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

Second session (hybrid)
Rome, 8 – 9 May 2023

UNIDROIT 2023
Study LXXXC – W.G.3 – Doc. 2
English only
May 2023

ISSUES PAPER

1. The development of the Legal Structure of Agricultural Enterprises project (hereinafter the LSAE project) began during the 2020-2022 UNIDROIT Work Programme and was extended at high-priority level to the 2023-2025 Work Programme. This project constitutes the third joint project developed in partnership with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD); it is a follow-up from the [Legal Guide on Contract Farming](#) (finalised in 2015) and the [Legal Guide on Agricultural Land Investment Contracts](#) (finalised in 2020).

2. This document provides an update on the progress carried out by the Working Group established in 2022 and the three informal Subgroups that were created in 2023 after the second session of the Working Group. It sets out various issues that the Working Group may wish to consider, during its third session on 8-9 May 2023. This document retains a revised version of the Issues Paper discussed during the first and second sessions of the Working Group, respectively held on 23-25 February 2022 ([Study LXXXC - W.G.1 - Doc. 2](#)) and on 2-4 November 2022 ([Study LXXXC – W.G.2 – Doc. 2](#)). The issues considered in this document were identified by:

- the UNIDROIT Secretariat, in collaboration with FAO and IFAD representatives;
- the participants in a Consultation Webinar co-organised by UNIDROIT, IFAD and FAO on 14–15 April 2021;¹
- the Members of the UNIDROIT Governing Council;²
- the Working Group members and observers;³ and
- the participants and Co-Chairs of Subgroups during the intersessional meetings.

3. This document is not intended to provide an exhaustive list of the issues to be covered in the international instrument providing guidance on Legal Structure of Agricultural Enterprises. Rather, its purpose is to provide a description of some of the issues already discussed and questions to guide the discussion of the Working Group during its third session. This document is divided into two main sections: (i) preliminary matters and (ii) issues related to the scope of the guidance instrument.

¹ The [Summary Report](#) of the Consultation Webinar is available on UNIDROIT's website and a [video](#) recording of both days of the Consultation Webinar is available on UNIDROIT's YouTube channel.

² All Governing Council documents related to the LSAE project since 2020 are available at: <https://www.unidroit.org/meetings/governing-council/>.

³ Summary Reports of the first and second Working Group sessions are available at the LSAE project website: <https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/>.

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I. PRELIMINARY MATTERS

A. Background of the project

4. UNIDROIT's work in the field of Private Law and Agricultural Development began in 2009, when the Governing Council and General Assembly agreed that UNIDROIT's broad mandate gave the Institute a wide range of opportunities to contribute to the Sustainable Development Goals (SDGs) and to create new synergies with other Rome-based intergovernmental organisations, in particular those focusing on agricultural development.⁴

5. In 2011, the UNIDROIT 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 agriculture.⁵

6. 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 and adopted in 2020.

7. In light of the finalisation of the agricultural land investment contracts project, the UNIDROIT Governing Council, during its 98th session,⁶ reassessed the future areas of work in the field of Private Law and Agriculture Development and recommended 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 priority.⁷

8. As a first step, the UNIDROIT Secretariat analysed the existing international initiatives to avoid overlap and duplication of previous efforts⁸. It submitted a feasibility study⁹ 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 conduct.¹⁰

9. 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

⁴ For more information see: [UNIDROIT 2009 – C.D. \(88\) 17](#), para. 88 and [UNIDROIT 2009 – C.D. \(88\) 7. Add.6](#).

⁵ The Acts of the Colloquium were published in the [Uniform Law Review](#), Oxford University Press, Volume 17, Issue 1-2 (2012).

⁶ [UNIDROIT 2019 – C.D. \(98\) 14 rev.2](#), paras. 78-82.

⁷ [UNIDROIT 2019 – A.G. \(78\) 12](#), para. 51.

⁸ For more information on the relationship between the LSAE project and other international initiatives, as well as a description of international instruments that should be taken into account by the Working Group when developing the guidance document see section E of the Issues Paper prepared for the first Working Group session [UNIDROIT 2022 – Study LXXXC – W.G.1 – Doc. 2](#), paras. 24-31.

⁹ [UNIDROIT 2020 – C.D. \(99\) B.5](#).

¹⁰ Committee on World Food Security (CFS), [Principles for Responsible Investment in Agriculture and Food Systems](#) (2014), paras. 50-52.

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 to be addressed in the prospective guidance instrument.¹¹

10. The conclusions and recommendations of the Consultation Webinar were presented to the Governing Council at its 100th session (22-24 September 2021), which endorsed the LSAE project and upgraded its priority to high.¹²

11. 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 instrument. The Governing Council recommended maintaining the high priority level of the LSAE project in the 2023-2025 Work Programme.¹³ In November 2022, during the second session of the Working Group, further progress was made in defining the scope, taxonomy and content of the prospective guidance instrument.

B. Organisation of the work

1. Composition of the Working Group

12. Consistent with UNIDROIT's established working methods, the Secretariat set up a Working Group in 2022, 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. As at 26 April 2023, the Working Group is composed of nine members. Additional members may be invited in the future.

13. The Working Group is chaired by Governing Council Member Justice Ricardo Lorenzetti (Supreme Court of Argentina) and coordinated by Professor Fabrizio Cafaggi (Judge at the Council of State of Italy and Professor at the University of Trento and LUISS, Rome). The Working Group also includes representatives of the legal departments of FAO and IFAD, as well as technical experts from other departments, such as FAO's "Agrifood Economics Division" and "Food Systems and Food Safety Division" and IFAD's "Research and Impact Division" and "Inclusive Rural Finance, Markets and Value Chains Division".

14. A significant number of observers, representing international and regional intergovernmental organisations, farmers associations, non-governmental organisations, and the private sector have also been invited to join the Working Group. Observers 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 ensures that different regional perspectives are taken into account in the development of the instrument. Such organisations also channel relevant input from experts with a specialised background, 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 instrument once it has been adopted.

15. In addition, within the framework of a Chair Programme in the field of private law and sustainable agricultural development supported by the Directorate General for Development Cooperation (*Direzione Generale per la Cooperazione allo Sviluppo* - DGCS) of the Italian Ministry of

¹¹ 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 [UNIDROIT 2021 – C.D. \(100\) B.24](#), para. 80.

¹³ [UNIDROIT 2022 – C.D. \(101\) 21](#), paras. 234,247.

Foreign Affairs and International Cooperation (*Ministero degli Affari Esteri e della Cooperazione Internazionale* - MAECI), a senior researcher joined the Secretariat and the Working Group in November 2022 to assist with the development of the LSAE project.

16. The complete list of members and observers of the LSAE Working Group is available on the [LSAE project's dedicated website](#).

2. Methodology and timeline

17. Under the guidance of the Chair of the Working Group, UNIDROIT Governing Council Member, Justice Ricardo Lorenzetti, the Working Group undertakes its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT's practice, in principle the Working Group has not adopted any formal rules of procedure and seeks to make decisions through consensus. Meetings are held in English without translation.

18. The Working Group generally meets twice a year (for two or three days) in Rome (Italy) at the seat of UNIDROIT. Remote participation is possible, although experts are expected to attend in person if circumstances permit.

19. After each session of the Working Group, the Secretariat shares the draft summary report with all participants on a confidential basis, for internal purposes of the Working Group only. A separate, high-level summary of the sessions are published on the LSAE project's dedicated website (<https://www.unidroit.org/work-in-progress/legal-structure-of-agri-enterprise/>).

20. Regarding the anticipated timeline for the development of the LSAE project, the Secretariat has proposed to carry over the activities concerning the LSAE project to the new Work Programme 2023-2025¹⁴. The tentative calendar envisages the preparation of the draft instrument over six in-person sessions during 2022-2024, followed by a period of consultations before submitting the complete draft for adoption by UNIDROIT, FAO, and IFAD in 2025.

