STUDY

Requested by the JURI Committee

Improving cross-border cooperation in the enforcement of administrative fines and recovery claims

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Improving cross-border cooperation in the enforcement of administrative fines and recovery claims

Abstract

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, looks into the challenges and possible improvements of administrative cooperation between Member States, as regards cross-border enforcement of administrative fines and recovery claims. Legal instruments to facilitate transnational cooperation are necessary. Also the terms 'fine' and 'recovery claim' are often subject to different definitions in the Member States. Framework Decision 2005/214/JHA works for offenses regulated therein. Measures to improve cooperation are allowed by Article 82(1) TFEU but administrative authorities are regularly not judicial authorities. Amendments can be based on Article 114(1) TFEU if they serve to supplement provisions on information, service and enforcement assistance.

This document was requested by the European Parliament's Committee on Legal Affairs.

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EXECUTIVE SUMMARY

The Committee on Legal Affairs Committee of the European Parliament (JURI Committee) has requested expertise on how to improve administrative cooperation in cross-border enforcement of administrative fines and recovery claims. Effective legal instruments and best practices are necessary as the enforcement authorities can normally only exercise their powers on their own territory, but legal standards enforced by one Member State can also be infringed by natural or legal persons from other Member States.

This study presents a comparative analysis of the legal framework for cross-border enforcement of fines and recovery, including EU legislation and bilateral and multilateral legal instruments, in four Member States, namely Belgium, Germany, the Netherlands and Austria. It concludes, in particular, with the following remarks:

- As regards fines, a small number of legal instruments does exist both at the EU level and in the form of bilateral or multilateral agreements, but these seem insufficient when it comes to fines that are common in some Member States. In particular, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (Framework Decision) can be applied to administrative sanctions, provided that they are based on a decision of a court (or, in certain circumstances, of an authority of the issuing State other than a court) imposing the payment of a fine by a natural or legal person. In addition, the administrative penalty must be imposed for an offence listed in Article 5(1) of the Framework Decision and punishable in the issuing State. Other offences may also be recognised and enforced. However, in this case, "the executing State may make the recognition and enforcement of a decision subject to the condition that the decision relates to conduct which would constitute an offence under the law of the executing State, whatever the constituent elements or however it is described".
- The terms 'fines' and 'recovery claims' are based on the respective legal systems and consequently subject to different definitions and classifications in the Member States examined. Standardisation does not seem possible and does not appear to be advisable.
- The Framework Decision 2005/214/JHA is in principle a functioning legal basis for fines around the offences regulated therein. The case law of the Court of Justice of the European Union seems to have clarified existing questions.
- Insofar as there are supplementary bilateral agreements (example: treaty between the Federal Republic of Germany and the Republic of Austria on administrative and legal assistance in administrative matters), these are often used as a matter of priority.
- Improved cross-border cooperation in the enforcement of fines and recovery in the EU requires a legislative competence of the Union. In the area of judicial cooperation in criminal matters, the legal basis results from Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), whereby this is to be regarded as a conclusive authorisation. Measures to improve cross-border cooperation in the enforcement of fines must therefore be covered by Article 82(1) TFEU. Article 82(1) TFEU only covers cooperation between judicial authorities. Administrative authorities are generally not included.
- Rules on enforcement assistance for fines can nevertheless be based on Article 82(1)(2)(a) TFEU, so that Framework Decision 2005/214/JHA can be extended by including further offences in the catalogue of offences for which a reciprocity check is not required. A slight reduction of the minimum amount of EUR EUR 70€ can be considered, as well as an amendment of the rule that the enforced amounts remain in the executing state. Article 82(1) TFEU does not provide a suitable legal basis for the recognition procedure. The only exception to this is assistance with service, insofar as the service of the judgment itself is concerned.

- An overarching use of the competence basis in Article 114(1) TFEU, which covers all public-law claims that can be subsumed under the concept of recovery, is not possible.
- If regulations on information, service and enforcement assistance are related to constructive prohibitions, there is a link to the internal market because the functioning of the internal market is promoted by these prohibitions. If the forms of assistance are necessary to prevent the circumvention of prohibitions serving a fundamental freedom, regulations to prevent the circumvention of prohibitions may also be enacted in the form of independent legal acts on the basis of Article 114(1) TFEU.
- It is also possible to use bases of competence from the individual policy areas of the TFEU for measures of information, notification and enforcement assistance. As with Article 114(1) TFEU, the factual connection with the subject matter is decisive for the use of a specific competence standard with regard to information, notification and enforcement assistance.
- If and to the extent that existing legal acts are to be amended, it must be examined whether the prerequisites of one (or more) bases of competence exist. If the legal act to be amended is based on the internal market competence of Article 114(1) TFEU, an amendment of the legal act supplementing regulations on information, service and enforcement assistance can also be based on this basis. This also applies if no regulations on administrative assistance have existed to date.
- In the case of existing legal acts based on a specific competence norm, this cannot be answered uniformly. A legal act based on Article 114(1) TFEU and covering one or more policy areas seems preferable. Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws serves as a model here. In any case, all concerned legal acts providing for sanctions must be transferred to an annex.
- Beyond the Union's competences, the way remains open via bilateral or multilateral agreements, which can close the gaps that Union law must inevitably leave.

1. INTRODUCTION

Effective legal instruments and best practices are necessary to facilitate cooperation in the cross-border enforcement of fines and recovery. The Member States' enforcement authorities can in principle only exercise their powers on their own territory, but legal standards enforced by one Member State can also be infringed by natural or legal persons from other Member States.

As far as fines are concerned, there are a small number of legal instruments both at the EU level and in the form of bilateral or multilateral agreements. However, these seem insufficient when it comes to fines, which are common in some Member States. In particular, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties can be applied to administrative sanctions, provided that they are based on a decision of a court (or, in certain circumstances, of an authority of the issuing State other than a court) imposing the payment of a fine by a natural or legal person. In addition, the administrative penalty must be imposed for an offence listed in Article 5(1) of the Framework Decision and punishable in the issuing State. Other offences may also be recognised and enforced. However, in this case, "the executing State may make the recognition and enforcement of a decision subject to the condition that the decision relates to conduct which would constitute an offence under the law of the executing State, whatever the constituent elements or however it is described".

In practice, local authorities in one Member State may not always have sufficient information as to whether a certain conduct can be classified as a "penalty" under the law of another Member State and, consequently, whether the associated fine can be classified as such. Moreover, in cases where the Framework Decision provides for the possibility of cross-border enforcement of fines, the amounts recovered will in principle accrue to the state carrying out the recovery. As a result, Member States may be less inclined to make use of this possibility. The Framework Decision offers an option to derogate from this principle by concluding bilateral or multilateral agreements.

As regards recovery claims (e.g. amounts due to non-compliance with tax rules or due to non-compliance with building regulations), they are usually not of a punitive nature and cannot usually be categorised as "penalties". Therefore, they do not fall within the scope of the Framework Decision. Bilateral cross-border agreements are also often missing, which makes the enforcement of claims practically impossible.

The aim of this study, requested by the Committee on Legal Affairs (JURI Committee) of the European Parliament (Parliament), is to provide an overview of the status and challenges of cross-border enforcement of fines and recovery in the EU. The study will review the EU legal framework and the existing bilateral and multilateral legal instruments and analyse whether – and if so, what kind of – improvements are needed at the EU level to address the identified challenges and improve cross-border cooperation.

In particular, the study will address the following aspects:

- Give a comparative analysis of the legal framework for cross-border enforcement of fines and recovery, including EU legislation and bilateral and multilateral legal instruments in four Member States - Belgium, Germany, the Netherlands and Austria.
- Examine the terms/definitions of "fines" and "clawback" (and the systems behind) in the respective legal frameworks; analyse whether harmonisation would be necessary.
- Identify and assess the existing EU legal framework in relation to cross-border cooperation in the enforcement of fines and recovery; where available, analyse the case law of the Court of Justice of the European Union (CJEU, Court of Justice) in this area.

- Investigate, in relation to fines, under which conditions the application of the Framework Decision is necessary and analyse whether - and if so, which - amendments would be necessary.
- Summarise the findings and, where appropriate, develop concrete policy recommendations to Parliament and other relevant stakeholders on how the EU legal framework could be improved to ensure more effective cross-border cooperation in the enforcement of fines and recovery.

2. DEFINITION OF 'ADMINISTRATIVE FINES' AND 'RECOVERY CLAIMS'

In order to be able to do justice to the objective of the study, it is first necessary to define the terms 'administistrative fine' and 'recovery claim' in the legal systems of the countries to be examined, and to evaluate them in their respective legal contexts. Therefore, the following chapter examines the concepts, definitions and systems behind these terms in the respective legal systems of Austria, Belgium, Germany and the Netherlands.

However, before moving to national legal systems, it is first necessary to look into the definitions of 'administrative fines and 'recovery claims' at a higher level. This arises from the fact that the terms cannot be translated directly from English into the respective languages of the countries to be studied. This would lead to inaccuracies when comparing their legal meaning.

2.1. Similarities and differences

Both administrative fines and recovery measures are **administrative measures that (can) give rise to monetary payment obligations**. **The distinction** between the two is made, among other things, by the **requirement of culpability for administrative fines**. Moreover, the authority pursues other objectives through the respective instrument.

Administrative fines are meant to **punish an offender** and are part of the penalties that an administrative authority can impose. Penalties in turn can only be imposed in case of intent or negligence of the offender.

In contrast, **reparatory measures, such as recovery claims,** are only meant to **recover a benefit from the beneficiary or to direct the offender's behavior** in a certain direction. They **do not have a punitive character** and thus **do not require culpability** for their imposition. For example, an administration could withdraw a wrongly obtained advantage. It is only necessary that the authority can prove that a certain norm or administrative act has been violated, without having to prove intent or negligence on the part of the offender.

2.2. Administrative fines

Administrative fines can be understood to **encompass punitive monetary penalties on a person for an act that is contrary to the applicable rules, but is not a crime**. In other words: **a punitive sanction imposed by an administrative body or court containing an unconditional obligation to pay a sum of money**. Measures, which are not monetary in nature, are thus excluded from the definition. This description is derived from a recommendation on administrative sanctions given by the Council of Europe in 1995 as there is no (more recent) EU definition of an administrative sanction.[1] The Council of Europe defined administrative sanctions as "administrative acts which impose a penalty on persons on account of conduct contrary to the applicable rules, be it a fine or any other punitive measure, whether pecuniary or not". For the purpose of this report, which only covers administrative fines and not the whole spectrum of administrative sanctions, the definition was therefore adapted.[2] In practice,

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[1] Council of Europe, Committee of Ministers, Recommendation No. R (91) 1 of the Committee of Ministers to Member States on Administrative Sanctions, adopted on 19 February 1991. See also: *Kärner*, in Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative? European Criminal Law Review, 2021 (2) p. 156 - 176 (157), even states that there is no definition at all.

2 De Moor-van Vugt also classifies administrative fines as one part of several that belongs to administrative sanctions in Administrative sanctions in the EU, Review of European Administrative Law; Vol. 5, NR. 1, 5-41, p. 5. Moreover, Council

the term administrative 'fine' is used in various European legal acts, such as the General Data Protection Regulation. However, none of those legal documents provide a definition of the term.

As already mentioned, **administrative fines** are punishments in character, which raises the question of how they can be **distinguished from criminal fines**. For the purpose of this study, however, a general understanding of the distinction between the two is sufficient. This is especially the case since **Framework Decision 2005/214/JHA**, which will be discussed later, is **applicable both to administrative as well as criminal fines.**

Nevertheless, it shall be noted that while the delimitation on a European level is partly fuzzy, the European Court of Human Rights has outlined some criteria that the CJEU has endorsed.[3] For example, in order to be classified as a criminal fine, it is decisive whether the prohibitive norm is directed at all people, whether the purpose of the sanction is primarily punishment, and how severe the norm violation is.[4]

2.3. Recovery claims

Recovery claims can be understood to be the **counterpart to punitive measures**, such as fines, and therefore also be called reparatory measures.[5] They only aim to enforce an administrative decision, influence a citizen's behaviour or to recover a benefit for the administration, but not to sanction a person's behaviour. They include all claims that may arise for an authority in connection with the enforcement or reversal of its administrative acts, which are aimed at **(re)establishing a lawful state of affairs**. More precisely, recovery claims should therefore be understood to include penalty payments with a compulsory element, the recovery of public-law claims as well as their enforcement. Examples of such measures would be the recovery of subsidies or unjustly paid child benefit, due social security contributions, or the costs incurred by the authority due to the towing of a wrongly parked vehicle, to name only a few.

On a European level, the term "recovery claims" has **not yet been defined by a legislative act**. However, Regulation 2988/95 on the protection of the European Communities financial interests[6] contains the Title II "Administrative measures and penalties", which helped to outline the boundaries of the term. In this title, Article 4 defines the following acts as measures (reparatory as opposed to punitive): 1. **withdrawal of the wrongly obtained advantage**, 2. **an obligation to pay or repay the amounts due or wrongly received**, 3. **the total or partial loss of the security provided in support of the request for an advantage granted of the receipt of an advance**. This provides the above-mentioned differentiation of reparatory measures from measures of a punitive nature in an EU legislative act, without defining the terms themselves.

Regulation 2988/95 on the protection of the European Communities financial interests contains a Title II on "Administrative measures and penalties". In its Article 5(a), administrative fines are listed as one form of administrative penalties.

3 *De Moor-van Vugt*, Administrative sanctions in the EU, Review of European Administrative Law; Vol. 5, Nr., 1, 5-41, p. 12.

4 ECtHR, judgment of 8 June 1976, Engel and others vs. The Netherlands, No. 82.

5 *De Moor-van Vugt*, Administrative sanctions in the EU, Review of European Administrative Law; Vol. 5, Nr., 1, 5-41, p. 12 (this has not been explicitly stated as a fact, but it underlies the distinction of the measures).

6 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interest, OJ L 312, 23.12.1995, p. 1–4.

2.4. Germany

2.4.1. Administrative fines

In Germany, a distinction is made between criminal fines (*Geldstrafe*) and **administrative fines** (*Geldbuße*). As explained above, criminal fines such as those regulated in the Criminal Code (*Strafgesetzbuch*) are not the subject of this study. Administrative fines are **covered in** a separate statute, the **Act on Regulatory Offences** (*Ordnungswidrigkeitengesetz*). In its Section 1, Paragraph 1, the **administrative offence** is legally defined as follows: "A regulatory offence shall be an **unlawful and reprehensible act**, constituting the **factual elements** set forth in a statute that enables the act **to be sanctioned by imposition of a regulatory fine**."[7] For one, this results in the three-parted structure of the German administrative offence with **facts, unlawfulness and culpability**. Secondly, it follows from this definition that **no custodial sentence can be imposed for an administrative offence** under German law. According to Section 1, Paragraph 2, the scope of the Act on Regulatory Offences includes both federal (*Bundes-*) and provincial law (*Landesrecht*) and thus encompasses the entire German administrative law.

The Act on Regulatory Offences regulates the procedure for administrative offences, the imposition and collection of fines as well as some administrative offences.[8] However, the vast majority of regulatory offences are found in other statutes, such as driving a motor vehicle in traffic with 0.5 per mille of alcohol in the blood according to Section 24a of the Road Traffic Act (*Straßenverkehrsgesetz*), or operating a business that requires a permit without having the required permit according to Section 144 of the Trade, Commerce and Industry Code (*Gewerbeordnung*).

Like the Austrian Administrative Offences Act (see below), the German Act on Regulatory Offences shows **strong similarities to the structure and content of a criminal code**. This is due to historical reasons and to the fact that it actually developed in its current form after the Second World War from the administrative branch of criminal law (*Verwaltungs-/Ordnungsstrafrecht*).[9]

As a rule, **administrative offences** in Germany are **prosecuted by the administrative authorities**. However, somewhat surprisingly, the general administrative procedural law (*Verwaltungsverfahrensgesetz*) is not applicable. Instead, the **provisions on criminal proceedings**, including the Code of Criminal Procedure (*Strafprozessordnung*), **are applicable unless otherwise specified** in the Act on Regulatory Offences. The person concerned may, for example, instruct a defense counsel and must be given the opportunity to make a statement in response to the accusation.[10] In cases of negligible regulatory offences the administrative authority may caution the person (*Verwarnung*) or caution the person as well as impose a cautionary fine (*Verwarnungsgeld*).[11] The caution only becomes effective if the person concerned agrees to it and pays the cautionary fine immediately or at least within one week.[12] Otherwise, the authority can continue the proceedings and

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7 Official English version of the Act on Regulatory Offences, available at: https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html#p0013. The vocabulary of the Official English version is used as much as possible in this section.

8 *Metselaar, Adriaanse*, Grensoverschrijdende inning van bestuurlijke boetes, p. 74.

9 *Engelhart* in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht, Vorbemerkungen zu § 1.

10 § 55 Act on Regulatory Offences.

11 Idem, § 56 I.

12 Idem, § 56 I.

issue a regular fining notice.[13] It makes no difference to the legal quality of the regulatory fining notice and the legal action to be taken against it whether it is a notice against a legal or a natural person.[14]

The person concerned can file an objection (*Einspruch*) to the regulatory fining notice within two weeks. The objection has to be submitted to the administrative authority that issued such notice.[15] Firstly, the administrative authority examines whether to uphold or withdraw the regulatory fining notice, if the objection is admissible.[16] If it does not grant the applicant's request, it sends the files of the proceedings via the public prosecution office (*Staatsanwaltschaft*) to the district court (*Amtsgericht*). On receipt of the files by the public prosecution office, it assumes the functions of the prosecution authority. It submits the files to the Local Court judge if it neither discontinues the proceedings nor conducts further investigations.[17] Which district court has jurisdiction depends on the location of the administrative authority that issued the regulatory fining notice.[18]

At the district court, the procedure following an admissible objection is governed by the provisions of the Code of Criminal Procedure applicable following an admissible objection to a penal order (*Strafbefehl*), unless otherwise provided.[19] The Act on Regulatory Offences lightens the duties of the court by some procedural simplifications and facilitations.[20] Essentially, though, the requirements of criminal procedure apply, including the obligation of the court to investigate the truth *ex officio*, meaning by virtue of its own motion. Thus, the court does not start from the facts that the authority has established in its investigations but conducts its own taking of evidence. Likewise, it does not merely review the admissibility and justification of the penalty notice, but makes its own decision on the merits.[21] At the end of the judicial proceedings, the judge decides whether the person concerned is to be acquitted, whether a regulatory fine is to be imposed on them, whether any incidental consequence is to be ordered or whether the proceedings are to be discontinued.[22] They also have the option to transition into criminal proceedings if they assess the offence as a crime and inform the person concerned of the change.[23]

In addition to this administrative procedure, it is also possible for a regulatory offence to be prosecuted by the public prosecution office from the start, namely if the regulatory offence is connected to a criminal offence. In this case, criminal procedural law is applicable to the entire proceedings and the regulatory offence only forms an annex to the criminal charges. Often enough, the punishment of the administrative offence is not carried out separately at all, since the charged criminal offence usually outweighs it. But especially in cases where there would otherwise be gaps in criminal liability, sanctioning through an administrative offence can be helpful for the authorities.[24]

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13 § 65 I Act on Regulatory Offences.

14 Idem, §§ 30, 88 II.

15 Idem, § 67 I.

16 Idem, § 69 II.

17 Idem, § 89 IV.

18 Idem, § 68 I.

19 Idem, § 71 I.

20 Idem, §§ 72 – 78 Act.

21 *Engelhart* in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht, § 71 OWIG Rn. 2.

22 § 72 III Act on Regulatory Offences.

23 Idem, § 81 I.

24 A typical example would be the above mentioned drunk driving with 0,5 per mille alcohol in the blood. If the person concerned does not show any inhabitations regarding the alcohol, their conduct is not punishable by § 316 of the Criminal Code (Strafgesetzbuch), but would still be sanctionable as a regulatory offence according to § 24a of the Road Traffic Act.

2.4.2. Recovery claims

Both federal (*Bundes-*) **and provincial authorities** (*Landesbehörden*)[25] can have **claims under public law against individuals**. These can be claims for e.g. taxes or social security contributions that still have to be paid, but also for amounts paid out by the state that are now being reclaimed. In principle, the **Federal Administrative Procedure Act** (*Verwaltungsverfahrensgesetz des Bundes*) applies to administrative acts of the federal authorities, and the **respective provincial administrative procedure act** applies to those of the provincial administrations (*Landesverwaltungsverfahrensgesetze*). The provisions of provincial law **largely correspond verbatim to those of federal law**; only with regard to the interest regulations have some *Länder* adopted deviating provisions.

The authorisation **bases for levying a tax, charge or contribution** can be found in the **respective sectoral legislation**. With regard to the withdrawal or revocation of an administrative act and the resulting claim for reimbursement, there are, on the one hand, the general regulations in the respective Administrative Procedure Act and, in part, special regulations in the sectoral laws, e.g. tax law and social law. If there is a special legal regulation, it is applied with priority, sometimes exclusively.[26] In the following, the federal regulation will be explained by way of example.

Both favourable unlawful and favourable lawful administrative acts can be revoked (*widerrufen*) or withdrawn (*zurückgenommen*) for the past under certain conditions.[27] If the repeal (*Aufhebung*) is effective, the claim for restitution arises directly by operation of law.[28] The authority merely determines it in writing,[29] whereby it has no discretionary powers according to the wording of the law.[30] However, as long as an objection (*Widerspruch*) or a complaint (*Anfechtungsklage*) against the revocation has a suspensive effect,[31] it must await the outcome of the proceedings.

The extent of the obligation to repay is determined by the provisions of the **law of unjust enrichment** (*Ungerechtfertigte Bereicherung*) of the **German Civil Code**. It is therefore possible for the person concerned to plead the they are no longer enriched as the benefit is no longer available in his or her assets. If this is true, they have to repay nothing or less, insofar as they did not know and did not grossly and negligently misjudge the circumstances that led to the repeal of the administrative act.

In addition to reclaiming the benefits granted, the authority may also demand interest. Decisive for the exercise of its discretion is in particular whether the person concerned is responsible for the circumstances that led to the withdrawal, revocation or invalidity of the administrative act and pays the amount to be refunded within the set time limit.[32] As regards EU legislation, particularly Article 5(I)b of Regulation 2988/95 on the protection of the European Communities financial interests[33], this **obligation to pay interest may already be regarded as a sanction and not a mere reparatory administrative measure** anymore. **However, the (national) aim of interest is to prevent delays in**

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25 Municipalities, districts and independent cities (*Gemeinden*, *Kreise und kreisfreie Städt*) do not count as a third level in the German administrative structure, but are considered part of the *Länder*.

