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**UNIDROIT Working Group for the
preparation of a Guide on the Legal Structure
of Agricultural Enterprises**

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ISSUES PAPER

1. This document contains various issues that the UNIDROIT Working Group may wish to consider, during its second session on 2–4 November 2022, for the preparation of the Legal Structure of Agricultural Enterprises (LSAE) Guidance Document.
2. The LSAE project is jointly developed by the International Institute for the Unification of Private Law (UNIDROIT), the Food and Agricultural Organisation of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD). The LSAE project was included in the UNIDROIT Work Programme in 2019 and is a natural follow-up from the [Legal Guide on Contract Farming](#) (finalised in 2015) and the [Legal Guide on Agricultural Land Investment Contracts](#) (finalised in 2020).
3. This document retains a revised version of the Issues Paper discussed during the first session of the Working Group, held on 23-25 February 2022 (Study LXXXC - W.G.1 - Doc. 2). The issues considered in this document were identified by:
 - (i) The UNIDROIT Secretariat, in collaboration with FAO and IFAD representatives;
 - (ii) The participants in a Consultation Webinar co-organised by UNIDROIT, IFAD and FAO on 14–15 April 2021¹;
 - (iii) Feedback received from members of the UNIDROIT Governing Council
 - (iv) Feedback received from Working Group members and observers at the first session; and
 - (v) The participants in the intersessional meetings conducted between June and September 2022.
4. This document is not intended to provide an exhaustive list of issues nor a full legal analysis of each issue. Rather, its purpose is to provide a starting point for the Working Group's deliberations and a structure for discussions at the second meeting.
5. This document is divided into two sections: (i) preliminary matters and (ii) issues related to the scope of the Guidance Document. It raises a number of questions and provides recommendations that the Working Group may wish to consider.

¹ This document may be read alongside the [Summary Report](#) of the Consultation Webinar.

TABLE OF CONTENTS

I.	PRELIMINARY MATTERS	3
	A. Background of the project	3
	B. Target audience	4
	C. Format and title of the instrument	5
	D. Organisation of the work	6
	(i) <i>Composition of the Working Group</i>	6
	(ii) <i>Methodology and provisional timetable</i>	7
	(iii) <i>Summary of the first Session of the Working Group and intersessional work</i>	8
	E. Relationship with existing international initiatives	9
II.	ISSUES RELATED TO THE SCOPE OF THE GUIDANCE DOCUMENT	12
	A. General focus on legal forms for collaboration and the impact of exogenous and endogenous factors	12
	B. The impact of market structure on agricultural enterprises	14
	C. The role of midstream agri-MSMEs in contributing to rural transformation	17
	D. Multiparty contracts for collaboration in agri-food supply chains	19
	E. Agricultural cooperatives and corporations for collaboration in agri-food supply chains	21
	F. Exogenous factors' impact on collaboration of agricultural enterprises: sustainability, digital technology, finance and insurance	22

I. PRELIMINARY MATTERS

A. Background of the project

6. UNIDROIT'S work in the field of private law and agricultural development began in 2009, when the Governing Council agreed that UNIDROIT'S broad mandate in the field of private law gave the Institute a wide range of opportunities to contribute to the development goals established by the international community, and to create new synergies with other inter-governmental organisations in the field of agricultural investments and production².

7. In 2011, the Secretariat organised a Colloquium on "Promoting Investment in Agricultural Production: Private Law Aspects" (Rome, 8-10 November 2011). The Colloquium focused on the following potential areas of work: (a) title to land, (b) contracts for investment in agricultural land; (c) legal structure of agricultural enterprises, (d) contract farming, and (e) the financing of agriculture³.

8. The tripartite partnership between UNIDROIT, FAO and IFAD was established after the above-mentioned colloquium, and the [Legal Guide on Contract Farming](#) was the first joint instrument adopted in 2015. The [Legal Guide on Agricultural Land Investment Contracts](#) was developed subsequently, between 2016 and 2020.

9. In light of the finalisation of the agricultural land investment contracts project, the UNIDROIT Governing Council, during its 98th session,⁴ reassessed the future areas of work in the field of private law and agriculture development and agreed to recommend new work on the legal structure of agricultural enterprises. The LSAE project was approved by the General Assembly in 2019 and included in the 2020-2022 Work Programme, initially at a medium priority⁵.

10. As a first step, the UNIDROIT Secretariat submitted a feasibility study⁶ at the 99th session of the Governing Council (23-25 September 2020), in which it suggested that the LSAE project could investigate and make recommendations on how smallholders and agricultural Micro-, Small-, and Medium-sized Enterprises (agri-MSMEs) can: (i) improve market access; (ii) improve forms of aggregation and coordination of agricultural enterprises through the use of contractual networks, the development of corporate governance rules and the delineation of ownership; (iii) ease access to critical resources and insurance through investment vehicles; and (iv) address unfair commercial practices and cases of abuse of power or dominant position through the existing dispute settlement mechanism and other remedies so as to obtain more responsible business conduct⁷.

11. The Governing Council authorised the Secretariat to continue its consultations with a view to identifying the main legal issues in which UNIDROIT, in cooperation with FAO and IFAD, could make a meaningful contribution. Accordingly, on 15 and 16 April 2021, a Consultation Webinar was co-organised to discuss the LSAE project and, notably, to outline the possible topics the prospective future instrument could address⁸.

² For more information see: [UNIDROIT 2009 – C.D. \(88\) 17](#), para. 88 and [UNIDROIT 2009 – C.D. \(88\) 7, Add.6](#).

³ The Acts of the Colloquium were published in the *Uniform Law Review* 2012-1/2.

⁴ [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), paras. 78-82.

⁵ [UNIDROIT 2019 – A.G. \(78\) 12](#), para. 51.

⁶ [UNIDROIT 2020 – C.D. \(99\) B.5](#).

⁷ Committee on World Food Security (CFS), [Principles for Responsible Investment in Agriculture and Food Systems](#) (2014), paras. 50-52.

⁸ The [summary report](#) is available on UNIDROIT'S website and a [video](#) recording of both days of the Consultation Webinar is available on UNIDROIT'S YouTube channel.

12. The conclusions and recommendations of the Consultation Webinar were presented to the Governing Council at its 100th session (22-24 September 2021). The Governing Council endorsed the LSAE project and upgraded it to a high priority project. It also allowed the Secretariat to establish a Working Group⁹.

13. At its 101st session (8-10 June 2022), the Governing Council was informed by the Secretariat that a Working Group had been established to carry out the project. The first session of the Working Group took place in February 2022 and progress was made in clarifying the scope and content of the prospective guidance document. The Governing Council recommended maintaining the high priority level of the LSAE project in the 2023-2025 Work Programme¹⁰.

B. Target audience

14. As consistent with all UNIDROIT instruments, the prospective Guidance Document should be relevant to all jurisdictions irrespective of their particular legal tradition. The LSAE project can assist parties involved in agri-food supply chains, particularly legal professionals representing smallholders and smaller enterprises (including community-based enterprises and family farmers) and, to a certain extent, legislators and policymakers¹¹.

15. In order to address the challenges faced by smaller enterprises, the LSAE project aims to identify good practices and possible solutions for the adaptation of the legal structure of agricultural enterprises to different scenarios (e.g., sustainability, digitalisation, finance). The challenges faced by agri-food supply chain leaders operating downstream (e.g., large retailers) could also be considered, but the framing of the LSAE project should resonate with the realities and challenges faced by actors operating in the midstream segment and in low- and middle-income countries¹².

16. In addition, the LSAE project may go beyond the “production stage” to focus on the challenges faced by actors that add the most value to agri-food products and who operate on stages beyond the farm gate (e.g., input providers, processors, traders and retailers). The main target audience, therefore, can be those enterprises that have the potential to grow and contribute to rural and urban development, but because of a disabling business environment they are impeded from fully leveraging their potential to do so.

17. While the definition of “agricultural enterprises” may be revised, the relevant audience of the LSAE project could be smallholders and agri-MSMEs that are working towards higher degrees of formality, as addressing the challenges they face to grow could eventually stimulate the formalisation of informal enterprises. The LSAE project might therefore be drafted in an accessible manner to extend its use to a broader audience beyond legal professionals¹³.

18. During the first session of the Working Group, it was discussed that the definition of “agri-MSMEs” varies from country to country and that the LSAE project should avoid adopting a generic definition that might not fit a particular country context. It was suggested that the Working Group could follow the taxonomy developed by IFAD’s “Smallholder and Agri-SME Finance and Investment Network (SAFIN)” which defines “agri-SMEs” as “profit-oriented enterprises that are involved in the agricultural value chain either directly or by providing enabling services to value chain actors”, which

⁹ [UNIDROIT 2021 – C.D. \(100\) B.24](#), para. 80.

¹⁰ [UNIDROIT 2022 – C.D. \(101\) 21](#), paras. 234,247.

¹¹ [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 2](#), para. 12; [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), para. 20.

¹² [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 2](#), para. 13; [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), para. 21.

¹³ [UNIDROIT 2022 – C.D. \(101\) 10](#), paras. 11-12.

“do not have to have ambitions to grow but must be profit-oriented”¹⁴. Agri-SMEs may “include small commercialising farms and farmer cooperative-owned enterprises. However, farmers must sell at least 50% of their production to qualify”¹⁵. Micro-enterprises are “typically informal, focused on income generating activities and have less than five full time equivalent workers”¹⁶.

Questions for the Working Group:

- *The Working Group may consider further defining the notion of “agricultural enterprises” that the LSAE Guidance Document should focus on. One option could be to adjust the notion to “agri-food enterprises”, as these would focus on food commodities and products.*
- *The Working Group may wish to further discuss the definition of “agri-MSMEs” and whether the focus should be on actors operating in the “midstream segment”, beyond production and for profit. It is important to decide whether the analysis of legal forms of collaboration will focus on both on-farm/beyond farm gate scenarios.*
- *The Working Group may wish to further discuss the notion of “smallholders” (landholding size) and “family farmers” covered in the LSAE project and whether these actors may be considered as equivalent to “small-scale farmers” (scale of production).*

C. Format and title of the instrument

19. The participants of the first Working Group session favoured developing the LSAE project’s Guidance Document as a “legal toolbox” which would showcase the most useful collaborative legal structures that parties can use for different purposes. Additionally, the Guidance Document would consider how the inputs, resources, outputs and the distribution of gains and losses would be addressed in the different contractual and corporate models. The instrument would seek to empower smallholders and agri-MSMEs to adopt enterprises that provide them with better access to markets and benefit their needs¹⁷.

