

ANNEX 2

**EXPLANATORY NOTES FOR
PRECEDENT MEMORANDUM OF UNDERSTANDING TO PLAN CSR-SUPPORTED
COMMUNITY DEVELOPMENT
(long version)**

Introduction

These notes explain briefly how to use the long version of the precedent Memorandum of Understanding (MoU) to plan community development.

The MoU is designed as a practical knowledge tool to facilitate effective planning and design of CSR-supported development work in Indonesian communities.

It is primarily intended for use as the basis for preparing a legally-binding contract between:

- a company or an Indonesian state-owned enterprise; and
- a registered not-for-profit community-based or civil society organisation with expertise in community development,

that propose to work together on planning CSR-supported community development.

By making the precedent document available, TNP2K encourages companies and state-owned enterprises to work together with civil society organisations to design and plan community development initiatives that are thoughtful, well-targeted and likely to achieve a sustainable reduction in poverty in Indonesian communities.

However, the precedent MoU could also be useful for:

- a philanthropic organisation that contributes funding for community development from sources other than CSR; and
- organisations involved in disaster relief within Indonesia that need to quickly document the agreed terms on which they will jointly contribute to planning social assistance in disaster-affected communities.

Important note on seeking legal advice

Each party should seek its own legal advice before signing any legally-binding contract based on the precedent MoU to ensure that its legal rights and interests are properly protected.

Further, the parties should ensure that signing a contract based on the MoU does not in any way contravene the prevailing laws and regulations. For instance, the funding for designing and planning (and implementing) community development must not be derived from any illegal activities or money laundering or contravene any other regulations that specifically apply to the parties due to their status and/or business activities.

Legal disclaimer

Please note that the important legal disclaimer on the reverse of the cover of the report to which this document is annexed applies to the long and short versions of the precedent MoU and these explanatory notes.

Contents of the precedent MoU

The MoU suggests ways of providing for the rights and obligations of each of the parties and the process they will follow in forming a working partnership to design and plan community development initiatives.

Although the precedent aims to strike a fair balance between the parties where their interests may be different, the parties should always carefully consider whether the provisions set out in the MoU are

fair and appropriate for their own particular needs and circumstances. The MoU should not be used as a rigid precedent. It should be used as a guide and should always be amended as necessary to reflect your actual circumstances.

Note that the MoU refers to Party A and Party B throughout but you should feel free to replace these terms with the names of the actual parties or use the terms “company” and “civil society organisation” if you prefer.

The following paragraphs are designed to help you understand the purpose of each provision in the precedent document and to prompt you to consider if the provision is suitable for your needs or if it should be changed or deleted.

You may need to draft and insert new provisions to cover issues that are not included in the precedent MoU but that need to be covered to meet the needs of the parties and their particular circumstances.

The following numbers refer to the numbered articles and sections in the MoU.

1. PARTIES AND BACKGROUND

Is each party a legal entity?

The parties must be legal entities if they wish to use the MoU to form a legally-binding contract.

If a community-based organisation is not a registered legal entity, it could still use the MoU as a source of ideas and language for a less formal, non-legally-binding document that sets out the intentions of the group and a company to work together on community development planning work with the support of CSR funding.

What are you planning to do?

Delete the reference to a community action plan (and the definition of a community action plan in section 1) if you wish to plan only one or more community development initiatives rather than a complete community action plan.

Do any CSR laws apply?

The Background should refer to any Indonesian legislation that applies to CSR activities and spending by the company so it is clear what legal obligations the company needs to meet. If no CSR laws apply, delete the references to legislation.

Definitions and interpretation

Check that the existing definitions make sense for your needs. When amending the document to suit your needs, add new definitions for any new terms that you use a lot in your document, to make it easier to read.

The interpretation section explains that headings (although they help the reader) are of no legal importance when interpreting the document and that certain words will be legally interpreted as including other words.

2. AGREEMENT TO WORK TOGETHER

Why are you entering this MoU?

Section 2.1 should explain accurately what the parties intend to do in their work together.

Term of the MoU

Insert the dates on which you intend the MoU to start and finish and the anticipated dates for the performance reviews. Agree on the details of a performance review from the start, including the aspects of performance that will be assessed and the expectations of the company as to the standards of work to be met by civil society organisation staff. Set these out in writing as a guide for the civil society organisation. This guide can be inserted in a schedule to the MoU.

