8 Needs and approaches of legal flexibilisation in the cross-border context

The symbolic character, function and attention given to border regions have undergone significant change in recent decades. The advantages of European integration, but also the hurdles that still exist, can be experienced here in everyday life[500] – this resulting special role in the context of Europeanisation is also expressed by the designation of the border regions as "laboratory and motor for the development of the European continent".[501] Nevertheless, border regions are less developed than the rest of the respective nation states.[502] According to the European Commission, a reduction of only 20 % of the existing border-related restrictions could lead to an increase in GDP of 2 %.[503] A reduction of the existing legal and administrative barriers is therefore necessary to fully exploit the potentials of border regions.[504]

After the legal framework of cross-border cooperation has been rather static in recent years[505], there are now new approaches to reduce legal hurdles in the context of cross-border cooperation: the proposal for a regulation on a new cross-border mechanism[506] is essentially based on an initiative launched by the Grand Duchy of Luxembourg during its Council Presidency. The resolution on the 55th anniversary of the Elysée Treaty

500 AGEG 2008: 11.
501 Lambertz 2010: VIII.
502 European Commission 2017: 4.
503 European Commission 2017: 7.
504 Beck 2015; 2018.
505 The main legal framework conditions for cross-border cooperation result from the Madrid Framework Convention of the Council of Europe and its implementing agreements (in the Upper Rhine region this is the Karlsruhe Convention); in terms of EU law, the EGTC Regulation should also be mentioned. The Madrid Framework Convention entered into force in 1981, the Karlsruhe Convention in 1997 and the Third Additional Protocol to the Madrid Framework Convention in 2013. The EGTC Regulation adopted in 2006 was amended in 2013. There have thus been no significant changes to the legal framework since 2006.
506 Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism to overcome legal and administrative obstacles in a cross-border context, COM(2018) 373 final.

calls for a strengthening of cross-border cooperation, including the transfer of own competences to the "Eurodistricts" – if necessary by introducing the use of exception and experimentation clauses. According to the Aachen Treaty[507] it should be possible to provide for exception clauses for territorial authorities of border regions and cross-border units if obstacles in the context of cross-border cooperation cannot be overcome otherwise, Art. 13 para. 2 Aachen Treaty. Finally, another proposal is to apply the principle of "mutual recognition" originally developed by case law to cross-border administrative and legal situations.[508]

Against this background, this article examines whether there is a need to make the existing legal framework of cross-border cooperation more flexible, what the possibilities and limits of the practical areas of application are, and the question of further needs for concretisation. The Upper Rhine region and two projects implemented here serve as examples: the extension of the tramway from Strasbourg to Kehl and the water supply between the municipality of Bad Bergzabern and the French municipality of Wissembourg.

8.1 Flexibilisation needs in the context of cross-border governance

The Upper Rhine region is an originally common living space that has been subject to numerous border shifts and armed conflicts and shifts in borders.[509] As a result, the region today certainly has a common cultural heritage, but no common cultural identity.[510]

A characterisation of the cultural profiles of France and Germany, as carried out by Beck[511] on the basis of criteria known in the literature (based in particular on the work of Hofestede, Hall, Jann and others), shows that the two cultures are often at different ends of the scale of characteristic expression with regard to communication style, the role or perception of time, action orientation, differentiation, argumentation style, power distance and problem-solving strategies.[512] This has implications for cooperation.

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507 Treaty between the Federal Republic of Germany and the French Republic on Franco-German Cooperation and Integration.
508 Beck, 2015.
509 Wassenberg 2011: pp. 72.
510 Dussap-Köhler 2011: 131.
511 Beck, 2011b.
512 Beck, 2011b: pp. 153.

European administrative systems are closely linked to the cultural background and historical development of the respective country.[513] Even between Germany as a federal state and France as a centralised state, there are differences in the distribution of competences, hierarchies, responsibility holders, processes and foundations of public action.[514] This makes the search for the right contact or cooperation partner on the other side difficult or even impossible.[515] At the same time, this is a symptom of the administrative systems – both institutionally and procedurally – designed for national action as "visible differences".[516] Added to these is the respective administrative culture, which also shows clear differences with regard to various aspects, for example the structure and function of meetings.[517]

It can thus be stated that on the one hand, cross-border cooperation aims to overcome existing border-related restrictions that exist due to historical development and cultural factors. On the other hand, cross-border cooperation itself is under the influence of these factors.[518] The degree of impact, especially of administrative cultures, is determined by the object of cooperation, the type of task, the interaction relationships and the actors involved, as well as the degree of institutionalisation.[519]