20. The legal toolkit’s purpose would not be to identify the best legal structure but to provide parties’ with good practices, identified in terms of efficiency and distributional values to generate outcomes that are beneficial across agri-food systems. A number of participants proposed to adopt a systematic approach when developing the Guidance Document to address issues raised beyond the context of supply chains. Therefore, a more holistic, circular, cross-sectoral and community-based approach could be used for the development of the Guidance Document. Hence, it would be important to consider the interrelationship between the different legal structures analysed¹⁸.

21. The Guidance Document should be flexible enough to transcend international, national, regional, and sub-regional levels, as well adaptable to, at least, three different variables: geography, commodities and communities. In the first session, the Working Group supported the idea that the Guidance Document should be evidence-based and agreed to revisit the methodology for the empirical research once the work progressed¹⁹. As a soft law instrument, the Guidance Document is not intended to be binding, and it will not have a prescriptive function.

22. The Working Group did not yet decide on the structure and table of contents of the future instrument. This is something to be considered during the second or third session of the Working

¹⁴ SAFIN, ISF. [Learning brief: Agri-SME taxonomy](#), March 2021, p. 2

¹⁵ Id.

¹⁶ Id.

¹⁷ [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), paras. 27 and 29

¹⁸ [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), paras. 32.

¹⁹ [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), paras. 33-34.

Group. With regards to the title, the Working Group considered that the current title of the LSAE project was very broad and needed to be adapted to reflect the content that would actually be covered in the Guidance Document²⁰.

Questions for the Working Group:

- *The Working Group is invited to reflect on the need to adapt the working title for the future instrument. For example, it may consider adjusting the title to "Collaborative Legal Instruments for agricultural enterprises", as the project focuses on collaborative legal instruments that can be used by the enterprises rather than their structures.*
- *The Working Group is invited to further reflect on the table of contents of the future instrument to facilitate the work going forward.*

D. Organisation of the work

(i) Composition of the Working Group

23. Consistent with UNIDROIT's established working methods, a Working Group has been set up, composed of members selected in their personal capacity for their expertise in the fields of contract law, corporate law, commercial law, property law, agricultural law, digital technology, and sustainability. Non-legal experts, such as economists, have also been invited as members of the Working Group. The members were also selected based on representation of different legal systems and geographic regions of the world. Additional members may be invited in the future.

24. As of October 2022, the LSAE Working Group is composed of the following members:

- Ricardo Lorenzetti (Justice at the Supreme Court of Argentina, Member of the UNIDROIT Governing Council) – Chair of the Working Group
- Fabrizio Cafaggi (Judge at the Council of State Italy, Professor University of Trento and LUISS) – Coordinator of the Working Group
- Carlo Russo (Professor, University of Cassino and Southern Lazio)
- Cynthia Giagnocavo (Professor, Universidad de Almeria)
- Dongxia Yang (Professor, China University of Political Science and Law)
- Georg Miribung (Professor, Eberswalde University for sustainable development)
- Hagen Henry (Professor, University of Helsinki)
- Matteo Ferrari (Professor, University of Trento)
- Matthew Jennejohn (Professor, Brigham Young University)
- Paola Iamiceli (Professor, University of Trento)
- Virgilio De Los Reyes (Professor, De La Salle University)

25. The following experts will be representing FAO and IFAD, partner organisations in the LSAE project.

Representatives from FAO

- Donata Rugarabamu (Legal Counsel, Legal Office)
- Buba Bojang (Legal Officer, Development Law Service)
- Teemu Viinikainen (Legal Consultant, Development Law Service)
- Sisay Yeshanew (Legal Consultant, Development Law Service, Ethiopia)
- Siobhan Kelly (Agribusiness Economist, Food Systems and Food Safety Division)

²⁰ [UNIDROIT 2022 – C.D. \(101\) 10](#), paras. 19.

Representatives from IFAD

- Katherine Meighan (General counsel)
- Ebrima Ceesay (Legal Counsel)
- Athur Mabiso (Senior Technical Specialist, Research and Impact Division)
- Jonathan Agwe (Senior Technical Specialist, Inclusive Rural Financial Services)

26. A number of intergovernmental organisations, non-governmental organisations, and private sector representatives have also been invited to attend the Working Group sessions as observers. While observers do not have voting rights, they are entitled to full participation in the Working Group's discussions and are considered an integral part of the working team. The participation of these organisations and stakeholders should ensure that different regional perspectives are taken into account in the development and adoption of the instrument. Such organisations can also channel relevant input from experts with a specialised background, also allowing for interdisciplinary synergies. Moreover, it is also anticipated that the partner organisations will assist in the regional promotion, dissemination and implementation of the Guidance Document once it has been adopted.

27. As of October 2022, the following organisations and stakeholders have been invited to participate as observers in the Working Group:

- Asian Farmers' Association for sustainable rural development (AFA)
- Eastern Africa Farmers Federation (EAFF)
- Global Action for Improved Nutrition
- International Agri-Food Network
- International Cooperative Alliance (ICA)
- International Development Law Organisation (IDLO)
- International Institute for Environment and Development (IIED)
- Organisation for the Harmonisation of Business Law in Africa (OHADA)
- Organization of American States (OAS)
- United Nations Commission on International Trade Law (UNCITRAL)
- United Nations Industrial Development Organisation (UNIDO)
- United Nations Conference on Trade and Development (UNCTAD)
- World Bank Group
- World Farmers Organisation (WFO)
- World Food Law Institute
- World Food Programme (WFP)

28. Finally, UNIDROIT has also invited a number of individual experts and academics to participate in the Working Group as observers.

(ii) Methodology and provisional timetable

29. The Working Group will undertake its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, in principle the Working Group will not adopt any formal rules of procedure and will seek to make decisions through consensus under the Chair's guidance.

30. The Working Group will meet at least twice a year (for two-three days) in Rome (Italy) at the seat of UNIDROIT. Meetings will be held in English without translation. Remote participation will be possible, although experts will be expected to attend in person if circumstances permit.

31. After each meeting of the Working Group, the Secretariat will share a summary report with all participants on a confidential basis, for internal purposes of the Working Group only. A separate, high-level summary of the meeting will be published on the UNIDROIT website.

32. Regarding the proposed timeline of the LSAE project, the Secretariat has proposed to carry over the activities concerning the LSAE project to the new Work Programme 2023-2025²¹. It is envisaged that the prospective Guidance Document be developed over five Working Group sessions in the period 2022-2024, followed by a period of consultations before submitting the complete draft for adoption by UNIDROIT, FAO and IFAD. The following would be a tentative work plan for 2022-2024:

- Sessions of the Working Group:
 - First session: 23-25 February 2022
 - Second session: 2-4 November 2022
 - Third session: March 2023
 - Fourth session: October 2023
 - Fifth session: February 2024
- Consultations: scope of which to be determined
- Review of first draft: April 2024
- Final draft for approval: June 2024

(iii) *Summary of the first session of the Working Group and intersessional work*

33. The first session of the LSAE project Working Group took place in Rome at the seat of UNIDROIT and via videoconference from 23 to 25 February 2022 and was attended by 40 participants²². The Working Group discussed that the LSAE project could start by focusing on the transformations in the agri-food supply chains and their effects on the choice of legal forms of efficient commercial collaboration among agricultural enterprises, including both horizontal and vertical collaborative ventures. Addressing both the horizontal and vertical collaborative ventures would contribute to a systems perspective in terms of collaboration, as opposed to the more value chain linear collaboration lens.

34. Therefore, during its first session, the Working Group considered that the main focus of the project could be on collaborative legal structures that support small producers and agri-MSMEs to do business with one another, access markets and improve collaboration with different agri-food chain actors. It was indicated that a conceptual framework could be used to distinguish both the endogenous and exogenous factors that affect the choice between contracts, cooperatives and corporate legal forms. However, it was noted that the endogenous and exogenous variables would not be the focus of the project but would help analyse the different choices of legal structures that serve the purpose of collaboration among smallholders and agri-MSMEs.

35. The Working Group agreed to concentrate on three categories of instruments aimed at promoting efficient commercial collaboration between parties: contracts, including bundles of contracts and multiparty contracts, companies with or without legal personality, and cooperatives. Other types of legal structures, beyond contracts, corporations and cooperatives would be considered only where relevant and based on the reality in practice.

36. Other matters examined during the first session included the impact of market structure on agricultural enterprises, the role of midstream agri-MSMEs in contributing to rural transformations, the contractual arrangements for collaboration in agri-food supply chains, particularly regarding the use of multiparty contracts, and the impact of technology, sustainability, green finance and insurance on the structure of agricultural enterprises (see Section II below for more information on how these issues relate to the scope of the instrument).

²¹ [UNIDROIT 2022 – C.D. \(101\) 4 rev.](#), paras. 31-34.

²² For more information, reference is made to the Summary Report of the first session of the Working Group [UNIDROIT 2022 - Study LXXXC – W.G.1 – Doc. 3](#).

37. After the first Working Group session, the UNIDROIT Secretariat agreed with FAO and IFAD to undertake intersessional meetings to advance the work on the project. Between June and September 2022, nearly all Working Group members and observers were involved in an intense working schedule. A brief overview of the topics discussed during the intersessional period is provided below:

- First Intersessional Meeting: held on 16 June 2022, from 14:00 – 17:00
- Second Intersessional Meeting: held on 22 September 2022, from 14:00 – 17:00
- Third Intersessional Meeting: held on 30 September 2022, 14:00 – 17:30

38. The purpose of the first intersessional meeting was four-fold. First, to collect empirical evidence on the use of the three categories of collaborative legal forms (multiparty contracts; cooperatives and corporations). Second, to analyse the legal differences between the three categories of collaborative forms. In addition, the participants started to discuss the definition of certain key terms that remained unclear (i.e. agricultural enterprise, agricultural markets, midstream segment in agri-food chains, family enterprise, community-based enterprise).

