



MEMORANDUM

TO Province of Limburg
Mr. M.P.T. Rongen

DATE 2 November 2023

OUR REFERENCE 1015094

COPY TO -

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SUBJECT Interreg Euregio Meuse-Rhine

Dear Mr. Rongen,

On behalf of the Province of Limburg (hereinafter: **'the Province'**) you have asked us to provide a legal memorandum with regard to the following matter.

Background

Interreg is a European grant scheme aimed at spatial and regional development. Parties from different countries cooperate on different Interreg programmes. The specific provisions for Interreg are currently laid down in Regulation (EU) 2021/1059 of the European Parliament and of the Council¹ and Regulation (EU) 2021/1060 of the European Parliament and the Council².

One of the 60 Interreg-areas is Interreg Euregio Meuse-Rhine (hereinafter: **'Interreg M-R'**). Interreg M-R consists of a cooperation between (various authorities from) the member states the Netherlands, Belgium and Germany. Interreg M-R provides financial investments in projects within the fields of innovation, economy, social inclusion, education and territorial cohesion.

The Province was appointed as the 'Managing Authority' (hereinafter: **'MA'**) of Interreg M-R. Also a 'Monitoring Committee' (hereinafter: **'MC'**) was installed as mentioned in Article 28 of Regulation 2021/1059, which in turn intends to appoint a 'Steering Committee' (hereinafter: **'SC'**) as mentioned in Article 22 of Regulation 2021/1059. The MC is responsible for monitoring the progress of the programme, including launching of calls for proposals. The SC will be responsible for the selection of projects / beneficiaries to which a grant will be awarded. As MA, the Province is responsible for awarding these grants following the advice from the SC.

The MA, MC and SC are assisted by the Joint Secretariat (hereinafter: **'JS'**) as mentioned in Article 46 of Regulation 2021/1059. The JS also provides information to possible beneficiaries about funding

¹ This regulation was preceded by Regulation (EU) 1299/2013.

² This regulation was preceded by Regulation (EU) 1303/2013.

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opportunities and assists potential beneficiaries and partners in the implementation of operations. We understand that the JS of Interreg M-R is comprised of staff members of the Province, as well as staff members of the so-called Regional Antennas (hereinafter: '**RAs**'). These RAs have offices in the partner-regions of Interreg M-R, and perform tasks regarding the preparation and development of cross-border projects. Within the JS, the staff members are responsible for the assistance to beneficiaries during the implementation of the project. The staff members of the Province are also responsible for giving assistance to the MC and SC with regard to the selection of projects for grants. To this end, an analysis is made of the applications that have been received within a given time period. Based on this analysis, the JS provides suggestions to the SC with regard to the selection.

Below, we will firstly explain the question presented to us by the Province. Secondly, we will provide a summary of our conclusions. We will then mention the relevant legal framework (both European and Dutch), after which we will elaborate on our analysis.

Question

The Province has identified a potential risk with regard to the (securing of) a fair and independent selection of beneficiaries/projects to which grants will be awarded.

This risk is related to the fact that staff members of the RAs – who on the one hand assist potential beneficiaries with their applications for grants – are in fact employed by the same governmental bodies whose representatives have a seat in the SC. Also, we understand that one RA may – on basis of rotation – be delegated as an observer who can take part in meetings of the SC. This invokes the risk that the selection process within the SC could be (indirectly) influenced by staff members of the RAs, and that RAs could provide an advantage to specific potential beneficiaries by (knowingly or unknowingly) provide information about the decision making process within the SC.

The Province seeks to mitigate these risks. To that end, the Province is of the opinion that documents concerning the decision making process within the SC on the selection of projects should only be shared with members of the SC specifically, and not with the RAs. This includes documents such as individual opinions of SC members, as well as the assessment done by MA/JS. Only the final selection-advice of the SC to the MA (the Province) should become available to the RAs.

As we understand, one or more programme partners have objected to this measure. They are of the opinion that they should be informed in full about the decision-making process within the SC, including sending the meeting documents in advance. The argument is used that this information is needed for the RAs in order to provide high-quality guidance in working towards a full application. The Province therefore wants to know whether it is allowed to deny the RAs said information or not.

Conclusions

The importance of preventing any conflict of interest during the selection of projects under the Interreg-programme follows from both European law and Dutch law. Firstly, this necessity is addressed in

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Regulation 2021/1059, that contains an obligation for the adoption of rules of procedure for MCs that must prevent situations of conflict of interest. In addition, the European Commission has – on multiple occasions – emphasized the importance of preventing any suspicion of conflict of interest, in particular regarding the ‘double role’ of RAs.

Decisions of the Province on awarding and rejecting (submissions for) subsidies are subject to Dutch administrative law. Dutch administrative law recognises the doctrine on the distribution of scarce public rights (including subsidies). This implies that administrative authorities (such as the Province) must ensure that all potential beneficiaries have fair and equal opportunities for applying for such rights. This doctrine is based on principles of European law on equal treatment and transparency.