In accordance with the multilevel governance approach,[520] which has become established to explain the European Union and its own distribution of sovereignty as a sui generis organisation, the concept of governance is also applied in cross-border cooperation.[521] While cross-border cooperation initially had a strongly territorial logic of action, i.e. an orientation towards the territories defined by national administrative units, this changed in the context of progressive European integration.[522] The development towards a functional logic of action of governance structures has been analysed in the literature with numerous models for the characterisation of (cross-border) governance, which often refer back to previous develop-

513 Beck, 2011b: 146.
514 Dussap-Köhler 2011: 130.
515 Dussap-Köhler 2011: 130; Wassenberg 2011: 79.
516 Dussap-Köhler 2011: 130; European Commission 2017: 9.
517 Beck 2011b: pp. 155.
518 Beck 2017b: pp. 351.
519 Beck, 2011b:163.
520 Marks 1993.
521 Beck/ Wassenberg 2011.
522 Blatter 2004.

ments.[523] With this development towards a functional logic of action, cross-border cooperation itself developed many levels ("multi-level") and a broad spectrum of actors ("multi-actor")[524] and thus shows its typology as part of the multi-level system itself.

Specifically for cross-border cooperation, Beck/Pradier propose a definition of governance with four dimensions: a territorial, a transnational, a European and a factual/strategic dimension.[525] The latter of these four dimensions refers to the tasks fulfilled within the cooperation, which in turn has an impact on the necessary actors as well as the degree of politicisation and institutionalisation of the respective governance structure.[526] Structures of cross-border cooperation can thus be differentiated according to the subject of cooperation (single issue, policy-related or integrated cross-sectorial) or their functional logic, which in turn is determined by the degree of institutionalisation.[527] This structure can also be considered from the point of view of the reference points of holistic governance[528] (see following figure).

A general trend observed in the literature is a change in the tasks of cross-border cooperation: on the one hand, a development towards the integrated perception of overall territorial development tasks (thematic dimension), on the other hand, a development towards decision-making and implementation functions, i.e. in functional terms, towards an implementation of cross-border cooperation at the action level.[529] At the implementation level, however, institutionalisation plays an important role. With regard to the EGTC, however, it must be noted that it is used to a rather limited extent and the intended institution building has not yet been really successful.[530]

From the perspective of the factual-strategic dimension of cross-border governance, the anchoring of cross-border territorial objectives in sectoral sectoral policies is necessary at the structuring level, which, according to Beck/Pradier, could be achieved through experimentation clauses at the level of legal regulations and cross-border perspectives in sectoral programmes.[531]

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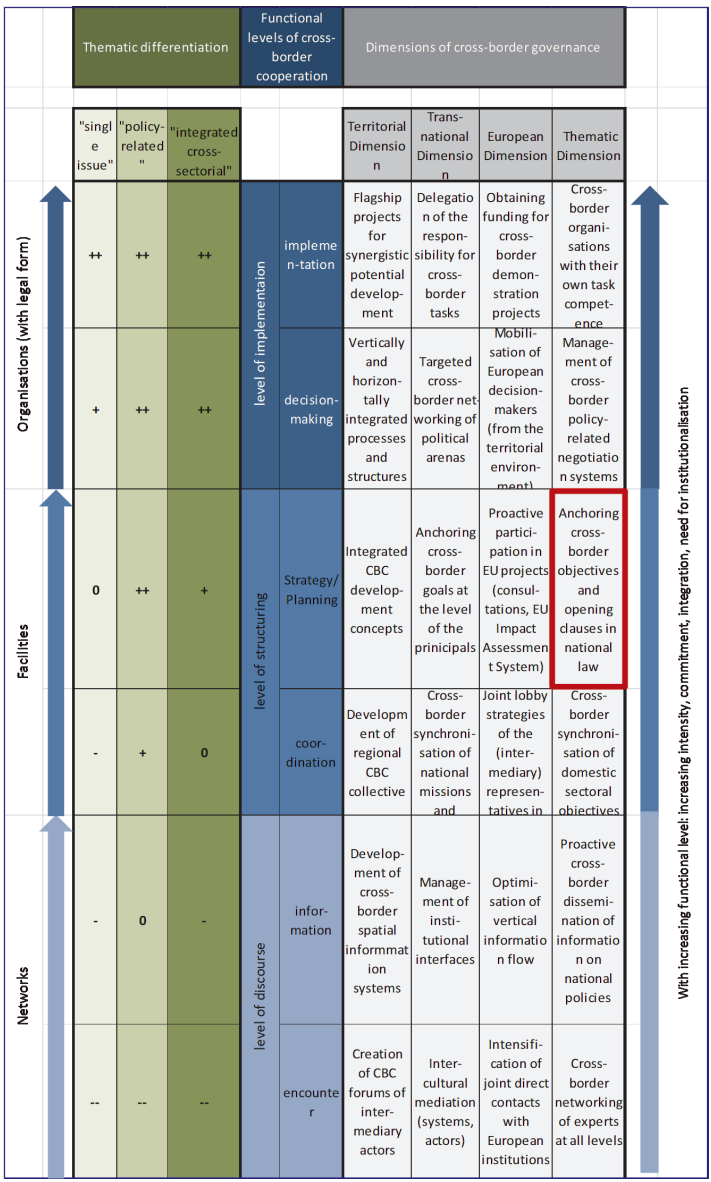
523 e.g. Hooghe/ Marks 2003; Blatter 2004; Beck/ Pradier 2011; Fricke 2015; Zumbusch/ Scherer 2019.
524 Zumbusch/Scherer 2019.
525 Beck/ Pradier 2011: pp.124.
526 Ibid.
527 Beck/ Pradier 2011; Beck 2017: pp. 348
528 Beck/Pradier 2011: pp. 129.
529 Beck 2017b: 361.
530 Beck 2017b: pp. 361.
531 Beck/ Pradier 2011: pp. 130.

