

**EXPLANATORY MEMORANDUM TO
THE CONTROL OF TRADE IN ENDANGERED SPECIES (ENFORCEMENT)
(AMENDMENT) REGULATIONS 2009**

2009 No. 1773

1. This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (“the COTES Regulations”). The amendment concerns the prosecution of offences relating to commercial trade in specimens of endangered species. The purpose of the amendment is to clarify how a prosecution should be brought where it is not possible to establish with certainty the species, subspecies or population to which a specimen belongs.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 This instrument closes a legal loophole highlighted during a recent failed prosecution, under regulation 8 of the COTES Regulations, of a trader who offered for sale traditional Chinese medicines claiming to contain specimens of endangered species.

4.2 The COTES Regulations prescribe the enforcement provisions relating to Council Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora (“the Principal Regulation”), which applies, within the EC, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”).

4.3 Endangered species afforded protection by CITES are listed in one of four Annexes (Annexes A to D) to the Principal Regulation. Species are allocated to the appropriate Annex according to their biological status and the impact that international trade may have on their conservation status. Annex A contains species threatened with extinction and so commercial trade is generally prohibited; Annex B contains species that are not necessarily threatened with extinction now but may become so unless trade is closely monitored.

4.4 This instrument also allows for ambulatory references to the Principal Regulation and to Commission Regulation (EC) No. 865/2006, which sets out further rules for the implementation of the Principal Regulation.

4.5 The Annexes to the Principal Regulation listing the species afforded CITES protection are updated after every triennial Conference of Parties to reflect decisions made to vary that level of protection. These species listing amendments are routinely implemented in the EU after each Conference through an amending Commission Regulation updating the Annexes. Without the ambulatory text, the COTES Regulations would have to be routinely amended every three years to take into account changes to the Annexes of the Principal Regulation. Commission Regulation 865/2006 is also updated after each Conference of Parties to reflect Conference recommendations on the interpretation and implementation of CITES provisions. The inclusion of ambulatory references in this instrument eliminates the administrative burden that would otherwise be incurred in updating the COTES Regulations to reflect the regular amendments to the EC legislation.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

- **What is being done and why?**

7.1 In 2007 a court case was brought against a trader of traditional Asian medicines on ten counts of offering for sale specimens of controlled species contrary to regulation 8 of the COTES Regulations. The indictment related to traditional Asian medicines claiming to contain ingredients derived from endangered species, namely musk deer, bear and orchids. The major defect with the case concerned species that are listed in both Annex A and B to the Principal Regulation – “split-listed” species. It is not always possible to determine whether a particular split-listed specimen derives from a species (or subspecies or geographical population) listed in Annex A or one listed in Annex B. In the 2007 case this resulted in the failure of the prosecution, because in order to prove the relevant offences in the COTES Regulations it was necessary to prove the Annex from which the specimen derived.

7.2 This amending instrument introduces a presumption that, where it is not reasonably practicable to identify whether a specimen of a ‘split-listed’ species belongs to Annex A or B to the Principal Regulation, it belongs to Annex A. This will enable the prosecution to proceed with a charge under the offence in regulation 8(1) of the COTES Regulations.

7.3 The ruling in the 2007 case was reported in the media and so the existence of a loophole in the COTES Regulations in relation to split-listed species has been made public. Until the Regulations have been amended to rectify the problem, it is unlikely that the Crown Prosecution Service will be able to secure convictions for offences falling within the remit of this loophole. It is important that the loophole be closed to allow effective CITES enforcement.

- **Consolidation**

7.4 The purpose of the amendment made by this instrument is to ensure that the legislative loophole identified in 2007 is closed. Defra is keen to avoid further delay and so the remit of this amendment does not extend to consolidation. The COTES Regulations are, however, to be the subject of an in depth review over the next two years, which is likely to result in significant changes. Consolidation will be considered at that time.

8. Consultation outcome

8.1 No new offence is being created by this instrument, and there has been no public consultation.

9. Guidance

9.1 No guidance is being provided on the effect of this instrument. The amendment of the COTES Regulations is of a technical nature and will be of most interest to enforcement authorities and the legal profession. Both sectors should understand the nature and intention of the amendment without additional guidance.

9.2 The amendment will be publicised on Defra's website and will be announced in CITES news bulletins.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The effectiveness of this amendment will be considered as part of the detailed COTES review scheduled to take place in 2009 and 2010.

13. Contact

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