

**EXPLANATORY MEMORANDUM TO THE
PLANT BREEDERS' RIGHTS (DISCONTINUATION OF PRIOR USE
EXEMPTION) ORDER 2005**

2005 No. 2726

1. This explanatory memorandum has been prepared by Defra and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 This Order discontinues the prior use exemption in section 9(5) of the Plant Varieties Act 1997 (the "1997 Act") which exempts farmers from paying a royalty for the use of a protected variety where the variety was farm saved before the 1997 Act came into force (effectively May 1998).
3. **Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 The UK prior use exemption was designed to keep in step with the similar, but entirely separate, Community regime with the intention of discontinuing it when the parallel exemption lapsed in Community law. However, in accordance with section 9(6) of the 1997 Act, a negative resolution statutory instrument (Order) is needed to discontinue the UK exemption, i.e. it did not expire automatically on the same day it expired in the Community regime.
5. **Extent**
 - 5.1 This instrument applies to England and Northern Ireland.
6. **European Convention on Human Rights**
 - 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.
7. **Policy background**
 - 7.1 Farm-saved seed is seed harvested by a farmer from propagating material planted on his own holding. Section 9 of the 1997 Act makes a farmer liable to pay a "sensibly lower" royalty for the use of farm-saved seed of varieties protected by plant breeders' rights as compared to the full amount normally charged for the use of certified seed. The prior use exemption is an exception to this which allows growers not to pay any royalties on farm-saved seed of old varieties.

- 7.2 Defra has consulted stakeholder representatives on the intention to make an Order to discontinue the prior use exemption for farm-saved seeds and come into line with the Community regime. The consultation made clear that:
- If the Order were made, small farmers would continue to be exempt from the payment of royalties by virtue of a specific exemption in section 9(4) of the 1997 Act.
 - the British Society of Plant Breeders (BSPB) and the farming unions have already agreed to keep old varieties of combinable crops such as cereals and pulses 0% rated, i.e. growers would not be charged farm-saved seed royalties on these varieties even if the prior use exemption was repealed. Therefore, only growers of the older potato varieties would be affected by discontinuation of the prior use exemption, if the Order were made.
- 7.3 Of the seven organisations which responded to the consultation, four (representing plant breeders) were in favour of the discontinuation of the UK prior use exemption and three (representing UK farming unions) were against. A summary of the responses is Annexed to this memorandum.
- 7.4 Plant breeders argued that without increased remuneration plant breeding is not a sustainable activity and that the supply of improved new varieties would diminish. The UK farming unions agree in principle that breeders of old potato varieties protected by UK plant variety rights are entitled to remuneration but have not been able to agree on the level at which this should be set. Defra has facilitated mediation talks between BSPB and the farming Unions which failed to reach a settlement. Ultimately this is a civil matter for plant breeders and the unions to agree upon.

8. Impact

- 8.1 A Regulatory Impact Assessment is attached to this memorandum (**Annex A**).
- 8.2 There is no impact on the public sector.

9. Contact

Siobhan Costello at Defra Plant Variety Rights Office and Seeds Division Tel: 01223 342359 can answer any queries regarding the instrument.

1 Regulatory Impact Assessment on an Order to discontinue the prior use exemption for farm saved seeds in section 9(5) of The Plant Varieties Act 1997.

2. Purpose and intended effect of measure: to discontinue the UK prior use exemption for farm saved seeds in section 9(5) of The Plant Varieties Act 1997 following the cessation of a similar exemption in the Community Plant Variety Rights scheme. The measure is intended to keep the UK and EU Plant Variety Rights regimes aligned in respect of royalty payments.

2(1) The objective: the proposed amendment would:

- bring UK and EU practices into line
- allow UK Breeders to resume collecting royalty payments on farm saved seeds of UK protected varieties - as they may now do on varieties protected by Community plant variety rights

2(2) The background

1. The Plant Varieties Act 1997 makes a farmer liable to pay the holder of variety rights a 'sensibly lower' royalty for the use of a protected variety of farm-saved seed as compared with the full amount charged for the use of seed supplied with the authority of the holder of rights. This liability does not apply to varieties that were farm saved before the 1997 Act came into force (effectively May 1998) and for which no royalties were paid for that farm-saved use. This is generally known as the 'prior use' exemption. A similar prior use exemption applies under Council Regulation 2100/94 in respect of the Community Plant Variety Rights scheme. The UK national scheme is entirely separate from the Community scheme although it operates in much the same way.

