

Guide to the Plant Varieties Act 1997

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Guide to the Plant Varieties Act 1997

The Guide is divided into three parts, each corresponding to the equivalent Part of the Act. Information on Schedules has been inserted after the sections which introduce them

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Plant breeders' rights are a form of intellectual property. They were first established in the UK under Part I of the Plant Varieties and Seeds Act 1964. The basis for the 1964 Act was the 1961 International Convention for the Protection of New Varieties of Plants. This established the first international system of plant breeders' rights and a Union - UPOV - to oversee it and to provide a forum for discussion and agreement on issues relating to plant variety protection. The UK played a major role in the development of the 1961 Convention and was the first to ratify it following the enactment of the 1964 Act. Some minor changes were made to the 1961 Convention, in the period up to 1978. These were implemented in the Plant Varieties Act 1983 which amended the 1964 Act.

The Plant Varieties Act 1997 implements fundamental revisions to the UPOV Convention adopted on 19 March 1991. It repeals (and re-enacts where appropriate) Part I of the Plant Varieties and Seeds Act 1964, as amended, and establishes a national system of plant breeders' rights based on the 1991 Convention. The Act extends to the United Kingdom, except for section 47 which applies to Great Britain. Section 47 amends Part II of the Plant Varieties and Seeds Act 1964 to extend the time limit for bringing summary proceedings for contraventions of seeds regulations from 6 to 12 months.

The Act also brings the UK plant breeders' rights regime into line with the separate European Community regime, which came into effect in 1995 and is based on the 1991 Convention.

About this guide

The guide provides the following information on each section and Schedule to the Act:

- A summary;
- A description of its objectives;
- Its detailed provisions;
- The equivalent provisions (if any) in the 1964 Act, the UPOV Convention and the Council Regulation.

The interpretation of legislation is ultimately a matter for the Courts. Nothing in this guide affects that position.

Devolution

Since the guide was first produced in 1997 by MAFF, there has been devolution. The relevant changes are explained below.

Wales

By Article 2 and Schedule 1 of the National Assembly of Wales (Transfer of Functions) Order 1999 (S.I. 1999/672), all functions of a Minister of the Crown under the Act, so far as exercisable in relation to Wales, are transferred to the National Assembly of Wales except the functions of "the Ministers" so far as exercisable by a Minister of the Crown other than the Secretary of State for Wales under sections 2, 11, 18, 27-29, Schedule 1 and paragraphs 7, 14 and 15 of Schedule 3.

Scotland

The subject matter of Parts I and II of the Act are within the legislative competence of the Scottish Parliament pursuant to section 30 and Section C4 (Intellectual Property) of Part II of Schedule 5 to the Scotland Act 1998.

All the functions of the Secretary of State for Scotland in relation to the PVRO, the Controller and the Plant Varieties and Seeds Tribunal have been transferred to the Scottish Ministers. These modifications were largely specified in Schedule 8 of the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999 (S.I. 1999/1747).

This Order provides that functions specifically exercisable in relation to the PVRO, the Controller or the Tribunal and previously exercisable by the Secretary of State for Scotland acting jointly with other Ministers of the Crown, shall instead be exercisable by the Scottish Ministers and those other Ministers acting jointly.

However the situation is different in relation to any function of making regulations under sections 17(8), 18, 22(2), 24, 26(2), 28, 29, 44 and 48 of the Act. Here, the function of the Secretary of State for Scotland ceases and instead these functions shall be exercisable only with the consent of the Scottish Ministers.

Also, the function of making rules under paragraph 13 of Schedule 3 to the Act shall be exercisable in relation to Scotland by the Scottish Ministers instead of by the Lord Chancellor.

A further modification was specified in the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc.) (No. 2) Order 2000 (S.I. 2000/3251). Schedule 6 of this Order provides that the function of making orders under paragraph 6(2)(c) of Schedule 2 to the Act shall be exercisable only with the consent of the Scottish Ministers.

Northern Ireland

The subject matters of Parts I and II of the Act are reserved matters on which the Northern Ireland Assembly may legislate pursuant to section 4(1) and paragraph 27 of Schedule 3 of the Northern Ireland Act 1998. The devolved government has been suspended since 15 October 2002 by statutory instrument under the 1998 Act and since then the Northern Ireland Departments have continued to function under the Secretary of State for Northern Ireland.

The Northern Ireland Act 1998 (Modification of Enactments) Order 2002 (S.I. 2002/2843) covers the transfer of the functions of the Secretary of State for Northern Ireland in relation to the PVRO, the Controller and the Tribunal.

The Order provides that functions exercisable in relation to the PVRO, the Controller and the Tribunal and also exercisable by the Secretary of State for Northern Ireland acting jointly with one or more of another Minister of the Crown, the Scottish Ministers or the National Assembly for Wales shall be exercisable by the Northern Ireland Department of Agriculture and Rural Development (DARD) instead.

Introduction

However, the situation is different in relation to any function of making regulations under sections 6(6), 9(7), 9(12), 11(2), 14(5), 15(6), 17(8), 18, 22(2), 24, 26(2), 28, 29, 44 and 48 of the Act. Here, the function of the Secretary of State for Northern Ireland ceases and instead these functions shall be exercisable only with the consent of DARD. Also, the function of making orders under paragraph 6(2) of Schedule 2 to the Act shall be exercisable only with the consent of DARD.

Furthermore, in paragraph 13 of Schedule 3 to the Act, the function of making rules shall be exercisable in relation to Northern Ireland by DARD rather than the Lord Chancellor. Such rules are to be made by statutory rule in Northern Ireland rather than by statutory instrument and are to be laid before and subject to annulment in pursuance of a resolution of the Northern Ireland Assembly. (At the time of going to press the Northern Ireland Assembly is suspended).

At the time of going to press the Northern Ireland Assembly is suspended.

Transfer of Functions

The Ministry of Agriculture, Fisheries and Food was dissolved and the functions of the Minister under the Act were transferred to the Secretary of State for Environment, Food and Rural Affairs by the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002 (S.I. 2002/794).

Section 1 - Plant Breeders' Rights

Summary

This section provides for plant breeders' rights to be granted in accordance with Part I of the Act. Rights may be granted for all plant genera and species. The section also defines "variety" for the purposes of the Act.

Objective

Plant breeders' rights may be granted in accordance with Part I of the Act, for varieties of all genera and species. The 1991 Convention requires contracting parties to offer protection to all genera and species, within five years from the date on which it becomes bound by the 1991 Convention. The UK has chosen not to use the five year period of grace and the Act thus enables protection of all genera and species from the time it comes into force.

The 1961/1978 Convention allowed contracting states to be selective in the genera and species for which they offered protection. However, the 1964 Act provided protection for over 400 genera and species and in practical terms the extension to all genera and species is unlikely to result in applications for exotic or unusual species, at least in the short term. The extension does, however, simplify the administration of plant breeders' rights. Under the 1964 Act, separate plant breeders' rights schemes existed for groupings of species and protection could not be offered to a particular species until a scheme covering it was in place. The extension of protection to all genera and species has enabled the requirement for schemes to be dropped.

Section 1(3) defines "variety" in the same terms as the 1991 Convention, ie as a plant grouping within a single botanical taxon "of the lowest known rank". In many cases, the lowest known botanical taxon is a species or a botanical variety. But advances in plant breeding technology have resulted in inter generic crosses - for example, Triticale is a cross between the botanical species *Triticum aestivum* (wheat) and *Secale cereale* (rye), which are in different genera. The words "of the lowest known rank" recognise the possibility that this might not be a species and thus ensure, for example, that crosses between species in different genera fall within the definition of variety.

The definition also makes it clear that a variety as such does not have to meet the criteria for protection. A variety which, for example, is not sufficiently uniform to qualify for a grant of rights (see section 4) still falls within the definition of variety, if it meets the other criteria in the definition. This establishes that all varieties - not just those which meet the criteria for protection - must be considered for the purpose of establishing whether a variety is distinct.

Detailed provisions

Section 1(1) provides that plant breeders' rights may be granted in accordance with this Part of the Act.

Section 1(2) provides that plant breeders' rights may be granted for varieties of all genera and species.

Section 1(3) defines variety for the purposes of the Act. A variety is plant grouping within a single botanical taxon of the lowest known rank, which grouping, regardless of whether it meets the criteria for a grant of rights, can be:

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
- distinguished from any other plant grouping by the expression of at least one of those characteristics;
- considered as a unit with regard to its suitability for being propagated unchanged.

Equivalent provisions

Section 1 of the 1964 Act
(there is no equivalent definition of "variety" in the 1964 Act)

Articles 1(vi), 2 and 3 of the 1991 Convention

Articles 1 and 5 of the Council Regulation.

Section 2^w - The Plant Variety Rights Office

Summary

This section provides for the continued existence of the Plant Variety Rights Office (PVRO) headed by an officer appointed by Ministers and known as the Controller. The section also introduces Schedule 1 which relates to the functioning of the PVRO.

Objective

The section continues the arrangements established under the 1964 Act to entrust the administration of plant breeders' rights to a separate body, with a semi-autonomous status. The establishment of the PVRO by the 1964 Act was based on a recommendation of the Committee on Transactions in Seeds (Cmnd 1092, July 1960, paragraph 346) that the administration of plant breeders' rights should be entrusted to a new and separate body, with a status broadly similar to that which then existed between the Patent Office and the Board of Trade.

Also, Article 30 (1) (ii) of the 1991 Convention requires contracting parties to maintain an authority entrusted with the task of granting plant breeders' rights.

The PVRO has United Kingdom functions and responsibility for it rests with the Secretary of State, the Scottish Ministers, the National Assembly for Wales and the Secretary of State for Northern Ireland.

Detailed Provisions

Section 2(1) provides for the continued existence of the PVRO and the appointment of the Controller by the Ministers.

Section 2(2) introduces Schedule 1.

Equivalent provisions

Section 11(1) of the 1964 Act

Article 30(1)(ii) of the 1991 Convention

Article 4 and Part 3, Chapters I and III of the Council Regulation.

^w See page i regarding devolution in Wales

Schedule 1^w - The Plant Variety Rights Office

Summary

This Schedule provides for the appointment of a Deputy Controller and other staff of the PVRO by Ministers and for the payment of their salaries and allowances and those of the Controller. The Schedule also provides for Ministers to authorise other officers to carry out the functions of the Controller and deals with the use in legal proceedings of certified copies of documents issued by the Controller.

Objective

The PVRO is staffed by civil servants employed by the Department for Environment, Food and Rural Affairs. They administer plant breeders' rights for the United Kingdom. The arrangement established by the 1964 Act, which continues, is for the cost of the PVRO to be carried for convenience on the vote of the Department for Environment, Food and Rural Affairs, notwithstanding the interest of the territorial departments.

Detailed provisions

Paragraph 1 provides for the appointment of staff of the PVRO.

Paragraph 2 covers the payment of staff and the Controller of the PVRO.

Paragraph 3 provides for authorised officers to carry out the functions of the Controller.

Paragraph 4 covers the use in legal proceedings of certified copies of documents issued by the Controller.

Paragraph 5 provides that any document purporting to be certified in accordance with paragraph 4 above, shall be regarded as certified without proof of the official character or handwriting of the person appearing to have certified the document.

Equivalent provisions

Sections 11(3), (5) and (7) of the 1964 Act
Article 30(1)(ii) of the 1991 Convention
Part 3, Chapters I and III of the Council Regulations.

^w See page i regarding devolution in Wales

Section 3 - Grant of plant breeders' rights

Summary

This section requires the Controller to grant plant breeders' rights to an applicant if he is satisfied that the conditions in section 4 are met. The Controller may, by notice, require the applicant for rights to provide whatever information, documents, plant or other material, facilities, or test or trial results he considers necessary, within specified time limits, to enable him to decide whether the conditions are met and hence to reach a decision on the application. If an applicant fails to supply these details within the specified time limit, the Controller may refuse the application.

Objective

Under the 1964 Act, matters such as the quantity, quality and type of plant material which had to be provided in support of applications for plant breeders' rights were specified in the Plant Breeders' Rights Regulations 1978 (as amended) (SI 1978/294). This section enables the Controller to specify these requirements by notice. The notice may be published in the Plant Varieties and Seeds Gazette and/or served on the applicant. The section also enables the Controller to specify anything else which an applicant must provide in support of an application. This might include, for example, the identification of a satisfactory test procedure, results of any tests or trials which the Controller may require an applicant to undertake and/or facilities for carrying them out. This will enable the Controller to reach a decision on the application.

The ability of the Controller to specify requirements will enable him to react flexibly and rapidly where necessary. As developments occur in plant breeding technology the Controller will be able to take account of these in his specifications.

This is particularly important now that the possibility of protection is open to all genera and species. In the case of an application for rights for a rare or exotic variety there may not be an established testing procedure. The PVRO does not have established tests to cover every eventuality. This section therefore affords an applicant seeking rights in a rare species the opportunity to provide this information. The onus is with the applicant to do so. If the applicant is unable to meet the requirements within a time limit specified by the Controller, the application may be refused.

Detailed provisions

Section 3(1) requires the Controller to grant rights to an applicant, provided he is satisfied that conditions in section 4 are met.

Section 3(2) enables the Controller to require an applicant to provide him with whatever is necessary for the Controller to satisfy himself that the conditions are met.

Section 3(3) enables the Controller to refuse an application if the applicant does not provide the required information within the time limit specified by the Controller.

Equivalent provisions

Sections 1(2) and 9(5)(a) and (b) of the 1964 Act

Article 12 of the 1991 Convention

Articles 49, 50, 55, 61 and 62 of the Council Regulation.

Section 4 - Conditions for the grant of rights

Summary

This section, read in conjunction with Schedule 2, establishes what criteria a variety must satisfy to qualify for a grant of rights and what criteria an applicant must meet to be entitled to a grant of rights in respect of a variety. If the criteria are established, then the Controller is required by section 3 to grant the applicant plant breeders' rights.

The criteria a variety must satisfy are that it must be distinct, uniform, stable and new. Schedule 2, Part I explains in detail what is meant by distinct, uniform, stable and new.

The person entitled to a grant of rights for a variety is the person who breeds, or discovers and develops, it or his successor in title, or an employer where an employee breeds, or discovers and develops, a variety in the course of his employment. Section 4(3) and (4), which define the person entitled to a grant of rights, are closely based on the definition of "breeder" in the 1991 Convention. The section also provides for determining priority between two or more applicants who independently breed, or discover and develop, the same variety, by reference to detailed provisions in Schedule 2, Part II.

Objective

The objective of this section is to define the conditions which a variety and an applicant must meet to qualify for a grant of plant breeders' rights. The conditions it lays down are based on the 1991 Convention.

It is for the Controller to determine whether conditions for a grant of rights are met by the variety and by the applicant. Section 3 enables him to require whatever is necessary to enable a decision to be reached. The requirements for a variety to be distinct, uniform, stable and new are specified in Article 5(1) of the 1991 Convention. Distinctness, uniformity and stability are normally established by growing plant material of the candidate variety provided by the applicant. Whether a variety is new, and whether the applicant is the person entitled to a grant of rights in respect of it, is normally established from information provided by the applicant.

The 1991 Convention is based on the principle that the "breeder" of a variety, as defined in Article 1(iv), is the person entitled to a grant of rights. Section 4(3) and (4) are based closely on this definition of "breeder".

The word "develops" in section 4(3) is intended to make clear that simply discovering a variety growing in the wild is not sufficient to entitle a person to a grant of rights in respect of it. He must also do something further to develop the variety. At its simplest, development might involve replicating the variety to produce sufficient stocks to make it commercially viable. In most cases, though, development will involve further, more complex, work for example to eradicate disease or to fix a desirable trait.

Article 4 of the 1991 Convention requires contracting states to afford the same treatment to nationals of other contracting parties as it affords to its own nationals. Section 4 is more generous than Article 4 requires and it applies no nationality restrictions. Applications are accepted from nationals of non UPOV countries as well as from nationals of UPOV contracting countries and all applications are treated in the same way as domestic applications. This reflects the principle that it is in the UK's interest to attract applications for varieties which might be of benefit, regardless of whether they originate in a UPOV contracting state or elsewhere and regardless of whether the country of origin of the applicant offers reciprocal protection to UK nationals.

Plant breeders' rights relate to the characteristics of a variety and not the method by which it is produced. Section 4(6) makes this clear by establishing that "discovery" means discovery of genetic variants arising from existing varieties, as well as discovery of previously unknown plants growing in the wild. The source of genetic variation discovered from existing varieties may be natural or artificially induced mutation. Since plant breeders' rights do not extend to acts done for the purpose of breeding another variety (see section 8), existing varieties which are the subject of plant breeders' rights may be the source from which a new variety is discovered.

Detailed provisions

Section 4(1) sets out the conditions which must be met by a variety in respect of which an application for plant breeders' rights is made and by the person by whom the application is made. The conditions are that:

- the variety is a qualifying variety as set out in section 4(2);
- the person applying for plant breeders' rights is the person entitled to the grant of rights for that variety, in accordance with section 4(3), (4) and (5).

Section 4(2) sets out the criteria a variety must meet to establish that it is a "qualifying variety". These are that the variety must be distinct, uniform, stable and new. Schedule 2, Part I defines what is meant by the terms distinct (paragraph 1), uniform (paragraph 2), stable (paragraph 3) and new (paragraph 4).

Section 4(3) provides that, subject to section 4(4) and (5), the person entitled to the grant of plant breeders' rights in a variety is the person who breeds, or discovers and develops it, or his successor in title. A person may sell or otherwise transfer his entitlement to a grant of rights and successors in title may therefore apply for and be entitled to a grant of rights, provided they meet all the other conditions which an applicant must meet.

Section 4(4) establishes that where a person breeds, or discovers and develops, a variety in the course of his employment, then unless there is an agreement to the contrary the employer, or the employer's successor in title, is the person entitled to the grant of rights in that variety.

Section 4(5) introduces Schedule 2, Part II, which sets out how entitlement to a grant of rights is established when two or more applicants have independently bred, or discovered and developed, the same variety and makes provision for priority in respect of applications originating outside the UK.

Section 4(6) provides that "discovery" means discovery of genetic variants arising from existing varieties, as well as discovery of previously unknown plants growing in the wild.

Equivalent provisions

Section 2 of the 1964 Act
Articles 1 (iv), 5(1) and 11 of the 1991 Convention
Articles 6, 11, 12 and 52 of the Council Regulation.

Schedule 2 - Conditions for the grant of plant breeders' rights

Part A - Criteria for grant of rights

Summary

Part I of Schedule 2 applies for the purpose of determining whether the criteria in section 4 (2) which a variety must meet to qualify for a grant of rights are met. The variety must be new in a technical sense, in that it must be clearly distinguishable by one or more characteristics capable of precise description from any other variety in common knowledge at the time of application. It must also be sufficiently uniform in those characteristics which are examined to establish whether it is distinct. The characteristics included in the examination for distinctness and any others used in the variety description must also be reproduced unchanged when the variety is propagated. In the case of hybrids, which can only be reproduced by repeating the original cross between their parents, the resulting hybrid variety must be stable in its essential characteristics at the end of the cycle of reproduction.

