16 November 2018

Dear Gillian,

THE CONTROL OF TRADE IN ENDANGERED SPECIES (AMENDMENT) (EU EXIT) REGULATIONS 2018
EU EXIT LEGISLATION

I write in relation to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, the Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a no-deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our responsibility to ensure that devolved law continues to function on and after EU withdrawal.

The UK Government is proposing to make the above named regulations to ensure the continued operability of regulations which relate to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The proposed corrections are technical in nature and limited to preserving the effective functioning of CITES regime, which is currently governed and implemented on a UK-wide basis. As such, Scottish Ministers would be content to consent to the Regulations should our consent be sought.

However, the UK Government has not written to request the consent of Scottish Ministers to the Regulations and we are therefore not in a position to notify the Scottish Parliament under the agreed protocol. This is due to an on-going disagreement with the UK Government as regards devolved competence in relation to CITES.
As you will be aware, the import and export of endangered species is reserved by the Scotland Act 1998 (Schedule 5, Part II, section C5). However, Scottish Ministers consider that there are devolved elements within the CITES regime, on which the Regulations will touch. In our view, the domestic implementation of CITES is a reserved matter only so far as it concerns the prohibition and regulation of the import and export of endangered species. The prohibition and regulation of transactions which do not involve export or import measures are not reserved. Measures which go beyond the requirements of CITES such as those regulating the advertising, transport for sale or purchase and sale in the domestic market are broadly considered to be devolved. The UK Government does not agree with our analysis and considers the whole of CITES to be a reserved matter.

It is crucial that we ensure devolved interests are respected and we will continue to press our position with the UK Government in relation to CITES. I will be writing to the UK Government shortly to set out the Scottish Government’s view of the extent of devolved interests in CITES and to make clear that we consider our consent is needed for the Regulations to proceed. In the meantime, and in the spirit of being open and transparent with you in relation to our preparations for EU Exit, I attach details of the proposed Regulations for your consideration.

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

I look forward to hearing from you in due course.

Yours,

ROSEANNA CUNNINGHAM
THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF 
WILD FAUNA AND FLORA (CITES) 

The Trade in Endangered Species of Wild Flora and Fauna (Amendment) (EU Exit) Regulations 2018 

1. Name of the instrument and summary of proposal 

The Trade in Endangered Species of Wild Flora and Fauna (Amendment) (EU Exit) Regulations 2018 address minor and technical deficiencies arising from the withdrawal of Scotland as part of the United Kingdom from the European Union, based on a presumed no deal scenario. 

2. Explanation of law that the proposals amend 

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) controls the trade in endangered or protected animal or plant species. CITES controls apply to the import from or export to third countries of dead or living controlled species, as well as parts or derivatives (e.g. skin, fur, teeth, shell, feathers or blood and parts of some plants, e.g. seeds). 

The provisions of the Convention have to be implemented uniformly in all EU Member States. CITES is implemented in the EU through a set of regulations known as the EU Wildlife Trade Regulations. These regulations contain stricter requirements than the Convention in some instances. 

The EU Wildlife Trade Regulations are: 

- Principal regulation - Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (as last amended by Commission Regulation (EU) 2017/160); 
- Commission Implementing Regulation (EU) 2017/1915 prohibiting the introduction into the Union of specimens of certain wild fauna and flora. 

3. Summary of the proposals 

The Trade in Endangered Species of Wild Flora and Fauna (Amendment) (EU Exit) Regulations 2018 are required to ensure that CITES legislation remains operable in the UK after EU Exit.
CITES legislation includes both the EU Wildlife Trade Regulations and the supporting UK regulations that contain enforcement powers, sanctions and fees relating to CITES. The relevant UK regulations are: the Control of Trade in Endangered Species Regulations 2018 (COTES – S.I. 2018/703) and the Control of Trade in Endangered Species (Fees) Regulations 2009 (S.I. 2009/496). The proposed Regulations make corrections to ensure operability when the UK leaves the EU.

The corrections include amending references to the EU and EU institutions, and administrative processes, to UK equivalents; updating legal references to refer to relevant UK legislation; and modifying the reporting requirement, so that reports that are currently provided to the Commission will, in the future, be published by the UK Government.

The proposed Regulations do not alter policy or the way CITES legislation currently operates in the UK, outside of limiting the scope of the territorial application of the legislation to the United Kingdom. CITES controls that previously applied within the EU and at the EU borders will, after EU Exit, apply within the UK and at the UK borders.

4. Why are these changes necessary?

These changes are necessary to allow the continuation of the effective functioning of this legislation.

5. Impact on devolved areas

The import and export of endangered species is reserved by the Scotland Act 1998 (Schedule 5, Part II, section C5). The Scottish Ministers consider that there are devolved elements within the CITES regime, which the proposed Regulations will touch upon.

In the view of Scottish Ministers, the domestic implementation of CITES is a reserved matter only so far as it concerns the prohibition and regulation of the import and export of endangered species. The prohibition and regulation of transactions which do not involve export or import measures are not, in the Scottish Ministers’ view, reserved matters. Measures which go beyond the requirements of CITES such as those regulating the advertising, transport for sale or purchase and sale in the domestic market are broadly considered to be devolved also.

The UK Government does not agree with that analysis and considers the whole of CITES to be a reserved matter. However, we are content that the amendments themselves to the proposed Regulations are appropriate, as they properly reflect how responsibility for CITES presently operates in practice as regards Scotland.

6. Stakeholder engagement/consultation

We have written to our stakeholders setting out the general approach we are taking to correcting deficiencies in environmental legislation and we are in regular contact with all our stakeholders regarding the move towards leaving the EU. However, these measures are aimed solely at preserving the functioning of the law as it stands at
present and, therefore, we have not undertaken any engagement, or any formal consultation, about these specific amendments.

7. Any other impact assessments?

On the basis that these amendments do not result in any policy changes, no impact assessment has been prepared.

8. Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation

The Scottish Ministers consider it necessary to ensure that the relevant legislation is prepared in the event of a no deal EU Exit to ensure the continued effective operation of the CITES regime. Whilst there is some disagreement between the Scottish Ministers and the UK Government over competence, the Scottish Ministers agree with the policy intention of the proposed regulations and are content to consent to those regulations, given the measures are technical in nature and limited to preserving the effective functioning of CITES regime, which is currently governed and implemented on a UK-wide basis.

The UK Government has not requested the consent of the Scottish Ministers to the proposed Regulations as it does not consider that they contain provisions relating to devolved matters which the Scottish Ministers could include in an SSI under the European Union (Withdrawal) Act 2018. Scottish Ministers consider that their consent is needed for Defra Ministers to make the proposed Regulations and will be writing to the UK Government shortly to set out their view of the extent of devolved interests in CITES.

9. Do the proposed changes adhere to the environment and animal principles?

The proposed changes are minor technical changes and adhere fully to the existing environmental principles. There are no changes relevant to animal welfare.

10. Are there governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

The UK Government is a signatory to CITES and will remain primarily responsible for UK compliance with the Convention. The Scottish Ministers will continue to support those efforts and will continue dialogue with the UK Government about the differing views on competence as necessary.

11. Intended UK laying date

The SI was laid for sifting at Westminster on 14 November. The Scottish Government has not been informed as to when the SI will be made.

12. Information about any time dependency associated with the proposal

There is no time dependency associated with the proposals.
13. Any significant financial implications?

There are no financial implications associated with the proposals. However if separate arrangements for Scotland were to be considered, it is worth noting that the Animal and Plant Health Agency (APHA) currently processes around 50,000 CITES-related UK transactions per annum. Processing any Scottish share of this total in Scotland would likely create significant extra costs.