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# Between the devil and the deep blue sea.

# The CJEU case-law on financial corrections imposed by the Commission on the Member States

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# Abstract

Under EU law, Member States manage almost 80 per cent of funds coming from the EU budget (EU funds). To further protect these funds, the European Commission verifies if national authorities respect spending rules. If they do not, the Commission may impose financial corrections on the Member States in the areas of the Common Agricultural Policy (CAP) and cohesion policy. The Commission has imposed such corrections since 1976, and from the very beginning they served as a law enforcement mechanism in the area of EU funds. It goes without saying that the present model of financial corrections is significantly influenced by an affirmative approach of the European Court of Justice (CJEU). The functioning of financial corrections is an arena of competing interests. The Commission, acting on behalf of the European Union's interests and protecting its funds, is usually inclined to develop rules obliging the Member States to cover illegal expenditures from their national budgets. Another perspective is taken by the Member States, who are at times inclined to disregard their responsibility for cases of improper spending, and charge them to the EU funds in order to protect their own national interests (and budgets). The CJEU is often an arbiter in this arena, acting between the devil and the deep blue sea, as it tries to protect the EU funds, but also to safeguard the interests of the Member States. This article presents and examines the role the CJEU has played, and is still playing, in relation to the adoption of financial corrections. The article discusses whether rules developed by the CJEU concerning financial corrections favour the interests of any of the parties involved.



# Keywords

EU funds; Common Agricultural Policy; cohesion policy; expenditures; sanctions; CJEU


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Under European Union (EU) law, Member States manage almost 80 per cent of funds coming from the EU budget (EU funds). Since under Article 325 of the Treaty on the functioning of the European Union (TFEU) they are responsible for the protection of the EU funds, the Member States bear the primary responsibility for preventing, detecting and following up on irregularities and frauds involving these funds. To further protect the funds, the European Commission checks whether the Member States properly fulfill their tasks as provided by EU law. To this end the Commission verifies if national authorities properly control whether beneficiaries respect spending rules. If that is not the case and EU funds have been irregularly spent in the areas of the Common Agricultural Policy (CAP) and cohesion policy, the Commission imposes financial corrections on Member States. The Commission has done so since 1976[1], and from the very beginning the corrections have served as a law enforcement mechanism in the area of EU funds. Legal provisions directly regulating the funds were introduced in EU law only in 1999.[2] From then on, these provisions became progressively more

[1] 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).

detailed and comprehensive,[3] and were to a large extent shaped by case-law of the Court of Justice of the European Union (CJEU).

It goes without saying that the present model of financial corrections is significantly influenced by an affirmative approach of the CJEU. Through its case-law, the Court gradually accepted the Commission's practice of adopting such corrections, developed legal standards that the Commission had to respect, and established rules allowing the Court to perform judicial control over Commission decisions imposing corrections. To mention a number of examples, the CJEU acknowledged that the Commission could determine the amount of financial corrections on the basis of rules adopted in guidelines which were formally not binding, and recognized the Commission's competence of imposing extrapolated and flat-rate financial corrections. It decided that the amount of financial corrections must be proportionate to the infringement of law by the Member States or their beneficiaries and recognized the Member States' right of defense during the procedure of the corrections' adoption. The Court also established a reverse burden of proof resting on Member States during judicial procedures they initiated against the Commission's decision to impose corrections. Even though these rules were initially established in CJEU case-law – and, surprisingly, not so much popularised or commented – many of them were later on included in CAP and cohesion policy regulations and are now normative standards.

