

Towards a borderless Europe - Legal tools enabling a cross-border cooperation without geographical borders

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Abstract

The contribution answers the research question of which legal tools can be used to further develop cross-border cooperation away from cross-border cooperation in geographically or functionally defined border areas towards ubiquitous cross-border cooperation, i.e. applicable everywhere on the territory of the Member States. The contribution, which is based on jurisprudential methodology, discusses the possibility of non-territorial experimental and opening clauses and, by further developing the rights developed from EU citizenship, considers how the border can ultimately be overcome as an element of the offense, but at the same time also as an exclusionary element for the application of EU law.

Cross-border mobility as a cause and justification for cross-border cooperation no longer only takes place in geographical or functional border regions. Today, for example, a citizen entitled to freedom of movement can not only be active across borders, for example on foot or by bicycle between Strasbourg (F) and Kehl (D), but also between Stuttgart and Strasbourg or between Kehl and Paris (by high speed trains such as TGV), but also between Paris and Berlin (by plane) or even digitally from any location within the EU to any other location, for example in a home office. As a result, geographical or functional border areas are becoming useless as a justification for cross-border cooperation and exemptions developed for this purpose. The contribution shows how such exceptional provisions (such as the opening or experimental clauses popular at the political level) can be developed in the legislative process (by means of a cross-border impact assessment) in such a way that they do not require geographical differentiation criteria. With a view to overcoming the limits of the current legal system, the article considers whether a further development of EU citizenship might not also enable the ubiquitous application of EU law without a cross-border element, i.e. without the (internal) border as a point of reference, to create a legal system that is cross border friendly. A conclusion and an outlook resolve this contribution.

Keywords: borderless Europe, geographical border regions, cross-border cooperation, legal tools, derogation clause

Introduction

With the increasing interdependence of border areas, cross-border mobility no longer only takes place in geographical or functional border regions. Today, a person entitled to freedom of movement can not only work across borders, for example on foot or by bicycle between Strasbourg (F) and Kehl (D), but also between Stuttgart and Strasbourg (using high-speed trains such as the TGV) or between Kehl and Paris, but also between Paris and Berlin (by plane) or even digitally from any location within the EU to any other location, for example in a home office. Geographical or functional border areas are thus losing their significance as a justification for cross-border cooperation and derogation clauses developed for this purpose. Against this background, the article shows the potential of using legal instruments to develop the status quo of geographically or functionally defined border areas into ubiquitous cross-border cooperation, i.e. cooperation that is applicable everywhere on the territory of the Member States. The possibilities of non-territorial experimentation and opening clauses are discussed and it is examined whether a further development of EU citizenship could not also enable the ubiquitous application of EU law without a cross-border element, i.e. without the (internal) border as a point of reference, and thus create a border-friendly legal system. A conclusion and an outlook round off this article.

Definitions

The legal analysis is based on the following definitions:

A border region is understood to be an identifiable, definable region located along one or more national borders as opposed to a border region (Bundesministerium für Verkehr, Bau und Stadtentwicklung, 2011, p. 8). The definition and size of the region vary and depend on administrative and institutional factors. In Germany, the prevailing understanding is based on districts located on the border. The demarcation of border regions is not exclusive; on the contrary, border regions can also overlap (Chilla, 2020).

Cross-border cooperation is understood as cooperation between neighbouring (territorially delimited) border regions across a national border (Niedobitek, 2001). This has developed considerably over the past decades with the development of the European single market and EU structural and regional policy (Wassenberg, 2015, p. 95).

Derogation clauses grant the legal addressee the power to derogate, provided that this fulfils the substantive legal requirements. A distinction must be made between experimental, opening and exception clauses with regard to the legal user and the temporal dimension of these derogation regulations.

An experimental clause is not defined in (constitutional) law, but can be defined more precisely as a legal provision that allows the testing of a deviation from a regulation that otherwise continues to apply for a limited period of time (Weber, 2024). An experimental clause can

therefore be used to gather experience in a specific area, which can later serve as the basis for permanent, application-oriented (Beck, 2004, p. 488; German Bundestag, 2018) standardization (Bay. VGH, decision of 2015, September 25; Az. Vf. 9-VII-13, mn. 185; German Bundestag, 2018). With regard to its target group, an experimental clause only has a systematic effect if it grants the executive the discretionary power to allow exceptions to the legislator's orders in individual cases.