The variety must also be new in a commercial sense. It must not have been exploited commercially by, or with the consent of, the applicant for rights for more than one year in the United Kingdom or more than four years (or six years for trees and vines) elsewhere before the application for rights is submitted.

Objective

The objective of Part I is to set out the requirements specified in section 4(2) which a variety must meet to qualify for a grant of rights. The technical criteria, that the variety must be distinct, uniform and stable (DUS), have existed since plant breeders' rights were first introduced. These criteria are defined in broad terms in the 1991 Convention (and the earlier Convention on which the 1964 Act was based). Growing tests are used to establish whether a variety is DUS. Candidate varieties are typically grown alongside other known varieties to check whether they are distinct and uniform. Stability is assessed by examining the extent to which characteristics are reproduced. Growing tests may be supplemented in some instances by laboratory techniques such as electrophoresis. Where a variety is assessed as being DUS, the results of the tests are used to produce a definitive description of the variety.

The broad definitions in the 1991 and earlier Conventions are backed by detailed technical protocols, drawn up by UPOV technical committees whose members are nationals of UPOV contracting states. There are about 150 technical protocols, each one relating to a particular species or genera.

These form the basis of DUS tests in all UPOV contracting states. A DUS test in another UPOV contracting state should therefore be equivalent to a DUS test in the UK.

The technical protocols spell out the characteristics which are to be examined to establish whether one variety is distinct from another. Distinctness is normally established at present by reference to characteristics expressed in the phenotype (basically the plant as it grows). They may be morphological (e.g. leaf shape, flower colour) or physiological (eg early or late flowering). Protein electrophoresis is also permitted for some species in some circumstances. The significance of the difference - for example its value in economic terms - is not relevant. It is sufficient that it exists and can be precisely described, so enabling the variety to be separately identified.

A variety must be distinct from all others in common knowledge at the time an application for rights is submitted. Factors relevant to whether a variety is in common knowledge are set out in section 38(3)&(4). Some events always make a variety a matter of common knowledge. If it is, or has been, on a register of plant varieties (eg a National List) or the subject of plant variety rights in any country it is in common knowledge. An application for entry on a register or for plant variety rights in any country puts a variety in common knowledge, provided it is ultimately successful. Other events, such as circulation in trade, may make a variety a matter of common knowledge depending on circumstances.

A variety must be sufficiently uniform in the characteristics used in the examination of distinctness, to qualify for protection. Technical protocols provide guidance for individual species or genera on what is "sufficient". But broadly speaking, the degree of uniformity required for a variety to be "sufficiently" uniform depends on the method of reproduction. Varieties which are vegetatively propagated are expected to show a high degree of uniformity. Sexually reproduced varieties may show more variation and those which are out pollinating can be expected to be more variable than self pollinating varieties.

The characteristics used in the examination of distinctness must be reproduced for a variety to meet the criterion that it must be stable. So too must any other characteristics used to describe the variety (a characteristic which is not stable will not anyway be useful in a variety description). Varieties which are vegetatively propagated or sexually reproduced varieties obtained through a generation sequence must be stable in these characteristics in each propagation or from generation to generation respectively. Varieties which require the repeated use of other varieties in their production (mainly hybrids) must be stable in these characteristics each time they are produced from the parent material.

Technical protocols are subject to regular review and amendment to take account of developments in plant breeding science and technology. The definitions of distinctness, uniformity and stability have been drawn sufficiently widely to accommodate changes in the technical protocols. Developments in technology suggest, for example, that at some future point it may be possible to test for distinctness by analysis of the genetic make up of a variety. If genetic analysis is developed and becomes accepted in UPOV, then the definition of distinctness in the Act is wide enough to accommodate a new technique of this nature.

In the main, DUS tests in the UK are conducted on the Controller's behalf by bodies independent of the breeder, such as the Niab or the Scottish Agricultural Science Agency. This will continue to be the case, although the Controller may require the breeder to provide information, test results etc to support an application (see section 3). Where a DUS test has been undertaken in another UPOV contracting state, the Controller may buy the test report and use it as a basis for his decision on an application for a grant of UK rights.

A variety must also be new (novel) in a commercial sense to qualify for a grant of rights. Under the 1964 Act, any commercialisation in the UK before an application for rights was submitted disqualified a variety. Arrangements in the Act allow limited prior commercialisation within the UK for up to a year before an application for rights is submitted. Prior commercialisation outside the UK may take place for up to four years (or six years for trees and vines) before a UK application for plant breeders' rights is submitted. This gives plant breeders a limited opportunity to test the market both in the UK and abroad before deciding to commit themselves to an application for rights.

There are certain other exceptions, in which sale or disposal of a variety may take place without affecting novelty (see paragraphs 4(4) - 4(9)). These are similar to those in the 1964 Act.

Novelty requirements also provide that commercialisation of a hybrid destroys the novelty of the parent lines (see paragraphs 4(10) - 4(11)). The breeder of a hybrid may keep the parent lines secret and not sell them separately or protect them by plant breeders rights. In these circumstances, a breeder whose hybrid variety was nearing the end of its period of protection might seek protection of the parent line. If the parent line met all other criteria and was granted protection, this would effectively double the period of protection of the hybrid. Paragraphs 4(10) and (11) prevent this from happening.

Detailed provisions

Paragraph 1 sets out what is required for the variety to be distinct. It must be clearly distinguishable by one or more characteristics capable of precise description from any other variety whose existence is a matter of common knowledge (see section 38(3) and (4)) at the time of application.

Paragraph 2 sets out what is required for a variety to be uniform. It must be sufficiently uniform in the characteristics used in the examination of distinctness (see paragraph 1).

Paragraph 3 sets out what is required for a variety to be stable. The characteristics used in the examination of distinctness (see paragraph 1) and any others used for the variety description must be reproduced for a variety to meet the criterion that it must be stable.

Paragraph 4 sets out what is required for a variety to be new.

Paragraph 4(1) introduces sub paragraphs (2) and (3), which set out the extent to which a breeder can commercially exploit a variety before applying for rights, without destroying novelty.

Paragraph 4(2) has the effect of allowing a variety to be commercially exploited by the breeder

for up to one year in the UK before an application for rights is submitted, without destroying novelty. Propagating or harvested material may be sold or disposed of under this provision.

Paragraph 4(3) has the effect of allowing a variety to be commercially exploited by the breeder for up to four years (or six years for trees and vines) outside the UK before an application for rights is submitted in the UK. As in paragraph 4(2), both propagating and harvested material may be sold or disposed of under this provision.

Paragraph 4(4) introduces the exceptions in subparagraphs (5), (6), (8) and (9) which define circumstances in which sale or disposal of a variety may take place without affecting novelty. Paragraph 4(5) provides that the sale or disposal of any material of a variety to another person who is, or becomes, the person entitled to apply for rights does not affect novelty. This enables a plant breeder, for example, to "sell" his entitlement to apply for a grant of rights in a variety he has bred to another person.

Paragraphs 4(6)&(7) provide for the sale or disposal of propagating material for the purpose of "bulking up" the breeder's stocks of a variety or carrying out tests and trials, provided the propagating material remains under the breeder's control and any material produced under these arrangements remains in the ownership of the breeder or is sold back to him. This enables breeders to enter into contracts with growers under strictly controlled conditions without destroying the novelty of the variety.

Paragraph 4(8) permits the sale or disposal of material other than propagating material produced in the course of breeding, bulking up or carrying out tests or trials on the variety, provided no mention is made of the variety name. This would allow surplus seed to be sold as animal feed, for example, or sale of straw produced from the variety. Paragraph 4(9) allows disposal (but not sale) of a variety at an exhibition or to enable it to be displayed at an exhibition without jeopardising novelty.

Paragraphs 4(10)&(11) provide that commercial exploitation of a variety which requires the repeated use of another variety to produce it destroys novelty in the other variety. In the main, this affects hybrids and parent lines of hybrids.

Equivalent provisions

Schedule 2, Part II of the 1964 Act
Articles 6, 7, 8 and 9 of the 1991 Convention
Articles 7, 8, 9 and 10 of the Council Regulation.

Part B - Priorities between applicants for rights

Summary

This is introduced by section 4(5). It sets out who is entitled to a grant of rights when two or more people independently breed, or discover and develop, the same variety and makes provision for priority in respect of applications originating outside the UK.

Objective

This part of Schedule 2 has two objectives. First, it establishes who is entitled to a grant of rights when two or more people independently breed, or discover and develop, the same variety. In general, this will be the first person to submit a valid application to the PVRO. In the unlikely event of two people submitting an application for the same variety on the same day, then the one who was first in a position to make a valid application is the person entitled to rights. This ensures that the PVRO must reach a conclusion on who is entitled to rights - in other words, a winner must be identified. In reaching a decision, the Controller may have to consider, for example, documentary evidence from the breeding programmes of the applicants. The second objective is to set out the circumstances when the date of an earlier application, submitted in another country, is to be regarded as the date of a UK application for the same variety, for the purpose of establishing who is entitled to a grant of rights and whether the variety is distinct and new.

Detailed provisions

Paragraph 5(1) provides that where two or more people independently breed, or discover and develop, the same variety, the first to submit an application and any successor in title, is the person entitled to rights.

Paragraph 5(2) provides for the circumstance of two or more people submitting an application in respect of the same variety on the same day. The one who was first in a position to make an application is the person entitled to the rights.

Paragraph 6(1), as read with paragraph 6(7), has the effect that the date of an application submitted in the UK is the date of an earlier application in another country if certain conditions (see paragraphs 6(2) to 6(6)) are met. Where the date of the UK application becomes the earlier date, this applies for the purpose of establishing distinctness (see paragraph 1), novelty (see paragraph 4) and who is entitled to a grant of rights (see paragraph 5).

Paragraph 6(2)^{NIS} provides that priority may be claimed in respect of a parallel application if the UK application is submitted within 12 months of the earlier application. Priority is available in respect of applications for a Community plant variety right or a right in a country or intergovernmental organisation which is a member of UPOV. Ministers may additionally designate other, non UPOV, countries by order for the purposes of recognising priority of applications.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

Paragraph 6(3) provides that a parallel application must not have been submitted earlier than 12 months before the UK application is submitted.

Paragraph 6(4) provides that the UK application must include a claim to priority in respect of the parallel application.

Paragraph 6(5) provides that the parallel application in respect of which priority is claimed must not have been refused or withdrawn ie it must still exist at the time of the UK application.

Paragraph 6(6) requires the applicant to provide the Controller with copies of the parallel application, certified by the plant variety rights authority in the country in which it was made, within three months of making the UK application.

Paragraph 6(7) has the effect that where priority is established the date of the UK application is the date of the earlier, or earliest, parallel application.

Paragraph 6(8) provides that where parallel applications are made on different dates, the earliest of these dates is the one taken into account for priority purposes.

Paragraph 6(9) defines "the Convention" as the 1991 Convention. It also makes clear that priority can only be claimed in respect of an application for rights in the same variety.

Paragraph 7(1) provides that priority derived through paragraph 6 is forfeit if the applicant does not, within the "relevant period" as defined in paragraph 7(2) or (3), satisfy all the requirements that have to be met before a grant of rights can be made.

Paragraph 7(2) defines the relevant period as two years from the expiry of the 12 months during which priority can be claimed in respect of a parallel application. This should normally be sufficient to permit the examination to be completed in the other country. In practical terms, the Controller may then buy a report of the examination of a variety from the authorities in which the parallel application was made and use this as the basis for his decision (see note on objectives of Schedule 2, Part I).

Paragraph 7(3) enables the Controller to substitute another period when the parallel application is rejected or withdrawn before the end of two years. If the parallel application is withdrawn or rejected in the other country, PVRO will normally wish to proceed with its own examination of the variety.

Equivalent provisions

Schedule 2, Part I of the 1964 Act
Article 11 of the 1991 Convention
Articles 52 and 55.5 of the Council Regulation.

Section 5 - Rights in relation to application period

Summary

This section establishes a system of provisional protection which applies to all applications from the date of publication in the Plant Varieties and Seeds Gazette until the date on which rights are granted. If rights are granted, applicants will be entitled to reasonable compensation for acts done by others, during this period, which would infringe the breeder's rights if done after rights are granted.

Objective

This provision replaces optional arrangements in the 1964 Act for applicants to apply for a protective direction to protect their variety during the period between when rights were sought and granted. Provisional protection applies automatically to all applications from the date of publication in the Plant Varieties and Seeds Gazette until the date on which rights are granted. During this period, applicants may exploit their candidate varieties, if they so wish. If rights are granted, breeders will be entitled to reasonable compensation for acts within the scope of breeders' rights done without their authority during the application period.

Provisional protection removes a tier of bureaucracy and the separate fee required for protective directions.

Detailed provisions

Section 5(1) provides that if an application for rights is granted a breeder is entitled to compensation for any act done during the application period which, if done after rights are granted, would infringe them.

Section 5(2) defines application period as beginning with the day on which details of the application for rights are published in the Plant Varieties and Seeds Gazette and ending with the grant of rights.

Equivalent provisions

Section 1(3) and Schedule I of the 1964 Act
Article 13 of the 1991 Convention
Article 95 of the Council Regulation.

Section 6 - Protected variety

Summary

This section sets out the scope of plant breeders' rights in a protected variety. The holder of a plant breeders' right is entitled to prevent anyone else doing certain things with propagating material of the variety without his authority. Authority may be given on whatever terms and conditions the holder of rights wishes to impose, subject to the safeguard of compulsory licensing (see section 17).

Plant breeders should normally exercise their rights in respect of propagating material. They may, however, exercise them against harvested material obtained from the unauthorised use of propagating material, but only in circumstances where there has not been a reasonable opportunity to exercise rights against the propagating material before harvest. Ministers may also prescribe by regulations products of varieties in respect of which breeders may exercise rights, where these products are directly obtained from harvested material to which rights extend because it has been obtained from the unauthorised use of propagating material, and the breeder has not had a reasonable opportunity to exercise rights before the product is obtained.

Objective

A plant breeders' right is an intellectual property right, akin to a patent. The scope of the breeder's right was narrowly drawn in the 1964 Act, in that the basic right was confined to the exclusive right to sell propagating material and produce propagating material for the purpose of selling it.

This section sets out the wider scope of the breeder's right in the protected variety, as provided in Articles 14(1) - 14(4) of the 1991 Convention. The right is expressed as a right to prevent others from doing certain things, rather than an exclusive right "to do", but this will have no practical effect. Those things which the breeder can prevent others from doing with propagating material of his protected variety are listed at section 6(1). The effect is to give the breeder control over the actions which are normally necessary to enable propagating material of a variety to be commercialised. For example, the production of seed of a protected cereal variety or the taking of cuttings from a vegetatively propagated protected variety requires the breeder's authority. The breeder's authority is normally given in the form of a licence.

In normal circumstances rights only extend to propagating material of the variety. When propagating material is sold by the breeder, or with his authority, the propagation which the buyer undertakes is authorised in the sale. For example, if certified seed is sold with the breeder's authority, to produce a commercial grain crop, its propagation is authorised with the sale. The breeder's right is exhausted at the point the seed is sold for the purpose of producing the commercial crop and he has no control over the production of that crop, or the crop harvested for consumption (see section 10).

The breeder may, however, exercise rights over harvested material obtained through the unauthorised use of propagating material, where he has not had reasonable opportunity to exercise rights over the propagating material. The breeder cannot choose to exercise rights over harvested material. He must exercise them over use of the propagating material, if he can reasonably do so, right up to the point of harvest. A breeder who knows a crop has been planted using material without his authority in a way which infringes his rights should not, therefore, wait until after harvest to exercise his rights on the harvested material.

Ultimately it is for the courts to decide what constitutes "reasonable opportunity" in any given case. But the most obvious example is the unauthorised use of propagating material in a country which does not offer protection to the species concerned, followed by import of harvested material into the UK. This may be relevant, for example, where there is unauthorised propagation of a variety outside this country to produce cut flowers which are subsequently imported into the UK.

Where rights are extended to harvested material, the breeder can prevent any of the acts described in section 6(1) from being done in respect of the harvested material, without his authority

Ministers may, by regulations, bring products within the scope of plant breeders' rights, where these are made directly from harvested material which is obtained through the unauthorised use of propagating material. This reflects the optional provision at Article 14(3) of the 1991 Convention. If Ministers use these powers, they must prescribe the products to which rights are extended and the varieties from which they are obtained. An example of varieties and directly made products which might be prescribed, by regulations, are varieties of aromatic plant species used to produce oils and oil (the directly made product) used in perfume.

Ministers may make use of these powers where they are convinced that the breeder's right in respect of varieties used for a particular purpose is being abused and breeders cannot protect their varieties from this abuse at an earlier stage. They might also use these powers if products were prescribed in the Community regime and they considered it desirable to make regulations to keep the UK regime in step. The Council Regulation contains a provision (at Article 13.4) allowing for the possibility of extension of the breeder's right to directly made products in an implementing regulation.

If rights are extended to a directly made product, the breeder can prevent any of the acts in section 6(1) in respect of the product. But he will only be able to do so if he can show he did not have a reasonable opportunity to exercise rights at an earlier stage in the production cycle. He cannot simply choose to exercise rights against a prescribed product if, for example, one of the acts in section 6(1) was done in respect of the harvested material, before the product was obtained, and he had a reasonable opportunity to exercise rights in respect of that act. As with harvested material, it will ultimately be for the Courts to decide what constitutes "reasonable opportunity".

There may be circumstances where none of the acts in section 6(1) are done in the transition from harvested material to directly made product. Extension of rights to directly made products is not therefore restricted to circumstances where a section 6(1) act is done to obtain the product from the harvested material.

Section 6 reflects the so called "cascade principle" in Article 14(1) - (3) of the 1991 Convention.

Detailed provisions

Section 6(1) sets out the scope of plant breeders' rights. The breeder has the right to prevent anyone else from doing any of the following acts as respects propagating material of a protected variety without his authority:

(a) Production or reproduction (multiplication)

Acts which result in the production or reproduction of propagating material of a protected variety require the breeder's authority. Examples include:

- Multiplication of seed to produce more seed, including multiplication for use on the same holding (although use of farm saved seed is exempt from the breeder's right in some circumstances - see section 9);
- Production of more plants by taking cuttings from a variety which is vegetatively propagated;
- Production of plants through tissue culture;
- Production of a protected hybrid variety from protected or unprotected parent lines.

(b) Conditioning for the purposes of propagation

The breeder's authority is needed to condition propagating material before it is planted, for example cleaning and chemically treating seed, preparation of plant material for propagation by tissue culture. Conditioning for purposes other than propagation does not come within the breeder's right, for example drying grain or preparing wheat for milling.

(c) Offering for sale

The breeder's authority is needed to offer propagating material for sale.

(d) Selling or other marketing

The breeder's authority is required for selling and all other forms of marketing. For example, if propagating material of a protected variety is given away, free of charge, as part of a wider marketing strategy, the breeder's authority is required.

