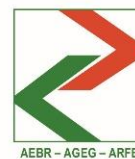




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Final report by the expert¹

Advice case title: Sharing freshwater across the border

Full official name of the advised entity: Provincie West-Vlaanderen

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II. Executive summary

Currently cross-border cooperation regarding the water system in the Belgian-Dutch area is very fragmented. The current climatic evolution is one of the main incentives for the Belgian-Dutch attempt to move from a fragmented cooperation landscape in water management to a more coordinated cross-border cooperation. Public actors on both sides of the border want to explore the possibility to cooperate under the umbrella of an overarching cooperation structure and/or to develop an overarching legal framework for cross-border cooperation with regard to water management within this region. From a legal perspective, such a coordinated cross-border coordination is a rather complex given that requires some clarifications.

In this regard, the applicant formulated the legal challenges with regard to water management across the Belgian-Dutch border as follows: "Not only is there a need for a cross-border agreement framework concerning the sharing of freshwater, but there are also no cross-border agreements regarding capture bans and so forth. This leads to situations where a farmer on Flemish territory is no longer allowed to capture water in dry periods, while his colleague on Dutch soil 500 meters away does have the possibility to extract water."

This report identifies a number of tools that can facilitate the envisaged structural cooperation and safeguard it as much as possible from legal ambiguities. The first part of the report identifies the possible legal structures for cross-border cooperation, being a cooperation based on an international agreement, a "European Grouping on Territorial Cooperation" and a "Benelux Groepering voor Territoriale Samenwerking". The second part provides tools to tackle legal issues that might arise during the execution phase of the cross-border cooperation, being a evolutionary approach of the mentioned bilateral agreements on the one hand and a tool to find a solution for conflicting rules of national law.

III. Historical context

At the beginning of this case study, the following situational and historical description was provided:

"The cross-border approach to water between Flanders and the Netherlands is greatly hindered, because of two historical tracts. Joint disaster prevention or drought policy turns out to be impossible because the land border acts as a water barrier. Since the 16th century, several actions have been taken to reclaim land from the sea in the lowland regions of Western Europe (the Low Countries). This has been done through large-scale reclamation, both in present-day Provinces of Zeeland, East and West Flanders (the Euregio Scheldemond). This reclamation went hand in hand with the construction of dikes, dams and drainage locks and the emergence of hydraulic organizations such as water boards, polder boards (Flanders) and water authorities (the Netherlands).

For a long time, drainage from Flanders and the Netherlands was directed to het Zwin. The water discharge ran via de Westerschelde to the North Sea, entirely over Dutch territory. Because of the separation of the Netherlands and Belgium in 1839, as signed in the Treaty of London, Belgium had to organize the drainage on its own territory. The Leopold Canal was dug between 1843 and 1854 to achieve this. This waterway is 46 kilometres long and has two discharge points: one at Zeebrugge, directly into the North Sea and a second at

de Braakmankreek. This is indeed on Dutch territory. This became possible because the two countries signed a new agreement in 1920.

This artificial separation ensured that freshwater from Flanders was no longer shared with the Netherlands, but excess water was discharged into the North Sea. Before the construction of the Leopold Canal, the fresh water was shared among the Low Countries and the creeks and channels on Dutch and Flemish territory were filled by the freshwater.

Currently cross-border cooperation regarding the water system is very fragmented. In 2010, the water managers within the framework of the Euregion Scheldemond organized the cross-border project "Water for now and later", in which the challenges for the water system around the land border were discussed. This resulted in the establishment of the cross-border working group Polders and Creeks in 2012. This has however not yet led to a concrete agreement framework for when there is a threat of too much or too little freshwater.

IV. Identified obstacles and aim of the report

The applicant refers to both the lack of an (unambiguous) cross-border cooperation structure and the (national) legal framework as an obstacle.

This report aims to provide recommendations with regard to the development of a future-proof cross-border water system that is able to cope with the ongoing climate change. It will serve as a starting point for WP 5 of the forthcoming INTERREG project "*WijWater*". This work package will focus on cross-border cooperation and the agreements required in this respect. The overall objective of this work package is to continue the cross-border cooperation initiated by the *WijWater*-project in a sustainable way after the end of the project period. Several work packages of this project will address numerous content-related aspects of cross-border cooperation in the field of freshwater sharing across the border within the Euregion Scheldemond. For this reason, this report cannot yet take into account all the concrete aspects around which the partners will initiate cross-border cooperation.

