UACES 45th Annual Conference

Bilbao, 7-9 September 2015

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Financial Corrections Applied to Agricultural and Cohesion Expenditures: Effective Instrument to Improve the Accountability in the EU? [2]

1 Setting the scene – the financial pressure as an inclination for enforcement of the EU law by the Member States

Under the European Union (EU) law, an obligation to ensure that the law adopted within the framework of this international organisation is implemented and enforced basically lies on the Member States. This obligation results from the principle of sincere cooperation (Article 4 (3) TEU), which emanates from the public international law principle *pacta servanda sunt*. Implementation and enforcement of the Union's law is nevertheless secured by the legal mechanisms developed under the EU law. The most known is probably the complaint brought under the Article 258 TFEU by the Commission against the Member State to the Court of Justice of the European Union (CJEU) claiming that this State infringed its treaty obligations. Other are the legal principles formulated in the jurisprudence of the CJEU, *inter alia* the principle of the Union's law primacy, the principles of direct and indirect effect of the EU law or the principle of Member States liability for damages caused to individuals because of depriving them rights foreseen in the Union' law[3]. They may be recognised as the Union's law-enforcement mechanisms as they ensure that the Union law is respected. They are applied in vertical and in horizontal relations, between individuals, Member States and the Union's institutions. The scope of this paper is, however, more narrow as it only focuses on legal mechanisms that ensure the Member States implement the Union law and the role which the financial pressure plays in this regard.

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[2] This paper was drafted in the framework of research project No 2012/05/B/HS5/0067 "The financial sanctions imposed on the Member States by the institutions of the European Union" funded by the National Science Centre.

[3] N. Półtorak, *European Union rights in national courts*, Kluwer Law International, 2015.

If anyone starts to reflect on how the financial burden is used under the Union law to encourage, not to say force, the Member States to comply with their treaty obligation of ensuring that the EU law is implemented and complied with, the starting point would probably be the **lumps sum payments** and **penalty payments** introduced to the EC Treaty by the Maastricht treaty (1992) (Article 260 TFUE). These financial penalties may be imposed on the Member State by the CJEU if the State fails to execute the CJEU's judgement stating that this State infringed the Union law. If the Member State does not restore the EU law violation stated in the first judgement, the CJEU may adopt a second judgment and impose a lump sum payment or a penalty payment on this State. These sanctions are to incline the Member State concerned, through the financial pressure, to finally eliminate infringement of the EU law, which it did not remove voluntarily earlier. Penalty payments and lump sum payments play slightly different roles. While the penalty payment is to persuade the Member State to enforce the CJEU' judgment in the shortest possible time, the lump sum payment is a purely financially burden resulting from non-compliance with the CJEU' judgment.[4] If my calculations are correct until now the CJEU imposed these financial sanctions in 25 cases against 11 Member States. Six judgments concern Greece[5], 3 – France[6], Spain[7] and Italy[8], 2 – Ireland[9], Portugal[10] and Sweden[11]. There are one judgement against Belgium[12], Luxembourg[13], Germany[14] and Czech Republic[15]. The highest lump sum payments were imposed on France[16] and Italy[17] and the highest penalty payments on Spain[18] and again – on Italy[19]. What's symptomatic, while in the prior years, after these financial sanctions were introduced to the EC Treaty, they were used relatively seldom, usually in 1 or 2 judgements

[4] C-304/02 *Commission v French Republic*; C-387/97 *Commission v Hellenic Republic*; case C-121/07 *Commission v French Republic*; case C-568/07 *Commission v Hellenic Republic.*
[5] Cases: C-387/97, C-369/07, C-568/07, C-109/08, C-407/09, C-496/09.
[6] Cases: C-304/02, C-177/04 and C-121/07.
[7] Cases: C-278/01, C-610/10 and C-184/11.
[8] Cases C-119/04, C-496/09 and C-196/13.
[9] Cases: C-374/11 and C-279/11.
[10] Cases: C-76/13 and C-70/06.
[11] Cases: C-76/13 and C-70/06.
[12] Case C-533/11.
[13] Case C-576/11.
[14] Case C-503/04.
[15] Case C-241/11.
[16] 57 mln euro in case C-304/02 for each 6 months of non-complying with the judgement.
[17] 42 mln euro in case C-196/13 and 30 mln euro in case C-496/09 months of non-complying with the judgement.
[18] 30 million euros in Case C-184/11.
[19] 40 million euros in Case C-196/13 and 30 million euros in Case C-496/09.

issued per year. With the elapse of time they are adopted more frequently, the highest number of 7 judgments issued in 2011.

