RURAL ECONOMY AND CONNECTIVITY COMMITTEE

AGENDA

34th Meeting, 2018 (Session 5)

Wednesday 19 December 2018

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **South of Scotland Enterprise Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Steve Dunlop, Chief Executive, Scottish Enterprise;

   Douglas Cowan, Director of Strengthening Communities, Highland and Islands Enterprise;

   Chris Brodie, Head of Sector Development Skills Planning, Skills Development Scotland;

   Malcolm Roughhead, Chief Executive, Visit Scotland;

   Michael Cross, Director of Access, Skills and Outcome Agreements, Scottish Funding Council.

2. **European Union (Withdrawal) Act 2018:** The Committee will consider a proposal by the Scottish Government to consent to the UK Government legislating using the powers under the Act in relation to the following UK statutory instrument proposals—

   The Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019;

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

3. **South of Scotland Enterprise Bill (in private):** The Committee will review the evidence it has heard on the South of Scotland Enterprise Bill at today’s meeting.

Steve Farrell  
Clerk to the Rural Economy and Connectivity Committee  
Room T3.40  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5211  
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The papers for this meeting are as follows—

**Agenda Item 1**

Cover note

PRIVATE PAPER

**Agenda Item 2**

Note by the clerk
Background

1. The Bill was introduced to the Parliament by Fergus Ewing, Cabinet Secretary for the Rural Economy on 24 October 2018. The Rural Economy and Connectivity Committee was designated as lead committee at stage 1.

2. The establishment of an enterprise body for the South of Scotland was announced in October 2016 as part of the Scottish Government’s enterprise and skills review. Phase 2 of that review set out in more detail proposals for the new agency.

Purpose of the Bill

3. The Bill establishes a South of Scotland Enterprise (SSE) agency. Scotland has two existing enterprise agencies: Scottish Enterprise and Highlands and Islands Enterprise (both established by the Enterprise and New Towns (Scotland) Act 1990).

4. This Bill is a technical, enabling Bill which provides for:
   - The establishment of the agency,
   - its objectives and powers,
   - operational matters,
   - accountability and ministerial powers,
   - the transfer of property and liabilities, and
   - governance and staff

5. Further information on the Bill can be found on the Parliament’s website.

Committee scrutiny

6. The Committee plans to take evidence from the Scottish Government Bill team and Cabinet Secretary as well as economic development, business, local authority and community interests.

7. The Committee has received correspondence on the Bill which is available in the annexes –
   - Annex A - submission from Visit Scotland who are due to give evidence at the meeting,
   - Annex B – letter from Scottish Government Bill Team responding to follow up questions from the meeting on 28 November 2018.
Annex A – Submission from Visit Scotland

VisitScotland supports the establishing of the South of Scotland Enterprise Agency and is actively engaged in its creation, with Malcolm Roughead, Chief Executive a member of the SOSEP Board.

The creation of the Agency is a key moment for the tourism industry in the South of Scotland and in establishing the region as a leading, all year-round, total quality visitor destination.

VisitScotland already delivers for the South of Scotland, investing £500,000 in a new two year marketing campaign for the region and working directly with over 500 local businesses in Quality Assurance schemes.

VisitScotland envisages working with the Agency to build economic success through the following activities:

- The development of an integrated tourism strategy and supporting action plan for the South of Scotland.
- The creation of an integrated marketing plan for South of Scotland based on a clear identity and unique proposition.
- The development and implementation of a new model for industry collaboration based on a co-operative approach.
- The creation of a tourism innovation and skills investment plan.
- The creation of a digital economy strategy and supporting action plan for tourism.

Developing the Visitor Economy

As well as building on the excellent tourism product in the South of Scotland, the Agency should support sectors that complement and support the visitor economy. This includes the creative industries, food and drink, farming, forestry and fisheries; all of which add to the South of Scotland experience for visitors. The Agency must also help ensure that the unique character, history and traditions of the many towns and villages continue.

From a tourism perspective it will be essential for the Agency to seek input and advice from industry partners, who are well placed to communicate how the agencies work can contribute to positive social and environmental outcomes. VisitScotland will add to this, bringing learning from other areas of Scotland and from its work and relationships with other national tourism organisations, destination marketing organisations and agencies.
Education and learning opportunities are vital for young people and peoples changing career. It is essential that local provision continues to include courses in tourism and hospitality and are seen as centres of excellence.

Addressing economic challenges

The Agency must tackle low levels of investment, help to create more and better paid jobs and work with partners to ensure young people stay in the South of Scotland with excellent education opportunities that lead into rewarding careers.