39. The purpose of the second intersessional meeting was to reflect upon the differences and main challenges stemming from the legal structure of agricultural cooperatives composed of only farmers, and those including other participants (e.g., input providers, processors, retailers). In addition, the meeting aimed to collect empirical evidence to understand the role of agricultural cooperatives in the promotion of collaboration in agri-food value chains versus other legal forms, such as multiparty contracts and corporations. A number of experts were invited to examine the specific and unique aspects of the cooperative enterprise operating in the agricultural sector across different jurisdictions.

40. The purpose of the third intersessional meeting was threefold. First, to discuss how corporations operate as instruments of collaboration among producers and among other actors. Second, to examine and discuss the relevance of digitisation and digitalisation in defining the choice of legal forms, the effectiveness of legal forms and their respective links with collaboration. Finally, participants discussed the factors that limit and improve access to credit and financing.

41. The main conclusions and questions raised during these meetings are further reflected in Section II below, which explains the issues related to the scope of the guidance document.

E. Relationship with existing international initiatives

42. The Guidance Document could focus on improving forms of collaboration in agri-food supply chains through the analysis of the internal and external functioning of agricultural enterprises operating in different scenarios for which there is currently a lack of international guidance (see the proposed scope in detail in Section II below). However, depending on the exact scope agreed for the LSAE project some of the below mentioned instruments may be relevant and should be taken into account by the Working Group when developing the guidance document to avoid overlap and duplication of previous efforts. The initiatives mentioned below are illustrative and should be revised as progress is made.

43. A large part of the work done by FAO and IFAD has thus far been focused on the implementation of broad policy objectives in the field of agricultural development, such as the promotion of agriculture for purposes of poverty alleviation, food security, legal empowerment of small farmers and social development of rural populations. However, FAO and IFAD have also paid particular attention to small businesses and microenterprises in support of the empowerment of specific categories of persons, such as women and young entrepreneurs. Their work has found that farming businesses tend to be established informally and that incorporation under a specific legal form is not a common practice nor a legal requirement. Producers tend to develop small to medium-

sized enterprises, including family-managed undertakings, without carefully considering the legal structures of their business.

44. At FAO, the Agri-food Economics Division (ESA) is developing a methodology that assesses the business models of small food manufactures and is looking at management issues, as well as at challenges related to agripreneurship in several countries²³. Some of FAO's technical guides have summarised the main opportunities and risks related to certain business models for agricultural enterprise (e.g., management contracts, sharecropping, joint venture, farmer-owned businesses and cooperatives),²⁴ highlighting the challenges to access global supply chains, alternative markets (e-commerce) and barriers to entry, such as complex administrative licensing requirements and regulatory frameworks entailing timely and costly business registration procedures which discourage entrepreneurship (e.g., the time needed to set up a limited liability company can range from half a day in New Zealand to 84 days in Eritrea). Access to finance is also highlighted as a significant challenge that rural entrepreneurs face, having to negotiate with risk-averse banks that demand unrealistic collateral, credit arrangements and contracts. These technical guides, however, do not provide detailed private law guidance regarding the legal structure established for each business model.

45. Together with FAO technical units, the Development Law Service of FAO has published, among others, legal studies on rules and principles related to land tenure, marketing of agricultural products, agricultural cooperatives,²⁵ international joint ventures in agriculture,²⁶ and legislative approaches to sustainable agriculture and natural resources governance²⁷. Some of these legal studies have identified several types of contractual arrangements to organise agricultural production (contracts for land use, joint ventures, employment contracts and producers' agreements with cooperatives)²⁸. While some studies identify the limited inclusion of smallholders in certain business models, they have not explored, through the lens of private law, why decision-making and the allocation of risks are unbalanced, for example, even when joint ventures entail co-ownership. One of the key issues faced in relation to the private law aspects of legal structures of agricultural enterprises is the difficulty to successfully establish adequate compliance mechanisms to enforce the applicable legal framework on the owners/participants of such enterprises. FAO's Sustainability Assessment of Food and Agriculture Systems (SAFA Guidelines) may also be useful for the development of the LSAE project²⁹.

46. IFAD's mandate focuses on country-specific solutions and finance specific programmes, such as value chain development projects involving small producers and private enterprises, with a particular focus on small to medium-sized local enterprises. As a result, IFAD's funded projects have the aim of stimulating the establishment of mutually beneficial partnerships with small rural producers involving legally binding contracts between two or more parties to better regulate risk-sharing, the pooling of resources, and profit-sharing. To improve the outcomes for all engaged parties, IFAD has been promoting the concept of Public-Private-Producer Partnerships (4Ps), as a more integrated way of doing business. According to IFAD, a "4P arrangement ensures that smallholder producers are respected partners and not relegated to the receiving end of public-private

²³ FAO, [Agripreneurship across Africa – Stories of inspiration](#), 2019.

²⁴ FAO, [Governance of tenure technical guide n°4](#): Safeguarding land tenure rights in the context of agricultural investment, 2015, p. 15-16

²⁵ FAO, *Agricultural cooperatives: key to feeding the world*, 2012.; FAO, *Agricultural cooperatives: paving the way for food security and rural development*, 2012.

²⁶ FAO, *Legal aspects of international joint ventures in agriculture*, Legislative study 45, 1990.

²⁷ FAO, [Legislative approaches to sustainable agriculture and natural resources governance](#), Legislative study 114, 2020.

²⁸ FAO, [Enabling regulatory frameworks for contract farming](#), Legislative study 111, 2018, p. 17.

²⁹ FAO, [Sustainability Assessment of Food and Agriculture Systems Guidelines](#).

partnerships (PPPs)³⁰. From IFAD’s perspective, contractual arrangements through the 4Ps can facilitate the financial integration of smallholders and rural small and medium-sized enterprises, as well as attract additional resources and support from banks, equity investors, input suppliers, and equipment leasing firms. In addition, the adoption of these “4Ps business models” have also received support from FAO’s Investment Centre which believes that “the 4P financing instruments also address the missing middle phenomenon – i.e. rural enterprises too small to obtain loans from commercial banks and development finance but too large to access microcredit schemes”³¹.

47. IFAD has developed guidance documents on how to design 4Ps, and has identified different business models that may be established within the partnership framework, including contract farming schemes, a joint-venture shareholding scheme, or a cooperative-led model. However, a legal analysis of the pros and cons of each one of these business models in terms of membership, access to capital, decision-making procedures, allocation of risks and responsibilities, as well as regulation of profit-sharing is lacking. This constitutes an apparent gap with respect to preparing for and implementing enterprises.

48. In light of the specificities of agri-businesses, the Guidance Document to be developed in the LSAE project could consider other international instruments which provide guidance for simplified legal structures, such as the ones developed by the United Nations Commission on International Trade Law (UNCITRAL), the Organisation of American States (OAS), as well as by the Organisation for the Harmonization of Business Law in Africa (OHADA). In this regard, and by way of example, the LSAE project could verify if some of the recommendations included in the OAS Model Law on the Simplified Corporation³² and the UNCITRAL Legislative Guide on Limited Liability Enterprises could contribute to the establishment and development of more inclusive agri-businesses³³. The UNCITRAL Guide envisions to reduce legal obstacles encountered by MSMEs and is adaptable to “any lawful business or commercial activity”³⁴, including agricultural activities³⁵.

49. In addition, the LSAE project’s work could build on the following additional international initiatives, events and instruments: the UNCITRAL Colloquium on Contractual Networks and other forms of Inter-Firm Cooperation³⁶; the work undertaken by the OAS Inter-American Juridical Committee, in particular the Guide on the Law Applicable to International Commercial Contracts in the Americas³⁷ and its recent work on contracts between parties of different bargaining power.

50. The reports prepared by the Special Rapporteur on the Right to Food could also be relevant, as they have identified that “better access to markets is key to improving livelihoods for many small-scale farmers in developing countries” and that “contract farming rarely encourages farmers to climb up the value chain and move into the packaging, processing or marketing of their produce”³⁸. Other

³⁰ IFAD (2016), [How to do public-private-producer partnerships \(4Ps\) in agricultural value chains](#), p. 2.

³¹ FAO, Investment Center, [Public-private producer partnerships to increase farmers’ incomes in Benin – PADAAM](#).

³² OAS (2012). [Model Act on the Simplified Stock Corporation](#).

³³ The Legislative Guide was adopted during UNCITRAL’s fifty-fourth session. The Guide will be available on the UNCITRAL website at <https://uncitral.un.org/en/texts/msmes>.

³⁴ Recommendation n°2, UNCITRAL (2021), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#).

³⁵ UNCITRAL (2021), [Draft Legislative Guide on an UNCITRAL Limited Liability Organization](#), para 27.

³⁶ UNCITRAL (2019). [Colloquium on contractual networks and other forms of inter-firm cooperation](#).

³⁷ OAS (2019). [Guide on the Law Applicable to International Commercial Contracts in the Americas](#).

³⁸ UN, 66th session of the General Assembly, Report on the right to food: towards more equitable value chains – alternative business models in support of the right to food”, [A/66/262](#).

business models could be considered, such as farmer-controlled enterprises, joint ventures and direct-to-consumer food marketing practices³⁹.

51. Regarding the role of cooperatives more specifically, the International Labour Organisation (ILO) is contributing to the development of public international cooperative law by elaborating on international guidance documents which aim to stimulate and assist national governments in the adoption or review of national legislation regarding cooperative law. Cooperatives, as a business model, may improve the agricultural productivity of farmers and facilitate access to markets, savings, credit, insurance and technology⁴⁰. In this regard, the ILO's Recommendation No. 204 on the Transition from the Informal to the Formal Economy⁴¹ and the 2002 ILO Promotion of Cooperatives Recommendation No. 193⁴², as well as the 1995 International Cooperative Alliance Statement on cooperative identity⁴³.