26 Kopp/Ramsauer, § 49a VwVfG Rn. 5.

27 §§ 48 and 49 Verwaltungsverfahrensgesetz.

28 Kopp/Ramsauer, § 49a VwVfG Rn. 9.

29 § 49a Verwaltungsverfahrensgesetz des Bundes.

30 Kopp/Ramsauer, § 49a VwVfG Rn. 11.

31 Idem, § 49a VwVfG Rn. 2.

32 § 49a III Verwaltungsverfahrensgesetz.

33 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interest, OJ L 312, 23.12.1995, p. 1–4.

reimbursement from leading to financial benefits for the obligor.[34] He or she is therefore not to be sanctioned, but **merely prevented from taking unlawful advantage** of the situation, which does not constitute a punishment in the strict sense.

2.4.3. Enforcement

The enforcement of public-law claims of the Federation, including administrative fines,[35] is regulated by the **Administrative Enforcement Act** (*Verwaltungs-Vollstreckungsgesetz*).[36] The ***Bundesländer*** each have their **own laws** for the enforcement of their public-law claims. In terms of content, these laws are very similar.

The enforcement of monetary claims like administrative fines is initiated by an **enforcement order** (*Vollstreckungsanordnung*), which is issued by the authority entitled to assert the claim.[37] The enforcement of such a monetary claim first requires that there is an administrative act by which the debtor has been requested to pay and that one week has elapsed since the notification of this notice. Before the enforcement order is pronounced, the debtor is given a special reminder with a payment deadline of another week. **Practical enforcement is carried out by the main customs offices** (*Hauptzollämter*).[38] The most common enforcement measures are the seizure of monetary claims (for example, the seizure of accounts or wages) and the seizure of property, which is initiated by enforcement officers in the field.[39] The **administrative enforcement procedure** and the **protection against enforcement** are governed by the **Fiscal Code (***Abgabenordnung*).[40]

The three means of enforcement available to the authority to enforce its administrative act which are aimed at actions, acquiescence or omissions are comparable in all federal states, albeit not identically regulated. These are the "**substitute execution of the act**" (*Ersatzvornahme*), the "**penalty payment (with a compulsory element)**" (*Zwangsgeld*) and the "**direct coercion**" (*unmittelbarer Zwang*).

Direct coercion means that the authority may **compel the obligor to act, tolerate or refrain from acting**, depending on what the content of the administrative act stipulates.[41] Since the latter does not constitute any monetary payment obligations, it is not discussed in more detail.

The substitute execution of the act can be employed if the obligation to perform an act that can be performed by another person is not fulfilled. Then the enforcement authority may **commission a third party to perform the act at the expense of the obligor**.[42] Most of the *Bundesländer* also consider the implementation by the authority itself as substitute execution, while some classify it as direct coercion.[43]

The penalty payment is imposed primarily if the act to be performed by the obligated person cannot be performed by another person and depends only on his or her will.[44] However, it is also possible to

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34 Kopp/Ramsauer, § 49a VwVfG Rn. 19.

35 § 90 Act on Regulatory Offences.

36 § 1 Verwaltungs-Vollstreckungsgesetz.

37 Idem, § 3 I, IV.

38 *Metselaar, Adriaanse*, Grensoverschrijdende inning van bestuurlijke boetes, p. 76.

39 https://www.zoll.de/DE/Der-Zoll/Aufgaben-des-Zolls/Einnahmen-fuer-Deutschland-und-Europa/Vollstreckung/vollstreckung.

40 § 5 I Verwaltungs-Vollstreckungsgesetz.

41 See for example, § 12 Verwaltungsvollstreckungsgesetz.

42 See for example, § 10 Verwaltungsvollstreckungsgesetz.

43 *Sadler/Tillmans*, in Sadler/Tillmans, VwVG/VwZG, 10. Auflage 2020, § 12 Unmittelbarer Zwang, no. 1.

44 See for example, § 11 I 1 Verwaltungsvollstreckungsgesetz.

threaten the obligor with a penalty payment if the obligation under the administrative act cannot be performed by another person and the obligor would be unable to bear the costs that would arise from the execution by another person.[45] In both cases, the function of the penalty payment is **to induce the obligor to perform the act** by obliging him or her to pay an additional sum of money otherwise. Subsidiary to the penalty payment, imprisonment for compulsory purposes *(Ersatzzwangshaft*[46]*/Erzwingungshaft*[47]*/Zwangshaft*[48]) can be ordered if the penalty payment cannot be collected. However, this is a decision which would be taken at a later stage by an administrative court upon request of the authority.[49]

2.5. Austria

2.5.1. Administrative fines

In Austria, violations of legal regulations are sanctioned partly by courts (for example violations of the criminal code) and partly by administrative authorities (for example violations of traffic laws). **Austrian law** therefore **distinguishes between judicial criminal law** (*Justizstrafecht*) **and administrative criminal law** (*Verwaltungsstrafrecht*),[50] but calls **both** of them "**criminal" law**. Likewise, Austrian legal **terminology does not differentiate between a criminal monetary penalty and an administrative fine**, both are called *Geldstrafe*.

According to the Austrian constitution, **administrative criminal law** is a matter for the **federal provinces** (*Bundesländer*),[51] so it could actually be expected that there would be different administrative criminal laws. Austria, however, knows the "**principle of competence as needed**" (*Bedarfskompetenz*)[52] in order to avoid too much procedural fragmentation.[53] According to this principle, the federal government may legislate in administrative procedural law, in administrative penal procedural law and in administrative enforcement law also for areas in which the *Länder* would be responsible. Deviating provisions may only be made if they are necessary to regulate the subject matter. The federal government has made use of this competence and enacted the Administrative Penalties Act (*Verwaltungsstrafgesetz*), which applies to the whole of Austria.[54]

Unlike many other countries, **the Austrian administrative system offers the possibility of imposing a custodial sentence as a primary penalty**.[55] Overall, the Administrative Penalties Act, which codifies

45 See for example, § 11 I 2 Verwaltungsvollstreckungsgesetz.

46 § 16 Verwaltungsvollstreckungsgesetz des Bundes, Art. 33 Bayerisches Verwaltungszustellungs- und Vollstreckungsgesetz, § 76a Hessisches Verwaltungsvollstreckungsgesetz.

47 § 16 Hamburgisches Verwaltungsvollstreckungsgesetz.

48 § 24 Verwaltungsvollstreckungsgesetz für Baden-Württemberg.

49 See for example, § 16 I 1 Verwaltungsvollstreckungsgesetz.

50 https://www.oesterreich.gv.at/themen/dokumente_und_recht/verwaltungsstrafrecht/Seite.1020600.html, information from the website of the Austrian government, as well as a lot of other information, contained in this section.

51 Articles 10 – 15 Bundes-Verfassungsgesetz, article 15 I states that insofar as a matter is not expressly assigned by the Federal Constitution to the legislation or also to the execution of the Federation (which administrative criminal law is not), it shall remain within the independent sphere of influence of the *Länder*.

52 Article 11 II Bundes-Verfassungsgesetz.

53 https://www.lindeverlag.at/buch/grundzuege_des_verwaltungsverfahrensrechts-5884/e/leseprobe/E00570.pdf.

54 It should be noted, however, that this does not mean that the Administrative Penalties Act also applies to every authority. The Introductory Act to the Administrative Procedure Acts (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*) specifies in more detail which authorities must apply the General Administrative Procedure Act, the Administrative Penalties Act and the Administrative Enforcement Act.

55 Articles 10–12 Verwaltungsstrafgesetz.

the "general" administrative penal law,[56] bares a lot of resemblance to criminal codes. However, for the procedural provisions, the Administrative Offences Act refers to the General Administrative Procedure Act (*allgemeines Verwaltungsverfahrensgesetz*)[57] and not to the Criminal Procedure Act.

Practically, the most important type of penalty under administrative criminal law is the **fine** (*Geldstrafe*).[58]

Fines can be imposed under different types of proceedings. One distinction being made is in the form of the **ordinary administrative penal procedure** (*ordentliches Verwaltungsstrafverfahren*)[59] as opposed to the "**shortened" administrative procedure** (*abgekürztes Verwaltungsstrafverfahren*).[60]

In ordinary administrative criminal proceedings, a preliminary investigation is conducted, and the accused is given the opportunity to justify him/herself.[61] They have the right to contact and mandate a defence counsel, with whom they may interact without supervision.[62] The ordinary criminal proceedings are terminated by the issuance of a penalty notice (*Straferkenntnis*), a notice issuing an admonition, or by the discontinuation of the proceedings.[63]

In the "shortened" administrative criminal proceedings the accused is not granted a hearing before the fine is imposed. There are three types of the shortened procedure, roughly translated as: the institutional or organ penalty order (*Organstrafverfügung*),[64] the anonymous order (*Anonymverfügung*),[65] and the penalty order (*Strafverfügung*).[66]

Only the penalty order, which is always directed against a natural person, can be directly appealed by the person concerned (specifically through an *Einspruch*). The objection must be filed within two weeks with the authority that issued the penalty order,[67] otherwise the administrative act becomes final. If it is raised in due time and not withdrawn or restricted, the penalty order becomes invalid and the ordinary administrative penalty proceedings are initiated.[68]

There is no right of appeal against the organ penalty[69] and anonymous orders.[70] If the person concerned wants to defend himself or herself, it is sufficient not to pay the amount demanded.[71] In the case of the organ order, the ordinary administrative criminal proceedings are then initiated; in the case of the anonymous order, either a penalty order is issued against the offender who is identified by then or the ordinary administrative criminal proceedings are initiated as well.

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56 Note however, that there are other forms of administrative penal law of course, including the law of fiscal offences and disciplinary law, for example. *Höpfel/Kert*, in Jansen (ed.), Administrative Sanctions in the European Union, p. 37.

57 Article 24 Verwaltungsstrafgesetz. Note that the Administrative Procedure Act is also a statute which the Austrian legislator was able to enact thanks to the principle of competence as needed, article 11 II of the Austrian constitution.

58 https://www.oesterreich.gv.at/themen/dokumente_und_recht/verwaltungsstrafrecht/.

59 §§ 40 – 46 Verwaltungsstrafgesetz.

60 Idem, §§ 47 – 50.

61 Idem, §§ 33 II, 40.

62 Idem, § 32a.

63 Idem, § 43 I.

64 Idem, § 50.

65 Idem, § 49a.

66 Idem, § 47 – 49.

67 Idem, § 49 I.

68 Idem, § 49 II.

69 Idem, § 50 VI 1.

70 Idem, § 49a VI 2.

71 Idem, § 49a VI 3, 50 VI 2.

In the end, all forms of administrative acts can be brought before the courts. For all forms ultimately end up in the ordinary administrative criminal proceedings.

It is the **administrative courts**, who are competent to hear cases against administrative fines in Austria. The correct remedy is the so-called *Beschwerde*,[72] which translates to appeal or complaint. It has to be filed in writing within four weeks[73] and must be submitted to the authority that issued the decision.[74] First, it has the option to settle the appeal by means of a preliminary decision (*Beschwerdevorentscheidung*) on the appeal.[75] However, if the applicant's request is not granted, he or she may request the issuing authority to refer the matter to the administrative court. This request is called *Vorlageantrag*.[76] In proceedings in administrative criminal cases, special procedural provisions are applicable in addition to the general provisions of the Administrative Court Procedure Act (*Verwaltungsgerichtsverfahrensgesetz)*.[77]

Which administrative court has jurisdiction depends, on the one hand, on whether the decision is issued by a federal (*Bundes*-) or provincial authority (*Landesbehörde*) and, on the other hand, on the location of the authority.[78] If the decision is issued by a federal authority, the **Federal Administrative Court** (*Bundesverwaltungsgericht*) is generally competent (unless the more specific jurisdiction of the Federal Finance Court is established). If the decision is issued by a provincial authority, the **respective provincial administrative court** (*Landesverwaltungsgericht*) is normally competent. Notwithstanding, the jurisdiction of the court may also be determined in the provisions of administrative law, which then takes precedence over the general regulation.[79]

As a rule, **the administrative court shall hold a public hearing**,[80] in which it conducts its own hearing of evidence.[81] It is therefore **not bound by the facts communicated by the administrative authority, but investigates them independently**. Unless the appeal is to be dismissed or the proceedings are to be discontinued, the appeal proceedings end with a decision on the merits.[82] Thus, the procedure in administrative criminal cases deviates from the general procedure, in which the administrative court would only review the contested decision.[83] Based on a complaint filed by the accused or in his/her favour, no higher penalty may be imposed in the decision (as well as in the preliminary appeal decision) than in the contested decision.[84]

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72 § 46 I Verwaltungsstrafgesetz, § 7 Verwaltungsgerichtsverfahrensgesetz.
73 § 7 IV 1 Verwaltungsgerichtsverfahrensgesetz.
74 Idem, § 12.
75 Idem, § 14.
76 Idem, § 15.
77 §§ 37 – 52 Verfahren in Verwaltungsstrafsachen, Verwaltungsgerichtsverfahrensgesetz.
78 Unter anderem § 3 Verwaltungsgerichtsverfahrensgesetz.
79 https://www.oesterreich.gv.at/themen/dokumente_und_recht/verwaltungsstrafrecht/Seite.1020200.html.
80 § 44 Verwaltungsgerichtsverfahrensgesetz.
81 Idem, § 46.
82 Idem, § 50.
83 Idem, § 27.
84 Idem, § 42.

2.5.2. Recovery Claims

Recovery claims comprise the recovery of public-law claims as well as their enforcement, including penalty payments with a compulsory element and costs incurred for the substitute execution of an act.

Both federal (*Bundes-*) **and provincial authorities** (*Landesbehörden*) can have claims under public law against individuals. These can be claims for e.g. levies or fees that still have to be paid, but also for amounts paid out by the state that are now being reclaimed. The **authorisation bases** for levying these charges can be found **in the specialised laws**, which in many cases also regulate their repeal.[85] Besides, the **General Administrative Procedure Act** (*Allgemeines Verwaltungsverfahrensgesetz*) allows for the amendment and rectification of administrative acts *ex officio* (*Abänderung und Behebung von Amts wegen*).[86] In this context, no categorical decision is made between lawful and unlawful administrative acts. Notices from which no right has accrued to anyone, in other words, which are onerous, can always be revoked without further requirements.[87] However, by their very nature, these cannot give rise to a claim for restitution, so they are of no relevance to this study. In contrast, the revocation or amendment of favorable decisions, which would include, for example, the payment of child benefit, is only possible to a limited extent.

The issuing authority may amend a decision if there is a qualified public interest.[88] Not every public interest is sufficient, but the amendment must be necessary and unavoidable for the elimination of circumstances endangering the life or health of people or for the prevention of serious economic damage. In doing so, it shall impair acquired rights as little as possible. The amendment shall take *ex nunc* effect, i.e. only from the time it is made and not retroactively. The (highest) Administrative Court (*Verwaltungsgerichtshof*) ruled that, contrary to the wording of the provision, the revocation of an administrative act by the issuing authority is also possible, as sometimes only this constitutes a meaningful measure in the public interest.[89]

The competent higher authority (*Oberbehörde*) may also amend a decision for the same public reasons. In addition, it may declare the decision null and void[90] if it was issued by an incompetent authority or by an improperly composed collegial body. It may also declare the decision null and void, if it would lead to a result that is contrary to criminal law, if it is actually unenforceable or if it suffers from an error that is expressly threatened with nullity by a statutory provision. It is disputed whether, in the case of such a declaration by the higher authority, the original administrative act loses its legal effect only *ex nunc* or already *ex tunc*, i.e. retroactively.[91]

The General Administrative Procedure Act does not regulate how the reimbursement of public-law benefits and their interest payment is to be made after a remedy or amendment. Some special laws contain their own regulations on this.[92] In the majority of cases, recourse is made to the provisions of

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85 For example: § 27 IV Wasserbenutzungsrecht.

86 Titel of § 68 Verwaltungsverfahrensgesetz.

87 68 II Verwaltungsverfahrensgesetz.

88 § 68 III Verwaltungsverfahrensgesetz.

89 *Rosenzopf*, Die Rechtskraft von Bescheiden im erstinstanzlichen Verfahren und von Entscheidungen im Verfahren vor den Verwaltungsgerichten, p. 37 (wth a footnote on further court decisions); *Tschreppl*, Die außerordentlichen Rechtsmittel gegen rechtskräftige Verwaltungsakte im Vergleich Österreich /Deutschland, p. 40.

90 § 68 IV Verwaltungsverfahrensgesetz.

91 *Rosenzopf*, Die Rechtskraft von Bescheiden im erstinstanzlichen Verfahren und von Entscheidungen im Verfahren vor den Verwaltungsgerichten, p. 42; *Tschreppl*, Die außerordentlichen Rechtsmittel gegen rechtskräftige Verwaltungsakte im Vergleich Österreich /Deutschland, p. 38.

92 For example: § 107 Allgemeines Sozialversicherungsgesetz.

the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) for reimbursement, more precisely to those of the law of payment of a non-debt (*Zahlung einer Nichtschuld*), analogous to legal principles,[93] in order to fill the existing gaps in public asset law.[94] According to this, a person who has received something due to an error, even if it is an error of law, to which he has no right against the party rendering the service or good, must return what has been rendered.[95] This includes things that have been given as a true debt may be reclaimed by the giver from the receiver if the legal reason for keeping them has ceased.[96]

If the main claim is to be decided by notice, the default interest shall also be determined in the same notice, unless otherwise provided by law.[97] The entitlement of public authorities to interest on arrears (*Verzugszinsen*) is generally recognized, even in the absence of a specific statutory provision.[98] The Austrian Constitutional Court (*Verfassungsgerichtshof*) stated that unless the law provides otherwise, interest on arrears must also be paid in the case of public-law obligations.[99] This interest of four per cent is not a penalty, but a real compensation for the loss in value of the nominal amount owed due to the passage of time.[100] Again, the analogous application of the provisions of the Civil Code is used.[101] However, the legislator is free to make deviating regulations and thus also to set higher interest rates, which then have a penalizing effect.[102] This has been done, for example, in various places in the Federal Tax Code (*Bundesabgabenordnung*).

2.5.3. Enforcement

The enforcement of public-law claims is regulated by the Federal Administrative Enforcement Act (*Verwaltungs-Vollstreckungsgesetz).*[103] **Enforcement authorities** under this Act are **always** the **district administrative authorities** (*Bezirksverwaltungsbehörden*), irrespective of whether it is their own claim or that of a superior authority.[104] They shall also enforce the claims of other federal and provincial authorities, unless otherwise provided for in the specialised statutes.[105]

The collection of monetary claims (*Eintreibung von Geldleistungen*) is carried out either by the district administrative authorities themselves or at their instigation by the competent court.[106] In principle, the district administrative authorities shall instruct the court to carry out the recovery in accordance with the provisions applicable to the judicial execution proceedings. If considerations of speed and cost savings so dictate, the district administrative authority may also carry out the collection itself. In doing

93 *Raschauer*, Allgemeines Verwaltungsrecht, 2009, p. 413, 467, no. 1209, 1395.

94 Idem, p. 428, no. 1250.

95 § 1431 Allgemeines Bürgerliches Gesetzbuch.

96 Idem, § 1435.

97 https://rdb.manz.at/document/ris.vfghr.JFR_09929772_06A00018_01.

98 *Raschauer*, Allgemeines Verwaltungsrecht, 2009, p. 467, no. 1397.

99 Idem, p. 415, no. 1215.

100 *Idem*, p. 416, no. 1215.

101 § 1333, 1334, 1000 I Allgemeines Bürgerliches Gesetzbuch.

102 *Raschauer*, Allgemeines Verwaltungsrecht, 2009, p. 416, no. 1215.

103 As already described above, according to the Austrian Constitution, the matter of administrative enforcement actually belongs to the competence of the *Länder*, however, the Federal Government was able to enact a uniform regulation on the basis of the "principle of competence as needed" according to Article 11 of the Austrian Constitution.

104 § 1 I Nr. 1 Verwaltungsvollstreckungsgesetz.

105 Idem, § 1 I Nr. 2.

106 Idem, § 3 I.

so, it shall apply *mutatis mutandis*, meaning with the necessary changes, the provisions on the collection and securing of public charges (*Abgabenexekutionsordnung*).[107]

The means of enforcement of other obligations and omissions (*anderer Leistungen und Unterlassungen*) are the "substitute execution of the act" (*Ersatzvornahme*),[108] the „coercive penalty" (Zwangsstrafe),[109] divided into penalty payment (*Geldstrafe*) and imprisonment (*Haftstrafe*), as well as the "direct coercion" (*unmittelbarer Zwang*).[110] Since only the substitute execution of the act and the penalty payment can entail payment obligations, only they will be explained in more detail.

The substitute execution of the act can be employed if the person obliged to perform work or services in kind has not fulfilled this obligation at all or not completely or not at the proper time. The deficient performance may then be effected after prior warning at the risk and expense of the person obliged. It is therefore an obligation that is not of a highly personal nature, but can also be fulfilled by another person. The authority may require the person concerned to pay the costs in advance against subsequent settlement.[111]

The penalty payment is imposed if the obligation to tolerate or refrain from an act or to perform an act which cannot be performed by a third party due to its peculiar nature is not fulfilled. Its function is **to induce the person concerned to conform to their obligation** by forcing him or her to pay an additional sum of money otherwise. The threatened coercive measure (*angedrohtes Zwangsmittel*) shall be enforced immediately upon the first infringement or after the fruitless expiry of the time limit set for the performance of the act.[112]

2.6. Belgium

2.6.1. Administrative fines

Just like in other countries, fines are the **most widespread form** administrative sanctioning takes in Belgium.[113] Describing Belgian Law on administrative fines (*bestuurlijke boetes*) in a concise but structured way is not an easy task, however, as administrative fines are **not regulated uniformly**. There is **no explicit attribution of responsibilities to** any government entity regarding the authority to **regulate, organise or impose administrative sanctions**.[114] Instead, according to a ruling by the Constitutional Court, **the federal state, the communities and the regions can each regulate fines for their area of competence**.[115] This is because the competence also encompasses an inherent power to impose sanctions for infringement of the legislation enacted on the basis of this competence.[116] For example, municipalities are responsible for fines imposed for nuisance. This would include the use of an electric lawnmower on Sunday and public urination.[117]

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107 Full name: Bundesgesetz über die Einbringung und Sicherung der öffentlichen Abgaben.

108 § 4 Verwaltungsvollstreckungsgesetz.

109 Idem, § 5 Verwaltungsvollstreckungsgesetz.

110 Idem, § 7.

111 Idem,§ 4 II.

112 Idem,§ 5 II 2.

113 *Put*, Rechtshandhaving door administratieve sancties in het recht, p. 1197.

