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## ***b-solutions***

### **FINAL REPORT BY THE EXPERT**

**Advice Case:** MOBITRANS — Boosting Minho River Cross-Border Mobility

**Advised Entity:** European Grouping of Territorial Cooperation River Minho EGTC, PT-ES

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## **I. Description of the Obstacle**

### **1.1.-Context of Rio Minho Mobility**

Minho River cross-border area is located between the North of Portugal and Galicia Euro-Region, in the Vigo-Porto corridor, comprising 26 municipalities with an area of 3312km<sup>2</sup> and a population of 376000 inhabitants. As a cross-border area, this is the main border with excellent road links, the most permeable border, and also the most densely populated area in the entire Spanish-Portuguese border<sup>1</sup>.

One of the major shortcomings that border municipalities face is transport, which is usually very scarce in these territories, even though they are a key element or facilitator in the achievement of other cross-border cooperation initiatives and projects.

For this reason, different entities of cross-border cooperation have tried, successively, to study the demands of cross-border mobility and to propose initiatives with the objective of improving the supply of public services integrating the municipal/intermunicipal and cross-border scale. Thus, in 2012 Uniminho<sup>2</sup> carried out a Public Transport Plan for Minho Cross-border Area (MOBITRANS), updated and completed in 2019, by Rio Minho Aect<sup>3</sup> in the Rio Minho sustainable mobility cross-border plan.

Plan's diagnosis exposes the mobility of passengers, in Minho cross-border area, is done mainly by land transport and through the use of private vehicles, since the supply of public transport services is very scarce, and limited to long distance international services. The train and river passenger flows are insignificant.

In general, the main reason stated for cross-border trips is "shopping" (this purpose encompasses 45% of trips in an average day and 50% of trips in a market day). The purpose "leisure" is the second most stated in cross-border trips (19% in an average day) and "work" comes in third (18% on an average day).

Analysing trip times and lengths, it is possible to confirm that the majority of cross-border trips are short local trips (70% of trips have a length shorter than 20km and 50% a duration less than 15min). As for trip frequency, almost 70% of passengers cross the border once a week and 20% do it daily.

Trips beginning or ending in Salvaterra do Minho, Porriño, Vigo, Tui, Tomiño, Arbo, Melgaço, Monção, Valença and Vila Nova de Cerveira municipalities comprise 70% of all cross-border trips on an average day. Valença is the municipality with the highest trip attraction/generation, and can be considered as a "regional capital".

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<sup>1</sup> According to data from the Spain-Portugal Cross-Border Observatory, in 2016 the average cross-border traffic intensity of light vehicles was 27057, of which 15,524 were concentrated at the Tui-Valença border crossing and 7,205 at the Salvaterra do Minho-Monção border crossing.

<sup>2</sup> Public Transport Plan for Minho Cross-border Area (MOBITRANS)

<sup>3</sup> Sustainable cross-border transport plan for the Minho 2019 river, pending approval.



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The majority of concessions carry out two or less runs daily. This phenomenon is frequent in rural areas. This particular area, where supply adjusts itself to existing demand, it is common to make one trip to school/work in the morning and a return trip in the evening.

Currently, there is no tariff integration amongst the several private transport operators in the region, nor between other transportation services. Furthermore, there is no transport infrastructure that allows the interchange between the several modes of public transport available in the study region.

The region expects future relevant investment with an impact on the transport system: on one hand, the development of the PLISAN (Logistical and Industrial Platform of Salvaterra-As Neves) may alter the region's territorial gravity centre, moving it towards the interior part; and, on the other hand, the development of the high-speed railway network may present a good opportunity to change mobility patterns in the region towards more sustainable modes of transport.

From this scenario, and the best international practices, Public Transport Plan for Minho Cross-border area defined several measures to improve the current situation in regard to cross-border public mobility in the short, medium and long term. Currently, the **Rio Minho Aect wish to launch several initiatives proposed in short term, to improve and develop the cross-border public transport system, based on approach on low cost execution and simple solutions.** Particularly, It wish to take account to extend following three interurban bus lines, between 2-4 km, beyond the Spanish-Portuguese border:

- Extension of Vigo- Tui (ES) line to Valença (PT), 2.23km extension to current route network
- Extension of Vigo – Salvaterra line to Monção. 2.52km extension to current route network
- Extension of Monção – Viana do Castelo (PT) line to Tui(ES) or Salvaterra(ES). 3.13km extension (Tui) and 2.77km extension (Salvaterra) to current route network

The launch of these projects in the Rio Minho area, on the occasion of the B-solutions program, responds to two main factors: a) the evolution of Portuguese law on the attribution of competences in transport in favour of municipal and intermunicipal entities, which allows decision-making and the organisation and management of local services in the field of cross-border cooperation and b) the revision of the planning and procurement of public transport services, on both sides of the border, in response to the necessary adaptation, by December 2019, to Regulation EC 1073/2009 on the procurement of public passenger transport services by rail and road.

## **1.2.- Description of the legal and administrative obstacles**

- a) Reorganization of the transport competence map and multiplicity of players involved in public transport.



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In Portugal, the administrative organisation of transport has undergone a very important change, leading to the creation of new transport authorities, which are currently completing a process of taking over competences and organising and contracting public transport services. To this circumstance, it is necessary to add the inexistence of previous antecedents, in the zone, of concertation and/or cooperation between public services of transport of passengers by road.

