



Department
for Environment
Food & Rural Affairs



Llywodraeth Cymru
Welsh Government

Tackling Invasive Non-native Species

A new enforcement regime

January 2018

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Introduction

1. Invasive non-native species, or Invasive Alien Species as they are commonly referred to across Europe, are animals and plants that are introduced accidentally or deliberately into a natural environment where they are not normally found, with serious negative consequences for their new environment. They represent a major threat to native plants and animals in Europe, and cost the British economy an estimated £1.7 billion per annum¹.
2. The purpose of this consultation is to seek views on a proposed enforcement regime for England and Wales which is required to be put in place to enforce the restrictions contained in the EU Invasive Alien Species Regulation ((EU) 1143/2014)² (“the Regulation”). We intend to enact this enforcement regime by way of a statutory instrument later this year.
3. The Regulation came into force on 1 January 2015. The aim of the Regulation is to prevent or manage the introduction, or spread, of invasive non-native species across the European Union. It provides for a set of measures to be taken in relation to invasive non-native species included on a list of species of Union concern. Three distinct types of measures are envisaged, which follow an internationally agreed hierarchical approach³ to combatting invasive non-native species:
 - **Prevention:** a number of robust measures aimed at preventing species of Union concern from entering the EU, either intentionally or unintentionally;
 - **Early detection and rapid eradication:** Member States must put in place a surveillance system to detect the presence of species of Union concern as early as possible and take rapid eradication measures to prevent them from establishing;
 - **Management:** some species of Union concern are already well-established in certain Member States and concerted management action is needed so that they do not spread any further and to minimise the harm they cause.
4. The current list of 49 species to which the Regulation applies is attached at Annex A.

¹ The Economic Cost of Invasive Non-native Species on Great Britain (2010), CABI

² Regulation (EU) No 1143/2014 on the prevention and management of the introduction and spread of invasive alien species

³ Convention on Biological Diversity - Decision VI/23

Exiting the EU

5. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force.
6. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

Restrictions

7. The restrictions outlined at Article 7 of the Regulation prohibit the intentional:
 - (a) importing;
 - (b) keeping;
 - (c) breeding;
 - (d) transporting;
 - (e) selling;
 - (f) using or exchanging;
 - (g) permitting to reproduce, grow or cultivate or
 - (h) releasing into the environmentof any live specimens of the species on the Union list.
8. Further information about these restrictions and what they might mean for you can be found on the Great Britain non-native species secretariat's [website](#).
9. The UK Government and Devolved Administrations will put in place management measures for all species of Union concern that are already widely spread in the United Kingdom, so that their impacts are minimised. For example, Defra and the Devolved Administrations are signatories to the UK Squirrel Accord, which aims to promote a coordinated approach to controlling the grey squirrels and securing the future of our red squirrels and woodlands. We will be consulting on species-specific management plans that will set out these measures in due course. These will be available on the Great Britain non-native species secretariat's [website](#).

Permits

10. In some limited circumstances, establishments may apply for a permit to allow them to derogate from the restrictions set out under the Regulation. These circumstances include for the purposes of research, ex-situ conservation and scientific production of medical products or, in exceptional cases, for reasons of compelling public interest, which may include social or economic reasons. The Animal Plant and Health Agency administer the permitting scheme in the UK.

11. As part of the enforcement regime, penalties will be introduced in England and Wales in respect of:

- Making a false statement to obtain a permit;
- Falsifying or altering a permit; or using a specimen otherwise than in accordance with a permit;
- Knowingly contravening a condition or requirement of a permit;
- Intentionally obstructing an authorised enforcement officer;
- Impersonating an enforcement officer, with intent to deceive;
- Attempting to commit any of the offences above;
- Possessing anything capable of being used for committing any of the above offences.

In Scotland and Northern Ireland, the devolved administrations will be introducing penalties through their own respective domestic legislation.

Environmental regulation

12. Two principles are fundamental in environmental regulation: that harm should be prevented or minimised, and that the “polluter pays” for the harm they cause. Under the “polluter pays” principle, the environmental and social costs of failing to prevent or control risks to the environment should fall on those who are responsible for them. When operators fail to comply with the law, enforcement may be needed to achieve this objective.

