

# Driving Under the Influence of Psychoactive Substances in Europe and the Phenomenon of Driving Licence Tourism

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## Abstract

*This article contains two main sections. Firstly, a detailed overview of the legal counter-measures for psychoactive driving in the European member states is presented. Thereby, the main focus is put on driving licence related measures, because they are connected Europe-wide with high levels of special and general deterrence. The legal differences of the miscellaneous re-granting procedures are depicted as well, because their impact of getting impaired drivers off the road may not be underestimated. Secondly, the consequence of the heterogeneity of the official regulations especially for licence re-granting - the phenomenon of driving licence tourism - is presented and discussed in detail with very special respect to the jurisdiction of the European Court of Justice. In this context, some possible solutions for this problem for traffic safety are pointed out.*

## A) Introduction

The phenomenon of driving licence tourism is specific to Germany because in all judgments of the European Court of Justice<sup>2</sup> concerning this subject, the Federal Republic of Germany has been the culprit. Licence tourists are citizens with a German domicile, who have lost their licence through a lack of driving suitability, in most cases because they did not pass the medical-psychological examination and, thus, are not able to obtain a licence in Germany. As a result, they attempt to obtain a valid licence in another member state of the European Union (EU)<sup>3</sup>. Although these people have not in actual fact changed their domicile, they apply for the acceptance of their foreign driving licence<sup>4</sup> in Germany. As these driving licence holders do not actually make use of the freedom of movement, driving licence tourism can be defined as the misuse of the European principle of mutual licence acceptance<sup>5</sup>. The lack of driving suitability is mostly based on the previous consumption of alcohol, illicit or medicinal drugs whilst driving. Licence tourists primarily aim to circumvent the stringent German legal regulations concerning licence reinstatement, especially with regard to the obligatory medical-psychological examination. Between July, 2004 and November, 2006, 4,453 of the total of 5,905 foreign licence applicants with a German domicile lost their driving privileges due

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<sup>1</sup> This article only expresses the personal opinion of the author.

<sup>2</sup> See for more detailed information: D).

<sup>3</sup> Weber, Neue Zeitschrift für Verkehrsrecht (NZV) 2009, 310, 311.

<sup>4</sup> Neither the European regulations nor the European Court of Justice (ECJ) make a precise distinction between the driving licence (i. e. the legal permission to drive) and the licence document, but use it in an overlapping sense (see only: Geiger, Straßenverkehrsrecht (SVR) 2008, 366, 367, fn. 9).

<sup>5</sup> Geiger, SVR 2008, 366, 367.

to the consumption of psychoactive substances and were therefore considered to have been driving under the influence (DUI)<sup>6</sup>. As is to be expected, these numbers did not decrease in the aftermath, thus, this phenomenon is connected with measurable endangerments for traffic safety<sup>7</sup>.

This circumvention is based on the lack of European harmonization of the legal regulations concerning driving suitability<sup>8</sup>. To get a better impression of the heterogeneity, the national regulations for psychoactive driving are presented in greater detail in the following section. As will follow, the main focus is placed on driving licence measures and the re-granting procedure, which can be regarded generally as very effective.

## B) Legal practices of the European member states in the case of psychoactive impaired driving

### I. General statements

All European member states recognize that driving under the influence of psychoactive substances is a serious problem for traffic safety<sup>9</sup>. The legal regulations to combat this, however, differ widely across Europe. Unfortunately, the majority of the countries focus specifically on experiences related to driving under the influence of alcohol and attempt to apply these to other psychoactive substances. This approach is rather problematic due to the diverse nature of both subjects, but it is based on the lack of scientific knowledge<sup>10</sup>.

The EU project DRUID<sup>11</sup>, which dealt with the problem of substances that affect the central nervous system whilst driving, was finalized successfully in October, 2011. Within this project, work package 6, task 1 conducted a comprehensive questionnaire survey on legal regulations for driving under the influence of alcohol, illicit and medicinal drugs among all 27 EU member states, Croatia, Norway and Switzerland. The main aim of this survey was to reveal the composition of the current status of legal regulations in this highly dynamical field. The section that follows is mainly based on these results. That said, none of these 30 countries were able to provide an empirical evaluation on the effectiveness of criminal measures.

The prevalence rates for alcohol and drugs consumption amongst drivers in European countries<sup>12</sup> are not conclusive in respect of the effectiveness of any specific legal system. The recognition of societal, historical and legal frame conditions is,

<sup>6</sup> Printings of the German Parliament no 16/3855, pp. 1 f. Updated information is unfortunately unavailable.

<sup>7</sup> Equal: *Grabolle*, Zeitschrift für Schadensrecht (ZfS) 2008, 662, 663; *Zwenger*, ZfS 2006, 543, 549. Another opinion (with respect to the declining number of victims in traffic): *Säffel*, NZV 2007, 493.

<sup>8</sup> See: *Grohmann*, Blutalkohol – Alcohol, drugs and behavior 2005, 106, 113 f.

<sup>9</sup> *Mettke*, Drogen im Straßenverkehr, Neue Kriminologische Studien (Drugs in traffic, New criminological studies), Volume 22, Legal dissertation, , 2001, p. 263.

<sup>10</sup> Organisation for Economic Co-operation and Development (OECD), Drugs in Traffic – Final Report, February 2010, document no: JT 03279147, p. 53.

<sup>11</sup> Details on the DRUID-project can be found on the homepage: [www.druid-project.eu](http://www.druid-project.eu).

<sup>12</sup> See for further details: Europe-wide examination of TISPOL, conducted in December, 2007 (the results can be found in: *Blutalkohol – Alcohol, drugs and behavior* 2008, p. 123).

however, a very important factor when impaired driving is sanctioned. This applies to the creation of the legal regulations as well.

## II. Problems on the factual offence level

### 1. Driving under the influence of alcohol

The general BAC thresholds in Europe range from 0.0 per mille up to 0.8 per mille. Currently, most of the countries have implemented a legal threshold of 0.5 per mille. Only Germany, Italy, Croatia and have implemented a zero-tolerance approach for youth drivers, while many more member states implemented this for first time drivers. Special regulations for professional drivers are only in force in a few countries. With the exception of Spain, all of these states have put zero-tolerance regulations into effect. For all three risk groups, only Germany, Italy and Luxembourg have implemented lower thresholds than for standard drivers. That said, countries without special thresholds tend to impose sanctions for offences of these risk drivers harsher than law infringements of other drivers<sup>13</sup>.

### 2. Driving under the influence of illicit drugs and medicines

Due to the lack of scientific knowledge, no member state is able to implement risk thresholds for driving under the influence of psychoactive substances other than alcohol yet. Thus, there are two different approaches available, the zero-tolerance and the impairment approach. Currently, the majority of the European states pursues the impairment approach, although it is connected with a number of problems relating to evidence. Seven states have implemented the zero-tolerance approach already. Germany, Belgium and Finland pursue a two-tier approach to combat the use of psychoactive substances in drivers. The zero-tolerance approach is therefore valid for some specific substances, which are listed in the national legal regulations. For all other substances, an impairment of the driver must be proven first.

The line taken on the use of illicit substances when driving differs measurably among the European states. For example, in France only driving under the influence of narcotics is forbidden. In contrast, the vast majority of the countries have decided to sanction drivers under all substances which are listed in the general regulations for intoxicants (e. g. Slovakia)<sup>14</sup>. In a lot of these countries, the zero-tolerance approach is implemented as well, while Germany only regards this wide substance-related extension opportune if the driver shows significant signs of im-

<sup>13</sup> See for further details: *DRUID-Deliverable 6.1, State-of-the-Art on Withdrawal of Driving licence – Results of a Questionnaire Survey*, July, 2009, available at: [http://www.druid-project.eu/cdn\\_031/nn\\_107548/Druid/EN/deliverables-list/downloads/Deliverable\\_\\_6\\_\\_1,templateId=raw,property=publicationFile.pdf/Deliverable\\_6\\_1.pdf](http://www.druid-project.eu/cdn_031/nn_107548/Druid/EN/deliverables-list/downloads/Deliverable__6__1,templateId=raw,property=publicationFile.pdf/Deliverable_6_1.pdf), pp. 23 f.

<sup>14</sup> *DRUID-Deliverable 6.1, State-of-the-Art on Withdrawal of Driving licence – Results of a Questionnaire Survey, Annex II (Country reports)*, July 2009, available at: [http://www.druid-project.eu/cdn\\_031/nn\\_107548/Druid/EN/deliverables-list/downloads/Deliverable\\_\\_6\\_\\_1,templateId=raw,property=publicationFile.pdf/Deliverable\\_6\\_1.pdf](http://www.druid-project.eu/cdn_031/nn_107548/Druid/EN/deliverables-list/downloads/Deliverable__6__1,templateId=raw,property=publicationFile.pdf/Deliverable_6_1.pdf), p. 169.

pairment. It seems curious that a violation against the zero-tolerance approach is regarded as a criminal offence (e. g. Bulgaria), because only Belgium, Germany, Finland and Portugal have implemented analytical thresholds, which are capable of indicating at least the possibility of physical and medical impairment. All other countries define the law infringement as the exceeding of the limit of detection<sup>15</sup>. This proceeding contains the undesirable problem of mixing up the objectives of general drug and traffic policy<sup>16</sup>, although the latter is actually only applicable in the case of proven impairing effects of the specific substance. These effects currently remain unproven for all psychoactive substances other than alcohol. For example, Luxembourg defines impairment as the exceeding of a certain substance concentration in saliva. This may lead to a low acceptance among the drivers concerned due to the poor reliability of this detection method.

