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Mutual Recognition of Driving Licences in the EU – Current State of Integration and Perspectives

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Abstract

A driving licence is a document and an administrative act, which is, according to the principle of territoriality, only valid in the territory of the issuing State. This is incompatible with practical needs of international traffic, and mutual recognition helps to overcome the problem. This article presents the development of mutual recognition of driving licences in the EU, from pre-existing public international law to current harmonising legislation and the relevant ECJ jurisprudence. It finds that once there was sufficient harmonisation, the ECJ promoted mutual recognition, while the EU legislator had to close the loopholes for 'driving licence tourism' by amending the directives. Unlike in other areas of the internal market, primary law never played an important role for the mutual recognition of driving licences. Determining the current state of integration, the article identifies a lack of information exchange between Member States and a lack of harmonisation of sanctions as main obstacles for full, unconditional recognition, and proposes ways leading towards an 'internal market of driving licences'.

1. Introduction and Outline

Traffic does not stop at borders, but the effect of a driving licence does, at least technically. For decades, the underlying principle of territoriality of administrative acts has been overcome by law (first public international law, later European secondary law) requiring states to mutually recognize driving licences. Nonetheless, we are still far away from full and unconditional recognition, let alone from an 'internal market' for driving licences. This article, on the one hand, presents the general framework of mutual recognition of driving licences: beginning with the principle of territoriality (2.), it examines different possibilites for overcoming this principle (3.), but also presents the reasons for limiting mutual recognition (4.). On the other hand, European secondary law on the mutual recognition of driving licences and the relevant jurisprudence of the ECJ is analyzed (5.). The evolution of this law reflects a shift in focus from facilitating mutual recognition to harmonising the requirements for obtaining a driving licence and preventing 'driving licence tourism'. This development is in line with the increasing integration of other areas of

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the internal market, and it shows the importance of common standards (and their observation) as a basis for mutual recognition. Combining the general approach and the analysis of EU law, the article concludes with an examination of the current state of integration (6.) and the perspectives for further development in the area (7.).

2. Territoriality of Driving Licences

The term driving licence is an ambiguous one. Sometimes, and primarily, it describes the tangible document, which is evidence of an extant right to drive.[1] But it is also used to describe the administrative act issued by a state authority (permit or licence),[2] granting the holder the right to drive one or more categories of motorised vehicles. To obtain the licence (in both senses) applicants have to fulfil certain criteria (minimum age, aptitude, driving instruction), and they have to pass theoretical and/or practical tests.[3] The details vary depending on the class of vehicles.

According to general principles of international law, a state can only exercise power over its own territory.[4] Therefore, as a starting point, the effect of a driving licence is limited to authorizing its holder to drive a vehicle in the territory of the state that has issued the licence. Of course, this result of the territorial limitation of sovereignty is totally incompatible with practical needs: a driver would need a licence for every state he or she wanted to drive in or through, but, realistically, traffic does not stop at borders.

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1 See, for example, the opinion of AG *Bobek* on Case C-195/16 *Staatsanwaltschaft Offenburg v I.* [2017] EU:C:2017:374, paras 32 seq.

2 M Szydło, 'EU legislation on driving licences: does it accelerate or slow down the free movement of persons?' (2012) 13 German Law Journal 345 (passim). In contrast, AG *Bobek*, in his opinion on Case C-195/16 (n1) para 36, is mistaken when he considers the right to drive as stemming 'from a legal event, namely the actual fulfilment of all the physical, mental and intellectual conditions necessary to acquire it' – in fact, it follows from the administrative act, the issuing of which depends on the fulfilment of the mentioned criteria. On the distinction see also F Koehl, 'Europäischer Führerscheintourismus: Aktuelle Entwicklungen' [2018] DAR 588, 589; case C-195/16 *Staatsanwaltschaft Offenburg v I.* [2017] EU:C:2017:815, para 49.

3 In Germany, for example, see §§ 7 seq. of the Fahrerlaubnisverordnung (FEV / Regulation on Driving Licences).

4 See H Maurer/C Waldhoff, *Allgemeines Verwaltungsrecht* (19th edn, Beck, Munich 2017) para 9 ref 68.

3. Overcoming the Territoriality of Driving Licences: Different Techniques

As early as 1926, this problem was addressed by the *Convention internationale relative à la circulation automobile* ('The Paris Convention') which, in its article 7, provides for the issuing of international driving licences:

'International driving licences issued by the authorities of a Contracting State, or by an association empowered thereto with the countersignature of the authority, shall permit in all other Contracting States the driving of motor vehicles in the categories for which they have been issued and shall be recognised as valid without further examination in all Contracting States. However, the right to make use of the international driving permit may be refused if it is obvious that the conditions prescribed in the preceding Article are not fulfilled.'[5]

Later, other multilateral or bilateral agreements were concluded between states, the most important being the Vienna Convention on Road Traffic of 1968. Its Article 41, paragraph 1 reads (in the original version, which has been amended several times):

'Contracting Parties shall recognize:

a. any domestic permit drawn up in their national language or in one of their national languages or, if not drawn up in such a language, accompanied by a certifiend translation;

b. any domestic permit conforming to the provisions of Annex 6 to this Convention; and

c. any international permit conforming to the provisions of Annex 7 to this Convention

d. as valid for driving in their territories a vehicle coming within the categories covered by the permit, provided that the permit is still valid and that it was issued by another Contracting Party or by an association duly empowered thereto by such other Contracting party. [...]'

Interestingly, a comparison of the wordings of these two multilateral treaties shows a difference we find again in modern EU administrative law doctrine. Whereas the Paris Convention of 1926 reads 'international driving licences ... shall permit in all other Contracting States the driving of motor vehicles', the Vienna Convention of 1968 reads 'Contracting Parties shall recognize [... the permits] as valid for driving in their territories'. For the holder of the driving licence, the result is the same: the right to drive abroad. But from the perspective

5 Translation from the official French version, which reads: 'Les permis internationaux de conduire délivrés par les autorités d'un Etat contractant ou par une association habilitée par celles-ci avec le contreseing de l'autorité, permettent dans tous les autres Etats contractants la conduite des automobiles rentrant dans les catégories pour lesquelles ils ont été délivrés et sont reconnus comme valables sans nouvel examen dans tous les Etats contractants. Toutefois, le droit de faire usage du permis international de conduire peut être refusé, s'il est évident que les conditions prescrites par l'article précédent ne sont pas remplies.'

of legal doctrine, one might be tempted to draw a categorical distinction between the transnational effect of a driving licence (as provided for in the Paris Convention) and a system of mutual recognition (as established by the Vienna Convention).