114 Idem, p. 96.

115 Idem, p. 96.

116 Idem, p. 96.

117 https://www.belgium.be/nl/justitie/veiligheid/gemeentelijke_administratieve_sanctie_gas.

Unlike many other countries, **Belgium has neither an administrative procedure act nor a general administrative law code** (*algemene wet bestuursrecht*).[118] Also, **administrative offences are not regulated in a separate statute** (as is the case in Germany, for example), which would be an option, too. There is **neither a uniform procedure nor a catalogue of possible sanctions**. Different public bodies, such as the tax authorities, have the possibility to impose administrative sanctions, including fines.[119] The applicable **procedural rules and legal remedies depend on the respective specialised law**,[120] without being unified. Sometimes it is necessary to file an appeal against the fine with the issuing administration first (*georganiseerd bestuurlijk beroep*),[121] sometimes the person concerned can immediately call upon a court (*jurisdictionele beroep*).[122] Which branch of the judiciary is competent to hear a case against an administrative fine also varies**. Both administrative courts and ordinary courts** have been assigned the task for different areas of specialised law.[123] The Belgian rules on fines are therefore often described as fragmented.[124] However, there are some laws with **overarching** application, such as the **Act "concerning the explicit justification of administrative acts"** (*betreffend de uitdrukkelijke motivering van bestuurshandelingen*),[125] which by its broad scope also includes fines. This act for example stipulates that every administrative fine should be explicitly justified.

The gaps in the legal (protection) system created by this lack of legislation have been partially filled by **case law** over time.[126] In particular, this jurisprudence revolves around the question of what powers and decision-making possibilities the court is entitled to when reviewing a monetary sanction imposed by the administration. As in many other countries, **the principle of separation of powers in general administrative law results in a limited review competence of the courts**. They can fully review the legality of an administrative measure, but with regard to the **discretionary power of the authority** only a weakened control takes place. Discretion is **only reviewed insofar as it affects the legality of the administrative decision**.[127]

In the case of fines, which by their nature are punitive in character, such **limited judicial review is not sufficient according to the case law of the European Court of Human Rights** (ECtHR). With regard to the scope of judicial review, they are to be measured against Article 6 of the European Convention on Human Rights (ECHR) and therefore **require full judicial review** (*beroep in volle rechtsmacht*),[128] even if the legal protection takes place before the administrative courts, which usually would not have such a competence. Some Belgian scholars also derive this necessity from the principle

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118 *Put/Andries*, Administrative Sanctions in the European Union, p. 104.

119 EURIEC, Cross-border enforcement of administrative fines and recovery claims, p. 7.

120 *Put/Andries*, Administrative Sanctions in the European Union, p. 106.

121 For example in the case of a fine concerning the Brussel´s Inspection Act (*Brusselse Wetboek van inspectie, preventie, vaststelling en bestraffing van milieumisdrijven*), in which the person concerned has to file an appeal (*beroep*) with the so called *Milieucollege* first, article 49.

122 For example in the case of a fine concerning Flemish environmental enforcement law (*Vlaamse milieuhandhavingsrecht*), in which the person concerned can immdiately appeal with an administrative court (the *Handhavingscollege* in this particular case).

123 *Opdebeek/de Somer*, Algemeen bestuursrecht. Grondslagen en beginselen, p. 706.

124 *Opdebeek/de Somer*, Algemeen bestuursrecht. Grondslagen en beginselen, p. 705; *Put/Andries*, Administrative Sanctions in the European Union, p. 104.

125 *Put/Andries*, Administrative Sanctions in the European Union, p. 105.

126 *Put*, Rechtshandhaving door administratieve sancties in het recht, p. 1209.

127 *Put/Andries*, Administrative Sanctions in the European Union, p. 104.

128 ECtHR, judgment of 23 June 1981, cases 6878/75, 7238/75 Le Compte, van Leuven and de Meyere v. Belgium, no. 51; Constitutional court 30 March 2011, Role number 44/2011, Considerations B.6 and B.38.

of separation of powers (*rechtsbeginsel van de scheiding der machten*), since sanctioning violations of the law is a typical task of the judiciary.[129]

Full judicial review in this context means that the Belgian court either makes its own decision within the framework of the applicable laws[130] or that an administration, after the administrative act has been annulled, must issue a new decision in which it is bound by the court's decision.[131] For example, the court can set aside the fine imposed by the authority[132] if the facts of the norm are not fulfilled or the administrative decision suffers from other errors. It can also reduce the amount if, for example, the seriousness of the violation is not proportional to the amount of the penalty imposed.[133] If necessary, it can even reduce the fine below the statutory minimum if this is required by international and thus higher-ranking law.[134]

In addition to the individual provisions of the respective specialised laws, the courts primarily apply the general principle of proper administration and the general principles of criminal law in their review.[135] The formal principles of proper administration include, for example, the right to be heard and the right of defense, as well as the statement of reasons. The substantive principles include, for example, the prohibition of abuse of power, equality and reasonableness.[136] The criminal law principles that apply indirectly[137] include the presumption of innocence, the right to remain silent and the principle that punishment must have a legal basis.[138]

In summary, the **Belgian legal system uses principles of both administrative law and criminal law to deal with the specificities of fines, which have both administrative and criminal elements**.

2.6.2. Recovery Claims

In Belgium, too, recovery claims are understood to mean the **claim for restitution, the penalty payment** (*dwangsom*) and **the compulsory enforcement *ex officio*** (*bestuursdwang*).[139]

In the multi-layered Belgian administrative system, public law claims by the authorities against individuals can arise at various levels. These can be claims for e.g. taxes or social security contributions that still have to be paid, and which are regulated in the specialized laws, but also for amounts paid out by the state that are now being reclaimed. Since Belgium does not have a general administrative law code, there is **no general description of whether and in what cases a government can revoke its own decisions, resulting in a recovery claim in the strict sense**. In its place, the Council of State (*Raad van State*) has developed a **jurisprudential doctrine** on this subject (the so-called *intrekkingsleer*), which other administrative judges have adopted and which shall be outlined.[140]

[129] *Put*, Rechtshandhaving door administratieve sancties in het recht, p. 1198.

[130] As the *Handhavingscollege* in Flanders does, for example, Article 44 Decreet betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges.

[131] *Put/Andries*, Administrative Sanctions in the European Union, p. 115.

[132] Idem, *Put/Andries*, Administrative Sanctions in the European Union, p. 113.

[133] Idem, p. 114.

[134] Idem, p. 112.

[135] Idem, p. 124.

[136] Idem, p. 125.

[137] Idem, p. 125.

[138] *Tijs*, Algemeen Bestuursrecht in hoofdlijnen, p. 198.

[139] EURIEC, Cross-border enforcement of administrative fines and recovery claims, p. 7.

[140] *Opdebeek/de Somer*, Algemeen bestuursrecht. Grondslagen en beginselen, p. 120.

Belgian law **differentiates between the revocation** (*intrekking*) **and the repeal** (*opheffing*) of administrative acts. In the case of a revocation, the administrative act loses its effect retroactively, also called *ex tunc*. In the case of a repeal, it only loses its effect *ex nunc*, meaning for the future. Furthermore, Belgian law distinguishes between administrative acts from which rights are incurred and those from which they are not, as well as between lawful and unlawful acts. Lawful acts that are beneficial for the individual cannot be revoked or repealed. An unlawful legal act, which has conferred rights, like a subsidy for example, can be revoked under certain conditions. These conditions include that the act has been provoked by deceit, a norm allows the revocation, the act is considered "non-existent" (an act affected by such gross and manifest illegality that its existence may be ignored) or the appeal period before the competent administrative court has not yet expired. The same reasons apply to the repeal of unlawful legal acts. The authority competent to repeal the administrative act is the authority that would have been competent to issue it, pursuant to the "actus contrarius" principle, also called principle of parallelism of powers.[141]

In the absence of a general administrative procedure code, there is also **no general statutory basis in Belgium for the right of recovery** that can arise in favour of public authorities. This is criticised by Belgian lawyers, as the current legal situation entails various uncertainties and obstacles.[142] In some **specialised laws**, there are specific legal bases that allow for recovery.[143] One example is the recovery of subsidies granted by the Communities and Regions (*gemeenschappen en gewesten*).[144] However, it has not become clear whether, in the absence of a special statutory basis for authorisation, subsidiary recourse can be made to civil law provisions for recovery or whether another legal figure is used.[145]

If the authority wants to charge **interest on arrears**, it also needs **a special legal authorisation under public law**. Such a basis is regulated, for example, for tax law[146] and other debts at the finance department of the federal government (*federale overheidsdienst financiën*).[147] If someone does not pay his debts there on time, four per cent interest on arrears (*nalatigheidsinteresten*) is charged. Remarkably, in the above-mentioned law allowing the recovery of subsidies, no provision was made for interest on arrears. Also on websites of the Belgian state, no interest on arrears is mentioned with regard to the recovery of subsidies,[148] which suggests that it is not charged either.

This leaves open the question of whether, in cases where there is no basis for authorisation under public law, it would theoretically be possible to have recourse to the civil law provisions on interest on arrears.[149] However, there were no concrete statements or indications in this regard.[150]

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141 Idem, p. 119-122.

142 https://www.elfri.be/rechtsleer/de-terugvordering-van-onrechtmatige-staatssteun-in-belgie.

143 For example, § 19 II Schoolpactwetgeving.

144 Article 13 Wet tot vaststelling van de algemene bepalingen die gelden voor de begrotingen, de controle op de subsidies en voor de boekhouding van de gemeenschappen en de gewesten, alsook voor de organisatie van de controle door het Rekenhof.

145 See: *Mast/ Dujarding/ Van Damme/ Vande Lanotte*, Overzicht van het Belgisch Administratief Recht, 2017; *Opdebeek/de Somer*, Algemeen bestuursrecht, Grondslagen en beginselen; *Tijs*, Algemeen bestuursrecht in hoofdlijnen).

146 https://www.vlaanderen.be/als-u-niet-tijdig-betaalt-invordering-en-nalatigheidsintresten.

147 https://financien.belgium.be/nl/particulieren/betalen-terugkrijgen/betalingsproblemen

148 https://www.vlaio.be/nl/subsidies-financiering/corona-hinderpremie/wat-na-een-negatieve-beslissing.

149 Article 5.240 Burgerlijk Wetboek.

150 The search in three textbooks on general administrative law did not contain any references to this when searching for "rente" or "intresten/interesten" (used were: *Mast/ Dujarding/ Van Damme/ Vande Lanotte*, Overzicht van het Belgisch Administratief Recht, 2017; *Opdebeek/de Somer*, Algemeen bestuursrecht, Grondslagen en beginselen; *Tijs*, Algemeen bestuursrecht in hoofdlijnen).

2.6.3. Enforcement

As already stated in the other areas of law, there is also **no general legal framework** in Belgium for the enforcement of administrative law. An administrative enforcement code (*recht van de administratieve rechtshandhaving*) is missing. As a result, it remains difficult to make generally valid statements for the whole of Belgian administrative law. Much is regulated separately in **special laws**, for example in environmental or tax law.

The enforcement of monetary claims differs depending on the type of claim. In the case of a fine for a traffic offence, for example, the authority must initiate legal proceedings before the police court (*politierechtbank*) if the fine is not paid.[151] The court then issues a judgment, which can be enforced. This means, however, that the authority cannot enforce its fine on its own. In the case of a municipal administrative sanction fine (*GAS-gemeentelijke administratieve sanctie*), on the other hand, the authority has various possibilities. The municipality may institute civil proceedings to recover the fine[152] or send a bailiff (*deurwaarder*) if no further appeal is possible.[153] Where there is repeated failure to comply with the decision to pay an administrative fine, the board may consider proceeding with **administrative seizure** (*bestuurlijke inbeslagname*) or **administrative forfeiture** (*bestuurlijke verbeurdverklaring*).[154]

With regard to the obligation to perform, tolerate or refrain from an act, Belgian law, like Dutch law, knows the **administrative order under penalty payment** *(bestuurlijke (last onder) dwangsom*) as a means of exerting pressure if the obligation is not complied with. However, it seems to be **much less common in Belgium**. In terms of content, the Belgian administrative order under penalty payment seems to be similar to the Dutch one, as examples examined revealed.[155] The power to impose them must be established by law, since under Belgian law it is considered a reparative sanction (*herstellender sanctie* or *probleemverhelpende sanctie*), and all sanctions require a basis of authorisation.[156] Administrative penalty payments are regulated, for example, in environmental law[157] and in the law on the establishment of the data protection authority.[158] However, in Belgian literature on general administrative law,[159] the penalty payment (*dwangsom*) is almost exclusively discussed as judicial penalty payments (*dwangsommen door de rechtbank*), often in connection with the Council of State (*Raad van State*). In this respect, it is also difficult to make more detailed general statements here.

In addition, there is also the **administrative coercion** (*bestuursdwang*), **when an obligation to act, tolerate or refrain is not fulfilled**. This involves *de facto* action by authorised persons to end a violation of the law, to eliminate its consequences and to prevent a repetition. To this end, all costs and risks are shifted to the alleged offender. The coercion is also not applied immediately, unless it concerns

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151 https://www.politie.be/5415/vragen/verkeersboete/je-gaat-niet-akkoord-met-de-verkeersboete-bezwaar; https://www.anwb.nl/vakantie/belgie/reisvoorbereiding/verkeersboetes.

152 http://www.gasboetes.be/wp-content/uploads/2013/04/Hoe-verloopt-de-sanctieprocedure-bij-een-administratieve-geldboete.pdf (Question 7).

153 https://www.antwerpen.be/info/5a86a0fba6779315b62ef8cf/gas-boete-voor-foutparkeren; https://www.politie.be/5425/vragen/politiereglement/wat-je-moet-weten-over-gas.

154 http://www.gasboetes.be/wp-content/uploads/2013/04/Hoe-verloopt-de-sanctieprocedure-bij-een-administratieve-geldboete.pdf (Question 8).

155 https://omgeving.vlaanderen.be/nl/bestuurlijke-maatregel-en-bestuurlijke-dwangsom.

156 *Tijs*, Algemeen Bestuursrecht in hoofdlijnen, 2012, p. 191.

157 Art. 46 Brusselse Wetboek van inspectie, preventie, vaststelling en bestraffing van milieumisdrijven.

158 Art. 100 § 1 no. 12 wet tot oprichting van de Gegevensbeschermingsautoriteit.

159 Used were: *Mast/ Dujarding/ Van Damme/ Vande Lanotte*, Overzicht van het Belgisch Administratief Recht, 2017; *Opdebeek/de Somer*, Algemeen bestuursrecht, Grondslagen en beginselen; *Tijs*, Algemeen bestuursrecht in hoofdlijnen.

particularly urgent cases, but the offender is first given the opportunity to fulfil the obligation him- or herself.[160] In this respect, there are great **parallels to the other three countries** examined.

2.7. Netherlands

2.7.1. Administrative fines

Just like in the other countries, the Dutch legal system distinguishes criminal fines (*strafrechtelijke boetes*) **from administrative fines** (*bestuurlijke boetes*). Whether a sanction is designed by the legislator as a criminal, administrative or mixed system depends on a number of general as well as specific factors. For example, the nature of the offence, the severity of the intended monetary sanction and the need to use investigative powers and coercive measures of criminal law must be taken into account.[161] By way of illustration, the violations of road traffic regulations, which are particularly relevant across borders, are sanctioned both administratively and criminally.[162]

In the Netherlands, the **administrative fine is defined by law in the general administrative law code** (*algemene wet bestuursrecht*) as a **punitive sanction consisting of an unconditional obligation to pay a sum of money**.[163] Apart from this definition, the general administrative law code offers **general rules and principles** on administrative fines, including the *ne bis in idem* principle,[164] the duty of the legislator to prescribe the maximum of a fine by law[165] as well as the time period after which an infringement can no longer be sanctioned.[166] A section on the procedure regarding administrative fines is also included.[167] Unlike the German Act on Regulatory Offences, however, it **does not contain any provisions on specific administrative offenses**.

The provisions of the general administrative law code relating to fines are, for the most part, mandatory law (*dwingende bepalingen* or *dwingend recht*).[168] This means that they also **apply to all special administrative law and take precedence over any conflicting standards**. However, the legislature may, by formal law, order that certain sections of the general administrative law code shall not apply to a specific matter. This must then be justified in detail. An example of such a case can be found in the traffic administrative enforcement act (*wet administratieve handhaving van verkeersvoorschriften*).[169]

In addition, there are two provisions[170] in the general administrative law code on fines that grant the legislator regular power of deviation (*gangbare bepalingen*). One of them is the decision on the

[160] Due to the lack of general statements in the previously mentioned Belgian literature sources, the findings from the following website (https://omgeving.vlaanderen.be/nl/bestuurlijke-maatregel-en-bestuurlijke-dwangsom) were also abstracted for this part on administrative coercion.

[161] https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/integraal-afwegingskader-voor-beleid-en-regelgeving/verplichte-kwaliteitseisen/uitgangspunten-bij-de-keuze-van-een-sanctiestelsel; for an illustrative diagram, see *Jansen*, Administrative Sanctions in the European Union, p. 464.

[162] https://www.anwb.nl/juridisch-advies/in-het-verkeer/verkeersovertreding-nl/verkeersboete-ontvangen; https://www.anwb.nl/vakantie/nederland/reisvoorbereiding/verkeersboetes.

[163] Article 5:40 Algemene wet bestuursrecht.

[164] Idem, Article 5:43 Algemene wet bestuursrecht.

[165] Idem, Article 5:46.

[166] Idem, Article 5:45.

[167] Section 5.4.2. Algemene wet bestuursrecht.

[168] In the general administrative law code there are four types of regulations: mandatory regulations (*dwingende bepalingen*), regulations with a power of derogation (*gangbare bepalingen*), regulations with a subsidiary function (*vangnetbepalingen*) and optional regulations, which apply only if the special law refers to them (*facultative bepalingen*).

[169] Article 2a wet administratieve handhaving van verkeersvoorschriften.

[170] Article 5:44 no. 2 and Article 5:53 no. 1 Algemene wet bestuursrecht.

requirements to be imposed on the administrative procedure. Normally, the requirements for the proper procedure differ according to the amount of the fine. If a fine of 340 euro or less is imposed, the hearing of the transgressor (*overtreder*), is optional, as is the preparation of a report.[171] If the fine exceeds 340 euros, the aggravated procedure (*verzwaarde procedure*) applies and the hearing before the fine is issued and the preparation of the report are obligatory.[172] Such a report shall include the name of the transgressor, the date, place and time of the violation, the rule violated and the act that led to the violation.[173] However, the legislator may always specify in the sectoral laws that the aggravated procedure shall apply even if the 340 euro limit is not reached, thus deviate from the rule that is provided in the general administrative law code.[174]

Besides this power to decide on the procedure, the special legislator confers the power and the competence of the administrative body to impose fines and the infringements for which they can be imposed in the sectoral laws.[175] By now, **more than 100 specialised laws** (*bijzondere wetten*) **provide for fines as a sanction**.[176] The special legislator is also obliged to determine in the specialised laws whether the administration is free to determine the amount of the fine within the framework of the applicable laws or whether it must adhere to certain previously determined levels for the fine.[177]

When the fine has been imposed and the **person concerned** wishes to defend him- or herself against the fine, they **must first lodge an objection** (*bezwaar*) **with the authority that imposed the fine**[178] within six weeks.[179] According to the general administrative law code, the objection does not have suspensive effect unless it is ordered in the special administrative law.[180] The authority then usually decides on the complaint within six weeks.[181] The person concerned can also request the authority to proceed immediately to court.[182] If the authority agrees, the preliminary administrative procedure is skipped.[183] If, on the other hand, the administration carries out the preliminary administrative procedure and does not comply with the request of the person concerned, the latter may in turn seek judicial protection within six weeks.[184] For this purpose, an appeal (*beroep*) must be filed in writing or digitally[185] with the administrative court.[186]

Since it is the administrative courts who are competent to hear cases on administrative fines in the Netherlands, they apply the rules of **administrative procedural law**.[187] This means that they are

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171 Article 5:48 en 5:50.

172 Idem, Article 5:53.

173 Idem, Article 5:48 no. 2.

174 Article 5:53 no. 1, last part of the sentence.

175 Article 5:3 no. 1 in combination with 5:4 no. 1 Algemene wet bestuursrecht; *Jansen*, Administrative Sanctions in the European Union, p. 321.

176 *Jansen*, Administrative Sanctions in the European Union, p. 334, 357.

177 Article 5:46 no. 2 Algemene wet bestuursrecht.

178 Idem, Article 6:4 no. 1.

179 Idem, Article 6:7. Systematically, this follows from Article 8:1 in connection with 7:1 Algemene wet bestuursrecht. According to this, the person concerned must first file a complaint before he or she can appeal to the administrative court, unless one of the grounds for exclusion mentioned in Article 7:1 applies. However, fines are not mentioned here, so that the administrative preliminary proceedings must be carried out.

180 Article 6:16 Algemene wet bestuursrecht.

181 Idem, Article 7:10.

182 Idem, Article 7:1a no. 1.

183 Idem, Article 7:1a no. 3, 5.

184 Idem, Article 6:7.

185 *Ministerie van Justitie en Veiligheid*, Informatieblad Bezwaar en beroep tegen een beslissing van de overheid, p. 8.

186 Article 6:4 no. 3, Article 8:1 Algemene wet bestuursrecht.

187 *Jansen*, Administrative Sanctions in the European Union, p. 441.

competent to add to the facts and complete the legal grounds by virtue of their own motion (*ex officio*).[188] Furthermore, given the proximity of administrative and criminal sanctions, they seek the greatest possible alignment and apply criminal procedural precedents.[189] Also, the administrative courts are **not limited to merely reviewing the legality of the administrative act** as is often the case, but can reach their own decision on the matter regarding fines. If they annul a decision imposing an administrative fine, they take a decision on the imposition of the fine and determine that their judgment to that extent replaces the annulled decision.[190]

2.7.2. Recovery Claims

Claims under public law against individuals can be claims for e.g. taxes or social security contributions that still have to be paid, but also for amounts paid out by the state that are now being reclaimed. The **authorisation bases** for levying a tax, charge or contribution **can be found in the respective sectoral legislation.**

With regard to the **withdrawal or amendment** (*intrekking* or *wijziging)* **of an administrative act** (*beschikking*),[191] **the general administrative law code makes such provisions only for subsidies**.[192] A subsidy in this context is legally defined as the entitlement to financial resources provided by a governing body for the purpose of certain activities of the applicant, other than as payment for goods or services provided to the governing body.[193] An order that grants a subsidy (*subsidievaststelling*)[194] can be withdrawn or changed to the disadvantage of the beneficiary if one or more of three criteria apply.[195] Firstly, the recipient did not comply with the grant-related obligations, after the grant was made. Secondly, the grant determination was incorrect and the recipient knew or should have known this. Thirdly, the subsidy would have been determined at a lower level had the authority known facts or circumstances, of which it could not reasonably have been aware at the time of its decision. The withdrawal or amendment has retroactive effect up to and including the time when the grant was established (*ex tunc*), unless otherwise provided for at the time of withdrawal or amendment.[196] The administrative body may recover unduly paid subsidy amounts by enforcement order (*dwangbevel*).[197]

The withdrawal or amendment of other administrative acts is not regulated in the general administrative law code. The Guidelines for Legislation (*Aanwijzigingen voor de regelgeving*), which at least central government lawyers are required to follow when drafting legislation,[198] stipulate that where it is necessary to be able to withdraw or amend an administrative decision based on a norm, the power to do so must be expressly provided for.[199] The grounds for revoking or amending a decision shall be set out in the regulation.[200] Reasons for revoking or changing a decision may be, for example the information provided turns out to be so incorrect or incomplete that a different decision would have been taken on the application if the correct information had been known when it was assessed.

