Edward Mountain MSP
Convenor of the Rural Economy and Connectivity Committee
Scottish Parliament
Edinburgh
EH99 1SP

5 December 2018

Dear Edward

PLANT BREEDERS’ RIGHTS
MARKETING OF SEEDS AND PLANT PROPAGATING MATERIAL
EU EXIT – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament 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.

On 11 September, Michael Russell, the Cabinet Secretary for Government Business and Constitutional Relations, wrote to the Convenors of the Finance & Constitution and Delegated Powers and Legislative Reform Committees 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 unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

Although agriculture is a devolved area, Plant Breeders’ Rights and the Marketing of Seeds and Plant Propagating Material (National Listing) are undertaken jointly by Ministers, with provisions implemented by way of UK SIs, which are to be laid in Westminster. A Notification of Intention to Consent, which sets out the details of two UK SIs and the reasons why I am content that Scottish devolved matters are to be included in these UK SIs, is attached.

We are yet to have sight of the final SIs, and they are not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SIs are laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convenor of the Environment, Climate Change & Land reform Committee and the Delegated Powers and Law Reform Committee.
I look forward to hearing from you within 28 days from the date of this letter.

MAIRI GOUGEON
Varieties, Seeds and Plant Propagating Material

1. Name of the SIs

- The Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018 [subject to negative procedure]
- The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018 [subject to negative procedure]

2. A brief explanation of law that the proposals amend

The Plant Breeders’ Rights (Amendment etc.) Regulations 2018

2.1 Council Regulation (EC) 2100/94 on Community Plant Variety Rights (CPVRs) and its implementing regulations set out a unitary system of intellectual property rights for new varieties of plants. The Council regulation establishes the Community Plant Variety Office to implement the legislation, stating who is entitled to rights and the requirements for novelty, distinctness, uniformity and stability, and 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. The legislation states 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.

2.2 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).

2.3 A separate system of UK Plant Variety Rights operates under the Plant Varieties Act 1997 (c.66). The holding of CPVRs in a particular variety currently suspends the effect of any concurrent UK plant variety right. The UK Plant Variety Office and the Controller of Plant Variety Rights are designated as cross-border public authorities. Devolved competence in relation to these bodies is subject to the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) Order 1999 (S.I.1999/1747)

The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018

2.4 This instrument addresses deficiencies in the Seeds (National Lists of Varieties) Regulations 2001 (“the 2001 Regulations”), in a UK legislative context, as a result of EU exit. At present varieties which have been registered on a UK National List or on the EU Common Catalogue are marketable in the UK. Following exit, UK varieties will no longer appear on the Common Catalogue and the 2001 Regulations will require to be amended in order to remove references to varieties appearing only on the Common Catalogue. The instrument also amends retained directly applicable EU implementing legislation on the marketing of plant propagating material (listed at Appendix 1) to make it operable once the UK leaves the EU. The instrument also
makes necessary amendments to 2001 Regulations to reinstate a historical reference to the Novel Foods Regulation incorrectly changed in the out of date references SI and to update the list of derogated species which is out of date.

2.5 In relation to national listing, the 2001 Regulations confer powers on the Secretary of State and Ministers in each of the devolved administrations acting jointly on a UK-wide basis.

3. **Summary of the proposals and how these correct deficiencies**

*The Plant Breeders’ Rights (Amendment etc.) (EU Exit) Regulations 2018*

3.1 This Regulation will recognise, under the Plant Varieties Act 1997 (c.66) (“the Act”), all CPVRs published in the register of the Community Plant Variety Office, and in force on 29 January 2019 (the last date on which a determination of rights can be granted and have completed the appeal period prior to exit day). The Regulation will maintain the same scope of protection, without requiring an application for UK Plant Variety Rights, payment of fees or re-examination by the Controller of UK Plant Variety Rights. CPVRs granted between 29 January 2019 and exit day will be subject to a two month appeal period which will not have expired by exit day. These grants of CPVRs will be treated as ‘unresolved applications’ under the Regulation. Applications for CPVRs which have not been determined by exit day will also be treated as unresolved applications.

3.2 The Regulation will allow an application for UK plant variety rights within six months of exit for any variety with an unresolved application for CPVRs on exit, using the priority date (date of application) and technical examination (test for distinctness, uniformity and stability) as for CPVRs. This will be an application for UK rights under the Act, with the decision made by the UK Controller.

3.3 The Regulation will amend the Act and secondary legislation made under it to make the detailed provisions for UK plant breeders’ rights which are currently made through reference to the Council Regulation. These amendments concern variety denominations and farm saved seed.

*The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018*

3.4 This instrument amends provisions which are inappropriate or redundant as a result of the withdrawal of the UK from the EU and makes necessary changes to ensure that the law functions correctly after the UK has left the EU, maintaining the operability of retained directly applicable EU legislation. The instrument also provides for a temporary two year period during which time basic seed certified in the EEA and Switzerland may be accepted into the UK Certification system in order to guarantee continuity in seed supplies.