C. Working Group sessions and Intersessional work

1. First Working Group session (23 – 25 February 2022)

21. The first session of the LSAE Working Group took place in a hybrid format, in Rome at the seat of UNIDROIT and via videoconference, from 23 to 25 February 2022. The Working Group was attended by 40 participants who were welcomed by opening remarks from UNIDROIT Deputy Secretary-General Professor Anna Veneziano, FAO Legal Counsel Ms Donata Rugarabamu, and IFAD's General Counsel Ms Katherine Meighan. The discussions were guided by an Issues Paper ([Study LXXXC – W.G. 1 – Doc. 2](#)) prepared by the Secretariat in collaboration with FAO, IFAD, and a number of members of the Working Group.

22. As further detailed in the Summary Report of the Working Group's first session ([Study LXXXC – W.G. 1 – Doc. 3](#)), among other topics, participants discussed: (i) the issue of formality and informality of actors operating in the value chain; (ii) the realities and challenges faced by actors operating in the midstream segment of the agri-food supply chain, beyond the "production stage" and in low- and middle-income countries; (iii) issues relating to market structure and coordination; and (iv) the digital transformation underway in the agri-food sector and how it affects the internal and external functioning of agricultural enterprise.

¹⁴ [UNIDROIT 2022 – C.D. \(101\) 4 rev.](#), paras. 31-34.

23. 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 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.

24. 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.

25. 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 March and November 2022, nearly all Working Group members and observers were involved in an intense working schedule. Three intersessional meetings were organised: (i) the first intersessional meeting took place on 16 June 2022 and focused on approaches to gather empirical evidence for the LSAE project; (ii) the second intersessional meeting took place on 22 September 2022 and focused on agricultural cooperatives; and (iii) the third intersessional meeting took place on 30 September 2022 and focused on corporations, digitalisation and access to credit and financing.

2. Intersessional work (April – November 2022)

26. 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).

27. 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.

28. 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.

3. Second Working Group session (2 – 4 November 2022)

29. The second hybrid session of the Working Group was held in Rome and remotely, between 2 and 4 November 2022. The Working Group was attended by a total of 44 participants, and the discussions during this session were guided by a Revised Issues Paper ([Study LXXXC – W.G.2 – Doc. 2](#)). The Summary Report of the second session is available in [Study LXXXC – W.G.2 – Doc. 3](#).

30. During the second session, participants further explored (i) the notion of agricultural enterprises, (ii) the features of horizontal and vertical collaboration, (iii) the heterogeneity of legal forms (including the development of hybrid entities, such as B-corporations), (iv) multiparty contracts in agriculture, (v) cooperatives, and (vi) the challenges of implementing sustainable practices across the supply chain and to access finance.

31. With regard to cooperatives, participants considered (i) the internationally recognised cooperative identity and principles¹⁵, (ii) the reasons why cooperatives are an adequate legal form to collaborate in the field of agriculture, (iii) cooperative governance, finance and the federated cooperative structure, and (iv) the different forms of participation of cooperatives in the supply chain.¹⁶

32. With regard to multiparty contracts, participants considered the concept of what constitutes a multiparty contract and its boundaries/relationships with the other legal forms considered in the LSAE Guide. They also discussed the core aspects and key issues worth considering in the LSAE Guide.¹⁷ A structure containing eleven topics for the analysis of multiparty contracts in the LSAE Guide was proposed.¹⁸ The Working Group decided to reassess the adaptability of the proposed structure of analysis for multiparty contracts with regard to the other legal forms considered in the project at its third session.

4. Intersessional work (January – April 2023)

33. One of the key resolutions of the Second Working Group was the creation of three sub-groups which would advance their respective topics, namely: cooperatives; corporations; and multiparty contracts. It was envisioned that despite not planning any intersessional meeting in the period November 2022 to May 2023, these groups would, due to their reduced scope and expertise in their respective subject matter, be able to develop concise contemporary frameworks for the third Working Group meeting.

34. The three established Subgroups are led by the following members of the Working Group:

- Subgroup 1 on multiparty contracts, led by Professors Fabrizio Cafaggi, Paola Iamiceli, and Matteo Ferrari;
- Subgroup 2 on cooperatives, led by Professors Hagen Henry, Cynthia Giagnocavo and Georg Miribung; and
- Subgroup 3 on corporations, led by Professors Matthew Jennejohn and Virgilio de Los Reyes.

35. The Subgroup Co-Chairs contribute towards the identification of issues per subtopic for the deliberations of the Working Group. Between February and April 2023, the Co-Chairs of the Subgroups were invited to reconsider whether the topics proposed for the analysis of multiparty contracts were also valid to analyse cooperatives and corporations.

5. Next sessions of the Working Group and intersessional work

36. The Secretariat suggests that at least two more Working Group sessions be held between 2023 and 2024. It is proposed that the fourth session of the Working Group take place on 8-10 November 2023.

¹⁵ Seven cooperative principles and values were discussed, such as self-help, self-responsibility, democracy, equality, equity and solidarity.

¹⁶ See the [Summary Report](#) of the second session of the Working Group, paras. 68-121.

¹⁷ See the [Summary Report](#) of the second session of the Working Group, paras. 22-67.

¹⁸ Id. para. 38.

37. The continuation of the intersessional work is also highly encouraged. For the next intersessional period, the Secretariat suggests: (i) retaining the three Subgroups on cooperatives, multiparty contracts and corporations; (ii) considering the establishment of a Drafting Committee to start preparing a first draft of the instrument based on the discussions and input collected so far; and (iii) organising virtual intersessional meetings on specific issues, if needed. Both members and observers will be invited by the Secretariat to express their interest in participating in one or more of the Subgroups.

Questions and suggestions for the Working Group

- It is suggested to discuss the dates proposed for the fourth Working Group session (tentatively scheduled for 8-10 November 2023).
- Does the Working Group agree with the proposed approach for the next intersessional period?

II. ISSUES RELATED TO THE SCOPE OF THE GUIDANCE DOCUMENT

38. This section further describes some of the topics that the Working Group has already discussed in previous meetings, as well as proposes new questions for deliberation during the third session of the Working Group.

A. Target audience

39. As consistent with all UNIDROIT instruments, the prospective guidance instrument should be relevant to all jurisdictions irrespective of their particular legal tradition. Guidance will be developed for legal professionals representing smaller enterprises (including community-based enterprises and family farmers) and, to a certain extent, for legislators, and policymakers. However, the final instrument will be drafted in an accessible manner to extend its use to a broader audience beyond legal professionals.¹⁹

40. The challenges faced by agri-food supply chain leaders operating downstream (e.g., large retailers) may also be considered, but the framing of the LSAE project should resonate with the realities and challenges faced by actors operating mainly in the midstream segment of agri-food value chains²⁰ and in low-and-middle-income countries.²¹

41. While the definition of “agricultural enterprises” for the purpose of the LSAE project may still be revised, the Working Group generally agreed that the relevant target audience of the guidance document could be smallholders and agri-MSMEs²² 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 main target audience, therefore, are those enterprises that have the

¹⁹ [UNIDROIT 2022 – C.D. \(101\) 10](#), paras. 11-12

²⁰ The role of midstream agri-MSMEs in contributing to rural transformation, in particular their potential role in accelerating pro-poor and sustainable growth in the agri-food systems was discussed during the first session of the Working Group. See the Issues Paper [UNIDROIT 2022– Study LXXXC – W.G.1 – Doc. 2](#), paras. 50-58 and the [Summary Report](#) of the first session of the Working, paras. 43-54

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

²² During its first session, the Working Group discussed 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. See the [Summary Report](#) of the first session of the Working Group, para. 45.

potential to grow and contribute to rural and urban development, but because of a disabling business environment are impeded from fully leveraging their potential to do so. During the second session of the Working Group, it was clarified that the notion of agricultural enterprises adopted should be considered mainly in the economic perspective, to capture business activities of individual entrepreneurs and not only activities of legal entities, such as companies.

