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Delegations will find attached document COM(2023) 545 final ANNEX 2.

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ANNEX 2

ANNEX

to the

**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

on the implementation of the Recovery and Resiliency Facility: Moving forward

Annex II – Reversal of Milestones and Targets under the Recovery and Resilience Facility

In accordance with the second sentence of Article 24(3) of Regulation (EU) 2021/241 (‘the RRF Regulation’), “[t]he satisfactory fulfilment of milestones and targets shall presuppose that measures related to previously satisfactorily fulfilled milestones and targets have not been reversed by the Member State concerned.” This note provides a framework for the application of this provision. It addresses a recommendation from the European Court of Auditors¹ and provides legal clarity and transparency on the process to be followed in case of a reversal, ensuring the continued implementation of the RRF. The Commission can review and amend this methodology as it gathers more experience with its application.

1. Scope of reversal

A reversal of a milestone or target exists when a milestone or target that was previously correctly considered as satisfactorily fulfilled (and the Member State has been paid for) cannot any longer be considered as satisfactory fulfilled.

Since the Regulation refers to an absence of reversal “*by the Member State concerned*”, the triggering of Article 24(3), second sentence, only covers a reversal which is imputable to the Member State, by action or by omission². This situation is not necessarily equivalent to a situation where the milestone or target simply ceases to be fulfilled. The Regulation, therefore, does not imply that all milestones and targets must continuously be achieved throughout the lifetime of the RRF, in order not to be considered reversed. Given this, reversals of the milestone or target that are not imputable to the Member State are not considered a basis for triggering Article 24(3) of the RRF Regulation³.

Imputability of the Member State may derive from actions or omissions of other State organs, public bodies and public undertakings other than only the government⁴.

¹ Special report 07/2023: Design of the Commission’s control system for the RRF.

² This reading of action by the Member State concerned is supported by other language versions of the RRF Regulation. For example, in the French text: *Le fait d'avoir atteint les jalons et cibles de manière satisfaisante présuppose que l'État membre concerné n'a pas annulé les mesures liées aux jalons et cibles précédemment atteints de manière satisfaisante.*

³ For example, should a natural disaster destroy an infrastructure investment, whilst the milestone or target may no longer be considered satisfactory fulfilled, it is not the Member State that has caused this reversal. As another example, should an SME enter into insolvency after receiving a subsidy, it is not the action or inaction of the Member State that has caused this.

⁴ For example, if a milestone required the entry into force of legislation and was considered as satisfactory fulfilled, if later the legislation is annulled by a Court, this is considered as a reversal by the Member State where the Member State should swiftly take action to ensure that new legislation is adopted that respects the requirements of the milestone.

Cases to be distinguished from a reversal

The **failure of a Member State to implement subsequent steps of a reform or investment does not, *prima facie*, indicate a reversal** of previously satisfactorily fulfilled milestones or targets but may well affect the satisfactory fulfilment of a subsequent milestone or target.

A change of a reform or investment that would still meet the requirements of the related milestone or target should not be considered as a reversal. In this respect, changes in elements that are not required for the satisfactory fulfilment of the respective milestone or target cannot be a basis to consider a milestone or target reversed.

In the specific situation **where a breach of the obligation of protection of the financial interests of the Union would result in the reversal of a milestone or target**, the Member State should take action to ensure that the milestone or target is still met. Should the Member State fail to take such action within a reasonable time, this failure would trigger Article 24(3), second sentence, of the RRF Regulation.

A reversal of a milestone or target by the Member State is distinct from a finding (ex post) that the evidence underlying a payment request was incorrect. A finding by the Commission, for example through its ex-post audits, that the evidence underlying a payment request was incorrect means that the milestone or target should not have been considered as satisfactorily fulfilled in the first place. For such cases, recoveries will take place on the basis of Article 19(2)(a) of the Financing Agreement.

Risk of a reversal

Whilst both investments and reforms may be reversed by the Member State, the risk of a Member State being responsible for the reversal of a milestone/target related to a reform is greater than for an investment. Once an investment is in place and has been assessed as satisfactorily fulfilled, it is unlikely that Member States will take action to reverse such an investment. This is in line with the *travaux préparatoires* for this provision, which was introduced in the negotiations with a rationale of ensuring that reforms were not reversed⁵.