**Law 52/2015 on the legal framework for public passenger transport services**, based on a delegation of State powers<sup>4</sup>, recognises municipalities as competent transport authorities for municipal public passenger transport services and Intermunicipal Communities for inter-municipal public passenger transport services which are carried out integrally or mainly in their geographical area.

Both the municipalities and the Intermunicipal Communities<sup>5</sup> have the right to form associations for the joint provision of the passenger transport services for which they are responsible (arts. 6.7), as well as the right to delegate their powers, in whole or in part, to other entities. In addition, transport authorities may delegate their powers to other transport authorities or to other public authorities and two or more transport authorities may agree on the shared exercise of their powers, through inter-administrative contracts (Article 10).

The **Alto Minho Intermunicipal Community (hereafter CIM Alto Minho)** is a public entity that integrates the municipalities of Arcos de Valdevez, Caminha, Melgaço, Monção, Paredes de Coura, Ponte da Barca, Ponte de Lima, Valença, Viana do Castelo and Vila Nova de Cerveira with a population of 244 836 inhabitants.

In accordance with the provisions of Law 52/2015, and the inter-administrative contracts signed, certain competencies are exercised by the municipalities, others are exercised on a shared basis between the municipalities and CIM Alto Minho and others have been delegated to CIM Alto Minho. The current situation of the distribution of competences is detailed below:

### **Competences of the Municipalities**

- Direct or indirect operation of public passenger transport services
- Determination of public service obligations
- Investment in networks, equipment and services dedicated to public passenger transport
- Financing of public passenger services, networks, equipment and infrastructure
- Definition and approval of tariffs for public passenger transport services

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<sup>4</sup> Article 6 foresees, before 30 June 2016, the signing of inter-administrative agreements between the State, Intermunicipal Communities, metropolitan areas or municipalities. The competences of the transport authorities are defined in Article 4

<sup>5</sup> Its legal status is defined in Law 75/2013 on the legal status of local authorities, Law 73/2013 on the financial status of local and intermunicipal authorities and Law 52/2015 on the legal status of the public passenger transport service.



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- Counterparts to the operation of public passenger transport services
- Taxation of the operation of public passenger services
- Carrying out mobility consultations
- Organisation and financing of school transport

### **Shared competences between municipalities and CIM Alto Minho**

- Organisation, planning and development of public passenger transport networks and services, as well as equipment and infrastructure.
- Definition and approval of tariffs for public passenger transport services
- Conducting mobility surveys
- Promotion of the adoption of transport planning instruments in the geographical area

### **Powers delegated to the CIM Alto Minho**

- Advertising of public passenger transport services

Ultimately, and without prejudice to other titles of competence of the State in the field of transport<sup>6</sup>, in accordance with annex art. 5 a) e) and f) of Law 52/2015, the **State is the competent transport authority for public passenger transport services, among others, of a) national scope e) national express services; f) international scope.**

With regard to international transport services, **Decree Law 3/2001** is the framework regulation for passenger transport, which regulates access to the profession and access to the transport market, developing certain aspects regulated in Regulation EC 1073/2009 establishing common rules for access to the international market for coach and bus services. Thus, Article 18 makes the provision of regular passenger transport services between Portugal and an EU country subject to the **prior authorisation of the Instituto da Mobilidade e dos Transportes (IMT, I.P.)**, a state public entity, unless otherwise provided in a bilateral or multilateral agreement.

In **Spain**, the territorial criterion is an essential element in the system of distribution of land transport competences between the State and the Autonomous Communities. In this way, the Autonomous Regions have exclusive competence for transport that takes place entirely within their territory and beyond that, planning is the exclusive competence of the State. (SSTC 86/1988, 180/1999)

The State has recognized in the constitution different competence titles that affect the organization and legal regime of passenger transport services. By way of illustration, international relations (149.1.3), commercial legislation (art 149.1.6), road, traffic and

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<sup>6</sup> Two state entities are involved in the land transport sector: a) The Autoridade da Mobilidade e Dos Transportes, an independent administrative entity for the regulation, promotion and defence of competition in the maritime-transport and mobility sectors of land, river and maritime transport. Its competences of mobility, land transport and infrastructures are defined in art. 5.2 Decree Law 78/2014 of the Statutes of Autoridade da Mobilidade e Dos Transportes and b) Instituto da Mobilidade e dos Transportes (IMT I.P.), the body in charge of the functions of technical regulation, authorizations, coordination, inspection and planning of the land, river and respective infrastructures transport sector in accordance of Decree Law 77/2014.



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motor vehicle transport (art 149.1.21), basic legislation on administrative contracts (art 149.1.18) or land transport which passes through the territory of more than one Autonomous Community (art 149.1.21) should be highlighted. As a result of these attributions, in relation to the present study, the legal framework of the transport system is determined by:

**-Law 16/1987 on Land Transport Management (LOTT) and Royal Decree 1211/1990 which approves the Land Transport Management Regulation** which, among other matters, regulates the contracting regime for regular services for general passenger use (arts 67-87 and arts 61-97) and the authorisation procedure of the General Directorate of Land Transport of the Ministry of Public Works for the provision of regular international passenger transport services by bus (arts 106-109 and 144\_155).

**-Law 9/2017 on public sector contracts** applicable to the contracting of passenger transport services (Additional Provision Eight), without prejudice to the provisions applicable to the determination of the harmonised regulation of Law 31/2007 on contracting procedures in the water, energy, transport and postal services sectors.

