

Mutual Recognition of Financial Penalties

Practical Experiences in Germany with the Application of Framework Decision 2005/214/JHA



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Article

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ABSTRACT

This article seeks to demonstrate the practical challenges of enforcing financial penalties EU-wide. The instrument allowing such enforcement – Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties – has been transposed in almost all Member States but little appears to be known about its practical implementation. In Germany, quite remarkable figures have been observed both for incoming and outgoing requests.

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I. Introduction

Foreign road users who travel in Germany as well as German road users in other Member States must abide by the respective national traffic regulations: „When in Rome, do as the Romans do!“¹ Road users who do not do so are likely to face prosecution and a financial penalty. Other criminal offences or infringements of the rules of law may of course entail a financial penalty, too. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (in the following: FD 2005/214)² allows for the EU-wide recognition and execution of such a penalty. As of today, almost all Member States have transposed FD 2005/214 into their national law, and Germany has established bilateral contacts with many of these Member States in order to enhance cooperation under this instrument. Therefore, an account of this cooperation from the German perspective may be of interest. Additionally, the developments on the European level are shown.³

II. Incoming Requests

1. Figures and subject-matter

The competent authority in Germany for all incoming and outgoing requests is the Federal Office of Justice (*Bundesamt für Justiz*) in Bonn. Since October 2010, more than 76,000 decisions from other Member States have been registered (all figures as at 3.6.2019). Until 2015, the figures rose considerably from 6 in 2010 over 2,869 in 2011 to 9,395 in 2014; from 2015 onwards, the figures range between 10,000 and 12,000 decisions per year. This consolidation is mostly due to the fact that almost all decisions are Dutch ones (about 98%). Nearly all Dutch decisions concern traffic offences.⁴

Besides the Netherlands, Belgium, Bulgaria, Estonia, Finland, France, Italy, Croatia, Latvia, Lithuania, Austria, Poland, Portugal, Romania, Sweden, Slovenia, Spain, the Czech Republic, Hungary and the United Kingdom have transmitted decisions to Germany. How British decisions are dealt with in the future – the United Kingdom transmitted 137 decisions to Germany between 2010 and 2018 – will depend upon the outcome of the Brexit process. All Member States listed above (without the Netherlands) transmitted about 1,300 decisions between October 2010 and June 2019.

Germany has made considerable efforts to promote cooperation on the basis of FD 2005/214. Since 2010, 23 meetings with other Member States have taken place, five of these meetings in 2018 with the Czech Republic, Denmark, Italy, the Netherlands and the Slovak Republic.⁵ In 2019, meetings are planned with Latvia and Lithuania.

The Netherlands and Germany are currently planning to enhance cooperation on the basis of e-CODEX/Me-CODEX so that decisions can be transmitted to Germany via a secure transmission path by 2020/2021. In general, cooperation with the competent Dutch Centraal Justitieel Incassobureau is excellent. Austria, Germany's neighbour and a holiday destination for many Germans, does not transmit many decisions under the EU instrument (FD 2005/214) simply because there is an older bilateral treaty in place between the two countries that captures most traffic offences.⁶

2. Recognition and execution in Germany

68,000 cases (= 90% of all 76,000 cases) have been processed and are closed; 39,000 decisions were successfully recognized and executed. The success ratio is about 57%. The federal budget took in nearly €5.4

million, €900,000 in 2018 alone. This figure does not reflect all the monies obtained from the enforcement of decisions as it does not cover the monies that go to the federal states' (*Länder*) budgets in (the limited number of) cases where courts are involved.

Germany had to refuse recognition and/or execution in about 19,700 cases. The grounds for refusal enlisted in Art. 7 FD 2005/214 do not play a significant role in practice. The most important ground for refusal is simply that the person does not live in Germany anymore or that his or her whereabouts cannot be established. In a limited number of cases that were about traffic offences, Germany refused recognition because decisions were based on the principle of car owner's responsibility, and the car owner objected accordingly upon being heard.

3. Challenges

FD 2005/214 is based on the principle of mutual recognition. It does not harmonize the respective national rules on how a decision is taken, how it is served upon the person, and how it becomes final. It was never the purpose of FD 2005/214 to do so. All the mentioned items are different from Member State to Member State, but sometimes make cooperation under FD 2005/214 difficult when establishing whether, for example, the person ever received the decision or not.

