

NETHERLANDS (KINGDOM OF THE)

Contribution received in reply to UPOV Circular E-23/116, of July 6, 2023

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 The Netherlands

The Netherlands welcomes UPOV Circular E-23/116 of July 6, 2023, and the responses from members of the WG-SHF, as inputs for the fourth meeting of the WG-SHF.

The Netherlands is of the opinion that documents WG-SHF/3/2 and Annex of Circular E-23/116 do not reflect and include all issues raised during the discussions in the WG-SHF. We would like to bring these back to the attention of the members of the WG-SHF and propose the following revisions to some of the existing FAQs in order to better reflect the findings of the study and the consequent discussions in the WG-SHF.

Does the UPOV system mean that farmers need the breeder's authorization to sell their harvested crop?

As long as farmers use seed that is from a legal source, farmers do not need the breeder's authorization to sell the harvested crop of a protected variety. This is for example the case if the seeds that have been used were produced and marketed by the breeder or with his authorization, or produced within the exceptions to the plant breeders' rights provided in the legislation of the country concerned (see [Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention](#)).

Can a farmer sell seed of a protected variety without the authorization of the breeder?

As a general rule, the authorization of the breeder is required for the selling of seed of a protected variety by any person.

Under the [1978 Act](#) of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for "the offering for sale" and "the marketing" of the reproductive or vegetative propagating material, as such, of the variety.

Under the [1991 Act](#) of the UPOV Convention (see Article 14(1)) the "offering for sale" and "selling or other marketing" of the propagating material of the protected variety requires the authorization of the breeder.

In general, re-sales of seeds that were initially marketed by the breeder or with its consent, is not prohibited under UPOV.

Further, acts done privately and for non-commercial purposes do not require the authorization of the breeder. It depends on the applicable national law whether, and under what conditions, local sales of a surplus harvest from a protected variety by a subsistence/smallholder farmer, i.e. that part of the harvest that has not been consumed by such farmer's household, to other subsistence/smallholder farmers can be considered to be done privately and for non-commercial purposes.

Can a farmer replant seed of a protected variety without the authorization of the breeder?

Commercial farmers (scope of the optional exception, Article 15 (2))

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It is necessary to consult the legislation in each UPOV member to know the answer to this question.

Under the [1978 Act](#) of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for the production for purposes of commercial marketing of the reproductive or vegetative propagating material, as such, of the variety. However, no specific mention is made of replanting seed of a protected variety by farmers. Therefore, it is necessary to consult the legislation in each UPOV member.

Under the [1991 Act](#) of the UPOV Convention (see Article 15(2)), there is an optional exception to the breeder's rights according to which UPOV members can decide to allow farmers to replant seed on their own farms without the authorization of the breeder, under certain circumstances. The wording of this optional exception is as follows:

“Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or Article 14(5)(a)(ii).”

It is a matter for each UPOV member to decide if, and how, to incorporate this option in its legislation.

Subsistence/smallholder farmers ((scope of the obligatory exception, Article 15 (1))

The 1991 Act and 1978 Act give no definition of the words “commercial”, “subsistence” or “smallholder farming”. This is, in particular, obvious for the terms “subsistence” and “smallholder” as these depend - amongst other elements - on local economic and societal circumstances. Therefore, it is necessary to consult the legislation in each UPOV member to know the answer to this question specific for that UPOV member.

Under the 1978 Act of the UPOV Convention (see Article 5), the prior authorization of the breeder is required for the production for purposes of commercial marketing of the reproductive or vegetative propagating material, as such, of the variety. The 1978 Act of the UPOV Convention is silent on the question of subsistence farmers, and therefore it totally depends on the national legislation.

Under the 1991 Act of the UPOV Convention (see Article 15(1)(i)), a compulsory exception sets out that the breeder's right does not extend to “acts done privately and for non-commercial purposes”. Farmers living at the edge of poverty often barely produce enough food for their own consumption and that of their dependents. Occasionally, these farmers may however produce more than for their own consumption needs and have some surplus production that they may sell or barter for other vital goods, locally to other such farmers. Thus, the propagation of a protected variety by a farmer exclusively for the production of a food crop substantially for home consumption to be consumed by that farmer and the dependents of the farmer, normally should fall within the meaning of acts done privately and for non-commercial purposes.

Is it possible for subsistence/smallholder farmers to exchange or sell propagating material of protected varieties locally, farmer to farmer?

Since the 1991 Act and 1978 Act do not specifically address or define subsistence/smallholder 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 can decide for themselves which farmer practices should fall within the scope of this exception, under specific conditions and where the legitimate interests of the breeders are not significantly affected, in the occasional case of surplus production of their harvest of propagating material of protected varieties, allowing subsistence/smallholder farmers to exchange this surplus production locally, farmer to farmer.

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Further, depending on the applicable national law, sale of surplus production by subsistence/smallholder farmers to other subsistence/smallholder farmers locally, could qualify as an act “done privately and for non-commercial purposes”. In that case such acts would not require the authorization of the breeder.

Under the UPOV system, breeders decide the conditions and limitations under which they authorize the exploitation of their protected varieties. Can subsistence/smallholder farmers, for instance, be allowed to exchange seeds of protected varieties freely within the local community?

Article 14(1)(a) of UPOV 1991 and article 5(1) of UPOV 1978 define the acts in respect of the propagating material for which the breeder authorization shall be required; Article 14(1)(b) and respectively Article 5(2) state that the breeder may make his authorization subject to conditions and limitations.

Therefore any breeder may decide on the conditions and limitations under which he authorizes the exploitation of his/her protected variety. He may, for instance, allow the farmer to exchange seeds of protected varieties freely within the local community.

A survey of UPOV members revealed that there have been no reported legal actions against subsistence/smallholder farmers for infringement of plant breeders' rights in UPOV member states: (Link to survey).