2. Process to identify reversals

During the preliminary assessment of each payment request, the Commission will consider whether it has any evidence that milestones and targets have been reversed by the Member State. This will be done on the basis of:

1. *The payment request:* In line with the request for payment template, Member States should confirm to the Commission with each payment request that previously satisfactorily fulfilled milestones and targets have not been reversed. If the Member State has not confirmed this (or has explicitly confirmed that milestones or targets have been reversed), this will be a trigger for further investigations by the Commission.

⁵ The principle of non-reversal is linked to the novelty of the RRF, which finances reforms of Member States, alongside investments. Notably, this provision was introduced with the logic that the long-lasting impact of the RRF is to a great extent dependent on the continued implementation of reforms, which could, due to the nature and set-up of the policy-making process, be reversed, through other, contradicting actions taken by the Member State.

2. *Notifications by the Member State:* In line with Clause 2.2 of the Operational Arrangements, Member States are required to notify the Commission of any change in the documentation identified in the verification mechanism on which the assessment was made, which is of a material nature to affect such assessment or the assessment of future milestones and targets.
3. *Any additional evidence that the Commission may obtain:* The Commission may be aware via alternative sources (for example, the European Semester, stakeholders' information or ex post audits) of evidence that previously satisfactorily fulfilled milestones and targets have been reversed by the Member State.

Based on the above, should the Member State confirm in its payment request that measures related to previously satisfactorily fulfilled milestones and targets have not been reversed and the Commission does not have evidence to the contrary, this will be confirmed to the Economic and Financial Committee in the preliminary assessment of the relevant payment request.

Should the Commission consider that a milestone or target that was previously considered as satisfactorily fulfilled *may* have been reversed by the Member State, in accordance with Article 6(4) of the Financing Agreement, the Commission may ask supplementary information and carry out checks or on-the-spot controls in order to determine whether a reversal by the Member State has occurred.

3. Implications of a reversal imputable to the Member State

In line with Article 24(3) of the RRF Regulation, in case the Commission considers that a measure related to a previously satisfactorily fulfilled milestone or target has been reversed by the Member State, no further milestone or target will be considered as satisfactory fulfilled, until the reversal is addressed.

A Member State may address a reversal of a milestone or a target by taking action to ensure that the milestone or target is again considered as satisfactory fulfilled.

In case that the Member State does not take action, the Commission shall address a reversal of a milestone or target by putting the Union budget in the same position as if that milestone or target had never been considered as satisfactory fulfilled.

The Commission will address the reversal by suspending the payment of funds from the subsequent payment requests. This will result in a suspension – and, if no action is taken within six months, in a reduction – of an amount equal to the amount received by the Member State that can be imputed to the milestone or target that was reversed. The Commission will use the partial suspension methodology for this purpose, as detailed in annex II of the Communication “*Recovery and Resilience Facility: Two years on, A unique instrument at the heart of the EU’s green and digital transformation*” of 21 February 2023”⁶.

In accordance with the partial suspension methodology, to ensure the effective use of RRF funds and protect the financial interests of the Union, the non-fulfilment of milestones or targets related to a Member State’s audit and control system that were necessary for complying with Article 22 of the RRF Regulation leads to the suspension of the full

⁶ https://commission.europa.eu/system/files/2023-02/COM_2023_99_1_EN.pdf

instalment and all future instalments. Following the same approach, in case a reversal concerns such milestones or targets, no further milestone or target will be considered as satisfactory fulfilled until the reversal has been rectified by the Member State.

4. Legal framework and procedure in case of a reversal imputable to the Member State

In line with Article 24(3) of the RRF Regulation, the Commission will take into account potential reversals, when assessing the following payment requests submitted by the Member State concerned.

Article 24(6) of the RRF Regulation concerns the case where the Commission's preliminary assessment establishes that the milestones and targets have not been satisfactorily fulfilled. This provision is applicable also in case where measures related to previously satisfactorily fulfilled milestones and targets have been reversed by the Member State concerned, given that, also in that case, these milestones or targets can no longer be considered as satisfactorily fulfilled.

