

IAS Enforcement consultation – OATA response

1. 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.

Imports of live ornamental fish into England and Wales are currently controlled under the Import of Live Fish (England and Wales) Act 1980 (ILFA). Section 1 of ILFA prohibits the import into, or the keeping or the release, in any part of England and Wales of live fish, or the live eggs of fish, of a species which is not native to England and Wales and which in the opinion of the Minister might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales. Section 3 of ILFA creates criminal offences in relation to the import, keeping or release of prohibited species.

ILFA currently regulates the five crayfish species and one fish species currently listed in the EU Invasive Alien Species Regulations (EU IAS). It provides for ILFA Orders that enable the management of all crayfish and freshwater fish in trade and provides suitable mechanisms to prevent their release into and management within natural waters. Species controlled under ILFA can readily be amended according to any future identified needs based on a thorough risk assessment process that reflects the particular environmental circumstances we find nationally. It is therefore more pertinent to our national situation than the questionable and inconsistent risk assessment processes applied to proposals for listings under the EU IAS.

The existing regime under ILFA is well-established and well understood. Given that it was designed with the express purpose of preventing the introduction of invasive, non-native fish species there appears little merit in seeking to develop additional or alternative measures in relation to the species it controls. To do so risks creating confusion, uncertainty and potentially contradictory controls, with the accompanying risk of unintentional non-compliance.

The consultation makes no clear recommendations as to other regulatory control options beyond references to ILFA and the Wildlife and Countryside Act 1981 (WCA). However, it should be noted that the WCA does not prohibit the import of controlled species whereas ILFA does. Subsequent sale of controlled species would be captured as an offence as the species should not be available in the country in the first place. Thus, ILFA provides a stronger mechanism for preventing the introduction of prohibited species into the environment by not letting them into the country in the first place. We would consider any legislation that only allows for the management of a problem once it has arrived (such as would be the case if WCA was used) as being a retrograde step.

We consider that species of Union concern that are already subject to the Import of Live Fish (England and Wales) Act 1980 (ILFA) should continue to be managed under that framework.

It should also be noted that there is such a broad spectrum of invasive species, from highly invasive species such as *Fallopia japonica* that are not listed as of EU-wide concern, to species that are not invasive in the UK such as *Eichhornia crassipes* that are listed. Considering the wide range of responses required to deal with each, a single, 'one-size fits all' framework would not be appropriate.



2. 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.

The consultation provides little context as to the potential circumstances in which civil sanctions may be applied making it difficult to determine in what cases civil or criminal sanctions would be most appropriate. There are, however, potentially significant challenges relating to the enforcement of invasive species controls and other issues that should be taken into account in considering the penalties that should be applied to offences.

Some of the plant species of Union concern are known to be difficult to identify, including *Myriophyllum heterophyllum*, *Lagorosiphon major* and *Cabomba carolinana*, all of which have been significant in trade in the past. This could result in specimens being unknowingly or unintentionally mis-labelled or sold as other similar species. It would be inappropriate to apply criminal sanctions in such circumstances, noting especially that the enforcing authorities could have problems identifying such species themselves.

Also, it appears to be proposed that all species of Union concern will continue to be controlled in the UK once we leave the EU, regardless of whether or not they present an invasive threat in this country. Whilst we would not condone anyone trading in goods illegally, criminalising individuals or businesses for undertaking activities that present no biosecurity risk in the UK does not seem to be proportionate.

Fundamentally, the objective must be to bring people into compliance with the new controls. This will be challenging enough given there is insufficient or no justification for the controls on some of these species. **We would therefore prefer the use of civil penalties over criminal sanctions.**

It is not apparent from the consultation document what appeals processes will be in place for people or businesses subject to civil sanctions. **We believe that an appeals process is paramount and that any new regulations must make provision for them.**

3. 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. 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

Paragraph 31 of the consultation document proposes including on Schedule 9 of the WCA all those species of Union concern not already included on it. **We do not support this proposal.**



The identification of species of Union concern has been fundamentally flawed from the beginning in two major respects:

- The Risk Assessment processes used have been inconsistent and inadequate. This has been recognised by the European Commission in their decision to look again at the processes used.
- The continued adoption of species at an EU-wide, rather than regional level regardless of levels of risk. There are species of Union concern that present absolutely no biosecurity risk in the UK, a prime example being *Eichhornia crassipes*, a species that is most unlikely to ever become invasive in this country.

