



COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Hundred and Tenth Session

Rome, 28-29 May 2020

Use of unspent balances of biennial appropriations

I. INTRODUCTION

1. This document is submitted to the Committee following consideration by the Council at its 163rd Session of the Reports of the Joint Meeting of the Programme and Finance Committees and the CCLM concerning a proposal for the use of unspent balances. In particular, the Council “*noted the outcomes of the Committee on Constitutional and Legal Matters (CCLM) and the Joint Meeting on the use of unspent balances, and accordingly requested that the Secretariat submit for the benefit of a more fundamental discussion by the Council and its Committees a related paper. The paper shall take into account the need for consistency with the rule established in Financial Regulation 4.2 and other applicable Financial Rules and Regulations of the Organization, as well as related practices at UN and other relevant entities*”¹. The Council “*underlined the importance of the role of the CCLM in any further such discussions*”².

II. BACKGROUND

2. The Conference, at its Forty-first Session in June 2019, “*recalled Council’s request for a proposal to be presented on the systematic use of unspent balances of biennial appropriations, following review by the Committee on Constitutional and Legal Matters (CCLM) and the Joint Meeting of the Programme and Finance Committees (footnote CL 158/REP, para 10c), and requested that such a proposal be presented to their next Sessions in October-December 2019*”³.

3. At its 109th Session, the CCLM considered a “*Proposal for use of unspent balance of biennial appropriations*”⁴. It “*reaffirmed the importance of Financial Regulation 4.2 which states the Organization’s policy regarding unobligated appropriations at the end of the financial period*”⁵, and recommended a process that the Conference could approve in anticipation of unspent balances - based

¹ CL 163/REP, paragraph 9 (a).

² *Ibid.*, paragraph 14.

³ C 2019/REP, paragraph 73 (a).

⁴ CCLM 109/3.

⁵ CL 163/2, paragraph 10.

on approval by the Council on the recommendation of the Joint Meeting - proposals made by the Director-General for the use of unspent balances, with the unspent balance reverting to the General Fund in the absence of approval by the Council. The full text of the proposal is set out in the Annex hereto.

4. Subsequently, the Joint Meeting noted the recommendations of the CCLM and:

“a) while noting long-standing practice of the Conference in carrying forward unspent balances of biennial appropriations, observed that the establishment of a permanent procedure to carry over unspent balances is inconsistent with Financial Regulation 4.2;

b) recommended that the Council should have a more fundamental discussion about the compliance with Financial Regulation 4.2 in relation to the current practice prior to the implementation of the proposal, taking into account in particular the need to ensure transparent and proper budgetary processes and procedures”⁶.

5. As reflected in paragraph 1, the Council requested further consideration of this matter.

III. RULES AND PRACTICES OF FAO

6. Financial Regulation 4.2 stipulates that:

“Except as provided for in Financial Regulation 4.3 relating to the Technical Cooperation Programme, appropriations shall be available for obligations during the financial period to which they relate and unobligated appropriations at the close of the financial period shall be cancelled.”

7. Thus, budgetary execution should adhere to the appropriations and allotments issued in accordance with the Financial Regulations. Underspends are kept to a minimum but may occur in light of the obligations upon the Director-General under the Financial Regulations not to permit expenditure to exceed the approved appropriation. Reference is made in this regard to, in particular, Financial Regulation 4.1 (a), which stipulates that the *“appropriations voted by the Conference for the ensuing financial period shall constitute an authorization to the Director-General to incur obligations and make payments for the purpose for which the appropriations were voted, and up to the amounts so voted”*.

8. In accordance with Article IV of the FAO Constitution:

“1. The Conference shall determine the policy and approve the budget of the Organization and shall exercise the other powers conferred upon it by this Constitution.

2. The Conference shall adopt General Rules and Financial Regulations for the Organization”.

9. Pursuant to Rule XX of the General Rules of the Organization,

“The Conference shall, at each regular session:

(a) examine and adopt the budget for the ensuing financial period;

(b) adopt the final accounts of the Organization for the preceding financial period, after having considered the report of the Council thereon;

(c) consider the report of the Director-General on the receipt of contributions from Member Nations and Associate Members since the previous session; and

⁶ Report of the Joint Meeting of the 127th Session of the Programme Committee and 178th Session of the Finance Committee (4 November 2019) CL 163/6, paragraph 2.

(d) on the recommendation of the Council, or on the request of a Member Nation transmitted to the Director-General not later than 120 days before the opening of the session, re-examine the scale of contributions of Member Nations”.

10. In exercise of these functions, the Conference adopted the Financial Regulations. Having done so, the Conference has the legal authority to decide to amend the Financial Regulations, or to depart from them on a case-by-case basis. It may therefore authorize exceptions to Financial Regulation 4.2 and approve carry forward of unused balances. As reflected in document CCLM 109/3, it has taken decisions exercising this authority on a number of occasions in the past years.

