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Fifth session (hybrid)
Rome, 18 – 20 March 2024

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SUMMARY REPORT

OF THE FIFTH SESSION

(18 – 20 March 2024)

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1. The fifth session of the Unidroit Working Group established in partnership with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) to prepare a Legal Guide on Collaborative Legal Structures for Agricultural Enterprises (hereinafter "the CLSAE project" or "the CLSAE Guide") was held in hybrid format from 18 to 20 March 2024 at the premises of Unidroit in Rome (Italy) and online for those who were unable to attend the session in person. The Working Group was attended by members and observers from intergovernmental organisations, farmers' associations, non-governmental organisations, academic institutes, and the private sector, as well as members of the Unidroit Secretariat. The list of participants is available in Annexe II.

Item 1: Opening of the session and welcome

2. The UNIDROIT Deputy Secretary-General opened the fifth session of the CLSAE Working Group by welcoming all participants. She informed that she would be acting as Chair of the session, replacing the UNIDROIT Secretary-General, who would be participating online. She thanked the members of the Working Group for their ongoing commitment and work conducted during the intersessional period between December 2023 and March 2024 to prepare the draft discussion papers for the fifth session of the Working Group. She informed that the project continued to be supported by the Italian Ministry of Foreign Affairs and International Cooperation (MAECI) through the MAECI/UNIDROIT Chair Programme. She noted that Dr Keni Muguongo Kariuki continued working on the CLSAE project as the MAECI/UNIDROIT Chair holder and that, as of February 2024, the Secretariat had welcomed Ms Jeannette Tramhel as a new Senior Legal Consultant to work on the CLSAE project as well.

Item 2: Adoption of the agenda and organisation of the session

3. The UNIDROIT Deputy Secretary-General introduced the annotated draft agenda and the organisation of the session (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 1). She informed the Working Group that the annotated draft agenda listed all the documents that would be considered as the basis for discussion: (i) Draft Discussion Paper on Companies (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 2); (ii) Draft Discussion Paper on Multiparty Contracts (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 3); (iii) Draft Discussion Paper on Digital Platforms (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 4); (iv) Draft Discussion Paper on Cooperatives (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 5); and (v) the Secretariat report (UNIDROIT 2024 – Study LXXXC – W.G.5 – Doc. 6). She noted that all documents had been distributed to the Working Group participants by email.

4. The Working Group adopted the agenda and organisation of the session as proposed (available in Annexe I).

Item 3: Update on intersessional work and developments since the fourth Working Group session

5. A member of the UNIDROIT Secretariat updated the Working Group on the intersessional work undertaken since the fourth session. It was noted that the Secretariat had continued to provide support to the Working Group for the organisation of intersessional meetings to advance the review and preparation of draft discussion papers. With the intention of gathering real-life examples to render the CLSAE Guide more practical and user-friendly, additional efforts had been made to gather empirical evidence on the use of cooperatives and companies in the agricultural sector. The Rome-based FAO Development Law Service had reached out to regional and country-level offices for data and facts regarding people involved in agricultural cooperatives and the advantages and barriers for farmers in joining cooperatives. IFAD had shared a database of some private sector and farmer organisations that IFAD worked with to help the Working Group identify the collaborative legal structures commonly adopted.

Item 4: Consideration of work in progress

(a) Draft Discussion Paper on Companies

6. With regards to the scope and approach of the draft discussion paper prepared for the fifth session of the Working Group, a member of the Subgroup on Companies explained that the paper described certain features of company legal forms that could be considered in the CLSAE project.[1] For comparison purposes with the other collaborative legal forms considered in the project (e.g., cooperatives and multiparty contracts), the paper did not delve into the analysis of specific company forms due to the complexities of national variations. However, Annexe I of the discussion paper included a brief analysis of the differences between some of the common types of company legal forms (e.g., general partnerships, limited liability partnerships, corporations, full proprietorships, etc.). It was noted that the discussion paper focused on company forms that were relevant for smaller actors operating within agri-food chains. The overall purpose of the paper was to provide a high-level overview to ensure comprehension for the target audience of the CLSAE Guide, particularly those involved in training smallholders and agri-MSMEs.

7. The Working Group acknowledged that several sections still required further development, adjustment, and contextualisation, particularly to better integrate the dynamics of supply chains. Specific features, such as conversion, corporate groups, dispute resolution, access to credit, and digitalisation, were highlighted as requiring further discussion on the need for their inclusion and the depth of coverage.

Fiduciary duties

8. O*ne participant* recommended to include the nature of fiduciary duties among the company features to be considered in the discussion paper, noting it could help further distinguish the purposes of a company and the extent to which taking into account other factors beyond profit was permitted. Another participant noted that irrespective of the objective of a particular company (e.g., maximisation of shareholder value, public benefit, social purposes, sustainable development, etc.) the profit-oriented nature of companies would not change. One participant noted the importance of taking into account the time horizon of the company when analysing its purposes and approach towards sustainability.

9. A query was raised as to whether the nature of fiduciary duties could be a useful way of framing the discussion on sustainability, public benefit, and the distinction between companies and partnerships. It was noted that in some jurisdictions, like the United States of America, some courts had adopted strict interpretation of a company director's fiduciary duty with regard to profit maximisation or shareholder wealth maximisation.

Types and purposes of companies

10. Working Group participants suggested that distinguishing collaborative legal forms according to their purposes could be a suitable approach for the CLSAE Guide. However, a key question raised was whether it would be possible to depart from the purposes as specified by the law. It was noted that the laws on cooperatives were rather strict and that although there were some laws which allowed for the members of cooperatives to depart from the objective set by the law and to specify different objectives in the statutes, this was sometimes seen as contradictory to the cooperative's

[1] The table of contents of the Draft Discussion Paper on the use of companies as collaborative instruments in agriculture contained the analysis of the following company features: purpose of the company; formation; separate legal personality; scope of liability of the members; asset partitioning; membership; members' contributions and capital; governance, management and decision-making; ownership issues; distributions and financial rights; exit and withdrawal; life and dissolution of a company; transfer of rights; dispute prevention and resolution.

principles. The Working Group further reflected upon the extent to which the private autonomy principle could be applicable. Additionally, it was highlighted that there had been some "back-and-forth" movement between commercial companies and cooperatives, where the lines between the two legal forms were becoming increasingly blurred.

11. *One participant* observed that the paper seemed to be distinguishing legal structures based on two main types of criteria: (i) those focused on maximising the difference between revenue and costs, and (ii) those acting exclusively in members' self-interest versus those considering other goals as well.

12. It was recommended that the Working Group could consider further distinguishing the types and purposes of companies based on the applicable law (e.g., commercial code, civil code, etc.). It was highlighted that there were civil law companies which had no profit purpose but still had separate liability and were deemed companies.

13. A query was raised about the extent to which the foundational profit purpose of companies could be "stretched" by members reinvesting profits into collaborative projects rather than distributing to shareholders. A response to this query discussed how sustainability could be profitable and not just considered a constraint. An argument was made that companies were compatible with the integration of profit and sustainability objectives. Examples were given from Italy and the United States of America, where companies had been integrating the public benefit objective into their statutes and bylaws. It was suggested that the discussion paper could integrate more information on "public benefit companies" that contemplated the combination of for-profit objectives with positive externalities. Building on this, another participant cited an example of an organically grown company in Oregon as an agri-company using a public benefit structure. It was noted that this company had transitioned through different ownership models, including being owned by a perpetual purpose trust with multi-stakeholder board representation. It was suggested that looking into the scholarly writing about this case study might be useful in providing guidance on how to deal with liability issues.

14. *One participant* highlighted that the concept of "public benefit" should not be confused with sustainability. It was clarified that public benefit was a wider concept than sustainability, and that sustainability implied specific obligations that public benefit did not.

15. It was noted that sustainability should not be considered as a criterion to distinguish between different collaborative legal forms, as it had become an universal requirement, not specific to certain legal forms. It was recommended that the analysis of sustainability, as one of the purposes of the collaboration, could be undertaken in two different manners. Sustainability could be considered as an option. In this case, it was explained that the discussion paper could simply highlight which structural features of a company would be needed to pursue sustainability goals. The alternative approach suggested was to analyse in greater detail how sustainability would entail changes in the features of a company considered, such as in the area of governance. As an example, the Working Group could consider the possibility of having independent board directors representing stakeholder interests not directly involved in the business activity and how this would affect the governance and decision-making structure. It was noted that this type of reflection could raise questions about how fiduciary duties would be impacted if the board representation reflected a broader set of interests beyond those of just shareholders. Additionally, it was indicated that this could also have implications for liability and remedies. Overall, the view expressed was that the discussion paper could further integrate other company legal forms (e.g., public benefit) and add specific references to how sustainability considerations might affect the company structure and operations (e.g., governance, decision-making, board composition, fiduciary duties, liability, and remedies).

16. Additionally, it was mentioned that the agency problem could also be relevant to a discussion on the purpose of companies, where the managers' objectives (e.g. growth) might not align with shareholders' objectives.

Definition of key terms

17. The need to ensure clear definitions and understanding of terms like "profit", "non-profit", "not-for-profit" was highlighted. While *one participant* queried whether engaging in further doctrinal discussion regarding the definition of profit and non-profit forms was useful, other participants emphasised the importance of agreeing upon whether the notion of profit could be understood as embedded in the business activity or something that affected the investment redistribution of the surplus. *One participant* expressed uncertainty about the language used in footnote 6 of the paper regarding cooperatives being categorised as "non-profit" or "not-for-profit". It was noted that some companies did not consider themselves for-profit because they had strict rules on reinvesting profits into social activities, even though they were still maximising the difference between revenue and costs. A concern was raised regarding the distinction between "profit" and "surplus" and the adoption of a more generic term, with "positive result" instead proposed.

18. *One of the members of the Companies Subgroup* drew the participants' attention to the definition of profit proposed in the draft discussion paper: "any surplus that remains on amounts earned, for example, revenues or income, after all amounts spent in the operation of business or activity, operating expenses, have been deducted." It was clarified that the reference to "profit" as the purpose of companies should not be equated with the intent to distribute dividends to members. Rather, the explanation indicated that profit in companies could be distributed to members but could also be reinvested in the company. The explanation further clarified that the proposed definition of profit generation - as a foundational objective for companies - meant to emphasise the importance placed on this goal for companies, and the need for such businesses to earn more than they spent in order to be financially viable.

19. In response, *one participant* considered that the explanation did not significantly change the earlier points made and raised the perspective that even if a company did not distribute dividends and instead reinvested profits, this still ultimately benefited the shareholders through increased liquidation value. The view expressed was that either distributing dividends or reinvesting profits represented profit for the shareholders. The possibility for a company not to distribute dividends was acknowledged, but it was indicated that if that was the objective, then the consequences of that approach would need to be examined more granularly.

20. Additionally, the Working Group discussed the specific meaning of the term "company" as used in the paper, and it was questioned whether a different term would be more appropriate. *One participant* suggested using the term "enterprise", as it might be more akin to the business organisations being referred to. The participant highlighted the importance of this concept as many jurisdictions had laws and definitions around enterprises, which might explicitly exclude cooperatives.

21. In response to the above, *one of the members of the Subgroup* explained that the term "enterprise" had been considered in previous versions but was ultimately not used as it was deemed too broad, potentially encompassing multiparty contracts as well. The term "company" was considered less broad than the term "business organisations" and therefore more reflective of the types of entities covered.

Corporate group arrangements and conversion

22. *One of the members of the Subgroup on Companies* raised a question as to whether the topic regarding corporate group arrangements needed to be covered in the discussion paper given the CLSAE Guide's main focus on the interests of the smallest enterprises in agrifood value chains. It was suggested that guidance on these more complex corporate structures could be developed in a separate chapter dedicated to the comparison and combination of different collaborative legal structures.

