

**Consultative Committee**

**CC/99/11**

**Ninety-Ninth Session  
Geneva, October 27, 2022**

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**REPORT ON THE WORKING GROUP ON GUIDANCE CONCERNING SMALLHOLDER FARMERS IN RELATION TO PRIVATE AND NON-COMMERCIAL USE (WG-SHF)**

*Document prepared by the Office of the Union*

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**EXECUTIVE SUMMARY**

1. The purpose of this document is to report on developments concerning possible guidance on the implementation of the exception of acts done privately and for non-commercial purposes and invite the Consultative Committee to consider how to proceed with regard to the Working Group on Guidance concerning Smallholder Farmers in relation to private and non-commercial use (WG-SHF).

2. The Consultative Committee is invited to:

(a) note the developments on possible guidance concerning smallholder farmers in relation to private and non-commercial use, as reported in this document; and

(b) consider the conclusions of the Chair of the WG-SHF on the work of the WG-SHF and next steps, as set out in paragraphs 18, 19 and 21 of this document, and provide guidance on if and how the WG-SHF should continue with its work.

3. The structure of this document is as follows:

EXECUTIVE SUMMARY .....	1
BACKGROUND .....	2
DEVELOPMENTS SINCE THE NINETY-EIGHTH SESSION OF THE CONSULTATIVE COMMITTEE .....	2
UPOV Circulars E-21/229 and E-21/230 of November 19, 2021 .....	2
First meeting of the WG-SHF (March 17, 2022).....	3
Second meeting of the WG-SHF (September 7, 2022).....	3
Third Meeting of the WG-SHF (March 16, 2023) .....	4
Proposal by the Chair of the WG-SHF for next steps.....	4
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)	

## BACKGROUND

4. The Consultative Committee, at its virtual session, held on October 28, 2021 considered documents CC/98/11 and CC/98/15.

5. The Consultative Committee noted the comments from the European Union on document CC/98/11 "Possible guidance concerning smallholder farmers in relation to private and non-commercial use", received in response to Circular E-21/124 of August 23, 2021, that were not of a straightforward nature (see document CC/98/15, paragraphs 64 and 65). The Consultative Committee noted the explanation that had been provided by the Office of the Union that the proposals in paragraph 13 of document CC/98/11 would be considered by the Consultative Committee at its virtual session on October 28, 2021, in conjunction with the comments from the European Union.

6. The Consultative Committee:

"(a) noted the developments since the ninety-seventh session of the Consultative Committee on possible guidance concerning smallholder farmers in relation to private and non-commercial use, reported in document CC/98/11;

"(b) decided to establish a Working Group to develop guidance concerning smallholder farmers in relation to private and non-commercial use, to include drafting a revision of the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention' and drafting a revision of the FAQs on exceptions to the breeder's right;

"(c) agreed that the terms of reference of the Working Group be approved by the Consultative Committee by correspondence;

"(d) agreed that the Working Group 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 Working Group;

"(e) agreed that the first meeting of the Working Group be held on March 17, 2022, by electronic means;

"(f) agreed to invite the Project Team (Euroseeds, Plantum and Oxfam), in conjunction with the Office of the Union, to prepare an analysis of the contributions in the compendium with the replies to UPOV Circular E20/246 (see Annex I of document CC/98/11) and present a report with recommendations for consideration by the Working Group at its first meeting;

"(g) agreed that a copy of the compendium with the replies to UPOV Circular E 20/246 (see Annex I of document CC/98/11) be provided to the Project Team and the Working Group subject to the agreement of the observer State and observer organizations that contributed to the compendium;

"(h) recommended to the Council to agree to the inclusion of an item 'Revision of the 'Explanatory Notes on Exceptions to the Breeder's Right under the 1991 Act of the UPOV Convention', in the agenda of the seventy-ninth session of the CAJ to be held on October 26, 2022; and

"(i) agreed to include an item in the agenda of the ninety-ninth session of the Consultative Committee, to be held on October 27, 2022, for a report on the work of the Working Group and recommendations, if appropriate." (see document CC/98/16 "Report", paragraph 73).

## DEVELOPMENTS SINCE THE NINETY-EIGHTH SESSION OF THE CONSULTATIVE COMMITTEE

### UPOV Circulars E-21/229 and E-21/230 of November 19, 2021

7. The Office of the Union issued UPOV Circular E-21/229 on November 19, 2021, inviting the Consultative Committee to approve the draft ToRs of the WG-SHF. On December 19, 2021, the Consultative Committee approved, by correspondence, the terms of reference (ToRs) for the WG-SHF, as reproduced in the Annex to this document.

8. The Consultative Committee agreed that the WG-SHF be composed of those members of the Union and observers to the Council that expressed an interest to be part to the WG-SHF. The Office of the Union issued UPOV Circular E-21/230 on November 19, 2021, inviting members of the Union and observers to the Council to express their interest to be a member of the WG-SHF.

9. In reply to Circular E-21/230 of November 19, 2021, the following members of the Union and observers to the Council expressed an interest to be members of the WG-SHF: 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).

10. In addition to the members of the WG-SHF, the following members of the Union subsequently expressed an interest to participate in the meetings of the WG-SHF: China, Spain, Paraguay, Republic of Korea and Russian Federation. In accordance with the terms of reference for the WG-SHF, those members of the Union were also invited to join the meetings of the WG-SHF.

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

11. 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 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.

12. 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).

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

14. 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](https://www.upov.int/meetings/en/details.jsp?meeting_id=67775)

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

15. 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.

16. The documents of the second meeting of the WG-SHF are available at:  
[https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70189](https://www.upov.int/meetings/en/details.jsp?meeting_id=70189).

17. The report of the second meeting of the WG-SHF will be made available at  
[https://www.upov.int/meetings/en/details.jsp?meeting\\_id=70189](https://www.upov.int/meetings/en/details.jsp?meeting_id=70189) on October 26, 2022, if approved.

18. The Chair of the WG-SHF 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.”

19. 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.

#### Third Meeting of the WG-SHF (March 16, 2023)

20. The WG-SHF agreed that the third meeting of the WG-SHF should be held via electronic means on March 16, 2023, subject to approval by the Consultative Committee at its ninety-ninth session.

#### Proposal by the Chair of the WG-SHF for next steps

21. The Chair of the WG-SHF invites the Consultative Committee to consider the following next steps:

(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.

22. *The Consultative Committee is invited to:*

*(a) note the developments on possible guidance concerning smallholder farmers in relation to private and non-commercial use, as reported in this document; and*

*(b) consider the conclusions of the Chair of the WG-SHF on the work of the WG-SHF and next steps, as set out in paragraphs 18, 19 and 21 of this document, and provide guidance on if and how the WG-SHF should continue with its work.*

[Annex follows]

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 (APBRES), CropLife International, European Coordination Via Campesina (ECVC), Euroseeds, International Community of Breeders of Asexually Reproduced Horticultural Plants (CIOFORA), 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]