Joint Training Event
of the Contact Committee of the Heads of the SAIs and the EU and the ECA and the EUROSAI
(organized by the Czech Supreme Audit Office and the European Court of Auditors)

"Experience with the development and carrying out CAP audits"

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Irregularities in the framework of the EU regulations

Introduction

The Member State and irregularities

The Commission and irregularities: Conformity Clearance

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Introduction

Dear Colleagues,

the aim of my presentation is to read together some articles of the EU regulations and, exactly, the provisions concerning the matter of financial irregularities and financial recoveries linked to them.

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The main regulations dealing with irregularities are:

- *Council regulation 1290/2005 of 21 June 2005: on the financing of the common agricultural policy*
- *Commission regulation885/2006 of 21 June 2006: on the accreditation of paying agencies and other bodies and the clearance of accounts of the EAGF and the EAFRD*
- *Commission regulation 1848/2006 of 14 December 2006: concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and organisation of an information system in this field.*

My intervention is limited to the rules concerning the European Agricultural Guarantee Fund (EAGF).

I have chosen this subject because of the fact that it is a matter of great concern in Italy for its consequences: the duty to recover the sums wrongly paid and refund them to the EU budget.

The table shows the financial corrections supported by Italy in the period 1999-2009.

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– EAGF financial correction 1999-2009: situation October 2009

(EUR millions)

Financial correction 1999-2009:	
- conformity clearance decision	1.087,8
- clearance of account decision	243,6
Total	**1.331,4**
Irregularity cases 1982-1999	310,8
Financial correction total	**1.642,2**
Corrections under conciliation procedure	19,6
Corrections in dispute	291,9
Corrections detected by the Commission total	**1.953,7**

The issue of irregularities is strictly connected with the wider topic of the protection of the financial interest of the Community budget.
In this regard, I would like to remember that five agreements, signed by the Member States in the second half of the '90 (nineties), deal with the protection of financial interest of the EU budget.

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- *The Convention of 26 July 1995 (to combat fraud which damages the EU budget)*
- *The (first) Protocol of 26 September 1996 (to combat corruption which damages the EU budget)*
- *The Protocol of interpretation of 29 November 1996 (on the powers of the European Court of Justice)*
- *The Convention of 26 May 1997 (to combat corruption)*
- *The (second) Protocol of 19 June 1997 (to combat money laundering)*

But it is not the case to examine these agreements now.

The above mentioned link between financial interest and irregularities/recoveries is stated by
art. 9, 1290/2005

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(art. 9, 1290/2005)

Protection of the financial interests of the Community
and assurances regarding the management of Community funds

1. Member States shall:
(a) within the framework of the common agricultural policy, adopt all legislative, regulatory and administrative provisions and take any other measures necessary to ensure effective protection of the financial interests of the Community, and particularly in order to:
(i) check the genuineness and compliance of operations financed by the EAGF and the EAFRD;
(ii) prevent and pursue irregularities;
(iii) recover sums lost as a result of irregularities or negligence,
(b) set up an efficient management and control system comprising the certification of accounts and a declaration of assurance based on the signature of the person in charge of the accredited paying agency

This link is also made by the regulation which specifies the concept of "irregularity" (art. 2, 1848/2006) and, in the same context, stresses the "prejudice" against the EU general budget.

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(art. 2, 1848/2006)

1. 'Irregularity' has the meaning assigned to it by Article 1(2) of Regulation (EC, Euratom) No 2988/95, that is any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the Communities either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by charging an unjustified item of expenditure to the Community budget;

Therefore, as for the irregularities, firstly the Member State has the duty of preventing, pursuing and detecting irregularities or negligence and, secondly, of recovering sums lost as a result of irregularities and negligence.

In which situation, during what procedure, by whom can irregularities be discovered?

The irregularities, as above defined, can be discovered by:

- the Member State, id. National (administrative or control) authorities or bodies dealing with the EU funds
- the Commission

The situations in which the irregularities are discovered differ from Member State and Commission.

