Towards de-territorialised cross-border cooperation: Exceptional rules for cross-border situations without territorial differentiation criteria

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1 Abstract

Territorially formulated special regulations for border regions appear to be legally problematic and politically outdated in view of the advancing digitalisation, the increasingly internal market-oriented cross-border mobility[1] that transcends border regions, even beyond border regions with their inherent lack of local ties.[2]

This text presents the legal problems of territorially formulated special regulations for border regions and develops the conceptualised solution proposal of de-territorialised cross-border special regulations, i.e. those without territorial references. The consequence is that even in a purely national context, exemption, opening and experimental clauses could be useful regardless of biographical perimeters and thus apply without discrimination to the entire legal territory for nationals and foreigners.

This approach can also serve as a starting point for a more far-reaching concept of de-territorialised cross-border cooperation that transcends border regions.

2 Definitions, problem description and case studies

2.1 Definitions

Cross-border cooperation is understood as cooperation between neighbouring (territorially delimited) border regions across a national border.[3]

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[1] Cf. Chilla at al., Grenzraumatlas, working materials from the BMBF project Cohesion in Border Regions (CoBo), 2023, p. 52.

[2] In general, the term de-territorialisation is understood as the detachment of the law from its territorial anchoring, albeit in relation to the territorial exclusivity claim of the state as sovereignty holder derived from the principle of sovereignty. In the present case, the term is understood as the detachment of exceptions for cross-border issues from territorial requirements within the respective state territory. See Schmalenbach, Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts, in: M. Jestädt (ed.), Grenzüberschreitungen, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Vol. 76 (Berlin 2017), p. 245 ff (249).

[3] In detail: Niedobitek, Das Recht der grenzüberschreitenden Verträge, Tübingen 2001, p. 7 ff.

Border regions are defined as identifiable, definable regions located along one or more national borders (as distinct from the border region).[4] 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.[5]
The collective term "derogation regulations" covers all regulations that deviate from another regulation. This includes, for example, opening clauses by which a legislator allows another legislator to deviate from certain provisions of its legislation, i.e. to concretise, supplement or replace them with its own provisions.[6] Exemption clauses are regulations provided for by the legislator that allow the executive to make a factually different decision if certain predetermined conditions are met. Experimental clauses therefore differ from opening and exception clauses in that the authorisation to deviate is generally limited in time.[7] The real-world laboratories currently under political discussion represent a territorially defined and time-limited possibility of authorising deviations from statutory provisions in order to achieve a specific objective. In this respect, they are related to special economic zones.

2.2 Problem description

The subject of recurring discussions in cross-border cooperation is the call for special regulations that define mostly favourable derogation rules for certain border regions defined territorially, i.e. according to geographical or political criteria, with which the disadvantages arising from the heterogeneity of the national legal systems should be overcome or at least compensated for. Such regulations are - also recurrently - countered from the respective national perspective that they are constitutionally problematic, in particular with regard to the respective constitutional principles of

[4] BMVBS (ed.), Metropolitan Border Regions, Final Report of the Model Project of Spatial Planning (MORO) "Supraregional Partnerships in Cross-Border Interdependence Areas", p. 8 (fn. 1 with further references);
https://www.bbsr.bund.de/BBSR/DE/veroeffentlichungen/ministerien/bmvbs/sonderveroeffentlichungen/2011/DL_MetropolitaneGrenzregionen.pdf?__blob=publicationFile&v=2 (2 December 2023).
[5] Further information: Chilla, in BMI (ed.), Innerstaatliche Vernetzung von Grenzregionen; https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/heimat-integration/innerstaatliche-vernetzung-grenzregionen.pdf?__blob=publicationFile&v=4 (3.12.2023).
[6] Weber, in Weber Legal Dictionary, 22nd ed. 2022.
[7] Cf. Frey/Müller, Experimentation clauses in cross-border cooperation, https://www.auswaertiges-amt.de/blob/2593508/de9c4cdba39f490bc4e436d03117d46e/230419-studie-experimentierklauseln-data.pdf (12.12.2023).

equality, because they would establish unequal treatment within the country and thus a new border compared to purely national situations.[8]

However, such territorially limited derogation regulations also appear problematic from a cross-border perspective: firstly against the backdrop of increasing European integration, the associated, increasingly far-reaching cross-border mobility of people and the associated interdependence of the member states, even beyond the defined border areas, this time primarily from the legal perspective of the prohibition of discrimination under EU law, for example within the framework of the EU fundamental freedoms. This perspective is reinforced by the accelerated digitalisation and the associated mobility of (cross-border) life circumstances.

