

Supplemental Material to

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Legal and Ethical Aspects Regarding the Development and Application of Screening Assays to Detect vCJD Infections

Working Group 'Overall Blood Supply Strategy with Regard to Variant Creutzfeldt-Jakob
Disease (vCJD)'

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1 Legal Regulation of the Development and Application of in vitro Medical Devices

a) Directive 1998/79/EC on IVDs

Directive 1998/79/EC of the European Parliament and of the Council of October 27, 1998 on in vitro diagnostic medical devices¹ (IVDs) means any medical devices to be used in vitro for the examination of specimens (including blood and tissue donations) derived from the human body, solely or principally for the purpose of providing information concerning a physiological or pathological state, to determine the safety and compatibility of donations with potential recipients or to monitor therapeutic measures (see also loc. cit. article 1, paragraph 2, sentence b).

The directive is specifically intended to be used first of all for the purpose of ensuring the *smooth operation of the European internal market* regarding the trade with IVDs, see loc. cit. recital (1). In accordance with article 14, paragraph 1 of the Treaty establishing the European Community (TEC)², the establishment of the internal market is a fundamental aim of the Member States of the European Union laid down in the primary legislation of the European Community (EC) and the European Union (EU). The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty, see article 14, paragraph 2 TEC. This requires that IVDs placed on the market comply with the same laws, regulations and accordingly also the generally recognized technical quality standards. The provisions in force in the Member States at the effective date of the directive with regard to IVDs were highly different and thus created barriers to trade, which were to be removed by establishing harmonized rules, see recital (2) of the directive 1998/79/EC.

The objective of the directive 1998/79/EC, i.e. the removal of barriers to trade with regard to IVDs, should be reached particularly by providing patients, users and third parties with a high level of *health protection* and attaining the performance levels originally attributed to them by the manufacturer, see also loc. cit. recital (5). Health protection for the individual and the Community is the second essential aim of the directive, which is in direct correlation with the former. Not only does this concern correspond to the goal of an as high as possible level of health as stipulated in article 3 p) and article 152 TEC, and to principle of the protection of confidence, but is also expresses the commitment of the European Union to the fundamental rights. According to article 6 paragraph 2 of the Treaty on European Union (TEU)³, the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴ (ECHR)⁵ signed in Rome on November 4, 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. The ECHR referred to here, which is also referred to as governing in article 1 paragraph 4 of the directive 1998/79/EC, stipulates the right to life in article 2 and the right to respect for his/her private and family life in article 8. The latter also encompasses the right to informational self-determination⁶ as well as the right to physical integrity⁷. These fundamental rights are also warranted in all constitutions of the Member States of the EU and have been proclaimed in article 3 paragraph 1 and article 8 of the Charta of Fundamental Rights of the EU⁸. In Germany the right to informational self-determination⁹ is legally protected by article 2 paragraph 1 in conjunction with article 1 paragraph 1 sentence 1 of the Basic Law (Grundgesetz; GG) for the Federal Republic of Germany¹⁰ and a person's right to life and physical integrity by article 2 paragraph 2 GG. It is not only a matter of subjective rights to defend an individual versus the state but of fundamental objective legal decisions committing the state to avert potential threats of the life and physical integrity of the citizens in order to protect national health¹¹. In the present context this does not only refer to the life and physical integrity of the donors, but also and foremost the recipients of blood and blood products. Accordingly, if an IVD was available by which one might detect a severe infection in the blood of a donor, and if this infection was not insignificant regarding its transmissibility by such a

¹ OJ L 331/1 of December 7, 1998.

² See the consolidated version in OJ C 325 of December 24, 2002.

³ See the consolidated version in OJ C 325 of December 24, 2002.

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 as amended in the protocol No. 11, come into effect on 1 November 1998 (ECHR).

⁵ www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

⁶ European Court of Human Rights, decision of April 9, 2007, Application No. 62617/00, Case of Copland v. The United Kingdom.

⁷ Received opinion, see also *Grabenwarter*, Europäische Menschenrechtskonvention, 2003, pp. 205 f. with further references.

⁸ OJ C 303/1 of 14 December 2007.

⁹ See in lieu of many others only FCC decision 65, 1 (census).

¹⁰ Basic Law for the Federal Republic of Germany as amended in the Bundesgesetzblatt part III, No. 100-1, consolidated version, last amended by the law of 28 August 2008 (FLG I S. 2034).

http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf

¹¹ See in lieu of many others only FCC decision 78, 179 (Complementary and Alternative Medicine Law).

donation and its epidemiology, the state has to oblige the blood services by means of legislature to apply this diagnostic assay and to exclude those potential donors from donating blood who have a positive test result according to this assay.

IVDs can be divided into two large groups. One of these, outnumbering the other one, is the group of those products which do not pose an immediate threat for patients and which are handled by well-trained personnel and the results of which can be confirmed using an additional way. For these devices, the conformity assessment procedure can generally be performed under the sole responsibility of the manufacturer. However, for all other devices whose failure seriously threatens 'health', requires the involvement of a 'notified body'. IVDs to be developed for the detection of a vCJD infection potentially belong to the latter category of devices. In view of the non-curability of vCJD disease, false-positive results can carry large-scale severe threats to the emotional, mental and physical health of the donor or patient. On the other hand, false-negative results can imply similar threats for the collective recipients of vCJD-contaminated blood. An aggravating factor is the fact that results of blood investigations can be confirmed (or refuted) clinically only at the onset of the disease or after death by histopathological investigation of brain material.

The directive 1998/97/EC requires of those groups of products used in blood transfusion and the prevention of AIDS and certain types of hepatitis an optimum level of safety and reliability, see loc. cit. recital 23. List A in Annex II itemizing these medical devices needs updating, taking account of technological progress and of developments in the field of health protection, see loc. cit. recital 24. Currently it is suggested to include medical devices to be developed for the detection of vCJD infections in donor blood into List A in Annex II of the directive 1998/97/EC. Prima facie this is first of all supported by the severity and incurability of this disease. However, compared to AIDS and hepatitis and according to the current state of knowledge, there is no similar epidemiology in the case of vCJD. The routes of transmission are also considerably more limited in the case of a vCJD infection than those of the infectious diseases mentioned in List A in Annex II of the directive 1998/97/EC. Apart from ingesting contaminated beef, the incorporation of human materials (e.g. blood, tissues, vCJD-contaminated surgical instruments) is the only other route of infection.

For all devices referred to in List A in Annex II other than those intended for performance evaluation, the manufacturer shall, in order to affix the CE marking, either

- follow the procedure relating to the EC declaration of conformity set out in Annex IV (full quality assurance), or
- follow the procedure relating to EC type-examination set out in Annex V coupled with the procedure relating to the EC declaration of conformity set out in Annex VII (production quality assurance), see article 9, paragraphs 2 and 3 of the directive 1998/97/EC. Without prejudice all IVDs must meet the demands of Annex I of this directive, see article 3.

