

WG-SHF/1/4

Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use

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**First Meeting
Geneva, March 17, 2022****REPORT**

adopted by the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use

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OPENING OF THE MEETING

1. The Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF) held its first meeting via electronic means, on March 17, 2022, chaired by Mr. Marien Valstar, President of the Council.
2. The meeting was opened by the Chair, who welcomed the participants.
3. The list of participants is reproduced in the Annex to this report.

ADOPTION OF THE AGENDA

4. The WG-SHF adopted the draft agenda as proposed in document WG-SHF/1/1.

ANALYSIS AND REPORT WITH SUGGESTIONS PREPARED BY THE PROJECT TEAM

5. The WG-SHF considered documents WG-SHF/1/2 and WG-SHF/1/3.
6. The WG-SHF 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.
7. 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".
8. The Chair thanked the Project Team for their work on this topic and the valuable basis that this provided for consideration in UPOV. He invited comments and questions for the Project Team on document WG-SHF/1/3.
9. The Delegation of Japan considered that the UPOV Convention did not provide a possibility to interpret "acts done privately and for non-commercial purposes" in the way described in the flow-chart contained in document WG-SHF/1/3, Annex II where material was sold. It observed that the definition or interpretation of "smallholder farmer" would need to be country-specific and further observed that it was a matter of whether the act was done privately and for non-commercial purposes, not a matter of the scale of the act or by whom the act was done. The Delegation also had concerns about the feasibility of monitoring and verifying the approach. It recalled that there were about 1,000 holders of PBRs in Japan and unauthorized propagation even on a small scale could be very problematic. It considered that the approach would not contribute to the effectiveness of the UPOV system of plant variety protection because it would threaten investment in plant breeding.

10. The representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOPORA) expressed concerns about the interpretation proposed by the Project Team and noted that CIOPORA had not been consulted by the Project Team before the flow diagram had been developed. It considered that selling could not be considered to fall within the scope of “acts done privately and for non-commercial purposes”. It explained that 500 farmers each growing just 3 apple trees could undermine the ability of breeders to capture the value of a variety, particularly in the case of “club” varieties. He considered that any guidance should not cover vegetatively propagated crops or fruit.
11. The representative of the International Seed Federation (ISF) recalled that there was no conflict between breeders and farmers because they needed each other, and recalled the finding that in UPOV members there had been no legal action against smallholder farmers by breeders for infringement of breeders’ rights. The representative emphasized that the guidance should not relate to farmers such as those in South America that, while they are called small farmers, are engaged in commercial activities.
12. The Delegation of Chile expressed concern that the proposed approach could change the basic concept of private and non-commercial in the UPOV Convention. It was also explained that, in Chile, some farmers that are considered to be small farmers have farm sizes of 200Ha so it would not be appropriate to have a single definition or interpretation of smallholder farmer. The Delegation also expressed concern that the proposed guidance might create a risk that farmers would consider themselves to be exempt from other controls, such as phytosanitary controls.
13. The Delegation of the European Union supported the benefit of clarifying the situation of smallholder farmers in relation to plant variety protection. The Delegation noted that the situation concerned subsistence farming and smallholder farmers in developing countries that were producing crops for home consumption. The Delegation supported the approach by the Project Team of specifying activities rather than defining criteria for farmers.
14. The Delegation of Switzerland recalled that diversity was needed for agriculture to meet the challenges of climate change and recalled that there were other factors that affected farmers access to seed, including regulations concerning seed, biosafety and phytosanitary matters. The Delegation recalled the finding that there have been no examples of legal actions against smallholder farmers for infringement of plant breeders’ rights in UPOV members. It was noted that the private and non-commercial exception applied to all types of persons and not just smallholder farmers. The Delegation supported the approach set out in the flow chart, noting that the quantitative aspects would need to be considered at the country level to provide the desired legal certainty within the scope of the 1991 Act of the UPOV Convention.
15. The Delegation of Norway welcomed the initiative and expressed its appreciation for the work of the Project Team.
16. The Delegation of the United States of America recalled that the exception for acts done privately and for non-commercial purposes was a compulsory exception and would need to be applied by all Contracting Parties, so caution was needed in developing the guidance.
17. The representative of the Association for Plant Breeding for the Benefit of Society (APBREBES) recalled that the guidance would be in the form of an Explanatory note which would not be binding on UPOV members. He supported the revision of the FAQ because he considered that the current FAQ was too narrow to be meaningful, with particular regard to farmers in the global south.
18. The Delegation of Japan recalled that the aim of the UPOV Convention was to provide protection for breeders and noted that issues concerning access to seed were related to seed regulations and should be considered in the relevant forum, which was not UPOV.
19. The Project Team agreed that there would be a problem in trying to define the term “smallholder farmer” and had avoided developing any definition in the proposal. It was explained that CIOPORA had not been included at the beginning of the project because the original proposal had specifically related to seed crops and CIOPORA had been consulted after it became apparent that the proposal would extend to vegetatively propagated crops.
20. The representative of ISF recalled that there had been no examples of legal actions against smallholder farmers for infringement of plant breeders’ rights in UPOV members and wondered how plant breeders’ rights were obstructing smallholder farmers.