The 2021 coalition agreement between the SPD, Greens and FDP mentions the term "experimental clauses", albeit with the aim of "improving cooperation in border areas".[9] In fact, derogation regulations such as experimental or opening clauses, but also new approaches such as cross-border living labs, could be a solution to avoid legal disadvantages for cross-border life situations even beyond territorially defined border regions, but only if these are not formulated in territorial terms, but in terms of people or groups of people or life situations.

The fundamental question arises as to whether modern cross-border cooperation can still be territorially delimited internally and how such de-territorialised cross-border cooperation can be implemented.

2.3 Case studies

Before the problems described are analysed from a legal perspective, they will be illustrated using three examples.

A first (not entirely hypothetical) example should illustrate this: A Corona Regulation based on the German Infection Protection Act contains an exemption rule according to which persons who live abroad in a geographically defined border region (such as the mandate area of the Upper Rhine Conference) and work in Germany (possibly also in a geographically defined border region such as the mandate area of the Upper Rhine Conference) are exempt from presenting certain otherwise required certificates

[8] In addition to the principles of equality under constitutional law, the general principles of state structure and the constitutional legislative and administrative competence provisions must also be taken into account in this context.

[9] Chapter "European partners", p.108.

(such as proof of a current rapid test). This regulation would treat people who live or work outside the mandate area of the Upper Rhine Conference (e.g. because they commute by train from Stuttgart to Strasbourg or from Paris to Kehl) in a disadvantageously unequal manner.

Another example, this time not hypothetical: An employee who works in a border area of a contracting state (e.g. France) that is defined by municipality and who lives in the border area of the other contracting state (e.g. Germany) and usually returns there every day, does not pay tax on his earned income in the source state, but in his place of residence (e.g. Art. 13 para. 5 DTA France; in this case, the border area for persons resident 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; for persons resident on the German side, all municipalities lying wholly or partly within a 20 km strip on the other side of the border).

A third example, this time a current one: In July and August, people under the age of 28 who hold the Deutschland Ticket and are resident in Baden-Württemberg, Rhineland-Palatinate and Saarland were able to use regional trains in the Grand Est region free of charge by way of reciprocal recognition.[10] However, people under the age of 28 from Hesse or Bavaria could not.

3 Legal framework for cross-border derogation regulations

In the following, the legal problems of such regulations will be analysed.

Derogation regulations pursue the a priori legitimate purpose of overcoming or eliminating the disadvantages of cross-border situations - territorially organised within a border region defined by geographical, but typically by political criteria.

In principle, cross-border derogation clauses 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 under EU law is therefore, in particular, its provisions on discrimination and restriction under international law (1.), EU law, in particular the fundamental freedoms (2.), national

[10] https://vm.baden-wuerttemberg.de/de/service/presse/pressemitteilung/pid/freie-fahrt-fuer-junge-menschen (16/07/2024).

constitutional law (3.), in addition to the requirement of certainty, in particular the allocation of competences stipulated by the Basic Law in Art. 70 et seq. GG as well as aspects of fundamental rights such as, in particular, questions of equality (Art. 3 para. 1 GG). In addition, the respective legal framework conditions of the states concerned must be taken into account (4.).

The following presentation subsumes the characteristics of cross-border derogation regulations under this catalogue of tests and discusses the extent to which their territorial restriction can be justified in relation to de-territorialised regulations or may even be prohibited in the sense of a consistent interpretation of the law.