23. *One participant* disagreed and shared the view that such corporate group arrangements could be useful for smallholders, in particular for those who wished to collaborate for the use of a certain technology or machinery. *Another participant* raised a definitional issue relating to the notion of "corporate group arrangements". It was highlighted that the notion of "group of companies", as presented in the discussion paper, seemed to deviate from the typical legal understanding of corporate groups. It was recommended that, for the purposes of the CLSAE Guide, a more precise definition of what constituted a corporate group be developed to distinguish it from other forms of company collaboration or coordination. It was noted that in certain jurisdictions a "group of companies" implied one company having control and direction over other subsidiaries. A key point raised was the importance of presenting guidance on the alternative structures that smallholders and agri-MSMEs could adopt (e.g., a peer-based arrangement or a more hierarchical and centralised structure with limited autonomy).

24. It was further explained that the distinction typically made between horizontal and vertical integration did not fully capture the specific way cooperatives and companies were interacting. A much wider perspective involving a mix of hierarchical and heterarchical organisational elements was necessary. The Working Group was encouraged to further reflect upon and identify a shared definition of "group of companies" before its next session.

25. *One of the members of the Subgroup on Companies* noted that the issues related to corporate groups could be raised in the sections of the discussion paper devoted to membership and management. *A participant* highlighted that the legal status of a "company of companies" and of a "group" would be different, with the group having distinct features in terms of governance, power of coordination and control. It was suggested that it would be worth undertaking a comparative legislative analysis to verify how corporate groups were defined in different jurisdictions.

26. On the topic of conversion, it was clarified that the concept could refer to the transformation of a company into another form of company or into another legal form such as cooperative. It was suggested that the Working Group could further explore the topic of transformation within and between collaborative legal forms in the Guide. There was consensus that greater alignment on terminology and functional headings was needed for clarity and consistency. The Working Group was also of the view that an extensive discussion on conversion in the Guide's chapter on companies might not be appropriate and that part of this discussion could be covered in the chapter dedicated to the comparison and combination of different collaborative legal forms.

De facto company and informal arrangements

27. A question was raised as to whether the Subgroup had considered addressing *de facto* companies in the paper. *A participant* raised the importance of understanding the concept of a *de facto* company and its legal implications, particularly in relation to the interpretation of multiparty contracts as companies. Examples in Germany and Italy were mentioned where courts had interpreted certain multiparty contracts as actually constituting *de facto* companies, rather than just contracts.

28. *Another participant* noted that the *de facto* company was distinct from the broader concept of "informality", as discussed in the Guide. It was recalled that informality had been discussed in the previous Working Group session and that it could refer to agricultural businesses that did not comply with legal requirements (e.g., registration) or did not adopt legal structures recognised by law. Another participant noted that even an informal agricultural business, when engaging in activities that resembled company operations, could face the consequences of a company in terms of, for example, liability. Additionally, it was highlighted that being considered a *de facto* company could have implications on joint and unlimited liability for the members, even if their intention was not to form a company. The Working Group was recommended to further address these different scenarios in the Guide.

29. *A participant* expressed uncertainty about the parallel between *de facto* company activities and cooperatives, suggesting that the connection might be more relevant to multiparty contracts. Concern was raised about the terminology used to describe *de facto* companies, particularly because of the potential confusion between civil and commercial companies governed by specific civil or commercial codes. It was proposed to include these distinctions in the glossary to clarify the concepts surrounding *de facto* societies or companies in the Guide.

Limited liability and asset partitioning in company structures

30. The Working Group considered the issue of limited liability and asset partitioning, specifically by addressing a question posed in the draft discussion paper regarding whether, for the purpose of limiting financial risk, a company where members were not personally liable for the obligations of the company would be an appropriate collaborative legal form. In response to this, *one participant* highlighted that, before suggesting what could be an appropriate legal form, it would be important to further introduce the different options (e.g., limited versus unlimited liability) and explain the different mechanisms that might be used to limit liability with respect to certain groups of assets, as well as the general consequences.

31. The participant suggested that while it was important to consider limiting financial risk, there were other relevant aspects to consider when choosing a mechanism to limit liability or not. It was proposed that the scope of analysis of different regimes of liability could be expanded to include, for example, the allocation of specific assets for the purpose of the collaboration. The participant further explained the potential issue with focusing solely on limiting financial risk – it was noted that if the sole purpose of the collaboration was to minimise individual financial risk, the logical conclusion would be to contribute as little as possible. Such a collaboration that only relied on a very limited set of resources would not be proportionate or adequate to achieve the intended purposes. Thus, it was suggested that when discussing liability regimes, the paper should not focus solely on the risk of losing contributed assets or resources. The need to further distinguish between the different types of contributed resources, such as money, physical assets like land, and intangible resources like knowledge or labour, was also noted.

32. Additionally, it was emphasised that the value of assets should be measured not only in terms of risk towards creditors but also as essential tools for realising the goals of the collaboration. It was highlighted that land was a critical asset, as losing it could mean losing the primary means of work. It was also noted that when members contributed with assets like land it created a shared interest among them in ensuring those assets were managed effectively and in alignment with the collaboration's objectives. Ultimately, the participant was of the view that when discussing liability regimes and the role of contributed assets, the Working Group could take into account not just the risk of creditors seizing the assets, but also the value of those assets in enabling the collaboration to achieve its goals.

33. Building on this, a second participant highlighted two key issues relating to collaboration and contribution within companies. Firstly, the participant highlighted a technical question of what constituted a valid contribution and how it had an impact on collaboration. Using a hypothetical example of a company with five members contributing with different factors of production (financial, machinery, land, work, etc.), a question was raised as to whether a company could be formed based on diverse contributions and what the implications were. Secondly, the participant highlighted a more complex issue related to contributions of work and land, questioning if company law or cooperative law provided higher protection for these fundamental resources. It was noted that there seemed to be a trade-off between allowing contributions of work and land to enhance collaboration while limiting liability for these non-monetary resources. The Working Group was recommended to further distinguish between the types of contribution and liability, as well as to further explain the required balance to promote collaboration while protecting essential resources.

34. *Another participant* referred to UNCITRAL's Guide on Limited Liability Enterprises, where it was suggested that work could be contributed as a resource, especially considering that it might be the only available contribution for some members. Regarding land as a contribution, it was noted that while there might not be an initial issue with providing land as a contribution, more research was needed, particularly concerning agricultural land regulations and customary laws that might impact how land contributions were treated and protected from creditors.

35. *A participant* discussed the practice of converting all types of contributions into monetary value within cooperatives. It was noted that the majority of farmers who joined cooperatives remained individual farmers and did not make their land available for common production. A concern was raised about the form in which agricultural land could be contributed within cooperatives, particularly if it could be used as collateral. It was noted that ownership rights to land were generally not transferred to cooperatives. The participant highlighted the diversity of land ownership practices globally, noting differences between Northern European and American perspectives and those governed by customary laws in other parts of the world. Further, it was highlighted that, contrary to the common assumption that members needed to buy shares, there was great flexibility in starting cooperatives without initial capital requirements. The inclusive nature of cooperatives thus allowed for participation without significant financial contributions.

36. A point was raised regarding the similarities between cooperatives and multiparty contracts, particularly in the context of starting collaborations with or without a common fund. A parallel was drawn between the cooperative model that allowed for commencing operations without an initial capital contribution and the concept of initiating multiparty contracts with or without shared resources. This comparison highlighted the flexibility and adaptability of both cooperative structures and multiparty contracts in accommodating various collaboration models based on the availability of resources and the specific needs of the participants. The discussion underscored the evolving trends towards more inclusive and accessible collaboration frameworks that did not necessarily mandate a minimum capital requirement, aligning with the contemporary practices aimed at fostering cooperative endeavours and partnerships.

37. A question was raised regarding the possibility of a lessee to confer his or her credit from a land lease agreement into a company, even if the land was not owned but leased. *A participant* highlighted that in companies it was common to confer not only goods but also credits. A key question raised was whether a lessee could protect his- or herself by conferring a fundamental asset, such as leased land. *Certain Working Group participants* emphasised the importance of accurately assessing the value of services or rights conferred in agreements, as disagreements over valuation could lead to complications.

38. *The UNIDROIT Secretary-General* drew attention to the particularities of the concept of asset partitioning within companies in Italian law (e.g., *patrimoni destinati*, *patrimoni separati*) but noted these were less common in other legal systems. It was suggested that the Working Group could further investigate alternative approaches when work could not be used as capital and explore whether models like asset partitioning might be beneficial for improving institutional performance.

39. In response to the above and based on feedback from practitioners, a participant expressed uncertainty about the practical application of asset partitioning and the concept of "patrimoni separati". It was noted that an alternative could be to create a separate company for specific ventures or projects to effectively manage liability by concentrating and separating risks through the company structure. Participants discussed the differences between creating a multipurpose vehicle and a single-purpose company, as well as whether it was more appropriate for agricultural enterprises to organise their activities in a manner that concentrated risks through specific collateral or spread liabilities across common resources. The need for further consideration on how risks were managed and liabilities structured within the different collaborative legal forms was emphasised. Lastly, it was reiterated that the goal of the Working Group was to assess the comparative advantages of different

approaches and determine which methods are more practical, cost-effective, and inclusive for agricultural operations.

(b) Draft Discussion Paper on Multiparty Contracts

Exit of multiparty contracts

40. *One of the members of the Subgroup on Multiparty Contracts* introduced the draft discussion paper, in particular the sections devoted to exit, dissolution and post-contractual obligations. She explained that while voluntary exit was generally permitted, measures should be taken to avoid disruption of the collaboration. Matters regarding exclusion or forced exit were also highlighted as an important tool in terms of governance. It was suggested that the Working Group could further discuss how abuses related to such exclusion could be avoided. Additionally, the relevance of discussing when and why multiparty contracts (MPCs) should provide rules for dissolution and to what extent certain obligations should survive the dissolution of a collaboration were also noted.

41. To illustrate the topics proposed for discussion, an example was given of an MPC among ten farmers, a supplier of digital devices, a digital service provider and a financier for the development of new digital infrastructure, with the objective to monitor compliance with sustainability standards through data collection on waste disposal. It was noted that the consequences would vary considerably, depending upon whether exit was by one of the farmers, the financier or digital service provider, as well as whether exit could cause dissolution of the entire MPC. The main question discussed was how, through regulation of exit and dissolution, incentives could be provided to protect the value of the collaboration. Other aspects considered included the reasons for either exit or dissolution, the exit mechanism, and the consequences of the mechanism, in terms of the parties' rights and obligations and the allocation of proceeds and liabilities.

42. The distinction was made between voluntary and forced exit, and also between forced exit due to either a fundamental breach (which had been addressed specifically in the discussion papers on cooperatives and companies) and a supervening event that made it either impossible or too costly for the exiting party to continue, a situation similar to hardship. It was pointed out that exit and dissolution were not entirely separate events because in some cases exit might also cause dissolution, particularly if the exiting party was essential to the collaboration. Another distinction, and one with possible application to the analysis of cooperatives and companies, was differentiation between exit from the MPC (the collaborative legal form) and exit from a single project of that collaboration.

43. It was noted that this topic in general was one where freedom to contract was essential. Parties could decide on an open or more limited voluntary exit regime; the types of instances in which exit would be possible; the periods during which exit would not be allowed (for example, at the beginning of the collaboration); penalties to discourage exit, particularly during the early stages of collaboration; whether to accept a decision to exit but with delayed effect or loss of right to reimbursement of contributions; or whether to retain certain collaborative obligations after exit for a certain period. It was also observed that all of these mechanisms could mirror equivalencies under the company and the cooperative forms. Arguments could be made for both a liberal exit strategy and a restricted one; a more liberal approach could encourage parties to join a collaboration, whereas a more restrictive approach could be appropriate where a party was considered essential or difficult to replace.