[188] Article 8:69 Algemene wet bestuursrecht.
[189] *Jansen*, Administrative Sanctions in the European Union, p. 443.
[190] Article 8:72a Algemene wet bestuursrecht.
[191] Idem, Article 1:3 no. 2.
[192] Idem, Section 4.2.6.
[193] Article 4:21 no. 1 Algemene wet bestuursrecht.
[194] Idem, Article 4:42.
[195] Idem, Article 4:49 no. 1.
[196] Idem, Article 4:49 no. 2.
[197] Idem, Article 4:57 no. 1, 2.
[198] https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/aanwijzingen-voor-de-regelgeving.
[199] § 5.5, aanwijziging 5.21 no. 1 Aanwijzigingen voor de regelgeving.
[200] Idem § 5.5, aanwijziging 5.21 no. 2.

Alternatively, the decision was taken in violation of statutory provisions or the decision may not have been used for a certain continuous period.[201]

It should thus be noted that the **withdrawal or amendment of an administrative act that is not a subsidy is carried out according to the respective sectoral law**. In this context, the regulator has to determine the factual prerequisites separately in each case, without being restricted by the general administrative law code.

For the payment of a **monetary debt** or the repayment of a debt of an individual to an authority, there are again regulations in the **general administrative law code**.[202] The obligation to pay a sum of money shall be determined by order (*beschikking*) and state the sum of money to be paid and the term within which payment must be made,[203] usually six weeks.[204] If the debtor defaults, he or she has to pay interest, which the authority also determines by order (*beschikking*).[205] With regard to the amount of interest, the general administrative law code refers to the general part of the contract law (*algemeen gedeelte van het verbintenissenrecht*) of the Civil Code *(Burgelijk Wetboek*).[206] The interest at the statutory rate (*wettelijke rente*) is set by the sovereign each year and in 2023 will be four per cent for non-trading transactions and 10.5 per cent for trading transactions.[207] However, the special legislator may deviate from the regulations on interest and make other rules about the default and its consequences in the sectoral legislation.[208] If he does not, the regulations of the general administrative law code apply.

2.7.3. Enforcement

The enforcement of public-law claims is regulated by the general administrative law code as is the enforcement of other administrative acts (*besluiten/beschikkingen*).

If the authority wants to enforce a **monetary claim**, it must first send the debtor a formal reminder (*aanmaning*). As a rule, the debtor is given a (new) payment deadline of two weeks.[209] If he or she still does not pay or does not pay in full, the authority can often[210] issue a so-called enforcement order (*dwangbevel*).[211] An enforcement order is legally defined as a written order from an administrative body aimed at enforcing the payment of a sum of money.[212] The power to an enforcement order exists only if it is conferred by law.[213] It produces an enforceable title, which can be enforced under the rules of the

201 https://www.kcbr.nl/beleid-en-regelgeving-ontwikkelen/aanwijzingen-voor-de-regelgeving/hoofdstuk-5-bijzondere-bestanddelen-van-regelingen/ss-55-toekenning-en-terminologie-van-bestuursbevoegdheden/aanwijzing-521-intrekking-wijziging-van-een-beschikking.

202 Section 4.4.1 Algemene wet bestuursrecht. As Article 4:85 b provides that the provisions of Title 4.4.1 are applicable if the decision (*besluit*) can be appealed against by objection or appeal (*bezwaar of beroep*), which is the case for monetary recovery claims according to Article 8:1 – 8:5 algemene wet bestuursrecht.

203 Article 4:86 Algemene wet bestuursrecht.

204 Idem, Article 4:87.

205 Idem, Article 4:99.

206 Article 4:98 Algemene wet bestuursrecht, refers to Article 119 no 1, 2 as well as Article 120 no 1 of the Burgerlijk wetboek.

207 https://www.rijksoverheid.nl/onderwerpen/schulden/vraag-en-antwoord/hoogte-wettelijke-rente.

208 Article 4:103 Algemene wet bestuursrecht.

209 Idem, Article 4:112.

210 *Den Ouden/ Kortmann/ Jongbloed/ Van den Brink/ Tjepkema*, De bestuursrechtelijke geldschuldenregeling, Titel 4.4. awb geëvalueerd, p. 53.

211 Article 4:117 no. 1 Algemene wet bestuursrecht.

212 Idem, Article 4:114.

213 Article 4:115 Algemene wet bestuursrecht. If it is not conferred, the authority has to refer to the civil court) *Den Ouden/ Kortmann/ Jongbloed/ Van den Brink/ Tjepkema*, De bestuursrechtelijke geldschuldenregeling, Titel 4.4. awb geëvalueerd, p. 53.)

Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*).[214] The enforcement order may also collect the formal reminder fee, interest and costs of the enforcement order itself.[215]Claims that are collected in this way include fines and penalty payments with a coercive element (*last onder dwangsommen*) as they are monetary claims.[216] The enforcement order itself cannot be objected to or appealed against either before the enforcement authority or before the administrative courts.[217]

Regarding the **enforcement of other administrative acts**, the authority has two different means at hand that are of relevance here. Both are categorised as **remedial sanctions** (*herstelsancties*) under Dutch law, which is defined as an **administrative sanction aimed at partly or fully rectifying or ending a violation, at preventing the repetition of a violation, or at removing or limiting the consequences of a violation**.[218] For both, the authority also has to be authorized by the legislator to impose one of the measures.[219]

Firstly, the authority may issue an order under **administrative coercion** (*last onder bestuursdwang*).[220] It consists of an order to remedy the breach in whole or in part; and the power of the administrative authority to enforce the order by actual action, if the order is not carried out or not carried out in time.[221] The costs incurred in doing so are borne by the addressee, unless they should not reasonably be borne by him or her in whole or in part.[222] Roughly speaking, the citizen or company is told which obligations they have to fulfil[223] and that otherwise the authority will take action itself at their expense. The order under administrative coercion thus consists of two parts. Often, the authority is assisted in the actual implementation by a commissioned company.[224]

Secondly, the authority may issue a **penalty payment with a coercive element** (*last onder dwangsom*). Such a notice consists of an order to remedy the breach in whole or in part; and the obligation to pay a sum of money if the order is not carried out or not carried out in time.[225] So, just like in the case of an order under administrative coercion, it consists of two parts and the addressee has to remedy their breach of law by themselves in the first place. However, in this case, the authority does not enforce the obligation, but instead burdens the addressee with an (additional) monetary claim, if they fail to comply. **The general administrative law code authorises the administration to impose a penalty payment whenever it is allowed to issue an order under administrative coercion**.[226] Thus, the administration can choose in each case which remedial sanction it considers more promising. However,

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[214] Article 4:116 Algemene wet bestuursrecht.

[215] Idem, Article 4:119 no. 1.

[216] Article 5:10 no. 2 Algemene wet bestuursrecht, which, according to Article 5:03, applies to all sanctions regulated in Section 5 (*Hoofdstuk*) and thus also includes fines and penalty payments.

[217] Article 8:4 no. 1b, as well as Chapter 6 and 7 Algemene wet bestuursrecht.

[218] Article 5:2 Algemene wet bestuursrecht.

[219] Idem, Article 5:4 no. 1.

[220] There are also the urgent (*spoedeisend*) administrative coercion (*bestuursdwang*) (Article 5:31 no. 1 Algemene wet bestuursrecht) and the very urgent (*zo spoedeisend […], dat)* administrative coercion (*bestuursdwang*) (Article 5:31 no 2 Algemene wet bestuursrecht). In the former case, the administrative coercion is initially ordered in writing, but the person concerned is not given the opportunity to remedy the situation himself or herself. In the latter case, the administrative coercion is carried out immediately without first ordering it in writing or giving the person concerned the opportunity to remedy the situation. On a side note, the section on the order under administrative coercion does not apply to action for the immediate maintenance of public order, Article 5:23 Algemene wet bestuursrecht.

[221] Article 5:21 Algemene wet bestuursrecht.

[222] Idem, Article 5:25 no. 1.

[223] Idem, Article 5:24 no. 1.

[224] https://handhavingsrecht.nl/de-last-onder-bestuursdwang-in-een-notendop.

[225] Article 5:31d Algemene wet bestuursrecht.

[226] Idem, Article 5:32 no. 1.

it cannot choose for the penalty payment of course if the interest that the regulation in question is intended to protect precludes it.[227] In practice, the penalty payment is more popular with the administration as the order under administrative coercion bares the risk for the authority that it has to act if the order is not complied with.[228]

2.8. Comparison

For clarity, overviews will be given in tabular form.

2.8.1. Legal protection against administrative fines

Table 1: Legal protection against administrative fines

	Relevant material law	**Procedural law in administrative proceedings**	**Carrying out an administrative pre-procedure**	**Competent court**	**Procedural law in court proceedings**	**Scope of review of the court**
Austria	Administrative *Penalties* Act	General Administrative Procedure Act (General *Administrative Procedure Act*)	Yes. (*Objection*)	Administrative courts	Special provision in the Administrative Court Procedure Act (*Administrative Court Procedure Act*)	Own taking of evidence and decision on the merits
Belgium	Varies	Varies	Varies, (if yes *georganiseerd bestuurlijk beroep*)	Administrative as well as ordinary courts	Varies	Full judicial review
Germany	Act on *Regulatory* Offences (*Ordnungswidrigkeitengesetz*)	Code of Criminal Procedure (*Criminal Procedure Code*)	Yes. (*Objection*)	Ordinary court (district *court*)	Code of Criminal Procedure (following an admissible objection to a penal order (*penalty order*), unless otherwise provided)	Own taking of evidence and decision on the merits
The Netherlands	General Administrative Law Code (*Algemene*	General Administrative Law Code (*Algemene*	Yes. (*bezwaar*)	Administrative courts	General Administrative Law Code	Own taking of evidence and decision on the merits

[227] Idem, Article 5:32 no. 2.

[228] *Jansen*, Administrative Sanction in the European Union, p. 326.

	wet bestuursrecht)	*wet bestuursrecht)*			(Algemene wet bestuursrecht)	

2.8.2. Recovery claims in the strict sense

Table 2: Recovery claims in the strict sense

	Repeal/revocation of administrative acts	**Resulting claim for reimbursement**	**Interest on arrears**
Austria	*Amendment* and *rectification* of administrative acts ex *officio* Regulated in the *General Administrative* Procedure Act Sometimes regulated in sectoral laws	No regulation in the General Administrative Procedure Act Sometimes regulated in sectoral laws Otherwise analogous application of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)	No regulation in the General Administrative Procedure Act Sometimes regulated in sectoral laws Otherwise analogous application of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)
Belgium	Revocation and repeal (*intrekking en opheffing)* Jurisprudential doctrine, developed by the Council of State, adopted by other courts	No general regulation Sometimes regulated in sectoral laws	No general regulation Sometimes regulated in sectoral laws
Germany	*Revocation and withdrawal* Regulated in the *Administrative* Procedure Act Sometimes regulated in sectoral laws	Regulated in the *Administrative* Procedure Act Sometimes regulated in sectoral laws	Regulated in the *Administrative* Procedure Act Sometimes regulated in sectoral laws
The Netherlands	Withdrawal or amendment of subsidies (*intrekking of wijziging*) is regulated in the General Administrative Law Code (*Algemene wet bestuursrecht*) For other administrative acts (*beschikkingen*), it is regulated in sectoral laws.	Regulated in the General Administrative Law Code (*Algemene wet bestuursrecht*) Sometimes regulated in sectoral laws	Regulated in the General Administrative Law Code (*Algemene wet bestuursrecht*) Sometimes regulated in sectoral laws

2.8.3. Enforcement

Table 3: Enforcement

	Legal regulation	**Collection of monetary claims**	**Means of enforcement of other obligations**

Austria	Federal *Administrative* Enforcement Act	Practical enforcement is carried out by the district *administrative* authorities themselves or at their instigation by the competent court Applying mutatis mutandis the provisions on the collection and securing of public charges (*Abgabenexekutionsordnung*)	Substitute execution of the act (*Ersatzvornahme*) *Coercive penalty* - *penalty* payment - *imprisonment*
Belgium	No general legal framework for enforcement Regulated separately in the sectoral laws	Differs depending on the type of claim	Regulated in the sectoral laws Administrative coercion (*bestuursdwang*) Penalty payment *(bestuurlijke (last onder) dwangsom*)
Germany	*Administrative* Enforcement Act(*s)*	Practical enforcement is carried out by the main customs offices (*Hauptzollämter*) The procedure is governed by the Fiscal Code (*Abgabenordnung)*	Substitute execution of the act (*Ersatzvornahme*) Penalty *payment*
The Netherlands	General Administrative Law Code (*Algemene wet bestuursrecht*)	Enforcement by the competent authority happens under the rules of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*)	Administrative coercion (*last onder bestuursdwang*) Penalty payment (*last onder dwangsom*)

3. EXISTING LEGAL FRAMEWORK FOR CROSS-BORDER COOPERATION

The enforcement of fines and recovery claims in cross-border legal transactions will usually require **cooperation between administrative authorities in various steps** of the recovery process. Before fines or recovery claims can be enforced, important legally relevant measures usually have to be taken beforehand. This begins with the **substantiation or determination of the claim**. Already at this stage, a cross-border exchange of information may be necessary. An example of this is the question of the owner's data of a vehicle, if one only has information about the registration number. Or the search for the company or shareholding structure of a corporation. This information may be available in (registers of) other countries.

In the vast majority of cases, **the basic decision on the claim must then be served on the debtor as a legally mandatory procedural step**. Service can be effected in different ways. Service can and often must also be affected by cross-border traffic[229]. The enforcement of the claim, in turn, usually requires the existence of a so-called **enforcement order**, and this title **must also be served**. Only then can the enforcement proceedings be brought to a successful conclusion.

Functioning cooperation between administrative authorities of different Member States in the cross-border enforcement of public-law pecuniary claims always presupposes the existence of legal bases. **The multiplicity of types of public-law monetary claims means that there cannot be a single legal basis.** The **EU can only act within the framework of the principle of conferral if the Treaties assign it a specific competence**. Both in the area of competence for tax law and for social security systems, there are already established individual procedures for the cross-border recovery of monetary claims. Their mechanisms extend to all the enforcement-relevant steps just mentioned.

Another instrument for cross-border recovery is **Framework Decision 2005/214/JHA**, which is **applicable to financial penalties**[230]. Furthermore, there are **isolated agreements between Member States** whose applicability in the area of existing secondary law is not always beyond doubt[231] . What is certain, however, is that in addition to the legal bases mentioned, there are certainly **a large number of public-law monetary claims for which there are no explicit legal bases with regard to cross-border enforcement**.

In a first step, therefore, the existing systems in the area of taxes and social security systems will be presented below.

3.1. Cross-border cooperation in tax law

Only "national taxation" is no longer possible in a globalised world. The increasing cross-border economic activity, whether by individuals or companies, means that the taxation of individuals or companies is often no longer possible without information from abroad[232] . However, national taxation sovereignty ends at the border. If a tax authority needs additional information from abroad, it can only obtain this information through the support of the foreign tax administration. **Upon request, the foreign tax authority (requested authority) should provide the domestic tax authority** (requesting authority) **with the information necessary for correct taxation**. The **legal basis** for such

[229] On service as an individual issue in the proceedings for a decision, see below. 3.3.5.1.

[230] Cf. below 3.3.1.1.

[231] Cf. below 3.3.3.1.

[232] Czakert, Der internationale Informationsaustausch bei der Festsetzung und Beitreibung von Steuern, IStR 2010, 567.

requests for information are **bilateral treaties** (double tax agreements, information agreements), **multilateral treaties** such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters by the OECD and Council (OECD-MA)[233] or, within the EU, the Directive 2011/16/EU on administrative cooperation in the field of taxation. The structure of the legal bases mentioned is based on Article 26 and Article 27 OECD-MA[234].

Cross-border cooperation around taxation is regulated by **legal acts at the EU level** as well as by **national implementing legal acts**. On the one hand, **EU law** deals with **mutual assistance in the context of trade between administrative authorities** in the area of taxation; on the other hand, Directive 2010/24/EU on mutual assistance for the recovery of claims relating to certain taxes, duties and other measures lays down comparable provisions for **mutual assistance in the recovery of claims** under tax law, so here, too, a division into two parts can be stated, which corresponds to the above system: on the one hand it is about obtaining knowledge and on the other hand it is about enforcing existing claims (analogous to knowledge and enforcement).

3.1.1. Information relevant to the application and enforcement of the relevant national law

In the area of taxation, EU law deals with administrative assistance in the context of trade between administrative authorities. To this end, rules are formulated on the exchange of information that is likely to be relevant for the application and enforcement of the respective national law**.** Directive 2011/16/EU on administrative cooperation in the field of taxation[235] applies in principle to all taxes and is intended to combat tax evasion as well as tax avoidance and tax avoidance. To this end, cooperation between the authorities of the Member States is improved. This is done through an exchange of information via a system of central liaison offices in the Member States. The Member States can initiate an exchange of information on individual requests and partly also by means of automated notifications (e.g. on remuneration from employment or pensions, Article 8(1) of Directive 2011/16/EU). The amendment of Directive 2011/16/EU by Directive (EU) 2021/514 served to expand the automatic exchange of information. Regulations that are to be regarded as special regulations in the area of EU law are primarily applied. This is the case regarding Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value-added tax[236]. Agreements between Member States that provide for more extensive cooperation also take precedence over the application of Directive 2011/16/EU. Pursuant to Article 1(3) Sentence 1 of Directive 2011/16/EU does not apply to mutual assistance in criminal matters in the Member States.

[233] For more information, see Convention on Mutual Administrative Assistance in Tax Matters.

[234] OECD Model Convention 2017 for the Elimination of Double Taxation and of Tax Evasion and Avoidance in the Field of Taxes on Income and on Capital of 21 November 2017.

[235] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ L 64/ of 11.3.2011, as last amended by Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ L 104/1 of 25.3.2021.

[236] Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268/1, 12.10.2010, as last amended by Council Regulation (EU) 2020/1108 of 20 July 2020 amending Regulation (EU) 2017/2454 as regards the date of application in response to the COVID 19 pandemic, OJ L 244/1, 29.7.2020.

3.1.2. Debt recovery

On the other hand, Directive 2010/24/EU on mutual assistance for the recovery of claims relating to certain taxes, duties and other measures[237] assists in the recovery of fiscal claims within the framework of mutual assistance.

a. Scope of application

In addition to taxes and levies of all kinds, Directive 2010/24/EU also covers refunds, levies, fines, **penalties,** fees, interest and costs, insofar as they are related to a tax or levy claim[238]. According to Article 5 et seq. of Directive 2010/24/EU, mutual assistance in the enforcement of claims begins with an exchange of information, which complements the exchange of information under Directive 2011/16/EU.

Furthermore, Directive 2010/24/EU obliges Member States to **serve** all documents related to recovery, including court documents (Article 8(1)). In addition to the enforcement order, this also applies to requests for payment and the collection of the claim itself[239] . However, according to Article 9(2)(2) of Directive 2010/24/EU, direct service by registered mail or by electronic means in another Member State is also possible.

In a decisive step, Directive 2010/24/EU thus creates the basis for mutual enforcement assistance. This enforcement takes place based on a uniform enforcement order and requires neither a recognition procedure[240] nor a declaration of enforceability in the requested Member State (Article 12(1)). Jurisdiction over the debtor's remedies is also clearly allocated by Article 14 of Directive 2010/24/EU. With regard to all regulatory areas of Directive 2010/24/EU, the Commission's Implementing Regulation (EU) No. 1189/2011[241] sets out specific requirements.

In addition to Directives 2011/16/EU and 2010/24/EU, there is an Agreement between the EU and Norway on administrative cooperation, combating fraud and the recovery of claims in the field of VAT, which was approved by Council Decision (EU) 2018/1089 on behalf of the Union[242]. This extends the effects of both Directives in the field of VAT and related claims (including fines, fees, surcharges, interest and costs) to cross-border cooperation between the Member States and Norway.

3.1.3. Implementation in the Member States

After the entry into force of Directive 2010/24/EU, the Commission presented two reports on the application of this Directive[243]. For the first report, the experience of the application of Directive

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237 Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to certain taxes, duties and other measures, OJ L 84/1, 31.3.2010.

238 Cf. on this and the development with regard to predecessor regimes: *Dutta*, Cross-Border Enforcement of Claims in Europe: Convergences of Recovery Systems in Civil and Administrative Matters?, IPRax 2010, 504, 505; cf. also: *Cranshaw*, Cross-Border Pursuit of Foreign Tax and Duty Claims in the Internal Market of the European Union, DZWIR 2019, 459, 461 et seq.

239 See also: *Dutta*, IPRax 2010, 504, 506.

240 Cf. on this already: ECJ C-233/08, paras. 41, 44 and 50.

241 Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules for implementing certain Articles of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 302/16, 19.11.2011. L 302/16, 19.11.2011, as amended by Commission Implementing Regulation (EU) 2017/1966 of 27 October 2017 amending Implementing Regulation (EU) No 1189/2011 as regards the transmission of requests for mutual assistance and the follow-up of such requests, OJ L 279/38, 28.10.2017.

242 Council Decision (EU) 2018/1089 of 22 June 2018 on the conclusion, on behalf of the Union, of the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud, and the recovery of claims in the field of value added tax, OJ L 195/1, 1.8.2018.

243 Article 27(3) of Directive 2010/24/EU obliges the Commission to submit such a report to Parliament and Council every five years.