The **Autonomous Community of Galicia**, has **exclusive competence of road transport with full itinerary** in the Autonomous Community (art 27.8 LO 1/1981 of April 6 of the Statute of Galicia). This attribution entails the legislative (corresponds to the Galician Parliament in terms of the Statute and the laws of the State), regulatory and executive (corresponds to the regional government) powers. In particular, the **Government of Galicia** (hereafter Xunta of Galicia) **exercises the powers of planning, ordering, coordination, control, inspection and sanction of the public transport services of autonomous scope**.<sup>7</sup>

In Galicia, as a result of above-mentioned competence there is an autonomous regulation related to public passenger transport services composed of different provisions<sup>8</sup> completed by other state regulations<sup>9</sup>, for example, in the area of regular public passenger transport for general use, and because its supplementary application<sup>10</sup>.

This is completed, in the field of public transports, with other competences of development and execution of the legislation of the State in the matter of contracts and

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<sup>7</sup> Article 72 first Law 2/2017 on fiscal, administrative and management measures

<sup>8</sup> Law 6/1996 on coordination of urban and interurban services in Galicia, Law 5/2009 on urgent measures for the modernization of the public transport sector in Galicia, Law 10/2016 on urgent measures to update the public transport system in Galicia and the Public Transport Plan of Galicia, Law 2/2017 on fiscal, administrative and management measures

<sup>9</sup> Law 16/1987 on the organisation of inland transport and its implementing regulations, Royal Decree 1211/1990, insofar as certain precepts constitute basic legislation in accordance with second final provision, so, they are enacted in development of the exclusive competences of the State, and therefore apply throughout the national territory.

<sup>10</sup> In the area of exclusive competences of the Autonomous Community of Galicia, the preference for the application of autonomic law and the supplementary nature of state law is recognised in the absence of autonomous right (art. 38 of Organic Law 1/1981).





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administrative concessions<sup>11</sup> in the scope of the autonomous community and the promotion and planning of the economic activity of Galicia<sup>12</sup>.

Ultimately, municipalities have recognized the competence of “traffic, vehicle parking and mobility. Urban public transport” (Article 25.2.g Law 7/1985 of local regime bases) adapting its exercise to the terms established by the legislation of the State and the Autonomous Communities. In the case of the municipalities of Galicia, we must also consider Law 5/1997 regulating the local administration of Galicia. According to articles 80, 81, 86, urban public transport is a minimum service for municipalities with more than 50,000 inhabitants. Municipalities with a lower population are not obliged to provide the service. The municipalities of the cross-border area of this study, are located below that population reference, so that the provision of transport services corresponds to the government of Galicia.

In addition, to complete the framework of competences of the territorial entities with regard to passenger transport, in the cross-border field, we must refer to the **Treaty of Valencia on cross-border cooperation between territorial entities of Spain and Portugal of 2002**. This Treaty legally articulates, through the technique of inter-administrative agreements, the legal regime for the development of institutionalised cooperation actions between the territorial, Portuguese and Spanish entities included in Article 3. Between these territorial entities are the Autonomous Community of Galicia, CIM Alto Minho and Spanish and Portuguese Municipalities.

These entities may sign cooperation agreements within the scope of their competences, which are recognised in their respective internal law, and which respond to a common interest.<sup>13</sup> On the contrary, the Treaty itself expressly excludes certain competences<sup>14</sup>. In any case, the limits of such institutionalised cross-border cooperation are to be found in respect for treaty provisions, European and national laws and the international commitments assumed by Spain and Portugal.<sup>15</sup>

The scope of cooperation actions, in accordance with Article 5, may be wide-ranging, from the **concertation of initiatives and decision-making, the promotion of studies, plans and projects, to the realisation of investment projects, the management of infrastructures and equipment and the provision of services of public interest**. In order to achieve such cooperation actions, agreements, among others, may include the direct establishment of

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<sup>11</sup> Article 28. 2 Basic Law 1/1981

<sup>12</sup> Article 30, exclusive competence in accordance with the bases and ordering of general economic activity and general state planning

<sup>13</sup> Article 4.2

<sup>14</sup> Article 5.3. expressly excludes the following attributions from the agreements: a) normative and public security powers, b) the control powers of territorial bodies and entities and the sanctioning powers, nor the powers that have been delegated to them, without prejudice to the fact that, in the case of a body with legal personality that assumes the joint provision of a public service, the body assumes the exercise of the regulatory and sanctioning powers inherent to the provision of the service; (c) the power to extend its effectiveness to regional or local authorities which have not signed the agreement.

<sup>15</sup> Article 4.3



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legal obligations<sup>16</sup>, the conclusion of contracts with third parties or the creation of cross-border cooperation bodies.

Finally, the competences of the **European grouping of territorial cooperation Rio Minho (Rio Minho EGTC)** also deserve attention, insofar as it is the promoter of the Mobitrans cross-border project. It is a public law entity with its registered office in Valença (Portugal) and its legal status is determined by Regulation EC 18/2006 as amended by Regulation 1302/2016, Portuguese law and its statutory provisions. Participated by the CIM Alto Minho and the Deputacion of Pontevedra, it was created with the objective of promoting territorial cooperation among its members, through the realization of the competences attributed to it by the European, Portuguese and Spanish legislation, as well as those that are delegated to it for the execution of programs and projects co-financed mainly by European funds (Regional Development, Social and Cohesion Funds).

In statutory terms, the fifth and sixth clauses define the scope of the functions and competences attributed to the Rio Minho EGTC, aimed at: a) Articulating a common space and promoting territorial cooperation relations in its territory b) Increasing the territorial cohesion of the intervention territory c) Promoting cross-border cultural and natural heritage d) External promotion for the valorisation of endogenous resource potentialities e) Creating and consolidating a Rio Minho tourist brand.