44. Given that MPCs needed mechanisms to prevent opportunistic exit, for example, to prevent misuse of knowledge developed within the collaboration, it was explained that exit was usually allowed only in circumstances when it would not prejudice other parties, or upon payment of compensation. A suggested alternative was transfer of participation, which would be functionally equivalent to an exit plus the entry of another contracting party – however, in such cases the

remaining parties should have some say; most rules under applicable law would reflect a balance between freedom to exit and the interests of remaining parties.

45. Governance of the effects of exit was another issue discussed, and it was noted that MPCs could establish limits on restitution and contribution. The prior example was referenced to illustrate that a farmer might be permitted to exit but only if willing to forego prior contribution, such as special equipment essential to the collaboration, or upon restitution in kind or cash. Another question discussed was whether MPCs could limit an exiting party's access to proceeds or profits for collaborative activities carried out to date. Participants of the Working Group expressed that, in principle, MPCs could limit this right so as to discourage exit. As to the extension of post-contractual obligations and liability, it was noted that there were examples of contracts in which the exiting party was still obliged to perform some contractual obligations and remained liable for activities undertaken before the exit.

46. *Another member of the Subgroup on MPCs* suggested that the analysis of exit could be differentiated based on the type of contracting party because this would be appropriate in multi-stakeholder contracts and would enable comparison with the chapters of the CLSAE Guide on cooperatives and companies where exit regulation was connected with member status or contribution level. This was supported by *one of the FAO representatives,* who noted that the impact on the collaboration would be very different if the exiting party were the digital service provider rather than one of the farmers. It was noted that if the farmers knew that the party on which the collaboration was dependent had a heightened level of responsibility prior to exit, this would help to build trust within the relationship. Although it might be desirable that each of the farmers could exit at will, if this same approach were available to "more powerful parties", it might result in an undue advantage because exit by such party would potentially dissolve the entire collaboration. Therefore, it was considered important to further discuss how to incorporate protection for smallholders and agri-MSMEs in the context of all collaborative legal forms covered in the CLSAE project.

47. *Certain Working Group participants* emphasised the importance of encouraging loyalty so that the digital service provider would not leave the farmers in a lurch. It was further illustrated that when faced with possible exit by a digital service provider, farmers could elect to "fork" the open-source software (i.e., make a copy and continue to use it). It would be sufficient to stipulate in the contract that if the digital service provider were to voluntarily exit, the license would be made available as a post-contractual obligation or the open software licence itself might so permit. It was noted that proliferation of open-source software was expanding to many sectors including agriculture.

48. *One of the members of the MPC Subgroup* further explained the notion of "essential performance" noting that in economics, "essential" referred to irreplaceability of the resource or difficulties of replacement at reasonable cost. It was recommended that the Working Group could further distinguish the different kinds of regulation of exit. It was noted that one could use a general criterion concerning proportionality between the cost and the price of exit.

49. Working Group participants indicated that MPCs could be ancillary to the main contract. A grain farmer could have been required by the buyer to join the network with the service provider in order to improve the quality of the grain or to receive certification of sustainability standards. The farmer, who was dependent primarily on the main contract of sale with the buyer, might have been made more vulnerable in negotiations with the buyer by constraints imposed on the exit from the ancillary service contract; if the farmer were to become excluded from the main contract, the farmer would nonetheless likely remain contractually bound to the ancillary contract and required to pay for services (such as certification, for example). A second example was given in which the buyer wanted to replace the supplier for some reason. However, instead of terminating the contract and accepting liability for unfair trade practices, the buyer excluded the seller from the ancillary certification service, which was a prerequisite for the sale. *One of the members of the Subgroup on MPCs* interpreted the

second example differently: if the supplier was excluded from the main contract with the buyer, perhaps that supplier would appreciate flexibility to exit the ancillary contract. These kinds of interactions between the two levels of contracts were noted as very important with implications for how to regulate entry, exit and exclusion.

50. *Another members of the Subgroup on MPCs* suggested to rationalise the discussion through application of the principle of proportionality, not only to the gravity of the consequences of voluntary exit but also in the case of forced exit. It was emphasised that although there existed a strong relationship between exit and exclusion, in reality these were different dynamics.

51. *One of the members of the Subgroup on Companies* suggested that the Working Group might wish to look at exit and exclusion from the perspective of incentives, rather than penalties, and socio-cultural elements that encouraged parties to remain in a collaboration.

52. *One of the members of the Subgroup on Cooperatives* noted that, in the context of a contract, the terms "exit" and "withdrawal" referred to specific rights and obligations. By comparison, there were no such specific obligations for members of a cooperative, whether in the law, the articles of association or the bylaws. Thus, it was noted that a member could withdraw from the cooperative and yet continue to be bound by contract.

53. *One of the members of the Subgroup on MPCs* shared the example of a cooperative - comprised of apple growers - where one (or more) growers desired to withdraw on a voluntary basis for some reason and queried whether the cooperative had any mechanism to regulate such voluntary withdrawal so that it would not disrupt the collaboration. *One of the members of the Subgroup on Cooperatives* responded that freedom of association also included the freedom to withdraw. Therefore, it would not be possible to prevent withdrawal entirely, but certain conditions could be imposed. It was noted that this type of condition would generally not be found in the bylaws but in additional documents, perhaps in a contract or in the delegation of this power to management.

54. *One of the members of the Subgroup on MPCs* stressed that this discussion illustrated one of the key questions of the CLSAE project, namely, when either a cooperative or a company entered into an agreement (e.g., to sell milk or apples) whether that agreement would be subject to the law of contract, companies, or cooperatives. If the law of contract would govern, it would mean that there would be an MPC on every such occasion, which seemed neither plausible nor supported by evidence. For example, it would be important to know whether the law of contract would apply to a dispute between a member and the cooperative. It was noted that the main difference between contracts and companies in this regard was that when a party voluntarily exited from a company, restitution would not be rendered immediately upon withdrawal but rather upon dissolution, so as to preserve the assets of the company for creditors. By contrast, in the case of MPCs, freedom to exit was not limited by the existence of a common asset.

55. *The UNIDROIT Secretary-General* noted that ways to exit from a company were usually regulated by law, and more complex matters by contract law rather than by statute or bylaws, notwithstanding certain limitations on party autonomy. The reimbursement upon exit was usually limited to situations where substantial elements had been altered, such as a change in the original purpose of a company.

56. *One of the members of the Subgroup on Companies* pointed out that UNCITRAL's Legislative Guide on Limited Liability Enterprises (LLEs) accepted reasonable delay in payment of compensation, bearing in mind the circumstances, and referred to general dispute resolution provisions where the amount was at issue.

57. *One of the members of the Subgroup on MPCs* noted the Working Group's general understanding that rights and obligations on matters such as production specifications would

generally not be included in the statutes, articles of association or bylaws of a company or cooperative; rather, these matters would be addressed in MPCs and subject to the law of contract. It was noted, however, that certain scholars held the opposite view.

58. *Another member of the Subgroup on MPCs* pointed out that production specifications required uniform application. Accordingly, if specified by contract, these specifications could not be adopted by majority vote as unanimity would be required; by contrast, if specified by internal regulation, the specifications would be approved in accordance with ordinary procedural standards and subject to the law of companies or cooperatives.

59. *The UNIDROIT Secretary-General* noted that although the type of regulations under discussion usually applied to very large companies, these could also be envisioned for smaller companies. The Working Group was encouraged to further analyse what such internal regulations entailed and whether their breach would constitute a breach of duties for which expulsion was warranted. Working Group participants observed that the extent to which this was governed by statute or contract would probably vary by jurisdiction.

Dissolution

60. *One of the members of the Subgroup on MPCs* opened the discussion on dissolution and post-contractual obligations with a view towards comparison with companies and cooperatives. An example was given of an MPC to implement an experimental project for five years, at which point the collaboration ended as provided in the agreement. In such circumstances, any investments, remaining assets and liabilities, as well as possible future opportunities for the parties to collaborate, should be governed by the contract. In the case of voluntary exit where the financing party had exited from the contract and the remaining parties were unable to find alternative financing, the exit of an essential party caused disruption and dissolution of the collaboration.

61. In the ensuing discussion, dissolution was recognised by the Working Group participants as a topic that differentiated the three collaborative legal forms quite significantly and that therefore could also be considered in the comparison chapter of the CLSAE Guide. *One of the members of the Subgroup on Cooperatives* noted that the emphasis of the analysis regarding dissolution should be focused on providing guidance which promotes the preservation of the collaboration. It was noted that, in the case of cooperatives, dissolution only took place in exceptional cases, with very few reported judicial decisions. *A member of the Subgroup on MPCs* pointed out that one might draw the conclusion from such an observation that contracts were less stable than cooperatives, not only because of the differences in legal structure but also in culture. It was noted that, in the field of contracts, there had been considerable debate over ways to continue the collaboration through measures such as renegotiation and good faith. If this would lead to the recommendation that for smallholders and agri-MSMEs seeking stable and long-term collaboration the cooperative form would be preferable to MPCs, that would be acceptable, if supported by logical argument.

62. It was suggested that, from the perspective of MPCs, it would be helpful to clarify those instances in which the contract could or should come to an end and whether this required a collective decision, either by consensus or majority. Secondly, the effects and consequences of dissolution should be addressed as far as possible, in terms of rights and liabilities as well as restitution and access to proceeds (including not only cash assets but also equipment, intellectual property or know-how developed through the collaboration) and the manner of distribution, given that not all assets would be easily divisible. It was noted that, notwithstanding dissolution, a party could be subject to post-contractual obligations.

63. The importance of establishing clarity about the consequences of liquidation was also stressed because this would be a way to create incentives to collaborate in a certain way and to maintain relationships. If the dissolution occurred because of fundamental breach by one of the

contracting parties, this could create a claim for damages by other parties, as well as liabilities towards third parties, both in contract or in tort. This raised the issue of unlimited liability in the context of MPCs and prompted the question of whether post-contractual obligations would also be a relevant consideration in the chapters on cooperatives and companies.

Post-contractual obligations

64. It was explained that a post-contractual obligation survived the end of the contract, in contrast with the liability that arose out of the breach of contractual duties. The example given was where one party ended the relationship but was still under an obligation to perform a task that would otherwise undermine the collaboration, for example, to provide information and resources. Other examples of post-contractual obligations would include non-disclosure, non-competition and duty of confidence.

65. *One of the members of the Subgroup on Companies* acknowledged that the issues raised by the MPC Subgroup could be further developed in the companies' discussion paper with a comparative perspective while recognising that there would be nuances and differences between partnerships and shareholder corporations. It was pointed out that the approach taken in the UNCITRAL Legislative Guide on LLEs had been to provide default rules for very simplified regimes that would be easy for parties to apply. A concern was expressed as to the level of detail that was expected in addressing these matters from the companies' perspective.

66. *One of the members for the Subgroup on Cooperatives* observed that the issues under discussion were also relevant for cooperatives. It was suggested that the analysis could propose possible general solutions to these issues without going into detail. Concerns were raised as to what constituted good practice and which rules were to be considered the default rules. It was noted that if smallholders and agri-MSMEs were to be integrated into value chains, which tended to be transnational, the question regarding the applicable law would arise (and whether this included only State law or other types of law as well).

67. *Another member of the Subgroup on Cooperatives* asked whether the post-contractual obligations were new obligations completely unknown at the beginning of the collaboration or known to some extent.

68. *One of the members of the Subgroup on MPCs* responded that the obligations would not be completely unknown as they should have already been foreseen in the contract. While some could be based on the good faith principle, this would not be applicable in all jurisdictions. Therefore, it was suggested that the best approach would be to include explicit provisions in the contract. It was noted that duties of confidentiality and non-competition after conclusion probably meant that these existed during the contract. However, some obligations could be totally new. The example given was where a party had exited a contract that had required members to avoid pesticide use; nonetheless, that obligation would continue to the extent that it would allow the other parties to preserve the collaboration and continue the sustainability programme. This illustrated the connection between post-contractual and contractual obligations.

