wage costs incurred. This is expected to be minimal.

12.10 The impact on the public sector results from the list of direct costs above. Where costs relate to the service provided by the Animal and Plant Health Agency, most can be recovered from businesses who use and benefit from these services, but there are some that are not eligible to be recovered and will, therefore, be borne by the public sector.

Additional Indirect Costs

12.11 We could expect indirect costs if phytosanitary certification processes (either pre-UK or within UK) lead to delays in delivering plants and plant products to the sales shelf, which could erode product life and value. This would particularly be an issue for perishable plants and plant products. However, given that the approach is to undertake any checks remotely for goods that currently require an EU plant passport, in order to minimise disruption (and only follow-up in the way that would be done for plant passporting already), we do not expect any additional impacts on businesses, unless they occur pre-border in EU countries.

12.12 Some businesses may not be able to host checks inland at their premises. These businesses would need to enter their consignment at a port in the UK that could carry out checks at the border. There may, therefore, be indirect costs associated with the requirement to send goods via a different route.

Additional Benefits

12.13 There may be some minimal increase in protection against the spread of plant pests and diseases. This is because the current requirement is for an EU plant passport for trade in higher risk plants and plant products between the UK and other EU countries and that requirement would now increase to a phytosanitary certificate for those plants and plant products. In addition, there may be extra data available on higher risk commodities (through pre-notification), which would allow for better targeting of plants and pests from the EU which present a biosecurity risk.

12.14 An impact assessment has not been prepared for this instrument because the direct impacts on businesses and the public sector are expected to be below the de minimus

threshold for requiring an impact assessment, as outlined in paragraphs 12.3 to 12.14 above.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The legislation applies equally to all businesses importing controlled plant health material, including small businesses. The risk of introducing harmful organisms is not mitigated by the size of the business.

14. Monitoring & review

14.1 No specific monitoring arrangements are needed.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Liz McIntosh at the Department for Environment, Food and Rural Affairs, Telephone: 02080 262414 or email: liz.mcintosh@defra.gsi.gov.uk can be contacted with any queries regarding the instrument.

15.2 Nicola Spence, Deputy Director for Bee Health and Seeds, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Gardiner of Kimble, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI.	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2.	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs.	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence.	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under s. 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA 1972, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under s. 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA 1972.	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity, Lord Gardiner of Kimble has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Plant Health (Amendment) (England) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because the instruments largely correct technical deficiencies that will arise from withdrawal and ensures that the existing regimes for safeguarding UK biosecurity will continue to operate effectively, in England, once we leave the EU. This is in line with government policy.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity, Lord Gardiner of Kimble has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are that there is real public concern about biosecurity and that the government should at least maintain the protections that currently exist. The public would also expect us to be able to take enforcement action against those that are in breach of plant health legislation. In addition, businesses would expect us to provide conditions within England that support the trade and movement of plant material.

3. Equalities

3.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity, Lord Gardiner of Kimble has made the following statement:

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

5. Criminal offences

5.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity, Lord Gardiner of Kimble has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the creation of criminal offences and for the penalties in respect of them in the Plant Health (Amendment) (England) (EU Exit) Regulations 2019."

5.2 Amendments to existing offences in the Plant Health (England) Order 2015 and the Plant Health (Forestry) Order 2005 will be needed to reflect new requirements introduced through the Plant Health (Amendment) (England) (EU Exit) Regulations 2019 for regulated third country goods which enter England via the EU, which have not been subject to plant health checks in the EU and arrive at fast-moving, high-volume Ro-Ro ports. The new requirements will require these goods to be moved inland and held securely until plant health checks have been completed. The new offence will provide the ability to enforce and prosecute serious cases of non-compliance with these new requirements.

5.3 In addition, a new criminal offence is also required to enforce any failure to comply with any prohibition or restriction in demarcated areas to prevent the spread of certain harmful plant pests in cases where this is an outbreak involving one of these pests. Offences under the Plant Health (England) Order 2015 or the Plant Health (Forestry) Order 2005 carry, on summary conviction, a penalty of a fine not exceeding level 5 on the standard scale.