42. While discussing the target audience, the Working Group considered the heterogeneity of the rural market space where smallholders operate 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). During its first session, the Working Group discussed the impact of market structure on agricultural enterprises²³ and the interdependences among different supply chain actors. Compared to the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, which covered agricultural production contracts between farmers and buyers, there was general agreement among Working Group participants that the prospective LSAE Guide could consider actors operating beyond the “production stage”. The focus should be on the challenges not only faced by producers, but also by actors that add the most value to agri-food products and who operate at stages beyond the farm gate (e.g., input providers, processors, traders and retailers). Therefore, determining which legal structure of agricultural enterprise is appropriate would require an analysis of the possible interactions that may take place among different market players.

B. Format and title of the instrument

Questions and suggestions for the Working Group

- The Working Group is invited to further reflect on the table of contents for the overall guidance instrument to facilitate the work going forward (see Annexe).
- The Working Group is invited to further reflect on the new working title for the future instrument.

43. The participants of the first Working Group session favoured developing the LSAE project’s guidance instrument as a “legal toolbox” which would showcase the most useful collaborative legal structures that parties can use for different purposes. Additionally, the guidance instrument 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 needs.²⁴

44. 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 analysed.²⁵

²³ During the first session, the Working Group considered a number of issues relating to market structure and coordination to understand how the legal structure could be affected, see the Issues Paper [UNIDROIT 2022 – Study LXXXC – W.G.1 – DOC. 2](#), paras. 38-49, as well as the [Summary Report](#), paras. 39-41.

²⁴ [UNIDROIT 2022 – Study LXXXC – W.G.1 – DOC. 3](#), paras. 27 and 29

²⁵ [UNIDROIT 2022 – Study LXXXC – W.G.1 – DOC. 3](#), paras. 32.

45. 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 progressed.²⁶ As a soft law instrument, the Guidance Document is not intended to be binding, and it will not have a prescriptive function.

46. During its previous sessions, the Working Group did not discuss the table of contents for the overall guidance instrument in detail. At its second session, the Working Group began to deliberate on a proposed structure that could be adopted. It was proposed that three different sections could be developed in the LSAE Guide: (i) the first section could reflect what happens before the establishment of a formal legal structure, focusing on the analysis of the pre-formal forms of collaboration; (ii) the second section could cover the comparative analysis of multiparty contracts, cooperatives and corporations; and (iii) the third section could address the peculiarities and features that distinguish the three legal forms. Therefore, the Working Group may consider agreeing upon a draft table of contents for the overall guidance document based on what was suggested or an alternative structure may also be proposed (see Annexe I to this document).

47. At its second session, the Working Group also 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 Document. It was suggested that the working title of the project could be changed to “Collaborative Legal Instruments for Individual and Collective Agricultural Enterprises”.²⁷ This new title was proposed to highlight the focus on legal forms of collaboration and not on the legal forms of agricultural enterprises. It was clarified that the new working title would need to be approved by UNIDROIT’S Governing Council and that the final title of the guidance instrument would be determined once the entire document is finalised.

48. The Working Group may consider discussing whether the new title proposed is the one that should be presented to the UNIDROIT Governing Council for approval or whether a more concise title could be proposed, such as “Collaborative Legal Structure for Agricultural Enterprises”. The Working Group is therefore invited to confirm whether there is the need to specify – individual and collective agricultural enterprises – in the title.

C. General focus on legal forms for collaboration: contracts and legal entities

Questions and suggestions for the Working Group

- The Working Group may consider further discussing how collaboration is defined in the context of the LSAE project.
- The Working Group may consider further discussing the fundamental differences between multiparty contracts, cooperatives and corporate entities and decide the most appropriate methodology for the comparative analysis of the legal forms of collaboration.

49. During its first session, the Working Group agreed that instead of incorporating into larger enterprises, the best way to improve access to finance, international markets, services, and resources, while respecting the small size of agricultural enterprises, would be through the enhancement of collaboration. For instance, it was noted that collaboration may be necessary to access and/or manage resources when it is too expensive to deploy the same resource individually.²⁸

²⁶ See the [Summary Report](#) of the first session of the Working Group, paras. 33-34.

²⁷ See the [Summary Report](#) of the second session of the Working Group, para. 187.

²⁸ It should be noted that the legal forms to govern the collaborations will differ depending on the characteristics of the resource. There is a distinction between sharing material or immaterial resources and, within

50. The Working Group considered that the general focus of the LSAE project could therefore be on “collaborative legal forms” that support smallholders (including family-owned enterprises) and agri-MSMEs to do business with one another to, among other things: (i) increase efficiency, (ii) enhance sustainable agricultural development, (iii) explore innovation opportunities, and (iv) address unfair commercial practices. With the objective of promoting more inclusive agri-business relations, the prospective guidance instrument 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.

51. During the second session of the Working Group, it was noted that collaboration is important because there is an increasing competition between value chains, supply chains, networks of relationships, knowledge flows and management. It was therefore suggested that the LSAE Guide could analyse legal forms of collaboration not only along the value chain but consider the value chain as a whole in order to understand how it could function in a satisfactory manner.²⁹

Definition of collaboration

52. The definition and framing of the notion of collaboration was addressed during the second session of Working Group. It was proposed that the notion of collaboration could be understood as a “form of interaction among multiple players with common objectives that may be limited to exchanges of goods and services or imply an engagement in projects with or without shared resources”.³⁰ Collaboration in this sense would differ from mere coordination, where parties may have conflicting objectives and interests. Collaboration implies the existence of common activities whereas coordination occurs among totally independent activities. Collaboration usually takes place when there is a need to share resources or a common objective that cannot be achieved individually.

53. Therefore, collaboration is not only aimed at sharing resources but also at achieving common objectives that would not otherwise be achieved (for example, for the purchase of inputs at a lower cost when parties can buy a larger quantity and to access new markets by providing quantities of products or complementary products that individual producers would not be able to provide).

Different types of collaborative organisations

54. While recognising the variety of forms of collaboration and the existence of many different types of organisation of agricultural production, processing and distribution, participants favoured focusing the analysis on three categories of legal forms aimed at promoting efficient commercial collaboration and greater inclusivity: (i) contracts, including bundles of contracts and multiparty contracts; (ii) corporations, with or without limited liability; and (iii) cooperatives. It was noted that the three legal forms selected for analysis in the LSAE project would merely serve as archetypes rather than as an exhaustive list of different organisational forms. Other types of legal structures, beyond contracts, corporations, and cooperatives, would only be considered where relevant and practical.

55. During the second session of the Working Group, it was acknowledged that the three legal forms should not be seen as alternatives from the point of view of smaller enterprises in the value chain and should be analysed as complementary building blocks of the value chain itself. It was suggested that instead of focusing on understanding when one of the three collaborative legal forms should be used, the Working Group could focus on analysing when a specific legal form would not be

the latter, between immaterial resources like technology and know-how that can be subject to appropriation and data that cannot or should not be subject to appropriation. This distinction not only features different ownership regimes but may also have an impact on the legal forms (such as on the structure of the contract and its governance).

²⁹ See the [Summary Report](#) of the second session of the Working Group, para. 75.

³⁰ Id., para 26.

suitable for a specific situation. By way of illustration, the prospective guidance instrument could describe how a cooperative may not be the most suitable legal structure for a group of farmers that are highly heterogenous, unless they adopt an effective conflict of interest mechanism.

