

## EXPLANATORY MEMORANDUM TO

### THE CONTROL OF TRADE IN ENDANGERED SPECIES REGULATIONS 2018

2018 No. 703

#### 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 Command of Her Majesty.

#### 2. Purpose of the instrument

- 2.1 The Control of Trade in Endangered Species (COTES) Regulations 2018 consolidate a number of existing pieces of secondary legislation in this area, primarily the Control of Trade in Endangered Species (Enforcement) Regulations 1997 and subsequent amending legislation. COTES 2018 will also introduce updates to the existing enforcement regime. Our updates reflect evolutions in the nature of trade in endangered species since 1997, as well as our obligations under EU Regulations and the Convention on International Trade in Endangered Species.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

##### *Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

#### 4. Legislative Context

- 4.1 The UK is a party to the Convention on International Trade in Endangered Species (CITES). Our legal obligations under CITES are implemented through EU Wildlife Trade Regulations that are directly applicable in the UK. The UK has domestic secondary legislation establishing sanctions for infringements of the EU Wildlife Trade Regulations, the most important of which is the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (“COTES 1997”).
- 4.2 Several amendments to both COTES 1997 and the EU Wildlife Trade Regulations have been made over the years, in part reflecting international commitments made under CITES. The nature of the trade in endangered species has also changed particularly in relation to the increase in on-line trade. Updates to legislation will help law enforcement respond to these changes, enabling us to continue protecting wildlife from unsustainable trade.
- 4.3 The need for change has been highlighted in discussions with stakeholders and enforcement agencies (including UK Border Force and the police). The Environmental Audit Committee (EAC), in its inquiry into wildlife crime during the

2012-13 Parliamentary session, included reform of COTES as one of its central recommendations.

- 4.4 COTES Regulations 2018 repeal and replace the majority of existing CITES-related secondary legislation. The UK is a party to CITES in its own right, and will continue to be bound by CITES commitments after EU Exit. Consolidation will therefore be important to achieving Day One operability for the UK's CITES regime as it will reduce the current volume of CITES-related secondary legislation.
- 4.5 This instrument also allows for ambulatory references to Council Regulation (EC) No 338/97 (the Principal Regulation) and to Commission Regulation (EC) No. 865/2006, (the Subsidiary Regulation) which sets out further rules for the implementation of the Principal Regulation.
- 4.6 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 levels 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. Extent and Territorial Application**

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

## **6. European Convention on Human Rights**

- 6.1 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 The context and purpose of the Control of Trade in Endangered Species (COTES) Regulations 2018 is set out in section 4 of this Explanatory Memorandum.
- 7.2 Globally, the illegal wildlife trade is estimated to be worth between £7bn- £17bn per year, and is a serious criminal issue with real world impacts. The UK needs to have the right legislative tools to prevent abuse of the CITES licensing system. The UK government has made high level political commitments on the illegal wildlife trade and is leading the global response in this area. The 2017 manifesto commits to “protecting rare species”, and pledges to “continue to take action to improve animal welfare”. COTES is a key part of our regime to tackle the illegal wildlife trade, to protect endangered species, and also helps to protect the welfare of animals traded.