The conformity assessment procedure in terms of article 9 of the directive 1998/97/EC is concluded with a CE marking of the product in accordance with article 16 of this directive. At the same time, this results in the free movement of goods, see loc. cit. article 4, paragraph 1. Where a Member State ascertains that the devices may compromise the health and/or safety of patients, users or, where applicable, other persons, or the safety of property, it shall take all appropriate interim measures to withdraw such devices from the market, see loc. cit. article 8 paragraph 1.

b) Implementation in the German Medical Devices Act (Medizinproduktegesetz; MPG)¹²

In accordance with article 249 paragraph 3 TEC, the 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. Before the period of implementation has expired, which in the case of 1998/97/EC in accordance with article 22 paragraph expires on December 7, 1999, the provisions of directives are not immediately in force in the Member State but must be implemented by an intrastate act of law. For this purpose administrative regulations are insufficient which are merely effective for internal relations¹³. Rather it is necessary to accordingly implement a directive to issue externally effective statutory instruments which are binding for all persons present in the sovereign territory of a Member State, that is, an appropriate act of parliament and/or statutory instruments based on a sufficiently specific law, see article 80 paragraph 1 GG. Regulations essential to the fundamental rights have to be issued by an act of parliament according to the doctrine of constitutional proviso¹⁴.

An implementation of the directive 1998/97/EC in the MPG was obvious since the directive 1998/97/EC considers IVDs as medical devices, see the legal definition loc. cit. article 1 paragraph 2b. The implementation was effected only after the period of implementation expired upon coming into effect of the Second Act amending MPG of December 13, 2002¹⁵.

¹² Medical Devices Act, as amended and promulgated on August 7, 2002 (FLG I S. 3146), last amended by § 1 of the Law of June 14, 2007 (FLG I S. 1066).

¹³ See in lieu of many others only ECJ, decision of May 30, 1991 – C-361/88, Technical Instructions on Air Quality Control (TA Luft).

¹⁴ See in lieu of many others only FCC decision 47, 46 (48 f.) (Sex education).

¹⁵ FLG I S. 3586, 2002 I S. 1678.

aa) General Requirements of the Placing on the Market of IVDs

First of all, in section (§) 3 paragraph 4 MPG adopts the definition in article 1 paragraph 2 (b) of the directive 1998/97/EC on IVDs. If IVDs are concerned that are intended to be placed on the market, they need to bear the CE marking, see § 6 paragraph 1 MPG. §§ 7 and 8 paragraph 2 MPG then discuss the responsibilities of the manufacturer to comply with the essential requirements in Annex 1 of the directive 1998/79/EC and the common technical specifications. The obligation to affix a CE marking is specified in § 9.

bb) Performance Evaluation prior to Placing on the Market of IVDs

Products intended for the purpose of performance evaluation do not need the CE marking because they are not placed on the market, in accordance with § 3 paragraph 11 MPG in conjunction with § 6 paragraph 1 MPG. But they may only be supplied for performance evaluation purposes if the manufacturer keeps the documentation ready, see § 12 paragraph 3 MPG. Evidence of the suitability of IVDs for the intended purpose specified by the manufacturer should be provided through performance evaluation. This means to either supply data from scientific literature or to perform performance evaluation studies, see § 19 paragraph 2 MPG. Regarding the latter, § 24 MPG applies accordingly in providing evidence of the suitability of IVDs for the intended purpose through performance evaluation.

In accordance with § 24 paragraph 1 MPG,

‘the provisions contained in § 20, paragraphs 1 to 5, 7 and 8 shall apply accordingly to performance evaluation studies of in vitro diagnostic medical devices if:

1. invasive sampling is conducted either exclusively or supplementarily to obtain a specimen for the purpose of a performance evaluation of an in vitro diagnostic medical device,
2. in the context of the performance evaluation study, additional invasive or other stressful examinations are conducted, or
3. the results obtained in the context of the performance evaluation are to be used for diagnostic purposes without it being possible to confirm them by means of established procedures.

In the remaining cases, the consent of the person from whom the specimen is to be taken, is necessary in so far as this person’s personal rights or commercial interests are affected.’

This regulation implements article 1 paragraph 4 of the directive 1998/79/EC¹⁶.

‘For the purposes of this Directive, the removal, collection and use of tissues, cells and substances of human origin shall be governed, in relation to ethics, by the principles laid down in the Convention of the Council of Europe for the protection of human rights and dignity of the human being with regard to the application of biology and medicine and by any Member States regulations on this matter.’

With respect to the diagnosis, the maintenance of confidentiality of personal data, as well as the avoidance of discrimination on the basis of genetic composition of males and females are of paramount importance.

Regarding the performance evaluation of IVDs to screen for a vCJD infection previous to a blood transfusion, and in case one of the alternatives mentioned in § 24 paragraph 1 MPG should apply, this means in particular a positive weighing of risks/benefits (§ 20 paragraph 1 sentence 1 MPG), the informed consent of a participant (§ 20 paragraph 1 sentence 2 MPG), the provision of an investigational plan reflecting the latest scientific knowledge (§ 20 paragraph 1 sentence 8 MPG) as well as the taking out of an insurance policy for the participants (§ 20 paragraph 1 sentence 9 MPG). Compared to § 23 MPG, § 24 MPG is the more specific law in that here already CE-certified IVDs are covered.

2 Reference to the German Transfusion Act (Transfusionsgesetz; TFG)

The fundamental relations between the development of IVDs, their application and blood transfusion have already been demonstrated when discussing the directive 1998/97/EC. Below it will be discussed to what extent this corresponds to the respective regulation in transfusion legislature. First of all, it has to be pointed out that § 24 MPG as a *lex specialis* regulation overrides the TFG. However, in case performance evaluation studies are performed in the context of blood donations, and unless special regulations were made in § 24 MPG, the TFG may be applicable in addition¹⁷.

¹⁶ Similarly the explanatory memorandum, see also draft of the Second Act amending the MPG, ORP 14/6281 of June 15, 2001, p. 34 (<http://dip21.bundestag.de/dip21/bid/14/062/1406281.pdf>).

¹⁷ TFG as amended and promulgated on August 28, 2007 (FLG I S. 2169).

a) The Directives 2002/98/EC, 2004/33/EC and 2005/61/EC as Regards the Transfusion of Blood

Directive 2002/98/EC of the European Parliament and of the Council of January 27, 2003 – setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC¹⁸ and Commission Directive 2005/61/EC of September 30, 2005¹⁹ implementing Directive 2002/98/EC – have as their primary purpose to ensure the quality and safety of whole blood and blood components in order to prevent in particular the transmission of diseases, see recital (1) and article 1 of the Directive 2002/98/EC. Furthermore, the willingness of citizens to donate blood is stated as a fundamental goal of the regulation, loc. cit. recital (2). In order to ensure an equivalent level of safety and quality of blood and blood components, whatever their intended purpose, directive 2002/98/EC establishes the technical requirements for obtaining and testing of blood and blood components including the starting material for the manufacture of medicinal products, see articles 16–23 of this directive. In vitro diagnostic medical devices applied in this connection must comply with the specifications of directive 1998/79/EC, see article 2 paragraph 3 of directive 2002/98/EC.

In accordance with article 17 of directive 2002/98/EC Member States shall take all necessary measures to ensure that, upon agreement of a willingness to commence the donation of blood or blood components, all donors in the Community provide the information referred to in article 29(c) to the blood establishment. This also encompasses the health history of the donor. If the donor is aware of having a transmissible infectious disease, he/she is obliged to report this to the blood donation establishment, see also article 3 in conjunction with Annex II B of directive 2004/33/EC²⁰.

In addition, traceability of donations must be established in accordance with article 14 of directive 2002/98/EC. The system used in this connection shall ensure ‘full traceability to the donor as well as to the transfusion and the recipient thereof’.