69. *Another member of the Subgroup on MPCs* noted that the basic point was that parties could identify post-contractual obligations in the contract and that this would not pose a problem even though one could argue that if the contract had been terminated, it would not be enforceable.

70. Three additional questions were raised for the discussion of the Working Group. One concerned minority rights. It was noted that to reach agreement on dissolution, unanimity would be required in MPCs, while in companies it seemed that a majority would be sufficient with compensation generally provided to minorities. Given that the topic regarding dissolution was treated differently across the three collaborative legal forms considered in the CLSAE project, it was recommended that

it also be addressed in the comparative chapter, and that ways to protect minorities could be further described in the chapters on cooperatives and companies. Secondly, it was pointed out that contracts were presumed to be of limited duration, whereas the opposite was true for companies and cooperatives. This was considered important because it could influence the decision about dissolution and the choice of collaborative legal form; if parties' expectations were to collaborate only for a limited time on one project, MPCs could be the preferred choice. The third point concerned the relationship between the initial contribution and the activities performed during the life of the contract. The example given was a research and development project where the goal was unknown and the efforts required by each party were unknown – hence, the outcome was very uncertain. While this was feasible for an MPC, it was not known whether that was possible in cooperatives and companies, which were complex organisations with multiple objectives. This was another dimension that could be included in the comparative chapter.

71. *One of the members of the Subgroup on Cooperatives* noted that the approach that had been taken for the development of the discussion paper on MPCs was very precise, whereas the other discussion papers had adopted a more holistic and general approach. Nonetheless, the information and input provided were sufficient to revise the discussion paper. It was noted that in the discussion paper on cooperatives, aspects regarding the duration of collaboration and minority protection could be analysed in more detail. However, this would require empirical evidence based on cooperative legislation, statutes and bylaws. The challenges of undertaking such research was noted, but it was also acknowledged that the findings could help develop better guidance on topics that were still missing.

72. *The representative of FAO* reiterated their willingness to continue the effort to obtain practical examples but that for that to be successful, it would be helpful to have a clear questionnaire with the key issues that were to be explored.

73. *The UNIDROIT Deputy Secretary-General* noted that IFAD had been participating online but due to connection difficulties would be contacted separately for assistance with examples from their field work as well.

(c) Draft Discussion Paper on Cooperatives

74. *The UNIDROIT Deputy Secretary-General* opened the discussion on cooperatives, noting that two of the members of the Subgroup were not able to join the fifth Working Group session.

Approach of analysis, power imbalance and operations within value chains

75. *One of the members of the Subgroup on Cooperatives* informed that the draft discussion paper had mainly focused on cooperatives as collaborative legal forms for smallholder farmers. The relevance and need to further analyse how cooperatives collaborated within value chains was acknowledged, and it was suggested that both "layers of analysis" be considered moving forward. Additionally, the importance of distinguishing between farmers and peasants was pointed out, as well as the fact that these actors might be governed by non-State law.

76. The Working Group was invited to further discuss the shifting reasons for power imbalances between chain leaders, farmers and other actors. It was noted that traditionally power imbalances in value chains were connected to capital and labour issues; however, more recently, the use of data had also become a factor for power imbalance. Moreover, besides the distinction between organisations and contracts, the Working Group could further reflect upon the distinction between different types of organisations based on the principle of private autonomy. It was noted that in many jurisdictions this principle applied to contracts but not necessarily to organisations (e.g., only to a certain extent and exceptionally would cooperatives be allowed to introduce profit-related objectives in their bylaws). It was recalled that public international law regulated cooperatives'

objectives and forms. Furthermore, it was emphasised that cooperatives tended to act as intermediaries between cooperative members and the market and, therefore, cooperative members should be taken into account to define the applicable law.

77. *The Coordinator of the Working Group* noted three questions that could be further developed in the discussion paper on cooperatives. Firstly, the distinction between cooperatives operating within value chains, those focused solely on production and those integrating production, processing, and distribution. It was suggested that this topic could be further developed to explain how vertical integration within cooperatives affected collaboration compared to horizontal cooperation among farmers. In other words, the Subgroup on Cooperatives was invited to further consider whether a cooperative that integrated vertically operated differently, in terms of the type of collaboration, vis-à-vis cooperatives that operated horizontally among farmers. Secondly, it was noted that the size of cooperatives could be analysed in more detail to highlight the potential differences in collaboration based on whether cooperatives were small or large. Thirdly, the origins and actors behind the foundation of cooperatives could be explored to understand the differences in terms of the type of collaboration established when cooperatives were driven by buyers, larger enterprises or other actors such as international organisations.

78. *Another member of the Subgroup on Cooperatives* explained that horizontal and vertical integration in cooperatives could not be addressed separately, as one generally led to the other. It was noted that as cooperatives grew larger an increasing risk of losing the core purpose of promoting cooperative members' interests could occur. Regarding size, it was noted that only cooperatives founded by local communities (bottom-up approaches in cooperative development) had been considered in the discussion paper and that cooperatives used by large enterprises (top-down approach) had not been analysed since they were generally perceived as tools for buyers' advantages.

Data concerning the types and size of cooperatives

79. A question was raised as to whether FAO, IFAD or any of the institutional observers to the Working Group could provide data concerning the types and size of cooperatives operating particularly in non-European and non-North American countries. It was noted that it would be relevant for the Working Group to further understand how cooperatives were developed in other regions such as Africa, Asia and Latin America. Still in relation to the additional evidence needed, *one of the members of the Subgroup on Cooperatives* stated the importance of conducting further research regarding cooperative statutes, bylaws, and internal regulations that translated the aim of promoting members' interests into practical implementation.

80. *A member of the UNIDROIT Secretariat* recalled the efforts made during intersessional meetings to gather data related to cooperatives. It was noted that FAO and IFAD did not directly collect data themselves but had provided information based on consultations with local offices and publications developed by the International Cooperative Alliance (ICA) and the World Cooperative Monitor.

81. *A representative of FAO* acknowledged the lack of habitual data collection on official statistics concerning agricultural cooperatives and their sizes. Instead, it was explained that FAO relied on publicly available national statistics from countries involved in their projects or data collected by ICA.

82. *Another representative of FAO* noted that the work of FAO's division on inclusive rural transformation and gender equality mainly focused on small cooperatives that included vulnerable groups and which promoted participatory governance, as well as the involvement of cooperative members in decision-making processes. It was suggested that representatives from the FAO trade division, who worked on larger cooperatives, could also be invited to contribute to the discussions of the CLSAE Working Group.

83. *A member of the Working Group* drew attention to the "Coops4dev" project as a valuable resource with detailed information on agricultural cooperatives. It was highlighted that the Coops4dev project's geographical interface covered over 100 countries, including many African countries. With regards to the size of cooperatives, it was noted that exceptions to the "one member, one vote" principle existed, particularly in secondary cooperatives and broader cooperative associations.

Cooperative governance

84. The Working Group discussed the evolving nature of cooperative governance and the need to adapt to new challenges posed by large-scale participation and technological advancements. Concerns related to the use of data among and beyond the cooperative members were highlighted, and a question was raised as to whether large-scale types of governance put pressure on the "one member, one vote" principle. The issue of digital identity and digital participation, in the context of large-scale collaborations, was also discussed to note the challenges of authentication of the person voting, the risks of degeneration of the democratic principle, and new types of voting mechanisms that went beyond the usual "one member, one vote" principle.

85. *A member of the Subgroup on Cooperatives* recalled that the notion of participation in cooperatives encompassed a wide range of activities beyond mere voting and recommended the Working Group not to overemphasise the "one member, one vote" principle.

86. Variations of the voting model in cooperatives were discussed, such as transaction-based voting, and it was highlighted that the essence of cooperative governance lay in democratic and participatory processes rather than voting mechanisms alone. The relevance of understanding the common needs of cooperative members was emphasised to further explain the importance of a participatory approach. It was suggested that the Working Group consider the participation of external actors in cooperatives with caution, as excessive interference could disrupt cooperative values.

87. Regarding statistics and data collection, the usefulness of the Cooperative Monitor for the CLSAE Project was questioned as it mainly focused on large cooperatives and did not contain data regarding smaller cooperatives. It was recommended that the Working Group further consider the initiatives undertaken by the International Labour Organization as it was in the process of establishing an international data collection mechanism on cooperatives.

88. *The Coordinator of the Working Group* noted the diversity in cooperative structures by sharing examples of agricultural cooperatives operating in the wine industry. Additionally, drawing from cooperative examples in Italy, it was noted that larger cooperatives tended to be vertically integrated, covering the entire production cycle, while smaller cooperatives often focused solely on production. However, a question was raised as to whether this landscape regarding the varying sizes and structures of cooperatives had evolved.

89. *A member of the Subgroup on Cooperatives* highlighted the complexity of agricultural cooperatives, emphasising the need to consider both horizontal and vertical integration, as well as their role within value chains. It was noted that historically in cooperative value chains, producers and consumers were part of the same organisation; however, more recently, separate entities handled production, processing, and distribution, and this created new types of conflicts. Producers' cooperatives generally envisaged higher prices for their goods, while consumer cooperatives aimed for low prices to benefit their members. Participants acknowledged a trend in vertical disintegration for reasons of competition and enhancement of single stakeholder benefit. Additional, careful consideration was recommended when using examples from national cooperative laws, to acknowledge the evolving nature of legal frameworks and the diverse contexts in which cooperatives operated.

Collaboration within a single cooperative and between separate cooperatives

90. *The Coordinator of the Working Group* highlighted the importance of differentiating between collaboration within a single cooperative and collaboration between separate cooperatives. A question was raised as to whether it was more efficient to integrate production, processing, and distribution within one large cooperative or to have separate cooperatives for each stage, then collaborate at a higher level.

91. *A member of the Subgroup on Cooperatives* observed that both internal integration within a single cooperative and collaboration between separate cooperatives could be successful, as long as the chosen structure benefited the cooperative members. While large, integrated cooperatives and multi-level cooperative networks were viable models of collaboration, a thorough understanding would require examining not just the stages of production but also the practical rules and procedures that translated the goal of member benefit into concrete actions.

92. A question was raised as to whether it was better to have one large cooperative handling everything or have separate, potentially competing entities collaborating. Participants' attention was drawn to a trend of vertical disintegration, which could indicate that cooperatives might be moving away from large, integrated structures, and that disintegration created challenges for collaboration across separate entities.

93. *A member of the Subgroup on Cooperatives* expressed partial agreement with the affirmation of a tendency towards vertical disintegration within cooperatives but noted that disintegration increasingly occurred for reasons of competition and enhancement of single stakeholder benefits.

94. The Working Group discussed the importance of further analysing internal regulatory documents of agriculture cooperatives (e.g., bylaws, statutes, contracts, etc) to further understand the practices generally adopted and to identify best practices for the purpose of developing the guidance instrument. Participants were invited to share suggestions on how to access the relevant material.

Breach of cooperative obligations, membership responsibilities, and sanctions

95. *A member of the Subgroup on Cooperatives* noted that the draft discussion paper had briefly explained the differences between breach of obligations by the cooperative management and breach of obligations by cooperative members. Examples of typical member obligations were provided, and fundamental breaches were distinguished from other types of breaches. It was noted that the discussion paper explained how non-compliance could be addressed, and the varied types of remedies were pointed out. Additionally, it was noted that the discussion paper sought to address the consequences of breach and whether besides exclusion there were other consequences that allowed the breaching member a possibility to correct his or her behaviour in order to ultimately fulfil the cooperative obligation.

96. The importance of distinguishing between breaches of statutes and regulations was emphasised, and it was noted that this differentiation was crucial for both cooperatives and companies. For the purposes of further understanding the remedies, it was recommended that the discussion papers on cooperatives and companies could further distinguish between breach of a rule concerning the organisation and breach of a rule concerning the collaborative project itself (e.g., requirements for the production of organic products). It was noted that breaching a project-related rule typically did not lead to exclusion from the cooperative or company, whereas breaches of organisational rules could result in more severe consequences such as suspension or expulsion.