Nevertheless, this report aims to formulate guidelines for setting up a legal structure facilitating cross-border cooperation on the one hand and guidelines for resolving the current legal obstacles identified by the partners. These legal obstacles identified are twofold: Existing bilateral agreements concerning the water flows located in the border area and potentially conflicting national water policy regulations.

The proposed solutions concern the deliberate formalisation of cooperation, on the one hand, and the pursuit of a substantive logistic alignment within the framework of this cooperation, on the other hand.

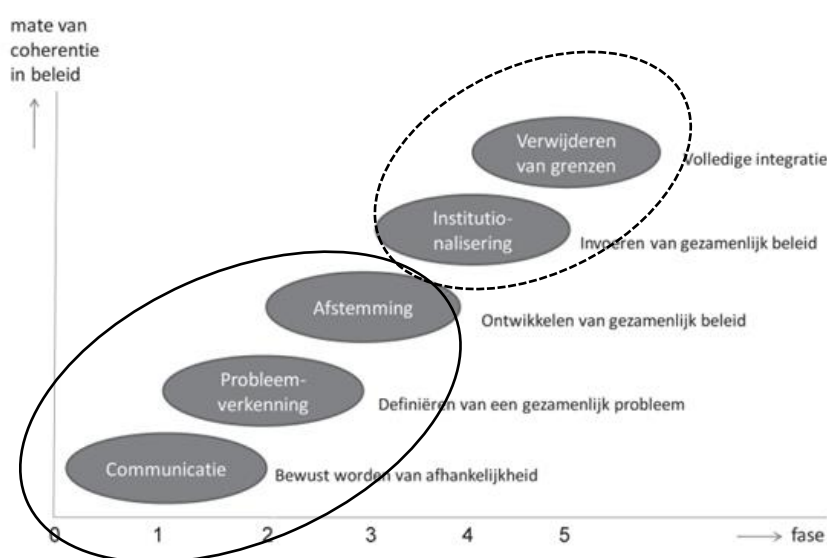
V. A brief outline of the current cross-border cooperation landscape

Shaping an integrated water policy across the Belgian-Dutch border has long been an important concern.² The current cross-border cooperation is situated at the consultation

² See for example J. HEYNEN, "Instrumenten voor een integraal waterbeheer in het Nederlands-Vlaams grensgebied: Het Nederlands-Vlaams integraal waterbeheer overleg (NVIWO) en de grensoverschrijdende stroomgebiedscomités".

level. Various working groups unite partners across borders without being able to fulfil tasks instead of the partners involved because they participate on their own behalf. Therefore, the output of such working groups is generally limited to mutual information and coordination of certain policy aspects.³ A concrete example concerns the cross-border Working Group "Polders en Kreken" that was created following the cross-border project "Water for now and later" and after the abolition of the "stroomgebieden".⁴

In the absence of the possibility of substitution, the mutual coordination of certain policy aspects is mainly steering in nature and there is in fact no guarantee of effective policy coherence on either side of the border.⁵ In this regard, the model below designed by VERWIJMEREN and WIERING illustrates the interrelatedness between the potential coherence of policies on the one hand and the different stages of cooperation in the case of cross-border cooperation on the other hand⁶ In this model, they express the stages of cross-border cooperation in chronological order.⁷ The brief outline of the current water policy cooperation landscape at the Belgian-Dutch border provided by the applicant confirms that the existing forms of cooperation are currently situated in the "communication" ("communicatie"), "problem exploration" ("probleemverkenning") and "alignment" ("afstemming") phases.



VERWIJMEREN & WIERING

³ The task description of the cross-border Working Group "Kreken en Polders" confirms the limited scope of its remit as a consultative body.

⁴ See for example "Jaarverslag 2018 GOW Kreken en Polders", [file:///C:/Users/lucp10152/Downloads/Jaarverslag%202018%20GOW%20Kreken%20&%20Polders%20\(2\).pdf](file:///C:/Users/lucp10152/Downloads/Jaarverslag%202018%20GOW%20Kreken%20&%20Polders%20(2).pdf) (consultation 1 September 2023).

