

TOWARDS A BORDERLESS EUROPE. LEGAL TOOLS ENABLING A CROSS BORDER COOPERATION WITHOUT GEOGRAPHICAL BORDERS

Prof. Dr. Michael Frey, Mag. rer. publ. and Rahel Alia Müller, B.A.
University of Applied Sciences Kehl (Germany)

LUPS-CESCI
Research Group on
Cross-Border Cooperation




NATIONAL RESEARCH, DEVELOPMENT
AND INNOVATION OFFICE
HUNGARY

PROJECT
FINANCED FROM
THE NRDI FUND

Agenda

- I. Our reflection: Which legal tools could help to create a borderless Europe?
 1. Derogation Clauses in general
 2. Status quo: Cross-Border Derogation Clauses
- II. The legal framework for Derogation clauses
 1. EU law
 2. National Constitutional Law
 3. Internal Law
- III. Status futurus: Deterritorialised Derogation Clauses
 1. Legal impact of deterritorialised derogation clauses
 2. Legal rebound on fundamental freedoms, EU-citizenship and national law
 3. Impact on institutional cross-border cooperation
- IV. And more to come: Other Legal Tools of Cross-Border-Friendly Legislation
- V. Summary

LUPS-CESCI
Research Group on
Cross-Border Cooperation




NATIONAL RESEARCH, DEVELOPMENT
AND INNOVATION OFFICE
HUNGARY

PROJECT
FINANCED FROM
THE NRDI FUND

I. Our reflection: Which legal tools could help to create a borderless Europe?

(1) Derogation Clauses in general

There are various tools of cross-border friendly legislation, today's focus is on derogation clauses:

Opening clause

(Granting of a derogation in favour of another legislator)

Exception clause

(Granting of a deviation authority in favour of the executive)

Opening clause

(Granting of a temporary power of derogation in favour of the executive)



They could be inserted on various levels:

International treaty law

Constitutional

Simple-Law

Sub-legislative



NATIONAL RESEARCH, DEVELOPMENT
AND INNOVATION OFFICE
HUNGARY

PROJECT
FINANCED FROM
THE NRDI FUND

I. Our reflection: Which legal tools could help to create a borderless Europe?

(2) Status quo: Cross-Border Derogation Clauses

Towards deterritorialised cross-border cooperation: Derogation clauses for cross-border situations without territorial / function differentiation criteria

No cross-border derogation clause

Cross-border derogation clause based on territorial restrictions

Cross-border derogation clause based on functional restrictions

Cross-border derogation clause without any further restrictions

General derogation clause without any restrictions

II. The legal framework for Derogation clauses

(1) EU law

- Constitutional Principles (e.g. of conferral, subsidiarity, legal certainty)
- Fundamental Freedoms
 - Cross-border element required to open the scope of application
 - Justification of unequal treatment based on public security, public order, public health
 - No protection of national discrimination
- EU-Citizenship
- Coherence Principle (Art. 20 Charter on Fundamental Rights of the EU)

II. The legal framework for Derogation clauses

(2) National Constitutional Law

- Compliance with Constitutional Principles
 - Constitutional order of competences (Art. 70 seq., Art. 83 GG)
 - Principle of certainty (Art. 20 para. 3 GG)
 - Consistent integration of derogation clauses into the regulatory structure of ordinary law (system justice imperative)
- Compatibility with fundamental rights, in particular the principle of equality (e. g. Art. 3 para. 1 GG), non-discriminatory design
- Obligation to act in accordance with international law, especially on the part of the executive - the national legislator may (potentially) override international or EU-law

II. The legal framework for Derogation clauses

(3) Internal Law

- The respective specialized law can also set specific framework conditions for the use of cross-border derogation clauses, in particular
 - specific requirements for their purpose, which must be
 - Coherence and consistence with the general purpose of the specialized law.

III. Status futurus: Deterritorialised Derogation clauses

(1) Legal impact of deterritorialised derogation clauses

- Cross border derogation clauses with only functional restrictions will allow to fix obstacles only in these specific cases.
- Cross border derogation clauses without any further restrictions will allow to fix cross-border obstacles in all cases covered by the specific law.
- General derogation clauses without any cross-border element do completely equalise cross-border situations and internal situations.