56. While the LSAE Guide could generally state that all three legal forms can be used to foster collaboration, the comparative analysis should still be envisaged to suggest to the reader that not all three legal forms can be used in any given situation. There may be cases where the guidance instrument may suggest to the reader that they may not only prefer to use one legal form but that that legal form is the only available option to suit certain purposes.

57. At its third session in May 2023, the Working Group may consider further discussing the fundamental differences between multiparty contracts, cooperatives and corporate entities and decide the most appropriate methodology to be adopted for the comparative analysis of the legal forms of collaboration.

58. An organisation may be set up by a contract (or bylaw) and yet not constitute a contract. The terms “contract” and “organisations or legal entities” are indicative of the difference: an “organisation” has “organs” (e.g., an assembly, a board); a “contract” is traditionally considered an agreement to do or not to do something specific. However, this distinction is not completely black and white. Contracts may have a precise object, whereas organisations have objectives, broadly defined, that allow for various activities, not necessarily previously determined. Traditionally, the contracting parties have opposing interests which they agree to satisfy reciprocally, whereas the participants in a legal entity have common interests, the satisfaction of which they pursue together.

59. As further explained below and in the Draft Discussion Paper on multiparty contracts in agriculture, the Working Group may consider whether the multiparty contracts proposed to be analysed in the guidance instrument may exemplify the trend regarding “contract organisation” and framework contracts which create obligations over long period of time.

Functional approach for the comparative analysis of different legal forms

60. At its second session, the Working Group considered adopting a “functional approach” to compare the collaborative legal forms analysed in the LSAE project. Therefore, the comparison between different legal systems and jurisdictions would not be doctrinal ; however, the functional approach would require the identification of “functionally equivalent categories” (e.g., entry, governance, exit, dissolution, etc.) to ensure compatibility between different concepts developed in the respective fields of contracts, cooperatives, and corporations.³¹ A comparison of different legal institutions, such as contracts and organisations would seem to be admissible under a functionalist approach, as long as these legal institutions fulfil the same functions.

61. It was suggested that the LSAE Guide could be structured in two different ways: (i) a scholarly approach, focusing on certain functional characteristics (entry, exit, governance) and how they each apply to multiparty contracts, cooperatives and corporations; or (ii) a more practical approach, which should ideally include information on how a multiparty contract should be drafted, how a cooperative statute should be drafted, and how a company’s bylaws should be drafted. It was noted that these two approaches could be combined. While the final structure of the guidance instrument will depend on how the project progresses, it was generally accepted that it would be useful if the LSAE Guide were structured in line with the second approach, namely that it first discusses multiparty contracts, cooperatives and corporations and then includes the comparative analysis.³²

³¹ See the [Summary Report](#) of the second session of the Working, para.57.

³² Id., paras. 60-62.

Choice and complementarity between different legal forms

62. The choice of the collaborative legal form is freely made by the parties, but it can be guided by legal requirements. Contracts are collaborative legal forms that require a lower level of formality. The creation of a legal entity aimed at governing the collaboration either in the form of a corporation or a cooperative, even when the simplified instrument is selected, usually requires meeting a wider set of formal requirements concerning both those who participate and the resources necessary to start and operate the collaborative endeavour.

63. The objective of the LSAE Guide is to describe the appropriateness of each collaborative legal form to assist the target audience in their selection of the most suitable legal form to pursue their respective objectives. The assumption being that there is no legal form for all purposes and that depending on the objectives of collaboration, and the context within which collaboration occurs the selection might lead to different legal forms. Hence one form does not fit all. The choice of collaborative legal form may depend upon, among other, the number, the size and the market, as well as the contractual power of individual participants. It may also depend on whether resources should be shared, and in the affirmative, whether these are material or immaterial resources.

D. Multiparty contracts for collaboration in agri-food supply chains³³

Questions and suggestions for the Working Group

- The Working Group is invited to consider the topics and questions proposed in the Draft Discussion Paper on Multiparty Contracts, sent separately to the Working Group members and observers.

64. Multiparty contracts may be used to specify the internal organisation and management of agricultural enterprises 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.). Associative contracts may also be important instruments to facilitate commercial collaboration and cross-border trade relationships. The LSAE guidance instrument aims at covering 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 to become contract-makers rather than just contract-takers.

65. 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 smallholders that operate in local and often more informal markets. Approaching agricultural enterprises from the perspective of smaller enterprises, rather than a leading 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 to which they refer.

66. 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 enterprises' 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.

³³ The issues raised in this section should be considered in conjunction with the revised "Draft Discussion Paper on Multiparty Contracts" prepared by the Coordinator of the LSAE project, Professor Fabrizio Cafaggi and Working Group Members Professor Paola Iamiceli and Professor Matteo Ferrari, as well as by Mr Samuel Scandola (Researcher assistant/Legal Consultant at UNIDROIT).

67. Unlike the bilateral contractual relationships addressed in the LGCF (agricultural production contracts), the LSAE project intends to cover different contractual arrangements established in the case of integrated relations, where a legal dependency among contracting parties is created. In this context, among other aspects, it is important to pay attention to how 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.

68. 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 signalled as a key issue to be analysed in the LSAE project.

69. During its second session, the Working Group discussed a proposed structure for the analysis of multiparty contracts in the LSAE Guide, composed of eleven key issues worth considering, as follows:

- Taxonomy – to distinguish between several typologies of multiparty contracts from both a functional and a structural perspective;
- Contract formation – to inform when a multiparty contract is formed and what the boundaries are between pre-contractual negotiations and contractual formation;
- Entrance – to distinguish between the first phase when a multiparty contract is concluded, and later stages, where additional participants can be added;
- Content definition – to inform what content should be included to ensure the contract is effective and functional, as well as the techniques that may be used to define the contents of the multiparty contract, whether it be through negotiation of participants, framework contracts, or standard terms;
- Governance – to clarify who should define the governance structure of multiparty contracts, considering its long-term nature and whether the implementation should be entrusted to one manager or committees who bears the last resort decision-making power;
- Execution – to inform the main aspects of execution to be considered when implementing a horizontal or vertical multiparty contract given the strong interdependences among contractual performances;
- Change of circumstances and supervening impossibility – to verify the extent to which well-established legal rules surrounding bilateral contracts are applicable and whether there are specific characteristics of force majeure and contractual impossibility in long-term multiparty contracts designed to establish collaboration;
- Breach – to inform how breach should be defined and fundamental breach be distinguished from other forms of breach (in particular, how the definition of breach correlate with contractual interdependencies);
- Liability – to clarify how liability for breach of multiparty contracts should be defined and allocated internally and towards third parties;
- Remedies – to inform what the available remedies are for breach of multiparty contract and how remedies for the collaboration and remedies for individual harm suffered by each participant should be distinguished;

- Exit, dissolution and post-contractual obligations – to inform whether parties can exit the contract before dissolution and the differences between voluntary and forced exit.

70. The Working Group agreed with the proposed outline of issues, as well as to examine the modalities in which multiparty contracts may help producers and other businesses operating in agri-food markets to collaborate and implement strategic projects, with special regard to those that improve social and environmental sustainability in agriculture. Participants supported further distinguishing between exchange contracts and associative contracts.

71. In the ensuing intersessional period, after the second session of the Working Group, the eleven topics mentioned above were further developed by the Subgroup on multiparty contracts. During its third session, on 8-9 May 2023, the Working Group is invited to consider the revised Draft Discussion Paper on multiparty contracts, sent separately to the Working Group members and observers. The Working Group also decided to assess the applicability of the structure of analysis proposed for multiparty contracts to the other legal forms considered in the project, cooperatives and corporations,³⁴ as further described in Section E below.