⁵ The cross-border Working Group "Kreken en Polders", established after the abolition of stroomgebiedcomités, is an example of this.

⁶ J. VERWIJMEREN en M. WIERING, Cross-border co-operation in river management, 2007.

⁷ For a more extensive analyses of the different phases and their mutual interaction, see for example J. VAN DER MOLEN, *Crossing borders: een kader voor het tot ontwikkeling brengen van grensoverschrijdende samenwerking in watermanagement*, 2011.

The objective of the *WijWater*-project is to achieve the phase of "*institutionalisation*" and eventually even the phase where complete integration is achieved. In other words, it is the aim to achieve a higher degree of policy coherence. The final step, full integration is not possible without removing administrative - and legal - boundaries.⁸ Given the territoriality of national administrative law, from the legal perspective, achieving full integration is not evident. Nevertheless, some recommendations in this report carry the potential to achieve full integration in the field of water management across the Flemish-Dutch border in the longer term.

VI. Legal analyses and guidelines

What follows is an explanation of possible forms of cooperation that could facilitate the pursuit of such institutionalisation.

A legal structure for cross-border cooperation

The applicant indicates that he is looking for a sustainable (legal) embedding of the envisaged cross-border cooperation. The first part of the legal analyses and guidelines addresses this question by providing an overview of the legal possibilities in this area. The separate interpretation of each of these possibilities should allow the applicant to weigh up in concrete terms the effective operationalisation process of the envisaged cross-border cooperation

An overview of the possible instruments that allow to proceed with institutionalisation

In recent decades, a supranational framework on cross-border cooperation has emerged.⁹ This regulatory framework supports different phases of cooperation that represent VERWIJMEREN and WIERING in the model.

The supranational regulatory framework for cross-border cooperation is modular in nature: the regulatory frameworks that allow local actors to institutionalise cross-border interlocal cooperation assume different levels of competence but do not relate hierarchically to each other.¹⁰

This implies that actors wishing to cooperate across borders can in principle decide for themselves on which regulatory instrument they base the intended cooperation. The INTERREG *WijWater*-project will identify the specific cooperation needs and can generate a concrete mapping of the cooperation needs. As not all details are known at this point in time, the following is an overview of the regulatory frameworks and associated instruments on which future Flemish-Dutch collaborations focused on water management can be based. These are frameworks and instruments that to various degrees can support the different phases as outlined by VERWIJMEREN and WIERING. We do not focus exclusively on the so-called "*institutionalisation*" because it may be useful to also legally frame the previous phases being "*communication*" ("*communicatie*"), "*problem exploration*"

⁸ J. VAN DER MOLEN, "Crossing borders: een kader voor het tot ontwikkeling brengen van grensoverschrijdende samenwerking in watermanagement", 2011.

⁹ The Outline Convention of Madrid d.d. 20 mei 1985 was the first legal framework at the supranational level facilitating cross-border cooperation.

¹⁰ See for example, L.VAN DER AUWERMEULEN, "Wettelijke grondslagen voor grensoverschrijdende interlokale samenwerking", 2020.

("probleemverkenning") and "alignment" ("afstemming"). The forms that support those phases of cross-border cooperation allow to give the cooperation a sustainable character and have the potential to evolve into forms that effectuate more policy coherence.

The levels of competence applicable from a territorial perspective to the envisaged Flemish-Dutch cooperation

The following levels of competence provide a regulatory framework for cross-border cooperation between Flemish and Dutch actors:

The Council of Europe: [European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities](#) (hereinafter "the Madrid Outline Convention")

The European Union: [REGULATION \(EC\) No 1082/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on a European grouping of territorial cooperation \(EGTC\)](#) (hereinafter "the EGTC-Regulation")

The Benelux: [Benelux Treaty on cross-border and inter-territorial cooperation](#) (hereinafter "the Benelux-Treaty")

The various instruments on which the envisaged Flemish-Dutch cooperation could be based

The overview below illustrates the possible structures that a partnership could adopt for the purpose of a Belgian-Dutch water policy. Given the modular nature of the regulatory framework for cross-border inter-local cooperation, the Belgian and Dutch partners are in principle free to decide which structure to opt for. Moreover, an evolution from one cooperation structure to another is possible. The regulatory level regulating the relevant structures is irrelevant in relation to this evolution. An essential aspect of the decision-making process to opt for one structure or the other concerns a clear overview of the specific cooperation needs. The overview below takes into account the following cooperation needs: the partners that should/will be involved and the concrete objective of the partnership. Furthermore, the overview shows how the respective forms of cooperation are installed and whether the publication of incorporation is required. Finally, an estimate of the achievable degree of policy cohesion is discussed for each instrument.