3.5 The UK Government is also bringing forward legislation (which does not extend to Scotland and which is therefore not subject to consent) to implement a two year transitional period for the marketing of EU produced seed and plant propagating
NOTIFICATION TO THE SCOTTISH PARLIAMENT

material in English (and Welsh as they also implement for WG) marketing legislation. With insufficient seed and plant propagating material available in the UK, this will ensure a continued supply of seed while a trade agreement with the EU is being negotiated. The Scottish Government will make amendments to Scottish marketing legislation to replicate this two year period for the marketing of EU produced seed and plant propagating material.

4. An explanation of why the change is considered necessary

*The Plant Breeders’ Rights (Amendment etc.) Regulations 2018*

4.1 After the United Kingdom exits the European Union, Council Regulation 2100/04 and CPVRs granted under it 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. The changes made by this Regulation to primary legislation (The Plant Variety Rights Act 1997 (“the Act’)) and secondary legislation made under the Act are necessary to ensure continued, identical protection in the UK of varieties with CPVRs existing before 29 January 2019. It is also necessary to allow application for UK plant breeders’ rights for any application for CPVRs which is unresolved on exit day. Some provisions of the Act rely on the Council Regulation and amendments are required to bring these entirely into UK legislation.

*The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018*

4.2 The amendments made by this instrument will not have a substantive impact on current practices or standards. The instrument remedies deficiencies that will arise in European legislation retained under the 2018 Act, for example inappropriate references or references which have no practical application in relation to the UK. Defra and the DA’s have agreed the need for a policy change to remove references to the EU Common Catalogue of varieties from the 2001 Regulations. This is a logical change following exit (when UK listed varieties will no longer be included on the Common Catalogue). The process of registering Common Catalogue varieties on to the UK National List that are currently marketed in the UK is already being addressed by Defra with no consequential impact on UK seed companies.

4.3 The instrument also required minor amendments to ensure that industry could continue to function efficiently in the event of the UK leaving the EU in a “no deal” scenario, for example, by retaining existing EU rules allowing equivalent third countries to retain their status in the UK; allowing the continuation of temporary experiments established to test improved alternatives to current seed marketing practices and to allow temporary relaxation of seed germination requirements to resolve seed supply difficulties due to adverse growing conditions. The instrument also removes reference to the EU Common Catalogue directives as any new varieties post Brexit will need to be listed on the UK’s National List to allow marketing.
5. Scottish Government categorisation of significance of proposals

5.1 The Scottish Government considers that the proposals fall into category A as there are no significant policy changes. The amendments to these SIs are technical in nature and Scottish Ministers agree that the changes constitute a pragmatic approach to addressing deficiencies.

6. Impact on devolved areas

The Plant Breeders’ Rights (Amendment etc.) Regulations 2018
The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018

6.1 The Scottish Government agree that the changes in the proposed statutory instruments constitute a pragmatic approach to addressing deficiencies that have arisen in these existing instruments, arising as a result of EU Exit, and are the best option in the circumstances to ensure continued effective operation of the National List and UK Plant Variety Rights. The proposed Regulations respect the current arrangement of Ministers acting jointly in these devolved areas.

7. Summary of stakeholder engagement/consultation

7.1 The Scottish Government has not undertaken a public consultation on this instrument, but have shared with its three main stakeholders and the users of UK plant variety rights and of the UK National List, a series of information letters making them aware of the changes that Government requires to implement. Further to this, arrangements have been made for the Animal and Plant Health Agency (“APHA”) to come to Scotland and deliver three information workshops to the industry. APHA is responsible for listing varieties on the UK National List, responding to industry’s enquiries on applying for UK Plant Variety Rights and also for implementing the changes made by this legislation.

8. A note of other impact assessments

The Plant Breeders’ Rights (Amendment etc.) Regulations 2018

8.1 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.

8.2 There is no, or no significant, impact on the public sector.
8.3 An Impact Assessment has not been prepared for this instrument because no significant impact on business or the voluntary sector is foreseen

The Marketing of Seeds and Plant Propagating Material (Amendment etc.) (EU Exit) Regulations 2018

8.4 The impact on the marketing of seed and other propagating material of agricultural, vegetable, fruit and ornamental species is expected to be as follows for imports. Given the UK’s significant dependence on the EU for seed to enable certain produce to be grown, the UK plans to recognise EU certified seed and Common Catalogue varieties for an interim two year period. This is expected to mitigate the impacts that would otherwise be felt by these sectors. Without this, or any adaptation by the industry to source seed from non-EU countries or produce UK seed, there could be significant losses to these sectors, worth a total of around £3bn annually1, that rely on this seed.

