



# REPLIES OF THE EUROPEAN COMMISSION

## TO THE EUROPEAN COURT OF AUDITORS' SPECIAL REPORT

on “Systems for ensuring compliance of RRF  
spending with public procurement and state aid  
rules”

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This document presents the replies of the European Commission to observations of a Special Report of the European Court of Auditors, in line with Article 265 of the [Financial Regulation](#) and to be published together with the Special Report.

## I. THE COMMISSION REPLIES IN BRIEF

**The Commission welcomes the European Court of Auditors' (ECA) special report on the systems for ensuring compliance of RRF spending with public procurement and State aid rules.** The report highlights the positive development in the control framework established under the RRF Regulation<sup>1</sup>, which has undergone continuous improvements over time thanks to the joint efforts of the Commission and Member States in accordance with their respective responsibilities. The ECA proposes further potential enhancements, which, in some cases, extend beyond the RRF legal framework and hold relevant for future programme design.

**The Commission's monitoring and control framework for the RRF reflects the nature of the RRF:** the RRF is a performance-based instrument and, in accordance with the RRF Regulation, the only beneficiaries of the RRF are the Member States; they commit to implement a set of measures, with specific milestones and targets (set by the Council), which they must achieve to unlock a disbursement from the Commission.

**The RRF Regulation clearly prescribes the Member States' primary responsibility to ensure compliance with EU and national law, notably public procurement and State aid rules.** The Regulation allows the Member States to use their regular national budget management systems to discharge this responsibility. If a Member State detects any specific irregularities, it must take action to correct them and inform the Commission accordingly, notably in the management declaration.

**Considering this legal framework, the Commission recalls that the legality and regularity of RRF payments from the Commission to the Member States is solely based on the satisfactory fulfilment of milestones and targets.** When issues related to the protection of the financial interest of the Union are detected, including those related to public procurement and State aid, the Regulation establishes: (i) further systems of corrections for the protection of the financial interest of the Union under Article 22(5), which the Commission gives assurance on in the DG ECFIN Annual Activity Report and which are covered by the Framework for reduction and recoveries, and (ii) the concept of reversal. On the latter, the Commission has additionally clarified in the reversal methodology how it will apply this RRF Regulation concept to address, inter alia, situations of milestones/targets no longer being considered as satisfactorily fulfilled, including where issues related to the protection of the financial interests of the Union subsequently come to light. This is without prejudice to the powers of EPPO and OLAF.

In case of serious irregularities not corrected by a Member State or a serious breach of an obligation from the Financing or Loan Agreement, the Commission may engage in a proportionate reduction of the support under the RRF and the recovery of any amount due to the Union budget (Article 22(5) RRF Regulation).

**On State Aid and public procurement, the Commission did not agree with ECA's view about the existence of an assurance gap at EU level with respect to Member states' compliance with EU and national rules<sup>2</sup>.** The Commission considers that it has had since the start of

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<sup>1</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility

<sup>2</sup> See Commission's replies to ECA Special Report 07/2023 'Design of the Commission's control system for the RRF'.

implementation of the Facility reasonable assurance on the respect of the obligation by Member States to regularly check compliance with State aid and public procurement rules.

**From the very beginning, the Commission has considered whether Member States' control systems ensure compliance with national and EU law.** When the national Recovery and Resilience Plans (RRPs) were submitted, the Commission has assessed that Member States had in place adequate arrangements to ensure that EU and national rules are complied with. As acknowledged by the ECA, there is no assessment criterion in the RRF Regulation regarding EU and national rules, nonetheless the Commission put in place guidance and additional requirements in the financing agreement to ensure that risks regarding compliance with EU and national laws were adequately covered. Where necessary, dedicated audit and control milestones were introduced to address weaknesses related to the control system before the first payments are done.

