

Rebecca Evans AC/AM
Y Gweinidog Cyllid a'r Trefnydd
Minister for Finance and Trefnydd



Llywodraeth Cymru
Welsh Government

Mick Antoniw AM
Chair, Constitutional and Legislative Affairs Committee
National Assembly for Wales
Tŷ Hywel
Cardiff Bay
Cardiff
CF99 1NA

7 February 2019

Dear Mick,

Thank you for your letter regarding the Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2018.

Before addressing the specific questions raised in your letter, I would like to set out some more detailed information about the effect and intention of these regulations to give the committee some more context about why these regulations were made on a UK-wide basis.

The Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2018 (the 2018 Regulations) address deficiencies resulting from the UK's withdrawal from the EU. They confer functions on an existing public authority (the Controller of Plant Variety Rights – the Controller) that acts under the direction of, and is appointed by, the Secretary of State, the Welsh Ministers, the Scottish Ministers and the Northern Ireland Department acting jointly.

A well-established UK-wide legislative framework already exists for Plant Variety Rights through The Plant Varieties Act 1997 (the 1997 Act) and a non-legislative agreement is planned to set out governance, decision-making, dispute resolution and market access/export.

When the UK leaves the EU, Council Regulation 2100/04 and Community Plant Variety Rights (CPVR) granted pursuant to 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 the 2018 Regulations are necessary to ensure continued protection in the UK of varieties granted CPVR before 29 January 2019, which would allow for the two-month appeal provision to conclude on 29 March. It is also necessary to allow applications for UK plant breeders' rights for any application for CPVR, which is unresolved on exit day.

Some provisions of the 1997 Act refer to the Council Regulation and amendments are required to bring these, where appropriate, into UK legislation.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The 2018 Regulations 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. This will be an application for UK rights under the 1997 Act, with the decision made by the Controller. An unresolved application is an application where a decision has not been made by the Community Plant Variety Office before exit day or where a decision to grant rights has been made but the two-month appeal period does not end before exit day.

We saw no benefit to Welsh citizens affected by the regulations of establishing a Wales-only regime for plant breeders' rights. The subject of plant breeders' rights has a history of joint action. The 1997 Act provides that the Controller acts under the direction of and is appointed by the Secretary of State, the Welsh Ministers, the Scottish Ministers and the Northern Ireland Department acting jointly. The transfer of the functions under that Act to the National Assembly for Wales (by SI 1999/672) preserved those joint functions. The secondary legislation the Regulations amend was made jointly. The Plant Breeders' Rights (Naming and Fees) Regulations 2006 were made jointly, in part, by the National Assembly.

The lack of benefit to establishing a separate Wales-only regime, which was considered alongside the potential cost and logistical challenges of establishing such a regime by exit day, was a compelling policy rationale for deciding the Controller is the appropriate body on which the new functions should be conferred. UK-wide regulations were the only method by which to achieve this policy aim as the devolved administrations do not have the power to confer joint UK-wide functions on the Controller.

Additionally, there was no scope to create a functional Wales-only regime through the EU Exit SI programme. The Welsh Ministers' powers under the EU (Withdrawal) Act 2018 are subject to various limitations, the most pertinent of which appears in section 8(7)(d) (applied to the corresponding powers of the Welsh Ministers by paragraph 1(3) of Schedule 2) that regulations under section 8(1) may not establish a public authority. There are powers under the EU (Withdrawal) Act for additional functions to be conferred on an existing public authority – in this case the Controller – but no powers to establish a new public authority such as a Wales-only Controller.

Plant varieties and seeds are devolved subjects (see the exception to section C4 of Schedule 7B to the Government of Wales Act 2006). The Assembly could legislate to create a Wales Plant Variety Office but there would have been no opportunity to do so by exit day. Doing so would also have involved removing functions from the Controller, which would engage paragraph 10 of Schedule 7B to the Government of Wales Act 2006. Paragraph 10 does not constitute an absolute bar to legislation – it requires that the Secretary of State consents to provisions that engage the paragraph.

As paragraph 10 of Schedule 7B to the Government of Wales Act 2006 already applies to the Controller, it is not certain that conferring functions that sit naturally within the Controller's remit will have a negative impact on legislative competence compared to the current position. It seems unlikely that any hypothetical future legislation on plant breeders' rights would be confined to addressing the new functions in isolation.

You asked why the Assembly was not consulted in advance of Welsh Ministers giving consent to this SI. The Presiding Officer has previously written to the First Minister about the reliance on the UK Government's legislation, with concerns that this has not enabled detailed scrutiny by the National Assembly. The First Minister's reply explained the need to work with the UK Government in the unique circumstances of Brexit and stated that written statements are being provided for Assembly Members about those UK SIs which are being laid in areas devolved to Wales.

As the EU (Withdrawal) Act powers require that new functions are conferred on existing public bodies, leaving the EU will mean some existing public authorities will assume additional functions. We anticipate that in Wales many of these will be conferred on authorities within the Welsh legislative competence. However, there may be similar instances where the most appropriate body is a UK-wide body. The effect such a conferral would have on legislative competence will vary depending on the subject matter. It is not possible to state definitively whether a future SI would raise the same issue in advance of considering the draft of the SI.

You also asked about the agreements we have entered into with the UK Government about future consents.

Welsh Government officials are in contact with the Wales Office about the unintended restrictions on the Assembly's competence created by powers conferred in EU Exit SIs and other legislation, which engages paragraphs 8, 10 and 11 of Schedule 7B of the Government of Wales Act. Officials are examining the issue in detail and considering how it can best be resolved. The Welsh Government will keep the National Assembly, including the Constitutional and Legislative Affairs Committee, informed about the progress of these discussions.

Yours sincerely,

A handwritten signature in black ink that reads "Rebecca Evans". The signature is written in a cursive, flowing style.

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