(e) Exporting

Restrictions on export were a common feature of plant breeders' rights licences under the regime established by the 1964 Act and it is expected that this will continue. The breeder may impose whatever restrictions he wishes on the export of propagating material of his variety to third countries. He may also apply restrictions on exports to other member states, provided the restrictions do not conflict with EC competition law. The interaction between EC competition law and intellectual property rights in individual licensing situations is complex. It is for individual breeders and licensees to satisfy themselves that any agreements they enter into in respect of plant breeders' rights are compatible with EC competition law.

(f) Importing

The breeder's right to authorise imports enables him to exercise rights in respect of imported propagating material purchased abroad without payment of royalty. A breeder who imposes restrictions on imports from other Member States will need to satisfy himself that these are compatible with EC competition law (as for exports).

(g) Stocking for any of the purposes mentioned in paragraph (a) - (f) above

The acts in (a) - (f) above are essentially acts related to the commercial exploitation of a variety. The breeder's authority is also required to stock propagating material of the protected variety for these purposes.

(h) Any other act prescribed for the purposes of this provision

The acts listed in (a) - (g) are those listed in the 1991 Convention as being within the scope of the breeder's right. In addition, the Convention permits contracting states, if they so wish, to prescribe other acts in respect of propagating material which require the authorisation of the breeder (see Article 14(4)). Section 6(1)(h) enables Ministers to prescribe such additional acts in regulations. This provision will allow Ministers to act if, in the future, a serious gap in the protection afforded to breeders is identified.

Section 6(2) gives the breeder powers to authorise others to do the acts listed in section 6(1). He will normally do this by issuing a licence. The licence may include whatever terms and conditions the rights holder decides to impose. The licensing system is the mechanism whereby the breeder keeps control of propagating material of his protected variety and obtains an income through charging royalties for authority given in the licence. Anyone who does any prohibited acts in respect of propagating material of the protected variety, without the breeder's authority, infringes his right.

Section 6(3) enables the breeder to prevent the acts listed in section 6(1) in respect of harvested material obtained by unauthorised use of propagating material, unless he has had reasonable opportunity, before the harvested material is obtained to exercise his rights against the unauthorised use of the propagating material.

Section 6(4) provides that Ministers may prescribe descriptions of varieties and products to which plant breeders' rights extend, where the product is:

- made directly from harvested material to which rights are extended by virtue of section 6(3); and
- is of a prescribed description.

Section 6(5) provides that the breeder's right does not extend to directly made products where a section 6(1) act is done as respects the harvested material from which it is made,

- and the act was done with the breeder's authority; or
- the breeder had reasonable opportunity to exercise his rights in respect of the act done to the harvested material.

Section 6(6)^{NI} (a) explains that "prescribed" means prescribed in regulations made by the Ministers. The things that can be prescribed are:

- additional acts in respect of propagating material which require the breeder's authority (section 6(1)(h));
- descriptions of varieties (eg descriptions which identify the use to which the varieties are put)(section 6(4)); and
- descriptions of directly made products to which rights extend (section 6(4)).

Section 6(6)(b) ensures there is no doubt that pot plants (ie whole plants) and parts of plants such as straw, grain, cut flowers, foliage and fruit are "harvested material".

Equivalent provisions

Section 4 and Schedule 3 of the 1964 Act
Article 14(1) - 14(4) of the 1991 Convention
Article 13.1 - 13.4 of the Council Regulation.

^{NI} See page ii regarding devolution in Northern Ireland

Section 7 - Dependent varieties

Summary

This section provides that the holder of plant breeders' rights has the rights conferred by section 6 in respect of any variety which is dependent on his protected variety. Dependent varieties are defined as those whose repeated production requires the repeated use of the protected variety, or those which are essentially derived from a protected variety which is not itself essentially derived.

Essentially derived varieties are further defined. A variety is deemed to be essentially derived from another (initial) variety if it is predominantly derived from the initial variety, or another variety that is predominantly derived from the initial variety, and it retains the expression of the essential characteristics resulting from the genotype, or combination of genotypes, of the initial variety. An essentially derived variety must be clearly distinguishable from the initial variety by one or more characteristics capable of precise description. Apart from the differences which result from the act of derivation, an essentially derived variety must also conform to the initial variety in the expression of the essential characteristics resulting from the genotype, or combination of genotypes, of the initial variety.

A non exhaustive list of the way in which essentially derived varieties may be obtained is given.

Section 7 does not apply to any varieties which were in common knowledge (which is defined in section 38(3) and (4)) before the Act comes into force.

Objective

This section, which gives effect to Article 14(5) of the 1991 Convention, extends the breeder's right in a protected variety to any other variety which is dependent on it. The issue this seeks to address is that where a variety is dependent on a protected variety, the holder of rights in the protected variety should be entitled to recognition for the contribution which his variety makes to the dependent variety.

This recognition is given by providing that the holder of rights in a protected variety can prevent anyone from doing any of the acts in section 6(1) in respect of the dependent variety without his authority. In simple terms, therefore, he can prevent the commercial exploitation of the dependent variety without his authority. It is expected that he will charge a royalty for giving his authority to exploit the dependent variety and so obtain some recompense for the contribution his protected variety makes to it.

The dependent variety may be the subject of a separate grant of plant breeders' rights if it meets all the criteria which a variety must meet to qualify for rights (see section 4). The holder of plant breeders' rights in a dependent variety which is protected separately may or may not be the holder of rights in the other variety on which it is dependent.

Where plant breeders' rights exist separately in a dependent variety, the holder of those rights has all the rights conferred by section 6 in respect of it. The effect of this is that the authorisation of the holder of rights in the dependent variety, and the holder of rights in the variety on which it is dependent, is required for its commercial exploitation. If a dependent variety is not separately protected, then the authorisation of the holder of rights in the protected variety is all that is needed to exploit it.

Two different types of dependency are defined. The first occurs where a variety can only be obtained by repeated use of a protected variety. The production of a hybrid is the most common example of this. This type of dependency was recognised in the 1964 Act (see schedule 3), which provided that the repeated use of a protected (ie parent) variety to produce a hybrid required the authorisation of the holder of rights in the protected variety. This still applies, under section 6, but in addition, section 7 extends the rights in a protected parent variety to the hybrid itself.

The second type of dependency, essential derivation, was not recognised in the 1964 Act and represents a fundamental change, introduced by the 1991 Convention to address developments in plant breeding technology and concerns about "minimum distances" between plant varieties.

It can take many years to develop a variety using traditional plant breeding techniques. Very small changes to a protected variety may occur, for example, through natural or artificially induced mutation or may be achieved using techniques such as backcrossing or gene transfer technology. The result may be a second - dependent - variety which is distinct from the protected variety, perhaps by one characteristic. In all other respects, the dependent variety is the same as the one from which it is derived. Thus, except for the characteristic which makes it distinct, the dependent variety has the same genetic make up as the variety from which it is derived and it expresses the same characteristics.

The characteristic which makes the dependent variety distinct need not necessarily have any commercial value. A very small cosmetic change, just sufficient to make a variety distinct, is all that is necessary to obtain a new variety which can compete in the same market as the initial variety and even displace it, well before the owner of the initial variety has obtained an adequate return on his investment. The 1991 Convention ensures the holder of rights in the initial variety can obtain a return on his investment in the initial variety, by providing that the breeder's right extends to the dependent variety.

The freedom to use protected varieties in a breeding programme, without charge, has always been recognised by UPOV and is included in the 1991 Convention (see Article 15(1)). These provisions do not change that, but they do mean that anyone using a protected variety in a breeding programme may have to acknowledge dependency, if their work results in an essentially derived variety.

The section provides that an essentially derived variety cannot be derived from another essentially derived variety - in other words, a chain of dependency cannot exist. But a variety obtained from the use of an essentially derived variety may itself be essentially derived from the initial variety. To illustrate, if variety C is obtained from a selection from variety B and variety B is essentially derived from variety A, then C may also be essentially derived from A. C cannot, however, be essentially derived from B.

It is for plant breeders to establish whether varieties are essentially derived or not, through the courts if necessary. The Controller and the PVRO do not have any role in deciding on this matter.

The extension of the breeder's right to dependent varieties does not apply to any dependent varieties in common knowledge at the time the Act comes into force. This means a breeder cannot, for example, claim an interest in a variety already in commerce when the Act comes into force on the grounds that it is essentially derived from his protected variety.

Detailed provisions

Section 7(1) provides that the holder of plant breeders' rights shall have the same rights in respect of a dependent variety as he has under section 6 in respect of the protected variety.

Section 7(2) provides that one variety is dependent on another variety if:

- repeated production of the variety is not possible without repeated use of the other variety; or
- it is essentially derived from another variety and this other variety is not itself an essentially derived variety.

Section 7(3) provides that a variety shall be deemed to be essentially derived from another variety - the initial variety - if:

- it is predominantly derived from the initial variety, or another variety which is predominantly derived from the initial variety, and it retains the expression of the essential characteristics resulting from the genotype or combination of the initial variety;
- it is clearly distinguishable from the initial variety by one or more characteristics capable of precise description (ie it is sufficiently distinct to qualify for a separate grant of plant breeders' rights, if it meets all the other criteria); and
- except for the differences resulting from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics resulting from the genotype or combination of genotypes of the initial variety.

Section 7(4) provides a non exhaustive list of the techniques which may result in an essentially derived variety.

Section 7(5) provides that the holder of plant breeders' rights shall not be able to claim rights in respect of any dependent variety in common knowledge before the Act comes into force.

Equivalent provisions

Schedule 3, paragraph 2 of the 1964 Act (but only in respect of the definition of a variety whose production requires the repeated use of another variety)

Article 14(5) of the 1991 Convention

Articles 13.5 and 116.4 (1st indent) of the Council Regulation.

Section 8 - General exceptions

Summary

This section sets out the circumstances in which plant breeders' rights do not apply to the protected variety. These are for acts done for private and non-commercial purposes, for experimental purposes, or for the purpose of breeding another variety.

Objective

Section 8 implements the compulsory exceptions to the breeder's right in Article 15(1) of the 1991 Convention.

It allows the use of protected varieties for acts which are both private and non-commercial, without the authority of the breeder and without infringing the breeder's right. The 1991 Convention does not give a definition of what constitutes a "private and non-commercial" use; neither does this section and ultimately it will be for the courts to decide in case of dispute.

Use which clearly falls within the category of private and non commercial, however, occurs when an individual buys a protected variety from a nursery and further propagates the plant for private use in his own garden.

Propagation of large quantities of protected varieties for stocking gardens open to the public, or gardens surrounding business premises open to the public would not fall within the exemption. Neither would acts done privately, but for a commercial purpose. For example, propagation of large quantities of protected varieties for the purpose of stocking the gardens of company premises not generally open to the public could, nevertheless, be regarded as being done for the commercial purpose of enhancing the company's image.

The section also exempts acts done for experimental purposes, or for the purpose of breeding another variety, from the scope of breeders' rights. The principle of the free use of germplasm (ie the right to use a protected variety in a breeding programme without the breeder's authority) has always existed in UPOV, and continues to do so. Without it, breeders who had already been granted rights could, if they were so inclined, hinder and restrict developments in plant breeding by others, and create a monopoly for their own varieties in the market.

Detailed provisions

Section 8(a) provides that acts done for private and non-commercial purposes are outside the scope of breeders' rights.

Section 8(b) provides that acts done for experimental purposes are outside the scope of breeders' rights.

Section 8(c) provides that acts done for the purpose of breeding another variety are outside the scope of breeders' rights.

Equivalent provisions

There are no equivalent provisions in the 1964 Act, but the scope of rights in that Act was such that the acts excepted from the breeder's right by section 8 were not within the breeder's right under the 1964 Act.

Article 15(1) of the 1991 Convention

Article 15 of the Council Regulation.

Section 9 - Farm saved seed

Summary

This section exempts from the breeder's right a farmer's use as seed, on his own holding, of harvested material obtained from the holding, ie farm saved seed. The exemption applies to protected varieties and varieties essentially derived from them (see section 7), but not to varieties whose production requires the repeated use of the protected variety (mainly hybrids). The exemption is limited to species or groups prescribed by Ministers by order.

Farmers who use farm saved seed of a protected variety, or a variety which is essentially derived from the protected variety, are liable to pay the holder of rights equitable remuneration, which is "sensibly lower" than the amount charged for the production of propagating material of the variety with his authority in the same area. "Sensibly lower" is defined by reference to the Council Regulation, which includes similar provisions in respect of farm saved seed.

Small farmers as defined in the Council Regulation are exempt from the requirement to pay for the use of farm saved seed.

Farmers who have saved seed of a variety to which this section applies before the Act comes into force are not required to make payment for its use. Ministers may by order discontinue this exemption, after 30 June 2001, for a variety, group or species.

Ministers may by regulations prescribe information which plant breeders must give to farmers and seed processors and which farmers and seed processors must give to plant breeders for the purpose of this section. Ministers may also, by regulation, make provision restricting the circumstances in which farm saved seed may be moved for processing off the holding on which it was obtained. Regulations may include provisions to enable Ministers to monitor the operation of this section or regulations made under it. They may also include provision imposing an obligation of confidence in relation to information supplied by virtue of the regulations.

References to a farmer's own holding are references to any land he exploits for plant growing, whether as his property or otherwise managed under his own responsibility and on his own account.

Objective

The breeder's right under the 1964 Act (section 4(1)) was restricted to the sale of propagating material and the production of propagating material for the purpose of selling it. When a farmer produced a commercial grain crop (eg milling wheat) and he saved some of the grain to plant to produce another commercial grain crop, his actions did not fall within the scope of the breeder's right and the breeder could not therefore claim any royalty on the farm saved seed.

The 1991 Convention extends the scope of the breeder's right to all production or reproduction of propagating material of a protected variety, not just production for sale. It also extends the

breeder's right to conditioning for the purpose of propagation - in other words to cleaning and treating seed for planting. The effect of this is to bring the use of farm saved seed within the scope of the breeder's right.

The 1991 Convention contains an optional provision which enables contracting parties to restrict the breeder's right, within reasonable limits and subject to safeguarding his legitimate interests, to permit farmers to use farm saved seed of a protected variety or a variety which is essentially derived from it (Article 15(2)). The 1991 Convention does not allow contracting parties to restrict the breeder's right in respect of varieties whose production requires the repeated use of a protected variety - in other words, it does not allow farm saved seed of hybrids. In practice, however, a crop produced from hybrid seed cannot, realistically, be farm saved because it will not reproduce true to type.

The Council Regulation and farm saved seed implementing rules (Commission Regulation (EC) 1768/95) give effect to the farm saved seed exemption in respect of varieties protected by Community plant variety rights. Section 9 gives effect to this exemption for UK protected varieties. It follows closely the relevant provisions in the Council Regulation and the farm saved seed implementing Regulation.

It provides that plant breeders' rights do not extend to the use of farm saved seed of protected or essentially derived varieties of species or groups specified by order made by Ministers. The Council Regulation lists those species and groups to which the farm saved seed exemption applies in the Community regime. This includes all species and groups which farmers are known to farm save in the Community. It is the intention to specify those same species and groups for the purpose of section 9. This is to be done by order, rather than in the section itself, so that the list can be amended if the corresponding list in the Council Regulation is amended.

Where the use of farm saved seed is exempt from the breeder's right, the farmer is nevertheless required to pay the breeder equitable remuneration which is "sensibly lower" than the royalty charged on certified seed of the same variety in the same area. "Sensibly lower" is to be determined by reference to the Council Regulation. In practice, it is for breeders to decide what to charge for the use of farm saved seed, in the light of this provision.

Some farmers are exempt from the requirement to pay for the use of farm saved seed. Small farmers, as defined in the Council Regulation, are permanently exempt. Any farmer who has saved seed of a variety before the Act comes into force may continue to save it free of charge until such time, after 30 June 2001, as Ministers discontinue this "prior use" exemption by order. The Council Regulation contains a similar "prior use" exemption (Article 116.4, second indent) which expires on 30 June 2001, unless it is extended before then.

It is the intention to discontinue the "prior use" exemption in section 9 on the same date as it expires in the Council Regulation. Before then, the Commission is required to produce a report, on a variety by variety basis, on the use of farm saved seed of established varieties. The Council Regulation provides for the 30 June 2001 date to be extended in implementing rules, if this report justifies it.

If the expiry date of the "prior use" exemption is extended in the Community regime, then it is the intention to continue the exemption in the UK regime. Section 9 enables Ministers to specify

the date of expiry, after 30 June 2001, by order. It also enables Ministers to specify different dates for different varieties, groups, or species to ensure that this provision can be kept in line with the Community provisions.

Section 9 also enables Ministers to prescribe, by regulations, information which plant breeders must provide to farmers and seed processors and vice versa for the purposes of this clause. Plant breeders may, for example, be required to provide farmers and seed processors with details of royalty charged on certified seed of their varieties. Farmers and seed processors may be required to provide plant breeders with information on the amount of farm saved seed used or processed by them. The regulations may include provision obliging recipients of this information to keep it confidential. The sensitive information which must be kept confidential might include, for example, the tonnage of a species a processor has cleaned for a client or the hectareage of a species sown by a farmer.

Ministers may also make provision in regulations concerning the processing of farm saved seed off farm, to ensure the integrity of the seed. It is intended that similar provisions will be prescribed to those in the farm saved seed implementing rules of the Community regime (Article 13). These require farmers to ensure that seed processors who clean farm saved seed off farm give appropriate undertakings to secure the identity of the seed.

Regulations may also include provisions enabling Ministers to monitor the operation of this section. This might, for example, include a requirement on plant breeders to provide aggregated statistical data through their representative organisation.

Farm saved seed must be produced and used on the farmer's own holding - if it is not, then it does not come within the terms the exemption from the breeder's right in section 9. Own holding is defined in the same way as in the farm saved seed implementing rules in the Community regime, ie any land which the farmer actually exploits for plant growing, whether as his property or otherwise managed under his own responsibility and on his own account.

This does not necessarily mean the own holding must be a single unit. Two separate farms owned by the same farmer and physically separated by distance would together be the "own holding" of the farmer and farm saved seed could be moved between them.

Similarly, where a farmer owns one farm and rents another which he employs someone to manage for him, the farms together represent his own holding and farm saved seed could move between them, provided the success or failure of the rented farm is the farmer's responsibility. Other arrangements, such as growing contracts or where partnerships are involved, are not so clear cut. In cases of doubt farmers or plant breeders will need to obtain their own legal opinion in respect of their individual circumstances.

Ministers may, by order, amend section 9 for the purpose of securing that it corresponds with the equivalent provisions on farm saved seed in the Community regime. An order under this provision is subject to affirmative resolution. For the immediate future, it should be possible to keep in step with the Community regime without resort to this provision, by using the powers to make secondary legislation contained in this section and by relying on the definition of "Council Regulation" provided in section 38(1). However, if the Community regime is substantially changed in the longer term, it is important that Ministers have flexibility to keep the UK regime in step.

Detailed provisions

Section 9(1) provides that, subject to section 9(2), plant breeders' rights do not extend to farm saved seed of a protected or essentially derived variety.

