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Dear Edward

THE PLANT BREEDERS' RIGHTS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019 AND THE MARKETING OF SEEDS AND PLANT PROPAGATING MATERIAL (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019 – PROTOCOL WITH SCOTTISH PARLIAMENT

The Scottish Parliament, Rural Economy and Connectivity Committee at its meeting on 19 December 2018 recommended that the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019 and the Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2019 should both include Scottish devolved matters, as set out in the notification to the Parliament.

The Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019 and the Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2019 were laid in the UK Parliament on 8th and 4th of February 2019 respectively.

During scrutiny of the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019 (PVR01), the UK Parliament's Joint Committee on Statutory Instruments (JCSI) identified some minor errors in the drafting of that instrument, which DEFRA are proposing to correct by way of a further amending SI.

In addition, DEFRA have identified the instrument currently prevents an applicant with unresolved EU rights from applying for UK Plant Breeders' Rights (PBR) more than 6 months after exit. The intention is that applications for UK PBR made within six months of exit day are given benefits, which enables those applications to be determined as a matter of priority. However, the policy intention is that applications after six months an application should still be possible, but they would not benefit from be treated as a priority. In error the current drafting of regulation 10 (2) of the instrument suggests, contrary to the policy intention.

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DEFRA are proposing to correct the drafting error by way of a further amendment SI, which we understand is to be laid during the month of May. They have undertaken to provide the Scottish Government with an opportunity to view the draft SI as soon as it becomes available.

I am content that these amendments are necessary and is still within the scope of the previous notification. The amendments are essentially technical and consistent with the previous policy intention behind the SI (to facilitate applications for UK PBR following a no deal exit from the EU).

No errors were found in the Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2019.

In notifying the RECC, I would also like to take this opportunity to apologise for the delay in responding to the points raised by RECC in their letter of 20 December 2018 indicating consent to these UK SIs. However, Annex A of this letter provides a reply and an update in light of the questions asked by the Committee.

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



MAIRI GOUGEON

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Now that the UK instruments have been finalised, I also take this opportunity to provide an update addressing the points raised in the Committee's letter dated 20 December 2018.

The Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019

1. What are the practical effects of the UK no longer being able to access the CPVR system? In particular, will there be any loss of access to information or expertise, and will there be any impact on Scotland's ability to monitor adherence to rules on plant variety rights?

The current system using the CPVO process, allows for a single test to be carried out in the EU, and PBR can then be granted to a variety which is valid throughout the whole EU. After Brexit, breeders will need to apply in the UK and the EU separately.

When the UK submitted the Article 50 notification of intention to withdraw from the EU, the European Commission informed the Community Plant Variety Office ("CPVO") that UK DUS¹ test certificates would no longer be accepted. Despite this, we are still exchanging DUS reports and we still have full access to the CPVO database, but this will be withdrawn if and when the UK exits the European Union.

Post Brexit

We anticipate that without 3rd country CPVO entrustment², which the UK cannot apply for until it exits the EU, the UK will only be provided with general public viewing to the CPVO database. This will allow us to check for the existence of a variety and who the applicant /owner etc, but would not provide access to any technical data.

However, being a member of the International Union for the Protection of New Varieties of Plants ("UPOV") we have access to their data base, which will contain much of this information. UPOV also provides breeders with the opportunity to apply for PBR (including UK rights) using their online PRISMA system, an alternative to downloading APHA application form from the Gov.UK website. APHA can download any applications made via PRISMA onto their own system.

During the period when the UK may be transitioning or awaiting third country entrustment from the CPVO, Defra and the Devolved Administrations have agreed to continue aligning our UK testing system to that of the CPVO, which should help with our application. We can do this as the UK and CPVO are members of UPOV, therefore using the same protocols for DUS testing.

The UK already has a wealth of expertise in plant variety testing, but is aware that it will have to grow and work on maintaining its knowledge and retaining its world wide networking groups. As the UK we already have individual membership to many International bodies, and therefore will still be able to attend meetings and workshops.

¹ To establish whether a new variety is distinct, uniform and stable (DUS) testing must be carried out in a member state. DUS testing is required for plant breeders rights and for entry to the National List which is required to enable marketing.

² Entrustment to carry out DUS testing on behalf of CPVO.

The UK has always had its own legislation for Plant Breeders' Rights ("PBR"), which by virtue of the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019 has been updated to take account some of the requirements of the EU's PBR requirements, and any deficiencies arising in the event of the UK's withdrawal from the EU in a no deal scenario. During the drafting of this instrument, the UK Government consulted with the British Society of Plant Breeders (BSPB), who represent most of the UK based plant breeders, and are also responsible for collecting royalties in the UK to ensure the legislation is workable, including allowing breeders' to collect fees, which they rely on for the continued investment in plant breeding.

2. Is there a significant difference between the UK system of recognising plant breeders' rights, and that of the Community Plant Variety Rights system?