Figure 20 Thematic and functional differentiation of cross-border cooperation in the context of the dimensions of cross-border governance[532]



Source: Beck/Weigel 2021: 290

The number and breadth of legal and administrative hurdles that the European Commission has compiled in the context of the "Cross-border review"[533] shows that the step across the border is still the exceptional case. There can therefore be no talk of anchoring cross-border dimensions in national specialised law. Most of the legal areas relevant for cross-border cooperation remain within the competence of the member states.[534] The sovereign area is excluded from cooperation in the current legal framework (Madrid Framework Convention, Karlsruhe Convention, EGTC Regulation).

Additionally, when looking at the tasks of existing EGTCs and other cross-border organisations of public actors, it is noticeable that they usually have an abstract mission ("promoting cross-border cooperation"). Examples where an EGTC manages cross-border infrastructure or provides services of general interest, such as the EGTC Hôpital de Cerdanya, are in the minority.

It therefore seems as if the current legal framework hinders an increasing integrated potential development in the border regions. Progressive institutionalisation and the increased use of synergy effects in broad thematic fields can only take place if the legal framework for joint task fulfilment exists. Legal flexibility in cross-border cooperation could therefore not only contribute to the reduction of existing obstacles, but also promote the further development of cross-border cooperation.

8.2 Instruments of legal flexibility

In order to adapt the legal framework to the special needs of border regions, various approaches are discussed. In general, making the legal framework more flexible should be understood here as the possibility of finding special legal solutions for border regions that are appropriate to their situation.[535] The use of experimental or exception clauses is conceivable, as is mutual recognition, the creation of exceptions analogous to

532 Presentation based on Beck/ Pradier 2011 and Beck 2017a.

533 The list of these obstacles is available online at http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/cross-border/review/#1, (30.03.2022)

534 Beck 2015: 16.

535 Weigel 2019: 33.

the de minimis rule in state aid law[536] and the introduction of a new mechanism through European law.

Experimental clauses are *"a legislative technique by which the legislator authorises the executive to exceptionally deviate from or dispense with applicable law in order to test a project to be carried out by the administration, which is to be finally standardised at a later date on the basis of the experience gained*"[537]. There are experimental clauses in both German and French law. However, the objective has so far been rather to modernise the administration,[538] for example in Germany at the turn of the millennium to test the new budget law.[539]

In France, the right to experiment is even enshrined in the constitution, Art. 37–1 and Art. 72–4 constitution française. The idea, which is becoming stronger in the course of decentralisation efforts, that the needs of territories and territorial authorities could differ depending on their location is very surprising, especially in view of the principle of "uniformité", which has a very high value as a central constitutional principle in France[540]. The two articles distinguish experiments with two different objectives: on the one hand, the transfer of new competences (Art. 37–1), on the other hand, it is a question of temporarily entrusting a territorial entity with normative power in the field of application of a given law or regulation.[541] In the second case, Art. LO-1113–1 to LO-1113–7 CGCT, which concretise the implementation, however, define so many requirements for the application of the experimental possibilities that hardly any use has been made of them to date.[542]

Since, according to their definition, experimental clauses serve to test a new regulation, they cannot be valid indefinitely. Especially with regard to the use of experimental clauses for cross-border cooperation, this can create uncertainty if it is unclear whether a regulation will be generalised after the trial phase.