In accordance with article 21 of directive 2002/98/EC, blood establishments shall ensure that each donation of blood and blood components is tested in conformity with requirements listed in Annex IV. Member States shall ensure that blood and blood components imported into the Community are also tested. Annex IV specifically itemizes infections with HIV, hepatitis B and hepatitis C. Since to date there is no IVD to screen for vCJD available on the market, this infection transmissible by blood transfusion is not listed in Annex IV.

The specifications of directive 2002/98/EC are also amended in particular by Commission Directive 2004/33/EC which particularly sets out requirements regarding information and consent of the donors as well as their eligibility.

b) Sub-Constitutional Implementation in the TFG

In relation to the German Medicines Act (Arzneimittelgesetz; AMG)²¹, the TFG represents the more specific law, incidentally the former remains applicable²².

As stipulated in § 1, the TFG has the purpose ‘to ensure the safe collection of blood and blood components and a safe and secured supply of the population with blood products and therefore to increase self-sufficiency on the basis of voluntary unpaid donations of blood and blood components’.

aa) Consent and Information of the Donor

Therefore § 6 paragraph 1 TFG stipulates that ‘blood collection can (may) only be performed provided that the donating person was informed knowledgeably in advance in a way understandable for members of the general public about the essential nature of the blood donation, the blood donation procedure and its significance and the related examinations, and has consented to the collection of the donation *and to the examinations.*’ Donor information has to at least comply with the requirements as regards content itemized in Annex II A of directive 2004/33/EC, see article 2 of directive 2004/33/EC in conjunction with article 249 paragraph 3 TEC.

¹⁸ OJ L 33/30 of February 8, 2003.

¹⁹ Commission Directive 2005/61/EC of September 30, 2005 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards traceability requirements and notification of serious adverse reactions and events, OJ L 256/32 of October 1, 2005.

²⁰ Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components, OJ L 91/25 of March 30, 2004.

²¹ AMG as amended and promulgated on December 12, 2005 (FLG I S. 3394), last amended by § 9 paragraph 1 of the Act of November 23, 2007 (FLG I S. 2631).

²² So appropriately *Lippert*, in *Wenzel* (ed.), *Handbuch des Fachanwalts Medizinrecht*, 2007, p. 1378.

bb) Assessment of Eligibility in the Context of Blood and Plasma Donations according to the Current State of Scientific Knowledge in Medicine and Technology

In accordance with § 5 paragraph 1 sentence 1 TFG, only ‘eligible persons’ shall be admitted to donate blood and plasma. According to this, the eligibility is assessed and ascertained by a physician responsible according to the current state of *the medical and technical sciences*. In accordance with article 3 of directive 2004/33/EC, the information set out in Part B of Annex II are to be obtained from the donors, in particular regarding their state of health. ‘There *shall be no* admission to donate blood as far as and as long as the person willing to donate has to be excluded or deferred from the donation according to the guidelines of the German Medical Association’, see § 5 paragraph 1 sentence 2 TFG. The guidelines of the German Medical Association (Bundesärztekammer) determine the current state of scientific knowledge and are proclaimed in accordance with § 12a paragraph 1 TFG, in consultation with the senior federal authority²³ in the form of a bulletin in the Federal Gazette (FG)^{24,25}. It is assumed that the current state of scientific knowledge regarding medicine and technology in terms of § 5 paragraph 1 TFG has been observed, if the guidelines of the German Medical Association according to paragraph 1 have been complied with, see § 12a paragraph 2 TFG. Aside from this, donors have ‘at least’ to be examined for HIV and hepatitis B and C, in accordance with § 5 paragraph 3 sentence 1 TFG. Since only the failure to test for those infection markers specifically referred to in § 5 paragraph 3 sentence 1 TFG incur a penalty, see § 31 TFG, the failure to test for other markers remains without any consequences by Criminal Law, but might possibly lead to liability by Civil Law. In compliance with European Law the specifications set out for eligibility assessment are to be interpreted to that effect that the criteria set out in Annex III of directive 2004/33/EC regarding donor eligibility are complied with, see loc. cit. § 4.

Since in accordance with § 12a paragraph 2 TFG this concerns a refutable assumption, an investigation for markers not referred to in the guidelines of the German Medical Association might be indicated according to the current state of scientific knowledge if the data published in this regard suggest this. Therefore, the physician responsible for admitting the donor to blood donation is obliged, if applicable, to perform tests, in accordance with § 5 paragraph 1 TFG, and be liable by Civil Law for failure of performance, even if the test in question has not (yet) been itemized in the guidelines of the German Medical Association. Therefore the current state of scientific knowledge of medicine and technology is a decisive measure in assessing the eligibility of a donor. If accordingly an IVD was developed for screening purposes for epidemiologically significant infectious diseases transmissible by blood donation, and if this device has proved to be suitable for the intended purpose in a performance evaluation study in accordance with § 24 MPG and if it was approved for placing on the market, then to screen a donor for this infection complies with the current state of scientific knowledge of medicine and technology.

cc) Processing of Personal Data of the Donors

In accordance with § 11 paragraph 2 TFG, the blood donation establishments are authorized to collect the required individual-related personal data from the donor and to communicate cases with a health risk to the competent authorities, stating date of birth and gender of the person concerned. Donations tested positive for a marker are reported to the Paul-Ehrlich-Institut and the epidemiological data to the Robert Koch-Institut, see §§ 21 and 22 TFG. In accordance with § 6 paragraph 1 sentence 1b) of the Infection Protection Act (Infektionsschutzgesetz; IfSG)²⁶, a justifiable suspicion of a spongiform encephalopathy which may have been caused by an infection with vCJD must be reported to the local health authority.

Relating to the development and application of IVDs for the detection of vCJD, this means that products approved for this purpose must be used to assess the eligibility of a donor, in accordance with § 5 paragraph 1 TFG, at any rate in those instances where it is not implausible that the blood of the donor is infected with vCJD.

Elimination of a Donation and Tracing in the Case of Positive Test Results (So-Called Look-Back Procedure)

In accordance with § 19 paragraph 1 sentence 1 TFG, donations in which an infection has been detected, or for which there is a *justifiable suspicion for infection that might be able to cause a serious disease*, shall be eliminated and previous donations shall be traced (look-back). The procedure for reviewing the presumed diagnosis and the look-back is based upon the current state of scientific knowledge. It is problematic to determine the meaning of ‘diagnosis’ and of

²³ This is also the Paul-Ehrlich-Institut, see § 27 paragraph 1 TFG

²⁴ Proclamation of the guidelines regarding the collection of blood and blood components and the application of blood products (hemotherapy) in accordance with §§ 12 and 18 of the TFG of September 19, 2005, FG of November 5, 2005, No. 209a, last amended on April 17, 2007, FG No. 92 of May 19, 2007, S. 5075.

²⁵ With a critical attitude regarding the role of German Medical Association, with applicable considerations *Hasskarl, Zur Zulässigkeit der Umsetzung der EG-Blutrichtlinien 2002/98/EG und 2004/33/EG in nationales Recht durch Richtlinien der Bundesärztekammer nach §§ 12 und 18 Transfusionsgesetz, Transfus Med Hemother 2005;32:34–41.*

²⁶ Infection Protection Act of 20 July 2000 (Federal Law Gazette I S. 1045), last amended by § 2 of the Law of December 13, 2007 (FLG I S. 2904).

