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General Problems of Transposing EC-Directives into Member States Law

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Introduction

EC-directives constitute an important instrument for harmonizing law within the European Union.

Art. 249 sec. 3 EC reads:

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

The binding force at one hand and the choice of form and methods result in discrepancies in the range of applications and create obstacles to the functioning of the Single Market.

I. Legal Concept for transposing EC-Directives

The legal concept for transposing EC-directives is based on five principles:

- Existence of a directive harmonizing a certain field of law
- Binding quality of the wording of a directive into national law of an EU-Member State
- Application of transposed directives in accordance with the rulings of the European Court of Justice
- Sanctions resulting from an inadequate transposition of a directive.

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1. Existence of a directive harmonizing a certain field of law

A precondition for taking harmonization measures by directives is the existence of a provision in the EC-treaty giving competence. Legislative power of EU-institutions exists only, if a transborder activity is at stake, if the efficiency principle (effet utile) demands for regulation on EU-level and if the principle of subsidiarity (Art. 5 EC) does not apply. The subject matters for regulations are sometimes not mentioned expressively but mandated by policies or purposes laid down in the EC-treaty.

Thousands of EC-directives are regulating narrow sectors of social and economic problems. For example, the more than 25 directives in the field of information and communication technology (ICT), which is by definition not bound to any territorial power and therefore represents a transborder activity, provide a legal framework for economic actions, within the (electronic) Single Market; they constitute a subsystem of the Information Society, wherein information and knowledge are valued for being sources for progress and wealth.

Harmonizations by directives occur *ex post* or *ex ante*. Ex ante – harmonizations seem to comprise a contradiction because harmonizations take for granted that national laws exists which conflict with the Single Market. An example for an *ex ante* – directive represents the Directive on Electronic Signatures.[1]

This directive came into existence despite only Italy and the Federal Republic of Germany had already introduced respective provisions on national level before. In order to prevent divergent national regulations in future in a highly sensitive field the Directive on Electronic Signatures was enacted. This directive “harmonized” two national statutes and created some sort of “unified law” for additional thirteen (now twenty-five) EU-Member States. The legal impact on the national legal systems differs considerably.

Today, we face a manifold of problems concerning the coming into existence if a directive, its purpose, its range of application or its interpretation. Binding parts of a directive are often hard to identify. Many directives contain political compromises and therefore provide too many options for regulations on state level which result in a fictitious EU-harmonization level. Even recitals of a directive, which become part of the official text and are often taken into account by the European Court of Justice, contain semantic overlaps or contradictions.

Convincing solutions for solving those problems are not to be seen. Under discussion is a more precise division of jurisdiction between EU-Member States origin and regulations on EU-

[1] 1999/93/EC of 1999/12/13, OJ L 13 2000/01/19, p.12.

level. Other measures may contain the reduction of the number of options for the transposition process or an explicit classification of a directive as a minimum standard regulation, a framework regulation or a full scale regulation.

2. Binding Quality of the wording of a Directive as published in the Official Journal

The text of a directive is published in twenty languages. These are the main languages spoken within the 25 Member States (except Gaelish). All twenty languages are official languages and all twenty language versions of the text are equally authoritative according to the basic contracts (Art. 53 EU; 314 EC; Accession Agreements). Therefore, the national wording of a directive owns binding force.

But what does that mean in practice? It is impossible to create total congruity with the semantics of twenty national languages and, moreover, with the respective specific *legal languages*.[2] The legal languages are anchored in legal traditions and institutions which differ from Member State to Member State. The German term "Treu und Glauben" did not exist as a legal term in English; it was translated to the new English term "good faith", but the range of application may differ substantially. The English term "universal service" did not exist in the German legal language but was introduced as "Universaldienstleistung". Different meanings result in different applications. The problem is how to avoid a negative impact on harmonization measures.

One solution could be to improve the translation services on European level. The number of translators is permanently "exploding" in order to satisfy the current demands and to work backwards for the translation of the "aquis communautaire" for the new accession states. Some EC-directives (e.g. the Data Protection Directive 95/46/EC) took several months to get it translated and issued.