- **European Outline Convention on transfrontier Co-operation between territorial communities or authorities**

Instrument	A bilateral agreement facilitates the cooperation structure.
Establishment	A bilateral agreement with regard to cross-border watermanagement should be concluded between the Minister of Foreign affairs and the Minister(s) competent for the aspects watermanagement taken into account
Possible partners	The Outline Convention includes all public actors at the local or regional level but leaves it up to the respective States to determine whether they allow specific local actors to cooperate based on the Outline Convention or not.
Possible aim	The different partners can only take part within the framework of their national competences. An increase of competences is not possible.
Publication	<p>The approved bilateral agreement should be communicated to the Secretariat General of the Council of Europe. It concerns a reporting obligation without legal consequences.</p> <p>Under the application of national law, the approved agreement should be published in the "<i>Belgisch Staatsblad</i>". It concerns more specifically the publication of the legal act ratifying the agreement.</p>
Degree of policy cohesion	The degree of policy cohesion is strongly dependent on the content of the agreement. Cooperation on the level of communication, problem exploration, alignment and institutionalisation can be achieved. The achievement of complete integration is not likely since this could be qualified as deviation from the legislative process at the national level.

- Regulation (EC) No 1082/2006 of the the EP and of the Council of 5 July 2006 on a European Grouping of territorial cooperation (EGTC)

Instrument	An EGTC is a cooperation structure with legal personality facilitated by EU law but to a certain extent regulated by the national law of the seat that partners choose for this legal person.
Establishment	A cooperation agreement, initiated by the partners should be approved by the Member States under which' authority they resort. Statutes for the legal person should be concluded.
Possible partners	<p>The EGTC-regulation provides the following list of possible partners:</p> <ul style="list-style-type: none"> - <u>Member States or authorities at national level;</u> - <u>regional authorities;</u> - <u>local authorities;</u> - <u>public undertakings within the meaning of point (b) of Article 2(1) of Directive 2004/17/EC of the European Parliament and of the Council (1) or bodies governed by public law within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council (2);</u> - <u>undertakings entrusted with operations of services of general economic interest in compliance with applicable Union and national law.</u>
Possible aim	<p>Within an EGTC cooperation, the partners can in principle only act within the framework of their national competences. However, the Regulation foresees the possibility to expend the competences of one or more partners involved within the framework of the specific EGTC cooperation.</p> <p>It is not possible to refer the following competences to an EGTC cooperation:</p>
Publication	The establishment of an EGTC cooperation requires the publication of the statutes according to the national procedure of the state where the seat is located.

Degree of policy cohesion	The degree of policy cohesion can reach the level of institutionalism since the EGTC is a legal person that acts on behalf of its own statutes. The EGTC-Regulation does not entail the possibility to establish integration.
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- **Benelux-Treaty on cross-border and inter-territorial cooperation**

The Benelux-Treaty foresees 3 cross-border cooperation forms:

- *A BGTS*
- *A administrative agreement*
- *A joint body*

Instrument	BGTS: A cooperation structure with legal personality facilitated by the Benelux-Treaty but to a certain extent regulated by the national law of the seat that partners choose for the legal person.
Establishment	The partners conclude an establishment agreement with regard to the envisaged cooperation. The intervention of the competent minister is not needed. The partners draw up statutes.
Possible partners	<ul style="list-style-type: none"> - States Parties to this Convention; - all public authorities of a Party to this Convention; - all public institutions, in the broadest sense, having their seat in the territory of the Parties to this Treaty, including public enterprises, legal persons principally financed or controlled by public authorities, and legal persons which, by virtue of a concession or legal mandate, perform public - perform public functions; - joint ventures between these participants
Possible aim	The partners can only act within the framework of their national competences. (incl. competences of powers of regulation and governance if allowed by internal law)
Publication	The partners have the obligation to report the establishment to the Secretariat General of the establishment of the BGTS. The Secretariat

	General will publish the establishment in the Official Benelux Publication Journal. The statutes should be published in accordance to the national rules with regard to the acknowledgement of legal personality.
Degree of policy cohesion	The degree of policy cohesion can reach the level of institutionalism since the BGTS is a legal person that acts on behalf of its own statutes. The Benelux-Treaty does not entail the possibility to establish integration.