2. At Community level, the prior use exemption has lapsed. It was due to expire automatically on 30 June 2001 unless extended by the Council of Ministers. Council Regulation 2100/94 required the Commission to produce a report on established varieties before 30 June 2001 as a prelude to discussions on whether to extend the exemption. Following repeated requests by UK officials for the Commission to fulfil this obligation, the Commission has only recently stated it does not intend to propose a retrospective extension of the Community prior use exemption.

3. The UK prior use exemption is regulated by section 9(5) of the 1997 Act. This legislation was designed to keep in step with the Community regime 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.

4. In accordance with section 9(6) of the 1997 Act, a negative resolution statutory instrument is needed to discontinue the UK prior use exemption in section 9(5) i.e. it did not expire automatically on 30 June 2001 although the 1997 MAFF Guide to the Plant Varieties Act 1997 stated that it was the intention to discontinue the UK prior use exemption on the same day it expired in the Council Regulation.

2(3) Risk assessment

There is an expectation on the part of UK plant breeders that the prior use exemption will be lifted since this was the stated intention when the 1997 Act was introduced. To do nothing would therefore risk damaging Defra's reputation. It would also deny breeders the opportunity to collect additional royalties on UK protected varieties, without which plant breeding might not be a sustainable activity resulting in the supply of improved new varieties diminishing.

2(4) Business sectors affected

- breeders of old potato varieties protected by UK plant variety rights.
- growers of farm saved seed of old potato varieties protected by UK plant variety rights

The British Society of Plant Breeders (BSPB), representing the interests of most UK plant breeders, wants to collect farm saved seed remuneration on the old potato varieties protected by UK plant variety rights in the same way as it can for varieties protected by Community plant variety rights. BSPB's interest is limited to potato varieties because it has already agreed¹ with the NFU to keep combinable crops 0% rated i.e. producers would not be charged farm saved seed royalties on combinable crops even if the prior use exemption is repealed.

2(5) Issues of equity and fairness

Plant breeders would point to the agreement to keep combinable crops 0% rated as evidence of equity and fairness. Breeders of old potato varieties maintain that potatoes need to be treated differently because breeders need a longer period of time to recoup their development costs and to make sufficient profit to allow for reinvestment in new potato varieties. It should also be noted that there is a wide choice of varieties with no PBR so farmers can avoid paying by choosing non-affected varieties.

3. Options

Option 1: Do nothing.

Option 2: Make an Order to discontinue the prior use exemption for farm saved seeds in section 9(5) of The Plant Varieties Act 1997.

4. Benefits

Option 1: Would benefit growers of farm saved seed of old potato varieties protected by UK plant variety rights by allowing them to continue growing these varieties free of charge. This option would, however, deny breeders of old potato varieties protected by UK plant variety rights from collecting royalties on their varieties.

Option 2: would bring UK and EU practices into line and allow breeders of old potato varieties protected by UK plant variety rights to collect royalties on their varieties.

¹ This agreement "the Heads of Agreement on the Use of Farm Saved Seed of Older Varieties of Combinable Crops after the UK Plant Varieties Bill is enacted" provides that if a variety had obtained UK Plant Variety Rights prior to 1 September 1994, producers would never be charged farm saved seed royalties on it.

5. Compliance costs for business:

Option 1: do nothing – could, in total, save growers of farm saved seed of old potato varieties protected by UK plant variety rights an estimated £540,000* per annum by allowing them to continue to avoid making royalty payments. This option would cost breeders the same amount by denying them the right to collect royalties.

Option 2: make an Order to discontinue the prior use exemption - would have the opposite effect to option 1 and could, in total, cost growers of farm saved seed of old potato varieties an estimated £540,000* in royalty payments. It would increase the revenue of breeders of old potato varieties by the same amount.

* estimated figure provided by BSPB. This figure represents approximately 0.1% of the annual value of the UK potato crop.

6. Consultation with small business: ‘small firms impact test’

This measure would not impact on small farmers who would continue to be exempt from the payment of royalties by virtue of a specific exemption in section 9(4) of the 1997 Act.

7. Competition assessment

Discontinuing the prior use exemption for farm saved seeds in section 9(5) of The Plant Varieties Act 1997 would have no impact on combinable crops and is not expected to distort the market for old potato varieties.

8. Enforcement and Sanctions

The enforcement of royalty payments on old potato varieties would be a matter for BSPB or individual breeders to pursue through the civil courts.

9. Monitoring and review

This again would be a civil matter for BSPB or individual breeders.

