First Experiences in Germany with Mutual Recognition of Financial Penalties

Christian Johnson

eucrim
European Law Forum: Prevention • Investigation • Prosecution

AUTHOR

Christian Johnson

Head of Department III "International Legal Assistance in Criminal Matters; Hardship Payments; Research" Bundesamt für Justiz (Federal Office of Justice), Bonn/Germany

CITE THIS ARTICLE

Johnson, C. (2013). First Experiences in Germany with Mutual Recognition of Financial Penalties. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2013-009

Published in eucrim 2013, Vol. 8(2) pp 65 – 68

https://eucrim.eu

ISSN:

I. Framework Decision 2005/214

1. Introduction

Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties (hereinafter FD 2005/214) was adopted on 24 February 2005.[1] It set a deadline for Member States to comply with its provisions: 22 March 2007. As of today, 24 Member States have transposed FD 2005/214 into their respective national law.[2] This instrument provides for an EU-wide execution of financial penalties on the basis of the principle of mutual recognition. FD 2005/214 has broken new ground. Before 2005, a multilateral or EU instrument for the trans-border execution of financial penalties had never existed.[3] For the first time, administrative offences were included in an EU instrument on cooperation in criminal matters.[4] For the general public, FD 2005/214 has, above all, been perceived as an instrument that allows the trans-border execution of road traffic offences and Recital 4 explicitly states that FD 2005/214 should also cover financial penalties imposed in respect of road traffic offences. The list of offences in Art. 5 para. 1, where double criminality is not to be verified, was extended by adding, among other offences, "conduct which infringes road traffic regulations."

In contrast, above all, to Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, FD 2005/14 appears not to have enjoyed the attention it deserves at the EU level yet. No current statistical data are available, and there is no manual in place as is the case for the European Arrest Warrant.[5] The report from the Commission based on Art. 20 of FD 2005/214 was published on 22 December 2008.[6] In October 2012, the state of play of the implementation of FD 2005/214 was compiled.[7]

2. The Situation in Germany

a) Implementation

Germany transposed FD 2005/214 by the act of 18 October 2010 that entered into force on 28 October 2010.[8] The Federal Office of Justice in Bonn, an authority within the remit of the Federal Ministry of Justice, has been designated as the competent authority for all incoming and outgoing cases under FD 2005/214. No reliable estimates as regards the possible number of cases were available when preparing the practical functioning of FD 2005/214. This article aims to present the experiences that Germany has made both as executing and as issuing state by discussing the main features of FD 2005/214.

b) Numbers of cases: Germany as executing state

As executing state, Germany received 2869 decisions from other Member States in 2011; in 2012; 6095 decisions have already been transmitted to Germany. In 2013, the numbers will most probably rise again. The most decisions by far are transmitted by the Netherlands. For example, in 2011, 2823 of all 2869 decisions were of Dutch origin. Most of them were road traffic offences, above all speeding and red-light offences. As of today, Germany has received no more than 261 decisions from other Member States (Slovenia, Poland, Sweden, Spain, France, Romania, Austria, Bulgaria, Latvia, Lithuania, Portugal, the Czech Republic, Hungary, and the United Kingdom). This rather low number has started to increase significantly in recent months. Germany has so far taken in more than €180.000, but not all cases have been processed yet. In Germany, the person sentenced by another Member State is heard before formal recognition and execution, and he or she is given the opportunity to raise any objections or to pay the financial penalty. In many cases, the sentenced

https://doi.org/10.30709/eucrim-2013-009

persons choose to pay immediately, and the case is closed within a few weeks. Both the numbers and the nature of cases demonstrate the relevance the new instrument potentially has for every EU citizen.

c) Numbers of cases: Germany as issuing state

In 2011, the Federal Office of Justice received 1802 decisions from the public prosecutor's offices and various other German authorities. In 2012, 4035 decisions were registered. Not all decisions have yet been transmitted to other Member States. In particular, translation of the certificate (the standard form in the annex of FD 2005/214) is costly and time-consuming. Road traffic offences are responsible for about 35% of all decisions. In 2011, about 2/3 of the decisions were decisions in criminal matters, while 1/3 covered administrative offences. So far, 346 German decisions have been recognized and successfully executed in Poland, the Netherlands, Romania, Lithuania, the United Kingdom, Austria, the Czech Republic, Spain, Portugal, Denmark, Luxemburg, and Sweden. These states have taken in more than €85.000. Cooperation especially with the Dutch and Polish authorities has proven to be both extensive and successful. Many decisions have already been recognized and are currently being executed. Execution may take time – no different from a purely national execution – where the sentenced person is accorded the possibility to pay in instalments.