The execution of the CJEU judgements by the Member States is not the only area where enforcement of the Union law is secured by the financial deterrence. Similar incentive is foreseen in the area of Economic and Monetary Union (EMU) where **fines** and **deposits** may be imposed on the Member States that exceed the budgetary discipline. Article 126 TFEU obliges the Member States to avoid excessive budgetary deficit, and if it occurs, a fine may be imposed on the State that breaches this prohibition. Such a fine is imposed by the Council if it takes the view that the Member State concerned failed to put into practice its recommendations, calling it to correct the excessive budgetary deficit within a specified time limit (Article 126 (11) TFUE). Deposits and fines may also be imposed on the Member States for breaching the budgetary prudential requirements included in the Stability and Growth Pact. Provisions setting up these financial sanctions were strengthened in 2011, in at the face of the financial crisis experienced by the EU, by the Fiscal Compact and by the legislative package called "six-pack[20]". These acts foresee that fines and deposits may be imposed on these Member States of the euro-zone that breach the budgetary prudential requirements established in the EMU. So far, though, no fine was imposed, yet.

Last but not least, **financial corrections** are another EU law enforcement instrument that employ a financial deterrence to ensure the Member States' compliance with the Union law. They are applied in the area of Common Agricultural Policy (CAP) since the 1976, when the first financial correction was adopted[21], and since 1999 in the cohesion policy. Financial corrections are to ensure that expenditures financed from the Union's budget for implementation of these policies are in line with all applicable legal provisions. They are imposed on the Member States by the Commission, after the mediation procedure, in the form of a decision that can be challenged to the CJEU. In principle, imposition of financial correction consists of the withdrawal of EU funds granted to the Member State within the multiannual financial framework because of discovered illegality of expenditures. Thus, for the Member States financial corrections usually involves a reduction of the Union funding. Only in 2014, the Commission made financial corrections over 2.2 billion euro (approx. 2.3%

[20] Regulations No 1177/2011, No 1176/201, No 1175/2011, No 1174/2011, No 1173/2011 and directive No 2011/85/EU

[21] Communication from the Commission to the European Parliament and the Council "*Application Of Net Financial Corrections On Member States For Agriculture And Cohesion Policy"*, COM(2013)934 final, p. 7.

of payments transferred from the EU budget to Member States)[22]. Interesting thing is to notice that the average amount of financial corrections applied in the 2008-2012 was 30% higher than in 2003-2007. In years 1999-2013 (CAP) and 2000-2006 (cohesion policy), the highest financial corrections were imposed on Greece, Italy and Spain. In years 2007-2013 (cohesion policy), they were imposed on Romania[23]. What's striking, despite the financial corrections are adopted by the Commission often, almost on a routine basis, they are unfamiliar to the wider audience, usually not familiar with the EU funds and its managements, controls and sanctions. They are also rarely described in the literature[24]. This conference creates a good opportunity to present them to the public.

[Growing tendency of using financial sanctions as the Union law-enforcement instruments?] Before doing so one may rightly ask if we are witnesses of a growing tendency of using the financial deterrence as an incentive employed for ensuring the Member States comply with the Union law. *Prima facie* one could say so observing a growing adoption by the Union's institutions of lump sum payments, penalty payments (Article. 260 TFEU) and financial corrections (CAP and cohesion policy) as well as inclusion in legal texts provisions allowing to impose deposits and fines in the EMU. The common feature of all these law-enforcement instruments is that they foresee a threat of financial deterrence for these Member States who do not comply with the Union law. If that would be the case, then it would mean that the Union law is more and more departing from its genetic root, namely the public international law where financial sanctions are used very rarely. This is because members of international organisations are reluctant to accept that the violation of provisions, created by them, or by organs of their organisations, may cause a financial burden to them. In the EU law, however, a different approach is visible lately.

While discussing the questions of the EU law enforcement, one should indicate its specific feature noted by Paul Craig[25], namely the tension between collective interests of the Member States and their individual interests. Collective interests of the Member States,

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[22] Report from the Commission to the European Parliament and the Council "*Protection of the European Union's financial interests — Fight against fraud 2014 Annual Report*" COM(2015) 386 final, p 5.

[23] Communication from the Commission to the European Parliament *"Protection of the European Union Budget to end 2012"*, COM(2013) 682, p. 11-10 and 14.

[24] P. Craig, *EU administrative law*, Oxford University Press 2012, p. 102-106; H.C.H. Hofmann, G.C. Rowe, A. Türk, *Administrative law and policy of the European Union*, Oxford University Press 2011, p. 747-759; A.J.G Ibáňez, Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States, *European Law Journey*, 2006 (2), p. 148-175.