2010/24/EU in the years 2011 to 2016 was evaluated[244]. The consultations with stakeholders carried out for the report resulted in the assessment that Directive 2010/24/EU had contributed to improving the collection and recovery of claims in relation to certain taxes. This is also reflected in the sum of the amounts recovered annually in the application of Directive 2010/24/EU. During the reporting period, the sum increased from EUR 62.7 million to EUR 147 million. These amounts were already between €283 million and €393 million in the period of the second report (2017 to 2019). [245]

3.2. Cross-border cooperation in social security systems

The cross-border collection of social contributions or the recovery of overpaid social benefits is the subject of Article 84 of **Regulation (EC) No. 883/2004**[246]. The Regulation, which is directly applicable in the Member States, is **the basis for the collection of contributions owed**, but also the **recovery of benefits not owed, also in other Member States** according to the procedural rules or the safeguards and privileges applicable there. Following the principle of mutual recognition and equal treatment of enforceable decisions of courts and authorities, **all foreign claims covered can be enforced like domestic claims** (Article 84(2).

3.2.1. Scope of application

The question of which claims are covered by Regulation (EC) No 883/2004 is answered on the one hand with regard to the scope of application positively standardised in Article 2 and on the other hand with regard to Directive 2010/24/EU on mutual assistance for the recovery of claims relating to certain taxes, duties and other measures[247]. In Article 2(3), compulsory social security contributions are excluded from the scope of application. All other branches of social security covered by Regulation (EC) No 883/2004 are not taxes or duties.

The specifications of Regulation (EC) No. 883/2004 are concretised by the Implementing Regulation (EC) No. 987/2009[248]. This concretisation concerns not only the recovery of a claim according to Article 75 et seq. but also the compensation to be sought primarily through retention according to Article 72 et seq. All provisions on requests for information (Article 76), notification (Article 77) up to the cross-border recovery procedure (Article 78 to 85) are based on the fundamental idea that the requested institution alone must apply its own enforcement law. There is considerable overlap with the provisions of Directive 2010/24/EU on mutual assistance for the recovery of claims relating to certain taxes, duties and other measures, although differences remain in the details. A targeted harmonisation of the provisions has not yet taken place.

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[244] COM (2017) 778 final of 18.12.2017.

[245] COM (2020) 813 final of 18.12.2020.

[246] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/1, 30.4.2004, as last amended by Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority and amending Regulations (EC) No 883/2004, (EU) No 492/2011 and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJ L 186/21, 11.7.2019.

[247] Cf. above 3.1.2.

[248] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ L 284/1, 30.10.2009, as last amended by Commission Regulation (EU) 2017/492 of 21 March 2017. March 2017 amending Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004, OJ L 76/13, 22.3.2017.

3.2.2. Implementation in the Member States

Statistical data on information requests and cross-border recoveries were collected for 2016 and demonstrate the effectiveness of the instrument[249] . Of the Member States studied here, Austria and Germany had sent the highest number of requests for information, 2494 and 3687 respectively, while the number of requests received was 1873 in Germany and 713 in Belgium. As regards the recovery of outstanding contributions, the data show an unclear picture as not all Member States provided data. However, Austria, the Netherlands and Germany in particular each reported high numbers of recovery requests sent and received. By far the largest number of recovery requests related to family benefits not owed. Luxembourg alone made 5314 requests, Poland received 9066 requests. It also seems important to note that most of the requests had also already been processed during the reporting period.

3.3. Cross-border cooperation in the recovery of fines

3.3.1. Legal basis

In addition to the recovery of tax claims and claims in the area of social security systems, EU law also extends to the **Union-wide enforcement of financial penalties**. The legal basis for this is found in **Framework Decision 2005/214/JHA**.

a. Framework Decision 2005/214/JHA

Framework Decision 2005/214/JHA[250] provides a legal basis, implemented by the Member States, for the cross-border enforcement of financial sanctions within the Union. Like other legal acts, Framework Decision 2005/214/JHA establishes the principle of mutual recognition[251] in EU secondary legislation.

The principle of mutual recognition is primarily the basis for the realisation of the internal market. According to the principle of origin, the country of destination withdraws its own regulatory claim and limits it to domestic goods and services. The respective regulation of the country of origin is recognised as equivalent. The recognition principle guarantees the free circulation of goods, services and persons in the internal market. Even after the entry into force of the Treaty of Lisbon, this **principle for judicial cooperation in criminal matters is anchored in primary law, in Article 82(1) TFEU**. In the area of judicial cooperation in criminal matters, mutual recognition means that a **Member State of enforcement recognizes judgments or decisions of another Member State** as such and **provides such assistance as is necessary for enforcement**[252].

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[249] Recovery procedures - Statistical data applicable to reference year 2016, De Wispelaere/Pacolet, 2018.

[250] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22.3.2005, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009. February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, to strengthen the procedural rights of persons and to promote the application of the principle of mutual recognition to decisions rendered following a trial at which the person concerned did not appear, OJ L 81/24, 27.3.2009.

[251] This principle goes back to a decision at the special European Council in Tampere (15/16.10.1999); cf. also the Commission's programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10 of 15.1.2001.

[252] Council Conclusion No. 2 on Mutual Recognition in Criminal Matters, "Promoting Mutual Recognition by Strengthening Mutual Trust", OJ C 449, 13.12.2018, p. 6–9.

b. Regulation (EU) 2018/1805

The Framework Decision 2005/214/JHA is flanked in the area of application of Article 82 (1) TFEU by Regulation (EU) 2018/1805[253] for the cross-border recognition and enforcement of freezing and confiscation orders. Unlike other legal bases, which are also based on the principle of mutual recognition, the aforementioned legal acts extend to public-law monetary claims. However, the scope of application cannot go beyond the legal basis in primary law, in Article 82(1) TFEU, there. Accordingly, judicial cooperation in criminal matters within the meaning of Art 82 TFEU includes, on the one hand, offences that are punishable under the law of a Member State. Such penalties include custodial sentences and fines, as well as other penal consequences such as driving or professional bans or the loss of the right to vote, as well as measures of correction and security independent of guilt[254]. The confiscation of proceeds of crime and instrumentalities also falls within the regulatory competence of the Union. [255]

Penalties also include monetary sanctions such as fines, even if an administrative or judicial authority punishes an infringement of legal provisions. The prerequisite is, however, that such administrative decisions can be appealed to a court with jurisdiction in criminal matters.

c. Individual questions

i. Scope of Framework Decision 2005/214/JHA

The scope of application of the Framework Decision 2005/214/JHA results from its Article 5: its Paragraph 1 lists the offences which, “if they are punishable in the issuing State and as they are defined by the law of the issuing State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to recognition and enforcement of decisions”. A comparison of different language versions of the Framework Decision requires a more detailed explanation. While the English language version speaks of "*offences, if they are punishable*", the French version of "*les infractions ... sont punies"* and the Dutch version of "strafbare *feiten*", the German language version includes "*Straftaten und Verwaltungsübertretungen (Ordnungswidrigkeiten)*" in the scope of application. These differences indicate insufficient clarity.

ii. Reach

Due to the lack of clarity of the terms in the different language versions of the just mentioned, it must therefore be clarified which practices fall under Article 5 of Framework Decision 2005/214/JHA. Methodologically, this can only be clarified in interaction with other standards:

iii. Fines

The scope of applicability therefore does not result from the terminology in isolation (in German: *Straftaten und Verwaltungsübertretungen - Ordnungswidrigkeiten)*; it needs to be considered in combination with other terms and definitions as found in Article 1 of Framework Decision 2005/214/JHA.

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[253] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders, OJ L 303/1, 28.11.2018; cf. Commission proposal for a Regulation on the digitisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters and amending certain acts in the field of judicial cooperation, COM(2021) 759 final, Article 23 of which provides for an amendment to Regulation (EU) 2018/1805.

[254] Cf: *Vogel/Eisele* in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, TFEU Art. 82 Rn. 12 (as of September 2022).

[255] Cf. also Directive 2014/42/EU of 3.4.2014.

As a result, the scope of conduct results from the term "decision", which alone can be the subject of enforcement. According to the definition in Article 1 lit. a) of the Framework Decision 2005/214/JHA, a decision is **any monetary sanction** that was either taken by a court for a criminal offence or taken by another authority, **provided that the administrative decision could at least be challenged before a court that also has jurisdiction in criminal matters**. In this case, therefore, not only criminal acts can form the basis of the sanction, but also other infringements of legal provisions. Recital 4 of Framework Decision 2005/214/JHA furthermore expressly states that fines imposed for an offence against traffic regulations are also to be covered. Thus, the scope of application of Framework Decision 2005/214/JHA is exactly within the framework set by Article 82(1) TFEU. For fines, this means that related procedural costs as well as payments imposed on victims, victim support organisations and public funds are also covered[256]. Civil law claims, on the other hand, are not covered.

iv. Public-law receivables

It is also clear that claims under public law that are founded on a decision by an administrative authority cannot fall within the scope of application of the Framework Decision, at least if a challenge of this decision before a court that is also competent for criminal matters is not provided for in Member State law. In principle, this applies to such claims grouped together under the concept of a claim for recovery[257] , because they are not punitive in nature, but also cannot be challenged before a court that also has jurisdiction in criminal matters.

However, Article 1 lit. a) iii) of the Framework Decision 2005/214/JHA raises questions regarding the scope of application, as regards the expression "court also competent in criminal matters" which may, for example, affect the Austrian legal situation described above[258]. In its judgment of 14 November 2013 in case *Baláz*[259] on the Independent Administrative Tribunals in Austria, the Court of Justice ruled that the term "court also competent in criminal matters" is an autonomous term of Union law, which is to be interpreted as including any court that applies a procedure that combines the essential features of criminal proceedings[260]. This broad interpretation has significant consequences. In some Member States, administrative courts decide on administrative offences (according to the German understanding in each case), which are otherwise precisely not competent in criminal cases. [261]The Framework Decision 2005/214/JHA is therefore also applicable to decisions against which an appeal leads to such judicial protection.

3.3.2. Statistical examples

a. Outgoing proceedings in Germany[262]

Table 4: Outgoing proceedings in Germany

[256] Cf: *Hackner/Trautmann*, Die Vollstreckung ausländischer Geldstrafen und Geldbußen nach dem Gesetzentwurf der Bundesregierung zu einem Europäischen Geldsanktionengesetz, DAR 2010, 71, 72.

[257] Cf. chap. 2.1.2.

[258] Cf. above 2.2.1.

[259] Judgment of the Court (Grand Chamber) of 14 November 2013, Marián Baláž, C-60/12 , EU:C:2013:733.

[260] However, the Independent Administrative Tribunals were dissolved in Austria as of 1 January 2014 (Verwaltungsgerichtsbarkeits-Novelle 2012, Österreichisches BGBl.I Nr. 51.

[261] Johnson, Recognition and enforcement of EU monetary sanctions under Framework Decision 2005/214/JHA, SVR 2016, 449.

[262] Source: Federal Office of Justice in Germany - as of 18.01.2023.

	Total number	Netherlands	Belgium	Austria
2010	0	0	0	0
2011	1.802	157	0	45
2012	4.035	350	46	137
2013	4.410	828	94	112
2014	5.596	887	162	92
2015	5.767	890	165	94
2016	7.402	1.098	187	92
2017	8.176	884	307	68
2018	9.471	1.040	394	76
2019	12.859	1.790	748	86
2020	10.431	1.195	533	48
2021	14.804	1.090	487	57
2022	14.976	1.330	694	49
2023	414	69	18	0
Total	100.143	11.608	3.835	956

b. Incoming proceedings in Germany [263]

Table 5: Incoming proceedings in Germany

	Total number	Netherlands	Belgium	Austria
2010	0	0	0	0
2011	2.869	2.823	0	4
2012	6.103	5.948	0	6
2013	9.494	9.332	0	8
2014	9.393	9.261	16	9
2015	10.115	9.893	93	23
2016	11.536	11.404	1	6

[263] Idem.

2017	10.774	10.577	3	10
2018	10.477	10.294	23	3
2019	10.294	10.154	7	8
2020	7.422	7.247	6	3
2021	6.565	6.361	1	10
2022	6.203	5.891	1	18
2023	465	455	0	0
Total	101.710	99.640	151	108

Regarding Austria, it should be noted that Austria and Germany jointly assume, in accordance with Article 18 of the Framework Decision 2005/214/JHA, that the Treaty between the Federal Republic of Germany and the Republic of Austria on Administrative and Legal Assistance in Administrative Matters of 31 May 1988 (DEU-AUT Treaty) continues to apply without restriction[264]. This applies equally to administrative fine decisions below and above 70 euros.

3.3.3. Other legal regulations

Cross-border cooperation in the enforcement of monetary sanctions can also be carried out based on other legal arrangements. These can be agreements or conventions.

a. Bi- and multilateral agreements

Cross-border cooperation in the enforcement of financial sanctions can also take place on the basis of bilateral or multilateral agreements. The Framework Decision itself emphasises in Article 18 that an application of such agreements is not excluded if they offer possibilities that go beyond the Framework Decision and contribute to a further facilitation or simplification of the procedures for the enforcement of financial penalties. Irrespective of the fact that this would apply even if it were not explicitly stated in the EU secondary legislation, only a few agreements exist that concern cross-border enforcement of fines.

b. Article 39(4) of the Schengen Implementing Convention

In the area of police cooperation, Article 39(4) of the Schengen Convention allows for the conclusion of agreements between the competent ministers of the Contracting Parties to regulate cooperation in border areas. This primarily concerns intervention in foreign territory. Bilateral agreements between neighbouring Member States exist extensively here but do not concern the subject of this study.

c. Prüm Convention and Council Decision 2008/615/JHA

The same applies to the multilateral *Prüm* Convention[265], which Belgium, Germany, the Netherlands and Austria, among others, have signed and ratified. The purpose of this convention is in particular to

264 Cf. below 3.3.3.5.

265 Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping

combat terrorism, cross-border crime and illegal migration. Only a few years after its conclusion, the Prüm Convention was transferred to a greater extent into the legal framework of the EU by Council Decision 2008/615/JHA. Since the United Kingdom and Ireland also opted for participation, the agreements of the Prüm Convention henceforth applied to all EU Member States except for Denmark[266]. In a further decision[267], the Council laid down the "necessary administrative and technical provisions" for the implementation of the Convention arrangements. For the United Kingdom, the core elements of the Prüm cooperation will continue to apply after "Brexit" due to the trade and cooperation treaty with the EU concluded at the end of 2020, in particular mutual access to DNA, fingerprint and vehicle registration data[268]. Due to compromise with the other EU governments, not all provisions of the Prüm Convention were included in Council Decision 2008/615/JHA.

d. Benelux Police Treaty

Cross-border police cooperation between Belgium, the Netherlands and Luxembourg was put on a new footing with the conclusion of a new Benelux Police Treaty in 2018[269]. The treaty aims to improve the exchange of information, create more opportunities for cross-border operations and facilitate police investigations in the neighbouring country. Among other things, this new treaty will facilitate access to police databases and allow for the inspection of population registers. However, the treaty has not been ratified by all the signatory states and has therefore not yet entered into force.

e. Treaty between the Federal Republic of Germany and the Republic of Austria on Administrative and Legal Assistance in Administrative Matters

A bilateral regulation on the enforcement of fines exists between Germany and Austria[270] . This treaty regulates administrative and legal assistance between the two Member States in the area of administration in a general and comprehensive manner. According to Article 1(1), the two Contracting States shall afford each other administrative and legal assistance in public law proceedings of their administrative authorities, in Austrian administrative criminal proceedings and in German administrative fine proceedings, insofar as they are not pending before a judicial authority, furthermore in proceedings before the Austrian courts of administrative jurisdiction and the German courts of general administrative jurisdiction in accordance with the provisions of this Treaty. In this context, according to the associated declaration, the treaty applies not only to public administration, including proceedings in administrative offences in the Federal Republic of Germany and administrative criminal proceedings in Austria, but also to administrative and judicial assistance from and with courts of general administrative jurisdiction. This includes the administrative courts, the higher administrative courts (administrative courts) and the Federal Administrative Court, but not the courts of social and fiscal jurisdiction. On the Austrian side, the entire sovereign activity of the administrative authorities as

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up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005. Available at: https://data.consilium.europa.eu/doc/document/ST-10900-2005-INIT/en/pdf.

266 Aden, in: Lisker/Denninger Handbuch des Polizeirechts 2021, Chap. M European legal bases and institutions of police action marginal no. 59.

267 Council Decision 008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 6.8.2--8, L 210, 12).

268 Art. Law.Prum 5-19 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one Part, and the United Kingdom of Great Britain and Northern Ireland, of the other, 2020.

269 https://wetten.overheid.nl/BWBV0006758/2018-07-23#Verdrag.

270 Treaty between the Federal Republic of Germany and the Republic of Austria on Administrative and Legal Assistance in Administrative Matters of 31 May 1988, Federal Law Gazette II 1990, p. 357.

well as their control by the independent administrative senates, the Constitutional Court and the Administrative Court are covered[271].

f. Non-contractual enforcement assistance

If there are no bilateral or multilateral agreements and the Framework Decision does not apply, the only way left for cross-border enforcement is via non-contractual enforcement assistance, which is regulated individually in all Member States. The procedure to be followed is very complex and regularly requires a court decision on the enforceability of the foreign title, especially in the case of incoming requests.

3.3.4. Individual questions and overview of case law

a. Traffic offences

As can already be seen from recital (4) of Framework Decision 2005/214/JHA, there was a particular focus on the recording of traffic offences. The practical effectiveness of the Framework Decision in this area was significantly increased by the adoption of Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 to facilitate the cross-border exchange of information on road safety related traffic offences (Cross-border Directive)[272]. For the most important road safety endangering offences[273], the exchange of information between Member States is considerably facilitated by granting access to data on the vehicle and the keeper or owner by means of an automated search. This access to the central keeper data was the decisive step towards a largely smooth cross-border prosecution of the traffic offences concerned[274]. The adoption of the Cross-border Directive based on the legal basis of Article 91(1)(c) TFEU had become necessary because the Court of Justice[275] had previously annulled the corresponding provision in Directive 2011/82/EU facilitating the cross-border exchange of information on road traffic offences endangering road safety[276]. The Court of Justice rejected Directive 2011/82/EU because it had been wrongly based on the authorisation in Article 87(2) TFEU. According to Article 87(2) TFEU,[277] measures may be adopted that serve police cooperation between the competent authorities of the Member States. However, according to recital (26), Directive 2011/82/EU should pursue the objective of "ensuring a high level of protection for all road users in the Union by facilitating the cross-border exchange of information on road safety offences". The improvement of road safety, however, can only be the subject of a measure based on Article 91(1)(c) TFEU. Directive 2011/82/EU based on Article 87(2) TFEU was therefore not effectively adopted.

b. Procedural steps and core elements

On the way to a complete process of cross-border enforcement of fines, the procedure concerning traffic offences can serve as an example of how the individual steps take place on the basis of which

[271] Circular of the Federal Ministry of the Interior (BMI) dated 3. 9. 1990 - VII 6 - 130 081 - OST/3.

[272] Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 to facilitate the cross-border exchange of information on road safety related traffic offences, OJ L 68/9, 13.3.2015.

[273] Cf. Article 2 of Directive (EU) 2014/413.

[274] The fact that the exchange of keeper data was not covered by Framework Decision 2005/214/JHA was one of the main reasons for criticism, see: *Johnson/Plötzgen-Kamradt*, DAR 2010, 738, 739.

[275] Judgment of the Court (Grand Chamber) of 6 May 2014, *Commission* v *Parliament and Council*, C-43/12, EU:C:2014:298.

[276] Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 to facilitate the cross-border exchange of information on road safety related traffic offences, OJ L 288/1, 5.11.2011.

[277] https://wetten.overheid.nl/BWBV0006758/2018-07-23#Verdrag.

the rules and treaties can be applied. It seems to make sense to divide the procedure into two processes and to shed light on the associated legal problems, i.e. the recognition procedure and the enforcement procedure. The Framework Decision was implemented in Germany, for example, with the Law on International Mutual Assistance in Criminal Matters (IRG) - a separate section on monetary sanctions was added to the Ninth Part on Mutual Assistance in Enforcement with the Member States of the EU[278]. According to this understanding, it is not a matter of a finding but an enforcement assistance procedure, i.e. a procedure that (solely) serves to enforce a monetary sanction that has already been legally imposed in another EU country. In many cases, however, the exchange of information already takes place in the proceedings. For example, the query of the holder's data is information that is required in the course of the proceedings. Therefore, Article 4(1) of the Cross-border Directive (additionally stipulates that may be used for investigations in relation to the offences referred to in Article 2, Member States shall allow the national contact points of the other Member States referred to in paragraph 2 of this Article to access the following national vehicle registration data relating to the vehicle and data relating to the owner or holder of the vehicle, with the power to carry out an automated search.

3.3.5. Jurisprudence overview

a. Service, right to be heard and liability of the holder

The subject matter of the Court of Justice judgment of 5 December 2019 in case *Centraal Justitieel Incassobureau* (C-671/18)[279] were questions of service, the right to be heard and keeper liability in the Netherlands. In doing so, the CJEU held that Framework Decision 2005/214/JHA must be interpreted as meaning that, after a decision imposing a fine or a financial penalty has been served in accordance with the national law of the issuing Member State, which includes an indication that an appeal may be lodged and within what time-limit, the authority of the Member State of enforcement may not refuse to recognise or enforce that decision, provided that the person concerned has been allowed a sufficient period in which to appeal against it, which is a matter for the referring court to determine, the fact that the procedure for imposing the fine or financial penalty in question is in the nature of an administrative procedure having no effect[280].

Furthermore, Article 20(3) of Framework Decision 2005/214/JHA must be interpreted as meaning that the competent authority of the enforcing Member State cannot refuse to recognise or enforce a decision imposing a fine or a financial penalty for infringements of road traffic regulations where such a penalty was imposed on the basis of a **presumption of liability (keeper's liability)** under the national law of the issuing Member State against the person in whose name the vehicle concerned is registered, provided that that presumption is rebuttable[281].

b. Recognition and enforcement of judgments against legal persons

The judgment of 4 March 2020 in case *Centraal Justitieel Incassobureau* (183/18)[282] dealt with the recognition and enforcement of judgments against legal persons. The term "legal person", which is

[278] IRG §§ 87 ff IRG regulate incoming requests, IRG § 87 o and IRG § 87 p IRG regulate outgoing requests.

[279] Judgment of 5 December 2019, Centraal Justitieel Incassobureau, C-671/18, EU:C:2019: 65.

[280] Idem., paragraph 50.

[281] Idem., paragraph 58.

[282] Judgment of 4 March 2020, Centraal Justitieel Incassobureau, C-183/18, EU:C:2020:153.

contained, inter alia, in Article 1 lit. a and Article 9(3) of Framework Decision 2005/214/JHA, is to be interpreted according to the law of the state that issues the decision imposing a financial penalty.

