



Council of the
European Union

Brussels, 28 February 2023
(OR. en)

6966/23

LIMITE

JUR 153
FIN 263
CADREFIN 30
POLGEN 23

OPINION OF THE LEGAL SERVICE¹

From: Legal Service

To: Budget Committee

Subject: The legal nature and effects of the 1970 Gentlemen's Agreement with the Parliament in budgetary matters

I. INTRODUCTION

1. At its meeting of 16 November 2022, and in the framework of the follow up discussion on the conciliation committee agreement in view of the adoption of the EU budget for 2023, Coreper requested the opinion of the Council Legal Service in relation to the nature, legal effects and the continued application of the so-called "Gentlemen's Agreement" between the Council and the Parliament on the estimates of expenditure of those institutions.
2. The present opinion addresses those questions. It builds upon and further develops the various oral interventions recently provided by the Council Legal Service at meetings of Coreper and of the Budgetary Committee.

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II. BACKGROUND

3. The Gentlemen's Agreement is based on a unilateral Council Resolution of 22 April 1970 according to which:

“The Council undertakes to make no amendments to the estimate of expenditure of the European Parliament. This undertaking shall only be binding in so far as this estimate of expenditures does not conflict with Community provisions, in particular with regard to the Staff regulations, and to the seat of the institutions.”

4. The Council Resolution was adopted at the occasion of the conclusion of the 1970 Budgetary Treaty, whereby the Treaties were amended with a view to vesting the European Parliament with powers as budgetary authority on the same footing as the Council². The 1970 Budgetary Treaty introduced a transitional regime applicable until the 1975 financial year according to which the Council retained the ultimate power to reject the Parliament's amendments to the draft EU budget. In this context, the Council unilaterally undertook not to make amendments to the Parliament's administrative expenditure.³
5. At the expiry of the transitional regime, the Council continued to respect its commitment not to amend the Parliament's estimate of expenditure and the Parliament - by then co-exercising full powers for the approval of the EU budget - de facto agreed to reciprocate in relation to the Council section of the budget, so to avoid acrimonious debates between the two institutions on their respective administrative expenditure. This arrangement between the two arms of the Budgetary authority is referred to as the “Gentlemen's Agreement” and has been confirmed since then by consistent practice by the two institutions and referred to in formal acts drawn up by them, as explained below.

² Treaty amending certain budgetary provisions, *OJ L 2, 2.1.1971, p. 1–12*.

³ The Council Resolution had the following title: “*Resolution relating to the section of the budget concerning the European Parliament for the period referred to in Article 78a of the EESC Treaty, Article 203a of the EEC Treaty and Article 177a of the EAEC Treaty*”. The three articles laid down a transitional regime for the approval of the budget “*for financial years preceding the financial year 1975*” in which, while enhanced, the Parliament's role was still limited to providing an opinion on the draft budget.

III. LEGAL ANALYSIS

6. The Council Legal Service will in turn examine the following four issues:

- a) The nature and legal effects of the Gentlemen's Agreement.
- b) The material scope of application of the Gentlemen's Agreement.
- c) The limits to the obligations set out in the Gentlemen's Agreement.
- d) The conditions and procedure for amending the terms or repealing the Gentlemen's Agreement.

a) Nature and legal effects of the Gentlemen's Agreement

7. Two different questions must be examined: first, whether the Gentlemen's Agreement has legally binding effects; second whether it can be regarded as a bilateral act, even though its origin is in a unilateral Council Resolution.

8. The fact that the Gentlemen's Agreement is based on a practice developed from a unilateral Resolution of the Council which was originally intended to have a limited application in time does not per se determine whether it entails a clear commitment having legal effects. By analogy it is relevant to refer to the case law according to which the legal effects of an act must be determined having regard to its content as well as to the intention of its author, so as to assess whether the act is the product of its author and is intended to affect the interests or modify the legal situation of the recipient.⁴

9. In terms of content, the Gentlemen's Agreement establishes criteria for the exercise of the discretion that the two arms of the budgetary authority enjoy in the budgetary procedure. The decision to exercise a certain self-restraint so as to facilitate the budgetary negotiations falls within – and does not exceed - the well-established competence of an Institution to adopt acts of auto-organisation for the exercise of its powers and to take measures to comply with its duty of sincere cooperation. In this sense, the content of the Gentlemen's Agreement is similar in nature to the inter-institutional agreements concluded in the budgetary domain on the basis of Article 295 TFEU.