The use of experimentation clauses proposed in the resolution on the occasion of the 55th anniversary of the Elysée Treaty finds no mention in the Aachen Treaty. The situation is different with the exception clauses: For the purpose of facilitating the daily lives of people living in border

536 Beck 2015; 2017b.
537 Maaß 2001 : 39.
538 Maaß 2001; Bouillant/ Duru 2018.
539 Maaß 2001 : pp. 4.
540 Bouillant/Duru 2018.
541 Bouillant/ Duru 2018.
542 Bouillant/ Duru 2018.

regions and removing obstacles hindering cross-border projects (Art. 13 para. 1), local authorities of border regions and cross-border units are to be provided with "dedicated funds and accelerated procedures"; if this is not possible with any other instrument, "derogations may also be provided" (Art. 13 para. 2). As a special authorisation, derogations are explicitly regulated in the law.[543] In German law, derogations have so far been found, for example, in building law (§ 56 para. 3 LBO).

The creation of exceptions analogous to the de minimis rule under state aid law would also be conceivable for cross-border situations.[544] In this regard, EU Regulations 1407/2013 and 1408/2013 regulate when aid that meets the criteria of Article 107 TFEU can be exempted from the obligation to notify the Commission under Article 108 TFEU. Here, the idea of thresholds could be transferred to ensure that exemptions remain so.

Another conceivable way of making the legal framework more flexible is to apply the principle of mutual recognition to cross-border cooperation.[545] The principle goes back to the so-called "Cassis de Dijon" decision of the EugH[546] and is a central principle for the realisation of the free movement of goods in the European internal market.[547] According to this principle, the consumption within the European internal market of goods which are not subject to harmonisation regulations and which have been lawfully produced and put on sale in another member state may not be prohibited even if the regulations applied to their production differ from the domestic regulations.[548]

Transferred to the context of cross-border cooperation, this could mean that the regulation of an administrative matter which corresponds to the provisions applicable in one Member State is recognised by the other Member States. Central to this would be the criterion of functional equivalence.[549] This approach provides very pragmatic solution perspectives; at the same time, it would not be necessary to generate exceptional circumstances on a large scale – which, apart from the question of constitutional admissibility, would not overcome borders, but only shift them.[550] Thresh-

543 Maaß 2001 : pp. 64.
544 Beck 2017b: pp. 22.
545 Beck 2015.
546 ECJ, Judgment v. 20.02.1979, 120/78, European Court Reports1979–00649.
547 Beck 2015 : 18; Craig/ de Bùrca 2011 : pp. 595.
548 paragraph 3 of the recitals of Regulation (EC) No 7264/2008.
549 Beck 2015: 21.
550 Beck 2015: pp. 19.

olds analogous to the de minimis regulations could in this case help to maintain proportionality and not apply the regulation to mass phenomena.[551]

For the introduction of a "mechanism to overcome legal and administrative obstacles in a cross-border context", a draft regulation on a mechanism to overcome legal and administrative obstacles in a cross-border context has been available since the end of May 2018.[552] Essentially, it is intended to make it possible to apply the legal provisions of a state involved in cooperation on the territory of the other state in the context of cross-border cooperation. For this purpose, the mechanism provides for the following procedure:

The initiator[553] identifies a legal obstacle in connection with the planning, development, staffing, financing or operation of a joint project[554]. After the legal obstacle has been identified, the initiator prepares an initiative proposal, Art. 8 No. 3 of the proposed Regulation; the requirements for this are contained in Art. 9 of the proposed Regulation. First, a preliminary analysis is carried out by the adopting Member State, Art. 10 of the proposed Regulation, on the basis of which the content of the draft commitment or declaration is elaborated, Art. 13f. VO proposal. The proposal is then sent to the transboundary coordinating body of the receiving Member State, Art. 15 of the proposed Regulation. The coordinating body examines the proposal in consultation with the competent authori-

551 Beck 2015: pp. 21.

552 COM (2018) 373 final.

553 This is the actor who identifies the legal obstacle and activates the cross-border mechanism by submitting a so-called initiative proposal, Art. 3(5) Draft Regulation. The initiator can be a public or private body responsible for initiating or initiating and implementing a joint project (lit. a), one or more local or regional authorities established in a cross-border region or exercising sovereign rights there (lit. b), a body established for cross-border cooperation, e.g. an EGTC (lit. c), an organisation serving to promote the interests and exchange the experience of cross-border territories and their actors (lit. d) or one or more of these bodies (lit. e), Art. 8 Par. 2 Draft Regulation.

