EUROPEAN
COURT OF AUDITORS

ISSN 1831-0834

Special Report No 8 // 2011

RECOVERY OF UNDUE PAYMENTS MADE UNDER THE COMMON AGRICULTURAL POLICY

EN

Special Report No 8 // 2011

RECOVERY OF UNDUE PAYMENTS MADE UNDER THE COMMON AGRICULTURAL POLICY

(pursuant to Article 287(4), second subparagraph, TFEU)

EUROPEAN COURT OF AUDITORS

EUROPEAN COURT OF AUDITORS
12, rue Alcide De Gasperi
1615 Luxembourg
LUXEMBOURG

Tel. +352 4398-1
Fax +352 4398-46410
E-mail: euraud@eca.europa.eu
Internet: http://www.eca.europa.eu

Special Report No 8 // 2011

Cataloguing data can be found at the end of this publication.
Luxembourg: Publications Office of the European Union, 2011

ISBN 978-92-9237-223-1
doi:10.2865/52004

Printed in Luxembourg

CONTENTS

GLOSSARY

AAR: Annual activity report: report by a director-general of the Commission giving an account of the achievements of the key policy objectives and core activities of the directorate-general.

AGRI: European Commission Directorate General for Agriculture and Rural Development

Annex III and Annex IIIA: The overview of amounts to be recovered from final beneficiaries provided by the paying agency to the Commission as part of its annual accounts.

CB: Certification body: public or private legal entity designated by the Member State with a view to certifying the truthfulness, completeness and accuracy of the accounts of the accredited paying agency.

Clearance of accounts: The procedure by which the Commission accepts the accounts of the Member States and thereby the expenditure made by the paying agencies to farmers and beneficiaries. Firstly the accounts of paying agencies are checked for accuracy by certification bodies in the Member States and are then subject to an annual financial clearance decision by the Commission. Secondly the Commission itself then carries out the conformity clearance procedure based on audits which permit it to identify and exclude (in later years) payments not complying with the rules.

EAFRD: European Agricultural Fund for Rural Development

EAGF: European Agricultural Guarantee Fund

EAGGF: European Agricultural Guidance and Guarantee Fund

CJEU (ECJ): Court of Justice of the European Union

GBP: Pound sterling (£)

Irregularities: 'Irregularity' shall mean 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 or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure. See Article 1(2) of Regulation (EC, Euratom) No 2988/95.

IT: Information technology

MS: Member State

OLAF: European Anti-Fraud Office

PA: Paying agency: the organisation responsible within a Member State for the proper assessment, calculation, inspection and payment of agricultural subsidies. Part of the work of the paying agency may be done by delegated bodies.

PACA: *Premier Acte de Constat Administratif ou Judiciaire*. A French acronym commonly used to denote the date that the beneficiary is notified for the first time in writing by an authority in the Member State that an amount of agricultural subsidy should not have been paid. This is the date at which the debt should be recorded in the accounts (Annex III/IIIA tables) but not — in the case of pre-debtors — in the debtors' ledger of the paying agency. See also Article 35 of Regulation (EC) No 1290/2005.

Pre-debtor: The 'pre-debtors' fulfil the criteria of the Commission to be included in the accounts (Annex III/IIIA tables) and are the result of a pre-notification where the debtor has been informed by the PA of a potential debt which may end up in a recovery notification. The time elapsing between informing of a potential debt and the recovery notification can take several months or even years. See also 'PACA'.

Recoveries vs financial corrections: Recovery of unduly paid amounts from the beneficiary through a recovery notification issued by the PA. Financial corrections to Member States can be imposed by the Commission under (1) the financial clearance (reliability of the annual accounts) and/or under (2) the conformity clearance (legality and regularity of the underlying transactions) of the annual accounts of the PA. Amounts under financial corrections are financed by national budgets.

Recovery rate: The Court has calculated various recovery rates in the report by comparing the amounts recovered to the debt outstanding recorded and expressing this as a percentage.

TFR: The task force recovery was set up in 2002 to examine old cases of debt relating to irregularity as many hundreds of old cases had not been followed up. Its purpose was to decide whether the debt could be written off to the cost of the budget or whether, where Member States had been negligent, the debt should be charged to the Member State concerned.

50/50 rule: As part of the review of European legislation relating to debt and recovery in 2006, the so-called 50/50 rule was introduced which allows the Commission to automatically take back from the Member States 50 % of debts that remain unrecovered in the debtors' accounts after four years, or after eight years where there is a legal case pending for the debt.

EXECUTIVE SUMMARY

I.
The European Union spends around 55 billion euro per year on agriculture and rural development, some of which is wrongly paid due to irregular or incorrect claims or errors. This report examines the procedures for recovery of undue payments. In particular it focuses on recoveries by Member State authorities and the monitoring role of the Commission.

II.
The Court previously examined the arrangements for the recovery of irregular payments in its Special Report No 3/2004. It found that there were significant weaknesses in the arrangements for reporting, recovery and writing off irregular payments. Subsequently the Commission implemented important changes in the way in which debts are recorded, reported and certified in the Member States. It also transferred the responsibility for financial follow-up to DG AGRI from OLAF. The impact of these changes is also examined in this report. The Court examined both the reporting of recoveries by Member States to the Commission and the presentation of figures on recoveries in the annual accounts of the EU.

III.
The Court found that the arrangements introduced in 2006 have improved matters by providing more accurate information and greater detail on debts and recoveries at the level of the Member States and by giving more information in the annual accounts. The recovery rates have also improved in respect of debts raised from 2006 onwards, however, certain weaknesses persist:

— New procedures, which result in the automatic reimbursement to the Commission of 50 % of the amount of old debts, enhance the protection of the EU's financial interests by 'recovery' via the transfer of funds from the Member State budget to the European Union budget. The system has certain shortcomings such as running the risk of encouraging the write-off of debt by Member States as early as possible or reporting debt as late as possible and allowing certain amounts to 'escape' from the procedure.

— Differences in treatment between Member States means that debts are recognised at different times, reported figures are not comparable, interest is applied inconsistently and the point in time debts can be written off can vary significantly, leading to a negative financial impact on the EU budget.

— The likelihood of recovery of an undue payment is affected by delays in the Member States' initiation of recovery procedures, shortcomings in their recovery actions, and their limited enforcement possibilities.

— Where delays in the initial recording of debt occur, the transmission of information relating to irregularities to OLAF can also be delayed.

EXECUTIVE SUMMARY

IV.
The Court therefore recommends that the Commission should further improve the way in which debts in the Member States are managed and reported upon and ensure a consistent treatment of those across all Member States by:

— requesting Member States to record the irregularities and other debts once they are legally due, notably at the time the recovery notification has been drawn up;

— clarifying certain key reporting and accounting concepts which have been inconsistently applied thus far by issuing guidelines, in a timely manner;

— introducing a uniform time limit between the discovery of a potential irregularity and the notification of the recovery order to the debtor which would enhance harmonisation between Member States and ensure a more timely transmission of information on irregularities to OLAF;

— introducing explicit rules in relation to the application of interest;

— providing further clarification of the circumstances under which debts can be declared as irrecoverable, in particular in relation to the rules for writing off debt in insolvency cases;

— reviewing the application of the new, automatic 50 % recovery procedure rules to ensure its effective application;

— finalising the follow-up of old 'Task Force Recovery' cases, which were supposed to have been finalised some three years ago.

V.
During the period 2006–08, covered by the Court's audit, around 90 % of the amounts reported in the EU annual accounts as 'recoveries of undue payments' were those made by the Commission through deductions from the Member States and not actual recoveries of the unduly paid aid from beneficiaries. This undoubtedly protects the financial interests of the EU but without the full deterrent effect of a recovery made from an unduly paid beneficiary.

VI.
The Commission should therefore explore methods that permit it to reduce the proportion of its 'recoveries' from Member States' budgets, and increase the proportion of undue payments recovered from the beneficiaries who received them.

INTRODUCTION

1. The EU spends around 55 billion euro per year on agriculture and rural development. ***Table 1*** shows a breakdown of spending between the guarantee fund (EAGF) and rural development for the 2006 to 2009 period.

2. Management of most of this expenditure is shared between the Member States and the Commission. The aid is paid out to farmers and beneficiaries by the paying agencies (designated national authorities), which are then reimbursed by the Commission. Some of these payments are made irregularly or with errors and, if detected, have to be recovered. This report examines the arrangements for such recoveries.

3. In order to safeguard the EU financial interests, Member States are required to 'adopt all legislative, regulatory and administrative provisions and to take any other measures necessary to:

(a) check the genuineness and compliance of operations financed by the EAGF and the EAFRD;

(b) prevent and pursue irregularities;

(c) recover sums lost as a result of irregularities or negligence[1].'

[1] Article 9(1)(a) of 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).

TABLE 1

AGRICULTURE SPENDING 2006–09 (MILLION EURO)[1]

	2006[2]	2007	2008	2009
EAGF	42 116	42 446	43 011	46 120
Rural Development	11 543	11 154	10 671	8 992
Total	**53 659**	**53 620**	**53 682**	**55 112**

[1] The amounts are the payments made for Chapters 05 02 and 05 03 (EAGF) and Chapters 05 04 and 05 05 (Rural Development) as included in Volume II, Annex A (ii), pp. 356–379 for 2006 and in Volume II, Annex B: Expenditure (i), pp. 306–315 of the Annual Accounts of the European Communities for 2007 as well as Tables 5.1 and 3.1 of the Annual Report 2008 and 2009 respectively.

[2] Prior to 2007 there was only a single fund, the EAGGF.

4. Member States are required to undertake checks (generally on a sample basis) on the regularity of individual payments. Some checks take place before the payment is made, in which case the detected irregularities can be deducted directly from the payment to be made. For checks carried out after payment has taken place, Member States are required to record a debt for any undue payments detected and then request repayment of the overpaid amount from the beneficiary.

5. Many beneficiaries repay as requested, but if they lodge an appeal and if the debt is subsequently upheld by the PA, an enforcement action for its recovery is initiated, sometimes involving legal action. Under certain conditions (in the case of insolvency, or the cost of recovery exceeding the amount due), the paying agency can decide to halt recovery and declare the amount as irrecoverable to the EU and the debt is written off.

6. ***Table 2*** sets out the total amount for which recovery is ongoing and amounts recovered as recorded in the Member States debtors' accounts for the period 2006–09 as follows:

TABLE 2

AMOUNTS RECORDED IN THE MEMBER STATES' DEBTORS' ACCOUNTS (MILLION EURO)

EAGF year ending 15 October	2006	2007	2008	2009
Amount for which recovery is ongoing as at 15 October	1 267[1]	1 437[2]	1 246	1 115
Amounts recovered during the EAGF year	104[3]	152	113	111
Percentage recovered[4]	8,2 %	10,6 %	9,1 %	10 %

[1] In its AAR 2009, the Commission corrected its originally reported figure of 1 449 million euro for 2006 because of corrections for Italy: AGEA.

[2] The Court's analysis showed that an amount of 209 million euro was overstated for FY 2007 because of the inclusion of invoiced amounts for temporary sugar restructuring. If this overstatement was taken into account then the percentage recovered would rise to 12,8 %.

[3] Based on totals provided by certification bodies for 'Table 1 and 2 data'.

[4] This percentage is calculated on the basis of the year-end figures. If the average debt figure is used the percentages would be 6,8 %, 11,2 %, 8,4 % and 9,4 % for the years 2006–09 respectively.

7. As can be seen, the level of amount for which recovery is ongoing in the Member States' accounts has remained relatively stable with recoveries and write-offs (see ***Table 4***) being largely compensated by new debts raised, ***Annex I*** gives a breakdown of the new debts raised between 2006–09. For cases from 2006 onwards however the recovery rates have improved (see ***Table 3***).

8. The arrangements for financing the common agricultural policy (CAP) also provide for the Commission to clear the accounts relating to agriculture and rural development: the Commission accepts the amounts paid out by the Member States and may reduce payments to Member States when it finds that they have misapplied the regulations governing the CAP. Although the Commission has often reported these reductions as 'recoveries', most of the transactions involved take the form of corrections which do not recover undue payments from the beneficiaries, rather they shift part of the cost of the CAP onto national taxpayers. In the context of the clearance of accounts, a small part of the Commission's clearance decisions relate to the recovery of specific debts.