IV. THE RULES AND PRACTICE OF OTHER UN SYSTEM ORGANIZATIONS

11. In the United Nations, any budget surplus must return to the Member States, in accordance with Financial Regulations 3.2 (d)⁷ and 5.4⁸. It is noted that, in addressing the impact of liquidity challenges on the implementation of the programme budget for the biennium 2018–2019, the report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) states:

“The Secretary-General recalls in his report (A/74/570, para. 7) that in May 2019 he had proposed a set of measures to address the liquidity problems in the regular budget and peacekeeping operations in an earlier report on improving the financial situation of the United Nations (A/73/809). The Advisory Committee recalls that in its report thereon, it had recommended that the General Assembly adopt certain measures, including a proposal to suspend the surrender of unspent appropriations for the regular budget for a trial period of one year (A/73/891, para. 22). In its resolution 73/307, the Assembly endorsed some measures to alleviate the lack of availability of cash in peacekeeping missions but did not endorse the proposal to surrender unspent appropriations for the regular budget”⁹.

12. Similarly, UNESCO’s Financial Regulation 5.2 states that:

“In the assessment of the contributions of the Members States, adjustments shall be made to the amount of the appropriations approved by the General Conference for the following financial period in respect of:

(a) (...)

(b) Any apportionment of the surplus/deficit account approved by the General Conference for distribution to the Member States”¹⁰.

13. FAO has been advised that, under exceptional circumstances, the UNESCO General Conference may allow any unspent balances – on strictly budgetary basis – to be carried over to the next biennium. Thus, for example, in 2017, the 39th Session of the General Conference in its

⁷ ST/SGB/2013/4. Regulation 3.2:

“For each of the two years of a budget period, the contributions of Member States shall be assessed on the basis of half of the appropriations approved by the General Assembly for that budget period, except that adjustments shall be made to the assessments in respect of:

(...)

(d) Any balance of the appropriations surrendered under regulations 5.3 and 5.4”.

⁸ Regulation 5.4: *“At the end of the 12-month period provided in regulation 5.3 above, the then remaining balance of any appropriations retained will be surrendered. Where a commitment remains valid at the end of the 12-month period, it shall be cancelled and funded from the current appropriations”.*

⁹ Document A/74/583, Second performance report on the programme budget for the biennium 2018–2019, paragraph 9.

¹⁰ UNESCO Basic texts: 2018 edition; including texts and amendments adopted by the General Conference at its 39th Session (Paris, 30 October–14 November 2017).

Resolution 69 on the Collection of Member States' Contributions¹¹, authorized a carry forward to address a cashflow challenge, as follows:

“Recognizing the cashflow challenge that the Organization is facing and may face in the future due to the delayed payment of substantial amounts of arrears in Member States' assessed contributions,

11. Approves the carry forward to the 2018-2019 financial period of any remaining available unspent funds under the expenditure plan of the regular budget set out in document 38 C/5”.

14. It is understood that these balances were not adjusted from the budget for the following biennium, but were treated separately.

15. Article 18 of the Financial Regulations of the International Labour Organization (ILO) establishes, in relevant part, that:

“2. The amount of any surplus resulting from an underspending of the approved or amended budget, expressed in Swiss francs calculated at the budget rate of exchange for that financial period, shall be used to reduce the contributions of Members in the following way: Members which paid their ordinary contributions in the financial period in which this surplus accrued shall have their share of the surplus deducted from their contributions assessed for the second year of the succeeding financial period; other Members shall not be credited with their share until they have paid the contributions due from them for the financial period in which the surplus accrued. When they have done so their share of such surplus shall be deducted from their contributions assessed for the first year of the next financial period for which a budget is adopted after such payment.

3. The amount of any surplus resulting solely from the receipt of contributions in excess of the level of the budget as adopted by the International Labour Conference or as subsequently amended by the Governing Body, net of any reimbursements to the Working Capital Fund or other borrowings, shall be transferred to the Special Programme Account as defined in article 11.9”¹².

16. Article 11.9 of the ILO Financial Regulations provides that:

“The Director-General shall transfer the surplus referred to in article 18.3 to a Special Programme Account, which shall be used, subject to the authorization of the Governing Body, to finance high-priority activities of limited duration that were not otherwise provided for under the budget adopted by the Conference and that do not create any expectation of additional future funding”.

17. ICAO Financial Regulations address carry forward in some detail, establishing that:

“5.6 The Secretary General up to 10 per cent per appropriation for each Strategic Objective or Supporting Strategy and, above this percentage, the Council, irrespective of its authority under Regulation 5.9 to effect transfers between Strategic Objectives or Supporting Strategies, may determine that any unspent balance of appropriations in any financial year be carried over to the following year. The total of expended and carried over appropriations shall not exceed the Total Authorized Appropriation plus amounts carried over from the previous year. Any balance of unspent appropriations and appropriations not carried over to the following year shall be cancelled.

