

MANAGEMENT OF THE GUADIANA BASIN AS A CASE STUDY OF CROSS-BORDER COOPERATION IN THE EUROPEAN UNION: NEW PERSPECTIVES FROM EUROPEAN ENVIRONMENTAL LAW?

Por

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ABSTRACT: This Paper aims to examine the current legal regime of cross-border cooperation within the framework of the European Union and the Member States of the Council of Europe. In particular, this Paper analyzes the joint management of the international Guadiana River Basin by Spain and Portugal to assess whether it is necessary to link this cross-border cooperation definitively to the Council of Europe system and European Union law. According to this perspective, the management of the natural resources requires joint action along border territories, the consequence of which is the repurposing of the instruments for achieving such cooperation, and even rethinking the role of Public Law in the field of Cooperation.

KEYWORDS: Cross-border cooperation; integrated management; natural resources; legal framework.

SUMMARY: I. Introduction and study context. II. Management of the Guadiana Basin by Spain and Portugal as case law: the concurrence of legal systems. III. The current legal status of cross-border cooperation. IV. Final remarks: the need to integrate European environmental objectives in cross-border cooperation.

COOPERACIÓN TRANSFRONTERIZA EN EL MARCO DE LA UNIÓN EUROPEA: EL CASO DE LA GESTIÓN DEL RÍO GUADIANA. ¿NUEVAS PERSPECTIVAS DESDE EL DERECHO EUROPEO DEL MEDIO AMBIENTE?

RESUMEN: Este Trabajo pretende abordar el régimen jurídico de la cooperación transfronteriza en el momento actual, en el marco de la Unión Europea y de los Estados partes del Consejo de Europa. En este sentido, se plantea un supuesto específico de cooperación transfronteriza, vinculado a la gestión conjunta entre España y Portugal de la Cuenca Internacional del Río Guadiana, a partir del cual valorar la necesidad de conectar definitivamente el sistema del Consejo de Europa con el Derecho de la Unión Europea. Desde esta perspectiva, la gestión de los recursos naturales requiere de una acción conjunta entre los territorios fronterizos cuya consecuencia última es la necesidad de repensar los instrumentos de cooperación e, incluso, el papel del Derecho Público en el ámbito de la Cooperación.

PALABRAS CLAVE: Cooperación transfronteriza; gestión integrada; recursos naturales; marco legal.

SUMARIO: I. Introducción y contexto del estudio. II. El caso de la gestión del llamado Bajo Guadiana entre España y Portugal: la concurrencia de regímenes jurídicos en la gestión del recurso. III. El escenario actual general para la cooperación transfronteriza. IV. Consideraciones finales: la necesidad de integrar los objetivos ambientales de la Unión Europea en los mecanismos de cooperación transfronteriza.

I. INTRODUCTION AND STUDY CONTEXT¹

Cross-border cooperation, as an element of cooperation between territories², is an instrument for achieving objectives related to regional development and integration³, given that its functionality and operability can redress the inequalities or imbalances that can hold back territorial development.

The Guadiana River is a natural frontier between Spain and Portugal, in particular the Guadiana Basin (the so called Bajo Guadina as the final section of the river), close to its outlet into the Atlantic Ocean. As such, this area requires cross-border cooperation between both States to manage the water resources of the Guadiana⁴, which also encompasses natural spaces, some of which are protected, that form part of a unique geographical environment.

This work evaluates the adequacy (or inadequacy) of the mechanisms for cross-border cooperation in areas where there are common objectives to be reached, such as in environmental aspects where European Law demands action, specifically with regard to the territorial framework formed of the Hydrographic Basin of the Guadiana River, and

¹ This work has its origins in the 6th Meeting of the Network Transnational Administrative Law, in a discussion on the “Legal challenges of cross-border cooperation”, held at the Universidad Pompeu Fabra, 17 May 2019.

² See F. ARIAS APARICIO, “La cooperación territorial europea y la cohesión de las Regiones Fronterizas: el potencial de las Agrupaciones Europeas de Cooperación Territorial”, in *Revista General de Derecho Administrativo (RGDA)*, nº 52, 2019, p.5. The author describes the three levels of cross-border cooperation required to adjust territorial imbalances as cross-border cooperation, transnational cooperation and inter-territorial cooperation. Cross-border cooperation is a type of interregional cooperation that “functions in order to unite regions or local entities that share a common border...to develop frontier zones, drive growth and tackle common identified challenges”. This is the subject area covered by this Paper and in which the case study acquires greater significance.

³ On the characterization of cross-border cooperation within the framework of International Law, see N. ARENAS HIDALGO, “La Cooperación transfronteriza como política derivada de la Unión Europea. Sus instrumentos jurídicos”, in P.A. FERNÁNDEZ SÁNCHEZ, (Dir.), *La asimetría institucional entre España y Portugal en el marco de la cooperación transfronteriza (Andalucía, Algarve y Alentejo)*, Ed. Atelier, Barcelona, 2008, p. 77.

