Trade-offs in Auditing the EU Recovery and Resilience Facility – Flexibility vs Compliance

A Greek Case Study

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Article

ABSTRACT

The EU Recovery and Resilience Facility (RRF) is a very particular option for managing resources at EU level. One of its features is the involvement of national audit authorities when it comes to ensuring that financed projects are implemented in a timely and reliable fashion. In this context, the success of the RRF as a managing and auditing scheme of EU resources is assessed against certain criteria, which can be weighted differently. Using the example of the audit arrangements in Greece, this article seeks to highlight the need for a balanced approach between the two main objectives of the audit process: flexibility and compliance.

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I. Introduction

In October 2023, the European Court of Auditors (ECA) published its Annual Report for the year 2022. In addition to other interesting findings and conclusions, the Union's external auditors presented the results of their audits on the management and the transactions of the EU Recovery and Resilience Facility (RRF).[1] The RRF (formally known as the Recovery and Resilience Mechanism[2]) is the main instrument created to manage the resources included in the NextGenerationEU recovery instrument (also known as the EU Recovery Instrument[3]). The latter represents a dedicated, comprehensive framework of measures adopted to support the economic recovery of the EU and tackle the repercussions of the COVID-19 pandemic. This is achieved by leveraging substantial amounts of public and private investment within a single, coherent approach at EU level in the spirit of solidarity between Member States. Creating these schemes has been seen as a constitutional-level intervention in the institutional framework of the EU, complementing the Economic and Monetary Union, as it gives the Union a federal-like budgetary power.[4]

Due to its aim and the wide range of activities included in its scope,[5] the RRF has been equipped with a special management system, both at national and at EU level. It deviates significantly from the basic principles of the Union's budgetary functions, thus highlighting the exceptional (in the sense of distinct and unique) character of this financial scheme. In general, the RFF follows a very particular philosophy of managing its resources, with a view to speeding up the implementation of actions. To this end, the management and monitoring procedures focus on achieving results rather than complying with rules.[6] Thus, according to the provisions of the RRF Regulation, payments are not subject to detailed disbursement verifications; rather, they are based on the achievement of multiplier effects in relation to pre-defined milestones and indicators (target values) through the implementation of reforms and investment projects. Payment requests are simply accompanied by a management declaration on the use of resources and a summary of audits.[7] There are several similar arrangements that distinguish the RRF's management and auditing from the usual model employed for instruments financed by the EU budget.

II. Managing the RRF at EU Level

According to Regulation (EU) 2021/241 (hereinafter the RRF Regulation), the European Commission is responsible for managing the fund, an option in line with the direct management model.[8] However, several critical decisions, such as approving the National Recovery and Resilience Plans and the suspending of funding, are taken by the Council.[9] This differentiation is a consequence of the exceptional nature of the whole scheme. In general, the direct management model requires a direct link between the Commission and the end beneficiaries – in the case of the RRF the national governments of the EU Member States. However, there is a strong political component to the whole framework of the RRF, in particular regarding accountability arrangements. For example, the authority to suspend financial assistance to a Member State lies with the Council, and not the Commission. This means that the national authorities are not controlled by a supranational body, such as the European Commission, but by the Council, which is an intergovernmental body, and may (and often does) adopt a more political approach. So, while – as a rule – the Commission is accountable to the European Parliament when it comes to the management of the EU budget in the context of EU budgetary governance,[10] in the case of the RRF things seem to be different: the accountability lies with the Council, which has the relevant decision-making powers.