Section 9(2) provides that section 9(1) only applies to material of varieties of species or groups specified by Ministers, by order.

Section 9(3) provides that where a farmer's use of farm saved seed is exempt from plant breeders' rights by virtue of section 9(1), the farmer is liable pay the breeder equitable remuneration, which is sensibly lower than that charged for production of propagating material of the same variety in the same area with the breeder's authority.

Section 9(4) exempts small farmers as defined in the Council Regulation from the obligation to pay for the use of farm saved seed.

Section 9(5) exempts a farmer who has saved seed of a particular variety before the Bill comes into force from the obligation to pay for use of farm saved seed of that variety.

Section 9(6) enables Ministers to discontinue the "prior use" exemption in section 9(5), after 30 June 2001, by order. An order under this provision may discontinue the exemption in respect of a variety, group or species.

Section 9(7)^{NI} enables Ministers to make regulations which make provision:

- enabling farmers and seed processors to require information from plant breeders, and vice versa, which Ministers consider necessary for the operation of this clause;
- restricting the circumstances in which farm save seed may be moved off farm for processing;
- enabling Ministers to monitor the operation of this clause or regulations made under it.

Section 9(8) provides that regulations enabling farmers and seed processors to require information from plant breeders, and vice versa, may impose obligations of confidence in relation to the information supplied.

Section 9(9) provides that the circumstances in which a variety may be deemed to be essentially derived and the non exhaustive examples of derivation in section 7(3) and (4) apply for the purposes of section 9(1), in the same way as they apply for the purposes of section 7(2).

Section 9(10) provides that remuneration is sensibly lower for the purposes of section 9(3) if it would be taken as being sensibly lower within the meaning of the Council Regulation.

^{NI} See page ii regarding devolution in Northern Ireland

Section 9(11) sets out what constitutes a farmer's own holding for the purposes of this section.

Section 9(12)^{NI} provides that Ministers may amend this section by order, to ensure that it corresponds with the farm saved seed provisions in the Community regime.

Equivalent provisions

There are no equivalent provisions in the 1964 Act

Article 15(2) of the 1991 Convention

Article 14 of the Council Regulation and Commission Regulation (EC) No 1768/95 of 24 July 1995 (the farm saved seed implementing rules).

^{NI} See page ii regarding devolution in Northern Ireland

Section 10 - Exhaustion of rights

Summary

This section provides that the breeder's right does not extend to any material of the protected variety sold or otherwise marketed in the United Kingdom by, or with the consent of, the holder of plant breeders' rights, or any material derived from such material, unless:

- there is further propagation of the variety; or
- material which may be used to propagate the variety is exported to a country which does not offer protection to the genus or species to which the variety belongs, unless the material was for final consumption.

Objective

This section provides for the breeder's right to be exhausted on material disposed of or sold in the UK by him, or with his authority, and any material derived from material so disposed of, or sold. There are two exceptions to this. Firstly the breeder's right is not exhausted when there is further propagation of the material, other than a propagation authorised in the sale or disposal. Secondly, the breeder's right is not exhausted when material capable of propagation is exported to a non-qualifying country, other than for the purposes of growing a commercial crop. A non-qualifying country is defined as one which does not provide protection for varieties of the genus or species to which the variety belongs.

The principle behind this section is that the breeder can only exercise rights once in a cycle of production. Once the breeder has authorised sale of material, his right should be exhausted on that material, and on any material derived from it, unless there is a further propagation not authorised in the sale. A farmer, for example, buys seed (propagating material) to grow, ie to propagate, to produce a crop. This propagation is authorised as part of a sale or disposal, and the breeder's right does not extend to it once the sale or disposal has taken place in the UK, with his authority.

If, for example, a farmer buys certified first generation wheat seed (C1), he does so to propagate it to produce a crop. The farmer is entitled to propagate the seed and produce a crop. The crop produced may be commercial grain or it may be second generation seed (C2).

If the crop the farmer produces is a commercial grain crop - say milling wheat - the only propagation which occurs is the one authorised on the sale of seed. The breeder's right does not extend to the product of the seed (the milling wheat), ie material derived from the propagating material.

The farmer may, alternatively, use the C1 wheat seed to produce a further generation of seed, C2. The propagation of C1 seed to produce a crop is authorised with the sale of the seed. But the breeder's right is not exhausted in relation to any resulting C2 seed, nor will he have authorised any propagation of that C2 seed. Sale or disposal of the resulting C2 seed and its propagation, requires the breeder's authority.

The breeder's right may not be exhausted, however, if material of a variety sold with his authority to be used for a purpose which results in exhaustion is diverted from that purpose. For example if seed is sold to produce a commercial crop, but the harvested grain is then planted and used to produce another crop, instead of being sent for, say, milling then there is further propagation and the breeder's right is not exhausted (but see also Section 9).

In the ornamentals sector, propagation may be authorised and royalty charged on the basis of the number of plants resulting from the propagation. These plants may be traded on until they reach the final consumer (the amateur gardener, for example). Rights are exhausted with the authorised propagation to produce the plants. The growing on of the plants, to a size when they might be sold to the final consumer, is part of the authorised transaction, and not subject to a further royalty. If, however, the plants are diverted from the purpose authorised in the original transaction and, for example, used to take cuttings to produce more plants, there is further propagation, not authorised by the breeder. The breeder's right is not exhausted in these circumstances.

The provisions on exhaustion apply to rights in the protected variety under section 6 and to rights under section 7 in relation to a dependent variety.

The section is based on Article 16 of the 1991 Convention which provides for exhaustion of rights when material is disposed of in the "territory of the contracting party". Territory is defined as the UK for the purposes of this section. The 1991 Convention allows intergovernmental organisations to act together for the purpose of establishing territory (Article 16(3) of the 1991 Convention). If they do so, they are required to notify the Secretary General of UPOV.

The European Union is an intergovernmental organisation and territory for the purpose of this clause could be territory of the EU, if EU Member States agreed and the Commission notified the Secretary General of UPOV accordingly. However the EU is not, as yet, a contracting party to the 1991 Convention. Nor has the Commission notified the Secretary General that Member States have assimilated their territory for the purpose of this Article of the 1991 Convention.

Territory is therefore defined as the UK for the purpose of this section of the Act. The European Union may become a contracting party to the 1991 Convention in the future; it may also assimilate the territory of its Member States for the purpose of exhaustion of national rights. If it does so, territory for the purpose of this section would need to be redefined as the EU. This change could be made, if necessary, by secondary legislation made under section 2(2) of the European Communities Act 1972.

Also, if territory is assimilated, it would be for the EU to resolve the position of Greece and Luxembourg, which are not members of UPOV.

Detailed provisions

Section 10(1) provides that plant breeders' rights do not extend to material sold or marketed in the UK by or with the consent of the holder, or any material derived from such material.

Section 10(2) provides that section 10(1) does not apply:

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- if there is further propagation of the variety; or
- if material which enables propagation is exported to a non qualifying country unless the material was exported for final consumption.

Section 10(3) provides that a non qualifying country is one which does not offer protection to the genus or species to which the variety belongs.

Section 10(4) provides that for the purpose of this section, material of a variety means the following:

- any kind of propagating material;
- harvested material, including entire plants and parts of plants;
- any product made directly from harvested material.

Equivalent provisions

There is no directly equivalent provision in the 1964 Act, but section 4(5) is relevant
Article 16 of the 1991 Convention
Article 16 of the Council Regulation.

Section 11^w - Duration

Summary

This provides that a grant of plant breeders' rights shall have effect for 25 years, or 30 years for trees, vines and potatoes, from the date of grant. Ministers may, by regulations, extend the period for which rights have effect for a species or group, for a maximum of 5 years in total. The section also provides that the period of protection for a variety is not extended by any period during which a parallel Community right exists which prevents the exercise of the national right, or during which plant breeders' rights are suspended because the holder of rights has failed to comply with a compulsory licence.

Objective

This section provides that plant breeders' rights have effect for 25 years, except for trees, vines and potatoes where rights have effect for 30 years. This is the same as the period of rights in the Council Regulation (Article 19). The extra period of protection for trees, vines and potatoes reflects the fact that it takes longer to develop and build up stocks of propagating material and reach a point at which they can be exploited commercially to bring in a return for the breeder.

The 1991 Convention (Article 19) requires contracting parties to set a minimum period for the duration of rights of 20 years, or 25 years for trees and vines. There is no upper limit on the period of protection; this is left to the discretion of contracting parties.

The 1964 Act provided that plant breeders' rights should exist for a minimum of 25 years for trees and vines and 20 years for other species, and a maximum of 30 years. The duration of rights for particular species or groups were prescribed in schemes. A few species of ornamentals had a 25 year period of protection and trees and potatoes were protected for 30 years. But a majority of schemes, including the main agricultural crops (cereals, oilseeds, field peas and beans), vegetables, and most ornamental species provided for rights to last for 20 years. The Act extends the period of protection from 20 to 25 years for these species.

Section 11 has effect for rights granted to a protected variety under section 6 and to rights under section 7 in respect of a dependent variety. But the rights which the holder of plant breeders' rights in the protected variety has in the dependent variety are extinguished at the same time as his rights in the protected variety. In simple terms, dependent rights cannot be divorced from rights in the protected variety and they live and die with those rights.

The section provides that Ministers may, by regulations, extend the period of rights for a species or group, for up to 5 years in total (ie to 35 years for trees, vines and potatoes, and to 30 years for other species or groups). The Council Regulation contains a provision enabling it to be amended to extend the duration of rights for a genus or species for up to five years (Article 19).

^w See page i regarding devolution in Wales

If the Council Regulation is amended to extend the period of protection in the Community regime, Ministers may use the powers in this section to keep the periods of protection in the UK regime in line.

The section also provides that the duration of rights cannot be prolonged because it has been impossible to exercise them due to a parallel Community right. The Council Regulation prohibits cumulative protection (Article 92). The effect of this is that if a national right is granted prior to the grant of a Community right, the breeder is unable to invoke the national right for as long as the Community right remains in force. In practical terms, the national right may be held in abeyance until the Community right is surrendered. At that point, the national right can be brought back into operation. But the period for which the national right has effect continues to run while it is in abeyance.

The period for which a right has effect also continues to run during any time the right is suspended because of failure by the holder of rights to comply with a compulsory licence provision (see section 23).

Section 11 applies to rights granted under the 1964 Act which are still in existence when it comes into force (see section 40).

Detailed provisions

Section 11(1) provides that plant breeders' rights have effect for 25 years, or 30 years for trees, vines and potatoes, from the date of grant.

Section 11(2)* provides that Ministers may by regulation specify, for a species or group, that rights shall continue in effect for a longer period than specified in section 11(1), not exceeding:

- 35 years in the case of trees, vines and potatoes; and
- 30 years for all other species.

Section 11(3) provides that the period for which plant breeders' rights have effect shall not be extended in the following circumstances where it has not been possible to exercise the right:

- where there is a parallel Community right which prevents the breeder from exercising the national right;
- where the rights have been suspended because the breeder has failed to comply with the conditions of a compulsory licence (see section 23).

Equivalent provisions

Section 3 of the 1964 Act (and schemes made under it)

Article 19 of the 1991 Convention.

Article 19 of the Council Regulation.

* See page ii regarding devolution in Northern Ireland

Section 12 - Transmission

Summary

This section provides that plant breeders' rights shall be assignable like other proprietary rights and establishes that rights under section 6 and section 7 cannot be assigned separately.

Objective and detailed provisions

Section 12 provides that plant breeders' rights may be bought, sold or otherwise transferred as with any other kind of proprietary right. It also provides that rights under section 6 in a protected variety, and those under section 7 in a variety which is dependent on the protected variety, cannot be separately assigned. Any right which the breeder of a protected variety has in a dependent variety is inextricably linked to the right in the protected variety. It is neither possible nor appropriate for rights in a protected variety and a dependent variety to be bought, sold or otherwise transferred separately.

Equivalent provisions

Section 4(4) of the 1964 Act

Article 1(iv) of the 1991 Convention

Article 23 of the Council Regulation.

Section 13 - Remedies for infringement

Summary

This section provides that plant breeders' rights are actionable at the suit of the holder. It also provides that in proceedings for infringement, the same relief is available as for infringement of other proprietary rights.

Objective

Plant breeders' rights are a proprietary right. Infringement of plant breeders' rights is thus subject to the same remedies as exist for infringement of other proprietary rights, such as patents. A breeder who considers that his right has been infringed is able to take action against the infringer through the civil courts.

The section sets out a non exhaustive list of remedies available to a breeder whose rights have been infringed. Relief is available by way of damages, injunction, interdict, account or otherwise. These remedies are the same as are available in respect of other proprietary rights.

The provisions on infringement of rights and the remedies for infringement also apply in respect of rights under section 7 in a dependent variety.

Any action for infringement of rights has to be brought by the holder of rights. The PVRO plays no part in enforcing plant breeders' rights.

Detailed provisions

Section 13(1) provides that plant breeders' rights are actionable at the suit of the holder.

Section 13(2) sets out remedies available in respect of infringement of plant breeders' rights. These are the same as for other proprietary rights.

Equivalent provisions

Section 4(1) of the 1964 Act

Article 2 of the 1991 Convention

Articles 94, 96, 97, 104 and 107 of the Council Regulation.

Section 14 - Presumptions in proceedings relating to harvested material

Summary

This section applies to any proceedings for the infringement of plant breeders' rights as respects harvested material. It provides for certain presumptions to apply where the holder of rights proves, in proceedings for infringement, that any material to which the proceedings relate has been the subject of an information notice given to the defendant, and the defendant has not provided the information requested in the notice within a prescribed time. The presumptions apply unless the contrary is proved, or unless the defendant shows he has a reasonable excuse for not providing the information.

The presumptions are that the material to which the notice relates was obtained through unauthorised use of propagating material and the holder of rights did not have reasonable opportunity, before the material was obtained, to exercise rights in relation to the unauthorised use of propagating material.

Ministers prescribe, by regulations, the form an information notice must take and the particulars which it must contain.

Objective

This section (and section 15) applies to all genera and species, but its main purpose is to address particular problems which breeders of ornamental varieties face in enforcing their rights and is most likely to be used by this sector of the industry. In the normal course of events, plant breeders must exercise their rights against propagating material (see section 6(1)). Rights are only extended firstly to harvested material, and subsequently to prescribed products obtained directly from harvested material, where the breeder's right has been infringed at an earlier stage in the production cycle in circumstances where he has not had reasonable opportunity to act against the infringement (see section 6(3) and (4)).

For agricultural crops, the end product sold to the farmer is propagating material (ie seed). This is subject to statutory certification controls which, although unrelated to plant breeders' rights, nevertheless provide a marketing framework which makes it easier for breeders to exercise their rights. Ornamentals are not subject to statutory certification controls. Most are vegetatively propagated and the end product is eg a pot plant or bush which may be sold to the final consumer in outlets ranging from market stalls to supermarkets.

Ornamentals are often traded through a number of suppliers before they reach the final consumer. The plant breeder quickly loses control of the sales chain after the first, authorised, propagation upon which royalty is paid. Vegetatively propagated plants can be easily multiplied. The product of an illicit propagation is identical to the product of an authorised propagation. It is thus extremely simple for dishonest people to further multiply protected varieties without the

breeder's authority, and so escape payment of royalties. This disadvantages honest traders, who pay royalties and are undercut by those who do not pay.

Plant breeders cannot establish whether material has been obtained from an authorised propagation unless they know its source. If sellers refuse to provide details of where they obtained the material (which those who knowingly trade in illicit material will almost certainly do) then plant breeders have a strong suspicion, but no more, that their rights have been infringed. Section 14 enables plant breeders to exercise their rights more effectively by tracing material back through the supply chain.

The section provides for an information notice to be served by the breeder to establish from where the harvested material of his variety (eg rose bushes, pot plants) has been obtained. If the person to whom the notice is given does not supply the information requested in it, within a prescribed time limit, certain presumptions will operate in subsequent infringement proceedings, unless the defendant proves otherwise or shows he had a reasonable excuse for not supplying the information.

It is for the Courts to decide what constitutes "reasonable excuse". But it is envisaged, for example, that a person who can show he has lost all his records in a fire would have a reasonable excuse for not complying with an information notice. It is not, however, envisaged that a person could, for example, claim commercial confidentiality as a reasonable excuse for failing to comply with an information notice, particularly since there is an obligation of confidence in respect of information obtained from notices (see section 34).

The breeder must prove the link between the harvested material which is the subject of the information notice and the harvested material which is the subject of infringement proceedings, to activate the presumption.

The presumptions are:

- that the harvested material was obtained through the unauthorised use of propagating material; and
- the breeder did not have reasonable opportunity, before the harvested material was obtained, to exercise his rights in respect of the unauthorised use of propagating material.

The information notice must be in a form prescribed by Ministers, by regulations, which will also prescribe the information which can be required and the time within which it must be provided.

The basic information requested in a notice may be commercially sensitive; for example, the person on whom the notice is served may not wish other persons to know where he obtains his supplies, for legitimate commercial reasons. Section 34 provides that breeder who obtains information is therefore required to keep it confidential, except where he uses it for its intended purposes.

This section also applies in respect of rights under section 7 in a dependant variety.

It is considered that the provisions of this section are procedural, within the meaning of Article 103 of the Council Regulation. The intention is that plant breeders should be able to use information notices in respect of harvested material of Community protected varieties, as well as varieties protected nationally under this legislation.

Detailed provisions

Section 14(1) provides that section 14 applies to proceedings for infringement of plant breeders' rights as respects harvested material.

Section 14(2) provides that, in infringement proceedings, if a holder of plant breeders' rights proves, in relation to the harvested material which is the subject of the proceedings, that

- it has been the subject of an information notice given to the defendant by, or on behalf of, the holder of rights; and
- the defendant has not supplied the information requested in the notice within a prescribed time limit,

then the presumptions in section 14(3) shall apply in respect of the material identified in the notice, unless the defendant proves to the contrary or shows reasonable excuse why he has not supplied the information.

Section 14(3) provides that the presumptions are:

- that the harvested material was obtained through unauthorised use of propagating material; and
- the holder of rights did not have reasonable opportunity, before the harvested material was obtained, to exercise rights in respect of the unauthorised use of the propagating material.

Section 14(4) provides that the reference in section 14(2) to an information notice is to a notice which

- is in a prescribed form;
- specifies the material to which it relates;
- contains a request for the supply of the prescribed information (and only the prescribed information) in respect of the material to which it relates; and
- contains such other particulars as may be prescribed.

Section 14(5)^{NI} provides that "prescribed" means prescribed in regulations made by Ministers.

Equivalent provisions

There are none, but Article 30(1)(i) of the 1991 Convention is relevant.

^{NI} See page ii regarding devolution in Northern Ireland

Section 15 - Presumptions in proceedings relating to products made from harvested material

Summary

This section applies to any proceedings for the infringement of plant breeders' rights as respects any product made directly from harvested material. It provides for certain presumptions to apply where the holder of rights proves, in proceedings for infringement, that any product to which the proceedings relate has been the subject of an information notice given to the defendant, and the defendant has not provided the information requested in the notice within a prescribed time. The presumptions apply unless the contrary is proved or unless the defendant shows he has a reasonable excuse for not providing the information.

