

Working group on guidance concerning smallholder farmers in relation to private and non-commercial use

WG-SHF/1/3

**First Meeting
Geneva, March 17, 2022****Original:** English
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ANALYSIS AND REPORT WITH SUGGESTIONS PREPARED BY THE PROJECT TEAM*Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance***EXECUTIVE SUMMARY**

1. This document presents the report with suggestions prepared by the Project Team (Euroseeds, Plantum and Oxfam), in conjunction with the Office of the Union, to be used as the initial basis for the discussions on developing guidance concerning smallholder farmers in relation to private and non-commercial use (see document WG-SHF/1/2 “Background Information”, paragraphs 13 and 14).

2. The “Analysis and Report with Suggestions prepared by the Project Team” is presented in Annex I to this document. Annex II of this document reproduces the flowchart that the Project Team presented to the Consultative Committee at its ninety-seventh session, held on October 29 and 30, 2020.

3. *The Working group on guidance concerning smallholder farmers in relation to private and non-commercial use (WG-SHF) is invited to consider the “Analysis and Report with Suggestions prepared by the Project Team”, presented in Annex I to this document, as the initial basis for the discussions on developing guidance concerning smallholder farmers in relation to private and non-commercial use.*

[Annexes follow]

ANALYSIS AND REPORT WITH SUGGESTIONS PREPARED BY THE PROJECT TEAM

I. Introduction

Plant Variety Protection (PVP) aims to encourage the development of new varieties of plants, for the benefit of society. The mechanism through which it operates is to provide breeders with recognition and a mechanism to recoup their investments in the seed value chains with the view of reinvesting in the creation of new varieties for the benefit of farmers, growers and society at large. All farmers need good seeds¹. The private and non-commercial use exemption is an obvious exception to the rights in the UPOV Act. However, the interpretation of this exemption requires further guidance, notably with respect to the use of protected varieties by smallholder farmers in order to secure their food needs. Supporting plant breeding contributes among other policy objectives to global food security (SDG 2).

The project team suggests that UPOV recognizes that many smallholders are not connected to the formal (commercial) seed systems. These farmers may engage in the use, exchange and local sale of self-produced seeds which remain as a surplus in cases where not all the harvest has been consumed by the farmer's household, with the view of improving their food security and livelihood. This proposal mainly applies to plant reproductive material of home-consumed food crops.

Whereas no examples of prosecution of smallholder farmers for infringement of the plant breeder's right have been identified in any of the UPOV members, concerns about this have been raised by some stakeholder groups. By shedding light on which activities with a protected variety can be considered to fall within the scope of the private and non-commercial use exemption, we consider that UPOV can further clarify its contribution to local food security of smallholders. Providing this "comfort zone" for smallholder farmers, brings the possibility that such smallholder farmers can eventually use also seeds of better quality that they may get hold of without the need for them to worry about the protected status of the variety. This guidance thus strengthens the PVP system while allowing smallholder farmers to continue their practices and avoiding to weaken the commercial opportunities of right holders at the same time.

Finally, it is important to note that the rights that PVP grants are independent from other rules that regulate the seed sector that may exist in UPOV members, including but not limited to seed laws (variety registration and quality controls), phytosanitary and biotechnology regulations. Similarly, the current formulation of the exemption will not impact such other rules.

II. Specific points for further discussion in UPOV WG & recommendations:

As provided for in the Terms of Reference of the WG SHF, the project team assessed the comments received from the Contracting Parties and Observers of UPOV and based on that assessment drew a number of recommendations. Since the comments in the mentioned submissions were requested and were made in relation to the flowchart included in the Project Report, also most of the recommendations relate to the flowchart itself.

Issue 1: The relationship between the optional exception as foreseen in Article 15(2) and the exception for acts done privately and for non-commercial purposes as foreseen in Article 15(1)(i).**Assessment:**

The project team is of the view that there should be no confusion between the scope of application of the optional farm-saved-seed exception as foreseen in Article 15(2) and the exception for acts done privately and for non-commercial purposes as foreseen in Article 15(1)(i). From the structure and formulation of the text of the exceptions, it is clear that while Article 15(1)(i) targets private and non-commercial acts, Article 15(2) targets an act that is clearly done in the context of professional activities and at a commercial scale. This is why the implementation of the optional exception requires a careful balance between the interests of the farmer and those of the breeder.

¹ In this document and the attached flowchart, 'seeds' refers to all types of plant propagating material.