13. More specifically, the main purposes of environmental enforcement are to:

- prevent continuing environmental risk or harm;
- secure improvements leading to compliance;
- ensure environmental damage is put right;
- remove any financial benefit from non-compliance;
- make restitution to communities adversely affected;
- punish behaviour that seriously undermines regulation, at its worst intentional, reckless or grossly negligent non-compliance.

14. If enforcement achieves these purposes, it will help to secure important results:

- deter future non-compliance with environmental requirements; and
- prevent environmental harm from occurring in the first place.

15. The proposals set out below are designed to ensure that proportionate environmental enforcement and penalties are effective in pursuing these principles and purposes.

Proposed enforcement regime

16. The Regulation requires Member States to introduce penalties in domestic legislation for any breaches of restrictions contained in it. A requirement of the Regulation is that the penalties must be effective, proportionate and dissuasive and may include, for

example, fines, seizure of the species and immediate suspension or withdrawal of a permit.

17. There is a range of enforcement tools available to environmental regulators to achieve the best outcomes for the environment and for people. The proposed enforcement regime set out in this document ranges from the provision of advice and the issuing of warning letters to a variety of civil penalties and criminal offences already in place under existing legislation. We are also seeking your views on whether to create new criminal offences to enforce restrictions which are not mirrored in existing legislation. Any action beyond the provision of advice or the sending of a warning letter is considered to be a penalty, either civil or criminal.
18. Annex B sets out the restrictions in the Regulation and the proposed criminal and civil penalties available to address each breach. We consider that Natural England, Natural Resources Wales, the Police and the Crown Prosecution Service should be responsible for enforcement of the proposed regime. More information on the proposed regime is set out below.
19. Some species listed under the Regulation may already be subject to control measures through existing regulatory frameworks. For example, the Import of Live Fish (England and Wales) Act 1980 (c.27) regulates the import, keeping and release of non-native fish. We will be carrying out further analysis of the implications for this enforcement strategy of existing regulatory frameworks. We would welcome any views you may have on this point.

Q1. Where a species of Union concern is already subject to control through an existing framework, do you consider that it should continue to be managed under that framework for restrictions that are covered by the Regulation? Please explain your reasons.

Advice and guidance

20. Advice and guidance should be offered by the regulator to assist people to come back into compliance at any point. Advice and guidance will normally be provided after a breach of a restriction in the Regulation has occurred or where a breach is likely to be committed and should be offered without prejudice to any other enforcement response that may be required. In most cases, this is likely to be the first course of action to seek to bring an individual or business into compliance with the Regulation.

Warning letters

21. A warning letter is a written notification that a regulator believes an offence or breach of a restriction in the Regulation has been committed. It may, in the event of further non-compliance, influence subsequent choice of penalty.
22. The regulator should consider serving a warning letter prior to seeking enforcement action.

Civil penalties

23. The availability of civil penalties allows regulators to distinguish more effectively between those with a good general approach to compliance and those who tend to disregard the law. They enable regulators to respond flexibly to the circumstances of each case.

24. Civil penalties can be applied to any person who commits a breach of the restrictions in the Regulation, including for example: businesses, landowners, individuals, public organisations and non-governmental organisations.

25. We propose that civil penalties should be available for all breaches of the restrictions in the Regulation.

26. The specific penalties proposed are:

- **Fixed monetary penalty:** A requirement to pay a monetary penalty of a fixed amount. The proposed levels for fixed monetary penalties are £1,000 for individuals and £3,000 for businesses;
- **Variable monetary penalty:** A requirement to pay a monetary penalty of an amount determined by the regulator reflecting the circumstances of the offence;
- **Compliance notice:** A requirement to take specified steps within a stated period to secure that an offence does not continue or happen again;
- **Restoration notice:** A requirement to take specified steps within a stated period to secure that the position is, so far as possible, restored to what it would have been if no breach had occurred;
- **Enforcement undertaking:** These enable a person, whom a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking;
- **Third party undertaking:** These enable a person who has received a regulator's notice of intent to impose a variable monetary penalty, for example, to give a commitment to take action to benefit a third party affected by the non-compliance;
- **Stop notice:** A requirement for a person to stop carrying on an activity described in the notice until it has taken steps to come back into compliance.

