



COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Hundred and Eleventh Session

Rome, 26-28 October 2020

New Strategy for Engagement with the Private Sector

I. Introduction

1. This item has been placed on the Provisional Agenda of the Committee on Constitutional and Legal Matters (hereinafter “CCLM” or “the Committee”) under Rule XXXIV, paragraph 7 (m) of the General Rules of the Organization (GRO), whereby the Committee shall consider specific items referred to it which may arise out of: “*policy aspects of relations with international governmental or non-governmental organizations, national institutions or private persons*”.

2. This document focuses exclusively on the legal and constitutional framework under which the New Strategy for Private Sector Engagement (“the Strategy”) has been drafted and which is currently under development. The Committee is not called upon to review the Strategy. Rather, it is requested to provide any views it may have on the overarching legal principles to which the Strategy should conform, with a view to preserving the legal and constitutional status of the Organization in accordance with its Basic Texts. Specific review of the elements and features of the Strategy from a programmatic perspective will be undertaken by the Programme Committee during its forthcoming 129th Session which will take place from 9 to 13 November 2020.

3. Engagement with the private sector takes many forms, most of which involve the public association of FAO’s name and emblem alongside that of a partner. It can include, for example, the joint conduct of activities in the field, co-organization of seminars and conferences, collaboration in research, and joint publication. The Strategy will apply to all engagements with the private sector. Thus, the application of the overarching principles identified in this document will not be limited to engagements formalized through the conclusion of agreements or memoranda of understanding.

4. To support the implementation of the Strategy, a set of operational tools and legal instruments will be developed together with operational guidelines. They will, in particular, be designed to facilitate the engagements and, at the same time, ensure adherence to the above-mentioned principles.

II. Background

5. FAO has a long history of cooperation with the private sector, dating back to 1996 when the World Food Summit emphasized the need for increased cooperation with the private sector to achieve food security for all, and encouraged the development of public-private partnerships. In 2000, FAO adopted the “*Principles and Guidelines for FAO cooperation with the private sector*”, which set out a number of principles, drawing upon criteria contained in the Basic Texts for cooperation with international non-governmental organizations as well as from other UN System approaches to collaborate with civil society and private sector organizations. In 2013, the FAO Council approved a “*Strategy for Partnerships with the Private Sector*” (“the 2013 Strategy”)¹, pursuant to which all FAO partnerships with the private sector were expected to adhere to a number of UN principles. These principles aim, in particular, to ensure that FAO’s neutrality and impartiality will not be compromised and its reputation negatively affected through its cooperation with private sector entities. Subsequently, in 2015, with a view to giving operational guidance on the 2013 Strategy and in accordance with that Strategy, the FAO Secretariat adopted “*Guidelines for Partnerships and Collaboration with the Private Sector*”², which contained step-by-step guidance on how to develop, establish and manage partnerships in support of the FAO Strategic Objectives.

6. In 2019, an independent evaluation of the 2013 Strategy was undertaken³. At its 127th Session, the Programme Committee⁴ agreed with a series of recommendations contained in the evaluation report and, in particular, the development of a new vision for engagement with the private sector and a subsequent update of the 2013 Strategy through an inclusive process with the FAO Members. The Programme Committee, *inter alia*, “*underscored the need to improve FAO responsiveness to the growing partnership opportunities and requested FAO streamlines internal procedures and risk management in alignment with the best practices within the UN system*”, “*underlined the balance to be sought between the due diligence process on the one hand and facilitating transparent partnerships and cooperation with the private sector on the other hand*”, and “*stressed the importance of partnerships with the private sector to mobilize knowledge, technical tools, technologies and capacities that can contribute to the achievement of the SDGs*”. The recommendations were endorsed by the 163rd Session of the Council⁵ which, *inter alia*, “*welcomed the Evaluation of FAO’s private sector partnership strategy, and encouraged FAO to develop a new vision for private sector partnerships, and further integrate such partnerships in its work, underlining the need for due diligence processes, including related to conflicts of interests, balanced with transparent partnerships and cooperation in this regard*”.

III. Practice in the United Nations System

A. Recommendations by the Joint Inspection Unit

7. In 1999, the UN Joint Inspection Unit (JIU) recommended that UN System organizations which had not yet done so adopt a set of guidelines, including principles and procedures, to be followed for dealings with the private sector⁶. While recognizing that many organizations had, at that time, increased their operational and policy links with the private sector, the JIU considered that they had weak normative frameworks and limited specific tools founded on the protection of each organization’s image, reputation and values. The JIU also concluded that self-protecting measures to mitigate reputational risks and misuse of the UN symbols were yet to be developed.