'justifiable suspicion for infection' in terms of § 19 paragraph 1 sentence 1 TFG. Indications suggesting an infection which must be taken seriously must be considered grounds for justifiable suspicion of infection²⁷. In the view of the National Advisory Committee 'Blood' (Arbeitskreis Blut), a justifiable suspicion is only assumed for those donors for whom 'a sample that was repeatedly positive or reactive in the screening test is also positive, reactive or indeterminate in supplemental tests'²⁸. To the extent that one has to assume that 'supplemental tests' refers to test procedures other than the screening test²⁹, a justifiable suspicion of infection would never apply, not even in the case of severe, untreatable and fatal diseases transmissible by blood, because of a lack of alternative test methods. The look-back procedure has the purpose of avoiding damage caused to the health of the donor and third parties, thus § 19 paragraph 1 sentence 1 TFG in light of article 2 paragraph 2 sentence 1 GG must be interpreted accordingly, consistent with the Constitution. Therefore, while a confirmation test is still lacking, a justifiable suspicion of infection also applies if the screening assay employed has to be considered as suitable, according to the state of the art, for the purpose of detecting the infection in question. The National Advisory Committee 'Blood' has obviously not accounted for the present case that no test is available to confirm the screening test results, therefore the above-mentioned interpretation of the term 'justifiable suspicion' does not contradict the stipulations in recommendation (Votum) 34.

Additionally, it must be investigated whether a precautionary deferral of the donor and the look-back procedure in accordance with § 19 TFG are ruled out by the fact that false-positive results may occur. This must be negated in view of the severity of vCJD disease and its transmissibility to recipients, at any rate in those cases where false-positive results are considered to be improbable due to the state of development of the IVD, see article 2 paragraph 2 sentence 1 GG.

The intended purpose of article 14 of directive 2002/98/EC to protect the health of donors and recipients by implementing the look-back procedure in the EU would also be aborted if the stipulations regarding a 'justifiable suspicion', in terms of § 19 paragraph 1 sentence 1 TFG, cannot be accomplished for lack of confirmation tests, if applicable on an individual basis. In this respect recital (2) of directive 2002/98/EC must be consulted in the interpretation of its article 14: 'In order to safeguard public health and to prevent the transmission of infectious diseases, all precautionary measures during their collection, processing, distribution and use need to be taken making appropriate use of scientific progress in the detection and inactivation and elimination of transfusion transmissible pathogenic agents.'

Depending on the state of technology of the screening test for vCJD to be evaluated, a 'justifiable suspicion' in terms of § 19 paragraph 1 sentence 1 TFG must thus be assumed in the event of a reproducible reactive positive test result. Even if no suitable confirmation test was available, this sample has to be eliminated and a look-back procedure initiated.

Therefore, it is doubtful whether the tests currently under development for the detection of vCJD have the state of development required to generate a 'justifiable suspicion' in terms of § 19 paragraph 1 sentence 1 TFG. At any rate this would be the case if they prove sufficiently specific and sensitive and technically feasible in performance evaluation studies that are suitable regarding their methods, especially with regards to biometrics.

3 Application of IVDs for the Detection of (In-)Curable Diseases prior to a Transfusion

In several respects the development and application of IVDs for the detection of (in-)curable diseases prior to a transfusion affects the fundamental rights of donors and recipients.

a) Right to Physical Integrity regarding the Performance Evaluation and Application of IVDs in the Context of Transfusions, § 2 Paragraph 2 GG

In accordance with § 24 paragraph 1 sentence 1 (1) MPG in conjunction with § 20 paragraph 1 (2) MPG, the informed consent of the donor is required if invasive sampling is conducted exclusively to obtain a specimen for the purpose of a performance evaluation of an IVD or if more blood than usual is collected for this purpose. The same applies in accordance with § 24 paragraph 1 sentence 1 (2) MPG if in the context of the performance evaluation study additional invasive examinations are conducted. An interference regarding the physical integrity of a participant in this research project is accordingly justified by his/her consent, see article 2 paragraph 2 sentence 3 GG.

²⁷ So appropriately *von Auer*, in *von Auer/Seitz* (eds.), *Kommentar zum TFG*, as of 2003, marginal number 5 concerning § 19; similarly, *Flegel* in *Lippert/Flegel* (eds.), *Kommentar zum TFG und den Hämotherapie-Richtlinien*, 2002, marginal number 6 concerning § 19.

²⁸ See section 1.2 of the recommendation 34 of June 14, 2006, *Bundesgesundheitsblatt* 9/2006, p. 940.

²⁹ At any rate this could safely be assumed according to recommendation 24 of the National Advisory Committee 'Blood' of 8 November 2000, *Bundesgesundheitsblatt* 3/2001, pp. 305-316, on account of the reference to annexes A2, B2 and C2 contained in section 1.2.

Probably with regard to potentially false-positive results during a performance evaluation study, this is likewise required if the results of the study 'are to be used for diagnostic purposes' and no established procedures are available to confirm them, see § 24 paragraph 1 sentence 1 (3) MPG. Currently this is the case regarding the development of an IVD for the detection of a vCJD infection, because the unambiguous diagnosis of this disease is only possible *post mortem* by histopathological investigation of the brain.

If the performance evaluation study is conducted in the context of a blood donation, the informed consent of the donor to this examination is necessary not only in accordance with § 24 paragraph 1 sentence 1 (3) MPG, but also in accordance with § 6 paragraph 1 TFG. Persons participating in a performance evaluation study of an IVD that is under development for the detection of vCJD infections, in the context of donating blood or if a vCJD infection is suspected, may not be included in this study without their informed consent. This applies also to cases where the performance evaluation study is intended to be performed without invasive (additional) sampling or other invasive examinations.

b) Right to Substances Collected from One's Body as a Fundamental Right, Article 2 Paragraph 1 GG

In principle, every person has a personal right that is protected by the GG to substances collected from the body as far as these still carry personal references, i.e. they have not been rendered anonymous, see article 2 paragraph 1 GG in conjunction with article 1 paragraph 1 sentence 1 GG³⁰. The performance evaluation of an IVD represents a biomedical research project using substances collected from a person's body. In any case, in accordance with § 24 paragraph 1 MPG, the consent of the contracting party protected by the GG is consequently necessary if the substances collected from the body shall not be rendered anonymous, in which case the personal right shall no longer be affected, see § 24 paragraph 1 sentence 2 MPG.

Resulting from 3a) and b), the performance evaluation of an IVD can only be conducted on specimens rendered anonymous without the consent of the person from whose body the specimens were collected, if none of the prerequisites referred to in § 24 paragraph 1 sentence 1 MPG interferes and if the examination is not conducted in the context of a blood donation.

Thus, it is a question of whether and when a substance originally collected from a body is rendered anonymous so that data derived from them also no longer carry personal references. The rendering anonymous of substances collected from the body, which have to be regarded as carriers of personal data, is defined as follows in the corresponding application of § 3 paragraph 6 of the Federal Data Protection Act (Bundesdatenschutzgesetz; BDSG)³¹:

'Rendering anonymous' means the modification of personal data so that the information concerning personal or material circumstances can no longer or only with a disproportionate amount of time, expense and labor be attributed to an identified or identifiable individual.'