Following recommendations from the ECA in March 2023 and from the European Parliament<sup>3</sup>, the Commission accepted to intensify its audit work on the systems which the Member States implement to ensure compliance with EU and national rules, notably regarding State aid and public procurement. In addition, before issuing the 2022 AAR, the Commission performed a dedicated review based on DG ECFIN own audits, on other Commission audits and on the work of national audit bodies where the opinion was unqualified or qualified with a limited impact. The Commission considers that this dedicated review was sufficient to provide reasonable assurance for the payments made in 2022.

**Consequently, since mid-2023, the Commission updated its audit strategy and extended the scope of its audit work to systematically check in all types of audits whether Member States regularly check compliance with public procurement and State aid rules, including the effectiveness of such checks.** In this respect, the Commission welcomes ECA's positive view issued in this report about the updated RRF audit strategy and enhanced checks on public procurement and State aid.

**On the basis of its updated audit strategy and extended scope of audit work, for the 2023 AAR, the Commission was able to derive reasonable assurance on, *inter alia*, "notably for public procurement and State Aid, the respect of the obligation of Member States laid down in Article 22(2) (a) of the RRF Regulation to regularly check that the financing provided in the context of the underlying transactions has been properly used in accordance with all applicable rules..."** The Commission notes that the ECA raised some observations regarding the maturity level of the audit work underlying the assurance, the scope of the checks, the proportion of audited implementing bodies with public procurement and State aid and the risk assessment methodology. First, the Commission considers that its assurance was drawn from mature audit work communicated in all cases to the concerned Member States either through draft or final audit reports or from the most recent findings contained in flash reports at the date of the signature of the Annual Activity Report (AAR). This represents in the Commission's opinion the most conservative and comprehensive overview of the audit work performed, as well as the most up-to-date information at the point of signature of the AAR. Second, on the scope of the checks, the Commission has since April 2023 (i.e. one month after receiving ECA's recommendation) rolled out detailed and complete checklists on public procurement and State aid, whose final versions were approved in September 2023. Specifically, regarding the specific checks for GBER and RDI framework under State aid rules, the Commission checks that Member States have assessed the conditions applicable for the relevant measures and have notified the use of such schemes to the relevant Commission services. Furthermore, the Commission recalls that Member States have the full

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<sup>3</sup> ECA Special Report 07/2023, recommendation 3, and European Parliament resolution of 11 April 2024 with observations forming an integral part of the decisions on discharge in respect of the implementation of the general budget of the European Union for the financial year 2022, Section III – Commission and executive agencies (2023/2129(DEC))

responsibility of ensuring compliance with the requirements of the relevant legislation. Third, The Commission recalls that, as the RRF is a performance-based instrument, it does not select implementing bodies for the purpose of its ex-post audits, but milestones and targets. Therefore, considering the diverse national set-ups, disclosing the proportion of audited implementing bodies with public procurement and State aid measures would not provide meaningful and comparable information likely to affect the Commission assurance. Finally, the Commission has put in place a rigorous risk assessment methodology underpinning the declaration of assurance, which covers the level of risk for each payment regarding legality and regularity and for each Member State regarding Article 22(2)a, and Article 22(5) of the RRF Regulation.<sup>4</sup> **Considering all controls conducted and information available, the Commission had reasonable assurance for the payments done in 2023** on, amongst others, the respect of Member States of the obligation to regularly check compliance with EU and national rules pursuant to Article 22(2) point a of the RRF Regulation, including the effectiveness of such checks.

The ECA notes that the Commission has so far not applied reductions for system weaknesses. The Commission highlights that any finding at system level detected as part of its audit work was followed up through appropriate recommendations subject to a strict follow-up and depending on the severity of the weakness, through additional audit and control milestones. Hence, **no correction measures by the Commission were necessary as of the end of May 2024** as Member States either had implemented or were in the process of implementing corrections themselves. The ECA also reports that Member States do not always recover from final recipients. **The application of different national procedures is fully expected in light of the legal framework of the RRF and the nature of the instrument.** In addition, the Commission recalls that, if the Member State fails to correct a serious irregularity, the Commission can itself apply corrections.