A NEW FRAMEWORK 2006

9. The Court last reported on the recovery of irregular payments in 2004 (Special Report No 3/2004). At that time the Court highlighted a low rate of recovery of reported debt, inconsistencies in the data reported, a large volume of old debts neither recovered nor written off and a lack of clarity in the division of responsiblities between DG AGRI and OLAF.

10. In 2006, the Council introduced a new regulatory framework[2]. The most significant change was the introduction of the '50/50 rule' which shares the financial consequence of non-recovered debt equally between the EU budget and related Member State. The rule helps protect the financial interests of the Union. Member States are charged for 50 % of amounts not recovered four years after the date the debt was recognised, or eight years if the recovery process is being pursued in the courts. The date on which the debt is recognised is therefore important for the application of the rule. However, if a final judicial decision confirms that the debt was not due, the amount charged under the 50/50 rule has to be paid back to the Member State by the Commission.

[2] Council Regulation (EC) No 1290/2005, Commission Regulation (EC) No 883/2006 (OJ L 171, 23.6.2006, p. 1) and Commission Regulation (EC) No 885/2006, complemented by Commission guidelines, and Commission Regulation (EC) No 1848/2006 (OJ L 355, 15.12.2006, p. 56).

11. The 50/50 rule is intended to provide an incentive for Member States to ensure a more timely recovery of debts. It represents an improvement over the previous situation whereby unrecovered debt was allowed to remain in the accounts for very long periods, sometimes decades, until ad hoc decisions were finally taken to write them off. There are two main risks to the effective application of the rule: (i) postponement of the date that debts are first recognised, thereby delaying the date that Member States can be charged in case of non-recovery; and (ii) writing debts off as irrecoverable before all recovery possibilities have been exhausted, in order to avoid the application of the rule to a specific debt.

12. Further changes were introduced by the new framework with respect to the communication by Member States to the Commission of irregularities and the progress made in recovering them. Prior to 2006, such information was sent to the EU anti-fraud office, OLAF. Detailed information is now sent to the responsible Commission Service, DG Agriculture and Rural Development, so that debts can be more closely monitored. Also, the threshold for communicating individual irregularities to OLAF was raised from 4 000 to 10 000 euro.

HOW ARE DEBTS AND RECOVERIES REPORTED?

13. Information on the situation with regard to debts and recoveries in the Member States is reported yearly by the paying agencies to the Commission in separate tables (Annex III and Annex IIIA data) attached to their annual accounts[3]. This information is also used as a source of information on recoveries provided in the Annual Activity Report (AAR) of the Director-General of Agriculture and Rural Development.

14. Based on the information from Member States, the Commission publishes data on the level of debt and recovery of undue payments in notes to the financial statements of the European Union. The amounts reported in the EU accounts are significantly less than the aggregate of the amounts recorded in the Member States' records to take due account of the Commission's estimates of amounts considered as recoverable (see paragraphs 59 to 61). The Commission also reports annually to the European Parliament and the Council on the protection of the EU financial interests and the fight against fraud, including recoveries of undue agricultural payments.

[3] Cf. Commission Regulation (EC) No 885/2006 of 21 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and of the EAFRD (OJ L 171, 23.6.2006, p. 90).

AUDIT SCOPE AND APPROACH

15. The Court assessed the effectiveness of the systems established and operated by Member States to recover identified debts, together with the Commission's supervision of the process. The audit addressed the following questions:

(i) Do Member States process and record debts correctly?

(ii) Are Member States successful in recovering identified undue payments?

(iii) Do Member States write off debts as irrecoverable appropriately?

(iv) Does the Commission supervise and monitor recoveries effectively?

16. The audit covered EAGF recoveries for the 2006, 2007 and 2008 financial years, all of which were subject to the new rules introduced in 2006.

The audit involved:

— analysis of a sample of 14 paying agencies in eight Member States, focusing on those with the highest recorded debt;

— testing of a sample of 670 transactions (494 individual debts, 176 other transactions);

— examination of the Commission's guidance, audits and application of financial corrections.

More detailed information on the work done is provided at the beginning of each section in the observations. The audit did not assess the effectiveness of Member States in identifying irregularities for recovery.

OBSERVATIONS

DO MEMBER STATES RECORD AND PROCESS DEBTS CORRECTLY?

17. After identifying irregularities and errors, Member States have a number of obligations to follow in respect of the resulting debt. These include:

— accurate recording of the amount and date of the debt and its reporting to the Commission, inter alia to provide an appropriate basis for the application of the 50/50 rule;

— correct classification of the debt, which can also have an impact on the 50/50 rule; and

— the calculation, charging and recording of interest.

18. The Court examined the implementation of such obligations in the paying agencies selected by an evaluation of the systems in place as well as through the testing of the sample of transactions. It analysed the debtors' accounts, and checked the accuracy of the tables provided to the Commission. The Court also assessed the extent to which the rules allow for differing interpretations which could lead to different treatment between Member States (including potential impact on the amounts recovered).

INACCURACIES IN THE DEBTORS' ACCOUNTS

19. Amounts to be recovered may be classified as irregularities, errors in administrative procedures or other amounts recoverable. The rules applicable to each category are somewhat different, as explained in paragraphs 29 and 30. For a sample of transactions, the Court checked the accuracy of the tables reporting debts to the Commission. The main inaccuracies found by the Court related to cases that were incorrectly classified or where no or inadequate supporting documentation existed on file for the recorded amounts[4]. The total amount of errors involved in the Court's sample was 8,3 million euro and concerned 89 cases out of the total of 670 transactions examined. Where irregularities are concerned, these inaccuracies may have a financial impact since they can affect the normal application of the 50/50 clearance mechanism and directly impact on the amounts corrected by the Commission and recovered from Member States.

[4] Example: At RPA (UK), for seven cases out of the sample of 66, underlying documentation could not be presented: amount involved 4,3 million GBP.

20. The debtors accounts in the individual paying agencies are also checked by independent auditors (the certification bodies, CBs) which report to the Commission on the reliability of the accounts presented. However, the certified figures can also be significantly changed in later years by the CBs themselves. For Italy, for instance, the total of outstanding debts at the end of 2006, which was certified by the Italian CB, was adjusted downwards by 182 million euro[5] in 2009, or in the case of Denmark, recovered amounts already certified by the Danish CB for 2008 had also be corrected upwards by 4,7 million euro and those for 2009 downwards by 14,1 million euro in subsequent years. Such large adjustments call into question the reliability of the certified figures. As can be seen in the example presented in ***Box 1*** the CBs also encountered difficulties in certifying the accuracy of the figures recorded in the Member States.

[5] In its AAR 2009, the Commission corrected its originally reported figure of 1 449 million euro for 2006 because of corrections for Italy: AGEA.

BOX 1

MISSING OR UNREADABLE DATA AT THE RURAL PAYMENTS AGENCY (RPA) (UK)

At the RPA, the Court was unable, for 2006 and 2007[6], to reconcile the figures reported to the Commission with the amounts recorded in the agency's debtor accounts as the RPA debtor's data has become corrupted. For 2006, differences amounting to 8,8 million pounds sterling were noted[7], 81 % of them due to corrections. Problems had also been found by the certification body's audit, and their recompilation of the debtor's accounts provided only some, but not full, assurance and the certification body concluded that the accuracy of debts recorded was poor for 2007.

[6] Table 5 of Annex III to Commission Regulation (EC) No 885/2006.

[7] The 8,8 million pounds sterling refers to differences found by the Court's reconciliation work and not to errors found in the Court's sample as described in paragraph 19.

INCONSISTENCIES IN THE DATE THE DEBTS ARE RECORDED

21. The date on which irregularities must be recorded in the debtors accounts of the Member States (Annex III) is a key element for the application of the regulation as it determines the initiation of the time limits of four years and eight years for applying the 50/50 rule. The regulation defines this date as, '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.'[8] The date of initial recording of debts is thus governed by the concept of the primary administrative or judicial finding more commonly known by its French acronym PACA (*Premier Acte de Constatation Administrative*).

22. The European Commission has further developed this definition in its guidelines[9] which from 2008 onwards[10], also provide that all irregularity cases should be included in the annual accounts of the paying agencies even if the debt has not been officially notified in the form of a recovery notification[11], in order to record these cases as 'potential debtors' or 'pre-debtors'. Despite the intended harmonisation, the date of the PACA continues to be interpreted differently in the Member States and the Commission's instructions to individual Member States have not always been consistent. In practice it varies between the date of a check by the control body, at the earliest, and the date of issue of the recovery notification, at the latest. The Court found that there can be a difference of up to six years between these two dates. Although the regulations do not fix a time limit for the notification of a debt following a check, the ECJ Decision in Case C-54/95 requires that the recovery procedure should be initiated within one year after all relevant facts with regard to the irregularity are known.

[8] Article 35 of Council Regulation (EC) No 1290/2005.

[9] Section 5.3.5 of Guideline No 2.

[10] Guideline No 1: paragraph 2.7: column (g) of Annex III.

[11] Recovery notifications can be regarded as a receivable whereas 'potential debtors' are not.

23. Member States that use the latest possible time and consider the date of the written recovery notification to constitute the PACA gain additional time before amounts are subject to the 50/50 clearance mechanism and do not always register the potential debt as a 'pre-debtor' as stipulated in the Commission guidelines. This means that an irregularity detected can be accounted for and be the subject of a correction by the Commission in different years depending upon the policy adopted by the Member State concerned.

24. The Spanish authorities generally consider the PACA date to be the first assessment (*acuerdo de inicio*) sent to the beneficiary before the recovery notification. However, two PAs (FEGA and AVFGA)[12] audited have taken into account the date of the recovery notification from 2008 onwards which, under the given circumstances, is not in line with current legislation. The French PAs complied with the regulation and guidelines until 2008 but for 2009 they changed their reporting system to use a later operative date, the date of the recovery notification, to overcome disadvantages of an early recording of debts as 'pre-debtors'. At the end of 2009, the Commission requested the French authorities to change the system back again.

25. A limited number of cases were found in Germany, Belgium, Hungary and the United Kingdom[13] where previous written assessments had been sent to potential debtors which should have constituted the recording date of the debt in the accounts but no such recording was made.

26. The problem of different interpretations of the date of the PACA was raised in the Court's 2004 report and was accepted by the Commission as requiring attention. However, guidelines issued by the Commission have not yet promoted a harmonised approach to this problem, the significance of which has increased with the introduction of the 50/50 rule.

[12] FEGA: *Fondo Español de Garantía Agraria*.
AVFGA: *Agencia Valenciana de Fomento y Garantia Agraria*.

[13] General confirmation by the German PA (HZA Hamburg-Jonas): 'in some cases'; German PA (Hannover): two out of 12 cases; Belgian PA (BIRB): one out of 11 cases; Hungarian PA: (ARDA) one out of 12 cases; United Kingdom PA (RPA): four out of seven cases.

INCONSISTENCIES AS A RESULT OF DIFFERING INTERPRETATIONS OF SPECIFIC TYPES OF DEBT

27. The Court also found inconsistent interpretations by the PAs of the concepts of irregularity, errors due to administrative procedures, and other types of recoveries. It is important that Member States interpret these concepts in the same way to ensure consistent and comparable reporting; the differences in interpretation can also have a financial impact on the EU budget.

28. In 2006 and 2007, all debt cases (whether they are classified as irregularities, administrative errors or 'other') were reported to the Commission[14] in Member States debtors accounts and made subject to the 50/50 clearance mechanism.

29. From 2008 undue amounts paid as a result of administrative errors are no longer included in the Member States debtor accounts (Annex III tables) since they must be repaid to the EU budget at the end of each year in the context of the financial clearance of accounts.

[14] Tables 1, 2 and 5 of Annex III to Commission Regulation (EC) No 885/2006.

BOX 2

FRANCE PAYING AGENCY ONIEP[15]: 'OTHER' DEBT

In 2008, the PA reported a case for the first time — in the part of the accounts not subject to the 50/50 clearance rule — with the justification that the irregularity was covered by bank guarantees. The case dated from 1997, with a potential financial impact of 8,5 million euro. If the case had been classified as an irregularity instead of 'other' debt it would have been cleared in 2006 when the 50/50 rule was introduced and 4,3 million euro returned to the EU budget, without prejudice to any subsequent encashment of the guarantees.