Instrument	The administrative agreement is a written agreement that may provide for a participant to take care of tasks of another participant, in the name and according to the instructions of the latter participant, with respecting the right of the Party of the participant authorised to give instructions. participant. The arrangement may not provide that tasks of another participant will be taken care of in its own name.
Establishment	The administrative agreement is concluded between partners without the intervention of the competent minister.
Possible partners	<ul style="list-style-type: none"> - States Parties to this Convention; - all public authorities of a Party to this Convention; - all public institutions, in the broadest sense, having their seat in the territory of the Parties to this Treaty, including public enterprises, legal persons principally financed or controlled by public authorities, and legal persons which, by virtue of a concession or legal mandate, perform public - perform public functions; <p><i>joint ventures between these participants</i></p>
Possible aim	The partners can only act within the framework of their national competences.
Publication	The partners have the obligation to report the establishment to the Secretariat General of the establishment of the BGTS. The Secretariat

	General will publish the establishment in the Official Benelux Publication Journal.
Degree of policy cohesion	With the administrative agreement, a level of alignment can be reached.

Instrument	A joint body is a consultation platform without legal personality and cannot take decisions that bind participants or third parties.
Establishment	Partners can agree to establish a joint body. It is advisable to conclude a written agreement, but it is not obligatory.
Possible partners	<ul style="list-style-type: none"> - States Parties to this Convention; - all public authorities of a Party to this Convention; - all public institutions, in the broadest sense, having their seat in the territory of the Parties to this Treaty, including public enterprises, legal persons principally financed or controlled by public authorities, and legal persons which, by virtue of a concession or legal mandate, perform public - perform public functions; - joint ventures between these participants
Possible aim	The partners can only act within the framework of their national competences.
Publication	The partners have the obligation to report the establishment to the Secretariat General of the establishment of the BGTS. The Secretariat General will publish the establishment in the Official Benelux Publication Journal.
Degree of policy cohesion	With a joint body, only communication and problem exploration are being facilitated.

Actors to be involved

- Selection of partners based on competence

In the description of this case, the applicant indicates to attach particular importance to clarity regarding the actors to be involved in the cooperation process.

Only local actors with a public mission can participate in the aforementioned forms of cooperation. Private partners are explicitly excluded by all of the above. Since a partnership cannot bring about an extension of authority, the choice of partners involved in future cross-border cooperation on flooding and climate-proof water policy depends linearly on the intended cooperation. After all, a partnership can only perform the tasks that individual partners are authorised to perform under national law. In other words, the national division of competence is the starting point.

As pointed out in the schematic overview of the different instruments above, some of the different regulatory frameworks contain on the premise that cooperation is possible within the framework of competences granted under national law.

The aforementioned EGTC Regulation contains as the only regulatory framework the possibility of conferring on partners within the framework of cooperation, powers which they do not possess under national law. Subject to prior approval by the States concerned and within the scope of an EGTC, the EGTC Regulation provides for the possibility to derogate from the principle that partners are bound by the powers they possess under domestic law. The State to which a partner belongs may, within the framework of a specific EGTC, extend the powers of a specific actor.¹¹

The aforementioned EGTC Regulation contains as the only regulatory framework the possibility of conferring on partners within the framework of cooperation powers which they do not possess under national law. Indeed, the EGTC Regulation provides for the possibility to derogate, subject to prior approval by the States concerned, from the principle that partners are bound, within the scope of an EGTC, by the powers they possess under domestic law. The State to which a partner belongs may, within the framework of a specific EGTC, extend the powers of a specific actor.¹²

- Political-administrative allocation within the chosen form of cooperation

Each of the aforementioned instruments facilitating cross-border cooperation, given its limitation to partners with a public mission, inevitably brings together persons with a political mandate. Administrative representation is not required but is also necessary from an operational perspective and with a view to continuity of work.