⁴ Judgment of 1 October 2009, *Commission v Council*, C-370/07, EU:C:2009:590, paragraph 42 and case-law cited.

10. The content of the original Council Resolution clearly reflected the intention of that institution to be bound by it, as it stated in clear terms that "(...) *This undertaking* [not to amend the estimates of expenditure of the European Parliament] *shall only be binding in so far as (...)*" (emphasis added). The Council Resolution was therefore based on the understanding that the "*undertaking*" not to amend the estimates of expenditure of the other institution was binding among them except in certain circumstances that this opinion will examine in turn.
11. Concerning the question whether the Gentlemen's Agreement can be regarded as a bilateral instrument binding both on the Council and on the Parliament, despite the fact that it originated in a unilateral Resolution of the former, the Council Legal Service is of the view that compliance with the terms of the Resolution has been consolidated throughout time as a well-settled practice between the two institutions. This is reflected in acts and statements where they have both clearly and beyond any doubt expressed their understanding that they are bound by it⁵.
12. On the one hand, following the expiry of the transitional period in relation to which the Council Resolution was originally adopted, the Council continued to apply its terms on the understanding of a reciprocal binding undertaking by the Parliament.⁶ Moreover, on some occasions, where the Council has been critical of the estimate of expenditure of the Parliament, it has consistently refrained from introducing amendments to that estimate. Instead, it has asked the Parliament to reconsider its position and exercise self-restraint with its administrative expenditure, in accordance with its understanding that it was complying with the terms of a binding agreement.⁷

⁵ See, by analogy, Case C-25/94, *Commission v Council* (FAO Arrangements), EU:C:1996:114, paragraph 49.

⁶ See for instance the reply provided by Council to a written parliamentary question on 10 March 2010: "[the 1970 Council Resolution] *has always been interpreted and applied by the European Parliament and by the Council to mean that each institution refrains from questioning the administrative budget of the other*". EP doc. E-6478/2009 (ASW).

⁷ This is for instance the position taken by Council during the budgetary negotiations for the 2022 and 2023 budgets in relation to Parliament's requests for additional posts in its establishment plan (which added to the steep increase in administrative costs due to high inflation and thus threatened the respect of the annual expenditure ceilings set out in the MFF Regulation).

13. On the other hand, the Parliament has reciprocated the Council's undertaking and generally refrained from scrutinising the Council's estimate of expenditure. In so doing, it was, in effect, complying with its reciprocal obligation vis-à-vis the Council.⁸ Most notably, in those instances where the Parliament has called into question the respect of the Gentlemen's Agreement, it has not denied its binding character but rather contested its application to certain categories of expenditure⁹.
14. Finally, the legally binding character of the Gentlemen's Agreement has also been acknowledged by the two institutions acting jointly, as reflected in the joint statement made in connection with the adoption of the 2002 Financial Regulation,¹⁰ according to which "*the European Parliament and the Council agree that the procedures for transfers and for amending the establishment plan will be applied taking due account of the Gentlemen's agreement of 22 April 1970*".¹¹

⁸ For instance, in a working document preparing the Parliament position on the draft budget 2002, it is stressed that "*Parliament has de facto agreed to reciprocate to what is in principle a unilateral undertaking from Council*" and that "*Parliament has always been supportive of this instrument, as it contributes to a smoother budgetary procedure*", working document 2, Parliament doc. PE 300.009. Parliament budget negotiators have regularly invoked the respect of the obligations resulting from the Gentlemen's Agreement during the negotiations for the adoption of the yearly budget, notably in reaction to the Council's request to reconsider its administrative expenditure. This has notably been the case during the budgetary negotiations for the 2022 and 2023 budgets.

⁹ In addition, the Parliament has in the past contested that certain Council expenditure relating to CFSP could be qualified as administrative rather than operational and thus opposed the application of the Gentlemen's Agreement to it. For instance, during the discussion on the draft amending budget 2/1994, the Parliament amended in first reading the Council's envelope by ECU 100.000, corresponding to the financing that Council had provided from its own budget to support for the administration of the town of Mostar pursuant to Decision 94/308/CFSP. See Resolution of 27 October 1994, EP doc A4-0027/94, OJ C 323, 21/11/1994, p.148. The distinction between administrative and operative expenditure in the domain of CFSP has been raised in Parliamentary debates in subsequent years. See for instance working document 2, Parliament doc. PE 300.009, discussed by the Committee on Budgets in the context of the discussion on the draft budget 2002. On the material scope of the Gentlemen's Agreement see section 2) of this opinion.