27. We also propose that the standard of proof for fixed monetary penalties, variable monetary penalties, compliance notices and restoration notices should be set at the balance of probabilities

28. The detail of the proposed civil penalty regime is set out in Annex C.

Q2. Are you content with the proposed civil penalties regime including the levels for fixed monetary penalties and standards of proof? What, if any, changes would you propose? Please explain your reasons.

Criminal offences

29. In England and Wales, we propose to use two existing domestic criminal offences covering release into the environment and sale to give regulators another option to enforce the most serious breaches of the Regulation. These powers could be used, for example, to address deliberate releases of species of particular concern in Great Britain, or where an offender persists with selling a species despite previous warnings or penalties.

30. These existing offences are:

- **Release into the environment** – Under section 14 of the Wildlife and Countryside Act 1981, it is a criminal offence to release into the wild a species of animal that is not ordinarily resident in the wild in Great Britain or is listed on Schedule 9 to the 1981 Act. It also a criminal offence to plant or cause to grow in the wild a plant listed on Schedule 9;
- **Ban on sale** - Under section 14ZA of the Wildlife and Countryside Act 1981, it is a criminal offence to sell, or offer for sale, a live animal which is of a species not ordinarily resident in GB in the wild or a regular visitor; or a specimen of animal or plant species listed under Schedule 9; and where the Secretary of State has made an order banning its sale.

A person guilty of an offence under section 14 or 14ZA of the Wildlife and Countryside Act 1981 is liable:

- a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
- b) on conviction on indictment, to a imprisonment for a term not exceeding two years or to a fine, or to both.

31. We propose to amend Schedule 9 to the Wildlife and Countryside Act 1981 in England and Wales to include reference to species of Union concern which are not already included on it. We also propose to make new ban on sale orders covering all species of Union concern under section 14ZA of the Wildlife and Countryside Act 1981.

32. Penalties in respect of the importation and exportation of species of Union concern are provided for by the Customs and Excise Management Act 1979. This Act makes it a criminal offence under sections 50, 68 and 170 to import or export contrary to any prohibition or restriction that is currently in force. These apply to the restrictions contained in the Regulation.

33. The UK government is committed to preventing the proliferation of unnecessary new criminal offences and to ensuring that any new offences are fit for purpose. When creating a new offence, it must be both proportionate and necessary to achieve the overall objective.

34. In addition to the use of civil penalties and existing criminal domestic offences, we want your views on whether it is proportionate and necessary also to create new criminal offences to cover the remaining restrictions in the Regulation. These are:

- a. keeping;
- b. breeding;
- c. transporting;
- d. using or exchanging; and
- e. permitting to reproduce, grow or cultivate.

Q3. Do you consider that breaches of these restrictions merit the creation of new criminal offences or should we rely on civil penalties and existing criminal offences? Please explain the reasons for your answer.

35. We also want your views as to whether it is proportionate and necessary to create new criminal offences for breaches relating to the permitting scheme, which are outlined at paragraph 11 above.

Q.4 Do you consider that breaches relating to the permitting scheme merit the creation of new criminal offences or should we rely solely on civil penalties? Please explain the reasons for your answer.

36. If new criminal offences are created, we propose to set the level of penalties at those for offences under section 14 or 14ZA of the Wildlife and Countryside Act 1981, which is set out at paragraph 30 above.

Q.5 If new criminal offences are created, do you think that the penalties should be set at the same level as those for offences under section 14 or 14ZA of the Wildlife and Countryside Act 1981? Please explain the reasons for your answer.

Determining when to use civil or criminal proceedings

37. Where regulators are minded to pursue enforcement proceedings, they should routinely look to use civil penalties rather than criminal offences. The enforcement through criminal proceedings should be reserved only for the most serious breaches of the Regulation or where civil penalties have been applied but offending continues.