Further on, by the criteria that have been included in the flowchart, the project team aimed at precisely delineating activities which would clearly indicate a commercial nature and would thus exclude the application of the private and non-commercial use exception (such as seed production as main activity, sales of seed through official/organized channels etc.). Last, it is important to emphasize that according to the flowchart, an activity of sales or exchange of seeds would only remain non-commercial if it is done locally and farmer to farmer. Sales at local level should – by definition – exclude any large-scale activity but the criterion that the farmer who is allowed to benefit from the exception must produce substantially for home consumption and can also only sell to another farmer who is equally producing substantially for home consumption, should guarantee that there is no confusion between the scope of the optional exception at one hand and of the private and non-commercial use exception on the other hand.

Recommendation:

In case the WG decides to revise and amend the explanatory note on Exceptions to the breeder's right, it is recommended to clearly explain the difference in the scope of application of the two exceptions and provide respective guidance to UPOV members on how to best ensure such delineation in their national or regional legislation.

Issue 2: Does the proposed guidance in the flowchart have any negative impact on other seed-related legislation?

Assessment:

The project report clearly states on several occasions that the sole purpose of the project was to look at the scope of the private and non-commercial use exception. In this regard, in their submissions, UPOV members did not report on any legal actions by breeders for infringement of breeder's rights in relation to the type of activities by smallholder farmers described in the flowchart.

Similar to the fact that a PVP does not give a breeder the right to sell seed (which depends primarily on aspects of the seed law), the flow-chart does not *per se* justify or stimulate the exchange or sale of uncertified or illegal seed. The fact that other (inter)national seed regulations or commercial laws restricting the exchange or sale of such material may be in place is expressed in the flowchart itself as well as in the explanatory comments to it. Therefore, we feel that our proposal does not back or justify the use of poor quality seeds or promotes any activities that would be contrary to obligations under other relevant legislation in any way.

Recommendation:

When clarifying the scope of the private and non-commercial use exception, it is worthwhile to clarify in the Explanatory Notes that the activities that are allowed under the exception and are therefore not restricted from a plant breeder's right point of view, may still be restricted by other national or regional legislation (e.g.: seed laws, phytosanitary, GMO biosafety or biosecurity legislation).

Issue 3: Should the flowchart follow a different approach for different crop groups (including perennial crops) or types of production?

Assessment:

It is important to keep in mind the aim of this exception, being the limitation of the scope of breeders' rights to avoid undue obstruction of smallholder or (near-) subsistence farmers using seeds with the intent of growing a crop substantially for home consumption. Sowing seeds with the main intent of selling and/or exchanging the produce would notably not fall under this exception. Since this latter intent is most likely prominent in horticulture, and notably fruits, but also in by far the majority of vegetable growing, means that explicit rules do not seem to be necessary for different crop groups.

Additionally, sale and/or exchange of seeds needs to happen locally and between smallholder farmers. In other words: both the smallholder farmer providing seeds and the smallholder farmer receiving those seeds need to meet the criteria provided in the flowchart. This way, the effects of these sales and/or exchanges are limited to those smallholder farmers themselves, and there is no risk of material flowing out of the local area through intermediaries. This greatly reduces any negative effects that formal seed systems might incur. Also, it is therefore not necessary to differentiate between different crop types or methods of propagation, other than in determining what amount may be deemed to be for home consumption.

Furthermore, it needs to be re-emphasized that the purpose of the project has been to provide for a comfort zone for those farmers who have issues with food security and are engaging in the exchange or sales of self-produced seeds, which may occasionally include seed of a protected variety, to generate the necessary income to ensure their food security and livelihoods. The project team is of the opinion that there is no evidence from different countries if any breeder's rights have been infringed by smallholder farmers by activities of exchange/sales of self-produced propagating material (regardless of the type of crop or reproduction method). The flowchart is to be regarded as a tool that provides elements that can indicate the commercial or non-commercial nature of an activity by a smallholder farmer. Growing a certain type of crop by a smallholder farmer is not per se an indication of the commercial or non-commercial nature of the activity but an element to take into account in the overall assessment. Such assessment may vary depending on the other elements and indications that need to be considered in a given case.

Recommendation:

We recommend to the WG to conclude that the crop type and reproduction method (vegetative or seed reproduction) is not given a specific emphasis as a preliminary element of the final assessment. It may however be an element in the implementation of the exception if a UPOV member wishes to give more emphasis to crops that are nationally or regionally important for food security and farmers' livelihoods.

Issue 4: Should non-food crops be excluded from the exception?