Some countries do not differentiate between illicit drugs and medicines, while others do. There are also states which do not make differences between prescribed and non-prescribed medicines, but the crucial element for them is the impairment caused by the taken substance (e. g. Germany, Denmark, Estonia, Great Britain, Austria and Cyprus). Latvia has implemented a zero-tolerance approach in the case of driving under the influence of drugs, while for driving under the influence of medicines, the impairment approach is valid. In the case of recidivism within one year, each substance concentration above the limit of detection is regarded as an infringement of the law. In Finland, a zero limit for narcotic substances is in force in general, with the exemption of the driver using a prescribed medicine in the prescribed dose. In this case, only the existence of individual impairment violates the law.

### III. Overview of the legal consequences

#### 1. General aspects

The sanctions for driving under the influence of psychoactive substances among European countries differ less in the case of the generally available measures than in case of the abstract legal sanction frames. Generally speaking, the official reactions are fines, demerit points, driving bans or licence withdrawals and jail sanctions<sup>17</sup>. In all countries in Europe, only the courts have the competence to impose prison terms. Some countries (e. g. Latvia, Lithuania) have introduced the possibility of administrative arrest for a maximum period of 30 days. In the event that the psychoactive driver has caused bodily harm, only courts, and not administrative bodies are authorized to impose sanctions<sup>18</sup>. In this context, it is important to

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<sup>15</sup> *Nickel/de Gier*, Driving under the influence of alcohol and drugs: a survey on zero tolerance, saliva testing and sanctions, October, 2009, p. 14.

<sup>16</sup> *Gillard* in: Pomicou-Group (ed.), Road traffic and psychoactive substances, Proceedings, seminar in Straßbourg from the 18<sup>th</sup> to the 20<sup>th</sup> June, 2003, April 2004, p. 379.

<sup>17</sup> *ESCAPE*, Traffic enforcement in Europe: effects, measures, needs and future – Final report of the ESCAPE consortium, contract no.: RO98-RS.3047, February, 2003, p. 12.

<sup>18</sup> *ESCAPE*, p. 12.

consider that the sanctioning by the administration, which contains also sanctioning by the police, is generally much swifter than the judicial sanctioning procedure, what is connected with higher levels of general and special deterrence<sup>19</sup>. Finally, the legal systems of some countries contain civil consequences like criminal damages or reduced assurance claims.

Italy has adopted a rather interesting concept. The individual sanction imposed can be between a third to a half times greater if driving under the influence of alcohol, drugs or medicines took place between 10 p. m. and 7 a. m.<sup>20</sup>. The intention of this concept is that its impact should act as a stronger deterrent. Nevertheless, this approach can be improved, as during the late evening and early hours of the morning, there are primarily drunken drivers in terms of traffic. In contrast, drivers under the influence of illicit drugs and medicines can be detected more or less constantly through out the day, while drugged drivers crop up more regularly during the night and in the early morning hours. Thus, a substance-related approach might increase the effectiveness of this measure.

## 2. Driving under the influence of alcohol

The way in which offences are categorized differs measurably among the European countries. On the one hand, driving under the influence of alcohol is regarded as an administrative offence in some countries, while it is considered legal practice in Austria and Croatia. Yet even in these two member states, the causation of bodily harm leads to the qualification as a criminal offence.<sup>21</sup> On the other hand, Belgium, Cyprus, Great Britain, Luxembourg and the Netherlands always classify drunken driving as a criminal offence. If driving under the influence of alcohol is considered to be a criminal offence without any exception, the most obvious advantage is a more proportional sanctioning than in case of administrative imposition, which is mostly very abstract for all types of drivers and – at least sometimes – not proportional to the single case. A disadvantage is the hazard of court overloading, because judicial sanctions generally necessitate personal hearings. This must be considered alongside the fact that drunken driving is a mass phenomenon in all European countries. In addition, the classification as a criminal offence might lead to an overestimation of the individual charge of guilt.

For these reasons in particular, the vast majority of the states in Europe considers driving under the influence of alcohol generally to be an administrative offence, while the existence of aggravating circumstances leads to the classification of a criminal offence<sup>22</sup>. Such circumstances are either the causation of an accident (e. g. Lithuania) or having exceeded certain BAC-levels, which range from 0.2 per mille

<sup>19</sup> See for more details: *DRUID-Deliverable 6.1*, p. 51.

<sup>20</sup> *DRUID-Deliverable 6.1*, Annex II, p. 108.

<sup>21</sup> More details to the legal situation in Austria: *Mettke* (see: fn 8), p. 284.

<sup>22</sup> See for further details: *DRUID-Deliverable 6.1*, State-of-the-Art on Withdrawal of Driving licence – Results of a Questionnaire Survey, Annex I (Tables), July, 2009, available at: [http://www.druid-project.eu/cdn\\_031/nn\\_107548/Druid/EN/deliverables-list/downloads/Deliverable\\_\\_6\\_\\_1,templateId=raw,property=publicationFile.pdf/Deliverable\\_6\\_1.pdf](http://www.druid-project.eu/cdn_031/nn_107548/Druid/EN/deliverables-list/downloads/Deliverable__6__1,templateId=raw,property=publicationFile.pdf/Deliverable_6_1.pdf), pp. 38 f.

in Norway and Sweden to 1.2 per mille in Bulgaria, Portugal and Spain. Estonia considers any distance driven with a BAC of at least 1.5 per mille to be a criminal offence without exception, while from 0.5 per mille upward this classification is valid in the case of impairment. Additional circumstances include unsafe driving manoeuvres (e. g. Czech Republic), the existence of general signs of impairment (e. g. Ireland) or the endangerment of other people or valuable goods (e. g. Slovakia). Additionally, recidivism can also lead to an “upgrade” to criminal offence (e. g. Latvia). The definition of recidivism differs considerably between the member states. While in Slovakia the driver has to commit three law violations within twelve months in order to be considered a recidivist, in Slovenia two infringements within two years are sufficient.

All European states legally threaten fines as sanctions for drunken drivers<sup>23</sup>. The upper and lower limits – if they are contained within the regulations of the respective state – vary measurably. The main reason for this lies in the abstract levels of monetary fines, which are predominant in the non-judicial field, which have to take the economical situation of the whole country into consideration.

Not all European legal systems contain the competence to impose jail sanctions upon first-time offenders. For example, in Slovenia the offender can only be held in custody for six to twelve hours. Thus, this measure is to counter any potential danger that may arise from the drunken driver getting behind the wheel before being entirely fit to drive. Consequently, this is not a sanction in the strictest sense of the word. Other countries like Italy, Estonia and Poland have established connections between the sanction frames for jail terms and certain BAC levels. In Romania, the written law does not contain fixed sanction frames, but the judge has the competence to impose proportional sanctions with respect to the circumstances of the case in hand. In Denmark, the jail sanction can be substituted by community services.

In addition, the majority of countries are able to fine offenders with demerit points on their licences<sup>24</sup>. Only single states do not have such a system (e. g. Finland and Ireland). Two different approaches exist for demerit point systems. The system can be accumulative, thus, exceeding a certain number of points leads to the withdrawal of the licence. Alternatively, the system can be subtractive, whereby the credit of good points is reduced by each offence and if the level reaches zero, the licence is automatically withdrawn. In addition, some countries (e. g. Austria and Germany) prolong the testing phase of the driving licence for drink drivers who are youths.

Only Italy imposes vehicle-related measures. In the case of driving with a BAC of more than 1.5 per mille or the refusal of an alcohol breath test, the driven vehicle is impounded and sold at public auction if the car is the offender's property<sup>25</sup>.

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<sup>23</sup> DRUID-Deliverable 6.1, Annex I, pp. 4 f.

<sup>24</sup> DRUID-Deliverable 6.1, Annex I, pp. 10 f.

<sup>25</sup> See: Blutalkohol – Alcohol, drugs and behavior 2008, p. 308.

The police in Belgium have the competence to confiscate the driving licence for a maximum time period of six hours if the driver's breath alcohol concentration is higher than the legal limit. The licence is given back if a further breath test does not detect any alcohol in the body. This measure focuses on danger defence through the reestablishment of driving suitability. In case of drugged driving, the licence can be confiscated for twelve hours.

A driving ban can be imposed in almost all European countries except Denmark, France, Latvia, Sweden and – in some special cases – Austria.

Driving licence withdrawal is the regular official consequence for driving under the influence of alcohol in most countries<sup>26</sup>. Some states only withdraw the licence of first time offenders if a BAC-level measurably above the general level is reached. If the detected BAC-level is below this value, the less severe measure of a driving ban is imposed. Other countries, however, have implemented legal regulations to withdraw the licence in case of first exceeding the legal limit (e. g. Czech Republic and Poland). In this context, the length of the withdrawal period can be combined with the BAC level for which the driver has tested positive (e. g. Austria). Finland is the only EU member state which allows a reduction in the withdrawal period by the installation of an alcohol ignition interlock device.

Licence reinstatement is connected with very different preconditions in the European states. In the Netherlands, no specific withdrawal period is imposed, but the re-establishment of driving suitability is only subject to the reinstatement procedure. In contrast, most countries impose the licence withdrawal for a specific period of time. In some states, it is sufficient to apply for a new licence after the expiration of the withdrawal period (e. g. Bulgaria and Romania)<sup>27</sup>. Other states require a new theoretical and/or practical test, but not a medical or even a psychological examination. It might be doubted that the advantages for traffic safety are as comprehensive as in the case of medical-psychological examinations due to the fact that people with consumption problems are not able to make a precise distinction between drinking and driving without professional psychological support.