554 Infrastructure measure with effects on a specific cross-border region (a cross-border region is an area that extends to neighbouring NUTS level 3 regions with internal borders of two or more landlocked states, Art. 3(1) Draft Regulation) or service of general economic interest provided in a specific cross-border region, Art. 3(2) Draft Regulation.
NUTS3 level refers to small areas comprising districts or counties of 150,000 to max. 800,000 inhabitants, Art. 3 para. 2 Regulation (EC) 1059/2003 of the European Parliament and of the Council of 26.5.2003, OJ L 154 of 21.6.2003, p.1.

ty of the transferring state, Art. 16f. Proposal of the Regulation. In the framework of the implementation of the commitment, the administrative acts necessary for the implementation of the joint project are adopted by the competent authorities applying the substantive law of the transferring state or administrative acts already adopted are amended, Art. 18 of the proposed Regulation. Formally, the procedure for issuing or amending an administrative act under national law must be observed. In the case of a declaration, the necessary administrative acts can only be adopted after the amendment of national law, Art. 19 of the proposed Regulation. Monitoring of the application of the obligation or declaration can be carried out either by the accepting or the transferring authority, Art. 20 of the proposed Regulation. In addition, the proposed Regulation contains provisions on legal protection against the application and monitoring of the commitments and declarations in Art. 21 and Art. 22.

According to Art. 4 para. 2 lit. c) TFEU, the area of economic, social and territorial cohesion falls within the scope of shared competences. Specific regulations on economic, social and territorial cohesion can be found in Art. 174 ff. TFEU. The legal basis of the proposed Regulation is Article 175 (3) TFEU, according to which "specific actions" may be taken outside the funds referred to in Article 175 (1) TFEU in order to achieve the objective of economic, social and territorial cohesion referred to in Article 174 TFEU.[555] According to the explanatory memorandum of the proposed regulation, the proposed mechanism is also in line with the principle of subsidiarity enshrined in Art. 5(3) of the Treaty on European Union (TEU)[556] as well as the principle of proportionality from Art. 5(4) TEU.[557] Here, the voluntary nature of the mechanism is emphasised in particular.[558]

8.3 Investigation of practical application perspectives

As outlined above, from the perspective of cross-border cooperation and increasing institutionalisation, making the legal framework of cross-border cooperation more flexible seems desirable. In the following, concrete examples of application will be used to show which needs for flexibility exist,

555 COM (2018) 373 final, p. 3.
556 Ibid.
557 COM (2018) 373 final, p. 4.
558 COM (2018) 373 final, p. 3.

i.e. how legal and administrative hurdles make themselves felt and to what extent the mechanisms presented can contribute to their solution.[559]

8.3.1 Extension of the Line D of the Strasbourg Metropolitan Area tramway to Kehl

Already at the turn of the millennium, it was discussed whether the Strasbourg tram could run to Kehl.[560] It was to take some time, but on 28 April 2017, the cross-border tram was finally inaugurated.[561] This not only has a great symbolic effect thanks to the newly built Rhine bridge, but also serves to alleviate daily traffic problems[562] and thus creates a concrete added value in the everyday life of the citizens.

The cooperation of the city of Kehl, the Eurométropole Strasbourg and the Strasbourg Transport Services (CTS) for the extension of the tram line and the operation of the tram can be qualified as a "single issue" cooperation in thematic terms. A joint institution was neither created for the construction of the infrastructure nor for the operation of the tram line. The implementation is closely coordinated and jointly supported; from a functional point of view, the cooperation is therefore to be assigned to the action level.

In the course of the project realisation, numerous hurdles of an administrative and legal nature arose. Although the project was realised, i.e. a solution was found for all hurdles, some of them are rather circumvention strategies.

The legal hurdles described had different causes. For example, in the case of divergent legal institutions regulating ownership of public infrastructure and the implementation of ticket controls, the reason can be found in the fact that French and German law make a different allocation to public and private law in these cases. The application of mutual recognition or experimental clauses cannot lead to a solution here, as these cannot provide solutions for collisions that subsequently arise with national law. It would be conceivable in the case of the regulation of property relations

559 for more details, see Weigel, 2019.
560 Kehl, 2017: 65.
561 Kehl, 2018a: 21.
562 On an average weekday, the Europabrücke, which crosses the Rhine, is traversed by 30,000 -40,000 cars https://www.wro.de/presse/detailansicht/news/ein-motor-der-stadtentwicklung/ (30.03.2022)

(in the concrete case the tram bridge over the Rhine) to subject the bridge as a whole to the legal order of a state (e.g. the "domain public") with the help of a cross-border declaration. Here, however, a declaration would be necessary, as the handling of the "imported" legal institution would have to be regulated in German law.

