Internal UNFPA legal advice

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provided by the UNFPA Legal Office to UNFPA management

1. This refers to UNDP/UNFPA/UNOPS Executive Board decision 2026/2 ("Engagement with the UN80 Initiative"), which provides *inter alia* that the Board "[r]equests … UNFPA … to further provide … additional …information …, including … (c) internal legal advice" (operative paragraph 8). The United Nations Population Fund (UNFPA) Legal Office provided internal legal advice to senior management over the past few months, both in writing and orally. Accordingly, management has requested the UNFPA Legal Office to summarize the internal legal advice so far provided. The summary provided here primarily relates to a potential merger in the form of a consolidation of UNFPA and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) into a new entity.

Establishment of a new entity

2. UNFPA was first established by the Secretary-General in 1967 as a trust fund without any distinct identity under the United Nations Charter, to provide assistance in the field of population, in response to General Assembly resolution 2211 (XXI) of 17 December 1966. However, UNFPA's status changed in 1972, when the General Assembly decided to place UNFPA "under the authority" of the General Assembly (General Assembly resolution 3019 (XXVII) of 18 December 1972). In 1979, the General Assembly clarified that by its 1972 resolution, UNFPA had been established as a subsidiary organ of the General Assembly within the meaning of Art. 22 of the Charter (General Assembly resolution 34/104 of 14 December 1979).

3. Art. 22 of the Charter provides as follows: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions." Accordingly, we advised that under the Charter, it would fall within the authority of the General Assembly to establish a new subsidiary organ and to consolidate UNFPA into that newly established entity. (We understand that this has been confirmed by the United Nations Office of Legal Affairs.)

Role of the Executive Board

4. In General Assembly resolution 48/162 of 20 December 1993, the Executive Board was assigned a number of functions (see Annex I, paragraph 22 of the resolution). In particular, sub-paragraph (g) provides that the Board may "recommend new initiatives to the [Economic and Social] Council and, through the Council, to the [General] Assembly as necessary". Accordingly, we have advised that there may be an important role for the

Executive Board in considering the merits of any proposed merger by consolidation, and it stands to reason that the General Assembly could give considerable weight to the views of the Executive Board.

Potential implications for the UNFPA mandate

5. The mandate of UNFPA was first established and broadly defined in ECOSOC resolution 1763 (LIV) of 18 May 1973, operative paragraph 1 (a) - (d). In 1994, the mandate was subject to a fundamental reorientation under the Programme of Action adopted at the International Conference on Population and Development (ICPD) held at Cairo, Egypt, which created a new human rights-based foundation for international population policy. The UNFPA Executive Director served as the Secretary-General of the ICPD (General Assembly resolution 47/176 of 22 December 1992). The ICPD Programme of Action was endorsed by the General Assembly and UNFPA was designated as the lead agency for its implementation (General Assembly resolution 49/128 of 19 December 1994). Furthermore, successive strategic plans approved by the Executive Board and other instruments requesting UNFPA to undertake certain activities have given additional scope and contour to the mandate of UNFPA.

6. As noted above at paragraph 3, under Art. 22 of the Charter, the General Assembly holds the power to establish subsidiary organs as it deems necessary for the performance of its functions. Upon request, this office provided UNFPA with internal legal advice that UNFPA should be aware that the consideration at the level of the General Assembly of a possible merger opens the possibility and creates an inherent risk that the mandate of UNFPA could be subject to reconsideration as a part of that process. Such reconsideration could take many forms, including explicit amendments or revisions of agreed language, or reinterpretations of existing language. The dynamics of such a risk materializing are hard to foresee and would qualify as a political and programmatic matter rather than a legal issue.

7. In this connection, this office was asked to advise internally whether any "guarantee" could be provided that the UNFPA mandate would not be disturbed in the context of a merger. Please note that we advised that, from a legal perspective, no such assurance or guarantee could be provided.

UNFPA Basic Agreements and other Host Country Agreements concluded with Member States

8. Basic agreements and host country agreements can be advantageous in establishing the legal status of UNFPA, its operations and personnel, in a particular country. Such agreements help in facilitating and securing a range of protections for UNFPA.