Another point of concern that has been raised is the (non)disclosure of data relating to the management of the RRF resources. More specifically, the direct management model provides for the recording and publication of all legal and natural persons who are recipients of EU funds through a special system operated by the

European Commission.[11] As for RRF resources, the provisions of the relevant Regulation[12] initially did not provide for such a record, given that only the EU Member States themselves are considered final beneficiaries. Thus, only the amounts allocated to the Member States were recorded and made public, and no details were provided on the beneficiaries (natural and legal persons) of these funds on the ground. At national level, there was no obligation under the RRF Regulation to make such disclosures, only to provide this information to the control mechanisms of the European Union. This shortcoming was partially corrected by the amendment of Regulation 2021/241 and the addition of a provision (Art. 25a) for the creation, in each Member State, of a public portal listing and publishing the 100 final beneficiaries (natural and legal persons) of the RRF with the highest amounts of funding.[13]

It is true that the legality and regularity of expenditure under other EU programmes mainly depends on the eligibility of a beneficiary, of a project, and of the costs declared. The eligibility of such funding is often governed by conditions relating to the costs that can be incurred and declared, which may also need to be identifiable and verifiable. Eligibility conditions for this type of funding also include Union rules ensuring the effective functioning of the single market (i.e., public procurement and State aid rules), and compliance with the relevant national rules. However, in the context of the RRF, the eligibility of a beneficiary, of a project, and of the funds needed to implement investment projects is not a formal condition that the Commission needs to take into account when payments are made to Member States.[14]

Overall, the rationale of the initiators of the RRF is that, although operational objectives and control should be defined in detailed arrangements and procedures to avoid complications either during or after financed operations, such an arrangement may cause excessive administrative burdens, instability, and uncertainty, affecting the rate of payments and delaying the implementation of the measures financed. Moreover, shifting the focus to regulatory compliance, away from intervention and results, puts the emphasis on procedures rather than contents when selecting projects. This is the logic behind the RRF resource management provided for in the relevant Regulation: i.e., to facilitate the rapid implementation of projects and the achievement of results, albeit with a clear risk when it comes to detecting resource mismanagement. This situation, together with the national authorities' central role in managing the RRF as final beneficiaries, shows that the arrangements put in place at national level are very important to ensure sound financial management of the RRF resources.

The looser standards for ensuring the legal, regular, and sound financial management of RRF resources caused by the above-mentioned "flexible" arrangements are somewhat counter-balanced by the provisions on the protection of the EU's financial interests contained in the RRF Regulation.[15] These provisions confer upon the Member States and the European Commission the joint responsibility to act within their respective spheres of competence. This is meant to guarantee that the financial interests of the EU are protected by ensuring that projects financed by the RRF comply with applicable EU and national law, in particular as regards the prevention, detection, and correction of fraud, corruption, and conflicts of interest. Moreover, this is achieved by preventing serious breaches of the obligations arising out of the relevant financing agreements, in particular with regard to double financing.[16]

III. The National Authorities' Involvement in RRF Audits – A Greek Case Study

1. General framework in the RRF

The core idea of the audit arrangements, according to the RRF Regulation, is that the Member States, as beneficiaries, are expected to take all appropriate measures to ensure that the use of the RRF resources

complies with applicable EU and national law. The competent national audit authorities are required to cooperate with their EU counterparts; yet the arrangements of this cooperation have not always been considered effective. For instance, the Commission considers the national authorities solely responsible for checking that RRF financing has been used correctly, i.e., in accordance with all applicable national and Union rules (compliance audit). At the same time, the Commission reserves the right to intervene in cases of serious irregularities and non-compliance with the obligations arising from the financing agreement, in particular when it comes to the avoidance of double funding. In this regard, it focuses on the Member State systems to prevent, detect, and correct cases of fraud, corruption, conflicts of interest and double funding.[17] This approach has been criticised, given the significant level of verified non-compliance with national or EU rules (e.g., on public procurement or State aid).[18] Moreover, the systems audits carried out by the European Commission are not sufficient, meaning that there is no clear information on how compliance is checked.[19] This situation represents a serious risk which directly affects the assurance on the legality of management, which should also be provided for the resources of the RRF under the responsibility of the European Commission, and signifies accountability shortcomings in the institutional framework of the Union.[20]

In any case, the cooperation between national and EU authorities in the context of managing and auditing the RRF is crucial, as it allows for mutual support, advice, and sharing of experience. This creates added value when it comes to pinpointing and raising red flags, and the development of audit schemes adapted to the requirements of managing the RRF resources efficiently.