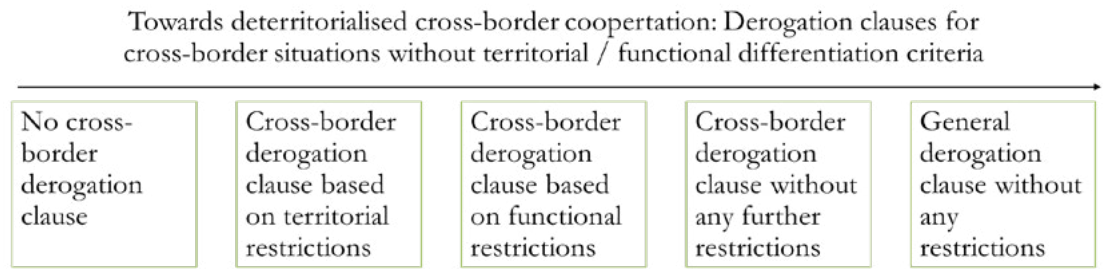
In contrast, opening clauses are regulations that allow a legislator to deviate from, specify or supplement certain regulations, i.e. to replace the regulations with their own regulations (Weber, 2024). Examples of an opening clause include the provisions of Art. 72 para. 3 of the German Basic Law or, at EU law level, the numerous opening clauses of the GDPR (for the example of the GDPR see: Stemmer in Wolf, Brink & v. Ungern-Sternberg, Art. 7 para. 16-19; Grzeszick, 1997, pp. 545 seq.).

Status quo: derogation clauses for cross-border situations with territorial, functional or no other criteria

The status quo of cross-border cooperation shows that existing legal frameworks are often unable to effectively

remove cross-border obstacles or at least compensate for any disadvantages. This is largely due to the fact that there is a general lack of derogation clauses that would allow deviations from national regulations in cross-border situations (1.). Where deviation rules exist, these are often limited on the basis of territorial criteria, for example in the case of Art. 13 para. 5 of the German-French double taxation agreement (2.). In addition to this territorial limitation of derogation clauses for cross-border situations, there are also functionally limited derogation clauses (3.). Furthermore, derogation clauses are conceivable that are based exclusively on the criterion of crossing the border and do not contain any other criteria (4.). What both types of derogation clauses have in common is that they still presuppose the border as a reference feature and finally those that generally provide the possibility of derogation (5.). The regulations are likely to differ primarily in terms of their material scope of application (standard-related derogation regulations for cross-border situations, statutory derogation regulations for cross-border situations and general standard- or statutory-related derogation regulations). The following diagram illustrates this categorization:

Figure 1: Categorization of various derogation clauses for cross-border situations



Lack of derogation clauses for cross-border situations

A practical example, which is not just hypothetical but frequently occurs in the numerous municipalities along the border due to their close political, cultural, historical and economic ties, could be the potential for a wide range of cooperation opportunities that have not yet been exploited due to legal obstacles. With regard to these cross-border forms of cooperation at municipal or regional level, the formation of joint bodies, such as committees involving citizens, should be considered in particular.

The municipal code of Baden-Württemberg can serve as an example of this: It provides for the possibility of appointing advisory committees, which are constituted from among the members of the municipal council, in accordance with § 41 para. 1, 2 GemO for the preliminary consultation of the municipal council's negotiations or individual items on the agenda (Brenndörfer in Dietlein & Pautsch, 2025, Art. 40 mn. 6). The committees consist of politically elected members of the municipal council and their number depends on the size of the municipality (see § 25 para. 2 GemO). In addition, both knowledgeable residents and experts can be consulted on individual matters in accordance with § 33 para. 3 GemO. The respective national legal framework therefore excludes reciprocal participation in decision-making committees by citizens in the respective other municipality due to a lack of the necessary resident status. In this respect, this example represents a suitable and comparatively administratively efficient

use case for the application of a derogation regulation, such as an experimental clause in the Baden-Württemberg municipal code.

Territorially limited derogation clauses for cross-border situations

Territorially limited derogation clauses for cross-border situations are those that contain a derogation clause for cross-border situations that are limited in their scope of application to a specific territorial area, usually border regions.