⁴ Regarding the importance of the natural elements for the development of cross-border cooperation, although it refers to mountain areas, see PERRIER, B., LEVRAT, N., “Melting law: Learning from practice in transboundary mountain regions”, *Environ. Sci. Policy* (2015), <http://dx.doi.org/10.1016/j.envsci.2014.12.02>, p.1-2.

in particular, the Guadiana Basin. Cooperation, therefore, entails agreement on territorial, economic and social aspects, among others, in this area. The methodology applied in this Paper is the case study. The first part of this work describes the legal situation of the management of the Guadiana Basin, based on my participation in the project “Environmental Assessment and Integrated Management of the Water and Habitats of the Bajo Guadiana (VALAGUA)”: European Union Project (FEDER), INTERREG V A ESPAÑA-PORTUGAL (POCTEP 0007-VALAGUA-5-P) 2014-2020 Operational Territorial Cooperation Program (1st call for projects)⁵. This process will identify the key questions pertaining to the legal regime governing cross-border cooperation, which is the basis of an assessment of the model being applied within the setting of the EU but closely linked to the framework devised by the Council of Europe⁶.

The aim of the VALAGUA project is to provide solutions to enable the integrated management of the water resources and biodiversity in the Guadiana Basin (the said final section of the Guadiana River), given the importance of its location between the Algarve and Alentejo regions of Portugal and southern Andalusia. The objectives of this project reflect similar aims for the environmental management and protection of waterways as stated in the EU Water Framework Directive⁷. The project aims to establish ways to integrate the systems applied by Portuguese and Spanish authorities to manage the waters of the Guadiana Basin, the habitats, and flora and fauna in the area, in particular the spaces that are legally protected by the Natura 2000 network. The starting point of this project from the legal perspective was to unveil the instruments deemed suitable to foster coordination, to guarantee the rational, integral use of the water resources in the Guadiana Basin.

Any analysis of the management of the Guadiana Basin necessarily focuses on cross-border cooperation in the guardianship of the environment, which means the protection of the waters as a fundamental resource⁸. In my opinion, the water shortages, and the

⁵ I was a member of the University of Huelva research group that participated in the development of the project, with Dr. Rosa Giles and Antonio Rodríguez, available at <https://www.valagua.com/es-inicio>.

⁶ On the evolution of both systems, see E.J. MARTÍNEZ PÉREZ, “La renovación de los instrumentos jurídicos para la cooperación territorial en Europa”, in *Revista General de Derecho Europeo*, nº 34, 2014, p. 2 ff.

⁷ Directive 2000/60/EC of the European Parliament and the European Council, 23 October 2000, establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000).

⁸ As acknowledged by the authors, by identifying natural resources management as an objective or logical area of development for cross-border cooperation: see, J. M^a PÉREZ MEDINA, “Experiencias de cooperación transfronteriza y nuevas perspectivas. El desarrollo en España del Reglamento Comunitario sobre la Agrupación Europea de Cooperación Territorial (AECT)”, in D. CANALS i AMETLLER/ A. GALÁN GALÁN, (Dir.), *Entidades Locales y fronteras: Instrumentos jurídicos de cooperación transfronteriza*, Fundació Carles Pi i Sunyer, nº 24, Barcelona, 2008, p. 113.

demands of guaranteeing the good ecological quality of the waters⁹ for the survival of certain ecosystems¹⁰ require a rethink of the traditional forms of cross-border cooperation since its reach can be undermined by problems relating to environmental governance. The case study here underlines a fundamental question on the future of cross-border territorial cooperation: the need to assess the compatibility of common legal formulas for cross-border cooperation with compliance with the obligations established in European Directives, because the latter require a degree of interstate and inter-administrative collaboration that differs from that which currently exists¹¹.

Cooperation clearly needs to provide a setting for the involvement of public administration¹², to the extent that the challenge of ordering cross-border cooperation amounts to the simple recognition of the need for compatibility between two legally differentiated systems (a question that has already been dealt with, in my opinion¹³), and the integration of both systems in order to develop mechanisms and instruments that characterize the relations between both administrations which, naturally, must function within the EU's legal framework, and work within an environment as diverse as a frontier between two states.

⁹ On the need to guarantee the rational use of water as a natural resource by demanding the establishment of agreed positions, see A. FANLO LORAS, "*La protección del agua y de sus ecosistemas en la Directiva Marco de Agua: una valoración crítica desde España*", in *Revista Aranzadi de Derecho Ambiental*, nº 43/2019, pp. 3-8.

¹⁰ New challenges confront international cooperation in terms of transnational natural resources; see A. SERENO, "*La idea de gobernanza ambiental aplicada a las cuencas hidrográficas*", in *Revista Aranzadi de Derecho Ambiental*, nº 24/2013, p.2. The author underlines the need to articulate alternative formulas for "global governance" to the more traditional legal instruments in International Law.

¹¹ See I. CARO-PATÓN CARMONA, "*La Directiva Marco de Agua y su transposición al Derecho español: análisis jurídico general*", in *Revista Aranzadi de Derecho Ambiental*, nº. 9/2006, p.40.