Rendering anonymous of samples collected in the context of donations for blood transfusion, which are tested for diseases with potentially serious courses like HIV, hepatitis B and C or also vCJD, is not permissible because these samples must remain traceable to the donor, see § 19 paragraph 1 TFG in conjunction with § 14 paragraph 1 of directive 2002/98/EC. It is problematic whether this also applies to samples used in the context of a performance evaluation study of an IVD for the detection of fatal diseases. § 19 paragraph 1 sentence 1 TFG does not differentiate, either in its wording or its spirit and purpose, the possible origin of a justifiable suspicion of an infection with a pathogen causing fatal diseases. Specifically it is not required that the suspicion has arisen in the scope of the eligibility assessment of the donor in accordance with § 5 TFG. In that case the donor would have to be deferred in the first place. In accordance with section 2.1 of Annex III of directive 2004/33/EC, already those 'persons who have a family history which places them at risk of developing a transmissible spongiform encephalopathy (TSE), or persons who have received a corneal or dura mater graft, or who have been treated in the past with medicines made from human pituitary glands' have to be deferred from making allogeneic donations. Additionally, the directive stipulates that 'for variant Creutzfeldt Jakob disease, further precautionary measures may be recommended', loc. cit.

The MPG assumes in § 24 paragraph 1 sentence 1 (3) that the performance evaluation study might be, at the time the study was performed, the only possible way to make a diagnosis regarding an infection or a disease. Blood donors are also tested for their state of health, see § 5 TFG. In this respect the eligibility assessment represents a health check related to a specific occasion. The detection of an infection or a disease made on this occasion may represent a 'diagnosis' in terms of § 24 paragraph 1 sentence 1 (3) MPG and, depending on the stage of development of the IVD, a 'justifiable

³⁰ See Lippert, Forschung an und mit Körpersubstanzen - wann ist die Einwilligung des ehemaligen Trägers erforderlich? MedR 2001, pp. 406 ff.

³¹ FDPA as amended and promulgated on 14 January 2003 (FLG I S. 66), last amended by § 1 of the law of August 22, 2006 (FLG I, S. 1970).

suspicion' in terms of § 19 paragraph 1 sentence 1 TFG as well as possibly a 'confirmed diagnosis' in terms of § 19 paragraph 1 sentence 4 TFG (see also below). This does only apply to persons who are either donors in terms of the TFG or who are suspected to have a disease.

The information and consent of a participant in a performance evaluation study of an IVD which is being developed to screen for vCJD infections is always necessary in accordance with § 19 paragraph 1 TFG, unless the participant is not a blood donor, the blood used has virtually been rendered anonymous and no (no additional) blood is collected expressly for the purpose of participating in the performance evaluation study.

c) Right to the Data Generated from Substances Collected from One's Body as a Fundamental Right of the Donor

aa) Right to Informational Self-Determination, Article 2 Paragraph 1 in Conjunction with Article 1 Paragraph 1 Sentence 1 GG

The right of an individual to principal self-determination regarding whether and which personal data relating to him/her shall be processed has first been inferred in 1983 by the Federal Constitutional Court (Bundesverfassungsgericht; FCC) from the right to Personal Freedoms (article 2 paragraph 1 GG) and Human Dignity (article 1 paragraph 1 sentence 1 GG)³². This fundamental right is not warranted without limitations. However, limitations require to be in accordance with the law and must comply with the principle of commensurability, in particular they must not exceed the degree which is indispensable for the protection of public interest³³.

In Europe the protection of personal data is additionally warranted by article 8 paragraph 1 ECHR (European Convention for the Protection of Human Rights and Fundamental freedoms) as well as by the European directive with regard to the processing of personal data 1995/46/EC³⁴.

In the present context it is a matter of an interference rule in terms of the data privacy laws, in particular regarding the provision in § 11 TFG. In accordance with § 11 paragraph 2 TA, the blood donation establishments are allowed to collect, record and use personal data of the donating persons as far as this is necessary for the purposes referred to in § 11 paragraph 1 TFG. They transmit the recorded data to the competent authorities and the senior federal authority as far as this is required for the surveillance tasks according to the AMG or for the prosecution of criminal offences or a misdemeanor in close connection with the collection of blood. To comply with the collection of risk factors according to the AMG, the date of birth and the gender of the donor have to be specified.

In case a vCJD infection is detected in the context of an eligibility assessment in accordance with § 5 paragraph 1 TFG, the data collected and recorded have to be transmitted to the authorities responsible. This transmission is also indispensable for the protection of national health and is therefore consistent with the Constitution.

bb) Right to Knowledge/Ignore regarding One's State of Health as a Fundamental Right Derived from Article 2 Paragraph 1 in Conjunction with Article 1 Paragraph 1 Sentence 1 GG

The right to informational self-determination derived from article 2 paragraph 1 in conjunction with article 1 paragraph 1 sentence 1 GG also comprises the right to acknowledge/ignore an information regarding oneself.

(1) Right of Access of the Donor regarding Positive Results in the Context of a vCJD Screening Test

It is a question of whether the blood donor had a claim against the blood donation establishment to be informed about the results of a vCJD screening test to which he/she has granted consent if the diagnosis of the infection has not been 'confirmed' in terms of § 19 paragraph 1 sentence 4 TFG, and therefore the physician responsible has no obligation to inform the donor about the test results without being asked by him/her.

The person concerned is entitled to the right to access to personal data processed by a body responsible in accordance with §§ 19, 34 BDSG. He/she cannot effectively abandon his/her right to access, see § 6 paragraph 1 BDSG.

However, the right to access does not apply without restrictions. In this respect one must discriminate between institutions subject to public law and those not subject to public law.

(a) The *provision of information by an institution subject to public law* (health authorities, university clinics or other hospitals with Länder (federal states) or municipalities as their responsible bodies) to the person concerned is *not done in accordance with § 19 paragraph 4 No. 3 BDSG* (or identic Data Protection Acts on the Länder level), as far as '... the data or the fact that they are being stored must be kept secret in accordance with a legal provision or by virtue of their nature, in particular on account of an overriding justified interest of a third party'.

³² Decision of the FCC 65, S. 1, 43 (census).

³³ Decision of the FCC 65, S. 1, 44 (census).

³⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23 November 1995.

It is a question of whether the results of a vCJD test are to be regarded as data that ‘by virtue of their nature ... must be kept secret’ from the person concerned.

First it is noteworthy that the refusal to give information for the benefit of the person concerned has not been included on purpose. As the additional specification ‘... in particular on account of an overriding justified interest of a third party ...’ in § 19 paragraph 4 No. 3 BDSG shows, the data referring to the person seeking information are regularly to be regarded as non-confidential in terms of this specification unless another fact of exclusion according to § 19 paragraph 4 BDSG intervenes. Furthermore, medical data are not by virtue of their nature subject to non-disclosure³⁵. Rather, the refusal to provide information on medical data, especially concerning a presumptive diagnosis, can lead to a violation of the dignity and the right to self-determination of the person concerned (see below for further detail). The Federal Administrative Court (Bundesverwaltungsgericht) of Germany also regards it to be inconsistent with the fundamental right to the free development of one’s personality to deny a former patient at a psychiatric state hospital access to his own records exclusively on the grounds that there was the danger of damage caused to the applicant’s health³⁶.

(b) A similar argumentation applies to the *entitlement to information* if data are processed in the *private sector* (i.e. for example blood donation establishments of relief organizations, privately funded hospitals etc.) in accordance with § 34 paragraph 4 in conjunction with § 33 paragraph 2 sentence 3 BDSG.