3.1 International legal framework

International law has a twofold reference to cross-border derogation rules: Firstly, such derogation rules 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 regulations; international law as the framework for national cross-border derogation regulations - the starting point for the analysis is the principle of territoriality under international law. According to this principle, national regulations apply territorially 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 state organisation.[11] 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.[12] Accordingly, an intervention contrary to international law would occur if foreign states or their subdivisions carry out sovereign acts on foreign territory on the basis of their national law. If a state acts extraterritorially, this therefore requires an authorisation

[11] Proelss, Völkerrecht, 9. Aufl. 2023, Rn. 122; Dupuy/Kerbrat, Droit international public, 16ème édition 2022, no. 33 - 35.

[12] Proelss, Völkerrecht, 9. Aufl. 2023, Rn. 122; Dupuy/Kerbrat, Droit international public, 16ème édition 2022, no. 33 - 35.

under international law, which therefore permits the foreign state to take (sovereign) action on its own territory.

Cross-border derogation regulations, 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 authorisation under international law.

3.2 EU legal framework

Territorial derogations are characterised by unequal treatment between the cross-border situation covered by them within the border zone and cross-border situations that take place at least partially outside this border zone. This unequal treatment should initially be measured against the EU's fundamental freedoms.

In the area of EU fundamental freedoms, 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 presuppose a cross-border element in 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[13] (Art. 26 et seq. TFEU), 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.[14] As a result, derogations that are only applicable in territorial-geographical border regions appear to be fundamentally unsystematic from an EU internal market perspective.[15] However, "contrary to the system" does not also mean unlawful: unequal treatment can also be justified within the framework of

[13] Cf. von Bogdandy, in Grabitz/Hilf/Nettesheim (eds.), Das Recht der Europäischen Union, Status: 80th ed. August 2023; Art. 18 TFEU, para. 1.

[14] Cf. ECJ, judgement of. 11.07.2002, Case C-60/00, Carpenter; ECJ, Judgement of 07.07.1992, Case C 370/90, Singh.

[15] Cf. von Bogdandy, in Grabitz/Hilf/Nettesheim (eds.), Das Recht der Europäischen Union, Status: 80th EL August 2023; Art. 18 TFEU, para. 40: "Unlawful restrictions can therefore also be considered in the taxation of frontier workers (...)." Cf. also ECJ, judgement of. 30.5.1989, ref. 305/87, in which 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.

fundamental freedoms, provided there is a written or unwritten justification for the unequal treatment and the unequal treatment is also proportionate.

These could include, in particular, public safety, public order and public health, as well as the written justifications specific to fundamental freedoms and, subsidiarily, the unwritten justifications based on the so-called Cassis case law of the ECJ[16] .

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

Furthermore, cross-border derogation provisions must be examined with regard to the coherence requirement derived from Art. 20 CFREU.[17] The Charter of Fundamental Rights is an integral part of EU primary law via the provision of Art. 6 para. 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.[18] 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.[19] Consequently, it must be examined to what extent territorial criteria are coherent in their nature to achieve the objective of cross-border derogation provisions.

3.3 National constitutional framework

3.3.1 Constitutional requirement of certainty and competence provisions

Derogation regulations, regardless of whether they are territorial or non-territorial, must continue to fulfil the constitutional requirements of certainty derived from the core

[16] ECJ, judgement of. 20 February 1979, Ref. 120/78, Cassis de Dijon.

[17] For the systematic location of the principle of coherence, see Pache, in Ehlers (ed.) Europäische Grundrechte und Grundfreiheiten, 4th ed. 2014, § 11 para. 135 et seq.

[18] Unproblematic as far as this is concerned: Thym, Expertise on the European legal requirements for internal border controls and restrictions on freedom of movement of 7 May 2020, p. 9; VG Koblenz, Ref. 3 K 545/20.KO. Quoted from HS Festschrift, fn. 35.