What is the difference between the two? In a wide understanding of the terms, they belong together: transnationality means that an administrative act has effects of some sort in at least one other state than the state in which it was issued;[6] recognition is the instrument which can lead to that effect, because the act is treated as valid by another state.[7] However, following increasing European integration, the terms are sometimes used in a different, narrower way:[8] according to this theoretical model, the transnational administrative act is considered to be the more integrative instrument because the powers to amend, suspend or annul it remain with the authority that issued it (the "lead authority") – authorities in other Member States can only provide information to that lead authority and request it to take action.[9] Mutual recognition, in the same narrow sense, is used to describe a system in which foreign administrative acts only serve as a reference (in German doctrine: 'Referenzentscheidung'), which must be recognized by other states, but the recognition of which can be refused under pre-defined circumstances.[10] Such models certainly contribute to the understanding of the different models of administrative cooperation in the EU, but a closer look shows that in reality, the dividing line is often blurred. On the one hand, it is debatable whether 'recognition' requires a formal decision by the host state.[11] If one was of that opinion, systems in which recognition does not take place expressly on a case-by-case basis, but *ipso iure*, i.e. by way

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6 M Ruffert, in Ehlers/Pünder (eds), *Allgemeines Verwaltungsrecht* (15th edn, De Gruyter, Berlin 2016) 21 para 71; M Ruffert, 'Der transnationale Verwaltungsakt' (2001) 34 Die Verwaltung 453 seq.; L de Lucia, 'From Mutual Recognition to EU Authorization, A Decline of Transnational Administrative Acts?' (2016) 8 Italian Journal of Public Law 90.

7 See M Ruffert, 'Recognition of Foreign Legislative and Administrative Acts' (2008) Max Planck Encyclopaedia of Public International Law https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1087?prd=EPIL para 2 [accessed 05/09/2020].

8 Overall, the terminology remains unclear, see H Wenander, 'Recognition of Foreign Administrative Decisions - Balancing International Cooperation, National Self-Determination, and Individual Rights' (2011) 71 ZaöRV 755, 758 seq.

9 Szydło (n2) 348. However, competences of temporary suspension for other Member States are not considered as incompatible with that model, see G Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck, Tübingen 2004) 153.

10 ibid, 181 seq; E Pache, 'Verantwortung und Effizienz in der Mehrebenenverwaltung' (2007) 66 VVDStRL 106, 130.

11 For example, the case of driving licences (which do not require a formal recognition, see *infra* 5.) is sometimes considered as an example of the Referenzentscheidungsmodell, see A Glaser, *Die Entwicklung des Europäischen Verwaltunsgrechts aus der Perspektive der Handlungsformenlehre* (Mohr Siebeck, Tübingen 2013) 560 seq. Other scholars hold that a Referenzentscheidung must not have effect in other Member States *ipso iure*; see T Siegel, *Europäisierung des Öffentlichen Rechts* (Mohr Siebeck, Tübingen 2012), para 214.

of simple acquiescence of the host state (demanded by law),[12] would automatically imply the existence of transnational administrative acts, even if there was still a possibility for unilateral non-recognition. On the other hand, systems of mutual recognition, even those requiring a formal decision in every single case, can be designed in a way that leaves little room for non-recognition.[13] In contrast, systems of transnational administrative acts sometimes contain 'safeguard clauses', which factually allow (temporary) non-recognition.[14] The wording of a legal text is often inconclusive,[15] and eventually, the creativity of the European legislator surpassed the possibilities of doctrinal categorisation. With regard to driving licences, it should be kept in mind that (regardless of the possibility to fit them into one category[16]) the question of recognition should not be examined without considering questions of annulment, suspension and non-recognition.

When the EEC came into existence in 1958, the Paris Convention of 1926 was still in force for all founding members and remained so (article 234 EEC Treaty). From 1977 onwards, the Vienna Convention of 1968 was in force. Therefore, there was no immediate pressure to deal with driving licences on the European level, at least not with the purpose of fostering mutual recognition – it was already there, based on mutual/multilateral agreement.[17]

However, the case law of the ECJ shows another possible route to mutual recognition of driving licences: the four freedoms. In 1978, the Court decided the case of Michel Choquet, a French national who was prosecuted in Germany for driving without a valid licence. He was in possession of a French driving licence, but he had failed to exchange it for a German one within one year after entering the country, which was a legal requirement at that time (and covered by the Paris Convention of 1926, which only demanded temporary recognition).

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12 This is often called "passive mutual recognition", see KA Armstrong, 'Mutual Recognition', in C Barnard and C Scott (eds.), *The Law of the Single European Market* (Hart Publishing 2002) 240-242; de Lucia (n6) 94-99.

13 See, for example, art 28 (2) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L 311/67.

14 For example, directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2007] OJ L 263/1, provides for a type approval for motor vehicles, which is widely considered to be an administrative act with transnational effect; see M Schröder, *Genehmigungsverwaltungsrecht* (Mohr Siebeck, Tübingen 2016) 277; H-C Röhl, 'Das Risiko einer Nicht-Zulassung und Betriebsuntersagung von Fahrzeugen' (2020) 183 NZV 187; similarly, T Siegel, *Entscheidungsfindung im Verwaltungsverbund* (Mohr Siebeck, Tübingen 2012) 336. However, Chapter XII of the directive contains safeguard clauses allowing Member States to prohibit the sale of vehicles under certain circumstances.

15 Schröder (n14) 566.

16 Szydło proposes an 'intermediate subcategory', (n2), 349.

17 In contrast to compulsory mutual recognition, see L Arroyo Jiménez, 'Mutual recognition in the Spanish Multi-level Administrative State' (2020) 3 REALaw (page number?).

The court ruled that the recognition of foreign driving licences was, in principle, a matter of domestic law, and that it was not a classic case of a forbidden dual burden,[18] i.e. a situation in which the host state insists on verifying that certain conditions are met even though such a verification has already taken place in the home state. However, in the view of the Court, the non-recognition of a foreign driving licence could still amount to a violation of the free movement of persons if the conditions imposed by national rules on the holder of a driving licence issued by another Member State did not correspond with the requirements of road safety.[19] From today's perspective, the *Choquet* judgment might appear too reluctant with regard to the principle of mutual recognition, as we are used to settled case-law according to which 'all measures which prohibit, impede or render less attractive the exercise of the freedom of movement and the freedom of establishment must be regarded as restrictions on that freedom',[20] especially double inspections, authorisations and other 'dual burdens'. But the Court explains its position convincingly: in 1978, the

'laws on the issue of driving licences – especially as far as concerns the rules for driving tests, the frequency of medical examinations, the term of validity of driving licences and the definition of the different classes of motor vehicles – differ[ed] to such an extent that the mere recognition of driving licences for the benefit of persons who elect to reside permanently within the territory of a Member State other than the state which issued them with a driving licence [could not] be contemplated unless the requirements for the issue of those driving licences [were] harmonized to a sufficient extent.'[21]

Indeed, the Paris Convention of 1926, in its article 6, had only required a driver to have (apart from the minimum age of 18 years) qualities that provide a sufficient guarantee for public safety, a wording that left plenty of room for different opinions on what these qualities are.