¹² See N. ARENAS HIDALGO, ...*op.cit.* p.78. I agree with the author's approach in characterizing the role of state intervention in cross-border areas as "encouraging inter-regional cooperation strategies". In my opinion, the difficulty lies in acknowledging that it is not only public authorities linked to a specific territory that are responsible for powering this cooperation, but also other structures acting through more informal and flexible channels that can promote cooperation: consider the operational capacity of the Euroregions, for example. On the differences between formal and informal organizational solutions for cross-border cooperation, see C. FERNÁNDEZ DE CASADEVANTE ROMANÍ, "*Fundamento y marco normativo de la cooperación transfronteriza entre Entidades Locales*", in D. CANALS i AMETLLER/ A. GALÁN GALÁN, (Dir.) ...*op.cit.* pp. 19, 20.

¹³ The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins, Albufeira, 30 November 1998 (Albufeira Agreement: BOE nº 37, 12 July 2000) emphasizes this in the Preamble, clearly stating that the Agreement recognizes the link between International Law and Community Law on matters of the environment and sustainable use of waters, to "guard against the risks that might affect the waters or be caused by them in the Spanish-Portuguese hydrographic basins".

II. MANAGEMENT OF THE GUADIANA BASIN BY SPAIN AND PORTUGAL AS A CASE LAW: THE CONCURRENCE OF LEGAL REGIMES

The demands placed on the management of the Bajo Guadiana and the conservation of its natural resources provide an interesting reference point for the difficulties to be confronted in any institutionalized articulation of cross-border cooperation. This perspective has alerted to the lack of any genuine organization of cooperation or concurrence of entities without legal standing to generate cooperation, or in the duplication of individual efforts by both sides due to the presence of organizational or legal asymmetries. Undoubtedly, such a scenario undermines the very idea of cooperation as a principle of Public Law, which implies working together on fairly equal terms, with a shared aim, with cooperation constituting a suitable channel for overcoming differences of all kinds.

There is a range of problems areas related to the management of the Guadiana Basin that cluster around the dysfunction of a cross-border cooperation model that has failed to integrate EU Law adequately¹⁴, which is unfortunate, as EU Law provides organizational solutions to harmonize cross-border relations when both States need to fulfil common EU objectives, such as the management of shared hydrographic basins¹⁵.

Existing problems relate to the lack of legal clarity on the status of the Guadiana Basin as an autonomous hydrographic zone. There needs to be clarification as to what exactly the Guadiana Basin is, and the extent of its territorial reach, as the basis for designing specific measures to stimulate cooperation. This confusion also extends to the lack of definition of the instruments required for water resource planning by both Spain and Portugal¹⁶. The problem lies in the fact that the integration of the Portuguese and Spanish parts of the Guadiana Basin, which one author has defined as a morphological reality, is not legally defined.

However, there is a second approach to the concept of the Guadiana Basin that is linked to the notion of a Euroregion, and this refers to the Alentejo-Algarve-Andalucía

¹⁴ Regarding the space that International Law has ceded to European Law, see J., BARNES, “*Las administraciones públicas españolas en la cooperación transfronteriza*”, in P.A., FERNÁNDEZ SÁNCHEZ, (Dir.), ...*op.cit.* p.184 and 187.

¹⁵ See F. ARIAS APARICIO, “*La cooperación territorial europea...*”, *op.cit.* p.2: the author insists on the consolidation of a different idea of frontier, as “a zone that is suitable for exchanges to take place, and where close economic, social and cultural links can be forged by joint actions on both sides of the divide”.

¹⁶ See Royal Decree 650/1987, 8 May, which divided the Guadiana's hydrographic basin for organizational purposes, and Royal Decree 1664/1998, 24 July, Guadiana II Hydrological Plan, to which the Guadiana Basin is linked.

Euroregion (AAAE)¹⁷. The Euroregion idea functions through an instrument known as the Work Community. The problem with this concept is that it constitutes a technical division established to develop the territorial area of Alentejo-Algarve-Andalucía, while the Guadiana Basin remains undefined. What is more, the territorial demarcation of the Guadiana Basin includes municipalities that belong to the AAAE, areas also covered by projects financed by the EU, via FEDER funds in the INTERREG programs. In my opinion, what is important is that the Euroregion concept constitutes a connection to the position adopted by the EU, within which this zone is identified.

On the other hand, as previously mentioned, the need to provide an integrated protection system for water resources seems to be accepted, giving rise to a new paradigm based on the idea of the unity of a basin for resource management, and the importance of the quantity and quality of the water reaching the territorial waters downstream, the state of the dependent ecosystems, as well as consideration of the coastal and transitional waters, not just the continental waters¹⁸. This is the thesis of the unity of the basin posited by SERENO, which breaks with perspectives based on previous international instruments¹⁹.

Cooperative actions between Portugal and Spain in the Guadiana Basin occur within the framework of the The Agreement on Cooperation for the Protection and Sustainable Use of the Waters of the Spanish-Portuguese Hydrographic Basins, known as the Albufeira Agreement (1998), whose aim is to incorporate Community policies on water, on the aquatic and terrestrial ecosystems under their authority, and the sustainable use of water resources. This new integrated perspective on basin management had already significantly contributed to the drafting of the Helsinki Water Convention and the EU Water Framework Directive, and both legal texts subsequently influenced the shaping of the 1998 Albufeira Agreement, which led to a change in the management of the cross-border water masses shared by Portugal and Spain. However, the Albufeira Agreement is an international legal instrument with its own organization, raising doubts about whether the type of structure for cooperation is effective from the perspective of European Law and, in particular, the current EU Directive Water Framework.