¹⁰ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 16.9.2002, p. 1.

¹¹ Joint Statement of the European Parliament and Council on Articles 22 and 47, entered in the Council minutes during the procedure for the adoption of the 2002 Financial Regulation.

15. It must therefore be concluded that, despite the lack of proper formalisation, the original unilateral 1970 Council Resolution has in practice been consolidated in an agreement between the European Parliament and the Council having binding effects on both institutions, as demonstrated by their consistent practice and their respective understanding that they are bound by it.

b) *The material scope of application of the Gentlemen's Agreement*

16. The Gentlemen's Agreement sets out the commitment not to amend the estimates of expenditure of the other institution. This refers to the estimates of expenditure which are drawn up by each institution in the framework of the budgetary procedure under Article 314 TFEU and Article 39 Financial Regulation¹² and on which the Commission bases its proposal containing the draft EU budget. The obligation not to modify the estimates of expenditure of the other institution applies therefore in the course of the budgetary procedure and any breach of that obligation is to be settled within the framework of the negotiations between the two arms of the budgetary authority for the adoption of the yearly budget.

17. As the powers of budgetary control entrusted to the budgetary authority have evolved with time¹³, the Gentlemen's Agreement has also been applied to budgetary actions other than the adoption of the general budget of the Union.

¹² Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, OJ L 193, 30.7.2018, p. 1–222.

¹³ Successive modifications of the Financial Regulation have strengthened the control of the budgetary authority beyond the approval of the yearly budget and extended it to certain acts of budgetary implementation carried out by Union institutions. This has mainly been done by introducing various obligations to inform and seek authorization from the budgetary authority for certain operations having a significant budgetary impact.

18. In the Joint Statement that accompanied the adoption of the Financial Regulation of 2002, as referred to in point 14 above, the Council and the Parliament agreed to apply the Gentlemen's Agreement also to the procedures for transfers and for amending the establishment plan. Since then, the Gentlemen's Agreement has been applied to actions such as the carry-over of appropriations¹⁴, the transfers of appropriations¹⁵, the modification of establishment plans for staff¹⁶, and the approval of building projects likely to have significant financial implications and eventual related loans¹⁷. Beyond the domain of the Financial Regulation, the application of the Gentlemen's Agreement has in practice been extended to the obligation of information concerning special advisers as provided by the Staff Regulations.¹⁸
19. In all these instances, both the European Parliament and the Council refrain from scrutinising the other branch of the budgetary authority. It is noted that whilst the Gentlemen's Agreement may be applied to expenditure related to the budgetary actions as referred to in the previous point, it cannot relieve either institution from their procedural obligations under the Financial Regulation, including those relating to the provision of information.

¹⁴ See Article 12(3) of the Financial Regulation, providing for an obligation to inform the budgetary authority of the decision to carry over appropriations.

¹⁵ See Articles 29 and 31 of the Financial Regulation, providing for the obligation to inform of and seek authorization for transfers of appropriations.

¹⁶ See Article 53 of the Financial Regulation, providing for the obligation to inform of and seek authorization for modifications to the establishment plan.

¹⁷ See Articles 266 and 267 of the Financial Regulation, providing for the obligation to inform the budgetary authority on the building policy, to inform of and seek authorization for building projects likely to have significant financial implications of the budget and to seek specific authorization when the building acquisition project is proposed to be financed through a loan.