[19] ECJ, ECR 2007, I-1891, para. 57 (Plaganica); Pache, in Ehlers (ed.) Europäische Grundrechte und Grundfreiheiten, 4th ed. 2014, § 11 para. 143. Quoted from HS Festschrift, footnote 36.

principle of the rule of law in Art. 20 para. 3 GG. Corresponding derogation regulations must continue to fulfil the legislative powers laid down in Art. 70 et seq. GG. Furthermore, the provisions of Art. 83 f. GG with regard to administrative competences are also relevant. These constitutional provisions cannot be overridden by derogation provisions under ordinary law or international treaty law either, because the system of competences laid down by the higher-ranking constitution (in this case the Basic Law) may not be overridden 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 issue of the federal government's competence to conclude foreign policy treaties affecting the competences of the federal states.[20]

However, legislation can also take place beyond formal laws, for example by means of ordinances issued by the executive. However, this also requires authorisation to issue ordinances.

3.3.2 Fundamental rights, in particular Art. 3 para. 1 GG

Furthermore, cross-border derogation regulations 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 (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 considerations, requires[21] a factual reason whose weight is appropriate to the degree of unequal treatment.[22] In addition to the testing of new regulations, the promotion of

[20] Nettesheim, in Dürig/Herzog/Scholz, Grundgesetz-Kommentar, edition 99th EL, September 2022, Art. 32, para. 72 et seq.
[21] BVerfGE 55, 72, B. v. 07.10.1980; Az.: - 1 BvL 50, 89/79, 1 BvR 240/79.
[22] Cf. in detail: Kischel, in Epping/Hillgruber (eds.) BeckOK Grundgesetz, status: 53rd ed. 15 November 2022; Art. 3 para. 37.

cross-border cooperation in general as an objective, the intensity of the cross-border obstacle to be overcome could also be used as a factual reason. 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. [23]

By contrast, derogation provisions without a territorial reference merely create unequal treatment between cross-border situations that are 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 (e. g. Art. 3 (1) GG).

3.4 Simple legal framework

As the statutory framework is heavily dependent on the respective specialised legal environment, selected areas of specific territorially structured derogation regulations will be outlined below as examples. Among other things, the territorial criteria on which the regulations are based and their justification will be discussed.

According to the case law of the Federal Constitutional Court, agreements under international law[24] , such as the double taxation agreements already mentioned above or the Treaty of Aachen, also fall under the status of a simple legal framework.

1. 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 in the European fundamental freedoms and 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 based on territorial criteria, particularly in areas relevant to the internal market that are covered by the European fundamental freedoms, appears disproportionate.

[23] Cf.. BVerfG, B. v. 7.2.2012; Az.: - 1 BvL 14/07.

[24] BVerfG, order of 15 December 2015; Ref.: - 2 BvL 1/12 -, para. 1-26, BVerfGE 141, 1; Jarass, in Jarass/Pieroth, GG, 17th ed. 2022, para. 7 (11).

4 Enterritorialisation as a solution ?

Based on the legal criteria for exemptions described above, possible solutions are outlined below. In addition to completely de-territorialised exemptions, exemptions can also be considered as a milder means, whose scope of application is still territorial, but whose spatial areas of application are based on subject-specific functional criteria and in this respect translate the concept of functional areas developed in economic geography into the legal system.

According to the definition of derogations, their scope of application opens up in the event of a deviation from other regulations. This occurs regardless of whether this deviation is caused territorially, e.g. by the incompatibility of two legal systems or without territorial criteria.

Contrary to some territorially limited exceptions, the politically defined territorial areas often no longer correspond to the lived reality in the increasingly networked border areas. For example, studies on the survey of commuters to Germany show that their radius does not necessarily end in the politically defined "border area".[25] Against this background, so-called soft spaces[26] , which also include functional spaces, appear to be more appropriate. From an administrative perspective, a functional space is characterised as a "local, structured cross-border space"[27] in particular by "existing socio-economic relationships", "a cross-border development strategy [...] [and] cross-border [...] governance bodies"[28] . By defining the functional spatial delimitation of interdependent areas on the basis of indicators such as economic strength or commuter flows, a strong centre, which can be multipolar, is at the centre of the analysis.[29] Macro-regional strategies, such as the Danube Region, Baltic Sea and Alpine Space strategies, also pursue an equally functional approach.[30]

In accordance with the legal framework for cross-border derogations described above, unequal treatment can be justified by objective reasons, at least under national

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[25] Cf. Bertram/Hippe/Paul/Chilla: Grenraumatlas, working materials from the BMBF project Cohesion in Border Regions (CoBo), 2023: Commuters by country of origin (2021), p. 51.