An example of a territorially limited cross-border derogation regulation concerns employees who work in a border area of a contracting state (e.g. France) defined by municipality and live in the border area of the other contracting state (e.g. Germany) and usually return there every day. They do not pay tax on their earned income in the source state, but in their place of residence (e.g. Art. 13 para. 5 DTA France; in this case, the border area for persons residing in France comprises the departments of Haut-Rhin, Bas-Rhin and Moselle on the French side and all municipalities on the German side whose territory lies wholly or partly within a 30 km strip from the border, and for persons residing on the German side all municipalities lying wholly or partly within a 20 km strip on the other side of the border).

Functionally limited derogation clauses for cross-border situations

An example of a functionally limited derogation clause for cross-border situations can be the cross-border frontier regulations in coordinating European social law, namely in Art. 1 f of Regulation (EC)

883/2004. According to this, a frontier worker is “a person who pursues an activity as an employed or self-employed person in one Member State and resides in another Member State to which he/she returns as a rule daily or at least once a week”. There is no territorial restriction here, but there is a functional restriction in that it is required that the person must normally return daily, at least once a week.

Derogation clauses for cross-border situations without further restrictions

The fourth conceivable group of cross-border derogation clauses would be one without any restrictions. This would be based solely on the characteristic of the border crossing. Such a rule would be effective for all cross-border situations of a specific specialized law in which it is applied.

General derogation clauses without restrictions

Last but not least, an alternative could also be derogation regulations that allow derogations without any explicit link to cross-border situations. Such a derogation clause would apply equally to purely national domestic situations and thus implicitly also to cross-border situations. The provision of Art. 177a GO Bayern¹ could serve as an example of such a provision at state level.

At the level of EU law, such a regulation would lead to a dissolution of the so-called cross-border element and could thus lead to cross-border cooperation without borders in an institutional dimension.

Interim conclusion

Derogation clauses for cross-border situations are conceivable in various explicit and implicit forms: territorial, functional or without (further) restrictions. A more in-depth analysis could possibly reveal a chronological line of development from clauses with missing cross-border derogation regulations to territorially and functionally designed derogation clauses to those without further restrictions, as well as a comprehensive presentation of all corresponding derogation regulations.

Any derogation clause must comply with the legal framework of EU law and national law. The legal framework of such clauses will therefore be presented below.

Legal framework

Such derogation clauses pursue a priori the legitimate purpose of overcoming or eliminating the disadvantages of cross-border life situations by allowing a deviation from the existing national legal situation and thus leading to an opening.

¹ The regulation has the following wording: “Art. 117a Exemptions

(1) The State Ministry of the Interior, Sport and Integration may, in the interests of the further development of local self-government, approve exceptions to the provisions of this Act and the regulations issued pursuant to Art. 120 on a case-by-case basis in order to test new models of governance, budgeting and accounting, procedural simplification and administrative management.

(2) The approval shall be limited in time.

(3) Conditions and requirements shall be permitted in particular in order to maintain the comparability of the implementation of municipal law as far as possible, including in the context of a trial, and to make the results of the trial usable for other municipalities, rural districts and districts.”

In principle, cross-border derogation clauses thus exceed the respective national legal framework, irrespective of their possible territorial restriction, insofar as the clause itself or the derogation from otherwise applicable law made possible by the clause constitutes a violation of higher-ranking law. The standard of review is therefore EU law, in particular its provisions on discrimination and restriction in the area of international law (1.), European law, in particular fundamental freedoms (2.), national constitutional law (3.), in addition to the requirement of certainty, above all the distribution of competences, e.g. standardized by the Basic Law in Art. 70 et seq. GG as well as questions standardized by fundamental law, in particular with regard to the general fundamental right to equality (Art. 3 para. 1 GG). In addition, the respective legal framework conditions of the states concerned must be taken into account (4.).

International law framework

International law has a twofold reference to cross-border derogation clauses: Firstly, such derogation clauses could be contained in international treaties themselves (such as double taxation treaties) and thus constitute their legal basis; above all, international law regulations can also result in limits for such regulations at the level of national law.

In both cases - international law as the basis for cross-border derogation clauses; international law as the framework for national cross-border derogation clauses - the starting point for consideration is the principle of territoriality under international law. According to this principle, national regulations apply to the respective national

territory, while international treaty regulations with substantive legal effect apply to the territory of the contracting parties involved.