With regard to the tendering and awarding of the construction of the tram line and the operation of the tram line, the German public procurement regulations provide for different procedures, which in turn are the prerequisite for public allocations. This is therefore less about fundamental differences in legal nature than about the definition of standard procedures in implementation of the European directives on public procurement law. Not only does it make little sense to apply different tendering procedures to cross-border infrastructure, depending on the structure, it is also technically impossible to carry out two construction projects and combine them. This is a suitable area of application for the cross-border mechanism. In the case of cross-border tenders, it would also be conceivable to introduce an experimental or exception clause to enable the testing or application of the tendering procedure of the respective neighbouring country. Provided that a uniform European mechanism exists, however, this would be preferable.

A legal hurdle also existed in the transfer of construction management to CTS, which on the French side as the concessionaire of Eurométropole also makes all investments in the infrastructure of the tramway network. The agreement that exists here and is contractually presupposed, that CTS will also exercise the authority to build on the German side within the framework of the concession, is an example of a solution that is actually not a solution. The concession area is congruent with the Eurométropole area and thus ends at the border. The application of this regulation by means of a cross-border mechanism would not be suitable for extending the concession area to German soil. The same applies to mutual recognition. Here, there would have to be much more of a possibility on the French and German side to transfer the building authority to a cross-border institution; this could be achieved through exception clauses in French law.

Another area where instruments of legal flexibility could be used is the area of technical requirements. Here, for example, the existing obligation on the German side to equip tram trains with "indicators" should be mentioned. In fact, this problem was solved by retrofitting the tram trains. However, the cross-border mechanism or mutual recognition could make this step superfluous and help to reduce the duplication of procedures and standards in cross-border projects. However, mutual recognition would

need to be given a reliable legal framework for this, for example in the form of a European regulation.

Finally, the enforcement of claims arising from the cooperation agreement is a field in which the instruments of legal flexibility cannot contribute to a solution of the problem. Both the Karlsruhe Agreement and the Freiburg Agreement on Border Bridges in Municipal Burden of Construction provide for a decision on the applicable law and the competent court. In purely factual terms, however, there is no legal basis on the basis of which an administrative court is authorised in a matter of public law to pronounce justice over a foreign territorial authority and to enforce such a judgement.

8.3.2 Extension of the cross-border water supply of the municipality of Bad Bergzabern and the municipality of Wissembourg

The municipality of Wissembourg in Alsace and the Rhineland-Palatinate municipality of Bad Bergzabern already have existing cooperation in the field of wastewater disposal through a cross-border sewage treatment plant and in the field of drinking water supply. For ecological reasons, the decision was made as early as the 1970s to jointly manage a groundwater reservoir from a borehole located on German soil. However, in its current form, only the supply of water to Wissembourg is possible; conversely, Wissembourg cannot supply water to Bad Bergzabern due to topographical differences. The aim of the project under investigation is to enable the delivery of water to Bad Bergzabern through several construction measures. The cooperation covers the subject area of water, so it is thematically a policy-related cooperation. At the action level, there is a high need for institutionalisation here; a cross-border institution exists in the form of the Wissembourg – Bad Bergzabern LGCC.

One conceivable administrative hurdle in this context could be different requirements for drinking water quality. In purely factual terms, however, the drinking water quality is above the European as well as the German and French regulations. Compliance with the values is checked by taking samples before the water is "mixed" and can thus be proven. In this specific case, therefore, no legal flexibility is required.

The situation is different with regard to the distribution of competences: in implementation of the loi NOTRe, the city of Wissembourg will lose responsibility for drinking water supply on 1 January 2020, and this will be transferred to its French association of municipalities. With regard to

project implementation, this creates uncertainty among the German partners, who are reluctant to end the project with another partner. Since the cause here lies in a national competence regulation, an exception clause as a regulation under national law could provide a remedy, for example by enabling regional authorities in border regions in the respective sectoral law to implement tasks with the corresponding counterpart on the other side instead of with the French association of municipalities (in this concrete case, therefore, the fulfilment of the water supply together with the Bad Bergzabern association municipality).

8.4 Assessment of the different instruments

The cross-border mechanism[563]

For the cross-border mechanism, the area of technical requirements in particular seems to come into question as a field of application. Here, with a view to different types of the mechanism, there is also the advantage that the provisions are often regulated in regulations and would therefore enable the direct application of the mechanism in the form of the cross-border obligation.