21. The Project Team noted that, although there had been no examples of legal actions, the right “on paper” to initiate a legal action against smallholder farmers for exchanging seed existed, which could damage the perception of UPOV. It was also noted that smallholder farmers could lack clarity and certainty in what they could do.

22. The Delegation of Japan reported on a case of prosecution of a foreign cherry company that received propagating material of a variety protected in Japan from a farmer in Japan, which infringed the plant breeder’s right, and emphasized that outflow of protected varieties overseas could happen regardless of the scale of the farmer or the type of agriculture, even if they were smallholder farmers, and that the proposal would create a loophole for such outflow of protected varieties.

23. The representative of the South Centre supported the development of guidance that would help governments to have a more coherent approach in terms of implementing their obligations across different international instruments, that would be supportive of both farmers’ rights and breeders’ rights.

24. The Project Team observed that the provision of guidance on the matter of smallholder farmers would be beneficial for existing UPOV members and could also assist countries to become UPOV members or to move from the 1978 Act to the 1991 Act of the UPOV Convention.

25. The Chair invited participants to consider the recommendations in document WG-SHF/1/3 as a basis for further work.

26. After some comments were made on the assessment sections of the document, the Chair clarified that the intention was to consider only the recommendations and not the text in the assessments.

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).

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.

27. The Delegation of Japan considered that, by definition, any sale or exchange of PBR protected seeds falls into the category of non-private and commercial use, which prevented the flow chart being used as a basis for the determining private and non-commercial use in Article 15(1)(i) of the 1991 Act.

28. The Delegation of the European Union noted that certain aspects of Japan’s concerns related to enforcement and suggested that this aspect should be considered.

29. The Delegation of Japan observed that the proposal raised issues on the feasibility of monitoring and verifying the approach and therefore enforcement and agreed that enforcement would also need to be considered in relation to any guidance.

30. The representative of the Seed Association of the Americas (SAA) explained the importance of this issue for breeders in the Americas and considered that the wording of Article 15(1)(i) was very clear and provided legal certainty for all stakeholders along the value chain because it concerned private and non-commercial acts. The scope of Article 15(2) was clearly different and related to professional activities at a commercial scale. He considered that the proposals put forward by the Project Team might be in violation of Article 14(1) and might result in legal uncertainty for breeders, farmers, PVP offices and enforcement bodies. He further noted that recognizing that surplus production of seed of protected varieties could be exchanged and/or sold without official labelling or the right holder’s brand would be a de facto permission for “brown bagging” and illegal seed marketing.

31. The Chair concluded that there was no disagreement with Recommendation 1 as such, although the concerns raised above would need to be addressed.

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

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).

32. The Chair concluded that there appeared to be agreement on the need to provide the clarification suggested in Recommendation 2.

NEXT STEPS

33. The WG-SHF agreed that the second meeting of the WG-SHF should consider recommendations 3 to 6 in document WG-SHF/1/3 and continue to identify the elements that need to be addressed as a next step. On that basis, there would be no need for a new document for the second meeting. The WG-SHF noted that a report of the first meeting would be circulated for approval by correspondence before the second meeting.

DATE AND PROGRAM OF THE SECOND MEETING

34. The WG-SHF agreed that the second meeting of the WG-SHF be held via electronic means, on Wednesday, September 7, 2022.

35. The following program was agreed for the second meeting of the WG-SHF:

1. Opening of the meeting
2. Adoption of the agenda
3. Analysis and report with suggestions prepared by the Project Team (document UPOV/WG-SHF/1/3).
4. Date and program of the third meeting

36. This report was adopted by correspondence.

[Annex follows]

ANNEXE / ANNEX / ANEXO

(dans l'ordre alphabétique des noms français des membres /
in the alphabetical order of the French names of the members /
por orden alfabético de los nombres en francés de los miembros)

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[Fin de l'annexe et du document/
End of Annex and of document/
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