- 7.3 Whilst there are many legitimate traders in CITES-listed species, there are also those who show clear criminal intent and disregard for the law. Internationally, individuals and organised groups are drawn to illegal trade in endangered species as a relatively low risk, high reward activity, exploiting any ‘weak links’ in trade controls. In recent years, the police and Border Force have uncovered illegal activity within the UK relating to a wide variety of valuable commodities, including ivory, rhino horn, birds of prey, tiger parts and more. This includes cases of serious, deliberate and repeat offences. The UK currently has a strong reputation for enforcement, and we see relatively low levels of serious COTES offences, but failure to maintain effective legislation would put this at risk.
- 7.4 We are proposing to make a number of updates to the legislation. These are intended to make the legislation clearer and easier to use, and to facilitate effective enforcement. The changes we are planning to make will:
- 7.4.1 Allow enforcement bodies a new power to make “test purchases” of specimens where trade in such specimens would normally be an offence
  - 7.4.2 Include a provision that a “suitably qualified person” would be able to take non-invasive samples from live animals or other samples, e.g. from dead specimens, parts and derivatives or plants, rather than requiring a vet to do this. Currently, a vet would technically be required to take a sample from inanimate objects such as a Brazilian rosewood table.
  - 7.4.3 Enable police to recover expenses linked to seizure of a live specimen in the course of investigating an offence. The court that convicts a person of the offence has power to order the person to reimburse the expenses.
  - 7.4.4 Allow for ban or suspension from possessing or controlling CITES specimens to be imposed on persons who transgress the Regulations.
  - 7.4.5 Include a power to designate ports of entry and exit through which CITES controlled species and products can be brought in and out of the UK.
  - 7.4.6 Repeal and replace several items of COTES legislation:
- 7.5 The legislation will also establish a new regime of civil sanctions. This new regime will be available to respond to non-compliance with certain new requirements under EU and international law. These new requirements relate to advertising specimens for sale and failing to properly package and label caviar. The new civil sanctions regime will be administered by the Animal and Plant Health Agency who are likely to use the regime by addressing these new breaches with the use of Stop Notices.
- 7.6 Article 6 of the European Convention on Human Rights protects the right to a fair and public hearing. Article 6(2) and (3) provide additional safeguards in criminal proceedings. These additional safeguards include for example: the right to be presumed innocent; the right to put forward your case at a hearing. It is sometimes argued that the imposition of a civil sanction attracts the article 6 safeguards applying in criminal proceedings. In the case of COTES 2018, the right to appeal to the First-tier Tribunal is designed to accord these safeguards.

### ***Scale of offending***

- 7.7 Over the 5 year period 2012-2016, there have been an average of 10 convictions per year under COTES. In this 5 year period, 18 offences were heard at the Crown Court and 33 at the Magistrates’ court. This resulted in 19 prison sentences and 22 fines.

## ***Consolidation***

- 7.8 One purpose of the COTES Regulations 2018 is to consolidate existing secondary legislation on COTES. To this end, the COTES Regulations 2018 repeal and replace:
- a) The Control of Trade in Endangered Species (Enforcement) Regulation 1997
  - b) The COTES (Enforcement) Regulation 2005,
  - c) The COTES (Enforcement) Regulation 2007
  - d) The COTES (Enforcement) Regulation 2009
  - e) The Control of Trade in Endangered Species (Ports of Entry) Regulations 1985

## **8. Consultation outcome**

- 8.1 A formal public consultation on the updates contained in the COTES Regulations 2018 ran from 10 February 2015 to 10 March 2015. Defra received 49 responses to the consultation, of which 16 were from individuals and 33 were from organisations.
- 8.2 Proposals contained in the consultation were supported, either fully or in part (with some comments) by a majority of respondents. The measures put forward in the COTES Regulations 2018 are therefore largely the same as those covered by the 2015 consultation. Since the conclusion of the formal consultation, officials at the Department of Environment, Food and Rural Affairs have continued to engage regularly with stakeholders to ensure they are updated on progress and aware of any developments in our position.

## **9. Guidance**

- 9.1 No guidance is being produced for the majority of offences covered by this instrument as these are not new offences. The consolidation is of a technical nature and will be of most interest to enforcement authorities and the legal profession. Both sections should understand the nature and intention of the consolidation without additional guidance.
- 9.2 However, the enforcement authority responsible for administering civil sanctions will produce guidance on the use of civil sanctions and in particular the appeals process.
- 9.3 The new Regulations 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 estimated to be around £7,400, arising from costs of familiarisation with the new legislation.
- 10.2 The impact on the public sector is expected to arise largely from the impacts of the new civil sanctions regime on the justice system. The Ministry of Justice has estimated these costs to be approximately £9,000 – £10,000 per annum.
- 10.3 An Impact Assessment has not been prepared for this instrument as it is a low cost measure and a Non-Qualifying Regulatory Provision status been approved.

## **11. Regulating small business**

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

11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken following consultation with stakeholders is to publicise the new Regulations and the new offences created, through existing customer contacts and particularly to known traders of specimens in Annexes A to D to the Principal Regulation.

## **12. Monitoring & review**

12.1 These Regulations do not contain a review provision. There is not expected to be a significant annualised net impact on businesses as the costs anticipated which are set out in section 10, are well below the £5m threshold. There are no other factors which suggest that it would be desirable or proportionate to include a review clause.

## **13. Contact**

13.1 Elaine Kendall at the Department for Environment, Food and Rural Affairs  
Telephone: 0208 026 6664 or email: [Elaine.Kendall@defra.gsi.gov.uk](mailto:Elaine.Kendall@defra.gsi.gov.uk) can answer any queries regarding the instrument.