97. *The UNIDROIT Secretary-General* noted the common practice in company law for partners to undertake certain obligations to perform, which could be formalised in two ways: through a contract

with the company or institutionalised through articles of association or statute. It was suggested that the Working Group could further discuss the type of analysis desired, as various legislative options existed globally to address such matters.

(d) Draft Discussion Paper on Digital Platforms

98. *A member of the UNIDROIT Secretariat* recalled that at the fourth session of the Working Group, a question had been raised as to whether it would be relevant to develop a separate chapter on digital platforms within the CLSAE Guide. Accordingly, a Subgroup on Digital Platforms had been established and a draft discussion paper had been prepared for the consideration of the Working Group at its fifth session with a view towards making a decision on whether and how to address digital platforms within the Guide.

Definition of key terms

99. *One of the members of the Subgroup on Digital Platforms* explained that the terms "platforms" and "digital platforms" had been used in a variety of disciplines, with related but slightly different meanings. Generally "digital platform" referred to a two-sided or multi-sided online marketplace that facilitated and intermediated value-enhancing transactions between two or more groups. The notion of "intermediate" was important because of the degree to which the platform could become involved in a transaction. In some cases, a pure or neutral intermediary would not become involved at all, whereas in other cases, especially as had been determined by case law, the appearance of neutrality was not borne out because in reality the platform set the terms for group interaction. Various employment disputes with Uber were cited as an example. It was noted that the discussion paper highlighted the distinction between digital platforms and digital solutions, which were less about intermediation and referred primarily to a direct software-based service (e.g. Microsoft Word).

100. It was explained that these digital platforms had been "housed" in various legal entities in the sense that they had been operated by companies, cooperatives, and consortia. Additionally, it was noted that the particular technical and economic features of digital platforms could create certain tensions within the legal entity that had created or operated them.

101. Digital platforms were categorised into two types: (i) innovation platforms (technological foundations on which third parties could build their own digital goods and services, such as Apple IOS or the Android equivalent), and (ii) transaction platforms (a kind of intermediation of a direct exchange of good and services). However, it was pointed out that hybridisation was happening where a "pure" transactional platform used the data gathered in new (initially not intended) types of applications. The example given was again that of Uber; it had continued as a classic transaction platform, but the data gathered about drivers and riders enabled Uber not only to build new functionalities on the application but also to open their Application Programming Interface (API) so that others were able to embed the Uber software into their own applications (e.g., Booking.com). This porousness that allowed third-party developers to innovate on top of Uber's own original digital platform raised the issue that the boundary between one and the other was becoming less clear.

102. Another issue that was explained was that of direct or indirect network effects vis-à-vis digital platforms. The example given of a direct effect was the Facebook platform where users benefitted as more users joined, which created value through interactions on the same side of the platform. An indirect effect occurred when an increase in the number of users in one group would result in greater value to another group of users who then decided to join. It was pointed out that while digital platforms could generate network effects to ensure economic sustainability, this could also have certain implications on issues like participation and engagement with stakeholders.

Stakeholders of digital platforms

103. An overview was given of the main stakeholders of digital platforms, which included the operator (for-profit or non-profit); the developer (in charge of building the platform or its complementary applications); and the user groups or members. It was pointed out that developers could have either contractual or employment relationships with the operator, or as third-party developers might have only loose relationships.

104. It was explained that user groups were individuals and organisations who took advantage of the services offered through the digital platform, while members were a subcategory of users and had certain rights and duties by virtue of their membership agreement. It was noted that a typical corporate platform might not have any members, while a cooperative platform might have members who were platform users and users who were not cooperative members yet benefitted from the platform services (e.g., UpandGo). It was pointed out that what was of interest to the CLSAE Working Group was that the rights of members did not concern only organisational, corporate or cooperative governance but also technological governance and that this was an aspect that could be compared.

Data collection and risks of market failures

105. It was explained that in the agricultural sector, data collection practices had gradually become integrated into digital platforms that now involved a range of activities, from monitoring weather patterns to creating new e-commerce opportunities. No longer confined to data collection on weather or soil, new services were being built on top of digital platforms. Examples given were AI used for precision farming to grow crops more efficiently and blockchain-based food provenance systems (e.g., to trace the provenance of Australian beef sold in Chinese markets).

106. It was pointed out that while these innovations enabled certain efficiencies, there were also at least five risks of market failures from the intensification of data collection practices: (i) "lock-in" of farmers' data that made it difficult for farmers to switch to a different platform; (ii) weak bargaining power of farmers vis-à-vis service providers; (iii) data siloed and fragmented across many service providers, minimising the data value in terms of improved farming practices; (iv) clash of interests between those of farmers and the public interests; and (v) farmers' concern over data being misused by third parties.

107. It was noted that the concept had gradually evolved, at least in the EU, from one of data ownership towards that of data access, and that this evolution was relevant to discussions by the Working Group about how the three collaborative forms could address these broad market failures, some of which were digital and technology-related, while others concerned bargaining power and how to balance private and public interests.

108. Following the introduction of the discussion paper on digital platforms, *a member of the UNIDROIT Secretariat* reiterated that the Working Group had to decide whether the development and deployment of a digital platform would be an important goal for the smallholders and the agri-MSMEs for whom the CLSAE Guide was being developed and how this goal might have an impact on the choice of collaborative legal structure.

109. *Another member of the Subgroup on Digital Platforms* outlined four elements for the consideration the Working Group when deciding whether to deal with digital platforms in a separate chapter or within the chapters dedicated to the other forms of collaboration considered in the CLSAE Guide (multiparty contracts, cooperatives and companies).

Number of participants

110. The first distinctive element concerned the number of participants collaborating. It was noted that more members could participate in digital platforms than what was practically possible with multiparty contracts, cooperatives and companies. Even if in theory contracts and cooperatives could have large numbers of members, there were practical constraints on how large multiparty contracts and cooperatives could grow while retaining their core features.

111. The Working Group was encouraged to further discuss (i) how digital platforms were able to address the practical challenges of coordinating large, heterogeneous and geographically diverse members or user groups, and (ii) what digital mechanisms had been used to address these practical challenges in coordinating large numbers of participants.

Multiple layers of collaboration

112. The second element of distinction was that digital platforms allowed users to create or magnify collaborative projects distinct from the platform itself. The first layer of collaboration enabled the existence and operation of the platform and usually concerned the members of the platform itself. The second collaborative layer allowed users, not only members, to develop new collaborative projects based on the platform. It was pointed out that this aspect of collaboration was not the same in multiparty contracts, cooperatives and companies, where special projects were usually related to internal members and not external beneficiaries. This idea of multiple layers of collaboration which were made possible by digital platforms had an impact on the governance structure, which could be centralised or decentralised.

113. It was discussed whether the presence of a large number of members or contracting parties allowed for centralised governance or would invariably lead to decentralisation of governance. The Working Group was invited to further consider whether there was a correlation between the number of members or contracting parties and centralised versus decentralised governance.

Relative importance of intermediation

114. It was observed that although the intermediating function was also found in other forms of collaboration, there it was an ancillary function, whereas in digital platforms, intermediation was the core activity.

Ease of entry and exit of members and resources

115. It was noted that digital platforms were more porous than other forms of collaboration with regard to the entry and exit of both members and users, as well as resources. The distinction between external resources was becoming blurred or even meaningless since digital platforms could co-opt resources from members, users, and even other partners.

Methodology

116. It was suggested that whether digital platforms merited separate consideration in the CLSAE Guide would depend on whether the aforementioned four elements were convincing, and also on the emphasis placed on different variables. For example, the potential for digital platforms to bring together a large number of users might not by itself merit consideration as a separate collaborative structure, since there were other instances where companies, and maybe also to a lesser extent, multi-party contracts and cooperatives, would be able to coordinate very large numbers of members. Secondly, many platforms could be structured as cooperatives or companies; thus, if the Working Group wished to emphasise the function of a form, there could be a different result in terms of considering digital platforms as distinctive.

117. Of three alternatives, one would be to include a separate chapter on digital platforms. The opposite approach would be to integrate consideration of digital platforms into the specific analysis within the three chapters already under development. A third solution would be to include a section within each of the three chapters on multiparty contracts, companies, and cooperatives, that focused on this component, with some sort of separate identity but within the three main forms of collaboration identified so far.

118. *The representative of FAO* noted that FAO was about to release a publication on e-commerce of food that also discussed the role of online intermediaries and platforms from the perspective of food safety and consumer protection, through the lens of public law. It was noted that in some jurisdictions these entities were considered food business operators, and in others they were not, which reflected major disagreement at the international level on this topic. It was explained that the forthcoming publication would be complementary to the CLSAE Guide with very little overlap. Support was given for the proposal to discuss platforms as a subsection of each chapter; some hesitation was expressed in dedicating a whole separate chapter to the topic because doing so might give digital platforms greater importance than necessary.

119. *A member of the Subgroup on Companies* recalled that the CLSAE Guide's focus was on legal structures and that digital platforms were not a legal structure. Therefore, it was suggested that consideration could be given to how digital platforms would be governed by company law, cooperative law, or contract law. As digital platforms were relatively new, it was noted that the laws would probably be silent about a number of aspects, but that it would be interesting to discuss digital platforms as a subsection in each chapter to show the limits of the rules of each legal structure for governing this new collaborative form. Additionally, it was explained that digital platforms was not specifically considered by UNCITRAL in its work on MSMEs or LLEs, but the UNCITRAL Working Group on Electronic Commerce that could be contacted. To this, *the representative from FAO* pointed out that in the forthcoming FAO publication on e-commerce, mention was made of the UNCITRAL Model Law on Electronic Commerce, although it did not specifically address agriculture and food.

120. *One of members of the Subgroup on Digital Platforms* observed that there appeared to be greater "disembeddedness" of platforms from legal operators, as platforms had been developing governance structures, including dispute resolution frameworks, that eventually became quite distinct from the governance of the entity that had created the platform itself. An example given from the discussion paper was the worker cooperative in France that developed a dispute resolution platform for online disputes of the type seen with eBay or Amazon, or disputes between freelancers and their clients. Governance of the platform was distinct from governance of the worker cooperative, yet with overlap between members of the platform, which was open to online disputes from around the world, and members of the cooperative. The case illustrated multiple layers of collaboration where the worker cooperative was considering to further disembed the platform, such that platform governance would become even further remote from the worker cooperatives governance. It was noted that there would be even more such disembeddedness in the years ahead although currently these platforms were (still) very much influenced by their operators and were (still) part of another collaborative legal structure, and thus it made sense for the Working Group to consider the limits and possibilities of the legal structures covered in the CLSAE project in addressing the problems of digital platforms.

121. One such issue concerned the disposition of data when an entity was dissolved. The example was given of a toy store company that had collected data about children. During bankruptcy administration it was determined that because this was sensitive data, it could only be sold to another comparable type of firm. It was suggested that such cases could be considered not only in terms of limit, but also as a way of using these entities creatively to engage with this data ownership question.

122. *One of the members of the Subgroup on Digital Platforms* highlighted the relevance of understanding where these platforms were positioned in the value chain, as enablers of new functionalities and new dynamics.

123. *A member of the Subgroup on Multiparty Contracts* acknowledged that the presentation had demonstrated the centrality and role of data and had convinced the Working Group of the distinctive nature of digital platforms as a form of collaboration. Although digital platforms could be addressed in subsections of each chapter, it was noted that additional analysis apart would be important to demonstrate the distinctive features of this form of collaboration.