¹¹ 39th Session of the General Conference, 30 October – 14 November 2017.

¹² ILO Financial Regulations (2010 edition), as adopted by the International Labour Conference at its 29th (1946) Session; the present text includes all amendments adopted up to the 98th (2009) Session.

5.7 Appropriations shall remain available after the end of the financial year to which they relate to the extent that they are required to discharge expenditures incurred during that year.

(...)

5.10 With the approval of the Council, the Secretary General may defer the implementation of specific activities planned for the third financial year of a triennium to the first financial year of the next triennium. With the approval of the Council, that part of the appropriation shall remain available to incur and to discharge expenditures relating to the deferred activity”¹³.

18. The above suggests that the rules of most other UN System organizations share the same underlying principle as those of FAO. Thus, the relevant regulations establish that unobligated appropriations at the close of the financial period are cancelled, but the relevant Governing Bodies nevertheless retain the legal authority to approve carry forward of unspent balances as exceptions to those regulations.

V. THE LEGAL STATUS OF FINANCIAL REGULATION 4.2 AND THE PROPOSAL PRESENTED IN THE REPORT OF THE 109th SESSION OF THE CCLM

19. Regulation 4.2 represents the established rule of the Organization on the use of unspent balances. While the Conference may have decided to depart from the application of Regulation 4.2 on a fairly regular basis in the past years, this does not serve to amend Regulation 4.2, nor otherwise detract from its legal validity. Furthermore, the Conference’s decisions to authorize carry forward are legally valid. Each decision taken by the Conference regarding unspent balances is the exercise by the Conference of its authority to apply, amend, suspend or otherwise depart from the Financial Regulations it has adopted.

20. From a formal legal perspective, the CCLM’s proposal, as set out in the Annex to this document and considered at the 109th Session of the CCLM, is compatible with the legal framework of the Organization. The process reflected would require an individual decision to be taken by the Conference, thus confirming that an explicit decision continues to be required to depart from the strict application of Financial Regulation 4.2.

VI. SUGGESTED ACTION BY THE COMMITTEE

21. The Committee is invited to review this document and make such observations thereon as appropriate.

¹³ The ICAO Financial Regulations, Sixteenth Edition - 2017 (incorporates all amendments approved by the 39th Session of the Assembly on 5 October 2016), Doc 7515/16.

ANNEX

Proposal set out in the Report of the 109th Session of the Committee on Constitutional and Legal Matters, Section IV, for use of unspent balances of biennial appropriations

1. The CCLM considered document CCLM 109/3 “*Proposal for use of unspent balance of biennial appropriations*”. Following presentations by the Legal Counsel and the Director of the Office of Strategy, Planning and Resources Management (OSP), the Committee deliberated on the legal and constitutional aspects of this matter, bearing in mind that it would also be the subject of consideration by the forthcoming Joint Meeting of the Programme and Finance Committees.

2. The CCLM reaffirmed the importance of Financial Regulation 4.2 which states the Organization’s policy regarding unobligated appropriations at the end of the financial period.

3. It recommended that the Conference consider using the following language in anticipation of unspent balances of budgetary appropriations, either in the appropriations resolution or in its report:

“The Conference authorises the Director-General, notwithstanding Financial Regulation 4.2, to submit a proposal for one-time use of unspent balances of the [current biennium] appropriations for approval by the Joint Meeting of the Programme and Finance Committees, and the Council at their respective meetings in [dates for first sessions in the subsequent biennium]”.

4. The CCLM understood that, subject to the review and adjustments by the Joint Meeting of the Programme and Finance Committees and the Council, the following approval procedures would apply:

- a) Following closure of the accounts, the Secretariat prepares information regarding the balance of unspent funds in the previous biennium and the proposed uses of those funds.
- b) The proposed uses of the carryover of unspent balances would be for specific one-time, high priority organization-wide matters, and would generally fall in the following categories:
 - one-time expenditures on critical measures required to achieve greater efficiency and effectiveness of the Organization, without negatively impacting FAO’s ability to deliver the approved programme of work;
 - one-time expenditures associated with transformational change of the Organization; including strengthening accountability, governance and impacts of activities;
 - non-budgeted expenditures of a one-time nature required as a result of the decisions or recommendations of external bodies such as the UN General Assembly.
- c) The proposal for use of unspent funds would be referred to the Joint Meeting based on input derived from the Annual Report on Budgetary Performance and Budgetary Transfers (ARBP) which is submitted to the Finance Committee for approval as a standing item at its first session of the new biennium.
- d) The Council approves the proposed use of carryover funds, based on recommendations from the Joint Meeting.
- e) The Secretariat implements the Council’s guidance and reports on the use of carryover funds, in line with the established reporting practice and rules.

5. The CCLM further understood that, if there is no approval by the Council, the unspent balance would revert to the General Fund.