The current rules of procedure of the MC – that will provide the basis for rules of procedure of the SC – already appear to contain specific Chinese walls that must prevent conflicts of interests during the selection of projects. However, we note that the current provisions are predominantly aimed at the decision making process within the MC/SC. They do not yet address the previous phase, during which RAs assist parties in the preparation of submissions. Since members of the RAs work for the same organisations as members of the MC/SC, it is important to also prevent any suspicion of conflict of interest at this stage. In this regard, the limitation of access to information regarding the decision making process within the MC/SC appears to be an effective measure. This would help to mitigate the risk of RAs sharing useful information with specific parties that could provide an advantage when applying for grants.

We would like to emphasize that the importance of effective Chinese walls does not only flow from previous letters from the European Commission, but also from the responsibility of the Province under Dutch administrative law. A lack of effective measures to prevent conflicts of interest could pose the risk of decisions by the Province on awarding and rejecting (submissions for) grants or subsidies being overturned by Dutch courts. This is especially the case since the European Commission has already pointed to possible shortcomings in the previous set up of the programme.

I. LEGAL FRAMEWORK

1. With regard to the relevant legal framework, mainly two aspects are important. First of all it is relevant to establish whether there are any applicable provisions regarding the sharing of information between the different organs of Interreg M-R. More specifically, it must be established whether the RAs have a right to access to the aforementioned information.
2. Secondly, it is important to establish whether there are legal grounds for limiting the sharing of information regarding the decision-making process within the SC. These grounds could lead to the conclusion that it is necessary or at least desirable to take mitigating measures as suggested by the Province.

Rules on access to- and/or sharing of information

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3. Neither Regulation 2021/1059 nor Regulation 2021/1060 provides for specific rights for RAs to information regarding the (process of) selection of projects. This appears to be a matter of a more practical nature that has been left to the relevant programme-partners to regulate themselves.
4. The partners of Interreg M-R have concluded a Partnership-agreement in June of 2016. This Partnership-agreement does not contain specific provisions regarding the sharing of information. Article 3, sub 1 of the Partnership-agreement does provide that the MA will adopt a document concerning the 'management and control system', which lays down the duties and responsibilities of the different partners, as well as the relevant procedures and agreements. We understand that this document has not yet been adopted.

Reasons for limitation of access to- and/or sharing of information

5. The measure of limiting the sharing of information regarding the decision-making process within the SC is – in short – aimed at preventing any distortion of competition between potential beneficiaries. It is aimed at ensuring that the selection process remains fair and unbiased and potential beneficiaries cannot be put at an unfair advantage.

Regulation

6. The importance of a fair and unbiased selection process is acknowledged in Regulation 2021/1059. First of all, article 22, sub 2, of Regulation 2021/1059 provides that the MC or SC shall adopt criteria and procedures for the selection of 'operations' (or projects) which are non-discriminatory and transparent. Also, article 28, sub 2 of Regulation 2021/1059 provides that the MC must adopt rules of procedure. These rules of procedure of the MC and, where applicable, of the SC shall prevent any situation of conflict of interest when selecting Interreg operations (projects). These rules of procedure shall include provisions regarding voting rights and rules for attending the meetings.
7. These provisions adhere to the more general principles of European law on equal treatment, non-discrimination and transparency. These principles have been acknowledged by the Court of Justice of the European Union in a wide range of cases, most notably in judgements regarding the rights on free movement of goods and services as well as public procurement.³ Regarding the latter, these principles form the basis for Directive 2014/24/EU on public procurement (and related Directives). Article 24 of Directive 2014/24/EU also provides that contracting authorities must take appropriate measures to effectively prevent, identify and remedy conflicts of interests in order to avoid any distortion of competition.

Rules of procedure

8. We understand that the MC has indeed adopted its rules of procedure during its constituent meeting of 8 February 2023. The rules of procedure of the SC are being prepared, as the SC is installed due to a decision of the MC. The main principles with regard to conflicts of interests will thereby most likely be taken over from the rules of procedure of the MC. The provisions regarding conflicts of

³ For example CJEU C-203/08, *Betfair*; and CJEU C-72/10 and C-77/10, *Costa & Cifone*; and CJEU C-496/99P, *Succhi di Frutta*.