There is a new tendency to create acceptance for new autonomous *European terminology* for use on Member State level (so called "Eurospeak") and to prevent the use of specific national legal terms.

The "Joint Practical Guide" of the European Parliament, the Council and the Commission for Persons involved in the drafting of legislation within the Community institutions reads:

[2] Isabel Schübel-Pfister, Sprache und Gemeinschaftsrecht, Berlin 2004; Mario Wandruszka, Interlinguistik, Munich 1971; Bernhard Großfeld, Language Writing and the Law, 5 European Review 383 (1997); W. Christian Lohse, Sprache und Recht in der EU, in: Lohse (Hrsg.), Die deutsche Sprache in der Europäischen Union, Baden-Baden 2004, S. 96 (98 ff.).

"5. Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care".
This informal advice is difficult to perform.

A complex method for the interpretation of the wording of a directive besides references made to the recitals is the evaluation of the meaning of a term by performing a comparative evaluation in equally authentic languages.

Some examples:

Art. 42 sec. 5 lit. a s. 2 / Annex X Directive 2004/18/EC

English Wording	French Wording	German Wording
Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and *appropriate procedures*, that: [a – h]	Les dispositifs de réception électronique des offres, des demandes de participation et des plans et projets doivent au moins garantir, par les moyens techniques et *procédures appropriés*, que: [a – h]	Die Geräte für die elektronische Entgegen-nahme der Angebote, der Anträge auf Teilnahme sowie der Pläne und Entwürfe müssen mittels geeigneter technischer Mittel und *entsprechender Verfahren* gewährleisten, dass [a – h]

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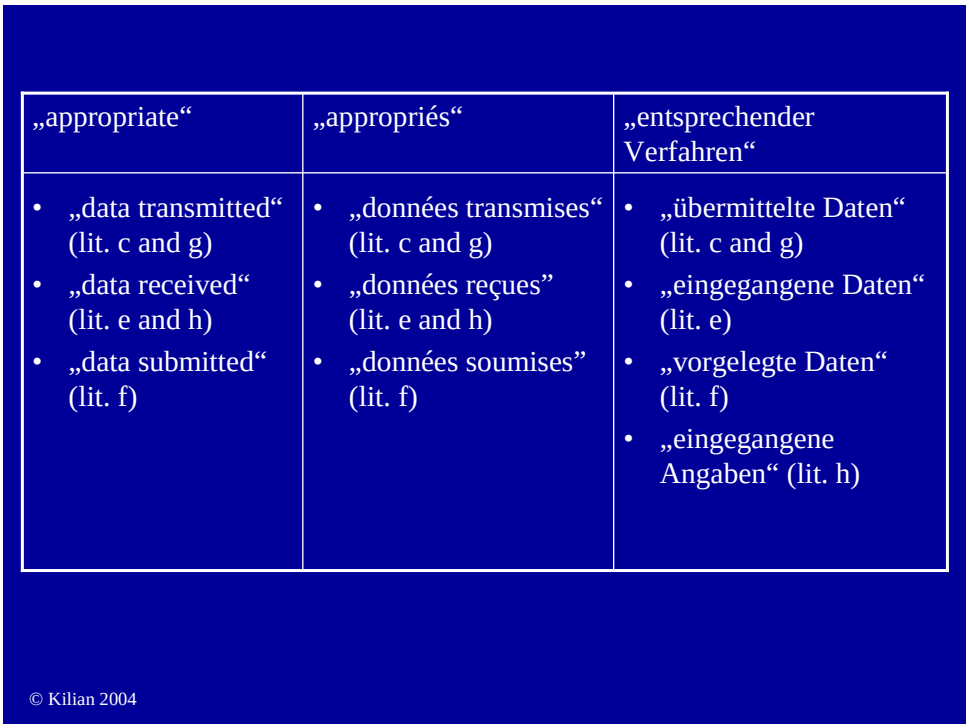


The German wording differentiates between “eingegangene Daten” and “eingegangene Angaben” whereas this differentiation is avoided in the English and French text of the Directive.