¹ <http://www.fao.org/3/a-i3444e.pdf>. Approved by the Council at its 146th Session, Rome, 22-26 April 2013 (CL 146/REP, paragraph 14)

² <http://old.belal.by/elib/fao/661.pdf>

³ <http://www.fao.org/3/ca6678en/CA6678EN.pdf>

⁴ <http://www.fao.org/3/na582en/na582en.pdf>

⁵ <http://www.fao.org/3/nb990en/nb990en.pdf>. Paragraph 10 (b)

⁶ JIU/REP/99/6 – “*Private Sector Involvement and Cooperation with the United Nations System*”

8. In 2009, the JIU issued a note⁷ recognizing that, while criteria and guidelines were in place for collaboration by the UN organizations with the private sector, these were inconsistent across the UN System. The JIU recommended that current guidelines of the different organizations be revised and streamlined from a System-wide perspective in order to avoid inconsistencies, and to improve the selection of partners.

9. In 2015, the UN Secretary-General issued “*Guidelines on a Principle-Based Approach to the Cooperation between the United Nations and the Business Sector*”⁸. These *Guidelines*, applicable to the UN and its Funds and Programmes, provide a framework for a common and systemic approach to partnerships with the business sector, while safeguarding the integrity, impartiality and independence of the UN. They reflect that the “*overarching principle is that collaboration between the United Nations and any relevant partners, including the private sector, should not impose undue rigidity in partnership agreements while always serving the purposes and principles embodied in the Charter of the United Nations and always being undertaken in a manner that maintains and promotes the integrity, impartiality and independence of the Organization*”. The *Guidelines* set out that:

*“Cooperation between the United Nations and the business sector is principle-based. These principles are included in the United Nations Global Compact and the United Nations Guiding Principles on Business and Human Rights. The United Nations Global Compact provides an overall value framework for cooperation with the business sector. The principles of the Global Compact on human rights, labour, the environment and anti-corruption are based on intergovernmental agreements and are specifically relevant for business. Similarly, the United Nations Guiding Principles on Business and Human Rights, which have been unanimously endorsed by the Human Rights Council, serve as the baseline reference point for expected business conduct, and as a benchmark for responsible business implementation”*⁹.

10. They also stipulate that:

“The United Nations will not engage with business sector entities:

a. Which contribute to or are otherwise complicit in human rights abuses, tolerate forced or compulsory labour or the use of child labour, are involved in the sale or manufacture of anti-personnel landmines or cluster bombs, or that otherwise do not meet relevant obligations or responsibilities required by the United Nations.

*b. That are engaged in any activities which are inconsistent with sanctions established by the United Nations Security Council or other similar measures”*¹⁰.

11. In a more recent report¹¹ issued in 2017, the JIU recognized the existence of advanced and comprehensive practices for dealing with the private sector in the UN System. However, with a view to meeting the Agenda 2030 objectives, it emphasized the imperative for change in the UN System’s relations with the private sector, including changes in the current normative, administrative and operational arrangements. The JIU recognized that “*the United Nations system cannot ‘transform the world’ unless it transforms itself*”. Addressing the *Guidelines* issued by the UN Secretary General in 2015, the JIU believed “*that, in the light of the new approach for a revitalized partnership with the private sector requested in the 2030 Agenda, the Guidelines appear to offer more of a ‘defensive’ line (safeguarding the integrity, impartiality and independence of the United Nations and managing risk)*

⁷ JIU/NOTE/2009/1 - “*Corporate Sponsoring in the United Nations System – Principles and Guidelines*”

⁸ https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fun_business_partnerships%2Fguidelines_principle_based_approach_between_un_business_sector.pdf

⁹ *Ibid*, paragraph 7

¹⁰ *Ibid*, paragraph 16

¹¹ JIU/REP/2017/8 - “*The United Nations System – Private Sector Partnerships Arrangements in the context of the 2030 Agenda for Sustainable Development*”
https://www.unjui.org/sites/www.unjui.org/files/jiu_rep_2017_8_english_1.pdf

than a 'proactive' operational line (facilitating the formulation and implementation of partnerships)". Consequently, the JIU recommended review and revision of many of the UN System guidance documents, including the 2015 *Guidelines*.

B. Policies of other organizations

12. In most UN System organizations, relations with the private sector are governed by specifically designed policies. As each organization is unique with its own mandate, fields of operation and institutional structures, these policies are not identical. They are all, however, based upon similar principles, as illustrated in the mechanisms adopted by the UN specialized agencies and other UN entities identified below.