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interest are laid down in article 7 of the rules of procedure. A distinction is made between organisational- and personal conflicts of interest:

- i. Organisations conflicts of interests can arise when a member of the MC must decide on a proposition that falls within the mandate of the organisation that the member represents. For smaller organisations it is mentioned that the development and execution of projects on the one hand and the evaluation of projects on the other, must be assigned to different administrative units to maintain a clear distinction of functions;
 - ii. Personal conflicts can arise when private interests of a member of the MC – such as external personal or professional relations or financial interests – conflict with the exercise of the members official duties.
9. In order to prevent conflicts of interests, several measures have been adopted in the MC's rules of procedure. Members of the MC must recognize and report potential conflicts of interests before or at the start of MC meetings. Members with a conflict of interest may not take part in discussions/meetings and the decision making process regarding the relevant matter and must leave general meetings when said matter is discussed. Also, they are forbidden from attempts to influence the decision making in any other way.

Dutch administrative law

10. In this case it must also be noted that the Province is responsible for the formal awarding of grants. It is our understanding that this is done through the awarding of subsidies. To this extent, the Province has laid down the 'Nadere subsidieregels voor Eerste Oproep Interreg Maas-Rijn (NL-BE-DE). We therefore assume that these grants classify as 'subsidies' under Dutch administrative law and must comply with the Dutch General administrative act (hereinafter: '**Awb**'). Interested parties can – after an objection procedure – file an appeal with the Dutch courts regarding decisions of the Province on the awarding or rejection of subsidies.
11. An important doctrine within Dutch administrative law is the so-called doctrine on the distribution of scarce public rights.⁴ This doctrine is formally based on general principles of Dutch law regarding equal treatment, but was developed in close relation to aforementioned European law. In short, this doctrine entails that public authorities must provide potential beneficiaries with the possibility to compete for scarce public rights. This entails that a selection procedure must be organised, and fair and non-discriminatory criteria must be shared beforehand. This doctrine is also applicable on the awarding of scarce subsidies.⁵
12. In line with this doctrine, Dutch administrative courts have already ruled that authorities must perform their tasks regarding the review of submissions for scarce rights without prejudice. Any

⁴ The highest administrative court in the Netherlands, the Council of State, first recognized this doctrine in the so-called 'Vlaardingen-judgement' (ECLI:NL:RVS:2016:2927).

⁵ Judgement of the Council of State of 11 July 2018, ECLI:NL:RVS:2018:2310.

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member of a commission tasked with such review that has any personal interest in one or more submissions, could try to ensure that less submissions comply with the set criteria for awarding of the scarce rights or try to promote the chances of the submission in which he has a personal interest. Therefore, it was concluded that regarding members of the commission that were personally involved with specific projects at least a suspicion of conflict of interest arose. The fact that these members excused themselves when deciding on those project to which they had a personal interest, was insufficient according to the Administrative High Court for Trade and Industry (one of the highest Dutch administrative courts).⁶ The fact that the commission was partly comprised of members with personal interests in certain projects therefore lead to the conclusion that the relevant decisions were overturned.

II. ANALYSIS

13. First of all, we conclude that there does not appear to be any explicit right to information for the RAs regarding the process of selection of projects. Based on the information we have at our disposal, the programme partners do not appear to have concluded any specific agreements on this point. Therefore, we conclude that it is still up to the programme partners to decide in which way they would like to regulate this matter.
14. The second question is whether there are any legal grounds or reasons to (on part or as a whole) restrict the sharing of certain types of information between different organs within Interreg M-R. In our opinion, these do exist.
15. As mentioned, Article 28, sub 2 of Regulation 2021/1059 provides that the MC (and therefore also the SC) must provide for rules of procedure that prevent conflicts of interest. Such conflicts of interests could lead to situation such as the distortion of competition between potential beneficiaries. This would be in conflict with principles of European law such as equal treatment and non-discrimination, as well as – since decisions of the Province on the awarding of subsidies are subject to Dutch administrative law – with the Dutch legal doctrine on the distribution of scarce subsidies.
16. It is up to the programme partners to ensure a fair and non-biased selection process. It is therefore also up to them to decide on specific measures to prevent potential conflicts of interest. These measures will however have to be sufficiently effective to prevent or mitigate potential conflicts of interest.
17. We do point out that the European Commission has – on multiple occasions – emphasized that issues regarding the double role of some of the partners requires addressing. In its letter of 13 February 2018, the European Commission pointed to the double role of partners, who sometimes are both judge and party. The European Commission recommended adapting the management set up. In its letter of 15 June 2018, the European Commission referred to the role of RAs in particular

⁶ Administrative High Court for Trade and Industry, 13 June 2016, ELI:NL:CBB:2016:155.

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when stating:

"We welcome your new rule that the persons who have been involved in the preparation of the projects (e.g. through the Regional Antennas) or who represent a programme partner cannot take part in the assessment of the project in question. However, this does not solve the fact that there is still an imperfect segregation of duties between the preparation of the projects (done with the support of the Regional Antennas who also work for their regional authority) and the decision on the projects (in the Monitoring Committee, where the same regional authorities are represented). The issue remains that the persons in the Regional Antennas have a 'double hat' (working both for the Joint Secretariat and for the regional authorities who are also members of the Monitoring Committee).