52. Finally, the studies developed by the Donor Committee for Enterprise Development, in particular those related to informality and business enabling reforms⁴⁴ and the World Bank work on Business Enabling Environment⁴⁵. At the European level, the Working Group may wish to consider the Directive 2019/633 of the European Parliament and of the Council on Unfair Trading Practices in Business-to-Business relationships in the Agricultural and Food Supply Chain⁴⁶ and also the COPA-COGECA EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement⁴⁷.

Question for the Working Group:

- *Are there any further international or regional instruments and initiatives to those mentioned above that need to be considered when developing the LSAE Guidance Document?*

II. ISSUES RELATED TO THE SCOPE OF THE GUIDANCE DOCUMENT

53. This section further describes some of the topics that the Working Group started discussing in the first session of the Working Group and in the intersessional meetings, as well as proposes new questions for deliberation.

A. General focus on legal forms for collaboration and the impact of exogenous and endogenous factors

54. The legal structures and functions of agricultural enterprises, including the types of contractual arrangements, corporate entities and cooperatives established for collaboration along the agri-food supply chain, are constantly transforming and being adapted to new needs, such as to the Sustainable Development Goals, new digital technology scenarios, as well as to new legislative demands and green finance.

³⁹ UN, 66th session of the General Assembly (2011), Report on the right to food: towards more equitable value chains – alternative business models in support of the right to food”, [A/66/262](#).

⁴⁰ UN General Assembly (2013), Report of the Secretary-General, [Cooperatives in social development and the observance of the International Year of Cooperatives](#), A/68/168, para. 80 (b).

⁴¹ ILO (2015), [ILO's Recommendation No. 204 on the Transition from the Informal to the Formal Economy](#).

⁴² ILO (2002), [Promotion of Cooperatives Recommendation, 2002 \(No. 193\)](#).

⁴³ ICA (1995), [International Cooperative Alliance Statement on cooperative identity](#).

⁴⁴ DCED, [Business Environment Reform](#).

⁴⁵ World Bank, [Business Enabling Environment](#).

⁴⁶ European Union (2019), [Directive \(EU\) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain](#).

⁴⁷ [EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement](#) (2018).

55. In addition, the ways in which smallholders and agri-MSMEs organise themselves, and the legal structure they set up for the development of their agricultural activity may depend on a number of factors, such as the landholding size, the ability to carry out commercial activities, the position within the value chain, the participation in business networks and strategic alliances, and the functional purpose of the enterprise (e.g., to achieve socio-economic, environmental and/or cultural objectives). Agricultural enterprises may have different legal structures, objectives, and functions, and may link producers to markets, suppliers of inputs and financial services in various ways. For instance, collaboration among enterprises may be the only path to generate the benefits of scale and to access global markets. To illustrate, collaborative agreements between small and large enterprises may be established when smaller producers are organised in networks or cooperatives and adopt collective arrangements with intermediaries or final producers. A functional connection may be developed between the horizontal variety of collaborative agreements and the vertical relationships established with large transnational companies at the retail level.

56. During the first session of the Working Group, it was agreed that instead of incorporating into larger enterprises, the best way to guarantee access to markets while respecting the small size of agricultural enterprises was to enhance collaboration. Greater collaboration was seen as a key driver towards different modes of interaction among actors in the agri-food chain. Therefore, with the objective of promoting more inclusive agri-businesses, which consider the interests and voices of smallholder producers and agri-MSMEs, the prospective LSAE Guidance Document aims to identify good practices for smallholders and agri-MSMEs to become active players, especially in the context of increasing sustainability requirements and digitalisation of agricultural activities.

57. The LSAE project is premised on the idea that the structures and activities of agricultural enterprises are the result of many concurring factors. Freedom of contract and parties' choice is an important but not exclusive factor that influences the choice of legal forms. The legal structure of agricultural enterprises and the organisation of agri-food supply chains may be influenced by endogenous, as well as by exogenous factors.

58. The endogenous factors to be considered in the LSAE project could be those traditionally considered by lawyers, such as: (i) the regulation of entry and exit of members or contractual parties; (ii) liability and creditors' rights (asset portioning); (iii) governance (distinction between contractual and corporate governance); (iv) breach of corporate obligations and breach of contractual obligations; and (v) remedies (remedies in the corporate forms and in the contractual forms for breach).

59. In terms of exogenous factors, the choice of legal forms of collaboration do not occur in a vacuum, as mentioned above agricultural enterprises operate within an economic environment affected by several factors, such as new technology, climate change, social economic changes, resources, markets, consumer demand, competition, etc. Collaboration is part of the strategy that an agricultural enterprise may use to address the changes in the economic environment and the exogenous factors. Thus, it would be relevant to consider the overall enabling and disabling business environment, as well as how sustainability, digital technologies, and finance, among other factors, are affecting the choice of legal forms.

60. The project could analyse how some of these factors influence the design and activities of agricultural enterprises. Therefore, instead of covering a single type of collaborative legal form, such as multiparty contracts and describing its parties, content, breach, remedies, and dissolution mechanisms, the LSAE project proposes to address different instruments, including corporate entities and cooperatives to identify good practices for specific purposes, such as to increase accessibility to critical financial resources.

Questions for the Working Group:

- The Working Group may consider identifying the key concepts and terms that need to be further defined during the upcoming intersessional meetings. It could be helpful to start elaborating on a comparative legal and economic glossary to describe key terminologies.
- The Working Group may consider focusing its analysis of the collaborative legal forms (multiparty contract, cooperative and corporation) with regards to one or two specific exogenous factors (e.g., new technologies, sustainability or finance).

B. The impact of market structure on agricultural enterprises

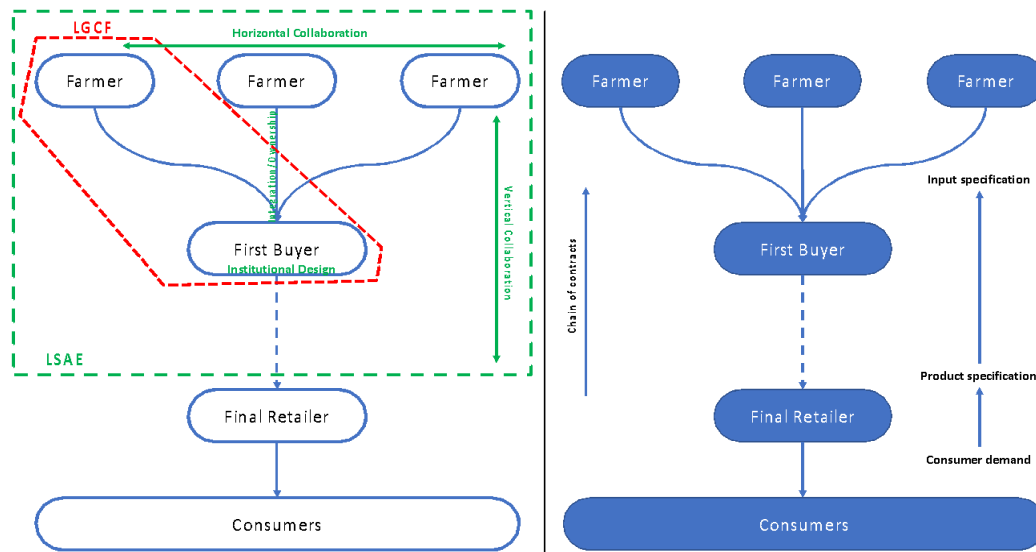
61. As briefly noted in the previous sections, the scope of the LSAE Guidance Document will be broader than the scope of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming in several ways, such as by considering: (i) supply chain stages beyond production and the farm gate; (ii) a wider variety of economic activities contributing to agricultural production (e.g., logistics, processing, marketing, capacity building, etc.); and (iii) coordination tools and different types of legal forms to organise production other than contracts.

62. While the LGCF covered the life-cycle of bilateral agricultural production contracts between farmers and buyers, the LSAE project will consider good practices for potential interactions that may take place among different market players operating at the upstream and downstream levels. The objective in the LSAE project is to cover cases of interdependence among supply chain actors and collaborative legal forms for better allocation of risks and profits within agri-food systems.

63. Flexibility, efficiency and coordination of the supply chain are key competitive advantages, which is why processors and retailers often promote aggregation of farming enterprises to minimise coordination costs. Hence, retailers may prefer to work with cooperatives, producer organisations, and large traders instead of contracting with individual farmers. This preference may have a great impact on the choice of legal structures, as supermarket chains for example may promote the adoption of cooperatives and producer organisation structures that undertake to ensure compliance with international standards among their members. From this perspective, the choice of the legal structure of the first buyer is strongly affected by the incentives provided by the retailers to aggregate firms (the leaders of the value chains). Aggregation can be project-based or organisational, with the formation of new entities such as cooperatives, corporate joint ventures, consortia, etc.

64. The main advantages of horizontal coordination/concentration of production for retailers are: (i) reduction of transaction and contracting costs (one contract instead of hundreds of them); (ii) economies of scale in technology adoption (for example, producer organisations can hire agronomists that serve hundreds of associates); (iii) managing information asymmetries (intermediaries know local farmers better than the retailer); (iv) economies of scope in production (large traders can offer a basket of many products instead of a few ones); (v) advantages in litigation and dispute resolution (especially with private traders). It is easier to settle disputes with one large structure than finding compromises with many farmers with diverging interests.

65. This implies that the legal structure should support economic agents facing more complex challenges than those considered by the LGCF. The following figure explains these issues using the example of a stylised value chain.