Powers of entry

38. In order to enforce this regime effectively, regulators will need new powers of entry and powers to search and take samples in order to investigate whether:

- a. there is an unlawfully imported or acquired species on the premises;
- b. a breach of a restriction under the Regulation has been or is being committed and the evidence of the breach may be found on any premises, or

c. a condition of a permit has been or is being complied with.

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Annex A - List of species of Union concern

Plants		Animals	
Alligator weed	<i>Alternanthera philoxeroides</i>	Amur sleeper	<i>Perccottus glenii</i>
American skunk cabbage	<i>Lysichiton americanus</i>	Asian hornet	<i>Vespa velutina</i>
Asiatic tearthumb	<i>Persicaria perfoliata</i> / <i>Polygonum perfoliatum</i>	Bryant's fox squirrel	<i>Sciurus niger</i>
Broadleaf watermilfoil	<i>Myriophyllum heterophyllum</i>	Chinese mitten crab	<i>Eriocheir sinensis</i>
Chilean rhubarb	<i>Gunnera tinctoria</i>	Coypu	<i>Myocastor coypus</i>
Crimson fountaingrass	<i>Pennisetum setaceum</i>	Egyptian goose	<i>Alopochen aegyptiacus</i>
Curly waterweed	<i>Lagarosiphon major</i>	Grey squirrel	<i>Sciurus carolinensis</i>
Eastern baccharis	<i>Baccharis halimifolia</i>	Indian house crow	<i>Corvus splendens</i>
Floating pennywort	<i>Hydrocotyle ranunculoides</i>	Marbled crayfish	<i>Procambarus fallax f. virginalis.</i>
Floating primrose	<i>Ludwigia peploides</i>	Muntjac deer	<i>Muntiacus reevesi</i>
Giant hogweed	<i>Hercleaum mantegazzianum</i>	Muskrat	<i>Ondatra zibethicus</i>
Green cabomba	<i>Cabomba caroliniana</i>	North American bullfrog	<i>Lithobates (Rana) catesbeianus</i>
Himalayan balsam	<i>Impatiens glandulifera</i>	Pallas's squirrel	<i>Callosciurus erythraeus</i>

Japanese stiltgrass	<i>Microstegium vimineum</i>	Raccoon	<i>Procyon lotor</i>
Kudzu vine	<i>Pueraria lobata</i>	Raccoon dog ⁴	<i>Nyctereutes procyonoides</i>
Milkweed	<i>Asclepias syriaca</i>	Red eared slider ⁵	<i>Trachemys scripta</i>
Nuttall's waterweed	<i>Elodea nuttallii</i>	Red swamp crayfish	<i>Procambarus clarkia</i>
Parrot's feather	<i>Myriophyllum aquaticum</i>	Ruddy duck	<i>Oxyura jamaicensis</i>
Persian hogweed	<i>Heracleum persicum</i>	Sacred Ibis	<i>Threskiornis aethiopicus</i>
Sosnowski's hogweed	<i>Heracleum sosnowskyi</i>	Siberian chipmunk	<i>Tamias sibiricus</i>
Water hyacinth	<i>Eichhornia crassipes</i>	Signal crayfish	<i>Pacifastacus leniusculus</i>
Water primrose	<i>Ludwigia grandiflora</i>	Small asian mongoose	<i>Herpestes javanicus</i>
Whitetop weed	<i>Parthenium hysterophorus</i>	South American coati	<i>Nasua nasua</i>
		Spiny-cheek crayfish	<i>Orconectes limosus</i>
		Topmouth gudgeon	<i>Pseudorasbora parva</i>
		Virile (northern) crayfish	<i>Orconectes virilis</i>

⁴ The restrictions do not come into force until 2 February 2019

⁵ This includes all sub-species of *Trachemys scripta* e.g. yellow-bellied slider, red-eared slider, Cumberland slider, slider and common slider