The principle of mutual recognition, which underlies the systematics of the Framework Decision, means according to its Article 6 that the Member States are in principle obliged to recognise a decision on the payment of a financial penalty transmitted pursuant to Article 4 of the Framework Decision without any further formality and to take without delay all necessary measures for its enforcement, the grounds for refusing to recognise or enforce such a decision being interpreted narrowly[283].

National authorities must interpret national law in its application, taking into account the whole body of national law and applying the methods of interpretation recognised therein, as far as possible in the light of the wording and purpose of the Framework Decision, in order to ensure the full effectiveness of the Framework Decision in question and to reach a result which is consistent with the purpose pursued by it. In doing so, a national court may not assume that it cannot interpret a national provision in conformity with EU law merely because it has been consistently interpreted in a manner incompatible with EU law or because it is applied in that manner by the competent national authorities[284].

With regard to the interpretation of national provisions, the Court of Justice is in principle required to take as a basis the statements resulting from the order for reference. It is not competent to interpret the national law of a Member State. However, in the context of preliminary ruling proceedings, the Court of Justice may, on the basis of the case-file in the main proceedings and the observations submitted to it, give indications which are likely to enable the national court to give its decision[285].

Framework Decision 2005/214/JHA, as amended by Framework Decision 2009/299/JHA, must be interpreted as not requiring a court of a Member State to disapply a provision of national law which is incompatible with Article 9(3) of Framework Decision 2005/214/JHA, as amended by Framework Decision 2009/299/JHA, since that provision has no direct effect. However, the referring court is obliged, as far as possible, to give a conforming interpretation of national law in order to ensure a result compatible with the purpose pursued by Framework Decision 2005/214/JHA, as amended by Framework Decision 2009/299/JHA[286].

c. Translation for delivery abroad

In the judgment of 6 October 2021 in the case *Prokuratura Rejonowa* (C-338/20)[287] the Court of Justice dealt with the question of refusing a request if the underlying penalty notice had not been translated into the language of the addressee when served abroad. Accordingly, Article 20(3) of Framework Decision 2005/214/JHA must be interpreted as allowing the authority of the Member State of enforcement to refuse to enforce a decision within the meaning of Article 1(a) of that Framework Decision, imposing a financial penalty for a traffic offence, where that decision was served on its addressee without being accompanied by a translation, in a language which he understands, of those elements of the decision which are essential to enable him to understand what he is charged with and

283 Idem., paragraph 50.

284 Idem., paragraph 66, and Judgment of 24 June 2019, Poplawski, C-573/17, EU:C:2019:530, paragraph 73 and 77.

285 Judgment of 4 March 2020, Centraal Justitieel Incassobureau, C-183/18, EU:C:2020:153, paragraph 71.

286 Idem., paragraph 79.

287 Judgment of 6 October 2021, Prokuratura Rejonowa Łódź-Bałuty, C-338/20, EU:C:2021:19.

to exercise fully his rights of defence, and without his being given the opportunity to obtain such a translation on request[288].

d. Failure to name the responsible driver as a list offence

Also in its judgment of 6 October 2021 in case *Zalaegerszegi* (C-136/20)[289], the Court of Justice ruled on a referral from a Hungarian court on the classification of the Austrian administrative offence of failing to designate the driver responsible as a listed "road traffic" offence under Framework Decision 2005/214/JHA. Accordingly, Article 5(1) of the Framework Decision 2005/214/JHA is to be interpreted as meaning that, unless one of the grounds for refusal of recognition or enforcement expressly provided for in that Framework Decision applies, the authority of the executing State may not, in principle, refuse to recognise and enforce a final decision on the payment of a fine if the authority of the issuing State states in the certificate referred to in Article 4 of the Framework Decision 2005/214 as falling within one of the categories of criminal offences and administrative offences for which Article 5(1) of that Framework Decision did not provide for verification of double criminality[290].

e. Appeal only indirectly to a court of law

According to the Court of Justice judgment of 7 April 2002 in case *Prokuratura Rejonowa* (C-150/21)[291], Article 1 lit. a no. ii of Framework Decision 2005/214/JHA is to be understood as meaning that the imposition of a financial penalty on a natural person by a final decision taken by a non-judicial authority of the issuing Member State and relating to an offence punishable under the law of that Member State is a 'decision' within the meaning of that provision if the legislation of that Member State provides, that the appeal against that decision shall first be examined by a public prosecutor under the supervision of the Minister for Justice, but that, if the public prosecutor issues a decision rejecting the appeal, the person concerned may subsequently bring the matter before a court which also has jurisdiction in criminal matters, provided that access to that court is not subject to conditions which render it impossible or excessively difficult[292].

f. Court also having jurisdiction in criminal matters - Nature and extent of the control exercised by the court of the Member State of enforcement

According to the Court of Justice judgment of 14 November 2013 in case *Marián Baláž* (C-60/12)[293] , the expression "court also having jurisdiction in criminal matters" within the meaning of Article 1(a)(iii) of Framework Decision 2005/214/JHA constitutes an autonomous concept of EU law and is to be interpreted as meaning that any court applying a procedure which combines the essential features of criminal proceedings falls within this concept. The Independent Administrative Tribunal in the Länder (Austria) fulfils these criteria and therefore falls under this term. It is also sufficient that a person had the opportunity to bring the matter before a court also competent in criminal matters, even if he or she had to go through a pre-trial administrative procedure before filing an appeal. Such a court must be fully competent to examine the case both in terms of legal assessment and factual circumstances[294].

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288 Judgment of 6 October 2021, Prokuratura Rejonowa Łódź-Bałuty, C-338/20, EU:C:2021:19, paragraph 40.

289 Judgment of 6 October 2021, Zalaegerszegi Járásbíróság, C-136/20, EU:C:2021:804.

290 See paragraph 40.

291 Judgment of 7 April 2022, Prokuratura Rejonowa Łódź-Bałuty, C-150/21, EU:C:2022:268.

292 See paragraph 46.

293 Judgment of 14 November 2013, *Balaz*, C-60/12, EU:C:2013:733.

294 Judgment of 14 November 2013, *Balaz*, C-60/12, EU:C:2013:733, paragraph 42.

4. DEFICITS IN ENFORCEMENT

4.1. Enforcement relevant steps

Regardless of whether it is a sanction for a violation of a legal provision or a recovery in the broad sense, the **enforcement of a claim under public law presupposes in the first step that this claim is substantiated**. The reason for improving cross-border cooperation in enforcement can therefore already lie in this first step. As has been shown, for example, in the area of violation of traffic regulations, it may first be necessary to **determine a responsible party** against whom a claim can be directed. The **query of owner data** is therefore an enforcement-relevant step for the substantiation of the claim. But cross-border cooperation between administrative authorities may also be necessary around recovery, for example if a registration address has to be determined.

The next necessary step on the way to enforcement is the service of **the finding that substantiates the claim**. Here, too, it is initially irrelevant whether it is a sanction or a recovery. In both cases, cross-border service may be necessary.

If payment is not made after service of the notice, enforcement proceedings must be initiated. The **enforcement order must** again **be served** before the actual enforcement can take place. Both this service and the enforcement itself may require cross-border cooperation.

4.2. Deficiencies in the knowledge process

4.2.1. Unproblematic areas

In the particularly practical area of **traffic offences**, the above mentioned Directive 2015/413/EU on facilitating the cross-border exchange of information on road safety related traffic offences provides an adequate basis for the cross-border exchange of holder data. In the area of cross-border cooperation in **social security systems**, Regulation (EC) No. 883/2004 also provides an appropriate legal basis for the Union, which also has its effects in the recognition procedure and significantly facilitates effective enforcement. In particular, the Implementing Regulation (EC) 987/2009, which specifies both the cognizance and the enforcement procedure, contributes to this. Administrative assistance between administrative authorities in the area of **taxation** is also harmonised in secondary law to such a depth that cross-border cooperation can be described as effective. Not least, the amendment of Directive 2011/16/EU on administrative cooperation in the field of taxation by Directive (EU) 2021/514, which expanded the automatic exchange of information, was an important step in this regard. Priority agreements between Member States can even improve cooperation.

4.2.2. Judicial cooperation in criminal matters

If we look at the area of judicial cooperation in criminal matters covered by Article 82 TFEU, there are already **deficits** with regard to effective cross-border cooperation **for the pre-trial proceedings**. Comparable instruments, such as an automated exchange of holder data, do not exist in EU secondary law.

The EU Mutual Assistance Convention in Criminal Matters between Member States[295] applies to all criminal matters and thus completely covers the area of competence of Article 82 TFEU. It also applies to fiscal offences and offences in the area of social security systems. It also covers offences

[295] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/1, 12.7.2000.

against legal provisions that are punished by administrative authorities, provided that the decision can be appealed against by a court that also has jurisdiction in criminal matters. The EU Mutual Assistance Convention in principle obliges the Member States of the Union to provide mutual assistance. The basis for this Convention is the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, which still applies. It relates, in particular, to **mutual assistance in the examination of witnesses**, service of **documents and searches**.

On the other hand, neither the European Convention of 1959 nor the EU Convention on Mutual Assistance in Criminal Matters of 2000 provide any significant tools for cross-border cooperation **in the area of fines**. Thus, a requested **Member State is obliged to execute a request for mutual legal assistance**. If the execution of the request requires the **transfer of personal data, none of the conventions provides a sufficient legal basis** for this transfer. Furthermore, problems may arise around service of process. In principle, cross-border transmission by post is provided for in Article 5(1) of the EU Mutual Assistance Convention. However, if according to the law of the requesting Member State a simple transmission by post is not sufficient, but the finding must be formally served, the mediation of the competent authorities of the requested Member State is required. **The entire regime of the mutual assistance conventions is primarily geared towards criminal offences in the narrower sense and their investigation and prosecution**. The area of offences against the law is included, but has not been the focus of the parties in terms of instruments.

4.2.3. Sanctions outside judicial cooperation in criminal matters

Outside the scope of application of Article 82 TFEU and thus also outside both the relevant EU secondary legislation and the conventions on mutual assistance, the provisions of **tax law** and the area of **social security systems** have already been designated. In addition, this area includes **all other recoveries** in the broad sense as well as **administrative sanctions**, **provided they do not belong to criminal matters** within the meaning of Article 82 TFEU. These can be infringements of legal provisions, insofar as the law of a Member State does not provide for legal recourse against a corresponding decision by an administrative authority to a court that also has jurisdiction in criminal matters. Such administrative sanctions may exist in the Member States in all those areas where substantive harmonisation in one of the Union's policies includes the implementation of a sanctioning mechanism to improve the enforcement of Union law[296]. The practice of the EU legislator to include administrative sanctions as instruments for the implementation of EU secondary legislation in administrative law directives has not been abandoned even after the entry into force of the Lisbon Treaty and the associated communitarisation of judicial cooperation in criminal matters. However, **the mere fact that a Member State sanction is preceded by** such **an EU law basis does not speak against the qualification of a sanction as criminal**. In these cases, the **Member States can decide for themselves** whether a sanction is criminal in the sense of EU law or not. It always has a criminal character if the requirements of Article 82 TFEU are fulfilled, i.e. if the sanction is imposed by an administrative authority, but legal action against the decision is open to a court that also has jurisdiction in criminal matters. However, this can lead to a **different categorisation of sanctions for the same infringement** of a legal provision in the Member States. **If an administrative sanction does not fall under the EU law concept of criminal matters and** if this sanction **consists of the imposition of an obligation to pay money, it is not to be treated differently from a recovery** with regard to

[296] For example, Art. 79 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334/17 of 17.12.2010; cf. *Kärner*, Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?, EuCLR 2021, 156 et seq.

cross-border cooperation**.** The deficits to be presented in the following therefore also extend to these claims.

4.2.4. Recoveries

This leaves those claims under public law that can be summarised under the term "reclaims". What they have in common is that they have **no sanction effect**. Rather, they are directly aimed at the **establishment of a lawful state of affairs**. To this end, a natural or legal person can be deprived of a financial benefit that was wrongfully granted, or the obligation to pay an amount owed can be enforced. A penalty payment, the threat of which is made with the aim of enforcing a regulatory obligation, can also be regarded as a claim for recovery. If the threat is unsuccessful, the penalty payment must be set and recovered. Such claims may also arise in the judicial sphere, for example if administrative fines are imposed to enforce the obligation to appear in court.

The areas of taxation already mentioned as well as the social security systems are sufficiently geared to cross-border cooperation under secondary law – also regarding the procedure for obtaining information. Based on the relevant legal foundations in Article 42 and 308 of the EC Treaty[297], **Regulation (EC) No. 883/2004** is an important instrument for the realisation of the internal market. The same can be said for **Directive 2011/16/EU** in the field of taxation. This directive is based on Articles 113 and 115 TFEU. Cross-border administrative assistance going beyond this can cover **all forms of mutual assistance** between authorities of the Member States. This assistance **may concern both the proceedings for a ruling and subsequent enforcement**. It can involve **information assistance, service assistance and enforcement assistance**. The EU has so far refrained from creating general provisions for these forms of cross-border administrative assistance. Instead, area-specific administrative assistance obligations have been introduced.

An exchange of information also takes place in the area of application of the **Services Directive**[298]. Article 33(1) provides for the transmission of information on the reliability of service providers. The **Professional Qualifications Directive**[299] also imposes obligations for the cross-border exchange of information. According to its Article 8(1) in conjunction with Article 56(1), the transmission of information on the legality of an establishment as well as on professional sanctions may be required. The scope of the Professional Qualifications Directive is limited to regulated professions. However, the exchange of information within the scope of application of these secondary legal acts has no reference to claims for recovery yet to be established, it only serves to prepare an official decision. Consequently, **these legal acts lack regulations on sanctions for possible infringements of the law**. With the exception of the areas of taxation and social security systems, the aforementioned secondary legislation is **therefore not suitable for the purpose of improving the cross-border enforcement of recovery claims**.

For **consumer protection law**, **Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws**[300] provides an **explicit**

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297 Corresponds to Article 48 and 352 TFEU.

298 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006.

299 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22, 30.9.2005.

300 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345/1, 27.12.2017, as last amended by Directive (EU) 2019/771 of the European Parliament and of the

legal basis to improve administrative cooperation with the aim of protecting consumers from cross-border infringements of Union consumer law. The regulation covers **a wide scope of application**, which is currently determined by 28 regulations and directives listed in the annex. Although the instruments for cross-border enforcement of consumer law are primarily aimed at preventing or remedying infringements, they also cover the **possibility of sanctions** (Article 9(4)(h) and (5)). Insofar as the prevention or elimination of infringements is concerned, penalty payments may be applied. Chapter III of Regulation (EU) 2017/2394 establishes an **administrative assistance mechanism** which, in addition to the obligation to grant cross-border administrative assistance by **providing information** (Article 11), also provides for the possibility of **a cross-border enforcement request** (Article 12). However, cross-border enforcement is different from the enforcement of a claim under public law in a Member State other than the one in which the claim was established. Rather, the requested authority decides on the necessary enforcement measure itself. When fulfilling such enforcement requests, the duty of mutual assistance then also applies, but there is **no legal basis for cross-border notification or enforcement** in Regulation (EU) 2017/2394.

Administrative sanctions are also the subject of numerous secondary legal acts. The density of regulation varies considerably. **In most cases, the EU legislator is content to establish an obligation** for the Member States **to determine sanctions for infringements of the substantive provisions** of the legal act in question that are effective, proportionate and dissuasive. **Rules on information, notification or enforcement assistance** are then completely **absent**. A different path is chosen by **Regulation (EU) No 596/2014 on market abuse** (Market Abuse Regulation)[301], which contains comprehensive regulations on both criminal and administrative sanctions. This also includes regulations on administrative assistance in the event of necessary cross-border cooperation. However, these are not independent and, above all, complete regulations on information, service and enforcement assistance. A different path is chosen by **Directive (EU) 2019/1 on strengthening the competition authorities of the Member States with a view to more effective enforcement of competition rules and ensuring the proper functioning of the internal market**[302]. In this legal act, Member States are obliged to implement fines as well as periodic penalty payments. However, unlike Regulation (EU) No 596/2014 on market abuse (Market Abuse Regulation), Directive (EU) 2019/1 on strengthening the competition authorities of the Member States also contains comprehensive provisions on cross-border administrative assistance (Article 24 et seq.), covering both information and notification and enforcement assistance.

Administrative assistance in the area of recovery is also standardised in i**ntergovernmental conventions**, which can supplement the foundations of EU law. First of all, such a convention exists for cross-border administrative assistance with regard to legal and factual information, the transmission of documents and concrete investigations[303], which neither Austria nor the Netherlands have signed.

Council of 20 May 2019 on certain aspects of the sale of goods governed by contract law, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ L 136/28, 22.5.2019.

301 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ. L 173/1, 12.6.2014; last amended by Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 on the promotion of the use of SME growth markets, OJ L 320/1, 11.12.2019.

302 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on strengthening Member States' competition authorities with a view to enhancing the effectiveness of competition enforcement and ensuring the proper functioning of the internal market, OJ L 11/3, 14.1.2019.

303 European Convention on Obtaining Information and Evidence in Administrative Matters Abroad of 15 March 1978, Council of Europe, European Treaties Collection - No. 100; available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=100

Apart from Belgium and Germany, which have signed and ratified the Convention, only three other Member States of the Union have also done so[304]. This Convention is thus not suitable as a basis for cross-border cooperation between the EU Member States. Another Convention concerns the service abroad of documents in administrative matters[305], which the Netherlands has not signed. Of the EU Member States, a total of eight states have ratified this convention. Thus, the Convention is also not suitable as a basis for cross-border cooperation in the enforcement of recoveries. For cross-border administrative assistance between Germany and Austria, the Treaty of 31 May 1988 forms a basis in both the proceedings for recognition and enforcement. In the proceedings for recognition, the provisions on hearings, information and evidence (Articles 5 to 8) as well as those on service (Articles 10 to 13) facilitate the cross-border enforcement of monetary claims under public law.

4.3. Deficits in the enforcement procedure

4.3.1. Unproblematic areas

As far as cross-border enforcement of public-law monetary claims is concerned, the areas of **taxation and social security systems** in particular can be described as those in which, on the basis of existing secondary legislation, the border between Member States does not constitute an insurmountable obstacle. As far as the area of criminal matters within the meaning of Article 82 TFEU is concerned, Framework Decision 2005/214/JHA also provides a legal basis which aims at and also substantially facilitates cross-border recovery. The Framework Decision complies most effectively with the principle of mutual recognition insofar as it dispenses with the requirement of verification of mutual criminality in the context of cross-border recovery. The catalogue of offences listed in Article 5(1) belong for the most part to the offences that can be described as the core area of criminal law and are to be regarded as a common basic set of offences for all Member States[306]. However, offences from the core area of criminal law are not of interest for the subject of this study. It is only the conduct mentioned in Article 5(1), indent 33, which violates the rules regulating road traffic, which both concerns the subject of the investigation and has an extremely high practical relevance. The cross-border enforcement of fines punishing such an infringement can thus be described as unproblematic. This result must only be limited insofar as the unproblematic cross-border enforcement only starts from an amount of EUR 70. Below this limit, recognition and enforcement of a decision can be refused.

4.3.2. Judicial cooperation in criminal matters

It follows from the above that enforcement of financial penalties is not always unproblematic, even within the scope of application of Framework Decision 2005/214/JHA. **Enforcement of amounts less than EUR 70 regularly fails**. This also applies to offences against the regulations governing road traffic. Furthermore, **a major obstacle to cross-border enforcement of fines and penalties is the need for a mutual criminality check**, which can be maintained for all offences not listed in Article 5(1). Whether the fact that according to Article 13 the proceeds of cross-border enforcement measures remain in the executing state is also an obstacle cannot be assessed here. Empirical data on this question is not available.

304 Italy, Luxembourg and Portugal.

305 European Convention on the Service Abroad of Administrative Documents of 24.11.1977, Council of Europe, European Treaties Collection - No. 94, available at: https://www.coe.int/en/web/conventions/.

306 Cf. also: *Hackner/Trautmann*, DAR 2010, 71.

4.3.3. Sanctions outside judicial cooperation in criminal matters

Sanctions outside of judicial cooperation in criminal matters are not treated differently from recoveries in enforcement proceedings. Therefore, the following remarks are also relevant in this respect.

4.3.4. Recoveries

For the entire area of recovery, including sanctions outside of judicial cooperation in criminal matters, **only the areas of taxation and social security systems** can be named, in which secondary law bases facilitate cross-border enforcement of public-law claims. Directive 2010/24/EU on mutual assistance for the recovery of claims relating to certain taxes, duties and other measures allows both direct cross-border service of the enforcement order and cross-border enforcement on the basis of a uniform enforcement order[307]. Within the scope of application of Regulation (EC) No. 883/2004 on the coordination of social security systems, foreign claims may be enforced in the same way as domestic claims (Article 84(2)). From information to service to the cross-border recovery procedure, all relevant legal questions are answered by the implementing Regulation (EC) 987/2009[308].

As already described in the information procedure, **the EU has refrained from comparable harmonisation measures**. The **guidelines**[309] presented for the proceedings already provide only **limited assistance** in this part of the entire procedure. The need for enforcement is not apparent here. Also Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws[310] does not provide an instrument to facilitate cross-border enforcement of a public law claim. Thus, **outside the areas of taxation and social security systems, there is no EU act that would facilitate cross-border enforcement of public law monetary claims that are not considered criminal matters within the meaning of Article 82 TFEU**.

The general rules on non-contractual enforcement assistance therefore only do not apply if there is a contractual agreement between the states involved. Here it is again the **treaty of 31 May 1988 between Germany and Austria** that substantially facilitates cross-border cooperation in enforcement proceedings as well. Enforcement assistance under Article 9 begins with an amount of EUR 25 and subjects enforcement to the law of the requested state. Sums recovered do not remain with the executing state, but are transferred to the requested state after deduction of the costs of enforcement. The **Multilateral Convention on the Service Abroad of Administrative Documents**[311], which at least facilitates cross-border service in enforcement proceedings, is an **unhelpful instrument**, not least because of the fact that of the Member States examined here, the Netherlands has not signed this Convention.

Outside the scope of the above-mentioned bilateral and multilateral agreements, only non-contractual enforcement assistance regulated in the legal systems of the Member States remains around recovery.

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[307] Cf. above 3.2.

[308] Cf. above 3.3.

[309] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22, 30.9.2005.

[310] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345/1, 27.12.2017, as last amended by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of the sale of goods governed by contract law, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ L 136/28, 22.5.2019.