The presumptions are that the harvested material, from which the product to which the notice relates was made, was obtained through unauthorised use of propagating material; that the holder of rights did not have reasonable opportunity, before the harvested material was obtained, to exercise rights in relation to the unauthorised use of propagating material; and that no relevant act was done to the harvested material before the product was made. A relevant act is any one of the acts within the scope of the breeders' right in section 6(1) which is done with the rights holder's authority, or one in respect of which the breeder had reasonable opportunity to exercise his rights.

Ministers prescribe, by regulations, the form an information notice must take and the particulars which it must contain.

Objective

Section 15 makes similar provision to section 14, for information notices in respect of products directly made from harvested material. Plant breeders' rights only extend to products of a description prescribed by Ministers by regulations, which are directly made from harvested material of varieties of a description also prescribed by Ministers by regulations (see section 6(4)). Section 15 is thus only relevant in those circumstances where Ministers use their regulation making powers to extend rights to directly made products in the circumstances provided in section 6.

Where section 15 does apply, it will do so in a manner similar to section 14 in respect of harvested material. Section 15 provides for an information notice to be served by the breeder to establish from where the product, made directly from harvested material of his variety, has been obtained. If the person to whom the notice is given does not supply the information requested in it, within a prescribed time limit, certain presumptions will operate in subsequent infringement proceedings, unless the defendant proves otherwise or shows he had a reasonable excuse for not supplying the information.

As with section 14, it is for the Courts to decide what constitutes "reasonable excuse". But it is envisaged, for example, that a person who can show he has lost all his records in a fire would have a reasonable excuse for not complying with an information notice. It is not, however, envisaged that a person could, for example, claim commercial confidentiality as a reasonable excuse for failing to comply with an information notice, particularly since there is an obligation of confidence in respect of information obtained from notices (see section 34).

The breeder must prove the link between the product which is the subject of the information notice and the product which is the subject of infringement proceedings, to activate the presumption.

The presumptions are:

- that the harvested material from which the product was made was obtained through the unauthorised use of propagating material;
- the breeder did not have reasonable opportunity, before the harvested material was obtained, to exercise his rights in respect of the unauthorised use of propagating material; and
- no relevant act was done with the harvested material, before the product was made.

A "relevant act" is one done with the breeder's authority, or one in respect of which he had a reasonable opportunity to exercise his rights.

The information notice must be in a form prescribed by Ministers, by regulations, which will also prescribe the information which can be required and the time within which it must be provided.

This section also applies in respect of rights under section 7 in a dependent variety.

It is considered that the provisions of this section are procedural, within the meaning of Article 103 of the Council Regulation. The intention is that plant breeders should be able to use information notices in respect of products directly made from harvested material of Community protected varieties, as well as varieties protected nationally under this legislation, where rights have been extended to directly made products in the Community regime.

Detailed provisions

Section 15(1) provides that section 15 applies to proceedings for infringement of plant breeders' rights as respects any product made directly from harvested material.

Section 15(2) provides that, in infringement proceedings, if a holder of plant breeders' rights proves, in relation to any product which is the subject of the proceedings, that:

- it has been the subject of an information notice given to the defendant by, or on behalf of, the holder of rights; and
- the defendant has not supplied the information requested in the notice within a prescribed time limit,

then the presumptions in section 15(3) shall apply in respect of the product identified in the notice, unless the defendant proves to the contrary or shows reasonable excuse why he has not supplied the information.

Section 15(3) provides that the presumptions are:

- that the harvested material from which the product was made was obtained through unauthorised use of propagating material;
- the holder of rights did not have reasonable opportunity, before the harvested material was obtained, to exercise rights in respect of the unauthorised use of the propagating material; and
- no relevant act was done, before the product was made, as respects the harvested material from which it was made.

Section 15(4) provides that an act is relevant for the purpose of section 15(3) if it is mentioned in section 6(1) and it is:

- done with the authority of the holder of rights; or
- it is an act in respect of which the holder of rights has had a reasonable opportunity to exercise his rights.

Section 15(5) provides that the reference in section 15(2) to an information notice is to a notice which:

- is in a prescribed form;
- specifies the product to which it relates;
- contains a request for the supply of the prescribed information (and only the prescribed information) in respect of the product to which it relates; and
- contains such other particulars as may be prescribed.

Section 15(6)^{NI} provides that "prescribed" means prescribed in regulations made by Ministers.

Equivalent provisions

There are none, but Article 30(1)(i) of the 1991 Convention is relevant.

^{NI} See page ii regarding devolution in Northern Ireland

Section 16 - Maintenance of protected variety

Summary

This section provides that during the period for which plant breeders' rights are exercisable, holders of rights must be able to produce, to the Controller, propagating material capable of producing the protected variety. The holder of rights must also provide the Controller with any information or facilities necessary to enable the Controller to satisfy himself that the holder is fulfilling his duty to maintain the protected variety. Facilities include facilities for inspection of the measures taken to preserve the protected variety.

Objective

This section provides that a holder of plant breeders' rights is obliged to ensure propagating material of the protected variety is available, which is capable of producing plants with the same characteristics as those taken into account when rights were granted, throughout the period for which rights are exercisable. In other words, he must ensure the continued existence of the variety whilst rights are in effect.

A holder of rights must also demonstrate to the Controller that he is complying with his duty to maintain the protected variety, if he is asked to do so. He must provide the Controller with whatever information and facilities the Controller requires to satisfy himself that the variety is being properly maintained. The section also provides for the inspection of facilities by or on behalf of the Controller of measures taken to maintain the protected variety.

The obligation to maintain the variety is particularly important in the case of cross-fertilised species (eg grasses, clovers, onions, beet and certain brassicas). The risk that cross fertilised species will cease to have the same characteristics as the variety for which rights were granted in the first place, unless the breeder takes steps to maintain propagating material of the variety, is greater than for self-fertilised or vegetatively propagated species.

The provisions of section 16 do not apply in respect of rights under section 7 in a dependent variety.

The provision in the 1964 Act which enabled Ministers, by regulations, to exempt some species or groups of species from the maintenance provisions has not been re-enacted.

Detailed provisions

Section 16(1) provides that the holder of plant breeders rights must ensure that, throughout the period for which rights are in force, he is able to produce to the Controller propagating material which is capable of producing the protected variety.

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Section 16(2) provides that the holder of rights must provide to the Controller whatever information or facilities the Controller requires to satisfy himself that the holder is fulfilling the duty in section 16(1).

Section 16(3) provides for inspection by or on behalf of the Controller of the measures taken by a holder of rights for the preservation of the protected variety.

Equivalent provisions

Section 6 of the 1964 Act.

Article 22(1)(b)(i) of the 1991 Convention

Article 64 of the Council Regulation.

Section 17 - Compulsory licences

Summary

This section re-enacts and clarifies the compulsory licence provisions from the 1964 Act. The Controller may issue a compulsory licence if he is satisfied that the holder of plant breeders' rights has unreasonably refused to grant a licence or has imposed or put forward unreasonable terms.

Objective

It is a fundamental assumption underlying the grant of plant breeders' rights that breeders should make their protected varieties as widely available as possible, to those who wish to grow or use them. While this would generally be in the breeder's own interest, he might, in some circumstances, think that it would be more advantageous to limit the licences he authorises to one or more selected growers or merchants, or to attempt to retain a monopoly.

This section enables an applicant to apply to the Controller for the grant of a compulsory licence. The Controller may override the authority of the holder of rights, to licence others on his (ie the Controller's) own terms, if he is satisfied that the breeder has refused to grant a licence to the applicant or has offered or imposed unreasonable terms.

The 1991 Convention lays down that, except where expressly provided in the Convention, no contracting party may restrict the free exercise of the breeder's right for reasons other than of public interest (Article 17(1)). This section lays down the criteria on which the Controller makes his decision. The Controller can grant a compulsory licence only if he considers it in the public interest to do so, and if he is satisfied with the competence and financial soundness of the applicant.

If the Controller is satisfied that the public interest criteria are met and that therefore a compulsory licence should be granted, he must set the terms for the licence. The section sets down examples of the terms the Controller may include in the licence. In considering what terms to set for the licence, the Controller is required to take account of both the public interest and of the need to ensure that there is equitable remuneration for the breeder.

The Controller may issue a compulsory licence, regardless of whether the breeder has already issued a licence to the applicant or to another person. The timescale for planting may mean that seed merchants and growers have no alternative but to accept, without delay, the terms of licences imposed by a holder of rights, if their business is not to be adversely affected. If they think the terms are unreasonable, they will not later be debarred from seeking to obtain better terms through an application to the Controller.

This section also provides for regulations to specify, for varieties of a species or group, a period of time which must elapse between the grant of plant breeders' rights and the coming into effect of a compulsory licence.

This provision, which is re-enacted from the 1964 Act, stems from a recommendation by the Committee on Transactions in Seeds (Cmnd 1092, July 1960, paragraph 190) that such a period of freedom from compulsory licensing would enable a breeder to build up stocks of his plant variety for distribution, and establish his position in the market as the originator of the plant variety.

The provisions of this section apply to rights granted to a breeder under section 6 of the Act and to rights conferred under section 7 in respect of a dependent variety.

Detailed provisions

Section 17(1) provides that the Controller may grant a compulsory licence to an applicant provided he is satisfied that the holder has unreasonably refused the applicant's request for a licence or that the holder has imposed or put forward unreasonable terms in granting or offering to grant a licence. The compulsory licence may include any rights which might have been granted by the holder of rights.

Section 17(2) sets out the criteria which the Controller must take into account when deciding whether to grant a compulsory licence. He must be satisfied that it is necessary to ensure that the variety is available to the public at reasonable prices, is widely distributed and is maintained in quality. He must also be satisfied that the applicant has the means, including financial means, to exploit the right in a competent and business-like manner and that he intends to do so.

Section 17(3) provides that a licence issued by the Controller cannot be an exclusive licence, ie the Controller cannot prevent the holder of rights from issuing a licence for the variety to others.

Section 17(4) provides that the Controller shall set the terms of the licence as he thinks fit, and gives guidance as to what terms might be included. In particular, the licence may include terms as to remuneration to the holder of the plant breeders' rights and terms requiring the holder of rights to make propagating material available to the holder of the compulsory licence. This ensures that notwithstanding the grant of a compulsory licence, the holder of rights receives adequate recompense, and that the holder of the licence has access to propagating material, without which the licence would have no value.

Section 17(5) sets down the criteria which the Controller must take into account when deciding the terms to include in the licence. These are that the variety is available to the public at reasonable prices, widely distributed, maintained in quality and that there is reasonable remuneration for the holder of rights.

Section 17(6) provides that a compulsory licence may be issued regardless of whether the holder of rights has already granted a licence to the applicant or any other person.

Section 17(7) provides that any agreement purporting to bind any person not to apply for a compulsory licence is void.

Section 17(8)^{NIS} enables the Ministers to specify in regulations for a species or group of plants a period during which a compulsory licence cannot come into effect. The period would commence from the date of the granting of rights and any compulsory licence issued during the period would not have effect until the period had expired.

Section 17(9) provides that the Controller may at any time, on the application of any person, extend, limit, vary or revoke a compulsory licence if he is asked to do so.

Equivalent provisions

Section 7 of the 1964 Act

Article 17 of the 1991 Convention

Article 29 of the Council Regulation.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

Section 18^{NISW} - Selection and registration of names

Summary

This section enables the Ministers to make regulations providing for the naming of plant varieties and for keeping a register of names. It also requires the Controller to publish all entries made in the register in the Plant Varieties and Seeds Gazette and in such other manner as seems to him to be necessary.

Objective

This section substantially re-enacts the equivalent provisions of the 1964 Act. Article 20 of the 1991 Convention requires that all protected varieties should have a unique name, registered with the plant variety rights authority. So far as possible, the name by which a variety is registered should be the same in any UPOV state in which it is protected. The Convention lays down the broad principles for naming varieties. UPOV also provides more detailed guidance on naming, which is internationally recognised and which the UK (and the Community regime) follows. This detailed guidance is included in regulations in the UK.

Detailed provisions

Section 18(1) provides that Ministers may make regulations concerning:

- the selection of names for varieties which are the subject of applications for the grant of plant breeders' rights,
- changes of name for varieties which have already been granted rights,
- the keeping of a register of the names of varieties which have already been granted rights.

Section 18(2) provides that the regulations made under section 18(1) above may, in particular:

- enable the Controller to require an applicant for the grant of rights to select a name for the variety in respect of which a grant has been sought. This would allow the Controller to compel a reluctant applicant to put forward a name;
- enable the Controller to require the holder of plant breeders' rights to select a different name for a protected variety. This might be necessary if, for example, the connotation of the original name changes over a period of time;
- prescribe classes of varieties;

^{NISW} See page i and ii regarding devolution in Northern Ireland, Scotland and Wales

- prescribe grounds on which registration may be refused. For example, if the name is identical to, or may be confused with, another registered name, if it is liable to mislead or cause confusion concerning the characteristics or value of the variety, or if the name is liable to cause offence;
- prescribe the circumstances in which representations may be made as to a decision on the name chosen for a variety;
- enable the Controller to refuse an application for grant of rights or terminate the grant of rights, if the applicant or holder fails to comply with requirements imposed by the regulations;
- provide for the publication or service of notices of decisions which the Controller proposes to take; and
- provide for the inspection of the register by members of the public.

Section 18(3) requires the Controller to publish notice of all entries made in the register, including any alterations, corrections and erasures, in the Plant Varieties and Seeds Gazette and in such other manner as appears to him convenient to ensure sufficient coverage within the industry.

Section 18(4) clarifies that for the purposes of section 18 (1), the variety in which respect of which plant breeders' rights are granted is the protected variety.

Equivalent Provisions

Section 5 of the 1964 Act

Article 20 of the UPOV Convention

Article 63 and 66 of the Council Regulation.

Section 19 - Duty to use a registered name

Summary

This section imposes a duty to use the registered name of a protected variety when selling, offering for sale or marketing propagating material of the variety.

Objective

This section is intended to prevent a buyer of propagating material being misled by the sale or marketing of a protected variety, or a previously protected variety, under a name or names, other than the registered name.

The requirement to use the registered name applies from the date on which plant breeders' rights are granted and continues even after the period of protection for the variety has expired.

Contravention of the requirement to use a registered name is a criminal offence, for which a fine of up to £1,000 may currently be imposed. However it is recognised that failure to use the registered name may have been done unwittingly and therefore the section makes allowance for such circumstances.

The section implements the requirement of Article 20 (7) of the 1991 Convention. In accordance with Article 20(8) of the 1991 Convention, the use of a trade mark is permitted, for example to distinguish a particular company, provided the trade mark and registered name are juxtaposed and the registered name is easily recognisable. Similar provisions existed in the 1964 Act.

Detailed provisions

Section 19(1) provides that a person must use the name registered under section 18 for a variety, when he sells, offers for sale or markets propagating material of that variety.

Section 19(2) provides that the requirement in section 19 (1) above applies to varieties which are currently protected and also to those which have previously been protected, but for which rights have now expired.

Section 19(3) allows the use of a trademark alongside the registered name. The trademark and registered name must be juxtaposed and the registered name must be easily recognisable.

Section 19(4) sets the penalty for contravention of the duty in section 19 (1) at a fine not exceeding level 3 on the standard scale. This is currently £1,000.

Section 19(5) provides that in circumstances where proceedings are brought for a contravention of section 19 (1), it shall be a defence to prove that all reasonable precautions were taken against committing the offence and that the accused had no reason to suspect that he was committing an offence.

Equivalent Provisions

Section 5A of the 1964 Act

Article 20 of the UPOV Convention

Article 17 of the Council Regulation.

Section 20 - Improper use of a registered name

Summary

This provides that it is an infringement of plant breeders' rights to use the registered name of a protected variety in offering for sale or otherwise marketing any material of a different variety in the same naming class. It is also an infringement of rights to use a name so similar to the registered name that it is likely to deceive or cause confusion.

Objective

This provision substantially re-enacts the equivalent provision of the 1964 Act. A variety which is the subject of plant breeders' rights will be identified in the public mind by its registered name and the remuneration obtained by the holder of rights will be directly related to the popularity of the variety. It is essential that the holder of rights should be able to protect himself against attempts by other people to take advantage of the popularity of his protected variety by selling material of a different variety under the same name.

This applies equally to attempts to sell material of a different variety under a name which so closely resembles the registered name of the protected variety, that a purchaser is liable to be confused or deceived.

This section recognises that it may be possible to unwittingly infringe the holder's rights in this respect and appropriate allowances are made for such circumstances.

Detailed provisions

Section 20(1) provides that a person who uses the registered name of a protected variety to sell material of a different variety within the same naming class commits an infringement of rights and the holder may take civil action against that person. (Naming classes are those prescribed in regulations made under section 18).

Section 20(2) provides that it is also an infringement of the rights of the holder if a person sells material of a different variety under a name which so nearly resembles the registered name of the protected variety that it is likely to deceive or cause confusion and the holder may take civil action against that person.

Section 20(3) provides that in any proceedings brought for infringement of rights in respect of this provision, it is a defence for the accused to claim that he had taken reasonable precautions against infringing rights and had no reason to suspect that he was infringing rights.

Section 20(4) defines "class" and "registered name".

Equivalent Provision

Section 5(6) of the 1964 Act
Articles 18 and 94 of the Council Regulation.

Section 21 - Nullity

Summary

This requires the Controller to declare a plant breeders' right null and void if it is subsequently established that the variety was not distinct or new at the time rights were granted, or that rights were granted to a person not entitled to them. The Controller must also declare rights null and void where uniformity or stability were established from information provided by the applicant which is subsequently shown to have been incorrect.

Objective

The 1991 Convention draws a distinction between circumstances where the breeder's right must be made null and void and circumstances where the breeder's right may be terminated. The breeder's right must be made null and void in circumstances where it should never have been granted in the first place, ie because at the time of application the variety did not fulfil the conditions required for the grant of rights, or because the person to whom rights were granted was not the person entitled to receive them.

In cases where the right is declared null and void, it is as if the right had never existed. In these circumstances, anyone who, for example, had paid royalty to the holder of rights could seek repayment.

If rights under section 6 in a protected variety are declared null and void, any rights under section 7 in a dependent variety would also be null and void.

Detailed provisions

Section 21(1) provides that the Controller shall declare plant breeders' rights null and void in the following circumstances:

- when rights were granted to a variety which at the time of grant did not meet the criteria specified for distinctness and novelty, or
- where the grant of rights was based upon incorrect information provided by the applicant and it is established that when rights were granted the variety did not meet the criteria specified for uniformity and stability, or
- where the person to whom the rights were granted was not entitled to the grant of rights and the rights have not subsequently been transferred to him or his successor in title.

