EXPLANATORY MEMORANDUM TO

THE OFFICIAL CONTROLS (PLANT HEALTH AND GENETICALLY MODIFIED ORGANISMS) (ENGLAND) REGULATIONS 2019

2019 No. 1517

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument implements part of the EU Smarter Rules for Safer Food ("SRSF") package of regulations, a set of three EU regulations for the protection against animal disease and plant pests. The package will modernise, simplify and improve existing health and safety standards for the agri-food chain, taking a risk-based approach to animal, plant and public health protection, introducing more efficient pest and disease control measures.

2.2 The specific purpose of this instrument is to supplement two EU regulations: Regulation (EU) 2016/2031[1] on protective measures against pests of plants ("the EU Plant Health Regulation"); and Regulation (EU) 2017/625[2] 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").

2.3 This instrument will enable official controls and other official activities relating to plant health rules to be carried out in accordance with these Regulations and actions taken to enforce these rules. It will also enable official controls relating to the deliberate release into the environment of genetically modified organisms ("GMOs") for the purposes of food and feed production, to be carried out in accordance with the EU Official Controls Regulation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was not ready to be laid before the dissolution of parliament due to the delay of the publication of the related tertiary legislation from the European Commission.

3.2 A separate instrument, the Official Controls (Animals, Feed and Food, Plant Health Fees etc.) Regulations 2019 (S.I. 2019/1488), enforcing other parts of the SRSF Regulations was made, as an exceptional case, during dissolution on 3 December 2019 and came into force from 14 December 2019.

[1] https://eur-lex.europa.eu/eli/reg/2016/2031/oj
[2] https://eur-lex.europa.eu/eli/reg/2017/625/oj

3.3 It was considered that it would be more appropriate to postpone the making of this instrument until a new Parliament had been formed as a similar exceptional case could not be made for making this instrument during the pre-election period. Key tertiary legislation related to the EU Plant Health Regulation was also only published by the European Commission on 10 December 2019.

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)

3.4 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.

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 and the EU Official Controls Regulation ("the EU Regulations") applied directly from 14th December 2019. They replaced Council Directive 2000/29/EC on protective measures against the introduction of organisms harmful to plants or plant products into the EU and against their spread within the EU[3]. This 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. Similar but separate legislation to these Orders operates in Scotland, Wales and Northern Ireland.

6.2 The EU Regulations and the tertiary legislation made under these Regulations became directly applicable in the UK on 14th December 2019. While domestic legislation is not needed to implement the substantive provisions in this EU legislation, supplementary domestic provisions are necessary to ensure that the competent authorities in England are able to carry out their obligations under the EU Regulations. It also ensures that these competent authorities are able to enforce the EU Regulations and implement derogations to various provisions in the EU legislation that are available to member States. This instrument contains these supplementary domestic provisions for both plant health and the deliberate release of GMOs. It additionally revokes a number of existing plant health orders, such as the Plant Health (England) Order 2015 and the Plant Health (Forestry) Order 2005. There will be separate but parallel legislation for England, Wales, Northern Ireland, and Scotland.

6.3 This instrument is related to the Official Controls (Animals, Feed and Food, Plant Health Fees etc.) Regulations 2019 (S.I. 2019/1488) which contains enforcement powers to implement the EU Official Controls Regulation in areas other than plant health and the deliberate release of GMOs. The Food Standards Agency have also made three statutory instruments in relation to the EU Official Controls Regulations:

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

(i) the Official Feed and Food (England) (Miscellaneous Amendments) Regulations 2019; (ii) the Meat (Official Control Charges) (England) (Amendment) Regulations 2019; and (iii) the Fishery Products (Official Controls Charges) (England) (Amendment) Regulations 2019.

7. Policy background

What is being done and why?

7.1 The EU Regulations establish controls and restrictions which apply to the import from third countries (countries which are not EU member States), and the internal movement within and between EU member States, of certain plants, plants pest and other material (such as soil) to help reduce biosecurity risk, strengthen the current plant health regime and protect the environment from the spread of harmful pests and diseases.

7.2 There are no other policy options available as the EU Regulations are directly applicable in EU member States. As a member State, the UK is legally obliged under the EU Regulations to ensure that it has sufficient powers to enforce the EU Regulations. The UK was closely involved in drafting these EU Regulations, and is supportive of their content.

7.3 The EU Regulations revise and improve the current EU plant health legislation. The revised legislation will protect domestic agriculture, horticulture, forestry, parks, gardens and the environment by preventing the entry of harmful plant pests and diseases.

7.4 Part 2 of this instrument designates the Secretary of State and the Forestry Commissioners as the competent authorities in relation to England for the purposes of the EU Regulations.

7.5 Part 3 contains additional provisions in relation to consignments of plants, plant products and other objects from third countries which are subject to official controls and other official activities on their entry into the EU, to assist plant health inspectors who are carrying out checks on imports.

