

Safeguarding against possible conflicts of interest in nutrition programmes:

Draft “Approach for the prevention and management of conflicts of interest in the policy development and implementation of nutrition programmes at country level”

Comments by Judith Richter (29 September 2017)

I would like to thank the WHO Nutrition team for sending me the „**Draft approach for the prevention and management of conflicts of interest in the policy development and implementation of nutrition programmes at country level**” for review. I am aware that much work has gone into developing these three documents.

However, I find myself once again in the unfortunate position of having to note that key comments made by experts during the *Technical Consultation on addressing and managing conflicts of interest in the planning and delivery of nutrition programmes at country level*¹ (TC) in October 2015 have not been taken into account in the drafting of these documents. It would thus appear that any advice that raises unwanted questions or concerns about the proposed approach will be also disregarded during this consultation round.

My comments will therefore be less about the concrete content of the three documents. I shall rather focus on key parts in one of them, the 11 September *WHO Discussion paper* which explains the new *Draft approach*² and place it in a broader context. My aim is to draw attention to ‘the politics of conflicts of interest.’

I am one of those who have long been concerned about the lack of adequate conflict of interest (CoI) policies at WHO (and other UN agencies). My 2003/2004 consultancy on public interest safeguards at WHO for the Finish government led to an unfortunate discovery: conflict of interest regulation was considered an ‘obstacle’ to more flexible ways of working with business and venture philanthropy ‘partners’. CoI guidance was not welcome. A Senior Legal Officer at WHO told me that the organization had not been able to find an official definition of conflicts of interest because all existing ones had been considered as “too constraining.”

Promised staff training on conflicts of interest never got off the ground. A report *Assessing Conflicts of Interest* developed in 2001 by an outside expert was taken rapidly out of circulation. Among others, I was told that the consultant had overstepped his mandate by raising issues of institutional conflicts of interest, not just individual conflicts of interest. According to the consultant, although interviewed WHO senior officials considered CoIs issues a ‘hot’ topic in light of the rapid trend towards partnerships, conflicts of interest had become a ‘taboo subject’.³

Seen the path of the latest WHO ‘reform’, in particular of the process leading up to the *Framework of engagement with non-State actors (FENSA)*, it seems that some powerful actors within, and outside, of WHO still hold the view that conflicts of interest regulation may be an undesirable

¹ http://www.who.int/nutrition/events/2015_conflictsofinterest_nut_programmes/en/

² <http://www.who.int/nutrition/consultation-doi/Discussion-paper-nutrition.pdf>

³ Richter, J. (2004). Public-private partnerships and international health policy making: How can public interests be safeguarded? Helsinki, Ministry for Foreign Affairs of Finland, Development Policy Information Unit, pp 19-33
[http://www.webcitation.org/query.php?url=http://global.finland.fi/julkaisut/pdf/public_private2004.pdf&refdoi=10.1186/1744-8603-1-6.](http://www.webcitation.org/query.php?url=http://global.finland.fi/julkaisut/pdf/public_private2004.pdf&refdoi=10.1186/1744-8603-1-6)

obstacle to further development of public-private hybrids and close interactions such as public-private 'partnerships' (PPPs), multi-stakeholder partnerships (MSPs), MS-coordinating platforms/movements, and global MS-'governance'.⁴

Calls by Member States and civil society organisations on WHO's Secretariat to provide guidance on CoIs found no echo. Instead, critical Member States were told - after they had rejected the setting up of multi-'stakeholder' **World Health Forum** and a first FENSA draft - that they were being difficult. For example, at the 2014 Regional Meeting of WHO Europe, they were told to let an imperfect FENSA pass. It was argued that any resulting problems could be ironed out later. In my recollection, the Director-General's Report to the 2015 Executive Board recognised that many Member States felt uncomfortable with this recommendation. They reiterated the call for WHO to give better guidance on conflicts of interests. The WHO Regional Committee for Africa, for example, stated in its Report to the 2015 Executive Board:

"Representatives recommended that WHO should develop a comprehensive policy on conflicts of interest in the framework of engagement with non-State actors. It was emphasized that WHO should proceed with caution in developing a policy on engagement with non-State actors, as such a policy would have far-reaching implications for the Organization...."⁵

WHO Member States continued engaging in hard negotiations around FENSA. Yet, there was never an opportunity to have a debate on FENSA problematic CoI definitions and conceptualisation even though this has been requested over and over again by concerned civil society actors since 2014.⁶

I was hopeful that this situation would be remedied as an indirect outcome of the *WHO Technical Meeting on Addressing and managing conflicts of interest in the planning and delivery of nutrition programmes at country level* in October 2015. However, the *Agreement for performance of work (APW)* for the consultant elaborating the background paper for the discussions asked to:

"Establish clear definitions on the different types of conflict of interest, types of interactions and the type of non-state actors to consider during the consultation. The documents need to be aligned with the WHO Framework of engagement with Non-State actors (FENSA), and if information is missing, the Scaling-Up Nutrition (SUN) movement definitions should be used."