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

Questions and suggestions for the Working Group

- The Working Group is invited to further discuss the outline of topics to be considered in the Chapters of the guidance instrument dedicated to corporations and cooperatives. An alternative structure can be proposed.
- The Working Group could consider the working definitions proposed for cooperatives and corporations to ensure that the subject matter is clearly understood and agreed upon.
- The Working Group is invited to further consider how agricultural cooperatives and corporations respond to new trends (digitalisation, sustainability, finance). Do they adopt different organisational arrangements? What are the features that differentiate cooperatives and commercial companies (e.g., objective, liability, succession)?

72. 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 venture agreements). 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. 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, and how the two entities differ in terms of voting systems, organisational purpose, and access to capital markets.

73. An efficient and effective collaboration within the value chain would depend on how these legal structures address complex and diverse situations, such as: (i) diversity of activity (production, transformation, and processing); (ii) degree of integration (operational or organisational); (iii)

³⁴ See the [Summary Report](#) of the second session of the Working, para. 67.

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.

74. Cooperatives are debatably one of the most prevalent organisational forms used throughout agricultural markets.³⁵ Cooperatives can collaborate downstream, upstream and with other companies. A clear understanding of their definition, identity, functions, governance, etc., is paramount to providing an outline for their analysis in the LSAE project, to ensure that they continue following their principles and values for their members when participating in value chain arrangements.

75. During its second session, the Working Group agreed to further define heterogeneity and homogeneity within cooperatives, as well as to take into account the level of heterogeneity with respect to the term "cooperative" whilst also abiding by some core common principles, values, and features.³⁶ Both the internal legal structure and the external relationships that cooperatives and corporations may establish with other actors along the chain would be considered. The Working Group was encouraged to consider the similarities and distinctions between cooperatives and corporations, and also the different types of corporations that the LSAE project could focus on.

76. Between January and April 2023, during the second intersessional period, the Co-Chairs of the Subgroups on cooperatives and corporations were invited to reconsider whether the eleven topics proposed for the analysis of multiparty contracts were applicable to the specificities of cooperatives and corporations (see para. 68 above). The Co-Chairs were informed that they could deviate from the structure proposed for the analysis of multiparty contracts if they considered it to be inconsistent with the logic of corporations and cooperatives. The Co-Chairs were also invited to highlight specific features of cooperatives and corporations that would need to be added to make the guidance instrument more effective at addressing matters that potential stakeholders might require.

77. The Co-Chairs of the Subgroup on cooperatives emphasised the need to include reference to some peculiarities regarding cooperatives in the proposed structure of analysis and overall considered that the structure proposed could be slightly different. Alternatively, the structure of analysis of cooperatives within the LSAE project could be based on the Principles of European Cooperative Law (PECOL),³⁷ which focus on the "ideal" legal identity of cooperatives. The PECOL contain five chapters: (i) definition and objectives of cooperatives; (ii) internal governance; (iii) financial structure; (iv) external control; and (v) cooperation among cooperatives. Despite not fully agreeing with the application of the proposed structure for analysing multiparty contracts to the analysis of cooperatives, the Co-Chairs of the Subgroup on cooperatives still considered how some of the eleven topics proposed could be analysed from the perspective of cooperatives, as briefly described below.

Taxonomy of agricultural cooperatives

78. The LSAE Guide could distinguish between several typologies of agricultural cooperatives based on their economic activity and structural characteristics. As a starting point, the Working Group could consider the 2020 report prepared by the International Labour Office (ILO) on "Statistics on Cooperatives: Concepts, classification, work and economic contribution measurement"³⁸ which

³⁵ Valentinov, Vladislav, Why are cooperatives important in agriculture? An organizational economics perspective, in: Journal of Institutional Economics 2007 (3), 55-69.

³⁶ See the [Summary Report](#) of the second session of the Working Group, paras. 104-106, 112, 121.

³⁷ The PECOL were published in 2017 and developed by a Study Group on European Cooperative Law, with the support of the European Research Institute on Cooperatives and Social Enterprises (EURISCE). For more information see: <https://euricse.eu/en/the-principles-of-european-cooperative-law/>.

³⁸ A joint initiative of the International Labour Office (ILO), the Committee for the Promotion and Advancement of Cooperative (COPAC) and the International Centre of Research and Information on the Public, Social and Cooperative Economy. Available [here](#).

recognised that although the classification according to economic activity is already realisable with the International Standard Industrial Classification (ISIC), there does not seem to be a uniform typology for cooperatives. However, based on previous research conducted by ILO, EURISCE, the International Co-operative Alliance (ICA) and others³⁹, the typologies of cooperatives may be organised according to characteristics that are based on a variety of criteria:

- member relationship, for example, consumer, user, worker;
- nature of member's activities as a producer;
- nature of membership types, for example multi-stakeholder cooperatives; and
- nature of the cooperative's function in relation to the members' production, for example, purchasing, marketing, etc.

79. The key common feature in such criteria is that cooperatives are member-centred. Therefore, it seems to be consensual or nearly consensual that the following four criteria could be used to distinguish a cooperative from other private institutional units considered in the LSAE project:

- created on a voluntary basis with freedom of membership;
- meets members' needs through the market;
- follows the democratic governance principle; and
- the distribution of surplus is made according to the members' transactions or usage.

80. Coherent with the above-mentioned criteria and considering the definition of cooperative, as contained in the ICA statement and integrated into the ILO Recommendation N°193, as an "autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise",⁴⁰ the LSAE Working Group could consider the following working definition for a cooperative:

a member-based organisation with legal identify that functions according to specific principles which implies the shared identity of member-users and has specific objectives and functions related to its members-users' needs.

81. The Working Group could also consider highlighting the definition of cooperative based on ownership as proposed by certain authors⁴¹ which sets out a distinct organisational typology of models of agricultural cooperatives limited to the consideration of property rights and contract theories, focused on residual claim and control rights. In such a scheme, the cooperative and corporation are seen as polar opposites on a continuum. It does not take into account the member-centred criteria. When defining cooperatives, the Working Group may also consider distinguishing between primary and secondary level cooperatives and how these multi-tier cooperatives participate in value chains and form of cooperative groups.

Formation of an agricultural cooperative

82. Beyond defining cooperatives, it is critical for the Working Group to elaborate on the formation of agricultural cooperatives with regard to the following elements: (i) which instrument

³⁹ See ILO 2020 where it mentions ILO (2013a), EURISCE and ICA (2016), UN (Dave Grace and Associates, 2014) and others (Lund, 2011, Pascucci and Gardebroek, 2010).

⁴⁰ See the [Summary Report](#) of the second session of the Working, para. 72.

⁴¹ Fabio Chaddad and Michael Lee Cook, *An Ownership Rights Typology Of Cooperative Models*, 2002.

creates them; (ii) what sort of membership do they usually consist of; (iii) which laws apply in their formation; and (iv) why they are formed.

83. A cooperative, like a corporation, is constituted in most countries under a cooperative law or, in some instances, laws which allow for the establishment of cooperative enterprise activities. They are created under statutes and establish bylaws. A cooperative is established by contract, but it is not a contract; it is the “product” of that contract. With regards to the contract that established the cooperatives, most jurisdictions will grant freedom to contract. Apart from the content dealing with the establishment, further content is determined by law. As for the rules which generally govern the cooperative, the parties are only free to decide to the extent the cooperative law allows them to stipulate through bylaws/statutes.

84. Most countries have one general cooperative law, but some have several sectoral cooperative laws. As with other organisational enterprise laws, they seek to ensure that the cooperative will effectively pursue the objective set by law and that the ensuing form justifies the attribution of legal personality, the main consequence of which is a shift of liability (inciting economic risk-taking). While not in detail, the content of the cooperative law is predetermined by public international law, especially ILO Recommendation n. 193.⁴²

85. In a second-level cooperative, each first-level cooperative is a separate entity that has a membership share entitling it to voting rights in the second-level cooperative. It is also possible that second-level cooperatives have a mix of member types, such as first-level cooperatives and individual farmer members. In some cases, third-level cooperatives may be formed.