2. Greek audits for RRF

Greece is an interesting example of a national RRF resource audit system. The Greek National Recovery and Resilience Plan (NRRF-Greece) was approved very early on by the Council of the European Union,[21] and the relevant financing agreement was signed and then ratified by Law No. 4822/2021 (Government Gazette A' 135). The details of the management and audit of the actions and projects financed by the NRRF-Greece are included in Ministerial Decision 119126 EX 2021 (Government Gazette B’ 4498).

The audit arrangements (see Art. 7 of the above-mentioned Ministerial Decision) provide for a wide scope of auditing activities, aiming to verify the following:

- The proper implementation of actions and projects in accordance with the principles of sound financial management and national and Union law;
- The satisfactory achievement of the approved milestones and objectives;
- The avoidance of fraud and corruption;
- The absence of conflicts of interest;
- The absence of double financing of actions and projects.

The achievement of each milestone and objective associated with payment requests is to be verified by a specially appointed Independent Auditor, who prepares a detailed report with all positive and negative findings, even including the necessity of financial corrections (recoveries). This report is to be studied and accepted or responded to by those concerned within ten days; subsequently, the competent Managing Authority issues the appropriate decisions. This procedure is completely novel, at least in the context of the Greek system for the management of EU resources. The reduced time limits and the provision for an auditor, which is not part of the existing formal audit system, signify the will for a flexible and prompt audit procedure, in accordance with the overall concept adopted in the RRF provisions at EU level.

Furthermore, in a more typical scheme, the Audit Committee of the Greek Ministry of Finance is tasked with carrying out sample audits, regarding all five above-mentioned issues included in the scope of the RRF audit systems. These audits may be carried out on the spot and/or at the headquarters of this Committee, on the basis of supporting documents and data held by the audited bodies in electronic or paper form, which are necessary to ensure an adequate audit trail. The results of these sample audits are presented in reports that are issued to those concerned, inviting them to comment. After ten days, the findings of the audits are finalised, and the competent officials from the Ministry will issue all necessary decisions. As noted, this audit scheme has a wider scope of action than the scheme of the Independent Auditor. Nonetheless, its nature, entailing only sample audits, has raised questions about its effectiveness and the actual assurance it provides.

It goes without saying that these audit schemes do not prevent the competent EU authorities (European Commission, European Anti-Fraud Office, European Public Prosecutor's Office, and European Court of Auditors) from verifying the correct use of the EU financial assistance granted under RRF and carrying out administrative investigations and/or on-the-spot checks of the actions of any final beneficiary, implementing agency, contractor, and subcontractor receiving Union funding.

3. Decision of the Greek Court of Audit on the applicable thresholds

However, a very interesting development can be noted that demonstrates that flexibility is put over compliance when it comes to auditing RRF financing activities. It concerns the pre-contractual audit of contracts in the framework of projects financed by the NRRF-Greece – more specifically Art. 200, which was introduced under Law 4820/2021 (Government Gazette A' 130). This law provides for the auditing activities of the Greek Court of Audit (*Elegktiko Synedrio*), which has a dual function, being both the external audit authority and the supreme financial court of Greece. Art. 200 provides for accelerated procedures, such as the appointment of a rapporteur for pre-contractual audits at a stage prior to the dispatch of the relevant file for audit or the possibility of appointing special audit teams during the procedure for the preparation of contracts financed by the RRF, etc. These provisions are supplementary to the general provisions on pre-contractual audits by the Court of Auditors contained in Art. 324 of Law No. 4700/2020 (Government Gazette A' 127). This latter Article sets a general threshold of contract value, amounting to €300,000, above which any public contract for work, supplies, or services concluded by the State, other public authorities, local authorities and their legal entities, and public enterprises, is subject to pre-contractual control. However, it was further provided that in the event of the contracts being co-financed by EU funds, the above-mentioned threshold is increased to €5 million, allegedly for reasons of flexibility, facilitation, and acceleration of the co-financed projects under which the contracts in question are awarded.