National sovereignty fundamentally grants nation states external sovereignty, i.e. the fundamental independence of a state from other states, as well as internal sovereignty, i.e. the right to self-determination in matters of their own state organization (Schweisfurth, 2006, p. 351 seq.; Frey & Müller, 2024, p. 494). This also gives rise to the prohibition of intervention under international law, according to which subjects of international law have a right to non-intervention by other states (Schweisfurth, 2006, p. 353 seq.; Frey & Müller, 2024, p. 494). Accordingly, an intervention contrary to international law would be deemed to have taken place if foreign states or their subdivisions carried out sovereign acts on foreign territory on the basis of their national law. If a state acts extraterritorially, this therefore requires an element of permission under international law, i.e. permission for the foreign state to take (sovereign) action on its own territory (Frey & Müller, 2024, p. 494).

Cross-border derogation clauses, i.e. those that regulate cross-border situations or groups of persons in a way that deviates from the national reference legal system, regularly constitute an encroachment on the national law of the other state and generally require a corresponding authorization under international law.

European law framework: The cross-border element as a prerequisite for fundamental freedoms in the internal market

Territorial derogation clauses are characterized by unequal treatment between the cross-border situation within the border zone that they cover and cross-border situations that take place at least partially outside this border zone. This unequal treatment would initially have to be measured against the EU's fundamental freedoms.

In principle, the European fundamental freedoms are not applicable to purely domestic situations that do not involve an element that extends beyond the territory of one Member State into another Member State (Dohms in Wiedemann, 2020, Art. 35 para. 213). It follows from this that provisions of discrimination and restriction law, such as the general prohibition of discrimination in Art. 18 TFEU and the specific prohibitions of discrimination of all EU fundamental freedoms, characteristically require a cross-border element in order to open up their scope of application. As a result, however, the fundamental freedoms are not limited in their applicability to a geographically or territorially delimited area of border regions, but rather apply equally within the entire internal market due to Art. 26 et seq. TFEU (von Bogdandy in Grabitz, Hilf & Nettesheim, 2025, Art. 18 TFEU para 1), which encompasses the territory of all 27 Member States. The ECJ has interpreted

this cross-border element broadly; it is sufficient here that the person claiming discrimination is at least also a national of another EU Member State (cf. ECJ, judgement of 2002, July 11, Ref. C-60/00, Carpenter; ECJ, judgement of 1992, July 7, Ref. C-370/90, Singh). As a result, derogation clauses that are only applicable in territorial-geographical border regions appear to be fundamentally unsystematic from the perspective of the European internal market (von Bogdandy in Grabitz, Hilf & Nettesheim, 2025, Art. 18 TFEU para 40²; cf. ECJ, judgement of 1989, May 30, Ref. 305/87³). Here, however, unsystematic does not also mean unlawful: unequal treatment can also be justified within the framework of fundamental freedoms, provided there is a written or unwritten justification for the unequal treatment and the unequal treatment is also proportionate.

Such justifications would include, in particular, public safety, public order and public health, as well as the written grounds of justification specific to fundamental freedoms and, subsidiarily, the unwritten grounds of justification based on the so-called Cassis case law of the ECJ (ECJ, judgement of 1979, February 20, Ref. 120/78, Cassis de Dijon). Purely national situations, on the other hand, i.e. those in which this cross-border element is missing, are to be assessed as so-called discrimination against nationals exclusively according to national (constitutional) law, i.e. in the case

2 *“Unlawful restrictions can therefore also be considered in the taxation of frontier workers (...).”*

3 In this decision, the ECJ classified a Greek regulation, according to which the acquisition of rights to real estate located in Greek border areas by foreign natural or legal persons was restricted, as being in breach of the prohibition of fundamental freedom and discrimination.

of unequal treatment according to the fundamental equality rights of the German Basic Law (in particular Art. 3 para. 1 GG)