In the *Choquet* judgment, the Court implicitly emphasizes the most important requirements for mutual recognition: trust, and rules as a basis for that trust. Mutual recognition in general, and recognition of driving licences in particular, is (politically) only acceptable if one state can trust that the standards in other states are roughly equivalent to domestic ones. Without that trust, which is created by the demands of EU primary law,[22] but also, inter alia, by the similarity of laws governing the prerequisites for obtaining a driving licence (and by their proper application),[23] recognition remains limited to a temporary

18 Case C-16/78 *Choquet* [1978] EU:C:1978:210, para 7.
19 ibid, para 8. This was recently confirmed in case C-195/16 I. (n2), para 69.
20 See, for example, Case C-503/14 *Commission v Portugal* [2016] EU:C:2016:979, para 40.
21 Case C-16/78 *Choquet* (n18) para 7.
22 On art 4(3) TEU, see Szydło (n2) 368.
23 This is not always the case, see *infra* 5.4.

concession for the sake of international traffic, but it is no act based on trust in equivalence.

The fact that today this harmonisation has been accomplished (at least to a considerable extent, see *infra* 5.) must not be mistaken as a basis on which the four freedoms could now be invoked. Although the importance of driving licences to facilitate the free movement of persons (and goods) is obvious,[24] secondary law did not only harmonise the prerequisites for mutual recognition, but also provides for that recognition itself: article 2 (1) of directive 2006/126[25] expressly demands mutual recognition.[26] Therefore, there is neither the need nor the possibility of invoking the primary law and its four freedoms for the very same purpose.[27] As a result, as long as the directive does not fail to address a certain question, the four freedoms can only be used for interpreting the directive in their light.[28]

4. Necessary Limits of Mutual Recognition

As we have seen, the mutual recognition of driving licences was established as soon as international motor traffic gained significant importance. It allows the holder of a driving licence to drive in another country, thereby facilitating cross-border traffic in the internal market and beyond. However, the 'right to drive' deriving from a driving licence[29] is, even in the home state in which the licence was issued, neither permanent nor unconditional. Driving licences can be suspended for a certain time or even revoked, usually following traffic (or other) offences by the holder. The revocation of a licence is usually combined with a temporary prohibition to obtain a new licence, and sometimes a medical and psychological test needs to be passed before a new licence can be obtained. Such measures, like the issuing of driving licences,[30] are subject to the principle of territoriality, and they pose multiple challenges to the principle of mutual recognition.

A state which issued a driving licence can, in principle, only take measures with effect on its own territory; however, these measures may affect recognition by other states. For example, it is obvious that a driving licence that does not

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24 See recital 2 of directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences [2006] OJ L 403/18.

25 See *infra* 5.3.

26 So it is now compulsory mutual recognition, see Arroyo Jiménez (n17).

27 Case C-195/16 *I.* (n2) paras 55 seq.

28 Similarly, Case C-419/10 *Wolfgang Hofmann v Freistaat Bayern* [2012] EU:C:2012:240, para 76, with regard to article 21 TFEU. Otherwise the harmonisation prevents an application of primary law, see M Nettesheim, 'Normenhierarchien im EU-Recht' [2006] EuR, 737, 757 f.

29 For that distinction, see *supra* 2.

30 ibid.

exist anymore because it was revoked by the issuing state can no longer be recognized by another state. The case of a suspension by the issuing state is already more difficult – does it only suspend the permission to drive in the home state, or everywhere else, too? With regard to the regulatory content of a suspension (the general 'right to drive' is still there), this may be debatable, but, in practice, the problem rarely occurs because the driving licence card (until 1999: document) which is, formally, the object of recognition,[31] is confiscated for the time of the suspension. A prohibition on obtaining a new driving licence is only relevant in the state that imposed it, as long as it is not transnationalised in some way. In the absence of such transnationalisation, other states, in principle, are not prevented from issuing a driving licence to a person who is not allowed to obtain one in a different state. This leads to another problem: if State A revokes someone's driving licence and places a prohibition on obtaining a new driving licence on him or her, and State B issues a driving licence to that person, does State A have to recognize this licence? Obviously, the question should be addressed by the law governing mutual recognition and the answer should be no: the intention of mutual recognition is not to enable this sort of 'driving licence tourism'.

The question of whether recognition can be refused is also relevant when drivers commit traffic offences in a different state than the one in which they obtained their driving licence. Following the principle of territoriality, other states than the one that issued a driving licence cannot revoke it: the existence of the foreign administrative act is, in principle, not at their disposal. There are several options to handle this problem: the state in which the incident occurs could be authorised to act instead of the state which issued the licence. Or, it could refuse to recognize the foreign licence as a substitute for a suspension or revocation of a domestic driving licence. Then, the follow-up question is whether the issuing state can take the temporary or permanent non-recognition by another state as a reason to suspend or revoke the driving licence also in the 'home state', then again with effect for all other states. It is obvious that mutual recognition must not lead to an exemption from foreign laws, which the drivers have to follow and which may provide for sanctions upon them. In order to make mutual recognition of driving licences (politically) acceptable, the laws governing it – in addition to ensuring that foreign licences are roughly equivalent to domestic ones in terms of requirements to obtain them[32] – must find answers to these questions. In fact, this is the case since the Paris Convention of 1926, which did not only state (very general) requirements for obtaining the licence,[33] but also allowed to not recognize a licence if the holder obviously did not satisfy

31 Case C-195/16 *I.* (n2) para 49.
32 See *supra* 3.
33 Art 6, see *supra* 3.

these conditions.[34] This wording was very vague, but today, the limits of mutual recognition of driving licences are addressed by the directives on driving licences in a much more detailed way.

5. Recognition of Driving Licences under EU Law

Article 91 (1) (d) TFEU gives the EU the power to set the 'appropriate provisions' in the field of transport policy. Based on this competence, which has existed since 1958 in more or less the same way, the European legislator has issued, starting in 1980, three directives so far[35] and some amendments to them. The ECJ has delivered numerous judgments on the interpretation of these directives, particularly on the second and third directive.[36] Surprisingly, almost all of these judgments are preliminary rulings based on requests from Courts of one Member State – Germany. Apparently, Germany has the strictest (some say excessively strict[37]) laws on driving licences,[38] and therefore, it has the biggest problem recognising driving licences which are issued according to lower standards.

5.1. The first directive on driving licences

The first directive on driving licences (80/1263/EEC), which had to be transposed by January 1983, focused on technical aspects of recognition, in particular the 'community model' of a licence, i.e. the printed form,[39] and on categories of vehicles. Harmonisation of requirements to obtain a driving licence was kept to a minimum, as the ECJ correctly noted in *Sofia Skanavi* and

34 Art 7, final sentence, reads: 'Toutefois, le droit de faire usage du permis international de conduire peut être refusé, s'il est évident que les conditions prescrites par l'article précédent ne sont pas remplies'.

35 See *supra* 3.

36 The most important ones are: case C-476/01 *Kapper* [2004] EU:C:2004:261; case C-227/05 *Daniel Halbritter v Freistaat Bayern* [2006] EU:C:2006:245; case C-340/05 *Kremer* [2006] EU:C:2006:620; joined cases C-329/06 *Wiedemann* and C-343/06 *Funk* [2008] EU:C:2008:366; case C-225/07 *Möginger* [2008] EU:C:2008:383; case C-445/08 *Kurt Wierer v Land Baden-Württemberg* [2009] EU:C:2009:443; case C-184/10 *Mathilde Grasser v Freistaat Bayern* [2011] EU:C:2011:324; case C-467/10 *Akyüz* [2012] EU:C:2012:112; case C-419/10 *Hofmann* (n28); case C-260/13 *Aykul* [2015] EU:C:2015:257.