In my opinion, this new approach requires cross-border cooperation of a degree capable of achieving truly integrated water resources management, or at least for a

¹⁷ Created by the Agreement of 5 May 2010 (BOE nº 166, 9 July), available on <http://www.euroaaa.eu/site/index.php?module=ContentExpress&func=display&ceid=42>.

¹⁸ See A., EMBID IRUJO, "La política de aguas y su marco jurídico", Revista Aranzadi de Derecho Ambiental, nº 14/2008, p.12.

¹⁹ A., SERENO ROSADO, *Ríos que nos separan, aguas que nos unen. Análisis jurídico de los Convenios Hispano-Lusos sobre aguas internacionales*. Ed. Fundación Lex Nova, Valladolid, 2011, pp. 26 ff.

coordination framework to be established²⁰. In this latter case, the EU Water Framework Directive favors the idea of joint basin management, and encourages the development of a single hydrological plan for the Guadiana international hydrographic basin; however, it allows each Member State to design its own plan on condition that it fosters close coordination between the two States (art.13.2). This second option is readily applicable to the Guadiana; nevertheless, it insists that the Commission for the Application and Development of the Albufeira Convention (CADAC) clearly defines the areas of water to be covered by both States' hydrological plans, as these are considered to be cross-border water masses, as well as their geographical demarcation. This brings us to the second problem identified in this case study, which is how to fit the international instrument of the Albufeira Convention to the requirements of the EU Water Framework Directive.

The Albufeira Convention is characterized by several international institutions in the following terms:

The Conference of the Parties (COP), a political body that has only ever been convened three times since the inception of the Albufeira Convention in 2000. The COP's legal framework, as established in the Albufeira Convention, is extremely limited because of its political nature.

The CADAC, which was envisaged as a technical institution with a broader legal framework²¹. The Commission is composed of *delegations named by each of the Parties based on prior agreement*. Delegates are usually representatives of the environment ministries in both States; in Spain, they are members of the Directorates General or Sub-Directorates General of related ministerial departments, as well as representatives of the various Hydrographic Confederations controlled by the Ministry of the Environment.

On the other hand, the Commission is a technical body bereft of its own resources and fully dependent on the will of the Parties to the Convention, and lacks the necessary independence to ensure fulfilment of the objectives set out in the Albufeira Convention and, ultimately, the objectives of the EU Water Framework Directive: this technical institution's lack of legal capacity to take action to fulfil the aim of providing an integrated system of protection for the Guadiana is the cause of friction arising from differences

²⁰ Consider the scope of the Convention, *ex art. 3* and its reach extending to specific environmental measures in *art.10 ff*. On the importance of the Albufeira Convention for the integrated management of the Portuguese-Spanish basins beyond the sections that are international, and the inclusion of the environmental perspective in its content, see S. SALINAS ALCEGA, "*Organismos de gestión de cuencas hidrográficas transfronterizas. El caso de las cuencas hispano-portuguesas*", *Revista Aranzadi de Derecho Ambiental*, nº 16/2009, p.9.

²¹ Regarding the difference between these political and technical entities in the Convention, see S. SALINAS ALCEGA, *op.cit.* pp. 7 ff.

between the stipulations of the Albufeira Convention and the more specific demands of the EU Water Framework Directive.

The CADAC functions through working groups that do not consist of Commission members; these groups work on a specific subject area or on issues of a territorial nature. Currently, as set out in the International Planning Process Coordination Document 2016-2021, there are two working groups, the Exchange of Information group and the Planning group²². Both groups are tasked with actions to ensure that Member States comply with the legal requirements in the EU Water Framework Directive, and with ensuring coordination of Portugal and Spain's hydrological plans for the international hydrographic basins, and sustaining a common perspective throughout the period 2016-2021, regarded as a second hydrological planning cycle.

However, the efforts of these groups have not generated any genuine cooperation on the adoption of common measures to be enacted during the 2016-2021 timeframe, despite this being a fundamental requirement of the EU Water Framework Directive, in so far as the programs are linked to the achievement of environmental objectives in the hydrological plans, and these must be coordinated between the two States (articles 3.4 and 4 of the EU Directive): the result is confusion regarding compliance with the EU Water Framework Directive's environmental objectives, given that the Albufeira Convention has failed to provide a credible organic structure or genuine coordinated planning²³.

Finally, cross-border cooperation in the Guadiana Basin is significantly hindered by the lack of synthesis in terms of territorial and administrative organization between Portugal and Spain, which has a direct effect on the management of water resources that both States share, and on the model of protection of natural spaces in the Guadiana Basin.

The more centralized organization that characterizes the Portuguese state stands in contrast to the more decentralized structure adopted by Spain in terms of water management and fulfilment of environmental objectives.

