

SL(5)468 – The Genetically Modified Organisms (Deliberate Release and Transboundary Movement) (Miscellaneous Amendments) (Wales) (EU Exit) (No. 2) Regulations 2019

Background and Purpose

These Regulations correct deficiencies in Welsh legislation which arise as a result of the UK's exit from the European Union. They ensure the statute book in Wales remains up to date and operable once the UK leaves the European Union.

This Committee considered the Genetically Modified Organisms (Deliberate Release and Transboundary Movement) (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 on 13 March 2019 – a report on those Regulations raised a number of technical points. The Welsh Government responded to this Committee's report on 25 March 2019 and in that response, the Welsh Government accepted that many of the issues raised by the Committee necessitated amendments, which are now made by these Regulations.

Procedure

Affirmative.

Technical Scrutiny

The following point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation

Regulation 2(6)(b) inserts a reference to Council Decision 2002/811/EC into regulation 17(2)(g) of the Genetically Modified Organisms (Deliberate Release) (Wales) Regulations 2002 ("2002 Regulations"). Under regulation 17(2)(g) of the 2002 Regulations, as amended, an application for consent to market genetically modified organisms must contain a monitoring plan prepared in accordance with Annex VII of the Deliberate Release Directive, as read with the guidance notes set out in Council Decision 2002/811/EC.

Amendments to relevant EU law referred to in these Regulations are made under the Genetically Modified Organisms (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/90) (in respect of Council Decision 2002/812/EC, Council Decision 2002/813/EC and Commission Decision 2003/701/EC) and the Genetically Modified Food and Feed (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/705) (in respect of Council Regulation 1829/2003). At the date of this report, there do not appear to be any amendments to deal with any defects and deficiencies under Council Decision 2002/811/EC, arising as a result of the United Kingdom's exit from the European Union.

The guidance notes set out in Council Decision 2002/811/EC include reference to the Commission and Member States which do not appear to be relevant following the United Kingdom's exit from the European Union. Further, provisions are contained in Council Decision 2002/811/EC that are similar



to those contained in relevant EU law, but only the latter have been amended by the 2019 EU Exit Regulations referred to in the preceding paragraph.

It is acknowledged that Council Decision 2002/811/EC will apply not only in Wales and that the Secretary of State was responsible for making the 2019 EU Exit Regulations referred to in the preceding paragraph. It is further acknowledged that the equivalent England only SI contains a provision which refers to Decision 2002/811/EC.

An explanation is requested of why it is not necessary to amend Council Decision 2002/811/EC.

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly

1.1 References to the National Assembly for Wales

A number of the amendments made by regulation 2 have the effect that the 2002 Regulations will use two different names to refer to what is now the same legal person i.e. “the [former] National Assembly for Wales” and “the Welsh Ministers”. All these references are to be interpreted as references to the Welsh Ministers by virtue of paragraphs 28 and 30 of Schedule 11 to the Government of Wales Act 2006, However, that will not be immediately apparent to those seeking to understanding the legislation.

These Regulations provide consistency of reference within amended regulations and this improves the clarity of the law for those provisions. References to the National Assembly for Wales remain elsewhere in the 2002 Regulations, including to connected and adjacent provisions (for example regulations 23 and 24 of the 2002 Regulations) and the possibility of confusion therefore remains.

In our view, the Welsh Ministers have the vires to change all references from the National Assembly for Wales to the Welsh Ministers, where appropriate, under paragraph 21 of Schedule 7 to the EUWA, as such changes would be supplementary or incidental to provision made under paragraph 1(1) of Schedule 2 to the EUWA.

1.2 References to “shall”

A number of the amendments made by regulation 2 have the effect that the 2002 Regulations use both “shall” and “must”.

These Regulations provide consistency of reference within amended regulations and this improves the clarity of the law for those provisions. References to “shall” remain elsewhere in the 2002 Regulations, including to connected and adjacent provisions (for example regulations 19 to 21 of the 2002 Regulations) and the possibility of confusion therefore exists.

In our view, the Welsh Ministers have the vires to change all references to “must”, where appropriate, under paragraph 21 of Schedule 7 to the EUWA, as such changes would be supplementary or incidental to provision made under paragraph 1(1) of Schedule 2 to the EUWA.