Furthermore, cross-border derogations must be examined with regard to the coherence requirement derived from Art. 20 CFREU (Pache in Ehlers, 2014, Art. 11 para 135 et. seq.). The Charter of Fundamental Rights is an integral part of EU primary law via the provision of Art. 6 (1) TEU, and the Member States are bound by it in accordance with Art. 51 CFREU. Accordingly, the objective of a measure that interferes with a fundamental freedom must be achieved by the Member States in a coherent and systematic manner, i.e. domestic and cross-border situations must be treated equally (Thym, 2016, p. 40; VG Koblenz, Ref. 3 K 545/20.KO; Frey & Müller, 2024, p. 501). However, if a state adopts regulations that pursue an objective in a non-coherent manner, it can no longer invoke this objective to justify the restrictions (ECJ, ECR 2007, I-1891, para. 57, Plaganica; Pache in Ehlers, 2014, Art. 11 para. 143; Frey & Müller, 2024, p. 501). Consequently, it must be examined to what extent territorial criteria are coherent in their nature to achieve the objective of cross-border derogations.

National constitutional law framework

At the level of national constitutional law, the standard of review, in addition to the requirement of certainty, is above all the allocation of competences standardized by the Basic Law in Art. 70 et seq. GG as well as issues standardized by fundamental

rights, in particular with regard to the general fundamental right to equality (Art. 3 para. 1 GG).

Constitutional requirement of certainty and competence regulations

Derogation clauses, whether territorial or non-territorial, must continue to meet the constitutional requirements of certainty derived from the principle of the rule of law in Article 20(3) of the Basic Law.

Corresponding derogation clauses would still have to comply with the legislative competence regulations laid down, e.g. in Art. 70 et seq. of the Basic Law. Furthermore, the provisions of Art. 83 seq. Basic Law with regard to administrative powers are also relevant.

These constitutional provisions can also not be overridden by derogation clauses under ordinary law or international treaty law, because the order of competences laid down by the higher-ranking constitution (in this case the Basic Law) may not be reshaped by ordinary legislation or international treaties. In this context, reference should be made to the so-called Lindau Agreement, which - admittedly without legally binding effect - defined a 'modus vivendi' supported by constitutional practice for the constitutional question of the federal government's competence to conclude foreign policy treaties affecting the competences of the federal states (Nettesheim in Dürig, Herzog & Scholz, Grundgesetz-Kommentar, 2024, Art. 32 para 72 et. seq.). However, legislation can also take place beyond formal laws, for example by means of ordinances issued by the executive. However, this also requires the power to issue ordinances.

Fundamental rights standard, in particular the fundamental right to equality (Art. 3 para. 1 GG)

Furthermore, cross-border derogation clauses typically create unequal treatment between the cross-border cases covered and the purely national cases not covered due to the lack of a cross-border element. In practice, derogation regulations in purely national situations, i.e. those in which the cross-border element is missing, are therefore always to be assessed as so-called discrimination against nationals exclusively in accordance with national (constitutional) law, i.e. in accordance with the fundamental equality rights of the Basic Law (in particular Article 3 para 1 of the Basic Law), because they enable unequal treatment through the possibility of derogation. In order to justify this, the BVerfG's examination, which is now based on proportionality aspects, requires a factual reason whose weight is appropriate to the degree of unequal treatment (Kischel in Epping & Hillgruber, 2025, Art. 3 para. 37). In addition to the testing of new regulations, the objective of promoting cross-border cooperation in general and the intensity of the cross-border obstacle to be overcome could be used as objective reasons. The fact that the areas of protection of EU fundamental freedoms are affected can also be used as a factual reason. However, purely fiscal interests are not a suitable differentiation criterion.

By contrast, derogation clauses without a territorial reference merely create unequal treatment between cross-border situations covered irrespective of location and purely national situations. In the absence of a cross-border element with regard

to the disadvantaged purely national situation, it must also be assumed here that discrimination against nationals is not to be measured against EU law; the standard of review is therefore solely national constitutional law (Art. 3 para 1 GG).

Simple legal framework

The simple legal framework depends heavily on the specific legal subject matter standardized in each case, so that only exemplary deviation clauses can be outlined below.

Furthermore, according to the case law of the BVerfG (BVerfG, decision of 2015, December 15; Ref.: - 2 BvL 1/12 -, para. 1-26, BVerfGE 141, 1; Jarass, in Jaras & Pieroth, Grundgesetz-Kommentar, 2024, para. 7 (11)), international agreements, such as the double taxation agreements mentioned above or the Treaty of Aachen, must also be included in the examination of the framework of ordinary law.