III. Status futurus: Deterritorialised Derogation clauses

(2) Legal rebound on fundamental freedoms, EU-citizenship and national law

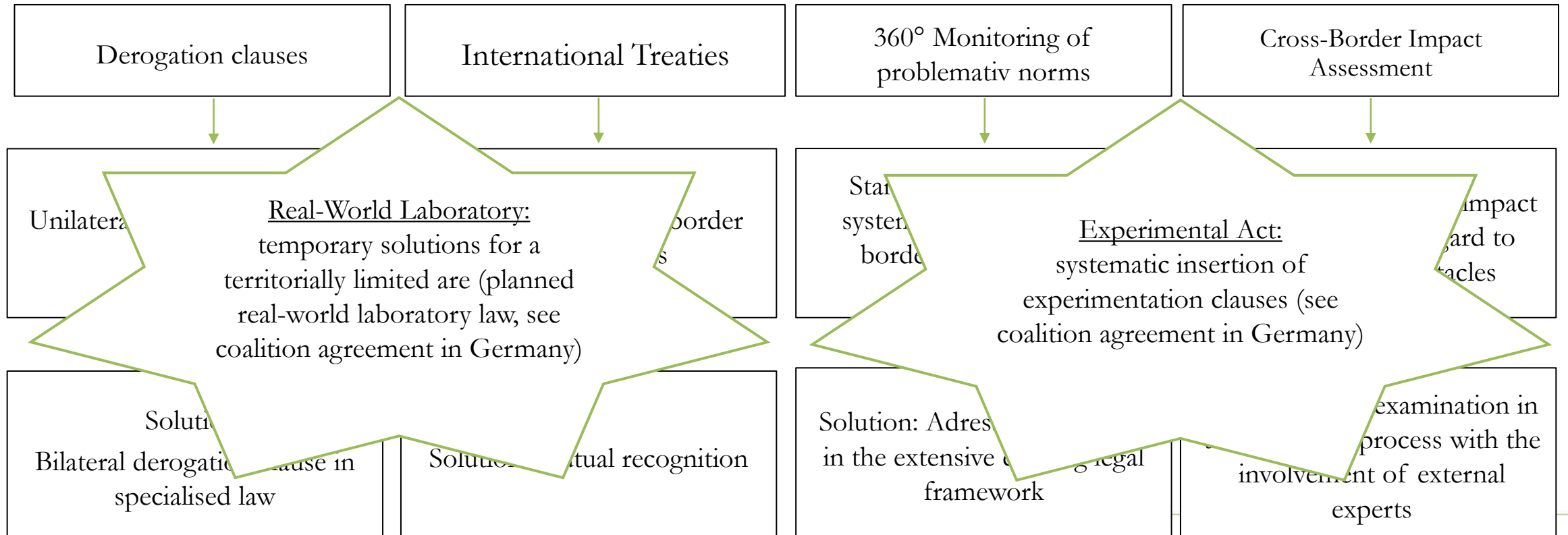
- Dissolution of the cross-border element (as in the case of General derogation clauses without any cross-border element) will deeply impact the doctrine of the fundamental freedoms
 - Fundamental freedoms will also be applicable on all internal cases (so called reverse discrimination cases)
 - Doubling the protection of all cases by precedental application of EU-law and national constitutional law
- EU-citizenship
 - further development of the Riuz-Zambrano ruling of the ECJ
- National law: complete supremacy

III. Status futurus: Deterritorialised Derogation clauses

(3) Impact on institutional cross-border cooperation

- With deterritorialized derogation clauses, cross-border cooperation is - in fact and then also in law - no longer just a matter for border regions, but ubiquitous.
- This tool can help to dissolve the effect of marginalizing border regions.
- A potentially quantitative accumulation in border regions can be regulated in a decentralized manner with the help of onsite responsibilities in border regions.

IV. And more to come: Other Legal Tools of Cross-Border-Friendly Legislation



PROJECT FINANCED FROM THE NRDI FUND

V. Summary

- There are several tools potentially serving to create a borderless Europe, such as international treaties, derogation clauses, an enhanced monitoring and a cross-border impact assessment.
- Derogation clauses in several forms could be a useful tool to make several legal systems legally compatible.
- They have to respect several provisions of the legal framework of EU- and national (constitutional) law.
- Derogation clauses without any (further) borderspecific restrictions would have a rebound on fundamental freedoms, EU-citizenship and national law.
- It may have also rebounds to the institutional cross-border cooperation itself.

THANK YOU!

We remain at your disposal for any questions and suggestions:

frey@hs-kehl.de / muellerr@hs-kehl.de

LUPS-CESCI
Research Group on
Cross-Border Cooperation



NATIONAL RESEARCH, DEVELOPMENT
AND INNOVATION OFFICE
HUNGARY

PROJECT
FINANCED FROM
THE NRDI FUND