For the development of its competences, the EGTC may a) Execute and manage contracts or agreements in order to have access to national and European financial resources b) The management of equipment and operation of services of general interest when expressly defined, by constituent entities or other entities on the basis of the legally foreseen procedures c) The promotion and elaboration of studies, plans, programmes and forms of relationship between associated entities d) The promotion of cooperation between members and e) all those resulting from the EGTC Regulation .

At present, the EGTC does not have any delegated powers concerning regular passenger transport services, either from its members or from third parties.

b) Absence of cross-border scale in the planning and provision of passenger transport services

At present, there are no mechanisms and/or practices of cross-border cooperation or concertation by transport authorities in relation to the planning and/or provision of regular passenger services at cross-border level.

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<sup>16</sup> In other words, those relationships of a mandatory nature for the provision of services, the performance of public works, supplies or other activities of common public interest, without the need to enter into contracts with third parties.





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This obstacle is due to two factors: the first, only since the 2015 law, which foresaw the articulation as transport authorities of the municipalities and intermunicipal communities, the conditions for a cross-border cooperation at local/regional level are present given that, the previous asymmetry of state/regional competence existing on both sides of the border, towards complex not to say unfeasible, any action.

Secondly, the planning instruments for public passenger transport services which have been approved or are being drawn up, based on the principle of territoriality applied to transport and in the absence of experience in managing transport on a cross-border scale, do not include any provision for coordination or cooperation in those areas closing the border, which could contribute to a rationalisation of resources or an improvement in the coverage of services. This is a non-existent reality in planning<sup>17</sup>. As a result, it obviously does not exist in the provision of passenger transport services either

Thus, in November 2018, Xunta of Galicia approved the **Public Transport Plan of Galicia**. This plan, whose scope of action is limited to the territory of the Autonomous Community of Galicia, orders the regular public transport services of its competence, as well as the coordination of all public transport services that are developed in the Autonomous Community.

In relation to the public transport network, the plan includes both services and territories potentially affected by future allocations, the types of allocations envisaged such as assumptions and conditions for the integration of regular public transport services for general and special use. The development of the Plan's public transport services is carried out by means of the corresponding approved draft services (art. 2, Law 10/2016).

Currently, there are a number of development projects in the bidding phase and other pre-projects in the review phase prior to approval and subsequent bidding that include lines that affect the Minho River cross-border area. These are the following:

Projects in bidding:

- XG. 621: South of Condado County, East of Vigo and Municipal District of Tui (connection of the Salvaterra do Minho area with Vigo).
- XG 670: Municipalities of Mos, O Porriño, Tui

Preliminary draft under revision:

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<sup>17</sup> In Spain see State legal provisions on programming, planning and organisation of the transport system (articles 15,16 Law 16/1987 and article 25 Royal Decree 1121/1990) and Galicia Region in accordance with the territorial scope of exercise of its powers set out in the Statute of Autonomy (art. 37)



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- XG 883: Baixo Minho and South of Vigo County (connection zone of Tui, Tomiño, A Guarda and Vigo)
- XG 888: South Condado Paradanta and Center of Condado (connection between areas of Salvaterra do Miño and As Neves and Vigo)
- XG 888: South Paradanta county and Center of Condado (connection between areas of Salvaterra do Miño and As Neves and Vigo)
- XG: Municipality of Tui

As we have advanced, although the territorial scope of the Transport plan is limited to Galicia, without there being any cross-border forecasts, in the context of the meetings held, the Directorate of Mobility of the Xunta of Galicia, has expressed the willingness to study, if requested in the processing of pre-projects, the line or lines that could be the object of an extension to Portuguese territory.

With regard to transport planning in the Rio Minho CIM<sup>18</sup> territorial area, the approval of the Transport Operational Plan is expected in December 2019, corresponding with the tendering of the transport lines. This plan includes both municipal, interurban and inter-regional lines. According to the information provided, the existing lines or the new lines foreseen in the operational plan that cross the municipalities of Valença and Monção and that could be studied for a possible cross-border extension would be as follows:

- L 24836 Monção-Pinheiros
- L 24844 Trute-Monção
- L 24866 Anhoes-Monção
- L 33022 Monção-Portela de Alvite
- L 33024 Monção-Boivao
- L 33027 Monção-Tangil (Cruzeiro)
- L 33033 Cavenca-Monção
- L 33036 Monção-Melgação
- L 33042 Melgação-Viana do Castelo
- L 33077 Fontoura Reguegas-Valença
- L 33079 S.Bento Lagoa-Valença
- L 33083 Boivao-Valença
- Chamozinho-Valença Line Proposal
- Proposal for the Gondelim-Valença line

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<sup>18</sup> As transport authority, it is competent to plan and coordinate existing or planned passenger transport services in its respective geographic area, as well as to guarantee the articulation of the transport services of its competence with the transport services of other transport authorities in adjacent geographic areas (Article. 13.1 and 2 Law 52/2015) because the CIM, in Portuguese system, guarantees the actions between the municipalities and the central administration's services in the field of mobility and transport.



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Given that the main objective of the project to extend the transport lines between the municipalities of Tui and Valença and Salvaterra do Minho and Monção is the connection of transport networks that allow citizens access to urban centres and to the intermodality of existing transport services, it will be up to the authorities responsible for planning to assess between those identified lines which offer the best conditions in terms of routes and frequencies for a more detailed technical and economic study.

