

Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use**WG-SHF/2/3****Second Meeting
Geneva, September 7, 2022****Original: English
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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 second meeting via electronic means, on September 7, 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/2/1.

ANALYSIS AND REPORT WITH SUGGESTIONS PREPARED BY THE PROJECT TEAM

5. The WG-SHF considered documents WG-SHF/2/2 and WG-SHF/1/3.
6. The WG-SHF noted that, at its first meeting, held via electronic means, on March 17, 2022, it had considered documents WG-SHF/1/2 "Background Information" and WG-SHF/1/3 "Analysis and report with suggestions prepared by the Project Team". The WG-SHF noted that the report of the first meeting was provided in document WG-SHF/1/4 "Report" and that report contained the conclusions of the WG-SHF in relation to recommendations 1 and 2 in document WG-SHF/1/3.
7. 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.
8. The WG-SHF noted that, at its first meeting, the WG-SHF had agreed that the WG-SHF, at its second meeting, should consider recommendations 3 to 6 in document WG-SHF/1/3 and continue to identify the elements that needed to be addressed as a next step. On that basis, the WG-SHF had agreed, at its first meeting that there would be no need for a new document for the second meeting.
9. The Chair invited participants to consider the recommendations 3 to 6 in document WG-SHF/1/3.

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

“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.”

10. The WG-SHF made no comments on recommendation 3.

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

“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.”

11. The representative of the International Community of Breeders of Asexually Reproduced Horticultural Plants (CLOPORA) expressed the opposition of CLOPORA to any broadening of the private and for non-commercial purposes exemption for vegetatively propagated varieties, such as ornamentals and fruits. Taking into consideration that those crops remained in the ground for a couple of years and also that fruit trees can give fruits for decades, then the value of the breeder’s right could be decreased significantly if included in the project.

12. The Delegations of Norway, Switzerland and the European Union expressed their support for Recommendation 4.

13. The representative of the Association for Plant Breeding for the Benefit of Society (APBRES) expressed support to Recommendation 4. He also noted that medicinal plants were non-food crops that are often used for home consumption and considered that they should be part of the exception.

14. The Delegation of the United States of America expressed its wish to reserve its decision on agreement or opposition to the individual Recommendations until after the discussions.

15. The Chair concluded that there were some expressions of support for Recommendation 4 as such, although the concerns raised would need to be addressed.

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

“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.”

16. The Delegations of the European Union, Switzerland, Netherlands and Norway expressed their support for Recommendation 5.

17. The Delegation of Japan considered the idea that “there is no material flowing out of the local area and there is no confusion between informal and formal seed systems”, in the second paragraph of the “Assessment” concerning Recommendation 5 in document WG-SHF/1/3, hypothetical and vague, which could not work as a realistic mechanism. It considered that “intention” was not a factor that could be used in practice. It observed that there was an assumption of compliance with the flowchart contained in document WG-SHF/1/3, Annex II, regarding exchanges of seeds between smallholder farmers, which could not be monitored or verified. It considered that the approach presented in the flowchart did not provide any guarantee of compliance and would not contribute to the effectiveness of the UPOV system of plant variety protection.

18. The Delegation of Chile expressed its support for the intervention of the Delegation of Japan. It considered that it would be important to clarify “territory” and “location”. The Delegation was of the view that the reference in Article 15(1)(i) of the 1991 Act to “acts (...) for non-commercial purposes” was contradictory with the text of the Recommendation 5, which referred to “sales”.

19. The Delegation of the United States of America expressed concerns about the interpretation proposed by the Project Team and would welcome the definition of clear boundaries in the interpretation of the exception under Article 15(1)(i) of the 1991 Act. It did not support the Recommendation as it was presented in the document.

20. The Chair concluded that there were concerns raised regarding Recommendation 5 that would need to be addressed. He noted that further work would be necessary to provide clarifications on the issues raised above.

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

“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.”