[25] P. Craig, *EU administrative law*, Oxford University Press 2012, p. 102-106.

represented by the Council, are expressed in the EU provisions setting up duties, obligations and mechanisms for their enforcement. In some cases collective interests of the Member States influence an ambitious tenor of the EU provisions and its rigid consequences foreseen when these provisions are breached. There is, however, a certain tension between these collective interests of the Member States and their individual interests, as the ones that have to execute these strict requirements. The more efforts, staff, time and costs are needed to comply with the EU law, this contradiction is higher. In the result, individual Member State may have an incentive to avoid to execute duties imposed on it by the Union law and to diminish its responsibility if things go wrong. Financial corrections illustrate this tendency well.

2 Financial corrections – what are they?

2.1 What do we know about financial corrections?

2.1.1 Shared management

To understand the logic of financial corrections, it is necessary to focus on institutional relations between the Commission and the Member States and their roles played within the Union policies' implementation processes. As known, implementation of the CAP and the cohesion policy is decentralised. This means that it is the Member States who perform majority of tasks, starting from the selection of projects to be financed from the Union's funds, making payments to beneficiaries, controlling if projects are implemented properly and payments are legal, ending with the final financial clearance with the Commission. The Commission' role differs considerably. According to Article 17 (1) TEU, it oversees the application of the Union law under the control of the CJEU and executes the EU budget. This second duty, generally formulated in the Article 17 (1) TUE is clarified in Article 317 TFUE which imposes on the Commission the responsibility for the implementation of the Union's budget. Discharge from this duty is given to the Commission by the European Parliament, acting on a recommendation from the Council, on the annual basis (Article 319 TFEU). If one would like to describe these roles in different words it could say that the Member State are "CAP and cohesion policies' implementators", while the Commission – "the guardian of the Treaty", also responsible for the EU budget.

Under the Union law a special legal term, namely the **shared management**[26]**,** was created to mirror the policy implementation scheme which indicates specific tasks and responsibilities imposed on the Member States and on the Commission which relate with spending of the EU funds for implementation of the CAP and the cohesion policy[27]. Assignments performed in the framework of the shared management are provided in regulations concerning CAP[28] and cohesion policy[29]. In general, duties performed by the Member States relate to irregularities and effective operation of the management and control system. An essence of an irregularity, as defined in Article 1 (2) of Regulation 2988/95[30], is a breach of the EU law detrimental to the financial interests (art. 325 TFEU), thus to EU funds. Member States must detect and prevent irregularities, recover from beneficiaries amounts unduly paid as irregularities and inform the Commission about detected irregularities and the

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[26] P. Craig, *Shared Administration, Disbursement of Community Funds and the Regulatory State*, University of Oxford Legal Research Paper Series 2009, p. 22

[27] The costs of CAP and the cohesion policy are covered from the EU budget where they are included as funds: the European Agricultural Guarantee Fund (EAGF), the European Agricultural Fund for Rural Development (EAFRD), the European Social Fund (ESF), the European Fund of Regional Development (EFRD) and the Cohesion Fund (CF).

[28] Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ L 347, 20.12.2013, p. 549); Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ L 255, 28.8.2014, p. 18); Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ L 255, 28.8.2014, p. 59–124).

[29] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320); Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 138, 13.5.2014, p. 5).

[30] Council Regulation (EC, Euratom) no 2988/95 of 18 December 1995 on the protection of financial interests (OJ EC L 312 of 23.12.1995, p. 1). Irregularity is any infringement of the EU provisions resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the EU or budgets managed by them, either by reducing or losing the revenue accruing from the own resources collected directly on behalf of the EU, or by an unjustified item of expenditure.

course of legal proceeding conducted in these cases. Although the notion of the management and control systems is not defined under the EU law, the CAP and cohesion policy regulations define specific functions that this system must ensure (e.g. certain types of controls) and requirements concerning national institutions that perform these tasks (e.g. paying agencies). Thus it may be stated that the management and control system involves national institutions designated by the Member States to perform tasks defined under the Union law related to daily administration of EU funds allocated for implementation of the CAP and the cohesion policy as well as implementation of these tasks. Under the shared management it is then the Commission's role to oversee whether the Member States perform their duties, so the EU funds are spent in accordance with the law. If it is not the case it may impose financial corrections.

2.1.2 Essence

Is follows from the above that **financial corrections are a law-enforcement instrument established under the Union law, imposed by the Commission on the Member States to ensure legality of the Union budgetary expenditures spent for implementation of the CAP and the cohesion policy**. As the Commission and CJEU declare, the purpose of financial corrections is to restore a situation where 100% of the expenditures declared for financing from the EU budget are in line with the applicable rules. Financial corrections enable the Commission to discharge its responsibility for supervision of the EU law and implementation of the EU budget, as required by Article 17 (1) and Article 317 TFUE.