- c) Transport authorities adopting an international approach to passenger transport to the detriment of a cross-border vision in the management of local/regional transport services.

Despite the existence of important socio-economic and institutional relations at different levels, and the weight that in terms of daily journeys occur in this part of the Spanish-Portuguese border, an assimilation of cross-border transport with international transport can be seen in the administrative bodies on both sides, as a result of European and national regulations, and, therefore, a transfer of responsibility to the States.

This approach highlights several aspects. On the one hand, insufficient knowledge of the cross-border legal framework between Spain and Portugal, in relation to the potential for cooperation on the management of public services in general, and transport services in particular. Thus, the Treaty of Valença on cross-border cooperation between territorial entities and bodies in Spain and Portugal allows the transport authorities of local/regional services, within the scope of their competences and in accordance with the national rights and international commitments of both States, to sign agreements concerning, for example, the coordination or management of public transport services.

This could be due to the absence, in this area, of cross-border cooperation agreements involving the management of public passenger transport services or public services in other areas, according to existing public information.<sup>19</sup>

On the other hand, the confirmation of insufficient and inadequate European and national legal passenger transport framework, by not establishing a specific regime for local cross-border passenger transport, in relation to international passenger transport which would facilitate the implementation and development of joint initiatives and projects.

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<sup>19</sup> Cross-border cooperation carried out by Spanish territorial entities. Secretary of State for Public Administration, 2016.



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## II.- Indication of the Legal/Administrative Dispositions causing the Obstacle

The cross-border extension of transport lines, currently existing or to be put out to tender, between the border municipalities of Tui and Valença, and Salvaterra do Minho and Monção, do not currently present any legal obstacles to their implementation, beyond the complexity resulting from the concurrence of procedures legally provided for, in Spain and Portugal, and which will be detailed later in the roadmap.

Without prejudice to the foregoing, a possible legal obstacle that may exist in any of the extensions to be implemented between Tui and Valença and Salvaterra-Moncao would refer to whether they include the performance of urban cabotage services. The Mobitrans project does not include it in principle. In any case, Mobitrans' proposals are a starting point, capable of being redirected or modified by the competent transport authorities.

From a legal perspective, cabotage services are regulated by Regulation **(EC) 1073/2009 of 21 October 2009 on common rules for access to the international market for coach and bus services**. This rule defines the legal regime for the provision of international transport services, in particular the scope and procedure for authorisations of regular services by the States concerned<sup>20</sup>.

The Regulation provides, as a general principle, for (a) special regular services, provided that they are covered by a contract concluded between the organiser and the carrier, (b) occasional services and (c) regular services provided by a carrier not resident in the host Member State in the course of a regular international service. These cabotage services must in any case be authorised in accordance with the provisions in force, provided that the grounds for refusal laid down in Article 8(4) do not apply. If authorised, the laws, administrative and regulatory provisions applicable to the service in the host country in accordance with Article 16 of the Regulation must also be taken into account.<sup>21</sup>

This general principle applicable to cabotage services is derogated from in Article 15 c) **for "regular services serving the needs of an urban centre or conurbation, or transport needs between that centre or conurbation and its surrounding area"**.

Ultimately, Article 25 of Regulation 1073/2009 provides that Member States may conclude bilateral or multilateral agreements for the further liberalisation of international services, in particular in relation to the authorisation regime, simplification or waiving of control

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<sup>20</sup> Articles 6-10

<sup>21</sup> Article 16.1 refers to the application of the legislation of the host country with regard to the conditions of the transport contract, the weight and dimensions of the vehicles, the requirements for the determination of categories of passengers, driving time and rest periods and VAT on transport services. Article 16(2) for regular cabotage services refers to the legislation of the host country in relation to the requirements of authorisations, tender procedures, locations to be served, regularity, continuity, frequency and itineraries.



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documents, in particular in border regions. This provision thus makes it possible to review the legal regime of the regulation.

Regulation EC 1073/2009 has direct legal effects, both in Spain and Portugal, although that provision refers back to national law for certain issues, as noted above. In Spain, **Law 16/1986 on the organisation of land transport** (Title III, Chapter V arts 106-109) and **Royal Decree 1211/1990 approving the Regulations on the Organisation of Land Transport** (Title IV, Chapter IV arts 144-155), refer to the application of Community legislation or international conventions to which Spain is a party, and regulate, among others, regulatory aspects relating to authorisations and the issuing of control documents for the performance of international road passenger transport by the Directorate General for Land of the Ministry of Development.

In Portugal, **Decree Law 3/2001**, the framework regulation on passenger transport, which regulates access to the profession and access to the transport market, makes regular passenger transport services between Portugal and an EU country subject, by virtue of Article 18, to prior authorisation under the competence of the Instituto da Mobilidade e dos Transportes (IMT, I.P.), a State public body, unless otherwise provided for in a bilateral or multilateral agreement.

At present, **between Spain and Portugal, there is no agreement aimed at further liberalisation or simplification of the Community regime for international regular transport** under the terms of Article 25 of the Regulation, so that the general regime provided for applies.

Consequently, the legal obstacle identified, i.e. the exclusion of cabotage on regular international urban services, is situated in European law and not in the national law of Spain and Portugal. Therefore, in the event of an extension of regular passenger transport services between Valença-Tui and Salvaterra do Minho-Monçao, urban cabotage would be excluded in so far as this obstacle can only be removed or modified by means of a Community provision or by a bilateral or multilateral agreement.