Interim conclusion

This presentation illustrates the high requirements for the justification of unequal treatment through derogation regulations, which is reflected in the multi-level system in particular through its double examination density inform of the European fundamental freedoms as well as in national constitutional law in the fundamental rights and thus in the jurisdiction of the European Court of Justice or the Federal Constitutional Court. On this basis, the justification of unequal treatment developed on the basis of territorial criteria appears disproportionate,

particularly in the areas relevant to the internal market that are covered by the European fundamental freedoms.

Status futurus: Effects of (cross-border) derogation clauses without further regulations as a basis for cross-border cooperation without borders

As a first step, the effects of the use of the derogation clauses described above will now be outlined. The text focuses on the derogation clauses for cross-border situations with functional restrictions and without further restrictions as well as those derogation clauses that are not linked to any further restrictions, in particular for cross-border situations, i.e. the derogation clauses described above under II. points 3 - 5.

The effects of such regulations on EU law and the national legal framework will then be presented.

Finally, we will reflect on what effects this could have on institutional cross-border cooperation.

Direct effects of the derogation clauses themselves

The following effects can be considered for the deviation clauses mentioned above under II.3 - 5:

Functionally limited derogation clauses for cross-border situations initially include the power to derogate for the competent executive authorities in the cases covered by them. These are all cross-border situations to which the additional functional criteria

apply. It is therefore a specific solution tool for specific legal norms that cannot be analogized.

Further within their scope of application are derogation clauses for cross-border situations without further restrictions. In contrast to the first-mentioned variant, this derogation clause is applicable either to a specific legal provision of a specific law or to all legal provisions of a specific law. Their scope of application is therefore wider in both cases.

General derogation regulations can regulate the authority for derogations for the scope of application of a law. Unlike the other derogation clauses mentioned, they do not only apply to cross-border situations, but are also applicable in purely national situations. This means that cross-border situations can be treated in the same way as purely national situations, either because the application of the derogation clauses puts cross-border situations on an equal footing with domestic situations, or because both cross-border situations and national situations can benefit from the derogation clauses in the same way.

In this scenario, there would be a complete overlap in the scope of application of the derogation clauses, for example between Union law and national law. As a consequence, the previously uncovered case group of discrimination against nationals would then also be covered by the protection of Union law.

Such an extension would have a significant impact on EU fundamental freedoms, European citizenship and the national legal system.

Indirect effects of enlargement on EU fundamental freedoms, EU citizenship and the national legal system

Such a new concept with corresponding derogation regulations would have considerable repercussions and repercussions, for example on EU fundamental freedoms, European citizenship and the national legal system.

Impact on EU fundamental freedoms

As an effect on the fundamental freedoms, first of all, there would be a core area of the fundamental freedoms that would also apply if there was no direct cross-border element, which would mean a deviation from the previous dogmatics.

A waiver of the cross-border element, which incidentally is not explicitly mentioned in the wording of the fundamental freedoms, in a core area would otherwise not entail any changes in the area of personal or substantive protection.

This would ensure that the fundamental freedoms are completely covered by the relevant national fundamental rights.

The impact on the fundamental rights of the ECHR would also have to be examined subsequently.

The impact can be illustrated using the example of the ECJ ruling on 'German beer' (ECJ, judgment of. 12.7.1987, C-178/84, Case 178/84, ECR 1987, p. 1227 et seq.). According to current case law, the import of beer that does not comply with the German Reinheitsgebot (Purity Law) is permitted under the designation 'beer', while German breweries continue to brew only beer that complies with the

German Reinheitsgebot (Purity Law - so-called reverse discrimination), even if this is intended for export.

With a derogation regulation, these breweries could now also brew beer with other ingredients, at least for export, since the protection of the free movement of goods now extends to all national cases and thus also to them.

Effects on European citizenship

In the area of legal protection, this would also double the protection of this group of cases to the effect that legal protection by the ECJ would also be possible in these domestic cases.

In the context of EU citizenship, the development of ECJ case law on EU citizenship, in particular in the Ruiz-Zambrano ruling (ECJ, judgment of. 8.3.2011, C-34/09, Ruiz Zambrano, ECR 2011, I-1177, para. 44), could point in this direction and be put to good use. In this decision, the ECJ developed a core area of EU citizenship that is independent of a cross-border element (Frey & Müller, in appearance).