**The ECA reported weaknesses in some of the sampled Member States' control systems in terms of coverage, quality, timing and documentation.** The Commission maintains that the co-legislators explicitly prescribed a primary responsibility for the Member States to ensure compliance with EU and national law. As a result, Member States can use their national budget management systems. Therefore, the Commission considers that it cannot impose additional requirements beyond those foreseen in the current legal framework. However, the Commission will learn from the report and is ready to complement its existing guidance.

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<sup>4</sup> See Annex 5 of DG ECFIN Annual Activity Report 2023.

## II. REPLIES TO THE RECOMMENDATIONS

### Recommendation 1 - Ensure compliance with public procurement and state aid rules in future EU programmes

**If designing instruments based on financing not linked to costs to be implemented by member states, the Commission should:**

- a) define requirements for the member state control and audit systems, for example in terms of coverage, quality, timing, documentation and corrective measures, to ensure compliance with public procurement and state aid rules;**
- b) check whether member states provide sufficient assurance at the start of any proposed instrument, and throughout its implementation.**

**Target implementation date: When designing instruments based on financing not linked to costs.**

The Commission **partially accepts** sub-recommendation 1(a).

In case of any future instruments based on financing not linked to costs to be implemented by Member States, the Commission will define key requirements for Member States to ensure compliance with EU public procurement and State Aid rules without prejudice to the specific requirements of each future basic act. However, the Commission cannot prejudge the design of future legislative proposals, including those on future instruments, nor accept recommendations whose implementation may not be possible due to the design of future instruments to be decided by the co-legislators. Future legislative proposals and programme design will need to be tailored to the specific context in which they are made, in line with the Commission's own rules on the preparation of legislative proposals, and as such cannot be subject to an ex-ante framing.

The Commission can accept in principle to address the list of requirements such as coverage, quality, timing, documentation and corrective measures but at this stage it cannot foresee a detailed form of such requirements. These will also need to be tailored to the specific situation and as such, similarly, cannot be subject to an ex-ante framing and will depend on the choices of the co-legislator.

The Commission **partially accepts** sub-recommendation 1(b).

In case of any future instrument based on financing not linked to costs implemented by Member States, and without prejudice to the specific requirements of each future basic act, the Commission accepts to verify whether Member States provide the necessary safeguards to ensure compliance with EU public procurement and State aid rules.

The Commission, at the same time, cannot prejudge the design of future legislative proposals, including those on future instruments, nor accept recommendations whose implementation may not be possible due to the design of future instruments to be decided by the co-legislators. In this context, the Commission also recalls that the nature and extent of the verifications at the start of any such instrument will depend on the design of the future instruments which therefore at this time also cannot be predicted. Future legislative proposals and programme design will need to be tailored to the specific context in which they are made, in line with the Commission's own rules on the preparation of legislative proposals, and as such cannot be subject to an ex-ante framing.

## **Recommendation 2 - Define requirements for member state control and audit systems for public procurement and state aid**

For the remaining implementation of RRF, the Commission should communicate to member state authorities that:

- a) they should provide evidence of controls covering all main public procurement and state aid risks at least by the time the member state submits the payment request to the Commission;**
- b) audit bodies should provide assurance on such controls through a mix of systems and substantive testing.**

**Target implementation date: September 2025.**

The Commission **accepts** Recommendation 2(a) and Recommendation 2(b).

The Commission has already developed guidance<sup>5</sup> at the start of the Facility on control systems and audit work to assist Member States in meeting their obligations. The Commission will further develop its guidance on control systems and audit work by including the checks to be carried out for the main risks related to public procurement and State aid.

## **Recommendation 3 - Further strengthen Commission checks on member state systems ensuring compliance with public procurement and state aid rules**

**The Commission should:**

- a) disclose in its annual activity report the proportion of implementing bodies with procurement and state aid relevant investments in each member state covered by the Commission audits;**
- b) check controls on the granting of state aid at granting authority level, or when not feasible, disclose in its annual activity report any elements not covered by the Commission's audit work;**
- c) use the work of audit bodies on the control systems only if a compliance audit has shown that such work can be relied upon.**

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<sup>5</sup> Guidance on the assessment of the internal control systems set in place by the Member States under the Recovery and Resilience facility, 23/01/2023, Ref. Ares(2023)495520.

