

# Legal review of document on managing conflicts of interest

## *Scope of request*

1. Following a request from the Global Social Observatory on 10 January 2014, a rapid legal review was done of the document, “Engaging in the SUN Movement: Prevent and Managing Conflicts of Interest,” GSO SUN Working Paper 6, as revised up to 13 January 2014 and its executive summary. It was clarified by Dr. Katherine Hagen of GSO that the document is known as “the reference document” or “reference note”.
2. To understand the context of the reference document, the one-pager on the Consultation Process on the Conflict of Interest in the Scaling up Nutrition (SUN) Movement and the Draft Report of the Third Consultation on Conflict of Interest in the Scaling up Nutrition (SUN) Movement, 16 October 2013, were also consulted.

## *General comments on the reference document and the executive summary*

3. Overall, the reference note and executive summary constitute a legally sound basis on which the SUN Movement may continue to develop tools and materials of use to the various stakeholders. As detailed below, there are a few aspects of the note which could be strengthened from a legal viewpoint. Some of them could be dealt with through some reorganization of the main document.
4. Beyond having agreed that conflicts of interest should be prevented and effectively addressed when they nonetheless occur, the international community has not identified a unified legal approach to “conflict of interest” in any detail. An effective approach to conflict of interest issues will be connected to a clear alignment of the roles and responsibilities of those involved in the SUN Movement, since a conflict of interest issue implicitly involves the questions: Conflict on the part of whom? In relation to which decision or action? With which consequences?
5. The approaches highlighted in the reference note – “prevent, identify, resolve, monitor, build capacity” (PIRM+C), risk management and due diligence – are all legitimate to use as avenues through which conflict of interest issues may be tackled. They present the advantage of being frameworks that are already used in other contexts. They may however resonate differently with various groups. For instance “due diligence” in relation to human rights gives rise to obligations and processes of a somewhat different nature for governments than for business (see the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,’ annexed to UN General Assembly document A/HRC/17/31 (21 March 2011)).

## *Specific comments*

6. The main area for improvement of the Reference Note would entail ensuring consistency in its target audience. The note says that it is to be a point of reference “for governments and supporters in SUN countries,” (para. 2) while later stating that it is “intended for governments” (para. 4, para 26, etc.). Then it refers to “stakeholders” and defines its focus as addressing “inter-organizational conflicts of interest” (para. 7). One difficulty with this mixing of target audiences is that each of them will probably already have in place various codes of conduct or other guidelines that govern their respective spheres of activity. To be most effective, whatever is agreed within the SUN Movement would need to take those into account without engaging in re-invention or duplication.

7. The reference note justifiably stresses working within the existing legal framework (paras. 20-21 and 29-31). Among the UN documents listed, it would be advisable to mention the United Nations Convention against Corruption, ratified by 170 States. It briefly addresses the prevention of conflict of interest in relation to public officials and the private sector (Art. 7, para. 4 and Art. 8, para. 5) and indirectly in relation to officials of public international organizations (Ar. 16, para. 1). The UN entity serving as secretariat to the follow-up to the Convention (the United Nations Office on Drugs and Crime) maintains an on-line directory of competent national authorities, with which the SUN Movement might wish to liaise in countries. From the viewpoint of legal effectiveness, it would make sense to use whatever guidance on conflict of interest that has already been developed in various country contexts.

8. The reference note contains a good explanation of divergent, convergent and competing interests (paras. 9-10). This is also the case for potential, perceived and suspected conflicts of interest (paras. 15 to 18). The note also properly touches upon questions of transparency and disclosure (paras. 29-34). However, it does not contain a definition of “conflict of interest” – with the essential element of the interest *affecting conduct* (or being so perceived). This idea is set out in the executive summary as occurring when an interest “has the effect of compromising, interfering with, or taking precedence over ... official responsibilities”. The question is also touched upon indirectly under the section on identifying a conflict of interest (paras. 37-45). These elements could be drawn on to state earlier in the document when a conflict of interest occurs or may be perceived to occur.

9. Further development of the notion of “conflict of interest” might be drawn from that used by GAVI.<sup>1</sup> Its policy document states that a conflict involves, “A situation where a GAVI person has an actual, perceived, or potential Organisational or Financial/Personal interest, as defined below, that affect[s] the conduct of his/her duties and responsibilities with respect to GAVI; create[s] the perception that the GAVI person is using his/her position in GAVI for organizational or personal financial gain at the expense of GAVI. “ An “Organisational interest” is in turn defined as arising when a GAVI person is “an officer, director, trustee, partner or (negotiating to become) an employee of an entity that may benefit financial from a decision he or she would vote on.” This would need some adaptation for the SUN Movement, but might also be helpful in zeroing in on how organizational interests relate to individual actions or inactions.

10. The section of the note on the SUN Principles of Engagement in relation to avoiding conflict of interest does not seem to pose any legal difficulties. Taking into account comments made in a consultation, the notion of “Do no harm” could however be made more explicit (para. 24.3). The flow chart setting out the PIRM+C approach seems well adapted to the intended use (paras. 26-27).

11. The reference to “remedies” in the text (paras. 49-50) reflects use of this word in similar conflict of interest contexts, but the term “remedial action” would be more accurate, since self-correcting initiatives may also be involved.

### ***Suggestions for further consideration***

12. Consideration could be given to dividing up the Reference note into sections: a general or generic section that would be addressed to all participants in the SUN Movement and specific sections aimed respectively at governments, business, civil society, donors and the UN system. Most of the existing

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<sup>1</sup>Disclosure: the author serves as a (as yet inactive) member of the GAVI Alliance Ad Hoc Appeals Tribunal.

document would fall into the general section, but specific references to the various target audiences would be moved to their respective section or, if preferred, to annexes.

13. The text refers to annexes listing disclosure forms (para. 32) and laying out additional tools and mechanisms relating to the identification of conflicts of interest (para. 37) which apparently remain to be developed. The list of tools could include materials relating to the prevention of corruption, including conflicts of interest, available through the portals of the United Nations Public Administration Network and the United Nations Office on Drugs and Crime, as well as the International Code of Conduct for Public Officials annexed to United Nations General Assembly Resolution A/RES/51/59 of 12 December 1996 (published 28 January 1997).

14. As the consultations on this issue progress, consideration could be given to developing the due process elements of any mechanism that may be put into place regarding possible exclusion from the SUN Movement because of a conflict of interest (paras. 47-49). These would include clear information provided to the organization about accusations that have been made against it (without endangering possible whistleblowers) and a chance for the organization to respond and, if excluded, to appeal that decision to a neutral body if mediation is unavailable or fails. Developing external mediation seems to be a promising approach for the SUN Movement to pursue for the resolution of issues arising at the global level.

15. To avoid detracting resources from the main purpose of the Movement, whatever is put into place should not be too heavy or legalistic. Thus keeping the reference note unburdened by excessive detail is entirely appropriate. Overall the note is a very good basis for further work.

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