[15] ONIEP: Office National Interprofessionnel de l'Elevage et de ses Productions.

30. Furthermore, Member States have applied the concept of administrative error in an inconsistent manner. The Court identified 15 cases with a value of 7 million euro[16] communicated as irregularities that, it considered, should have been classified as administrative errors, and thus credited immediately to the EU budget.

31. PAs have different interpretations of what constitutes an irregularity[17]. For example, cases identified but which are not detected as a result of a scrutiny or cases that are covered by a guarantee are not considered as irregularities and not recorded as such in certain Member States (Germany and France). They are recorded as 'other' debts and therefore not considered for the application of the 50/50 clearance mechanism. If eventually such debts are declared as irrecoverable the risk of non-encashment of the guarantee is borne by the EU budget.

Box 2 provides an example of irregularity cases wrongly classified as other recoveries, and shows the impact on the EU budget.

INCONSISTENT APPLICATION OF INTEREST LEADING TO FINANCIAL LOSS

32. Given the sometimes long delays between an undue payment being made and its eventual detection and subsequent recovery, interest on outstanding debt should be charged[18], to protect the financial interests of the EU. With an average of some 1 200 million euro of debt outstanding the interest accruing to the EU budget on an annual basis is substantial — based on a conservative rate of 3 % per annum, the annual amount is estimated at 36 million euro. Where interest is fully charged to the EU budget, no loss occurs.

33. The Court found that the application of interest on debt was still not fully harmonised. For the vast majority of measures, the interest rate must be calculated in accordance with national law, but no specific rate is established, although it cannot be lower than the interest rate applicable for the recovery of amounts under national provisions. ***Annex II*** shows a summary of the different methods used by the PAs audited by the Court as regards the application of interest.

[16] Case described in ***Box 6*** is an example.

[17] For a legal definition see Article 1(2) of Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ L 312, 23.12.1995, p. 1) as shown in the glossary.

[18] Article 32(1) of Council Regulation (EC) No 1290/2005 provides that 'sums recovered following the occurrence of irregularity or negligence and the interest on these shall be made over to the paying agency and booked by it as revenue assigned to the EAGF in the month in which the money is actually received.'

34. Most of the PAs audited apply an automatic calculation mechanism, based on the interest rate calculated in accordance with national law, although there were wide variations applied in practice.

35. The European Court of Justice supported the Commission's view that interest is to be included in Annex III even if the principal amount has not been recovered or has not been established in legal proceedings[19]. However, in the current system interest payable is not always communicated to the debtor by sending an updated recovery notification as at 15 October every year, i.e. the year end for EU agricultural payments.

[19] Judgment of the General Court of 22 April 2010: Italy v Commission (T-274/08 and T-275/08) where the Commission imposed corrections of 214 million euro relating to the 50/50 clearance mechanism, including interest.

BOX 3

TREATMENT OF ACCRUED INTEREST IN SPAIN

At the Commission's request, AVFGA (PA Valencia) incorporated accrued interest in Annex III as at 15 October 2008, consequently updating the amount due for 575 cases. The accrued interest calculated by AVFGA on the basis of a compound interest formula until 15 October 2008 amounted to 11,6 million euro. The Court identified errors in the calculation, totalling 1,4 million euro of understatement. The calculation made by the PA was only for the purposes of reporting to the Commission as the debtors were not invoiced.

ARE MEMBER STATES SUCCESSFUL IN RECOVERING IDENTIFIED UNDUE PAYMENTS?

36. When an irregularity is detected, it is important that Member State authorities use all means to recover the amount from the beneficiary. The Court assessed for the years 2006 to 2009:

— the extent to which debts are recovered;

— how quickly Member States initiate recovery procedures after an irregularity is detected;

— how far non-recoveries can be considered as 'negligence' by the national authorities, thereby making them liable for the whole amount due; and

— the methods available to Member States to enforce recovery, and how they are used in practice.

RELATIVELY LOW RATES OF RECOVERY BUT SIGNS OF IMPROVEMENT

37. As shown in ***Table 2*** the annual rate of recovery of amount for which recovery is ongoing is rather low, at around 10 % of the total recorded debt. In order to try and assess the impact of the changes to the system, the Court has calculated a year-by-year recovery rate for the new debts established in years 2006–09. For cases from 2006 onwards however the recovery rates have improved (***Table 3***).

38. ***Table 3*** shows that the largest proportion of the recovery is achieved during the year in which a debt is established. In subsequent years, the recovery rate drops significantly. A more detailed analysis shows that the recovery rates for administrative cases are noticeably higher than cases under judicial proceedings (an overall recovery rate of 54 % in the first case against 8,3 % in the second case over the period 2006–09).

TIMELY INITIATION OF RECOVERY PROCEDURES IMPROVES THE CHANCE OF RECOVERY, BUT SIGNIFICANT DELAYS IDENTIFIED

39. The effectiveness of a recovery procedure is largely dependent on the rapidity of the steps adopted in the early stages. After the detection of a potential irregularity by the control bodies, it is important that a final decision should be taken as quickly as possible as to whether a debt exists and a recovery order should be issued.

40. However, the Court identified the number of PAs, particularly France, Italy and Greece, where debts were recorded unjustifiably late after the detection of the irregularity. Out of 494 cases examined in the abovementioned countries, 39 were affected by unjustifiable delays.

TABLE 3

RECOVERY OF DEBTS RECORDED AFTER THE INTRODUCTION OF THE 50/50 RULE

FY	Debt established concerning year (million euro)	Recovered 1st year	Recovered 2nd year	Recovered 3rd year	Recovered 4th year	Total recovered
2006	155	24,1 %	17,7 %	6,0 %	2,7 %	**50,6 %**
2007	257	33,3 %	12,7 %	3,6 %		**49,5 %**
2008	135	33,7 %	16,8 %			**50,6 %**
2009	135	35,5 %				**35,5 %**

WEAKNESSES IN RECOVERY ACTIONS BY NATIONAL AUTHORITIES

41. The Commission is responsible for supervising the diligence of the national authorities in pursuing the recovery of debts. When these authorities are found negligent in this regard, the Member State must reimburse the amount of the debt foregone to the EU budget. The Court identified several such cases where the Commission should determine whether negligence occurred. The most relevant cases identified were:

— cases where the judicial authorities cancelled the recovery procedure because the administrative authorities had failed to comply with one or more legally binding procedures, notably failure to engage in the adversarial proceedings that, depending on the national legislation, the PAs are required to undertake with the beneficiary[20];

— cases where the judicial authorities cancelled recovery proceedings because they considered that the cases were time-barred i.e. administrative procedures had taken too long, and that this was attributable to excessive delays of the administrative authorities in their recovery actions[21];

— cases where the administrative authorities failed to register their debt against the beneficiary in a collective insolvency in good time, effectively excluding the amount to be recovered[22];

[20] Five cases with financial impact of 2,2 million euro.

[21] Four cases with financial impact of 1,6 million euro.

[22] One case with financial impact of 0,2 million euro.

BOX 4

UNJUSTIFIED DELAYS IN GREECE AND ITALY

In Greece, the audit found seven cases where there were delays of between four and six years for the assessment of investigation reports. In the same country, for 18 cases, the final ministerial decision to validate the recovery took between two and seven years following the first recovery notification sent to the beneficiary. The value of these cases amounts to 10,3 million euro. In Italy, the audit found seven cases involving a total amount of 2,5 million euro where the delay between the investigation report and the recording of the debt extended to two to four years.

— cases where the administrative authorities had what were deemed to be sufficient grounds to present an appeal or to take the case to a subsequent level but failed to do so[23]; and

— cases where there were excessive delays in the recovery actions once the procedure had already been initiated, particularly concerning the initiation of enforcement recovery actions[24].

LIMITED ENFORCEMENT PROCEDURES AVAILABLE TO MEMBER STATE AUTHORITIES

42. Enforcement procedures fall exclusively under national legislation. An exception to this general principle came into force from financial year 2008[25], whereby Member States were required, without prejudice to any other enforcement action provided for in national law, to 'offset any still outstanding debt of a beneficiary which has been established in accordance with national law against any future payment to be made by the PA responsible for the recovery of the debt to the same beneficiary.'

[23] Six cases with financial impact of 5,3 million euro.

[24] 492 cases with financial impact of 7,3 million euro, mainly in Spain, as shown in ***Box 5***.

[25] Commission Regulation (EC) No 1034/2008 of 21 October 2008 amending Regulation (EC) No 885/2006 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the accreditation of paying agencies and other bodies and the clearance of the accounts of the EAGF and the EAFRD (OJ L 279, 22.10.2008, p. 13) introducing Article 5(b) in Commission Regulation (EC) No 885/2006.

BOX **5**

EXAMPLE OF LACK OF DILIGENCE BY THE NATIONAL AUTHORITIES: SPAIN (ANDALUCÍA)

In Spain (Andalucía), between 2006 and 2008, 252 cases were detected by the Court where the prescription period[26] of four years had already elapsed between the discovery of the irregularity and the time when the PA became aware of the facts and could start the recovery process. The PA decided to write off the amount of 5,8 million euro against the EU budget. Any negligence subsequently determined by the Commission would be attributable to the Spanish authorities.

[26] Following the prescription period the case is 'time barred' and cannot be pursued further.

43. However, the Court's audit found that the effectiveness of the enforcement procedure is limited by the following:

— Since 2008, the PAs audited have applied recoveries through offsetting where this is allowed by national legislation, however, offsets cannot be applied until the debt is legally recognised.

— Beyond offsetting or the calling in of guarantees (where applicable), none of the PAs audited has any other direct enforcement possibilities.

— Only some of the PAs audited[27] have the possibility, through legal means or convention, to enforce the recovery of Community debts through other bodies e.g. the regional or national tax/customs authorities. This possibility increases the chance of recovery.

— In all Member States audited, except Belgium and Greece, the recovery orders notified by the PAs are directly enforceable through a judicial authority.

— The execution of a recovery notification should only be suspended if the amount disputed is sufficiently secured (by a bank guarantee, cash deposit etc.) unless duly justified reasons for such a waiver are presented by the debtor. This principle was, however, not applied in all Member States audited.

[27] Paying agencies audited in Germany, Spain, Greece and Hungary.

DO MEMBER STATES WRITE OFF DEBTS AS IRRECOVERABLE APPROPRIATELY?

44. When debts are deemed to be irrecoverable (if the beneficiary is insolvent or if the cost of the recovery action is likely to exceed the amount recovered), the regulation allows Member States to write them off. In such cases the debts are removed from the debtor accounts submitted to the Commission. If this write-off takes place before the four- and eight-year time limits, then the 50/50 rule does not apply and the amount is effectively charged in full to the EU budget. This creates the risk that debts are written off prematurely — that is before all possible recovery steps have been exhausted — in order to avoid the application of the 50/50 rule and the related charge on Member States.

45. The Court examined a sample of 138 cases written off between 2006 and 2008 with a total value of 176,5 million euro, to assess whether the write-off was appropriate in the circumstances. It also:

— analysed the amounts written off between 2006 and 2009 and established the cost to the EU budget;

— examined the working definition of insolvency, and its impact on write-offs; and

— evaluated the other situations when debts are written off.

46. The Court's analysis of the figures for debt written off shows that most of the amounts declared as irrecoverable by the PAs were financed by the EU budget (see ***Table 4***). The situation in 2006 is considered to be exceptional as accumulated debts for the past, back to the 1980s, were written off in that year.

TABLE 4

AMOUNTS WRITTEN OFF 2006–09 (MILLION EURO)

	2006	2007	2008	2009	Total
Cases 'written off'	225,8	166,0[1]	32,4	64,4	**488,6**
Borne by the EU budget in total	207,2	154,4	25,3	42,0	**428,9**
Percentage of debts written off borne by the EU budget	91,8 %	93 %	78,1 %	65,1 %	**87,8 %**

[1] Out of the 166 million euro total, 117,1 million euro relates to a single debt declared irrecoverable in Italy.

LACK OF CLARITY IN THE CRITERIA TO BE APPLIED TO JUSTIFY WRITING OFF DEBT

47. Concerning the concept of insolvency, which is the reason given for over 90 % of debt written off, the regulatory provision[28] is not sufficiently explicit. In principle, PAs write off amounts under the following conditions.