37 B Schünemann/S Schünemann, 'Deutsche Bekämpfung des "Führerscheintourismus" scheitert am europäischen Prinzip der gegenseitigen Anerkennung' [2007] DAR 382, 383.

38 For example in comparison with Czech laws, see ruling of 03/03/2020 of the Koblenz Administrative Court, DE:VGKOBLE:2020:0303.4L158.20.KO.0A.

39 Art 1 and 2 of First Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence [1980] OJ L 375/1.

Konstantin Chryssanthakopoulos.[40] The way to overcome the principle of territoriality was described in the following way: "a Community model driving licence shall [...] entitle the holder to drive, both on national and international journeys, vehicles of the categories for which it has been granted".[41] The wording sounds like the description of a transnational administrative act, but article 5 (2),[42] article 8 (2)[43] and recital 8[44] of the first directive point clearly towards a system of mutual recognition, albeit one in which recognition takes place *ipso iure*: in other words, no formal act of recognition is needed in every single case. The object of recognition was, as it is today,[45] the licence document, not the actual 'right to drive'.

It is noteworthy that in cases in which the holder of a licence changed his/her "normal residence" to another Member State, recognition was limited to one year.[46] During that period, the holder could, in exchange for surrender of his old licence, obtain a driving licence (Community model) from that state. The directive provided for an exchange without further tests or requirements, but Member States were entitled to refuse to exchange the licence if its national regulations, including medical standards, precluded the issue of the licence.

This directive did not lead to a lot of claims. However, the ECJ found an opportunity to decide that failure to exchange a driving licence within the period of one year after changing the state of normal residence should not be punished like any other case of driving without a valid licence. Invoking the four freedoms, the Court reminded Germany that criminal penalties were not a proportionate sanction for violating a mere "administrative requirement".[47]

5.2. The second directive on driving licences

It took 11 years (plus 5 years of implementation) for further harmonisation to be accomplished by Directive 91/439/EEC.[48] In this directive,

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40 Case C-193/94 *Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] EU:C:1995:331, paras 26 seq.

41 Directive 80/1263 (n39) art 1(1).

42 Directive 80/1263 (n39) art 5(2): 'Member States may refuse to recognize the validity on their territory of driving licences issued to drivers under the age of 18 years.'

43 ibid, art 8(2): '...States shall recognize such drivers' licences as being equivalent.'

44 ibid, recital 8: 'Whereas the mutual recognition of driving licences issued by the different Member States and the exchange of a licence by a holder moving from one Community country to reside or work in another will only be possible further to an initial harmonization of the regulations governing the issue and validity of licences.'

45 Case C-195/16 *I.* (n2) para 49.

46 Directive 80/1263 (n39) art 8(1).

47 Case C-193/94 *Sofia Skanavi and Konstantin Chryssanthakopoulos* (n40) paras 29 seq. This idea was later confirmed with regard to (preliminary) licences not conforming to the EU model, see case C-195/16 *I.* (n2) paras 55 seq.

48 Council Directive 91/439/EEC of 29 July 1991 on driving licences [1991] OJ L 237 /1.

we find detailed minimum requirements for issuing driving licences for different categories of vehicles.[49] Mutual recognition is expressly mentioned in article 1, and is strengthened by dropping the requirement to exchange the licence within a year of taking up normal residence in another Member State (instead, the licence can be exchanged voluntarily[50]). In return (and to prevent misuse of the mutual recognition system), article 7 (5) states that no person may hold a driving licence from more than one Member State; however, the directive does not specify how to achieve that aim and does not name any consequences if someone holds several driving licences (for the same category of vehicles).

In contrast to its predecessor, which was silent on the issue, the second directive deals with sanctions against drivers from different perspectives. It is worth looking at them in detail because they have been incorporated (in a slightly modified way) into the third directive, which is still in force. First, article 8 (2) addresses the competences of the state in which the holder of a driving licence has his/her normal residence with regard to foreign driving licences:

'Subject to observance of the principle of territoriality of criminal and police laws, the Member States of normal residence may apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder of a driving licence issued by another Member State and, if necessary, exchange the licence for that purpose.'

In fact, this is not a limitation to mutual recognition, but a shift in competence from the state which issued a driving licence to the new state of normal residence. In accordance with the importance of that shift in competence, the term "normal residence" is now, also in contrast to the previous directive, defined in article 9 (1). It means:

'the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he is living.'[51]

In contrast, article 8 (4) (1) provides for a limitation to mutual recognition. According to this provision,

'a Member State may refuse to recognize the validity of any driving licence issued by another Member State to a person who is, in the former State's territory, the subject of one of the measures referred to in paragraph 2.'

Although the wording is slightly unclear with regard to the sequence of events,[52] this provision does not only address the situation in which (first) a

49 ibid, arts 3-7.

50 ibid, art 8(1).

51 Art 9(2) deals with some cases in which the application of this provision might be difficult or lead to questionable results, in particular in the case where personal and occupational ties point towards different Member States.

52 This is discussed in depth in Case C-419/10 *Hofmann* (n28) paras 67 seq.

measure (restriction, suspension, withdrawal or cancellation of a driving licence) was taken and (then), necessarily following a change in normal residence, a licence was issued to the addressee of the measure in a different state. It also covers the situation in which a driver commits a traffic offence in another Member State than the one of his/her normal residence (which is not necessarily the one where the licence was issued, see above), and it provides the state in which the offence occurred with the possibility of non-recognition.[53]

What article 8 (4) (1) does not address is the question of how other Member States, including the one of normal residence, may or must react to such an offence committed (and the sanction imposed) abroad. In fact, that question is only partially addressed in article 8 (4) (2), which reads:

'A Member State may likewise refuse to issue a driving licence to an applicant who is the subject of such a measure in another Member State.'

The purpose of this provision is not obvious at first sight: technically, it provides for a (possible) "recognition" of a sanction from abroad, applicable only in the specific situation of a request for a new licence in another Member State. The underlying rationale should not be seen in preventing a circumvention of the sanction for the benefit of the state that imposed it, because that state may refuse to recognize a new licence from abroad anyway, based on article 8 (4) (1). Moreover, against that background, it would not be comprehensible why it is only optional and not compulsory not to issue a new licence. Therefore, the main effect of article 8 (4) (2) is to enable a Member State to refuse to issue a driving licence even though the applicant fulfils all (other) conditions of national law. Consequently, the recognition of a sanction is for the benefit of the Member State in which the applicant requests a new licence, and, indirectly, for the benefit of all other states, except the one that imposed the sanction, because that state (not the others!) is already "protected" by article 8 (4) (1). However, in the absence of an obligation to refuse the issuing of a new licence and of an information exchange system, this attempt to factually transnationalize the effect of sanctions for traffic offences remains rather feeble.[54]

In addition, the second directive did not establish sufficient means of information exchange in order to effectively establish whether a driver was the subject of a restrictive measure in another Member State. Article 12 (3) only provided that the Member States "shall assist one another in the implementation of this Directive and shall, if need be, exchange information on the licences they have registered". In practice, the need for exchanging information was apparently only seen when there was already some suspicion that needed to be confirmed, but there was no standard cooperation.