13. In 2006, the International Labour Conference of the International Labour Organization (ILO) adopted basic principles for public and private partnerships (PPPs). Under these principles, PPPs must conform to ILO principles and values and to the UN's Global Compact principles. They must assure accountability, requiring that the responsibilities of each party be clearly spelled out in a partnership agreement, along with defined timelines and measurable outputs. Information on partnership activities must be publicly available and reported to the ILO Governing Body. The ILO principles also require that non-preferential treatment and non-endorsement is ensured and that impartiality is guaranteed, being managed with the interests of the ILO as paramount, in accordance with ILO regulations, rules and procedures and with no access to or influence on the ILO's policy-making structures, including its standard-setting and supervisory machinery. In 2014, ILO endorsed a "Strategy for wider ILO engagement with the private sector"¹². A Development Cooperation Dashboard on the ILO internet site provides an overview of ILO's PPP portfolio.

14. In 2016, the World Health Assembly of the World Health Organization (WHO) adopted the "*Framework for engagement with non-State actors*" (FENSA)¹³, which is based on a set of principles safeguarding the intergovernmental nature of WHO and its constitutional mandate. Among the most relevant in the present context are that any engagement must: demonstrate a clear benefit for public health; respect the intergovernmental nature of WHO and the decision-making authority of Member States as set out in the WHO's Constitution; protect WHO from any undue influence, in particular on the processes in setting and applying policies, norms and standards; not compromise WHO's integrity, independence, credibility and reputation; and be conducted on the basis of transparency, openness, inclusiveness, accountability, integrity and mutual respect; be effectively managed, including by, where possible avoiding conflict of interest and other forms of risks to WHO. Moreover, engagements must be in conformity with the WHO Constitution and mandate, as well as the General Programme of Work adopted periodically by the World Health Assembly. While recognizing that engagement with non-State actors "*supports implementation of the Organization's policies and recommendations as decided by the governing bodies, as well as the application of WHO's technical norms and standards*", FENSA identifies risks to be managed and requires that expected direct or indirect contributions to public health and the fulfilment of the Organization's mandate outweigh any residual risks of the engagement. They set out general principles to uphold integrity and accountability and transparency.

15. In 2019, the United Nations Educational, Scientific and Cultural Organization (UNESCO) updated its Comprehensive Partnership Strategy initially adopted in 2013. It contains an overarching partnership strategy, which aims at establishing a "*framework for leveraging partnership to enhance in a consistent and strategic way the impact and visibility of UNESCO's programme and to ensure that partnerships contribute to optimal results for the achievement of the Sustainable Development Goals*". The principles for engagement with partners, including the private sector, that UNESCO applies are consistent with those contained in the "*Guidelines on a Principle-Based Approach to the Cooperation between the United Nations and the Business Sector*". In particular, they include:

¹² https://www.ilo.org/gb/decisions/GB321-decision/WCMS_247075/lang--en/index.htm

¹³ <https://www.who.int/about/partnerships/non-state-actors>

equality, shared objectives and values, legality, clarity, fairness, balance, integrity, transparency, accountability, efficiency and sustainability.

16. In 2019, the World Food Programme (WFP) issued its Private-Sector Partnerships and Fundraising Strategy (2020-2025). WFP's private sector partners must aim to advance and support WFP's mandate and values and must demonstrate value for money and a commitment to meeting the principles of the UN Global Compact and the UN Guiding Principles on Business and Human Rights. The Strategy is complemented by the "*Guidelines for Private-Sector Partnerships*" which contain partner selection criteria, as well as the principles for cooperation which are largely based on the 2015 UN *Guidelines*.

17. All the policies and strategies outlined above also set out exclusionary criteria which are red lines for the respective Organizations. These are all consistent with the exclusions contained in the "*Guidelines on a Principle-Based Approach to the Cooperation between the United Nations and the Business Sector*" set out at paragraph 10 above. They also include elements that are directly linked to each organization's mandate. Thus, for example, WHO excludes any engagement with the tobacco or arms industry. UNESCO will not cooperate with entities which demonstrate that they are involved in activities, products or services that conflict with UNESCO's mandate. In some instances, the policies also provide for caution with respect to some entities, while not excluding engagement with them. Thus, the FENSA establishes that "*WHO will exercise particular caution, especially while conducting due diligence, risk assessment and risk management, when engaging with private sector entities and other non-State actors whose policies or activities are negatively affecting human health and are not in line with WHO's policies, norms and standards, in particular those related to noncommunicable diseases and their determinants*".