In Belgium, licence reinstatement depends on passing a medical and/or psychological examination if the responsible judge considers these measures to be opportune in the given case. In Bulgaria, only in specific cases theoretical and practical driving lessons are required, in all other cases an automatic re-granting of the licence is obligatory. Consequently, apart from its denotation this sanction is a driving ban. In Cyprus, only recidivists have to undergo medical and psychological examinations before their licence is re-granted. In Estonia, the offender has to pass a theoretical test only when the licence has been withdrawn for a minimum period of six months. Other countries like France always impose medical examinations on drunken drivers before reinstatement<sup>28</sup>. Great Britain has implemented a high risk

<sup>26</sup> See for details: *DRUID-Deliverable 6.1*, pp. 17 f.

<sup>27</sup> See for further details: *DRUID-Deliverable 6.1*, Annex I, pp. 18 f.

<sup>28</sup> *DRUID-Deliverable 6.1*, Annex II, p. 68.

offender scheme, which encompasses drivers with a BAC-level of at least 2.0 per mille, recidivists within ten years of having a BAC-level of at least 0.8 per mille and those who refuse a breathalyzer test<sup>29</sup>. These persons have to undergo a medical examination which proves that they do not suffer from alcohol problems and are suitable to drive. Apart from these high risk offenders, the licence re-granting does not require further preconditions. Drunken Italian drivers with a BAC of at least 1.5 per mille have to undergo a medical-psychological examination in each incident. The licence re-granting procedure in Greece does not differentiate between licence withdrawal for psychoactive impairment and for other reasons.

Most legal systems contain a conditional licence withdrawal (i. e. certain restrictions and/or conditions are imposed on the licence holder, but he/she does not lose the driving privileges completely). In contrast, a conditional licence (re)instatement is only part of the legal regulations in Germany, Austria, Estonia, Great Britain and Norway<sup>30</sup>.

Most countries impose more severe sanctions on recidivists than on first-time offenders<sup>31</sup> either by tightening the sanctions that can be imposed on first-time offender (e. g. prolongation of the licence measures or increasing the upper limit for fines) or by adding sanctions which cannot be imposed on first-time offenders (e. g. prison terms).

### 3. Driving under the influence of illicit drugs

At first, driving under the influence of illicit drugs is more often considered to be a criminal offence than driving under the influence of alcohol, even if aggravating circumstances are missing (e. g. Bulgaria and Finland). These countries do not generally pursue the zero-tolerance, but the impairment approach. Austria and Croatia are, once again, the only two states which classify drugged driving as an administrative offence. A considerable number of states “upgrade” the administrative to a criminal offence if aggravating circumstances are proven. These circumstances are either making unsafe manoeuvres (e. g. Czech Republic), having caused an accident (e. g. Lithuania), other obvious signs of impairment (e. g. Malta), recidivism (e. g. Estonia) or having endangered other persons or valuable goods (e. g. Slovakia). Due to the lack of scientific knowledge, no state considers drugged driving as a criminal offence if a certain substance concentration is reached or exceeded.

With the exception of Romania, driving under the influence of illicit drugs can be sanctioned with fines<sup>32</sup>. The majority of the national legal regulations also contains the competence to impose jail terms. Additionally, drugged drivers’ licences are often subject to demerit points. Only a few countries (e. g. Norway, Bulgaria) do not have the legal competence to impose driving bans.

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<sup>29</sup> DRUID-Deliverable 6.1, Annex II, p. 81.

<sup>30</sup> Details on all possible restrictions and conditions: DRUID-Deliverable 6.1, pp. 19 f.

<sup>31</sup> DRUID-Deliverable 6.1, pp. 29 f.

<sup>32</sup> DRUID-Deliverable 6.1, Annex I, pp. 4 f.

While most European countries can sanction drugged driving with licence withdrawal, this is not always the case for driving under the influence of medicines<sup>33</sup>.

The preconditions for licence re-granting are less strict in some countries than in case of drink driving. In Denmark, the reinstatement for drink drivers always comprises passing a rehabilitation course in addition to a theoretical and practical test, while for drugged drivers only these two tests are required, with no further obligatory measures<sup>34</sup>. There are, of course, numerous states which impose the legal obligation to undergo a medical-psychological examination after each occasion that the driver is caught under the influence of drugs (e. g. Austria, Italy and Poland). Finally, other countries in Europe have tighter regulations for the reinstatement after drugged driving than after drink driving. For example, in Hungary, only in the case of driving under the influence of illicit drugs and medicines a psychological examination becomes obligatory. Luxembourg goes even one step further, because not only alcohol recidivists, but also first-time offenders in the case of driving under the influence of drugs or medicines have to be examined by a medic. A psychological examination is obligatory in the two latter cases (for drugged drivers only in case of recidivism), but never for drunken drivers.

#### 4. Driving under the influence of medicines

Although the questionnaire of the DRUID-project dealt only with “driving under the influence of non-prescribed medicines”, a number of countries provided information on prescribed medicines whilst driving in traffic, too. An equation between non-prescribed medicines and illicit drugs does not appear to be wholly unrelated as the underlying motivation of the consumers is similar to that of drug consumption; both groups want to cause intoxication as opposed to healing. Thus, affording medicine consumers a privileged (legal) position is not justified as the consequences in terms of driving suitability for those concerned are quite comparable. Consequently, the sanctions for both situations are the same in some member states (e. g. Lithuania). In contrast, France does not impose separate sanctions on drivers under the influence of non-prescribed medicines, but takes this circumstance into consideration when the causation of an accident is sanctioned<sup>35</sup>. In Portugal, driving under the influence of non-prescribed medicines is not illegal and, thus, there are no legal ramifications. Driving under the influence of any kind of medicine is not subject to any legal regulations in Greece, but the responsible judge has the competence to prosecute and sanction such behaviour<sup>36</sup>.

Driving under the influence of medicines, at least in the case of non-prescribed medicines, is classified very heterogeneously in Europe. Although there are some countries which consider driving in this condition as a criminal offence without exception (e. g. Bulgaria and Cyprus), most states tend to lean towards lighter

<sup>33</sup> See for details: *DRUID-Deliverable 6.1*, pp. 17 f.

<sup>34</sup> *DRUID-Deliverable 6.1, Annex I*, pp. 18, 20.

<sup>35</sup> *DRUID-Deliverable 6.1, Annex II*, p. 65.

<sup>36</sup> See for details: *DRUID-Deliverable 6.1, Annex II*, p. 89.

sanctioning than in case of drunken or drugged driving. Therefore, Latvia, Sweden, Austria and Croatia always classify these law infringements as administrative offences. In accordance with driving under the influence of drugs, some countries “upgrade” this from an administrative to a criminal offence if aggravating circumstances, like having caused an accident, are present (e. g. Slovenia and Norway)<sup>37</sup>.

Generally, driving under the influence of medicines can be sanctioned with the same measures as driving under the influence of illicit drugs (i. e. fines, jail terms, demerit points and driving licence measures). The abstract legal frames for these sanctions are often measurably reduced in comparison to alcohol and illicit drugs, even in the case of non-prescribed medicines (e. g. Austria and Greece). Some countries like Austria, Bulgaria and Croatia waive on an obligatory licence withdrawal. Additionally, the upper limits for sanctions like a driving ban or licence withdrawal can be reduced in comparison to other intoxicated driving (e. g. Czech Republic). In Latvia, only fines and demerit points exist, but no other sanctions can be imposed on the driver. The legal systems of Luxembourg, the Netherlands and Croatia do not contain the (legal) competence to place the offender in custody. There are, nevertheless, legal systems which have in place exactly the same consequences for driving under the influence of medicines and illicit drugs (e. g. Finland, Great Britain, Sweden, Hungary and Cyprus).

Furthermore, there are measurable differences as far as licence reinstatement is concerned. Some states like Lithuania, Slovenia and Spain treat drivers under the influence of any medicine as drunken or drugged drivers. Other countries even regulate tighter preconditions for the re-granting of a licence than in case of alcohol (e. g. in Italy, a medical-psychological examination is obligatory just as it is for illicit drug drivers). Finally, there are countries in which a medical or psychological examination is obligatory, the same as for drunken or drugged drivers (e. g. Croatia and Belgium)<sup>38</sup>.

#### IV. Detection of impaired drivers

This section will close with some short statements regarding the execution of the legal regulations, especially with respect to the competences of the police.

##### 1. Alcohol driving

In a considerable number of European countries it is possible to breathalyse drivers even when they are not under suspicion of DUI, (e. g. Austria, Greece and Hungary). In other states, such action would be regarded as a violation of the rights of personal freedom and physical integrity.

In general, the countries which have implemented evidential breath tests without suspicion of DUI have the lowest rates of alcohol-related accidents<sup>39</sup>.

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<sup>37</sup> See: *DRUID-Deliverable 6.1, Annex I, pp. 38 f.*

<sup>38</sup> *DRUID-Deliverable 6.1, Annex I, pp. 20 ff.*

## 2. Drug driving

In all European member states, a blood analysis is needed to prove drugged driving. The majority of the states use so-called quick tests, which are only feasible if the individual concerned agrees on the basis that their cooperation is required. Controls carried out in the absence of reasonable suspicion are also possible in certain countries as this sort of routine check is not considered to impinge heavily upon the personal rights of the driver.