In CAP, financial corrections are adopted in the so-called clearance of accounts procedure and constitute amounts which the Commission recovers from the Member States (*net* financial correction). In the cohesion policy, however, financial corrections are usually the amounts that the Member States may re-use in the framework of operational programme, for another projects conducted in line with applicable law. The Commission, however, declares that this approach would be changed as from this programming period 2014-2020 and it would use in the framework of the cohesion policy *net* financial corrections more frequently[31].

[31] Communication from the Commission to the European Parliament and the Council "*Application Of Net Financial Corrections On Member States For Agriculture And Cohesion Policy"*, COM(2013)934 final, p. 3.

The CAP and cohesion policy regulations establish premises necessary for adoption of financial corrections, criteria influencing their amount and procedure followed to impose them.

2.1.3 Premises

[**CAP**] In the area of CAP, there are positive and negative premises. A positive premise is a situation which allows the Commission to impose a financial correction, a negative one excludes it. The positive premise consists a situation when the Commission finds out that despite the Member States assurance on the legality and regularity of expenditures declared to be financed from the EU budget, they were not in line with relevant legal provisions (Article 52 (1) Regulation no 1306/2013). The negative premise bans the Commission to exclude expenditures made by the Members States 24 months before it informed this State that it detected infringements of law in payments incurred by this State. Such expenditures may not be excluded from the Union' financing even if they were not in line with relevant provisions (so-called "24-month rule"). The 24-months rule is not applied in three, specifically described cases[32] (Article 52 (4) of Regulation No 1306/2013). *Ratio legis* of this rule, which may be comparted to 24-month limitation period, is to grant to Member States legal and financial guarantees as regards expenditures incurred in the past, as well as to provide a maximum period for the Commission to assess whether non-compliance with the legal provisions would result in financial effects to be borne by the Member States (point 36 of the preamble Regulation No 1306/2013). This rule is a unique feature of the CAP and was not adopted in the framework of the cohesion policy. The Court of Auditors criticizes application of the 24-month rule. It indicates that the limited resources available to the Commission to perform controls in the Member States, faced with this rule lead to a situation where the Commission cannot exclude from EU funding expenditures incurred in violation of the law. The Commissioned responded to this criticism and pointed out that it requested an extension of the period of 24 months, but this proposal was rejected by both the Council and the European Parliament[33].

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[32] These cases relate to: 1) expenses which were found to be irregularities; 2) infringements in the area of state aid in which the Commission launched the procedure under Article 108 TFEU or the infringement leading to submitting the complaint by the Commission against the Member State under Article 258 of TFEU; 3) infringement by the Member States of control obligations established in Article 79-88 Regulation 1306/2013.

[33] Special report no 7/2010 „*Audit of the clearance of accounts*", points 59-60 and 96.