However, it is difficult to avoid discrepancies in the Community Law system, where 25 Member States (legal subsystems) contribute their traditions, views, experiences, languages, expressions and values. The principle of equally binding normative texts (Art. 53 E; 314 EC) is fictitious because a method of how to coordinate deviations is lacking. The European Court of Justice acknowledges that legal terms in different languages do not necessarily have the same meaning[3]. The Court held that “the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern of legal certainty” and deemed it preferable “to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved”[4].

Whether this method decreases of increases uncertainties in harmonization of normative legal texts remains a question pending. More convincing is the ruling that the interpretation of a text should respect its context and the purpose of the regulation[5]

[3] ECJ C-283/81 of 1982/10/06, C.I.L.F.I.T., ECR 1982, 3415.
[4] ECJ C-80/76, North Kerry Milk Products Ltd. v. Minister for Agriculture and Fisheries, *ECR 1977, 00425*; see: Anne Lise Kjaer, „Eurospeak“ – „Eurotexte“ – „Eurobegriffe“, in Lars Eriksen/Karin Luttermann, Juristische Fachsprache, Brixen 1999, S. 116 (128 f.); Siegbert Alber, Die Rolle der deutschen Sprache im Gerichtshof der Europäischen Gemeinschaften, in: W. Chrstian Lohse (Hrsg.), Die deutsche Sprache in der Europäischen Union, Baden-Baden 2004, p. 51 (66).
[5] ECJ C-384/98 of 2000/09/14, Vanessa Susanne Dotter v. Österreichischer Bundesschatz ECR 2000, I-6795.

3. Adequate transposition of a directive into national law of an EU-Member State

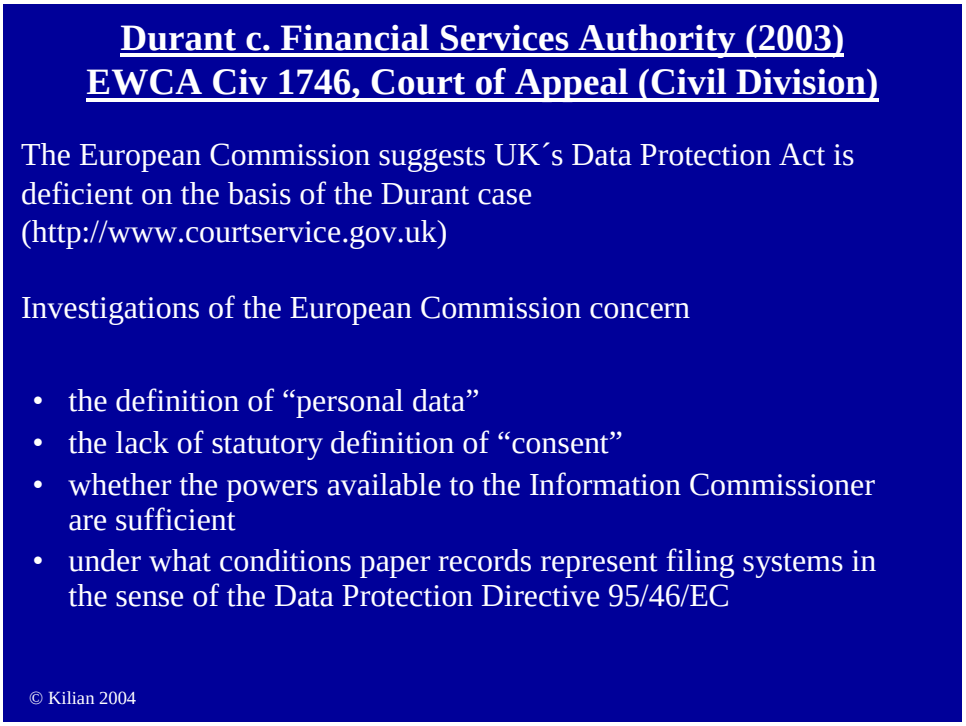
According to permanent case law by the European Court of Justice the transposition of a Directive into Member State law demands not necessarily that its provisions be incorporated formally and verbatim in express, specific legislation, and that a general context may, depending on the content of the directive, be adequate for the purpose, provided that it does guarantee the full application of the directive in a sufficiently clear and precise manner[6].