Agricultural Cooperative Membership

86. Membership is one of the core structural characteristics of cooperatives that distinguishes cooperatives from other business forms, such as corporations. Agricultural cooperatives are owned and administered by their members, who are at the same time customers, providers, and/or workers of the enterprise. Cooperative members have both a transactional and an organisational relationship with the cooperative, i.e., they possess a “dual role” or a “double quality” as owner-users of the firm. Rights and duties of the cooperative members are attached to “membership”.

87. The Working Group could distinguish between the first stage of cooperative membership and later stages where additional members may be added. Who decides about admissibility of members when a cooperative has already been formed? The ICA’s first Cooperative Principle on “Voluntary and Open Membership”⁴³ is critical to understanding the membership structure.

Governance and finance of Agricultural Cooperatives

88. The governance of cooperatives is regulated by law, leaving more or less leeway to the statutes/bylaws. The internationally recognised (binding) definition of cooperatives sets the objective and the cornerstone for the governance structure, which is “democratically controlled”. The cooperative governance system and the interaction between the members, the board of directors and the general assembly could be one of the specific features that the Working Group could consider to differentiate cooperatives. A number of instruments and strategies that could be adopted under

⁴² See [ILO Recommendation n. 193](#), para. 10, which states that “Member States should adopt specific legislation and regulations on cooperatives, which are guided by the cooperative values and principles set out in Paragraph 3 [...]”. These “values and principles” are those enshrined in the [ICA Statement on the cooperative identity](#) (1995) and should be understood as “the Cooperative Principles”.

⁴³ “[c]ooperatives are voluntary organizations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political, or religious discrimination”.

different cooperative governance models to safeguard the interests of the members were presented during the second session of the Working Group.⁴⁴

89. The Working Group may wish to consider the challenges of implementing the democratic control principle in multi-stakeholder cooperatives and when cooperatives operate in global value chains. In addition, the Working Group may consider the way voting is conducted, how members operate within the institution, how they designate operations, and the means in which they contract within their value/supply chains.

90. The financial structure of agricultural cooperatives is critical to the identity of the organisation. Some examples of the framework adopted are equity capital, debt capital, retained earnings, member contributions, and reserve *inter alia*. Cooperatives have internal systems for accessing and managing finance, however these systems may be more or less limited depending on the nature of commodities (e.g., cash crops, export crops). With regards to financing of cooperatives, there may exist a tension between the interests of user-members and non-user members. Often user-members seem to be reluctant to invest in their cooperative because of free-riding issues, a lack of specific incentives for older members to invest, and limited planning horizons. Yet, members still invest because they know that their farm is inherited.

91. In terms of distribution of benefits, two specific features of cooperatives could be further considered by the Working Group: (i) the surplus is generally distributed to user-members as refunds (e.g., patronage refunds); and (ii) a part of the surplus is allocated to indivisible reserves, which may be an alternative instrument for internal financing. In addition, regarding the finance aspects of cooperatives, the Working Group may consider analysing whether the financial resources of cooperatives are drawn differently depending on whether the cooperative is a single-stakeholder or multi-stakeholder cooperative.

92. With regards to the federated system of cooperatives, the Working Group may consider a single cooperative as usually being part of a cooperative system, with the aim of facilitating the activities of the so-called primary cooperative. Primary cooperatives are those that provide on-site services to members. In a cooperative system, the primary cooperatives outsource certain activities (e.g. selling goods on the international market) to a secondary cooperative. Since the latter also sells the goods of other primary cooperatives, this results in volumes that lead to greater efficiency, strengthening the market position of the secondary cooperative. As the primary cooperative is a member of the secondary cooperative, the cooperative promotion mandate also applies here - i.e. in the relationship between the primary and secondary cooperatives.

93. A tertiary cooperative provides other services to primary and secondary cooperatives, such as tax advice, accounting advice, unified marketing, and similar service. In addition, tertiary cooperative monitor whether that the primary and secondary cooperatives affiliated with it are effectively and efficiently fulfilling their cooperative promotion mandate. The result is a three-tier system whose main task is to promote the members of the primary cooperatives.

Breach of Cooperative Obligations

94. The Working Group is requested to consider the bond between the cooperative and its members for the cooperative to fulfil its core mandate/function (member promotion), in matters regarding breach. In this examination the Working Group is encouraged to examine how these questions are used to determine the consequences of a violation of this core mandate. It will also be important to understand whether there are different gradations in breaches of duty, as not every breach of duty has the same impact on the fulfilment of the promotion mandate.

⁴⁴ See the [Summary Report](#) of the second session of the Working, para. 86.

95. A distinction could be made to denote a fundamental breach (as determined by statutes), leading to expulsion or other specific sanctions.

Liabilities and remedies in Agricultural Cooperatives

96. The Working Group may consider further discussing the topic of liabilities within cooperatives, to align the chapter to the entirety of the LSAE guide. This could explore financial, contractual, product, environmental, employment, and legal liabilities *inter alia*. It is also important to understand what happens to the shares and in particular when and in what amount they must be paid out. An immediate payout can lead to liquidation problems, so the shares are often paid out at a later date.

97. The types of remedies that are available to members and a cooperative may also be described in varying situations. From breach of contract by members (e.g., expulsion, fine/penalty, freezing administrative rights, etc.), to breach of contract by third parties (e.g., as determined by civil law, penalties, fines, or as determined by contractual stipulation between the cooperative and third party).

Exit & Dissolution in Agricultural Cooperatives

98. To complete the exercise on agricultural cooperatives, the Working Group may consider the issue of exit of members and the dissolution of a cooperative. Regarding exit, how does the ‘open door’ policy operate, and what restrictions, if any, are imposed in terms of time limits. For example, are members only allowed to leave after they have been members for a certain period of time? Beyond voluntary exits, forced exits as a result of severe violations of obligations can also be considered, as well as other issues that arise out of these processes. Finally, on the matter of dissolution, an exploration of dissolution in a federated system may be interesting, in conjunction with what occurs to the resources of a cooperative upon dissolution.

F. Informal and quasi-formal forms of collaboration

Questions and suggestions for the Working Group

- The Working Group is invited to further examine the spectrum between informality and formality and how the notions of ‘formal, quasi or semi-formal, and informal’ may be defined for the purposes of the Guide.
- The Working Group could further identify and categorise the different types of informal and semi-formal associations present in the agricultural sector and then decide which require greater analysis.

99. During the previous sessions of the Working Group, participants recognised the need to further discuss the topic of informality in agricultural enterprises as they perceived it to be difficult to understand how to address the objective of the project without deeply discussing the implications of formal, semi-formal and informal business arrangements, as well as the different types of interactions that may take place. For instance, it was noted that members of informal common interest groups could also be members of cooperatives, and the Working Group would need to decide whether this type of interaction, between formal, informal, and quasi-formal arrangements should be addressed and how. The Working Group was invited to consider the overlap that may exist among the legal forms of collaboration analysed. For example, a cooperative may engage in multiparty contracts, as well as engage in informal arrangements. Therefore, it was suggested not to look at one legal structure in isolation and to instead consider the issue of collaboration and interlinkages between different legal forms.

