The cross-border recovery of administrative fines

An exploratory study of experiences in Belgium, Germany and the United Kingdom and possibilities for international cooperation

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Summary

This report presents the results of a quick study, conducted in the Netherlands, of the outcome of the cross-border recovery of administrative fines in certain European countries outside the Netherlands. 'Administrative fines' in this study are understood to be measures with which a financial sanction is imposed that is of a punitive nature and that may be imposed in principle without prior involvement by a court, following the meaning of Articles 4:50 and 4:51 of the Netherlands General Administrative Law Act. The study also addresses the question of the extent to which and under what legal conditions, if so desired, international solutions to problems can be found. The study was conducted in the period October 2013 to May 2014.

Background to the exploratory study

Laws to be enforced by the Dutch public authorities are not only violated by Dutch and Netherlands-based individuals and legal entities, but also by those residing or established in other countries. It has been reported in literature and by some Dutch authorities that the cross-border recovery of the imposed administrative fines can be problematic. The authorities competent for the recovery of such fines may in principle only exercise their powers on their own territory. As long as there are no appropriate instruments for cooperation in cross-border recovery of administrative fines, mobile citizens and businesses can easily evade enforcement. Although a small number of legal instruments do exist in European and bi- or multilateral frameworks to bring about cross-border recovery of fines, at first sight they appear to be inadequate when it concerns the administrative fines in the Netherlands.

In order to gain more insight into possible European or international solutions to these concerns, this study has carried out a quick scan to assess whether this problem has been observed in other countries as well, and, if so, whether practical or legal solutions have been developed.

Research questions

The report aims to answer the following main research question, which has been broken down into four sub questions:

Which possibilities exist in other EU countries than the Netherlands, particularly in Belgium, Germany and the United Kingdom, for the cross-border recovery of administrative fines, to

what extent do they produce positive results or encounter problems, and under what legal conditions and to what extent, if so desired, can international solutions to those problems be found?

1. Which legal and non-legal options exist in the selected countries for the cross-border recovery of administrative fines, particularly those imposed within certain reference areas (as explained below)?
2. What experiences do the (respondents of the) selected countries have with the cross-border recovery of administrative fines that are imposed within certain reference areas?
3. Do the (respondents of the) selected countries, perceive a need or wish for international cooperation concerning the cross-border recovery of administrative fines (and if so, to what extent), and under what legal conditions should that cooperation, in their view, be carried out?
4. Which legal possibilities exist for expanding international cooperation concerning the cross-border recovery of administrative fines?

Research methods

The research was conducted in the form of an exploratory quick scan and a desk study and interviews with representatives of government agencies and experts from academia and legal practice.

Several choices were made in answering the central research question. The report is limited to three neighbouring countries of the Netherlands: Belgium, Germany and the United Kingdom. It is furthermore limited to three reference areas. From a Dutch law perspective, the following reference areas were selected:

- the standards of behaviour that may be sanctioned with an administrative fine by the Netherlands Authority for the Financial Markets (‘Autoriteit Financiële Markten’) under the Financial Supervision Act (‘Wet op het financieel toezicht’);
- the employment of foreign workers without a work permit, in violation of Article 2 of the Netherlands Law on the employment of foreign nationals (‘Wet arbeid vreemdelingen’);
- sending spam in breach of Article 11.7 of the Telecommunications Act (‘Telecommunicatiewet’).

For each of the countries under examination, the study focused on the relevant counterpart of these reference areas. In some cases it proved necessary to partially abandon a particular reference area or to interpret it in a wider sense.

The research methods outlined above have a number of limitations, which have been explicitly identified in the report. Considering these limitations, the conducted interviews nevertheless present relatively clear results.

Key findings

The experiences with recovery problems concerning administrative fines, as assumed at the start of this study, vary greatly between the three selected countries. As to the question whether recovery problems exist, three factors seem particularly important:

- Are fines imposed in practice?
- Are they imposed transnationally?
- Do possibilities for transnational recovery already exist?