Guidance to Member States for the preparation of the summary of audits under the Recovery and Resilience Facility, 27/09/2021, Ref. Ares(2022)556445



**Target implementation date: May 2025, when preparing the next assurance declaration.**

The Commission **does not accept** Recommendation 3(a).

In line with the spirit of a performance-based instrument, the Commission checks on compliance with State aid and public procurement rules are done at system level. For its RRF ex-post audit work, the Commission must have assurance that the payment conditions have been met. It therefore selects milestones and targets, but not implementing bodies. The number of implementing bodies, their allocation of procurement and State aid relevant investments, and the number of milestones and targets in a specific payment request to which a specific body contributes, can vary considerably between Member States and payment requests.

Therefore, the proportion of implementing bodies with procurement and State aid related investment for each Member State covered by the Commission audits would therefore not provide meaningful and comparable information likely to affect the assurance.

The Commission **accepts** Recommendation 3(b).

The Commission has already accepted to undertake checks to verify whether the responsible body is properly checking the compliance with applicable State aid procedures. These checks are part of risk-based systems audits on the protection of the financial interests of the EU or audits on payment requests (i.e. ex-post audits on milestones and targets).

In the Annual Activity Report, the Commission will clarify the extent of the checks performed at the level of the granting authority by the Commission on State Aid.

The Commission **accepts** Recommendation 3(c).

The Commission acknowledges the importance of the reliability of national audit bodies' work. In line with the Commission's revised audit strategy, compliance audits on the national Audit Bodies are performed to assess whether the reported audit opinions on (parts) of the national internal control systems, the protection of the financial interests of the Union, and specific milestones and targets can be relied upon. Currently, in case these compliance audits provide either an unqualified opinion or a qualified opinion with limited impact, the Commission may decide to rely on the audit body work, based on a careful case-by-case analysis.

As the Commission intends to further increase the reliance on the work of audit bodies when sufficiently reliable, the Commission has clarified the conditions under which the work of audit bodies on internal control systems can be relied upon, with the aim of complementing the Commission's checks at granting authority's level.



## Recommendation 4 - Improve EU level assurance on compliance with public procurement and state aid rules

The Commission should:

- a) **clarify in its risk assessment methodology how the results of checks made before the draft report stage are reflected in its assessment of member state risk;**
- b) **disclose in its Annual Activity Report where it has not performed audits;**
- c) **classify member state systems as high risk where the audits have identified critical or very important findings for more than one implementing body until evidence has been obtained that the member state has taken the recommended corrective action.**

**Target implementation date: May 2025, when preparing the next assurance declaration.**

The Commission **accepts** Recommendation 4(a).

The Commission will further clarify in the Annual Activity Report how the results of audit work which has not yet resulted in a draft or final audit report are reflected in the assessment of the Member State's risk underlying the assurance declaration on RRF expenditure.

The Commission **accepts** Recommendation 4(b).

The Commission will continue to disclose in DG ECFIN's Annual Activity Report for which Member States its audits have included specific checks on public procurement and State aid.

The Commission **partially accepts** Recommendation 4(c).

The Commission accepts to review its Member States risk classification methodology for such cases, i.e. when the Member States accept the recommended corrective actions related to very important or critical findings in public procurement of State aid.

Given that the Member States have accepted the recommended corrective actions and are committed to implementing them, and that the Commission will continue to monitor the progress of these implementations, the Commission will categorize such instances as medium risk.

## Recommendation 5 - Define consistent corrective measures for breaches of public procurement rules

**The Commission should define corrective measures to be applied consistently among member states for breaches of public procurement rules.**

**Target implementation date: May 2025.**

The Commission **does not accept** recommendation 5.