As the measure related to the milestone or target is assessed as no longer satisfactory fulfilled, the Commission will follow the procedure of Article 24(6) concerning a negative preliminary assessment.

Procedure:

- The Commission will, first, inform the Member State that a milestone or target is assessed as no longer satisfactory fulfilled. The reasons for the negative preliminary assessment will be comprehensively explained to the Member State. Second, the Member State may present its observations within one month of the Commission's assessment. Third, in case the observations of the Member State concerned are not sufficient to alter the negative preliminary assessment, the Commission will adopt a suspension decision. Last, in accordance with Article 24(6), second subparagraph, in case that the Member State does not resolve the reversal by taking action to ensure that the relevant milestone or target can be assessed as satisfactory fulfilled within a period of six months from the suspension, the Commission will proceed to a reduction of funds, in accordance with Article 24(8) of the RRF Regulation.
- In order to establish the amount to be suspended, the Commission will calculate the value of the milestone or target that has been reversed by the Member State concerned and, therefore, can no longer be considered as satisfactory fulfilled, using the partial payment methodology⁷.
- In parallel, the Commission will proceed with its preliminary assessment of the satisfactory fulfilment of the milestones and targets of the payment request and will provide its findings to the Economic and Financial Committee.

⁷ In line with that Communication, the maximum value cannot exceed the full amount of the instalment(s) containing reversed milestones, except in the case of non-fulfilment of milestones and targets related to a Member State's control system.

- With the adoption of the suspension decision, the Commission will resolve the reversal, by ensuring that the Union budget is protected by being in the same position as if no payment for the reversed milestone or target had taken place. Given that, following the suspension, no funds are allocated to the Member State for any milestone or target that has not been satisfactorily fulfilled, the reversal is considered resolved, in line with Article 24(3) of the RRF Regulation. The Commission will then be able to assess the milestones and targets of the payment request and authorise the corresponding disbursement of the instalment of the financial contribution or the loan (not including the amount that was suspended due to the reversal⁸).

Reversal outside the context of a payment request

Where the Commission becomes aware of a reversal outside the context of a payment request, the Commission services will not wait until the submission of the next payment request and will immediately engage in a technical dialogue with the Member State concerned to establish whether a reversal has occurred. Following this technical dialogue, in case those explanations confirm the risks of a reversal, the Commission should inform the Member State in writing that the Commission considers a reversal has (or may have) occurred and ask for observations within one month. Such an assessment outside the procedure of a payment request would provide the maximum time to the Member State to address the reversal. In this respect, the Member State would know the Commission's views and unless it takes corrective action before the next payment request, a part of the next payment would be suspended in accordance with the above-mentioned procedure.

⁸ If needed, amounts would also be suspended from subsequent payment requests if the instalment amount for the on-going payment request is for less than the value that should be suspended.

Appendix: Legal Provisions

Article 24(3) of the RRF Regulation:

The Commission shall assess on a preliminary basis without undue delay, and at the latest within two months of receiving the request, whether the relevant milestones and targets set out in the Council implementing decision referred to in Article 20(1) have been satisfactorily fulfilled. The satisfactory fulfilment of milestones and targets shall presuppose that measures related to previously satisfactorily fulfilled milestones and targets have not been reversed by the Member State concerned.

Article 6(4) of the Financing Agreement:

The Commission may ask supplementary information and/or carry out checks and on-the-spot controls to verify the completion of milestones and targets, including on the non-reversibility of previously satisfactorily fulfilled milestones and targets.

Clause 2.2 of Operational Arrangements:

[...] In accordance with Article 24(3) of the RRF Regulation, the satisfactory fulfilment of milestones and targets shall presuppose that measures related to previously satisfactorily fulfilled milestones and targets have not been reversed by the Member State. [Member State] shall notify the Commission of any change in the documentation identified in the verification mechanism in Annex I on which that assessment was made, which is of a material nature to affect such assessment or the assessment of future milestones and targets.

Request for payment letter from the Member State:

We confirm that measures related to previously satisfactorily fulfilled milestones and targets have not been reversed.