

**Administrative and Legal Committee**

**CAJ/79/9**

**Seventy-Ninth Session  
Geneva, October 26, 2022**

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**EXPLANATORY NOTES ON EXCEPTIONS TO THE BREEDER’S RIGHT UNDER THE 1991 ACT OF THE UPOV CONVENTION”**

*Document prepared by the Office of the Union*

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**EXECUTIVE SUMMARY**

1. The purpose of this document is to report on developments concerning possible guidance on the implementation of the exception of acts done privately and for non-commercial purposes.

2. The Administrative and Legal Committee (CAJ) is invited to note:

(a) the developments on possible guidance concerning smallholder farmers in relation to private and non-commercial use, as reported in this document; and

(b) the decision of the Consultative Committee concerning next steps for the Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use (WG-SHF) will be reported to the Council, at its fifty-sixth ordinary session, to be held on October 28, 2022, under item “Report by the President on the work of the ninety-ninth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee (document C/56/13)”.

3. The structure of this document is as follows:

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**BACKGROUND**

4. The Council at its fifty-fifth ordinary session, held via electronic means on October 29, 2021, received the following report on the work of the Consultative Committee (see document C/55/13 “Report by the President on the work of the ninety-eighth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee”, paragraphs 34 and 35).

5. The Consultative Committee, at its ninety-eighth session, held on October 28, 2021, had noted the comments from the European Union on document “Possible guidance concerning smallholder farmers in relation to private and non-commercial use”, received in response to Circular E-21/124 of August 23, 2021, that were not of a straightforward nature. The Consultative Committee had noted the explanation that had been provided by the Office of the Union that the proposals in the document would be considered by the Consultative Committee at its virtual session on October 28, 2021, in conjunction with the comments from the European Union.

6. The Consultative Committee had:

(a) noted the developments since the ninety-seventh session of the Consultative Committee on possible guidance concerning smallholder farmers in relation to private and non-commercial use, reported in document CC/98/11;

(b) decided to establish a Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use, to include drafting a revision of the ‘Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention’ and drafting a revision of the FAQs on exceptions to the breeder’s right;

(c) agreed that the terms of reference of the Working Group be approved by the Consultative Committee by correspondence;

(d) agreed that the Working Group be composed of those members of the Union and observers to the Council that reply to a Circular expressing an interest to be part to the Working Group;

(e) agreed that the first meeting of the Working Group be held on March 17, 2022, by electronic means;

(f) agreed to invite the Project Team (Euroseeds, Plantum and Oxfam), in conjunction with the Office of the Union, to prepare an analysis of the contributions in the compendium with the replies to UPOV Circular E20/246 (see Annex I of document CC/98/11) and present a report with recommendations for consideration by the Working Group at its first meeting;

(g) agreed that a copy of the compendium with the replies to UPOV Circular E 20/246 (see Annex I of document CC/98/11) be provided to the Project Team and the Working Group subject to the agreement of the observer State and observer organizations that contributed to the compendium;

(h) recommended to the Council to agree to the inclusion of an item ‘Revision of the ‘Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention’, in the agenda of the seventy-ninth session of the CAJ to be held on October 26, 2022; and

(i) agreed to include an item in the agenda of the ninety-ninth session of the Consultative Committee, to be held on October 27, 2022, for a report on the work of the Working Group and recommendations, if appropriate.

7. The Council approved the inclusion of an item “Revision of the ‘Explanatory Notes on Exceptions to the Breeder’s Right under the 1991 Act of the UPOV Convention’”, in the agenda of the seventy-ninth session of the CAJ, to be held on October 26, 2022 (see document C/55/18 “Report”, paragraph 48).

## DEVELOPMENTS SINCE THE FIFTY-FIFTH ORDINARY SESSION OF THE COUNCIL

### UPOV Circulars E-21/229 and E-21/230 of November 19, 2021

8. The Consultative Committee approved, by correspondence, the terms of reference (ToRs) for the WG-SHF, as reproduced in the Annex to this document.