Checking double criminality may turn out to be complicated and quite time-consuming when it comes to offences like tax offences or offences against weapons regulations – none of them enlisted in Art. 5 para. 1 FD 2005/214, which abolishes the verification of the double criminality of the act for 39 criminal or regulatory offences.

As regards lapse of time, different periods of limitation must be distinguished: First, there is the period of limitation under the law of the issuing State, for example usually five years for Dutch decisions. If this period is over, the issuing State is obliged to withdraw the decision in accordance with Art. 12 FD 2005/214. Additionally, there may be a period of limitation for the recognition decision taken by the executing State. Last, but not least, there is a ground for refusal in Art. 7 para. 2 (c) FD 2005/214 that captures a very specific scenario where the decision relates to acts which fall within the jurisdiction of the executing State and where the execution is statute-barred according to its law. Sometimes, lawyers misunderstand this and claim that the period of limitation that would apply in a purely national case must be applied.

III. Outgoing Requests

1. Figures and subject matter

Since 2011, the Federal Office of Justice received more than 52,000 requests from administrative authorities and public prosecutor's offices in Germany. From the very beginning, figures increased significantly from year to year. In 2018 alone, the figures rose by 16% to about 9,500 decisions (which means that translation for 8,700 certificates had to be arranged and paid for⁷). The more this volume of decisions increases, the stronger the political signal is that a place of residence outside Germany, but in another EU Member State does not protect the person from being held responsible for a traffic offence (or any other criminal offence or infringement of the rules of law) committed in Germany. Of all cases, the percentage of traffic offences amounted to 37% in 2011, but to 91% in 2018.

In 2018, most German requests were – as in the previous years – transmitted to Poland (4,616 decisions), followed by Romania (1,436) and the Netherlands (1,040). With the exception of Ireland, that has not yet transposed FD 2005/214 into its national law, and Greece, that has not yet notified its transposition,

decisions have been transmitted to all other Member States. Until 2018, almost 700 decisions were transmitted to the United Kingdom. With regard to France, Germany decided in 2015 to transmit pilot cases only (since 2016, 116 pilot cases have been transmitted to the French authorities; as of today, 3 of them have been successfully executed). Italy transposed FD 2005/214 in March 2016; with regard to Italy, Germany also decided to transmit pilot cases only; in 2017 and 2018, about 70 such cases were transmitted.

2. Recognition and execution in other Member States

35,000 cases (= 67% of all 52,000 cases) were processed by other Member States and are closed. The success ratio is about 58%, i.e. very similar to incoming decisions. The executing Member States took in nearly €5 million. Again, the most prominent reasons for an unsuccessful execution were not the grounds for refusal under Art. 7 FD 2005/214, but the simple fact that the person had left the country or that his or her whereabouts could not be established or that the person simply did not have the means to pay the financial penalty. Member States' different rules on how the decision is served upon the person, whether it is accompanied by a translation into a language that he or she understands, and how a written procedure takes place and the person is informed of it also led to the refusal of recognition in a limited number of cases. The many bilateral meetings have proven to be very helpful in discussing such issues and in understanding the respective legal systems.

3. Challenges

Transmitting the decision to another Member State does not interrupt the period of limitation under German law. For example, a notice of a fine of up to €1,000 may be executed only three years after it becomes final. Some of this time is already consumed by preparing the request and particularly by translating the certificate; before that, in many cases the administrative authorities and the public prosecutor's offices that are in charge of the national execution will have tried to make the person pay the financial penalty. If the authority in charge in the executing State now decides to grant payment in instalments – fully in line with Art. 9 para. 1 FD 2005/214 according to which the enforcement of the decision shall be governed by the law of the executing State in the same way as a financial penalty of the executing State – many decisions may have to be withdrawn (Art. 12 para. 1 FD 2005/214) because they have become statute-barred in Germany. Ongoing execution in the other Member State, however, may have been successful in the end.