¹⁸ See Article 123 of the Staff Regulations, providing for the obligation to notify to the budgetary authority the intention to recruit special advisers and their remuneration (Regulation 31/62 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ P 045 14.6.1962, p. 1385, and subsequent amendments).

c) *Limits to the obligations set out in the Gentlemen's Agreement*

20. In accordance with the 1970 Council Resolution, the undertaking not to amend the estimate of expenditure of the other institution “*shall only be binding in so far as this estimate of expenditures does not conflict with Community provisions, in particular with regard to the Staff regulations, and to the seat of the institutions*” (emphasis added).
21. The exception provided in the text of the Council Resolution – which is the basis of the Gentlemen's Agreement – is an expression of the principle that no Interinstitutional Arrangement can run counter to primary or secondary law, or otherwise alter or supplement the institutional set-up provided by the Treaties.¹⁹ Even if the Gentlemen's Agreement confers upon the two institutions a margin of discretion not to interfere with their respective estimates of expenditure, that discretion cannot go as far as permitting the Council or the Parliament to relinquish their responsibility to authorise expenditure in a manner consistent with relevant EU law, notably the Multiannual Financial Framework (MFF) Regulation,²⁰ the Own Resources decision,²¹ the Financial Regulation, and more generally the budgetary principles enshrined in the Treaties. It is also noted that the Commission, as guardian of the Treaties and the institution to which the Treaties entrust the power to consolidate the estimates of expenditure of each institution and of proposing the draft budget, has the general responsibility of ensuring that the said estimates of expenditure are in line with the law of the Union.
22. Hence, either institution may consider that the estimate of expenditure of the other one does not comply with the relevant Union provisions, and thus that it is not bound by the Gentlemen's Agreement. Accordingly, it may amend that estimate. In this regard some clarifications are appropriate.

¹⁹ See in this sense opinion of the Legal Service of 10 February 2017, doc. 5151/1/17, point 18 and following; opinion of 30 August 2010, doc. 12964/10, point 5, opinion of 20 July 2015, doc. 11096/15, point 11; opinion of 4 July 2012, doc. 12225/12, point 11; opinion of 6 April 2005, doc. 7861/05, point 5.

²⁰ Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 433I, 22.12.2020, p. 11.

²¹ Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the European Union, OJ L 424, 15.12.2020, p. 1–10.

23. First, a manifest case of breach of relevant Union provisions would be where the estimate of expenditure of the other institution had the effect of pushing the yearly EU budget beyond the annual expenditure ceilings laid down in the MFF Regulation, i.e., heading 7 thereof on European Public Administration. This would be contrary to the third subparagraph of Article 312(1) TFEU that requires that the annual budget shall comply with the multiannual financial framework, and to Article 3(1) of the MFF Regulation, that imposes a specific obligation on the Parliament, the Council and the Commission to that effect.²²
24. Second, more generally, the Gentlemen’s Agreement should be applied bearing in mind the principle of institutional balance under which “*each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein*”.²³ This principle requires that the institutions are in a position to exercise their respective powers effectively. This notably entails that they have the support of an efficient administration and are resourced at the level necessary to carry out their functions. The evolution over time of the administrative resources allocated to the Council and to the EP, most notably those related to staff, should therefore not lead to imbalances affecting their capacity to carry out their respective functions, including those which they exercise jointly. An inequitable evolution of their respective administrative and staff resources could ultimately affect the institutional balance between the Council and the European Parliament, particularly in years when respect of EU budgetary provisions calls for a reduction in administrative expenditure for all institutions.

²² See Article 3(1) of the MFF Regulation according to which “*The European Parliament, the Council and the Commission shall, during each budgetary procedure and when implementing the budget for the year concerned, comply with the annual expenditure ceilings set out in the MFF*”. The European Council, which has the power to define the general political directions and priorities of the Union adopted conclusions of 17, 18, 19, 20 and 21 July 2020 concerning the current MFF. Paragraphs 129 and 130 thereof read as follows, “129. *In the context of a Union of 27 Member States, all EU institutions should adopt a comprehensive and targeted approach for considering the number of staff and are invited to reduce administrative expenditure where possible.*

130. *All EU institutions, bodies, agencies and their administrations should conduct a regular staff screening that ensures the optimisation of staff resources at the current level (...)*”.

