



APBREBES

Association for Plant Breeding for the Benefit of Society

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

Reply to UPOV Circular E-23/116 by APBREBES

Preliminary Note:

We are of the clear opinion that the working group must adhere to the agreed terms of reference and therefore concentrate on questions concerning smallholder farmers in relation to the “private and non-commercial use” exception in UPOV 1991. Discussions during the last meeting of the WG-SHF were wide-ranging and a clear summary of the decision was not made. However, it is undisputed that there was no consensus to overrule the agreed terms of reference (in any case - a working group would not have the authority to do so).

In our opinion, the questions to the working group in Circular E-23/116 are much too broad, i.e., beyond the scope defined in the Terms of Reference. We are of the opinion that this is not correct and that the working group must adhere to the Terms of Reference. In the following, we will therefore only discuss FAQs that are relevant for the use of the exception of “private and non-commercial use” by smallholder farmers.

Following a question posed by APBREBES, it was also clarified at the last meeting that proposals for FAQs do not necessarily have to comply with the existing Explanatory Notes but can follow an interpretation which will be reflected in a revised Explanatory Note as a second step. This is precisely the intention of our proposal below.

Proposal for a new FAQ

How can the exception for “private and non-commercial use” allow smallholder farmers to multiply, exchange or sell farm-saved seeds/propagating material?

Member countries are free to define the scope of the exception for private and non-commercial use. They may clarify that smallholder farmers are allowed to multiply, exchange or sell farm-saved seeds/propagating material at the local level.

Rationale: This Interpretation is based on the joint presentation and the flow-chart made by Oxfam, Plantum and Euroseeds (project team) in the working group that was supported by several Working Group members. It therefore makes sense to clarify in an FAQ that this can be a possible form of implementation. For the sake of consistency, relevant Explanatory Notes and Guidances must also be revised to reflect the same.

Proposal with respect to existing FAQs

If the above-mentioned proposal is accepted various existing FAQs must be reviewed and revised to ensure coherence and consistency.

However, we take this opportunity to highlight the need to delete the following FAQ for reasons mentioned below:

TO DELETE:

Is it possible for subsistence farmers to exchange propagating material of protected varieties against other vital goods within the local community?

Since the 1991 Act and 1978 Act do not specifically address or define subsistence farmers it is necessary to consult the legislation of each UPOV Contracting Party for the answer to this question specific to that UPOV member.

Within the scope of the breeder's right exceptions provided under the UPOV Conventions, UPOV Contracting Parties have the flexibility to consider, where the legitimate interests of the breeders are not significantly affected, in the occasional case of propagating material of protected varieties, allowing subsistence farmers to exchange this against other vital goods within the local community.

Rationale for deletion: This FAQ, in particular the second para (Within the scope ...) makes no sense, as it has no basis in the Convention Text or in an existing Explanatory Note and it should therefore be deleted.

In particular, it negligently confuses Art. 15.1 (i) and 15.2.: According to the UPOV Convention "The legitimate interest of the breeders" must be taken into account in the implementation of Art. 15.2. But this optional exception in our view does not foresee the exchange between farmers. This is also explained in UPOV/EXN/EXC/1. Therefore, the exchange of propagating material between farmers should rather be envisaged under Art. 15.1 – but nothing in the Convention indicates that for the implementation of this article special regard should be given to the legitimate interests of the breeders (it is more likely that Member States will justify the implementation of this Article on a broader basis).

There is therefore no basis to restrict the implementation of Art. 15.1 by wordings such as "the legitimate interest of the breeder", "in the occasional case" or "exchange against other vital goods".

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