7.6 Part 4 contains powers to enable plant health inspectors appointed by the Secretary of State or the Forestry Commissioners to take measures to prevent the establishment or spread of harmful plant pests in England by, for example, serving statutory notices setting out the action that must be taken.

7.7 Part 5 imposes additional temporary measures to prevent the entry of certain harmful plant pests into England or their establishment in, or spread within, England. These measures will further enhance the UK's biosecurity against these pests. This is permitted under the EU Plant Health Regulation where the UK is faced with an imminent threat of a plant pest entering its territory but the EU has not put in place measures to mitigate that risk or existing EU measures are not considered to be sufficient to mitigate the risk. The temporary measures include those targeted at plants, plant pest or plant products from third countries and from within the EU and were previously included in the Plant Health (England) Order 2015.

7.8 Part 6 makes further provision in relation to the registration of professional operators and the granting of authorisations to professional operators by the Secretary of State and the Forestry Commissioners.

7.9 Part 7 imposes additional requirements in relation to certain solanaceous species (potatoes) to implement the existing EU Control Directives relating to potato wart disease, potato cyst nematodes, potato ring rot and potato brown rot, which remain in force and are due to be repealed in 2022. The detailed requirements are set out in Schedule 2 of the instrument and replicate the existing provisions implementing those Directives in Article 39 of, and Schedules 13 to 16 to, the Plant Health (England) Order 2015. Schedule 2 sets out the measures to be taken by the competent authority to control and eradicate these potato pests and diseases, as well as certain prohibitions relating to planting of potatoes. This maintains existing EU and UK regimes outlining measures on potato controls.

7.10 Part 8 imposes additional notification requirements in respect of certain plants and plant products which are to be brought into England. The purpose of notification requirements in regulations 24 and 26 is to facilitate effective official checks of plants and plant products considered to pose a significant risk to plant health in the UK. The notification facilitates intelligence about the introduction of these plants and plant products to enable targeted checks of that material to be carried out. The notification requirements in regulation 25 are required under EU legislation where member States authorise the introduction of citrus fruits for industrial processing.

7.11 Part 9 sets out general powers of plant health inspectors to enable them to perform official controls and other official activities and enforce the EU Plant Health Regulation, the Official Controls Regulation and these EU Regulations, including powers of entry and inspection.

7.12 Part 10 sets out miscellaneous provisions which set out circumstances in which a notice should be served by the competent authority and the enforcement action to be taken by that competent authority.

7.13 Part 11 sets out the offences and penalties for non-compliance with specified provisions of the EU Plant Health Regulation, the Official Controls Regulation and other EU legislation, as well as the specified provisions of these Regulations.

7.14 These provisions replicate the enforcement mechanisms and penalties for non-compliance set out in the Plant Health (England) Order 2015, the Plant Health (Forestry) Order 2005 and other existing domestic plant health legislation. While the EU Plant Health Regulation and EU Official Controls Regulation will not result in any significant changes to the existing EU plant health regime, the new EU Regulations will introduce some new processes which will necessitate the creation of additional offences to ensure overall consistency.

7.15 The offences included in these Regulations are in relation to:

- contravention or failure to comply with the specified provisions, a provision or condition of a statutory plant health notice, a provision or condition of an authorisation or permit or condition of a written direction given by the competent authority (Regulations 38 and 39);
- provision of false or misleading information (Regulation 41);
- improper use of plant passports or phytosanitary certificates (Regulation 42);
- obstruction (Regulation 43); and
- disclosure of information held by Her Majesty's Revenue and Customs ("HMRC") (Regulation 44), which is an either way offence

7.16 The penalties for any offence under these regulations mirror those included in the Plant Health (England) Order 2015 and the Plant Health (Forestry) Order 2005 and are non-custodial (unlimited fines), except for the penalty that applies to the non-disclosure of certain information received from HMRC under information gateway provisions. The penalty for this either way offence includes custodial terms.

7.17 Part 13 makes an amendment to a previous instrument, the Official Controls (Animals, Feed and Food, Plant Health Fees etc.) Regulations 2019 so as to include reference to the deliberate release into the environment of GMOs for the purpose of food and feed production to the scope of "relevant legislation" as defined in regulation 2(1) of that instrument. The effect is to extend the designation of the Secretary of State as competent authority under the EU Official Controls Regulation, and also to extend the relevant provisions in relation to enforcement in that instrument to the deliberate release of GMOs. The deliberate release of GMOs is a devolved matter, and similar provisions will be made in Wales, Scotland and Northern Ireland.

7.18 Schedule 5 sets out the amendments made by these regulations to secondary legislation, including the Marketing of Vegetable Plant Material Regulations 1995, the Marketing of Ornamental Plant Propagating Material Regulations 1999, the Forest Reproductive Material (Great Britain) Regulations 2002, the Seed Potatoes (England) Regulations 2015, the Marketing of Fruit Plant and Propagating Material (England) Regulations 2017, and the Plant Health (Fees) (Forestry) (England and Scotland) Regulations 2015.