No they are essentially the same. Both use the same protocols for testing and analysis of data that allow for awarding the rights in conformity with the relevant UPOV protocols. The revision of the UK PBR legislation through the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019, as noted above, will ensure that the UK and EU processes remain similar.

3. Is the UK Controller adequately resourced – in terms of budget, capacity and expertise - to execute the CPVR system for the temporary period and, in the short and longer term, to respond to an increase in applications for UK plant variety rights?

The resource for the UK Controller is provided by APHA, but we are aware of some staffing increases within the PVRO, which supports the process. In addition, the new governance procedures that Defra and the Devolved Authorities have been agreeing, has set up a PBR group which will call on the existing expertise of officials from across the UK to provide the Controller with advice on PBR matters.

Following the UK's exit from the EU, it is anticipated in a 'no deal' there will be an increase in requests for UK PBR, from very few to around 1,500 per annum. Defra's delivery agency, APHA, provide for the administration of the UK's PVRO, there was some concern that their ageing IT system would not be able to cope with increase demand. However, APHA have tested the IT system, transferring over 30,000 EU PBRs to UK PBRs and the system has coped without any glitches. The exercise ensures that breeders' of existing varieties can still collect royalties in the UK, making it more favourable for EU breeders to send seed/ plant material to be marketed here and therefore ensuring continued supplies to the UK. APHA remain confident the system will also stand up to the increased PBR applications, that will be required to be inputted post Brexit. APHA have recruited an additional 2 people to carryout this work.

Defra is also seeking to replace its IT system that is used for variety registration. A new system would see online applications being made by the breeder themselves and allow for test centres to interact with the mainframe. The UK is looking at adopting, where possible, an on-line application system similar to UPOV's. We would expect any new IT system to be funded by the UK Government, with the maintenance funded by the people who use it to submit applications, as per the Defra IT system used for seed certification in England and Wales.

The three test centres in the UK – The National Institute of Agricultural Botany (NIAB) in Cambridge, SASA in Edinburgh, and Agri-Food and Biosciences Institute (AFBI) in Belfast have the knowledge, land and equipment to cope with any increased testing that will be

required. However, there will be the need for additional people to undertake the trial and data capture work. This will require increasing the number of temporary staff that would be sourced from seasonal agricultural workers or students.

As with the fees for the administration, trial work is also based on Government's policy of full cost recovery. With the anticipated increase of applications, it is actually envisaged that there could be reductions in costs in certain areas of this service due to economies of scale. This will require a review of the service and functions at a UK level.

The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2019

4. Will the EU similarly recognise UK certified seed for an interim two year period? If not, how will this affect seed producers in Scotland?

In a no deal EU exit, and with no 3rd country equivalence for seeds marketing at the point of exit, the EU will not recognise UK certification.

Allowing a temporary two year period to import seed from the EU will ensure continuity of supplies to the UK as a whole. This transitional arrangement is not required for plant propagating material or ornamental plants, because the statutory requirements for marketing are simpler, and imports can continue indefinitely. Similarly, in relation to seed potatoes, no express transition period has been provided for in Scotland. Whilst, theoretically, seed potatoes produced in the EU will continue to be marketable in Scotland after exit day, in practice, there is little or no demand from the Scottish industry for EU-produced seed potatoes. This is in contrast to the position elsewhere in the UK, which is heavily dependent on EU-produced seed potatoes. Therefore, it is considered that making express provision for a transition period would serve no useful or practical purpose.

In a no deal scenario the EU will not accept UK seed potatoes. This goes further than marketing standards, as seed potatoes from third countries are banned from entry into the EU under Directive 200/29/EC for plant health concerns. In a no deal Scotland will lose the EU market for seed potatoes, (~20,000 – 30,000 tonnes) which at the moment is around 13.5% of our marketable tonnage. The rest of the UK will allow seed potatoes to be imported for one year following exit day, this unfortunately leaves little incentive for an increase in demand for Scottish seed potatoes from the rest of the UK. The Minister for Rural Affairs and the Natural Environment wrote to the Secretary of State on this subject and met with Scottish producers to hear their views.

With the exception of just over 3,000 tonnes of grass seed, almost all seed used in Scotland (mostly cereals) comes either from or via England.

For exports, around 400 – 500 tonnes of herbage seed is exported to the Republic of Ireland (mostly as mixtures) and around 10 tonnes of oilseed rape is exported to Germany. Otherwise, Scotland exports very little small seed outwith the UK.

5. Is the Animal and Plant Health Agency (APHA) adequately resourced – in terms of budget, capacity and expertise – to carry out what appears to be a greater role in managing the UK National List, responding to industry enquiries, and implementing the legislative changes?

As with the administration of PBR, APHA have recruited staff to cope with the additional work anticipated for UK National Listing. The IT system for National Listing was tested for additional capacity in terms of registering varieties from the EU Common Catalogue on to the UK National List. However, as with the system for PBR, APHA are also seeking in due course to replace their ageing IT system.

