

Reflections on Article 22(4)i) of the Interreg Regulation

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Provision in article 22(4)i)

In selecting operations, the monitoring committee or, where applicable, the steering committee shall:

- *ensure that selected operations are not directly affected by a reasoned opinion by the Commission in respect of an infringement within the scope of Article 258 TFEU that puts at risk the legality and regularity of expenditure or the performance of operations;*

Why are we discussing this?

We have received frequent requests on this topic from colleagues working in programmes. This tells us that it is not entirely clear how to handle the provision in practice without imposing a disproportionate administrative burden on programme management.

The underlying consideration is:

EU money shall not be used for any projects that might contribute to an infringement of EU law.¹ While the sheer opening of infringement procedures by the Commission does not yet establish the existence of a violation of EU law (this is for the Court of Justice to find), the EU legislator chose to use this as a strong indicator, in order to avoid recovery procedures.

However, it should be stressed that the Commission is not obliged to open infringement procedures, even if it might consider that an EU country is violating EU law. Therefore, the mere fact that no infringement procedure has been opened (against a national law or practice) does not in itself allow the conclusion to be automatically made that it is in conformity with EU law.

The check required according to the provision in article 22(4)i) is very similar to checks for compliance with national law. Any ERDF contract issued by the MA includes the provision that the activities in the project have to comply with EU- and relevant national legislation. For obvious reasons it is good to do an initial compliance check ex-ante; i.e., before selection & contracting procedure, to prevent unnecessary risks: MA and NA, assessors and/or national representatives in the MC should check during the initial project assessment² if there is any risk that the subject of the project might infringe national law.

¹ This can be violations of primary law or secondary law

² Obviously, there is also the risk during project implementation (such as the infringement of procurement law): Risk prevention and containment during implementation should be tackled in dedicated risk management and anti-fraud mechanisms.

Legislative framework

Article 22(4)i) of Regulation (EU) 2021/1059 (Interreg Regulation)

❖ Step 1 – search in database on infringements

The primary source of information for your investigations is the database on infringements, which is managed by the Commission.

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en

You can choose the member state(s) ('country') under the category 'active cases'. For closed cases, you can assume that the issue has been resolved.

The status of formal notice³, reasoned opinion and procedures in court⁴ are of interest.

This would mean looking into the following elements under 'decision type':

- formal notice Art. 258
- formal notice Art. 258-260(3)
- additional formal notice + 2nd + 3rd
- reasoned opinion Article 258 TFEU
- additional reasoned opinion Article 258
- additional reasoned opinion Article 258 + Article 260
- referral to Court Art. 258
- referral to Court Art. 258 – 260(3) TFEU

Since the list of status to be considered under 'decision type' is quite comprehensive, we recommend selecting all and using a different filter: You may consider excluding certain policy areas from the search. The likelihood that an Interreg project might contribute to an infringement of Union law is practically zero in the following policy areas:

- Budget
- Defence Industry
- Enlargement
- Enterprise and Industry
- European Anti-Fraud Office
- Eurostat

³ For obvious reasons it is better to look into potential risks – the status of formal notice indicates that there is a possible risk of infringement, which is why the EU is sending a formal notice.

⁴ Despite the wording of the clause in the Regulation it is obviously of interest if the status of an infringement decision goes from 'formal notice' or 'reasoned opinion' over to court: Please remember that you should not fund any activities that might contribute to an infringement of EU law.

- Financial Stability, Financial Services and Capital Markets Union
- Home Affairs
- Human Resources and Security
- Internal Market and Services
- Internal Market, Industry, Entrepreneurship and SMEs
- Justice, Freedom and Security
- Justice, Fundamental Rights and Citizenship
- Legal Service
- Neighbourhood and Enlargement Negotiations
- Personnel and administration
- Publication office
- Secretariat General
- Task Force for Relations with the United Kingdom⁵
- Taxation and Customs Union

In our experience, these policy areas have never been the subject of Interreg projects. We think that in practice one can also exclude these for the future, since these policy areas are quite distant from the intent and rationale of EU Cohesion Policy Objectives, hence also quite distant from the objectives and intent of Interreg programmes.

❖ **Step 2 Look into the (remaining) sample and make a plausibility check**

The remaining sample is likely to be quite small, but it might still consist of several pages⁶ For example, it might contain decisions in the policy areas of environment or energy.

The database indicates the title of the decision. This will allow you to quickly spot any decisions that might be potentially relevant for your projects.

Please keep in mind the key objective of the check: The project may not be directly affected by an infringement procedure. It has to be clear that the funding provided to the project content does not contribute to a potential infringement of EU legislation. This requires a short plausibility check that involves looking into the subject of the decision and matching it with the subject of the project.

⁵ Except for Interreg programmes including UK that will be continued

⁶ Functionality of the database displays the number of pages only on top of the list on your screen - you'll have to 'turn pages' manually.