The study shows that in the United Kingdom, administrative fines are hardly ever imposed, so that recovery problems will not occur frequently. Moreover, where administrative fines are imposed by the UK authorities, it is not a given fact that they must be recovered across borders. This may be due mainly to chance. It is also possible that, in legal areas where transnational recovery is likely to be needed, it is decided at the regulatory level to opt for other enforcement methods that better reflect existing international frameworks. In some cases, it seems that regulators seek ad hoc alternatives with which to prevent cross-border recovery of administrative fines. Furthermore, recovery problems will not occur when possibilities for the recovery of administrative fines across borders already exist. To a large extent, this depends on the way in which these sanctions are embedded in the international system. To a lesser extent, it depends on how this recovery is placed in the national context. For instance, in the case of the German '*Ordnungswidrigkeiten*', which are strongly connected to criminal law, it is possible to tie these in with the various instruments for cooperation in criminal matters described in this report. At a first glance, this is much less obvious for Belgium and the UK. However, it is relevant how (broadly or narrowly) the available international instruments are interpreted.

Existing legal possibilities for cross-border recovery

In order to enforce the payment of an administrative fine abroad, an international legal basis is required. According to academic experts, such a legal basis does not yet (sufficiently) exist. It is conceivable that under certain circumstances the principle of loyalty in Article 4, paragraph 3, TEU, requires reciprocal assistance regarding the recovery of administrative fines. This is not certain however. A legal basis for cross-border recovery may sometimes be provided by the exequatur procedure in private international law. However, this procedure does not necessarily apply to the execution of (all) administrative fines as imposed by administrative bodies. In the international context, several additional transnational instruments have been developed. Special consideration should be given to the instruments on judicial cooperation in criminal matters, in so far as they (also) concern financial sanctions. Under current law, the Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences (Brussels, 13 December 1991) can be applied to administrative fines, but for now only in the relationship between the Netherlands and Germany. Since the judgment of the Court of Justice of the European Union in the *Baláž* case,[1] Framework Decision 2005/214/JHA (on the application of the principle of mutual recognition to financial penalties)[2] can under certain conditions be applied to administrative sanctions.

Administrative instruments for judicial cooperation in collecting administrative fines are rare. At a bilateral level, such cooperation has been established between Austria and Germany. Besides that however, administrative cooperation exists only in specific areas, concerning monetary debts in tax matters, and in the form of a Posting of Workers Enforcement Directive.[3] These instruments do not apply to the studied reference areas.

[1] ECJ 14 November 2013, Case C-60/12, ECLI:EU:C:2013:733.
[2] OJ 2005, L 76/16.
[3] Adopted by the EU's Council of Ministers on 13 May 2014.

Administrative fines in the selected countries

The Belgian law on (the recovery of) administrative fines is rather similar to the Dutch system. Belgian law however does not provide general legislation on this topic: the imposition and collection of administrative fines is regulated separately in the different reference areas. Recovery of administrative fines imposed at the Belgian federal level is carried out by a central administration, the 'Federale Overheidsdienst Financiën'.

In Germany, the law relating to administrative sanctions is closely related to criminal law and cannot be placed within the administrative law system. The imposition of administrative fines is in principle governed by the Act on Regulatory Offences ('Ordnungswidrigkeitengesetz'). The method of recovery depends primarily on the question whether the person concerned has lodged an appeal against the imposition of the sanction. If no appeal has been lodged or an unsuccessful one, the fine is recovered under the rules of the Administrative Enforcement Act ('Verwaltungs-Vollstreckungsgesetz') when imposed at federal level, and under the rules of the various states in other cases. Typically, the fine is collected by the institution that also imposed it.

In the United Kingdom, the concept of administrative sanctions – deliberately disconnected from criminal law – is increasingly common, but it remains a relatively new phenomenon that is still developing. The imposition and recovery of administrative fines is regulated separately in the different reference areas, but the procedures are similar in the cases studied. The administrative body that imposed the fine can seek an order for a recovery of costs through a civil court. The recovery then takes place through the civil law system. In the context of the illegal employment of foreign workers, initiatives have been taken to facilitate this procedure.

Experiences with cross-border recovery in the countries studied

The three selected countries in this study have different experiences with the cross-border recovery of administrative fines. In Belgium, administrative fines are regularly imposed abroad but it appears almost impossible to recover them successfully. If a fine is not paid voluntarily, then the amount must be written off in most cases. Therefore, alternatives are regularly sought to avoid the need for cross-border recovery, or to ensure that the enforcement objective is achieved in other ways. The main problem mentioned concerns the lack of a legal instrument with which payment can be enforced abroad. Furthermore, it is difficult in practice to trace the person concerned in order for the necessary documents to be served.