IV. The Strategy for private sector engagement: overarching legal principles

18. FAO's draft Strategy, while building on extensive consultations with Members and private sector actors in light of the results of the application of the 2013 Strategy, also takes into consideration lessons drawn from other UN System agencies, as well as the recommendations of the independent evaluation conducted in 2019. It takes into account the 2017 JIU recommendations set out above and, in particular, it seeks to respond to the request of the Council, as set out at paragraph 6 above.

19. While seeking to significantly advance FAO's engagement with the private sector and depart from the "defensive" approach to such engagement, the Strategy must address considerations of a policy and legal nature which derive from FAO's status as a UN System intergovernmental organization entrusted with developing independent impartial technical guidance for its Members and the international community at large. Proposed engagements with the private sector will be guided by a set of non-negotiable principles which address fundamental aspects of FAO's status as established under its Basic Texts.

A. Intergovernmental nature of FAO

20. The Strategy confirms and upholds the intergovernmental nature of the Organization. It has, therefore, been designed on the understanding that:

- a) given the intrinsic nature of its membership and governance and FAO's status as an intergovernmental organization of the United Nations System, the main FAO interlocutors are the Members; and
- b) the Basic Texts, rules, procedures or composition of FAO's Governing Bodies will not be affected or modified by the Strategy.

B. Impartiality, integrity and credibility

21. Private sector engagements must support and enhance, without compromising, the scientific and evidence-based approach that underpins FAO's work, as set forth in Article 1 of the FAO Constitution. These engagements must not compromise FAO's integrity, independence, credibility and reputation. They should be effectively managed so that any form of risks to FAO are avoided. This is particularly important in the case of FAO in light of its normative work, and the standard-setting functions of many of its Governing and Statutory Bodies.

22. Risks may emanate from perceived or actual conflicts of interest, undue or improper influence exercised by private sector entities on FAO's work, including on policies, norms and standard setting. "Blue-washing" of a company's image through the engagement with FAO also presents risks. Consistent with FAO's (and UN System) practice, the Organization will adopt mechanisms to identify and manage potential risks. To this end, the Strategy foresees that enhanced due diligence procedures¹⁴ to weigh risks and benefits of particular engagements will be established.

23. Furthermore, an engagement must not be primarily used to serve the interests of the private sector entity, with limited or no benefit to FAO nor can it be used to endorse the private sector entity's name, brand, product, views or activities. A set of exclusionary criteria including business categories (alcohol, tobacco, weapons, etc.) and/or practices (money laundering, terrorism financing, human rights abuses, etc.) considered inherently incompatible with values of the UN and FAO are also set out in the Strategy. These exclusionary criteria mirror those contained in other UN System's policies.

24. Reinforcing the preservation of FAO's integrity and independence, engagements under the Strategy will be handled in accordance with FAO's own rules and policies, including the Staff Regulations and Staff Rules, the Financial Regulations and Financial Rules, and the rules and policies governing procurement.

C. Primacy of FAO's mandate, strategic framework and programme of work

25. Engagement with the private sector must be looked at from the perspective of discharging the Organization's mandate by effectively servicing its membership. FAO must be fully responsive to priorities and needs of the Governing Bodies and the Members. Thus, engagements must reflect a demonstrable contribution to the delivery of FAO's mandate, strategic priorities, and programme of work.

26. In that vein, the Strategy stipulates that FAO's engagement with the private sector must demonstrate clear contribution to the attainment of the SDGs and be aligned with FAO's Strategic Framework, with a view to contributing to the achievement of Members' national development agendas.

D. Transparency and accountability

27. Engagement with the private sector must be conducted on the basis of transparency, openness and inclusiveness. The Strategy foresees that operational tools and guidelines will be developed to effectively implement this principle. This will include a web-based portal containing information on private sector companies and the establishment of an informal Private Sector Advisory Group (PSAG) which will be periodically consulted on a variety of issues related to engagements with the private sector. Internal guidance will also be developed for FAO personnel.

28. As an intergovernmental organization, the FAO Secretariat is accountable for its actions to its Members. The Strategy lays down general principles in this context. Accountability with respect to commitments made under each partnership is also needed. The above-mentioned operational tools and

¹⁴ The "UNSDG Common Approach to Prospect Research and Due Diligence for Business Sector Partnerships" will be used as a benchmark for development risk assessment procedures

guidelines will be designed and implemented to ensure clear and agreed responsibilities and accountability for all parties in partnership as well as defined timelines and measurable outputs.

V. Suggested action by the Committee

29. The CCLM is invited to provide its views or suggestions on this matter. It may, in particular, wish to consider whether the overarching principles articulated above, underpinning the Strategy, serve to appropriately protect the legal and constitutional status of the Organization while enabling wider and more effective engagement with the private sector.