

EXECUTIVE NOTE

The Plant Breeders' Rights (Discontinuation of Prior Use Exemption) (Scotland) Order 2005 SSI/2005/460

Introduction

1. The above Order was made in exercise of the powers conferred by section 9(6) of the Plant Varieties Act 1997 ("the 1997 Act") and of all other powers enabling the Scottish Ministers in that behalf. The instrument is subject to negative resolution procedure.

Policy objectives

2. The purpose of the Order is to discontinue the prior use exemption in section 9(5) of the 1997 Act in relation to varieties of the species and groups which are listed in The Plant Breeders' Rights (Farm Saved Seed) (Specification of Species and Groups) Order 1998 (SI 1998/1025). Effectively this amounts to a total discontinuation of the exemption.

Background

3. The 1997 Act exempts farmers from the liability under section 9(3) of that Act to pay the holder of plant variety rights a 'sensibly lower' royalty for the use of a protected variety of farm-saved seed as compared with the full amount that would otherwise be chargeable for the use of such seed. This is generally known as the 'prior use' exemption. An equivalent exemption, which co-existed with the UK exemption, had been introduced at European Community level by article 116(4), 2nd indent of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights ("the Council Regulation"). The Community prior use exemption expired on 30 June 2001.

4. The UK prior use exemption is embodied in section 9(5) of the 1997 Act. The exemption was originally designed to keep in step with the Community exemption and provides for individual farmers who had saved seed of protected varieties prior to 8 May 1998, to continue to do so free of charge. There has been a longstanding commitment on the part of the UK Government to review the exemption following expiry of the Community exemption and that review has now been completed by the UK Government and the devolved administrations.

5. The removal of the prior use exemption will not affect small farmers (defined by reference to certain criteria in article 14(3) of the Council Regulation), who will continue to be exempt from the payment of royalties by virtue of a separate exemption in section 9(4) of the 1997 Act.

Consultation

6. A UK wide consultation was carried out in May 2004 by the Plant Variety Rights Office (a cross-border public authority) on behalf of the UK Government and devolved administrations. Twenty five letters were sent out to various organisations representative of persons likely to be substantially affected by the Order. Seven organisations replied to the consultation paper of which two were Scottish, the National Farmers Union of Scotland (NFUS) and the Scottish Rural Business Association. There was also a response from an

organisation representing plant breeders throughout the UK, the British Society of Plant Breeders Ltd (BSPB).

7. The NFUS along with other farming unions (the growers) were against the removal of the prior use exemption while the BSPB (the breeders) were in favour of removing the prior use exemption. The disagreement centred on potatoes; since the parties had already reached an agreement that combinable crops (e.g. cereals and pulses) would remain 0% rated even if the exemption was repealed.

8. In practical terms, only growers of the older potato varieties protected by UK plant breeders' rights will be affected by discontinuation of the prior use exemption. Such growers would be legally required to pay holders of UK plant variety rights a "sensibly lower" royalty to continue using farm-saved seed of the protected older variety. This will not affect growers in Scotland as seed potatoes of listed varieties cannot be farm-saved for more than one generation. Prior stocks of seed potatoes should therefore not be present in High Grade Seed Potato areas of the UK, which includes the whole of Scotland.

9. The Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Northern Ireland will make an equivalent order for England and Northern Ireland and the National Assembly for Wales is expected to make an equivalent order also.

Financial effects

9. The new measures will have no significant effect on Scottish businesses. In such circumstances it was unnecessary to prepare a Regulatory Impact Assessment for this Order.

Scottish Executive Environment and Rural Affairs Department
21 September 2005