Concluding remarks with regard to the possible legal structure

Given the modular nature of the regulatory framework that puts forward a number of possibilities regarding cross-border cooperation, it is of prime importance to identify the specific cooperation needs. Both the substantive and operational objective of the

¹¹ Art. 7, 2 EGTC-Regulation.

¹² Art. 7, 2 EGTC-Regulation.

cooperation are important here. Moreover, the comparative table provided provides guidance for determining the (most) appropriate form of cooperation. When mapping the cooperation needs, in principle, only the intrinsic cooperation motives are important. Extrinsic motives such as obtaining INTERREG funding are not relevant for the mapping.

When choosing a specific instrument, a concrete test of the various instruments cited against the mapping of the specific cooperation needs is required. Irrespective of such mapping, it is useful to note that, for the time being, the cooperation possibilities contained in the Benelux regulatory framework are the most far-reaching. For example, the Benelux Treaty provides local actors with 3 different forms of cooperation. Moreover, the right of initiative for these forms of cooperation lies with the local actors themselves. They can rely on the border officials' contacts¹³ and the Benelux Working Group on Cross-border and Inter-territorial Cooperation¹⁴ when initiating one of these forms of cooperation. The limitation of competence is also limited within the Benelux Treaty. Finally, in application of this Treaty, local actors have the possibility to assign tasks of regulation and administration to the partnership.¹⁵

VII. The possible legal obstacles

Legal barriers to cross-border cooperation

A second concern raised by the applicant concerns the presence of a number of legal obstacles. Below, we frame the concerns raised within the broader legal framework relevant to addressing flooding and a shared water policy.

European and national legislation

The European Union pursues the harmonisation of national water policies through the following regulatory instruments.

[DIRECTIVE 2000/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2000 establishing a framework for Community action in the field of water policy](#)

[DIRECTIVE 2006/118/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on the protection of groundwater against pollution and deterioration](#)

[DIRECTIVE 2013/39/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 August 2013 amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy](#)

[DIRECTIVE 2007/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2007 on the assessment and management of flood risks](#)

Since the European Union frames water policy by means of directives, there is a high risk of legal and administrative obstacles in case of cross-border cooperation in this field. After

¹³ Art. 23 Benelux-Treaty.

¹⁴ Art. 22 Benelux-Treaty.

¹⁵ Art. 5 Benelux-Treaty.

all, these directives give member states a lot of freedom in drawing up their national water policies based on these directives.

Despite harmonisation at the European level, both legal and administrative differences exist as a result of transposition. In other words, directive transposition measures are an obstacle in themselves.¹⁶ Think, for example, of the dissimilar national, or even regional, procedures for pumping water for agricultural use or for water abstraction.

The simultaneous application of national law is the starting point here: both national (or regional) regulatory frameworks apply simultaneously. Actors wishing to cooperate have, for the time being, only the possibility to coordinate among themselves in terms of the application of national law.¹⁷

Bilateral agreements

The applicant refers to an 1839 agreement (following the treaty confirmation of the separation between Belgium and the Netherlands) and a 1920 agreement (basis for the digging of the Isabella Canal) as possible obstacles to cross-border cooperation on water policy.

Both agreements came about in a specific spirit of the times, prompted by independence and the clear separation of Belgium and the Netherlands. Today, however, they need to be interpreted in the current spirit of the times. European regulations are particularly relevant in this regard. Both cited directives pursue cross-border cooperation. It is useful to note in this regard that both the Floods Directive and the Water Framework Directive seek cross-border cooperation.

Cross-border cooperation is an established focus of the Floods Directive. It obliges responsible authorities to consider cross-border aspects during every stage of the risk assessment and planning process.¹⁸ The Water Framework Directive is also inspired by a transboundary approach to water policy.¹⁹ Therefore, forementioned agreements can not be seen as stand-alone legal obstacles.