## 3. Driving under the influence of medicines

Most countries do not place the main emphasis on drivers under the influence of medicines in the hands of the police and the checks that they carry out (e. g. Poland). The Spanish police only tests for benzodiazepines. In Slovenia, the existence of medicines can only be detected if the driver is simultaneously examined for drugs, so, no separate test for medicines exists<sup>40</sup>.

## V. Intermediate results

The previous statements highlight that psychoactive driving is treated very differently among the European member states. While in the field of sanctioning, it is possible to consider this procedure as justifiable, in the field of licence reinstatement, it is not. Licence re-granting of former intoxicated drivers is connected to a high responsibility on the part of the national driving licence agencies. Yet to fulfil this task of protection in relation to other road users, clear and strict legal preconditions for licence re-instatement must be implemented. Unfortunately, the legal systems of a number of countries are not as well equipped as they should be and, so, driving licence tourism appears as a consequence. This phenomenon will be presented and discussed in the next section. The creation of detailed common standards all over Europe is the main objective in this field, as otherwise traffic safety will be endangered on an unacceptable level.

## C) Introduction to the mutual acceptance of European driving licences

After the presentation of the very different preconditions for licence re-granting in the previous section, the following section gives a detailed presentation of the consequences of driving licence tourism.

The principle of mutual acceptance of driving licences in Europe is regulated in Art. 1 II Directive 91/439/EWG (entitled 2<sup>nd</sup> Driving Licence Directive)<sup>41</sup> (Art. 2 I Directive 2006/126/EG (entitled 3<sup>rd</sup> Driving Licence Directive)<sup>42</sup>) and aims at

<sup>39</sup> *European Traffic Safety Council (ETSC)*, A methodological approach to national road safety policy, March, 2006, available at: [http://www.etsc.eu/documents/A\\_methodological\\_approach\\_to\\_national\\_road\\_safety\\_policies.pdf](http://www.etsc.eu/documents/A_methodological_approach_to_national_road_safety_policies.pdf), p. 34.

<sup>40</sup> *DRUID-Deliverable 6.1*, Annex II, pp. 178, 187.

<sup>41</sup> OJ 1991 L 237/1 ff.

ensuring the freedom of movement<sup>43</sup>. Thus, Art. 7 I lit. b of the 2<sup>nd</sup> Driving Licence Directive (Art. 7 I Nr. 1 lit. e of the 3<sup>rd</sup> Driving Licence Directive) requires the domicile of the licence applicant to be in the issuing member state<sup>44</sup>.

The unconditional obligation to accept the licence without any formalities mainly aims at avoiding a check of the correctness of the sovereign act of another European state. For reasons of balance, the Directive requires that the issuing state complies with certain minimum standards<sup>45</sup>. Unfortunately, not all issuing bodies check the legal preconditions as carefully as intended by the European legislator<sup>46</sup>. The European Court of Justice emphasizes very strictly that only the state (re) granting the licence has the competence to check the corresponding preconditions<sup>47</sup>. This perception is mainly based on the equality of all European legal systems. Consequently, the state of acceptance is generally not competent to examine the decision of the issuing state<sup>48</sup>.

From the legal point of view in Germany, licence tourism is important from two different perspectives. On the one hand, the ban to use the licence in Germany is in the main focus. This decision is made by the administrative authorities. The corresponding regulation is contained in Art. 28 of the German Driving Licence Edict. On the other hand, the consequences in the shape of a criminal offence (driving without a valid licence) are very important for the persons concerned. However, as the criminal offence of Art. 21 sec. 1 and 2 no. 1 Road Traffic Act, is only committed if the licence is not accepted by the administration on the basis of Art. 28 Driving Licence Edict<sup>49</sup>, only the latter regulation will be highlighted in detail in the following section.

## D) The regulations of the German Driving Licence Edict

### I. General statements

Art. 28 sec. 1 sentence 1 Driving Licence Edict regulates that driving licences of all European states must be accepted if the licence holder has his/her domicile in the Federal Republic of Germany. The nationality of the licence holder does not matter in this context.

The following points only deal with the different cases of Art. 28 sec. 4 Driving Licence Edict, which contains the legal competence to refuse to accept a foreign

<sup>42</sup> OJ 2003 L 403/18. Most parts of Directive 91/439/EWG will be valid until the 19<sup>th</sup> of January, 2013 (see: Art. 17 I Directive 2006/126/EWG).

<sup>43</sup> Instead of many others: *ECJ*, DAR 2004, 333, 339; *Otte/Kühner*, NZV 2004, 321, 322; *Pießkala*, NZV 2009, 479, 481.

<sup>44</sup> See the more detailed statements: D) II.

<sup>45</sup> So explicit in the statement of the EU-Commission: *ECJ*, DAR 2004, 333, 336. See also: *Otte/Kühner*, NZV 2004, 321, 325.

<sup>46</sup> See only: *Hailbronner/Thoms*, Neue Juristische Wochenschrift (NJW) 2007, 1089, 1092; *Geiger*, SVR 2006, 401, 402.

<sup>47</sup> *ECJ*, DAR 2004, 333, 337; *ECJ*, DAR 2009, 191, 194.

<sup>48</sup> *Hailbronner/Thoms*, NJW 2007, 1089, 1092.

<sup>49</sup> Explicit: *Schäfer*, Deutsches Autorecht (DAR) 2010, 486.

driving licence. The legal existence of a non-German licence is not affected by this regulation due to a lack of corresponding national competence.

## II. Circumvention of the domicile precondition (Art. 28 sec. 4 no. 2 Driving Licence Edict)

Art. 28 sec. 4 no. 2 Driving Licence Edict was reformulated in 2009<sup>50</sup>. The driving privileges are not valid in Germany if the licence holder did not have – at the time of the licence (re)granting – his/her domicile in the issuing state, but in Germany. Only the car registration in the driving licence document or indisputable information of the issuing state are able to prove this circumvention.

The background for this regulation lies in the fact that within recent years, numerous German drivers, who lost their German driving licence, travelled to other European countries and received a new licence during their stay, which often only lasted one weekend. Thus, the domicile requirement is the compelling consequence of the heterogeneity of the preconditions for driving suitability<sup>51</sup>.

The key term is that of the “domicile”. Art. 7 sec. 1 sentence 1 Driving Licence Edict defines it as the location where the licence holder stays for a minimum period of 185 days per year.

The original wording of Art. 28 sec. 4 no. 2 Driving Licence Edict was not in line with European law, as the exclusion of foreign driving privileges was too comprehensive<sup>52</sup>. The judgments of the European Court of Justice are the basis for further understanding the whole set of problems in their entirety, and as such, it is presented in detail in what follows.

Directive 91/439/EWG requires in Art. 1 II<sup>53</sup> the mutual acceptance of European driving licences to ensure the freedom of movement. This aspect is always emphasized by European judges<sup>54</sup>. The acceptance without any formalities must be executed if the licence holder states a change in his/her domicile.

Only the issuing state has the legal competence to check the preconditions for licence (re)instatement, which comprises the domicile precondition as well. The latter aspect is regulated in Art. 7 sec. 1 lit. b Directive 91/439/EWG (Art. 12 sec. 1 Directive 2006/126/EG)<sup>55</sup>. When the licence document is presented by the licence holder, the state accepting it has to assume that the issuing state has checked and approved the necessary preconditions<sup>56</sup>. Art. 12 sec. 3 Directive 91/439/EWG<sup>57</sup> contains the obligation of the state accepting the licence to inform the issuing state about concerns in relation to the correctness of the licence, because only this second

<sup>50</sup> Third Edict to Change the German Driving Licence Edict of the 7<sup>th</sup> of January 2009 (Journal of the legal regulations in the Federal Republic of Germany, part I, 2009, pp. 29 f.).

<sup>51</sup> See only: *Oberverwaltungsgericht Lüneburg*, DAR 2005, 704, 705.

<sup>52</sup> So already: *Geiger*, DAR 2006, 490, 492.

<sup>53</sup> This obligation is equally contained in Art. 2 I Directive 2006/126/EG.

<sup>54</sup> This narrow point of view was criticised by *Geiger*, SVR 2008, 366, 371.

<sup>55</sup> *Dauer*, NJW 2010, 2758, 2761; *Oberverwaltungsgericht Lüneburg*, DAR 2005, 704, 705 f.

<sup>56</sup> *Otte/Kühner*, NZV 2004, 321, 322. Latest decision in this context: *ECJ*, NJW 2010, 217, 218.

<sup>57</sup> Generally formulated: Art. 15 Directive 2006/126/EG.

state has the legal possibility to impose appropriate measures on the licence holder<sup>58</sup>. If these measures are not executed<sup>59</sup>, a contract violation procedure can be launched according to Art. 259 of the Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union<sup>60</sup>.

In two decisions, the European Court of Justice restricted its judgment which emphasized the principle of mutual acceptance. Under very narrow preconditions, it is possible to refuse the acceptance of the licence<sup>61</sup>. Nevertheless, the principle of mutual acceptance is still very important for the European Court of Justice.

