

# Financing of Official Controls – Legal Aspects in Light of Regulation (EU) 2017/625

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*Pecuniae imperare oportet, non servire - money should be mastered, not served. This Seneca quote could be a short summary for the main rule related to financing of official controls. To reduce the dependency of the official control system on public finances, competent authorities of Member States should collect fees or charges to cover the costs that they incur. A self-financing system sounds like a perfect solution in theory; however, in practice it creates many legal issues that should be signalled, especially in the light of new provisions of Regulation (EU) 2017/625.*

## I. Introduction

The concept of financing of official controls has its roots in directives concerned with food and feed official controls<sup>1</sup>, and Regulation 882/2004 finally systemised such financing<sup>2</sup>. Point 32 of the Preamble to this act outlines that in order to make available adequate financial resources for organising official controls, the competent authorities of the Member States should be able to levy the fees or charges to cover the costs incurred through official controls. Articles 26-29 of the Regulation detail requirements for financing of official controls: the levels of the inspection fees (or charges) as well as methods and data used for their calculation<sup>3</sup>. However, it should be noted that these

provisions impose only general obligations on Member States to ensure that their actions are properly financed, but it is left to their national law to decide how exactly they realize this obligation<sup>4</sup>.

Studies related to the application of those obligations showed the lack of clarity and uniformity in particular provisions<sup>5</sup>. Based on these studies the authors pointed out that the Regulation is vague and therefore open to diverging interpretations by Member States, which “has led to significantly different fee charging systems, with MS generally calculating and charging fees at different levels and on different bases”<sup>6</sup>.

The new Regulation (EU) 2017/625<sup>7</sup>, which reforms official controls, changes the provisions con-

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1 See Case C-270/07 Commission v Germany [2009] ECR I-1983.

2 Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ L 165/1.

3 See Lepistö, O., Nevas, M., Hänninen, M. L., “Application of EU legislation concerning food control fees in Finland”, 5 *Archiv für Lebensmittelhygiene* (2010), pp. 189 et seq., at p. 189.

4 UK Food Standards Agency, “Regulation (EC) No 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules Q&A Notes for enforcement authorities on the feed and food elements”, 2008, at q. 46, available on the Internet at <<https://www.reading.ac.uk/foodlaw/pdf/uk-08009-enforcement-&a-notes.pdf>> (last accessed on 19 January 2018).

5 See GHK ADAS, “Preparatory work to support the impact assessment on reviewing the rules on the financing of official controls, A final report to DG SANCO”, 2011, available on the Internet at <[https://ec.europa.eu/food/sites/food/files/safety/official\\_controls/](https://ec.europa.eu/food/sites/food/files/safety/official_controls/docs/ghk_study_en.pdf)

[docs/ghk\\_study\\_en.pdf](https://ec.europa.eu/food/sites/food/files/safety/official_controls/docs/ghk_study_en.pdf)> (last accessed on 19 January 2018), Food Chain Evaluation Consortium (FCEC) European Commission Directorate General for Health and Consumers, “Study on fees or charges collected by the Member States to cover the costs occasioned by official controls, Final Report Part One: Main Study and Conclusions”, 2009, available on the Internet at <<http://www.ceasc.com/Images/Content/2386%20final%20report.pdf>> (last accessed on 19 January 2018).

6 GHK ADAS, *supra* note 5, at p. 13.

7 Regulation (EU) No 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products, amending Regulations (EC) No 999/2001, (EC) No 396/2005, (EC) No 1069/2009, (EC) No 1107/2009, (EU) No 1151/2012, (EU) No 652/2014, (EU) 2016/429 and (EU) 2016/2031 of the European Parliament and of the Council, Council Regulations (EC) No 1/2005 and (EC) No 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No 854/2004 and (EC) No 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Controls Regulation), OJ L 95/1.

cerning financing of official controls. The new rules will become applicable as of 14 December 2019, but should be analysed as soon as possible. The amount of regulations related to financing of official controls in a Member State's national law will not change immediately, and the new provisions are not as clear as imagined.

## II. Financing Official Controls in Regulation 2017/625 – General Rules

Regulation 2017/25 replaces the possibility to levy fees or charges by Member States from Regulation 882/2004 (“should be able to levy”<sup>8</sup>) with obligation (“should collect”). Within the Preamble the EU legislator states that a complex and resource-demanding system of official controls should be provided with a stable influx of resources and at a level appropriate to the enforcement needs at any given moment. Therefore, it should be as independent as possible from public finances. The source of its independency is quasi-financial autonomy achieved by the rules of collecting fees or charges to cover the costs:

- that incur when competent authorities of Member States perform official controls on certain operators and for certain activities for which Union agri-food chain legislation requires registration or approval in accordance with Union rules on the hygiene of food and feed or rules governing plant health, and
- as compensation for the costs of official controls performed in view of issuing an official certificate or attestation and costs of official controls performed at border control posts<sup>9</sup>.