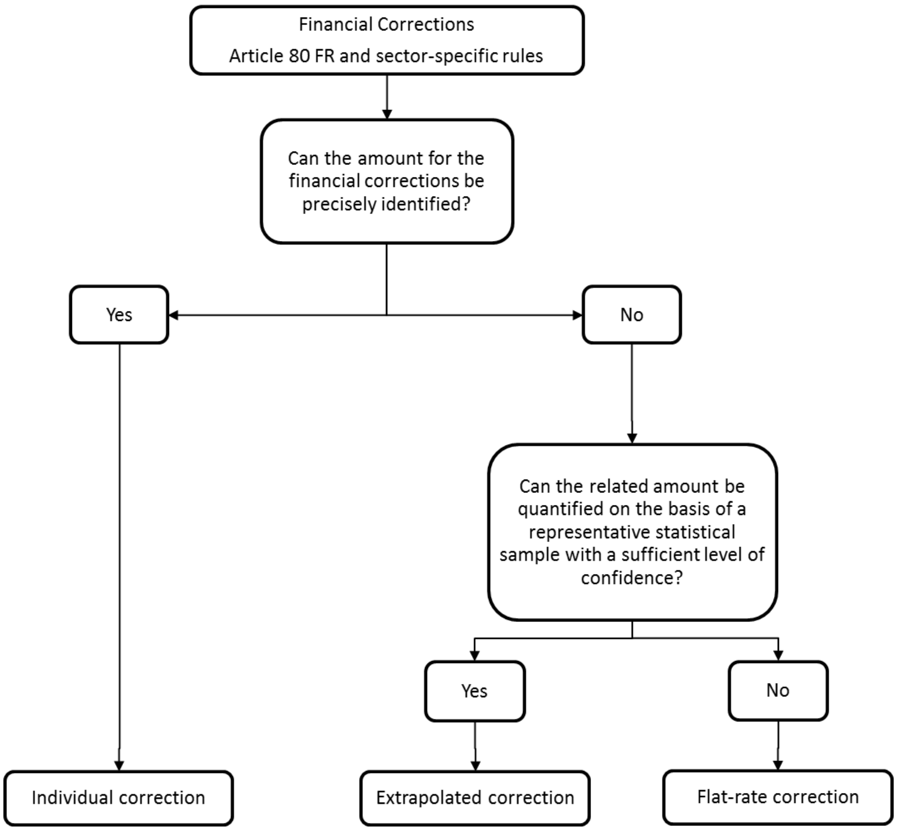
[Cohesion policy] Premises for imposing of financial corrections in the cohesion policy are much casuistic, when compare them to the premises established within the CAP. As mentioned, there are only positive premises which are the conditions allowing the Commission to impose financial corrections, with no negative premise excluding it (no 24-months rule). The Commission may impose financial corrections if it finds out that an expenditure declared by the Member State to be legal and regular and thus it was included in an expenditures declaration provided by this State to the Commission with request for reimbursement was in fact illegal (Article 85 Regulation No. 1303/2013). The Commission may also impose financial corrections when it finds out that the Member State infringed the principle of additionality, which requests it to partially co-finance projects implemented in the framework of the cohesion policy from national funds (Article 95 (6) Regulation No 1303/2013). The Commission may also impose a financial corrections where it identified a serious deficiency in effective functioning of the management and control system established by the Member State (Article 144 Regulation 1303/2013). Last but not least, the Commission may impose financial corrections when it identified weaknesses in implementation of operational program and requested the Member State to introduce necessary improvements, but the State did not do so, which finally lead to failure in achieving results of this program (Article 22 (7) Regulation No 1303/2013). This premise, introduced only in this programming 2014-2020, should ensure that the Union's budget is not used in a wasteful or inefficient way[34].

2.1.4 Financial corrections: criteria influencing their amounts and their types

The EU regulations provide criteria influencing amounts of financial corrections and their types. Commission estimates the amounts of financial corrections based on nature and gravity of law infringement detected and the financial loss caused to the Union's funds, taking into account the principle of proportionality. The application of such general criteria to determine the amount of financial corrections causes difficulties, especially if the reason for imposing it was deficiency in the effective functioning of the management and control system whose nature and financial consequences are usually difficult to determine.

[34] Financial corrections shall not be applied where the failure to achieve targets is due to the impact of socio-economic or environmental factors, significant changes in the economic or environmental conditions in the Member State concerned or because of reasons of force majeure seriously affecting implementation of the priorities concerned.

There are three types of financial corrections: individual financial corrections, extrapolated financial corrections and flat-rate financial correction. In principle, the amount of financial correction should equal to precisily identified amounts of an irregularity, so the unduly spent sum of Union's funds (**individual financial correction**). Only if the determination of this amount is either not possible or it would require disproportionate efforts, the Commission may apply extrapolated or flat-rate corrections. **Extrapolated financial corrections** may be applied when there is a systematic irregularity, that is a similar breach of law occurring in series of expenditures and it is possible to indicate a representative sample of illegal expenditures. Then results of checks performed on this sample are extended to the entire population of all expenditures and this is called as extrapolation. If this is not possible, a financial corrections is applied based on lump sums (**flat-rate financial correction**). This type of correction is applied in a last resort, only if reasonable efforts does not allow to determine the exact amount of illegal expenditures or extrapolate it amount (Art. 144 Regulation No. 1303/2013 and Art. 52 Regulation No. 1306/2013). The following diagram gives an overview of relevant mechanisms for the application of financial corrections[35].



[35] Communication from the Commission to the European Parliament and the Council "*Application Of Net Financial Corrections On Member States For Agriculture And Cohesion Policy*", COM(2013)934 final, p 6.

2.1.5 Procedure

Financial corrections usually result from controls and audits performed by the EU institutions, usually by the Commission or the European Court of Auditors. As stated they are imposed by the Commission in the form of a decision addressed to the Member State (Article 288 [4] of TFEU) who may then challenge it to the CJEU. Thus, there are two stages in the procedure for imposing financial corrections: 1) administrative stage of procedure which ends when the Commission adopts a decision imposing of financial corrections and 2) judicial stage of procedure conducted by the CJEU who controls its legality.