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Member State

- *Cases where is the same administrative authority which finds a mistake regarding the eligibility of the financed expenditure*
- *Cases where the mistake and relevant irregularity is found by an audit or inspection body*
- *Cases where is the final beneficiary who voluntarily brings the mistake to the attention of the administrative authority*

Commission

Irregularity discovered during:

- *The clearance of account procedure*
- *The monthly reimbursements procedure*
- *The conformity clearance procedure*

Also the procedures concerning the discovery of irregularities, the recovery of sums wrongly paid and the distribution of financial burden in case of non-recovery are different in relation to the subjects (Member State or Commission) who detected the irregularity.

The Member State and irregularities

The Member State,
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(art. 3.1, 1848/2006)

1. *... shall report to the Commission all the irregularities which have been the subject of **a primary administrative or judicial finding**.*

In point of fact, not all the irregularities shall be reported to the Commission. The Community regulations provide for the following exceptions:

a) case of sums wrongly paid, less than EUR 10,000.

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(art. 6, 1848/2006)

De minimis rule

1. *Where the irregularities relate to sums of less than EUR 10.000 in Community funding, Member States shall not forward the information provided for in Articles 3 and 5 to the Commission unless the latter expressly requests it.*

This exception is known as the "DE MINIMIS RULE" and avoids dealing with cases considered not to be relevant under the financial point of view. But, in any case, the Member State administrations are obliged to recover the sums of less than EUR 10,000.

b) cases of irregularities due to the bankruptcy of the final beneficiary or the final recipient

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(art. 3.2, 1848/2006)

- cases where the irregularity consists solely of the failure to partially or totally execute an operation co-financed by the EAFRD or subsidised under the EAGF owing to the bankruptcy of the final beneficiary or the final recipient; however, irregularities preceding a bankruptcy and cases of suspected fraud must be reported,

c) cases reported to the administrative authorities by the final beneficiary/recipient voluntarily
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(art. 3.2, 1848/2006)

- cases brought to the attention of the administrative authority by the final beneficiary or the final recipient voluntarily and before detection by the relevant authority, whether before or after the payment of the public contribution,

d) cases of mistakes discovered and corrected prior to the payment of the public contribution
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(art. 3.2, 1848/2006)

- cases where the administrative authority finds a mistake regarding the eligibility of the financed expenditure and corrects the mistake prior to payment of the public contribution.

What types of irregularities shall be reported? As above-said the regulations (1290/2005, art. 32.3 – 1848/2006, art. 3.1) introduce the concept of "a primary administrative or judicial finding" and connect the irregularities to be reported with this concept.
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(art. 35, 1290/2005)

Definition of administrative or judicial finding

For the purposes of this Chapter the primary administrative or judicial finding means the first written assessment of a competent authority, either administrative or judicial, concluding on the basis of actual facts that an irregularity has been committed, without prejudice to the possibility that this conclusion may subsequently have to be adjusted or withdrawn as a result of developments in the course of the administrative or judicial procedure.

As for the date of the reporting obligation, the regulation asks for a “quarterly report” (slide 10)

(art. 3.1, 1848/2006)

Quarterly report

1. At the latest within two months following the end of each quarter, Member States shall report to the Commission all the irregularities which have been the subject of a primary administrative or judicial finding.

I do not spend time to read all the details that the Member State shall give when reporting irregularities (referred to in art. 3.1, 1848/2006).

As a general rule, Member State is obliged to recover the sums wrongly paid in connection with irregularities.
Member State can recover the sums within a reasonable deadline (four years of the primary administrative or judicial finding) and, in this case, can benefit of a “flat-rate” recovery costs of 20% of the sums which shall be credited to the Community budget.

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(art. 32.2, 1290/2005)

2. When the Community budget is credited, the Member State may retain 20% of the corresponding amounts as flat-rate recovery costs, except in cases of irregularity or negligence attributable to its administrative authorities or other official bodies.

If Member State has not been able to recover the sums within four years of the primary administrative findings or within eight years in case of judicial procedure, the Community regulation divides the financial burden of the sums wrongly paid and not yet recovered between the Community and the Member States: this is the “fifty-fifty % rule” (art.32.5, 1290/2005)

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(art. 32.5, 1290/2005)

5. If recovery has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50 % of the financial consequences of non-recovery shall be borne by the Member State concerned and 50 % by the Community budget.