The Commission recalls that, under the RRF, Member States are primarily responsible for addressing breaches of public procurement and may use their national budget management systems to do so (art. 22.1 of the RRF Regulation). Therefore, the Commission cannot accept ECA's recommendation to "define corrective measures to be applied consistently among Member States". The application of different national procedures is fully expected in light of the legal framework of the RRF and the nature of the instrument.

## III. REPLIES TO OBSERVATIONS

### 1. Member state control and audit systems for public procurement and State aid

The ECA notes that the management declaration provided by the Member States alongside each payment request provides assurance at national level that the funds were managed in accordance with all applicable rules and that this assurance is underpinned by the audit summary<sup>6</sup>. However, the ECA further reports weaknesses in Member States' control and audit systems for public procurement and State aid in terms of timing, coverage, quality and documentation.<sup>7</sup> In this connection, the ECA also finds that the *“requirements laid down in the regulation and guidance did not sufficiently define public procurement and state aid checks in the initial phase”*.<sup>8</sup>

As recalled by the ECA, *“the RRF regulation allows member states to implement the RRF using their own national budget management systems and does not specify any further requirements”*.<sup>9</sup> Therefore, although the ECA finds that the **diversity of national control systems** *“has resulted in a complex control framework at EU level”*<sup>10</sup>, the Commission regards it as the **logical consequence of the legal framework established by the co-legislators**, enabling therefore that some implementing bodies *‘use existing procedures under their national systems’*<sup>11</sup>, or that, in France, *‘authorities rely on their existing national budget management systems’*<sup>12</sup>

The Commission has assessed that management and control systems function well for around 93% of the Cohesion Policy programmes, as reflected in the Annual Activity Reports for DG REGIO and DG EMPL. For those programmes where deficiencies have been identified, the Commission requests and monitors remedial actions with the respective national authorities to improve the quantity and quality of verifications. In 2023 deficiencies were identified and serious improvements were requested for only 10 audit authorities out of 116 for Cohesion Policy. The Commission considers therefore that the management and control systems for Cohesion policy in Member States are, for the vast majority of programmes, sufficiently effective in detecting the non-compliance with the applicable rules.

In addition, the Commission emphasizes that **since the start of implementation of the Facility, Annex I of the Financing Agreement signed with each Member State includes key requirements related to Member States' internal control systems for the RRF**. Notably, Key Requirement 1 pertains to procedures ensuring compliance with all applicable rules, which also, by default, encompasses public procurement and State aid rules. Furthermore, this Key Requirement must be read in conjunction with Key Requirement 3, which concerns the appropriate procedures for drawing up the Management Declaration and the Summary of Audits.

**Furthermore, as acknowledged by the ECA in prior reports, the Commission issued general guidance on the RRFs, including the control systems, in September 2020, January 2021, March 2023 and July 2024.** Additional dedicated detailed guidance on internal control systems<sup>13</sup>

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<sup>6</sup> See ECA observations 38-41.

<sup>7</sup> See ECA observations 38-78

<sup>8</sup> See ECA observation 7.

<sup>9</sup> See ECA observation 43.

<sup>10</sup> See ECA observation 43.

<sup>11</sup> See ECA observations 11 for Czechia and Italy or 43 for the general consideration.

<sup>12</sup> See ECA observations 47 and 56.

<sup>13</sup> Guidance on the assessment of the internal control systems set in place by the Member States under the Recovery and Resilience facility, 23/01/2023, Ref. Ares(2023)495520.

was provided in January 2023 and on audit work<sup>14</sup> in September 2021. Such written guidance is supplemented by ongoing discussions between the Commission and the Member States and written or verbal replies to specific questions on control and audit design.