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53 Case C-260/13 *Aykul* (n36) para 58.

54 It is only a factual transnationalisation, because the original driving licence is usually in the hands of the State which imposed the sanction, see *supra* 4., so the sanction terminates the possibility of recognition.

5.3. The third directive on driving licences

Fifteen years after the second directive, the third directive on driving licences (2006/126/EC), which is still in force today, did not only introduce the plastic card driving licence and the concept of "administrative validity" in order to prevent falsification of old licences with low security standards,[55] but also fostered harmonisation of the requirements for obtaining a driving licence. However, technically, it remains a "minimum harmonisation",[56] so Member States may keep higher standards – and sometimes remain reluctant to recognize driving licences from Member States with lower standards. With regard to mutual recognition, the basic structure remains the same as before, but the limits of recognition and the transnationalisation of sanctions for traffic offences were changed considerably.

Again, mutual recognition is expressly provided for in article 2 (1),[57] but this time, the directive puts even more effort into making sure that it does not become an instrument to circumvent sanctions for driving offences, the so-called "driving licence tourism".[58] The "one person – one licence" principle from the previous directive,[59] is now enforced by administrative measures: Member States get clear instruction to refuse to issue a licence where they establish that the applicant already holds a driving licence.[60] In order to obtain the necessary information, it is still possible to request assistance from other Member States, as under the previous directive.[61] But the European legislator is apparently aware of the shortcomings of that provision (and of the development of information technology), so the directive also provides for a new EU "driving licence network"[62] to facilitate information exchange, and it requires its use in certain cases.[63]

With regard to the one driving licence everyone is allowed to have, the state of normal residence – the definition remains unchanged[64] – keeps its central role. It is in this state only where driving licences may be obtained or renewed

55 Directive 2006/126/EC (n24) recitals 3, 7 and 17.
56 M Schröder, in Streinz (ed), *EUV/AEUV Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (3rd edn, Munich, Beck 2018), art 114 TFEU, para 49.
57 This only covers driving licences from other Member States, not (indirectly) from third countries, see case C-9/18 *Meyn* [2019] EU:C:2019:148. Also on the – now voluntary – exchange of licences see case C-112/19 *Kreis Heinsberg* (not yet decided).
58 See European Commission, COM(2003) proposal for a directive EC of the European Parliament and of the Council on driving licences [2003] 621 final, 5 seq.
59 Directive 91/439 (n48) article 7(5).
60 Directive 2006/126 (n24) article 7(5).
61 Directive 2006/126 (n24) art 15(1) .
62 See *infra* 6.1.
63 Directive 2006/126 (n24) art 7(5)(d).
64 ibid, art 12; directive 91/439 (n48) art 9.

(an exception applies to students studying abroad for at least six months[65]), especially after expiry of the administrative validity period. Moreover, the Member State of normal residence is the one that may not only impose sanctions on drivers with domestic licences, but

'apply its national provisions on the restriction, suspension, withdrawal or cancellation of the right to drive to the holder of a driving licence issued by another Member State and, if necessary, exchange the licence for that purpose.'[66]

So, as under the previous directive,[67] the Member State of normal residence is basically able to treat foreign driving licences like domestic ones. Again, such measures, which usually imply the (temporary) confiscation of the driving licence card, (factually) prevent recognition of that driving licence abroad.[68]

To fight the circumvention of sanctions by people changing their place of normal residence to another Member State in order to obtain a new driving licence there, article 11 (4) (1) of the third directive turns the right not to issue a new licence from the second directive[69] into an obligation to "refuse to issue a driving licence to an applicant whose driving licence is restricted, suspended or withdrawn in another Member State". This is certainly not a mere reminder not to issue driving licences to applicants without a permanent residence:[70] by this provision, at least theoretically, the third directive closes one big loophole enabling "driving licence tourism", and protects other Member States that cannot invoke article 11 (4) (2).[71] However, in practice, there is still a lack of administrative cooperation and no European register of sanctions, so Member States sometimes issue licences despite a pending sanction abroad. Nevertheless, the idea of extending driving bans in national law to 10 years or more in order to reap the benefits of that provision, has been suggested.[72] Unlike the second directive, the third directive distinguishes between a restriction, suspension or withdrawal of a driving licence on the one hand and its cancellation on the other hand; following the latter, other Member States still do not have to (but may) refuse to issue a driving licence.[73]

With regard to other Member States, i.e. the ones which are not the one of normal residence, the third directive holds to the concept of exceptional non-

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65 Directive 2006/126 (n24) art 7(1)(e).
66 ibid, art 11(2). This is, as before, subject to observance of the principle of territoriality of criminal and police laws.
67 ibid, art 8(2).
68 See *supra* 4.
69 Directive 2006/126 (n24) art 8(4)(4), see *supra* 5.2.
70 Contrary to what M Morgenstern, 'Der Abgesang des Führerscheintourismus' [2008] NZV 425, 428 suggests.
71 Szydło (n2) 361 therefore suggests to amend the directive.
72 D Plate, 'Europäischer Führerscheintourismus' [2015] SVR 366, 371; M. Noll, 'Führerscheintourismus – eine kritische Betrachtung' [2015] SVR 332, 333.
73 Directive 2006/126 (n24) art 11(4)(3).

recognition of foreign driving licences. The progress from the second directive lies in the fact that instead of providing for a mere right to non-recognition,[74] article 11 (4) (2) now obliges a Member State "to refuse recognition of a driving licence issued by another Member State to a person whose driving licence is restricted, suspended or withdrawn in the former State's territory". Similarly to the previous directive, the wording of that provision does not only cover cases of licences issued abroad during a pending sanction,[75] which is now a violation of Article 11 (4) (1), but it also encompasses situations where a driver commits a traffic offence in a Member State other than that of his/her normal residence.[76]

Considering that non-recognition (unlike the issuing of a new licence) only affects the Member State in which the sanction was imposed (there is no obligation to enter it into a European register of sanction or to communicate sanctions to other Member States automatically), it is surprising that the right to non-recognition was turned into an obligation to refuse recognition.[77] A possible explanation could be road safety, which is mentioned in the directive[78] and in ECJ jurisprudence[79] several times, as a signal to drivers that a licence from abroad is no protection against the enforcement of national measures.[80] In this context, the obligation to refuse recognition also eliminates the problem of *discrimination à rebours*,[81] i.e. the discrimination of a state's own citizens in favour of citizens from another Member State. This is a common problem which can occur when EU law takes priority over national law, because cases without a European context are still treated according to the national law, whereas in cases with an EU context the national law is inapplicable. This is irrelevant with regard to article 18 TFEU and to the four freedoms, but it can be a problem with regard to the constitutional law of the respective Member State.[82] As drivers with foreign