Performance reviews

Section 2.3 provides for regular performance reviews.

Do you intend to be legally bound by the MoU?

If you are using the MoU as the basis for a less formal, non-legally-binding agreement, delete section 2.4.

3. THE PLANNING PROCESS

Standards of work to apply

Article 3 commits the parties to using professional community development principles and practices in their planning work, including undertaking a participatory needs assessment to identify community needs and priorities.

Communications and public awareness process

Section 3.2 requires the establishment of a robust communications and public awareness process and gives the civil society organisation the responsibility for arranging and carrying out public communications, provided the company has first approved them. Develop the communications protocol early in the relationship, setting out an agreed regime for communicating or exchanging information when needed between the parties and other stakeholders. It could also cover ethics, confidentiality and the approvals required for internal and external communications, media announcements and publications.

Potentially useful community development tools

A number of potentially useful community development tools are listed in section 3.3 to prompt you to consider whether it would be appropriate to use any or all of them.

The civil society organisation may be best placed to advise whether any particular tool should be used and, if so, whether section 3.3 should be reworded to explain how and when the tool will be applied.

The aim is sustainable development

The parties commit in section 3.4 to aim for a sustainable improvement in the community with which they are working.

They also agree that their work should be aligned with the company's existing code of conduct and sustainability principles (if any) and its prior community engagement activities.

The importance of working with government

Section 3.5 deals with the issue of understanding relevant governmental development plans and priorities for the community so you can ensure your work complements and supplements government-budgeted community development initiatives but does not replace them.

Consider drawing on all the resources that government ministries and agencies have to offer that could assist your planning work. In particular, take advantage of the information and guidance available from the National Team for the Acceleration of Poverty Reduction (TNP2K) and the relevant regional poverty reduction coordination teams (TKPKD) to ensure that your initiatives will be well targeted to achieve a sustainable reduction in poverty in the relevant community.

Consider if you should enter into a technical cooperation agreement with a government agency under which the agency commits to cooperating with your work. Many legal regulations relate to government funding and budgeting processes and some of these could apply in this context so obtain legal advice on such matters before signing any agreement with a government agency.

If there is a CSR forum comprising local government and companies (and sometimes civil society organisations) actively coordinating CSR activities in the area, you may benefit from working with it, particularly in identifying gaps in development needs and the potential for synergies with other companies' CSR-funded initiatives and government development programmes.

Working with the CSR forum could also help you identify lessons learnt from previous community development activities in the area and prevent you from repeating mistakes.

Form of your planning work

If necessary, change the descriptions of the community action plan and the planning tools to be used in sections 3.6 and 3.7 to reflect your actual intentions and to add further helpful detail.

Both parties must agree on a plan before they can implement it

Section 3.8 states that the parties cannot proceed to implement their planning work unless and until both of them have agreed on its form. The consequences for the parties if they cannot agree are set out in article 12.

Monitoring and evaluation

Given the importance of being able to measure the effectiveness of your work together, section 3.9 deals with building monitoring and evaluation into your plans. This section could be expanded to give more detail if required.

4. ROLE OF THE COMPANY ("Party A")

To provide CSR funds and in-kind support

In accordance with an agreed budget and payments schedule, the company agrees to pay the CSR funding into a special bank account set up by the civil society organisation to receive these funds. The parties should prepare the budget and payments schedule and attach it to the MoU. This schedule should also contain details of in-kind, non-monetary support that the company will contribute to the design work under the MoU. It may be amended from time to time to reflect changed circumstances but only if both parties agree to the amendment.

To provide the civil society organisation with support for capacity-building

It is important that the civil society organisation brings competent professional community development skills and up-to-date knowledge to the CSR partnership. It is also important that the civil society organisation has strong managerial and administrative capabilities. Strengthening these aspects of a civil society organisation working in the community is itself a form of sustainable community development because the benefits should flow into the community and through to future development work by the organisation.

The MoU recognises the difficulties that civil society organisations can experience in obtaining funding for their staff to attend training courses, conferences and other capacity building activities. It contemplates that the company may provide additional funding as required to enable the civil society organisation to build its capabilities in ways that will benefit their work together. The company may also decide to offer mentoring, business coaching and training in reporting and keeping financial accounts, as appropriate, as well as to provide relevant template documents. All of these should improve the standard of the civil society organisation's work and the effectiveness of the company's investment under the MoU.