The decisions in the cases *Wiedemann* and *Zerche* clarified that a violation of the domicile principle, which is contained in the 3<sup>rd</sup> Driving Licence Directive and aims at combating driving licence tourism, leads to the competence to refuse the acceptance<sup>62</sup>. On the one hand, the licence must not be accepted if the violation of the domicile principle becomes obvious from the licence document itself<sup>63</sup>. This is regularly the case if the registered domicile is not located in the issuing state. On the other hand, the acceptance must not be executed if the violation of the domicile principle is based on undisputable information of the issuing state<sup>64</sup>. For this alternative, it is necessary that no reasonable doubts exist that the person concerned had – at the time of issue – his/her domicile in the issuing state<sup>65</sup>. The accepting state has the competence to make an enquiry in terms of administrative assistance at the issuing state<sup>66</sup>, at least if there is reasonable doubt that the domicile precondition was met<sup>67</sup>. This information can be used in the procedure of denial. However, it is not sufficient that the accepting state somehow acquires information that the domicile principle was infringed at the time of (re)granting<sup>68</sup>. When the named situations are present, the accepting state has the competence to uphold the validity of the licence until this circumstance is clarified<sup>69</sup>.

It is possible to doubt the effectiveness of both exceptions to combat driving licence tourism<sup>70</sup>. On the one hand, the registration of the domicile in the licence document is not obligatory, thus, it can be left out by the authorities without any consequences. On the other hand, it is questionable in which cases the issuing state will provide undisputable information concerning the violation of the domicile principle<sup>71</sup>, because this would prove the infringement of the legal obligations

<sup>58</sup> Latest decision in this context: *ECJ*, NJW 2010, 217, 218.

<sup>59</sup> This appears rather often (see only: *Verwaltungsgerichtshof Baden-Württemberg*, 21. 6. 2006, case 10 S 1337/05).

<sup>60</sup> OJ EG 2008 C 115/13. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:de:PDF>.

<sup>61</sup> Explicit: *Bundesverwaltungsgericht*, NJW 2010, 1828, 1829.

<sup>62</sup> *ECJ*, NJW 2008, 2403, 2407.

<sup>63</sup> Equal: *Bundesverwaltungsgericht*, DAR 2009, 212, 214 f.; *Oberlandesgericht Oldenburg*, NZV 2010, 305; *Oberverwaltungsgericht Koblenz*, DAR 2010, 535, 536.

<sup>64</sup> *European Court of Justice*, DAR 2008, 459, 463.

<sup>65</sup> *Geiger*, DAR 2010, 61.

<sup>66</sup> *Verwaltungsgerichtshof Baden-Württemberg*, *Blutalkohol – Alcohol, drugs and behavior* 2010, 41, 43.

<sup>67</sup> Equal: *Bundesverwaltungsgericht*, NJW 2010, 1828, 1830. *Dauer*, NJW 2010, 1830, 1831 states that these doubts are regularly present in cases of driving licence tourism.

<sup>68</sup> *Brenner*, DAR 2005, 363, 366.

<sup>69</sup> *ECJ*, NJW 2008, 2403, 2408.

<sup>70</sup> Similar: *König*, DAR 2008, 464. Other opinion: *Zwergler*, ZfS 2008, 609, 611.

written down in the EU Driving Licence Directive. This would justify the introduction of a contract violation procedure, which is regulated in Art. 259 of the Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union<sup>72</sup>. Finally, the effectiveness of the request within administrative assistance to combat driving licence tourism is questionable<sup>73</sup>.

The second exception was specified by the European Court of Justice in the *Wierer* case. Within this decision, the court emphasized the importance of the principle of mutual acceptance<sup>74</sup>. The sources of information, which can be used legally by the state of acceptance to justify the denial of a licence, are enumeratively listed in the former judgments<sup>75</sup>. Statements made by the person concerned, which he/she has to declare in relation to national authorities or courts due to the legal obligations of the accepting state, are not valid sources of information<sup>76</sup>.

Furthermore, the European Court of Justice decided that the statement of the issuing authorities, that the domicile principle was not checked, is not enough to meet the criterion “undisputable information of the issuing state”. This is a rather narrow point of view and will make the daily task of the acceptance authorities in the fight against licence tourism more complicated. The court justified this decision on the basis that a missing check of this precondition must not automatically result in a violation. This decision is, therefore, in line with former judgments of the court. In this specific case, the accumulation of all circumstances should have led to a denial of the domicile precondition, especially with respect to the individual explanation of the person concerned that this requirement was not actually fulfilled. Consequently, only information issued by the registry offices or other official authorities constitutes valid sources of information, while information given by private persons and entities, such as employees or landlords are not. It has yet to be seen whether the European Court of Justice will also disapprove statements made by the individual concerned, statements which he/she freely declares without any legal obligations to do so. In light of former judgments, the potential outcome seems rather clear.

In the interim, the wording of Art. 28 sec. 4 no. 2 Driving Licence Edict has been modified. The European Court of Justice approved this regulation as comparable with European law in the *Grasser*-case in which not the reinstatement, but the first-time application of a licence was at issue<sup>77</sup>. This is unique for all European judgments in this field and, thus, it is sufficient to prove a violation of the domicile principle. As such, the driving licence holder must not have been subject to licence measures in the accepting country as well. This point of view was predominant among a number of courts in Germany due to the factual situation in all former

<sup>71</sup> *Dauer*, NJW 2008, 2381, 2382; *Geiger*, SVR 2008, 366, 371.

<sup>72</sup> *Saurer*, JURA 2009, 260, 263, margin no 40.

<sup>73</sup> Rather similar: *Geiger*, DAR 2008, 463.

<sup>74</sup> *ECJ*, NJW 2010, 217.

<sup>75</sup> *ECJ*, NJW 2010, 217, 219.

<sup>76</sup> Similar: *Oberverwaltungsgericht Saarlouis*, 2. 12. 2009, case 1 A 358/09 margin no 58. Other opinion: *Verwaltungsgerichtshof Mannheim*, NJW 2009, 698.

<sup>77</sup> *ECJ*, 19. 5. 2011, case C-184/10.

European judgments, where such a measure had been imposed on the foreign licence holder before he/she applied for a new licence. In all of these cases, the licence withdrawal had been imposed due to drunken or drugged driving (i. e. the preconditions of Art. 28 sec. 4 no. 3 Driving Licence Edict were met simultaneously)<sup>78</sup>.

The Licence Directive does not contain an explicit legal consequence for the violation of the domicile principle. Thus, it was assumed that the European legislator had only regarded this violation as a formal law infringement, which does not justify the nullity of the licence as a whole. The former judgments of the European Court of Justice awarded the competence for withdrawal of the licence due to a violation of the domicile principle to the issuing state alone, to the exclusion of the accepting state<sup>79</sup>.

As such, prior to the judgment of the European court in the *Grasser*- case, it was argued that only in cases with a previously imposed licence measure was the refusal in keeping with the European law and judgment. This point of view was founded on the basis that not every circumvention of the domicile principle is connected with an increased danger to traffic safety, as this is not compellingly connected with an unreliability of the licence applicant<sup>80</sup> (e. g. when the driving lessons and the test are cheaper in the foreign state and the licence applicant chooses this state only for monetary reasons). As a consequence, this notion did not apply Art. 28 sec. 4 no. 2 Driving Licence Edict in case of a sole violation of the domicile precondition<sup>81</sup>. Nevertheless, the European Court of Justice expressed the opposite point of view in the named judgment of 19<sup>th</sup> May, 2011. It might be argued that the European court went one step too far in this judgment, because the motivation of Mrs. Grasser to apply for the licence in another EU state was not discussed. If this had been done and it had been revealed that only financial reasons were the crucial aspects of this „circumvention“, the decision would be not in line with the former judgments and the Driving Licence Directive, because the main objective of the domicile principle is the combat of licence tourism and, in turn, of hazards for traffic safety. If these aspects are not relevant to the specific case in hand, however, it is not justified to sharpen the former judgment. To sum up, the refusal of a foreign driving licence is only justified if the circumvention of the strict German driving licence regulations was the main aim of the applicant. If this is not the case, as it could have been in the case of Mrs. Grasser, especially due to the fact that she was not reapplying, but a first-time applicant, then refusing acceptance is not justified. Finally, the circumvention is more often present among those reapplying than among first-time applicants.

The Directive 91/439/EWG did not contain any legal consequences for the violation of the domicile precondition regulated in Art. 7 sec. 1 lit. b. However, the

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<sup>78</sup> See for this topic: *Pießkalla*, NZV 2009, 479.

<sup>79</sup> ECJ, NJW 2008, 2403, 2406.

<sup>80</sup> Equal: *Verwaltungsgericht Kassel*, Blutalkohol – alcohol, drugs and behavior 2010, 53, 54; *Geiger*, DAR 2006, 490, 493.

<sup>81</sup> See only: *Oberverwaltungsgericht Rheinland-Pfalz*, Blutalkohol – alcohol, drugs and behavior 2010, 261. Other opinion: *Geiger*, DAR 2010, 61, 61 f.

situation changed with the implementation of the EU Directive 2006/126/EG. Art. 7 sec. 5 subsec. 2, orders that the fulfilment of the requirements of sec. 1, which contains in lit. e the necessity of the domicile in the issuing state, must be carefully checked by the issuing state. Consequently, only this state under the second clause of sec. 5 subsec. 2 has the competence, but also the obligation, to withdraw the licence due to a lack of issuing preconditions. As a result, the judgment of the European Court of Justice of 19<sup>th</sup> May, 2011, must be approved, because it emphasizes – in contrast to judgments in the past – the importance of traffic safety and its endangerment owing to the phenomenon of licence tourism, which may be partly reduced by this new decision.<sup>82</sup>

### III. Circumvention of a national driving licence measure (Art. 28 sec. 4 no. 3 and 5 Driving Licence Edict)

A comprehensive understanding of the national regulations requires a brief presentation of the European legal foundations. Art. 11 sec. 4 sentence 2 of Directive 2006/126/EG contains the obligation of a member state to refuse a foreign European driving licence if the accepting state had imposed licence related measures on the holder. This regulation has been in force since 19<sup>th</sup> January, 2009, (see: Art. 18 sec. 2 Directive 2006/126/EG).