Only when a directive-compliant interpretation of these agreements is not possible, modulation or even abrogation of these agreements or specific provisions is required. Both the 1839 and 1920 agreements require the conclusion of a bilateral agreement to modulate or abrogate the agreements. The conclusion of such bilateral agreement is done by the Ministers of Foreign Affairs on the one hand and the Ministers responsible for environment and water policy on the other. After concluding such an agreement. There have been occasions in the past when a bilateral agreement has partially abrogated the then existing

¹⁶ The European Commission formally recognises that the national execution of EU directives can result/results in legal and administrative obstacles, see Commission, 28 May 2018, Proposal for a Regulation of the European Parliament and of the Council on a mechanism to remove legal and administrative barriers in a cross-border context, 2018/0198, 7.

¹⁷ An example of how this coordination can be conducted has been elaborated in the report: "Rapport grensoverschrijdende samenwerking bij infrastructurele projecten 2.0", <https://open.overheid.nl/documenten/ronl-920f673e-9c71-4c0a-b299-e65cdc3bc50d/pdf> (consultation 1 September 2023)

¹⁸ Speciaal verslag nr. 25 (Rekenkamer), 2018, 25-26, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.eca.europa.eu/Lists/ECADocuments/SR18_25/SR_FLOODS_NL.pdf (consultatie 28 augustus 2023).

¹⁹ See for example recitals 23 and 35.

framework. See, for example, the Agreement between the Kingdom of Belgium and the Kingdom of the Netherlands regulating navigation and recreation on the common Meuse, signed in Brussels on 6 January 1993.²⁰

Such a bilateral agreement could be limited to removing the legal obstacles to cross-border cooperation in the field of water policy but could also legally enshrine cross-border cooperation in the field of water policy in line with the European Outline Convention of Madrid. The scope of the relevant new bilateral agreement determines which ministerial involvement is required. In any case, the involvement of the Ministers of Foreign Affairs is required.

Conflicts of national law

When local actors belonging to different sovereign states cooperate across national borders, the tubular application of national law is the starting point. Alignment regarding the applicable substantive law rules is possible at 2 levels: the administrative level and the political level

- **Coordination at the administrative level**

Local actors working together across a national border may seek to align at the official level the procedures to be followed and the simultaneous application of applicable national law.²¹ However, such alignment ranks relatively low on the model of VERWIJMEREN and WIERING already cited. In other words, it offers a rather low guarantee of effective policy coherence across the Flemish-Dutch border.

- **Coordination at the political level**

Coordination at the political level can be pursued by international agreements, concluded by the competent Ministers and the Ministers of Foreign Affairs. These agreements requires legislative affirmation.

Specifically for cooperations between local actors situated exclusively within the Benelux, there is an additional possibility to overcome legal and administrative obstacles: the Benelux decision.²² The Decision concerns a specific Benelux mechanism that today finds its basis in Article 6, 2, a) of the Treaty establishing the Benelux Union. This decision allows for the legal anchoring of the approximation of policies on both sides of the border. The Committee of Ministers draws up and approves the decisions. This approval is followed by an official publication in each of the Benelux states. In other words, a decision only applies after publication in the *“Tractatenblad van het Koninkrijk der Nederlanden”*, the *“Belgisch*

²⁰<https://www.senate.be/www/?MIval=/publications/viewPubDoc&TID=33613144&LANG=nl>

²¹ “Rapport grensoverschrijdende samenwerking bij infrastructurele projecten 2.0”, <https://open.overheid.nl/documenten/ronl-920f673e-9c71-4c0a-b299-e65cdc3bc50d/pdf> (consultation 1 September 2023)

²² For local actors situated within the European Union, the “Cross-Border Facilitation Tool” (“CBFT”) might become a possibility to tackle legal obstacles in case of cross-border cooperation. However, the Regulatory framework for this tool has yet to go through legislative process. A first attempt of the Commission to shape a similar framework (2018) failed.

Staatsblad” en the “*Journal Officiel du Grand-Duché de Luxembourg*”. Unlike the bilateral agreement already cited, the dispositions do not require a ratification process.