For cases subject to legal proceedings:

— Insolvency proceedings declared by national courts and handled by liquidators: The Court found that, depending on the PA, the case could be written off at the opening, during or at the end of the insolvency proceedings thereby causing considerable variations in the application of the eight-year period granted before amounts are cleared under the 50/50 rule. The amounts finally recovered through the liquidation procedure are generally relatively low (between 0,14 % and 6 % of the debt).

For non-judicial (i.e. standard) cases:

— Impossibility to trace the debtor, death of the debtor or fruitless seizure (*nulla bona*) are the reasons generally invoked to justify write-offs: There is no common approach defined for the application of these criteria, leading to differing practices being used by the PAs audited and wide variations in the application of the four-year period granted before amounts are cleared under the 50/50 rule.

48. It was also noted that certain PAs write off their debts in the Annex III tables although they remain in the debtor's ledger under national legislation because of further recovery possibilities using national legislation (PAs in Germany). For co-financed measures, this practice leads to a different treatment of debtors, whereby recovery procedures for the national part of the debt are still continuing when the Community part has been written off.

[28] Article 32.6 of Council Regulation (EC)1290/2005.

49. Given that the majority of write-off is due to insolvency of the debtor, it is important to clarifiy the criteria applied in the Member States to ensure that the maximum amount is recovered to the EU budget and to ensure equal treatment of similar cases between Member States.

50. ***Box 6*** shows an example of an unjustified write-off and potential negligence on the part of the administrative authorities.

WRITING OFF DUE TO UNECONOMIC RECOVERY COSTS: SMALLER AMOUNTS INVOLVED BUT STILL A NEED FOR CLARIFICATION

51. Paying agencies made limited use of the practice whereby debts were written off because the recovery costs were adjudged to be higher than the amount to be recovered. The Court found that this was used mostly in cases for amounts of less than 100 euro, although, in the UK (RPA), it is generally considered only to be cost-effective to pursue by legal action debts exceeding 2 000 pounds sterling[29]. In Germany (PA — Hamburg-Jonas) the threshold set is 1 000 euro. The Commission has not provided any further guidance on this issue and differences between Member States remain. Between 2006 and 2009, some 880 000 euro was written off by the PAs for this reason.

[29] 'RPA debt recovery — High-level guidance/procedures' (Version 2.4 from 24.11.2008), paragraph 8.1.3.

BOX 6

UNJUSTIFIED WRITE-OFF OF DEBT TO THE CHARGE OF EU BUDGET BY THE GERMAN PA NIEDERSACHSEN

In this case, recovery notifications were issued for an amount of 4,9 million euro on 6 August 2003. Insolvency proceedings were opened on 1 August 2003. The amount was declared as irrecoverable by the PA on 15 October 2006, prior to the application of the 50/50 clearance mechanism, with the result that the entire amount was written off against the EU budget. However, at the time the case was declared as being irrecoverable, legal proceedings concerning the encashment of a guarantee covering the amount of the debt were still pending, meaning that recovery possibilities were not exhausted. The unjustified write-off borne by the EU budget was therefore 4,9 million.

CANCELLED CASES

52. Member States may cancel debts as a result of decisions adopted by an administrative or a judicial authority, normally when a reported irregularity is subsequently not confirmed by a court. This has the effect of writing off the debt and removing it from the debtors' accounts. In cases where the 50/50 rule has already been applied, then the amount already charged to the Member State has to be reimbursed from the EU budget. Therefore, it is important to follow up such cases and to examine whether the cancellation of the debt as reported by the Member State is fully justified and that the appropriate level of possible appeal has been fully explored by the Member State.

53. The Commission reported that it followed up 23 such cases above 1 million euro each for the financial years 2006 and 2007[30]. However, the Commission does not, for non-legal cases, assess the basis for the cancellation of the case and, for judicial cases, does not evaluate the possibilities for appeal to higher judicial instances and whether such possibilities were pursued. Whilst the certification bodies in the Member States examine such cases, the scope of their analysis is limited to verifying that a basis exists for the authorities to cancel the cases (e.g. the existence of a decision) and not whether that decision could and should have been appealed to a higher level. The relevant Commission guidelines issued to the certification bodies do not provide sufficient detail in respect of the work to be done. In total, between 2006 and 2009, debts with a value of 455 million euro were cancelled by the Member States, 261 million euro of which related to a relatively limited number of large cases (46) over 1 million euro.

[30] Commission reply No 632128 of 15 September 2010 to the Court's observation letter PF-3814 of 2 June 2010.

DOES THE COMMISSION SUPERVISE AND MONITOR RECOVERIES EFFECTIVELY?

54. The Commission has the responsibility to supervise Member State management and administration of agricultural spending, including action taken on recoveries. It is required to:

— publish complete and accurate information on debts and recoveries in the annual accounts, based on the data submitted by the national authorities;

— issue clear and unambiguous guidance on the application of the legislation;

— apply effective clearance mechanisms — including the 50/50 rule — to identify non-compliance with regulations, and impose corrections on Member States accordingly;

— finalise the work of the task force on recoveries for pre-2006 debts; and

— make appropriate use of the information provided by Member States on individual debts.

The Court assessed the operation of these various mechanisms, and checked whether they were being applied as intended, and were effective in protecting the financial interests of the Union.

WHAT DOES THE COMMISSION REPORT?

55. The Commission publishes information on the recovery of undue payments in notes to the annual accounts of the European Union. The Commission also reports annually to the European Parliament and the Council on the protection of the EU financial interests and the fight against fraud, including a section on recoveries for agriculture.

56. Information on the situation on recoveries in the Member States is reported yearly by the PAs in separate tables (Annex III and Annex IIIA data) in their annual accounts[31]. This information is also used as a source of information on recoveries provided in the Annual Activity Report (AAR) of the Director-General of DG AGRI.

[31] Cf. Commission Regulation (EC) No 885/2006.

57. ***Table 5*** shows the figures presented in the annual accounts of the European Union give the following picture with regard to EAGF debt.

58. The amounts presented in the annual accounts are significantly lower than those recorded in the Member States' debtors' accounts as they are adjusted downwards in accordance with recognised accounting policies and the principle of prudence. The adjusted figures reflect the fact that Member States may retain 20 % of any recovery, amounts already subject to 50 % clearance and to take account of what the Commission considers will not be recovered. In making this annual adjustment, the Commission applies an algorithm which, inter alia, takes into account the age of the outstanding debts. A table showing the various adjustments made to the figures is incuded at ***Annex III***.

59. ***Table 6*** shows the analysis of the figures published in respect of the 'recovery' of undue payments in the annual accounts of the European Union.

TABLE 5

OUTSTANDING DEBT AS SHOWN IN THE ANNUAL ACCOUNTS (MILLION EURO)

Year	2006	2007	2008	2009
EAGF gross receivables outstanding as at 31 December	1 009	902	684	627
Write-down	(477)	(483)	(392)	(350)
Net amount	532	419	292	277

60. There are significant differences between the above figures for debts (see ***Table 5***) and recoveries (see ***Table 6***) as presented in the accounts and the aggregate of those sums in the Member States' records (see ***Table 2***). This is partly explained by the different dates on which each of the figures is established. While a large proportion of these differences could be explained by the Commission services, important unexplained differences remained due to the absence of a regular reconciliation procedure. In addition, the treatment of certain debts arising as a result of the restructuring of the sugar market resulted in an overstatement of the 2007 accounts by some 104 million euro (see ***Annex III***).

61. The vast majority (some 87 % over the four years) of the 'recoveries' of undue payments reported in the annual accounts are the result of corrections by the Commission through the clearance of accounts procedures. These are in the main not linked to individual debts or irregular payments found. These corrections are borne by the taxpayers in the Member States concerned and are not an actual repayment of funds from a beneficiary unduly paid. It was therefore inappropriate to describe them as 'recoveries' in the accounts up until 2008.

TABLE 6

'RECOVERY' OF UNDUE PAYMENTS IN THE ANNUAL ACCOUNTS (MILLION EURO)

Financial year	2006	2007	2008	2009
Amounts recovered from beneficiaries and reimbursed by the Member States	108 (11 %)	115 (13 %)	129 (10 %)	132 (21 %)
Corrections applied by the Commission and recovered from the national authorities	839 (89 %)	739 (87 %)	1 148 (90 %)	493[1] (79 %)
Total	**947**	**854**	**1 277**	**625**

[1] The marked decrease in corrections in the 2009 accounts is explained by the Commission as being due to 368 million euro of clearance being 'non-implemented' at the end of 2008 (see Note 6.2.2 to the Annual Accounts of the EU 2009).

62. For example, in the notes to the annual accounts of the EU for 2008 (Note 2.10 on receivables and Note 6 on recovery of undue payments) the total debt as regards EAGF was stated at 684 million euro and some 1 277 million euro was shown as having been recovered in that year. Analysis of the 1 277 million euro shows that 129 million were recoveries from beneficiaries: the remaining portion of 'recoveries' — 1 148 million euro— comprised corrections imposed on the Member States through the clearance of accounts procedures. However, examination of the Member States' accounts shows that the amount owed to the various paying agencies was 1 246 million euro and the amount actually recovered from beneficiaries was 113 million euro. For 2009, while the Commission distinguishes more clearly between financial corrections and actual recoveries, it is still not possible to determine from the notes to the accounts the precise amount actually recovered from final beneficiaries.

GUIDANCE IS PROVIDED BY THE COMMISSION BUT IS SOMETIMES LATE AND INCOMPLETE

63. The Commission has clarified the application of the legislation in its guidelines to Member States issued in the context of the clearance of accounts. However, the annual updates applicable to the financial years 2006, 2007, 2008 and 2009 did not allow for PAs to fully adapt their systems, which created problems for Member States in ensuring those guidelines were fully complied with.

64. The Court has identified cases in Member States where the responsible authorities were unclear on how to deal with certain specific circumstances following the application of the 50/50 rule. These circumstances can lead to Member States not being reimbursed[32] or the budget being credited with more than it should have been.

[32] Example: PA Niedersachsen: 508 000 euro for amounts cleared twice by the Commission and not reimbursed within 20 months after the PA's request (situation as at January 2011).

FINANCIAL CLEARANCE: THE COMMISSION ACCEPTS THE DEBTORS ACCOUNTS AND CHARGES MEMBER STATES UNDER THE 50/50 RULE

65. Through the annual financial clearance of accounts decision the Commission has to determine the expenditure it accepts (subject to further audit) in each Member State on the basis of the accounts transmitted by the PAs.

66. The reliability of the PA's annual accounts, including the debtors' accounts, is verified by the independent certification bodies, which report to the Commission and issue an audit certificate. This system has been the subject of continuous updating and improvement by the Commission and the debtor's accounts are now more complete and more rigorously checked than they were at the time of the Court's previous report.

67. As from the financial year 2006, the financial clearance decision has included the amount to be charged to Member States' budgets as a result of the application of the 50/50 clearance mechanism[33]. Member States have been charged with the amounts shown in ***Table 7***. The table shows the predominant impact so far of the system was in eliminating old debts from the records. Its impact was greatest at the start of the procedure, where large numbers of old debts were subjected to the 50/50 rule and Member States charged as a result.

[33] Article 32(5) of Council Regulation (EC) No 1290/2005.

TABLE 7

AMOUNTS CHARGED TO MEMBER STATES UNDER THE 50/50 RULE (MILLION EURO)

	For 2006	For 2007	For 2008	For 2009
Charged to Member States under the 50/50 mechanism by Commission decisions	231,9	137,6	31,4	22,8

AMOUNTS CAN 'ESCAPE' THE 50/50 CLEARANCE PROCEDURE

68. The original amount of the debt may subsequently have to be adjusted upwards once there is a final decision from an administrative or judicial authority. These adjustments should also be subjected to the 50/50 clearance mechanism. However, if the amounts originally recorded as a debt have already been subjected to the mechanism, the adjustment may 'escape' or avoid clearance, particularly when they are accounted for under the same case identification number and the same financial year of primary finding of the irregularity. The same applies to any interest calculated on the debt.

69. The Court identified a total of 37,9 million euro as 'escaping' or avoiding clearance in the years 2006–09 in this way. If the 50/50 rule had been applied on this amount, it would yield another 18,9 million euro for the EU budget. The Court's analysis showed that the amounts 'escaping' clearance in this way outweigh the potential adjustments in the opposite sense, i.e. where the amount of the debt recorded in the Member State's accounts is reduced after the application of the 50/50 rule. The lack of clarity in the Commission's guidelines is partly responsible for these cases escaping the clearance mechanism and, although the Commission is aware of the circumstances, it has not reacted in a timely manner to remedy this situation. These findings were confirmed during the Court's on-the-spot audits.