The transposition of an EC-directive into national law is a complicated procedure. Member States have to take their external and internal (dogmatic) system into account while transposing a directive. There often occur uncertainties upon the binding character of expressions and of the content which results in divergences in transposition. Many transpositions become subparts of existing legislation, others form new special acts. In the long run transpositions tend to create a patchwork of regulations on Member State level which leads to an erosion of the legal system as such. In addition, reservations on national level against the content of a directive may limit its range of application.

The tendency to destruct the external and internal legal system of a Member State is a serious concern. The narrow time limits for transposition create a pressure for ad hoc-solutions. The problem of ensuring adequacy of transposition is difficult to solve on legislative and court level.

[6] ECJ C-433/93 of 1995/08/11 Commission v. Federal Republic of Germany, ECR 1995, I-2303.

One example:



Mr. Durant was a customer of Barclays Bank plc. and sought disclosure with Barclays. He asked the Financial Services Authority (The regulator for financial services in the U.K.) to help him obtain disclosure. The Financial Services Authority closed the investigations without informing Mr. Durant of the outcome due to its obligation of confidentiality under the Banking Act 1987. The Authority also refused access to al the manual files and the information sought because they were not "personal" and did not form part of "relevant filing system" according to Part I No. 1 (1) UK Data Protection Act 1998.

The Court of Appeals found that neither the Data Protection Directive nor the UK Data Protection Act is an automatic key to any information of matters in which a person may be named or involved. "Mere mention of data subject in a document held by a controller does not necessarily amount to his personal data". The information should have the putative data subject as its focus and should affecting his privacy. The mere fact that a document is retrievable by reference to his name does not entitle him to a copy of it under the UK Data Protection Act.

The judgement also restricted the notion "filing system" (Art. 2 lit. c Data Protection Directive 95/46(EC) and "relevant filing system" (Part I No. 1 (1) lit. c UK Data Protection Act 1998) in the sense that approximately the same standard of sophistication of accessibility to personal data in manual filing systems as to computerized records should be at disposal. The

Court found: “The protection given by the legislation was for the privacy of personal data, not documents.”

Another example for a deficient transposition of a directive may be demonstrated regarding the Data Protection Directive 95/46/EC. The transposition into amendments of the German Data Protection Act does not reflect the aspiration level to which data security measures have to be related to. While the German wording of the Data Protection Directive refers insofar to the “state of the art”, this reference is lacking in the German Data Protection Act. If the wording “state of the art” is a binding content of the directive, the German Data Protection Act would not be properly meet this demand and therefore infringe European law. Otherwise, the German Data Privacy Act would be in accordance with the Data Protection Directive, but data security measures in Germany could go below the existing state of the art, which may be defined by technical standards.

Art. 17 sec. 1 subsec. 1 Data Protection Directive 95/46/EC

English Version:	French Version:	German Version:
Having regard to the *state of the art* and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.	Ces mesures doivent assurer, compte tenu de *l'état de l'art* et des coûts liés à leur mise en oeuvre, un niveau de sécurité approprié au regard des risques présentés par le traitement et de la nature des données à protéger.	Diese Maßnahmen müssen unter Berücksichtigung des *Standes der Technik* und der bei ihrer Durchführung entstehenden Kosten ein Schutzniveau gewährleisten, das den von der Verarbeitung ausgehenden Risiken und der Art der zu schützenden Daten angemessen ist.