This European regulation has been transformed in German law with the regulation of the 7<sup>th</sup> January, 2009<sup>83</sup>. Art. 28 sec. 4 no. 3 Driving Licence Edict allows the refusal of a driving licence which has been issued since 19<sup>th</sup> January, 2009, as far as the holder had had been subject of licence measures of courts or administrative bodies in the accepting state.

The wording of Art. 28 sec. 4 no. 3 Driving Licence Edict was not changed<sup>84</sup>, because the German legislator stated that the restrictive interpretation of the European Court of Justice in relation to Art. 8 sec. 4 sentence 1 of Directive 91/439/EWG was no longer valid due to the change in European law. In the following, the validity of this assumption is examined.

This point of view is mainly based on the circumstance that Directive 2006/126/EG aims at combating licence tourism<sup>85</sup>. Moreover, the transformation of Art. 8 sec. 4 sentence 1 of Directive 91/439/EWG, which contained a facultative regulation, into the compelling norm of Art. 11 sec. 4 sentence 2 of Directive 2006/126/EG seems to justify the narrow interpretation as an exception no longer<sup>86</sup>.

The opposite point of view is primarily based on systematic aspects. The character of a regulation does not only change due to the lapse of the discretion rights<sup>87</sup>.

<sup>82</sup> Explicit: *ECJ*, 19. 5. 2011, case C-184/10.

<sup>83</sup> Official Journal of the legal regulations in the Federal Republic of Germany, part I, 2009, pp. 29 f.

<sup>84</sup> *Jancker*, DAR 2009, 181, 183.

<sup>85</sup> Explicit: *Oberlandesgericht Stuttgart*, NJW 2010, 2818, 2819 f.; *Verwaltungsgerichtshof Mannheim*, NJW 2010, 2821, 2823 f.

<sup>86</sup> Instead of others: *Jancker* in: *Burmann/Heß/Jahnke/Jancker* (eds.), *Straßenverkehrsrecht* (Traffic law), 21. run, 2010, § 2 StVG (Art. 2 German Road Traffic Act); *Verwaltungsgerichtshof Mannheim*, DAR 2010, 153, 155; *Verwaltungsgerichtshof Munich*, NZV 2007, 539, 541.

As the European legislator was familiar with the restrictive judgment of the European Court of Justice, it might be expected that – despite imposing norms in the combat against driving licence tourism with the introduction of the 3<sup>rd</sup> Driving Licence Directive – the new regulation would contain a clear statement in relation to this aspect, especially with respect to the conflict between the restriction of the principle of mutual acceptance and the freedom of movement<sup>88</sup>. Furthermore, the judgments in the cases of “Wiedemann”<sup>89</sup> and “Zerche”<sup>90</sup> were important cornerstones for the creation of Art. 11 sec. 4 sentence 2 Directive 2006/126/EG. Finally, the European legislator does not wish to devaluate the principle of mutual acceptance when combating the phenomenon of driving licence tourism<sup>91</sup>. In short, the stronger arguments are connected with the second opinion and, thus, the judgment of the European Court of Justice, which only refers to the level of sanctions, but not to the level of legal facts of Art. 8 sec. 4 sentence 1 Directive 91/439/EWG<sup>92</sup>, will be valid in future as well<sup>93</sup>. Consequently, the regulation of Art. 28 sec. 4 no. 3 German Driving Licence Edict is still only partly in accordance with European law<sup>94</sup>.

As it currently remains unclear whether the former judgment of the European Court of Justice is still applicable in the case of Art. 28 sec. 4 no. 3 Driving Licence Edict, this judgment, which is at least of relevance for driving licences issued before 19<sup>th</sup> January, 2009, is presented in detail in the following:

Despite the wording of Art. 8 sec. 4 sentence 1 in combination with sec. 4 of Directive 91/439/EWG, which regulates the application of national norms regarding a driving ban and licence withdrawal, and which seems to allow the refusal of the licence acceptance, the European Court of Justice declared the regulation of Art. 28 sec. 4 no. 3 Driving Licence Edict as inconsistent with the European principle of mutual acceptance.

The European Court of Justice has made one important restriction because this regulation only comes into effect when the licence was issued before the expiration of the ban period imposed on the offender by the criminal court<sup>95</sup>. In this context, the domicile precondition must not be violated as well<sup>96</sup>. The European court does not see any necessity to deny the possibility of licence reinstatement after the expiration of the ban period, due to the fact that from this point onwards the person concerned is allowed to apply for a new licence in the accepting state<sup>97</sup>. Otherwise,

<sup>87</sup> So: *Oberverwaltungsgericht Koblenz*, NJW 2010, 2825, 2826; *Oberverwaltungsgericht Saarlouis*, DAR 2010, 598, 599.

<sup>88</sup> *Hailbronner/Thoms*, NJW 2007, 1089, 1094.

<sup>89</sup> *ECJ*, NJW 2008, 2403.

<sup>90</sup> *ECJ*, DAR 2008, 459.

<sup>91</sup> *Pießkalla/Leitgeb*, NZV 2010, 329, 331 f.

<sup>92</sup> Explicit: *Oberverwaltungsgericht Koblenz*, DAR 2010, 406.

<sup>93</sup> See only: *Hailbronner*, NZV 2009, 361, 366; *Hessischer Verwaltungsgerichtshof Kassel*, *Blutalkohol – Alcohol, drugs and behavior* 2010, 154, 155 f.; *Saurer*, JURA 2009, 260, 264.

<sup>94</sup> *Pießkalla/Leitgeb*, NZV 2010, 329, 335.

<sup>95</sup> *ECJ*, DAR 2008, 582.

<sup>96</sup> Explicit: *Verwaltungsgerichtshof Baden-Württemberg*, *Blutalkohol – Alcohol, drugs and behavior* 2010, 255, 256; *Leitmeier*, NZV 2010, 377, 378.

<sup>97</sup> So already: *ECJ*, DAR 2004, 333, 339 f.

the country of acceptance would be able to refuse driving privileges in the long run. From the European point of view, this is not acceptable. From the German point of view, this approach is rather problematic due to the legal circumstance that administrative and judicial licence withdrawal in Germany is not imposed as a sanction, but as a preventive measure. In contrast, the European Court of Justice classifies withdrawal as a sanction and, so, the impact of this measure culminates with the expiration of the ban period. It could, therefore, be argued that this aspect of traffic safety does not seem to be as important as the principle of mutual acceptance.

In the *Weber*- case, the above mentioned judgment was extended to driving bans. A foreign driving licence must not, therefore, be accepted if it was issued while a driving ban was in effect. If the foreign licence were to have been accepted in these cases as well, the sanction of the imposing state would lose its impact on the offender. The regulation of Art. 28 sec. 4 no. 5 Driving Licence Edict, which is only applicable in the case of driving bans, is not relevant in practice due to the short maximum duration of this measure of three months<sup>98</sup>.

As a consequence, the foreign driving licence must be accepted when there was no ban period for re-granting imposed<sup>99</sup>. In Germany, this is only possible in cases of administrative, but not judicial withdrawal. Otherwise, the accepting state would be able to refuse the acceptance for a lifetime period which would devalue the European principle of mutual acceptance<sup>100</sup>. This would be a strange result, because the imposition of a ban period by the criminal court is an additional sanction in comparison to the administrative licence withdrawal without ban period<sup>101</sup>. The European Court of Justice might not change its opinion<sup>102</sup>, because if there was no ban period, the person concerned would immediately be able to apply for a new licence and, thus, this must also be possible in other member states of the EU.

It cannot be a legal requirement that the holder of a foreign licence meets with all the national re-granting requirements<sup>103</sup>. As such, the acceptance of a foreign driving licence may not be connected with the passing of a medical-psychological examination or another examination, which are not foreseen in the legal system of the issuing state<sup>104</sup>. It is sufficient that the issuing state has checked and approved the minimum requirements regarding physical and mental conditions written down in Annex III of the Second and the Third Driving Licence Directive. Thus, the driving licence document certifies that these requirements are met<sup>105</sup>, that the driver has regained his/her driving suitability<sup>106</sup> and that there are no doubts regarding the

<sup>98</sup> Geiger, DAR 2010, 121, 124.

<sup>99</sup> ECJ, NJW 2007, 1863, 1864. Other opinion: Schmid-Drüner, NZV 2006, 617, 622.

<sup>100</sup> Explicit: ECJ, NJW 2008, 2403, 2406.

<sup>101</sup> Morgenstern, NZV 2008, 425, 428.

<sup>102</sup> Other opinion: Jancker, DAR 2009, 181, 185; Oberverwaltungsgericht Nordrhein-Westfalen, Blutalkohol – Alcohol, drugs and behavior 2010, 145, 149.

<sup>103</sup> ECJ, NJW 2006, 2173, 2174. So already: Oberlandesgericht Saarbrücken, Neue Zeitschrift für Strafrecht – Rechtsprechungsreport (NStZRR) 2005, 50, 52. Critical: Geiger, DAR 2004, 340.