Analysing provisions related to financing official controls we can distinguish a set of specific rules related to this subject:

- the rule of adequacy – fees or charges shall not exceed the cost of the official controls<sup>10</sup>,
- the rule of non-return – fees or charges shall not be directly or indirectly refunded (unless unduly collected)<sup>11</sup>, and
- the rule of transparency – the competent authorities have to consult operators on the methods of calculation of fees (or charges), publish the way in which those instruments are calculated and publish the arrangements in place to ensure their thrifty and efficient use once collected<sup>12</sup>.

Quasi-financial autonomy of official controls is not the only rule related to financing provisions in Regulation 882/2004 as well as Regulation 2017/625. Of course, general EU principles are applicable to these regulations. Firstly, the principle of proportionality – fees and charges can not exceed what is necessary in order to achieve their objective – covering the cost of performing official controls and certain activities related to that topic. Secondly, the principle of subsidiarity, with its trans-border and international character, can be better achieved on Union level<sup>13</sup>.

Collecting fees or charges is also connected with the rule of FBO<sup>14</sup> responsibility. Union agri-food chain legislation is based on the principle that operators at all stages of production, processing and distribution (which are under their control) are responsible for ensuring compliance with the requirements relevant to their activities established by EU legislation. It means that each of the above-mentioned operators can be charged with the cost of official control<sup>15</sup>. What does this “cost of official control” really mean?

The EU legislator did not define costs, however, Regulation 2017/625 refers to “overhead costs”. Overhead costs could include the costs of the support and organisation necessity for planning and carrying out the official controls<sup>16</sup>. In Article 81 of Regulation 2017/625 we can find scope of costs concerning:

- the salaries of the staff, including support and administrative staff, involved in the performance of official controls, their social security, pension and insurance costs;

8 Point 32 of Preamble to Regulation 882/2004.

9 Point 65 of Preamble to Regulation 2017/625.

10 See Article 82.3 and Article 82.4 of Regulation 2017/625 as well as Article 27.4 of Regulation 882/2004.

11 See Article 83.2 of Regulation 2017/625 as well as Article 27.9 of Regulation 882/2004.

12 See Article 85 of Regulation 2017/625. The less specified transparency rule was also mentioned in Article 27.12 of Regulation 882/2004 – “The Member States shall make public the method of calculation of fees and communicate it to the Commission. The Commission shall examine whether the fees comply with the requirements of this Regulation”.

13 See Point 99 of Preamble to Regulation 2017/625 as well as Point 48 of Preamble to Regulation 882/2004.

14 Food Business Operator.

15 Point 13 of Preamble to Regulation 2017/625 as well as Point 4 of Preamble to Regulation 882/2004.

16 Point 66 of Preamble to Regulation 2017/625.

- the cost of facilities and equipment, including maintenance and insurance costs and other associated costs;
- the cost of consumables and tools;
- the cost of services charged to the competent authorities by delegated bodies for official controls delegated to these delegated bodies;
- the cost of training of the staff<sup>17</sup>, with the exclusion of the training necessary to obtain the qualification necessary to be employed by the competent authorities;
- the cost of travel of the staff, and associated subsistence costs; and
- the cost of sampling and of laboratory analysis, testing and diagnosis charged by official laboratories for those tasks.

In comparison, Regulation 882/2004 has not defined costs at all. The EU legislator included only three criteria to be taken into consideration for the calculation of fees: the salaries of the staff involved in the official controls, the costs for the staff involved in the official controls (including facilities, tools, equipment, training, travel and associated costs) and the laboratory analysis and sampling costs<sup>18</sup>.

The new provisions clarify the scope of costs that creates many legal issues under Regulation 882/2004<sup>19</sup>. However, they have not clarified the problems related to lack of definitions of “fees and charges”.

### III. The Lack of Definition of “Fees or Charges”

The EU legislator neither defines “fees” nor “charges”. The language versions of Regulation 882/2004 as well as Regulation 2017/625 differ as to the terms used in order to name legal instruments

created in order to cover the costs of official controls. For example, in the regulation in the French language version (“redevances ou taxes”) one of the terms relates to taxation. Whereas in the English language version (“fees or charges”) and Polish version (“opłaty i należności”) both terms have similar meanings associated with paid compensation for particular acts that are performed in the line of official duties. What is more, in the Italian language version of Regulation 882/2004 the instruments were similar to the French language version (“tasse o diritti”) when in Regulation 2017/625 they are constructed like in the English language version (“tariffe o diritti”)<sup>20</sup>.