Art. 16 FD 2005/214 provides that the certificate must be translated into the official language of the executing State. There is, however, no language regime foreseen by FD 2005/214 for the "Information from the executing State" (Art. 14 FD 2005/214) on the outcome. Many Member States use, fair enough, their own language while others make the effort to translate this information into German or English. Often, voluminous recognition decisions are translated even though the simple information that the decision has been fully recognized would suffice. In a limited number of cases, the information provided does not correspond to Art. 14 FD 2005/214; this makes additional inquiries necessary. Therefore, a working group at EU level developed standard forms to facilitate communication between the two States involved.⁸

IV. Developments at the European Level

1. Jurisdiction of the European Court of Justice

a) Judgement of 14 November 2013 (C-60/12 – Baláž)

Upon the request by a Czech court for a preliminary ruling, the European Court of Justice had to decide whether the Austrian “Independent Administrative Tribunals” („*Unabhängige Verwaltungssenate*“) met the requirement in Art. 1 (a) (ii) and (iii) FD 2005/214 of being a “court having jurisdiction in particular in criminal matters”. The European Court of Justice ruled that this term is an autonomous concept of Union law and must be interpreted as covering any court or tribunal, which applies a procedure that satisfies the essential characteristics of criminal procedure. The „*Unabhängige Verwaltungssenate*“ fulfil those criteria and must for that reason be regarded as coming within the scope of that term.⁹

This first ruling by the European Court of Justice on FD 2005/214 had a considerable impact on its scope of application: In many Member States, road traffic offences are not criminal offences, but only administrative offences (in Germany: „*Ordnungswidrigkeiten*“). In a number of these Member States administrative courts decide such cases when they are appealed by the offender. Such systems are now very likely to fall within the scope of FD 2005/214. This matches the idea behind this instrument to capture particularly road offences.¹⁰

b) Pending requests for preliminary rulings

Two more requests for a preliminary ruling by the European Court of Justice are currently pending. On 29 October 2018, the Polish Sąd Rejonowy w Chełmnie referred questions concerning the Dutch system of service of documents and the Dutch principle of car owner’s responsibility (Case C-671/18). This case highlights some of the challenges mentioned above for incoming decisions.

The facts of the second case (Case C-183/18), which was also referred by a Polish court, appear to be quite similar to those of the first case at first sight: it concerns a Dutch request to enforce a financial penalty against a legal person for speeding with a car owned by this person. According to Art. 9 para. 3 FD 2005/214, a financial penalty imposed on a legal person shall be enforced even if the executing State does not recognize the principle of criminal liability of legal persons. On 9 March 2018, the Polish Sąd Rejonowy Gdańsk-Północ w Gdańsku referred the question whether the provisions of Art. 1 (a), Art. 9 para. 3 and Art. 20 paras. 1 and 2 (b) FD 2005/214 should be interpreted as meaning that a decision transmitted for execution which imposes a financial penalty on a legal person should be executed in the executing State despite the fact that the national provisions implementing that framework decision do not provide for the possibility of executing a decision which imposes such a penalty on a legal person.

2. European Commission

The European Commission’s Directorate-General for Justice and Consumers (DG JUST) is currently analysing practical implementation in the Member States and has commissioned an external agency to do so by a “Questionnaire [...] on the application of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties”. This comprehensive questionnaire covers, for example, communication between the Member States, the use of the standard forms, any obstacles to mutual recognition and execution, the duration of the procedure and the success ratio. Also, an analysis of Member States’ transposition of FD 2005/214 is being planned.

3. Standard forms (Art. 14 FD 2005/214)

In 2017, an expert group developed five standard forms covering particularly the information by the executing State under Art. 14 FD 2005/214 on the outcome of the case.¹¹ These standard forms were translated into all official languages and can be retrieved on the EJN website. The two forms that transmit the information on full recognition and full execution of the decision promise to facilitate communication considerably.

As of today, the executing State often enough transmits the recognition decision in its own language, and this decision then needs to be expensively translated by the issuing State, only to learn afterwards that the decision was recognized after all. Some executing States translate this recognition decision themselves before sending it to the issuing State. The idea of the standard forms is to save the effort and the costs of translation on both sides. Many Member States' authorities (among them the Netherlands, Poland, Bulgaria, Finland, the Slovak Republic, Spain, the Czech Republic and Romania) have begun to use these forms.

4. Revision of the CBE Directive

The European Commission's Directorate-General for Mobility and Transport (DG MOVE) is currently working on a proposal to revise Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences ("enforcement-" or "CBE Directive").¹² The Commission intends to facilitate the cross-border enforcement of financial penalties for traffic offences with the aim of a fair and equal treatment of all offenders EU-wide. A proposal shall be tabled in the third quarter of 2021.