§ 9 German Data Protection Act	
German Version:	English Version:
Technische und organisatorische Maßnahmen	**Technical and organisational measures**
Öffentliche und nicht öffentliche Stellen, die selbst oder im Auftrag personenbezogene Daten erheben, verarbeiten oder nutzen, haben die *technischen und organisatorischen Maßnahmen zu treffen*, die erforderlich sind, um die Ausführung der Vorschriften dieses Gesetzes, insbesondere die in der Anlage zu diesem Gesetz genannten Anforderungen, zu gewährleisten. Erforderlich sind Maßnahmen nur, wenn ihr Aufwand in einem angemessenen Verhältnis zu dem angestrebten Schutzzweck steht.	Public and private bodies processing personal data either on their own behalf or on behalf of others shall take the technical and organisational measures necessary to ensure the implementation of the provisions of this Act, in particular the requirements set out in the annex to this Act. Measures shall be required only if the effort involved is reasonable in relation to the desired level of protection.

A measure to ensure the adequacy of a transposition is the procedure of notification by a Member State to the EU-Commission. Earlier, the Commission was satisfied with the notification that the implementation of the transposition was performed. Nowadays, the Commission expects detailed information on how the wording of a directive was transposed and in which context it took place. The Commission initiates controls of the adequacy by entrusting experts of the respective Member State with investigations and reports. This procedure was introduced as a precaution to prevent legal disputes at all levels of jurisdiction according to the EC treaty (Art. 226 EC).

Drafts for transpositions in the new EU Member States are often prepared by external advisers or big law firms. The national parliaments should gain or maintain control of the whole transposition procedures and should set up or consult scientific expert groups who are specialized in the subject matter of the directive.

4. Application of transposed directives in accordance with the rulings of the European Court of Justice

As regards the authoritative interpretation of directives the case law of the European Court of Justice has binding force. Those decisions take priority over court decisions on Member State level even over rulings of national constitutional courts. Only the hierarchical distribution of decision making power with regard to the interpretation of aims and content of directives prevents discrepancies in the Community law system.

European Court decisions are translated into all twenty official Member States languages, but divergencies in the meaning of a legal term worked out by the Court do not occur, because Art. 31 of the Code of Procedures of the European Court of Justice[7] determines that decisions contain binding interpretations of legal terms only in the respective language employed for the procedure in Court.

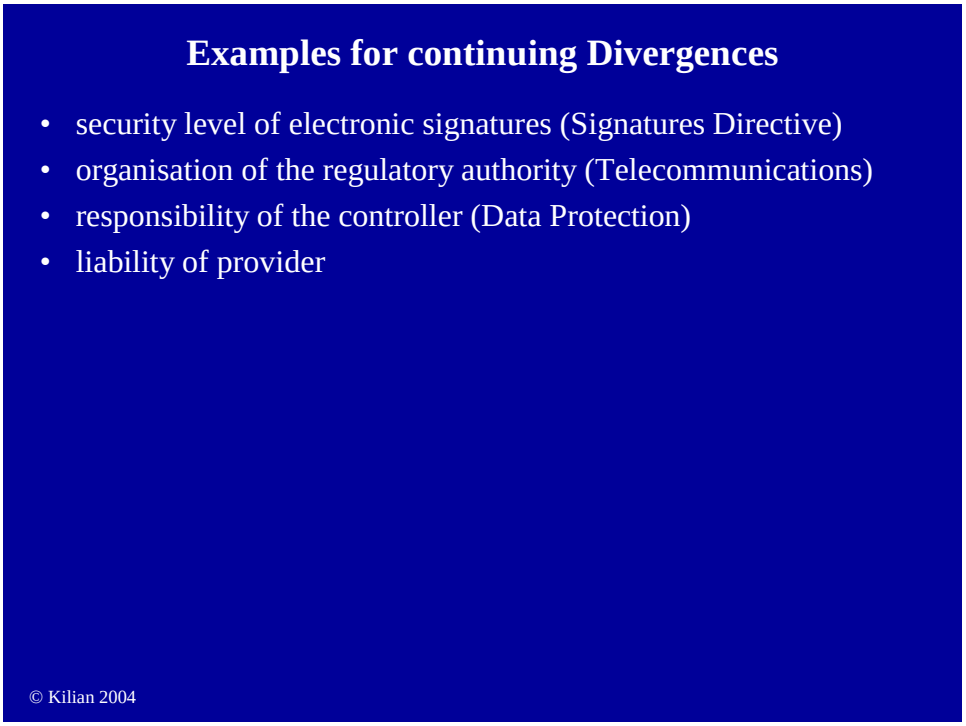
One problem, which often occurs, is that a directive imposes solutions which conflicts with existing Member States law. In those cases the national constitutions tend to avoid or restrict shifts in their legal system.