In this respect, it is necessary to take into account the **proposal of commission COM (2017) 647 final to amend regulation 1073/2009**, among other issues, with regard to regular international transport services and cabotage<sup>22</sup>. This proposal aims at opening up national transport markets insofar as they strengthen the market for international regular services, thereby responding to the problems identified as hampering the development of intercity bus services in the Member States.

In particular, and with regard to the subject matter of this report, the proposal proposes that the refusal of an authorisation for a regular international passenger service of less than 100km may only be carried out on the basis of a set of grounds. The proposal identifies 4 grounds, three of which refer to different regulatory breaches by the transport operator (Article 8c 2a, b, c) or, a fourth, in the case of a regular service, referring to the endangerment of the

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<sup>22</sup> Proposal subject to amendments at first reading in the European Parliament on 13 February 2019. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P8\\_TA\(2019\)0125](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P8_TA(2019)0125)





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economic stability of a public service contract (Article 8c 2d). This circumstance should be accredited by the regulatory body on the basis of an objective economic analysis.

In the case of regular international passenger transport services, for distances of 100 km or more, it is proposed to eliminate, as a reason for refusal of authorisation, the risk of the economic stability of a contract or public service.

In relation to authorised cabotage transport operations, the proposal removes the requirement that regular services be provided as part of a regular international service and the prohibition that cabotage operations in the form of regular services be carried out independently of a regular service.



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### **III. Description of a Possible Solution**

The analysis of the legal framework shows that the existing obstacles to the implementation of the project to extend public transport services beyond the border between Valença and Tui and Salvaterra do Minho and Monção are of an administrative nature and not of a legal nature.

The proposed roadmap for the implementation of the cross-border project, from the legal point of view, is articulated from the integration of the following 3 legal frameworks:

- a) The Cross-border cooperation between the territorial entities of Spain and Portugal, in particular the Treaty between the Kingdom of Spain and the Portuguese Republic on cross-border cooperation between territorial entities and bodies of 3 October 2002 and the provisions of national law on prior notification of cross-border cooperation agreements<sup>23</sup>.
  
- b) Community and national (Spanish and Portuguese) legislation<sup>24</sup> on regular international road passenger transport services, in particular Regulation (EC) No 1073/2009 of 21 October 2009 laying down common rules for access to the international market for coach and bus services and the following national provisions
  
- c) European legislation on the legal status and procurement of public passenger transport services, in particular Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, Directive 2014/25 on the procurement of entities operating in the water, energy, transport and postal services sectors, Directive 2014/24 on public procurement and Directive 2014/23 on the award of concession contracts and related national transpositions<sup>25</sup>:

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<sup>23</sup> In Spain, Royal Decree 1317/1997, on prior communication to the General State Administration and official publication of cross-border cooperation agreements between Autonomous Communities and local entities and foreign territorial entities. In Portugal, Decree-Law No 161/2009, which establishes the legal regime applicable to cooperation agreements.

<sup>24</sup> In Spain, Law 16/1986 on the organization of land transport (Title III, Chapter V arts 106-109), Royal Decree 1211/1990 approving the Regulation of Land Transport (Title IV, Chapter IV arts 144-155) and Order of 6 May 1999 implementing Chapter IV of Title IV of the Regulations to the Law on the Regulation of Land Transport in relation to the granting of authorisations for the international carriage of passengers by road. In Portugal: Decree-Law 3/2001, of legal regime of access to the transport of passengers by road and organization of the market of regular transport

<sup>25</sup> In Spain, Law 9/2017 on Public Sector Contracts, transposing into Spanish law Directives 2014/23/EU and 2014/24/EU of 26 February 2014, Law 31/2007 of 30 October 2007 on procurement procedures in the water, energy, transport and postal services sector, Law 16/1987 regulating land transport (Tit III, Cap II). In Portugal Amended Decree-Law 18/2008 approving the Public Contracts Code



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The proposed roadmap integrates the three stated legal framework and is implemented in the following three phases:

a) **Phase 1: Definition, concertation and legal formalisation of the project for the cross-border extension of regular transport services between Valença-Tui and Salvaterra do Minho-Monçao.**

In the light of the legal analysis of the competence framework, the transport authorities competent to define and to decide the cross-border project for the extension of services are, on the one hand, the Department of Infrastructure and Mobility of the Xunta of Galicia and, on the other hand, the CIM Rio Minho and the municipalities of Valença and Monçao.

This first phase includes technical and other legal cooperation actions. Thus, first of all, the transport authorities must define on the scope of the cross-border project of common interest to be developed. To this end, it is necessary, on the basis of the planning instruments for public transport services, approved and/or in preparation, to identify those transport services planned and/or tendered for that pass through the municipalities of Valença, Tui and Monçao and Salvaterra do Minho, on which the extension can be articulated. This is because the 2012 Mobitrans project proposes the extension of 3 lines, which have been review in planning.

The extension of lines is not an end in itself. The objective is the physical connection of transport networks, to facilitate citizens' access to urban centres and transport services on the other side of the border (e.g. bus terminal, etc.) in order to improve cross-border mobility.

Once the lines to be extended have been defined, it will be necessary to define the scope of the cross-border service (itineraries, frequencies, stops), its additional cost in relation to the planned lines and the operational modalities for its implementation under national law.