In Germany, more possibilities exist to collect the imposed fines abroad. The main reason is that Framework Decision 2005/214/JHA, also without the broader interpretation by the Court of Justice of the European Union in the *Baláž* case, applies to the administrative fines imposed in Germany due to the way these have been embedded in German law. Application of the Framework Decision – in so far as the respondents are aware – does not in all cases lead to successful cross-border recovery. This is partly due to the constraints in the Framework Decision itself, as well as to the fact that the Framework Decision does not apply outside the EU. Recovery may also fail because the person concerned is not able to pay, for instance as a result of bankruptcy or, in some cases, because the willingness of the corresponding authorities to collaborate leaves something to be desired. In Germany too, indications exist that ways are sought to avoid the cross-border recovery of administrative fines. Incidentally, not all German respondents actually impose administrative sanctions on foreign parties, while recovery actions are often not required and certainly the larger companies usually pay their fines voluntarily.

As for the United Kingdom, there is little to say about the success of cross-border recovery of administrative fines because there is hardly any experience in this regard. It is rare to find administrative fines imposed and certainly on persons abroad. In so far as a need does exist for cross-border collection of administrative fines, the main problem that is mentioned concerns the lack of an instrument with which payment can be enforced abroad. Moreover, it appears difficult in practice to trace the person concerned.

Necessity and desirability of international cooperation, conditions

When asked about the desirability for or necessity of further international cooperation in the field of cross-border recovery of administrative fines, respondents in Belgium readily state the need for such cooperation. It should be noted that this conclusion may have been influenced by the selection of respondents in Belgium, although that risk is limited. The Belgian respondents favour an instrument in which mandatory rules have been drawn up concerning the mutual recognition of administrative fines, although according to some there is also a need for customisation. There is a specific focus on cooperation in an EU context. The problems identified are found to mainly occur within the EU. Moreover, the EU Member States have the necessary experience with the minimum guarantees provided by Article 6 ECHR, thus enabling cooperation in this field. Should cooperation at the EU level not be possible, then the respondents see opportunities to cooperate bilaterally, especially with neighbouring countries. Furthermore, accompanying forms of cooperation should be considered, especially concerning the exchange of information between the requesting State on the one hand and the executing State (that will take over the recovery) on the other. Recovery applications should preferably be channelled through a central contact point, which internally distributes the requests to the competent authority. Possible grounds for refusal include: failure to meet the requirements for imposing fines that follow from Article 6 ECHR; the absence of inviolability of the fine; and the event that collection of the fine would bring disproportionate burden on the executing State or would be disproportionate relative to the debtor.

In Germany, the need for further cross-border cooperation is felt less strongly than in Belgium. One respondent has expressed the desire to develop cooperation instruments outside the EU framework. Within the EU, Framework Decision 2005/214/JHA should provide some solutions, although one respondent advocates to expand the list of offences that must be recognized without verification of double criminality, at least in his field. Another respondent feels no need for international cooperation, but does accept that such cooperation within the EU may be necessary. Should an instrument be created, then preference is given to a binding instrument with which the executing State is obliged to recognise the fines in question and to collect them. The German respondents also prefer – more so because of practical rather than principal reasons – to channel cooperation through a central contact point. As regards the grounds of refusal that should apply, the respondents tend to find inspiration mainly in the grounds set out in Framework Decision 2005/214/JHA.

In the United Kingdom it proved impossible to question the respondents about the necessity or desirability of international cooperation, nor on the related conditions. The responses of the respondents and further research, in which both experts and organisations in the fields of other reference areas were surveyed and the available literature was consulted, indicates that the cross-border recovery of administrative fines in the United Kingdom has hardly been problematized so far. There is no perception (yet) of a great problem, possibly because the transnational dimension as such is not experienced or because transnationality is perceived as an avoidable problem. The main reason however seems to be that the administrative enforcement is still in its (very) early stages. One of the extra organisations surveyed in this

study states that it will possibly be faced with this issue in the future, but as of yet it approaches the subject merely hypothetically.