66. In the example, a group of farmers sells their products to one or more first buyers. Goods are processed and traded downstream until they reach the final retailer, which sells to consumers. In modern value chains, the consumer may demand products with a complex set of characteristics (e.g., environmental, ethical, health, and organoleptic attributes), which is why retailers may require that their suppliers comply with strict product specifications (including product standards, process standards, delivery and sale conditions, etc.). In order to comply with these specifications, suppliers of retailers may require that their own suppliers provide raw materials and inputs that meet detailed input specifications. A key factor in this process is the role of input compliance with specification (input quality) in determining the compliance of the final goods with the desired product specification (output quality). For example, how important the quality of the cocoa bean is in determining the quality of chocolate. If input quality is important for output quality, the economic interdependence between the stages of the value chain is high. Instead, if input quality is not important, interdependence is low.

67. Therefore, the organisation of the value chain (governance) may be determined (among other factors) by the degree of interdependence among the different nodes participating in the production process. Interdependence may depend upon different factors. It may be determined by the need to implement product and process standards that require controls at every stage of the production process. Such standards may concern safety, quality, environmental and social dimensions. Interdependence may also depend on risk management, as risk arises from processes that often include multiple parties. Risk management often requires contractual and technological coordination that cannot be made efficiently through bilateral contracts. Interdependence may also depend on technology and common platforms, which tend to aggregate parties that would otherwise carry out their own activities independently. In addition, interdependence may depend on the perishable nature of the commodity that requires fast and common risk management.

68. If the degree of interdependence is high, it may be expected that final retailers (or their immediate suppliers) exert some form of control over input production. Therefore, if interdependence is high, legal agreements between first buyers and farmers must be such that compliance with input specification is granted to downstream buyers. In essence, the characteristics of the legal agreement between farmers and first buyers depends on the characteristics between the first buyers and their own buyers. All these dynamics may affect the legal structure of agricultural enterprises, for instance by favouring the emergence of contract chains for better coordination.

69. Considering the example of interdependence and contract chains in the Italian fresh produce sector, it is possible to identify a high level of interdependence, given that the quality of the final

product entirely depends on the quality of the input. Consequently, the legal agreements (mainly contracts or cooperative memberships) between farmers and their first buyers (private traders or cooperatives) strictly depend on the legal agreements with the final retailers. The quality of the final product strongly depends on processes and on inputs. As a result, a strong degree of process interdependence translates into contractual or corporate interdependence.

70. Retailers face unpredictable short-term fluctuations in the short run due to several reasons (such as weather conditions etc.), and they are able to have a reliable estimate of demand quantity and price for a given day only, and only a few days in advance. For this reason, they may ask suppliers to deliver at very short notice (usually one or two days) once the demand is revealed. Prices are determined when the order is placed, depending on a consumer's (unpredictable) willingness to pay. In this context, retailers transfer demand risk onto suppliers. In fact, suppliers must be flexible in delivery, but they must buy and stock produce at harvest time. In order to manage this risk, they require farmers to accept sales with a price to be determined. In this case, a characteristic of consumer demand (unpredictability) results in a product specification (delivery on demand) which in turn gives rise to an input specification (price to be determined). The terms of contract are adjusted accordingly.

71. In addition, consumers are becoming increasingly aware of the health and environmental issues associated with produce consumption (namely, use of chemicals and residues). For this reason, retailers require compliance with strict product specifications regarding chemical residues. These specifications can only be met if agricultural production is managed accordingly. In fact, retail suppliers ask farmers to comply with strict agronomic production practices and they provide on-site agronomic advice to make sure that these practices are implemented properly. Also in this case, a key feature of the legal agreement between farmers and first buyers is the ability of farmers to rapidly and seamlessly conform to changes in specifications that are required by retailers (flexibility of the supply chain).

72. As previously noted, the UNIDROIT/FAO/IFAD LGCF focused on a small part of the value chain (see Figure 1, the dashed red line) and the focus on agricultural production contracts had several implications: (i) it limited the analysis to a bilateral agreement between a farmer and a first buyer; (ii) vertical coordination was not addressed, the organisation of the value chain (including the organisation of the first buyer) was not debated; (iii) horizontal coordination was not an issue, the fact that a first buyer may allocate interdependent tasks to several farmers was not considered (for example, producing different crops to supply a competitive mix of products to downstream buyers); and (iv) other types of arrangements, including cooperative membership or ownership integration, were not considered.

73. Taking a step further, the LSAE Guidance Document could consider the legal challenges that, for example, a group of farmers may face when they are willing to take over the role of first buyer (vertical integration) or beyond. In this case, the farmers may consider: (i) choosing a legal structure for a joint activity, this includes defining property rights, for example; (ii) defining how risks, costs and benefits may be allocated between the first buyer entity and each one of the individual farmers (e.g., how transfer prices may be determined, how the joint enterprise may be financed, etc.); (iii) setting decision-making rules (e.g., majority vote, capital shares or democratic control); (iv) deciding how disputes between members can be settled; (v) finding a way to make sure that agricultural production meets their own interests and downstream buyers' specifications.

74. During the first session of the Working Group, participants acknowledged that the rural market space is very heterogeneous. Regarding the instruments for collaboration, it was indicated that the choice between contract or ownership may depend on transaction costs and asset specificity, as well as on distributive concerns (e.g., gains and losses, allocation of risks). In addition, different market power could be a driving factor for choosing one legal structure over the other. It was argued that collaboration may be necessary among smallholder farmers specially for the purchase of inputs.

Questions for the Working Group:

- The Working Group may start focusing the analysis of the LSAE project on the production stage and then evolve to the analysis of other stages along the value chain. For instance, it may further identify the needs, benefits and hurdles for collaboration in production and how the legal forms of collaboration might help. Thereafter, the Working Group could consider identifying whether the needs, benefits and hurdles change at the processing and distribution stages.
- The Working Group may start examining the different legal forms for collaboration adopted for horizontal integration amongst farmers, then move to the analysis of legal forms for vertical integration. It may start by analysing, how horizontal collaboration takes place for raising capital, liability and governance.

C. The role of midstream agri-MSMEs in contributing to rural transformation

75. The 2021 United Nations Food Systems Summit called on the international community to engage in collaborative efforts to facilitate the transformation of the global food system into one that is more nourishing, sustainable, equitable and resilient. With 70-90% of businesses in low-income countries registered as small and medium sized enterprises, it recognised the importance of these small firms as major constituents in the production, transport, processing and retailing of food.

76. Driven by rapid urbanisation, migration, and a growing middle class, the changing global food system, particularly in developing countries, is seeing heightened attention on the middle segment of agri-food value chains and their potential role in accelerating pro-poor and sustainable growth. Despite the important role played by post-farm gate small and medium agri-food enterprises in rural transformation and rural-urban connectivity, until recently, there has been little attention paid in policy and academic circles to these businesses for developing country contexts.

77. As defined by SOFA 2021, agri-food systems have three main components: (i) primary production; (ii) food distribution, linking production to consumption through food supply chains and transport networks; and (iii) household consumption. In addition to primary producers; households, individuals as final consumers, and large agri-food companies, agri-food enterprises fall into one of the following categories; providing input supply, post-harvest, storage, transport and food processing services; food distributors, wholesalers and retailers. While agri-food MSME is a heterogeneous term, it encompasses an array of entrepreneurial activities of varying sizes and structures. At times, the same agri-food MSMEs often play the important role of supplying farm inputs, information and advisory services as well as financial services such as credit to farmers. As such, these enterprises carry a lot of responsibility and accountability for ensuring the supply of safe, nutritious and sustainably produced food for people living in rural and peri-urban communities, notwithstanding their role as suppliers of farm inputs, financial and advisory services, as well as creators of much sought-after off-farm rural jobs.

78. Agri-food MSMEs account for a major share of rural jobs, and significantly contribute to the total added value in developing countries. In the African region, about 40% of non-farm employment is in the agri-food system, and an estimated 80% of the region's processed food is produced by small and medium processors. Their contribution to rural poverty reduction is evident from the activities they undertake to connect farmers to markets, while providing employment opportunities to unskilled poor people and vulnerable groups such as women or youth.

79. Agri-food processors (small, medium and large) also play a role through a range of value-adding services beyond processing, including transportation of commodities from the farm, post-harvest quality improvement activities, and food distribution to urban centres. Typically located close to production zones, agri-food processors are also important sources of off-farm rural employment

generation, especially for young people who are more likely to seek off-farm work. In addition, the availability of foodstuffs from food processors provides alternatives for home food preparation, enabling women to dedicate more time to income generating activities for household welfare.

80. As such, these enterprises are significantly invested in rural areas, acting as a connectivity hub bridging farming communities to increasing urban demand, while also generating employment and adding domestic value to the quality and nutrition of the food supplied to the national agri-food sector and beyond. Despite the potential of agri-food-processing enterprises in developing countries, this sector encounters a number of challenges, and struggles to keep up with the rapidly changing modern agri-food system.

81. Agro-processing in developing countries can be characterised by low technical and managerial competencies, a lack of support and access to financial services, particularly in rural areas; and poor soft and hard infrastructure – all contributing to higher transaction costs and compromising firm competitiveness.

82. As retailers and consumers become increasingly stringent and discerning with respect to food safety and environmental and social sustainability standards, additional burdens are placed on smaller enterprises in the form of investments in better technology and the training or recruitment of higher skilled employees. Smallholders and agri-MSMEs may struggle to compete with increasingly high standards due to their inherently small size, lack of economies of scale, and scarce resources.

83. With a view to “leave no one behind”⁴⁸ and the right support in terms of policy, legal resources and investment, the role of agri-food MSMEs can be nudged in a direction that leads to sustainable growth in the agri-food system, while enhancing competitiveness in domestic and international markets by ensuring that: nutritional value is added to food, rather than depleted; the employment generated results in decent jobs; and the operations and technologies employed are aligned with national climate change and social goals.

