

Net Zero, Energy and Transport Committee  
Tuesday 25 June 2024  
23rd Meeting, 2024 (Session 6)

## UK subordinate legislation: consideration of consent notification

### Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI):
  - Invasive Alien Species De-listing Regulations 2024
2. The process for the Scottish Parliament's consideration of consent notifications is set out in the [SI Protocol](#). Further details of this process are set out in Annex A.

### Invasive Alien Species De-listing Regulations 2024

3. On 29 May, the Minister for Climate Action wrote to the Committee to give notice of the Scottish Government's proposal to consent to the UK SI. This correspondence is in **Annexe B**. The SI notification is available in **Annexe C** and the summary notification in **Annexe D**.
4. The notification states that the proposed laying date of the SI is 1 July 2024. However, the UK General Election means it can no longer be laid on this date. It is possibly that it could be laid in July when the UK Parliament reforms. If the Scottish Parliament does not consider it ahead of the election, it may therefore lose an opportunity to express a view.
5. The Scottish Government has asked the Committee to respond to the consent notification by 28 June 2024.
6. After EU exit, the [Invasive Non-native Species \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) ("the UK Retaining Regulations") retained the EU protections in place for the prevention of the introduction and spread of invasive non-native species (INNS) and corrected deficiencies in relation to the EU legislation as it applies to the UK. As a part of retaining the Regulation, the UK Government adopted a list of species of special concern to which restrictions apply.
7. Species of special concern are species whose adverse impacts across Great Britain would be such that concerted action is required to ensure they do not become established in the wild. These species are subject to restrictions preventing them from being brought into the territory of Great Britain, kept, bred, transported, placed on the market, used or exchanged, allowed to reproduce, grown or cultivated, or released into the environment.

8. The effect of the UK instrument in the notification will be to update the GB list of species of special concern by de-listing 10 species that are not considered to meet the necessary criteria - that the species must, based on available scientific evidence, be capable of establishing within the territory of the United Kingdom under current and future predicted climate conditions.
9. The notification states that the species being de-listed by this UK instrument have been judged by a panel of experts, based on scientific evidence, to be incapable of establishing a viable population and spreading in the environment under current conditions and in foreseeable climate change conditions in the territory of the United Kingdom.
10. On this basis the Scottish Government considers that the SI is necessary and intends to bring an equivalent SSI removing these same species from the corresponding Scottish list.

## **Next steps**

11. If the Committee wishes to approve the proposals to consent to the SI, it may, in doing so, set out in its letter to the Scottish Government any observations or concerns that it thinks are relevant.
12. If the Committee is not content with either or both of the proposals, it should include in its letter to the Scottish Government one of the following recommendations:
  - That the Scottish Government should not consent to the provision being made in a UK SI and that the Scottish Government should instead take forward an alternative Scottish legislative solution; or
  - That the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

## **Clerks to the Committee**

**June 2024**

## **Annexe A: Process for parliamentary scrutiny of consent notifications in relation to UK statutory instruments**

1. The Protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications as 'type 1' or 'type 2'.
2. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g., they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. These are notified retrospectively, after the Scottish Government has given its consent.
3. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought before the Scottish Government gives consent to the UK Government making subordinate legislation in this way. Each type 1 notification must be considered by the relevant Committee.
4. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making Regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**
5. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.
6. If the Committee is not content with the proposal, however, it may recommend that the Scottish Government should not give its consent. In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—
  - Agree. If so, the Scottish Ministers would then withhold their consent.
  - Not agree. If so, the Parliament will debate the issue.
7. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UK SI. However, the Protocol also provides that if the Scottish Ministers consider that the Committee's proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

**Annexe B: Correspondence from the Minister for Climate Action**

Convenor of the Net Zero, Energy and Transport Committee  
Room T3.40  
Scottish Parliament  
Edinburgh

29 May 2024

Dear Mr Mountain,

**THE INVASIVE ALIEN SPECIES DE-LISTING REGULATIONS 2024 EU EXIT  
LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT**

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and then Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. Please note, we are yet to have sight of the final SI and it is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you by Friday 28 June.

Yours sincerely

Gillian Martin

## Annexe C: NOTIFICATION TO THE SCOTTISH PARLIAMENT

### Name of the SI(s) (if known) or a title describing the policy area

The Invasive Alien Species (Delisting) Regulations 2024

### Is the notification Type 1 or Type 2

The SI should be subject to a Type 1 notification since it is not merely of a technical nature and nor is it making minor changes which do not require parliamentary approval.