Annex B - List of restrictions

	civil	criminal	enforcing legislation
Restrictions under Article 7 of the EU IAS Regulation			
Import	✓	✓	Customs and Excise Management Act 1979
Keep	✓	?	Statutory Instrument coming into force during 2018
Breed	✓	?	Statutory Instrument coming into force during 2018
Transport	✓	?	Statutory Instrument coming into force during 2018
Sell	✓	✓	Wildlife and Countryside Act 1981
Use or exchange	✓	?	Statutory Instrument coming into force during 2018
Permit to reproduce	✓	?	Statutory Instrument coming into force during 2018
Release in to the environment	✓	✓	Wildlife and Countryside Act 1981
Miscellaneous restrictions under the proposed permitting and enforcement Regulation			
Make a false statement to obtain a permit.	✓	?	Statutory Instrument coming into force during 2018
Falsify or alter a permit; or use a specimen otherwise than in accordance with a permit	✓	?	Statutory Instrument coming into force during 2018

Knowingly contravene a condition or requirement of a permit.	✓	?	Statutory Instrument coming into force during 2018
Intentionally obstruct an appropriately authorised enforcement officer.	✓	?	Statutory Instrument coming into force during 2018
Pretend to be an enforcement officer, with intent to deceive	✓	?	Statutory Instrument coming into force during 2018
Attempt to commit any of the offences above	✓	?	Statutory Instrument coming into force during 2018
Possess anything capable of being used for committing any of the above offences.	✓	?	Statutory Instrument coming into force during 2018

? – to be determined following the outcome of the consultation exercise

Where a body corporate is guilty of an offence, a director, manager, secretary or similar person can be personally found guilty of that offence or of breaching a restriction in the Regulation where it was committed with their consent or connivance, or due to neglect on their part.

Annex C – Proposed civil penalties model

Fixed Monetary Penalty

1. The regulator may impose a fixed monetary penalty where it considers that a breach of a restriction in the Regulation has taken place.
2. A fixed monetary penalty should be offered for technical or minor offences where previous advice and guidance has been ignored, or to remove any marginal illicit financial gain.
3. The monetary penalty should be £1,000 for individuals; and £3,000 for a body corporate.
4. The regulator must serve a notice of intent setting out the grounds and the amount of the proposed penalty. The penalty can be discharged by paying 50% of the penalty within 28 days of receiving the notice of intent.
5. On receipt of a final notice, this monetary penalty would be reduced by 50% if paid within 28 days; or increased by 50% if payment is not received within 56 days.

Variable Monetary Penalty

6. The regulator may impose a variable monetary penalty where it considers that a breach of a restriction in the Regulation has taken place.
7. A variable monetary penalty should be used to remove any financial benefit from non-compliance and deter future offending. They will usually be considered for more serious breaches.
8. The maximum amount of the variable monetary penalty is £250,000. It will be calculated by applying the process set out in the relevant regulator's enforcement policy.

Compliance Notice

9. A regulator may issue a compliance notice requiring a person to take specified steps within a stated period to ensure that a breach of a restriction in the Regulation does not continue or happen again.
10. Compliance notices should be used where a breach may be ongoing in nature or the circumstances that have given rise to it may persist so there is a risk that the breach may recur. Compliance notices may be combined with restoration notices, variable monetary penalties and stop notices at the regulator's discretion and where appropriate.

Restoration notice

11. A regulator may issue a restoration notice requiring a person to take steps to restore harm caused by non compliance, so that the position is restored, so far as possible, to what it would have been if no breach had occurred. Restoration notices may be combined with compliance notices, variable monetary penalties and stop notices at the regulator's discretion and where appropriate.

Stop notice

12. A regulator may, without serving a notice of intent, issue a stop notice prohibiting a person from continuing an activity that is causing (or likely to cause) serious harm and that activity involves or is likely to involve a breach of a restriction in the Regulation. It can also immediately prohibit an activity that is likely to be carried out and likely to cause serious harm from continuing until specific steps have been taken. A stop notice may be issued with any other civil penalty except a fixed monetary penalty.

Enforcement undertaking

13. A regulator may decide to accept an enforcement undertaking from a person to take steps that would make amends for non-compliance and the effects for any breach of a restriction in the Regulation. If the regulator accepts the proposal, it will be a voluntary agreement between the regulator and the person who made the proposal. No other civil penalty may be imposed if the regulator accepts the enforcement undertaking, and the undertaking is carried out.