[26] according to Haughton/Allmendinger 2007

[27] https://interreg-gr.eu/de/finanzierung/funktionale-raume/ (14 JANUARY 2024).

[28] https://interreg-gr.eu/de/finanzierung/funktionale-raume/ (14 JANUARY 2024).

[29] Schuler/Dessemontet: Raumkonzept Schweiz - Abgrenzung der Handlungsräume, Swiss Confederation, Federal Office for Spatial Development, February 2016, p. 8.

[30] Sielker: Soft borders as a new spatial concept in the EU? The example of macro-regional co-operation, p. 79 - 94, p. 87. In: Grotheer/Schwöbel/Stepper: Nimm's sportlich - Planung als Hindernislauf, 2013.

constitutional law. Territorially organised unequal treatment, for example in the context of territorial derogations, could be objectively justified if there is a definition of the territorial area that is specific to the subject area and in this respect oriented towards functional criteria. However, this functional orientation of territorial areas as a normative criterion is likely to be difficult to implement, at best if the legislator is allowed to recognise that there will always be individual cases that exceed the functional framework. On the other hand, the approach of functional areas appears to make perfect sense with corresponding (empirical) economic-geographical considerations.
Consequently, this solution - the replacement of politically defined areas with functionally defined areas - appears to be merely an interim solution that already carries its own imperfections with it, or to put it in legal terms: Such regulations are likely to be less suitable, in the sense of objectively suitable, for bringing about a comprehensive legal solution to cross-border life issues compared to those that dispense with territorial criteria entirely. This also results from the consideration that the functional areas would have to be defined in each case according to the specific purpose of the law and thus differently, which - also in comparison to completely de-territorialised regulations - would probably lead to a considerable territorial fragmentation of the legal systems.
Consequently, experimental or opening clauses in the respective sectoral laws that are not based on territorial differentiation criteria would be preferable for the design of a de-territorialised derogation regulation. In this context, the initiative to establish cross-border real laboratories should also be considered in a correspondingly de-territorialised manner.

5 Further development: de-territorialised cross-border cooperation

The introduction of exemptions for cross-border situations without territorial limits as an element of cross-border-friendly legislation in the specialised laws would mean that these would no longer only apply in geographically defined border regions, but throughout the entire territory. As a consequence, cross-border cooperation would also become an institutionally ubiquitous task.
This could (finally) harmonise the scope of application of EU law and that of cross-border cooperation.

At first glance, this would have the advantage that cross-border cooperation would no longer be marginalised territorially, but would become relevant throughout the entire territory of a Member State or its member states.
In terms of administrative organisation, this would mean that jurisdiction for cross-border matters would also exist everywhere. However, this does not appear to make much sense in view of the excessive complexity of such matters.
Administratively, one solution could therefore be to concentrate a kind of "local jurisdiction" for cross-border issues with certain neighbouring countries at one office. There are already examples of this in numerous areas, such as agricultural law[31] or monument protection law. This solution would also make sense for reasons of administrative efficiency.

6 Conclusion

Territorially formulated special provisions for cross-border life circumstances are, as the present text has shown, if not already unlawful, then at least contrary to the system and in need of justification against the background of EU law and national constitutional anti-discrimination and equality principles.

One solution would be corresponding special provisions without territorial limitations or those that are based on other differentiation criteria relating to groups of people. This would ultimately make the scope of application of such special provisions compatible with the internal market.

These special provisions are part of a more comprehensive concept of cross-border friendly legislation and could be systematically taken into account in the revision of legal standards, for example by means of a cross-border impact assessment.

Ultimately, this would also institutionally de-marginalise cross-border cooperation.

[31] E.g. § 12 of the Vor-Ort-Zuständigkeitsverordnung Landwirtschaft BW.