84. During the first session of the Working Group, the instrumental role that agri-MSMEs play in connecting farmers to markets was acknowledged, as well as the challenges they face (e.g., their operations may be conditioned to improved infrastructure and rural financial services, including credit and other business support services). An example of a productive partnership developed in Papua New Guinea was pointed out to demonstrate the relevance of local processors and small-scale traders and wholesalers. In addition, two case studies undertaken in Benin and Malawi were highlighted to illustrate that business registration alone had a low impact on the expansion of access to formal markets and critical resources⁴⁹. An IFAD-supported Project in Lesotho was illustrated to indicate a number of common concerns among farmers and MSMEs regarding: (i) the cost of registration of enterprises; (ii) the ability to meet legal requirements (e.g., compliance with tax laws, labour laws, accounting, audits, industry standards, etc.); and (iii) the fear of disqualification from government support. Finally, another IFAD-supported Project in Rwanda for Rural Incomes through Exports (PRICE) was presented to indicate that farmer cooperatives appear to be a relevant legal entity for linking farmers to markets, including export markets. The cooperatives not only focused on providing access to input for production, but also engaged in processing and in obtaining certification.

85. The Working Group noted that the rural market space where smallholders operate is heterogeneous and recognised the complementary and contradictory functions that agricultural enterprises may exercise at the same time (e.g., a producer may simultaneously be an input provider and a consumer depending on the perspective of analysis). Preliminary views were exchanged within the Working Group regarding the formal and informal dimensions of actors operating in the agri-food

⁴⁸ For more information see the [UN Food Systems Summit website](#), in particular Action Track 4 – Advance Equitable Livelihoods.

⁴⁹ [UNIDROIT 2022 - Study LXXXC – W.G.1 – Doc. 3](#), para.43-44.

supply chain⁵⁰. It was noted that formalisation of agricultural enterprises also created risks and pushed some actors out of business. Therefore, the Working Group agreed not to address formality as inherently beneficial and to emphasise the need to consider both the advantages and disadvantages of formalisation. It was suggested to include some caveats in the LSAE Guidance Document to clarify that it would not advocate for formality or informality and would indicate their different meanings. However, the Working Group could privilege developing the LSAE Guidance Document in a manner that supports formalisation in malfunctioning markets, where informality is a leading driver of the dysfunctionality.

86. The Working Group also discussed the definition of the term “missing middle” or “hidden middle”, noting that the definition of agri-MSMEs varied between countries but was generally accepted to refer to those actors that operate close to the farm gate and are made up of agro-dealers, truckers, processors, wholesalers and street vendors, among others. These smaller actors are generally involved in the transformation process of the agri-food systems. A case from Senegal illustrated the links between the various components of an agri-food processor including procurement, finance, operations, human resources and management, as well as marketing and sales and the impact of these components on various aspects of rural and urban development.

Questions for the Working Group

- The Working Group is invited to further reflect on the target audience of the Guidance Document (smallholders and agri-MSMEs). The Working Group may consider to focus on formal or semi-formal agricultural enterprises.

D. Multiparty contracts for collaboration in agri-food supply chains⁵¹

87. Contracts play an important role in the coordination and integration of actors in agri-food supply chains as well as in corporate governance. Contracts are important because they sustain and structure agricultural value chains; coordinate diverse economic activities by linking input suppliers to producers, all the way to end buyers; and distribute risks and rewards among value chain actors. Contracts often also define obligations and standards on issues such as farming techniques, technology and product quality.

88. Contracts may be used to specify the internal organisation and management of the agricultural enterprise in detail (e.g. membership, representation, decision-making process, form of management, share of profits and losses, exclusion and withdrawal of a party, transfer, termination, dispute resolution, etc.). From an external point of view, associative contracts may also be important instruments to facilitate commercial cooperation and cross-border trade relationships. The LSAE Guidance Document could cover the basic terms, general principles, and guidelines that might be addressed in these contracts, including information on how contracts can be designed to assist smaller enterprises in contract-makers rather than just contract-takers.

89. Contracts vary substantially depending on whether we consider global value chains as either highly formalised chains led by major agribusinesses, or in terms of the realities of the vast majority of small-scale farmers that operate in local and often more informal markets. Approaching agricultural enterprises from the perspective of smaller enterprises, rather than a lead firm, could therefore give rise to a different set of contractual issues. Contracts also vary depending on commodities, jurisdictions, social contexts and the value chain segment they refer to.

⁵⁰ [UNIDROIT 2022 - Study LXXXC – W.G.1 – Doc. 3](#), para.49-52.

⁵¹ The issues raised in this section should be considered in conjunction with the “Draft Discussion Paper on Multiparty Contracts” prepared by the Coordinator of the LSAE project, Professor Fabrizio Cafaggi and Working Group Members Professors Paola Iamiceli and Matteo Ferrari.

90. Many other guidance documents have focused on certain types of contracts, such as contract farming arrangements. Less guidance is available on the wider range of multiparty contracts that cover provisions of inputs, technology, intellectual property, finance, insurance, and sales combined under the same contractual arrangement.

91. In order to understand and improve multiparty contractual arrangements, it is important to not only look at contracts between farmers and their immediate buyers, but at the whole contracting chain. In this sense, the LSAE Guidance Document could helpfully take a more holistic approach to contract issues in agri-food supply chains – perhaps by focusing on overarching principles concerning the role contracts play in coordinating value chains, more than on detailed guidance about specific contractual provisions. These issues primarily relate to coordinating sets of private contracts, so the private law dimensions are central, though there are also links to public governance, for example as regards to anti-trust legislation, where asymmetries in market power originate from concentration in certain segments of the chain.

92. Contractual issues may often relate to the process through which contracts are developed and implemented. Determining which contracting party has decision-making capacity over a particular issue, and at which stage, can thus ultimately affect smaller enterprise's ability to shape contractual terms. Therefore, it may be helpful to consider matters related to processes and power distribution in relation to both contract development and contract formalisation initiatives.

93. Unlike the bilateral contractual relationships addressed in the LGCF (agricultural production contracts), the LSAE Guidance Document could cover different contractual arrangements established in the case of integrated relations, where a legal dependency among contracting parties is created and they form one single legal entity. In this context, it is important to pay attention to how the balance between the different contracting parties is maintained. The major risk may be that smaller producers and agri-MSMEs lose any real power they may have if a joint or common venture is created with a more powerful party, which may essentially dictate the course of action. Therefore, the LSAE Guidance Document might address issues related to ownership and proprietary rights so as to point out best contractual practices to regulate the operation of the business (e.g., proprietary rights over assets of the business), as well as to analyse the question of ownership of assets within a corporate structure.

94. When collaboration takes place within multiparty contracts or linked bilateral contracts, liabilities may be allocated in different ways depending on the applicable law and possible agreements among the parties. In this sense, the LSAE Guidance Document could consider good practices to address risk-sharing issues (e.g., debts and losses) and differentiate any liabilities (e.g. non-compliance of the producer with social and environmental standards and how personal assets should be protected from farm business liabilities). Good practices could be distinguished depending on whether cooperation occurs within multilateral or linked bilateral contracts.

95. During the first session of the Working Group, participants discussed the notion of interdependence and interconnectedness in the chain of contracts with terms cascading down from one contract to the other. One of the problems identified was the lack of effective coordination in the value chain, in the alignment of different contractual requirements, such as pricing standards, delivery, product specification, force majeure, etc. Moreover, distributive dimension problems had also been identified, in particular in terms of distribution of benefits, costs and risks. Therefore, the coordination of the different levels of interdependent contracts was pointed out as a key issue to be analysed in the LSAE project.

96. While recognising the collaborative role that contracts may play in regulating forms of collaboration within agri-food supply chains, some participants of the Working Group recommended that it be taken into account that most farmers do not operate on the basis of formalised contractual arrangements. Informal spot transactions and verbal contracts tend to dominate trade of many

agricultural commodities in both local, national and even regional markets. Therefore, it was suggested not to look at one legal structure in isolation and to consider the issue of collaboration and interlinkages between different legal forms, for instance, between creating cooperative and contractual arrangements for finance. The Working Group agreed to further discuss how much emphasis would be given to the contractual instrument in the LSAE Guidance Document as contracts may not cover a number of the socio-economic relationships that are undertaken within the smallholder and agri-MSMEs sphere.

Questions for the Working Group

- The Working Group is invited to further discuss the definitions of multiparty contracts.
- The Working Group may consider discussing the distinctions between horizontal and vertical multiparty contracts and how they differ depending on the nature of participants.
- The Working Group is invited to discuss the formation, governance of entry, and form of the multiparty contracts, as well as the contractual content.

E. Agricultural cooperatives and corporations for collaboration in agri-food supply chains⁵²

97. Depending on their activity, smallholders and agri-MSMEs may be part of multiple corporate governance structures. Different parts of the agri-food supply chain may require the establishment of different legal entities (e.g., cooperatives or corporations, non-profit or for-profit organisations, limited liability organisations, community interest corporations or joint-ventures agreements). Organisational coordination is difficult as the two primary types of enterprises (capital-centred and person-centred) have different purposes and objectives. Capital-centred enterprises, such as stock companies, are investor driven and supposed to produce shareholder value, whereas person-centred enterprises, such as cooperatives, are driven by member needs and are supposed to produce member value.

98. The different forms of collaboration promoted by cooperatives and corporations could be considered in the LSAE project. An efficient and effective collaboration within the value chain would depend on how these legal structures address complex and diverse situations, such as the: (i) diversity of activity (production, transformation and processing); (ii) degree of integration (operational or organisational); (iii) degree of heterogeneity of the participating entities; and (iv) participants' interests and value chain purpose. Collaboration through cooperatives and corporations in the value chain could take form, for example, through aggregation of capital and human resources.

99. Corporations are characterised differently in each country, for example, in the United States, a corporation is characterised by legal personality, asset partitioning to either limited liability for stakeholders or entity shielding for the corporation, transferability of ownership interest, delegated management and investor ownership. The agency costs associated with collaboration in corporations could be minimised through structures which relate to formalities in the corporation; fiduciary duties on directors and managers to ensure that they act in the interest of stakeholders; and disclosure obligations through securities obligations.

