CL 160/4 - Information Note 1 Rev. 1 – November 2018

Legal opinion on the use of equity from the liquidation of the FAO Commissary for financing the Organization's 2019 share of the United Nations Resident Coordinator network

Background

1. The 173rd Session of the Finance Committee and the Joint Meeting of the 125th Session of the Programme Committee and the 173rd Session of the Finance Committee considered options for financing FAO's share of the new Resident Coordinator System for 2019, under United Nations General Assembly Resolution A/RES/72/279 *"Repositioning of the United Nations development system in the context of the quadrennial comprehensive policy review of operational activities for development of the United Nations system"*.

2. In this context, the question was asked whether it would be possible to use any equity available from the liquidation of the Commissary and, in particular, funds from the Working Capital Fund.

Status of the Commissary

3. The Commissary has been operating since 1953 as a self-sustainable pooling mechanism for the exercise of individual import privileges of staff members, on a quasi-commercial basis. Its operations are based not on any right, or any statutory objective, of FAO but, rather, on privileges of individual officials of FAO, exercised through FAO. Article XIII, Section 27, of the Headquarters Agreement recognizes that such officials enjoy *"(j) the right to import, free of duty and other levies, prohibitions and restrictions on imports" and "through the medium of FAO (emphasis added), reasonable quantities, to be agreed upon in accordance with a procedure to be established between the Government and FAO, of foodstuffs and other articles for personal use and consumption and not for gift or sale"*.

4. The Commissary has operated as a fully self-sufficient unit without any cost for the Organization. All actual or potential expenditures (such as, for example, provision for terminal emoluments) were charged to the Commissary. As a result of the liquidation of the Commissary - and after all obligations and liabilities were covered - a sum of EUR 2,760,512 is available. This corresponds to EUR 1,434,939 as retained earnings and EUR 1,919,713 from the Working Capital Fund.

Retained earnings

5. Since the beginning of the operations of the Commissary, there has been a link between the operation of the Commissary and the financing of staff welfare activities through the Staff Welfare Fund, as prescribed by a series of Conference Resolutions. Conference Resolution 18/93 decided that *"starting from the year ending 31 December 1992, the equivalent of 1% of the total sales shall be transferred to the Staff Welfare Fund and that the Director General decide whether any net profits of the Commissary are to be carried forward to the next year or transferred to the Staff Welfare Fund"*.

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The Resolution also decided that authority *"to determine the amounts for distribution to funds and reserves, as well as the transfer of any net profits to the Staff Welfare Fund, shall be vested in the Director-General who will report on such matters to the Finance Committee"*. This resolution was superseded by Conference Resolution 19/2017, which eliminated the 1 percent levy on all sales. However, Resolution 19/2017 retained the principle that the Director-General is vested with the authority to determine the amounts for distribution to funds and reserves, as well as the transfer of part of the annual net profits of the Commissary to the Staff Welfare Fund. On the basis of these provisions, the Organization has retained a percentage of earnings as part of its prudent approach towards the operation of the Commissary.

Working Capital Fund

6. The Conference, in its Resolution 64/51 adopted at its Sixth Session in 1951, established a revolving fund for the purchase of stocks for the Commissary, the fund to be reimbursed from the proceeds of sale of such stocks. In November 1987, the Council decided that it should be maintained at a level of 12 percent of the annual turnover of the Commissary. At its session of September 1991, the Finance Committee decided that the level of the fund should be increased to 13 percent.

Use of the above reserves

7. While managed by, or on behalf of the Director-General, the above funds are not funds of the Organization. The possibility of using existing reserves after the liquidation of the Commissary must be considered in light of two sets of principles:

a) The first relates to the fact that, as in the case with the liquidation of any other business, remaining assets are to be distributed to entitled claimants or beneficiaries.
b) The second concerns the operating principles of the Commissary as a self-sustainable business financed entirely by entitled beneficiaries.

8. In this connection, it should be underlined that all reserves – either those available from the Working Capital Fund or the retained earnings – were ultimately generated by entitled beneficiaries of the Commissary.

9. Based on the average pattern of consumption over the four last years of activity of the Commissary, 67 percent of the Commissary turnover was attributable to FAO's Headquarters based staff, 27 percent to WFP staff and 6 percent to Permanent Representatives and others (others included entities such as ICCROM, MFO, and offices of some other organizations based in Rome).

10. Under the circumstances, it is considered that funds resulting from the liquidation of the Commissary and the Working Capital Fund, at least as concerns the funds generated by FAO and WFP staff, would have to be used for purposes related to welfare of the staff based at Headquarters, or for purposes strictly related to the Commissary (such as the launching the new Commissary model). Typically, and consistent with very long-standing practice, the use of those funds for other purposes, such as the financing of the new Resident Coordinator System for 2019, would have to be discussed with staff representative bodies. A different approach to the matter and, in particular, the use of funds for purposes not agreed to by staff representative bodies, would potentially expose the Organization to appeals.

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Antonio Tavares
Legal Counsel