In a first "Inception Impact Assessment", the Commission drew the conclusion that there are deficiencies in the current system of mutual recognition. FD 2005/214 is not designed for masses of road traffic offences, but only suitable for more severe criminal offences. The Commission speaks of a missing efficient EU-wide scheme for cross-border enforcement of financial penalties. The basis for the Inception Impact Assessment was a study by an external agency according to which FD 2005/214 is not used in a substantial number of cases concerning sanctions for road traffic offences.¹³

Based on more than 128,000 incoming and outgoing decisions that have been processed by the Federal Office of Justice, a remarkably high percentage of road traffic offences and a success ratio of 57 respectively 58%, it is difficult to share the Commission's preliminary conclusions. The obstacles and challenges when looking at the cross-border enforcement in the field of road traffic offences do not lie so much within FD 2005/214, but elsewhere: in the proceedings that precede FD 2005/214 and that lead to a final decision (or not), for example: service of the decision; safeguarding the rights of the person to be heard and to appeal the decision; its translation.

V. Conclusions

With the adoption of FD 2005/214 the European legislator has created a well-functioning instrument for the cross-border enforcement of financial penalties. The subsequent development of the five standard forms has marked a big improvement in the communication between the executing and the issuing State. There is still room for improvement when it comes to better IT support, to streamlining the communication and to avoiding media breaks between the different national and international authorities involved. Moreover, some

Member States have yet to discover what a valuable contribution to justice in general and to road safety in particular FD 2005/214 can be.

1. S. Trautmann, "When in Rome, do as the Romans do!", (2018) *Deutsches Autorecht*, 472.↵
2. O.J. L 76, 22.3.2005, 16 (in Germany transposed by the Act of 18.10.2010, BGBl. I, p. 1408, Sec. 86 et seq. of the German Act on International Cooperation in Criminal Matters), amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (O.J. L 81, 27.3.2009, 24).↵
3. For earlier developments see C. Johnson, "First Experiences in Germany with Mutual Recognition of Financial Penalties", (2013) *eucrim*, 65.↵
4. In 2018, the percentage of traffic offences from other Member States than the Netherlands was about 50% of all cases from these Member States; of all Dutch cases, the percentage of traffic offences was about 99.6 %; of all decisions (EU-wide including the Netherlands) having come in between 2010 and 2018, 98.6% concerned traffic offences.↵
5. Some of these meetings were arranged together with the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), some of them by the Federal Office of Justice alone.↵
6. Treaty on Mutual Legal Assistance in Administrative Matters of 31.5.1988 (BGBl. 1990 II, p. 358). See also K. Brahms, L. Wurzel, and B. Häussermann, "Der Rahmenbeschluss Geldsanktionen – Wo stehen wir nach gut sieben Jahren?", (2018) *Neue Zeitschrift für Strafrecht (NSTZ)*, 193, 194. Figures for this bilateral treaty are not available; on the German side, the competences under this treaty are not a matter for the Federation, but one for the federal states (*Länder*). According to its Art. 18, FD 2005/214 shall not preclude the application of bilateral agreements between Member States in so far as such agreements allow the prescriptions of this FD to be exceeded and help to simplify or facilitate further the procedures for the enforcement of financial penalties.↵
7. Certificates for decisions being transmitted to Austria, Luxembourg and Belgium do not require translation.↵
8. See below IV.3.↵
9. The „*Unabhängige Verwaltungssenate*“ were abolished in Austria by 1.1.2014 (see the Verwaltungsgerichtsbarkeits-Novelle 2012, Austrian Federal Law Gazette I, Nr. 51/2012).↵
10. Please also refer to the judgements of the ECJ of 15 October 2015 (C-216/14 – *Covaci*) and of 22 March 2017 (C 124/16, C-188/16 and C-213/16 – *Tranca et al.*). These judgements deal with the service of German orders of summary punishment (*Strafbefehle*) and with the language regime for appealing such orders; therefore, these judgements will be of importance for the future practical implementation of FD 2005/214, e.g. when another Member State will be requested to recognize and execute such orders.↵
11. The working group was made up of members from the Netherlands, Poland, Finland and Germany, with coordination and valuable support provided by the European Commission. Four standard forms (Nos. 2–5) cover the communication from the executing to the issuing State while one standard form (No. 1) covers information in the opposite direction, for example the withdrawal of the decision as foreseen in Art. 12 FD 2005/214.↵
12. O.J. L 68, 13.03.2015, 9; available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-1732201_en.↵
13. "Evaluation study on the application of Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related traffic offences; available at: <https://publications.europa.eu/en/publication-detail/-/publication/77b97427-3c33-11e6-a825-01aa75ed71a1/language-en>.↵

* Authors statement

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