[311] European Convention on the Service Abroad of Administrative Documents of 24.11.1977, Council of Europe, European Treaty Series - No. 94; https://www.coe.int/en/web/conventions/full-list?module=treaty-detail

4.4. Interim conclusion

Cross-border cooperation in the enforcement of fines and recoveries finds a **sufficient basis for the areas of taxation and social security systems in both the findings and enforcement procedures**. For the area of criminal matters of the Union within the meaning of Article 82 TFEU, the automatic exchange of holder data on the basis of the Cross-border Directive provides an effective tool. Regarding criminal matters, the Convention of 20 April 1959 on Mutual Assistance in Criminal Matters and the Convention on Mutual Assistance in Criminal Matters of 29.5.2000 provide legal bases for the information procedure that are only effective to a limited extent. In the enforcement procedure, Framework Decision 2005/214/JHA provides a basically well-suited legal basis for the cross-border enforcement of fines. However, there are also deficits here in detail.

The area of recovery – except for the areas of taxation and social security systems **– has so far hardly been taken into account in EU secondary law, both in the proceedings for recognition and in the enforcement proceedings**. The existing area-specific administrative assistance obligations do in principle support an exchange of information. However, the rules are not geared towards the enforcement of a monetary claim under public law. This concerns both the area of service and the entire enforcement procedure. The existing intergovernmental conventions can hardly be an effective substitute here, as there are clearly too few states that have ratified these conventions.

In the relationship between **Germany and Austria alone, the treaty of 31 May 1988** forms a basis both in the proceedings for judgment and in the enforcement proceedings, which effectively facilitates the cross-border enforcement of both fines and recoveries.

In any case, it should be noted that **the existing instruments for cross-border enforcement of fines and recovery are highly structured and confusing**.

5. CHAPTER: WAYS TO IMPROVE CROSS-BORDER COOPERATION

If one assumes that cross-border cooperation in the enforcement of fines and recoveries only functions well in a few sub-areas, but beyond that is deficient and unclear, the question arises as to whether and how an improvement can be achieved here. **If an improvement is to be achieved through the creation of EU secondary law, the principle of conferral (Article 5(2) TEU) must be fundamentally observed. Harmonisation can therefore only take place to the extent that the EU has a corresponding legislative competence.** The following remarks therefore differentiate between competences that are intended to improve judicial cooperation in criminal matters and those that have as their object the establishment and functioning of the internal market.

Limiting the scope of EU law leads to a second approach, which deals with possibilities for improvement. If and to the extent that Member States conclude **bilateral or multilateral agreements**, they are not bound by the limits of EU law. This possibility will therefore also be considered.

5.1. EU law

Article 288(1) TFEU empowers the institutions of the Union to adopt secondary legislation. This authorisation extends in principle to the exercise of the Union's competences. This once again explicitly establishes the primacy of primary law for secondary law[312]. **Primary law**[313] is thus the standard of legality for secondary law. The powers of the EU institutions are therefore initially determined and limited by the Union's competences as laid down in the Treaties. Secondary law regulations on cross-border cooperation with regard to the different enforcement-relevant steps must therefore be supported by a competence basis in each individual case. Further limits under primary law can affect the content of the cooperation rules. In particular, guarantees of the administrative procedure required by the **rule of law** as well as the **fundamental rights of the Charter of Fundamental Rights** must be mentioned here. All contents of primary law also set the standard for an interpretation of **secondary law** in conformity with primary law.

5.1.1. Judicial cooperation in criminal matters

a. Principle of mutual recognition

Judicial cooperation in criminal matters is characterised by the principle of mutual recognition of judgments and decisions, which also governs the entire Title V[314] of TFEU. The extent to which there is to be approximation of laws is standardised by the competences in Article 82(2) TFEU for criminal procedural law and in Article 83 TFEU for substantive criminal law. While an approximation of laws must be limited to areas of crime in the narrower sense, the scope of the principle of mutual recognition and thus also of the competence norm of Article 82(1) TFEU extends to a broader concept of criminal matters. In this respect, literature and case law agree that **offences against legal provisions punished by administrative or judicial authorities are also to be counted as criminal matters if their decision can be appealed to a court with jurisdiction in criminal matters**[315]. **Administrative penalties** that can be subsumed under the concept of a fine **can therefore be the subject of secondary legislation based on Article 82(1) TFEU**. By contrast, **public-law monetary claims** that

[312] Calliess/Ruffert/Ruffert TFEU Art. 288 Rn. 9, 10.

[313] This refers not only to the Treaties, but also to the general principles of law developed by the Court of Justice and the principles securing Union law.

[314] "The Area of Freedom, Security and Justice".

[315] Cf. above 3.3.1.4.2.

fall **under the concept of recovery do not fall within** the scope of application of Article 82(1) TFEU at all. Overall, all administrative, civil, social and financial cases fall **outside the scope of criminal cases, even if they have a criminal offence as their subject matter**[316]. In Chapter 2, it was shown that the four Member States considered in this study each provide for a system of administrative penalties that fall under the broader concept of criminal matters.

The concept of **mutual recognition** is based on the fundamental idea that **each Member State recognises judgments or decisions of any other Member State** as such and **provides the assistance necessary for their enforcement**. In particular, it cannot be held against the assistance that the judgment or decision should not have been given or should not have been given in such a way under the law of the state in which enforcement is sought. This is an essential difference to traditional legal assistance. However, it does not seem necessary to establish instruments of mutual recognition outside of mutual assistance for this reason. On the contrary, mutual recognition makes the means of mutual legal assistance more effective. For it remains the case that in cross-border traffic the decision must be recognised by the executing state and converted into its own decision. Neither may the issuing state enforce in the executing state nor is the decision self-executing. In contrast to mutual assistance obligations at the level of international treaties, however, the concept of mutual recognition under EU law operates at the supranational level and thus cannot be unilaterally derogated from by a Member State.

As far as the concept of **mutual recognition extends**, it refers not only to the legal consequences, but **also to the factual basis and the legal requirements of a decision of the issuing Member State**. In principle, there is no review by the enforcing Member State. This does not imply a waiver of a recognition decision. However, the recognition decision of the executing Member State is limited to the respective prerequisites for recognition.

b. Scope of the competence norm of Article 82(1)(2) TFEU

In order to implement the principle of mutual recognition**, Article 82(1) TFEU empowers the European Parliament and the Council to adopt secondary legislation in four areas**. An approximation of laws cannot be based on this basis of competence. However, secondary legislation to implement the principle of mutual recognition can relate to both harmonised and non-harmonised areas. The authorisation is of greater importance for the non-harmonised area[317]. As in the entire area of freedom, security and justice, the competence from Article 82(1) TFEU is a **competence shared between the Union and the Member States** (Article 4(2) (j) TFEU). Thus, **the exercise of competence** by the Union is not only **limited** by the principle of conferral, but also **by the principles of subsidiarity and proportionality**. Unlike under the TEU as amended by the Treaty of Nice, the authorisation in Article 82(1) TFEU is to be regarded as conclusive. Recourse to Article 67(1), (3) TFEU is not possible. Measures to improve cross-border cooperation in the enforcement of fines must therefore be covered by Article 82(1) TFEU.

It must first be taken into account that Article 82 TFEU concerns **judicial cooperation in criminal matters** of the Union. While the concept of criminal matters has already been clarified and can also be extended to fines, it remains to be explained what can be included under the concept of cooperation and when this cooperation can be described as judicial. **Cooperation means any purposeful assistance by another Member State or by Union bodies to a criminal case pending in a Member**

[316] This may concern cases where an administrative interdiction is issued for the commission of a criminal offence.

[317] Cf. Grabitz/Hilf/Nettesheim/Vogel/Eisele TFEU Art. 82 marginal no. 52.

State[318]. For the area of criminal prosecution and execution of sentences, these are typical measures **such as the provisional arrest, detention and extradition or transfer of accused or convicted persons**. However, other mutual legal assistance measures such as **enforcement, procedural, information and evidence assistance** are also considered cooperation. With regard to all enforcement-relevant steps in the imposition and enforcement of a fine, these are thus covered by the concept of cooperation in Article 82(1) TFEU.

This **cooperation must ultimately be judicial**. This is the case if it is a **cooperation between judicial authorities**. This means that courts responsible for criminal matters are included, but also public prosecutors' offices, even if they are dependent on instructions and are thus not independent courts. Deviating from this, the term "judicial authority" may be interpreted more narrowly in a legal act based on the competence of Article 82(1) TFEU[319]. The term "judicial authority" remains a EU law term that must be interpreted uniformly throughout the Union. Within the framework set by Article 82(1) TFEU, it may then be necessary for areas of particular relevance to fundamental rights not to recognise authorities involved in criminal prosecution under Member State law as judicial authorities.

Notwithstanding this, **administrative authorities are in principle not to be regarded as judicial authorities, as they are to be attributed to the executive**. Something else may apply if authorities whose main task is not judicial are involved in the investigation of a criminal case. Not only police authorities, but also financial authorities can have their own investigative powers under Member State law in the context of criminal proceedings and are then judicial authorities in the broader sense. However, it seems questionable whether this can still apply if the investigation does not result in a criminal court decision, but the sanction itself is imposed by an administrative authority. This is precisely the case with administrative sanctions that are punished with a fine. As criminal cases, these decisions only fall within the scope of application of Article 82 TFEU if an appeal against this decision can be brought before a court that also has jurisdiction in criminal cases. However, it seems doubtful whether this classification then simultaneously leads to the administrative authority imposing the fine being regarded as a judicial authority. This could affect the possibility of taking measures to improve cross-border cooperation in the enforcement of fines on the basis of Article 82(1) TFEU. In any case, this may have an impact on the proceedings for the assessment of fines, which end with the setting of the fine by an administrative authority. Measures to assist in the provision of information, evidence and service of documents in the proceedings would then not be covered by the competence basis of Article 82(1) TFEU. The relevance of the correct competence basis is exemplified by Directive 2011/82/EU to facilitate the cross-border exchange of information on road safety related traffic offences[320], which was declared void by the CJEU solely because it was wrongly based on the competence standard of Article 87(2) TFEU[321]. The subject matter of the directive was information assistance in the proceedings for a finding with the aim of prosecuting and sanctioning traffic offences. And although the sanction can be regarded as a criminal matter within the meaning of Article 82(1) TFEU, the Court of Justice left no doubt that Article 91(1)(c) TFEU was to be used as the only possible basis for competence[322]. This is quite remarkable, since the subject of the annulled directive was cross-border access to data on the vehicle and the keeper or owner by means of an automated search, and this can easily be regarded as

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[318] Cf. Grabitz/Hilf/Nettesheim/Vogel/Eisele TFEU Art. 82 marginal no. 14.

[319] Within the scope of the Framework Decision on the European arrest warrant, the CJEU requires that the authority in the issuing and executing State is independent of instructions, see CJEU, Judgment of 27 May 2019, C-509/18, EU:C:2019:457; Judgment of 24 November 2020, C-510/19, EU:C:2020:953 paragraph 38 et seq.

[320] Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 to facilitate the cross-border exchange of information on road safety related traffic offences, OJ L 288/1, 5.11.2011.

[321] Cf. above 3.3.4.1.

[322] Judgment of 6 May 2014,*Commission v Parliament and Council*, C-43/12, EU:C:2014:298.

a measure under the concept of mutual recognition. Nevertheless, the Court of Justice assigned the subject matter of the directive to the area of harmonisation of laws in the internal market.

c. Objects of measures based on Article 82(1)(2) TFEU

The path to **improving cross-border cooperation in the enforcement of fines leads overall via the individual authorisations in Article 82(1) TFEU**. This can affect **both the proceedings for a decision and the enforcement proceedings, even if the administrative authorities imposing a fine are not regarded as judicial authorities**. The bases of competence in Article 82(1)(2) TFEU stand in this respect independently alongside Article 82(1)(1) TFEU, which refers directly only to the approximation of laws under Article 82(2) and Article 83 TFEU. Thus, **if and to the extent that information, evidence and notification assistance can be subsumed under one of the letters a) to d) in Article 82(1) TFEU, secondary legislation implementing the concept of mutual recognition can also be based on this basis if it concerns the recognition procedure**.

The competences from letters a) and d) are to be considered here. Pursuant to **Article 82(1)(2)(a) TFEU, rules and procedures may be laid down to ensure the recognition of all types of judgments and judicial decisions throughout the Union**. This competence standard covers the entire core area of the concept of mutual recognition. Decisions **do not have to be final decisions**; decisions in preliminary, intermediate or enforcement proceedings, possibly also in pardon or amnesty proceedings, are also covered[323]. The decision alone **must have a recognisable content**. This in turn presupposes a content that is **capable of enforcement and in need of enforcement**. The existence of *res judicata*, on the other hand, is not required. However, it is inevitable that it must be a court decision. Thus, **if the final decision is a court decision, all upstream and downstream decisions are also covered** by Article 82(1)(2)(a) TFEU. **The imposition of a fine**, on the other hand, is not a judicial but **an administrative decision**. Nor can it be regarded as a decision in preliminary or intermediate proceedings. In this case, however, there is no basic prerequisite for basing measures in the proceedings for a decision, which are intended to improve cross-border cooperation, on Article 82(1)(2)(a) TFEU. The situation is different for enforcement proceedings. This in turn is due to the fact that **legal recourse against administrative decisions imposing fines is open to a court that also has jurisdiction in criminal matters**. The existence of an administrative decision is therefore a prerequisite for a court decision to be taken. **Rules on enforcement assistance in the case of fines can therefore be based on Article 82(1)(2)(a) TFEU**.

Thus, **there is a basis in competence law for eliminating deficiencies in cross-border cooperation in the enforcement of fines**. As was worked out in the previous chapter, Framework Decision 2005/214/JHA provides an effective legal basis for cross-border enforcement assistance, also in the case of fines. Insofar as there is a **need for improvement in the scope of application of the Framework Decision**, **this could at least be covered by reference to Article 82(1)(2)(a) TFEU**. In this context, **extending the concept of mutual recognition to further offences** should be considered as a matter of priority. In the area of administrative sanctions, only fines imposed for a violation of traffic regulations have been covered so far. The effectiveness of cross-border enforcement assistance in this regard was discussed in chapter 3.3.4.1 in detail. The primary-law hurdles for an expansion of the catalogue of offences for which there is no verification of cross-criminal liability are not higher in this case if the offences are other than traffic offences. For although these have a high practical relevance, they do not differ in their unlawful character from the infringement of legal provisions from other areas of regulatory law. The CJEU's assessment of the instrument in the context of the enforcement of fines

[323] Cf. Grabitz/Hilf/Nettesheim/Vogel/Eisele TFEU Art. 82 marginal no. 59.

for traffic offences was consistently positive[324]. Furthermore, an increase in effectiveness could be achieved if the **minimum enforcement amount**, above which a review of reciprocity is not required, were **to be reduced to a lower amount than EUR 70**. For legal reasons, a minimum amount is probably necessary in order to avoid disproportionate expenditure. The limit of disproportionality should not be far below the amount of EUR 70. Finally, it was pointed out in the previous chapter that enforced amounts remain in the executing state. Legal reasons against changing this rule are not apparent[325].

If improvements can be achieved exclusively in the enforcement procedure via the competence basis of Article 82(1)(2)(a) TFEU, something else could result from **Article 82(1)(2)(d) TFEU** for the **proceedings for a declaration**. On this basis, **cooperation between judicial authorities or corresponding authorities of the Member States in the context of criminal prosecution, execution and enforcement of decisions can be standardised**. This open, general clause-like formulation makes it **difficult to determine the scope of application** more precisely. In any case, it is not only the **cooperation of judicial authorities** that is affected, but also of **corresponding authorities**. This can therefore also be administrative authorities. However, a **connection to criminal prosecution is necessary**. In addition, cooperation can relate to the execution and enforcement of decisions. These decisions do not necessarily have to be judicial decisions themselves, but can also be decisions by administrative authorities. However, it follows from the overall context of Article 82 TFEU that only decisions in criminal matters come into consideration. Moreover, in the area of execution and enforcement of decisions, it remains the case that judicial authorities and corresponding authorities are addressed. The correspondence to the judicial authority is therefore unavoidable. The connection with law enforcement cannot therefore be dispensed with. However, this connection does not yet exist if and to the extent that an administrative authority conducts an investigation procedure after a violation of legal provisions, at the end of which this same administrative authority issues a penalty notice. **During the entire investigation procedure, there is no connection between the investigating administrative authority and a judicial authority**. Only with the issuance of the administrative fine and the possibility of appealing against this administrative fine to a court that also has jurisdiction in criminal matters is the connection to criminal prosecution established. Therefore, it remains the case that the scope of application of Article 82 (1) TFEU is **only opened with the issuance of a penalty notice**. However, **the service of this decision, which is a prerequisite for the subsequent enforcement, can be regarded as a measure to facilitate enforcement and is thus, as it were, at the gateway to Article 82(1) TFEU**. Measures of assistance with service can thus be based on Article 82(1) TFEU both in enforcement and in recognition proceedings, but in recognition proceedings only with regard to the decision itself.

d. Legal form of the measures

The authorisation extends to measures adopted under the ordinary legislative procedure. By way of derogation from Article 294(2) TFEU, the initiative for a legislative act may come not only from the Commission but also from a quarter of the Member States (Article 76 TFEU). In principle, regulations, directives and also decisions can be considered as such legislative acts (Article 289(1) TFEU). Regulations and directives are to be given priority. The adoption of directives is not excluded by the fact that they are primarily measures to harmonise laws and that there is no harmonisation of laws in the area of Article 82(1) TFEU. It is precisely a matter of **creating uniformly applicable rules in all**

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[324] Cf. chapter 3.3.5.

[325] Cf. below on the political expediency of an amendment.

Member States in order to implement the principle of mutual recognition. As long as there are no changes to the purely domestic part of the legal order of the Member States, the area of competence of Article 82(1) TFEU is not exceeded. Even if the adoption of a regulation has the merit of being of general application, binding in its entirety and directly applicable in every Member State (Article 288(2) TFEU), the adoption of directives is possible in the same way. If and to the extent that the existing Framework Decision 2005/214/JHA should be amended, there is more to be said for the adoption of a directive, as its concept of graduated binding force corresponds to the former concept of the Framework Decision.

After the entry into force of the Lisbon Treaty, legislative acts in the area of competence of Article 82(1)(2) TFEU are adopted by qualified majority. The previously existing unanimity requirement no longer exists. The "emergency brake" according to Article 82(3) TFEU is also not applied in the area of application of Article 82(1)(2) TFEU.

5.1.2. Harmonisation in the internal market

Even if cross-border information, service and enforcement assistance in the judicial area are instruments for the realisation of the concept of mutual recognition, it is not excluded to consider comparable instruments also as instruments for the realisation of the internal market. While the instruments in the judicial area are the subject of mutual legal assistance, in the executive area all forms of assistance can be subsumed under the concept of administrative assistance. An example of this is administrative assistance for the cross-border recovery of tax claims, which is the subject of a secondary legal act based on Article 113 and 115 TFEU[326] for the harmonisation of the internal market. According to recital (1), the Directive contributes to the smooth functioning of the internal market. Therefore, even if information, service and enforcement assistance can be assigned to the concept of mutual recognition, it is not excluded to take measures of approximation of laws.

a. Primary law options for harmonisation

All forms of assistance require a basis of competence under primary law. According to the principle of conferral (Article 5(2) TEU), the approximation of the legal systems of the Member States by means of EU secondary legislation always requires a competence of the Union. The Treaty on the Functioning of the European Union contains regulatory competences in numerous places. These are not always competences for the harmonisation of laws. Harmonisation can even be expressly excluded[327]. Within the numerous powers of approximation of laws, **Article 114(1) TFEU** takes a central role. On the one hand, it can be described as a "**general harmonisation competence**"[328], on the other hand, it takes a back seat where competences are "otherwise provided in the Treaties". This in turn leads to difficulties in practice in choosing the appropriate legal basis. Within limits, these difficulties can be countered by referring to several legal bases. Taking into account the principle of speciality, the objective focus of the concrete measure must be taken into account. **Specific bases of competence with a connection to the internal market therefore take precedence over Article 114(1) TFEU**[329].

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326 Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to certain taxes, duties and other measures, OJ L 84/1, 31.3.2010.

327 For example, in Art. 168(5) TFEU for health protection measures.

328 Thus Calliess/Ruffert/Korte TFEU Art. 114 marginal no. 11; cf. also Geiger/Khan/Kotzur/Kirchmair/Khan TFEU Art. 114 marginal no. 1-5.

329 For example, Art. 43 TFEU for agriculture, Art. 53 TFEU for professional law, Art. 91 TFEU for transport, Art. 113 TFEU for indirect taxation.

According to Article 114(2) TFEU, on the other hand, there are three areas in which the subsidiary applicability of Article 114(1) TFEU is also excluded. These exceptional areas are due to reservations of sovereignty of the Member States, which is why the majority principle laid down in Article 114 TFEU should not apply. For the matter examined here, only the exception of taxes is relevant. In this context, the concept of taxes is to be understood in a broad sense and covers all types of levies[330]. According to the CJEU, the exception "covers not only substantive tax law, for example in the form of provisions on taxable persons, taxable transactions, the taxable amount and the tax rates (including exemptions), but also those on the modalities of the collection of these taxes"[331]. Therefore, not only substantive tax law is affected, but also procedural law, including recovery and enforcement issues. This also applies when it comes to environmental taxes, whose legal basis lies in Article 192(2) TFEU. All legal acts on information, notification and enforcement assistance in the area of levies must therefore be based on the area-specific competence bases. In addition, Article 115 TFEU can be used, which always requires unanimous adoption of the legal act.

Recourse to the basis of competence in **Article 114(1) TFEU** requires that the measures have as their object the **establishment or functioning of the internal market**. This reference to the internal market must not only exist objectively, but **must also be expressed in the objective of the legal act**. In addition to an objective, actual reference to the internal market, the subjective objective of the Union legislator must therefore also be directed towards the establishment or functioning of the internal market[332]. If this subjective reference to the internal market is missing, a legal act is already null and void for this reason. In its examination of whether there is a subjective reference to the internal market, the CJEU is regularly guided by the recitals of the legal act. The objective reference to the internal market results from existing obstacles to economic transactions within the Union. These obstacles are based either on a conflict with the fundamental freedoms or on a distortion of competition. Information, service and enforcement assistance in connection with cross-border enforcement of public-law claims would therefore have to serve to remove such obstacles. Since all forms of assistance are always related to a subject matter, this question cannot be answered in general terms, but only in relation to the subject matter to be regulated or governed. Thus, even at this level, an overarching use of the competence basis in Article 114(1) TFEU is excluded, which covers all public-law claims that can be summarised under the concept of recovery. At the same time, it can be stated that there must always be a factual connection with the establishment or functioning of the internal market for regulations on information, service and enforcement assistance.