### Overview of SI

After EU exit, the [Invasive Non-native Species \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (“the UK Retaining Regulations”) retained the EU protections in place for the prevention of the introduction and spread of invasive non-native species (INNS) and corrected deficiencies in relation to the EU legislation as it applies to the UK. It did so by amending Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, which has the status of Assimilated Law (“the Regulation”).

As a part of retaining the Regulation, the UK Government adopted a list of species of special concern to which restrictions apply. This list is contained in the Annex to the Commission Implementing Regulation (EU) 2016/1141 of 13 July 2016 adopting a list of invasive alien species of Union concern pursuant to Regulation (EU) No 1143/2014 of the European Parliament and of the Council and is now known as “the GB list of species of special concern”.

Species of special concern are species whose adverse impacts across Great Britain would be such that concerted action is required to ensure they do not become established in the wild. These species are subject to restrictions preventing them from being brought into the territory of Great Britain, kept, bred, transported, placed on the market, used or exchanged, allowed to reproduce, grown or cultivated, or released into the environment. The Secretary of State, may by regulations, add or remove species from the GB list of species of special concern with the consent of Welsh and Scottish Ministers.

The effect of the UK instrument will be to update the GB list of species of special concern by de-listing 10 species that are not considered to meet the criteria to be included in the list as set out in Article 4(3) of the Regulation. These species have been identified following a risk assessment by the GB Non-Native Species Risk Analysis Forum as required by Article 5(2) of the Regulation.

The majority of UK instrument will not apply to Scotland, except so far as it deals with areas that the UK Government considers are reserved, as they apply to INNS in relation to imports into, and exports from Great Britain, and the offshore marine

area. While import and export is generally reserved by the Scotland Act 1998 (Schedule 5, Part II, Section C5), the Scottish Government consider that the exceptions to the C5 reservation apply in relation to INNS. Those exceptions include the prohibition or regulation of movement into or out of Scotland of animals and plants for certain purposes, including protecting animal health and plant health. As a result, in the view of Scottish Ministers, the prohibition and regulation of import or export of things to or from the UK via Scotland, for these purposes, is not reserved. The exceptions cannot relate only to intra-UK movement, as this is not an aspect of import and export control.

By virtue of Article 32A of the Regulation the Secretary of State may not make regulations amending the list so far as it applies to Scotland in relation to the import to and export from Great Britain and the offshore marine area without the consent of the Scottish Ministers.

## **Background**

While it still held EU membership, the UK was subject to Regulation (EU) No. 1143/2014 of the European Parliament and of the Council on the prevention and management of the introduction and spread of invasive alien species. This regulation was retained in both UK and Scots domestic law and amended through several statutory instruments to ensure operability following the UK's exit from the EU.

The Regulation requires that species listed on the GB list of species of special concern must, based on available scientific evidence, be capable of establishing within the territory of the United Kingdom under current and future predicted climate conditions.

The species being delisted have been judged by a panel of experts, based on scientific evidence, to be incapable of establishing a viable population and spreading in the environment under current conditions and in foreseeable climate change conditions in the territory of the United Kingdom.

After EU exit, the Scottish Government also retained the EU protections in place for INNS by amending the Regulation and deficiency fixing it so as to apply it to Scotland. As such, the same list was retained under Scots law as the "Scottish list of species of special concern" by virtue of the Invasive Non-Native Species (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 ("the Scottish Retaining Regulations"). The same restrictions and criteria for listing species apply for both the GB list and the Scottish list. As a result of this criteria, Scottish Ministers have also agreed to take forward an SSI that will delist the same species from the Scottish list ensuring that both lists remain aligned. The UK SI and SSI will come into force on the same day. This will avoid any uncertainty, and any potential issues related to the United Kingdom Internal Market Act 2020.

## **Divergence from EU law**

The UK instrument diverges from Regulation (EU) 1143/2014 since it is removing ten species from the GB list of species of special concern that remain on the EU's

list of alien species of Union concern. In May 2022, following the completion of the comprehensive review of species on the EU list earlier in 2022, the EU added a further 22 species of the list of Union concern which have not been added to the GB list.

While this provision is relevant to the Scottish Government's policy to maintain alignment with the EU, divergence is not a concern because:

- divergence from EU law is necessary to satisfy the criteria for listing species set out in Article 4 of the UK Regulation in terms of relying on scientific assessment as the rationale for listing or delisting a species as explained above; and
- the instrument will not have any significant impacts upon maintaining and advancing the high standards that Scotland shares with the EU, access to EU markets for people, goods, and services, and a future Scotland's re-accession.

Note: The Regulation sets out identical criteria for listing species on both the GB list of species of special concern and the Scottish list of species of special concern. Therefore, Scots law also requires divergence from EU law and, as noted above, we intend to lay an equivalent Scottish instrument to satisfy these requirements.