It is notable that the former Benelux Convention on cross-border cooperation between territorial cooperation associations or authorities contained a provision that included a derogation the decision as an instrument to support cross-border cooperation, while the current Benelux Treaty does.²³ Consequently, the instrument of the decision does not enjoy general application today, but only occurs in domains in which the member states explicitly provide that the conclusion of a decision is possible. For cross-border cooperation with the objective of dealing with floods or implementing a joint climate-proof water policy, there is such a specific basis for taking decisions: Article 4 of the Benelux Convention on Nature Conservation and Landscape Protection, signed in Brussels on 8 June 1982. A recent example of a decision concerns the one that remedied legal differences on noise standards in the cross-border context of the Albertknoop.²⁴ The envisaged transboundary cooperation in the field of water policy falls within the broadly formulated scope of this Benelux Convention which aims to regulate consultation and cooperation between governments in the field of conservation, management and restoration of the natural environment and landscape.²⁵

At least the following of issues that should be taken into account when drafting such a decision

Defining a well-defined area to which the decision applies is unavoidable. The decision allows for a boundary marking prompted by well-defined domain-specific logic, but cannot replace a national regulatory framework in its entirety. Indeed, in this way, a decision would erode the privilege of the national legislature.

Incorporating an evaluation tool that allows for recurrent intervention in case of remaining or rising obstacles. When the evaluation of cross-border cooperation in application of the decision shows that certain legal and or administrative obstacles still exist, the cooperating partners can, in application of article 21, e) of the Benelux-Treaty, make an adjustment to the relevant Benelux decision.²⁶

Concluding remarks with regard to solving possible legal obstacles

Beide mogelijkheden om aan de geïdentificeerde juridische obstakels te remediëren vereisen een politieke actie. Meer specifiek is een optreden van de bevoegde minister(s) vereist. However, the preparation is done at the administrative level. Administrative preparation is advisable. The preparation of a decision concerning the cross-border approach to flooding and the pursuit of a joint climate-proof water policy could, for example, be done within the framework of one of the aforementioned cross-border

²³ Benelux-Overeenkomst van 12 september 1986 inzake grensoverschrijdende samenwerking tussen territoriale samenwerkingsverbanden of autoriteiten.

²⁴ <chrome-extension://efaidnbmnnnibpajpcglclefindmkaj/https://albertknoop.eu/wp-content/uploads/2018/02/Belgisch-Staatsblad-11.12.2017.pdf>

²⁵ Art. 1, 2 further explains the scope.

²⁶ Art. 21 e): “*The Secretariat-General’s task is to: [...] to make all proposals useful for the implementation of this Treaty, while respecting the competences of the other Benelux Union institutions.*” (unofficial translation).

cooperation forms. The political involvement in these forms of cooperation is a possible advantage in this respect.

A legal embedding of the cross-border cooperation can stimulate the preparation of both the conclusion of a bilateral agreement and a Benelux decision, but the achievement of one of these solutions does not constitute a decisive extrinsic motive that should be taken into account in the choice to proceed to a legal embedding of the envisaged cooperation. With regard to the Benelux decision in particular, it is the working group set up by the Benelux Treaty that guides its preparations.

VIII. Replicability

The focus of the report is on the border between Flanders and the Netherlands. Since water does not stop at a political border, the applicants stressed the fact that this report might serve as an inspiration for sharing freshwater across other borders such as the border between France and Belgium. Because of the specific situation of the border between Belgium and the Netherlands within the Benelux, this report does not fully apply to each of the internal European borders. In particular, the forms of cooperation contained in the Benelux Treaty on cross-border and inter-territorial cooperation are not generally applicable. They only apply today in Belgium, the Netherlands and Luxembourg. France, Germany and the United Kingdom can also become party to this Benelux Treaty and thus commit themselves for (part of) their territory to support the forms of cooperation contained therein.²⁷

Under Article 350 TFEU, Benelux fulfils a living lab function within the European Union.²⁸ The Benelux has clearly expressed its ambition to fulfil this laboratory function in the field of cross-border cooperation to the full and to develop best practices in cross-border cooperation.²⁹ Such best practices can inspire cross-border cooperation between local actors of other states as well as eventually lead to an overarching regulatory initiative to facilitate cross-border cooperation emanating from the European Union.

IX. Bibliography

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²⁷ Art. 27 Benelux-Treaty.

²⁸ Art. 350 TFEU: *"The provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties."*

²⁹ Recitals Benelux-Treaty.

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