100. Agricultural cooperatives may form agri-food supply chains of their own, but generally they integrate into chains composed of other types of enterprises that lead the development and purpose of global value chains. When further discussing the correlation between corporations and cooperatives, the Working Group may consider whether limited liability, transferable ownership interests and legal personality constitute the key similarities between corporations and cooperatives

⁵² The issues raised in this section should be considered in conjunction with the Summary Reports of the second and third intersessional meetings, held on 22 September 2022 and 30 September 2022.

and whether the two entities differ in terms of voting systems, organisational purpose, and access to capital markets.

101. During the intersessional meetings, it was noted that cooperatives could transition to a corporate model after a certain level of growth, however this could result in certain members losing unique social benefits. Participants also pointed out that it may be necessary to consider competition law and antitrust law as instruments capable of levelling the playing field between parties with unequal bargaining power.

Questions for the Working Group

- The Working Group is invited to further discuss the definitions and main features of corporations and cooperatives, as well as to outline the drivers of aggregation through cooperatives and corporations and to explain the differences between aggregation among producers and aggregation between producers, processors and distributors (e.g., is aggregation primarily a process to achieve economies of scale in production or a necessity to integrate production, processing, and distribution).
- The Working Group may wish to further discuss the governance structure and voting system of cooperatives, namely when there are multiple members, for instance, farmers, processors and distributors.
- The Working Group may wish to further consider the concept of limited liability in agriculture and the extent to which the choice between the limited or unlimited liability of a collaborative entity should reflect whether it is composed of both individuals and corporations.

F. Exogenous factors' impact on collaboration of agricultural enterprises: sustainability, digital technology, finance and insurance

102. The different exogenous factors described below (sustainability, digital technology, finance and insurance) may have an impact on the functioning of agricultural enterprises by shaping their objectives, activities, internal structure and how they relate to other players of the agri-food supply chain. These factors can either accelerate or slow down some of the dynamics of collaboration envisaged in the LSAE project, as well as may entail an additional set of challenges in terms of skills and know-how that smallholders and agri-MSMEs may need to develop to become active players in, and not passive receivers of, such transformations. In turn, these factors determine both modifications in the structures and operations of agricultural enterprises and the emergence of new business models⁵³.

Sustainability

103. The level of impact of sustainability requirements on the functioning and structure of agricultural enterprises depends on the relationships that the latter have with public bodies and financial investors. Because of the specific risks that farmers face, they may benefit from financial systems and *ad hoc* systems of public subsidies conditioned to the achievement of sustainability goals⁵⁴ such as those proposed by the UN 2030 Agenda for Sustainable Development⁵⁵.

104. During the first session of the Working Group, participants acknowledged that the legal structure of agricultural enterprises could have implications for sustainable development outcomes,

⁵³ European Parliament Research Service, Precision Agriculture and the Future of Farming. Scientific Foresight Study, December 2016, 34.

⁵⁴ See EU Commission, Farm to Fork Strategy, 20 May 2020, COM/2020/381 final, 16.

⁵⁵ United Nations General Assembly, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

particularly SDGs 1 (No poverty), 2 (Zero hunger); 5 (Gender equality); 8 (Decent work and economic growth); and 12 (Responsible consumption and production). The Working Group discussed how sustainability is increasingly becoming an opportunity for market opportunities and innovation rather than a barrier to access supply chains. The discussion initially focused on the new types of markets and increasing interdependence among supply chain actors, as well as how legal structures of agricultural enterprises had been affected by sustainability requirements, consumer expectations and the use of Environmental, Social and Governance (ESG) standards. It was generally accepted that agricultural enterprises cannot solely focus on environmental dimensions when working towards sustainability, but must also consider socio-economic, nutritional and social justice perspectives.

105. It was suggested that the LSAE Guidance Document could provide a range of legal instruments to assist smallholders and agri-MSMEs to address sustainability challenges, from both the institutional, organisational and transactional perspective by considering: (i) the role of cooperatives, networks and clusters to support compliance with sustainability standards and (ii) the role of contracts to fairly distribute the allocation of costs of compliance.

Digital technologies

106. Digital technologies can lead to a higher degree of integration within agri-food supply chains. In some cases, digital technologies are increasing the level of vertical integration among agri-food chain actors, along the lines of 'traditional' integration, with a chain leader exercising pressure, directly or indirectly, to adopt some form of digitalisation. In other cases, however, an increase in the level of horizontal cooperation may be identified, with the aim of optimising the production line (e.g., for the reduction of waste or to offer benchmarking services). This trend has an impact on the structure of agricultural enterprises from both an internal and an external perspective. Internally, it determines better management of some of the risks that are specific to the agri-food sector, while at the same time also causes a compression of the farmers' degree of autonomy. From an external perspective, agricultural enterprises become one of the nodes of a complex web in which information is collected, stored and processed with significant implications in terms of procurement processes, traceability and business development models. The following issues warrant further analysis by the LSAE project.

Data as a new production factor

107. Along with the inputs that are traditionally employed in the agri-food supply chain (seeds, agrochemicals, fertilisers, agricultural machinery), data is gaining importance as a new production factor capable of changing the structure and operational routines of agricultural enterprises. This is due to the fact that farming is becoming increasingly reliant on the digitisation of data and the digitalisation of its processes and operations. The digital transformation underway in the agricultural sector increasingly involves the generation of huge volumes of data, which can be stored and shared among different stakeholders, such as providers of agricultural services, farmer cooperatives, public bodies, etc. Like in other economic fields, agri-food related data is also becoming an increasingly precious asset that must be processed at an aggregated level in order to fully exploit the potential interconnections that can be generated. Within this scenario, big data analytics represent a way of developing new products and services that can make the agri-food supply chain safer, more secure, sustainable and efficient.

108. The degree of freedom that agricultural enterprises enjoy increasingly depends on the amount of control that can be exercised over data. If the control on data is placed outside the agricultural enterprise, the enterprises' autonomy will be more limited. The question of data control is therefore crucial from a legal standpoint. The first, basic question in this regard concerns who should retain control over the data generated by digital technologies employed in the agri-food sector. There are at least three different subjects to be considered: farmers; suppliers of digital services; manufacturers of agricultural equipment. In the case of control over data, farmers seem to

represent the most natural option, since data originates from within their range of activities⁵⁶. Nonetheless, at the same time, farmers may receive data that has been processed by the providers of digital services, which can be deemed as qualitatively new *vis à vis* the raw data that the farmers provided in the first place.

109. The role played by the manufacturers of agricultural equipment further highlights the importance of technology as an apparatus to *de facto* control data (for example by limiting data portability). In addition to the question of who can be identified as the data holder, a further issue concerns the kind of legal framework to be used for controlling access to data. Different solutions have been explored, ranging from patents for algorithms to copyright and/or patents for software, from trade secret protection to the *sui generis right* for data banks, from the creation of a new right of data ownership to the implementation of an open data environment⁵⁷. All of these potential solutions have significant limitations and are only applicable to a limited extent. According to a recent paper, the United Nation Development Programme appears to suggest that open approaches (open data; open-source software; open standards) can favour the adoption of digital technologies in developing countries⁵⁸.

Digital platforms

110. Digital platforms are reshaping business models, as well as supply and value chains. Platforms allow all the different actors to interact and form legal relationships with one another on both a horizontal and vertical basis. Many of the existing digital platforms do not interfere with farming operations as they simply showcase the products for sale.

111. While platforms create organisational models that may be regarded as economic units in the market, generally they are not incorporated companies but rather private contractual systems. The platform may provide the terms and conditions that will regulate users' dealings on the platform, with the platform operator supervising compliance of those rules and overseeing dispute resolution to promote trust in the market. Therefore, platforms can simultaneously operate in a regulatory and transactional capacity, and may be characterised as a centralisation model based on contracts, with the centralisation feature distinguishing them from other models such as distributed and decentralised models (Distributed Ledger Technologies and blockchain). The legal analysis of the centralisation model would require the identification of the platform's operator to determine who is in charge of regulating and managing the platform.

112. Some technologies, such as platforms, may simultaneously offer both integration and cooperation functions. In addition, the possibility to market products through digital platforms may exclude or reduce the role of some traditional intermediaries while allowing new intermediaries to emerge, such as digital service providers. Therefore, digital platforms have the potential to disintermediate the actors operating within the agri-food supply chain. The question is if disintermediation is modifying the instruments of collaboration. Traditionally, most of the focus has been on the integration between farmers and processors/distributors. Some examples in the digital realm also show an increasing integration between input providers and farmers. In some instances, this integration has been facilitated by smart farming technologies. The question, therefore, is if such processes impact the agricultural enterprises' structure, for example, favouring the creation of cooperatives and/or the emergence of new digital intermediaries that directly connect input providers

⁵⁶ See COPA-COGECA, EU Code of Conduct on Agricultural Data Sharing by Contractual Agreement, 2017, 8, available at: <https://eudatasharing.eu/node/736>.

⁵⁷ J. DREXL, *Designing competitive markets for industrial data – Between proprietisation and access*, Max Planck Institute for Innovation and Competition Research Paper No. 16-13, 2016, 24, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862975; C. ATIK, B. MARTENS, *Competition Problems and Governance of Non-Personal Agricultural Machine Data: Comparing Voluntary Initiatives in the US and EU*, in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2021, 3, 370.

⁵⁸ United Nation Development Programme, *Precision Agriculture for Smallholder Farmers*, cit., 78.

and farmers. There may be instances, where rather than forming a cooperative, groups of farmers may join a platform and the platform may provide a mechanism that enables joint sales directly to larger distributors who are also platform users. This type of arrangement could feature a multiparty contract. With regards to digital platforms, the Working Group could further consider the bargaining power of parties on online platforms and how the use of platforms in agri-food supply chains may impact a farmer's economic position and the distribution of benefits.

Digital farming: prescriptive and precision agriculture

113. The adoption of digital technologies in agriculture might reduce the amount of freedom farmers have in conducting their activities, and some of the functions that are traditionally performed within the enterprise's structure might be outsourced via digital services⁵⁹. In the case of prescriptive agriculture, the farmer might be unable to control which inputs to employ, having been supplanted by the provider of precision agriculture technologies. Farmers might become passive receivers of instructions that are then implemented by machines, almost suppressing any autonomy they have.