According to the ECJ, *the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions in that regard. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages*<sup>21</sup>. Of course, it can be said that it is purely semantic, and the most important aspect is the legal construction rather than the name of the instrument used by Member States. However, overall, both regulations suggest something different. It seems that even the EU legislator is not sure whether the taxation system should influence the official controls system or not.

In Article 26 of Regulation 882/2004 there is a general principle that Member States shall ensure that adequate financial resources are available to provide the necessary staff and other resources for official controls by whatever means are considered appropriate, including through general taxation or by establishing fees or charges. As the ECJ noted, *“it should be observed that, whereas Article 26 or Regulation 882/2004 provides for both the use of general taxation and the establishment of fees or charges to finance the provision of ‘the necessary staff and other resources for official controls’, Article 27 of that Regulation refers only to fees and charges and, in paragraph (1) thereof, authorises the Member States to levy such fees and charges only to ‘cover the costs occasioned by official controls’*<sup>22</sup>.

In practice based on this Regulation in the majority of Member States, the collected revenue is incorporated into the General State Budget. Only nine Member States in the survey claimed to be setting revenues specifically for the competent authorities performing the official controls<sup>23</sup>.

17 Referred to in Article 81 (a) of Regulation 2017/625.

18 Annex VI of Regulation 882/2004 – “Criteria to be taken into consideration for the calculation of fees”.

19 See Case C-112/15, *Kødbranchens Fællesråd* [2016], EU:C:2016:185.

20 Article 29 of Regulation 882/2004, Article 79 of Regulation 2017/625.

21 Case C-494/14, *Axa Belgium* [2015], EU:C:2015:692, at para. 31.

22 Case C-112/15, *supra* note 19, at para. 39.

23 Food Chain Evaluation Consortium, *supra* note 5, at pp. 18-19.

Regulation 2017/625 does not contain any information about providing resources for official controls through general taxation. This fact is also visible in a new, above-mentioned language construction of fees or charges in the Italian language version. However, the French language version has remained unchanged. It is worth noting that general rules related to financing official controls do not forbid to incorporate fees or charges instruments to the General State Budget. It means also that the ambiguity of the Member States' different approaches to this matter has not been resolved.

The rules of Regulation 882/2004 were applicable to national laws for many years. The flexible approach related to financing official controls caused many different understandings of fees or charges, even in the same country within different competent authorities. According to my studies related to Polish regulations in this subject, the discrepancy between calculating and charging fees is visible even when it comes to competent authorities in the same country. In Poland there are about 41 fees or charges regulations stated in 15 different acts related to five authorities. There is ambiguity even when it comes to the name of the legal instrument, and especially when it is related to a different branch of law (food law and public finance law) it seriously impacts legal certainty.

#### IV. Mandatory and Non-Mandatory Fees and Charges

The basic classification of fees (and charges) is related to the necessity of imposing them by the Member States. In Regulation 882/2004 general rule is the possibility ("may") of collecting fees or charges by Member States. Situations where Member States shall ensure collection of a fee are exceptions<sup>24</sup>. What is more important, this Regulation creates additional legal institutions related to charging for expenses arising from additional official controls<sup>25</sup>. When official controls revealed non-compliance with food and feed law, the FBO they concerned has to pay the extra costs resulting from those activities<sup>26</sup>.

In Regulation 2017/625 new provisions extended mandatory fees to most official controls performed on operators. Firstly, there are described mandatory fees or charges, then non-mandatory ones - defined briefly as other than those referred earlier, unless

prohibited by the legislative provisions applicable in the areas governed by the rules referred to in a regulation<sup>27</sup>.

The question is how many non-mandatory fees or charges can be established by a Member State and how much ambiguity can exist between the competent authorities of different countries? It is worth mentioning that Article 27.10 of Regulation 882/2004 states that without prejudice to the costs deriving from the expenses referred to by non-compliance activities, Member States shall not collect any fees other than those referred to for the implementation of this Regulation. However, the studies showed that competent authorities of different countries appear to have interpreted relevant provisions of Article 27 rather "openly"<sup>28</sup>. The Polish Regional Administrative Court considered whether Poland, as the Member State, can establish an additional fee or charge not listed directly in Regulation 882/2004. Based on Article 27 and Point 32 of the Preamble the Court pointed out, however, that although the EU regulation establishes rules related to fees or charges, it does not mean that a Member State can not charge activities not mentioned directly in Regulation 882/2004<sup>29</sup>.