21. The Delegation of Japan noted that, in the “Assessment” concerning Recommendation 6 “the project team came to the conclusion to abandon a quantitative approach and instead opted for an approach that is based on describing the nature of the activity”. The Delegation considered that, by definition, any sale or exchange of PBR protected seeds fell into the category of non-private and commercial use, which prevented the flowchart being used as a basis for the determining private and non-commercial use under Article 15(1)(i) of the 1991 Act. The Delegation concluded that the nature of the activity presented in the flowchart, in particular exchanging and selling material of the protected variety, would be contrary to Article 15(1)(i) of the 1991 Act. The Delegation was in favor of not continuing the work of the WG-SHF.

22. The Chair considered that the work of the WG-SHF could be beneficial to explain how the PVP system could provide assistance regarding access to, and choices of, protected varieties for all types of farmers, including smallholder farmers. Those explanations would be useful for those countries considering accession to the 1991 Act of the UPOV Convention. On that basis, he suggested that it would be premature to discontinue the work of the WH-SHF.

23. The Delegation of Chile observed that it was important, in any revision of the explanatory notes, to clarify for breeders and farmers which acts would fall under the optional exception “for commercial acts” or the compulsory exception “for non-commercial acts”. Those matters were not clearly explained in the document.

24. The Delegation of Switzerland was in favor of the approach set out in the Recommendation 6 as it would be impossible to define quantitative criteria at a global level. The Delegation recalled that countries’ specific indicators/parameters should be compatible with the UPOV Convention.

25. The Delegation of Argentina expressed its support to the intervention of the Delegation of Chile regarding Recommendations 5 and 6. The Delegation noted that any revision of the Explanatory Notes would be very important at the national level to assist in the interpretation of the UPOV Convention and dispute resolution. Therefore, it was of the view that it was too early to take decisions on the current document.

26. The Chair noted the concerns raised by the Delegations of Japan, Chile and Argentina. He suggested to present those elements when the Consultative Committee was invited to consider the next steps for the work of the WG-SHF.

27. The Delegation of Canada was in favor of continuing the work of the WG-SHF but with caution. It recalled that the purpose of the UPOV system was to ensure that farmers and society benefit from access to better varieties. It suggested that one possible way forward would be to enumerate all the factors of what could be considered a legitimate use for non-commercial purposes and when it could have an impact on the legitimate interest of the breeder to recover the investment in breeding.
28. The Delegation of the Netherlands expressed its support for the intervention made by the Delegation of Canada and for the continuation of the work of the WG-SHF.
29. The Delegation of the European Union was in favor of continuing the work of the WG-SHF to clarify the acts of smallholder farmers for home consumption and facilitate countries' membership to UPOV. It further noted that the work was also important in the context of food security matters and access to improved varieties.
30. The Delegation of Japan reiterated its concern that any guidance could create a loophole that would jeopardize the effectiveness of the UPOV system. It suggested that the work should be broadened to include how to deliver improved varieties to farmers, including smallholder farmers, when they fall into public domain after their period of protection.
31. The Chair noted that the matter raised by the Delegation of Japan could be included in the work of the WG-SHF. He explained that the work of the WG-SHF should help UPOV to communicate on the matter of smallholder farmers and recalled that the work of the survey had revealed that there had been no plant breeders' rights litigation of smallholder farmers in any UPOV member.
32. The Delegation of Norway supported the view of the Delegation of Switzerland and suggested that the revision of the Explanatory Notes would not change the UPOV Convention and would not reduce the flexibility of UPOV members but rather illustrate and clarify the meaning of the UPOV Convention for current and future members. It considered that how to provide access to new varieties after their period of protection should be a separate initiative involving joint efforts.
33. The representative of CIOPORA emphasized that it was not in the benefit of society to decrease the scope of protection, little by little, as breeders needed sufficient scope of protection to continue breeding.
34. The Delegation of the United States of America explained that it was willing to continue to discuss the matters but it had many concerns. It noted that the selling of the seed of protected varieties would not meet the requirement of private and non-commercial use. The Delegation expressed its support to the intervention made by the Delegation of Japan that consideration of the Recommendations without clear boundaries was not useful and did not provide for legal security.
35. The Delegation of Japan noted that in many cases tracing was impossible and the fact that there had been no litigation did not mean that there was no infringement.
36. The Delegation of Switzerland noted that if the discussion was broaden to other areas that could improve the livelihoods of smallholder farmers other actors should be included in the deliberations while being careful to avoid duplication of work in other international bodies, such as the Food and Agriculture Organization of the United Nations (FAO) and the International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA). The Delegation expressed the importance to continue the work of the WG-SHF to improve the situation of subsistence farmers in areas within UPOV's mandate.
37. The Delegation of Argentina was in favor of developing a document that was less dogmatic in its conclusions with a more logical approach. It was of the view that the flowchart in the document was not clear. The Delegation suggested the inclusion of several examples based on particular cases provided by UPOV members.
38. The representative of the Seed Association of the Americas (SAA) made an intervention on behalf of the International Seed Federation (ISF). The seed sector welcomed the opportunity to increase mutual understanding on the topic. She noted that the subject under discussion was a sensitive matter with different perspectives on how to handle it due to the differences around the world related to the social, economic and legal circumstances. The mission of the seed sector was to advocate for each farmer around the world to have access to seeds with informed choice and at the right time, place and with the right quality and quantity; to support farmers in creating value and having a decent income, and, with the assistance of the seed sector, enabling them to produce sustainable and secure food supply resilient to climate change; to continue laying the foundation to provide the consumers with abundant, healthy, safe, nutritious and varied food; and to find and respect the balance between breeders' and farmers' rights based on a deeper understanding and awareness of sustainable contribution to food security. She noted that the discussions at the WG-SHF would