TABLE 8

SHOWING THE IMPACT OF THE APPLICATION OF THE 50/50 MECHANISM IN REGARD TO THE MEMBER STATES

Member State	BE	DE	EL	ES	FR	IT	NL	PT	UK	Other MSs	Total
Amounts (in thousand euro)	8 046	31 975	15 954	44 611	43 944	245 963	7 158	9 644	10 618	5 874	**423 787**
%	1,9	7,5	3,8	10,5	10,4	58,0	1,7	2,3	2,5	1,4	**100,0**

SPECIFIC AUDITS ON DEBTS BY THE COMMISSION UNDER CONFORMITY CLEARANCE

70. The current legal framework[34] provides the Commission with the possibility to initiate the recovery from Member States through its own audit work during the conformity clearance of accounts procedure for specific reasons related to debt management.

71. The Court examined the work done by the Commission under conformity clearance procedures, but only where the decisions specifically dealt with debt management in the period 2006 to 2009. These procedures have not yet been fully concluded and, consequently, no recoveries from Member States through corrections have been proposed.

72. With regard to the Commission's audits, they were mainly focused on systems examination, but also covered a sample of 207 cases. For a certain number of them, the initial assessment of the Commission services, communicated to Member States[35], was that certain amounts not recovered could be subject to potential corrections and be recovered directly by the Commission from the Member State. The financial impact is estimated at 27,2 million euro and covers eight Member States (Belgium, Denmark, Germany, Greece, Spain, France, Italy and the UK).

[34] Article 32(4) and (8) of Council Regulation (EC) No 1290/2005.

[35] Formal notification pursuant to Article 11(2) of Commission Regulation (EC) No 885/2006.

TABLE 9

SHOWING THE MEMBER STATES AFFECTED BY AMOUNTS ESCAPING CLEARANCE

Member State	DE	EL	ES	FR	IT	Other MSs	Total
Total (in thousand euro)	535	1 129	17 127	8 070	10 637	381	**37 879**
%	1,4	3,0	45,2	21,3	28,1	1,0	**100,0**

THE 'BURDEN OF THE PAST', INCLUDING OLD TASK FORCE RECOVERY CASES, NEEDS TO BE LAID TO REST

73. The Court's previous report, published in 2004, found serious weaknesses in the treatment of debt and recovery. Thousands of old cases had been neglected due to weaknesses in previous procedures. These were to be decided upon by the Commission with the financial burden falling either to EU budget or to the Member State concerned.

74. In 2002, the Commission had set up an OLAF–AGRI Task Force Recovery (TFR) with a view to clearing irregularity cases notified under the old regulatory framework. Because of the large number of pending cases, the Commission decided to concentrate its work on cases above 500 000 euro.

— At that time 431 cases were above that threshold and 3 227 cases below it. By 3 October 2006[36], just before the new regulation came into force, 349 cases above the threshold had been cleared.

— All cases outstanding as at 15 October 2006, including the 82 (431–349) TFR cases that had not been treated and the 3 227 lower-value cases, were reported as having been cleared under the new 50/50 rule for 2006.

— A further conformity clearance decision of 13 February 2009 covered an additional 22 TFR cases (out of the remaining 82)[37], two of which were recovered twice (under the 50/50 rule and by conformity clearance decision).

— However, seven TFR cases, (Germany 1, Greece 3, France 1, Italy 1 and Portugal 1) worth 16,3 million euro were kept outside the Annex III table and not cleared 50/50 and are the subject of continuing clearance procedures in view of a final Commission decision.

— The Commission requested further information from Member States in 2009 concerning 49 outstanding old TFR cases as these cases could not be identified by the Commission in the Annex III tables. These procedures are still ongoing.

[36] Commission Decision 2006/678/EC of 3 October 2006 (OJ L 278, 10.10.2006, p. 24): Approximately 98 % of the amounts charged to the Member States concerned Italy, 311 million euro for 157 cases of irregularities. On 11 December 2006, Italy brought an action against the Commission (Case T-394/06); the case is pending before the ECJ.

[37] On 14.4.2009, Greece brought an action against the Commission concerning 13 cases of irregularity of 13,3 million euro, pleading, inter alia, that Council Regulation 1290/2005 was not applicable for old cases (Case T-158/09); the case is pending before the ECJ.

75. In addition to the 49 old task force cases that remain undecided, the Court's audit also found that the application of the 50/50 rule to cases initially foreseen to be treated by the task force but still open at 16 October 2006 led to inconsistent treatment of debtors relative to those cases already closed. Details of these cases are given in ***Annex IV***.

INFORMATION ON IRREGULARITY IS SENT TO OLAF TOO LATE

76. Following the Court's previous audit and subsequent to the adoption of the new regulatory framework DG AGRI became responsible for financial follow up and communications relating to debt and irregularity were routed to OLAF through it. The change in procedures was intended to place responsibility for follow-up with DG AGRI, the service that in effect paid out the monies to be recovered, whilst at the same time retaining the flow of information on irregularity to OLAF. The information made available to OLAF is intended for strategic intelligence purposes, namely risk analysis, fraud proofing and prevention, and not for financial follow-up as such.

77. The Court found that the information made available to OLAF is extensively used for reporting purposes, notably in the context of the OLAF annual activity report, the Commission report to the European Parliament and to the Council on the protection of the Communities' financial interests and the fight against fraud and other publications that are distributed to the Member States. However, at operational level both within OLAF and at the Commission, only limited use appears to be made of the database for analysis and strategic intelligence. This is, in part, due to the long delays which can occur in practice between the detection of a potential irregularity and its notification to the Commission under the new regulatory framework.

78. Currently OLAF, in recognition of the above limitations, is studying the possibility of proposing a modification of Commission Regulation (EC) No 1848/2006 in order to achieve two different objectives:

— to considerably reduce the long delays currently occurring between the detection of an irregularity and its notification to OLAF, from the Member States via DG AGRI;

— to further improve the content of the communications, in particular regarding certain key information necessary for the purposes of risk analysis, fraud proofing and prevention.

CONCLUSIONS AND RECOMMENDATIONS

79. The Court's audit of the systems established and operated by Member States to recover identified debts, together with the Commission's supervision of the process, concludes that overall they have improved since 2004. The systems are now more effective in protecting the EU's financial interests, particularly through the arrangements introduced for repayment by Member States to the EU of a proportion of unrecovered debts (the 50/50 rule). However, the system needs to be further improved by clarifying the rules, thereby reducing the scope for interpretation and diverging practices adopted by the Member States.

80. For the most part, Member States process and record debts in accordance with the rules and requirements. However, there are sometimes signficant differences in interpretation: debts are recognised at different times; reported figures are not comparable; interest is applied inconsistently and the date and the circumstances whereby debts are written off vary considerably. In general, the margin of interpretation granted to the Member States allow them to take decisions which have a negative financial impact on the EU budget.

81. Member States are now recovering a greater proportion of new debts, although the Court notes that the amounts being recorded as new debts have reduced. The Court found the likelihood of recovery of an undue payment to be adversely affected by the frequent long delays in the Member States' initiation of recovery procedures, shortcomings in the action they take, and the limited enforcement possibilities available to them.

82. While Member States generally write off debts in accordance with the rules, a lack of clarity in these rules means that there are considerable differences in the circumstances in which this happens. In particular, the point in the insolvency procedure where write-off occurs can differ between Member States. Such issues have particular significance as written-off debt is not subject to repayment to the EU budget within the 50/50 rule.

RECOMMENDATION 1

The Commission should further improve the way in which debts in the Member States are managed and reported upon and ensure a consistent treatment of those debts, across all Member States. In particular, it should:

— request Member States to report irregularities and other recoveries once they become legally due, notably at the time the recovery notification has been drawn up;

— issue guidelines in a timely manner to address current inconsistencies in key reporting and accounting concepts;

— introduce a uniform time limit between the discovery of a potential irregularity and the notification of the recovery order to the debtor, enhancing harmonisation between Member States and ensuring a more timely transmission of information on irregularities to OLAF;

— issue clear and unambiguous rules in relation to the application of interest on outstanding debt;

— clarify the circumstances under which debts can be declared as irrecoverable, in particular in relation to insolvency cases.

83. In relation to the Commission's supervision and monitoring, the Court found that the information provided in the annual accounts has improved, although the distinction between recoveries from individual beneficiaries — currently only 13 % of the total — and amounts repaid by Member State authorities (financed by national taxpayers) is still insufficiently clear. The Commission does not systematically reconcile the various sources of information, notably the aggregate data in the Member States' records, with the figures in the EU accounts, which reduces transparency and diminishes the possibility of identifying errors in the data. The Commission now provides more guidance to Member States, but it is sometimes late and incomplete. The task force set up in 2002 to resolve the treatment of previous unrecovered debts has completed its work, however the follow-up of certain cases remains to be finalised.

84. The introduction of the 50/50 rule, a key element of the 2006 framework, was intended to incentivise Member States to speed up the recovery procedures for reported debt. It represents an improvement on the previous situation whereby unrecovered debt was allowed to remain in the accounts for many years. However, the rule also introduces a risk that Member States 'manage' the reporting and write-off process to their advantage, notably to avoid or postpone its application (and resultant charge to the national budget). The Court's work showed this risk to be real in terms of:

— in the case of insolvency, writing off of the debt before it was fully justified to do so;

— delaying the date of recognition of the debt, thereby postponing the application of the rule.

RECOMMENDATION 2

The Commission should therefore:

— review specific aspects of the application of the 50/50 rule, for example amounts that potentially escape clearance, to ensure its effective application;

— ensure that the work of the certification bodies, in their testing of debtors' accounts in the Member States, covers the risks highlighted;

— consider how to recover a greater proportion of undue payments from beneficiaries;

— finalise the follow-up of the old Task Force Recovery cases as soon as possible.

This report was adopted by Chamber I, headed by Mr Olavi ALA-NISSILÄ, Member of the Court of Auditors, in Luxembourg at its meeting of 8 June 2011.

For the Court of Auditors

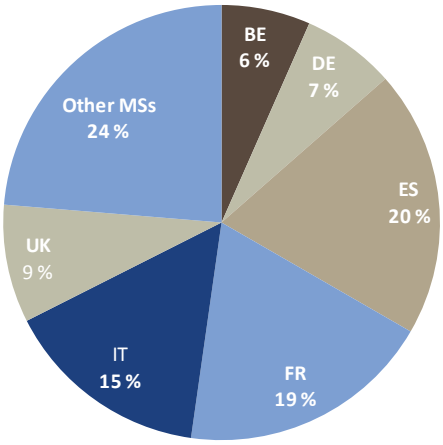
Vítor Manuel da SILVA CALDEIRA
President

ANNEX I

NEW DEBTS RAISED — INCLUDING 'PRE-DEBTORS' FOR 2006–09

An average of 199 million euro per year of new debt — including 'pre-debtors" mainly recorded in France and Italy — has been reported by Member States for the last four years.

NEW DEBTS RAISED 2006–09 (IN %)
TOTAL AMOUNT: 795 MILLION EUR



Member State	BE	DE	ES	FR	IT	UK	Other MSs	Total
Amount (million euro)	52,5	55,1	157,3	150,5	121,8	69,5	188,4	**795,1**

ANNEX II

APPLICATION OF INTEREST IN THE PAYING AGENCIES AUDITED

Code	Authority name	Interest between the date of the undue payment and the date of the recovery order	Interest between the date of the recovery order and the date of repayment	National rules applicable to all measures	Accrued interest at the end of the financial year
BE01	BIRB	Not applied	Rare	Yes	No
BE03	OP Wallonie	Systematic	Occasional	Yes	No
DE02	HZA Hamburg-Jonas	Systematic	Not applicable	Yes	No[1]
DE12	Niedersachsen	Not applicable	Systematic	Yes	No
ES01	Andalucía	Systematic	Rare	Yes	Yes
ES17	AVFGA	Systematic	Rare	Yes	Yes
ES18	FEGA	Systematic	Rare	Yes	Yes
FR14	ONIEP	Not applied	Rare	No	No
FR16	ONIGC	Not applied	Rare	No	No
GB09	RPA	Systematic	Not applied	Yes	No
GR01	OPEKEPE	Occasional	Systematic	Yes	No
HU01	ARDA	Occasional	Occasional	Yes	No
IT01	AGEA	Occasional	Systematic	Yes	Yes
IT02	SAISA	Occasional	Systematic	Yes	Yes

[1] Interest calculations are carried out systematically on a three years basis and communicated to the debtors to avoid the amounts becoming time barred.