Third Party Undertaking

14. A person who has been issued with a notice of intent to impose a compliance notice, restoration notice or variable monetary penalty may offer the regulator a third party undertaking as to action to be taken by that person to benefit a third party who has been affected by the breach of a restriction in the Regulation.

15. A third party undertaking would normally be an appropriate option where there is identifiable harm to local people or communities. Harm may include any:

- loss of amenity;
- nuisance;
- damage to local economic activity.

16. Measures offered in a third party undertaking could for example:

- compensate for the harm by providing or making improvements to the local environment or amenities;
- involve financial payment of compensation.

Non-Compliance penalty notice

17. These can be served by a regulator following non-compliance with a restoration notice, compliance notice or third party undertaking. The amount of the penalty is based on the costs the person in breach is avoiding by not complying with the original notice. If the notice or undertaking has been ignored completely, the penalty will be 100% of the costs avoided, but if a notice has been partially complied with, the penalty will be reduced accordingly.

Enforcement cost recovery notices

18. A regulator can serve an enforcement cost recovery notice to recover certain costs when imposing a penalty. This power is limited to variable monetary penalties, compliance notices, restoration notices or stop notices. The regulator will retain any money raised through the cost recovery provisions.

Revenue from penalties

19. All revenue from penalties in England, except those in relation to enforcement cost recovery notices, is paid into the Government's Consolidated Fund and is not available to regulators who impose them. In Wales, they are paid to the Welsh Consolidated Fund.

Standards and burden of proof

20. To use a fixed monetary penalty, variable monetary penalty, compliance notice or restoration notice, the regulator must be satisfied on the balance of probability that a breach of a restriction in the Regulation has occurred.

21. To serve a stop notice, the regulator must reasonably believe that the activity is causing (or likely to cause) serious harm and that activity involves or is likely to involve a breach of a restriction in the Regulation.

22. To offer an enforcement undertaking, the regulator must have reasonable grounds to suspect that the person has breached a restriction in the Regulation.

23. The burden of proof rests with the regulator. This requires the regulator to provide evidence that a breach of a restriction in the Regulation has taken place, rather than the individual or business accused to demonstrate compliance.

Notices and representations

24. Before imposing a fixed monetary penalty, variable monetary penalty, compliance notice or restoration notice, the regulator must first serve a "notice of intent" setting out what is proposed. On receiving a notice of intent, the person will have the right to make written representations and objections within 28 days to the regulator about the proposal to impose the penalty. The regulator then must decide whether to impose the penalty (with or without modification) or to impose a different penalty. If the regulator decides that a

penalty should still be imposed, it must then serve a final notice which will set out the penalty, information on how to appeal and the consequences for failing to comply with any requirements.

Appeals

25. Appeals can be made to the First Tier Tribunal against:

- Fixed monetary penalties;
- Variable monetary penalties;
- Compliance notices;
- Restoration notices;
- Stop notices;
- Decision not to issue a completion certificate for a stop notice or an enforcement undertaking;
- Non-compliance penalties;
- Enforcement cost recovery notices.

26. All notices (other than stop notices) are suspended pending appeal.

27. The First Tier Tribunal may, in relation to the imposition of a requirement or service of a notice:

- a. withdraw the requirement or notice;
- b. confirm the requirement or notice;
- c. vary the requirement or notice;
- d. take such steps as the regulator could take in relation to the act or omission giving rise to the requirement or notice;
- e. remit the decision whether to confirm the requirement or notice, or any matter relating to that decision, to the regulator.

Compensation

28. Where a stop notice has been served, the regulator may compensate a person if, as a result of the service of the notice or the refusal of a completion certificate, that person has suffered loss, and:

- The regulator withdraws or amends the stop notice because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
- The regulator is in breach of its statutory obligations;
- The person successfully appeals against the stop notice and the First Tier Tribunal finds that the service of the notice was unreasonable; or
- The person successfully appeals against the refusal of a completion certificate and the First Tier Tribunal finds that the regulator's refusal was unreasonable.

29. In these circumstances, compensation should cover loss including exceptional costs resulting from the service of the stop notice (for example, legal or expert advice).

Publicity

30. Regulators will be required to publish annually information on cases where a civil penalty has been imposed.