### **Draft of UK instrument**

The proposed instrument is expected to be laid on 1 July 2024. The commencement date has still to be agreed with Defra since the Scottish Government will be laying an equivalent Scottish instrument to amend the Scottish list of species of special concern and the UK and Scottish instruments need to come into force on the same date to avoid potential complications in relation to the UK Internal Market Act 2020.

### **Details of the provisions that Scottish Ministers are being asked to consent to.**

The UK instrument will remove ten species from the GB list of species of special concern. The species concerned are:

Crimson fountaingrass, *Pennisetum setaceum*

Water hyacinth, *Eichhornia crassipes*

Striped eel catfish, *Plotosus lineatus*

Coati, *Nasua nasua*

Balloon vine, *Cardiospermum grandiflorum*

Kudzu vine, *Pueraria montana*

Mesquite, *Prosopis juliflora*

Small Asian mongoose, *Herpestes javanicus*

Whitetop weed, *Parthenium hysterophorus*

Perennial veldtgrass, *Ehrharta calycina*

From the commencement date of the UK instrument, the above species will no longer be subject to restrictions in Scotland in relation to imports and exports from Great Britain and the offshore marine area.

### **Summary of the proposals**

The provision will ensure that the UK Government meets the requirements of the Regulation by de-listing species who do not fulfil the criteria to be listed in the GB list of species of special concern. As the Scottish Ministers are laying an equivalent SSI in Scotland, the two instruments will, ensure alignment across Scotland, England and Wales in relation to Scottish, UK and Welsh government policy on invasive species. The provision will not confer power on UK Ministers to legislate.

### **Does the SI relate to a common framework or other scheme?**

The UK Internal Market Act (2020) is relevant to the SI. Four of the ten species that are to be de-listed were previously sold commercially in the UK prior to being placed on the EU list of species of Union concern in 2016. Once the restrictions on species are lifted, UK businesses will be permitted to sell these species once again. As the Scottish Ministers proposed SSI will align the GB and Scottish lists there is no issue in relation to UKIMA.

There is currently expected to be a second UK SI, probably in 2025, to add species to the GB list of species of special concern; species are currently being assessed for potential inclusion on the GB list of species of special concern. It is likely there will be further additions of species to the GB list in the future after the first additions have been made.

### **Summary of stakeholder engagement/consultation**

While there has been no formal consultation on the amendment to the GB list of species of special concern, stakeholders were invited to comment on the fiches created for each species being considered for de-listing under the comprehensive review of species. In February 2022, the Scottish Government, Defra and the Welsh Government asked the membership of their respective country working groups on INNS to comment on the papers which summarised the findings of the



comprehensive review of the GB list and the evidence on which the review was based. In Scotland we approached the members of our country working group on INNS, the Scottish Non-native Species Action Group (NNSAG). Members of the NNSAG were asked to forward these papers to other appropriate stakeholders for comments.

**A note of other impact assessments, (if available)**

We have contacted Defra to confirm what impact assessments have been carried out in relation to the SI but we have still to receive a response.

**Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation**

Article 4(3) of the Regulation as applies to the UK lists the criteria that species must satisfy in order to be listed on the GB list of species of special concern. The SI is required to meet these conditions. Likewise, Article 4(3) of the Regulation as applies to Scotland contains an identical list of criteria for listing species on the Scottish list of species of special concern. This means that an SSI will be necessary to remove the same ten species from the Scottish list of species of special concern. Therefore it is appropriate for Scottish Ministers to give their consent to the provisions being included in the proposed instrument. This will ensure a continuation of the common approach on INNS policy across Scotland, England and Wales both in relation to devolved policy and reserved matters.

**Intended laying date (if known) of instruments likely to arise**

The intending laying date is 1 July 2024.

**Annexe D: SI NOTIFICATION: SUMMARY**

<b>Title of Instrument</b> The Invasive Alien Species (De-listing) Regulations 2024
<b>Proposed laying date at Westminster</b> 1 July 2024
<b>Date by which Committee has been asked to respond</b> TBC
<b>Power(s) under which SI is to be made</b> Article 4(1) of Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species as amended.
<b>Categorisation under SI Protocol</b> Negative
<b>Purpose</b> To remove ten species from the GB list of species of special concern since they do not satisfy the criteria for listing within the Regulation on the prevention and management of the introduction and spread of invasive alien species.
<b>Other information</b> There will be an equivalent SSI to remove the same ten species from the Scottish list of species of special concern since they do not satisfy the equivalent criterion for listing within the Scottish Regulation on the prevention and management of the introduction and spread of invasive alien species.
<b>SG Policy contact:</b> Alison Seton