The functioning of financial corrections is an arena of competing interests. The Commission, acting in the EU's interest and protecting its funds, is usually inclined to develop rules obliging Member States to cover illegal expenditures from their national budgets, even in cases where it is impossible to estimate the exact amount of funds spent in the breach of law. This approach has led to the development of flat-rate corrections, imposed on the basis of percentage rates (2 per cent, 5 per cent, 10 per cent, 25 per cent), which was later accepted by the CJEU. Another perspective is taken by the Member States, who are sometimes inclined to disregard their responsibility for cases of improper spending and charge them to the EU funds in order to protect their own national – not least financial – interests. The CJEU is often an arbiter in this arena, acting between the devil and the deep blue sea, as it tries to protect the EU funds, but also to safeguard the interests of the Member States. This should not be perceived as an allegation, but rather as a struggle to use law to reconcile conflicting interests. This article presents and examines the role the CJEU has played, and is still playing, in relation to the adoption of financial corrections. The article discusses whether rules developed by the CJEU concerning financial corrections favour the interests of any of the parties involved.

[2] Council Regulation (EC) No 1258/1999 of 17 May 1999 on the financing of the common agricultural policy (OJ L 160, 26.6.1999, p. 103). Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1).

[3] Presently provisions on financial corrections are included in 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) and 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, pp. 549–607).

## CHARACTERISTICS OF FINANCIAL CORRECTIONS

There is no legal definition of financial corrections. From the early years of European integration, this term was used by the Commission to describe the amount of EU funds irregularly spent by the Member States in the implementation of the CAP and cohesion policy. Presently, financial corrections function under the so-called *shared management,*[4] which allocates tasks and responsibilities related to of EU-funds spending. Generally, shared management foresees that the Member States bear responsibility for all duties related to the spending of EU funds by individual beneficiaries who implement CAP and cohesion policy projects and programmes. National administrations must ensure that all expenditures covered from these funds are legal, which requires different actions to be performed, e.g. conducing checks, imposing sanctions or recovering funds irregularly spent.

Under the shared-management rules, the Commission performs its Treaty-based task of being the guardian of EU law and EU funds.[5] If the Commission notices that a Member State did has not carried out its tasks properly, and as a result EU funds have been misspent, there are different legal actions the Commission can take, including imposing a financial correction on the Member State. To adopt that, the Commission issues a decision addressed to the Member State (Article 288 TFEU) indicating the amount of the financial correction and the corresponding law infringements justifying it. If the Member State does not agree with the arguments on which the Commission's decision is based, it may take an action to the CJEU requiring the correction's annulment (Article 258 TFEU). The CJEU then checks whether the Commission observed all requirements it should have respected during the adoption of the decision, and issues a judgement in which it either confirms the decision's legality or declares it null and void.

The amounts of financial corrections are relatively high. Only in 2014, the Commission imposed financial corrections over 2.2 billion Euro (approximately 2.3 per cent of payments transferred from the EU budget to Member States).[67] The average amount of financial corrections in the period of 2008-2012 was 30 per cent higher than from 2003 to 2007. During the years 1999-2013 (CAP) and 2000-2006 (cohesion policy), the highest financial corrections were imposed on Greece, Italy and Spain. From 2007 to 2013 (cohesion policy), the highest corrections were imposed on Romania.[8] It is striking that despite the fact that financial corrections are adopted by the Commission on a frequent basis, they are unknown to the wider audience and rarely discussed in scientific literature.[9]

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[4] Shared management is defined by Article 58 of the Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1–96). See: P. Craig, Shared Administration, Disbursement of Community Funds and the Regulatory State. In H. Hofmann, A. Türk (ed.) *Legal Challenges in EU Administrative Law, Towards an Integrated Administration*, Cheltenham: Edward Elgar 2009.

[5] Article 317 Treaty on the functioning of the European Union (TFEU).

[6] Article 17 Treaty on European Union (EU Treaty).

[7] 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.

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

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

## PROTECTING EU INTERESTS

### *The European Commission's guidelines determining the amount of financial corrections and flat-rate financial corrections*

A feature of financial corrections is that they were imposed much earlier than European Community (EC) regulations established rules for their adoption. For many years the Commission requested the Member States to return EC funds that were irregularly spent, on the basis of provisions that allowed the Commission to finance from these funds expenses incurred in accordance with the law.[10] These provisions, however, contained no rules describing how to establish amounts to be returned. In such circumstances, the CJEU accepted the Commission's suggestion that when it was impossible to determine the amount of expenditures covered from the agricultural fund (the European Agriculture Guidance and Guarantee Funds, EAGG) in breach of EC law, all expenditures from EC financing to that country must be returned.