[Administrative stage of procedure] In general, administrative stages of procedure conducted in the CAP and in the cohesion policy are similar. It begins with a Commission's letter informing the Member State that audit released possible infringements of law in the course of spending of the Union' funds and reparatory measures are required. Member States have two months for reaction, or, in justified cases and following the Commission's approval, a longer period. Then the Commission calls a bilateral meeting (co-called 'hearing') to reach an agreement on alleged law infringements, financial loss suffered by the EU budget and reparatory measures to be performed by the Member State. Then the Member State concerned has another two months to provide additional information, or in exceptional circumstances a longer period. The aim of this stage of procedure is, as observed by the CJEU, to discuss all issues that the Commission should take into account when it adopts a decision imposing of financial corrections[36]. Under the CAP, if the Commission and the Member State don't reach an agreement, the Member State may refer the case to the Conciliation Body for examination and mediation[37]. If an agreement is not reached within four months, the conciliation procedure is deemed to fail. Peculiar feature of the cohesion policy is that if such an agreement is reached, the Member State may re-use the amount of financial corrections again to implement different projects within the operational program. If an agreement is not reached, the Commission must issue a decision determining the amount of financial corrections within 6 months from the day of the hearing. In this case the amount of financial correction is excluded from Union's financing and the Member State may not re-use the funds again (*net* financial correction). This amount is deducted from the regular payments periodically transferred by

[36] C-346/00 *United Kingdom v Commission*, point 72.

[37] The Conciliation Body is composed of five members, nationals of different Member States, selected among eminent persons offering guarantee of independence, highly qualified in matters regarding the financing of the CAP or financial audit. The Conciliation Body accepts the case for examination when the amount that the Commission intends to exclude from the EU budget financing exceeds one million euro or amounts to more than 25% of annual expenses of this state as defined within one budget item.

the Commission to the Member State or, at the end of the programming period, if a deduction is not possible, they are recovered through a recovery order.

To sum up – the administrative stage of procedure is based on negotiations: the Commission indicates the amount of expenditures it intends to exclude from the Union' financing because of law-infringement detected and the Member State may, within indicated deadlines, undermine the Commission's findings and prove that the law was not violated, their gravity and scale was not so serious as the Commission claims so the amount of financial correction is too high.

[Judicial stage of procedure] Financial corrections are imposed in the Commission's decision subject to judicial review by the CJEU under the action for annulment (Article 263 of TFEU). This article defines a closed catalogue of grounds for annulment which include: lack of competences, infringement of essential procedural requirements, infringement of Treaties or any rule of law related to their application and misuse of power.

In actions against the Commission's decisions imposing financial corrections, Member States often claim that the Commission breached of their **right to defense**[38]. It follows from the CJEU settled case-law that in the course of the procedure leading to imposition of financial corrections the Commission must provide the Member States with all procedural guarantees granted by the Union law. Therefore the Commission may not narrowly interpret legal provisions which contain Member States' procedural rights, e.g. shorter deadlines for submitting documents. These provisions are considered by the CJEU as important procedural guarantees that allow to respect the Member States' right of defense. The CJEU also considers that the Commission may not use against the Member State any document that this State could not become familiar. On the other hand the CJEU states that procedural guarantees must be cautiously applied by the Member States so the State my not take a purely formal position in its contacts with the Commission if the circumstances of the case demonstrate that its procedural laws were fully respected[39].

The CJEU attaches importance to the application of **the principle of proportionality** when calculating the amount of financial corrections. According to this principle, the content

[38] C-32/95 P, *Lisrestal*, point 21; C-7/98, *Krombach*, point 42; C-462/98 P, *Mediocurso*, point 36; C-395/00, *Cipriani*, point 51; C-287/02, *Kingdom of Spain v Commission*, points 37- 38.

[39] C-50/94 *Hellenic Republic v Commission*, point 9; C-54/95, *Federal Republic of Germany v Commission*, point 91; C-245/97 *Federal Republic of Germany v Commission*, point 48; C-278/98 *Kingdom of Netherlands v Commission*, point 119; C-147/99 *Italian Republic v Commission*, point 57; C-130/99, *Kingdom of Spain v Commission*, point 125; C-329/00 *Kingdom of Spain v Commission*, point 83.