When these provisions were applied to projects financed by the NRRF-Greece, it was found that there was no ad-hoc arrangement setting a budgetary threshold of pre-contractual control for the contracts involved in these specific projects. The case was put before the Plenary Session of the Greek Court of Audit in its judicial capacity.

It ruled by a majority[22] that there are four reasons why contracts financed through RRF resources do not fall under the exception clause of an increased threshold of €5 million, but rather under the general rule of a basic threshold of €300,000. The first reason is the exceptional nature of the increased threshold, which necessitates a narrow interpretation of the relevant provision, especially when the difference between the two thresholds (basic and increased) is so significant. This approach is based on the importance of pre-contractual audits as a guarantee of legality arising from the principle of the rule of law and the historical background to the adoption of that exception, namely that it was provided for a very specific category of public contracts, which were deemed to require a special pre-contractual audit regime. The second reason is

similar, namely that the RRF is an exceptional instrument for dealing with the consequences of the COVID-19 pandemic,[23] making it separate from the EU Structural and Investment Funds for which the increased threshold was established. As a consequence, contracts under these financial schemes should also be treated differently from a legal point of view. The third reason refers to the wording of the relevant provisions, which states that the exception threshold is reserved for contracts "co-financed by Union funds," whereas Art. 200 of Law 4820/2021 refers specifically to contracts "financed by the Recovery and Resilience Facility." This indicates that these are different financing mechanisms that cannot receive the same legal treatment. The fourth reason focuses on the fact that while there is a specific provision for the pre-contractual audit of RRF contracts, which entails specific procedures (see above), there is no specific reference to a threshold for these contracts. According to the majority view, this means that the aim is to expedite procedures not by reducing the guarantees of the rule of law as a result of accepting an increased pre-contractual audit threshold, but by introducing procedural arrangements and administrative procedures capable of maintaining the regular pre-contractual audit threshold.

There was also a dissenting minority opinion in the Court of Audit's judgment, which put forward some interesting interpretative approaches.[24] More specifically, the minority focused on the nature and operating mechanism of the RRF, highlighting the need for timely implementation of the actions financed, i.e., within specific and strict timeframes (even by granting the possibility of receiving a pre-financing payment of 13% of the total resources – something that Greece has made use of). They are of the opinion that in light of the fact that the reference to the increased threshold is of a general nature and does not contain any exception for EU funding mechanisms, and since the need for a timely implementation of the RRF contracts is evident, the same justification for accelerating implementation should hold as for contracts co-financed by the Structural and Investment Funds of the European Union. Consequently, contracts for RRF actions should be subject to the increased threshold provisions.

It is clear from the judgment that the aim of the whole reflection was to seek a way of finding a balance between the need for flexible procedures for implementing RRF actions and the need to protect RRF resources from mismanagement through mechanisms such as pre-contractual audit. Given the above-mentioned RRF management pattern at EU level, and the importance of the competent national authorities, in particular in audit procedures, it is crucial to ensure that the resources of the RRF, which is a financial instrument of a "frontloaded" nature (i.e., funds must be paid out quickly in order to achieve the objective of economic recovery of the EU Member States as soon as possible), are managed in a sound and reliable manner. The jurisprudential position of the Court of Audit was a very useful contribution in this direction, as the application of the basic threshold for carrying out pre-contractual audits on RRF contracts, together with the procedural arrangements provided for by Art. 200 of Law No. 4820/2021, constitute a flexible but secure framework for the management of the relevant resources.