Effects of the extension on national law

As the above example suggests, such an extension would also have a considerable impact on the national legal system. In the area of application of the derogation clauses, there would be extensive scope for legal flexibilization. If corresponding derogation clauses were systematically introduced, considerable legal adjustments could be expected, which could be examined, evaluated and

implemented using the various instruments of cross border friendly legislation outlined below under IV.

(Indirect) effects of the extension on institutional cross-border cooperation

A corresponding introduction of derogation clauses would consequently also have (indirect) effects on institutional cross-border cooperation. In particular, the derogation clauses for cross-border situations with functional criteria, for cross-border situations without further criteria or, in general, derogation rules without reference to cross-border situations would have the consequence that their scope of application would cover the entire EU in the case of EU standards and the entire territory of a Member State in the case of national standards.

Applied to institutional cross-border cooperation, this would mean that cross-border cooperation would now also take place anywhere in the EU or anywhere in the territory of the Member States concerned. In this respect, the legal situation would correlate with the increased mobility and ubiquity caused by improved transport systems and digitalization.

Cross-border cooperation would also be ubiquitous without reference to the normative characteristic of the border and would not only occur in geographically or functionally defined border areas. .

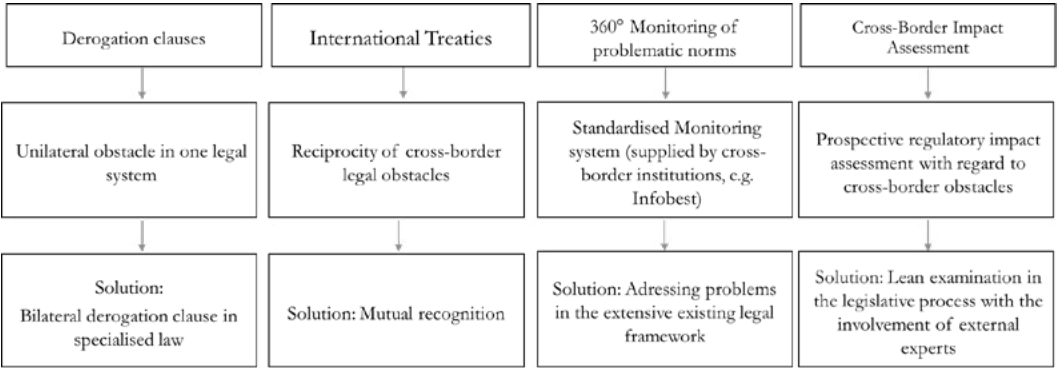
In quantitative terms, however, an accumulation of cross-border issues can be expected in the border regions. In the course of the necessary adaptation of the administrative framework conditions, this also means that administrative responsibility should ideally be decentralized in the respective border regions (e.g. in the sense of so-called local responsibility). This could also be useful in the course of implementing the Bridge4EU Regulation.

Overview: Tools for cross-border friendly legislation

However, such derogation clauses are not the only tools that can be used to overcome cross-border obstacles by dissolving the cross-border element. In fact, the toolbox of cross-border friendly legislation includes numerous other instruments, which will be outlined below (Frey & Müller, 2023).

The following graphic shows the tools:

Figure 2: Tools for cross-border friendly legislation



In addition, there are the initiatives set out in the coalition agreement between the CDU/CSU and SPD, the so-called Real-World Laboratory Act and the (general) Experimentation Act.

Conclusion

There are several instruments that can potentially contribute to the creation of a European area without internal borders, including, for example, international treaties, consistent and standardized monitoring of standards that cause problems in their cross-border application and a cross-border impact assessment, in addition to the derogation clauses described in detail in this article.

The various forms of derogation clauses dealt with here, in particular those for cross-border situations with functional criteria, for cross-border situations without further criteria or general derogation clauses for domestic and cross-border situations alike, can be a useful instrument for overcoming cross-border obstacles and making the legal systems of the Member States legally compatible with each other.

In particular, all of these instruments must comply with the aforementioned framework provisions of EU law and national (constitutional) law.

Such derogation clauses would have a significant impact on EU fundamental freedoms, European citizenship and national law and, with regard to institutional cross-border cooperation, would lead to it becoming ubiquitous in the future.