<sup>104</sup> ECJ, NJW 2008, 2403, 2405; ECJ, NJW 2006, 2173, 2174.

<sup>105</sup> ECJ, NJW 2006, 2173, 2175.

driving suitability of the licence holder<sup>107</sup>. The national authorities do not have the competence to refuse the acceptance with respect to a lack of driving suitability that manifested itself prior to the licence having been re-granted<sup>108</sup>. This also counts if this lack is still present at the time of acceptance. The acceptance can only be refused by retroactive behaviour, which proves that there is a lack of driving suitability<sup>109</sup>. It is not, however, necessary that the driver commits a law violation in traffic. The European Court of Justice decided in the case of *Scheffler* that the refusal of the licence was not justified if the medical-psychological examination was executed after the issuing and it contained unexceptionally aspects which appeared before the issuing<sup>110</sup>. This is a consequential continuation of the previous judgments. The driving suitability can be tested by the accepting state if the person concerned attracts negative attention<sup>111</sup>. This behaviour must be of some importance<sup>112</sup> to cause doubts in relation to his/her driving suitability. Abnormalities which appeared before the licence issuing can be taken into consideration<sup>113</sup>. If the medical-psychological examination is not passed the acceptance can be refused. This judgment is also applicable in the case of administrative licence withdrawal<sup>114</sup>.

The European Court of Justice was not impressed by the legal fact that the regulations for driving suitability are not yet harmonized in Europe and that, as a consequence, each member state must have the competence to prescribe tighter preconditions for licence (re)granting in its legal system<sup>115</sup>. The court once again emphasized the principle of mutual acceptance and decided that the possibility of the member states to implement stricter examinations of the licence applicant does not impinge upon the obligation to accept the foreign licence<sup>116</sup>. The European court justified its restrictive point of view with the necessity for a narrow interpretation of European regulations of exception, as otherwise the application of European law might be endangered<sup>117</sup>. Consequently, the sovereignty of the issuing state is ensured<sup>118</sup>, because otherwise the accepting state would have the possibility to re-check and measure the decision of the issuing state on the basis of its national law. In these cases, the acceptance of the licence does not depend on the knowledge of the issuing state for the reasons which led to the licence withdrawal<sup>119</sup>.

<sup>106</sup> *Morgenstern*, NZV 2008, 425, 426.

<sup>107</sup> *Pießkalla/Leitegeb*, NZV 2010, 329, 330.

<sup>108</sup> *Oberverwaltungsgericht Hamburg*, NJW 2007, 1150, 1152. Other opinion (with specific respect to the aspect of traffic safety): *Verwaltungsgerichtshof Mannheim*, NJW 2006, 1153, 1155 f.

<sup>109</sup> *Bundesverwaltungsgericht*, NJW 2010, 3318, 3320.

<sup>110</sup> *ECJ*, DAR 2011, 74, 76.

<sup>111</sup> *ECJ*, DAR 2009, 191, 194.

<sup>112</sup> See only: *Verwaltungsgerichtshof Munich*, *Blutalkohol – Alcohol, drugs and behavior* 2010, 308, 309; *Oberverwaltungsgericht Saarlouis*, 2. 12. 2009, case 1 A 358/09 margin no 68 f. (with reference to the judgment of the ECJ).

<sup>113</sup> *Geiger*, DAR 2011, 61, 62.

<sup>114</sup> *ECJ*, NJW 2007, 1863, 1864.

<sup>115</sup> Instead of others: *Geiger*, DAR 2004, 340; *Ludovisy*, DAR 2005, 7, 12. *Schöch*, *Blutalkohol – Alcohol, drugs and behaviour* 2005, 354, 363 was critical if the European Court of Justice would approve this approach.

<sup>116</sup> *ECJ*, DAR 2008, 459, 461.

<sup>117</sup> So already: *ECJ*, DAR 2004, 333, 339.

<sup>118</sup> In the same direction: *Brenner*, DAR 2005, 363, 365.

<sup>119</sup> *Zwenger*, ZfS 2006, 543, 545.

In contrast, the European Court of Justice approved the denial of the acceptance before the expiration of the ban period<sup>120</sup>. The licence will also not become retroactively effective with the expiration<sup>121</sup>, because otherwise the competence of the acceptance state contained in Art. 8 sec. 4 sentence 1 of Directive 91/439/EWG would be devaluated to a wide extent.

The conservation of traffic safety is the second main objective of both Driving Licence Directives. While the European Court of Justice often neglects this aspect in its judgments, this was not so in the *Schwarz*-case<sup>122</sup>. Mr. Schwarz was a holder of a German and an Austrian driving licence. He received the latter a long time before the first licence. In this decision, the European Court approved the rejection of the Austrian licence. As Art. 7 sec. 5 of Directive 91/439/EWG<sup>123</sup> regulates that each person is only allowed to hold one European licence<sup>124</sup>, the practical impact of this court decision is relatively small. The refusal of a licence is legal when this licence was issued before the second licence has been withdrawn<sup>125</sup>. The reason for this point of view is obvious; when the re-granting is executed after the withdrawal, the obligatory check of the preconditions contained in Art. 7 sec 1 lit. a of Directive 91/439/EWG ensures that the lack of driving suitability in general terms is covered, albeit this check is not executed with explicit respect to the specific lack of suitability<sup>126</sup>. However, when the licence is issued before the withdrawal, the doubts concerning driving suitability, which arise with the withdrawal, are not resolved. As a consequence, whether the person concerned fulfils the minimum requirements of Art. 7 sec. 1 lit. a in combination with Annex III of Directive 91/439/EWG<sup>127</sup> is not actually certified. The rejection in case of a check that has not been carried out in respect of the driving suitability after the licence withdrawal (e. g. replacement of the driving licence document or issuing of a substitute licence) is in accordance with this jurisdiction<sup>128</sup>.

In drawing a conclusion, the implemented differentiation in the jurisdiction of the European Court of Justice between driving licence reinstatement before and after the expiration of the ban period will be maintained under the validity of Art. 11 sec. 4 sentence 2 of Directive 2006/126/EG<sup>129</sup> as well, especially when one takes into consideration the fact that Art. 8 sec. 4 sentence 1 of Directive 91/439/EWG did not contain any hint of this differentiation either.

<sup>120</sup> So already: *Otte/Kühner*, NZV 2004, 321, 326 f.

<sup>121</sup> *ECJ*, DAR 2008, 582.

<sup>122</sup> *ECJ*, DAR 2009, 191.

<sup>123</sup> Identical wording: Art. 7 sec. 5 lit. a Directive 2006/126/EG.

<sup>124</sup> In contrast, *Säffel*, NZV 207, 493, 495 states that a number of persons apply for a second driving licence ahead to be able to circumvent a licence measure (illegally).

<sup>125</sup> *ECJ*, DAR 2009, 191, 195.

<sup>126</sup> Critical: *Verwaltungsgerichtshof Mannheim*, 21. 6. 2006, case 10 S 1337/06 margin no 10.

<sup>127</sup> *ECJ*, DAR 2009, 191, 195.

<sup>128</sup> *Oberverwaltungsgericht Nordrhein-Westfalen*, Blutalkohol – Alcohol, drugs and behavior 2010, 259, 261; *Verwaltungsgerichtshof Mannheim*, Blutalkohol – Alcohol, drugs and behavior 2010, 41, 42.

<sup>129</sup> Against the maintenance of this jurisdiction: *Geiger*, DAR 2010, 121, 123.

## E) Prospect: Continued validity of the German misuse jurisdiction?

The opinions in literature and jurisdiction regarding the solution of the problem of licence tourism by Directive 2006/126/EWG differ measurably<sup>130</sup>. As no important changes of the content of this Directive in comparison to Directive 91/439/EWG were implemented, a solution for this problem can hardly be stated. This is particularly relevant with respect to the judgment of the European Court of Justice, which continues to emphasise the overwhelming importance of mutual acceptance<sup>131</sup>. The factual requirements for the acceptance of foreign driving licences and their rejection were not changed, only the checking obligations of issuing states were tightened<sup>132</sup>. Although Directive 2006/126/EG contains some improvements and specifications in comparison to Directive 91/439/EWG, an important step forward in the combat against driving licence tourism has not been made so far<sup>133</sup>.

Despite the promising approach of the European Court of Justice to reduce licence tourism through its decision on the *Grasser*-case<sup>134</sup>, it is still questionable as to what extent the legal principle of knowingly misusing the law is able to justify the rejection of a foreign licence<sup>135</sup> when the corresponding document does not contain any hint of the violation of the domicile principle. In the case of *Grasser*, the document certified that the domicile of Mrs. Grasser was not in the issuing, but in the acceptance state. In this context, not the application for the licence itself, but the application for acceptance must be regarded as legal misuse<sup>136</sup>. This legal basis is founded on the jurisdiction of German courts and is regarded as absolutely necessary due to the circumstance that the European Court of Justice does not differentiate between licence holders which have actually changed their domicile and those who have not, while the only intention of those who fall in the latter category is the circumvention of the tight German driving licence regulations. As the domicile was not changed and, consequently, the freedom of movement was not affected anyhow, it seems proportional to exclude these people from legal protection.