9. UNFPA basic agreements. UNFPA has concluded up to 90 basic agreements with governments of UNFPA programme countries, most of which are registered as treaties as provided in Art. 102 of the Charter. These agreements cover the range of basic conditions

under which UNFPA provides assistance to governments, including importation and ownership title of supplies and equipment; financial and in-kind contributions by programme country governments; ownership and licensing of intellectual property; indemnification for third party claims; privileges, immunities and exemptions, including with respect to persons performing services and volunteers; access to the project site; issuance of visas and permits; and arbitration of disagreements. In holding with the general policy of the United Nations to seek limiting the proliferation of basic assistance or cooperation agreements, most UNFPA basic agreements provide that the Standard Basic Assistance Agreement (SBAA) concluded between UNDP and the country shall *mutatis mutandis* apply to UNFPA in the country. A few basic agreements apply other pre-existing assistance agreements (such as the Technical Assistance Board Agreement or the Special Fund Agreement) to UNFPA in the country or constitute *sui generis* agreements.

10. UNFPA host country agreements. Furthermore, UNFPA has concluded 18 agreements or arrangements with governments covering the legal status, privileges, immunities and exemptions enjoyed by UNFPA in respect of certain offices or operations not engaged in the implementation of programmes of assistance. These include UNFPA's regional offices, sub-regional offices, representation offices, UNFPA's Supply Chain Management Unit in Copenhagen, Denmark (under a common United Nations agreement), and an innovation project office located in the Charité Hospital in Berlin, Germany.

11. We have advised UNFPA that it has taken more than two decades to conclude the aforementioned agreements. Our experience has been that it has become an increasing challenge to conclude basic agreements with terms favorable to UNFPA (such as those included in the model UNDP SBAA).

12. UNFPA was advised that the aforementioned agreements apply specifically to UNFPA, its activities, personnel, and assets. (For example, basic agreements frequently stipulate that "the UNDP basic agreement shall apply *mutatis mutandis* to the activities and personnel of UNFPA in the [country].") As these agreements are UNFPA-specific, we advised UNFPA that the agreements would not automatically inure to the benefit of a newly created entity, given that a new entity's identity as a subsidiary organ under the Charter would be distinct from that of UNFPA. Rather, host governments and any new entity would need to agree separately to extend the terms of the agreements concluded with UNFPA to the new entity. Where governments are not prepared to do so, a new entity should plan to negotiate suitable alternative arrangements, if possible. Moreover, any such new agreements might require ratification under the constitutional rules of the concerned country.

13. We have further advised that any General Assembly decision merging the two entities might include that programme and other host countries are encouraged or called upon to extend the same terms included in UNFPA basic assistance or host country agreements to a new entity. It would be speculative for this office to opine whether or how many countries would be prepared to accede to such an encouragement or call. In consideration

of the foregoing, UNFPA was cautioned internally that a new entity may not be able to conclude suitable basic assistance and host country agreements in all the countries where UNFPA had been able to conclude such agreements in the past. Furthermore, where governments are willing to conclude such agreements with the new entity, UNFPA was advised that the time and effort required for the new entity to conclude suitable agreements may be considerable.

Products liability, indemnification

14. As part of its country programmes of assistance approved by the Executive Board, UNFPA procures, transports, imports, distributes, and uses large amounts of reproductive health (RH) programme supplies relating to its sexual and reproductive health operations. These include the procurement of RH programme supplies such as pharmaceuticals and medical devices[1], as well as certain non-expendable equipment such as trucks, off-road vehicles, mini-buses, and ambulances. The distribution and use of any of the foregoing may give rise to claims for compensation by third parties against UNFPA asserting that the third parties sustained injury.

15. In particular, UNFPA's RH supplies programming carries a risk of potential products liability. Broadly speaking, products liability can arise from manufacturing, design, and information defects. While rare, in the event that hormonal contraceptive medicines and other RH pharmaceuticals or medical devices procured, delivered, and used by UNFPA or its implementing partners[2] under a UNFPA programme of assistance were alleged to be defective and gave rise to financial claims for compensation for injuries under a products liability theory, such claims have the potential to be substantial. Given that UNFPA assistance is being provided for the benefit of the government and the people of the relevant country, the government, by operation of the basic agreement, agrees to bear all risks of operations and indemnify and hold harmless UNFPA from and against third-party claims. We have advised UNFPA that pending the conclusion of appropriate basic assistance agreements covering a new entity (see paragraphs 9-13 above) containing suitable indemnification provisions, the new entity might end up conducting sexual and reproductive health operations with liability protections that may be more limited than those of UNFPA.

16. Generally speaking, separately administered subsidiary organs are expected to be able to cover any liability arising under their operations from their own budget and assets. We advised UNFPA that a new entity's comptroller or risk officer should be prepared to carefully assess the risk of conducting sexual and reproductive health operations with limited liability protection against third-party claims and decide on the cost, scope, and practicality of any risk mitigation measures.