Member state can decide to halt recovery procedures if (art.32.6, 1290/2005):

a) the cost of implementing the procedure is out of proportion to the amount to be recovered
b) there is a situation of debtor insolvency

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(art.32.6, 1290/2005)

6. If there is justification for doing so, Member States may decide not to pursue recovery. A decision to this effect may be taken only in the following cases:
(a) if the costs already and likely to be incurred total more than the amount to be recovered, or
(b) if recovery proves impossible owing to the insolvency, recorded and recognised under national law, of the debtor or the persons legally responsible for the irregularity.
The Member State shall show separately in the summary report referred to in the first subparagraph of paragraph 3 the amounts for which it has been decided not to pursue recovery and the grounds for its decision.

In certain case the Commission, following completion of an *ad hoc* procedure, may decide (art. 32.8, 1290/2005):

a) not to divide the financial burden, if the administrative authorities or another official body of the MS are responsible of the irregularity
b) not to justify the MS decision to halt the procedure.

In these cases the sums not recovered are charged to the MS, not to the Community budget.

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(art. 32.8, 1290/2005)

8. Following completion of the procedure laid down in Article 31(3), the Commission may decide to exclude from financing sums charged to the Community budget in the following cases:
(a) under paragraphs 5 and 6 of this Article, if it finds that the irregularity or lack of recovery is the outcome of irregularity or negligence attributable to the administrative authorities or another official body of the Member State;
(b) under paragraph 6 of this Article, if it considers that the grounds stated by the Member State do not justify its decision to halt the recovery procedure.

The sums to be recovered may be charged to the MS also: a) if the MS has not initiated the appropriate administrative or judicial procedure within one year of the primary administrative or judicial finding; b) if there has not been any administrative or judicial finding and this may jeopardise the recovery.
Also in these cases a Commission's decision is necessary, after the *ad hoc* procedure has been followed (art. 32.4, 1290/2005)

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(art. 32.4, 1290/2005)

4. After the procedure laid down in Article 31(3) has been followed, the Commission may decide to charge the sums to be recovered to the Member State in the following cases:
(a) if the Member State has not for recovery purposes initiated all the appropriate administrative or judicial procedures laid down in national and Community legislation within one year of the primary administrative or judicial finding;
(b) if there has been no administrative or judicial finding, or the delay in making it is such as to jeopardise recovery, or the irregularity has not been included in the summary report provided for in the first subparagraph of paragraph 3 of this Article for the year in which the primary administrative or judicial finding is made.

A final consideration. In case of enforcement of the "fifty-fifty % rule" and for the principle of the protection of the financial interest of the EU budget, the MS can not give up the efforts aimed at recovering the sums wrongly paid, but it must follow to pursue the recovery procedures envisaged at national and community level (art. 32.5, 1290/2005).

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(art. 32.5 1290/2005)

The distribution of the financial burden of non-recovery in line with the first subparagraph shall be without prejudice to the requirement that the Member State concerned must pursue recovery procedures in compliance with Article 9(1) of this Regulation. Fifty percent of the amounts recovered in this way shall be credited to the EAGF, after application of the deduction provided for in paragraph 2 of this Article.

The Commission and Irregularities: Conformity Clearance

The main consequence of not recovering the sum wrongly paid detected by the MS is the deduction of this sum (or part of it) from the EU reimbursement of the expenditure declared by the MS's paying agency.
The same consequence happens when irregularities (expenditure not effected in compliance with Community rules) are detected by the Commission as a result of its inquiries.

In this case the Commission starts the so-called "conformity clearance procedure" (art. 31.1, 1290/2005) with the aim to decide whether to impose a financial correction on the Member State and, if so, to determine the amount of this correction.

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(art. 31.1 1290/2005)

Conformity clearance

1. If the Commission finds that expenditure as indicated in Article 3(1) and Article 4 has been incurred in a way that has infringed Community rules, it shall decide what amounts are to be excluded from Community financing in accordance with the procedure referred to in Article 41(3).

In practice, the "conformity clearance" guarantees the protection of the financial interest of the EU by excluding from EU financing expenditure which has not been paid in compliance with the EU rules and by imposing the above-mentioned financial corrections, that are recovered from the Member State.
However, the "conformity clearance", which usually covers expenditure made more than one financial year, cannot hit expenditure made more than 24 months before the Commission officially notifies the Member State of its audit finding .
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(art. 31.4 1290/2005)

4. Financing may not be refused for.

(a) expenditure as indicated in Article 3(1) which is incurred more than 24 months before the Commission notifies the member State in writing of its inspection findings.