Secondly, once the technical and economic terms of the project to extend lines have been defined and agreed, the transport authorities will draw up a draft cross-border cooperation agreement in accordance with the provisions of the Treaty of Valencia. This agreement shall include, at least, the aspects detailed below:

- Identification of the signatory parties: In accordance with the distribution of competences analysed, the agreement should be signed by the Xunta of Galicia, the CIM Rio Minho and the municipalities concerned, i.e. Valença and Monçao (depending on the lines finally adopted).
- The object of the agreement between the parties
- In the present case, the creation of a cooperation entity is not required. It shall be sufficient for the convention to define the corresponding obligations of the signatory parties, in particular those of a technical, administrative and economic nature



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necessary for the execution of the cross-border project. In addition, it would be advisable to provide for a committee to monitor the implementation of the convention, dedicated to exchanging information and coordinating the adoption of decisions corresponding to the signatory entities on the progress and coordination of the procedures provided for by law and the decisions to be taken or any other matter deemed to be of interest in relation to the cross-border project.

- The law applicable to the Convention and the forms of dispute settlement
- The procedure for amending any elements of the agreement
- Term and early termination conditions

Ultimately, once the draft cross-border cooperation agreement has been agreed upon, it is processed, for the purposes of prior communication and control, before the State Administration, in Spain before State Secretary for Territorial Policy, Ministry of Territorial Policy and the Civil Service in Spain and Agency for Development and Cohesion, I.P in accordance with the provisions of domestic law. The purpose of this procedure is to verify the adequacy of the draft convention with applicable domestic law and the international commitments of both States.

In the absence of objections, and once the draft convention on cross-border cooperation has been validated by both States, it is signed and officially published so that it has legal effects in Spain and Portugal.

#### **b) Phase 2: Adaptation of the cross-border project to international passenger transport regulations**

Once the technical and economic terms of the cross-border project to extend transport services between Valença-Tui and Salvaterra do Minho-Monçao have been approved, and the agreement on cross-border cooperation between the competent transport authorities has been formalised, transport operators responsible for the operation of public transport services must apply for the corresponding authorisation for the regular international passenger transport service in accordance with Regulation 1073/2009 , Law 16/1987 in Spain and Decree Law 3/2001 in Portugal.

The transport operators requesting authorisation for international regular transport will be those companies that have been awarded in the public tender processes previously carried out on the line(s) affected by the cross-border project, both on the Portuguese and on the Spanish side.

Thus, the company(s) awarded the Portuguese lines applied for authorization before the Instituto da Mobilidade e dos Transportes/IMP.IP in Portugal and the company(s) awarded the Spanish lines before the Directorate General of Land Transport of the Ministry of Public Works in Spain. These transport operators must meet the conditions and qualifications necessary for the provision of international transport services.



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In view of the forecasts for the carrying out of tenders by the Xunta of Galicia and the Cim Alto Minho before December 2019<sup>26</sup>, and pending the definition of the terms of the line extensions, it does not seem feasible to incorporate, in the contract specifications of those tenders, the clauses referring to the cross-border extension of transport services, given that they must be previously agreed between the transport authorities.

For this reason, it is understood that the legal-procedural articulation for the extension of the lines would take place, after the initial adjudication, and once the milestones described in phase 1 have been met.

**c) Phase 3: Modification of previously signed public contracts to operate cross border extension of transport lines.**

The extension of the transport services between Valença and Tui and Monçao- Salvaterra do Minho, in view of their location on the same border, would, according to the forecasts of the Mobitrans project, involve extensions of between 2 and 3.5 km. These distances represent a very limited scope, and no significant case, with respect to the routes, and distances of municipal, interurban or interregional lines, susceptible of incorporating those extensions. In any case, the definitive scope of the extensions will be determined once the affected lines and the route of the extension are approved.

From the legal point of view, in the scenario contemplated, the approval and implementation of cross-border extensions would entail a modification of previously signed public contracts. And in this sense, its processing will require compliance with the conditions and procedures provided for the modification of administrative contracts by national legislation.

Thus, in Spain, articles 203 to 207 of Law 9/2017, on public sector contracts, regulate the cases of modifications foreseen in the administrative clauses' specifications, such as those cases not foreseen in the specifications and referring to situations of additional services, unforeseeable circumstances and non-substantial modifications<sup>27</sup>.

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<sup>26</sup> December 3, 2019 is the deadline for the adequacy of obligations on the award of public service contracts (Article 8 Regulation 1370/2007)

<sup>27</sup> These articles provide that the modification of public contracts during their validity can only be modified in 2 cases: a) When this has been provided for in the specifications of particular administrative clauses, under the terms, forms and conditions, with a maximum of twenty per cent of the initial price. In any case, such modifications cannot alter the overall nature of the initial contract. b) Exceptionally, when it is necessary to make a modification that is not provided for in the specific administrative specifications, or that is provided for but not in line with the previous point, the modification may only be made in three specific situations: additional services, unforeseeable circumstances and non-substantial modifications, additionally conditioned with several requirements



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In the case of Portugal, Articles 311-315 of the Decree Law 18/2008, as amended, of the Public Contracts Code, regulate contractual modifications either due to abnormal or unforeseeable alteration of the circumstances of the contract or for reasons of public interest resulting from new needs or new circumstances<sup>28</sup>.

In summary, and in accordance with the foregoing, the extension of certain regular passenger transport services beyond the border between Valença and Tui and Salvaterra do Minho and Monção may become operational once the procedural roadmap consisting of the signing of a cross-border cooperation agreement between the transport authorities, the attribution of authorisations for the provision of regular international transport services to transport operators by the competent State entities and the amendment of the public contracts relating to the transport lines affected by the extension are completed.