124. *A member of the UNIDROIT Secretariat* noted that a decision of the Working Group seemed to have emerged to include a subsection within each of the chapters currently under development. Referring to the draft table of contents of the CLSAE Guide, it was noted that the first part of each chapter addressed the internal functions of the collaborative structure. The question raised was whether the analysis regarding digital platforms could follow the approach that had been proposed for the other exogenous factors (e.g., access to credit and sustainability) considered together at the end of each chapter. Alternatively, the question was whether the impact of digitalisation and digital platforms should be considered in relation to the internal functions of cooperatives, companies and multiparty contracts (for example, in relation to governance and management, formation, liability, etc.).

125. *One of members of the Subgroup on Digital Platforms* said that both approaches had their merits. The benefits of the former approach, to consider the topic at the end along with the other exogenous factors, would be to highlight digitalisation specifically, and digital platforms as part of the digitalisation process. If one were to include a section on liability and digital agricultural platforms in the chapters on companies, cooperatives and multiparty contracts, the content might be stretched or it might become a bit more speculative. By comparison, a subsection at the end of each chapter could allow upfront considerations and by doing so, this could create presumptions about some of these developing areas.

126. *The Coordinator of the Working Group* acknowledged that there appeared to be consensus on the choice of subsections, but was of the view that a separate chapter would be the best option for the following three reasons. Firstly, to dilute the specificity of platforms in the introduction and across the three chapters would reduce the importance of a growing phenomenon that was very relevant and that would change the scenario, whereas one chapter devoted to the topic would give it immediacy. Moreover, if contained in a separate chapter, the information would be much easier to review by those who wanted to start a digital platform. The second argument was that there were many types of collaboration that would not fit into one of the three collaborative forms. Thirdly, it was noted that the analysis of digital platforms required more of a functional than structural approach. Clearly there was a methodological disruption between the two that the Working Group needed to further consider.

127. *One of the members of the Subgroup on Multiparty Contracts* asked, assuming that the choice would be to address the topic in subsections, what the function of these subsections would be and whether it would be to understand the role of the three legal forms for running the platform.

128. *One of the members of the Subgroup on Digital Platforms* considered it worth discussing whether or not platforms really were different from cooperatives and multiparty contracts, not only in terms of managing large numbers of participants but also in allowing multiple layers of collaboration.

129. *One of the members of the Subgroup on Cooperatives* agreed that digital platforms should be addressed in a separate chapter because of their complexities. From the perspective of cooperatives, perhaps some insights concerning governance could be addressed, but the issues were

different (e.g., concerns related to data protection). A question that was considered interesting was whether these platforms could be used to govern the whole value chain. The essential aspect was that if platforms were to become so important and strong to govern the whole value chain, then they should be dealt with in a separate chapter.

130. *The Coordinator of the Working Group* explained that the ways in which multinational corporations organised entry, exit, and permanence in the supply chain were through something called a qualification system, which was a platform. However, there was almost no literature on the qualification system platforms to be able to develop this topic in the CLSAE Guide.

131. *One of the members of the Subgroup on Digital Platforms* noted that a platform operator could turn off certain features such as entry and exit whenever it wanted, while a more distributed type of platform such as those built on top of blockchain networks would not have an operator who could unilaterally change these features. The endogenous governance of that network would be what prevailed over the operator and then would become more important to be considered distinctively. There was hesitance in the Working Group about these particular features and mirroring them across other chapters because only very few examples of these truly distributed platforms were being used in digital agriculture to date. Many were simply platforms being built by cooperatives or companies, and a lot of those features were being turned on and off by the operator. So the questions regarding data and large-scale participation were all important factors to take into account and to be treated separately. But the fact that more centralised rather than distributed platforms were emerging would have an impact on whether to choose one or the other approach.

132. Additionally, it was noted that the cooperative identity principles would have an influence on questions related to data governance. This is why a cooperative, at the point of dissolution, would deal with a data set differently than a company would, because of different considerations and interests. *One of the members of the Subgroup on Cooperatives* noted that it would also be relevant to consider how governance of the entity (i.e., the cooperative) could be improved by means of digital platforms. It was explained that cooperatives, unlike companies, were subject to what was called the control risk. According to the principles, the cooperative members should have control over everything, but this was not maintained for many reasons, and thus there was the risk that members could lose control. It was suggested that perhaps intermediation between different groups vying for control could be dealt with through platforms.

133. *One of the members of the Subgroup on Digital Platforms* acknowledged the complicated dynamic and noted that cooperatives in different sectors (employment, agriculture, finance, etc.) each had very distinct issues. It was noted that in some cases there could be a positive impact of the use platforms to further engage members in governance. But there were downsides as well; the ease with which one could become a member made it seem that less was at stake and thus less need to participate in governance.

134. *A member of the Subgroup on Companies* expressed concern over the topic on digital platforms being treated as a separate chapter in the CLSAE Guide. It was suggested that the Working Group would need to avoid giving the impression of endorsement of digital platforms because of their limitations. The favoured approach would be to analyse the different features of legal structures and how these interacted with digital platforms. It was noted that one of the perceived advantages of platforms and a reason for their wide use was the high level of informality, flexibility and ease of use, but that was associated with a number of risks that needed to be clearly addressed.

135. *The Coordinator of the Working Group* pointed out that there was considerable debate underway globally and in EU legislation concerning distribution and control of power within digital platforms. It was noted that so far in the CLSAE project the focus had been on the issue of unevenly distributed power within the collaborative legal forms. It was noted that a separate chapter on digital

platforms would allow the Working Group to further consider the issue of power and instruments to control that power.

136. Reflecting on earlier comments, it was noted that another question to address was whether the Working Group should simply report on current realities or suggest policy recommendations. In States where farmers did not participate in platforms, it was envisioned that a policy recommendation in the CLSAE Guide could encourage smallholders to create their own digital platforms as an instrument for collaboration, rather than to try to gain access to existing ones, which would avoid hierarchies and greater concentration. It was stressed that currently the use of digital platforms was extremely difficult for smallholders to access, and an analysis that would recommend different types of governance for smallholders would be very difficult if constrained by the three subsections.

137. The Coordinator of the Working Group recalled that the discussion paper on multiparty contracts had tried to clarify the limits of freedom of contract that were generated by participation in the supply chain. It was not assumed that parties enjoyed complete freedom because many of the contractual terms were determined by the general terms and conditions of supply chain operators, which was presumed to be the case also for companies and cooperatives. It was stressed that the primary goal of the Guide was not to develop a critique, but rather to identify the gaps. The goal would be to illustrate what existed, if and why it worked (or did not) for smallholders, and to identify the features that should be included in digital platforms to meet their needs.

138. *The representative from FAO* further emphasised the keen interest of FAO on the topic regarding digital platforms and informed that other FAO colleagues working on digitalised agriculture could be invited for the next session of the Working Group. It was pointed out that an important aspect to be borne in mind was how to lessen or avoid the growing digital divide. Reference was made to the 2022 FAO Report on the State of Food and Agriculture, which was partially on digital agriculture, and which recognised the importance of these digital tools to promote the participation of smallholders. It was stressed that there was always a risk of leaving behind those smallholders unable to gain access due to limitations in technology or capacity and that this issue should be considered while drafting the CLSAE Guide.

139. *The UNIDROIT Deputy Secretary-General* noted that the discussion was already indicative of the possible way forward with respect to this particular topic. It was also mentioned that a message from IFAD had been received that underlined the importance of digital platforms for IFAD as well. However, it was noted that the Working Group did not yet appear to have achieved a consensus on whether this topic should be treated separately or in subsections within the single chapters.

140. *A member of the Subgroup on Multiparty Contracts* asked whether it would be possible to have more time to consider the alternatives. It was noted that, as evidenced by the discussion, this was a topic the Working Group clearly wanted to address. Regardless of where in the Guide it was to be discussed, it was suggested that the focus could be on identifying the main issues, the extent to which these issues resembled a collaborative legal structure already in place, and considering the link between functional and structural analysis. The role of cooperative governance and companies governance, if any, in managing and running digital platforms, and the relevance of multiparty contracts, if any, could be further developed in the discussion papers.

141. *One of the members of the Subgroup on Cooperatives* commented that digitalisation and digital platforms were not separate but interconnected concepts that had to be further clarified. It was noted that with the use of new technologies, actors and entities had been increasingly "de-organising" and that interactions were no longer undertaken solely within traditional legal entities and contracts.

142. *The UNIDROIT Deputy Secretary-General* recommended that during the intersessional period experts could develop a draft table of contents for a separate chapter or subsections on digital

platforms. It was observed that it would be important to identify certain issues and how best to underline the interplay with the different collaborative legal forms, taking into account that sometimes digitalisation in general or the use of digital platforms in particular might be relevant.

143. *The Coordinator of the Working Group* suggested to invite representatives from an organisation that ran digital platforms in agriculture to the sixth session of the Working Group.

(e) Other exogenous factors: sustainability and access to credit

Sustainability

144. The Working Group discussed how and where within the proposed CLSAE Guide the topic of sustainability would be considered as a driver towards collaboration and its impact on the choice of legal form. The recommendation that emerged out of the discussions was that consideration of sustainability should be integrated throughout the CLSAE Guide, rather than in a separate chapter, and included in the comparative chapter and introduction. This was consistent with the approach used in the two previous legal guides that had been developed by UNIDROIT in partnership with FAO and IFAD.

145. As a first step, it was suggested that the meaning and scope of the term as applied to the CLSAE Project should be clarified. It was noted that sustainability was an inherent feature of the cooperative legal form, where the emphasis on long term relations provided economic sustainability and the primary focus on member needs over monetary returns evidenced social sustainability. If environmental sustainability were to be addressed, the concern was that the analysis would become even more complicated, particularly if the mechanisms that would enable an enterprise to address the three interconnected aspects of sustainability were to be taken into account. Moreover, it was acknowledged that every enterprise had an obligation to contribute towards sustainable development nowadays.

146. For the cooperative legal form, it would be important to clarify whether only the needs of the members were to be considered or also those within a wider ambit that included stakeholders. It was pointed out that cooperatives emphasised their member-centred focus and mechanisms for participation not merely through voting, but also as co-entrepreneurs throughout the lifecycle of the enterprise. It was in this way that actions of individual persons as well as entities could become connected to address wider global issues such as climate change.

147. *The representative from FAO* explained that FAO considered sustainability through the lens of the Sustainable Development Goals (SDGs) and always considered all three aspects – namely, economic growth, social inclusion and environmental protection – as an interconnected whole.

Digitalisation and environmental sustainability

148. In relation to digitalisation, it was suggested that discussions of sustainability should also take into account the environmental footprint of some digitalisation projects. While intangible digital assets might seem of immaterial impact, it was becoming apparent that digital platforms and artificial intelligence could have a significant environmental footprint that should be acknowledged.

Business viability or environmental sustainability

149. The Working Group discussed the fact that in order for an enterprise to become environmentally sustainable, it might incur costs that would make the enterprise economically non-viable, especially if competitors did not initiate such change. Although this conflict between business viability and environmental sustainability would dissolve over time as the competitive divergence would eventually disappear, this was raised as an important policy decision that would merit

reflection in the CLSAE Guide. *The representative from FAO* pointed out that the issue was also one of framing; if seen from only one perspective – social inclusion, environmental protection, or economic viability – one would run the risk of missing the big picture of interconnectivity. It was necessary to draft the CLSAE Guide in such a way that none of the three aspects would be placed above the others.

Social sustainability

150. In relation to social sustainability, it was suggested by *the Secretary-General* that the Working Group might wish to address the less protective framework under the legal form of multiparty contracts. For example, if three individuals were to set up a company and were also employees of the company, labour law would offer those individuals protection as employees; however, if the individuals were to set up contracts among themselves to perform the same services, labour law would not apply. Accordingly, it would be advisable to point out this distinction in the comparison between these forms and also to note that there would be ways to ameliorate this difference. It was pointed out by *a member of the UNIDROIT Secretariat* that in some jurisdictions where the principle of the social function of the contract was embedded constitutionally, protection offered by labour law might apply notwithstanding the terms of the multiparty contract.