114. Precision agriculture is the most promising application of digitisation and big data analytics in the agri-food domain, and the most widely considered by policymakers, industry and academic researchers. Precision agriculture has been defined as "a farming management concept based upon observing, measuring and responding to inter and intra-field variability in crops or in aspects of animal rearing"⁶⁰; it has also been described as a "a set of technologies that combines sensors, information systems, enhanced machinery, and informed management to optimise production by accounting for variability and uncertainties within agricultural systems" in order to "apply the right treatment in the right place at the right time"⁶¹. The combination of data from different sources (field sensors, drones, satellites, tractors, robots, etc.) and algorithmic processing makes it possible to optimise farming operations by, for example, reducing the use of agrochemicals, harvesting a crop at the best time, and using the right quantity of water for irrigation.

115. While the adoption rate seems to be growing, the percentage of farmers that employ some form of precision agriculture applications is still limited, which is leading policymakers to propose strategies to increase the numbers⁶².

116. A significant driver to increase investments in precision agriculture applications is represented by the existing complementarities between traditional inputs and digital farming. This is the case, for example, of field sensors capable of collecting data on the mineral deficits in the soil or the level of water stress in a plant; these data sets can be processed through a software which then sends instructions to tractors specifying the kind of fertiliser to be used or the quantity of irrigation necessary. Artificial Intelligence, the Internet of Things, and Big Data are expressions that will become more and more frequently employed in the agri-food domain. The transition towards a sustainable agricultural system itself, which represents the main goal around which to build the future of the sector, is frequently linked to the development of a digital agri-food chain. These trends imply

⁵⁹ See the example reported in EIP-AGRI Seminar Report, *Data revolution: emerging new data-driven business models in the agri-food sector*, 22-23 June 2016, 11, available at: https://ec.europa.eu/eip/agriculture/sites/default/files/eip-agri_seminar_data_revolution_final_report_2016_en.pdf.

⁶⁰ JRC, *Precision Agriculture: An Opportunity for EU Farmers – Potential Support with the CAP 2014-2020*, European Union, 2014, 11, available at the URL: http://www.europarl.europa.eu/ReqData/etudes/note/join/2014/529049/IPOL-AGRI_NT%282014%29529049_EN.pdf.

⁶¹ R. GEBBERS, V.I. ADAMCHUK, *Precision Agriculture and Food Security*, in *Science*, vol. 327, issue 5967, 2010, 828.

⁶² This is the case of the European Union. The Farm to Fork Strategy foresees investments within the Common Agricultural Policy to facilitate the adoption of precision agriculture: EU Commission, *Farm to Fork Strategy*, 20 May 2020, COM/2020/381 final.

the need to enlarge the notion of inputs by including data as both a valuable asset for both private operators, public bodies and society at large, as well as an important factor for rural development.

117. Digital farming is usually associated with the pursuit of four main goals: (i) cost reduction, due to a more efficient use of (human, natural, man-made) resources; (ii) environmental protection, due to the more precise application of production factors; (iii) higher productivity in the field associated with a reduction of agri-food loss; (iv) better logistics due to the adoption of automated systems that can improve traceability and the performance of pre- and post-harvest operations, including distribution. These goals are capable of transforming the existing legal structures of agricultural enterprises since the digitisation processes will require not only significant (private and public) investments, but also a different approach to the way enterprises function internally and collaborate with other market participants.

118. For example, the Dutch sugar cooperative Cosun has developed a software through which “farmers can register their field data to then receive management tips and benchmarking data. At the same time, the cooperative uses this data to organise its logistics, production planning and its marketing (as it can provide its clients with sustainability data)”⁶³. In this example, the software has been developed internally by the cooperative under the pressure of the food and drink industry which is asking its suppliers to develop a sustainable supply chain. In other cases, companies rely on technology and software provided by a third party. For example, the Abaco group offers services that range from geo-spatial information related to plots to the collection of data on the field, from the control of the production costs for each plot and crop to the application of agronomic protocols⁶⁴. Processors, such as Ferrero and EcorNaturaSi⁶⁵, for example, resort to these services to better manage their supply chain, coordinating the different players and providing them with support and instructions to meet the desired production requirements.

119. A specific issue that frequently emerges in the management of the supply chain is the need to guarantee an adequate level of traceability of the materials employed in production processes. Global Positioning System (GPS) technology, monitoring sensors, and databases can be used to improve the traceability within the entire supply chain. All this information, which is partly collected through sensors and other devices, may be used to guarantee the origin, safety and sustainability of agricultural products.

120. The Working Group may consider analysing how the increasing use of these digital technologies impacts smallholders and agri-MSMEs to further evaluate how they have improved the level and intensity of collaboration (horizontally and vertically). For example, the Working Group is invited to discuss the role that cooperatives play for the adoption of digital technologies by farmers in developing countries⁶⁶.

Finance

121. Financial systems are increasingly developing frameworks for green finance, which consists of investing financial resources in economic activities that meet given environmental and social requirements⁶⁷. In these cases, it is important to measure the sustainability performance of agricultural enterprises. As further described below, ongoing digitisation processes and, in particular,

⁶³ EIP-AGRI Seminar Report, Data revolution: emerging new data-driven business models in the agri-food sector, cit., 10-11.

⁶⁴ See <https://www.abacogroup.eu/en/products/abacofarmer.html>.

⁶⁵ See <https://www.agrifood.tech/precision-farming/abaco-partecipa-alla-costruzione-di-un-futuro-piu-digitale-e-sostenibile/>.

⁶⁶ United Nation Development Programme, *Precision Agriculture for Smallholder Farmers*, Singapore 2021, 75, available at: <https://www.undp.org/sites/g/files/zskgke326/files/2021-10/UNDP-Precision-Agriculture-for-Smallholder-Farmers.pdf>.

⁶⁷ N. Batini, *Transforming Agri-Food Sectors to Mitigate Climate Change: The Role of Green Finance*, in *Vierteljahrshefte zur Wirtschaftsforschung*, 2019, 88, 7.

precision agriculture applications, can be a crucial way to provide data on the environmental performance of farmers and farming operations. It is therefore expected that such technological developments could have a meaningful impact on agricultural enterprises, both in terms of their structure and their financial sustainability. Precision agriculture technologies can help achieve the environmental requirements that are imposed by public aid systems and/or by private investors, for example, by preventing water loss in irrigation and reducing the use of agrochemicals, etc.

122. While these dynamics may be seen as favourable in terms of environmental policy and sustainable use of public and private resources, they may also represent a risk for farmers especially (but not only) in developing countries, since they might lack the resources and infrastructure to take part in these processes.

123. During the first session of the Working Group, participants discussed good practices to increase accessibility to critical financial resources. They considered how producers may transition to more formal enterprises in an inclusive way, by considering climate adaptation finance⁶⁸. In addition, during the third intersessional meeting, it was noted that to understand the impact finance has on the legal structure of an agricultural enterprise, it is important to determine whether the agricultural enterprise operates for production or post-harvest purposes as agricultural enterprises involved in primary production are seen as riskier to provide credit to than those dedicated to food processing, logistics and storage. It seems that lenders are less concerned with the legal structure of the agricultural enterprise and more focused on its formality, as informal organisations are less likely to provide financial statements and a business plan nor are they likely to have assets to pledge as collateral. Further, ordinarily lenders are more likely to provide short-term loans (under a year) for working capital rather than long-term financing as the maturity of those loans carries greater risk. The specifics of the legal and tax environment in which agricultural producers operate have significant bearing on whether they are able to obtain loans for machinery, particularly if the jurisdictions' regime allows leasing solutions for equipment.

124. The participants noted the need to explore innovative approaches to financing primary producers that go beyond the use of State programs. The participants discussed that many small farmers are unable to access credit since they are cash-based businesses. For a financial institution, it was noted that it is difficult and costly to lend to individual farmers but easier to lend to a group of individuals as a legal entity. Three forms of aggregation exist; (i) aggregation of agricultural products; (ii) aggregation of the producers themselves; and (iii) aggregation of assets. Assets can be pulled together and used for securitisation which can include aggregation of accounts, receivables or invoices, and warehouse receipts.

125. The volume of the businesses operations is also an important factor to consider. Farmers' data is important for traceability and for opening up development programs and opportunities. Digitisation of data may also contribute to access finance, as digital data information could be extracted in real time thus making it possible to reach small farmers.

Insurance

126. The interplay between sustainability, digital technologies and insurance can represent both an opportunity and a risk for smallholders and agri-MSMEs. While smallholders and agri-MSMEs may benefit from having greater access to more effective insurance services that are better tailored to their needs, they may also be discriminated against because they face higher risks than other enterprises and/or because they do not have the resources and infrastructure to subscribe to these new types of insurance policies.

⁶⁸ [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 3](#), para. 10.

127. The Working Group has not yet discussed this topic, but it may be important to reflect on whether, for example, the data that digital farming applications generate constitute an important reservoir for assessing risks and, therefore, for calculating premiums, measuring damages, and setting indemnities⁶⁹. For example, the challenges related to climate change mitigation and adaptation may exacerbate some of the risks that the agricultural sector faces, placing insurance companies under additional stress and making it more difficult to calculate risks and predict their exposure. This is one of the reasons why insurance premiums have increased globally⁷⁰. Precision agriculture might partially change this scenario, allowing insurance companies to better assess premiums and/or to reward farmers who adopt digital applications, for example by offering discounts.

⁶⁹ S. BAROCAS, K. LEVY, A. MATEESCU, *Reap What You Sow? Automation, Information, and Economic Distribution on the Farm*, 2019, 7-8, available at: https://robots.law.miami.edu/2019/wp-content/uploads/2019/03/BarocasLevyMateescu_WeRobot.pdf.

⁷⁰ L. PORTH, K. SENG TAN, *Agricultural Insurance. More Room to Grow?*, in *The Actuary*, 2015, 35, 36.