In accordance with § 34 paragraph 4 BDSG, the provision of information is not required ‘if the data subject does not have to be notified in accordance with Section 33 (2), sentence 1, Nos. 2, 3 and 5 to 7 of this Act’.

‘The provision of information is not required,’ in accordance with § 33 paragraph 2 sentence 1 (3) BDSG, ‘if (3) the data must be kept secret in accordance with a legal provision or by virtue of their nature, in particular on account of an overriding legal interest of a third party’.

Because the data are collected with the consent of the data subject, notification is no longer required in accordance with § 33 paragraph 1 BDSG. § 34 paragraph 4 BDSG has mainly the purpose not to override the exclusion of notification requirement in accordance with § 33 paragraph 2 BDSG by the entitlement to information granted in accordance with § 34 paragraph 1 BDSG (idea of consistency). Also the data subject cannot effectively abandon his/her right to access, see § 6 paragraph 1 BDSG.

Assuming along with the prevailing opinion that, irrespective of a lacking notification requirement according to § 33 paragraph 1 BDSG, the information should not be provided in case one of the facts of exclusion in § 33 paragraph 2 sentence 1 (2,3) and (5–7) interferes, the factual requirements of § 33 paragraph 2 sentence 1 (3) BDSG are not complied with in the instant case, because a (presumptive) diagnosis of a vCJD infection in the context of a screening test does not represent data to ‘*be kept secret ... by virtue of their nature*’. In the older jurisdiction of the German Federal Court of Justice³⁷ (all of them prior to the coming into effect of directive 1995/46/EC as well as the large-scale amendments of the BDSG in 1990 and 2001) a restriction of the entitlement of a patient, which is generally accepted by the Federal Court of Justice (FCJ), regarding his/her right of inspection³⁸ of his/her own patient’s records is assumed on the grounds of justifiable interests of the physician, the patient or of third parties. This refers particularly to verifiable medical results and reports on therapeutic measures. In particular, this should apply if there was a suicide risk of the person concerned³⁹. Certainly this jurisdiction and the literature agreeing to this to some extent⁴⁰ are not consistent with constitutional requirements.

Medical data of an individual are usually not regarded as subject to non-disclosure⁴¹ ‘by virtue of their nature’, due to an interpretation of the facts of exclusion, consistent with the Constitution, of § 19 paragraph 4 sentence 3, § 33 paragraph 2 sentence 1 (3) in conjunction with § 34 paragraph 4 BDSG. Otherwise the interest protected by the GG (article 2 paragraph 1 in conjunction with article 1 paragraph 1 sentence 1 GG) to know a patient’s disposition to contract a disease in the form of a (presumptive) diagnosis (as far as it is already possible or necessary to speak of a diagnosis based on a positive vCJD test result according to the state of scientific knowledge) would be regularly violated in a disproportionate way. Moreover, the differentiation made by prevailing theory between institutions subject to public law and those not subject to public law, as regards the entitlement to information concerning medical particulars, must be overruled as arbitrary and thus adverse to equality (see article 3 paragraph 1 GG).

Regarding access to patients records, the Federal Constitutional Court has established in its ruling of January 9, 2006⁴²,

³⁵ Similarly the prevailing doctrine, see Gola/Schomerus, Kommentar zum BDSG, 8th ed. 2005, marginal number 28 concerning § 19 with further references; Mallmann, in Simitis (ed.), Kommentar zum BDSG, 2006, marginal number 100 concerning § 19.

³⁶ FAC, NJW 1989, S. 2960.

³⁷ See for example FCJ, NJW 1983, 330.

³⁸ FCJ, NJW 1978, 2337, 2339; NJW 1985, 674.

³⁹ See Dix, in Simitis (ed.), Kommentar zum BDSG, 2006, marginal number 76 concerning § 33.

⁴⁰ See Gola/Schomerus, Kommentar zum BDSG, 8th ed. 2005, marginal number 34 concerning § 33; Dix, loc. cit. (footnote 39).

⁴¹ Similar to here “in principle” also Dix, loc. cit. (footnote 39).

⁴² FCJ, 2 BvR 443/02, www.bverfg.de/entscheidungen/rk20060109_2bvr044302.html.

'that the right to self-determination and personal dignity of a patient (article 1 paragraph 1 in conjunction with article 2 paragraph 1 GG) demand to generally acknowledge to every patient to be entitled against his or her physician and hospital to the right of inspection of their own medical records. Although this right to information has been granted with some restrictions based on the constitution [...] This does not change the fact, however, that it is based directly on the right to self-determination ensured by the GG and only has to take second place if there are accordingly grave conflicting interests. ... During the accordingly necessary consideration considerable importance is principally accorded to the patient's informational interests. Medical records with their data on anamnesis, diagnosis and therapeutic measures concern the patient directly in his or her privacy. ... Therefore and because of the possibly considerable relevance of the data contained in such records for self-determined decisions the treated person may make, this person is principally granted an ensured interest in learning how his or her health has been dealt with, which data have resulted from this and how the further course is assessed.'

The refusal to inform someone about a vCJD infection which was (allegedly or factually) detected by an IVD can only take place if this is justified by predominantly constitutional interests on an individual basis.

In the current context this is possibly provided only as long and as far as IVDs under development or developed for the detection of vCJD infections show the predominant probability of false-positive results. In these cases the principally justified informational interest of a person undergoing a vCJD test could possibly be counterbalanced by protecting his/her mental and emotional health, with the consequence that (for the time being) a positive result does not have to be disclosed to the person.

However, this is on condition that the disclosure of a medical result endangers the further treatment of a patient, as is conceivable for example in the case of a severe psychiatric disease. In an otherwise healthy blood donor this condition can not be answered in the affirmative. Also the fact that there is no therapy available for the vCJD disease does not support a refusal of the right to disclosure because the treatment of the infected person cannot actually be endangered by the disclosure of a positive result. The alleged or factual threat to the mental health and an possibly accompanying suicidal tendency in a person affected by a vCJD infection can and furthermore has to be adequately effectively averted by other measures regarding treatment and care.

Even the legislator, in § 19 paragraph 1 sentence 4 TFG, has required the physician responsible to notify the donor about a test result in case a confirmed diagnosis of an infection or a disease was made in the context of donating blood, even though a threat to the emotional and/or physical health could possibly be caused by this information and its failed assimilation. This evaluation intended by using the *lex-specialis* regulation does not support to regularly exclude the entitlement to information of the donor against the blood donation establishments about a finding below the level of confirmed diagnosis, in accordance with the specifications of the BDSG.

If the Federal Legislator wishes to exercise the official authority (to be found in article 13 paragraph 1 f) of directive 1995/46/EC) to deviate legally effectively from the right to disclosure (specified in article 12 of this directive) for the protection of the data subject regarding his/her medical data processed in the context of donating blood, due to the rule-of-law principle (article 20 paragraph 3 GG), this must be done in a sufficiently determined way, that is by explicitly including the data subject and the protective purpose mentioned in the directive into a fact of exclusion (doctrine of constitutional proviso)⁴³. In this respect it would be convenient, if applicable, to amend § 19 paragraph 1 TFG. In any case, from the specifications of the BDSG referred to, the blood donor who is subject to the law cannot conclude that information on his/her own state of health that affects him- or herself existentially and are critical for his/her future life may be withheld for his/her protection, without any other fact of exclusion present, due to other legally not particularly specified requirements to keep the data secret.