Following numerous regulatory changes, water management in Portugal was placed under its Environmental Protection Agency (EPA), in accordance with Decree-Law 130/2012, amending Portugal's 2005 Water Act Law²⁴, centralizing all competences that

²² On advances made in aspects of basin management such as compatible geographical information systems, exchange of information on typologies, and impact assessment of the water masses and water monitoring programs, see S. SALINAS ALCEGA, *op.cit.* p.21.

²³ CADAC: *Documento de coordinación internacional del proceso de planificación 2016-2021 en las demarcaciones hidrográficas internacionales compartidas por España y Portugal*, 30 June 2017, p. 28: <http://www.cadc-albufeira.eu/es/documentos/>, consulted 8 December 2019.

²⁴ Decreto-lei nº 130/2012 (*Diário da República* nº 120, 22 June 2012).

had hitherto been delegated to institutions such as the country's Water Institute or Hydrographic Administration. This a functional decentralization model that is determinedly centralized in territorial terms.

In Spain, the model is diametrically opposite, hence the difficulty in coordinating cooperation between the two States in the Guadiana Basin.

In regulatory terms, Spain's model is decentralized for territorial organization and water management, with the State is responsible for managing basins that cross more than one Autonomous Community or Region (art. 149.1.22 Spanish Constitution), so, the Autonomous Communities manage the basins that lie within their own borders. On the other hand, the State legislates on the environment nationwide (art. 149.1.23 Constitution).

However, the Guadiana River is a different matter, as demonstrated by Royal Decree 1560/2005²⁵, in which the State transferred functions and services to the Autonomous Community of Andalusia, and which is still in force today. The consequence of this regulation is that those sections of the Guadiana not considered international waters and which flow through the Autonomous Community of Andalusia are administered regionally, with competences for authorization of runoffs, water policy, etc. These non-international sections of the Guadiana are also defined in the treaty signed by Portugal and Spain, which establishes the lines of closure of the mouths of the Minho and Guadiana rivers (30 May 2017).

The situation of the Guadiana River is, therefore, highly complex since there are various legal instruments with authority over the hydrographic basin in terms of the national or international characteristics of the section in question; also, in Spain the authority of State administration, as exercised through the Hydrographic Confederations, and that of the Autonomous Community of Andalusia, overlap in the functioning of the institutions responsible for administering transitional and coastal waters. This is clearly to the detriment of unity of management of the Guadiana Basin, and emphasizes the fragmented nature of the management model for these water resources. This questions the extent of implementation of the EU Water Framework Directive (also based on the principle of unity of management) and whether its environmental objectives can be achieved, since it is evident that each administrative structure will undertake its own planning. In this case, cross-border cooperation must provide a framework that is more in accordance with this reality, and which can act as the channel for integration along the Guadiana.

²⁵ Royal Decree 1560/2005, 23 December, on the transfer of State functions and services to the Autonomous Community of Andalusia for hydraulic resources and use of the same within the water basins in the region that run into the Atlantic (Hydrographic Confederations of the Guadalquivir and Guadiana), *BOE* nº 307, 24 December 2005.

As an example, this fragmented approach directly affects the need to endow the authorities competent for each hydrographic demarcation with a concept broader than that of the basin, namely, one that embraces the coastal and transitional waters. The problem here is when, in order to comply with the EU Water Framework Directive, a program of measures needs to be approved for the entire demarcation; yet Spain has still not amended the territorial scope of the Hydrographic Confederations that are fundamentally linked to continental waters, and they are still unauthorized to manage the coastal zones subject to the environmental objectives of the EU Water Framework Directive. It is other institutions that guarantee compliance with the objectives for coastal water quality, which should be included in the hydrological plans (and this despite the fact that Article 36 of the Water Act Law allows for the creation of a Committee of Competent Authorities as a body to oversee internal cooperation on the management of intercommunity basins).

In any case, it is evident that the organizational differences between Portugal and Spain generate a distorted situation that cross-border cooperation could mitigate. This could entail the effective functioning of the structure set up under the Albufeira Convention to achieve compliance with the precepts of the EU Water Framework Directive for water resource management. This would depend on closely coordinated management of the water resources, since competence for these resources is shared between the European Union and Member States. This will require an effective administrative organization for which, in fact, a broad legal framework already exists.

The situation is equally complex in terms of natural spaces, not just because of the contraposition of national (and regional, in Spain's case) bodies but also for the need for legal regime concurrence, as required by Council Directive 92/43/EEC (21 May 1992): Conservation of Natural Habitats and of Wild Flora and Fauna (Habitats Directive)²⁶.

In this respect, the final problem posed in this Paper is how to protect the natural spaces that straddle the Portuguese and Spanish borders, and describe the overlap of the provisions of the EU Water Framework Directive on compliance with the environmental objectives for protected zones with those of the Habitats Directive and its Natura 2000 network:

Firstly, in terms of the regulatory framework on protection of natural spaces, the Spanish State has competence for basic environmental legislation such that it establishes minimum legal requirements that must be respected by the Autonomous Communities. The Autonomous Communities have the authority to declare a natural space (except in the case of National Parks) and manage it, whereas local entities have no competences over natural protected spaces.