74 Directive 91/439 (n48) art 8(4)(1).
75 Case C-419/10 *Hofmann* (n28) para 67.
76 Case C-260/13 *Aykul* (n36) para 58; see also F Koehl, Europäischer Führerscheintourismus: Aktuelle Entwicklungen [2016] DAR 186, 190.
77 Szydło (n2) 358 at footnote 63, is of the opinion that non-recognition remains facultative, but this is obviously not in line with the wording of directive 2006/126 (n24).
78 Directive 2006/126 (n24) recitals 2, 8, 11, 13, 15; arts 7, 18.
79 Case C-9/18 *Meyn* (n57) para 27, 32.
80 With a similar intention, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16, provides for recognition and enforcement of decisions on conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods. See also Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences [2011] OJ L 288/1, and Directive 2015/413/EU facilitating the cross-border exchange of information on road safety related traffic offences [2015] OJ L 68/9.
81 Cf A Epiney, Umgekehrte Diskriminierungen (Cologne, Heymann 1995) 33 seq.
82 Cf Federal Constitutional Court of Germany [2006] NJOZ 446, 447; Constitutional Court of Austria [2001] EuZW 219.

licences now have to be treated in the same way as drivers with national licences with regard to sanctions, such discrimination can no longer occur.

5.4. Questions and some answers by the ECJ

According to long-standing ECJ jurisprudence, established already with regard to the second directive, recognition must take place "without any formality".[83] This means, in particular, that the Member State which is under the obligation to recognize a foreign licence, is not entitled to investigate if the conditions to issue that licence have been met.[84] So, mutual recognition goes along with mutual trust that the Member State which has issued the licence has acted in accordance with the directive. Unfortunately, this trust is not always justified. Quite frequently, Member States, in particular Germany, have found that driving licences were issued in violation of the directive. The main cases are:

(1) that the applicant did not have his/her normal residence in the Member State which issued the licence, as required already by article 7 (1) (b) of the second directive and now by article 7 (1) (e) of the third directive; and

(2) that an applicant whose driving licence is restricted, suspended or withdrawn by one Member State, obtained a licence in another Member State, which under the second directive was a "de facto infringement"[85]; now it is prohibited under Article 11 (4) (1) of the third directive.

Unsurprisingly, cases like these gave rise to the question of whether recognition of such licences could be refused. The question is, of course, a delicate one, touching the core of mutual recognition, and, consequently the ECJ was reluctant to grant exceptions to the principle of mutual recognition. However, in some cases the Court acknowledged that Member States could refuse recognition of a licence.

5.4.1. Licences issued despite no normal residence in the issuing state

One of the more frequent problems is, apparently, that driving licences are issued by Member States without verifying that they have, based on the "normal residence" of the applicant, local jurisdiction to issue it; sometimes the requirement was even blatantly ignored by stating a residence abroad

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83 See most of the decisions mentioned in n36: e.g. case C-476/01 *Kapper*, para 45; case C-184/10 *Grasser*, para 19; more recently case C-195/16 *I.* (n2) paras 34, 45.

84 See, among others, Case C-184/10 *Grasser* (n36) para 21.

85 COM(2003) (n58) 5 seq.

in the licence itself.[86] The reasons why people try to obtain a driving licence from a state where they do not have their normal residence may vary to some extent, but mostly they want to profit from either lower requirements to (re-) obtain a licence, which exist despite all harmonisation efforts by the European legislator, or from lower cost (especially for driving instruction).

With regard to such cases, the ECJ held that the directives

'do not preclude a host Member State from refusing to recognise, in its territory, a driving licence issued by another Member State where it is established, on the basis of entries appearing in that licence, that the normal residence condition, [...] has not been observed.'[87]

So, for example, a Czech licence which states that the normal residence of the driver at the time of issue was somewhere in Germany, does not have to be recognized, because it is manifest from the document itself that the conditions for issuing it were not fulfilled. However, not all Member States have an elaborated registration system for their population,[88] so it may be easy to feign a normal residence. The ECJ, having been criticized for not sufficiently preventing misuse of the principle of non-recognition,[89] is aware of this problem, and (now) also accepts non-recognition in cases

'where it is established, on the basis, not of information coming from the host Member State, but [...] of other indisputable information from the issuing Member State, that the condition of normal residence [...] had not been satisfied.'[90]

The issuing Member State does not have to provide such information of its own accord, but it may be requested by the host state,[91] making use of the mutual assistance provision in the directives.[92] So, for example, if Germany as the host state manages to obtain information from authorities in the Czech Republic as the issuing Member State, according to which the registration address is a terraced house formally converted into a guesthouse without approved business operations, in which 35 other German nationals were registered at the same time, and if the applicant is unknown for tax purposes abroad, there is indisputable information indicating a domestic residence; therefore, the recognition of

86 For example, joined cases C-329/06 *Wiedemann* and C-343/06 *Funk* (n36); case C-184/10 *Grasser* (n36).

87 Case C-184/10 *Grasser* (n36) para 33.

88 See D Plate/F-R Hillmann III, 'Schluss mit dem Führerscheintourismus – Ein Lösungsvorschlag' [2014] DAR 7, 8.

89 See, for example, M Brenner, 'Führerscheintourismus in Europa: Noch kein Ende in Sicht' [2010] EuR 292.

90 Case C-467/10 *Akyüz* (n36) para 62, 65.

91 ibid, para 72. For possible investigation methods, see H Geiger/A Rebler, 'Maßnahmen gegen den Führerscheintourismus' [2012] SVR 361, 364.

92 Directive 91/439 (n48) art 12(3); directive 2006/126 (n24) art 15, see *supra*.

the Czech licence can be refused.[93] The refusal is possible regardless of a possible traffic offence.[94] If recognition cannot be refused by the host Member State, it is up to the issuing Member State to eventually withdraw or cancel a licence issued despite no normal residence in the territory, but apparently, such consequences are extremely rare.[95]

5.4.2. Licences issued despite a pending sanction against the driver

The second problem in connection with mutual recognition is the one of driving licences issued abroad, with the possible fulfilment of the requirement of normal residence, but at a time when the applicant was subject to restrictive measures in another Member State, especially the one of previous normal residence. Do other Member States, in particular the one of previous normal residence, have to recognize that driving licence?

In the frequent case of change of normal residence back to the Member State which imposed the original sanction, that state becomes competent to impose sanctions on the driver according to article 11 (2) of the third directive.[96] However, the ECJ has made it clear that this legal basis can only be used to impose sanctions for offences committed *after* the driving licence was issued by another Member State,[97] so it cannot be used to enforce an old sanction. Instead, the Member State of (new) normal residence can, and pursuant to the third directive must, refuse recognition of the foreign driving licence based on article 11 (4) (2) of the third directive, or, previously, article 8 (4) (1) of the second directive.[98] Thereby, the Member State of normal residence applies the same legal basis as any other Member State in which a driver with a foreign driving licence committed a traffic offence.