We are of the opinion that this system cannot be carried over into the next programming period (2021-2027). If Regional Antennas are necessary (which would really have to be demonstrated given the size of the programme and the many possibilities offered by digital tools), they would have to report directly and solely to the Joint Secretariat, which has to remain at the heart of day-to-day implementation of the programme. Regional Antennas or Info Points should only be seen as exceptions established in case of long or inaccessible border regions. In all cases, the role of these antennas is primarily to provide information and advice and to carry out some on-the spot monitoring activities. They should in no way be directly involved in project assessment and selection."

18. In its letter of 23 February 2022 the European Commission again reiterated that as far as the function of the RAs is concerned, the same person or same body cannot generate projects and at the same time be part of the pre-selection, and/or assessment and/or decision on these projects. The European Commission states it needs to be assured that the management system of each programme does not contain structures that might lead to potential conflicts of interest. According to the European Commission, in order to guarantee a strict separation of functions and to avoid any suspicion of conflict of interest, the RAs may not intervene and are not involved in the assessment and selection of projects.
19. In this regard, we point to the current provisions in the rules of procedure of the MC that are aimed at preventing conflicts of interest. In conformity with article 28, sub 2 of Regulation 2021/1059, Article 7 of the rules of procedure contains provisions on the attendance of meetings. Indeed, Article 7, sub 5 of the rules of procedure provides that members of the MC with a conflict of interest – which includes situations in which the proposition falls within the mandate of the organisation this member represents – may not take part in discussions regarding this matter, as well as the decision making and (parts of) general meetings where this matter is on the table.
20. Also, Article 7, sub 2 of the rules of procedure provides that the development and execution of projects on the one hand and the evaluation of projects on the other, must be assigned to different administrative units to maintain a clear distinction of functions. This provision is aimed at ensuring

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‘Chinese walls’ between the different function within organisations.

21. We assume that regarding the selection of projects for the awarding of grants, proposals for projects are considered to fall within the mandate of the specific organisation or partner region whose RA may have assisted in the preparation of that said proposal. Also, we assume that the provisions on attendance of discussions and meetings will also apply to the representative of the RAs that is appointed as observing member in the SC. Taking this into consideration, it is our opinion that these provisions are effective in preventing that the decision making process within the MC or SC itself is affected by potential conflicts of interest. The absence of members with conflicting interests during the decision making process and discussions limits the influence of the member to an important extent.
22. We note that decision making within the MC or SC is only one (albeit important) part of the overall selection process. Prior to this phase, projects are prepared and submitted for evaluation. At this stage, potential beneficiaries are being assisted and guided by the RAs. Since these members work for the same organisations as the members of the MC (or SC), it is still possible that competition is distorted in case members of the RAs have information at their disposal that could – if shared – put specific potential beneficiaries at an (unfair) advantage.
23. This risk would already be addressed to an important extent if Article 7, sub 2 of the rules of procedure implies that organisations must ensure that units tasked with the development of (proposals for) projects are different from those units tasked with the evaluation of said projects. In particular, this should entail that members of the MC or SC tasked with the (evaluation and) selection of projects are part of a different organisation unit as the RAs. If so, it appears that so-called ‘Chinese walls’ have already been prescribed that aim to ensure that both phases of a project do not unduly intervene on each other.
24. In line with this principle of a separation of units, it appears to be a logical step to limit flows of and access to information between these units as far as necessary to ensure effective Chinese walls between their respective functions. By doing so, not only the risk of the decision making process within the MC or SC is mitigated, but also the risk of distortion of competition by sharing of useful information with potential beneficiaries. Such measures of limiting access to information are in any case highly usual in organisations that deal with issues of a similar nature. This would, in our opinion, be an effective way to avoid the suspicion of a conflict of interests (as referred to by the European Commission).
25. The importance of effective Chinese walls is on the one hand emphasized by the European Commission. On the other hand, we again point to the responsibility of the Province as MA. Decisions by the Province on the awarding or rejection of (proposals for) subsidies are subject to Dutch administrative law. Since the budget for subsidies is scarce, the Province must ensure equal opportunities for potential beneficiaries. A lack of effective Chinese walls could lead to the risk of decisions of the Province being overturned by Dutch courts. This is especially the case since the

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European Commission has explicitly pointed to potential defects in these Chinese walls.

26. We again point to the fact that the Dutch Administrative High Court for Trade and Industry has already ruled that the mere fact that members with a personal interest in certain projects excuse themselves from reviewing those projects is insufficient, since those members could still try and influence the reviewing of other competing projects. In line with this judgement, we find it important that sufficient measures are taken to not only prevent that members of the MC/SC are not involved when reviewing projects in which they might have a personal interest, but also that the risk of the RAs – who work for the same organisations – promoting certain project in a manner that it might distort competition is as low as possible.

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