This argument was brought forward in a case in which the Commission requested France to return all funds received from the EAGGF in 1971-1972, because the national administration granted special aid financed from national resources in addition to the aid granted from the EAGGF to wine producers, which was forbidden by EC law.[11] France claimed that the Commission should cover the part of the aid paid in accordance with EC law from the EAGGF, and declared that it would finance from its own resources aid granted in violation of the EC law. The Commission, however, disagreed by stating that national aid considerably increased the production of wine in France during these years, and in consequence the funding from the EAGGF made it impossible to estimate the quantity of wine that would have been produced if the national aid would not have been granted. The Commission's argumentation convinced the CJEU, and the Court ruled that expenditures made in violation of the EC law must be covered by the Member States. They were not allowed, by a too broad interpretation of the EC regulations, to promote their own producers at the expense of producers from other Member States who applied a strict interpretation, since that would lead to distortions of competition between Community traders. As Usher rightly noted, results of such favourable interpretation could not be financed by the EAGGF.[12]

Over time, the CJEU softened its approach and ruled, also following a Commission proposal, that the Commission would not have to necessarily request the reimbursement of the entire aid from the EAGGF, but instead might determine the part of aid to be returned. The CJEU stated this in a case concerning aid for milk production in Italy, in which the Italian authorities granted aid to milk production as provided under EC regulation, but also aid compensating production losses, which was not foreseen by the law.[13] Even though the amount of aid that should not have been paid could not be accurately determined, the Commission estimated it would amount to 2 per cent of the aid granted from the EAGGF and the CJEU accepted this. At the following stage, the Court accepted the Commission's practice of estimating the amount of financial corrections on the basis of rules established in guidelines, having no legal force. The Commission adopted them in 1993, much earlier

[10] Article 8 (2) Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ L 94, 28.4.1970, p. 13–18).

[11] 15 and 16-76 *French Government v Commission,* points 9, 22-35.

[12] J.A. Usher, *EC Agricultural Law*, Oxford: Oxford University Press 2001, s. 180

[13] 129/84 *Italian Republic v. Commission*, points 33-38.

than provisions determining amounts of financial corrections were included in legally binding EU regulations, which happened in 2006.[14]

In the first financial corrections guidelines no VI/216/93, called Belle Group Report, it was decided that due to the sequential character of checks carried out by the Commission in the Member States, it would at times be difficult to discover whether beneficiaries' expenditures were lawful. Therefore, the Belle Group Report stated that the amount of financial loss of the EAGGF, which should be mirrored by the amount of financial corrections, should depend on the level of risk of incurring irregular expenditures, resulting from defects in the national control system. Three flat-rates were established to impose financial corrections. They amounted to 2 per cent, 5 per cent and 10 per cent, depending on the seriousness of the defects in the national control system. The Commission repeatedly underlined that the Belle Group Report reflected a compromise: when the amount of financial correction could not be determined, an intermediate solution would be based on flat-rates. In the Commission's view, this method of calculation ensured the observance of EU law as well as the principle of sound management and met understandable expectations on the side of the Member States that financial corrections imposed on them would not be excessively high.[15] The CJEU case-law proves that it considered financial corrections guidelines as binding, as it repeatedly verified whether the Commission complied with them when it adopted financial corrections.