Emphasizing the principle of strict interpretation of exceptions, the ECJ only accepts that recognition is refused if the foreign driving licence was issued during a pending sanction.[99] In contrast, the Court has made it very clear that a licence that was regularly issued not during the time of a sanction, but *afterwards*, must be recognized,[100] regardless of differing conditions for obtaining it in different Member States, regardless of whether it was acquired in the

93 See ruling of 12/01/2018 of the Baverian Administrative Court DE:BAYVGH:2018:0112.11CS17.1257.00.
94 Case C-184/10 *Grasser* (n36).
95 Brenner (n89) 297.
96 Previously, it was art 8(2) of directive 91/439/EEC (n48).
97 Case C-227/05 *Halbritter* (n36) para 38; case C-340/05 *Kremer* (n36) para 35.
98 Case C-260/13 *Aykul* (n36) para 55.
99 Case C-225/07 *Möginger* (n36). A rejected application for a licence does not qualify as a pending sanction, see case C-340/05 *Kremer* (n36).
100 Case C-476/01 *Kapper* (n36); case C-419/10 *Hofmann* (n36) para 67.

context of application of the four freedoms, e.g. by someone working as an employee abroad,[101] and even if the normal residence was then moved back to the state in which the (expired) sanction had been imposed. The only possibility to still refuse recognition is to establish, on the basis of entries appearing in that licence, or of other indisputable information from the issuing Member State, that the condition of normal residence had not been satisfied (see above).

In cases where non-recognition can be based on a pending sanction, the ECJ is (surprisingly[102]) generous with the strict interpretation of exceptions: according to several judgments, it does not matter if the driver uses the licence in the country which imposed the sanction only after it has been lifted. The fact that the driving licence was obtained at a time the holder was not allowed to obtain it in one Member State leads to permanent non-recognition in that state.[103]

5.4.3. Duration of non-recognition

While non-recognition is permanent when a driving licence was issued either in (manifest) violation of the requirement of normal residence or during a pending sanction, i.e., since the third directive, in violation of article 11 (4) (1), other cases require limitations to non-recognition. The ECJ decided this with regard to a case in which a Member State, which is not the Member State of normal residence and therefore cannot apply article 11 (2) of the third directive, has invoked article 11 (4) (2) on the basis of a traffic offence. In such a case, the ECJ accepts the non-recognition of the foreign licence, but it demands that the Member States' law provide for conditions for recovery of the right to drive compliant with the principle of proportionality.[104] Additionally, the principle of non-discrimination or equal treatment[105] should apply, so these conditions must be equivalent to those for drivers with a domestic licence.

6. Current State of Integration

Over the past 40 years, European legislation and ECJ jurisprudence[106] have succeeded in bringing mutual recognition of driving licences

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101 A limitation to such cases was discussed in Germany, see Morgenstern (n70) 428, but the ECJ did not mention the aspect at all.
102 Schünemann/Schünemann (n37) 385.
103 Inter alia case C-225/07 *Möginger* (n36).
104 Case C-260/13 *Aykul* (n36) paras 77 seq.
105 Art 18 TFEU.
106 On the interaction between the two see J Kokott, 'Verkehrsraum Europa: Der EuGH steuert mit'[2006] DAR 604, 608 seq.

several steps forward: even long-term recognition beyond one year of residence does not require an exchange of a driving licence anymore, the conditions for the issuing of driving licences have been harmonised to a considerable extent, and some steps against "driving licence tourism" have been taken, particularly with the third directive. So, where do we currently stand with regard to driving licences in European administrative law (doctrine)?

Technically, we are in a system of compulsory, automatic mutual recognition, with few exceptions, established by secondary law.[107] In contrast to other areas of EU law, where such secondary law was preceded by ECJ decisions which had invoked the four freedoms in order to achieve (and to determine the limits of) recognition,[108] primary law never played an important role in the mutual recognition of driving licences, because international agreements had already achieved a similar degree of recognition which would have been achievable by invoking the four freedoms.

If we consider mutual recognition as one step on the way to 'creating an ever closer union' (article 1 TEU), the question is what degree of integration has been achieved. The key indicator to determine this seems to be the role of the Member State that issued an administrative act. In driving licence law, this principle is modified, because following a change of normal residence, the Member State of that residence takes over the role of the issuing Member State.[109] Today, the Member State of normal residence plays an important role: for a long time, the ECJ has stressed that doubts surrounding the legality of a driving licence may only be examined by the issuing state (which is, at least in the beginning, the one of normal residence), whereas all other states are limited to informing that state and requesting an examination (and, ultimately, initiating an infringement procedure)[110], except in cases of a manifest violation of the requirement of normal residence. Only in that case, has non-recognition been accepted as a 'self-defence' against non-compliance with European law by other Member States. However, the picture changes when we focus on sanctions: by prohibiting Member States to issue driving licences to people that are under sanctions in another Member State[111], the third directive provides for a (partial) transnationalisation of sanctions. Otherwise, sanctions remain a national issue.

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107 On the categorization of mutual recognition, see, for instance, Armstrong (n12) 246 seq.; M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CML Rev. 405, 408 seq.; Arroyo Jiménez (n17).

108 Möstl (n107) 411. The prime example is of course the free movement of goods with the 'Cassis de Dijon' judgment; see also JHH Weiler, 'Mutual Recognition, Funtional Equivalence and Harmonisation in the Evolution of the European Common Market and the WTO' in F Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process* (Palgrave Macmillan 2005), 25, 43 seq.

109 Directive 2006/126 (n24) art 11(2).

110 Joined cases C-329/06 *Wiedemann* and C-343/06 *Funk* (n36) para 57.

111 Directive 2006/126 (n24) art 11(4)(1).

In a fully integrated system of transnational administrative acts, one would expect all authorities to be obliged to report a traffic offence to the Member State of normal residence, which would then take measures against the driver, with effects across the whole of the EU. Instead, according to the directives, authorities apply their local (criminal and administrative) law and refuse recognition only for their territory.

There are two main reasons why European integration did not go any further than this: firstly, information exchange between Member States is suboptimal, and secondly, EU competence in the area of sanctions for traffic violations is limited and has not been used up to this limit.

6.1. Lack of Information Exchange

First, further integration would require a speedy and reliable exchange of information between Member States. The European legislator is, at least in principle, aware of that, and introduced the European driving licence network 'RESPER' (RESeau PERmis de conduire) in the third directive.[112] However, that network was not fully operational for a long time – even in 2017, the ECJ found that Portugal had failed to fulfil its obligations to connect to the network.[113] Apart from that, the functionality of the network is limited: RESPER offers only four kinds of information exchange: Search Driving Licence By Name (SDLN, in order to verify if someone already has a driving licence), Get Driving Licence Details (GDLD, in order to verify that a licence is not counterfeit and still valid), Notification Driving Licence Status (NDLS, to notify other Member States about the exchange of a driving licence), and Secure Message (MS, to follow up questions that result from one of the previous inquiries).[114] This is in line with the directive, which only obliges Member States to exchange information on the licences they have issued, exchanged, replaced, renewed or revoked – suspension is not (expressly) mentioned. Apparently, Member States also have only limited interest in informing other Member States about sanctions – their main concern is that the drivers are off their own roads, but they care less about the other roads in Europe. Obviously, the principle of sincere cooperation in article 4 (3) TEU[115] is not enough, so there should be clear instructions about information exchange on all issues regarding driving licences, including sanctions, in secondary law. From a technical point of view, there are dependable solutions, such as the ones used for RESPER, for the implementation of

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112 See *supra* 5.3.