The Commission takes note of the criteria defined by the ECA, for the purpose of this audit, to assess RRF control systems and the work of audit bodies on public procurement and State aid in the five sampled Member States: coverage, quality, timing, and documentation<sup>15</sup>. **The Commission highlights that these criteria do not stem from the RRF Regulation, nor from Annex 1 of the Financing Agreement on key requirements for national internal control systems, nor from any Commission guidance.**

Specifically, regarding the coverage of audits, the Commission highlights that it already recommended to Member States, in its September 2021 guidance, to foresee both system audits and substantive testing: “Member States should ensure an adequate balance between system audits and audits of cases of support to investments and reforms”.<sup>16</sup> In its country-specific observations, **the ECA states<sup>17</sup> that no system or substantive testing on public procurement was conducted in France** by the national audit body for the sampled targets selected by the ECA. However, the Commission notes that France conducted a general audit before the first payment request, as well as a thematic audit on public procurement controls in 2022, covering 15 public procurement files<sup>18</sup>.

Finally, the Commission notes that **ECA’s timing criterion** (*‘before payment request and management declaration’*)<sup>19</sup> **could suggest that the legality and regularity of payments might be affected by weaknesses identified in controls on compliance with public procurement or State aid rules.** Whilst the Commission shares the ECA view that the RRF Regulation contains no requirement on the timing of audits<sup>20</sup> and that issues of public procurement and State aid generally do not affect the legality and regularity of transactions<sup>21 22</sup>, the ECA uses its timing criterion to make observations regarding the timing of Member States audits and controls.

## 2. Commission’s audit framework on public procurement and State aid checks

It is essential to note that **the RRF Regulation<sup>23</sup> explicitly prescribes the primary responsibility of Member States to ensure compliance with national and EU law, including public procurement and State aid.** The Commission therefore provides assurance that Member States

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<sup>14</sup> Guidance to Member States for the preparation of the summary of audits under the Recovery and Resilience Facility, 27/09/2021, Ref. Ares(2022)556445.

<sup>15</sup> See ECA observations 54 and 70.

<sup>16</sup> Guidance to Member States for the preparation of the summary of audits under the Recovery and Resilience Facility - ARES(2022)556445

<sup>17</sup> See ECA observations 13 and 63.

<sup>18</sup> See ECA observation 67.

<sup>19</sup> See ECA observations 54 and 70.

<sup>20</sup> See ECA observations 14 and 53

<sup>21</sup> See ECA observation 1

<sup>22</sup> The Commission recalls that when issues related to the protection of the financial interest of the Union are detected, including those related to public procurement and State aid, the Regulation establishes: (i) further systems of corrections for the protection of the financial interest of the Union under Article 22(5), which the Commission gives assurance on in the DG ECFIN Annual Activity Report and which are covered by the Framework for reduction and recoveries, and (ii) the concept of reversal.

<sup>23</sup> RRF Regulation, Article 22

regularly check that the financing provided has been properly used in accordance with all applicable rules, notably public procurement and State aid, including the effectiveness of such checks.

Since the early stages of RRF implementation, the Commission performs system audits to ensure Member States put in place adequate system for the protection of the financial interests of the Union, and audits to provide additional assurance on the fulfilment of milestones and targets. These early audits already incorporated checks on elements linked to public procurement and State aid. Following a recommendation issued in Special Report 07/2023<sup>24</sup>, the Commission enhanced its audit work, introducing additional checks on the effectiveness of the Member State control systems on public procurement and State aid. This has resulted in the use in all types of audits by the Commission, of comprehensive checklists on public procurement and State aid which were rolled out in April 2023 and approved in September 2023. Furthermore, DG ECFIN accordingly updated the RRF Audit Strategy in December 2023. On this basis, as observed by ECA<sup>25</sup>, the audit work in relation to public procurement and State aid effectively covered 14 (out of the 17 audited) Member States that received a payment during 2023.