4. Subsequent legislative amendment

However, a subsequent legislative initiative changed the situation. A few weeks after the Court of Audit's judgment, an amendment to Article 324 of Law 4700/2020 was introduced. Under this amendment, RRF contracts are now subject to the increased pre-contractual audit threshold (€5 million); furthermore, this new arrangement also retroactively applies to already concluded RRF contracts. The explanatory memorandum of this amendment pointed to a clearer wording of exceptions as the main reason for this initiative, aiming to achieve legal certainty as to the scope of this provision. This reasoning is rather unconvincing as the interpretative approach of the Court of Audit on the same issue is more substantiated and more reasonable, even when it comes to the minority's dissenting point of view. The €5 million threshold for a frontloaded financial instrument, such as the RRF, is risky, as the value of many contracts will be below this threshold, effectively exempting them from pre-contractual audit. Conversely, the Court of Audit's jurisprudential

approach had clarified – in a very balanced way – the framework within which the audit procedure for these contracts could operate in order to ensure that the need for adhering to the principle of the rule of law and the need for the rapid implementation of actions are both met. It has also been rightly pointed out that the Court of Audit's pre-contractual audit is strengthened by establishing the application of principles such as the principles of economy, necessity, and efficiency, which extend the audit work beyond verifying formal legality to substantive issues. In the case of the RRF, this would strike a balance between effective action, procedures, and the timely use of resources whilst upholding transparency and adhering to the rule of law.[25]

The above-mentioned legislative amendment, which represents a misguided way of strengthening flexibility, weakens the effectiveness of the pre-contractual legality audit as a guarantee of the rule of law in RRF projects. The very specific and quite reductive (in the sense of expediting procedures) structure of the system for managing RRF resources makes it easy to circumvent guarantees of the rule of law, especially when there is pressure from political developments. This shifts the focus of interest (see for instance the case of Poland[26]) from the protection of the principles of the rule of law to current issues regarding the management of evolving political affairs.

IV. Conclusion

It is uncontested that the parameters and standards of RRF management constitute a completely new model for the financing and governance of public policies in the EU. This model marks a radical change from the past, as a completely new management approach has been adopted. It is mainly based on the verification of effectiveness of policies. While compliance with rules is a factor, this is not examined to the extent or with the intensity as with other funding tools and policies of the Union.

With the EU Cohesion Policy representing the basic funding model, the RRF management model has in fact been perceived as an alternative model of EU funding. These two models should theoretically complement each other,[27] but the coexistence of a large number of financial instruments – each with different time-frames for eligibility, implementation of actions, and governance structures[28] – has resulted in a peculiar competition between them related to requirements in terms of governance, pace, priority of objectives, etc.[29]

In this sense, the RRF constitutes a key challenge for its initiators. If this new model proves to be effective both in supporting the rapid implementation of measures and in preventing the mismanagement of large amounts of European funds, it would be worth considering extending it to other EU policies involving large amounts. At a political level, the RRF has already been identified as a first step towards the establishment of a fully developed European fiscal union, in particular because of the innovative financing system of this instrument.[30] If it proves to be effective and capable of securing legal, regular, and sound financial management of EU resources through its dedicated audit schemes, then this could lead to its adoption as a model for a comprehensive overhaul of the EU's financial governance and of the resources allocated through its budget in general. In turn, this could represent the next step in the evolution of the Union's institutional framework.

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1. See European Court of Auditors, "Annual Reports for the 2022 financial year", Publications Office of the European Union, 2023, pp. 334-368.↩
2. See Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Mechanism, *O.J.* L 57, 18.2.2021, 17.↩
3. See Council Regulation (EU) 2094/2020 establishing a European Union Recovery Instrument to support the recovery from the COVID-19 disease crisis, *O.J.* L 433, 22.12.2020, I/23.↩
4. See F. Fabbrini, "Next Generation EU: Legal Structure and Constitutional Consequences", (2022) 24 *Cambridge Yearbook of European Legal Studies*, 45, 58-63.↩
5. See Recital 7 of Council Regulation 2094/2020, *op.cit.* (n. 3).↩
6. See E. Rubio, "Balancing Urgency with Control", (2021), 262 *Jacques Delors Institute Policy Paper*, 10.↩
7. See Arts. 22 and 24 of Regulation (EU) 2021/241, *op. cit.* (n.2).↩