²³ Article 13(2) TEU.

d) The conditions and the procedure for amending the terms or repealing the Gentlemen's Agreement

25. As clarified in this opinion, bearing in mind its nature and effects, the Gentlemen's Agreement can be assimilated to an Interinstitutional Agreement between the Parliament and the Council of the kind referred to in Article 295 TFEU.
26. In the particular case of the Interinstitutional Agreement of 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, the Council Legal Service has indicated that the amendment of its terms or its repeal should be agreed between the same parties to that Interinstitutional Agreement, on the basis of Article 295 TFEU.²⁴ This applies by analogy to the case at hand.
27. Accordingly, if the Council intends to amend and/or to repeal the existing Gentlemen's Agreement or to negotiate a new agreement, it should notify the Parliament of its intention to do so and invite it to enter into negotiations, in line with the principle of sincere cooperation. The result of those negotiations could take the form of a new stand-alone Interinstitutional Agreement. Alternatively, the specific provisions of the Gentlemen's Agreement, as amended, could be introduced in the current Interinstitutional Agreement on cooperation in budgetary matters and on sound financial management on budgetary discipline, or in any Interinstitutional Agreement replacing it.
28. Any such amendment could – and should - provide the necessary accuracy and clarity as to the scope, nature, and effects that the current Gentlemen's Agreement lacks, as well as settle any possible disagreement between the Parliament and Council concerning its application.²⁵

²⁴ Opinion of the Legal Service of 28 November 2018, doc. 14876/18, points 9 and 10. This legal opinion has also clarified that an Interinstitutional Agreement can be validly concluded between Parliament and Council without the participation of the Commission on the basis of Article 295 TFEU (see points 5 to 7 of the opinion). See, in this sense, point 4 of the Interinstitutional Agreement of 16 December 2020 on budgetary discipline, OJ (2020) L 433/28.

²⁵ See point 13 and footnote 9 of the present opinion.

29. The question arises whether the Council could unilaterally withdraw from the Gentlemen's Agreement if negotiations with the Parliament to amend and/or repeal and conclude a new one are not fruitful. In that regard it should be stressed that Interinstitutional Agreements concern matters that in principle fall within the power of internal organisation of each institution, which they agree to exercise jointly to foster their cooperation.
30. In such a context, an interpretation that would exclude in all cases the possibility for an institution to unilaterally withdraw from an Interinstitutional Agreement would deprive the power of internal organisation, which typically underlies their making, of its very essence and ultimately conflict with the system of competences provided for in the Treaties. Moreover, the Council could not be irreversibly bound by an Agreement whose application throughout time it considers has become such that it no longer serves the purpose for which that Agreement was initially conceived, and is liable to affect the principles of institutional balance and of sincere cooperation. Therefore, the Council could, as a last resort, unilaterally withdraw from the Gentlemen's Agreement after having exhausted all reasonable means to negotiate in good faith an alternative Agreement with the Parliament as outlined above.
31. As regards the voting rule for such a decision, the default rule of Article 16(3) TEU applies, which foresees that "*the Council shall act by a qualified majority except where the Treaties provide otherwise*". Since Article 295 TFEU does not foresee that Interinstitutional Agreements are adopted on a proposal from the Commission or from the High Representative, reinforced qualified majority would apply.²⁶

²⁶ As provided in Article 238(3)(b) TFEU. See opinion of the Legal Service of 28 November 2018, doc. 14876/16, point 8.

IV. CONCLUSIONS

32. In light of the above, the Council Legal Service is of the opinion that:

- i. The Gentlemen's Agreement is an agreement between the European Parliament and the Council intended to have binding effects on both institutions, resulting from their consistent practice based on the 1970 Council Resolution and documented in various unilateral and joint acts;
- ii. The material scope of the Gentlemen's Agreement has been expanded over time, from the obligation not to amend the estimates of expenditure of the other arm of the budgetary authority in the framework of the budgetary procedure under Article 314 TFEU, to a number of procedures for budgetary control laid down in the Financial Regulation and the Staff Regulations;
- iii. The application of the Gentlemen's Agreement must comply with all relevant provisions of EU law and respect the institutional framework laid down in the Treaties. In particular, it does not allow the Parliament and the Council to authorise expenditure in breach of the annual ceilings laid down in the MFF Regulation, or in a way that undermines the principle of institutional balance. Moreover, it cannot relieve the institutions of their procedural obligations under the Financial Regulation;
- iv. The Gentlemen's Agreement may be amended and/or repealed and replaced by a new Interinstitutional Agreement between the same parties. The Council could, as a last resort, unilaterally withdraw from the Gentlemen's Agreement after having exhausted all reasonable means to negotiate in good faith an alternative agreement with the Parliament. The Council shall act by reinforced qualified majority.
