

EXPLANATORY MEMORANDUM TO

THE PLANT BREEDERS' RIGHTS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

2018 No. XXXX

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the committees on the UK's exit from the European Union.

2. Purpose of the instrument

- 2.1 As a form of intellectual property protection, plant breeders' rights allow businesses to control seed and other propagating material of new varieties, allowing them to recoup the long term investment in their development. This instrument amends existing UK plant variety rights legislation to address deficiencies resulting from the UK's withdrawal from the EU. It revokes the principal EU Regulation (Council Regulation 2100/94) and implementing EU legislation and where appropriate amends domestic legislation to save EU provisions. This instrument gives effect to Community plant variety rights (CPVR), intellectual property rights for new varieties of plants in the EU, in the United Kingdom provided that they were granted up to two months before exit day (and provides for unresolved CPVR applications at exit). It also provides a framework of protection in part through the application of the Plant Varieties Act 1997 (the Act).

Explanations

What did any relevant EU law do before exit day?

- 2.2 Council Regulation (EC) 2100/94 on Community plant variety rights (the "Council Regulation") and its implementing regulations set out a unitary system of intellectual property rights for new varieties of plants in the EU. The Council Regulation establishes the Community Plant Variety Office to implement the legislation, makes provision as to who is entitled to a right, the requirements for novelty, distinctness, uniformity and stability, and for variety denominations. It states the scope of rights allowing the holder to control propagating material, the duration of rights, and conditions for actions after the grant of rights, including nullity, cancellation and transfer. This EU legislation provides for the governance and functions of the Community Plant Variety Office in managing applications, collecting fees, and making and publishing decisions, while providing for objection and appeal against decisions of the Office.
- 2.3 Implementing rules made under the Council Regulation detail the functioning of the Community Plant Variety Office, rules for variety denominations, fees, and conditions for the exception to the scope of protection concerning seed of protected varieties saved by farmers on their own holdings (farm saved seed).

Why is it being changed?

- 2.4 After the United Kingdom exits the European Union, the Community Plant Variety Office will have no function in the UK and CPVRs granted by that Office will no longer be recognised in the UK. This will affect the economic interests of rights holders and deprive them of enjoyment of those rights. This instrument ensures continued protection in the UK of varieties granted CPVR before 29 January 2019. It is also necessary to enable prospective holders to apply for UK plant breeders' rights regarding applications for CPVR which are unresolved on exit day. Some provisions of the Act or secondary legislation refer to provisions within the Council Regulation and its implementing EU legislation. Amendments are therefore made to bring these, where appropriate, into UK legislation.

What will it now do?

- 2.5 This instrument will give effect to CPVRs published in the register of the Community Plant Variety Office and in force on 29 January 2019. It will maintain the same scope of protection, without requiring an application, payment of fees or re-examination by the Controller of UK Plant Variety Rights. An unresolved application is an application where a decision has not been made by the Community Plant Variety Office before exit day. In addition, CPVRs granted between 29 January 2019 and exit day will also be considered as unresolved applications because they will still be subject to the possibility of appeal under the Council Regulation's two month appeal period.
- 2.6 This instrument will allow an application for UK rights within six months of exit for any variety with an unresolved application for CPVR on exit, using the priority date (date of application) and technical examination (test for distinctness, uniformity and stability) as for CPVR. Where an application is made, it will be for a UK right under the Act, and a matter for the UK Controller to determine.
- 2.7 This instrument also amends the Act and its secondary legislation with regard to legislative operability in the UK. It also provides detailed provisions for UK plant breeders' rights regarding variety denominations and farm saved seeds to remove cross referencing to the Council regulation or its implementing EU legislation.
- 2.8 The Council Regulation and its implementing regulations are revoked. They have no practical application in the UK after exit and are redundant.