To provide other resources

Although the MoU contemplates that the civil society organisation will take on the role of project manager for the parties' activities (see article 5 below), the company agrees, in section 4.4, to contribute the full benefit of its technical and business knowledge, skills and experience to the planning work. It may be helpful to add further detail to this section to describe the actual technical assistance that the company will provide.

To provide guidance on future CSR funding budget

In order for the parties to build realistic budgeting into their planning work, the company will give the civil society organisation guidance on the amounts of future CSR funding that may be available to implement proposed community development initiatives.

Security plan

Where the community location is affected by conflict, the company will take responsibility for working with the civil society organisation on appropriate security arrangements to ensure that employees and contractors remain safe during the activities.

To work to prevent or resolve community disputes

The company will be primarily responsible for preventing or resolving actual or potential disputes within the community. The civil society organisation agrees to assist if required.

5. ROLE OF THE CIVIL SOCIETY ORGANISATION ("Party B")

To undertake project management

The civil society organisation, applying professional standards to its work, will act as project manager.

To manage the agreed budget

The civil society organisation will be primarily responsible for preparing and managing the budget, payments schedule and timetable of activities.

However, the civil society organisation will need to work closely with the company when preparing these documents to ensure the company agrees with them. The documents can be changed if necessary as work proceeds but only with both parties' consent.

The payments schedule must provide sufficient funds at the start of the term of the MoU to allow the civil society organisation to mobilise the staff and other resources it will need to carry out its role.

The civil society organisation will need to set up a special purpose bank account to receive CSR funding paid by the company. This account will ensure that the company's CSR funds do not become mixed with the organisation's general funds or with funding from another source. This will help bring transparency and accountability to the organisation's financial management.

The total budget for work under the MoU should be inserted in section 5.2(d).

The parties should include funding in the budget to cover the civil society organisation's indirect costs and administrative overheads. This component of the budget may be referred to as a "management fee" and in this case the relevant percentage of the total budget amount should be inserted in section 5.2(f). The amount allocated for this purpose is a matter for negotiation and should reflect a realistic assessment of the actual indirect costs the civil society organisation will incur in operating at a professional standard while undertaking its obligations under the MoU.

To manage payments

The civil society organisation is given responsibility for paying valid invoices from third party contractors and suppliers. Invoices should be addressed to the civil society organisation, include the name of the community and planning project and state the purpose of the payment.

Payments are to be made from the funds deposited by the company in the special bank account. However, to allow for flexibility, section 5.3 does contemplate that the company could decide to pay third party contractors and suppliers directly.

The company will have the right to audit payment invoices.

To report and account to the company

Section 5.4 obliges the civil society organisation to maintain and retain proper records and accounts for its work under the MoU.

Financial accounts should be prepared in accordance with the "generally accepted accounting standards" in Indonesia.

The civil society organisation should prepare periodic reports on activities that allow the company: to understand progress against objectives and key performance indicators; to identify promised and actual deliverables; and to identify and understand the reasons for (and any consequences of) any delays or deficiencies in performance. These reports should also include suggestions for improvements. It would be wise to agree on the format for periodic reports from the start and attach this format to the MoU.

The parties also need to agree on the frequency of reporting on financial and operational matters. Once agreed, reference to the agreed reporting periods could be inserted into section 5.4.

To allow records and accounts to be audited by the company and its advisors

The company will be entitled to audit the civil society organisation's records and accounts from time to time. The company should give the organisation reasonable notice of an audit and try to carry it out during regular business hours. If the company requires the organisation to provide audited accounts, the company should include funding for the cost of auditing in the budget.

To ensure any lawful government charges are paid and recorded

The budget should include any amounts to be paid to any government agency by way of a tax, levy or other charge and required by law. The civil society organisation will be responsible for making such lawful payments and ensuring that it receives written acknowledgement of them.

6. GOOD GOVERNANCE AND DECISION MAKING

Decision-making process

Design a process for making decisions that encourages trust to grow as your work together progresses. The process should allow effective and timely decision making in a transparent and accountable manner.

Section 6.1 sets out a suggested process under which the parties' representatives at various levels could meet at different intervals to make and review decisions. The suggested process involves the following elements:

- ☐ Those people involved in day-to-day planning meet together at least twice a week;
- ☐ Those same people meet together with their respective immediate supervisors at least once each week; and
- ☐ All those from the weekly meetings meet together with their appropriate higher level managers and any other relevant stakeholders at least once a month.