8. For the direct financial management model see Art. 62(1)(b). 1 subsection a' and Arts.125-153 of Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union, *O.J.* L 193, 30.7.2018, 1.↩
9. See, for example, Art. 20 of Regulation (EU) 2021/241, *op. cit.* (n.2), on the approval of national recovery and resilience plans and Art. 10 on the suspension of all or part of the commitments or payments from the RRF.↩
10. See Art. 319 TFEU.↩
11. See. Recital 12 of Regulation (EU, Euratom) 2018/1046, *op.cit.* (n.8).↩
12. See Arts. 25 to 31 of Regulation (EU) 2021/241, *op. cit.* (n.2).↩
13. See Art. 1(10) of Regulation (EU) 2023/435 amending Regulation (EU) 2021/241 as regards REPowerEU funds in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755 and Directive 2003/87/EC, *O.J.* L 63, 28.2.2023, 1.↩
14. See. European Court of Auditors, "Design of the Commission's Control System for the RRF", Special Report 07/2023, Publications Office of the European Union, 2023, pp. 7-8.↩
15. See Art. 22 of Regulation (EU) 2021/241, *op. cit*. (n.2).↩
16. For more details on the protection of the EU's financial interests in the context of the RRF, see C. Kreith and Ch. Arwidi, "Protecting the EU's Financial Interest in the New Recovery and Resilience Facility", (2021) *eucrim*, 171.↩
17. See European Court of Auditors, Special Report 07/2023, *op. cit*. (n. 14), p.17.↩
18. See European Court of Auditors, Special Report 07/2023, *op. cit.* (n. 14), p.18.↩
19. *Ibid*.↩
20. *Ibid*.↩
21. See Council Executive Decision 10152/21/6.7.2021 approving the assessment of Greece's recovery and resilience plan, available online at: <https://greece20.gov.gr/to-plires-sxedio/> accessed 1 December 2023.↩
22. See *Elegktiko Synedrio* (Olomeleia) (Court of Audit - Plenary), 2 February 2022, Case no 380/2022, paras 11 & 12.↩
23. The exceptional nature of the RRF had been formally declared by the European Council in its Conclusions after its special meeting in July 2020 (EUCO 10/20, 21 July 2020, point A4), and further stated in Recital 6 of Regulation 2020/2094.↩
24. See *Elegktiko Synedrio* (Olomeleia) (Court of Audit - Plenary), 2 February 2022, Case no 380/2022, para 13.↩
25. See. A. Mavrommati, "The concept of efficiency in the pre-contractual audit of the Court of Auditors", (2022) 15 *Theory and Practice of Administrative Law*, 601, 605-606.↩
26. For an analysis of developments in the lifting of EU fiscal measures as a means of protecting the rule of law in Poland, see W. Van Gaal, "'Systemic' lack of scrutiny on EU's €723.7bn recovery fund", *EU Observer* <https://euobserver.com/news/155125> accessed 1 December 2023.↩
27. See G. J. Koopman, "Cohesion policy and the Recovery and Resilience Facility: not just two sides of the same coin", (2022) 1, *ECA Journal*, 27.↩
28. For a comparison between the RRF and the EU Cohesion Policy, see European Court of Auditors, Review 1/2023, *EU financing through Cohesion Policy and the Recovery and Resilience Facility: A comparative analysis*.↩
29. See A. Novakov, "Cohesion & NextGenerationEU: Europe's double-act for recovery?", (2022) 1, *ECA Journal*, 116.↩
30. The compromise reached by the European Council in its Conclusions of July 2020, as described in Art. 5 of Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union (*O.J.* L 424, 15.12.2020, 1) allows the European Commission to seek the resources necessary for the RRF through borrowing funds from the capital markets till 2026. This has been a novel political initiative, which has been characterised as exceptional as it signified a deviation from the basic framework of EU own resources.↩

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