

# CJEU Imposes Further Restrictions to German Penal Order System



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**News**

In its judgment of 14 May 2020 (Case C-615/18, *UY/Staatsanwaltschaft Offenburg*), the CJEU had to deal with the German rules on the service of penal orders (*Strafbefehle*) to persons living abroad and with their interpretation in conformity with EU law, in particular Directive 2012/13/EU on the right to information in criminal proceedings – for the third time.

## *Facts of the Case:*

The case was referred by the Local Court of Kehl, Germany, which has to decide on the criminal liability of a professional Polish lorry driver with permanent residence in Poland. On 14 December 2017, the driver was subject to a roadside check. The German police detected that he was driving without a driving licence, because the Local Court of Garmisch-Partenkirchen had imposed a fine on him and a three-month driving ban for failure to stop after a road accident (by means of a penal order of 14 August 2017). At the request of the public prosecutor's office in Garmisch-Partenkirchen, he appointed a person authorised to accept service of judicial documents on his behalf in Germany. The penalty order was served on the authorised person (a judicial staff member of the competent local court), who sent it to the known address of the accused person in Poland by ordinary post. It is not known whether the driver actually received the letter or not. Since the accused person did not lodge an appeal against the order, it acquired the force of *res iudicata* on 14 September 2017, i.e., the driving ban came into effect. After the roadside check in December 2017, the competent public prosecution office of Offenburg applied to the local court in Kehl to issue a further penal order against the Polish driver for the offence of negligently driving a vehicle without a driving licence and to impose on him a fine as well as an additional three-month driving ban.

## *Questions referred*

In light of the previous judgments of the CJEU and their tenets on the compatibility of the German penal order regime with Directive 2012/13 (judgments *Covaci* and *Tranca & others*, →[eu crim 2/2017](#), p. 70), the Local Court of Kehl had doubts as to whether the accused person was treated in a discriminatory way or suffered unjustified disadvantages only because his permanent residence is not in Germany but instead in another EU Member State. In essence, the court is unsure whether the current German criminal procedure, which operates with the possibility to serve criminal documents on intermediaries in Germany and which foresees certain conditions for restoring the position to the status *quo ante* (*Wiedereinsetzung in den vorigen Stand*), guarantees adequate protection of the individual's rights. Can the driver be held criminally liable, even though the period to oppose the penal order started to run not with the service on the accused abroad but to

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the authorised person in Germany? Can the driver be held criminally liable even though he was not aware of the first penal order and its *res iudicata* effect?

#### Decision of the CJEU

(1) The CJEU first examined whether Art. 6 of Directive 2012/13, which establishes the right to information about the accusation, precludes national legislation that let the two-week period start to lodge an appeal against a penal order by means of service on an authorised person, who was appointed by the accused person to receive judicial documents on his behalf. The CJEU maintains its case law on the subject matter as established in the cases *Covaci* (C-216/14) and *Tranca* (C-124/16):

- The Directive does not regulate the procedures whereby the information about the accusation must be provided to the suspect or accused person;
- Member States may differently regulate the service of judicial documents on persons residing within their territory and those residing abroad;
- The appointment of an authorised person for the service of judicial documents – as foreseen in German law – is, in principle, possible;
- The period to oppose the judicial decision may start to run from the moment when the decision is served to the authorised person;
- Any difference in treatment, however, cannot undermine the effective exercise of the rights of the defence of the accused person;
- Therefore, the accused person's position must be allowed to be restored to the *quo ante* status, namely when he actually becomes aware of the order;
- The accused person must benefit from the entire two-week period for lodging an objection to the order.

The CJEU scrutinized the German application requirements for restoration of status *quo ante*. It stressed that the two-week period for lodging the appeal must, *de facto*, be guaranteed, i.e., without any restrictions. Therefore, it is deemed incompatible if national law on the restoration of the status *quo ante* imposes the obligation on the accused person to seek information from the authorised person regarding the pending proceedings. It is likewise incompatible if the national law does not provide for the possibility to suspend the measures imposed in the penal order during the period of objection.

(2) Second, the CJEU examined the question of whether the driver can be held criminally liable for not complying with the measures imposed in the penal order (here: the penal order of Garmisch-Partenkirchen), based on the fact that he did not know the existence of the order. The judges in Luxembourg stated that, if this were the case, the *effet utile* of Art. 6 of the Directive 2012/13 would be jeopardized. The accused person must be afforded the opportunity to defend himself against a penal order from the moment he becomes aware of it. It is up to the national authorities to ensure that the person concerned actually gains knowledge of the measures imposed against him. The CJEU recommends that the referring court use the instruments of EU law, in particular the interpretation of national law in conformity with EU law and the inapplicability of national law not complying with EU law, to ensure the full effectiveness of the Directive.

#### Put in focus:

The judgment follows the conclusion of Advocate General (AG) [Bobek in his opinion of 20 January 2020](#). The AG rightly observed that the case at issue is different from the previously decided cases *Covaci* and *Tranca*. Whereas in *Covaci* and *Tranca*, the penalty orders in question were issued in the context of the *same criminal proceedings*, during which the breach of Art. 6 of Directive 2012/13 was alleged, the present *UY* case raises questions in *two interconnected but formally distinct sets* of criminal proceedings. The first penal order from

Garmisch-Partenkirchen has prejudicial effects for the second penal order pending before the Local Court of Kehl. This raises, for instance, the question of whether the *res iudicata* of the first penal order procedure is an interest that must be weighed against the accused person's individual rights.

The CJEU does not directly answer this question. It instead upholds the German provisions that regulate penal orders to persons residing abroad. However, as the AG notes, this "yes" is supplemented with "buts." The *UY* judgement adds more "buts" to the already existing ones established in the judgments *Covaci* and *Tranca*.

Against this background, one is left to wonder whether Germany needs a revision of its law, since the restrictions posed by the CJEU are difficult to implement in practice. It would be particularly necessary to strengthen the rules for the service of judicial decisions on persons residing outside of Germany. In this context, it is also questionable whether Germany should maintain its system of services to authorised persons (who are regularly staff members of German courts) in cross-border situations.

The EU legislator may also be required to act. The AG points out in his opinion that we currently have quite a paradoxical situation: whereas there are harmonised and strict EU rules on the cross-border service of documents in civil and commercial matters – establishing a high degree of protection –, there are close to none in criminal law.

In any case, for the referring court in Kehl, the present judgment means that the penal order against the Polish driver must be rejected. In the momentary situation, the judgment means that the defence must closely inspect how penal orders were sent abroad and whether clients actually became aware of them.

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