In the discussions of the Technical Meeting, experts stated that:

- the background paper's specific CoI definitions did "not conform to standard legal practice;"

⁴ See, e.g. Richter, Judith "Time to turn the tide: WHO's engagement with non-State actors & the politics of stakeholder-governance and conflicts of interest." 12 May 2014, *RR & letter to the BMJ* www.bmj.com/content/343/bmj.d5012/rr/697686; Valente, Flavio (2016). "Nutrition and food - how government for and by the people became government for and by the TNCs." TNI. <https://www.tni.org/en/article/nutrition-and-food-how-government-for-and-of-the-people-became-government-for-and-by-the>, accessed 02.02.2016

⁵ WHO Doc. EB 136/4 Annex http://apps.who.int/gb/ebwha/pdf_files/EB136/B136_4-en.pdf, para 5

⁶ IBFAN (2014) Statement on Engagement with Non-State Actors at the World Health Assembly; Open letter of civil society organisations to members of the 2016 WHO Executive Board, <http://www.babymilkaction.org/archives/8339>

- there was a need to specify that ultimately “conflicts of interest refer to conflicts ‘within’ a person and institution” and not ‘between’ them (a distinction proposed by Law Professor Ann Peters in her 2012 review of unaddressed conflicts of interest in global governance).
- the term “vested interest” should not be employed in analyses of conflicts of interest but be replaced by terms such as “financial” or “personal” conflicts of interest;

Experts also concluded that there cannot be a principle of “inclusiveness” when it comes to Col regulation.⁷

The relevance of these comments was beyond conflicts of interest in national nutrition policies and programmes. They pointed clearly at the need to revise FENSA’s proposed conflict of interest definitions and conceptualisation and review some of its “overarching principles.” They could have been used to raise attention of WHO Member States to the fact that there seemed to be a serious conflict between the aims of providing policy advice on how to best identify and appropriately address conflicts of interest at country level with that of ‘aligning’ the advice with the FENSA conceptualisation. This was not the case. FENSA was adopted at the 2016 World Health Assembly without amending its’ Col conceptualisation.

Also the first **Concept note** following the Technical Consultation, and now the Draft Approach *Discussion paper*, continue to disregard above, and other, pertinent comments. The definitions proposed continue to be at odds with standard definitions of conflicts of interest. The Draft Approach also disregards suggestions on how to further improve Col conceptualisations made by eminent experts and theoreticians such as Law Professors Marc Rodwin and Ann Peters.

Why is there no reference to the fact, that the **OECD Guidelines Managing conflict of interest in the public service**⁸ stated already in 2003 that sponsorship and public-private partnerships constitute particular “at risk areas” for conflicts of interest?

Advices given to OECD Member States to fulfil their mandate of constantly evaluating and adjusting Col policies and procedures to meet evolving situations include the duty to “provide a clear and realistic description of what circumstances and relationships can lead to a conflict of interest situation”, a.o. by providing “more focused examples of unacceptable conduct and relationships... to those groups that are working in at-risk areas, such as the public-private sector interface, government procurement, regulatory and inspectorial functions, and government contracting.”⁹

I cannot see such guidance reflected in the proposed “engagement” definitions. The *Discussion paper* seems to rather downplay concerns about these “at risk areas”, for example, by introducing such confusing and absurd distinctions as between “charitable” donations, “transactional” sponsorships, and “transformational” multi-stakeholder platforms (para 17). The linguistic novelty of turning persons in a position of trust, such as experts giving advice on public health matters, into “non-State individuals” (para 12. b) further muddies the waters. Nowhere can I see the recognition that the Col

⁷ Ibid, pp. 4-6, 22, 29

⁸ OECD. Ed. (2003). Managing conflict of interest in the public service: OECD Guidelines and country experiences. Paris, Organisation for Economic Cooperation and Development.

⁹ OECD (2003), D. Developing the Policy Framework.

policy guidance refers ultimately to the conflicts within the minds of individuals in a position of trust and/or the conflicts between the public mandates and financial interests within public institutions.

A thorough reading of the *2017 Discussion Paper **Draft approach for the prevention and management in the development and implementation of nutrition programmes at country*** makes me conclude that CoI advice and tools building on its conceptualization will lead to undermining, rather than supporting, national efforts to build up or improve national conflict of interest regulations in the nutrition arena.

I continue to have concerns that the process is framed in a way that guidance by CoI experts and other knowledgeable persons is disregarded as long it cannot be 'aligned' with the faulty approaches promoted in the FENSA and SUN policies. The process adopted for developing such a crucial policy guidance for Member States seems against the principles of open, scientifically informed, policy debate – in other words, it is an undue process. Some may see it as a violation of WHO's mandate to contribute to the building of the International Rule of Law.

When I send attached mail a year ago (see below), I was assured that my concerns about the advisory process would be taken into consideration into the continued follow-up. The question is: Why did - or could – the Nutrition Department not keep this promise?