100. It was agreed that formalisation would not be addressed as inherently beneficial, and both the advantages and disadvantages of formalisation would be emphasised in the prospective Guide. However, the Working Group considered that the guidance could be developed in a manner that supports formalisation in malfunctioning markets, where informality is a leading driver of the dysfunctionality. It was also suggested to focus on enforceable agreements. In previous sessions, some participants pointed out that the LSAE project seems to assume that small and medium family-owned enterprises without legal form or personality operating in the informal economy would want to and be able to collaborate in one of the three legal forms suggested⁴⁵. However, agricultural producers may not be interested in changing their informal reality and may not accept the legal forms which the Working Group suggests. Therefore, a need to rethink some of the underpinning assumptions and maybe consider using the methods of comparative law to identify other laws beyond State law which may contribute to understanding other forms of collaboration that may exist.

101. It was suggested that the LSAE Guide could consider the extent to which informal/unenforceable agreements have an influence on the construction of either formal or at least enforceable forms of collaboration. The guidance instrument could first acknowledge the existence of various informal and semi-formal agricultural enterprises, then focus on the main features of formalised collaboration through multiparty contracts, cooperatives and corporations. While the impact of informality was recognised as an undoubtedly important factor to consider when preparing the LSAE Guide, it remains to be clarified how pre-formal collaborative legal forms will be presented. In this sense, the Working Group may further consider how informality affects the forms of collaboration and if, for example, informal firms can only collaborate through contracts.

102. With regard to the definition of informal, semi-formal and formal enterprises, it was noted that formality may be defined institutionally (i.e. whether a business is registered under company law) and/or transactionally (i.e. whether an enterprise keeps record of its business transactions and documents its activities). During the intersessional period following the second session of the Working Group, the UNIDROIT Secretariat conducted further research to assist the LSAE Working Group to address the varying definitions. For clarity, there are as of yet, no universal definitions on the three categories of agricultural enterprises (*table 2*); however, the Secretariat sought to gather the parameters that are generally used to give a broad impression of the lens that may be applied by the Working Group (*table 1*).

103. The key areas when considering the legal status of an agricultural enterprise were adopted from the Donor Committee for Enterprise Development (DCED) approach⁴⁶ and the World Bank Enterprise Surveys, considering that appreciated three dimensions that are not mutually exclusive, namely:

Legal	Fiscal	Labour
Refers to the level of compliance with the legal and regulatory framework in a particular jurisdiction (e.g., startup capital, requirements for registration, licenses, credibility with third parties, liabilities).	Refers to the financial obligations (e.g., tax payments, bank accounts, bookkeeping).	Refers to the obligations associated with employing staff (e.g., registering staff, employment contracts, social security provisions, minimum wage).

Table 1. Matrix tool determining status of a legal entity⁴⁷

⁴⁵ See the [Summary Report](#) of the second session of the Working, para. 75.

⁴⁶ The DCED is “a forum for learning about the most effective ways to fulfil the Sustainable Development Goals by creating economic opportunities for the poor, based on practical experience in Private Sector Development as well as on domestic policy innovations worldwide”, available at: <http://www.enterprise-development.org/>.

⁴⁷ DCED (2021), [Dealing with firm informality](#), p.9.

104. It should be understood that there are other aspects that are context-specific, such as the type of farming practices, the size of the operation, and the level of technology used *inter alia*. To accurately determine the status of a specific agricultural enterprise, a comprehensive analysis of these factors is also necessary. The table below proposes three working definitions for formal, semi-formal and informal agriculture enterprises for the consideration of the Working Group:

Formal	Semi-formal	Informal
Agricultural enterprises that are registered businesses that comply with legal regulations and requirements, such as paying taxes, following labour laws, and adhering to food safety standards.	Agricultural enterprises that have some legal recognition but have flexible initiation procedures and operate outside of formal systems and regulations.	Agricultural enterprises that are unregistered and/or unregulated which operate outside of formal systems, such as taxes and labour laws. The operations are generally flexible.

105. Formal agricultural enterprises typically operate within the formal legal framework and comply with applicable laws and regulations. They have a clear legal status, such as a corporation or partnership, and are registered with relevant government agencies. Semi-formal agricultural enterprises generally refer to organisations and systems that have a combination of formal and informal characteristics and are regulated to some extent, but not fully recognised by the State or formal legal or administrative systems.⁴⁸ They operate in a grey area between formal and informal enterprises and are often established to fill gaps in formal systems or to provide additional services to farmers and rural communities.⁴⁹

106. Semi-formal agricultural enterprises play an important role in supporting farmers and rural communities by providing services and resources that may not be available through formal enterprises. They can also be more flexible and adaptive than formal enterprises, allowing them to respond quickly to the changing needs of farmers. Notably, “semi-formal” can be considered to be a transitory state which becomes more formal when there are incentives to support formality without increasing financial and/or bureaucratic burdens.⁵⁰ Examples of semi-formal agricultural enterprises may include farmer-based or community-based organisations when they do not have a formal ownership structure and may focus more on advocacy and networking. In some jurisdictions, groups of economic interest may also be considered semi-formal.

107. Informal agricultural enterprises refer to the non-formal and informal systems, practices, and organisations that govern the functioning of the agricultural sector and its interactions with other sectors. These enterprises are generally unregistered,⁵¹ not necessarily recognised by the State or not regulated by formal legal or administrative systems, but they play a crucial role in providing essential services and facilitating agricultural production, marketing, and distribution. Examples of informal agricultural enterprises may include self-help organisations and rotating savings and credit associations.

108. As mentioned above, formal, semi-formal and informal agricultural enterprises interact and collaborate in various ways to support the growth and development of the agricultural sector. This interaction and collaboration can take many forms, including:

- Integration of informal enterprises into formal systems: formal enterprises may recognise the importance of informal enterprises and integrate them into formal

⁴⁸ Msuya (2020), “Performance of Semi-Formal Microfinance Institutions in Tanzania: A case study of selected SACCOs and BRAC Tanzania”.

⁴⁹ World Bank (2014), [Credit Constraints and Agricultural Productivity: Evidence from rural Rwanda](#).

⁵⁰ FAO (2010), [Agro-based clusters in developing countries: Staying competitive in a globalised economy](#), p.11.

⁵¹ World Bank Group. “[Formal and Informal Microenterprises](#)”, Enterprise Note n.5 (2009).

systems. For example, a formal agricultural credit program may work with informal farmer association to reach a larger number of farmers and provide them with access to credit;

- Partnership and collaboration: formal enterprises may partner with informal enterprises to jointly address specific agricultural challenges. For example, a government agency may collaborate with informal local markets to improve the marketing and distribution of agricultural products;
- Support for informal enterprises: formal enterprises may provide support for informal enterprises, such as providing training and technical assistance, funding, or access to resources. This support can help informal enterprises become more effective and capable of supporting farmers.

109. The interaction and collaboration between formal and informal agricultural enterprises is important for the growth and development of the agricultural sector. Formal enterprises can provide the resources and support needed to help informal enterprises become more effective, while informal enterprises can provide the flexibility and adaptability needed to respond to the changing needs of farmers. By working together, formal and informal enterprises can create a more supportive and sustainable agricultural environment that benefits farmers, consumers, and the broader community.

G. Exogenous factors' impact on collaboration of agricultural enterprises: sustainability, digitalisation and access to finance

110. The legal structures and functions of agricultural enterprises, including the types of contractual arrangements, corporate and cooperatives entities 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 and new digital technology scenarios, as well as to new legislative demands and green finance. These factors can either accelerate or slow down some of the dynamics of collaboration envisaged in the LSAE project, and 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.

111. In previous Working Group sessions and intersessional meetings, the Working Group discussed and generally supported the idea that both endogenous and exogenous factors influencing the choice between and within collaborative legal forms could be further described in the guidance instrument, according to the different needs of the addressees. However, it was noted that the endogenous and exogenous variables would not be the focus of the project but would rather help analyse the different choices of legal structures that serve the purpose of collaboration among smallholders and agri-MSMEs.