II. Practical Experiences

1. Decision and Financial Penalty (Art. 1)

Art. 1 defines the key terms "decision" and "financial penalty." "Decision" refers to a final decision requiring a financial penalty to be paid by a natural or legal person, where the decision was made by a court or by an authority that meets the requirements set out in Art. 1 (a).[9] "Financial penalty" means the obligation to pay a sum of money upon conviction of an offence, imposed in a decision (Art. 1 (b) (i)), and a sum of money in respect of the costs of court or administrative proceedings leading to the decision. In principle, the practical application of these key terms has posed no problems.

In a limited number of cases, however, Germany as executing state received certificates with which the respective issuing state demanded the recognition and execution of costs of proceedings that had led (only) to a prison sentence. The scope of applicability of FD 2005/214 does not cover this scenario. It is admissible to recognize and execute only the costs of proceedings, but the main sanction must always be a financial penalty (or a combination of a prison sentence and a financial penalty).

2. Competent Authorities (Art. 2)

FD 2005/214 leaves it to the Member States to decide on the national competences (Art. 2 para. 1). The competence of a single authority[10] – as in the Netherlands and in Germany – has the invaluable advantage of a uniform practice. In the Netherlands, the Centraal Justitieel Incassobureau (CJIB) in Leeuwarden has been designated as the competent authority. Because of the high number of cases between the two countries, the CJIB and the German Federal Office of Justice have early established very close cooperation. Representatives from both authorities convene regularly. General as well as case-related information, e.g., clarifications, withdrawals of decisions, and notifications of execution, are exchanged, for the most part without expensive and time-consuming translations. This is particularly helpful when (partial) payments need to be traced, e.g., in a constellation where the Netherlands transmitted the decision to Germany and the sentenced person claims to have already paid in the Netherlands (which is possible under Art. 9 para. 2).

https://doi.org/10.30709/eucrim-2013-009

Many other Member States have opted for a decentralised system, which is in line with the general development of cooperation in criminal matters in the EU. In practice, however, quite different approaches to FD 2005/214 are likely, particularly when it comes to providing information under Art. 14.

3. Decision and Certificate (Art. 4), Languages (Art. 16)

a) Decision and Certificate (Art. 4)

According to Art. 4 para. 3, the decision together with the certificate must be transmitted to the executing state.[11] Art. 7 para. 1 allows refusal of the decision if the certificate is not produced, is incomplete, or manifestly does not correspond to the decision. In practice, the 8-page certificate is often not correctly completed. This triggers cumbersome consultations (Art. 7 para. 3). For German authorities wanting to benefit from FD 2005/214, the Federal Office of Justice has designed a web-based form that may be completed electronically; several tool-tips guide the user through the different segments and are regularly updated.[12]

b) Languages (Art. 16)

Under FD 2005/214, only the certificate, not the decision, needs to be translated into the official language of the executing state (Art. 16 para. 1). Many Member States' authorities have translated not only the individual case-specific information but also the certificate as such. This produces unnecessary translation costs because the certificate is available in all languages as annexed to FD 2005/214. When Germany is the issuing state, the Federal Office of Justice provides the translator with the certificate in the target language, which then only requires translation of the case-specific information.

In general, it must be noted – especially with regard to any consideration to abolish the €70 threshhold (Art. 7 para. 2 (h)) – that every case under FD 2005/214 requires costly translation and a considerable administrative effort.

4. List of Offences and Double Criminality (Art. 5)

The offences listed in Art. 5 para. 1, if they are punishable in the issuing state and as defined by the law of the issuing state, shall, without verification of the double criminality of the act, give rise to recognition and enforcement of decisions. The list was copied from FD 2002/584 on the European Arrest Warrant and extended by the last seven offences or groups of offences.[13] Unlike earlier legal instruments, FD 2005/214 is applicable both to criminal and administrative offences. It appears, however, that a number of Member States have transposed FD 2005/214 in a way that allows them to recognize and execute only decisions in respect of criminal offences. For the concept of list offences, it cannot be of any relevance whether the issuing state classifies the act as a criminal offence whereas it would only constitute an administrative offence under the law of the executing state (or vice versa). The same consideration is valid for unlisted offences and the lack of double criminality as a ground for refusal (Art. 5 para. 3, Art. 7 para. 2 (b)): recognition and execution of a decision may not be refused if the classification of the act as a criminal or an administrative offence differs between the issuing and the executing states, provided, of course, that the act may be sanctioned with a financial penalty in the executing state.[14]