²⁶ *DOUE* nº 206, 22 July.

On the contrary, in Portugal, the State is responsible for legislating on the environment and, in particular, natural protected spaces; it has authority to create and develop reserves and natural parks, recreational spaces, as well as the classification and protection of landscapes and places, acting as a guarantor of nature conservation.

This constitutional mandate is performed at national and regional or, even, local level: the natural spaces are designated and managed at national level by the national nature conservation authority, the Instituto da Conservação da Natureza e das Florestas; areas can be proposed for natural space status by any public or private institution (local governments and non-governmental environmental protection organizations).

As in the issue of water, there are clear differences in the institutional framework for natural spaces between Portugal and Spain, which increases the difficulties for closer international coordination between such bodies. Nevertheless, we should recognize the similarities between the various definitions of protection in each national statute established in accordance with the legal framework created by European directives.

In this context, the section of the Guadiana that passes through the province of Huelva and the Alentejo and Algarve regions of Portugal covers several zones classified as natural spaces, afforded special protection under the regulations in force in both Portugal and Spain. There is a connecting corridor between these spaces represented by the Guadiana Special Conservation Zone and the Chanza River. This connecting area was established in accordance with the Habitats Directive -which describes the concept of the *coherent network*. That said, the connection between different spaces could be improved by extending the surface area of the natural protected spaces around the public maritime domain and the public hydraulic domain of this area that forms part of the Guadiana hydrographic demarcation. In the Guadiana Basin, the protection of natural spaces could be strengthened by incorporating the water masses to consolidate these natural spaces.

The problem here is the lack of any administrative structure to enable a declaration of protection to be made on behalf of this space, or for its management, which leads us back to the opportunity to protect these spaces that would be provided by a proper structuring of cross-border cooperation.

III. THE CURRENT LEGAL STATUS OF CROSS-BORDER COOPERATION

Given the current situation, there appears to be a conflict between the legal regime of cross-border cooperation and the regulation of the waters and protected spaces covered by European Law. I believe that integration is key to resolving this impasse, by linking traditional instruments of cooperation to the formulas for potential cooperation provided by European Law, insofar as it is possible to take into account the peculiarities of each individual cross-border zone and the specific objectives related to the environment.

According to this perspective, and with regard to the limitations of this Paper, some considerations can be made on the “legal regime” of cross-border cooperation in Europe, characterized by the concurrence of the Council of Europe system and possible outcomes indicated in European Law, which insists on cooperation and territorial cohesion as a fundamental objective of the European Union.

On the Council of Europe, numerous authors have stated that the key to the system of cooperation lies in the Council Agreement that approved the Framework Agreement on cross-border cooperation between the Communities or Territorial Authorities (1980)²⁷, to be developed by subsequent Protocols, which have been adjusting the appropriate instruments for cooperation to the reality of the States involved²⁸.

According to this model, formalized by a set of instruments under International Law, spaces are created for the framing of bilateral Agreements²⁹, yet perhaps the biggest difficulty has been the structuring of an organization for cooperation with legal standing and capacity to take legally effective decisions³⁰. True, this space has enabled cooperation to develop that has been highly effective in providing “informal” flexible solutions, though strictly internalized in the territory, and it has successfully applied for EU funds and articulated solutions for compliance with the aims of European Law. Hence, despite the greater preponderance of the instruments of International Law, the cross-border cooperation that has developed within the scope of the Council of Europe has always maintained channels of communication with the EU system.

In this sense, we acknowledge the success of the Euroregions, which are considered to embody the formula developed from the actions of the Working Groups. The Euroregions are structures that bind their members together in association, and

²⁷ See F. LÓPEZ RAMÓN, “*Régimen jurídico de los acuerdos de cooperación transfronteriza entre entidades territoriales en el marco jurídico promovido por el Consejo de Europa*”, in D. CANALS i AMETLLER/ A. GALÁN, (Dir.)...*op.cit.*, pp. 51 ff. Also, see E.J. MARTÍNEZ PÉREZ, “*La renovación de los instrumentos jurídicos...*”, *op.cit.* p.23. The author states that this Agreement, together with the Protocols, amounts to the legal recognition of cross-border cooperation within the Council of Europe framework.

²⁸ *Ibidem*, pp. 23 ff. According to this author, these Protocols imply that cooperation goes far beyond simple connections between neighbors to represent firm relations between contiguous territories. To me, this facilitates an institutionalization of such cooperation. In fact, Protocol 3 of the Framework Agreement, signed in Utrecht, 16 November 2009, contemplates the European Grouping for Territorial Cooperation as a third way for channeling “institutionalized cooperative activities based on formulas of Public Law” on an international scale.

²⁹ For example, the Treaty of Valencia, 3 October 2002, between the Kingdom of Spain and the Republic of Portugal, on cross-border cooperation between territorial entities and instances (*BOE* nº 219, 12 September).