Section 21(2) provides that where priority is established in respect of an application by another person after a grant of rights has been made (see paragraph 6 of Schedule 2), the initial grant of rights can only be declared null and void, if the application in respect of which priority is established results in the grant of rights.

Section 21(3) provides that where a grant of rights is declared null and void it is as if the rights had never been granted.

Equivalent Provisions

Section 3(7) and Schedule 2, Part I, paragraph 2(6) of the 1964 Act

Article 21 of the 1991 Convention

Article 20 of the Council Regulation.

Section 22 - Cancellation

Summary

This section provides that the Controller may terminate the period for which rights have effect in certain circumstances. These are:

- if the Controller is satisfied that the variety is no longer uniform or stable;
- if it appears to the Controller that the holder of rights is no longer able to provide propagating material of the variety in accordance with the maintenance requirements (see section 16(1));
- if the Controller is satisfied that the holder of rights has failed to comply with a request for information or facilities which enable the Controller to satisfy himself that the holder of rights is fulfilling his duty to maintain the protected variety (see section 16(2));
- if the holder of rights applies to surrender them and the Controller is satisfied that it is proper to permit him to do so.

Before reaching a decision on an application to surrender rights, the Controller must give notice of the proposed surrender and hear any objections from interested parties, in accordance with requirements to be laid down in regulations.

If the Controller is satisfied that a variety was no longer uniform, or no longer stable, at an earlier date, he may make the termination of rights retrospective to that date.

Objectives

This section sets out the circumstances when a breeder's right may be terminated. Termination applies when conditions relating to the protected variety change after rights have been granted and, as a consequence, the rights should no longer continue. An example of when this is likely to occur is if the variety is not being properly maintained. A likely consequence of failing to maintain a variety properly is that it will not remain uniform and/or stable. Termination may be made retrospective if the Controller is satisfied that the variety did not meet the uniformity or stability requirements at some earlier date.

The section also enables the Controller to terminate rights if a breeder fails to provide information or facilities to demonstrate that the variety is being properly maintained.

A breeder may himself seek termination of rights. If he does so, the Controller must still be satisfied that it is proper to allow this. An interested party, eg anyone who had paid for and received a licence to exploit the variety might be aggrieved at the prospect of rights being surrendered and if so, would be able to make representations to the Controller.

When rights are terminated the validity of anything done before the date of termination is not affected. For example, anyone who had paid royalty to the rights holder before the date of termination would not be able to seek repayment.

If rights under section 6 in a protected variety are terminated, any rights under section 7 in a dependent variety would also cease with the termination of rights in the protected variety.

Detailed provisions

Section 22(1) provides that the Controller may terminate the grant of rights in the following circumstances:

- if he is satisfied that the variety is no longer uniform and stable,
- it appears to the Controller that the holder of rights is no longer in a position to provide him with propagating material as required in section 16(1),
- if the Controller is satisfied that the holder of rights has failed to comply with a request to supply the information and facilities required to confirm that he is fulfilling his duty to maintain the variety (see section 16(2)),
- if the holder of rights makes an application to surrender rights and the Controller is satisfied that the rights may properly be surrendered.

Section 22(2)^{NIS} provides that the Controller must give notice of an application to surrender rights in accordance with the procedures laid down in regulations, and must follow those procedures for hearing any representations by interested parties.

Section 22(3) provides that if the Controller is satisfied that the variety failed to meet the requirements for uniformity and stability at an earlier date, he may make the termination retrospective to that date.

Equivalent provisions

Sections 3(6) and 6(3) and (4) of the 1964 Act
Article 22 of the 1991 Convention
Article 21 of the Council Regulation.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

Section 23 - Suspension

Summary

This section provides that the Controller may suspend plant breeders' rights where the holder is in breach of any conditions imposed in a compulsory licence, on application by the holder of the compulsory licence. Rights must be reinstated on application by the holder of the right if the Controller is satisfied that he is no longer in breach of these conditions.

This is without prejudice to the remedies available through the courts to the holder of a compulsory licence.

Objective

This section provides that the Controller may suspend plant breeders' rights if a holder of rights fails to comply with the terms of a compulsory licence. The Controller may issue a compulsory licence if he is satisfied that the holder of rights has unreasonably refused to grant a licence to another person, or in offering or granting a licence has imposed unreasonable terms (see section 17).

A compulsory licence is issued on whatever terms the Controller thinks fit. One of the terms of the licence may, for example, require the holder of rights to allow the holder of the licence access to propagating material of the protected variety. If the holder of rights fails or refuses to comply with this, it may make the compulsory licence worthless. The holder of the licence may apply to the Controller to suspend the exercise of plant breeders' rights in the variety, where the holder of rights fails to comply with the terms of a compulsory licence.

If the holder of rights then meets the requirements of the compulsory licence, (eg supplies the propagating material) and, if the Controller is satisfied that this has been done, he must, on application by the holder of rights, terminate the suspension.

The practical effect of suspending plant breeders' rights is that the variety is not protected during the period of suspension. Any person can therefore exploit the variety while rights are suspended, without the authority of the holder of rights.

The section also provides that the civil remedies of the holder of a compulsory licence are not prejudiced by applying for suspension of rights.

Where plant breeders' rights under section 6 are suspended any rights under section 7 in a dependent variety are also suspended.

Detailed provisions

Section 23(1) provides for the Controller to suspend plant breeders' rights, on application by the licence holder, if he is satisfied that the holder of rights has failed to fulfil the conditions imposed on him by a compulsory licence.

Section 23(2) provides for the Controller to reinstate the rights, on application by the holder of rights, if he is satisfied that the holder of rights has met the requirements of the compulsory licence.

Section 23(3) provides that the civil remedies of the holder of a compulsory licence are not prejudiced by applying for rights to be suspended.

Equivalent Provisions

Section 7(7) of the 1964 Act

Article 17(1) of the 1991 Convention

There are no equivalent provisions in the Council regulation.

Section 24^{NIS} - Right to be heard: general

Summary

This provides that the Ministers shall, by regulations, make provision for decisions of the Controller which may be appealed to the Plant Varieties and Seeds Tribunal to be made after the person entitled to appeal, and any other person of a description prescribed by the Ministers, has had the opportunity to make representations to, and be heard by, the Controller or a person appointed by him.

Objective and detailed provisions

This section provides for the Ministers to make regulations providing for a person affected by a decision of the Controller to make representations to, and be heard by, him or a person appointed by him, before the decision is taken. The decision must be one that can be appealed to the Plant Varieties and Seeds Tribunal.

This ensures there is full opportunity for anyone affected by a decision to make his case known to the Controller, so that when the Controller takes the decision, he does so in the light of all relevant information which the affected parties have made available to him.

The regulations will provide for persons of a prescribed description to be able to make representations and be heard, as well as the person entitled to appeal to the Tribunal.

Equivalent provisions

Section 9(3) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

Articles 75-78 of the Council Regulation.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

Section 25 - Right to be heard: applications for compulsory licences

Summary

This section applies to applications for compulsory licences where the rights holder is, or is represented by, a society or similar organisation which has as a main object the negotiation or granting of licences to exercise plant breeders' rights, either as holder of rights or as agent for holders of rights. In these circumstances, organisations or persons with an interest in the compulsory licence application may apply to the Controller for the right to comment to him on it. These rights are additional to those conferred by section 24.

Objective

This section re-enacts a provision introduced in the 1964 Act. At that time it was known that the associations representing breeders intended to set up central offices to issue licences, either as agent or assignee of the holder of rights. The associations proposed to adopt standard forms of licence, rates of royalty and other conditions which would be discussed with organisations representing seed merchants and growers. It was considered that disputes might nevertheless arise leading to requests for the issue of compulsory licences on different terms and conditions. If such a dispute did arise, interest in the dispute might go wider than the parties immediately involved.

Many plant breeders are now generally represented by either the British Society of Plant Breeders for agricultural varieties and the British Association Representing Breeders for ornamentals. Both organisations have standard licences for a range of purposes, as envisaged when the 1964 Act was passed.

This section therefore continues the provision in the 1964 Act. It enables a person or organisation with an interest in a compulsory licence application in respect of a variety for which the licence has been issued by a breeder's organisation to make their views known to the Controller or a person appointed by him. However, the Controller must be satisfied that the organisation or person has an interest in the application and, where an organisation applies to make representations, that it is representative of those whom it claims to represent.

The right to be heard under this section is in addition to the general right to be heard in section 24.

Detailed provisions

Section 25(1) applies to an application for a compulsory licence under section 17, if the holder of the plant breeders' rights to which the application relates is, or includes, or is represented by, a society or other organisation coming within the scope of section 25(2) below.

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Section 25(2) provides that the society or organisation referred to in section 25(1) must have as one of its main objects the negotiation or granting of licences to exercise plant breeders' rights, either as the holder of rights or as an agent for the holder of rights.

Section 25(3) provides that an organisation or person may apply to the Controller to make representations concerning an application under this section, and the Controller shall afford the opportunity to make representations and to be heard, if he is satisfied that certain conditions are fulfilled.

Section 25(4) lays down the conditions referred to in section 25(3). These are that the organisation or person has a substantial interest in the application for a compulsory licence, that the application involved issues which may affect other applicants for a compulsory licence, and that any organisation which applies to make representations is properly representative of those it claims to represent.

Section 25(5) provides that the rights conferred by this clause are in addition to any rights conferred by section 24.

Equivalent provisions

Section 7(5) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 26 - Appeals to the Tribunal

Summary

This section identifies the decisions in respect of which an appeal may be made to the Tribunal. It also provides for Ministers to confer rights of appeal to the Tribunal against decisions taken under regulations made under certain sections.

Objective

This section re-enacts existing provisions for appeal to the Tribunal under the 1964 Act. It ensures that there are opportunities for appeal in all appropriate circumstances.

Detailed provisions

Section 26(1) sets out the decisions of the Controller against which an appeal may be made to the Tribunal set up under section 42 and Schedule 3. They are:

- the grant or refusal to grant plant breeders' rights under section 3;
- a preliminary decision in respect of whether the conditions laid down in section 4 for the grant of rights are met;
- the refusal or granting of a compulsory licence (section 17(1)) and its variation or revocation once granted (section 17(9));
- the declaration that plant breeders' rights are null and void (section 21) and the termination of plant breeders' rights because the variety is no longer uniform or stable, or because the breeder has failed to meet the maintenance obligations in section 16 (section 22(1)(a)-(c));
- the refusal of an application to surrender plant breeders' rights (section 22(1)(d));
- the grant or refusal of applications to suspend or reinstate plant breeders' rights in compulsory licence cases (section 23);

Section 26(2)^{NIS} provides that the Ministers may, by regulations, provide for appeals to the Tribunal against a decision of the Controller to refuse an application by an organisation to make representations under section 25. It also provides that the Ministers may, by regulations, provide for appeals against any decisions made by the Controller under regulations made in respect of naming varieties, how the Controller discharges his functions and fees.

Equivalent Provisions

Sections 1(4), 3(6) and (9), 6(5), 7(11) and 9(2) & (4) and Schedule 2 Part I, paragraph 2(6) of the 1964 Act

There are no equivalent provisions in the 1991 Convention Article 67 of the Council Regulation.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

Section 27^w - Ministerial guidance

Summary

This section provides that the Controller is to act under the general direction of the Ministers, except when taking decisions which can be appealed to the Plant Varieties and Seeds Tribunal.

Objective and detailed provisions

This section exempts the Controller from the direction of the Ministers in respect of any decision which can be appealed to the Plant Varieties and Seeds Tribunal. The effect is to establish the Controller's independence from the Ministers in respect of decisions on applications for a grant of rights, and other matters associated with the administration of plant breeders' rights.

Equivalent provisions

Section 11(2) of the 1964 Act

Article 30(1)(ii) of the 1991 Convention

The nearest equivalent in the Council Regulation is Article 36.

^w See page i regarding devolution in Wales

Section 28^{NISW} - Regulations

Summary

This section enables the Ministers to make regulations regarding the manner in which the Controller is to discharge his functions, in particular on matters concerning applications for the grant of plant breeders' rights

and other applications to the Controller. It includes a non-exhaustive list of matters which the Ministers may cover in regulations.

Objective

The Act lays down certain basic principles regarding plant breeders' rights and provides the necessary administrative machinery to grant rights. As with the 1964 Act, it establishes a framework for a system of granting rights, but the detailed procedures to be followed need to be set out in regulations. The powers to make regulations in this and other sections of the Act reflect its very technical nature, and the need for flexibility to meet changing circumstances and developments in plant breeding technology.

Representatives of all interested parties will be consulted on these regulations, before they are made, as required by section 48. Parliament will have the opportunity of considering the regulations under the negative resolution procedure.

Detailed provisions

Section 28(1) enables the Ministers to make regulations concerning the manner in which the Controller is to discharge his functions. This applies, in particular, to applications for the grant of plant breeders' rights and other applications to the Controller.

Section 28(2) gives a non-exhaustive list of the provisions which may be

included in regulations. The examples given are:

- to restrict repeated applications on the same subject;
- to prescribe circumstances in which representations may be made regarding any decision on an application or in connection with the charging of fees;
- the keeping of registers and records by the Controller and their rectification, and the circumstances in which they may be inspected by members of the public;
- the publication or service of notice of applications and the Controller's decision;
- the manner of dealing with objections to applications.

^{NISW} See page i and ii regarding devolution in Northern Ireland, Scotland and Wales

Equivalent Provisions

Section 9 of the 1964 Act

There are no equivalent provisions in the 1991 Convention

Articles 36 and 114 of the Council Regulation (detailed rules are laid down in Commission Regulation (EC) No 1230/95 as amended by Commission Regulation (EC) No 448/96, establishing implementing rules as regards proceedings before the Community Plant Variety office).

Section 29^{NISW} - Fees

Summary

This section enables Ministers to make regulations as respects the charging of fees for plant breeders' rights matters. Regulations may also authorise the Controller to refuse applications or terminate rights if fees are not paid, and to restore applications or rights if non payment of fees is made good.

Objective

It is Government policy that the work carried out by the PVRO on the granting and administration of plant breeders' rights is self financing. The fees fixed in respect of plant breeders' rights are set at the level necessary to recoup all costs incurred, including staff costs. A review of fees is carried out annually.

This section provides a statutory basis for fees and also provides an appropriate sanction when fees are not paid.

Detailed provisions

Section 29(1) provides for Ministers to make regulations regarding the charging of fees. This includes the regular fee payable by holders of rights to maintain the right.

Section 29(2) provides that the regulations made under section 29(1) may authorise the Controller to refuse an application in respect of plant breeders' rights if the relevant fee has not been paid. The regulations may also authorise the Controller to terminate rights if a holder of rights has failed to pay any relevant fees in connection with the rights. It also provide for the rights to be restored if the failure to pay fees is made good.

Equivalent provisions

Section 9(1) and (2) of the 1964 Act

Article 5(2) and 22 of the 1991 Convention

Article 21, 83 and 113 of the Council Regulation (detailed provisions in respect of fees are laid down in Commission Regulation (EC) No1238/95 on fees payable to the Community Plant Variety Office).

^{NISW} See page i and ii regarding devolution in Northern Ireland, Scotland and Wales

Section 30 - Use of outsiders

Summary

This section enables the Controller to use the services of people who are not directly employed in the PVRO to undertake, or assess the results of, tests and trials.

Objective and detailed provisions

This section re-enacts a provision from the 1964 Act. It provides for the Controller to use outside bodies to carry out and assess results of the tests and trials which he considers expedient for the purposes of Part I of the Act. These include, for example, tests for distinctness, uniformity and stability (DUS).

In practice, all this work is undertaken on behalf of PVRO by outside bodies. These include, for example, Niab, the Scottish Agricultural Science Agency and Department of Agriculture for Northern Ireland. The Controller may also use the services of foreign testing authorities, where appropriate. Choice of contractor depends on species.

Equivalent provisions

Section 11(4)(a) of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 54.1 (variety denominations) and 55 of the Council Regulation.

Section 31 - False information

Summary

This section provides that it shall be a criminal offence to knowingly or recklessly give false information to the Controller in an application where his decision may be appealed to the Tribunal (or in support of such an application), or in respect of information in connection with the maintenance of a variety. The section sets the penalty for doing this at a fine not exceeding level 3 on the standard scale (level 3 is currently £1,000).

Objective

The criminal offence created by this section is for the protection of the general public, particularly users of plant varieties. The provision of false information could result in a benefit to the offender at the expense of members of the public. Civil remedies protect the holder of plant breeders' rights against infringement of rights and the misuse of the registered name of his variety.

Detailed provisions

Section 31(1) establishes that it is a criminal offence to knowingly or recklessly give false information to the Controller and that on conviction the offender is liable to a fine not exceeding level 3 on the standard scale (currently £1,000).

Section 31(2) specifies that the information to which section 31(1) applies is information given in an application to the Controller for a decision against which an appeal lies to the Tribunal, information given by or on behalf of the applicant in connection with such an application, and information given in response to a request from the Controller to satisfy himself that the breeder is maintaining the variety (section 16(2)).

Equivalent provisions

Section 13(2) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 32 - False representations as to rights

Summary

This section makes it an offence for a person knowingly or recklessly to make false representations that he is entitled to exercise plant breeders' rights. This applies regardless of whether the variety is the subject of plant breeder's rights.

Objective

As with section 31, the criminal offence created by this clause is for the protection of the general public and plant breeders. The fine on conviction of the offence, as for section 31, is not exceeding level 3 on the standard scale (currently £1,000).

Detailed provisions

Section 32(1) makes it a criminal offence for a person knowingly or recklessly to falsely represent that he is the holder of plant breeders' rights or any rights derived from such rights. On conviction, an offender is liable to a fine not exceeding level 3 on the standard scale (currently £1,000).

Section 32(2) provides that it is immaterial, for the purposes of section 32(1), whether the variety in respect of which the representations relate, is the subject of plant breeders' rights.

Equivalent provisions

Section 13(1) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 33 - Exclusion from Restrictive Trade Practices Act 1976

Summary

This section exempts plant breeders' rights licences from the provisions of the Restrictive Trade Practices Act 1976 (the RTPA).

Objective

The RTPA requires the registration of specified agreements and provides, where appropriate, for proceedings before the Restrictive Practices Court, and prohibition of the agreement if found contrary to the public interest. Agreements which must be registered are those between two or more persons carrying on business within the United Kingdom in the production or supply of goods. Consequently, arrangements which are concerned solely with the terms on which licences will be granted or accepted, eg rates of royalty, do not come within the scope of the RTPA. Breeders' individual licensing arrangements would also not normally be caught by the RTPA.

Certain joint licensing arrangements, however, which breeders and growers (or merchants) and their organisations may wish to make, to ensure effective enforcement of rights, might be made unenforceable, because they would otherwise fall within the scope of Part II of the RTPA. Plant breeders' rights entail restrictions on the supply of goods, in that the holder can authorise (by licence) others to sell propagating material of the protected variety. Where two or more persons enter into joint arrangements, the subject of which was licences, they would fall within the scope of the RTPA.