9. The Consultative Committee agreed that the WG-SHF be composed of those members of the Union and observers to the Council that expressed an interest to be part to the WG-SHF. The following members of the Union and observers to the Council expressed an interest to be members of the WG-SHF: Argentina, Austria, Belgium, Canada, Chile, Colombia, Czech Republic, European Union, France, Ghana, Japan, Mexico, Netherlands, Norway, Switzerland, Tunisia, United Kingdom, United States of America, Zimbabwe, South Centre, African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), Association for Plant Breeding for the Benefit of Society (APBRES), CropLife International, European Coordination Via Campesina (ECVC), Euroseeds, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOFORA), International Seed Federation (ISF) and Seed Association of the Americas (SAA).

10. In addition to the members of the WG-SHF above, the following members of the Union subsequently expressed an interest to participate in the meetings of the WG-SHF: China, Spain, Paraguay, Republic of Korea and Russian Federation. In accordance with the terms of reference for the WG-SHF, those members of the Union were also invited to join the meetings of the WG-SHF.

#### First meeting of the WG-SHF (March 17, 2022)

11. The WG-SHF, at its first meeting, held via electronic means on March 17, 2022, noted the information provided in document WG-SHF/1/2 and in the compendium of contributions on experiences and views on the implementation of the exception of acts done privately and for non-commercial purposes in relation to smallholder farmers received in reply to Circular E-20/246 of December 22, 2020, as presented in Annex II to document WG-SHF/1/2.

12. The WG-SHF received a presentation by the Project Team with an overview of the key aspects of document WG-SHF/1/3 "Analysis and report with suggestions prepared by the Project Team" (see document WG-SHF/1/4 "Report", paragraphs 5 to 7).

13. The WG-SHF, at its first meeting, considered Recommendations 1 and 2 in document WG-SHF/1/3.

14. The documents and report of the first meeting of the WG-SHF are available at:  
[https://www.upov.int/meetings/en/details.jsp?meeting\\_id=67775](https://www.upov.int/meetings/en/details.jsp?meeting_id=67775)

#### Second meeting of the WG-SHF (September 7, 2022)

15. The WG-SHF, at its second meeting, held via electronic means on September 7, 2022, considered Recommendations 3 to 6 in document WG-SHF/1/3.

16. The documents of the second meeting of the WG-SHF are available at:  
[https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70189](https://www.upov.int/meetings/en/details.jsp?meeting_id=70189).

17. The report of the second meeting of the WG-SHF will be made available at [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70189](https://www.upov.int/meetings/en/details.jsp?meeting_id=70189), on October 26, 2022, if approved.

18. In relation to the next steps, based on the discussions at the second meeting of the WG-SHF, the Chair of the WG-SHF was of the view that the WG-SHF was moving forward while acknowledging that there was a lot of work still to be done. He proposed that a report on progress made by the WG-SHF be prepared for the information of the Administrative and Legal Committee (CAJ), at its seventy-ninth session, to be held on October 26, 2022. The Chair was of the view that it would be important to continue the work on the topic. In relation to the way forward, he suggested to seek guidance from the Consultative Committee, at its ninety-ninth session, to be held on October 27, 2022. He would make his recommendation and invite the Consultative Committee to decide if and how the WG-SHF should continue with its work.

#### Third Meeting of the WG-SHF (March 16, 2023)

19. The WG-SHF agreed that the third meeting of the WG-SHF should be held via electronic means on March 16, 2023, subject to approval by the Consultative Committee, at its ninety-ninth session, to be held in Geneva on October 27, 2022.