Results to (1): Because the refusal to provide information represents a violation of fundamental rights (right to informational self-determination, see article 2 paragraph 1 sentence 1 GG in conjunction with article 1 paragraph 1 sentence 1 GG), such a refusal is only possible on the basis of a sufficiently determined law (so-called doctrine of constitutional proviso). As a result, there are at any rate no legal grounds for the refusal to provide information to a person who has been tested for vCJD with his/her consent, provided that there are no grounds to assume that the positive test result for vCJD was a false-positive result, see §§ 19 paragraph 4 No. 3, 34 paragraph 4 in conjunction with 33 paragraph 2 No. 3 BDSG. Because of his contractual obligation to save the life and welfare of the donor, the information about the test result has to be given by a medical doctor who offers him medical and non-medical help and advice at the same time, if necessary.

(2) Requirement to Notify the Donor in the Case of a Positive Test Result in the Screening Test for the Detection of a vCJD infection in accordance with § 19 paragraph 1 sentence 4 TFG

In accordance with § 19 paragraph 1 sentence 4 TFG, the physician responsible is required to notify the donating person in the case of a 'confirmed diagnosis' of an infection which could lead to a severe disease. The whole purpose of this requirement to notify the donor is to thus provide him/her with the opportunity, if applicable, to initiate in time curative

⁴³ Consistent ruling of the FCJ, see for this *Sachs*, in *Sachs* (ed.), *Kommentar zum Grundgesetz*, 4th ed. 2007, marginal number 113 ff. concerning § 20 with further references.

or symptomatic therapeutic measures and – in the case of an infection risk for third parties – to prevent a (further) spreading of the disease by his/her own responsible behavior. In conjunction with §§ 223, 229 Penal Code as well as with civil liability derived from § 823 paragraph 1 and 2 of the Civil Code, in the latter sense it serves to protect the life and health of third parties, see article 2 paragraph 2 sentence 1 GG.

Notification in accordance with § 19 paragraph 1 sentence 4 TFG represents an interference with the donor's right to informational self-determination in the shape of the 'right to ignorance'. In fact, on implementation of European directives they themselves and not the Constitution are a yardstick regarding the right of the Member States⁴⁴. Although directive 2002/98/EC does not encompass a responsibility of the Member State to inform the infected donor regarding the nature of his/her infection, however, a claim is put in (which is not legally binding for the Member States) that in the case abnormal findings are reported to the donor, relevant counselling is also provided (see loc. cit. recital 19). Such a responsibility to inform does also not result from article 2 in conjunction with sentence 8 in Annex II A of directive 2004/33/EC. According to this, it is required to inform a donor about the responsibility of the blood establishment to notify the donor, through an appropriate mechanism, if test results show any abnormality of significance to the donor's health. However, this does not mean that there was a responsibility based on European Law to inform a donor about a specific positive test result without his/her consent.

According to § 19 paragraph 1 sentence 4 TFG, the origin of a confirmed diagnosis of an infection with an agent causing a severe disease is irrelevant. Rather the fact is sufficient that it occurred 'on the occasion of the donation'. The state of infection has to be considered to be 'confirmed' in those cases where the test regimen used according to recommendation (Votum) 24 (new: 34) of the National Advisory Committee 'Blood' leaves no doubt about the presence of an infection⁴⁵. Here again it is theoretically assumed that after all there was a second test assay available to confirm the vCJD screening test. Since the 'confirmed diagnosis' implies a higher level of certainty than the 'justifiable suspicion' in terms of § 19 paragraph 1 sentence 1 TFG, it cannot be departed from the requirement of a positive result in the context of a reference test, or only be departed under special circumstances. Therefore, it is a question of whether the interference with the right to ignorance, provided for in § 19 paragraph 1 sentence 4 TFG, in the shape of the responsibility of the physician to inform about a vCJD infection was constitutionally justified and required, if applicable, even if no confirmation test is available.

This depends on whether the responsibility to inform in order to safeguard public interests, which overrule the right to ignorance of the donor, was suitable and necessary for this, provided that there was no gentler way to reach the intended purpose (principle of commensurability)⁴⁶.

The right to life and physical integrity of the donors and the potential recipients of blood samples, but also of others who come into contact with the blood of an infected donor (like surgeons or dentists), is the public interest overruling the right to ignorance, see article 2 paragraph 2 sentence 1 GG. The transmission of agents causing severe diseases to third parties is not impossible if there are further donations from the infected donor. Furthermore, it must be considered that there is no nationwide information system to securely exclude the infected person from further donations. But the risk that this measure is not always sufficient to prevent transmission by contact with blood cannot be totally dismissed. Therefore the information of the donor about the 'confirmed diagnosis' serves to protect fundamental rights of the donor, but also the rights of third parties to life and physical integrity, see article 2 paragraph 2 sentence 1 GG⁴⁷. A gentler and equally suitable way to realize health protection is not in evidence.

From the point of view of the infected donor the information about a positive vCJD screening test result might represent a particular hardship because on being informed he/she has to face the possibility of having an incurable and fatal disease. On the other hand this might mean the chance to deal with this situation actively and responsibly while still in full possession of his/her mental and physical abilities during the incubation period, and, if applicable, to plan and take measures regarding care and/or therapy in time and, if applicable, to arrange his/her family affairs. At any rate, an initial and accompanying medical counselling (see § 19 paragraph 1 sentence 5 TFG) and pastoral or psychological care are required in these cases to avoid suicidal actions.

But there is no requirement to notify the donor in those cases in which the possibility remains that the result established by the IVD is probably a false-positive result and that therefore the test method does not justify the assumption of a 'confirmed diagnosis' according to the state of the art. At any rate, it will no longer be able to assume this with good cause after the assay has obtained CE marking and was tested regarding the requirements applying for IVDs mentioned in List A of Annex II of directive 1998/79/EC, after specificity and sensitivity have been established in the context of performance evaluation studies, and after several other tests using the same procedure show a positive result for the donor.

⁴⁴ Concerning the dictate of interpretation consistent with the directive, see in lieu of many others only ECJ, decision of October 5, 2004, C-397 to C-401/01 (Pfeiffer and others) - collection 2004, S. I-8835.

⁴⁵ See *v. Auer*, loc. cit., footnote 27, marginal number 16 concerning § 19.

⁴⁶ FCJ has consistently ruled, see only decision of the FCJ 33, 367, 376 f. = NJW 1972, 2214.

⁴⁷ Similarly, *von Auer*, loc. cit., footnote 27, marginal number 16 concerning § 19.

In case the development and establishment of the only available test for the detection of vCJD has advanced so far that no reasonable doubt was justifiable about the correctness of the test results, one has to assume already a ‘confirmed diagnosis’ in terms of § 19 paragraph 1 sentence 4 TFG if there is a reproducible positive result of a second test using the same and a second sample, even if there is no reference test available to confirm these results.

Depending on its stage of development, the question of the technical suitability of an IVD for a ‘confirmed diagnosis’ which is still subject to performance evaluation studies might therefore be able to be answered in the affirmative or in the negative.

Results to (2): For the time being and in view of the clinically insufficient validation of the screening tests under development for the detection of a vCJD, it cannot yet be assumed to regard a positive test result as a ‘confirmed diagnosis’ of the infection status. Therefore, according to the opinion held here, there is as yet no notification requirement in the case of a positive test result, in accordance with § 19 paragraph 1 sentence 4 TFG, subject to further development. This is without prejudice to the right of the donor to get information about the test results in accordance to §§ 19, 34 BDSG.