Before any decision to refuse financing is taken by the Commission, a "contradictory" procedure with the MS concerned shall be followed.

1. The Commission shall communicate the findings of its inquiry to the MS
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(art. 11.1 885/2006)

When, as a result of any inquiry, the Commission considers that expenditure was not effected in compliance with Community rules, it shall communicate its findings to the Member State concerned and indicate the corrective measures needed to ensure future compliance with those rules.

2. The MS shall reply within two months of receipt of the communication

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(art 11.1 885/2006)

The Member State shall reply within two months of receipt of the communication and the Commission may modify its position in consequence. In justified cases, the Commission may agree to extend the period for reply.

3. After the expiry of the period for reply the Commission shall convene a bilateral meeting aimed at reaching an agreement
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(art. 11.1 885/2006)

After expiry of the period for reply, the Commission shall convene a bilateral meeting and both parties shall endeavour to come to an agreement as to the measures to be taken as well as to the evaluation of the gravity of the infringement and of the financial damage caused to the Community budget.

4. The MS has two months from the date of reception of the minutes of the bilateral meeting in order to communicate any information deemed necessary for the ongoing examination

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(art. 11.2 885/2006)

Within two months from the date of the reception of the minutes of the bilateral meeting referred to in the third subparagraph of paragraph 1, the Member State shall communicate any information requested during that meeting or any other information which it considers useful for the ongoing examination.

5. After the expiry of the two months period, the Commission shall formally communicate its conclusion to the MS

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(art. 11.2.3 885/2006)

After the expiry of the period referred to in the first subparagraph, the Commission shall formally communicate its conclusions to the Member State on the basis of the information received in the framework of the conformity clearance procedure.

6. If the MS does not agree with the Commission's conclusion, it may ask for the "conciliation procedure" within 30 days of the conclusion receipt

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(art. 16.1 885/2006)

Conciliation procedure

1. A Member State may refer a matter to the Conciliation Body within thirty working days of receipt of the Commission's formal communication referred to in the third subparagraph of Article 11(2) by sending a reasoned request for conciliation to the secretariat of the Conciliation Body.

7. The Conciliation Body has four months in order to reconcile the different positions. If it is not able to reach a conciliation, the procedure shall be deemed to have failed and the Conciliation Body draws up a report making any remarks about the points of the dispute unresolved

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(art. 16.4 885/2006)

4. Where, within four months of a case being referred to it, the Conciliation Body is not able to reconcile the positions of the Commission and the Member State, the conciliation procedure shall be deemed to have failed. The report referred to in Article 12(c) shall state the reasons why the positions could not be reconciled. It shall indicate whether any partial agreement has been reached in the course of the proceedings

The report shall be sent to:
(a) the Member State concerned;
(b) the Commission;
(c) the other Member States in the framework of the Committee on the Agricultural Funds.

8. Taking into account the Conciliation Body's report and any information communicated by the MS, the Commission shall adopt, if necessary, the decision –

"conformity decision" - aimed at excluding from Community financing expenditure not complying with the EU rules

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(art. 11.3. 885/2006)

The Commission, after having examined any report drawn up by the Conciliation Body in accordance with Chapter 3 of this Regulation, shall adopt, if necessary, one or more decisions under Article 31 of Regulation (EC) No 1290/2005 in order to exclude from Community financing expenditure affected by the non compliance with Community rules until the Member State has effectively implemented the corrective measures.

9. The Commission's decision has as a consequence the deduction of expenditure from the monthly payment relating to the expenditure effected in the second month following the decision.

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(art.11.4 885/2006)

4. As regards the EAGF, the deductions from the Community financing shall be made by the Commission from the monthly payments relating to the expenditure effected in the second month following the decision pursuant to Article 31 of Regulation (EC) No 1290/2005.

10. And, finally, it is very important to underline that such a "conformity decision" can then be challenged by the Member State before the Court of First Instance in Luxembourg.

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THE LAST SHIELD

The Court of First Instance