Although new provisions of regulation 2017/625 seem to provide the answer to the existing construction of numerous fees or charges established in Member States, the extension of mandatory fees suggests their reduction to instruments enlisted in a new regulation in order to maintain legal certainty in different countries. It is difficult to predict whether the competent authorities will understand it that way or the state of ambiguity will remain.

#### V. The Methods of Establishing Fees or Charges

Under Article 27.4 (a) of Regulation 882/2004, the fees collected by the Member States shall not be high-

24 Article 27.1 and Article 27.2 of Regulation 882/2004.

25 When the detection of non-compliance leads to official controls that exceed the competent authority's normal control activities, see Article 28 of Regulation 882/2004.

26 See Lepistö, O., Nevas, M., Hänninen, M. L., supra note 3, at p. 189.

27 See Articles 79 and 80 of Regulation 2017/625.

28 Food Chain Evaluation Consortium, supra note 5, at p. 16.

29 Case II SA/Po 362/14, 22 May 2014, Regional Administrative Court in Poznań.

er that the costs borne by the responsible competent authorities in relation to performed controls. Article 27.4.(b) stipulates two methods of establishing fees or charges:

- flat-rate on throughout or time basis, and
- minimum rates based on the amount fixed in Annex IV section B or in Annex V section B of Regulation<sup>30</sup>.

Regulation 2017/625 also provides two methods of fixing fees or charges:

- at the amounts provided for in Annex IV of Regulation, and
- at the level of the calculated costs<sup>31</sup>. Calculation of costs should be established in accordance with:
  - the calculation of the actual costs of each individual official control, and applied to the operators subject to such official control – however it must be remembered that fees or charges calculated that way can not exceed the actual costs of the official control performed<sup>32</sup>, and
  - at a flat-rate on the basis of the overall costs of official controls borne by the competent authorities over a given period of time and applied to all operators irrespective of whether any official control is performed during the reference period in relation to each operator charged.
  - Those fees or charges also shall not exceed the overall costs incurred for the official controls performed over the period of time referred to therein. As premises in establishing those fees, the competent authorities of the Member States should take into consideration the impact that the type and size of the activity concerned and the relevant risk factors have on the distribution of the overall costs of those official controls<sup>33</sup>.

However, although Regulation 2017/625 extended the rules of establishing fees it is still noticeable that

estimating actual costs of individual control or even a flat-rate is highly demanding and almost impossible – but applicable in every official control performed under this provisions. As the ECJ ruled under Regulation 882/2004, “a standard fee by its very nature exceeds the actual cost of the measures which it is intended to finance cases and is lower than the cost in the other cases”<sup>34</sup>. What is more, Member States are enabled to “levy fees at the minimum rates laid down in Annex IV, section B to that regulation without having to adopt a measure of application at national level, even though the costs borne by the competent authorities in connection with the health inspections and controls laid down in that regulation are lower than those rates”<sup>35</sup>. Therefore, rates regulated in provisions are highly estimated, however non-discriminatory.

## VI. Conclusions

In the introduction I wrote that the new regulations related to financing of official controls should be analysed as soon as possible, because the national regulations of Member States will not change immediately. The question is whether the national regulations change at all. Although Regulation 2017/625 extends provisions related to financing of official controls, its provisions do not create clear construction that can be applicable to national laws in order to clarify the system of fees or charges.

The lack of definition of fees or charges is not a semantic problem. It causes a different understanding of those instruments in Member States and suggests deep connection with a taxation system that is allowed in the light of provisions of previous acts concerning financing of official controls - Regulation 882/2004. What is more, the rule of adequacy - stipulated that fees or charges shall not exceed the cost of the official controls - is only an artificial construction. On the other hand, standard fees, however artificial, give FBOs clarity about at least the amount of money they will be charged.

The extension of mandatory fees to most official controls performed on operators suggests that the EU legislator wants to make a system of financing of official controls become more transparent and easier to perceive. How will it look in practice? As usual, time will tell.

30 Food Chain Evaluation Consortium, *supra* note 5, at p. 17.

31 Article 79.1 of Regulation 2017/625.

32 Article 82.1 (b). and Article. 82.4 of Regulation 2017/625.

33 Article 82.1 (b). and Article. 82.3 of Regulation 2017/625.

34 Case C-270/07, *supra* note 1, at para. 32.

35 Case C-523/09, *Rakverre Piim AS and Maag Piimatööstus AS* [2011], EU:C:2011:460 at para. 31.

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