1.3 Explanatory Memorandum

Paragraph 1.2 of the Explanatory Memorandum incorrectly states that the definition of exit day under the EUWA on 5 November 2019 was 11.00pm on 31 October 2019, although the paragraph does flag that the definition is likely to change in the near future.

The definition of exit day under EUWA was amended by the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019/1423 on 30 October 2019.

Implications arising from exiting the European Union

These Regulations address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union.

Government Response

1) The Technical Point – Council Decision 2002/811/EC

The regulations amend the 2002 Regulations so as to require applications for consents to market genetically modified organisms to contain a monitoring plan prepared in accordance with Annex VII of the Deliberate Release Directive, as read with the guidance notes set out in Council Decision 2002/811/EC (“the Council Decision”). The Committee points out that the Council Decision contains provisions which have not been amended to reflect the UK’s departure from the European Union (e.g. provisions which refer to the European Commission) and that such provisions will remain after the Council Decision becomes retained EU law. The committee also notes that similar provisions in other legislation have been amended.

A very similar point was made by the Committee in its report on the Genetically Modified Organisms (Deliberate Release and Transboundary Movement) (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2019 (dated 13 March 2019) (“the March CLA Report”) at paragraph 2.2. The Welsh Government maintains the position outlined in its response to that point in the March CLA Report. That response read, so far as is relevant:

“This Decision consists of guidelines for preparation of a monitoring plan to be included in any post EU exit application for consent to market genetically modified organisms... while the Decision will become retained EU law on exit, its primary effect is to provide guidance on the provision of a monitoring plan as part of a consent application.”

The main legislation governing the monitoring plan is Annex VII of the Deliberate Release Directive, whilst the Council Decision only offers guidance on the preparation of that plan. In this context, the Welsh Government is of the view that no confusion will be caused by such out-dated references as remain in the Council Decision.

Further, it had been agreed, on a UK basis, that Brexit-related amendments to the Council Decision would be made by the Secretary of State. To have made amendments via the Regulations would therefore have involved discussions with UK Government. It would not have been practicable to conduct such discussions in the time available.

Welsh Government officials will now contact DEFRA to discuss this issue and consider whether amendments to the Council Decision may be needed.



2) The First Merits Point – References to “the National Assembly for Wales” and “shall”

The Committee highlight the fact that, after the 2002 Regulations have been amended by the Regulations they will contain both references to “National Assembly for Wales” and “the Welsh Ministers”. As the Committee points out, all such references are, by operation of by virtue of paragraphs 28 and 30 of Schedule 11 to the Government of Wales Act 2006, to be read as references to “the Welsh Ministers”. The Committee’s view is that the inconsistency of references in the 2002 Regulations as amended will be confusing for those reading the legislation.

In addition, the Committee notes that the 2002 Regulations, as amended, will contain various instances of the word “shall” and that these should have been replaced with “must”.

Very similar points were raised by the Committee in the March CLA Report (at paragraph 1.1 in relation to “National Assembly for Wales” and paragraph 1.2 in relation to “shall”). The Welsh Government maintains the position outlined in its response to that point in the March CLA Report which read, so far as is relevant:

“while it might have been desirable to make amendments to update references to the National Assembly more comprehensively, given the considerable pressures to deliver the EU Exit legislation within exceptionally challenging timescales, the focus has of necessity, centred on making the necessary operability and deficiency amendments in the legislation. The Welsh Government is of the view that failure to update the references does not render the instrument defective.”

The Regulations were prepared in the run up to 31 October (then anticipated to be “exit day”).

The Welsh Government would further point out that there are about 120 references to the “National Assembly for Wales” in the current version of the regulations being amended by these regulations. Those references cannot be amended to “Welsh Ministers” by a single amendment because the latter phrase is plural, not singular.

References to “shall” also occur frequently throughout the 2002 regulations.

These regulations do deal with out-dated uses of “the National Assembly for Wales” and “shall” where practicable.

3) The Second Merits Point – The Definition of “exit day” in the Explanatory Memorandum

It is acknowledged that the definition of “exit day” in the Explanatory Memorandum to the Regulations was incorrect. As a result, the Explanatory Memorandum will be withdrawn and re-laid.

As the Committee acknowledge, the possibility that the definition of exit day would be subject to change was flagged in the original Explanatory Memorandum.

Committee Consideration

The Committee considered the instrument and Government response at its meeting on 18 November 2019 and reports to the Assembly in line with the reporting points above, and also to highlight issues as a result of the UK exiting the EU.