The CJEU checked this in a case concerning a 10 per cent financial correction imposed on Greece, based on the Belle Group Report, applied due to shortcomings in controls of aid granted from the EAGGF for the production of olive oil. Greece claimed that a 10 per cent financial correction was in fact a *penalty*, and no EC provision authorized the Commission to adopt it. The Commission indicated that it calculated the amount of financial corrections based on criteria included in the Belle Group Report. Since shortcomings of national control significantly exposed the EAGGF to the risk of losses, it applied a 10 per cent flat-rate correction, as foreseen in the Report. Advocate General N. Fenelly pointed out that 'with the tacit approval' of the CJEU, the Commission had used flat-rates for a long time to determine the amount of funds to be excluded from the EAGGF.[16] The Court ruled that if the Commission could not determine the exact financial loss by the EAGGF due to the violation of spending rules, it would have no choice but to exclude the whole amount of expenditures from this fund. However, the Commission would be in the position to establish rules to assess the financial impact of such violations. Therefore, the Commission could – instead of excluding all expenditures incurred in violation of EC law from the EAGGF – identify shortcomings (defects) in national control systems and levels of risks of losses related to them in forms of guidelines. The Commission could then decide to what extent these criteria would influence the amount of flat-rates on the basis of which financial corrections would be imposed. Only then it would be up to the Member State to try and demonstrate that these rules would be arbitrary and unjustified. Since Greece did not provide such evidence, the CJEU dismissed its appeal. In this case the CJEU formulated an assumption, frequently quoted in its later case-law, that rules adopted in guidelines which determined amounts of financial corrections, would be correct, unless a Member State would prove that they were arbitrary and unfair.[17]

[14] Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ L 209, 11.8.2005, p. 1–25) and Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ L 210, 31.7.2006, pp. 25–78).

[15] C-50/94 *Greek Republic v. Commission*, point 27.

[16] Advocate General N. Fenelly' opinion to case C-50/94 *Greek Republic v. Commission*, point 42.

[17] 347/85 *United Kingdom v. Commission*, point 15; C-242/96 *Italy v. Commission*, point 75.

The reasoning following from the above-mentioned Greek case was a starting point for many subsequent judgments. The CJEU applied it in a case concerning a 10 per cent financial correction imposed on the Netherlands: Dutch administration tolerated that butter which was subsidised by the EAGGF in 1985-1987 was not produced under the conditions laid down in EC regulations. Instead, Dutch technology was used, which was supposed to ensure better quality.[18] The Netherlands considered that a 10 per cent financial correction was arbitrary, because according to the Belle Group Report such a rate could have been applied only if the control system was so defective that it could be reasonably assumed that there was a serious risk of loss for the EAGGF. According to the Netherlands, this was not the case. The Commission, however, noted that the financial correction imposed on the Netherlands was moderate because according to its findings nearly 40% of butter produced in the country in 1987 was manufactured using the 'improper' method, while the Commission excluded only 10 per cent of the subsidies granted for their production from the EAGGF financing. This argument convinced the CJEU, which reminded the Netherlands that in the absence of sufficient national control, the Commission could exclude the entire amount of expenditures incurred in violation of EC law from the EAGGF, so that the Netherlands would do better not to complain that the Commission excluded only 10 per cent of such expenditures. Since the Netherlands did not demonstrate that the Belle Group Report rules were arbitrary or unfair, the CJEU did not find grounds for the annulment of the Commission's decision.

### *Reverse burden of proof resting on the Member States*

Another aspect of CJEU case-law, which importantly influenced the operation of financial corrections, relates to the burden of proof applied in judicial procedures held in the Court concerning the reviewing of the legality of the Commission's decisions imposing financial corrections. It is a general procedural rule that if somebody presents a claim, one has to provide evidence to support it, and once evidence has been presented, it is up to an opposing party to prove the evidence presented is not adequate. In this sense, *onus probandi* lies upon the party which seeks to support its case by a particular fact of which it is supposed to be cognisant. In financial corrections cases, however, this procedural rule does not apply, as the CJEU decided that the burden of proof should be shifted from the Commission to the Member State.[19]

It follows from the case-law of the Court that if the Commission imposes financial corrections on a Member State, it does not have to provide exhaustive evidence of the EU law infringements justifying it, or to demonstrate precisely financial loss following from it, but it must present evidence that justifies its serious and legitimate doubts concerning the EU law infringement in question, and data which show the financial loss to be probable.[20] In such a case, it is up to the Member State to challenge the Commission's statements by presenting evidence demonstrating that the EU law infringement did not occur, that it was less than the Commission indicated, or that the Commission made an error in evaluating the financial consequences following from the infringement. Thus, if the Commission presents serious and legitimate doubts indicating an EU law infringement related to the

[18] C-28/94 *Netherlands v. Commission*, point 48, 55-56.