Some details, however, seem to be in need of improvement or concretisation. First of all, the mechanism described by the regulation suggests a long duration of the procedure, which could certainly have a negative impact on projects. It is also not yet clear how narrowly or broadly the term "legal obstacle" is defined. Applying the mechanism to several obstacles within a project or to a service of general economic interest would considerably increase the administrative burden. If the mechanism were applied to the entirety of the project or service, it would appear to be too inflexible – it seems quite conceivable that within a project, for one obstacle the regulation of one jurisdiction, for another obstacle the regulation of the other jurisdiction would make more sense. In the Upper Rhine region, the fact that Art. 2 para. 1, Art. 3 no. 1 of the draft regulation restricts the scope of application to member states, according to Art. 4 para. 3 member states should also be able to "use" the mechanism in

563 Cf. legislative resolution of the European Parliament of 14 February 2019 on the Proposal for a Regulation of the European Parliament and of the Council on a Mechanism to overcome legal and administrative barriers in a cross-border context (COM(2018)0373 – C8–0228/2018 – 2018/0198(COD)).

cross-border regions with third countries, is also a problem. However, the Parliament has already introduced this point in its first reading position and proposes that the Member States can also "use" the mechanism here voluntarily.[564] Finally, according to the draft, the period of application of the mechanism should be limited. Particularly in the case of the creation of common infrastructure, however, there must be certainty that the legal construction will also exist in the future.

The mechanism also raises critical questions with regard to questions of the territoriality of law and, associated with this, sovereignty, since it enables the application of law on the territory of another state. However, the EU in its capacity as a supranational organisation, which has been transferred sovereign rights of the member states to a considerable extent, already challenges the classical nation-state concept.[565] This also applies to cross-border interdependencies, which challenge the classical concept of territoriality.[566] Dealing with territorial frictions in border areas is therefore a challenge that runs through all areas of the European multi-level system.[567] However, the fact that increasing European integration abolishes classical concepts of territoriality and sovereignty is deceptive[568] – much more, a greater complexity is emerging,[569] with overlapping European spatial images and nation-state territories.[570] However, the emergence of "post-sovereignty" as a "notion of shared, overlapping and thus no longer classically autonomous sovereignty"[571] goes back to the voluntary transfer of sovereign rights by the member states to the European Union. This transfer of competences corresponds to the withdrawal of a state claim to exclusivity,[572] the EU legislatively fills the gap that has become free in the area of transferred competences, as in the case of the new mechanism.

564 http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2019/02-14/0118/P8_TA-PROV(2019)0118_EN.pdf. (30.03.2022)
565 Jureit/ Tietze 2015: 8.
566 Chilla 2015: 193.
567 Chilla 2015: 191.
568 Chilla 2015: p. 8; Jureit/ Tietze 2015: 23.
569 Chilla 2015: 209.
570 Tietze 2015: 78.
571 Jureit/Tietze 2015: pp. 7.
572 Niedobitek 2001: 426.

Experimentation and exception clauses

The creation of "independent competences for the Eurodistricts", as proposed in the resolution on the 55th anniversary, is to be rejected, as it would not overcome border-related restrictions but only shift them further inland. It is also problematic, especially with regard to infrastructure projects and a further institutionalisation of cross-border cooperation, that experimental clauses are limited in time. Before the end of the trial phase, it is not clear whether the regulation will subsequently be generalised.

Exception clauses therefore seem to make more sense[573]. Particularly in the area of competence regulations, these could allow for a deviation in favour of cross-border instead of national task fulfilment[574]. However, the implementation of both experimental and exception clauses requires a very high degree of consensual political will, which could considerably limit their practical usefulness.

Both experimentation and exception clauses raise questions about their compatibility with the principle of equality in Article 3(1) of the Basic Law. However, not every unequal treatment under the law is prohibited. Rather, there must first be a constitutionally relevant unequal treatment, i.e. unequal treatment of essentially the same thing.[575] In a next step, it must then be asked whether there is a constitutional justification for the inequality, i.e. whether it serves a legitimate purpose and is suitable, necessary and appropriate to achieve it.[576] The introduction of internal administrative experimentation clauses will generally affect public authorities at the legislative level and thus not fundamental rights holders.[577] Incidentally, the balancing of hurdles created by the border location seems quite suitable to justify a constitutionally relevant unequal treatment – although a detailed examination in the individual case is of course indispensable.

