

Statute Law Society – Annual Lord Renton Lecture

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Through A Glass Darkly:

Transposing EU drafting into English statutes –

Choices, Teleology and True Meaning [outline]

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Introduction

- Easy (all too easy) to sling mud at EU legislation
- Noticeable that good civil servants put onto the task of transposing EU law into statute or SI acquire grey hairs at a remarkable rate
- Structure of lecture: look first at what needs transposing, how it is drafted and (some of) the explanations for why it is not easy to transpose. Then, go on to look at the transposition obligation, the choices (in terms of transposition techniques) and the role of teleology in attempting to ascertain the true meaning of what is to be transposed

EU law

What needs transposing?

- Not the Treaty articles (they just have to be respected – see Joined Cases 9/65 and 58/65 *San Michele* [1967] ECR 1; *Ord* [1967] ECR 259 – but are not transposed as such)
- Not regulations: these are directly applicable (see Article 288 TFEU (ex Article 249 EC)¹) and hence self-executing - indeed, implementing measures are regarded as

¹ - 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States' (Article 288(2)).

obstructing the direct applicability of the regulation itself: Case 34/73 *Variola* [1973] ECR 981

- What we are talking about transposing are therefore primarily directives,² but also, historically, e.g. common positions

How is EU legislation drafted?

- in a word: for those used to English statutory drafting, 'confusingly'
- long preamble : see, e.g., Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the title itself strikes fear, does it not?) where recitals are some 40% longer than the enacting terms
- often divergent if not downright contradictory recitals (e.g., virtues of free movement of persons; need to maintain high level of public security)
- not all key terms defined (sometimes, virtually no key terms defined)
- where terms defined, definition may not be very precise (as seen through English statutory eyes at least)
- this is NOT because there is no guidance as to how to draft!
- See: Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p.1). Whilst the guidelines are not legally binding, it should be presumed that the institutions which adopted them by common accord (the Parliament, the Council and the Commission) follow them when drafting legislation: see also for example Case C-154/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 92, and Case C-344/04 *IATA* [2006] ECR I-403, paragraph 76
- See also the Interinstitutional agreement on better law-making (OJ 2003 C 321, p.1): there is also an immensely detailed and continuously updated 'style guide' available in all languages

² - '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 method' (Article 288(3)).

So, what goes wrong? Why is the source material (the EU law to be transposed) the way that it is?

- Different national approaches to how statutory drafting should be done (by which I mean not the unfortunate EU official loyally following the instruction manual, but the national officials who are meeting to discuss the draft)
- Compromise and negotiation: ambiguity as the way forward, so that then everyone goes home happy
- ‘let’s all put in what we’ve got already in our national legal system’: see, for example, Directive 2001/29/EC (already cited: harmonisation of certain aspects of copyright and related rights), where Article 2 lays down reproduction right; then, in Article 5(2) and (3), there are 20 optional exceptions or limitations to the reproduction right, of which 17 involve a further option for fair compensation (this directive with its drafting problems is discussed more fully in my Opinion in Case C-458/11 *VG Wort* (24 January 2013))
- Sometimes, the problem lies ‘upstream’ of EU law. See Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted – Article 12(1)(a) effectively transposes into EC law Article 1D of the 1951 Geneva Convention relating to the status of refugees – the text of original is Delphic; the EU legislator did a copy-paste; the result is a problem that gave rise to two Grand Chamber cases: C-31/09 *Bolbol* [2010] ECR 5539 and C-364/11 *El Kott* (judgment of 19 December 2012)
- Having 23 x equally authentic languages doesn’t help!

See Case C-173/07 *Emirates Airlines* [2008] ECR I-5257 (concept of ‘flight’) – the German version of Article 3(1)(a) of Regulation 261/2004 used ‘Fluggäste, die auf Flughäfen ... einen Flug antreten’, whilst the English has ‘passengers from an airport’. The French wording is ‘passagers au départ d’un aéroport’, and the Spanish, ‘pasajeros que partan de un aeropuerto’. Equivalent formulations to the EN and FR are found, for example, in the Dutch, Italian and Portuguese versions. So, GE was odd language out. The referring court, basing itself on GE, was inclined to think passenger (Dr Schecker) was right. (Will revert to this case later: suffice it to say now that both the Court and the AG (myself) felt otherwise!)

A further illustration: see Article 13 of Directive 2002/20/EC on the authorisation of electronic communications networks and services), where the Spanish text uses the

same word for two key terms, 'facilities' and 'resources', whereas various other language versions (e.g., EN and FR) have two different terms – the problem is touched upon in my Opinion in Joined Cases C-55/11, C-57/11 and C-58/11 *Vodafone España and others* (see point 15 and fn 22: I only discovered the full horror of the problem when the draft opinion was being translated into the language of procedure, Spanish!)

Transposition

- A reminder of what is meant to be happening : what the transposition duty is flows from definition of what a directive is in Article 288(3) TFEU
- Freedom given to Member State is freedom to be faithful to the objective and to get there within the framework of national legal system (in particular, fitting substantive rights within appropriate procedural structures)
- During the transitional period, the Member State must not adopt and bring into force measures that are likely seriously to compromise the result required by the directive: see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411

Choices

- Copy-paste: very faithful, but in my view a cop-out. The Member State's job is to implement the directive, not to leave individuals and businesses guessing as to what can / cannot be claimed or what is / is not allowed (this is particularly invidious if directive gives Member State wide latitude: see e.g., Directive 2000/78 re age discrimination and the abundant associated case-law)
- 'gold-plating' (a favourite phrase with certain politicians): strictly speaking, should mean 'going beyond what the directive actually requires' (which many directives but sometimes used disparagingly to mean being 'too deferential to Brussels'. NB that many directives leave Member States the freedom, *as a matter of national law*, to go beyond the directive's requirements (viewed through Brussels eyes, this is about leaving sovereign Member States free choice!)

- The ideal transposition ... is one that 'catches' the exact meaning of what was agreed at EU level and translates it faithfully into the idiom of national law so that, after the deadline, the directive becomes invisible and the citizen, reading national law, gets an exact and comprehensible picture of what his (new) rights and obligations are

Teleology

- So, how do we 'catch the exact meaning of what was agreed at EU level'?
- Suspect that either already well-known or that by now you have guessed: you cannot use just the literal text
- Instead, adopt what in the jargon is called the teleological approach (τελος ...): look at the aims, purpose and objectives of the legislation and work backwards from there to what the text 'must' therefore mean
- See the exercise undertaken by the Court in *Emirates Airlines* (cited earlier)(judgment examined in detail)

True meaning

- Ah, if only we knew!
- Neither advocates general nor judges are (unfortunately) issued with a crystal ball (or a divining rod) when take oath of office at the Court
- an illustration: trying to interpret Article 6(3) of the 'Habitats Directive' – see my Opinion in Case C-258/11 *Sweetman* (22 November 2012) at points 34-57 (I emphasise I have put this before you to illustrate the approach: I no idea yet if Court going to agree with me!)

Postscript

1 Corinthians 13:12: 'For now we see through a glass, darkly, but then face to face: now I know in part; but then shall I know even as also I am known.'

When identifying the point at which clarity and full knowledge come, St Paul did have in mind the afterlife!

Haven't attempted to give you the definitive answer as to how to transpose any particular piece of legislation correctly; but hope that may (perhaps) have helped you to peer through the glass with a little more insight.

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