and form of the Union's action may not exceed what is necessary to achieve the objectives of the Treaties (Article 5 (4) TEU). The CJEU states that the amount of a financial correction does not have to precisely reflect the amount of irregularity found. It argues that the limitation of the Commission's competences to claiming back only the amounts equivalent to the amount of irregularities discovered could encourage committing irregularities. According to the CJEU the protection of EU financial interests (Article 325 of TFEU) justifies recovery of amounts that were only partially irregular, but the estimation of amounts to be excluded from the EU financing must respect the principle of proportionality[40]. So while calculating the amount of financial corrections the Commission must take into account the seriousness of law infringement justifying. *Conserve Italia* judgments illustrate the CJEU approach towards application of the principle of proportionality in imposing of financial corrections. In *Conserve Italia IV* [41] the CJEU stated that the Commission obviously violated this principle because it applied a wrong method of calculation of the amount to be recovered to the EU budget due to the irregularity committed by beneficiary. The irregularity consisted of the premature start of preparatory works, without required prior approval of works by the Commission. Because of this irregularity, the Commission requested recovery of the whole amount of EU funds granted for the project (2.5 billion of Italian liras), what the CJEU objected. As regards the gravity of the irregularity the CJEU underlined that preparatory works began only a few days before the project was finally approved by the Commission and during these works the amount of 26 000 of Italian liras (1% of project value) was spent. So the financial value of amounted to 1% of the Union' funds granted for the project. In addition the beneficiary' voluntary explanations enabled to identify incorrect works and expenses. In result the CJEU stated that the Commission obviously infringed the principle of proportionality because it did not take into account the relation between the gravity of the irregularity and amount excluded from the EU financing. The CJEU arrived at a different conclusion in *Conserve Italia II*[42], where it decided that the Commission did not infringe the principle of proportionality by demanding to return whole amount of EU funds in a case when a beneficiary began to implement the project before permitted date and, in order to conceal this date, it falsified documentation.

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[40] T-216/96, *Conserve Italia* point 106; T-143/99, *Hortiplant SAT*, point 121; C-500/99, *P. Conserve Italia* points 88-89 and 101; T-186/00, *Conserve Italia v Commission* point 90; T-305/00, *Conserve Italia v Commission*, point 112.
[41] T-306/00, *Conserve Italia v Commission*, points 136-149.
[42] T-186/00, *Conserve Italia v Commission*, points 83-90.

The Member States also claim in actions for annulment of Commission's decisions imposing financial corrections on them that the Commission infringed the **principles of legal certainty and the protection of eligible expectations**. The CJEU declares that the principle of legal certainty excludes a departure from the linguistic interpretation of provisions that imposes duties on the Member States and giving words the meanings which is different from their normal meaning, to indicate additional requirements and obligations imposed on Member States. The CJEU underlines that the principle of legal certainty requires that anyone who is obliged to comply with provisions must precisely determine the scope of its duties and responsibilities[43]. This is why the CJEU considers that the Commission may not impose financial correction on a Member State who did not perform a specific types of control not required under the EU regulations but which, in the Commission's opinion, would increase the effectiveness of national controls. Thus a potential improvement of the control procedure may not be a reason for imposing of financial correction. This requires an evidence that the Member State seriously neglected a duty clearly defined in the EU law which exposed EU funds to the risk of loss or irregularity[44].

While reviewing the Commission's decision imposing financial corrections the CJEU developed a special procedural rule concerning **burden of proof**. It is a standard in judicial procedures that the burden of proof as regards the facts important for the case relies on the party that derives legal effects from them. In cases concerning financial corrections this procedural standard does not apply and the burden of proof is shared between the Commission and the Member State[45]. The CJEU states that if the Commission intends to impose financial corrections due to the EU law infringements attributed to the Member State, it does not have to provide exhaustive evidence of this law infringements or demonstrate precise financial loss following from it but it must present evidence which justified its serious and legitimate doubts as regards this EU law infringement and data which make the loss probable[46]. In such a situation it is for the Member State to challenge the Commission's statements by presenting evidence demonstrating that the EU law infringement did not occur

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[43] C-233/96 *Kingdom of Denmark v Commission*, point 38; C-245/97 *Federal Republic of Germany v Commission*, point 72.

[44] C-157/00, *Hellenic Republic v Commission*, points 29-30; C-5/*03 Hellenic Republic v Commission*, point 53.

[45] C-59/97 *Italian Republic v Commission*; C-28/94, *Kingdom of Netherlands v Commission*, C-253/97 *Italian Republic v Commission*; C-247/98 *Hellenic Republic v Commission*, point 45; C-278/98 *Kingdom of Netherlands v Commission*, point 40; C-130/99 *Kingdom of Spain v Commission*, point 34; C-375/99 *Kingdom of Spain v Commission*, point 14; C-377/99, *Federal Republic of Germany v Commission*, point 95; C-329/00, *Kingdom of Spain v Commission*, point 68.

[46] C-5/*03, Hellenic Republic v Commission*.

or that it was lesser than the Commission indicates or that the Commission made an error in evaluating the financial consequences following from this EU law-infringement. Thus, if the Commission presents serious and legitimate doubts indicating an EU law infringement in the course of spending of EU funds and the Member State does not present the evidence abolishing it, the CJEU would not have grounds to annul the Commission's decision. The CJEU explains that this shared burden of proof, which puts the Commission in the privileged position in judicial proceedings, is justified by the division of competencies between the Commission and Member States as regard EU funds management which is in hands of the national administrations. The CJEU argues that as it is the Member States really spend the EU funds, thus they have detailed and precise information as regards these funds and even if they would do not have it, it is easier for them than for the Commission to collect and verify such data[47]. In the CJEU' view, the fact that the Member State is not able to prove that the Commission's findings are incorrect only increases doubts as regards the national activities[48].