Although the current legal framework offers the tools to make operational the extension of passenger transport lines between Valença and Tui and Salvaterra do Minho and Monção, there is clearly evidence of a complexity resulting from the concurrence of administrative procedures that discourages and retracts any cross-border initiative related to passenger transport services.

#### **IV. Pre-Assessment of whether the Case could be solved with the European Cross-Border Mechanism**

The present case is analysed in view of the fact that the obstacles to the cross-border extension of transport services (without cabotage) are of an administrative nature due to the concurrence of a multiplicity of legal frameworks inadequate to the cross-border reality.

However, it is the European regulatory framework related to international transport, rather than the absence of a legal regime for cross-border transport, that determines the biggest stumbling block. The rest of the provisions, whether in relation to public passenger transport services or in relation to public procurement in both Spain and Portugal, do not really differ significantly.

We therefore understand, on a preliminary basis, that, in this study, it would not be appropriate to apply the European cross-border mechanism, under the terms of Commission proposal COM (2018) 373 final, which offers voluntary mechanisms to the competent

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<sup>28</sup>In Portugal, Articles 311-315 Public Contracts Code, regulate contractual modifications either due to abnormal or unforeseeable alteration of the circumstances of the contract or for reasons of public interest resulting from new needs or new circumstances. In both cases, depending on different causes, limits of between 25% and 10% of the contract price and the requirement to publish the amendments are envisaged. Article 454 establishes the regime and limits for contractual modification in the event of additional services.





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authorities, to make it possible to carry out cross-border projects applying the rules of one Member State in the neighbouring Member State.

## V. Other Relevant Aspects to this Case

Unlike other European borders, with a relevant degree of economic and social integration and with outstanding examples of cross-border management of public passenger transport (e.g. France-Switzerland, France-Luxembourg, Germany-Luxembourg...), the Spanish-French and Spanish-Portuguese borders are known in the field of transport and mobility, for different reasons of infrastructure, competence sharing, economic or territorial organisation, are characterised by a non-existent or deficient cross-border offer. This has led to economic dynamism at the borders, accompanied by a pattern of mobility based exclusively on the private vehicle, and this, regardless of the motivation for travel (work, studies, leisure, commercial).

The complex and tortuous roadmap to promote regular cross-border passenger transport services, integrating different European and national legal frameworks and insufficient knowledge and application of the potential of cross-border cooperation in relation to the management of local/regional public services make it even more difficult.

Nevertheless, some progress has been made in the cross-border context of Spain, which may help other projects to emerge and, above all, give visibility to the complexity involved in carrying them out. The project is located in a cross-border conurbation in the territory of the municipalities of Hondarribia-Irún (Spain) and Hendaye (France) with a population of 96,635 inhabitants. The project, supported by a cross-border cooperation agreement<sup>29</sup> between transport authorities<sup>30</sup>, includes the extension of two French intercities transport lines in Spanish territory completed by coordination with the rest of land services (bus and rail).

In particular, the first, line 31 "EHPAD-Hendaye Estación" extended to Irún Plaza San Juan with 14 daily services in each direction and connections, on the Spanish side, with the urban lines of Irún (Irunbus lines 1 and 2), the Irún-Hondarribia intermunicipal lines (managed by the Provincial Council of Gipuzkoa and the railway services between Hendaye-San Sebastián (managed by Euskotren) and on the French side, with other urban lines from Hendaye (35,33,37,39), the interurban express line Bayonne-Saint Jean Luz-Hendaye and the French railway services (TER,TGV) and Euskotren (at Hendaye station).

The second is the interurban line 33 between Urrugne-Hendaye which extends to Behobia in Irún. In a first phase, the extension reaches the Transport Centre, close to the borderline, with

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<sup>29</sup> Published in BOE no. 196 of 14 August 2018

<sup>30</sup> The Town Council of Irún and the Syndicat des Mobilités Pays Basque Adour



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11 daily services in each direction and with connections to the urban transport services of Irún (Irunbus lines 1 Zaisa-Hospital), and other urban lines of Hendaye (31,35,39).

This experience makes it possible to formulate some practical conclusions, of particular interest to this study:

- a) Despite the complexity of the inherent procedures applicable to cross-border transport, with the existing legal framework, it is possible to implement projects.
- b) The improvement in the supply of cross-border transport does not come about merely by extending transport lines, but must be accompanied by coordination or correspondence of services.
- c) Political will of the transport authorities in relation to the promotion and management of cross-border transport services is a determining and essential factor, in view of an existing regulation designed for international transport, but not for cross-border transport.
- d) It is only through consultation between local and regional transport authorities and the implementation of projects involving management that progress can be made in the consideration of cross-border transport, in the elimination and overcoming of both legal obstacles, through a proactive activity, and administrative obstacles, through greater knowledge and application of legal mechanisms.

## **VI. References and Appendix/Appendices if any**

This report is based on the analysis of the applicable European, Spanish (national and autonomous of Galicia) and Portuguese regulatory framework of passenger transport services, as well as on the existing documentation of the cross-border project, in particular:

- Public Transport Plan for Minho Cross-border Area, MOBITRANS, Uniminho Associação do Vale do Minho Transfronteiriço
- Draft Transboundary Sustainable Mobility Plan for the Minho River, pending approval, Rio Minho EGTC, September 2019
- Public Transport Plan of Galicia, Xunta de Galicia, 2018
- Cross-border cooperation carried out by Spanish territorial entities, Secretary of State for Public Administrations, 2016

**Maria Garayo Maiztegui**

A handwritten signature in blue ink, appearing to read 'M. Garayo'.



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