³⁰ However, as stated by F. ARIAS APARICIO in “*La cooperación territorial europea...*” *op.cit.* p.12, the framework of the treaties of Bayonne and Valencia provided for the creation of cross-border cooperation entities with legal standing (consortiums) and without (work communities).

participate in cooperative projects³¹, From this standpoint, the Euroregions are difficult to define³², due to how they are configured to achieve the objectives of such entities, but they offer sufficient flexibility to their members and facilitate the adoption of agreements although these are not legally binding.

In my opinion, Euroregions represent an interesting option for generating cross-border cooperation, as demonstrated by the workings of the Alentejo-Algarve-Andalucía Euroregion. This is because they exemplify a formula for real cooperation, enabling effective integration of the border areas and providing a space that attends to the common interests of border territories. They have the big advantage of being eligible for EU funds, and regional integration can flourish along the lines of the organizational solutions for cooperation established in European Law, especially, those in relation to the European Grouping of Territorial Cooperation (EGTC)³³, embodying full compatibility between the Council of Europe cooperation model and Union Law.

On the other hand, cross-border cooperation is strongly backed by the EU, as acknowledged in the Treaty on the Functioning of the European Union (art. 174³⁴), which states that the harmonious development of the Union depends on territorial development. And this is only possible when there is a perception of the border area as an opportunity to develop closer ties and achieve objectives of mutual interest within the territories concerned, as most clearly happens with environmental issues between territories. Hence, the question is to assess whether the organizational instruments and solutions for cooperation established within the framework of European Law are sufficiently substantial to justify the recognition of a right of territorial cooperation³⁵.

In terms of the EU framework, authors are unanimous on the two main pathways for articulating territorial cooperation, namely, finance, via the provision of specific funds

³¹ Consider F. ARIAS APARICIO, ...*op.cit.* p.13. The autor identifies the Euroregion concept as "governance structure".

³² See N. ARENAS HIDALGO, "*Los grandes proyectos europeos de cooperación transfronteriza. El Concepto de Euroregión*", in P.A. FERNÁNDEZ SÁNCHEZ, (Dir.), ...*op.cit.* p.110.

³³ See E.J. MARTÍNEZ PÉREZ, "*La renovación de los instrumentos jurídicos...*" *op. cit.* p.31: the author cites the Galicia-Norte Portugal Work Community created 31 October 1991, whose members later constituted the Galicia-Norte Portugal EGTC.

³⁴ The precept forms part of Title XVIII, in relation to *Economic, social and territorial cohesion*. In this sense, it has been stated that European Law provides for a "common right" to cross-border cooperation. See I. SANZ RUBIALES, "*Cooperación transfronteriza: el papel de los organismos jurídico-administrativos*", in A. D'OLIVEIRA MARTINS (Dir.), *O Direito Administrativo Transnacional (Direito Administrativo, Internacional, Europeo e Global) e as suas implicações no Direito Administrativo de Espanha e de Portugal*, Centro de Estudos Jurídicos, Económicos e Ambientais, Lisboa, 2018, p. 339.

³⁵ PERRIER, B., LEVRAT, N., "Melting law:..." *op.cit.* p.10

linked to the Interreg³⁶ programs, and the establishment of a specific organizational formula with legal public standing, as represented by the European Grouping of Territorial Cooperation (EGTC)³⁷, which constitutes an institutional solution to the various territorial requirements that need to be addressed in border areas.

The importance of the EGTC cannot be underestimated, since they are considered the formal alternative for structuring cross-border cooperation within the EU, and enabling the management of common resources³⁸. They constitute an instrument of Public Law, with their own organization and legal standing, subject to the State Laws that govern the territory in which they operate, and with competence to manage EU-financed programs³⁹. It seems that the key to success lies within the myriad solutions that they can absorb (local and/or regional entities, the Member States...)⁴⁰, according to the needs of the specific territories.

In this sense, there exists the Eurociudad del Guadiana, recently constituted as an EGTC, which integrates the municipalities of Vila Real do Santo Antonio, Castro Marim (in Portugal) and Ayamonte (Spain)⁴¹. The aim of this EGTC is to articulate common initiatives such as in tourism, to assess the zone's human resources and to stimulate business enterprise (Clause 5.c), all of which pertains to the municipalities involved. The specifically defined aims of this EGTC merely emphasize that the situations such as those indicated in the Proyecto Valagua can find an institutional solution within these Groupings.

³⁶ The authors have recognized the virtuality of these Programs to resolve border issues: among others, N. ARENAS HIDALGO, *"La Cooperación transfronteriza como política derivada..."* op. cit. p.89.

³⁷ Regulation (EC) n° 1082/2006 of the European Parliament and of the Council, 5 July 2006, on a European Grouping of Territorial Cooperation (EGTC), OJ L 210, 31.07. 2006. This Regulation has been modified by Regulation (EU) N° 1302/2013 of the European Parliament and of the Council, 17 December 2013, amending Regulation (EC) N° 1082/2006 on a European Grouping of Territorial Cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, OJ L 347 20.12.2013.

³⁸ See J. M^a PÉREZ MEDINA, *"Experiencias de cooperación transfronteriza ..."*, op.cit., pp.113, 114.