This section exempts restrictions on joint licensing agreements accepted by two or more licensees concerning sales and conditions from the RTPA. The section enables breeders (or their associations) to make licensing agreements with growers or merchants (or their associations) under which the latter accept restrictions eg the minimum prices at which the varieties shall be sold. It would not provide exemption for any agreement applying to the supply of varieties other than those varieties covered by the plant breeders' rights to which the agreement related. Nor would it apply to agreements between breeders about the terms on which they will supply goods eg fixing prices for their own sale of varieties in which they hold plant breeders' rights.

This section substantially re-enacts the equivalent provision in the 1964 Act. The thinking behind the section is that a plant breeder's right is a proprietary right (see section 12) and is therefore restrictive. It would be illogical for rights granted under the Act to be jeopardised by other legislation on restrictive practices in general (the RTPA).

Detailed provisions

Section 33 provides that the RTPA shall not apply to:

- any licence granted by the holder of rights or any other person authorised to grant a licence in respect of such rights;
- any assignment of plant breeders' rights or of the title to apply for the grant of such rights;
- any agreement for such a licence or assignment;

provided that it contains no restrictions described in section 6(1) of the Restrictive Trade Practices Act, unless they relate solely to goods which are plants or parts of plants of a variety to which the breeders' rights relate, or a variety to which those rights will relate if they are granted.

Equivalent Provisions

Section 8 of the 1964 Act

There are no equivalent provisions within the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 34 - Disclosure of information obtained under section 14 or 15

Summary

This section provides that, where a holder of plant breeders' rights obtains information pursuant to an information notice under section 14 or 15, he owes an obligation of confidence to the person who supplies the information. This does not, however, restrict disclosure of the information for the purposes of, or in connection with, establishing whether plant breeders' rights have been infringed or any infringement proceedings.

Objective

Section 14 and 15 provide for a breeder to serve an information notice in respect of harvested material, or products made directly from harvested material, of a variety in which he holds plant breeders' rights. An information notice will be served by the breeder to establish from where the harvested material, or product made directly from the harvested material, has been obtained. The information to be requested is prescribed by Ministers, by regulations.

This information may be commercially sensitive. For example, the person on whom the notice is served may not wish another person to know where he obtains his supplies, for quite legitimate commercial reasons. A breeder who obtains information is therefore required to keep it confidential, except where he uses it for its intended purposes of establishing whether his rights have been infringed, or any proceedings for infringement of plant breeders' rights.

The breeder would not be prevented from using information in the notice to track material of his variety back through a supply chain to the source of propagation, for the purpose of establishing whether the propagation was authorised. To illustrate, if the breeder serves a notice on X, the latter may say the material in question was obtained from Y. If the breeder then serves a notice on Y, he (ie the breeder) may have to inform Y that he has obtained information from X, alleging that Y supplied X with the material. The breeder will also be able to use information obtained in a notice in infringement proceedings, or in connection with infringement proceedings.

If, however, information is wrongfully disclosed by the breeder, the provider of the information would be able to bring a civil action against him for breach of a duty of confidence.

Ministers have powers to impose similar obligations of confidence in regulations requiring plant breeders to supply information to farmers and seed processors and vice versa in relation to farm saved seed (see section 9(7) and (8)).

Detailed provisions

Section 34(1) provides that, if a holder of plant breeders rights obtains information pursuant to a notice given for the purposes of section 14 (presumptions in proceedings relating to harvested material) or section 15 (presumptions in proceedings relating to products made from harvested material), then he owes an obligation of confidence to the person who supplied the information.

Section 34(2) provides that section 34(1) shall not have the effect of restricting disclosure of information for the purposes of, or in connection with:

- establishing whether plant breeders' rights have been infringed
- any proceedings for the infringement of plant breeders' rights.

Equivalent provisions

There are none.

Section 35 - Reference collections of plant material

Summary

This section permits the Controller to establish and maintain reference collections of plant material and to contribute towards the expenses incurred by others in maintaining reference collections, where appropriate.

Objective

This section continues the provision in the 1964 Act to allow the Controller to establish and maintain a reference collection. In practice, the organisations which undertake testing for distinctness, uniformity and stability (see section 30) maintain the reference collections and the Controller contributes towards the costs.

Detailed provisions

Section 35(1) provides that the Controller may establish and maintain reference collections of plant material.

Section 35(2) provides that the Controller may contribute towards the expenses incurred by others in maintaining a reference collection.

Equivalent Provisions

Section 11(4) (b) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation (but see Article 58 - costs of technical examinations - which enables fees to be paid to Examination Offices in accordance with implementing rules).

Section 36 - Offences by bodies corporate

Summary

This section provides that where an offence is committed by a corporate body with the consent of a director, manager, secretary or similar officer, or can be attributed to negligence by that person, the individual as well as the corporate body is guilty of the offence and can be punished accordingly.

Objective

This provision on offences committed by corporate bodies is a standard one, and similar provisions are to be found within other legislation. It enables proceedings to be taken against the officers of a body corporate, where they are personally responsible for an offence committed by it.

Detailed provisions

Section 36(1) provides that any director, manager, secretary or other similar officer of a body corporate or a person purporting to act in any such capacity, can be proceeded against personally in relation to an offence committed by that body.

Section 36(2) provides for a partner in a Scottish partnership to be personally liable in respect of offences committed by that partnership in the same way as a director of a corporate body in relation to offences committed by that body. This provision takes account of the fact that, unlike in England and Wales, in Scotland a firm is a legal person distinct from the partners of whom it is composed.

Equivalent Provisions

Section 35(1) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 37 - Jurisdiction in relation to offences

Summary

This provides for court proceedings to be taken in that part of the United Kingdom where the accused person is located.

Objective

This section is desirable because the nature of the offences which can be committed under this Part of the Act means they could take place in any part of the United Kingdom, or even in several places at the same time. There may therefore be difficulties about deciding where the offence has been committed. This is resolved by allowing proceedings to be taken where the defendant is for the time being located.

Detailed provisions

Section 37(1) enables proceedings for offences under this Part of the Act to be brought before a court having jurisdiction in the place where the accused is for the time being.

Section 37(2) provides that section 37 (1) shall not prejudice any jurisdiction exercisable apart from that under that clause.

Equivalent provisions

Section 35(2) of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 101 and 102 of the Council Regulation.

Section 38 - Interpretation of Part I

Summary

This section contains interpretations of the terms used throughout Part I, namely "the Council Regulation", "gazette", "name", "protected variety" and "variety". It also states that references to an applicant or a holder of plant breeders' rights include, where the context allows, reference to predecessors or successors in title. It also defines the circumstances under which the existence of a variety is to be taken to be a matter of common knowledge.

Objective

The use of an interpretation section permits this Part of the Act to be drafted more simply. Section 38(3) and (4) define "common knowledge". Section 38(3) provides for those circumstances in which a variety will be in common knowledge. Section 38(4) provides examples of other circumstances which may make a variety a matter of common knowledge.

Detailed provisions

Section 38(1) defines "the Council Regulation", "gazette", "name" and "protected variety". It also defines "variety" as having the meaning given by section 1(3).

Section 38(2) extends the meaning of "applicant for plant breeders' rights" and "holder of plant breeders' rights" to include his predecessors or successors in title.

Section 38(3) provides that, for the purposes of Part I, the existence of a variety shall be taken to be a matter of common knowledge if:

- it is, or has been, the subject of a plant variety right; or
- it is, or has been, entered into an official register of plant varieties in any jurisdiction; or
- it is the subject of an application which subsequently leads to its falling within the above categories.

Section 38(4) provides that, if section 38(3) does not apply, the existence of a variety may be taken to be a matter of common knowledge by reference to, for example:

- plant varieties already in cultivation or grown commercially; or
- plant varieties included in a recognised commercial or botanical reference collection; or
- plant varieties of which there are precise descriptions in any publication.

Equivalent provisions

Section 38 of the 1964 Act (definition of variety) and Schedule 2, Part II, paragraph 1(2) (Common Knowledge)

Article 1(vi)(Variety) and Article 7(part)(Common Knowledge) of the 1991 Convention
Article 5 (Variety) and Article 7.2 (Common Knowledge) of the Council Regulation.

Section 39 - Application of Part I to the Crown

Summary

This section provides that civil proceedings shall lie against the Crown if a servant or agent of the Crown infringes plant breeders' rights or improperly makes use of the registered name of a variety with the Crown's authority.

Objective

This is a standard provision. It enables the holder of rights to take action against the Crown, if his rights are infringed by a servant or agent of the Crown or if that servant or agent improperly makes use of the registered name of his variety.

An agent or a servant of the Crown may use a protected plant variety for the purposes described in section 8, eg for experimental purposes or for developing a new variety, because the activities in section 8 are outside the scope of breeders' rights. However if a servant or agent of the Crown wishes to carry out any of the acts specified in, for example, section 6, he must get the authorisation of the holder of rights to do so.

An agent or servant of the Crown will have the same right as others to apply for a compulsory licence.

Detailed provisions

Section 39(1) provides that the Crown is liable to civil proceedings in respect of any infringement of rights, or improper use of a breeder's registered name by servants or agents of the Crown acting in their official capacity.

Section 39(2) excludes proceedings against the Crown in respect of infringements or wrongs not covered by section 39(1).

Section 39(3) provides that this section shall have effect as if contained in Part I of the Crown Proceedings Act 1947. It ensures that the provisions of Part I of the Crown Proceedings Act 1947 relating to matters arising out of the liability of the Crown imposed by that Part will also apply to liability under section 39 (1).

Equivalent provisions

Section 14 of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 40 - Application of part I to existing rights

Summary

This section applies the provisions of Part I of the Act to plant breeders' rights granted under the 1964 Act, and in existence at the time the Act comes into force, with certain exceptions.

Objective

The effect of this is to extend the scope of the breeders' right in respect of varieties which have been granted rights under the 1964 Act and which are still protected when the Act comes into force. For example, the breeder's right is extended from the rather narrow scope in the 1964 Act of selling reproductive material and producing reproductive material for sale, to cover all those acts described in section 6(1).

Where the Act gives a longer period of protection for a species or group than the 1964 Act, then that longer period, less the period of protection which has already had effect, will apply. Hence a variety with 20 years of protection under the 1964 Act which has enjoyed 10 years of protection at the time this Act comes into force, will have its remaining period of protection extended to 15 years (see section 11). No variety protected under the 1964 Act will be subject to a shorter period of protection as a result of these provisions.

This section does not apply to provisional protection (see section 5). A breeder with rights granted under the 1964 Act cannot, therefore, use this provision to seek compensation retrospectively for acts done which would have infringed his rights while his application for protection was being assessed under the 1964 Act.

Detailed provisions

Section 40(1) provides that, subject to section 40(2) and (3), Part I applies to rights granted under the 1964 Act as it does to rights granted under Part I of this Act.

Section 40(2) provides that the compensation provisions applicable to rights granted under Part I of this Act by virtue of section 5 do not apply to rights granted under the 1964 Act.

Section 40(3) provides that section 11 can only extend the period of rights for a variety protected under the 1964 Act. The period of right for an existing variety cannot be shortened.

Section 40(4) defines "existing rights" as any rights granted under Part I of the Plant Varieties and Seeds Act 1964 which are exercisable on the coming into force of Part I of this Act.

Equivalent provisions

Not applicable.

Section 41 - Varieties of recent creation

Summary

This section provides that "varieties of recent creation", which were not hitherto protectable, may be regarded as new, provided an application for plant breeders' rights is submitted within 12 months of the day on which Part I comes into force and no propagating material, or harvested material, has been sold or otherwise disposed of in the UK or elsewhere earlier than 4 years (or 6 years for trees and vines) before that date.

Objective

This section relaxes the novelty provisions (Schedule 2, Part 1, paragraph 4(2)) in respect of a variety which could not be protected under the 1964 Act, because no scheme under that Act existed for the species or group to which the variety relates. The effect is to deem that such a variety is new, provided propagating or harvested material has not been sold, or otherwise disposed of, in the UK by or with the consent of the applicant for more than 4 years (or 6 years for trees and vines) before an application for rights is submitted. (This compares to the normal period of one year during which material may be exploited in the UK before an application for rights is submitted).

Applications must be submitted within one year of the Act coming into force. If plant breeders' rights are granted, the period for which they have effect is reduced by the period before the application in which they have been exploited, less one year. Thus, for example, a variety for which the period of protection is 25 years which is exploited in the UK for 3 years before an application for rights is submitted, would have the period of protection reduced by 2 years, to 23 years.

This one year reduction takes account of the fact that under Schedule 2, paragraph 4(2), any variety may be sold or otherwise disposed of in the UK for up to a year prior to the date of submission of the application for plant breeders' rights, without destroying novelty.

Detailed provisions

Section 41(1) provides for the section to apply to applications made within 12 months of the day of coming into force of Part I in respect of a variety:

- which was in existence prior to the coming into force of this Part of the Act;
- which is of a species or group in respect of which no scheme had been made under Part I of the 1964 Act;
- where a sale or other disposal of propagating or harvested material of the variety in order to exploit it has taken place in the UK, with the consent of the applicant, more than a year before the date of the application.

Section 41(2) provides that a variety to which section 41(1) above applies shall be deemed to be new if no sale or other disposal of propagating or harvested material of the variety has taken place for the purpose of exploiting it, with the consent of the applicant, more than 4 years (or 6 years in the case of trees or vines) before the day this Part of the Act comes into force.

Section 41(3) provides that paragraph 4(4) of Schedule 2 (which defines the circumstances in which sale or disposal of a variety may take place without affecting novelty) and paragraph 4(10) of Schedule 2 shall apply to a variety to which section 41(1) applies.

Section 41(4) provides that, if plant breeders rights are granted under this section, the period of those rights, (see section 11) will be reduced by the length of time during which they were sold or otherwise disposed of in the UK less one year.

Equivalent Provisions

There are no equivalent provisions in the 1964 Act
Article 6(2) of the UPOV Convention 1991
Article 116(2) of the Council Regulation.

Section 42 - The Tribunal

Summary

This section provides for the continued existence of the Plant Varieties and Seeds Tribunal (the Tribunal). It also introduces Schedule 3, which makes detailed provision about the Tribunal.

Objective

The continued existence of the Tribunal is provided for because the majority of appeals under the Act are likely to raise questions involving scientific and technical considerations, possibly of a high degree of complexity (eg detailed comparison of the characteristics of the plant variety concerned and those of another variety).

Prior to the 1964 Act which created the Tribunal, the Committee on Transactions in Seeds (Cmnd 1092, July 1960, paragraphs 357 - 359) considered that such questions could best be resolved after reference to an expert Tribunal for the following reasons:

- such a Tribunal could include persons skilled in the particular species or groups of plants to which the plant variety in dispute belongs, and persons familiar with the trade practices involved;
- that a Tribunal of this kind would provide an easy and expeditious appeal procedure, which it was hoped would not involve vexing delays or involve the parties concerned in heavy costs.

The Committee considered the alternative of setting up an appeal authority consisting of a nominated judge of the High Court sitting as an Appeal Tribunal, but were of the opinion that an expert Tribunal was more likely to be suited to the needs of plant breeders' rights (paragraph 358).

The Committee's views remain valid.

Detailed provisions

Section 42(1) provides for the continued existence of the Plant Varieties and Seeds Tribunal.

Section 42(2) introduces Schedule 3.

Equivalent provisions

Section 10(1) and Schedule 4 of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 45 - 48 of the Council Regulation.

Schedule 3 - The Plant Varieties and Seeds Tribunal

Summary

This Schedule makes provision about the Tribunal, concerning its constitution, the chairman, the two panels, selection from the panels, sittings, decisions, costs, rules as to the procedure, remuneration of members and appointment of offices and servants.

Objective

This Schedule substantially re-enacts Schedule 4 of the 1964 Act, simplifying the provisions which dealt with how the chairman of the Tribunal was to be appointed for the purpose of proceedings brought in England and Wales, Scotland or Northern Ireland.

Detailed provisions

Paragraph 1 provides that the jurisdiction of the Tribunal shall be exercised by the chairman (who shall be appointed pursuant to paragraphs 2 to 4 depending on where the proceedings have been brought), a member of the panel constituted under paragraph 7(1)(a) and a member of the panel constituted under paragraph 7(1)(b).

Paragraph 2(1) requires the Lord Chancellor to appoint a chairman of the Tribunal when proceedings are brought in England and Wales.

Paragraph 2(2) provides that a person may only be appointed chairman under paragraph 2(1) if he has a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990. Paragraph 3(1) requires the Lord President of the Court of Session to appoint a chairman of the Tribunal when proceedings are brought in Scotland.

Paragraph 3(2) provides that a person may only be appointed chairman under paragraph 3(1) if he is an advocate or solicitor in Scotland of at least 7 years' standing.

Paragraph 4(1) requires the Lord Chief Justice of Northern Ireland to appoint a chairman of the Tribunal when proceedings are brought in Northern Ireland.

Paragraph 4(2) provides that a person may only be appointed chairman under paragraph 4(1) if he is a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least 7 years' standing.

Note: The need for paragraphs 2 to 4 arises from the fact that the Tribunal may be called upon to deal with cases arising in any part of the UK. It has been considered desirable for appeal proceedings in each constituent country of the UK to be heard under the Chairmanship of a suitably qualified member of the legal profession in the country concerned.

Part II - The Plant Variety and Seeds Tribunal

This will facilitate any post-Tribunal proceedings on points of law arising in the courts of the country where the Tribunal sat. Provisions having equivalent effect were included in the 1964 Act.

Paragraph 5(1) provides, subject to paragraph 5(2), that the appointment of a chairman shall be for such term as the appointing authority determines.

Paragraph 5(2) provides that the appointment of a chairman shall not be for such term as to extend beyond when he becomes 70 but is subject to paragraph 5(6).

Paragraph 5(3) provides that a chairman who ceases to hold office shall be eligible for re-election.

Paragraph 5(4) provides that a chairman may resign by notice in writing to the appointing authority.

Paragraph 5(5) provides that the appointing authority may revoke a chairman's appointment.

Paragraph 5(6) provides that paragraph 5(2) is subject to section 26(4) to (6) of the Judicial Pensions and Retirement Act 1993 which provides power to authorise the continuance in office up to the age of 75.

Paragraph 6(1) provides that in the case of the temporary absence or inability to act of a chairman, the appointing authority may appoint a deputy.

Paragraph 6(2) provides that a person may only be appointed deputy if he has the required qualification.

Paragraph 6(3) provides that a deputy shall have all the functions of a chairman.

Paragraph 7(1)W requires the Ministers to draw up and from time to time revise:

- a panel of persons who have wide general knowledge in the field of agriculture, of horticulture or of forestry; and
- a panel of persons who have specialised knowledge of particular species or groups of plants or of the seeds industry.

Paragraph 7(2)W provides that the power to revise the panels drawn up under this paragraph includes the power to terminate membership of the panel but extends the provisions of section 7 of the Tribunals and Inquiries Act 1992 to the members of the panels. This makes it necessary to obtain the concurrence of the Lord Chancellor and of certain judicial officers in Scotland and Northern Ireland to dismissals in certain cases.