5. Grounds for Non-Recognition and Non-Execution (Art. 7)

The scope of FD 2005/214 has been considerably enlarged by the inclusion of administrative offences. Such offences differ from Member State to Member State more than criminal offences, and therefore lack of double criminality (Art. 5 para. 3, Art. 7 para. 2 (b)) has been applied in a number of cases by the respective

executing states. Most of the other grounds for refusal listed in Art. 7 have enjoyed no practical relevance so far.

Circumstances that FD 2005/214 has technically not conceived as grounds for refusal play a more prominent role. This is particularly the case with Art. 4 para. 1. Quite often, the sentenced person does not (or no longer) live or reside under the address provided by the issuing state. FD 2005/214 remains silent on the efforts that the executing state must undertake to get hold of the person. This practice seems to differ considerably from Member State to Member State. Some executing states leave it at that if the person cannot be found under the given address; others inquire with different registers or even make the police investigate his or her whereabouts. In a considerable number of cases, execution turned out to be unsuccessful simply because the person had no means to pay the financial penalty. If the issuing state has excluded the possibility of any alternative sanctions, including custodial sanctions, in the certificate (Art. 10), the possibilities of the executing state being able to execute the decision regularly come to an end. Therefore, Member States should carefully consider whether to exclude alternative sanctions or not.

6. Determination of the Amount to be Paid (Art. 8)

As an outflow of the principle of mutual recognition, the executing state may not reduce the financial penalty to the maximum amount provided for acts of the same kind under its national law. As an exception, a reduction is admissible where it is established that the decision is related to acts that were not carried out within the territory of the issuing state and when the act falls within the jurisdiction of the executing state (Art. 8 para. 1). These two requirements are so exceptional that Germany as executing state did not reduce a financial penalty in one single case. If one of the two states involved belongs to the Eurozone and the other not or both do not belong to the Eurozone, the executing state must convert the financial penalty into its currency at the exchange rate in effect at the time the penalty was imposed (Art. 8 para. 2). In general, the application of Art. 8 has raised no issues.

7. Accrual of Monies Obtained from Enforcement of Decisions (Art. 13)

Monies obtained from the enforcement of decisions shall accrue to the executing state unless otherwise agreed between the issuing and the executing states, in particular in cases of victim compensation (Art. 13). Some German authorities who expected “their” money to be transferred to Germany after successful execution in another Member State had to be advised otherwise. In one case, the Federal Office of Justice received a cheque from the executing state. Consultations led to the solution that the money remained where it was, and the cheque was destroyed. Besides standing for the political idea of a single area of justice, the distribution of monies as provided for in Art. 13 has the advantage of saving the cost and administrative difficulties of transferring the money.

8. Information from the Executing State (Art. 14)

FD 2005/214 obliges the executing state to provide information on the outcome of the case. Above all, the issuing state must be informed of the execution of the decision as soon as it has been completed (Art. 14 (d)) or why the decision has not been recognized or executed (Art. 14 (b) and (c)). Ideally, it should be possible to render this information in very few sentences. In practice, however, the (judicial or administrative) decision to recognize the foreign decision is often transmitted. These decisions on recognition are often very long, and they are regularly written in the language of the executing state.[15] Costly translation of the lengthy decision is required to inform the issuing state that its decision has been recognized and that the entire process has moved one step further. Though only a technical issue, EU-wide cooperation could be significantly improved if the executing state confined itself strictly to transmitting only the information required by

Art. 14. In the middle and long terms, costs of translation – besides the translation of the certificate – that far exceed the financial penalty cannot be justified. The Dutch practice is exemplary: short CJIB letters in English first confirm the receipt of the case and later convey its final outcome.