be taken up by the seed sector to build on the engagement towards sustainable farmers with a deeper understanding of their diverse contribution that address the vast and complex challenges on the ground.

39. The Project Team welcomed the discussions at the two meetings of the WG-SHF. It noted that it would not be appropriate for the Project Team to propose drafting for the revision of the Explanatory Notes. The Project Team further expressed its availability to assist the WG-SHF in its work, including the definition of boundaries.

40. The Chair thanked the Project Team for their work, which he observed had provided a valuable basis for the considerations by the WG-SHF.

NEXT STEPS

41. The Chair concluded that, given the sensitivity of the subject, he did not expect an easy process when starting the topic of providing guidance concerning smallholder farmers in relation to private and non-commercial use some years ago. He noted that the interventions had illustrated that some questioned whether there was a problem at all, while others pointed out that the lack of clarity might be preventing smallholder farmers from using quality seeds. He concluded that there was agreement at the WG-SHF that all farmers needed access to good seeds and that it was important to make an effort to improve the livelihood of farmers worldwide. The Chair expressed his gratitude, on behalf of the WG-SHF, to the project team for its report and the recommendations. He noted that the WG-SHF had discussed all the recommendations. The Chair acknowledged that while progress had been made at the WG-SHF to increase the mutual understanding on the topic, the WG-SHF was not yet ready to reach conclusions and start drafting an explanatory note. The Chair recalled that at its first meeting, the WG-SHF had agreed that more clarification on the subject must be provided before starting with a drafting exercise. He noted that there had been acknowledgement that the perceived or real restriction concerning certain acts with protected varieties was not always caused by PBR, as other seed legislation could be limiting those acts. The Chair recalled that the survey of UPOV members and observers had revealed that no PBR legal actions against smallholder farmers had been reported.

42. The Delegation of Japan noted that the non-existence of PBR litigation against smallholder farmers did not prove an absence of infringement.

43. The Delegation of Canada observed that breeders may choose not to pursue litigation because that would not be in their interest, taking into account the public perception of such actions.

44. The Delegation of Norway understood from the interventions that the seed industry was not interested to take legal action against smallholder farmers because their acts were considered to be outside their core business.

45. In relation to the next steps, based on the discussions at the second meeting of the WG-SHF, the Chair 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.

46. On the above basis, the WG-SHF agreed to report on the work of the WG-SHF to the CAJ, for information, and to the Consultative Committee for consideration of the next steps.

47. The WG-SHF agreed that the third meeting of the WG-SHF be held via electronic means, on Thursday, March 16, 2023.

48. *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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