Obstacles to the exercise of the fundamental freedoms already exist if different regulations of the Member States restrict the exercise of the fundamental freedoms in their area of application. Different legal provisions are thus an indication of existing barriers to trade and regularly legitimise an approximation of laws. This is most evident in the area of the free movement of goods, which is promoted by the harmonisation of product-related standards. However, not only freedom-enhancing but also freedom-reducing measures must be considered. Prohibitions can also be decided on the basis of Article 114(1) TFEU. As already follows from Article 114(3) TFEU, the Union, when harmonising, must promote public interests such as the protection of health, safety, the environment and consumer protection at a high level. The harmonisation of product requirements facilitates their marketability in the internal market. Such standardisation can result from the requirements of the above-mentioned or

330 Calliess/Ruffert/Korte TFEU Art. 114 marginal no. 15.

331 Judgment of 29 April 2004, *Commission v. Council*, C-338/01, EU:C:2004:253, paragraph 67 .

332 Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 83; Judgment of 10 December 2002, *British American Tobacco*, C-491/01 EU:C:2002:741, paragraph 60 ; Grabitz/Hilf/Nettesheim/Tietje TFEU Art. 114, para. 95.

other compelling public interests. An example of this is the eco-design requirements for light bulbs. The ban on conventional light bulbs enables the free movement of the entire product group of light bulbs. However, a prerequisite for such bans to be based on Article 114(1) TFEU is that the overall regulation forms a system that benefits the realisation of a fundamental freedom. Thus, it must not be a matter of individual product bans in isolation; rather, these must be integrated into a harmonisation system in order to contribute to the realisation of the internal market[333]. Regulations on information, service and enforcement assistance can have a connection to such constructive prohibitions when it comes to the enforcement of such prohibitions. It is conceivable that infringements of product bans in the Member States are punished as administrative offences. It is also possible that a regulatory measure to enforce a ban is to be enforced by means of a penalty payment. If regulations on information, notification and enforcement assistance are related to such prohibitions in this sense, there is an internal market connection because the functioning of the internal market is promoted. **If one can assume that the forms of assistance are necessary to prevent the circumvention of prohibitions serving a fundamental freedom**[334], **regulations to prevent the circumvention of prohibitions can also be issued in the form of independent legal acts on the basis of Article 114(1) TFEU**. However, **the link to the actual measure of harmonisation of laws must be maintained in any case**[335]. This is exemplified by Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws[336], which has its competence basis in Article 114(1) TFEU and lays down rules on cross-border cooperation also with regard to preventing circumvention of prohibitions. The link to the harmonisation measures is established via the 28 regulations and directives currently listed in the annex, each of which is based on a specific competence basis.

On the other hand, it is also conceivable to use bases of competence from the individual policy areas of the TFEU for measures of information, notification and enforcement assistance. The reason for this is that there are overlaps between the pure internal market competence of Article 114(1) TFEU and the competences of the individual policy areas. In this context, the competence norms are initially of equal value to each other. There is no fundamental speciality or subsidiarity. In its titanium dioxide decision[337] the CJEU had already decided that the content of Directive 89/428/EEC serves both environmental and competition policy purposes. Thus, an area of overlap may arise, within which the applicable basis of competence must then be determined in the individual case. This determination must be made according to the objective factual proximity of a measure to the regulatory content of a competence norm. The choice of the legal basis must be based on "objective, judicially verifiable circumstances"[338].

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[333] Grabitz/Hilf/Nettesheim/Tietje TFEU Art. 114 marginal no. 99.

[334] Judgment of 5 October 2000, *Germany v Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 100; Judgment of 10 December 2002, *British American Tobacco*, C-491/01, EU:C:2002:741, paragraph 82.

[335] *Classen* in von der Groeben TFEU Art. 114 marginal no. 48 et seq.

[336] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345/1, 27.12.2017, as last amended by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of the sale of goods governed by contract law, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ L 136/28, 22.5.2019.

[337] Judgment of 11 June 1991, *Commission* v. *Council,* C-300/89, EU:C:1991:244.

[338] Judgment of 26 March 1987, *Commission* v. *Council,* C-45/86, EU:C:1987:163; also: Judgment of 23 February 1988, *UK v. Council,* C-68/86, EU:C:1988:85; Judgment of 23 February 1988, *UK v. Council*, C-131/86, EU:C:1988:86; Judgment of 30 May 1989, *Commission* v. *Council,* C-242/87, EU:C:1989:217; Judgment of 29 March 1990, *Greece* v. *Council*, C-62/88,EU:C:1990:153; Judgment of 11 June 1991, *Commission* v. *Council,* C-300/89, EU:C:1991:244, paragraph 10; Judgment of 20 October 1992, *Parliament* v. *Council*, C-295/90, EU:C:1992:398, paragraph 13; Judgment of 17 March 1993, *Commission* v. *Council*, C-155/91, EU:C:1993:98, paragraph 7; Judgment of 30 January 2001, *Spain* v. *Council,* C-36/98, EU:C:2001:64, paragraph 58; Judgment of 28 June 1994, *Parliament* v. *Council*, C-187/93, EU:C:1994:265, paragraph 17; Judgment of 25 February 1999, *Parliament* v. *Council,* C-164/97 and C-165/97, EU:C:1999:99, paragraph 12; Opinion of 6

While the Court of Justice initially determined this objective proximity primarily on the basis of the objective connecting factor of the measure and only secondarily on the basis of the functional regulatory objective, the regulatory objective is now of primary importance[339]. However, it is not possible to name generally applicable standards for the delimitation, since it depends on the respective specific competence norm and its design. For example, in the area of environmental competence (Article 191 f. TFEU), product-related, production-related and plant-related requirements as well as environmental standards can be considered. The broad competence in the area of transport (Article 91 f. TFEU) covers market access, environment and safety as well as security, which includes comprehensive data transmission, punitive duties, infrastructure and pollution levies. For the use of a special competence standard, it is therefore a matter of **the factual connection with the subject matter with regard to information, notification and enforcement assistance**, just as with Article 114(1) TFEU. **If and to the extent that this subject matter can be appropriately based on a special rule of competence, the competence also extends to the forms of assistance in application of the principle of effectiveness.**

b. Extension of existing legal acts

If and insofar as existing legal acts with which an approximation of laws has already been effected are to be amended, the prerequisites for the legislative activity of the Union must also be present for this amendment. In each individual case, it must therefore be examined again whether the prerequisites of one (or more) bases of competence just presented are present. It is not mandatory that a legal act that was based on a specific competence standard can only be amended with reference to this specific competence standard. If the conditions of the internal market competence of Article 114(1) TFEU are met, this competence can also be used.

i. Services Directive and Professional Qualifications Directive

In Chapter 4.2.4 it was already worked out for the Services Directive[340] and the Professional Qualifications Directive[341] that the regulatory complexes of both legal acts are not aimed at sanctioning infringements or even establishing claims for recovery. An extension of these legal acts with regard to further forms of assistance such as service or enforcement assistance is therefore not necessary.

ii. Consumer protection

This is to be assessed differently for consumer protection law. Here, too, a secondary legal basis for cross-border cooperation exists in Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws[342]. Unlike in the scope of the Services Directive and the Professional Qualifications Directive, there may also be a need to impose sanctions or enforce regulatory orders. As shown in chapter 4.2.4, there are gaps when it comes to

December 2001, *Cartagena Protocol*, C-2/00, EU:C:2001:664, paragraph 22; Judgment of 10 December 2002, *British American Tobacco*, C-491/01, EU:C:2002:741, paragraph 93.

339 Grabitz/Hilf/Nettesheim/Nettesheim TFEU Art. 192 marginal no. 29 f.

340 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006.

341 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22, 30.9.2005.

342 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345/1, 27.12.2017, as last amended by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects of the sale of goods governed by contract law, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC and repealing Directive 1999/44/EC, OJ L 136/28, 22.5.2019.

cross-border information, service and enforcement assistance. These gaps could be closed by amending Regulation (EU) 2017/2394. This regulation finds its legal basis in the internal market competence of Article 114(1) TFEU. For an amendment, which would also have to be based on this foundation, the conditions of Article 114(1) TFEU would therefore still have to be met. Since freedom-reducing measures can also improve the functioning of the internal market, it can be assumed that supplementing the existing rules on sanctions and regulatory measures with effective rules on information, service and enforcement assistance would serve precisely this purpose. If the imposition or enforcement of sanctions or the issuing and enforcement of a regulatory measure fail because the addressee is resident in another Member State, it serves the internal market if these obstacles are removed. For the 28 Directives and Regulations listed in the Annex to Regulation (EU) 2017/2394, the cross-border enforcement of fines and recovery could therefore be improved by a corresponding amendment for both the finding procedure and the enforcement procedure.

iii. Sanctions in existing legal acts

Numerous legal acts of the Union contain provisions on penalties for infringements of the rules created by these legal acts. Occasionally[343] there are also provisions on periodic penalty payments. As outlined in Chapter 4, provisions on information, notification and enforcement assistance are the exception rather than the rule. With regard to the question of whether all existing legal acts that provide for an administrative sanction should be supplemented with provisions on information, notification and enforcement assistance, two questions arise: on the one hand, such a supplement would have to be legally possible, but on the other hand, the meaningfulness of such an undertaking must also be questioned.

As far as legal admissibility is concerned, the findings on consumer protection can also be applied here. If and to the extent that the legal act to be amended is based on the internal market competence of Article 114(1) TFEU, an amendment of the legal act supplementing rules on information, notification and enforcement assistance can also be based on this basis. This applies, for example, to Regulation (EU) No 596/2014 on market abuse (Market Abuse Regulation)[344]. An extension of the existing rules on mutual assistance in case of a need for cross-border cooperation in the imposition or enforcement of administrative sanctions is possible for this act, as just outlined for Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws. In view of the sanction options already standardised in detail in the Market Abuse Regulation, it also seems sensible to make such an addition.

Alongside these isolated legal acts dealing in detail with sanctions and cross-border administrative assistance, there is an enormous number of directives and regulations obliging Member States to lay down sanctions for infringements of Union law, without further specification of the type of sanction or of information, notification and enforcement assistance. As a rule, it is only the criteria of the Maize decision of the Court of Justice[345] that must be met with regard to sanctions: they must be effective,

[343] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on strengthening Member States' competition authorities with a view to enhancing the effectiveness of competition enforcement and ensuring the proper functioning of the internal market, OJ L 11/3, 14.1.2019.

[344] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ. L 173/1, 12.6.2014; last amended by Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 on the promotion of the use of SME growth markets, OJ L 320/1, 11.12.2019.

[345] Judgment of 21 September 1989, *Commission* v. *Greece*, C-68/88, EU:C:1989:339.

proportionate and dissuasive[346]. If and to the extent that such a legal act has its basis in Article 114(1) TFEU or a corresponding predecessor provision of primary law, it could be supplemented with provisions on information, notification and enforcement assistance by invoking Article 114(1) TFEU. Legal reasons for assessing this situation differently from those mentioned above are not apparent. However, if the competence basis of an existing legal act does not lie in Article 114(1) TFEU, but in a special authorisation, the question arises whether the addition of regulations on information, notification and enforcement assistance can also be based on this special authorisation. Again, this question cannot be answered in general terms, but only in relation to the respective competence norm. The fact that this can succeed is exemplified by the Cross-border Directive[347]. By means of this legal act, an important component of information assistance in the area of cross-border prosecution of certain traffic offences was created, which is based on Article 91 (1) lit. c) TFEU[348]. However, this is not an existing legal act that had already obligated the implementation of sanctions for infringements of Union law, but an independent legal act that deals exclusively with information assistance.

In the interest of a uniform system of information, service and enforcement assistance that is as broadly applicable as possible, however, it is in any case questionable whether such an approach is called for. As the example of Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws has shown, a system of information, notification and enforcement assistance can be created for an entire policy area with a legal act that has its basis in the internal market competence of Article 114(1) TFEU.

c. Creation of a new legal act

From the insight just gained, it can be deduced that the model of Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws is also transferable to other policy areas of the TFEU. What is not in question here is that freedom-shortening sanctions promote the functioning of the internal market. An effective system of information, notification and enforcement assistance also aims in this direction. These forms of assistance are necessary to prevent the circumvention of prohibitions that serve a fundamental freedom. However, it is indispensable that the link to the actual measure of legal harmonisation must be maintained in any case[349]. Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws ensures this through the 28 acts from the policy area of consumer protection listed in the annex.

It is therefore possible to create comparable legal acts establishing a system of information, notification and enforcement assistance for entire policy areas. These legal acts could be based on Article 114 (1) TFEU. The scope of application of information, notification and enforcement assistance would then have to be determined by means of a specific reference to sectoral legal acts along the lines of the Annex to Regulation (EU) 2017/2394. It is questionable whether it is also possible to adopt a single legal act that introduces an effective system of information, notification and enforcement assistance across policy areas throughout the Union. In this respect, there are serious doubts as to whether the necessary reference to a measure of legal harmonisation is then still maintained. In any case, all affected legal acts that provide for sanctions would have to be transferred to an annex. It would have to be ensured that

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346 cf. *Kärner*, Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?, EuCLR 2021, 156, 170.

347 Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 to facilitate the cross-border exchange of information on road safety related traffic offences, OJ L 68/9, 13.3.2015.

348 Cf. chapter 3.3.4 on the choice of the competence basis.

349 *Classen* in von der Groeben TFEU Art. 114 marginal no. 48 et seq.

all legal acts referred to could be amended with the majorities of the ordinary legislative procedure in order to prevent circumvention.

d. Legal form of the measures

If and to the extent that a legal act is to be adopted or amended, the legal basis of which lies in Article 114(1) TFEU, then in principle the regulation as well as the directive come into consideration. If a special competence standard is to be used, it follows from this competence standard which type of legal act is to be considered. In view of the fact that it is exclusively about cross-border information, service and enforcement assistance and thus about the mutual recognition of administrative decisions, there is a strong argument in favour of adopting a directly applicable regulation, as was done in the case of Regulation (EU) 2017/2394.

5.1.3. Intergovernmental agreements

As a rule, the areas in which comprehensive information, service and enforcement assistance is to be established are subjects of shared competence under Article 2(2) TFEU. The Member States therefore remain competent to legislate on their own in these areas, unless and insofar as the Union has taken action. If and insofar as information, notification and enforcement assistance is not standardised in a legal act of the Union, the way is open to the Member States to regulate themselves. Some of the legal acts dealt with here contain an express provision specifying this possibility. Both Article 18 of Framework Decision 2005/214/JHA and Article 2(4) of Regulation (EU) 2017/2394 refer to the possibility of concluding bilateral or multilateral agreements or arrangements between Member States.

It follows from what has been said about EU law that the Union cannot introduce comprehensive information, service and enforcement assistance between the Member States at all. This results from the principle of conferral. Even if all existing possibilities of legislation by the Union are fully exhausted, there remain areas in which information, notification and enforcement assistance cannot be introduced by Union law. These gaps can only be filled by bilateral or multilateral agreements or arrangements.

As explained in chapter 3.3.3, there are both bilateral and multilateral agreements on cross-border administrative and judicial assistance. In their current form, however, these agreements do not provide a basis for comprehensive information, service and enforcement assistance. Only the Treaty between the Federal Republic of Germany and the Republic of Austria on Administrative and Legal Assistance in Administrative Matters of 31 May 1988[350] is suitable as a model for an agreement between two Member States. However, the structure of this treaty cannot be transferred to a multilateral agreement without further ado. Moreover, every intergovernmental agreement is subject to unilateral amendment by a contracting state, as it is not supranational law.

5.2. Interim conclusion

Improved cross-border cooperation in the enforcement of fines and recovery in the EU requires a legislative competence of the Union. In the area of judicial cooperation in criminal matters, a legal basis arises from Article 82(1) TFEU. This competence norm is characterised by the principle of mutual recognition, which can be integrated into means of mutual legal assistance. Since Article 82(1) TFEU is to be regarded as a conclusive authorisation, **measures to improve cross-border cooperation in the enforcement of fines must therefore be covered by Article 82(1) TFEU**. Article 82(1) TFEU only

[350] Treaty between the Federal Republic of Germany and the Republic of Austria on Administrative and Legal Assistance in Administrative Matters of 31 May 1988, Federal Law Gazette II 1990, p. 357.

covers cooperation between judicial authorities. Administrative authorities are generally not included. Irrespective of this, rules on enforcement assistance in the case of fines can be based on Article 82(1)(2)(a) TFEU.

With reference to Article 82(1)(2)(a) TFEU, Framework Decision 2005/214/JHA could be amended to **include further infringements** in the catalogue of offences for which a reciprocity check is not required. **A slight reduction of the minimum amount of EUR 70** could be considered, as well as an **amendment of the rule that the enforced amounts remain in the executing state**.

Article 82(1) TFEU does not provide a suitable legal basis for the recognition procedure. The only exception to this is assistance with service, insofar as the service of the judgment itself is concerned.

Even if information, service and enforcement assistance can be assigned to the concept of mutual recognition, it is not excluded to take corresponding measures to realise the internal market. The necessary internal market connection of information, service and enforcement assistance can only be assessed in connection with the subject matter behind it. An overarching use of the competence basis in Article 114(1) TFEU, which covers all public-law claims that can be summarised under the concept of recovery, is therefore not possible. If regulations on information, service and enforcement assistance are related to constructive prohibitions, there is an internal market connection because the functioning of the internal market is promoted by these prohibitions. If the **forms of assistance** are **necessary to prevent the circumvention of prohibitions serving a fundamental freedom**, regulations to prevent the circumvention of prohibitions can also be enacted in the form of independent legal acts **on the basis of Article 114(1) TFEU**. It is also possible to use **legal bases from the individual policy areas of the TFEU for measures of information, notification and enforcement assistance**. As with Article 114(1) TFEU, the factual connection with the subject matter is decisive for the use of a specific competence standard with regard to information, notification and enforcement assistance. If and insofar as existing legal acts are to be amended, it must be examined whether the prerequisites of one (or more) bases of competence exist. **If the legal act to be amended is based on the internal market competence of Article 114(1) TFEU, an amendment of the legal act supplementing regulations on information, notification and enforcement assistance can also be based on this basis**. This also applies if no regulations on administrative assistance have existed up to now. In the case of existing legal acts that are based on a special competence norm, this cannot be answered uniformly**. A legal act based on Article 114(1) TFEU that covers one or more policy areas seems preferable. Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws serves as a model** here. In any case, **all concerned legal acts providing for sanctions must be transferred to an annex**.

Beyond the Union's competences, the way remains open via **bilateral or multilateral agreements**, which **can close the gaps that Union law** must inevitably leave.

6. CONCLUSIONS AND RECOMMENDATIONS

- As regards fines, a small number of legal instruments does exist both at the EU level and in the form of bilateral or multilateral agreements, but these seem insufficient when it comes to fines that are common in some Member States. In particular, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (Framework Decision) can be applied to administrative sanctions, provided that they are based on a decision of a court (or, in certain circumstances, of an authority of the issuing State other than a court) imposing the payment of a fine by a natural or legal person. In addition, the administrative penalty must be imposed for an offence listed in Article 5(1) of the Framework Decision and punishable in the issuing State. Other offences may also be recognised and enforced. However, in this case, "the executing State may make the recognition and enforcement of a decision subject to the condition that the decision relates to conduct which would constitute an offence under the law of the executing State, whatever the constituent elements or however it is described".
- The terms 'fines' and 'recovery claims' are based on the respective legal systems and consequently subject to different definitions and classifications in the Member States examined. Standardisation does not seem possible and does not appear to be advisable.
- The Framework Decision 2005/214/JHA is in principle a functioning legal basis for fines around the offences regulated therein. The case law of the Court of Justice of the European Union seems to have clarified existing questions.
- Insofar as there are supplementary bilateral agreements (example: treaty between the Federal Republic of Germany and the Republic of Austria on administrative and legal assistance in administrative matters), these are often used as a matter of priority.
- Improved cross-border cooperation in the enforcement of fines and recovery in the EU requires a legislative competence of the Union. In the area of judicial cooperation in criminal matters, the legal basis results from Article 82(1) of the Treaty on the Functionaing of the European Union (TFEU), whereby this is to be regarded as a conclusive authorisation. Measures to improve cross-border cooperation in the enforcement of fines must therefore be covered by Article 82(1) TFEU. Article 82(1) TFEU only covers cooperation between judicial authorities. Administrative authorities are generally not included.
- Rules on enforcement assistance for fines can nevertheless be based on Article 82(1)(2)(a) TFEU, so that Framework Decision 2005/214/JHA can be extended by including further offences in the catalogue of offences for which a reciprocity check is not required. A slight reduction of the minimum amount of EUR EUR 70€ can be considered, as well as an amendment of the rule that the enforced amounts remain in the executing state. Article 82(1) TFEU does not provide a suitable legal basis for the recognition procedure. The only exception to this is assistance with service, insofar as the service of the judgment itself is concerned.
- An overarching use of the competence basis in Article 114(1) TFEU, which covers all public-law claims that can be subsumed under the concept of recovery, is not possible.
- If regulations on information, service and enforcement assistance are related to constructive prohibitions, there is a link to the internal market because the functioning of the internal market is promoted by these prohibitions. If the forms of assistance are necessary to prevent the circumvention of prohibitions serving a fundamental freedom, regulations to prevent the circumvention of prohibitions may also be enacted in the form of independent legal acts on the basis of Article 114(1) TFEU.
- It is also possible to use bases of competence from the individual policy areas of the TFEU for measures of information, notification and enforcement assistance. As with Article 114(1) TFEU,

the factual connection with the subject matter is decisive for the use of a specific competence standard with regard to information, notification and enforcement assistance.

- If and to the extent that existing legal acts are to be amended, it must be examined whether the prerequisites of one (or more) bases of competence exist. If the legal act to be amended is based on the internal market competence of Article 114(1) TFEU, an amendment of the legal act supplementing regulations on information, service and enforcement assistance can also be based on this basis. This also applies if no regulations on administrative assistance have existed to date.
- In the case of existing legal acts based on a specific competence norm, this cannot be answered uniformly. A legal act based on Article 114(1) TFEU and covering one or more policy areas seems preferable. Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws serves as a model here. In any case, all concerned legal acts providing for sanctions must be transferred to an annex.
- Beyond the Union's competences, the way remains open via bilateral or multilateral agreements, which can close the gaps that Union law must inevitably leave.

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This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, looks into the challenges and possible improvements of administrative cooperation between Member States, as regards cross-border enforcement of administrative fines and recovery claims. Legal instruments to facilitate transnational cooperation are necessary. Also the terms 'fine' and 'recovery claim' are often subject to different definitions in the Member States. Framework Decision 2005/214/JHA works for offenses regulated therein. Measures to improve cooperation are allowed by Article 82(1) TFEU but administrative authorities are regularly not judicial authorities. Amendments can be based on Article 114(1) TFEU if they serve to supplement provisions on information, service and enforcement assistance.

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