[19] 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.

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

spending of EU funds and the Member State does not present contradicting evidence, the CJEU has no grounds to annul the Commission's decision.

The CJEU has explained that this reverse burden of proof, which puts the Commission in a privileged position in judicial proceedings, is justified by the division of competencies between the Commission and Member States regarding EU funds management. The CJEU argues that as the Member States spend the EU funds and are responsible for them, they have or should have detailed and precise information concerning them. And even if they do not have this information, it is much easier for them than for the Commission to obtain them.[21] In the CJEU's view, if a Member State is not able to prove that the Commission's findings concerning EU law infringements or its financial results are incorrect, it only increases doubts with regard to their responsibility for the EU funds.[22]

## PROTECTING THE MEMBER STATES' INTERESTS

### *The right of defence*

The right of defence assumes that each entity whose interests may be negatively affected by a decision taken by a public authority should have an opportunity to present its point of view on the matter before the decision is concluded. The right of defence is the source of other procedural rights, e.g. the right to be informed on charges brought against an entity, the right to access the connected files and documents or the prohibition of self-incrimination.[23] Under EU law, the right of defence was established by the CJEU in competition cases and has been granted to entrepreneurs who faced financial penalties for anti-competitive conducts imposed by the Commission.[24] This right was also analysed in EU funds cases.

In the *Lisrestal* case,[25] a beneficiary of EU funds claimed that the Commission infringed its right of defence because it adopted a decision requesting Portugal to return EU funds irregularly spent without having heard its position. The beneficiary was charged of irregularly spending funds from the European Social Fund (ESF) for the organisation of training for young workers. In such a case, national authorities are obliged to recover EU funds from the beneficiary, and the Commission recovers them from the Member State. The Commission issued the decision requesting Portugal to return the ESF funding, and the beneficiary claimed that the Commission infringed its right to defence, because before issuing this decision the Commission had not heard it.

The Court ruled that observance of the right to be heard, in all proceedings initiated against a person who faces a measure adversely affecting that person, is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question.

[21] 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.

[22] 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; C-243/97 *Hellenic Republic v Commission*, point 53; C-177/00 *Italian Republic v Commission*, point 177.

[23] 17/74 *Transocean Marine Paint p. Komisji*, point 15; C-462/98 P. Mediocurso, point 36, T-50/96 Primex Produkte Import-Export, point 59; T-7/89 Hercules hemicals, point 51-54; T-10-12 i 15/ 92 Cimenteries CBR, point 38; T-65/89 BPB Industries and rithis Gypsum, point 29-30, C-176/99 P ARBED, point 19-25; T-36/91 ICI, point 69-70; T-37/91 ICI, point 49-50.

[24] X. Groussot, *General Principles of Community Law*, Groningen: Europa Law Publishing 2006, s. 279-280.

[25] T-450/93 and C-32/95 P. *Lisrestal*.

The Court recognised that the decision to reduce assistance, adopted when the beneficiary had not been heard by the Commission before the adoption of the decision, infringed the beneficiary's rights of defence, irrespective of any practical difficulties for the Commission in consulting beneficiaries directly.[26] Despite this reasoning, the necessity of granting the beneficiary the right of defence in proceedings launched between the Commission and a Member State has not been upheld. The *Lisrestal* case stressed the importance of ensuring this right. Therefore, it is not surprising that later on, the CJEU ruled that the right of defence should be granted to Member States facing proceedings that could end in the adoption of decisions imposing financial corrections on them. The CJEU ruled that during these procedures the Commission must provide the Member States with all procedural guarantees granted to them under EU law, and was not allowed to narrowly interpret provisions safeguarding these guarantees, for instance shorter deadlines for the submission of documents, or the use of documents that the Member State in question was not familiar with. The CJEU recognised these provisions as important procedural guarantees. However, the CJEU stated that procedural guarantees must be cautiously applied, so that a Member State would not take a purely formal position in its contacts with the Commission, if the circumstances of the case would demonstrate that its procedural laws were fully respected.[27]

