

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

WG-SHF/3/2

**Third Meeting
Geneva, March 24, 2023****Original:** English
Date: March 17, 2023

OPTIONS TO ADDRESS MATTERS DISCUSSED AT THE FIRST AND SECOND MEETINGS OF THE WG-SHF

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EXECUTIVE SUMMARY

1. The purpose of this document is to provide options to assist the WG-SHF in providing the requested 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, based on the discussions at the first and second meetings of the WG-SHF.

BACKGROUND

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

2. 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 "Background information" 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, available at: https://www.upov.int/edocs/mdocs/upov/en/wg_shf_1/wg_shf_1_2.pdf.

3. 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).

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

5. 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

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

6. 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.

7. The documents and report of the second meeting of the WG-SHF are available at: https://www.upov.int/meetings/en/details.jsp?meeting_id=70189.

8. The Chair of the WG-SHF concluded at the second meeting 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."

9. 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.

Ninety-ninth session of the Consultative Committee, held on October 27, 2022

10. The Consultative Committee, at its ninety-ninth session, held on October 27, 2022, noted the developments on possible guidance concerning smallholder farmers in relation to private and non-commercial use, as reported in document CC/99/11 and the proposed next steps by the Chair of the WG-SHF for consideration by the Consultative Committee:

(a) to note that the WG-SHF has not yet completed the objectives in its terms of reference (ToRs), therefore, it is proposed that the WG-SHF continue its work in accordance with its ToRs and, in particular to seek 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 (ToRs "Modus Operandi" item (c), [see Annex to this document]);

(b) to invite the Office of the Union to prepare a document for the third meeting of the WG-SHF to assist the WG-SHF in providing the requested guidance, based on the discussions at the first and second meetings of the WG-SHF; and

(c) to invite the WG-SHF, at its third meeting, on the basis of the discussions at the first and second meetings, to provide guidance for the Consultative Committee at its one hundred and first session on options to:

- (i) draft a revision of document UPOV/EXN/EXC, to be prepared by the Administrative and Legal Committee; and
- (ii) draft a revision of the FAQs on exceptions to the breeder's right.

(document CC/99/11, paragraph 21)

11. The Consultative Committee agreed the following in relation to the next steps for the WG-SHF:

(a) to invite the Office of the Union to prepare a document for the third meeting of the WG-SHF to assist the WG-SHF in providing the requested guidance, based on the discussions at the first and second meetings of the WG-SHF; and

(b) to invite the WG-SHF, at its third meeting, on the basis of the discussions at the first and second meetings, to provide guidance for the Consultative Committee at its one hundred and first session on options to:

- (i) draft a revision of document UPOV/EXN/EXC, to be prepared by the Administrative and Legal Committee; and
- (iii) draft a revision of the FAQs on exceptions to the breeder's right.

(see document CC/99/13 "Report", paragraphs 85 and 87).

III. OPTIONS TO ADDRESS MATTERS DISCUSSED AT THE FIRST AND SECOND MEETINGS OF THE WG-SHF

12. The following section presents options for matters discussed by the WG-SHF at its first and second meetings, in chronological order, that could possibly be addressed in a revision of document UPOV/EXN/EXC and/or a revision of the FAQs on exceptions to the breeder's right.

13. For reference purposes, versions of the reports of the first and second meetings of the WG-SHF with highlighting of the source of the matters below have been published on the [WG-SHF/3](#) website.

Options for matters that could be considered in a revision of document UPOV/EXN/EXC

To explore possibilities to:

- (1) clarify the scope of application of the compulsory exception for acts done privately and for non-commercial purposes under Article 15(1)(i) of the 1991 Act and of the optional exception under Article 15(2) of the 1991 Act and to provide options on how to implement those provisions in national or regional legislation;
- (2) clarify, in relation to Article 15(1)(i), 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;
- (3) clarify, in relation to Article 15(1)(i), that the private and non-commercial exception applied to all types of persons and not just to smallholder farmers or subsistence farmers;
- (4) clarify that the export of material of a protected variety without the breeder's authorization or consent could take place regardless of the scale of the farmer or the type of agriculture, even if they were smallholder farmers;
- (5) consider matters of enforcement when acts take place beyond the exceptions and infringe the breeders' rights;
- (6) clarify that Article 15(1)(i) is concerned with private and non-commercial acts and Article 15(2) relates to professional activities at a commercial scale;
- (7) consider that, in the implementation of Article 15(1)(i), relevant UPOV members may wish to give more emphasis to crops that are nationally or regionally important for food security and farmers' livelihoods;
- (8) consider that, in the implementation of Article 15(1)(i), relevant UPOV members may wish to exclude 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;
- (9) consider in relation to Article 15(1)(i) that medicinal plants were non-food crops that are often used for home consumption;
- (10) clarify the notions of "territory" and "location" in relation to the implementation of Article 15(1)(i);
- (11) consider that exchanging and selling of material of the protected variety would be contrary to Article 15(1)(i);
- (12) clarify for breeders and farmers which acts would fall under the optional exception "for commercial acts" or the compulsory exception "for non-commercial acts";
- (13) enumerate, in relation to Article 15(1)(i), all the factors of what could be considered a legitimate use for non-commercial purposes and when it could be considered to have an impact on the legitimate interest of the breeder to recover the investment in breeding;
- (14) clarify, in relation to Article 15(1)(i), that the selling of the seed of protected varieties would not meet the requirement of private and non-commercial use;
- (15) consider, in relation to Article 15(1)(i), the inclusion of several examples based on particular cases provided by UPOV members; and
- (16) explain that breeders may choose not to pursue litigation against smallholder farmers because their acts were considered to be outside their core business.

Options for matters that could be considered in a revision of the FAQs on exceptions to the breeder's right

To explore possibilities to:

- (1) explain that acts permitted under the exceptions to the breeders' rights may still be restricted by other national or regional legislation (e.g. seed laws, phytosanitary, GMO biosafety or biosecurity legislation);
- (2) explain that if a surplus production of seed of protected varieties could be exchanged and/or sold without official labelling or the right holder's brand it would be a *de facto* permission for "brown bagging" and illegal seed marketing;
- (3) explain how to [deliver]/[provide access to] improved varieties to farmers, including smallholder farmers, when they fall into public domain after their period of protection;
- (4) explain how to improve the situation of subsistence farmers in areas within UPOV's mandate while avoiding 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);
- (5) explain that the survey of UPOV members had revealed that there have been no reported legal actions against smallholder farmers for infringement of plant breeders' rights in UPOV members;
- (6) explain that there would be a problem in trying to define the term "smallholder farmer";
- (7) explain that all farmers needed access to good seeds and that it was important to improve the livelihood of farmers worldwide and facilitate access to quality seeds by smallholder farmers; and
- (8) explain how the UPOV PVP system could provide assistance regarding access to, and choices of, protected varieties for all types of farmers, including smallholder farmers.

14. The WG-SHF is invited to consider possible options presented in this document, based on the discussions at its first and second meetings, for the next steps in providing the requested guidance in accordance with its Terms of Reference.

[Annex follows]

ANNEX

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 (APBREBES), 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]