8.5 In the longer-term for some varieties where the UK is not currently the primary market and UK breeders rely on listing in the Common Catalogue to allow marketing, there will be an additional cost in requiring that varieties are added to the UK national list. This cost is expected to be below the de minimis threshold for requiring an impact assessment and expected to affect fewer than 500 companies in England and Wales to list around 125 minor species and vegetable varieties each year. This cost will apply as and when new varieties are added to the UK national list and will be borne by the businesses who benefit from this service. In Scotland, we have four potato breeders who submit zero to three new varieties per annum.

8.6 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on business or the voluntary sector is foreseen

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

9.1 The Scottish Ministers propose to consent to UK SIs to fix deficiencies in the related legislation. The approach set out in the UK SIs is realistic, achievable and minimises immediate disruption. It ensures continuity of trade in varieties and seeds with minimal disruption.

9.2 We have long experience of working collaboratively with the UK Government in these areas. Maintaining the longstanding UK wide approach is preferable for stakeholders and beneficial for all four governments as there is little policy divergence. Although plant variety rights and national listing of varieties are both devolved areas, the nature of the current legislative framework (e.g. the designation of the Controller and Plant Variety Office as cross-border authorities and the policy decision to provide for joint exercise of functions by the Secretary of State and Ministers in each of the devolved authorities in the Seeds (National Lists of Varieties) Regulations 2001) would mean that to effect these amendments on a Scotland only

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1 Estimated £3bn+ of Gross Value Added (GVA) from crop and horticulture sectors. Estimates are based on calculating crop and horticulture output as a proportion of overall agriculture output, and applying to overall GVA. Agriculture in the UK, Defra (2017).
basis would first require substantial unpicking of a well-established and well-functioning legal framework.

9.3 The Scottish Ministers believe that the changes proposed in these regulations are necessary insofar as to secure continuation of effective regimes. The approach respects the devolution settlement and in the current circumstances where there is existing UK-wide legislation and there is a need to prepare for a no deal exit from the EU, the Scottish Ministers consider that it is appropriate for the fixing legislation to be made on a UK-wide basis by the UK Government.

10. Detail how Scottish Ministers’ have had regard to the guiding principles on animal welfare and the environment.

10.1 The legislation which will be rolled over post-exit and the related implementation legislation have already been made with the guiding principles on animal welfare and the environment in mind. The proposed fixes in the UK SIs adhere to the spirit of the underlying EU regime – no significant policy changes are proposed.

11. Intended laying date of instruments

11.1 The intended laying for sifting date of both instruments is 05 December 2018.

12. Does the Scottish Parliament have 28 days to scrutinise?

12.1 Yes. Defra has agreed to allow the 28 days.

13. Information about any time dependency associated with the proposal

13.1 It is essential that the Regulations are in force on the day we exit the EU in the event of a no deal scenario, to ensure that legislation is operable, allowing European breeders’ to send high grade seed to the UK, knowing that the sale will allow for collection of their royalties.

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

14.1 The Plant Varieties and Seeds Act 1964 already exists, making provision for the Ministers to act jointly and this forms the basis for the governance framework. The Plant Varieties Act 1997 also provides that Ministers appoint a Controller who position it is to operate the UK Plant Variety Rights Office. These have been in operation throughout our time in the EU, although UK plant variety rights & UK national listing were not as sought after as CPVRs and listing on the Common Catalogue (as the latter two allowed for marketing and collection of royalties in all member States). Both UK systems are anticipated to see an increase in uptake on exit, with no change to process or procedures.

14.2 Decision making will also continue under the Plant Varieties and Seeds Committee(PVSC), senior policy official from each of the National Authorities, being
supported by various technical groups also made up of officials from Defra, Scottish Government, Welsh Government and DAERA.

14.3 Progress after three framework meetings is good, with first drafts of MOU, TORs and Quality Assurance documents well underway.

15. Any significant financial implications

15.1 These Regulations are not expected to have any financial implications for stakeholders in Scotland.
APPENDIX 1

**Commission Decision 80/512/EEC:** authorising the United Kingdom and others not to apply the conditions laid down in Council Directive 66/401/EEC on the marketing of fodder plant seed, as regards the weight of the sample for the determination of seed of Cuscuta.

**Council Decision 2003/17/EC:** on equivalence of field inspections carried out in third countries on seed-producing crops and on the equivalence of seed produced in third countries.

**Council Decision 2005/834/EC:** on the equivalence of checks on practices for the maintenance of varieties carried out in certain third countries and amending Decision 2003/17/EC.

**Commission Regulation 217/2006:** laying down rules for the application of Council Directives 66/401/EEC, 66/402/EEC, 2002/54/EC, 2002/55/EC and 2002/57/EC as regards the authorisation of Member States to permit temporarily the marketing of seed not satisfying the requirements in respect of the minimum germination.

**Commission Regulation (EC) 637/2009:** establishing implementing rules as to suitability of the denominations of varieties of agricultural plant species and vegetable species.


**Commission Implementing Decision 2014/150/EU:** on the organisation of a temporary experiment providing for certain derogations for the marketing of populations of the plant species wheat, barley, oats and maize pursuant to Council Directive 66/402/EEC.