### *Principle of proportionality*

The CJEU attaches great importance to the application of the principle of proportionality[28] in financial correction cases as a criterion influencing their amounts.[29] The CJEU case-law concerning proportionate financial corrections is two-fold. On the one hand, the CJEU states that the amount of EU funds recovered to the EU budget does not have to precisely reflect the amount of irregularities detected. It may be higher, because limitations of the Commission's competences to reclaim only the amounts irregularly spent could encourage to commit irregularities. That could be the case if a beneficiary were aware that, in the worst case, it would have to pay back amounts detected as irregularly spent. Thus, the protection of EU financial interests requires a stricter approach.[30]

On the other hand, the principle of proportionality requires that when estimating amounts to be recovered, the seriousness of law infringement would be taken into account.[31] The *Conserve Italia IV* case illustrates this approach very well. In this case, the CJEU stated that the Commission obviously violated the principle of proportionality, because it wrongly calculated the amount to be recovered from the beneficiary. The beneficiary was charged of prematurely starting preparatory works on a project financed by the EU, without the required prior approval of the project by the Commission.

[26] C-135/92 *Fiskano*, point 39; C-48/90 and C-66/90 *Netherlands v. Commission*, point 44.

[27] C-287/02, *Kingdom of Spain v Commission*, points 37-38; 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.

[28] According to this principle, the content and form of the Union's action may not exceed what is necessary to achieve the objectives of the Treaties (Article 5 (4) TEU).

[29] Advocate General opinion on case C-417/12 P Danmark v. Commission

[30] Article 325 of TFEU.

[31] 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,* point 90; T-305/00, *Conserve Italia,* point 112.

Because of this irregularity, the Commission requested the beneficiary to recover the whole amount of EU funds granted (2.5 billion Italian Liras). This was objected by the CJEU. As regards the gravity of the irregularity, the CJEU stated that preparatory works began only a few days before the project was approved by the Commission, and during these days the conducted work amounted to 26,000 Italian Liras, which was equivalent to 1 per cent of the project value. In addition, the beneficiary's voluntary explanations helped to identify incorrect works and expenses. As a 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 the amount excluded from EU financing.

The CJEU has taken a similar approach in financial correction cases, which may be illustrated by the Spanish olive oil case.[32] After the Commission found that the applicant for aid included false data in the application for funding, which the responsible national authorities did not detect, it imposed a 100 per cent flat-rate financial correction on Spain for the production of olive oil in the given year. The Member State complained about this, claiming that the applicant had overcharged the data in the application for aid by 1.81 per cent in relation to the amount due. In the opinion of Spain, a 100 per cent flat-rate financial correction imposed due to this irregularity was highly disproportionate. The Court shared this opinion and annulled the Commission's decision. It noted that the Commission was obliged to take into account the seriousness of the law infringement and had to respect the principle of proportionality, while imposing financial corrections on Member States.

### *Principles of legal certainty*

Furthermore, the principle of legal certainty has been brought forward in financial correction cases. The CJEU has declared that this principle excludes a departure from the linguistic interpretation of provisions, which imposes duties on the Member States and gives words a meaning that is different from their normal sense, to indicate additional requirements and obligations imposed on the countries. The CJEU has underlined that the principle of legal certainty requires that anyone who is obliged to comply with specific duties must have a precisely determined scope of duties and responsibilities.[33]

Therefore the CJEU considers that the Commission cannot impose financial corrections on a Member State that did not perform any specific type 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 justify a financial correction. Such a correction requires evidence that the Member State seriously neglected a duty clearly defined in EU law, which exposed EU funds to the risk of loss or irregularity.[34] It also follows from the CJEU case-law that the Commission is required to determine amounts of financial corrections using methods established for this purpose, and must not use other methods for the calculation. This follows from a Greek case[35] concerning a financial correction imposed because farmers did not regulate the legal situation of areas illegally planted with vines, as required under Regulation no 479/2008.[36] The

[32] C-349/97 *Spain v. Commission*, point 225-229.