National Listing is provided for by officials across APHA, Defra and the Devolved Authorities who carry out the admin, official supervision of trials and decision making process. The trials are provided by industry under contract. The system, with exception of the decision making, is also run on a full cost recovery basis, with the users paying for the services. Now that the UK will receive applications for both PBR and National Listing it is anticipated a combined fee would be a possibility, as this would potentially minimise costs for the industry.

6. When will the “interim two-year period”, for recognition of EU certified seed and Common Catalogue varieties, start and finish (as described in para 3.5)?

The interim period starts the date on which the UK exits from the EU and will last for a period of two years.

7. Are these amendments to Scottish marketing legislation (per para 3.5) to be made by separate SSI, or are these to be made under a grant of powers included in this SI?

Separate SSI - the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019.

8. If the amendments are to be made via a power contained in this proposed SI, would the amendments be made by SSI and scrutinised by the Scottish Parliament?

Relevant amendments to Scottish marketing legislation were made by the Scottish Government (in exercise of powers under the European Union (Withdrawal) Act 2018) by virtue of the Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (<http://www.legislation.gov.uk/ssi/2019/59/contents/made;>) which I note the Committee considered on 13 March 2019

Both regulations

9. The Committee notes that plant variety rights and national listing of varieties are devolved matters. However, that the UK Controller and the UK Plant Variety Office are cross-border public authorities, and that the absence of policy divergence has meant that functions have been exercised jointly by the Secretary of State and Ministers in each of the devolved administrations through an established, functioning joint legal framework.

10. The Committee seeks reassurance that this framework is sufficiently robust and will continue to be respected in future.

The framework for this area of agriculture is built on the powers provided, in relation to plant breeders' rights, in the Plant Varieties Act 1997 (as amended by Orders under the Scotland Act 1998) and, in relation to national listing, the Seeds (National Lists of Varieties) Regulations 2001 (a UK-wide SI). These provide a legal framework in which relevant functions in relation to both the Controller and PVRO as well as national listing, can be exercised jointly by the Scottish Ministers along with Ministers in the other administrations of the UK.

This legislative framework is further underpinned by administrative arrangements. A senior policy officer from DEFRA as well as each of the Devolved Administrations together form the Plant Varieties and Seeds Committee (PVSC), which has responsibility for overseeing the work of the Controller, the PVRO and all the technical groups involved in the consideration of applications for, and the administration of PBRs, variety registration/national listing and seed marketing.

Whilst inevitably and subject to ongoing discussions between administrations, some further adjustment of the administrative arrangements will be required to reflect the UK's exit from the EU, we are satisfied that the overall frameworks (both administrative and legal) should continue to function robustly whilst continuing to sufficiently respect the devolution settlement.

The SG along with the other DAs have been discussing strengthening the current process, and agreeing a revised Governance process for work in this area.

11. In terms of stakeholder engagement, the Committee would appreciate further information about stakeholders' responses to the information letters and about where, and when, the APHA workshops be held.

Letters sent out at the start of the Brexit process to Stakeholders provided advice as to what was required to preserve plant breeders' right in both the EU and UK, as well as information on UK variety registration and what was required if a variety was to continue to be marketed here. This information was delivered on a number of occasions and via different mediums, proving successful with 2,500 more varieties being registered than the predicated 3,000.

Workshops held in November in Cambridge, and December in Edinburgh, provided stakeholders with an opportunity to gain a better understanding of what leaving the EU in a 'no deal' scenario would mean for plant breeders and for those whose business it is to market seed and plant propagating material.

The three sessions in Scotland were run over a two day period with 30 stakeholders from across the various crop industries attending. We also offered the ability to attend the various SG Area Offices to watch the presentations, and listen into the discussions. We were also prepared through Skype to send questions to Edinburgh from the attendees in the Area Offices, however, no one asked to use this facility.

Around 200 people attended the Defra sessions, including representatives of some European companies based in the UK.

We have started to receive some correspondence in the last six weeks which we suspect has been generated due to additional information (including that 3rd country equivalence will not be considered by the Commission until such time the UK leaves the EU), being placed on Government websites.

12. The Committee notes that paragraph 6 of the notification states that “[t]he proposed Regulations respect the current arrangement of Ministers acting jointly in these devolved areas”. Paragraph 14 also indicates that the Plant Varieties and Seeds Act 1964 makes provision for the Ministers to act jointly, and this forms the basis for the governance framework. Paragraph 8.5 seems to highlight that, in relation to listings, there are particular effects in relation to potato breeders in Scotland. The Committee asks whether the Scottish Government gave consideration as to whether the amendments concerning both plant variety rights and national lists should be scrutinised under joint procedure?

As noted above, given the current scope of the UK-wide legal frameworks, which already facilitate the joint exercise of functions on a UK-wide basis in a way which sufficiently respects the devolution settlement, the Scottish Government considered that recourse to joint procedure was not necessary in relation to the UK instruments so far as amending the relevant legislation in consequence of the UK’s potential withdrawal from the EU in a no deal scenario.