References

- Beck, W. (2004). Die kommunalrechtliche Experimentierklausel als Reforminstrument. *LKV*, 2004(11), 488–491.
- Bundesministerium für Verkehr, Bau und Stadtentwicklung. (2011). *Metropolitane Grenzregionen. Abschlussbericht des Modellvorhabens der Raumordnung (MORO) „Überregionale Partnerschaften in grenzüberschreitenden Verflechtungsräumen“*. https://www.bbsr.bund.de/BBSR/DE/veroeffentlichungen/ministerien/bmvbs/sonderveroeffentlichungen/2011/DL_MetropolitaneGrenzregionen.pdf?__blob=publicationFile&v=2
- Chilla, T. (2020). *Innerstaatliche Vernetzung von Grenzregionen*. Bundesministerium des Innern, für Bau und Heimat. https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/heimat-integration/innerstaatliche-vernetzung-grenzregionen.pdf?__blob=publicationFile&v=4
- Dietlein, J. & Pautsch, A. (2025). *BeckOK Kommunalrecht Baden-Württemberg*. C.H.BECK.
- Dürig, G., Herzog, R., & Scholz, R. (2024). *Grundgesetz-Kommentar*. C.H.BECK.
- Ehlers, D. (2014). *Europäische Grundrechte und Grundfreiheiten*. De Gruyter.
- Epping, V., & Hillgruber, C. (2025). *BeckOK Grundgesetz*. C.H.BECK.

- Frey, M., & Müller, R. A. (2023). Experimentation Clauses as an Element of Cross-Border Friendly-Legislation - The Franco-German Treaty of Aachen as a Model for Future Cross-Border Cooperation in Germany's Border Areas?. *German Yearbook of International Law*, 66, 379–396.
- Frey, M., & Müller, R. A. (in appearance). Cross border friendly legislation as a legal toolbox to implement EU-Citizenship and vice versa. In B. Wassenberg (Ed.), *Borders, Cross-Border Cooperation and European Integration*. Peter Lang.
- Frey, M., & Müller, R.A. (2024). Statik trifft Dynamik: Grenzüberschreitende Zusammenarbeit in der Corona-Krise. In J. Beck, J. Henkes, & P. Terry (Ed.), *Moderne Verwaltung und gesellschaftliche Entwicklung* (pp. 481–506). Nomos. <http://dx.doi.org/10.5771/9783748919537-481>
- German Bundestag. (2018). *Sachstand Experimentierklauseln in der grenzüberschreitenden kommunalen Zusammenarbeit*. Az. WD 3 - 3000 - 259/18. <https://www.bundestag.de/resource/blob/573014/a6bfa652bd1d6b81e8f431e7c358a753/WD-3-259-18-pdf.pdf>
- Grabitz, E., Hilf, M., & Nettesheim, M. (2025). *Das Recht der Europäischen Union*. C.H.BECK.
- Grzeszick, B. (1997). Öffnungsklauseln für die Kommunalverwaltung. *Die Verwaltung*, 4, 545–572.
- Jarass, H. D., Pieroth, B., & Kment, M. (2024). *Kommentar Grundgesetz für die Bundesrepublik Deutschland*. C.H.BECK.
- Niedobitek, M. (2001). *Das Recht der grenzüberschreitenden Verträge – Bund, Länder und Gemeinden als Träger*. Mohr Siebeck. <https://doi.org/10.1628/978-3-16-157965-3>
- Schweisfurth, T. (2006). *Völkerrecht*. Mohr Siebeck.
- Thym, D. (2016). Legal Framework for EU Entry and Border Control Policies. In K. Hailbronner, & D. Thym (Ed.), *EU Immigration and Asylum Law. Commentary* (pp. 31–51). Nomos.
- Wassenberg, B. (2015). Grenzüberschreitende Zusammenarbeit in Europa als Mittel der „kleinen“ deutschen Außenpolitik: das Beispiel des Oberrheins. *Revue d'Allemagne et des pays de langue allemande*, 47(1), 77–96. <http://dx.doi.org/10.4000/Allemagne.459>
- Weber, K. (2024). *Weber Rechtswörterbuch*. C.H.BECK.
- Wiedemann, G. (2020). *Handbuch des Kartellrechts*. C.H.BECK.
- Wolf, H. A., Brink, S., & v. Ungern-Sternberg, A. (2025). *BeckOK Datenschutzrecht*. C.H.BECK