Paragraph 8(1) provides for the selection of members of the panels to deal with cases. Ministers may use two methods, as follows:

^w See page i regarding devolution in Wales

- They may select a member or members to deal with that particular case or class or group of cases; and
- Alternatively, the Ministers may select a short list of members who are particularly qualified to deal with a certain class or group of cases and the members to deal with a particular case of that class or group will be selected from those lists, this final selection being done by Ministers or, if they so direct, by the relevant chairman.

Paragraph 8(2) provides that the member from the panel constituted under paragraph 7(1)(b) shall be selected for his knowledge of the subject matter of a particular case or class or group of cases.

Paragraph 9 provides that the Tribunal may sit anywhere in the United Kingdom.

Paragraph 10(1) requires that decisions of the Tribunal in the exercise of their jurisdiction shall be by majority vote.

Paragraph 10(2) provides that, in the event of a member of the Tribunal being unable to continue the hearing of proceedings, the proceedings may be continued before the two remaining members if the parties to the proceedings agree.

Paragraph 10(3) provides that, when proceedings are continued pursuant to paragraph 10(2), if the two remaining members of the Tribunal cannot agree on their decision then, on the application of any party to the proceedings, the case must be re-argued before a full Tribunal.

Paragraph 10(4) provides that a decision of the Tribunal cannot be questioned on the ground that a member of it was not validly appointed or selected.

Paragraph 11(1) provides that the Tribunal in any proceedings brought before it in England and Wales or Northern Ireland (see paragraph 12 for Scotland) may order any party to the proceedings to pay to any other party to the proceedings:

- a specified sum in respect of the costs incurred in the proceedings by the other party; or
- the taxed amount of those costs.

Paragraph 11(2) provides that where an order is made under paragraph 11(1) in relation to proceedings in England and Wales, the costs shall be taxed on a county court basis if so provided in the order and, if not so provided, by the county court.

Paragraph 11(3) provides that where an order is made under paragraph 11(1), in relation to proceedings in Northern Ireland, the costs shall be taxed on a county court basis (relevant to Northern Ireland) if so provided and, if not so provided, by the taxing master of the Supreme Court of Judicature of Northern Ireland.

Paragraph 12 provides that the Tribunal in any proceedings brought before it in Scotland (see paragraph 11 for England and Wales and Northern Ireland) may order any party to the proceedings to pay to any other party any expenses incurred in the proceedings by that party and may tax or settle the amount of any expenses to be paid under any such order or direct in what manner they are to be taxed.

Part II - The Plant Variety and Seeds Tribunal

Paragraph 13^{NIS}(1) empowers the Lord Chancellor to make rules as to the procedure in connection with proceedings brought before the Tribunal in exercise of their statutory jurisdiction and as to the fees chargeable in respect of those proceedings. These rules may make provision as to:

- the circumstances in which the Tribunal need not sit in public, or are not to sit in public;
- the form of any decision of the Tribunal;
- the time within which any proceedings are to be instituted;
- the evidence which may be required or admitted in any proceedings;
- the examination of the parties, and of witnesses, on oath or affirmation in any proceedings;
- the procedure for securing the attendance of witnesses and the production of documents in any proceedings.

Paragraph 13(2) provides that rules made under paragraph 13(1) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Paragraph 14^w provides that the Ministers may pay to members of the Tribunal such remuneration and allowances as the Ministers may determine.

Paragraph 15(1)^w provides that the Ministers may appoint such officers and servants of the Tribunal as the Ministers may determine.

Paragraph 15(2)^w provides that there shall be paid to officers and servants appointed under paragraph 15(1) such remuneration and allowances as the Ministers may determine.

Paragraph 16 defines the term "appointing authority" in relation to appointments made under paragraphs 2, 3 and 4 and defines the term 'relevant chairman' in relation to where proceedings are brought in the United Kingdom.

Equivalent provisions

Schedule 4 of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 45 - 48 of the Council Regulation.

^{NIS} See page ii regarding devolution in Northern Ireland and Scotland

^w See page i regarding devolution in Wales

Section 43 - Jurisdiction under arbitration agreements

Summary

This section provides that the Tribunal shall act as an arbitrator in matters referred to it relating to, or including, the infringement of plant breeders rights and that it may determine its fees for doing so.

Objective

This provision is substantially a re-enactment of the equivalent provision of the 1964 Act (section 10(3)). That provision was included because the Committee on Transactions in Seeds (Cmnd 1092, July 1960, paragraphs 363 -367) thought that infringement disputes would give rise to scientific and technical issues of the same kind as those arising in appeal cases to be heard by the Tribunal. For this reason they thought that the Tribunal should also be empowered to arbitrate on matters relating to the infringement of plant breeders' rights (or including the infringement of such rights), thereby taking advantage of the expert knowledge and experience of its members, and, at the same time, avoiding the expense of Court proceedings.

Such arrangements only apply where the plaintiff would be content with damages, and where both parties to the dispute agree on a reference to the Tribunal.

Detailed provisions

Section 43(1) requires the Tribunal to hear and determine matters agreed to be referred to it by arbitration agreements concerning the infringement of plant breeders' rights (or matters including such infringements).

Section 43(2) provides that the Tribunal may determine the fees payable for acting as an arbitrator under an arbitration agreement.

Section 43(3) provides that nothing in section 4 of the Arbitration (Scotland) Act 1894 (power to name oversman) shall be taken as applying to the Tribunal.

Clause 43(4) provides that in the application of this section to England and Wales or Northern Ireland "arbitration agreement" has the same meaning as in Part I of the Arbitration Act 1996. The meaning of "arbitration agreement" is found in sections 5(1) and 6 of that Act. It is an agreement to submit to arbitration present or future disputes.

Equivalent provisions

Section 10(3) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 44^{NIS} - Statutory jurisdiction: regulations

Summary

This section which substantially re-enacts equivalent provisions in the 1964 Act, empowers the Ministers to make regulations as respects appeals to the Tribunal under their statutory jurisdiction. The regulations may make provision for determining where an appeal is to be heard; other persons to be heard as parties; the status of a decision pending determination of the appeal; and notifying those affected by the suspension of a decision.

Objective and detailed provisions

Section 44 empowers the Ministers, as respects appeals to the Tribunal under their statutory jurisdiction (as described in section 46) to make regulations. The regulations may:

- provide for determining in which part of the United Kingdom an appeal is to be heard;
- authorise persons other than the appellant or the authority whose decision is appealed against to be parties to the appeal;
- suspend the operation of any decision pending the determination of an appeal; and
- notify those affected by the suspension of a decision.

Equivalent Provisions

Section 10(5) of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 67-72 of the Council Regulation.

^{NIS} see page ii regarding devolution in Northern Ireland and Scotland

Section 45 - Appeals from the Tribunal

Summary

This section substantially re-enacts equivalent provisions in the 1964 Act. It provides that, save on points of law, the decision of the Tribunal on an appeal under their statutory jurisdiction shall be final and conclusive.

Objective and detailed provisions

Section 45(1) provides that section 11 of the Tribunals and Inquiries Act 1992 (appeals on a point of law) shall apply to the Tribunal in relation to a decision on an appeal under their statutory jurisdiction as if the Tribunal were among those mentioned in section 11(1) of that Act.

Section 45(2) provides that, subject to section 45(1), any decision of the Tribunal under their statutory jurisdiction shall be final and conclusive.

Equivalent Provisions

Section 10(2) of the 1964 Act

There are no equivalent provisions in the 1991 Convention
Articles 73 and 74 of the Council Regulation.

Section 46 - Interpretation of Part II

Summary

This section defines the statutory jurisdiction of the Tribunal.

Objective

This section substantially re-enacts the equivalent provision in 1964 Act (Schedule 4, paragraph 9(3)). The re-enactment takes a different form to the original provision in that it identifies the separate pieces of legislation which comprise its statutory jurisdiction. This was not necessary when the 1964 Act was made because the provisions were within the Act itself.

There is no need to specifically exclude the jurisdiction of the Tribunal in a reference under an arbitration agreement from their statutory jurisdiction (as was the case in paragraph 9(3) of Schedule 4 to the 1964 Act). This is because references to arbitration agreements are not included in Part I of the Act, referred to in this section, but are included in Part II.

Detailed provisions

Section 46 defines the statutory jurisdiction of the Tribunal as:

- Part I of the Act (plant varieties: United Kingdom);
- Part II of the 1964 Act (seeds: England and Wales and Scotland); and
- the Seeds Act (Northern Ireland) 1965 (seeds: Northern Ireland).

Equivalent provisions

Schedule 4, paragraph 9(3) of the 1964 Act

There are no equivalent provisions in the 1991 Convention

There are no equivalent provisions in the Council Regulation.

Section 47 - Extension of time limit for institution of proceedings for contravention of seeds regulations

Summary

This section amends section 28 of the 1964 Act by inserting a new subsection (2A) after subsection (2), which has the effect of extending the period in Great Britain during which summary proceedings may be taken in respect of a contravention of seed regulations from 6 months to one year. The section does not extend to Northern Ireland.

Objective

The Magistrates' Courts Act 1980 (section 127(1)) and the Criminal Procedure (Scotland) Act 1995 (section 136), which apply to England and Wales and to Scotland respectively, require that all summary proceedings should be initiated within 6 months of the date of occurrence of the offence, unless otherwise stated in the parent Act. The parent Act of the seeds regulations (the 1964 Act) presently makes no specific provision in this respect.

An investigation by the UK Agriculture Departments into the issue of the marketing of unclassified potatoes for planting led to the publication in October 1996 of a report *The Sale of Unclassified Seed Potatoes*. The report found that there exists a market of undefined size in the illegal trade in unclassified seed potatoes or 'small ware' as it is more commonly known. There was universal agreement across all parts of the potato industry for action to be taken to limit this illegal trade. One of the recommendations of the Report was that the Government should, at the first opportunity, legislate to extend the time limit on mounting prosecutions of breaches of the seeds regulations.

Small ware potatoes may be marketed in the autumn as seed potatoes, when they have not been subject to statutory inspections under a seed potato classification scheme. The potatoes might be overwintered in store and not planted until the following spring. Only when the growing crop is inspected in late June/early July will there be any visual evidence of disease or purity problems leading to suspicion that statutory labelling and marketing requirements have been breached.

The present 6 month limit within which summary proceedings may be initiated is not always sufficient for an offence to come to light, evidence to be collected and a case to be prepared. The extension of the time limit to one year will allow time for these breaches to come to light and for the collection and examination of the appropriate documentary evidence to be completed in what are often complex and technical cases. The extension of the time limit for prosecution applies to all seeds regulations, not just those relating to seed potatoes.

Detailed provisions

Section 47 suspends, in relation to summary proceedings for contravention of seeds offences, the operation of section 127(1) of the Magistrates' Court Act 1980 or section 136 of the Criminal Procedure (Scotland) Act 1995 which provide for proceedings to be brought within 6 months of contravention. It provides that proceedings shall be brought within one year of the time when contravention occurred.

Equivalent provisions

Section 28 of the 1964 Act

This section does not relate to plant breeders' rights and the 1991 Convention and the Council Regulation are not relevant to it.

Section 48^{NIS} - Regulations and orders

Summary

This section enables the Ministers, in making regulations or orders under the Act, to provide for different cases or circumstances and to deal with supplemental, incidental and transitional provisions. It also provides how such regulations and orders are to be made. Ministers are required to consult organisations which appear to them to be representative of persons likely to be substantially affected by regulations or orders, before they are made.

Objective

The Act lays down certain basic principles and sets up the necessary administrative machinery for granting plant breeders' rights. Most of the detailed procedures to be followed by the Controller in the performance of the functions allotted to him will be set out in secondary legislation. The general effect of this section is to give the Ministers the necessary flexibility to deal with such detail when they are making secondary legislation and to provide how such secondary legislation is to be made.

An order made under section 9(11) is subject to affirmative resolution procedure. All other orders and regulations made by Ministers are subject to negative resolution, apart from commencement orders (see section 54).

Ministers are required to consult organisations which appear to them to be representative of persons likely to be substantially affected by regulations or orders, before these are made.

Detailed provisions

Section 48(1) provides that regulations or orders made under the Act may make different provision for different cases and circumstances and may contain supplemental, incidental and transitional provisions.

Section 48(2) provides that regulations and orders made by Ministers under the Act shall be made by statutory instrument.

Section 48(3) provides that statutory instruments, other than orders made under section 9(11) (see section 48(4)) are subject to negative resolution procedure.

Section 48(4) provides that orders made under section 9(11) shall be subject to affirmative resolution procedure.

^{NIS} see page ii regarding devolution in Northern Ireland and Scotland

Part III - Miscellaneous and General

Section 48(5) requires Ministers to consult organisations which appear to them to be representative of persons likely to be substantially affected by regulations or orders, before they are made.

Section 48(6) provides that this clause does not apply to orders made under section 54(3) (commencement).

Equivalent provisions

Sections 5(5), 9(6), 10(5) and 36 of the 1964 Act

The 1991 Convention and the Council regulation are not relevant.

Section 49 - General interpretation

Summary

This section contains interpretations of terms used throughout the Act, namely "the Controller", "the Ministers" and "the Tribunal". It also provides that references to plant breeders' rights in the Act include rights under section 7 (dependent varieties).

Objective

This use of an interpretation provision simplifies drafting of the Act. It is also considered useful to clarify that the rights which the holder of plant breeders' rights has in a protected variety include the rights which he has by virtue of section 7 in a dependent variety.

Detailed provisions

Section 49(1) defines the terms "the Controller", "the Ministers" and "the Tribunal".

Section 49(2) provides that references to plant breeders' rights include rights under section 7 (dependent varieties).

Equivalent provisions

Section 38 of the 1964 Act

The 1991 Convention and the Council Regulation are not relevant.

Section 50 - Receipts

Summary

This section provides that any fees received under the Act by the Controller or the Tribunal shall be paid into the Consolidated Fund.

Objective and detailed provision

Section 50 provides that any fees received by virtue of the Act, by the Controller or the Tribunal, shall be paid into the Consolidated Fund. This re-enacts the equivalent provision of the 1964 Act.

Equivalent provision

Section 37(2) of the 1964 Act

The 1991 Convention and the Council Regulation are not relevant.

Section 51 - Consequential amendments

Summary

This makes consequential amendments to the 1964 Act, the Parliamentary Commissioner Act 1967, the Trades Descriptions Act 1968 and the Tribunals and Inquiries Act 1992.

Objective

These changes are consequent on what has been done in the Act.

Detailed provisions

Section 51(1) provides that section 34 of the 1964 Act is amended in two places as follows:

- Section 34(1) (publication of notices in the Plant Varieties and Seeds Gazette of matters to be published under the 1964 Act) is amended to include a reference to Part I of the Act (plant varieties), as plant varieties are no longer covered by the 1964 Act; and
- Section 34(2) (lack of knowledge of an entry on the register is no defence in law) is amended to revise the reference to the register which is now dealt with in section 16 of this Act.

Section 51(2) amends section 38 (interpretation) of the 1964 Act to include the new title of the Plant Varieties and Seeds Tribunal.

Section 51(3) amends Schedule 4 to the Parliamentary Commissioner Act 1967, by substituting a reference to the Plant Varieties Act 1997 in the entry relating to the Plant Varieties and Seeds Tribunal.

Section 51(4) adds a reference to this Act in section 2(4) of the Trades Descriptions Act 1968.

Section 51(5) amends Part I of Schedule I to the Tribunals and Inquiries Act 1992 (Tribunals under direct supervision of the Council or Tribunals) to revise the reference to the authority of officers and the Tribunal.

Equivalent provisions

Not applicable.

Section 52 - Repeals

Summary

This section introduces Schedule 4 (repeals).

Objective and detailed provisions

The Act provides a revised statutory basis for the plant varieties regime. This section provides for Part I of the 1964 Act, and other references in it which deal with plant varieties, to be repealed. It also provides for repeal of certain provisions of other legislation which themselves amended or related to those parts of the 1964 Act which are being repealed.

Equivalent provisions

Not applicable.

Schedule 4 - Repeals

Summary

This Schedule lists the enactments to be repealed.

Objective and detailed provisions

The Schedule functions by reference to section 52. It lists the repeals to which section 52 applies. These are the enactments which formed the legislative base of the previous plant varieties regime (which is being replaced with the plant varieties regime contained in this Act), together with provisions which amended or related to those enactments and which should also be repealed.

Equivalent provisions

Not applicable.

Section 53 - Extent

Summary

This section provides that the Act, other than the section dealing with seeds (section 47) extends to Northern Ireland. It also provides that the Act may be extended by Order in Council, with modifications if appropriate, to the Channel Islands or the Isle of Man.

Objective

The plant varieties regime contained in the 1964 Act was extended to Northern Ireland by Order in Council in 1965. This section provides that this position shall be maintained.

The provisions for extension to the Channel Islands and Isle of Man, by Order in Council, if the elected representatives of the Islands or the Isle of Man so request, is the normal mechanism by which these matters are dealt with.

Detailed provisions

Section 53(1) provides that the Act, except section 47 (extension of time limit for institution of proceedings for contravention of seeds regulations) extends to Northern Ireland.

Section 53(2) provides that the provisions of the Act may be extended, modified if appropriate, to the Channel Islands or the Isle of Man by Order in Council.

Section 53(3) provides that an Order in Council made under section 53(2) may contain transitional and consequential provisions.

Equivalent provisions

Section 40 of the 1964 Act

The 1991 Convention and the Council Regulation are not relevant.

Section 54 - Short title and commencement

Summary

This section sets out the short title to the Act and makes provision for commencement.

Objective

This section provides that the Act may be brought into force (other than sections 49 (general interpretation) and 53 (extent) which come into force on Royal Assent) by commencement order which may contain transitional provisions and savings.

Detailed provisions

Section 54(1) provides that the short title of the Act is the Plant Varieties Act 1997.

Section 54(2) provides that section 49 (interpretation) and section 53 (extent) come into force when the Bill receives Royal Assent.

Section 54(3) provides that the provisions of the Act (other than sections 49 and 53) shall come into force on such days as the Minister may appoint by order and that different days may be appointed for different purposes.

Section 54(4) provides that an order made under section 54(3) may contain transitional provisions and savings.

Equivalent Provisions

Not applicable.

The following terms used in this guide have the meaning shown:

"The 1964 Act" - the Plant Varieties and Seeds Act 1964, as amended.

"The Act" - the Plant Varieties Act 1997.

"The 1991 Convention" - the International Convention for the Protection of New Varieties of Plants, of December 2, 1961 as revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991.

"UPOV" - the Union for the Protection of New Varieties of Plants, founded by the act of 1961.

"The Council Regulation" - Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.

"PVRO" - the Plant Variety Rights Office.

"Ministers" - this is defined in the Act to mean the Minister of Agriculture, Fisheries and Food, the Secretary of State for Scotland, the Secretary of State for Wales and the Secretary of State for Northern Ireland acting jointly. This position has been modified as set out in the sections on Devolution and Transfer of Functions below.

"The Secretary of State" - the Secretary of State for Environment, Food and Rural Affairs

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