151. This issue was considered very relevant given that the scope of sustainability extended across the full range of the supply chain. Where parties to a multiparty contract had made a commitment to protect human rights, the question would arise as to whether that commitment would encompass employees of the suppliers to these entities. To what extent the chapter on multiparty contracts should consider these matters would also need to be considered from an institutional perspective, given that another UNIDROIT project on Corporate Sustainability Due Diligence in Global Value Chains was underway and would examine similar issues.

SDGs and a legal perspective

152. It was suggested that the Subgroups might wish to use the SDGs as the lens through which to analyse sustainability, and some of the SDGs would be more relevant to the CLSAE project than others. Notwithstanding that much of the debate remained political, the Working Group agreed with the recommendation to adopt a legal approach, especially given that considerable legal material on the subject had been developed at all levels, both internationally and domestically.

153. *One of the members of the Subgroup on Cooperatives* explained that audit mechanisms were used in order to evaluate whether concrete steps had been taken to address cooperative member needs and whether the objectives as specified by law had been pursued by management. Some cooperatives used the social audit, which went beyond the standard financial audit to obtain information that would enable members to participate effectively and also to substantiate policy.

Dispute settlement and prevention

154. *One of the members of the Subgroup on Cooperatives* explained that in practice few conflicts had arisen between cooperative members and management because of the emphasis on conflict prevention.

155. For example, if a member were to attempt delivery of non-compliant produce, delivery would not be accepted and as a consequence the member would be unable to transact or participate in the cooperative's surplus, which illustrated peer pressure as one of the mechanisms to achieve compliance. It was noted that dispute resolution also encompassed prevention and that an explanation of corrective, rather than disruptive, mechanisms was invaluable, particularly with respect to possible breach of sustainability commitments. This would enable comparison across all three legal forms covered in the CLSAE Guide.

Social sustainability and workers' rights

156. Given the protection of workers' rights (and human rights more broadly) inherent in the cooperative form, it was suggested that this aspect could be further underlined. It was pointed out that it was necessary to bear in mind that the Working Group was considering agricultural, rather than worker cooperatives. Although a cooperative with agricultural members might have mechanisms to address social sustainability, these were not widely used. For example, in some jurisdictions, it would be possible to find, either as a requirement or an incentive, that cooperatives set up social funds in addition to legal reserve funds, but that these funds would have to be used for social purposes, such as health care.

Third-party consultations

157. The question was raised as to what extent the Working Group should consider consultation with interested third parties as a governance mechanism for collaboration. The example was given where an entity established with the objective to protect the environment would later be sold and the environmental sustainability project discontinued, and whether outside third parties should be consulted. This inspired inquiry as to whether the cooperative form, more so than the other two forms, had intrinsic mechanisms to involve constituents outside the cooperative itself when such decisions were made. In response, it was explained that this was neither specifically provided for nor prohibited under most governing documents and would most likely be addressed on a case-by-case basis.

Divergences and similarities

158. Concerning the concept of sustainability more broadly, it was noted that there was not necessarily a divide between the cooperative and company form. At least within the European Union, sustainability considerations were becoming obligations for all types of enterprises, which raised the question of whether "something more" was required of cooperatives. Under social enterprise law it was necessary to distinguish one type of entity from another, otherwise, there was no *raison d'être,* which was another reason for the CLSAE Project to clarify these distinctions.

159. It was suggested that the Working Group could describe how companies and cooperatives would address the same obligations and thereby highlight the specific mechanisms and tools available for use by each form to enforce sustainability commitments along the value chain.

160. As the discussions had largely reflected perspectives from the European Union, it was pointed out that other jurisdictions might not have the same levels of mandatory legislative protection for the protected interest group. As this could be considered an effect of the value chain approach, the Working Group was invited to consider whether the introduction should address the extraterritorial effects of such legislation.

Applicable law

161. It was emphasised that discussions on collaborative legal forms could not be delinked from the value chain, given that many chain leaders were based in jurisdictions that required compliance with emerging sustainability requirements that, in turn, were imposed on suppliers, for example, through the use of Standard Terms and Conditions. This raised the issue of applicable law, which was noted as extremely relevant but particularly complex for multiparty contracts by comparison with the other two forms. While determination of applicable law usually began with connecting factors, such as place of incorporation, the reasoning was different for multiparty contracts.

162. It was suggested that the Working Group could consider: (i) how a choice of applicable law could lead to possible circumvention of sustainability requirements and (ii) party autonomy as one

of the factors that could determine applicable law. It was noted that applicable law had been considered in the other two legal guides prepared by UNIDROIT in partnership with FAO and IFAD and that, in a similar manner, the CLSAE Guide might make reference to relevant regulatory frameworks at different levels. Accordingly, it was agreed that applicable law would be developed in the Introduction and that each chapter would refer back to the Introduction in respect of this topic.

Access to Credit

163. It was explained that the terms "access to credit" and "financing" were used interchangeably within UNIDROIT instruments. Whether an entity had the ability to acquire financing was key because without financing there could be no collaboration. The question for the Working Group was whether the structural form of the entity used by the agri-entrepreneur would impact the ability to obtain financing, and whether various aspects of that form, such as limited liability, separate legal personality, etc., would make a difference. It was recalled that, in previous Working Group sessions, the perspective shared by international financial institutions was that the main consideration was formality (as opposed to informality) rather than the particular type of legal form.

164. However, it was pointed out that access to external credit was inherently more difficult for cooperatives than for companies, although in terms of financing more generally, cooperatives could have an advantage; because of their internal dynamic and specific values, cooperatives could more easily fulfil the standards of credit worthiness. For entrepreneurs in the digital economy, the cost of the digital platform and its implications for financing could also affect the collaborative form selected and certain aspects of its structure.

165. Given considerable divergence in sources of financing and since access to credit had been considered extensively already by UNIDROIT and other international organisations, the question arose as to the extent and depth of analysis expected from the Working Group. Mention was made of several relevant instruments, such as the UNCITRAL draft guide on access to credit for MSMEs. *The UNIDROIT Secretary-General* clarified that the CLSAE Guide would not examine how to access finance but rather, while drawing upon previous instruments including the aforementioned, the goal would be to outline considerations for access to credit in the context of the agricultural sector and to consider forms of collaborative structures specific to such financing. The examples given were reciprocal guarantee schemes and other sector-specific products based on mutuality of risk.

166. It was pointed out that, in addition to formal credit, numerous types of informal sources of finance were also accessed by MSMEs, smallholders and agri-entrepreneurs. As not all credit was provided by institutional lenders, it was agreed that mention would also be made of other types of sources, such as rotating credit and savings associations.

167. There was broad consensus among the Working Group of the importance of access to credit and that this should be explained in the Introduction. As currently proposed, the Introduction would discuss needs of smallholders and agri-MSMEs, such as access to viable markets, market resources and inclusive finance, which encompassed this wider understanding of access to (formal and informal) credit. It was suggested that the Introduction consider not only how to finance collaboration, but also whether collaboration served as a driver to enable financing. The main focus of whether and how the form of the collaborative structure would influence access to credit would be better considered within each chapter.

(f) Open-discussion on combining and comparing the collaborative legal forms

168. *A representative from FAO* suggested that the perspective of analysis of the comparative chapter could be based on the importance of collaborative legal forms for smallholders, agri-MSMEs and their role in value chains.

169. *A member of the Subgroup on Companies* noted that the Working Group could base its discussions on the draft table proposed for the comparative chapter, which had been included as an annexe to the discussion paper on companies. It was noted that the table basically summarised various features relevant for comparative purposes to help smallholders and other types of agribusinesses to decide which form of collaboration was adapted to their needs. The Working Group was invited to further reflect upon the features that should be included in the comparative table. For example, it was discussed whether "formation costs" and "access to credit" deserved to be considered as one of the comparative features. Lastly, it was suggested that other relevant comparable features could be "legal personality" and "liability regimes".

170. *A member of the Subgroup on Cooperatives* expressed a need for clarity regarding the purpose of the comparative chapter and presenting different options of collaborative legal forms for smallholders and agri-MSMEs from which to choose. A question was raised as to whether the choice was intended to facilitate integration into global value chains, address power imbalances, or achieve other objectives and needs. It was noted that without a clear understanding of the intended goal of the chapter, it would be challenging to determine the comparative features for making a choice among the collaborative legal forms presented in the CLSAE project.

171. *The Coordinator of the Working Group* contended that access to global value chains should not be seen as the goal but as the consequence of collaboration. It would be important to understand if collaboration was undertaken as a means to achieve more specific objectives, such as research and development or experimenting a new environmental-friendly technology.

172. A question was raised as to how detailed the macro categories had to be for the purpose of the comparative analysis in the CLSAE project. It was noted that the Working Group had decided to develop chapters that would not be based on specific subject matters of collaboration. However, for the purposes of organising the comparative chapter, the Working Group was invited to reconsider whether it was important to specify the differences of collaborating for a certain purpose rather than another.

173. *A member of the Subgroup on Cooperatives* recalled the challenges of comparing multiparty contracts and legal entities, noting they were not mutually exclusive but rather represented different organisational types with distinct purposes. The need to consider the different purposes when comparing the collaborative legal forms was emphasised.

174. *The Coordinator of the Working Group* underlined the importance of understanding the differences between the collaborative legal forms considered in the CLSAE project before explaining how they could be combined. It was explained that the goal of the comparative chapter was to provide clarity on the available forms for collaboration, allowing users to make informed decisions based on their objectives and whether they might need a single collaborative legal form or a combination of collaborative legal forms. The comparative features which could be considered included liability regime, governance, entry and exit procedures, duration, and decision-making processes. The goal was to guide readers in choosing the most suitable collaboration form based on their preferences for these variables. Additionally, he highlighted the possibility of combining different methods as they were not mutually exclusive.

175. *A member of the Subgroup on Companies* suggested aligning the comparative features that would be discussed in the comparative chapter with the needs in terms of collaboration that would be highlighted in the Introduction of the guidance instrument.

176. *The Coordinator of the Working Group* suggested a step-by-step approach to simplify the analysis. It was acknowledged that the comparative features could differ depending on the position of stakeholders in the value chain, especially regarding elements like formation.

177. *One of the members of the Subgroup on Multiparty Contracts* noted that a pragmatic approach could be used to start the analysis with simpler questions related to the purpose of collaboration (for-profit, non-profit or a blend of both), group composition, entry and exit procedures, decision-making rights, governance, resource allocation, liability, and handling changes and unforeseen circumstances. These aspects could form the first layer of the comparative analysis. The second layer could delve into how these organisational aspects had an impact on access to credit and other needs, considering factors such as collateral and individual liabilities.

178. *A member of the Subgroup on Cooperatives* expressed uncertainty about whether the Working Group was discussing the same thing regarding the purpose of collaboration. It was noted that legal entities were distinguished by their purpose or objective as defined in the law. Specifically regarding cooperatives, it was noted that their purpose focused on needs satisfaction, although profit could be considered as essential for the development of the cooperative enterprise. It was suggested that the Working Group could start by further distinguishing the different types of purposes discussed: the purpose of the enterprise type (cooperative, companies and multiparty contracts) and the broader purpose of collaboration, then move on to the analysis of the other comparative features.

179. *The UNIDROIT Deputy Secretary-General* queried whether formation and the formalities involved in establishment of different collaborative legal forms could be analysed in parallel to membership access, as a separate but related issue.

180. *A member of the Subgroup on Cooperatives* considered formation as a relevant aspect, acknowledging its often high costs but also highlighting its potential as a cost-reducing factor over time, especially for cooperatives that required careful planning for long-term viability. The importance of investing time to define needs and train potential members was emphasised.