The importance of SMEs in the South of Scotland should be considered a key economic asset. With the commitment these businesses have to the region they should be regarded as the bedrock of economic development in the South Scotland and supported appropriately.

The location and transport connections need to be exploited to their maximum effect, with new developments adding to a strengthened network of road, rail and ports.

Building on from the Year of Young People, the Agency should ensure that there is a forum (or fora) where young people can provide their views and contribute their experiences to help shape the planning and delivery of activity and services provided by the Agency.

Visit Scotland
December 2018
Dear Convener,

I am writing to you to follow up the committee evidence session on the South of Scotland Enterprise Bill on 28 November. During this session, we agreed to write to the Committee providing further detail on two points:

- Definition of the southern Scotland NUTS 2 area;
- Examples of activities the Agency might undertake to help communities acquire assets, if the body did not have compulsory purchase powers.

South of Scotland NUTS2 area

The Committee asked about how the legislation defined the South of Scotland. We explained that the consensus for the agency to cover the two local authorities of Scottish Borders Council and Dumfries and Galloway Council had emerged as part of the work taken forward in the Enterprise and Skills Review. We had looked at other potential ways of defining the South of Scotland, including the Southern Scotland NUTS 2 area.

The Nomenclature of Units for Territorial Statistics (NUTS) is a set of geographical boundaries established and administered by the European Union (EU). The main purpose of NUTS areas is the reporting of regional economic statistics to Eurostat, the EU’s statistical agency. The NUTS geography is based on a hierarchy of levels, with NUTS1 as the highest level (Scotland is a NUTS1 region) and NUTS2 areas being broad spatial areas within that.

The South of Scotland NUTS2 region came into effect in 2018. It comprises the local authority areas of Dumfries and Galloway, the Scottish Borders, South Lanarkshire, East Ayrshire, South Ayrshire and part of North Ayrshire, excluding Arran and Cumbrae.

The South of Scotland NUTS2 region was considered as a potential operating area for the new South of Scotland Enterprise body (SOSE). The operating area proposed in the legislation, comprising the two local authority areas of Dumfries and Galloway and the Scottish Borders, was the option preferred by stakeholders. In addition to reflecting shared socio-economic challenges, this boundary would build on existing geographic boundaries and relationships, in an area that has a history of collaboration including through the South of...
Scotland Alliance. It would also ensure clarity for business and communities wanting to use the services of the new agency.

Communities acquiring assets

The Committee also asked about how SOSE could assist communities to acquire assets if SOSE did not have compulsory purchase powers.

We expect SOSE to take a positive and practical role in working with communities. With a clear focus on place, SOSE will be able to grow and strengthen resilient communities, helping them to identify and meet their needs. This would include SOSE working with existing legislation designed to encourage and support the ownership and control of assets by communities, including community right to buy and community asset transfer powers outlined in the Community Empowerment Act (Scotland) 2015.

The power to compulsorily purchase is not considered necessary for SOSE as the intention is that this body will work instead in a collaborative way with property owners and communities. SOSE will have its own ability to purchase (and sell) assets, and will be working with others who have separate statutory powers to purchase assets. This will include the local authorities in the area who have compulsory purchase powers under section 189 of the Town and Country Planning (Scotland) Act 1997. SOSE could therefore work with communities (who may be able to exercise the community right to buy or make requests to public bodies under asset transfer legislation) and local authorities (who have compulsory purchase powers) to acquire land.

Given the nature of compulsory purchase, it would be seen as a last resort by any body with such powers. There may be ECHR consequences of attempting to exercise compulsory purchase powers because of owners’ rights under Article 1 of Protocol 1 to the Convention. While both Scottish Enterprise and Highlands and Islands Enterprise have compulsory purchase powers, neither body has to our knowledge ever needed to use these powers.

Regarding the specific steps SOSE could take to work with communities, we would expect it to assist communities in building community capacity and managing assets as well as assisting communities to acquire those assets. Such activities could include:

- start-up grants to assist at the outset of a new project;
- access to professional advice and financial support towards project planning costs;
- short-term revenue funding to support intensive project planning stages;
- discretionary capital assistance towards asset purchase investment - readiness advice and sign-posting to investors;
- support with governance and developing organisational structures;
- assistance with attending learning events or conferences;
- assistance to go on a study or exchange visit;
- assistance in run their own training seminars; and
- enabling communities to network with other communities, to learn and share.

I hope this is helpful to the Committee.