9. Consequences of Transmission of a Decision (Art. 15)

Once the decision has been transmitted to another Member State, the issuing state may not, according to Art. 15 para. 1, proceed with its execution. Double execution must be avoided.[16] The sentenced person may, however, at all times voluntarily pay the financial penalty to the competent authorities of the issuing state (Art. 15 para. 3). Such (partial) payments have often occurred in practice, and they make swift communication between the authorities involved a necessity. In a significant number of cases, it appears that the sentenced person paid the financial penalty to the issuing state after he or she had been approached by the authorities of the executing state. In other words: the transmission of the decision increased the "pressure" on the sentenced person and made him or her pay in the issuing state. This is not the technical aim of FD 2005/214, but it is nevertheless a success. In a few cases, the Federal Office of Justice has observed that the competent authority of the executing state expressly gave the sentenced person the opportunity to pay the issuing state before continuing with the proceedings under FD 2005/214.

III. Outlook

Taking into account that FD 2005/214 has broken completely new ground, cooperation between many Member States and Germany has turned out to be successful.[17] The numbers of incoming and outgoing cases are already remarkably high. Awareness of FD 2005/214 and the opportunities it offers is increasing. This makes it necessary to further improve and streamline cooperation. One way to proceed could be a comprehensive handbook. Ideally, the issuing state would be put in a position to reliably assess whether the transmission of a decision has any chance of successful execution. In the interest of uniform practice, the national implementation of each Member State should be evaluated as to whether it fully complies with all provisions of FD 2005/214. Particular focus should be on the legal treatment of administrative offences. Only a technical point, but practically very important is the improvement of communication under Art. 14, which should be strictly limited to the information required by that provision. In particular, no decisions on recognition should be transmitted to the issuing state.

---

1. The German title of FD 2005/214 contains a small but remarkable error: "Rahmenbeschluss 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen" translates as "…application of the principle of mutual recognition of [not: to] financial penalties…"↩
2. Italy, Ireland, and Greece remain late.↩
3. The EC Convention on Enforcement of Foreign Criminal Sentences of 13 November 1991 has never entered into force. It had been declared preliminarily applicable (Art. 21 para 3) only between the Netherlands, Latvia, and Germany but has not gained any practical importance.↩
4. In German terminology: "Ordnungswidrigkeiten."↩
5. Doc. 17195/1/10, REV 1 of 17 December 2010.↩
6. COM (2008) 888 final.↩
7. Doc. 9015/2/12 REV 2. Refer also to doc. 7941/12 of 21 March 2012 (questionnaire and answers by Member States). All other available information can be found on the EJN website (http://www.ejn-crimjust.europa.eu).↩
8. Gesetz zur Umsetzung des Rahmenbeschlusses 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen (BGBl. I S. 1408). For an introduction to German implementation: *C. Johnson and St. Plötzgen-Kamradt*, Gegenseitige Anerkennung von Geldstrafen und Geldbußen in Deutschland, eucrim 2011, pp. 33-39.↩
9. The European Court of Justice (Case C-60/12) will adjudicate whether "Unabhängige Verwaltungssenate" in Austria falls within the term "a court having jurisdiction in particular in criminal matters" in Art. 1 (a) (ii) and (iii).↩
10. If a Member State designates (only) one competent authority, this is not to be confounded with a "central authority" within the meaning of Art. 2 para 2.; this central authority is only responsible for the administrative transmission and reception of decisions and for assistance.↩
11. Out of consideration are the changes in the certificate (doc. 13298/11 of 27 July 2011) by Framework Decision 2009/299 on *in absentia* decisions. The legal and practical difficulties caused by the necessity to work with two versions of the certificate at the same time are considerable.↩

https://doi.org/10.30709/eucrim-2013-009

12. https://www.bundesjustizamt.de/DE/Themen/Gerichte_Behoerden/EUGeld/EUGeld_node.html.↩
13. This has the rather bizarre consequence that serious crimes like murder, organized or armed robbery, or rape appear in a Framework Decision on Financial Penalties.↩
14. In this context, the term "double criminality" is, to a certain extent, misleading, as FD 2005/214 also covers administrative and not only criminal offences.↩
15. Art. 16 requires translation of the certificate into the language of the executing state. FD 2005/214 does not, however, install a language regime for the communication besides the transmission of the decision and certificate, e.g., consultations (Art. 7 para. 3) or information from the executing state (Art. 14).↩
16. The same reasoning is behind Art. 4 para. 4, according to which the issuing state shall only transmit a decision to one executing state at any one time.↩
17. No reliable information is available as regards cooperation on the basis of FD 2005/214 between other Member States.↩

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union