2.2 What we don't know about financial corrections?

[Legal nature of financial corrections] From the legal point of view it is crucial to note that financial corrections are not recognised as sanctions neither in the EU law nor by the Commission or the CJEU. The EU regulations regulating them don't use any formal "label", simply stating their name and describing how they work. The Commission calls them "correction mechanisms", and so does the CJEU. What's striking, despite the fact the CJEU does not literally recognise the financial corrections as sanctions, it consequently requires the Commission to respect legal standards applied to imposition of sanctions while it adopts financial corrections on the Member States. Just to name two of them: during the procedure leading to their adoption it must respect the Member States' right of defence and it must take into account the principle of proportionality while calculating their amount. Financial corrections are, however, sometimes called "financial sanctions" or "financial penalties" in some judgements or by some commentators but with no in-depth legal analyses. Normative silence or practice of the EU institutions is important but according to the principle *falsa demonstratio non nocet*, essence of the case is decisive, not its description. Thus names used

[47] C-278/98 *Kingdom of the Netherlands v Commission*, point 41; C-118/99, *French Republic v Commission*, point 37; C-349/97, *Kingdom of Spain v Commission*, points 46-49; C-287/02, *Kingdom of Spain v Commission*, point 53.
[48] C-243/97 *Hellenic Republic v Commission*, point 53; C-177/00 *Italian Republic v Commission*, point 177.

in order to describe financial corrections are important, but don't influence their legal nature, which so far is unknown.

It may be assumed that legal nature of the financial corrections can be decided on the basis of their legal characteristic: premises for their adoption (which is always a breach of the EU law), conditions influencing their amounts, including application of the principle of proportionality, their functions which are prevention and deterrence, a contradictory character of the procedure followed to impose them, an objective character of the Member States responsibility leading to their adoption, a legal form of their imposition (decision) or judicial control of the CJEU over them. Preliminary it may be assumed that these factors may indicate that even if financial corrections are not typical financial sanctions, their legal character is very close to them.

3 Concluding remarks: financial corrections as 'catch me if you can' game?

It is rather clear that financial corrections are the EU law enforcement instrument which uses the financial pressure as a factor encouraging the Member States to comply with the Union law while spending the Union's budgetary funds for implementation of the CAP and cohesion policy. Nevertheless a conscious observer may notice that in some cases the application of financial corrections reminds a 'catch me if you can' game in which the Member States play against the Union's institutions. The Member States through the their representative in the Council and in the European Parliament, take a lead as regards the legal shape of financial corrections and their stubbornness sometimes drives to inclusion in the legal texts of rules that they may take advantage of, even if the circumstances should rather preclude such benefits. This may be said on the 24-months rule established in the CAP indicating a limitation period which excludes the Commission from imposing of financial corrections on expenditures incurred before this period. It is certainly beneficial for the Member States, unnecessary for the Union's budget. The Commission efforts to prolong the period, not to mention to bail it, have failed. The rationale behind the 24-moths rule, referring to the Member States' legal and financial guarantees, is not convincing for anybody except the Member States who are granted the right of escaping from necessity to return to the Union's budget funds they spent illegally. Maybe this is the reason why the 24-month rule established a long time ago in the CAP, was not introduced to the cohesion policy. This time the Member States weren't strong enough to do so.

In this game the Commission is much better as regard the practice. In a large extend this is because of the shared burden of the proof established by the CJEU which allows the Commission to indicate only suspicions as regards legality of payments made by the Member States and imposing on the latter the whole *onus probandi*. So the Commission selects a small group of projects or expenditures and controls it and if finds any wrongdoings, there is a chance it may end up in flat-rate corrections imposed on a whole operational program. The better the Member State is organized as regards controls and management of the EU funds, the more it would be inclined to contest the Commission's findings. If, however, it is not a case and the Member State has good reasons to share the Commission's concerns, it rather silently agrees with proposed financial corrections and hope that it finds no more illegal expenditures. The Commissions is fully aware of how painful the financial corrections may be for the Member States in terms of financial and political consequences flowing from it and knowing this it declares that it is going to apply the most sever kind of financial correction, namely a *net* financial correction, even more frequently in the future. So it openly says 'I catch if I can'. So the game is on, and we can only wonder if it contributes to improving of accountability in the EU. Personally, I have some doubts.