ANNEX III

DIFFERENCES BETWEEN DEBTS RECORDED IN MEMBER STATES DEBTORS ACCOUNTS AND THE GROSS RECEIVABLES AS SHOWN IN THE ANNUAL ACCOUNTS

(million euro)

Year	2006	2007	2008	2009
Amounts recorded in Member State debtor accounts as at 15 October (***Table 2***)	1 267	1 437	1 246	1 115
Add: Adjustment for Italy (see endnote 1 of ***Table 2***)	182,0			
Add: Amount of debts outstanding reported by paying agencies in Annex IIIA			39,9	59,3
Add: Adjustments for year-end Oct – Dec	18,1	31,5	2,6	-2,0
Less: Pre-debtors			(152,9)	(163,4)
Subtotal nominal amounts estimated outstanding debts as per 31 December	1 467,1	1 468,5	1 135,6	1 008,9
Less: Amounts subject to 50/50 clearance	(274,4)	(330,1)	(288,9)	(233,8)
Less: 20 % retention allowed to Member States	(203,0)	(227,6)	(163,1)	(148,0)
Subtotal calculated gross amounts for the balance sheet	989,8	910,8	683,6	627,1
Remaining differences: unexplained[1]	19,0	-9,0		
Gross receivables as per annual accounts (***Table 5***) as at 31 December	1 009	902[2]	684	627

[1] The outstanding differences referred to in paragraph 60 are shown in this line of the table.

[2] The figure shown includes the overstated amount in relation to sugar detailed in paragraph 60.

ANNEX IV

LONGSTANDING UNRESOLVED ISSUES OF INCONSISTENT TREATMENT OF IRREGULARITY AND RECOVERY

Concerning the threshold of 500 000 euro that was fixed in the context of the task force recovery, the following example demonstrates the inconsistent treatment of the old cases:

— OLAF Case No DE/92/001: irregularity of 739 092 DM (< 500 000 euro)

— OLAF Case No DE/92/002: irregularity of 4 247 763 DM (> 500 000 euro).

Although both cases stem from the same irregularity, Case No DE/92/001 was cleared 50/50 for 2006, including interest, and subsequently declared irrecoverable by the Hamburg-Jonas PA. The second case, No DE/92/002, is still pending at the Commission and was not cleared in so far as it was excluded — without a Commission decision — by the PA from its Annex III figures. Whatever the final Commission decision may be, the first case has resulted in 50 % being charged to the EU budget whereas the second case will be either 100 % to the charge of the national or 100 % to the charge of the EU budget.

Furthermore, these two cases, provisionally removed from the 1991 clearance decision, came under a budget line that was 100 % excluded from Community financing, confirmed by a Court of Justice judgment on 21 January 1999. The ECJ's judgment could be seen as prevailing and should not be circumvented by the reporting provisions of Council Regulation (EC) No 595/91. Hence, the full amounts for the two cases should have already been excluded from Community financing in 1999. The financial impact to the EU budget is calculated as at 2,35 million euro.

ANNEX IV

EXPORT REFUND CASE IN ITALY

In 1996, the Commission disallowed from Community financing an amount of 118,1 million euro because of negligence on the part of the Italian authorities related to one beneficiary (Commission Decision No 96/311/EC). In 2006, debts of the same beneficiary of 2,9 million euro were cleared 50/50 as not been declared as irrecoverable by the Italian PA (SAISA). This amount is subject to a Commission investigation. In 2007, the Italian PA, contrary to its 2006 approach, has, with the acceptance of the Commission, written off an amount of 117 million euro because of insolvency proceedings for the beneficiary. The Commission's handling of the case, i.e. to accept a write-off of 117 million euro in 2007 and to investigate further into a smaller amount of 2,9 million euro without considering the negligence element decided upon in 1996, appears to be questionable.

REPLY OF THE COMMISSION

EXECUTIVE SUMMARY

III.
The Commission considers that the new clearance mechanism for irregularity cases introduced in 2006 has led to a significant improvement of the situation, both as regards the rate of recovery from final beneficiaries and the protection of the financial interest of the EU against deficient recovery procedures by Member States.

III. first indent
The Commission considers that the risk referred to by the Court in its observation is already addressed through the work of the certification bodies and its own conformity audits.

Where such shortcomings materialise, the resulting financial risk is addressed through financial corrections under Article 32(4) and (8) of Regulation (EC) No 1290/2005.

III. second indent
The fact that the application of the new regulatory concepts do not result in a uniform practice throughout all Member States is the inevitable consequence of the fact that the rules for the recovery of irregular payments have not been harmonised at EU level, but essentially continue to be a matter of national law.

The Commission checks the correct implementation of recovery procedures by Member States in the context of its conformity audits.

REPLY OF THE COMMISSION

III. third indent
The new clearance mechanism introduced by Regulation (EC) No 1290/2005 provides a strong incentive for Member States to complete recovery of undue payments from the beneficiaries as quickly as possible. As a result, by the end of financial year 2010, more than 40 % of the new EAGF debts from 2007 and thereafter have already been recovered, which is a significant improvement compared to the past.

III. fourth indent
Any delay in the transmission of such information to OLAF does not have any implications for the operation of the clearance mechanism for irregularities under Regulation (EC) No 1290/2005 (which is based on the Annex III table).

IV. first indent
The Commission will consider possible modifications to the current rules on the recording and reporting of irregularities and other debts in the context of its legislative proposals for the CAP towards 2020.

IV. second indent
The Commission has already issued gtidelines to clarify the reporting and accounting concepts. With the exception of the first year (2006), guidelines were always issued in July and, thus, more than half a year before the reporting deadline to the Commission. As the guidelines need to take account of the experience from the previous financial clearance exercise, it is not possible to advance this date further. Moreover, since the last regulatory change in October 2007, the guidelines have essentially remained stable.

IV. third indent
These time limits are already set in relevant case law and in Regulation (EC) No 1290/2005. It follows from the judgments in Case C-34/89 (points 12–13) and Case C-54/95 that the Member State cannot be inactive in a given case for more than one year and that within a four-year period from the moment of the first indication of an irregularity the investigation must normally be concluded and a decision on the initiation of recovery procedure be taken. The Commission will consider clarifying Member States' obligations in this respect in the context of its legislative proposals for the CAP towards 2020.

IV. fourth indent
The Commission considers that Guideline No 1 provides sufficiently clear guidance on the calculation and reporting of interests in the context of the annual financial clearance exercise. Furthermore the legal obligation to report interest as accessory of principal amounts was confirmed by the European Court of Justice in its judgement in joined cases T-274/08 and T-275/08. The Commission agrees, however, that the reporting of some Member States is deficient in this respect and is pursuing these deficiencies in the context of its conformity clearance procedures. The Commission is currently considering harmonising the substantive rules on the recovery of undue payments, including those on interests, thereby overcoming the differences resulting from the application of national rules.

IV. fifth indent
Article 32(6)(b) of Regulation (EC) No 1290/2005 explicitly provides that the decision to write off a debt as irrecoverable due to the insolvency of the debtor shall be based on an act recorded and recognised under the national law of the Member State concerned. The Commission verifies whether any such decision is properly justified in the context of its conformity audits and is providing feedback and recommendations to the Member States concerned on their administrative practice.

REPLY OF THE COMMISSION

IV. sixth indent
The 50/50 rule is applied on the outstanding amounts as they are reported in the Annex III table of Regulation (EC) No 885/2006 for the year in question. The financial result is not adapted retroactively to take account of either negative or positive corrections reported by Member States in subsequent years. This is the logical consequence of the automatic nature of this new clearance mechanism and follows from the explicit choice made by the EU legislator to limit any *ex post* rectifications to cases where the absence of any irregularity is recorded by an administrative or judicial act of a definitive nature (Article 32(5), fourth paragraph, of Regulation (EC) No 1290/2005).

IV. seventh indent
Some of the cases initially audited by the Task Force had to be left open because the recovery procedures were still ongoing and there was no negligence on the part of the Member State concerned. These cases were subsequently subject to the new clearance mechanism of the 50/50-rule.

V.
According to accounting rules, the Commission has to show the position of its debts and account for its own recoveries, including both recoveries from final beneficiaries and financial corrections from Member States. The Commission considers it inappropriate to compare the recoveries from final beneficiaries to the total amounts recovered by the Commission, which include financial corrections imposed on Member States.

VI.
According to the principle of shared management, the recovery of irregular payments from the beneficiaries is the sole responsibility of Member States. However, the financial corrections imposed on Member States under the clearance of accounts system, including the application of the 50/50 rule, are a strong incentive for them to improve their management and control systems including those relating to recovery of funds unduly paid because of irregularities and fraud, and, thereby, contribute to the legality and regularity of the transactions at final beneficiary level and to a faster recovery of irregular payments.

INTRODUCTION

6–7.
The percentage of recovery given in Table 2 does not take account of recoveries made by Member States before 2006. The Commission has calculated the overall recovery rates from final beneficiaries which, with above 40 %, show a considerably more positive result than the one presented by the Court. This is due to the introduction of the new clearance mechanism through Regulation (EC) No 1290/2005, which provides a strong incentive for Member States to complete recovery of undue payments from the beneficiaries as quickly as possible.

8.
Pursuant to Article 9(1)(a) of Regulation (EC) No 1290/2005 and in accordance with the principle of shared management, Member States are solely responsible for the recovery of debt amounts from the final beneficiaries. In case of recovery the Member State credits the sums recovered to the EU budget (Article 32(1) of the same regulation). Under shared management the Commission is entitled to receive assigned revenue from the Member States.

REPLY OF THE COMMISSION

11.
The Commission considers that the risks referred to by the Court are already addressed through the work of the certification bodies and its own conformity audits.

Where the risks referred to by the Court materialise, the resulting financial risk is addressed through financial corrections under Article 32(4) and (8) of Regulation (EC) No 1290/2005.

14.
See the Commission's reply to points 61–62.

OBSERVATIONS

19.
The amounts to be excluded from EU financing due to administrative errors as well as the information to be provided by Member States in the Annex III tables are verified and certified by independent audit bodies, the so-called certification bodies (CB). Deficiencies and inaccuracies detected by these certification bodies in this context are followed up by the Commission through conformity clearance procedures.

Moreover, the Commission verifies the Member States' classification and reporting of irregularities, administrative errors and other amounts to be recovered in the context of its conformity audits and, just like the Court, has detected cases of non-compliance which are now pursued with a view to proposing financial corrections for the amounts involved.

20.
In the case of Denmark, the CB revealed material errors in the course of its substantive testing of Annexes III and IIIA for financial year 2008, due to internal inconsistencies in the tables. Subsequently, the Commission services launched conformity enquiries and carried out audit missions to both the paying agency and the CB. Remedial actions were taken by the Danish authorities and new corrected Annexes III tables were submitted for financial year 2008, which were certified by the CB. Regarding financial year 2009, the material error identified by the CB in the substantive testing of Annexes III and IIIA related once again mainly to reporting/recording issues between the various columns of the tables. Here too, on the basis of the CB's work, the Commission launched a conformity enquiry. The situation has also been corrected by the Danish authorities and new tables submitted in September 2010, after having been reviewed by the CB. It is also to be noted that the corrections in the Annex III tables did not put into question the fair statement of recoveries declared as assigned revenue in the monthly declaration of expenditure (T104), and had no impact on the year-end outstanding balance of the debts.

REPLY OF THE COMMISSION

In the case of Italy, the annual accounts related to financial years 2004, 2005 and 2006 for AGEA could not be cleared in the original clearance decisions, as the CB concluded that the reporting of debts by the paying agency was unreliable. Consequently, the paying agency was requested to take corrective measures in order to ensure a correct reporting of debts and the CB was requested to carry out additional testing, in order to confirm the corrective measures implemented by the paying agency. On-the-spot missions were also carried out in the course of 2007 by the Commission services. As a result of this additional work carried out by the paying agency, the CB and the Commission services it was possible finally to establish a correct, outstanding balance of debts for financial year 2006 (487 million euro, thus 178 million euro lower than the figures initially communicated). Subsequently, the accounts were cleared, with proposals of financial correction to cover the remaining conformity issues.