(3) Information of the Recipient of an Infected Donation, If Applicable, in Accordance with § 19 Paragraph 1 sentences 6–8 TG

These sentences read:

‘If blood products, for which there is a justifiable suspicion that they transmit infective agents, have been used, then health care institutions are required to inform the persons treated without delay and to recommend that they get tested. Prior to getting tested the written consent of the person treated has to be obtained. The person treated must receive in-depth counseling.’

The term ‘justifiable suspicion’ must be interpreted similar to § 19 paragraph 1 sentence 1 TFG⁴⁸ so that in this case health care institutions are also required to inform the recipients of a donation.

d) Set of Problems Regarding (False-Positive) vCJD Results in the Context of Performance Evaluation Studies and Application of IVDs Approved for This Purpose in the Transfusion Medicine and Their Consequences for the Disposition to Donate Blood

In accordance with article 20 paragraph 1 of directive 2002/98/EC,

‘Member States shall take the necessary measures to encourage voluntary and unpaid blood donations with a view to ensuring that blood and blood components are in so far as possible provided from such donations’

the purpose of the TFG is opposed to a decline in the disposition to donate blood, see § 1 TFG. It must be established, though, that, according to the concept of directive 2002/98/EC as well as the TFG, the disposition to donate blood is not subordinate to the safety of the donations; rather on the contrary, the safety of the donations shall raise among other things the disposition to donate blood.

If and as far as in the eligibility examinations that have to be performed according to § 5 TFG agents causing severe diseases can be detected that also have to be reported to the donor, among others, the possibly associated decline in the disposition to donate blood is accepted by the law in favor of the safety of donations.

In the context of vCJD infections, the development and application of IVDs for their detection cannot be prohibited on principle by referring to a decline in the disposition to donate blood.

4 Liability of the Manufacturer of an IVD for the Detection of vCJD infections in the Case of False-Positive Results on the Grounds of Subsequent Suicide of the Person Affected

It must be examined whether the manufacturer of an IVD was liable for the consequences of a false-positive test result. Prior to CE certification and approval for the market, this is not the case because the suitability must first be established. For this reason also, in case the premises of § 24 paragraph 1 MPG apply, especially sentence 3, an insurance for the test persons must be taken out, see § 20 paragraph 1 sentence 9 in conjunction with paragraph 3 MPG. After the IVD has been approved for the market, § 1 paragraph 1 of the Product Liability Act applies. According to this, the manufacturer of a product is liable to compensate the person harmed for the damage resulting from it if someone is killed on account of a defect in a product or if his/her body or health is harmed or an object is damaged. An allegedly positive, but actually

⁴⁸ In cases of a potential transmission of HIV, HBV or HCV infection the National Advisory Committee ‘Blood’ requires in section 1.3 of the recommendation 34 (loc. cit., footnote 28 that the infection in the recipient must be ‘confirmed’ and critical evidence must exist indicating that the infection was transmitted by transfused blood products.

false-positive or false-negative result of a test screening for a vCJD infection might possibly lead to suicide in the person affected or to the spreading of an infection, for example by blood donation. However, in the former case this is not a direct consequence of the defect in the product, but rather the consequence of a self-harming act of the person harmed. Even if on the other hand the attribution of the suicide is answered in the affirmative, despite the interrupted causal course and the principle of the personal responsibility of the donor, and if one basically acted on the assumption that the facts of § 1 paragraph 1 of the Product Liability Act are complied with, a reduction of liability would have to be assumed because of the contributory negligence of the person affected, in accordance with § 6 paragraph 1 Product Liability Act in conjunction with § 254 of the German Civil Code (BGB)⁴⁹.

5 Involvement of Ethics Commissions in the Performance Evaluation Studies of IVDs

a) In Accordance with § 24 Paragraph 1 MPG in Conjunction with § 20 Paragraph 7 MPG

In the cases mentioned in § 24 paragraph 1 sentence 1 MPG, an opinion from an independent Ethics Commission registered with the competent senior federal authority must be obtained prior to performing a performance evaluation study of an IVD, see § 24 paragraph 1 sentence 1 MPG in conjunction with § 20 paragraphs 7 and 8 MPG. Since the favorable opinion of this Ethics Commission is not mandatory, see § 20 paragraph 7 sentence 3 MPG, it merely concerns a simple administrative action in the shape of a consultation. The opinion of the Ethics Commission therefore does not constitute an administrative decision in terms of § 35 paragraph 1 Administrative Procedures Law. However, the Ethics Commission must perform the consultation according to the legislation in force because it turns into an authority in terms of § 1 paragraph 4 Administrative Procedures Law by becoming entrusted with public power, which is meant by the registration in accordance with § 20 paragraph 8 MPG. As a member of the executive it is bound by law and justice in accordance with article 20 paragraph 3 GG⁵⁰. In this connection the task of the Ethics Commission is to ensure that the investigational plan, with the necessary documentation, is discussed by at least five commission members especially from the ethical and legal points of view and to verify whether the prerequisites contained in § 20 paragraph 1 sentences 1 and 4–9, paragraph 4 sentences 1–3 and paragraph 5 MPG have been met. In this connection it stands out in a negative way that no opinion is expected from the Ethics Commission regarding the contents of the information provided to the study participant and his/her consent.

b) On the Basis of § 15 of the Medical Association's Professional Code of Conduct on the Länder Level

For the most part the Ethics Commissions have been established at the Medical Associations or the medical university faculties, by or due to the laws concerning health-care professionals or the Medical Associations of the Länder. Pursuant to the laws and the articles, their paramount task is to provide advice to the members of the Medical Association and the medical faculties⁵¹. This corresponds to the requirement by law and by their professional code of conduct that the members of the Medical Association are advised by an Ethics Commission established there in the case of a biomedical research project, see § 15 of the Länder Medical Association's professional code of conduct. Even if the prerequisites of § 24 paragraph 1 sentence 1 MPG do not apply and it is therefore unnecessary to involve an Ethics Commission in accordance with § 20 paragraph 1 sentence 7 MPG, it might be necessary to appeal in advance to the Ethics Commission due to the professional code of conduct because of the biomedical character of the performance evaluation study if the person responsible for performing the study is a physician.

Remark: The summary and conclusions drawn from the above review of the legal and ethical aspects is integrated in the main body of the report, under section 5. b).

⁴⁹ Civil Code as amended and promulgated on January 2, 2002 (FLG I S. 42, 2909; 2003 I S. 738), last amended by § 1 of the law of July 4, 2008 (FLG I S. 1188).

⁵⁰ See for this in more detail v. Dewitz, in v. Dewitz/Luft/Pestalozza, Ethik-Kommissionen in der medizinischen Forschung, opinion October 2004, http://webarchiv.bundestag.de/archive/2007/0108/parlament/gremien/kommissionen/archiv15/ethik_med/gutachten/gutachten01_ethikkommissionen.pdf, pp. 237 ff. with further references.

⁵¹ See for example § 4c paragraph 1 Act on the Councils for the Medical Professions Berlin. Gesetz über die Kammern und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Tierärzte, Apotheker, Psychologischen Psychotherapeuten und Kinder- und Jugendlichenpsychotherapeuten (Berliner Kammergesetz)* vom 18. Dezember 1961 in der Fassung vom 4. September 1978.