573 Beck 2015 a/b
574 Cf. chapter 4, Aachen Treaty of 22 January 2019.
575 BVerfG 1, 14(52); Papier/ Krönke, 2012: 98.
576 Papier/ Krönke 2012: pp. 97.
577 See Weigel 2019: pp. 37.

The principle of mutual recognition

The principle of "mutual recognition" could enable a very pragmatic reduction of administrative hurdles[578]. The "mutual recognition of educational qualifications from the school, vocational and academic sectors" called for in the resolution on the occasion of the 55th anniversary[579] could also be achieved through such an approach. The area of technical requirements in administrative procedures would also be a possible area of application for mutual recognition.

Analogous to Regulation (EC) No. 764/2008 for the movement of goods, however, the application in the area of administrative procedures would also have to be secured by a Union legal framework. Particularly in the area of technical requirements or procedures that serve to prevent health risks, this would provide the necessary legal certainty.

Cross-border projects encounter obstacles in their planning and implementation, not only of a legal nature, but also of a legal nature. The origin of these hurdles often lies in national law; the local and regional authorities involved in cross-border cooperation cannot compensate for integration steps that have not been taken here.

Greater legal flexibility could be made possible by applying uniform procedures to the cross-border provision of services of general economic interest or cross-border infrastructure projects. This in turn could provide positive incentives to transfer the uniform project implementation to a cross-border body and thus contribute to further institutionalisation in cross-border cooperation. Legal flexibilisation could thus provide an important impetus for the development of cross-border cooperation in the sense of integrated cross-border potential development.

However, the reactions to the cross-border mechanism already show major concerns on the part of the member states, for example with regard to the voluntary nature of the mechanism and its compatibility with national constitutional law.[580] In the case of the Aachen Treaty, too, it remains to be seen whether it will stay a mere affirmation of will or whether local authorities in border regions and cross-border bodies will actually be equipped with procedures, including exception clauses, to reduce legal and administrative hurdles.

578 Beck 2015a/b
579 German Bundestag / Assemblée nationale 2018: 6.
580 http://data.consilium.europa.eu/doc/document/ST-15428-2018-REV-1/EN/pdf, p.5.

Cross-border cooperation has established itself as an independent policy field at the European level at the latest since the fall of the Iron Curtain. While important groundwork was already done in the 1980s by the Council of Europe, the policy field of cross-border cooperation has also gained strategic importance in the context of the treaty goal of "territorial cohesion", not least due to the Interreg programme and, most recently, the European Commission's attempts to establish its own legal forms and to minimise the still existing legal and administrative hurdles through appropriate action programmes. The realisation and practical design of cross-border cooperation nevertheless still depends to a considerable extent on the interaction of different political-administrative systems as well as acting actors on the ground. In the everyday life of cross-border cooperation, corporate and individual actors are dependent on systemic support services from the participating member states. In this context, the Aachen Treaty is of central importance. The contributions of a recent anthology on this very issue underline both the fragility and the great potential of cross-border cooperation, especially in the Franco-German context[581]. The contributions also make clear that the border closures that took place during the first phase of the Covid19 pandemic have left their mark, not least in the academic debate on this research topic.

Cross-border cooperation – not only in Franco-German relations – is at a crossroads today. Can a new and truly sustainable dynamic develop out of the pandemic experience that has enough strength to consistently use the potential inherent in the Treaty of Aachen and the approach of the cross-border mechanism? Or will also the post-pandemic phase be characterised by the fact that cross-border cooperation continues to suffer from the much-cited implementation deficit[582], because the compatibility of different legal and administrative systems as well as the challenge of bringing different political and administrative cultures to a productive horizontal interplay is extremely preconditional and ultimately depends on the will of individual courageous actors[583]? To date, cross-border cooperation is exclusively a subsystem that is constituted out of the main political and administrative systems of the participating member states and is inconceivable without active support contributions from this side.

581 Beck 2021
582 Harguindéguy/Sànchez-Sánchez 2017; Blatter 2004; Hooper/Kramsch 2007
583 Eisenberg 2007; Casteigts 2010; Botteghi 2014

The contributions of the anthology on the Aachen-Treaty[584] provide a rich source of ideas and application material for the foundation of a sustainable development perspective of cross-border cooperation after the pandemic. For the implementation of the innovation and flexibility potentials laid out in the Treaty of Aachen, these contributions contain a practice-oriented action programme that should be actively taken up by the cross-border committee and the cross-border parliamentary council in particular. Cross-border territories are laboratories of European integration[585] – the Aachen Treaty, if it is used and properly developed by the actors involved, can in this sense be an important catalyst for a new quality of horizontal integration in Europe.

584 Beck 2021
585 Lambertz 2010