This circumvention requires an objective and a subjective element. In addition to the omitted change of the domicile, the licence holder must act with the intention of circumvention<sup>137</sup>. The subjective element, which is based on the circumstance that only the issuing state has the legal competence to check the issuing requirements and that its decision must be respected in general by the state of acceptance, must aim at gaining a legal advantage by circumventing national regulations<sup>138</sup>. This

<sup>130</sup> Affirmative: *Zypries*, NJW 2007, 1424, 1425. Open: *Dauer*, NJW 2008, 2381, 2383. Carefully optimistic: *König*, DAR 2008, 464; *Verwaltungsgerichtshof Mannheim*, DAR 2010, 153, 155. Negative: *Geiger*, DAR 2010, 121, 125; *Hailbronner/Thoms*, NJW 2007, 1089, 1093; *Hailbronner*, NZV 2009, 361, 366.

<sup>131</sup> *Saurer*, JURA 2009, 260, 263 f.

<sup>132</sup> See only: *Hailbronner*, NZV 2009, 361, 367.

<sup>133</sup> In the same direction: *Säßfel*, NZV 2007, 493, 498.

<sup>134</sup> *ECJ*, 19. 5. 2011, case C-184/10. See: B) II.

<sup>135</sup> See also: *Dauer* in: Hentschel/König/Dauer (eds), *Straßenverkehrsrecht (Traffic law)*, 40. Run, 2009, § 28 FeV (Art. 28 German Driving Licence Edict), margin no 11.

<sup>136</sup> *Dauer*, DAR 2007, 342.

<sup>137</sup> Instead of others: *Geiger*, DAR 2007, 540, 541; *Oberverwaltungsgericht Rheinland-Pfalz*, NJW 2007, 2650.

<sup>138</sup> See only: *Oberverwaltungsgericht Berlin-Brandenburg*, *Blutalkohol – alcohol, drugs and behavior* 2007, 193, 196.

intention has to be directed at a circumvention of the German driving licence regulations, which are tighter than in the issuing state. To identify such a circumvention, a comprehensive evaluation of all circumstances in the specific case is necessary. One main case of application is the factual situation where the person concerned will not get a German licence due to his/her lack of driving suitability<sup>139</sup>.

The basis of legal misuse is treated as a separate case group for the rejection of a foreign licence. As Art. 11 sec. 4 of Directive 2006/126/EG does not contain any explicit regulation, the Directive does not regulate this aspect exclusively<sup>140</sup>. Due to the legal quarrel in this context, a clear statement by the European legislator would have been expected at time of the enactment of Directive 2006/126/EG. As a consequence, the national misuse judgment is still applicable<sup>141</sup>. With respect to the intention of the European legislator to combat licence tourism effectively, this may be the best manner in which to interpret it.

Nevertheless, it can hardly be predicted what point of view the very important judgment of the European Court of Justice will conquer. Despite some enquiries of German courts, which were explicitly directed at this legal matter<sup>142</sup>, the European court has not yet decided. Thus, a considered opinion in German literature and jurisdiction<sup>143</sup> states that the national authorities are obliged to accept the licence even in the cases of the misuse of law, because the previous judgment of the European Court of Justice is conclusive. Without the approval of the highest court in Europe, it does not seem opportune to implement further reasons for rejection.

The denial of a legal position in the case of it having been acquired through legal misuse can be regarded as a general principle of each constitutional state and, therefore, may also be applicable in European law<sup>144</sup>. Apart from this, it is doubtful as to whether this principle is applicable for driving licence regulations without any exceptions, because the competence to check the (re)granting preconditions must remain with the issuing state. As such, the rejection in cases of legal misuse would be equal to some form of partial competence of the part of authorities of the acceptance state to examine the sovereign decision of the issuing country. Consequently, the principle of mutual acceptance would be devaluated and the unique application of European law would be endangered.

As sizeable sections of the previous jurisdiction of the European Court of Justice are not consistent with the German misuse jurisdiction, the ECJ will not approve it explicitly<sup>145</sup>. Despite the very positive approaches for traffic safety in the European

<sup>139</sup> Equal: *Oberverwaltungsgericht Koblenz*, NJW 2007, 2650, 2651 f.

<sup>140</sup> *Dauer* in: Hentschel/König/Dauer (see: fn. 135), § 28 FeV (Art. 28 German Driving Licence Edict), margin no 12 a. Other opinion: *Verwaltungsgerichtshof Munich*, NZV 2007, 539, 543.

<sup>141</sup> *Oberverwaltungsgericht Weimar*, DAR 2007, 538; *Geiger*, DAR 2007, 540, 542.

<sup>142</sup> See: enquiries of the *Verwaltungsgericht Chemnitz*, DAR 2006, 637, 639 and of the *Verwaltungsgericht Sigmaringen*, DAR 2006, 640 and the corresponding decisions of the *ECJ* in NJW 2008, 2403 and DAR 2008, 459.

<sup>143</sup> Instead of others: *Oberlandesgericht Munich*, NJW 2007, 1152, 1153 f.; *Blum*, SVR 2009, 368, 372.

<sup>144</sup> See only: *Otte/Kühner*, NZV 2004, 321, 327. *Hailbronner/Thoms*, NJW 2007, 1089, 1092 do not derive any ban of misuse from the jurisdiction of the *ECJ*.

<sup>145</sup> *Oberverwaltungsgericht Saarlouis*, 2. 12. 2009, case 1 A 358/09, margin no 74 ff.; *Zwerver*, ZfS 2008, 609, 611.

judgment of 19<sup>th</sup> May, 2011, the rejection of this misuse jurisdiction may be regarded as settled<sup>146</sup>.

As a consequence, the problem of driving licence tourism will only be solved by two measures at a European level.

Firstly, it is urgently necessary to harmonize the legal preconditions for driving suitability all over Europe. This harmonisation must comprise not only the minimum requirements, but also the whole range of these requirements. The comprehensive discretion rights<sup>147</sup> of each member state when regulating the preconditions for licence (re-)granting must be eliminated. Additionally, establishing tighter legal requirements for re-applicants rather than for first-time applicants must be legally possible and the term “traffic safety” must be uniquely interpreted on the European level. In context with the manner in which these requirements are determined, the problem of the so called “race to the bottom” will appear<sup>148</sup>, because the tendency for compelling regulations for all member states orientated at the lowest and not at the highest standards exists. This is, last but not least, a political problem. The ban to prescribe stricter requirements in the national regulations would, however, lead to greater hazards for traffic safety than the current situation does.

Secondly, a pan-European driving licence register must be established and queried if a person applies for licence (re)instatement in any of the European member states<sup>149</sup>. Even if this long lasting procedure is finalized however, the obligation of access must be carried out to the letter. The existence of the legal obligation to merely check is not sufficient as can be seen from the domicile precondition.

## F) Final conclusions

The cornerstones of the phenomenon of driving licence tourism are the heterogeneous preconditions for driving suitability, the principle of mutual acceptance without any formalities, which is entirely defeated by the European Court of Justice, and the failure of thorough checks of the European minimum requirements in some member states. This problem intensifies in case of licence re-granting. The effectiveness of national licence regulations is devaluated measurably, because psychoactive impaired drivers are the main beneficiaries of this European possibility of circumvention.

Art. 28 sec. 4 no. 2 German Driving Licence Edict in the version of 19<sup>th</sup> January, 2009, is consistent with the judgment of the European Court of Justice. Despite considerable and well-founded opinions in literature and jurisdiction, the European Court of Justice does not insist on a previous imposition of licence measures in the state of acceptance when applying the named national regulation. The European

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<sup>146</sup> *Dauer*, NJW 2010, 1830.

<sup>147</sup> *Dauer*, NJW 2008, 2381.

<sup>148</sup> *Geiger*, SVR 2008, 366, 368.

<sup>149</sup> *Hailbronner/Thoms*, NJW 2007, 1089, 1093.

Court tried to combat driving licence tourism in its important decision of 19<sup>th</sup> May, 2011, in the case of *Grasser*. Nevertheless, it seemed doubtful whether the underlying factual situation necessitated a change in previous jurisdiction because not every violation of the domicile principle is necessarily connected with a threat to traffic safety. The criterion “undisputable information of the issuing state” was restricted by the latest judgments of the European Court of Justice.

The wording of Art. 28 sec. 4 no. 3 German Driving Licence Edict, was not changed for foreign driving licences, which have been issued since 19<sup>th</sup> January, 2009, because it was assumed that the restrictive judgment of the European Court of Justice is – with respect to the henceforward compelling regulation of Art. 11 sec. 4 sentence 2 of Directive 2006/126/EG – no longer justifiable. A thorough examination of this aspect negates this assumption, because the qualification as a restrictive exception still continues. The accepting state is furthermore authorised to refuse the licence when it has been issued while the judicial ban period of Art. 69 a sec. 1 German Criminal Code had been in force. In all other cases, the retrieved driving suitability and the examination of the physical and mental minimum requirements of Directive 2006/126/EG are certified by the possession of the driving licence document.

The separate case for the rejection of a driving licence in terms of the misuse of law of the German courts is not excluded by the Third EU Driving Licence Directive, because it does not contain a closing regulation. The application of this national jurisdiction requires an omitted domicile change and the intention of circumvention. Although the European Court of Justice had not decided yet if this national point of view is in line with European law, an approval is not very probable due to inconsistencies with the previous jurisdiction of the European court.

Driving licence tourism will be only solved by a complete harmonisation of the driving suitability preconditions on the European level and the implementation of a pan-European licence register, which has to be used obligatorily, at least in cases of licence reinstatement.