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

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

[35] T-376/12 *Greek Republic v. Commission,* points 167-200.

[36] Council Regulation (EC) No 479/2008 of 29 April 2008 on the common organization of the market in wine, amending Regulations (EC) No 1493/1999, (EC) No 1782/2003, (EC) No1290/2005, (EC) No 3/2008 and repealing Regulations (EEC) No 2392/86 and (EC) No 1493/1999 (OJ L 148, 6.6.2008, p. 1–61).

Commission imposed a financial correction on Greece explaining that this created a clear risk that farmers would apply for undue EU aid for these areas. Since the Commission was not able to accurately determine the financial amount of funds that it could have paid unduly, it determined the amount of financial corrections based on a fee that farmers could pay according to Regulation no 479/2008 to regulate the legal status of areas illegally planted with vines.

Greece appealed against the Commission's decision to the CJEU, challenging the method of calculating the amount of the financial correction. During the proceedings, the Commission admitted that it had calculated the amount of the financial correction using a method that was not foreseen for the purpose. The CJEU pointed out that according to the CAP regulation,[37] financial corrections would be applied only if expenditure financed from EU funds would have been incurred in violation of law. Since that did not apply in this case, as no expenditures had been spent yet, and there was merely a risk of illegal expenditure in the future, no financial corrections could be imposed. With regard to the amount of corrections, the fee provided under Regulation No 479/2008 was established to allow the farmers to regulate the legal status of areas where vines were illegally planted, and no provision entitled the Commission to use the regulation as a basis for calculating the amount of financial corrections imposed on a Member State. As a result, the Commission’s decision was declared null and void.

## CONCLUSION

It follows from the above case-law that the initial approach of the CJEU was oriented towards protecting EU interests. As Craig noted, the CJEU jurisprudence in fact has legitimized the Commission’s practices of applying financial corrections.[38] The CJEU definitely favoured EU interests when it allowed the Commission to apply flat-rate corrections, adopt guidelines including criteria determining their calculation (instead of requesting to include them in legally binding regulations), and develop the principle of the reverse burden of prove. However, in its later case-law the CJEU also developed a stance beneficial for the Member States. That was certainly the case when it required the Commission to grant Member States the right of defence in proceedings leading to the adoption of financial corrections. Obliging the Commission to observe the principle of proportionality while calculating amounts of financial corrections was also advantageous for the Member States, as they were thus assured that the amount would depend on the seriousness of the EU law infringement. Thanks to the CJEU case-law, the Member States were guaranteed that the Commission must establish correction amounts using methods established for this purpose.

In conclusion, the analysis of CJEU case-law on financial corrections shows that the CJEU is more inclined to take the side of Member States and declare the Commission’s decisions as void when it discovers that the Commission has breached procedural requirements during the process of the corrections’ adoption (e.g. Member States’ right of defence and right to justification). However, if that is not the case, it is extremely difficult for any Member State to prove that the Commission’s decision is illegal because of its material content. That would require demonstrating that the Commission committed a manifest error in calculating their amounts, which – as the CJEU case-law shows – happens rarely.

[37] Article 31 (1) 1 Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ L 209, 11.8.2005, p. 1–25).

[38] P. Craig, *EU Administrative Law*, Oxford: Oxford University Press 2012, pp. 84, 97 and 102-103.

Observing the legal development of financial corrections, one could ask if we witness a growing tendency of using financial deterrence as an incentive employed in order to ensure that the Member States comply with EU law. If that would be the case, then one could ask whether EU law might be departing from its roots, 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, might cause a financial burden for them. In the case of the EU law, however, a different approach is visible.

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