Yours sincerely,

Karen Jackson
Rural Economy and Connectivity Committee

34th Meeting, 2018 (Session 5), Wednesday, 19 December 2018

European Union (Withdrawal) Act 2018

Introduction

1. This paper supports the Committee’s consideration of consent notifications sent by the Scottish Government relating to the following UK statutory instruments (SIs)—

- The Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019;
- The Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2018; and

2. These regulations are being laid in relation to the European Union (Withdrawal) Act 2018 (‘the Act’). To assist the consideration of such instruments, a new protocol has been put in place between the Scottish Government and Scottish Parliament. Further detail on this protocol is available in a letter from the Cabinet Secretary for Government Business and Constitutional Relations.

Reporting

3. Under the protocol referred to above, the Committee has the following two options following its consideration of the UK SIs—

   a. Write to the Scottish Government to confirm it is content for consent for a UK SI to be given; or
   b. Consider the matter further, take evidence if appropriate and make a report to parliament.

4. If it chooses to report it may make one of the following three recommendations—

   a. it is content for consent to be given for a UK SI to be made in the UK Parliament only.
   b. it is not content with the Scottish Government granting its consent and that the proposals should be made by an SSI; or
   c. it is not content with the Scottish Government granting its consent and that the proposals should be included as a UK SI in both parliaments made under the joint procedure.

5. The Committee’s role in the protocol is to decide whether it agrees to the Scottish Government offering its consent to the UK Government to make regulations on its behalf. However, there are broader policy issues which may
arise in future, not as a direct consequence of the notification, but due to Brexit itself. The Committee may wish to note these issues in its response to the Scottish Government and request that it be kept up to date on any developments on these matters. These broader policy issues have been identified in relation to each instrument where appropriate.

**INSTRUMENTS**

6. This table is intended to give a brief overview only. The notification letters and documentation for the instruments are included in annexes to this paper.

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**AQUATIC ANIMAL AND PLANT HEALTH**

- Date notification received: 5 December 2018
- Deadline for consideration: 18 January 2019
- Categorisation: B (power to legislate)
- Detailed content: Set out in Annexe A.


8. The SI will confer on Scottish Ministers the power to amend Annexes 1A and 3 of Commission Regulation 1251/2008; that is, the power to vary the list of species which carry and transmit diseases (vector species). Animals listed as vector species are subject to controls which are designed to prevent the
spread of disease. The Scottish Ministers will also have the power to amend the list of places from which imports of aquaculture animals are permitted.


Policy and legal issues

10. No wider policy or legal issues have been identified.

11. The Committee may, however, when it writes to the Scottish Government to confirm its consent, want to ask—

- For confirmation of the legislative functions being transferred under Commission Directive 2006/88/EC;
- Whether the legislative functions which are being transferred are exercisable by Regulations and which parliamentary procedure will apply; and
- To be kept updated on the “future UK framework for aquatic animal health” detailed in the notification.

PLANT BREEDING AND SEED PROPAGATING

- Date notification received: 5 December 2018
- Deadline for consideration: 18 January 2019
- Categorisation: A (no significant policy changes)
- Detailed content: Set out in Annexe B.

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

12. The proposed SI concerns the intellectual property rights system of new plant varieties, and the operation of the Community Plant Variety Office and the UK Plant Variety Rights system. All Community Plant Variety Rights (“CPVRs”), published in the register of the Community Plant Variety Office and in force on 29 January 1997, will be recognised under the Plant Varieties Act 1997. The proposals also include the conferral of new, but time-limited, functions on the UK Controller concerning unresolved applications for CPVRs; these functions will require the UK Controller to operate the technical examination system for CPVRs.

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

13. This instrument amends the Seeds (National Lists of Varieties) Regulations 2001. Currently, varieties registered on a UK National List or on the EU Common Catalogue are marketable in the UK. After EU exit, UK varieties will no longer appear on the Common Catalogue, and references to the varieties appearing only on the Common Catalogue will need to be removed.
from the 2001 Regulations. The instruments listed in the Annex to the notification, concerning the marketing of plant propagating material, will become retained directly applicable EU legislation; this legislation is being amended. In order to continue functions of national listing, powers will be conferred on the Secretary of State and Ministers in each devolved administration acting jointly on a UK-wide basis.

14. The notification states that “references to the EU Common Catalogue of varieties” are being removed from the 2001 Regulations, because UK listed varieties will no longer be included on the Common Catalogue (para 4.2). Para 4.3 states that—

- the instrument retains “existing EU rules allowing equivalent third countries to retain their status in the UK”;
- it allows “the continuation of temporary experiments established to test improved alternatives to current seed marketing practices”;
- it allows “temporary relaxation of seed germination requirements to resolve seed supply difficulties due to adverse growing conditions”, and
- it “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”.