Directive 95/46/EC	**UK Data Protection Act**
„personal data“ = *any* information relating to an identified or identifiable natural person (art. 2 lit. a)	„personal data“ = data which relate to a living individual who can be identified from those data (Part I No. 1 (1) (a)) *and* affects a person‘s privacy (Durant Case)

The official wording of the Directive 95/46/EC implies that all personal data affects a person’s privacy whereas the UK Data Protection Act considers situations possible where personal data do not affect a person’s privacy.

Furthermore, directives may result in diverging technical, organizational and legal structures on Member State level.

[7] OJ C 193 of 2003/08/14, p.1



The only solution to prevent contradictions and the diminution of harmonization effects is to acknowledge the final decision making authority of the European Court of Justice and to observe the procedures as laid down in Art. 227, 234 EC.

5. Sanctions resulting from an inadequate transposition of a directive

Member States often fail to transpose a directive within the given time limit or in the right manner. By reason of these deficiencies the functioning of the Single Market is at stake and harmonization measures are delayed.

The EC-treaty provides procedures to exert pressure on Member States to comply with their obligations (Art. 226, 228 EC). These originally moral measures became effectively increased by European Court Decisions granting compensation to individuals against their Member State who failed to transpose a directive timely.[8] If a directive is intended to create rights for individuals the persons concerned can ascertain the full extent of their rights and where appropriate, rely on them before the national courts[9].

It is planned to impose additionally administrative fines on Member States for delays or improper transpositions. There is a tendency to streamline harmonization measures in order to achieve a coherent Community Law System for transborder activities in the Single Market.

[8] C-ECJ 6/90 and 9/90 1991/11/19, Francovich et Bonifaci/Italy, ECR 1991, I – 5357.
[9] ECJ 1995/11/08 – C 433/93, Commission v. Federal Republic of Germany, ECR 1995, I-02303.

II. Observations concerning the transposition of ICT-directives in Germany and Poland

Germany was in the past one of those Member States, who often failed to meet the deadline for a transposition. The main reason was and still is that the national legal system particularly in civil law, is a clearly constructed hierarchical coherent system which has a tradition of more than 100 years and was based and constructed on well defined principles. The transposition of EC-directives causes a leverage effect for watering down principles, structures, definitions and wordings. Hectic amendments tend to disturb the systematic approach. The transposition often lacks scientific advice. Each directive gives rise to the question, whether the transposition should be implemented into an existent statute or by a special act. New regulative ideas on European level ("informational duties", "universal service", "consumer") may conflict with regulative ideas on national level ("Vertragsfreiheit"; "Privatautonomie").

The transposition of directives into Polish law seems to be even more difficult. The shift from a former planning system to a market orientated system causes additional problems. Existing Polish law like the Law on Commercialization and Privatization of 1996 or the Law on Concessions for Enterprises of 1999 are hardly compatible with EC-law. In addition, there seems to be a lack of economical or technical need for introducing regulations in some fields at the moment (e.g. Microchip-Directives; Directive on Electronic Signatures). Even in Poland a critical scientific community interested in regulatory problems of the Information Society is just coming into existence. The CBKE (Centrum Badán Problemów Prawnych i ekonomicznych Komunikacji Elektronicznej) of Wroclaw University[10] takes care for research and teaching in Information and Telecommunications (ICT-) law and many of its doctorands are specializing themselves in these fields.

[10] www.cbke.prawo.uni.wroc.pl