Section 6.1 suggests that, as is customary in Indonesia, decisions are made by consensus rather than by each party having a vote that carries a percentage value.

It is important for good governance that all decisions are documented and that minutes are circulated for comment, reviewed, amended as necessary and signed when correct.

Section 6.1 builds in flexibility in how meetings are held. This should be changed if necessary to reflect the parties' preferences.

Commitment to ethical conduct

Section 6.2 contains a commitment to ethical practices and states the importance of training and monitoring staff for ethical conduct.

Conflicts of interest

If either party becomes affected by a conflict of interest, it must work to remove or resolve that conflict as soon as possible so that neither party's reputation is damaged and their work together is not adversely affected by the conflict.

Compliance with laws

The parties should commit to abide by relevant laws. Where the company or the civil society organisation has international connections, these laws could include laws of foreign jurisdictions that deal with matters such as corrupt conduct, privacy or the protection of children. This issue needs to be explored during negotiations so both parties are clear as to what laws apply to their work together.

7. CONTRACTORS AND SUPPLIERS

In article 7, the civil society organisation is given responsibility for procuring contractors and suppliers and contracting directly with them. It commits to using good procurement practices that also comply with the company's tender requirements under its procurement policies or under the law. For example, state-owned enterprises are subject to regulations that specify the tender requirements to be followed.

To the extent possible, the civil society organisation agrees to give preference to local community contractors and suppliers.

Provision is made for the company to approve procurement decisions made by the civil society organisation where the value of the contract is above a certain value. The parties need to agree on and insert this threshold contract value in section 7(f).

8. INSURANCE

The civil society organisation will be responsible for obtaining any agreed insurance policies. If the company does not require the organisation to do this, article 8 can be deleted.

9. EVENTS BEYOND A PARTY'S CONTROL

A party will not be in breach of the MoU if it cannot perform its obligations due to events beyond its control. This exemption from breach does not apply to any failure by the company to pay the agreed CSR funding.

Article 9 allows one party to terminate the MoU if the other party is unable to perform its obligations for longer than three months (or some other agreed period) due to events beyond the affected party's control.

The unaffected party is not, however, obliged to terminate the MoU. It could continue to wait longer than the agreed period for the other party to resume operating.

The parties should consider whether three months is appropriate or if some other period would better suit their circumstances.

10. REPRESENTATIONS

Each party should have made inquiries to check the reputation and capabilities of the other well before they get to the stage of negotiating an MoU. Article 10 provides formal representations from each party as to their legal nature, their legal capacity to contract and ability to carry out their obligations under the MoU without giving rise to any conflict of interest or breach of regulations or ethical principles.

11. CONSEQUENCES OF AGREEMENT ON A PLAN

If the parties complete their planning work under the MoU to their mutual satisfaction and the civil society organisation wishes to work with the company to implement any agreed community development initiative, the parties would need to agree the terms on which they would do so.

They could use the precedent Cooperation Agreement as the basis for their negotiations because it has deliberately been drafted to contain similar terms to this MoU and so should be easy to use.

Article 11 allows the company to set a reasonable period to conclude those negotiations. If at the end of that period the parties have not come to an agreement, the company will be free to work with another civil society organisation or to undertake the proposed plan itself.

12. INABILITY TO AGREE OR COMMIT

If the parties decide to stop working together under the MoU or if the company notifies the civil society organisation that for unexpected reasons or reasons outside its control it will not be able to provide CSR funding to implement the parties' planning, the MoU will terminate.

In such a situation, article 12 provides that the company will fund the civil society organisation's reasonable costs of closing down the CSR partnership's work.

13. DISPUTE RESOLUTION

Dispute resolution procedure

If a dispute arises between the parties that cannot be settled by senior management, article 13 provides for the dispute to be referred to mediation by a respected independent person. If mediation fails, the parties agree to refer the dispute to be settled by a court in the relevant jurisdiction.

Right to approach a court for urgent relief unaffected

The above procedure does not stop a party approaching a court for urgent relief at any time.

14. TERMINATION

Termination for breach

Article 14 sets out a number of reasons why the MoU could terminate. These are, in brief:

- ☐ breach of contractual obligations;
- ☐ conduct likely to damage the parties' work;
- ☐ insolvency;
- ☐ corrupt conduct; or
- ☐ the company has reasonable grounds to believe, as the result of a performance review, that the civil society organisation does not have the capabilities required to carry out its obligations.