15. Other changes made are—

- Defra is working to register Common Catalogue varieties, that are currently marketing in the UK, on to the UK National List (para 4.2), and
- Scottish marketing legislation will be amended in order to implement a two-year transitional period for the marketing of EU produced plant seed and plant propagating material, to ensure a continued supply of seed while a trade agreement with the EU is being negotiated (para 3.5).

16. It is not clear from the notification whether this final change is being made via this SI, or whether it will be done by separate SSI (with associated Scottish Parliamentary scrutiny). It is unclear which enabling power would be relied upon.

17. The notification explains that plant variety rights and national listing of varieties are devolved matters, but that the UK Controller and the UK Plant Variety Office are cross-border public authorities, and that the absence of policy divergence has mean that functions have been exercised jointly by the Secretary of State and Ministers in each of the devolved administrations. There is an established, functioning joint legal framework. Paragraph 14 goes on to say that the Plant Varieties and Seeds Act 1964 make “provision for the Ministers to act jointly and this forms the basis for the governance framework”.

**Policy and legal issues**

18. No wider policy or legal issues have been identified.
19. The Committee may, however, when it writes to the Scottish Government to confirm its consent, want to seek clarification on the following points—

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

• 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 our ability to monitor adherence to rules on plant variety rights?

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

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

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

• 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?

• 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)?

• 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? The notification could be clearer on this point. And if the amendments are to be made via a power contained in this proposed SI, would the amendments be made by SSI, in regulations, scrutinised by the Scottish Parliament?

Both regulations

• In terms of stakeholder engagement, it would be helpful to have information about stakeholders’ responses to the information letters and about where, and when, the APHA workshops be held.

• 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. Would it therefore be preferable for the amendments concerning both plant variety rights and national lists, to be made in an instrument that could be scrutinised under joint procedure?

DECISION

20. The Committee is asked to consider the consent notifications referred to in this paper and determine whether to:

   a. write to the Scottish Government to confirm it is content for consent for the UK SIs referred to in the notifications to be given;

   b. to note and request a response from the Scottish Government on the wider policy matters identified which may require to be addressed in future;

   or

   c. consider the matter further, take evidence if appropriate and make a report to parliament.

   Committee clerks
   December 2018
Consent notification for SI – aquaculture

Annexe A

Consent notification for SI relating to Aquatic Animal Health and Plant Health

The Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019

Notification to the Scottish Parliament of Scottish Ministers’ intention to consent to UK legislative proposals on areas of devolved competence

Title of instrument:

The Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019

Instrument and summary of proposal:

The Aquatic Animal Health and Plant Health (Transfer of Functions) (EU Exit) Regulations 2019 ("the Regulations") are a transfer of functions statutory instrument which provides for legislative functions currently conferred by the European Commission to be exercisable instead by public authorities in the United Kingdom.

This SI also covers plant health, but will not apply to Scotland as we already have the powers under the Plant Health Act 1967.


Council Directive 2006/88/EC lays down the animal health requirements to be applied for the placing on the market, the importation and the transit of aquaculture animals and products thereof; minimum preventive measures aimed at increasing the awareness and preparedness of the competent authorities, aquaculture production business operators and others related to this industry, for diseases in aquaculture animals; and minimum control measures to be applied in the event of a suspicion of, or an outbreak of certain diseases in aquatic animals.

Commission Regulation (EC) No. 1251/2008 lays down a list of vector species; the animal health conditions for the placing on the market of ornamental aquatic animals either originating from or intended for closed ornamental facilities; animal health certification requirements for the placing on the market of (i) aquaculture animals intended for farming, including relaying areas, put and take fisheries and open ornamental facilities, restocking and (ii) aquaculture animals and products thereof intended for human consumption and animal health conditions and certification requirements for imports.

The Regulations are made under the European Union (Withdrawal) Act 2018, are subject to the affirmative procedure in the UK Parliament and are expected to be laid in draft on 17 January. Under the terms of the Withdrawal Act the Regulations will not come into force until exit day.
Consent notification for SI – aquaculture

What is to be amended?

The Regulations do not make changes to policy content, but provide for legislative functions to be exercisable by UK authorities after the United Kingdom leaves the European Union. The Regulations give the appropriate authority the power to amend Annex 1A and 3 of Commission Regulation EC 1251/2008 where a number of conditions are met. The appropriate authority is defined as the Scottish Ministers in the case of regulations applying in relation to Scotland. The Scottish Ministers may also consent to the Secretary of State making regulations applying in relation to Scotland.