In terms of coverage of checks, the ECA asserts a “*risk of inconsistent coverage of checks across the Commission’s audits of member state systems*”.<sup>26</sup> **The Commission considers that this is a hypothetical risk not reflected in practice.** First, as explained above, the Commission has extended the scope of its audit work to systematically check in all types of audits whether Member States regularly check compliance with public procurement and State aid rules, including the effectiveness of such checks. Second, RRF audits are undertaken by a dedicated team of RRF auditors. Since the start of the audit campaign on RRF, the sample sizes for testing of public procurement were clearly defined in the audit planning documents, based respectively on a risk assessment of milestones and targets and internal guidelines. The Commission rolled out dedicated more comprehensive checklists from April 2023, which were adopted in September 2023, as acknowledged by ECA<sup>27</sup> and a minimum number of procurement procedures to be checked in Commission’s audits per implementing body has been defined as of September 2024.

The ECA affirms that the State aid checklist did not cover the Member States’ controls for grants to undertakings under GBER or RDI schemes<sup>28</sup>. Nonetheless, the Commission checks that Member States have assessed the conditions applicable for the relevant measures and have notified the use of such schemes to the relevant Commission services. The Commission notes that the existing State aid legal framework, clearing and monitoring mechanisms continue to apply also for RRF measures, and the RRF control mechanisms cannot be expected to duplicate or replace these mechanisms. The Commission recalls that the RRF Regulation establishes the primary responsibility of the Member States to ensure compliance with national and EU law, including the granting of State aid, and controls are to be implemented by the Member States via their internal control systems. In addition, the ex-ante State aid framework foresees procedures and consequences for non-compliance which apply also to any measures included in the RRFs. There is thus neither a legal obligation nor reasonable expectation that specific RRF-related audit work undertakes checks on the granting of State aid. In addition, in case this was required for a milestone or target fulfilment, the Commission has also verified the effective implementation of controls at the granting authority level for all State aid cases.

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<sup>24</sup> See ECA observation 81 and Special Report 07/2023 “*Design of the Commission’s control system for the RRF*”.

<sup>25</sup> See ECA observation 85.

<sup>26</sup> See ECA observation 83.

<sup>27</sup> See ECA observation 81.

<sup>28</sup> See ECA observation 81.

### 3. Commission assurance system on public procurement and State aid

**The ECA asserts that the Commission's assurance declaration in the area of State aid and public procurement has limitations<sup>29</sup>.** The Commission would like to recall that what constitutes legality and regularity under the RRF is different from other EU funding programmes. The Commission provides assurance on the legality and regularity of RRF payments to the Member States based on the satisfactory fulfilment of milestones and targets, rather than on eligible costs. In addition, regarding the protection of the financial interests of the Union, for what concerns public procurement and State aid, the Commission's assurance covers the respect of the obligation of Member States laid down in Article 22(2) point a of the RRF Regulation to regularly check compliance with public procurement and State aid rules, including the effectiveness of such checks. The Commission audit work performed in relation to public procurement and State aid, using the dedicated check lists rolled out in 2023, covered 14 (out of the 17) Member States that received a payment during 2023. **The Commission managed to consider all control results and information available at the time of the signature of the Declaration of Assurance in May 2024,** notably from its extensive audit work and following DG ECFIN's methodology, audit results from other sources (other DGs, national audit bodies) were also taken into account as appropriate to underpin the declaration of assurance.

For its Annual Activity Report, the Commission has put in place a risk assessment methodology underpinning the declaration of assurance, which covers the level of risk (low, medium, high) for each payment and Member based on three building blocks: i) regarding legality and regularity of made ; ii) regarding Article 22(2) point a, and iii) Article 22(5) of the RRF Regulation.<sup>30</sup> The established risk level criteria, in accordance with DG ECFIN's methodology, were applied consistently to determine for each payment and Member State the level of risk, notably as regards public procurement and State Aid. The Commission generally accepts the Court's observations and will continue to refine its risk assessment methodology. Further, in case Commission audits result in very important or critical findings to the Member States and the Member States accepted the recommended corrective actions, the Commission monitors regularly the implementation of the recommendations.