Stock holdings

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[1] Male and female condoms and IUDs constitute medical devices.
[2] As this term is defined in UNFPA financial regulation 2.1 k).

17. In decision 96/3, adopted on 19 January 1996, the Executive Board approved the establishment of a global contraceptive commodity programme, to be managed by UNFPA as an integral component of the overall work of UNFPA in strengthening RH programmes, including family planning and sexual health, and emphasized that these activities should be monitored carefully to ensure that they adhere to technical standards of safety and quality. Recalling that decision, UNFPA financial regulation 15.5 approved by the Executive Board permits the holding of stock of "essential goods in support of reproductive health". These may be held at the premises of suppliers or at alternative secure premises deemed suitable for the storage of contraceptive and other pharmaceutical products; in respect of stock held at supplier premises, where UNFPA has secured title to such products prior to shipment to the designated recipient, UNFPA is required to ensure that appropriate insurance is maintained in order to safeguard the interests of UNFPA (UNFPA financial rule 115.8). UNFPA was advised that in the event of a merger, it would be critical for a new entity to secure comparable authority with regard to its RH operations.

Global pharmaceutical quality assurance

18. UNFPA maintains a quality assurance system that applies to procurement and delivery of RH products[3] for use in UNFPA programmes of assistance as well as for disposition via Third Party Procurement (see below at paragraph 23). The system is designed to be risk-based and covers end-to-end quality measures, including supplier selection, procurement, pre-shipment testing (as applicable), transportation, storage, distribution, and post-delivery monitoring. In brief, as part of its quality assurance practice, UNFPA ensures that core RH supplies[4], *i.e.* (i) all contraceptive medical devices, such as male and female condoms and intrauterine devices (IUDs), as well as (ii) all hormonal contraceptive pharmaceuticals, are WHO-prequalified; and that other RH supplies are either produced by manufacturers that are WHO-prequalified, approved by a WHO-Listed Authority (WLA), or approved by a National Regulatory Authority (NRA) or Regional Regulatory System (RRS) at Maturity Level 3 or above. As a rule, independent batch testing prior to shipment is required, using WHO-prequalified and/or ISO 17025-accredited laboratories on the basis of samples taken in accordance with ISO 2859-1. The quality of RH products is monitored throughout the supply chain using a tracking and recall system to allow addressing quality concerns and the conduct of quality investigations. The system is designed to enforce time and temperature sensitivity of RH supplies, permit post-marketing pharmacovigilance, ensure adherence to WHO Good Storage Practices (GSP) and Good Distribution Practices (GDP), and facilitate last-mile delivery assurance.

[3] RH products are: (1) Male and female latex condoms; (2) IUDs; (3) Hormonal contraceptives and essential RH medicines; (4) Medical devices for maternal health and SRH; (5) Post-rape treatment kits, Fistula repair kits, dignity kits; (6) Menstrual hygiene products; (7) Midwives and healthcare providers educational and training material; and (8) Mobile clinics (static and ambulance).

[4] Core RH supplies are supplies deemed essential for delivering UNFPA programmes and the UNFPA mandate.

19. This office has advised UNFPA internally of the importance of ensuring that, in the event of any merger, there is no lapse or gap in the established quality assurance practice by the new entity that could lead to the programming of medicines or medical devices below necessary efficacy, quality or safety levels, which could give rise to a product defect and liability. Therefore, UNFPA was advised that in the event of a merger, UNFPA should pay particular attention that the new entity assume and continue the established quality assurance practice seamlessly and without any interruption whatsoever.

Contracting and concessional pricing for RH supplies

20. This office advised UNFPA that, generally speaking, in the event of a merger by consolidation, the contracts of the pre-existing entities transfer to the new entity. Therefore, the new entity would automatically assume the rights and obligations of UNFPA without UNFPA needing to assign each individual contract to the new entity.

21. The general rule notwithstanding, some contracts may prohibit automatic transfer (by anti-assignment or change-of-control provisions, or termination clauses in case of merger). In such cases, the consent of the other party to an assignment of the contract to a new entity may need to be sought in writing. For that reason, UNFPA was advised internally that in the event of a merger, UNFPA and the new entity should carefully review and map the pre-existing UNFPA contracts and take assignment action where necessary and feasible. The UNFPA Legal Office does not have any visibility as to the number of potentially affected contracts.

22. This office understands that UNFPA has established commercial arrangements with a multitude of suppliers and manufacturers of RH supplies, often at prices that are heavily discounted. UNFPA was advised that in order to maintain global RH commodity supply at affordable prices, in the event of a merger the new entity should make a particular effort to maintain the commercial and legal relationships with international and local manufacturers and suppliers of important RH products.