Annex 1A

Annex 1A lists possible vector species and the conditions under which they will be regarded as vectors of disease. The list forms part of the measures to ensure that aquatic animal diseases do not spread and will be relevant after Exit day to rules relating to aquatic animal health contained in retained EU law, and in particular the Aquatic Animal Health (Scotland) Regulations 2009 and Commission Regulation (EC) No. 1251/2008. The Regulations set out the criteria for amending the list. Examples of such criteria are that the disease is not established in the UK and its introduction would have a significant adverse economic impact on aquaculture in the UK. There are different criteria for exotic and non-exotic diseases. An appropriate authority may amend this list where the relevant criteria are met and an appropriate assessment has been carried out. The appropriate assessment which is being relied upon must also have been approved by all of the appropriate authorities.

Annex 3

Annex 3 lists third countries, territories, zones or compartments from which imports are permitted of aquaculture animals. An appropriate authority may amend Annex 3 by regulation where the amendment is necessary or appropriate in light of an assessment of the risks to the health of aquatic animals in the UK from the introduction of aquaculture animals or products reared or produced in a third country. The assessment must be approved by all of the appropriate authorities and meet certain conditions laid down in the Regulations.

Other Amendments to Commission Regulation (EC) No. 1251/2008

Commission Regulation (EC) No. 1251/2008 is also amended to allow for changes to be made to the animal health certificate, as will be required from time to time. The Regulation also contains saving and transitional provisions in respect of the model health certificate set out in direct EU legislation as it had effect in EU law immediately before exit day, to allow such a certificate be continued to be presented or otherwise used for transitional purposes on or after exit day.

Why is change necessary:

Changes are required to ensure that the regimes continue to function smoothly, and that the Scottish Ministers are able to respond to requirements to make legislative amendments quickly where necessary without the need for recourse to primary legislation. For example, the World Organisation for Animal Health and the European Food Safety Authority currently publish scientific advice on vector species. This regulation will allow UK authorities to keep up to date with best available evidence, changes to listed vector
Consent notification for SI – aquaculture

species in mainland Europe and help to protect Scotland’s fish health status and instil confidence in trading partners that we are working to the highest standards.

Categorisation of significance of proposals:
Category B. The Regulations create a power to legislate.

Impact on environmental and animal welfare guiding principles

Addressing the deficiencies ensures continued adherence to the environmental principles established in EU and international law. In maintaining the current approach aquatic animal health, and the management of aquaculture the Regulations maintain the existing level of environmental protection.

Impact on Devolved Areas

Aquaculture and aquatic animal health is a devolved policy area. As such the arrangements in the Regulations provide for agreement between devolved administrations and the UK Government where there is a requirement for cooperation in the interests of good aquatic health and management of alien or locally absent species in aquaculture.

Summary of stakeholder engagement/consultation

The Department for Environment, Food and Rural Affairs (DEFRA) has consulted with the devolved administrations of Scotland, Wales and Northern Ireland regarding this instrument. DEFRA has not carried out formal consultation external to government. The amendments made do not amount to a change in policy.

We are in regular contact with all our stakeholders regarding EU exit and any consequent legislative changes.

Any other impact assessments

An impact assessment has not been carried out in relation to the proposed SI as its main aim is to allow the continuation of the effective functioning of the regimes.

Reason for Scottish Ministers’ consent

Scottish Ministers should consent to UK Ministers laying the Regulations as they do not change current policy nor do they erode any devolved powers. The Regulations are written such that the Scottish Ministers are designated the appropriate authority in relation to regulations applying to Scotland. However, it also allows a mechanism by which the Secretary of State may make regulations in relation to Scotland where there is consent from the Scottish Ministers. Collaboration and joint working in animal health is essential for economic, health and trade purposes. It is expected that the United Kingdom will continue to work under a common aquatic animal health framework and this mechanism will provide the option to legislate uniformly across the UK. The Regulations will lay the foundations for a future UK framework on aquatic animal health.

Intended Laying date of UK Instrument

It is expected that this affirmative instrument will be laid in draft before the UK Parliament on 17 January 2019.
Consent notification for SI – aquaculture

Does the Scottish Parliament have 28 days to scrutinise?
Yes

Time dependencies
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 and that Scottish Ministers are able to bring forward measures for the protection of aquatic animal health.

Financial implications
This proposed SI is not expected to have any financial implications, including for the Scottish Government and for stakeholders in Scotland.

Associated SIs
The Aquatic Animal Health and Alien Species in Aquaculture (Amendment) (EU Exit) Regulations 2018. This SI has already been notified to Parliament, and following Parliament’s consideration Scottish Ministers have consented to its being made
Consent notification for SIs relating to Plant Breeding and Seed 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
Consent notification for SI – seeds and plant propagating

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 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.
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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.
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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 annually, 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 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

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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).
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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 and 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.
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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 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.