A couple of examples for infringement decisions and exemplary considerations on them:

Infringement decision	Exemplary considerations
Energy: Partial transposition by the Member State of Directive (EU) 2018/844 on the energy performance of buildings	Should you have such projects – in particular, when including pilot investments - it is important to consult with the ministry or department in charge of such matters. You have to make sure that the project is in line with the EU standard; this might also become a clause in the subsidy contract.
Energy: Failure to notify complete transposition measures for Directive (EU) 2019/692 on common rules for the internal market in natural gas	An example of an infringement decision that is most likely not relevant for any of your projects.
Mobility and Transport: Partial transposition by the Member State of Directive (EU) 2016/2370 - Opening the access to domestic rail markets and governance of the railway infrastructure	This might be relevant should you have a project that includes the completion of a missing link in railway infrastructure. If this is the case, you should seek advice from the competent authority (usually the Ministry of Transport) on how to tackle the issue (since the infrastructure manager who is most likely the beneficiary might not have an impartial view on it).
Environment: NATURE - Incomplete NATURA 2000 network	Should you have a project in a cross-border nature reserve you should clarify the status of the area in the NATURA 2000 network. If it is already in there – there is no risk. If it is not on the official list, the current status and the likelihood of the area to become part of the NATURA 2000 network should be clarified with the competent authorities at regional or national level.
Maritime spatial planning: Commission calls on Member State and Member State to establish and send copies of their Maritime Spatial Plan	Maritime spatial planning is a clear topic of interest for maritime programmes. If the Plan as the substantial legal basis is missing for one of the member states involved in the project, then the purpose and objective of the project might be affected. As such, this is a clear case for debate with the competent authorities.

❖ **Step 4 Seek clarification with competent authorities, if necessary**

As we have indicated in the table above, in some cases it is advisable to seek clarification with competent authorities to make sure that there is no potential risk.

In many cases, the MC includes representatives of the competent authority. Should you encounter hesitance when you are requesting support, please remind MC members that

according to article 22.(4)i) it is the MC that has to ensure that selected operations are not directly affected by a reasoned opinion.

The infringement procedure

*Failure to meet EU obligations may be due to:*⁷

- *National rules not being compatible with Union law;*
- *Failure to implement EU law;*
- *legislative or administrative decisions or practices;*
- *positive action⁸ (adopting measures contrary to EU law or not repealing any that are);*
- *negative action (delays in implementing EU law or failing to inform the Commission of the implementation).*

The legal proceedings before the Court of Justice of the European Union are:

- *usually brought by the Commission⁹;*
- *directed at the EU country, even if the perceived failings are the responsibility of its government, parliament, federal or subnational bodies.*

The procedure works as follows:

- *The Commission¹⁰ indicates that a given EU country may not be meeting its obligations.*
- *The Commission sends a letter of formal notice to the country in question, setting out its doubts as to the violation of Union law and requesting further information. That country must send a detailed reply by a given deadline, usually 2 months.*
- *On the basis of this reply, the Commission may:*
 - *issue a reasoned opinion (a formal request to comply with EU law, calling on the EU country in question to inform it of the measures taken to comply within a specified period, usually 2 months); or*
 - *close the case, in which the issues with the EU country concerned have been resolved without the Commission needing to pursue the procedure.*
- *If the country concerned fails to comply with the Commission's opinion within the timetable given, the Commission may refer the case to the Court of Justice. Please note that the Commission has a political margin of appreciation as to whether or not to bring a case to the Court. The Commission is also not bound by any deadline for bringing the case to the Court of Justice.¹¹*

⁷ See: <https://eur-lex.europa.eu/EN/legal-content/summary/infringement-of-eu-law.html>

⁸ Please note that in practice the Commission does not launch any infringement decision on the basis of single cases. The Commission intervenes only in the case of actions that can be labelled as systemic; i.e., inherent to current practice.

⁹ In exceptional cases it may also be initiated by another EU country

¹⁰ In exceptional cases another EU country

¹¹ If another EU country has initiated the procedure, it may refer the case to the Court even if the Commission does not deliver a reasoned opinion.

- *The Court decides whether or not the EU country has violated EU law. The relevant point in time is the date of the reasoned opinion plus two months. It is for the EU country to take all necessary measures to comply with the findings of the Court. In very specific circumstances, only the Court itself formulates measures that the EU country is to take to that effect.*
- *Following a ruling of the Court of justice finding that the EU country has violated EU law, the Commission will ask the MS to explain what measures it will take to correct the situation, and will give the country a certain deadline for that. If the Commission believes the country is not complying with the ruling of the Court (and therefore continues to be in violation of EU law, despite the ruling), it can refer the case to the Court a second time, recommending the size of fine it considers should be paid.*
- *If the Court finds that the judgment is still not being respected it can impose a lump sum and/or penalty payment.*
- *In the event that the Commission refers an EU country to the Court for failure to communicate national measures implementing EU law, it may at the same time ask the Court to impose financial sanctions. In this case, the Court can impose penalties at the stage of the initial judgment.*

Additional information source

If you are interested in more details, the database [Info Curia](#) on European case law might provide further information. There you can access information on all cases, sorting them by period, subject matter, procedure and result, etc.