22.
The Commission's interpretation of the concept of the primary administrative or judicial finding is clearly set out in Guideline No 2 and no substantive changes have been made to this interpretation since it was first introduced in 2006. It implies, in particular, that both pre-debts and debts have to be included in the Annex III table.

It follows from Article 35 of Regulation (EC) No 1290/2005 that the date of the primary administrative or judicial finding corresponds to the date when the three conditions set out in Guideline No 2 are met for the first time. Cases where Member States establish the primary administrative or judicial finding at a later date are pursued through conformity clearance procedures. However, due to the fact that the national procedures for the recovery of irregular payments differ between Member States, the type of document which satisfies the three conditions for the first time may also be different in each Member State.

The regulation does not fix indeed a time limit for the notification of a debt following a check. The time limit can however be deducted from relevant case law. It follows from the judgments in Case C-34/89 (points 12 – 13) and Case C-54/95 that the Member State cannot be inactive in a given case for more than one year and that within a four-year period from the moment of the first indication of an irregularity the investigation must normally be concluded and a decision on the initiation of a recovery procedure be taken. The Commission will consider clarifying Member States' obligations in this respect in the context of its legislative proposals for the CAP towards 2020.

23.
The Commission has provided a uniform set of criteria for the application of the concept of primary administrative of judicial finding in its Guideline No 2 and verifies Member States' compliance with these criteria in the context of its conformity audits. The fact that the application of this concept does not result in a uniform practice throughout all Member States is the inevitable consequence of the fact that the rules for the recovery of irregular payments have not been harmonised at EU level, but continue to be a matter of national law.

The notion of pre-debt does not exist in all the Member States.

REPLY OF THE COMMISSION

24.
As regards the situation in Spain, the Commission shares the Court's assessment and is pursuing the issue in the context of its ongoing conformity clearance procedures. It has requested the Spanish authorities to bring their administrative practice in line with Guideline No 2 by considering the '*acuerdo de inicio*' as the primary administrative or judicial finding. Spain reported its irregularity cases in the Annex III table for financial year 2010 according to this requirement.

As regards the situation in France, two paying agencies initially tried to change their administrative practice for financial year 2009, but at the insistence of the Commission eventually reverted back to their previous practice and, thus, ensured compliance with Guideline No 2 before the end of the financial clearance exercise.

25.
Cases where the primary administrative or judicial finding is not established in compliance with the rules are pursued through conformity clearance procedures.

26.
See the Commission's reply to point 22.

27.
The Commission has provided guidance on the interpretation of irregularities and administrative errors in its Guideline No 1 and is verifying whether Member States comply with this interpretation in the context of its conformity audits.

29.
The amounts to be excluded from EU financing due to administrative errors as well as the information to be provided by Member States in the Annex III tables are verified and certified by the certification bodies. Deficiencies and inaccuracies detected by the certification bodies in this context are followed up by the Commission through conformity clearance procedures.

Moreover, the Commission verifies the Member States' classification and reporting of irregularities, administrative errors and other amounts to be recovered in the context of its conformity audits and, just like the Court, has detected cases of non-compliance which are now pursued with a view to proposing financial corrections for the amounts involved.

30.
The Commission has identified similar problems and has improved its guidelines as of 2008 with a view to clarifying the concept of administrative error. Moreover, cases where the delimitation between irregularities and administrative errors is not respected by Member States in their administrative practices are followed up through conformity clearance procedures.

31.
The Commission agrees with the Court that cases may be an irregularity, and as such would be subject to the 50/50 rule, even if they are covered by a guarantee, and it is pursuing this issue with the Member State concerned (Germany, France) in the context of a conformity clearance procedure initiated in 2009 and 2011.

REPLY OF THE COMMISSION

Box 2
The nature of cases reported in the Annex IIIA table is under discussion with the French authorities in the context of the ongoing conformity clearance procedures.

33.
The Commission considers that Guideline No 1 provides sufficiently clear guidance on the calculation and reporting of interests in the context of the annual financial clearance exercise. Furthermore the legal obligation to report interest as accessory of principal amounts was confirmed by the European Court of Justice in its judgement in joined cases T-274/08 and T-275/08.

The Commission currently considers harmonising the substantive rules on the recovery of undue payments, including those on interests, thereby overcoming the differences resulting from the application of national rules.

34.
The proper application of interests by the paying agencies is systematically verified by the Commission in the context of its conformity audits on recoveries (as well as its accreditation audits). There are currently conformity procedures ongoing in this respect against 9 Member States.

35.
The Commission's requirement on interest is limited to the interest being reported and updated every year in the Annex III table in each case, including the pre-debts. Member States are responsible whether to communicate the interest amounts to the (potential) debtor immediately after the update as at 15 October each year or only at a later stage. In the case of pre-debts invoicing of interest would be even impossible as the recovery order for the irregular amount itself is not invoiced until the pre-debt is converted into a confirmed debt.

37.
The percentage of recovery given in Table 2 does not take account of the recoveries made by Member States before 2006. The Commission has calculated the overall recovery rates from final beneficiaries which, with above 40 % show a considerably more positive result than the one presented by the Court. This is due to the introduction of the new clearance mechanism through Regulation (EC) No 1290/2005, which provides a strong incentive for Member States to complete recovery of undue payments from the beneficiaries as quickly as possible.

40.
See the Commission's reply to Box 4 below.

Box 4
The Commission systematically checks the timely initiation of recovery procedures during its audits and unjustified delays are followed up in the context of conformity clearance procedures, including for the two Member States referred to by the Court.

41.
Under the new clearance mechanism, all cases are subject to the 50/50 rule. The system therefore no longer requires an exhaustive review of all individual cases. In accordance with its Communication of 27 November 2007, the Commission systematically reviews cases where the amount outstanding, written off or corrected to zero exceeds 1 million euro. Moreover, cases below 1 million euro are included in the sample which the Commission checks in the context of its on-the-spot audits. In the case of negligence by Member States in the recovery procedure, the Commission is applying a financial correction under Article 32(4) and (8) of Regulation (EC) No 1290/2005 in the context of its conformity procedures.

REPLY OF THE COMMISSION

41. fourth indent
The Commission does not evaluate the possibilities for appeals against judgments from lower courts, since in a Union of law which is based on the principle of separation of powers, a judgment of a national court is respected by the Commission, except in exceptional cases where there are indications of obvious and grave violations of EU law, as reflected in the jurisprudence of the European Court of Justice.

41. fifth indent
In the case of negligence by Member States in the recovery procedure, the Commission is applying a financial correction under Article 32(4) and (8) of Regulation (EC) No 1290/2005 in the context of its conformity procedures.

43. first indent
According to Article 5b of Regulation (EC) No 885/2006, the off-setting is made compulsory for the Member States to apply only once the debt has been established in conformity with national law.

43. second and third indent
The Commission also noted during its audits that the enforcement activities are undertaken in the majority of the Member States by enforcement bodies which are external to the paying agencies. However, as recovery is governed by national rules any other enforcement power for the paying agencies would have to be provided for in national law.

43. fifth indent
As recovery is governed by national rules, any such provisions would have to be provided by national law.

44.
The Commission considers that the risk that debts are written off prematurely is adequately addressed through the work of the certification bodies and its own conformity audits.

In accordance with its communication of 27 November 2007, the Commission systematically reviews cases where the amount outstanding, written off or corrected to zero exceeds 1 million euro. Moreover, cases below 1 million euro are included in the sample which the Commission checks in the context of its on-the-spot audits. If the grounds for the write-off are not well-founded, a financial correction can be imposed on the Member State concerned under Article 32(8)(b) of Regulation (EC) No 1290/2005.

46.
The 2006 figure is influenced by the retroactive application of the 50/50 mechanism; the 2007 figure is strongly influenced by one case amounting to 117,1 million euro.

In the insolvency cases, the debtor is usually bankrupt already when the recovery procedure starts, or it is the recovery procedure itself which results in the insolvency of the debtor. In these cases, the declaration of irrecoverability is made within four to eight years after the PACA and the loss is borne by the EU budget.

REPLY OF THE COMMISSION

During the annual certification exercise, the certification bodies are testing on a sample basis if these decisions are properly founded.

Cases written off with an amount exceeding 1 million euro are systematically audited by the Commission. Moreover, cases below 1 million euro are included in the sample which the Commission checks in the context of its on-the-spot audits.

47. first indent
Under Article 32(6)(b) of Regulation (EC) No 1290/2005, the insolvency of the debtor shall be established in accordance with the national insolvency law of the Member State concerned. Since the insolvency laws differ between Member States, both the timing of the decision not to pursue recovery due to the insolvency of the debtor and the type of documents supporting that decision indeed do vary across the Member States, and it is not possible to provide uniform guidance on the application of this provision at EU level. However, the Commission is verifying the Member States' administrative practice under this provision in the context of its conformity audits and proposes financial corrections where the decision not to pursue recovery cannot be justified by appropriate supporting documents. In this context, provisional or informal findings of insolvency cannot be accepted as justification.

Guideline No 5 requires the certification bodies to check and conclude whether proper justifications are provided for those cases where the paying agencies decide not to pursue recovery. An analysis of the certification reports received shows that in the far majority of cases the required audit work was done and the certification bodies concluded positively.

48.
Amounts can be declared irrecoverable in the Annex III table if the conditions under Article 32(6) of Regulation (EC) No 1290/2005 are fulfilled. However, if national law does not provide for writing off debts in the debtors' ledger (like in Germany) the cases continue to be registered in the debtors' ledger. The Commission is informed about these amounts by the reconciliation made by the certification bodies between in the Annex III table and the debtors' ledger during the annual clearance exercise.

49.
See the Commission's reply to point 47.

Box 6
The case is subject to a conformity clearance procedure (IR/2009/010/DE).

51.
Article 5a of Regulation (EC) No 885/2006 fixes a uniform de minimis threshold of EUR 100 for the application of Article 32(6)a of Regulation (EC) No 1290/2005. However, it follows from the first recital of Regulation (EC) No 1034/2008 that the introduction of this threshold does not prevent Member States from applying the said Article 32(6)(a) to cases exceeding 100 euro, if properly justified. The Commission discussed the higher thresholds applied by RPA with this paying agency and agreed to its application.

52.
In accordance with its Communication of 27 November 2007, the Commission systematically reviews cases where the amount outstanding, written off or corrected to zero exceeds 1 million euro. Moreover, cases below 1 million euro are included in the sample which the Commission checks in the context of its on-the-spot audits. The review of these cases so far shows that the cancellation in most of these cases is properly justified.

REPLY OF THE COMMISSION

53.
In the context of its reviews of individual irregularity cases the Commission assesses whether the negative corrections are properly justified by supporting documents. In contrast, it normally does not evaluate the possibilities for appeals against judgments from lower courts, since in a Union of law which is based on the principle of separation of powers, a judgment of a national court is respected by the Commission, except in exceptional cases where there are indications of obvious and grave violations of EU law, as reflected in the jurisprudence of the European Court of Justice.

Finally, it should be noted that the certification bodies carry out substantive testing on the column 'corrected amount' of the Annex III table, which provides reasonable assurance that the amounts corrected are properly justified.

In the Annex III tables of financial years 2006 and 2007, the Commission identified 44 cases with a negative correction exceeding 1 million euro, all together amounting to 256,9 million euro. All these cases have been or are being followed up.

For the amounts exceeding 1 million euro in the Annex III tables of 2008 and 2009 (15 cases), desk audits will be launched in the course of 2011.

60.
The outstanding unexplained differences in Annex III presented by the Court represent 1,9 % of gross receivable in 2006 and 1 % in 2007.

There are no unexplained differences in 2008 and 2009.

61–62. According to accounting rules, the Commission has to show the position of its debts and account for its own recoveries. In that perspective, the accounting position includes both recoveries from final beneficiaries and financial corrections from Member States through the clearance of accounts system.