Digitalisation

112. With regard to digitalisation, so far participants have discussed how it has reorganised agri-food chains into new chains and how decentralised chains have become more centralised. 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. The question is whether disintermediation is modifying the legal forms of collaboration (and if digitalisation is favouring the creation of cooperatives and/or the emergence of new digital intermediaries that directly connect input providers and farmers). The impact of digital platforms, the increasing value of farming data, outsourcing via digital services, precision agriculture and digital farming were among some of the main topics discussed so far.

113. 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 it 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 Working Group.

114. 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 and more secure, sustainable, and efficient.

115. The degree of freedom that agricultural enterprises enjoy increasingly depends on the amount of control that can be exercised over data. If the control of data is placed outside of the agricultural enterprise, the enterprise's autonomy will be more limited. The question of data control is therefore crucial from a legal standpoint.⁵²

116. While digital 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.

117. 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.

118. It was suggested that the Working Group could further 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 could discuss the role that cooperatives play for the adoption of digital technologies

⁵² For a more detailed description of the topics and questions related to - Data as a new production factor, see the Issues Paper prepared for the first session of the Working Group [UNIDROIT 2022 – Study LXXXC – W.G. 1 – Doc. 2](#), pages 18-23.

by farmers in developing countries⁵³ and the features of SmartAgriHubs headed by producer organisations.⁵⁴

Sustainability

119. Since the beginning of the LSAE project, Working Group participants have acknowledged that the legal structure of agricultural enterprises could have implications for Sustainable Development Goals (SDGs)⁵⁵, particularly for SDGs 1 (No poverty), 2 (Zero hunger), 5 (Gender equality), 8 (Decent work and economic growth), and 12 (Responsible consumption and production). In previous sessions, the Working Group discussed how sustainability should be considered an opportunity for market growth and innovation rather than a barrier to accessing supply chains.

120. The discussion initially focused on the new types of markets and increasing interdependence among supply chain actors, as well as on how legal structures of agricultural enterprises are 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. It was suggested that the LSAE Guide could provide a range of legal instruments to assist smallholders and agri-MSMEs to address sustainability challenges, from the institutional, organisational and transactional perspective by considering: (i) the role of cooperatives, corporations, networks and clusters to support compliance with sustainability standards; and (ii) the role of contracts to fairly distribute the allocation of costs of compliance.

121. During the second session of the Working Group, participants discussed the shift of sustainability from general public international law to specific rules of private law and the impact that new supply chain due diligence requirements could have on MSMEs. The increase in responsible investment through the development of environmental, social and corporate governance (ESG) and sustainability certification schemes was also pointed out.⁵⁶ The Working Group considered whether a specific legal structure better encapsulated this increasing trend towards greater sustainability requirements. It was noted that the contractual structure could ensure adherence to sustainability requirements through the inclusion of specific clauses, but there might be high transaction and coordination costs associated with monitoring sustainability performance. In the case of corporate forms, the participants considered that agricultural enterprises could also be structured as hybrid entities and include the “for benefit purpose”. Transaction costs associated with corporations including sustainability requirements in their company documents were also considered.

122. While acknowledging the challenges of coordinating individual rights and public interests, the Working Group considered it important to further consider the question of who bears the risk and cost of transitioning to sustainable practices within the supply chain, with respect to both the negative and positive externalities. It was suggested that the LSAE project could further analyse how the benefits of implementing sustainable practices have been distributed across the supply chain and how they could be distributed more equitably. Some participants noted the need to further consider the incentives, profitability, and returns on investment for smallholder farmers and cooperatives when discussing the costs of implementing sustainable practices.

123. It was generally accepted that the Working Group would continue discussing the variables that need to be considered in terms of sustainability. However, the UNIDROIT Secretariat suggested

⁵³ United Nation Development Programme, [Precision Agriculture for Smallholder Farmers](#), 2021.

⁵⁴ See the Summary Report of the second session of the Working Group [UNIDROIT 2022 – Study LXXXC – W.G. 2 – Doc. 3](#), para. 99.

⁵⁵ United Nations General Assembly, Resolution adopted by the General Assembly on 25 September 2015, [Transforming our world: the 2030 Agenda for Sustainable Development](#)

⁵⁶ See the [Summary Report](#) of the second session of the Working Group, para. 124

that the LSAE project should confine considerations regarding sustainability to those specifically relating to agricultural production, as the subject matter overlapped with a new UNIDROIT project which would begin in the 2023-2025 Work Programme, on Corporate Sustainability Due Diligence in Global Value Chains.

Access to Finance

124. 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 way⁵⁷. In addition, during the third intersessional meeting, organised in September 2022, 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.

125. Based on the discussions held so far, 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, lenders are ordinarily 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 jurisdiction's regime allows leasing solutions for equipment.

126. Overall, the Working Group has recognised the need to explore innovative approaches to financing primary producers that go beyond the use of State programs. 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. The impact of digitalisation on access to finance issues was also previously considered. It was noted that farmers' data is important for traceability and for opening up development programmes and opportunities. Therefore, digitisation of data may also contribute to accessing finance, as digital data information could be extracted in real time thus making it possible to reach small farmers.

127. Following the second session of the Working Group, participants agreed to further consider how cooperatives might be engaging the issue of simple bonds as an alternative means of finance. The importance of discussing the challenges of third-party investors and matters regarding social finance was also noted.⁵⁸

⁵⁷ See the [Summary Report](#) of the first session of the Working, para. 10.

⁵⁸ See the [Summary Report](#) of the second session of the Working Group, para. 153.

ANNEXE**DRAFT ANNOTATED TABLE OF CONTENTS FOR THE FUTURE GUIDANCE DOCUMENT**

The below draft table of contents was prepared by the Secretariat for consideration by the Working Group based on the Working Group discussions so far and the work conducted in the intersessional period. The Working Group is invited to propose any additional content that should be included, as well as any rearrangements of chapters as appropriate.

INTRODUCTION

- Purpose and objective of the Guide.
- Link of the Guide with the previous guides.
- Caveat: not suggesting a “a one size/form fits all”. Consequence being that the guidance developed must allow for national, local, sectoral adaptations.
- Delimitation of the target audience: smallholders and small and medium-sized farm enterprises.
- Indication of the justification for the focus on the three legal forms of collaboration given the fact that there are numerous other forms of collaboration. The justification should relate to the way the MSMEs are now collaborating or not and to their difficulties which the Guide is to help overcome.
- Recognition of the complexity of the legal situation: many national State and non-State laws involved.
- Presentation of the key notions of the guidance document, such as collaboration and the difference between collaboration, coordination, organisation, institutionalisation, etc.
- identification of issues that are intended to be addressed by collaboration (digitalisation, finance, sustainability, etc.). For example, the role digital platforms play in agriculture and how they affect governance structures could be introduced. The same could be done for the other exogenous factors considered so far by the Working Group (e.g. access to finance and sustainability).

CHAPTER I – Agri-food chains and micro, small and medium-sized enterprises

- Overview of how agri-food chains work and are structured, as well as role and position of MSMEs.
- Description of the intensive organisational integration into global value chains and the growing de-organisation of traditionally organised entrepreneurship.
- Highlight the issue of unfair commercial practices and unbalanced powers of supply chain actors, operating downstream and upstream. Draw attention to actors operating in the middle segment and explain how collaboration and

organisation is important to counterbalance the power that chain leaders generally have.

- Recognition that different parts of the agri-food supply chain may require the establishment of different collaborative legal forms.

CHAPTER II – Informal, semi-formal and formal forms of collaboration

CHAPTER III – Collaboration through multiparty contracts

CHAPTER VI – Collaboration through cooperatives

CHAPTER V – Collaboration through corporations

CHAPTER VI – Comparing and combining different legal forms to collaborate

CHAPTER VII – The implementation of the Guide: standard contracts and bylaws