Third Party Procurement

23. UNFPA contracts for RH and census supplies for government departments, including Ministries of Health, and other third parties referred to in UNFPA financial regulation 2.2 T i., outside of classic country programme contexts, on the basis of full payment in advance of the total cost of the procurement, unless, exceptionally, other payment terms are approved by UNFPA management (UNFPA financial regulation 15.3, referred to as Third Party Procurement). Governments benefit from concessional or otherwise discounted pricing negotiated by UNFPA at the global level, which is based on client relationships that have grown over a substantial period of time. Distinguished from traditional development assistance, under Third Party Procurement, governments take sovereign decisions as to whether and what supplies to procure. Supplies are paid for by governments (rather than by third-party donors) from their own tax and other government revenue. As such, Third Party Procurement is a critical element towards ownership by

developing countries of their population and development policies and public health strategies. UNFPA was advised that a new entity should be careful to maintain the regulatory, contracting, pricing, and quality assurance regimes underlying Third Party Procurement without any lapses in procurement services provided by UNFPA to governments, which would increase the risk of stock-outs of RH supplies and other adverse public health consequences.

Financing of programme activities

24. UNFPA has been assessed or qualified by a number of development partners as eligible to receive funding. Furthermore, UNFPA has provided assurances of sound fiduciary management and accountability frameworks and has made specific undertakings in relation to fiduciary principles vis-à-vis certain development partners. UNFPA was advised that a new entity may be subject to new or additional procedures by external parties to assess its fiduciary and accountability systems. Pending such (re)confirmations or the execution of new agreements relating to fiduciary principles, we have advised that UNFPA should be aware of the possibility that financing delays may occur.

Other implementation matters from an internal legal perspective

25. This office was requested to provide advice to UNFPA management on possible alternative arrangements short of a merger from a legal perspective. Accordingly, this office advised that, without prejudice to the right of the General Assembly to take decisions under Art. 22 of the Charter, there may be a range of alternative measures to enhance coherence, efficiency, and alignment between UNFPA and UN Women while maintaining the separate identities and mandates of the two subsidiary organs under the Charter. Such measures could, for example, extend to coordination of operational activities, coordination of programmatic activities, and delegated authority arrangements. At any rate, we understand that in response to a request from the Executive Board "to further provide … (b) alternative options for enhanced alignment, impact and efficiency" (Executive Board decision 2026/2, operative paragraph 8), such information is currently being collected.

26. By contrast, any merger by consolidation of UNFPA into a new entity would terminate the identity of UNFPA as a separately administered subsidiary organ under the Charter. Upon inquiry by management whether such a merger would be irreversible if unforeseen or unintended adverse consequences should arise because of the merger, placing the merits of the merger in question, we have advised that the merger, for practical purposes, would probably be irreversible.

27. We have further advised that in the event of a merger by way of consolidation, UNFPA should note that a new entity will require a full complement of regulations, rules, and administrative policies and procedures necessary for the effective and compliant management of a newly established subsidiary organ, including financial regulations and rules, accounting and auditing arrangements, appropriate fiduciary arrangements, risk

management arrangements responsive to the specific activities heretofore undertaken by UNFPA, and all necessary administrative, personnel, and financial delegations of authority.

28. A new entity would, presumably, establish a complement of posts for the fulfillment of its mandated duties. Assuming those posts will not neatly align with the post profiles of the two pre-existing entities, the staff to fill the new entity's posts would need to be selected from among the staff of the pre-existing entities and, maybe, competitively from outside. UNFPA was advised that this might require major human resources management action and careful management of staff redundancies on the part of the new entity, as well as the management of any staff litigation against the new entity for unlawful termination, improper non-renewal, and similar causes of action.

29. Finally, UNFPA was advised that mergers and consolidations carry the potential of causing a broad range of cultural problems for a newly established entity, including but not limited to the integration of divergent leadership and management styles, organizational identity, communications, and talent turnover, with a risk of staff conflict, lower productivity, and possible employment litigation as a result. While all United Nations staff are required to regulate their conduct in accordance with the standards of the Charter, the staff regulations, and the standards of conduct for the international civil service, UNFPA has been cautioned that a new entity should not underestimate those potential issues (which are known in industry to afflict many merger transactions) and make available sufficient financial resources to manage these issues professionally, so as to preempt employment disputes as much as possible.

UNFPA Legal Office
14 May 2026