3. Matters of special interest to Parliament

Matters of special interest to the Sifting Committees

- 3.1 This instrument is a proposed negative Instrument being made under the European Union (Withdrawal) Act 2018 and is therefore laid for sifting by the Sifting Committees.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble, has made the following statement regarding Human Rights:
- 5.2 “In my view the provisions of the Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The 1991 Convention of the International Union for the Protection of New Varieties of Plants (UPOV Convention) provides the basis for intellectual property protection for plant varieties. The Plant Varieties Act 1997 implements the UK’s obligations under the UPOV Convention and provides for plant breeders’ rights in the UK.
- 6.2 Through the European Union (Withdrawal) Act 2018 (the “2018 Act”), directly applicable EU regulations on the Community plant variety rights will be converted into UK law and will continue to apply after the UK has left the EU (“retained EU Law”). This instrument revokes that retained EU Law because the Council Regulation 2100/94 which establishes a system for CPVR and the Community Plant Variety Office will have no application in the UK on exit.
- 6.3 This instrument amends the Plant Varieties Act 1997 and secondary legislation made under the Act to address deficiencies which arise from the withdrawal of the UK from the EU.

7. Policy background

- 7.1 As a form of intellectual property protection, plant breeders’ rights allow businesses to control seed and other propagating material of new varieties, allowing them to recoup the long term investment in their development. The UPOV Convention provides the basis for intellectual property protection to encourage plant breeding.
- 7.2 The UK and the EU are both signatories to the UPOV Convention in their own right. The Convention is implemented by the EU through Council Regulation 2100/94 and by the UK through the Act. As a unitary right, the Council regulation provides protection in all Member States, while preventing any national right granted before a Community right from being invoked.
- 7.3 Most plant varieties marketed in the UK are protected through the European Union unitary rights system, although the Act (which in an earlier form predates the EU’s unitary system) remains in place. On exit, EU rights granted under Council Regulation 2100/94, and the legislation itself, will no longer have effect in the UK.
- 7.4 As deficiencies arise from the UK’s withdrawal from the EU Defra has decided to give effect to existing EU rights as if they had been granted under Plant Varieties Act 1997, and, for unresolved applications for EU rights, to allow an application for UK rights.

- 7.5 References to EU legislation in provisions in UK law for variety denominations and farm saved seed will be stated within that domestic legislation. The EU legislation will be revoked.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 There are no plans for consolidation.

10. Consultation outcome

- 10.1 The amendments have been discussed and agreed with the Devolved Administrations of Scotland, Wales and Northern Ireland. There has been no formal public consultation, but Defra has conducted targeted consultations with industry representative organisations. Their views have been taken into account when drafting this Instrument. Defra is continuing to engage with these organisations.

11. Guidance

- 11.1 No formal guidance material has been produced for this Instrument as the changes to industry practice, and action required by businesses, is minimal. Application processes for plant breeders' rights in the UK will be very similar to those while a member of the EU. Workshops providing an overview of the changes have been held for stakeholder organisations and businesses. Existing guidance will be updated before exit day.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies. This is because protection in the UK for varieties with existing EU rights will be maintained without any action being required by rights holders. Without this continued protection, there would be a potential loss in income for plant breeding businesses and further indirect impacts to the wider sectors reliant on the production of plants. These wider sectors cover a diverse range of interests, including production of food and feed, food manufacturing and retail, forestry, production and use of ornamental plants, sports turf, and industrial production.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because no significant impact on business or the voluntary sector is foreseen.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.

- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach is to bring existing EU rights into the UK framework. This process will not require businesses to take any action.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation will follow the course of normal departmental business. There are no substantive changes to current procedures or standards.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Andy Mitchell at the Department for Environment, Food and Rural Affairs
Telephone: 02080 265714 or email: Andy.Mitchell@defra.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Nicola Spence, Deputy Director for Animal and Plant Health at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
-------------------	--	---	---

DExEU/EM/7-2018.2

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

DExEU/EM/7-2018.2

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because this instrument addresses maintenance of the status quo by arranging continued recognition of plant variety rights previously recognised under EU legislation and requires no change in activity from industry.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 does no more than is appropriate. This is the case because the instrument only makes amendments to domestic law with regard to operability issues or where crossreferences to EU law will no longer be appropriate. EU law (including implementing legislation) is being revoked as it establishes an EU system and the CPVO which will have no function in the UK after exit.”

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. It is important to maintain the protection provided in the UK by Community plant variety rights granted before two months before exit, to allow applications for UK rights for unresolved applications for Community rights, and to provide detailed provisions for UK plant breeders’ rights regarding variety denominations and farm saved seed.”

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble, has made the following statement(s):

“This instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

4.2 The Parliamentary Under Secretary of State for Rural Affairs and Biosecurity Lord Gardiner of Kimble, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Lord Gardiner of Kimble have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.