113 Case C-665/15 *Commission v Portugal* (n.20).

114 See the European Car and Driving Licence Information website www.eucaris.net/services/resper/ [accessed 06/09/2020].

115 On its relevance for mutual recognition, see Wenander (n8) 768 seq.

the "Prüm Decisions"[116] or for the Schengen Information System (SIS),[117] which could be expanded for that purpose.[118]

6.2. Lack of Harmonisation of Sanctions

The second reason why the role of the home state is not strengthened beyond what the third directive provides for is the lack of harmonisation of sanctions for driving offences. Exceeding the speed limit by 30 km/h may lead to a suspension in one Member State and "only" to a fine in another state. Sanctions, at least the grave ones, belong to the area of criminal law, in which the EU has only very limited competences, so an obligation by the EU to fully recognize sanctions could be considered *ultra vires*. However, the principle of mutual recognition is also known in the EU criminal justice area,[119] and apart from that, the ECJ qualified "measures to facilitate the exchange of information concerning certain road traffic offences and the cross-border enforcement of the sanctions attached to them" as measures for the improvement of road safety, and therefore as transport policy within the meaning of article 91 (1) (c) TFEU.[120]

At the EU level, there are currently two acts dealing with sanctions: on the one hand, "Directive (EU) No 2015/413 facilitating cross-border exchange of information on road-safety-related traffic offences" enables Member States to get access to other Member States' vehicle registration data (regarding the vehicle itself and the holder) in order to punish certain traffic offences. As a result, traffic offences can be sanctioned even if only the licence plate of a vehicle is known (with the reservation that the national law must allow for punishing the holder regardless of him/her being also the driver[121]). On the other hand, "Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties" provides for recognition and enforcement of decisions on conduct which infringes road

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116 Art 12 of Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210/1, and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of that decision [2008] OJ L 210/12.

117 See Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates [2006] OJ L 381/1.

118 Of course, data protection requirements would have to be observed in that context. The European legislator is aware of that problem and has added paragraphs 3 and 4 to art 15 of directive 2006/126 (n24).

119 Möstl (n107) 418 seq.; C Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2015) 132 seq.

120 Case C-43/12 *Commission v Parliament and Council* [2014] EU:C:2014:298, paras 43 seq.

121 On that problem, see Kokott (n106) 610; K Funke, 'Europaweite Ahndung von Verkehrsverstößen: EU-Richtlinie über den Halterdatenaustausch' [2012] NZV 361, 364.

traffic regulations. As a result, traffic offences abroad do not necessarily lead to impunity, even if the driver (or holder, see above) is not fined on the spot.

Neither act deals with the consequences of a traffic offence for the validity of a driving licence, nor do they harmonise the process of imposing such sanctions, especially not with regard to the principle of due process. In relation to that, national (constitutional) law may not accept a recognition of sanctions from abroad without previously examining due process and equivalence. Here, it becomes relevant that while the mutual recognition of driving licences increases individual freedom (only at the expense of state competence), the mutual recognition of sanctions diminishes individual freedom.[122]

Nota bene, public international law has not helped either to further harmonise sanctions: The European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle of 1976 entered into force in 1983, but has, until today, only 12 Contracting Parties. Germany, for example, refuses to sign and ratify it because it considers it inefficient and irrelevant in the presence of EU law on the same subject.[123]

7. Conclusions and Perspectives

Over the past years, the EU has considerably advanced the mutual recognition of driving licences. The system established by European secondary law certainly accomplishes its primary aim – to facilitate cross-border traffic, and to overcome the territoriality of driving licences. As in many other areas where mutual recognition takes place through secondary law, the main technique has been the harmonization of the prerequisites for obtaining a licence, thereby making recognition (politically) acceptable, and ensuring the formal comparability of licences (especially through the establishment of driving licence categories[124]).

As it often happens, the ECJ has mostly fostered integration through its jurisprudence, leaving it to the European legislator to close the loopholes enabling driving licence tourism. The current system relies on a strong role of the Member State of normal residence, but (unlike in other areas, where Member States are limited to the application of safeguard clauses[125]) this state is not the only one taking decisions on the 'right to drive' with unionwide effect. Therefore, there are still cases of non-recognition, and it is very unlikely that

122 Schünemann/Schünemann (n37) 382; Möstl (n107) 410.

123 Deutscher Bundestag, BT-Drs. 19/10411, 13.

124 On the requirement of exact transposition, see case C-314/16 *Commission v Czech Republic* [2018] EU:C:2018:42.

125 See, for example, Chapter XII of Directive 2007/46/EC (n14).

further harmonisation will lead to a system of sole 'home state supervision'[126]. The main reason is that the 'right to drive' is determined by the interaction of different laws governing the issuing of the licence and governing sanctions. While the former have been harmonized to a considerable extent, the latter remain mainly a national issue.

However, there is room for improvement, certainly with regard to the exchange of information, but also with regard to sanctions. Based on the competence for transport policy, the Member State of normal residence should be notified of traffic violations abroad and it should be obliged to consider whether these violations justify a sanction, then with union-wide effect. For the sake of the principle of mutual recognition, this method seems preferable in comparison to an optional refusal of recognition of the driving licence by all Member States,[127] and in contrast to the refusal only by the Member State in which the incident occurred, which is already provided for in article 11 (4) (2) of the third directive.

When considering further harmonisation, it should also be kept in mind that the phenomenon of driving licence tourism does not only occur with the intention of circumventing national sanctions or as regulatory arbitrage[128], i.e. the search for the most favourable legal framework, but also with the intention of making use of the benefits of the internal market for services by choosing the country with the best (or cheapest) driving schools. In a Union that appreciates competition,[129] the protection of a national "driving licence economy" should not play a role. With a better system of information exchange, which would ensure that sanctions are not circumvented, the competence to issue a driving licence would not have to be limited to the state of normal residence, which – already today – may treat a foreign licence like a domestic one in many regards. Instead of fighting regulatory arbitrage with a normal residence requirement, the regulatory differences should be eliminated. Choosing an appropriate standard of harmonisation, as suggested in a different context by article 114 (3) TFEU, would also eliminate the race for the lowest requirements for driving licences, which is a constant fear.[130] In any case, the free movement of persons established by EU law leads to the roads being full of drivers with licences from many different Member States. Apparently, the risks for road safety resulting therof are acceptable, so they should not be over-emphasized in order to prevent reasonable harmonisation.

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126 Wenander (n8) 781.
127 This is suggested by Szydło (n2) 361.
128 ibid, 366.
129 See Protocol No 27 to the Treaty of Lisbon.
130 Morgenstern (n70) 429; VG Koblenz (n38).