20. The CAJ is invited to note:

(a) *the developments on possible guidance concerning smallholder farmers in relation to private and non-commercial use, as reported in this document; and*

(b) *the decision of the Consultative Committee concerning next steps for the Working Group to develop guidance concerning smallholder farmers in relation to private and non commercial use (WG-SHF) will be reported to the Council, at its fifty-sixth ordinary session, to be held on October 28, 2022, under item “Report by the President on the work of the ninety-ninth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee (document C/56/13)”.*

[Annex follows]

TERMS OF REFERENCE AND COMPOSITION OF THE WORKING GROUP ON GUIDANCE  
CONCERNING SMALLHOLDER FARMERS IN RELATION TO PRIVATE AND NON-COMMERCIAL USE  
(WG-SHF)

The Consultative Committee, at its ninety-eighth session, held via electronic means on October 28, 2021, decided to establish a Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use (WG-SHF) and agreed that the terms of reference of the Working Group be approved by the Consultative Committee by correspondence (see document [C/55/18](#) "Report", paragraph 19). The Consultative Committee approved on December 19, 2021, by correspondence, the terms of reference (ToRs) for the WG-SHF (see "Terms of Reference" below).

The Consultative Committee, at its ninety-eighth session, agreed that the WG-SHF be composed of those members of the Union and observers to the Council that reply to a Circular expressing an interest to be part to the WG-SHF (see document [C/55/18](#) "Report", paragraph 19). Circular E-21/230 of November 19, 2021, invited members of the Union and observers in the Council to express an interest to be members of the WG-SHF by December 19, 2021 (see "Composition" below).

TERMS OF REFERENCE AND COMPOSITION OF THE WG-SHF

PURPOSE:

The purpose of the WG-SHF is to develop guidance concerning smallholder farmers in relation to private and non-commercial use, which would be the basis for a revision of the "Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention" (document UPOV/EXN/EXC) and a revision of the Frequently asked questions (FAQs) on exceptions to the breeder's right.

COMPOSITION:

(a) members of the Union and observers to the Council that expressed an interest to be part of the WG-SHF in reply to Circular E-21/230 of November 19, 2021:

Argentina, Austria, Belgium, Canada, Chile, Colombia, Czech Republic, European Union, France, Ghana, Japan, Mexico, Netherlands, Norway, Switzerland, Tunisia, United Kingdom, United States of America, Zimbabwe, South Centre, African Seed Trade Association (AFSTA), Asia and Pacific Seed Association (APSA), Association for Plant Breeding for the Benefit of Society (APBRES), CropLife International, European Coordination Via Campesina (ECVC), Euroseeds, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA), International Seed Federation (ISF) and Seed Association of the Americas (SAA).

(b) other members of the Union would be free to participate at any meeting of the WG-SHF;

(c) the members of the Project "Options to interpret the notion of private and non-commercial use as included in Article 15. 1. I of the UPOV 1991 Convention" (Euroseeds, Plantum and Oxfam: "Project Team") would be invited to participate in the first meeting of the WG-SHF. Ad hoc invitations might be issued to the Project Team to attend other meetings of the WG-SHF, where considered appropriate by the WG-SHF; and

(d) meetings to be chaired by the President of the Council.

MODUS OPERANDI:

(a) the analysis of the contributions in the compendium with the replies to UPOV Circular E-20/246 and a report with suggestions prepared by the Project Team, in conjunction with the Office of the Union, will be used as the initial basis for the discussions on developing guidance concerning smallholder farmers in relation to private and non-commercial use;

(b) the WG-SHF to meet at a time and frequency to address its mandate, by physical and/or virtual means, as agreed by the WG-SHF;

(c) the WG-SHF to provide guidance for drafting the revision of document UPOV/EXN/EXC, to be prepared by the Administrative and Legal Committee, and the revision of the FAQs on exceptions to the breeder's right, to be prepared by the Office of the Union;

(d) the WG-SHF to report to the Consultative Committee on progress of its work and to seek further guidance from the Consultative Committee, as appropriate; and

(e) WG-SHF documents to be made available to members of the Union and observers to the Council.

[End of Annex and of document]