181. With regards to cooperative law, *the Coordinator of the Working Group* queried whether the "open doors" principle could be considered a differentiating feature in terms of control over entry. It was noted that companies and multiparty contracts could offer a higher degree of control over entry, whereas cooperatives appeared to allow an open access approach.

182. *A member of the Subgroup on Cooperatives* further explained the "open doors" principle, noting it was not applied in a straightforward manner. The complexity of allowing entry into cooperatives and the need to balance the rights of existing members with potential new entrants was emphasised.

183. *The Coordinator of the Working Group* proposed a structured approach to the comparative analysis, considering factors such as size, literacy, and welfare of participants in choosing between different collaborative legal forms. It was suggested that the comparative analysis could start from the perspective of smallholders first, then consider how the choice would change for non-smallholders. The importance of considering the vertical dimension of collaboration in the analysis was also emphasised, as entities tended to increase in size as they moved down the value chain. To a certain extent, he suggested to also include medium and large entities in the analysis. Adopting a value chain perspective would be beneficial, as it would involve considering entities of varying sizes.

184. *The UNIDROIT Deputy Secretary-General* emphasised the importance of not excluding collaboration between smallholders and larger entities, noting that such collaborations were common in practice. Additionally, it was noted that smallholders could operate independently or come together to form a larger entity, despite their individual sizes.

185. The Working Group agreed that a draft table of contents for the comparative chapter could be proposed for discussion during the sixth session to ensure consensus among participants.

(g) Structure of the future instrument, draft introduction and draft glossary

186. *A member of the UNIDROIT Secretariat* informed the Working Group that the draft glossary developed on a confidential basis for the consideration of the Working Group (Annexe II of the Secretariat Report, Study LXXXC - W.G. 5 - Doc.6) was intended for internal discussions, to promote use of consistent terminology and avoid the use of different, yet similar, terms. The Working Group would decide at a later stage whether to maintain the draft glossary developed in the final CLSAE Guide. It was suggested that the glossary could be drafted based on a functional approach, with a general term and definition encompassing the specific terminology adopted for each different legal form (e.g., "transformation" could be presented as one of the functional headings which would include a more detailed definition of specific terms such as "modification" for contracts, "conversion" for companies and cooperatives.

187. With regards to the term "partnerships", it was suggested that the Working Group could examine definitions of general partnerships in civil and common law jurisdictions and assess any commonalities. In some jurisdictions, the partnership form was distinguished from the unincorporated association by the requirement of activities "for profit" and at least two persons. Moreover, in most jurisdictions a general partnership would not enjoy limited liability, although in some jurisdictions it could be assigned legal personality. It was considered useful to note that in some jurisdictions limited liability partnerships were restricted for use only by professionals, as that restriction might limit availability of this form for use by the protected interest group (smallholders and agri-MSMEs).

188. Most experts indicated the importance of defining what constituted a "smallholder", despite the lack of a universally agreed-upon definition. *A representative from FAO* reiterated that there was no globally recognised definition of what constituted a smallholder, as this definition heavily depended on national contexts. It was suggested that the Working Group could adopt a flexible understanding of smallholders rather than attempting to establish a fixed definition that was not universally adopted. *A member of the Subgroup on Cooperatives* expressed concern about labelling smallholders as "unsophisticated", noting that many of these individuals possessed a high level of sophistication, albeit perhaps not in the conventional sense. *A member of the Subgroup on Companies* suggested using descriptors such as "having low levels of legal education" or being more specific about the educational or formality levels under discussion.

189. In relation to the definition of "digital platforms", it was suggested that the definition could follow the second alternative proposed based on Evans & Schmalensee (2016): "a digital platform is a two-sided or multi-sided online marketplace which facilitates value-enhancing transactions between two or more groups". However, the proposed definition could be adapted to read "facilitates and intermediates" as the notion of "intermediation" was widely used by scholars in this field. The definition proposed for "innovation platforms" was not considered necessary and could be deleted from the draft glossary.

190. Participants noted that the term "member" was used throughout the text but with different meanings in each chapter and that this term could be explained in the Introduction.

191. It was pointed out that the discussion papers referred both to "value chains" and "supply chains" and that the meaning was often dependent on the field of study. It was suggested that the Working Group could agree on the term that would be used and avoid any definitions in order to retain some flexibility. As there had been a clear recommendation from the project partners (FAO and IFAD) to focus on value chains, this choice as well as the related term "agri-food chain" would be explained in the Introduction for further discussion at the sixth session of the Working Group.

192. Regarding the definition of the term "agri-enterprise", one participant noted that the proposed definition was extremely wide, while another participant considered that such a broad definition was necessary for the CLSAE Guide because the project encompassed such a wide array of enterprises, including informal agri-MSMEs.

193. Lastly, in relation to the draft glossary, it was noted that the term "unfair commercial practices" could be considered judgmental by some, and therefore it was suggested that it could be explained as a legal term used to refer to specific situations.

194. In relation to the Introduction of the CLSAE Guide, *a member of the UNIDROIT Secretariat* provided an overview of the proposed content, which would include: (i) an overview of agri-food value chains and the role of smallholders and agri-MSMEs; (ii) a brief description of the challenges posed by agri-food value chains; (iii) a non-exhaustive list of needs of smallholders and agri-MSMEs to overcome the aforementioned challenges; (iv) an explanation of how collaboration could address the "needs"; (v) an introduction to the collaborative legal forms covered in the CLSAE Guide; (vi) the challenges due to differences in legal systems, including a discussion on the applicable law; and (vii) a summary of the main findings of each chapter.

195. Some experts acknowledged that the Introduction would establish the grounds for comparison among the collaborative legal forms. However, several of the proposed topics could be explored at length and overlap would need to be addressed in order to avoid repetition in the following chapters. It was suggested that the Introduction could include a brief description of how smallholders and agri-MSMES already collaborated. It was considered important to note that, notwithstanding the basic assumption that collaboration was favoured, there were large numbers of enterprises that did not want to collaborate, particularly in the context of access to large value chains. This could also identify the obstacles and reasons for resistance to collaboration.

196. It was noted that the current list of needs, while well-drafted, remained at a high-level of abstraction. In an effort to provide guidance at the global level, large amounts of material relevant to the individual context would be missed. Nonetheless, it was considered valuable to make the general case for collaboration while acknowledging its limitations.

197. *A member of the UNIDROIT Secretariat* noted that a proposed draft table of contents for the complete CLSAE Guide had been included in Annexe I to the Secretariat Report. It was explained that the current proposed structure would include a Preface, Introduction and six Chapters, respectively, devoted to Multiparty contracts (Chapter I), Cooperatives (Chapter II), Companies (Chapter III), Digital platforms (Chapter IV), Comparing and combining different collaborative legal forms (Chapter V), and a final chapter on the Implementation of the Guide (Chapter VI). In response to a request for elaboration on the proposed Chapter VI on Implementation, it was explained that whereas the previous two legal guides developed by UNIDROIT, FAO and IFAD did not include such a chapter, the Working Group would need to further consider whether to address the implementation issue within the CLSAE Guide as was being proposed or in a separate document.

198. The Working Group generally agreed that such a chapter on Implementation would be helpful as its added value would consist in explaining how to use the Guide to facilitate collaboration. It would also be very dependent upon the content that would be developed in the comparative chapter.

Item 5. Organisation of future work

199. *The UNIDROIT Deputy Secretary-General* explained that intersessional work would continue to include meetings of each Subgroup as well as work on the cross-cutting themes, such as sustainability, access to credit and the chapter on comparison and combining different collaborative legal forms.

200. *The representative from FAO* requested the experts working on the discussion papers to indicate precisely the additional information that was being sought to enable the FAO and IFAD representatives to make appropriate enquires. In addition, it was recommended to include more references to sources and examples, particularly legislation, from the Global South. It was also pointed out that the previous two legal guides had included references to instruments and documents from international organisations, rather than academic scholars, and the Working Group was invited to consider references to the former, where possible.

201. The dates for the next Working Group session were proposed for 2-4 October or 13-15 November *2024*. However, it was decided that the UNIDROIT Secretariat would inform the Working Group of the exact dates at a later stage, after consultation with the experts and observers.

Item 6 and 7. Any other business. Closing of the session

202. In the absence of any other business, *the UNIDROIT Deputy Secretary-General* thanked all the participants for their input and closed the session.

Annexe I

AGENDA

1. Opening of the session and welcome
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and developments since the fourth Working Group session (*Study LXXXC – W.G.4 – Doc. 3 - Summary Report)*
4. Consideration of work in progress
    (a) Draft Discussion Paper on Companies *(W.G.5 – Doc. 2)*
    (b) Draft Discussion Paper on Multiparty Contracts *(W.G.5 – Doc. 3)*
    (c) Draft Discussion Paper on Digital Platforms *(W.G.5 – Doc. 4)*
    (d) Other exogenous factors: Sustainability and Access to Credit
    (e) Draft Discussion Paper on Cooperatives *(W.G.5 – Doc. 5)*
    (f) Open-discussion on combining and comparing the collaborative legal forms
    (g) Structure of the future instrument, Draft Introduction and Draft Glossary *(W.G.5 – Doc. 6)*
    (h) Other matters identified by the Secretariat
5. Organisation of future work
6. Any other business
7. Closing of the session

Annexe II

LIST OF PARTICIPANTS

MEMBERS

Mr Fabrizio CAFAGGI *in-person*	Judge at the Council of State Italy and Professor at the University of Trento and LUISS
Mr Virgilio DE LOS REYES *remotely*	Dean De La Salle University
Ms Isabelle DESCHAMPS *in-person*	Lawyer, Consultant | Law and development (Canada)
Mr Matteo FERRARI *remotely*	Professor University of Trento
Mr Hagen HENRŸ *in-person*	Professor University of Helsinki
Ms Paola IAMICELI *in-person*	Professor University of Trento
Mr Morshed MANNAN *in-person*	Research Fellow, Robert Schuman Centre European University Institute
Mr Georg MIRIBUNG *in-person*	Professor, Eberswalde University for Sustainable Development
Mr Siniša PETROVIĆ *remotely*	Professor University of Zagreb
Mr Carlo RUSSO *in-person*	Professor University of Cassino and Lazio Meridionale
Ms Dongxia YANG *remotely*	Professor China University of Polical Science and Law

INSTITUTIONAL PARTNERS

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)	Mr Teemu VIINIKAINEN Legal Consultant (LEGN)
	Ms Cecile BERRANGER Rural Institutions and Services specialist Inclusive Rural Transformation and Gender Equality Division (ESP) *Remotely*
INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD) *remotely*	Mr Ebrima CEESAY Legal Counsel

INSTITUTIONAL OBSERVERS

INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO) *remotely*	Mr Romauldo MAVEZENGE Deputy Director of Programmes
	Ms Makena KIRIMA Programmes Lead for Africa
INTERNATIONAL COOPERATIVE ALLIANCE (ICA) *remotely*	Mr Jongseok LEE Agricultural Sector Advisor
WORLD FOOD LAW INSTITUTE *remotely*	Ms Marsha ECHOLS Professor Howard University School of Law

INDIVIDUAL OBSERVERS

Ms Roberta PELEGGI *remotely*	Associate professor University of Rome Sapienza
Mr Edward Kyei TWUM *remotely*	PhD Candidate University of Cassino and Lazio Meridionale
Mr Willy TADJUDJE *remotely*	YAMDUSI EXPERTISE President Cooperative Society

UNIDROIT SECRETARIAT

Mr Ignacio TIRADO *remotely*	Secretary-General
Ms Anna VENEZIANO	Deputy Secretary-General
Ms Priscila PEREIRA DE ANDRADE	Legal Officer
Ms Philine WEHLING	Legal Officer
Ms Jeannette TRAMHEL	Senior Legal Consultant
Mr Keni KARIUKI *Remotely*	MAECI-UNIDROIT Chair
Ms Chishiba MULONDA *remotely*	Legal Intern