10. Consultation

10(1) Within Government: appropriate Divisions within Defra and the Devolved Administrations have been consulted and agreed to discontinuing the prior use exemption.

10(2) Public consultation: Defra consulted a wide range of interests including the plant breeding and seeds industries, farmers and growers. The outcome of the consultation is attached at **Annex B** .

11. Summary and recommendation

This regulatory impact assessment supports and recommends option 2 for making an Order to discontinue the prior use exemption for farm saved seeds in section 9(5) of The Plant Varieties Act 1997.

12. Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits of making this Order are justified.

Signed: *Bach*

Date: *2nd October 2005*

Lord Bach
Minister for sustainable farming and food

SUMMARY OF CONSULTATION RESPONSES TO PROPOSALS TO DISCONTINUE THE UK PRIOR USE EXEMPTION FROM PLANT BREEDERS RIGHTS FOR FARM SAVED SEEDS

Responses were received from:

Agricultural Industries Confederation (AIC)
 British Society of Plant Breeders Ltd (BSPB)
 MBM Produce Ltd
 National Farmers Union (NFU)
 National Farmers Union Scotland (NFUS)
 Scottish Rural Property and Business Association (SRPBA)
 Ulster Farmers' Union (UFU)

Of the 7 organisations which replied, 4 were in favour of the discontinuation of the UK Prior Use Exemption, and 3 were against.

Response	Comment	For/Against discontinuation of the prior use exemption
AIC	<ul style="list-style-type: none"> • Would welcome the removal of UK prior use exemption • The prior use exemption creates an opportunity for fraud inasmuch as misdeclaration of varieties happens in order to avoid payment of royalties • Continued investment in plant breeding can only take place if market returns are sufficient and if those who are required to pay for access to plant breeding material do so 	For
BSPB	<ul style="list-style-type: none"> • Supports termination of UK prior use exemption • There needs to be consistency between UK and Community law on this issue • BSPB will consider challenging any continuing disparity if Defra chooses not to terminate the exemption • The commercial marketplace for potatoes is very different from that of combinable crops, with a much longer development process involved • Legislation suggests that any farm saved seed (FSS) collection system should be balanced and protect the interests of both breeders and growers, but that a breeder should benefit from a royalty income that 'as a whole is the legitimate compensation for the total use of his variety' • BSPB estimates that breeders have been able to collect only around 40% of the FSS remuneration due to them on eligible potato varieties 	For
MBM Produce Ltd	<ul style="list-style-type: none"> • Supports termination of UK prior use exemption • Breeders have huge costs in continuing to produce and market new varieties with limited income from royalties • UK legislation should be brought into line with the rest of Europe to allow royalties to be collected on FSS 	For

NFU	<ul style="list-style-type: none"> • Supports continuation of UK prior use exemption • The consultation largely affects potato growers and breeders: benefits to be gained for the whole industry firmly depend on agreement on FSS royalty rates • Without agreement on FSS, an unbalanced system exists concentrating collection of marketing levy and seed royalties on those growers where collection costs are lowest and not pursuing others • The exemption on old varieties must remain available as a separate option for discussion within FSS royalty negotiations between plant breeders and UK Farming Unions • Any change to the existing arrangements imposed on the industry by Defra would broaden the division on farm saved seed that currently exists between potato breeders and growers: this would have a negative impact on the chances of reaching a negotiated settlement 	Against
NFUS	<ul style="list-style-type: none"> • Supports retention of UK prior use exemption • Discussion of older varieties should form part of the negotiations between plant breeders and the Farming Unions to achieve agreement on the collection of potato FSS royalties • Development of new varieties is important for growers but the continued dominance of some older varieties casts doubt on the value for money of FSS royalties • Breeders of potato varieties continue to demand royalty rates deemed too high by farmers representatives so collection rates of potato FSS royalties are low • The gain/loss resulting from removal of the UK prior use exemption would primarily affect the potato industry and is highly dependent on an agreement being reached on FSS royalty collection 	Against
SRPBA	<ul style="list-style-type: none"> • Supports discontinuation of UK prior use exemption • Such a course of action would bring UK and EU practices into line 	For
UFU	<ul style="list-style-type: none"> • Supports retention of UK prior use exemption • Suggests the greatest gain to breeders of older potato varieties would be achieved by coming to an equitable agreement with the Farming Unions • Potato growers regularly reinvest in the plant breeding industry through purchases of certified seed 	Against

PVS Division – Defra August 2004