Assessment:

It is important to keep in mind the aim of the private and non-commercial use exception, being the limitation of the scope of breeder's rights to avoid undue obstruction of smallholder or (near-) subsistence farmers using seeds with the intent of growing a crop substantially for home consumption.

Whereas this latter intent is most likely not prominent in non-food crops such as ornamentals or fibre crops, in certain circumstances it is possible for the cultivation of non-food crops to also be considered substantially for home consumption. This may, for instance, be the case for fodder crops, where the fodder is used to feed livestock which is itself also used substantially for home consumption. Anything that is not for direct or indirect home-consumption is not considered to be falling within the exemption.

Recommendation:

We recommend considering the flowchart as a tool that indicates the commercial or non-commercial nature of an activity with a specific variety by a smallholder farmer. In principle, the project team is of the view that growing a protected variety of a non-food crop can *per se* be an indication of commercial activity, as indicated in the attached flow chart. However, the working group may want to clarify that in some cases the cultivation of non-food crops can be substantially for home consumption and, thus, can fall within the exemption in case all elements of the flow chart apply.

Issue 5: What is the relevance of the location of the act in the context of the private and non-commercial use exception?

Assessment:

The location of the act may be raised actually at two levels. One is whether the home-consumption needs to take place at the same location and the other is the meaning of "locally" in the context of the sales and/or exchange.

As regards the location of the home-consumption, the project team has not considered this in-depth but is of the view that there is no need for a strict interpretation. The only indication in this regard in the flowchart is that the home-consumption needs to be the farmer's "own" home consumption, meaning that it cannot be for the home consumption of a whole village but needs to be linked to the household of the farmer in the broad sense. From our perspective, the household may include family members not living strictly on the holding but forming clearly part of the household of the farmer (e.g. a dependent son studying in another location).

As regards the location of the act of sales or exchange, the project team believes that it is important that such acts take place 'locally' to imply that there is no material flowing out of the local area and there is no confusion between informal and formal seed systems. As regards the question of seed fairs, which may sometimes bring together smallholder farmers from various regions, the project team believes that to the extent that the exchange/sales takes place farmer to farmer where both the farmer providing seeds and the farmer receiving those seeds comply with the criteria provided in the flowchart, such events may also fall under the scope of the exception. Since the plant variety right is valid within a given territory, it is the view of the project team that also the exception should be understood as exempting activities within that given territory and not beyond.

Recommendation:

We recommend that the WG clarifies in the Explanatory Notes that the home consumption does not strictly have to take place on the farmers' holding but that it needs to be linked to his or her direct household.

With regard to the flowchart, we recommend to further clarify that the elements of the flowchart have to be fulfilled by both ends, i.e. not only by the farmer who exchanges and/or sells the surplus production but also by the farmer who receives it. So, the latter farmer also needs to sow the seeds with the intention of growing a crop substantially for his or her own home consumption.

Issue 6: Are there measurable or quantitative criteria that can be used in defining the key notions in the flowchart?

Assessment:

The project team has considered the inclusion of quantitative indicators as tools to define the specific category of farmers, or scope of activities, which is to fall in or outside the scope of the private and non-commercial use exemption. Such parameters were discussed during the first round of stakeholder consultations and could, for example, refer to the size of the farm or cropping area, household income, or amount or value of the produce grown or marketed.² Each possible indicator, however, was found to have its limitations. For example, efforts to distinguish non-commercial use by means of the size of a farm or cropping area was considered to be highly dependent on the specific location and/or crop grown. Indicators based on farmers' income or value of seed traded was considered difficult to monitor, and could also vary strongly amongst countries.

Hearing the concerns and discussing alternative approaches, the project team came to the conclusion to abandon a quantitative approach and instead opt for an approach that is based on describing the nature of the activity. This resulted in the development of a flowchart to guide its user in understanding whether or not an activity with self-produced seed is covered by the exception. The form of a flowchart was chosen to visualise the different criteria in such a way that it is easy to understand in comparison to plain text. The resulting flowchart is meant to assist stakeholders to identify and communicate which activities can be considered as falling under the private and non-commercial use exception. By describing the nature of the activity, the project team believes that no quantitative indicators need to be established.

Recommendation:

We recommend to the WG to consider the flow chart as a tool to specify the nature of the activity that is considered to fall within the scope of the exemption, and which can function next to country-specific indicators or parameters.

[Annex II follows]

² See the project's report from 2017, which is available in English, Spanish and French [here](#).

FLOWCHART 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"
PRESENTED TO THE CONSULTATIVE COMMITTEE IN 2020

"When can an activity with self-produced seed be considered to fall within the private and non-commercial use exception?"