Other remedies unaffected

A party terminating the MoU for breach under article 14 does not lose any other remedies it may have under Indonesian law.

Consequences of termination

Section 14.4 sets out the consequences of termination, including the need for the parties to settle outstanding business between them and with third party suppliers and contractors, and close down their work.

The civil society organisation must give the company a final report and acquittal of expenditure and deal properly with records and accounts as agreed with the company.

The section allows the civil society organisation to retain copies of documents needed for internal governance purposes and documents that would enable it to retain the benefit of professional learning.

Unused CSR funds must be returned to the company unless the company agrees that the civil society organisation may apply them for another purpose.

Waiver of article 1266 of the Indonesian Civil Code

The parties agree to waive their legal right to ask a court to approve the termination of the MoU.

15. CONFIDENTIALITY

Confidential information

Section 15.1 is an acknowledgement by both parties that they may exchange confidential information. For example, the civil society organisation may learn confidential information about the company's business and financial affairs. The section also provides that the MoU, once signed, is a confidential document and that the parties should keep its terms and conditions confidential.

Confidential information to be kept secret

Each party agrees to keep any confidential information provided to it secret and not to use it for its own benefit or to the detriment of the other. There are exceptions given, including the right of the civil society organisation to disclose confidential information on a confidential basis to any civil society network it belongs to, where the disclosure is required to enable it to perform its obligations under the MoU.

Confidential obligations to survive termination

It is important to understand that section 15.3 means that confidentiality obligations will survive termination of the MoU for an indefinite period.

16. INTELLECTUAL PROPERTY RIGHTS

No transfer of pre-existing Intellectual Property Rights

Intellectual Property Rights is a defined term.

Section 16.1 provides that the pre-existing Intellectual Property Rights of either party are not transferred to the other party when the parties enter into the MoU. Those pre-existing rights remain with the party that owns them.

Ownership of Intellectual Property Rights developed under the MoU

However, Intellectual Property Rights that are developed by either party in performance of its duties under the MoU will become the joint property of both parties. Accordingly, the party that creates the rights (for example, by preparing copyright material or creating a trade mark or an industrial design or patentable device) must immediately disclose information about them to the other party.

If this regime for ownership of intellectual property does not suit the parties, amend this provision to reflect your agreed regime.

Obligations to survive termination

The obligations to disclose jointly-owned Intellectual Property Rights survive termination of the MoU for an indefinite period.

17. OTHER ASSETS

Article 17 provides that, if and when the MoU terminates, assets other than intellectual property will be transferred to the community with which the parties have been working, unless the company and civil society organisation agree that the organisation could make better use of those assets.

18. GENERAL PROVISIONS

Notices

Section 18.1 sets out how each party should communicate with the other and contains address details.

Relationship of the parties

Section 18.2 makes it clear that the parties are not forming a legal partnership or a relationship of employment or agency by working together under the terms of the MoU.

It is important that employees of each party do not represent to anyone that they are authorised to represent or to bind the other party contractually.

Assignment

Neither party is allowed to assign its rights under the MoU unless the other party first agrees to that assignment.

Variation

No change can be made to the MoU unless both parties agree in writing to make that change.

Waiver

Any waiver by a party of a right under the MoU has no effect unless it is evidenced in writing.

Entire agreement

Section 18.6 provides that the MoU represents the whole agreement between the parties with respect to its subject matter. If the parties wish to preserve the effect of earlier related documents they have signed, they should mention them specifically in this section 18.6.

Severance

If any provision of the MoU is void, illegal or not enforceable, it can be deleted and the remaining provisions of the MoU will remain in effect.

Languages

If the MoU is prepared in English and in Bahasa Indonesia, the English version can be signed first and take effect before the Bahasa Indonesia version is signed. However, if there is any inconsistency between the versions, the meaning of the section of the MoU written in Bahasa Indonesia will prevail.

Counterparts

To assist with the practicalities of signing, the parties may sign identical copies of the MoU. If they do, the copies together will constitute one legal document.

Governing law

The laws of Indonesia govern the MoU.

SIGNING THE MoU

Each party should formally authorise in writing, in accordance with its internal governance procedures, the person who is entitled to sign the MoU on behalf of that party.