7.19 Schedule 6 lists the domestic instruments revoked by these regulations, which include the Plant Health (England) Order 2015, the Plant Health (Forestry) Order 2005, the Plant Health (Export Certification) (England) Order 2004, the Plant Health (Export Certification) (Forestry) (Great Britain) Order 2004 and the Plant Health (Wood Packaging Material Marking) (Forestry) Order 2006.

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

8.1 These instruments do not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This is not a consolidation, but the instrument revokes a number of domestic instruments, including the Plant Health (England) Order 2015 and Plant Health (Forestry) Order 2005 (insofar as it applies to England).

9.2 There are no plans to consolidate the marketing legislation listed in Schedule 5.

10. Consultation outcome

10.1 There has been no formal consultation on this instrument as it only makes minor changes to current practice with a total impact to all businesses of less than £3m per year. With regard to GMOs, there has been no formal consultation on this instrument as it makes no significant changes to current official control practices.

10.2 With regard to plant health, Defra has undertaken informal conversations with stakeholders in areas where the UK has some discretion. This was the case regarding the definition of 'close proximity' in regulation 5, which was set at 10 miles following informal engagement with ten stakeholders, some of whom were large trade

associations which represented a large number of businesses within the affected sector. The approach has been supported by major trusted stakeholders at regular forums and their feedback has been taken into consideration. Defra has engaged with relevant plant health stakeholders in preparation of the changes. Defra will continue to engage with stakeholders following implementation and will review the implementation of the EU Regulations as necessary.

10.3 In addition to stakeholder engagement, regular engagement with Devolved Administrations and Crown Dependencies where appropriate has been carried out. Plant health policy decisions have been discussed extensively at regular forums. In respect of GMOs, this instrument does not introduce any change of policy and will not produce any impact on businesses or the public. Devolved Administrations have been informed, and will draft their own legislation as they see fit.

11. Guidance

11.1 The main plant health stakeholders have been informed of the proposed changes. Details of the requirements will be placed on gov.uk: https://www.gov.uk/government/publications/smarter-rules-for-safer-food-what-we-are-doing/smarter-rules-for-safer-food

12. Impact

12.1 Plant health helps agriculture and forestry sectors remain sustainable and competitive, as well as protecting domestic biodiversity and ecosystems. Globalised trade and climate change now present a greater risk to these sectors.

12.2 The impact on businesses is estimated at an overall cost of £2.8m per year on average over a 10 year period, which falls below the £5m per year threshold which would require the need for a full Impact Assessment. It reflects costs to businesses expected to need to familiarise themselves with criminal sanctions and the costs of additional plant passport requirements that result from the new 10 mile radius definition of close proximity.

12.3 There is no impact on business in respect of the amendments made in Part 13.

12.4 There is no impact on businesses in respect of the consequential minor changes being made in Schedule 5.

12.5 There is no impact on charities or voluntary bodies.

12.6 The impact on the public sector is likely to be minimal.

12.7 The definition of close proximity, resulting in this additional plant passporting requirement, is expected to sharpen incentives to reduce the risks of plant pests and diseases through improved plant biosecurity assurance and traceability.

12.8 A full Impact Assessment has not been prepared for this instrument because of the low level of estimated impact across businesses that is below the £5m per year cost threshold.

13. Regulating small business

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

13.2 Familiarisation costs are expected to be low (up to £34 per firm, based on £17 per hour cost). As such, although costs may affect small businesses relatively more, the costs are still small per business.

13.3 Additionally, the costs of additional plant passports as a result of the new more tightly defined close proximity threshold are expected to mainly affect the larger-scale businesses in the sector.

13.4 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 The approach to monitoring of this instrument will be to conduct frequent initial reviews as we continue to support the development of EU tertiary legislation. In addition, changes will be made to take account of new or revised risk assessments, pest interceptions, changes in distribution of pests and other developments.

14.2 A statutory review clause is included in regulation 56.

14.3 The approach to monitoring of this instrument in respect of the marketing of seed potatoes, vegetable and ornamental plant propagating material and forest reproductive material is through the course of normal departmental business, as no substantive changes to current procedures or standards are being introduced.

14.4 The marketing legislation for seed potatoes, forest reproductive material and vegetable and ornamental plant propagating material does not contain a statutory review clause but in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Lord Gardiner has made the following statement:

"The amendments to the marketing legislation for seed potatoes, forest reproductive material and vegetable and ornamental plant propagating being made in this instrument have no annualised net impact on business and it would not therefore be appropriate to undertake a review given the costs of doing so. The Marketing of Fruit Plant and Propagating Material (England) Regulations 2017 already contain a review clause."

15. Contact

15.1 Emily Godfrey at the Department for Environment, Food and Rural Affairs Telephone: 0208 7200 972 or email: Emily.godfrey2@defra.gov.uk can be contacted with any queries regarding the 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 at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.