Since the beginning of the WHO 'reform' in 2011, I have heard concerns that stricter conflict of interest assessment and regulation might lead to the collapse of WHO since it would risk drying up important "voluntary" financial contributions. Had there been allowance for a correct interpretation of conflict of interest regulation early on in the trend towards close public-private interactions, conflict of interest arguments could have been used as one of the most powerful justifications for reinstating full public funding of such a key specialized UN agency as the World Health Organization. Could this review process be used to draw attention of the new WHO Director-General to this unique opportunity to re-open the debate on the risks of 'resource mobilization' from powerful economic actors and the need to fast-track the promised review of FENSA?

It is my hope that my comments are seen as a contribution to opening discussions on how to reverse the trend to see effective conflict of interest policies as obstacles, rather than a indispensable ingredients, in the safeguards needed to enable civil servants, health and nutrition professionals, academics, as well as WHO staff at all levels, to work fully in the public interest.

Yours sincerely,

Judith Richter, PhD

ANNEX

From: Judith Richter [<mailto:judith.richter@bluewin.ch>]
Sent: vendredi 26 août 2016 11:06
To: 'BRANCA, Francesco';
Cc: 'BOUKERDENNA, Hala'
Subject: RE: External Reviewers on WHO Conflict of Interest tools

Dear Dr. Branca,

Thank you for inquiring whether I would be available to review the first draft document which is meant to help WHO Member States to prevent and address conflicts of interest (CoI) in the planning and delivery of nutrition programmes at country level when they engage with non-State actors, in particular with influential private sector actors.

Thank you also for the invitation to give feedback on the draft Concept Note which describes the methodology and process by which the Department of Nutrition and Development (NCD) intends to coordinate a work stream with relevant WHO departments and external experts arrive at this, and other relevant, tools.

It is with regret that I decline this offer. A thorough reading of the Concept Note made me conclude that the methodology and process described will lead to undermining, rather than supporting, national efforts to build up or improve their national conflict of interest regulations. At the same time, I am concerned that the project will further legitimize the increase of undue influences of corporate and other powerful actors who have been undermining WHO's capacity to fulfil its constitutional mandate and main functions, in particular through the promotion of the multi-stakeholder partnership model. I shall mention only a few examples. The Concept Note:

- (1) Legitimizes the FENSA definition of conflicts of interest which has never been subject to a thorough analysis as demanded repeatedly by a number of civil society organisations and networks. It defines conflicts of interest at national level as follows: "In general, a conflict of interest arises in circumstances where there is potential for a secondary interest (a vested interest in the outcome of government's work in a given area) to unduly influence, or where it may be reasonably perceived to unduly influence, either the independence or objectivity of professional judgement or actions regarding a primary interest (government's work)." (see 1.2 Definitions)
- (2) While the Concept Note asserts that "The starting point and main reference for the development of these tools is the Technical Consultation on " Addressing and managing conflicts of interests in the planning and delivery of nutrition programmes at country level" held in Geneva on the 8-9 of October 2015". Why then ignores the draft Concept Note key comments made by experts and participants of the Consultation? Many had pointed at the need for a much deeper discussion about how to best conceptualize conflict of interest regulation and had urged to take currently existing legal definitions and theoretical debates better into account (see in particular pp. 4-6 of the Technical Report). Similar comments had already been made during the review of the draft Background Note for the Technical Consultation whose definition was, as by TOR, was aligned with that of FENSA (see e.g. mail by conflict of interest expert Prof. Marc Rodwin).

I was among those participants of the Technical Consultation, who commented on the Background Note and resulting draft Technical Report. Reviewers had been urged to give comments by end of January 2016. Unfortunately, the Report come out only on the first day of the 2016 World Health Assembly - too late to still provide arguments for critical Member States to use them during the FENSA process. The policy document was thus adopted without further WHA discussion of its inadequate conflict of interest conceptualization which was predicted to decrease WHO's capacity to fully act in the public interest.

- (3) The Concept Note proposes also to base the tools on previous WHO work on Col in areas such as the pharmaceutical sector and the tobacco Convention (see 1.2). The Concept Note lists as external "groups to reviewing and validating the project" those who participated at the Technical Consultation and describes them as "experts on conflicts of interest." While many participants had very valuable observation and contributions, few could be described as experts on conflicts of interest and more precision may be needed on what mix of experts, including from civil society, may best ensure a valid outcome. For example, a number of participants had specifically requested to not use SUN's Reference Note as guidance for conflict of interest regulation. Why then is SUN emerging as a major resource and reference group, e.g. in the collection of case studies? ...What efforts are made to include also e.g. voices from the tobacco, pharmaceutical and alcohol arena into the process to develop Col tools?

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For many years, I have engaged in good faith with WHO processes that would have strengthened the agency's capacity to fulfil its mandate. However, during WHO's reform process I have lost hope that WHO's leadership is serious about developing the safeguards needed to protect peoples' human right to health and adequate food and nutrition. I am concerned that WHO has become one of the actors who are actively engaging in redefining conflicts of interest.

Therefore, while I fully trust that you, Dr. Branca, wish to ensure that Member States receive guidance which serves their populations, I have lost trust that your agency provides you with the support to you need to lead process in a way that could ensure such an outcome.

With best wishes,

Judith Richter