### 4. RRF framework to correct breaches of national or EU law

As part of its audit activities, the Commission issues findings and recommendations on the national control systems, including on verifications of public procurement and State aid rules. **While some of the Commission's findings were of a serious nature, all such deficiencies were either appropriately remedied by the Member States or are in the process of being addressed, and hence no correction measures have been necessary yet.** The ECA correctly notes that the RRF Regulation and Financing Agreement do not stipulate any corrective action to be taken by the Commission or the Member State for individual breaches of public procurement or State aid rules

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<sup>29</sup> Sub-title preceding observation 84.

<sup>30</sup> See Annex 5 of DG ECFIN Annual Activity Report 2023.

which are not deemed to be fraud, corruption, or conflict of interest<sup>31</sup>. However, the Commission emphasizes that the findings of individual breaches are viewed as indicators of potential systemic weaknesses and are factored into future system audits as risk considerations. Moreover, according to State aid rules and related case law by the European Court of Justice, the granting of unlawful aid can lead to an obligation on the Member States to recover that aid from the beneficiary, whether on their own initiative or where imposed either by a national court, or by the Commission if the aid is found incompatible with the internal market.

The ECA rightly notes that **Member States may use their own national budget management systems to define corrective actions in cases of irregularities related to public procurement**. It also observes that the Commission “*did not issue further guidance*” on this matter, while acknowledging that some Member States apply the guidance developed for ESIF funds.<sup>32</sup> The Commission confirms that the use of national systems also implies the use of national correction mechanisms. As a result, the Commission cannot define consistent corrective measures across Member States. The Commission, however, can itself apply corrections if a Member State fails to correct a serious irregularity. To ensure transparent application of this provision, the Commission has issued a dedicated framework for reductions and recoveries under the RRF, including defining how it will apply corrective actions.<sup>33</sup>

In this respect, the ECA further observes that funds recovered under the national control systems need not be returned to the EU budget. **The Commission reminds that this reflects different levels of implementation: Union payments to the Member States are performance-based; if a serious irregularity at the implementation level is corrected by the Member State, and the payment milestone or target is still satisfactorily fulfilled, no harm has been done to the Union budget and the Commission has no basis to recover funds.** The ECA further observes that “*if member states do not apply recoveries for the individual breaches of the rules it could reduce the deterrent effect*”.<sup>34</sup> The Commission would like to put this observation into perspective. First, the obligation to correct and recover funds is a requirement under national law and serves the interests of national authorities, whilst Member States are legally obliged by the RRF legal framework to recover funds that have been misappropriated. To the extent that this RRF legal framework obligation is not respected, the Commission can recover funds for a serious breach of obligations of the Financing Agreement. Second, non-compliance with public procurement rules can directly impact RRF payments, when milestones and targets explicitly refer to public procurement requirements. Third, following audits in which individual breaches of public procurement rules have been found in cases which do not have an impact on the satisfactory fulfilment of the relevant milestone or target, DG ECFIN auditors have the possibility to recommend to the Member States the cancellation of the contracts concluded or awards following an unlawful selection procedure or to take alternative measures to address the issues at stake (i.e., lack of equal treatment). Fourth, findings on individual cases of non-compliance with EU and national law are an indicator of the effectiveness and efficiency of that auditee’s system, and the Commission would consider it as a risk factor in future system audits. Fifth, the Financing Agreement and Loan Agreement require Member States to regularly check proper use of funds, including compliance with all applicable rules. While individual breaches of public procurement rules do not constitute serious breaches, recurring or continuous violations of this obligation risk severe penalties, including the loss of up to 100% of the financial contribution or loan under article 22.5 of the RRF Regulation. Sixth, in case the individual breach of public procurement rules leads to fraud, corruption or a conflict of interest, which has not been corrected by the Member State, the Commission itself can launch a financial correction to recover the funds not corrected by the Member State. Finally, if the Commission identifies systemic

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<sup>31</sup> See ECA observation 89.

<sup>32</sup> See ECA observation 91 and Table 7.

<sup>33</sup> Annex IV to Commission notice *Guidance on recovery and resilience plans* (C/2024/4618)

<sup>34</sup> See ECA observation 92.



breaches of EU law regarding public procurement, it can initiate infringement procedures against the Member State.