EXPLANATORY MEMORANDUM TO

THE OFFICIAL CONTROLS (PLANT HEALTH AND GENETICALLY MODIFIED ORGANISMS) (ENGLAND) (AMENDMENT) (NO. 3) REGULATIONS 2020

2020 No. 1060

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food, and Rural Affairs ("Defra") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Official Controls (Plant Health and Genetically Modified Organisms) (England) Regulations 2019 (S.I. 2019/1517) ("the 2019 Regulations"). It provides for rules on penalties in relation to infringements of Regulation (EU) 2016/2031 on protective measures against pests of plants ("the EU Plant Health Regulation") and Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products ("the EU Official Controls Regulation"), by making provision for civil sanctions in relation to the offences set out in Part 11 of the 2019 Regulations.

2.2 This instrument introduces a more targeted sanctioning regime for offences set out in Part 11 of the 2019 Regulations, which will help to increase compliance with the EU Regulations and the 2019 Regulations and therefore ensure a high standard of UK biosecurity. The new regime will sit alongside the existing criminal sanctions regime, with criminal prosecution remaining as an option as a last resort for habitual/serious cases of non-compliance.

3. Matters of special interest to Parliament

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)

3.1 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

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 England only.

5. European Convention on Human Rights

5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The EU Plant Health Regulation establishes controls and restrictions which apply to the import (from third countries), and internal movement within and between EU member States, of certain plants, plant pests and other material (such as soil). The EU Official Controls Regulation provides for official controls and other official activities to ensure the application of rules in relation to various areas, including plant health.

6.2 The EU Plant Health Regulation and the EU Official Controls Regulation ("the EU Regulations") and the implementing legislation made under them, are directly applicable in the United Kingdom. Domestic legislation is not needed to implement the substantive provisions in this EU legislation. However, supplementary domestic provisions are necessary to enable the plant health authorities to carry out their obligations under the EU Regulations, enforce those Regulations and implement derogations to various provisions in the EU legislation that are available to Member States. The 2019 Regulations contain these supplementary domestic provisions. Separate but parallel legislation is in place in Wales, Northern Ireland, and Scotland.

6.3 This instrument amends the 2019 Regulations to make provision for civil sanctions in respect of offences set out in Part 11 of those Regulations.

7. Policy background

What is being done and why?

7.1 The EU Official Controls Regulation sets out the general obligations of the plant health and other authorities as regards enforcement action and identifies the actions in the event of non-compliance. The EU Regulations require Member States to lay down the rules on penalties applicable to infringements of the EU Regulations and take all measures necessary to ensure that they are implemented and provide effective, proportionate and dissuasive sanctions.

7.2 The 2019 Regulations, which replaced the Plant Health (England) Order 2015 and the Plant Health (Forestry) Order 2005 in January 2020, give effect to the EU Regulations as outlined in paragraph 6.2 above. As a review of alternative sanctions was not possible at the time, we decided to maintain the previous approach to enforcement and include the same mechanisms and penalties for non-compliance that were set out in the Plant Health (England) Order 2015 and the Plant Health (Forestry) Order 2005 and review this approach as soon as possible in 2020. Current legislation gives the Animal and Plant Health Agency (APHA) Plant Health and Seeds Inspectors and Forestry Inspectors powers to take action to prevent the import of pests and diseases and to ensure compliance by serving statutory plant health notices on consignments that do not comply with the regulations. Serious breaches of the regulations can lead to prosecution.

7.3 The historic lack of prosecutions in the plant health area suggests that the lack of a range of enforcement tools prevents a targeted and proportionate enforcement and therefore the criminal sanctions currently in place are unlikely to be particularly effective on their own. Many offences have historically been dealt with by way of a statutory plant health notice where criminal prosecution is not pursued, whereas a broader range of "in between" options would allow a flexible and proportionate enforcement response and help create a level-playing field between those who routinely comply with regulatory requirements and those who do not.

7.4 The suite of civil sanctions introduced by this instrument consists of compliance, restoration and stop notices, fixed and variable monetary penalties, as well as the ability to accept third party undertakings and enforcement undertakings. There are provisions which allow APHA and the Forestry Commission to recover its costs when imposing civil sanctions, in order to facilitate effective action. This instrument creates, as part of the civil sanctions regime, an offence in relation to a failure to comply with a stop notice. Failure to comply with a restoration or compliance notice may result in the person being criminally prosecuted for the original offence, set out in Part 11 of the Official Controls (Plant Health and Genetically Modified Organisms) (England) Regulations 2019, provided a variable monetary penalty was not also imposed. This is set out in paragraph 16(1) of the Schedule to the draft Regulations. Alternatively, APHA / FC may, irrespective of whether a variable monetary penalty was also imposed, serve a notice on that person imposing a non-compliance penalty.

7.5 During the transition period following the UK's exit from the EU on 31 January 2020, Defra continues to implement and apply EU legislation. Introducing these sanctions before the end of the transition period will ensure that the UK's already robust biosecurity framework is further strengthened.

7.6 Although the necessary powers to provide for a civil sanctions regime will be introduced through this instrument, they will not immediately be implemented. Defra will now begin work on developing detailed guidance on how they will be used and seek wider views from industry on the draft guidance in 2021. Following this, and consideration of responses received, the guidance will be published so that APHA and the Forestry Commission are able to begin using civil sanctions by the end of 2021.

7.7 In addition to allowing Defra the time to consider and draft detailed guidance, this approach will also allow industry more time to familiarise themselves with the civil sanctions regime before it is implemented.

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

8.1 This instrument does not relate to withdrawal from the European Union nor trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This is not a consolidation and is the third amendment of the Official Controls (Plant Health and Genetically Modified Organisms) (England) Regulations 2019.

10. Consultation outcome

10.1 We have carried out an initial engagement with stakeholders on the introduction of a civil sanctions regime and the range of sanctions, as well as the proposed thresholds for fixed and variable monetary penalties. All respondents were in favour of the introduction of civil sanctions and the proposed phased implementation plan.

10.2 We will seek wider views from industry in 2021 on draft guidance on how the civil sanctions will be used.

11. Guidance

11.1 Part 8 of this instrument imposes a requirement for the competent authority to publish guidance relating to the use of civil sanctions. Defra will develop detailed guidance and seek wider views from the trade on the draft guidance in 2021.

11.2 The civil sanctions may not be used until Defra have sought views on and published guidance. It is expected that APHA and the Forestry Commission will be able to begin using civil sanctions by the end of 2021.

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 An Impact Assessment has not been prepared for this instrument. There are no significant financial implications.

13. Regulating small business

13.1 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.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

14.1 A statutory review clause is included in regulation 56 of the 2019 Regulations.

15. Contact

15.1 Iain Johnstone at the Department for Environment, Food and Rural Affairs Telephone: 02080 265 265 or email: iain.johnstone@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Nicola Spence, Deputy Director for Plant Health Bees 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, 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.