Yet, as recognised by the Court in paragraph 63, the Commission is disclosing separately, as from 2009, the financial corrections through the clearance of accounts system from other recoveries. Moreover, as requested by the Court, the Commission will, in the future, show the current financial clearance proceeds under the 50/50 rule in the financial correction section (although the impact is not material, in 2009 it amounted to 5 % of the total recoveries of 625 million euro).

The Commission considers it inappropriate to compare the recoveries from final beneficiaries to the total amounts recovered by the Commission, which include financial corrections imposed on Member States.

REPLY OF THE COMMISSION

63.
With the exception of the first year (2006), Guideline No 1 was always issued in July and, thus, more than half a year before the reporting deadline to the Commission. As the guideline needs to take account of the experience from the previous financial clearance exercise, it is not possible to advance this date further. Moreover, since the last regulatory change in October 2007, the guideline has essentially remained stable.

64.
The cases referred to by the Court were of an exceptional nature and could only be dealt with on an individual basis.

As for the example given in the footnote, Germany was reimbursed with the amount of 508 165,76 euro.

67.
Following the application of the 50/50 rule the debt amounts remain in the Annex III table. Pursuant to the third subparagraph of Article 32(5) of Regulation (EC) No 1290/2005 the Member State concerned must pursue recovery procedures following the application of the 50/50 rule and credit 50 % of the sums recovered to the EAGF.

68.
The 50/50 rule is applied on the outstanding amounts as they are reported in the Annex III table for the year in question. The financial result is not adapted retroactively to take account of either negative or positive corrections reported by Member States in subsequent years. This is the logical consequence of the automatic nature of this new clearance mechanism and follows from the deliberate decision of the EU legislator to limit any *ex post* rectifications to cases where the absence of any irregularity is recorded by an administrative or legal instrument of a definitive nature (Article 32(5), fourth paragraph, of Regulation (EC) No 1290/2005). It should be noted, however, that 50 % of any corrected amounts which are recovered post clearance have to be credited to the EU budget.

69.
Most of the debt amounts are expected to be subject to positive correction after the application of the 50/50 rule as interest has to be calculated at the end of each financial year and it has to be updated in the Annex III table. Other corrections (positive or negative) are the results of further assessment of the control findings which may happen after the application of the 50/50 rule.

If corrections made by Member States after the application of the 50/50 rule were to be subject to any subsequent clearance, both positive and negative corrections would have to be taken into account and the Commission estimates that there would be no advantage for the EU budget.

As regards the clarity of the Commission's guidelines, the corresponding provisions are explicitly and clearly set in Article 32(5) of Regulation (EC) No 1290/2005.

REPLY OF THE COMMISSION

72.
During the years 2008–10, the Commission has been auditing the correct application of the new clearance mechanism through 15 on-the-spot controls covering 16 paying agencies in 12 Member States and around 90 % of all outstanding debts (including all EU-15 Member States with a low recovery rate for the cases detected since 2007). In general the Member States' authorities have adequate procedures in place to protect the financial interest of the European Union. Deficiencies found during these audits are being followed in the context of conformity clearance procedures. The diligence of the Member States' authorities in the recovery of the most significant individual irregularity cases is assessed in the context of a further nine-conformity clearance procedures. The Commission considers this audit coverage comprehensive and sufficient as regards the financial risk concerned.

74. third indent
In one of the cases, the excessive amount recovered has meanwhile been reimbursed to the Member State concerned. For the other case, the Commission has never received a request for reimbursement.

74. fifth indent
These procedures aim to ensure that the cases were properly reported in the Annex III tables and, thus, subject to the 50/50 rule.

75.
As described above the 50/50 rule was applicable to all non-cleared irregularity cases for which full recovery had not yet taken place by 16 October 2006. Therefore, it was also applied to the cases audited by the TFR, but not cleared through a conformity decision adopted before 16 October 2006.

Concerning the cases raised in Annex IV:

— the case DE/92/002 is subject to a conformity clearance procedure (IR/2009/010/DE).

— the two Italian cases were subject to the 50/50 rule by Commission Decision 2007/327/EC and were subsequently audited by the Commission.

REPLY OF THE COMMISSION

CONCLUSIONS AND RECOMMENDATIONS

79.
The Commission welcomes the Court's conclusion that the systems established and operated by Member States to recover identified debts and the Commission's supervision of the process have improved.

The Commission considers that its interpretation of the current rules has been clarified in the guidelines. However, diverging practices persist due to the fact that recovery is governed by national rules and the Commission will consider how to address this issue in the context of its legislative proposal for the CAP towards 2020.

80.
The Commission checks the debt management system of the Member States in the context of its conformity audits. However, the definitions and requirements laid down in EU law have to be applied to the national recovery procedure, which inevitably leads to differences in the concrete application across the Member States.

81.
Where shortcomings in the Member States' recovery procedures materialise, the resulting financial risk is addressed through financial corrections under Article 32(4) and (8) of Regulation (EC) No 1290/2005.

As recovery is governed by national rules, any enforcement power for the paying agencies would have to be provided for in national law.

82.
Under Article 32(6)(b) of Regulation (EC) No 1290/2005, the insolvency of the debtor shall be established in accordance with the national insolvency law of the Member State concerned. Since the insolvency laws differ between Member States, it is not possible to provide uniform guidance on the application of this provision at EU level. However, the Commission verifies the Member States' administrative practice in the context of its conformity clearance procedures with a view to ensuring that debts are not written off prematurely under this provision.

Recommendation 1 first indent
The Commission considers that the way in which debts are managed and reported upon by the Member States has already improved significantly, not least due to its conformity audits in this area.

Recommendation 1 second indent
The Commission will consider possible modifications to reinforce the current rules on the recording and reporting of irregularities and other debts in the context of its legislative proposals for the CAP towards 2020.

Recommendation 1 third indent
With the exception of the first year (2006), the guidelines were always issued in July at the latest and, thus, more than half a year before the reporting deadline to the Commission. As the guidelines need to take account of the experience from the previous financial clearance exercise, it is not possible to advance this date further. Moreover, since the last regulatory change in October 2007, the guideline has essentially remained stable.

REPLY OF THE COMMISSION

Recommendation 1 fourth indent
These time limits are already set in respective case law and in Regulation (EC) No 1290/2005. It follows from the judgments in Case C-34/89 (points 12–13) and Case C-54/95 that the Member State cannot be inactive in a given case for more than one year and that within a four-year period from the moment of the first indication of an irregularity the investigation must normally be concluded and a decision on the initiation of a recovery procedure be taken. The Commission will consider clarifying Member States' obligations in this respect in the context of its legislative proposals for the CAP towards 2020.

Recommendation 1 fifth indent
The Commission considers that Guideline No 1 provides sufficiently clear guidance on the calculation and reporting of interests in the context of the annual financial clearance exercise. Furthermore the legal obligation to report interest as accessory of principal amounts was confirmed by the European Court of Justice in its judgement in joined cases T-274/08 and T-275/08. The Commission agrees, however, that the reporting of some Member States is deficient in this respect and is pursuing these deficiencies in the context of its conformity clearance procedures.

The Commission is currently considering harmonising the substantive rules on the recovery of undue payments, including those on interests, thereby overcoming the differences resulting from the application of national rules.

Recommendation 1 sixth indent
Article 32(6)(b) of Regulation (EC) No 1290/2005 explicitly provides that the decision to write off a debt as irrecoverable due to the insolvency of the debtor shall be based on an act recorded and recognised under the national law of the Member State concerned. The Commission verifies whether any such decision is properly justified in the context of its conformity audits.

83.
The Commission considers it inappropriate to compare the recoveries from final beneficiaries to the total amounts recovered by the Commission, which include financial corrections imposed on Member States.

With the exception of the first year (2006), Guideline No 1 was always issued in July and, thus, more than half a year before the reporting deadline to the Commission. As the guideline needs to take account of the experience from the previous financial clearance exercise, it is not possible to advance this date further. Moreover, since the last regulatory change in October 2007, the guideline has essentially remained stable.

The TFR completed its work by issuing the Commission decision of 13 February 2009. In those cases where the Member States acted with the necessary diligence and recovery was still ongoing, the Task Force could not write off the outstanding amount at the expense of either the Member State or the EU budget. Therefore, these cases fell under the new clearance mechanism of Regulation (EC) No 1290/2005.

REPLY OF THE COMMISSION

84.
The Commission considers that the risks referred to by the Court are adequately addressed through the work of the certification bodies and its own conformity audits.

85. first indent
Under Article 32(6)(b) of Regulation (EC) No 1290/2005, the insolvency of the debtor shall be established in accordance with the national insolvency law of the Member State concerned. Since the insolvency laws differ between Member States, it is not possible to provide uniform guidance on the application of this provision at EU level. However, the Commission verifies the Member States' administrative practice in the context of its conformity clearance procedures with a view to ensuring that debts are not written off prematurely under this provision.

85. second indent
It follows from Article 35 of Regulation (EC) No 1290/2005 that the date of the primary administrative or judicial finding corresponds to the date when the three conditions set out in Guideline No 2 are met for the first time. Cases where Member States establish the primary administrative or judicial finding at a later date are pursued through conformity clearance procedures.

Recommendation 2 first indent
The 50/50 rule is applied on the outstanding amounts as they are reported in the Annex III table for the year in question. The financial result is not adapted retroactively to take account of either negative or positive corrections reported by Member States in subsequent years. This is the logical consequence of the automatic nature of this new clearance mechanism and follows from the deliberate decision of the EU legislator to limit any *ex post* rectifications to cases where the absence of any irregularity is recorded by an administrative or legal instrument of a definitive nature (Article 32(5), fourth paragraph, of Regulation (EC) No 1290/2005).

Recommendation 2 second indent
The Commission considers that the risks referred to by the Court are already addressed through the work of the certification bodies.

Recommendation 2 third indent
According to the principle of shared management, the recovery of irregular payments from the beneficiaries is the sole responsibility of Member States. However, the financial corrections imposed on Member States are a strong incentive for them to improve their management and control systems and, thereby, contribute to the legality and regularity of the transactions at final beneficiary level.

Moreover, the new clearance mechanism combined with the rule of compulsory compensation referred to above provides a strong incentive for Member States to complete recovery of undue payments from the beneficiaries as quickly as possible. As a result, by the end of financial year 2010, more than 40 % of the new EAGF debts from 2007 and thereafter had already been recovered, which is a significant improvement compared to the past.

Recommendation 2 fourth indent
The TFR completed its work by issuing the Commission decision of 13 February 2009. In those cases where the Member States acted with the necessary diligence and recovery was still ongoing, the TFR could not write off the outstanding at the expense of either the Member State or the EU budget. Therefore, these cases fell under the new clearance mechanism of Regulation (EC) No 1290/2005.

European Court of Auditors

Special Report No 8/2011
Recovery of undue payments made under the common agricultural policy

Luxembourg: Publications Office of the European Union

2011 — 62 pp. — 21 × 29,7 cm

ISBN 978-92-9237-223-1
doi:10.2865/52004

How to obtain EU publications

Free publications:

- via EU Bookshop (http://bookshop.europa.eu);
- at the European Union's representations or delegations. You can obtain their contact details on the Internet (http://ec.europa.eu) or by sending a fax to +352 2929-42758.

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions (e.g. annual series of the *Official Journal of the European Union* and reports of cases before the Court of Justice of the European Union):

- via one of the sales agents of the Publications Office of the European Union (http://publications.europa.eu/others/agents/index_en.htm).

QJ-AB-11-006-EN-C

THIS SPECIAL REPORT COVERS THE SYSTEMS ESTABLISHED IN MEMBER STATES FOR THE RECOVERY OF UNDUE PAYMENTS UNDER THE COMMON AGRICULTURE POLICY AND THE COMMISSION'S SUPERVISION OF THE PROCESS.

THE REPORT EXAMINES, IN PARTICULAR, THE FUNCTIONING OF THE '50/50 MECHANISM', WHEREBY 50 % OF UNRECOVERED DEBTS SHOULD BE AUTOMATICALLY CHARGED TO MEMBER STATES.

IT HIGHLIGHTS THE RISKS, SUCH AS PREMATURE WRITE-OFFS AND LONG DELAYS, ARISING FROM THE RECOVERY PROCEDURES AND THE RELATIVELY LOW RATE OF RECOVERY FROM FINAL BENEFICIARIES.

EUROPEAN COURT OF AUDITORS

Publications Office

ISBN 978-92-9237-223-1