As the UK leaves the EU it should give full and proper consideration to the removal of restrictions on non-invasive species. The UK Government has publicly committed to review the species of EU concern in this context. To include species on Schedule 9 of the WCA without a full and proper assessment of the risk in the UK will create legislative barriers to the future removal of restrictions on these economically important species and is not consistent with Government's stated policies in relation to Brexit. It would make it more difficult to deregulate for non-invasive species after we leave the EU at a significant ongoing and unnecessary cost to UK businesses. Any amendments to Schedule 9 should be limited to those species where a risk assessment can comprehensively demonstrate that the species presents a biosecurity threat in the UK. There already exists sufficient evidence to bring into question the appropriateness of controlling some of the species of EU concern in the UK.

We consider that only those species that can be demonstrated to be a threat in the UK should be subject to any tightening of regulatory controls.

Paragraph 34 of the consultation seeks views on the proportionality of additional criminal offences.

The Government's position in respect of these controls is unclear. There appears to be some inconsistency with its current approach as outlined in its FAQ (updated 21 July 2017) which states it is not prohibited to keep a listed plant in your garden providing you do not allow or encourage it to grow outside your garden. This is inconsistent with the question in paragraph 34 ((a) and (e)) which would criminalise such behaviour. Prior to its listing on the EU IAS *Lagarosiphon major* was the most popular submerged aquatic plant for garden ponds in the UK. It is likely that a large proportion of garden ponds in the UK will have this plant growing in them, potentially over a million ponds. To criminalise pond owners for the keeping or permitting to grow etc of these plants would be entirely disproportionate.

It is also unclear what would happen to existing animals held by individuals when a new species is listed. Many species of ornamental fish are kept for the purposes of private 'hobby' breeding. These animals are kept in closed environments with little or no risk of escape to the wild. Other than euthanasia it is unclear what should be done with these animals if people are no longer allowed to keep them. To criminalise them for failing to euthanise their pets and continuing to keep the animals again seems entirely disproportionate.

We would not therefore support new criminal offences as described and would urge the Government to make its position on the above points known at the earliest opportunity.

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.

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.

See response to Question 3.

6. Do you have any further views on the proposals?

Paragraph 11 of the consultation states that Scotland and Northern Ireland will be introducing their own penalties through their own domestic legislation. Whilst we acknowledge that this power has been devolved in these countries, it should equally be acknowledged that many businesses operate across the UK. **We would therefore urge close cooperation across all UK administration on the application of controls to ensure some degree of consistency and to avoid given advantages to one group of businesses over another.**

Paragraph 18 identifies those responsible for enforcement of the proposed regime. We would highlight our comments under Question 1 in relation to ILFA and **urge Government to recognised the important role to be played by the Fish Health Inspectorate (FHI) in relation to fish species subject to control.**

As a trade association we seek to work closely with the enforcement agencies in identifying illegal activity within our sector. However, in the past we have found that the priority given to invasive controls by different regulators has been variable in response to intelligence we provide to them. **We would urge Government to give fuller consideration to how intelligence is managed and acted upon and we would be willing to work with regulators in this regard.**

As indicated in our response to Question 3, we have major concerns about the proposal to introduce penalties for animal and plant species that are not invasive in the UK. We do not believe that people should be penalised for their actions where there is no demonstrable biosecurity risk. Indeed, many of the UK Government's own risk assessments have recognised that many species of Union concern do not present an invasive risk in the UK. **It is our firm view that as we leave the EU we should not be applying unjustified restrictions on such species.** We have seen numerous examples of a lack of support for the EU IAS Regulations with the result that restrictions are being intentionally ignored. This does nothing to help garner support for action where it is needed and brings the whole approach to invasive species into disrepute.

Instead of rushing to penalise people for unjustifiable offences, **we should take this opportunity to review the list of species of EU concern and design a system that is relevant to UK circumstances, applying controls and penalties only in relation to those species of genuine, proven concern.** This



would help to secure better buy-in from stakeholders, encourage better compliance and reduce the burden on the regulatory bodies.