³⁹ In Spanish law, the constitution of these Groupings is defined in Royal Decree 23/2015, 23 January, which enabled the adoption of the necessary measures for the effective application of Regulation (EC) n° 1082/2006, (BOE n° 27, 31 January). For a fuller description of the legal regime of these Groupings, see F. ARIAS APARICIO, *"La cooperación territorial europea ..."*, op.cit. pp. 20 ff. For an earlier interpretation, see I. SANZ RUBIALES, *"La Agrupación Europea de Cooperación Territorial (AECT): ¿Una nueva administración pública de derecho comunitario? Algunos problemas"*, in Revista de Derecho Comunitario Europeo, n° 31, 2008, *in totum*.

⁴⁰ See E.J. MARTÍNEZ PÉREZ, *"La renovación de los instrumentos jurídicos..."* op. cit. p.5.

⁴¹ Resolution of 7 February 2018, of the General Technical Secretariat, on the registration and publication of the Agreement and Statutes of the Ayamonte-Castro Marim-Vila Real do Santo Antonio-Eurociudad del Guadiana EGTC (BOE n° 98, 23 April).

Finally, a third channel for cross-border cooperation is clearly visible within the EU context, in the need for cooperation when applying European environmental regulations that require common management of natural resources. The EU Water Framework Directive expressly contemplates the establishment of international bodies⁴² for managing basins in Europe⁴³.

IV. FINAL REMARKS: THE NEED TO INTEGRATE EUROPEAN ENVIRONMENTAL OBJECTIVES IN CROSS-BORDER COOPERATION

The conclusions to be drawn on the potential evolution of cross-border cooperation in Europe, based on the situation described in this Paper on the Guadiana Basin, are the following:

First, the case study of the management of the Guadiana Basin has enabled us to identify the elements required for articulating cross-border cooperation between territories, in this case between Spain and Portugal. The study emphasizes the importance of identifying a shared objective on the environment, represented by the integrated management of waters and the protection of spaces around these water masses. This objective is a legal imperative of European regulations, with capacity to integrate a set of territorial entities that constitute a specific geographical zone with shared physical characteristics, although lacking outright legal recognition. However, it is important to point out that this zone “naturally” lends itself to cooperation: firstly, a historical tradition of cooperation exists along the border; secondly, there is already a cooperative-generating entity in place, namely the Algarve-Alentejo-Andalucía Euroregion, which embodies a spirit of human community between these territories.

The Guadiana Basin, with this socio-territorial substratum, provides an opportunity to observe how solutions for international cooperation can be developed within the same territory (specifically with regards to the Albufeira Agreement and with the contribution of the Algarve-Alentejo-Andalucía Euroregion), together with EU-funded programs and the application of European environmental regulations. An evident feature of the current cooperation model is the innumerable formulas that exist for achieving common objectives, which can promote partnership between the various cooperation entities based on different legal models.

⁴² Art. 3.6 of the Directive contemplates the possibility that Member States assign “a pre-existing national or international body as competent authority for compliance with the objectives of the Directive”.

⁴³ As stated by A. SERENO in *“La idea de gobernanza ambiental aplicada a las cuencas hidrográficas”...op.cit.* p.23, who posited that the EU Water Framework Directive represents an opportunity to exercise “multilevel governance along international borders”.

The case presented here shows that cross-border cooperation is an appropriate tool for mitigating the “frontier effect” and enabling compliance with European Law, as well as making more effective and efficient the various administrative bodies charged with guaranteeing the rational use of natural resources, which ultimately endows administrative action with a network⁴⁴ that can supersede the individual efforts performed in parallel by the two States involved in the management of these resources.

This perspective shows that European Law can empower cross-border cooperation to implement a model of governance that operates on many levels: the instruments analyzed here can generate, according to E.J. MARTÍNEZ⁴⁵, “coordinated European Union action...based on association and aimed at the development and administering of its policies”.

Thus, the environments and the management of natural resources that do not fall within artificially-created borders require a different type of cooperative action that can ensure the presence of “systematic units”⁴⁶ that constitute entities that embody a step towards integration rather than merely representing the sharing-out of resources between the States and territorial institutions that straddle the border. The situation of the Gadiana Basin represents a new approach for cross-border cooperation, linking with the requirements of the EU Water Framework Directive, in which the hydrographic demarcation option acts as a guarantee of the principle of unit of management.

Definitively, cross-border cooperation in Europe must be considered as a whole, in which two legal systems coexist but in which the prevalence of Union Law provides a way for evolution and development, insofar as European norms demand involvement by both parties in a way that differs from traditional cross-border territorial entities, since this cooperation embodies the achieving of European integration itself.

⁴⁴ See J. BARNES, “*Las Administraciones públicas españolas...*”, *op.cit.* p.185. On the relevance of the legal-public instruments, see I. SANZ RUBIALES, “*Cooperación transfronteriza...*”, *op.cit.* p. 329.

⁴⁵ E.J. MARTÍNEZ PÉREZ, “*La renovación de los instrumentos jurídicos para la cooperación...*” *op.cit.* p.5.

⁴⁶ A. SERENO, “*La idea de gobernanza ambiental...*” *op.cit.* pp.6-7.