Legal possibilities for increasing cross-border cooperation

Cooperation in this area – also outside the EU framework – will give rise to certain legal challenges because of the various ways in which the phenomenon of the administrative fine is perceived. Significantly, outside the framework of the criminal legal instruments only very limited possibilities exist for the cross-border recovery of administrative fines. As to whether any cooperation in collecting administrative fines is possible, it is also important that the recovery cannot be viewed as entirely separate from the imposition of the fines. It is particularly relevant which minimum guarantees apply to the imposition and whether these guarantees generally correspond in the various countries concerned. After all, cooperation based on mutual recognition (the method which was preferred by most respondents who favoured international cooperation) requires mutual trust as regards the manner of the realisation of the fines to be imposed. In addition, in relation to the willingness of countries to collaborate, it is also relevant whether they expect to receive more requests than they will send out (as is likely in the United Kingdom) or that the opposite is true (which possibly applies to Belgium).

In the event that increased collaboration in the area of cross-border recovery of administrative fines is opted for, several possibilities exist to achieve this. Whether grounds for cooperation can be found at the EU level, depends to some degree on the question of whether the power to impose administrative sanctions originates in national or in EU regulation. It is especially in the latter case that it may be necessary to address the effectuation of the sanctioning at the European level. Thus, it is possible that the scope of existing cooperation instruments be extended. Framework Decision 2005/214/JHA, according to the judgment of the Court of Justice of the European Union in the *Baláž* case, may under certain circumstances be applied to the cross-border recovery of administrative sanctions imposed in Belgium and the United Kingdom (this was already possible for Germany). The implications of this judgment for the scope of the Framework Decision are even greater if the term 'offences' were also to cover offences other than those sanctioned in criminal law. It is not certain whether this is the case. This uncertainty can be removed if the Council were to extend the list of offences in the Framework Decision for which the requirement of double criminality cannot be established. Due to its limited substantive scope, another existing recovery instrument, Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures,[4] offers no solutions under current law as regards the recovery of administrative fines imposed on the basis of the reference areas studied here. The Directive does provide a practical framework on the basis of which administrative fines could be collected abroad. On the basis of the applicable principles (Articles 113 and 115 TFEU), the Council may decide unanimously to extend the scope of the Directive.

Separate EU legislation concerning cross-border cooperation in the recovery of administrative fines can come into being in three ways. First, the judicial cooperation in criminal matters on the basis of Article 82, paragraphs 1 and 2, TFEU can serve as a useful starting point for such legislation. This idea is supported in literature.[5] It seems self-evident that administrative sanctioning would then have to comply with certain safeguards that are essential in criminal

[4] OJ 2010, L 84/1.

[5] G. Vermeulen, W. De Bondt and C. Ryckman (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, IRCP research series, vol. 42, Maklu: Apeldoorn 2012, p. 101.

law. Secondly, harmonisation on the basis of Articles 114 to 116 TFEU could be proposed. As some policy areas are excluded from harmonisation on the basis of Article 114 TFEU, a general recovery instrument would require a unanimous decision of the Council according to Article 115 TFEU, unless the lack of harmonisation leads to a distortion of the conditions of competition within the meaning of Article 116 TFEU. To the extent that cooperation cannot be established under other legal bases, Article 352, paragraph 1, TFEU may probably operate as ultimate grounds, but this provision too requires unanimity within the Council. Thirdly, it is possible to establish cooperation instruments in sector-specific sub-areas. In that case, a specific basis must be found in each policy area concerned. A good example of this is the recently adopted Posting of Workers Enforcement Directive.

Whether and to what extent international cooperation in bilateral or multilateral context is created, is mainly a question of (political) willingness by the countries concerned. If desired, inspiration can be drawn from the various existing forms of international cooperation. A substantial part of the relevant agreements, have been signed by few States and are in force in fewer. That does not indicate much willingness to extend or intensify such cooperation.

Concluding remarks

Apart from the question of the existing and possible options for cross-border recovery, one must realise that the potential success of cross-border recovery does not just depend on legal issues. For instance: even in Germany, it is incidentally opted for to avoid the necessity of collection in spite of the applicability of Framework Decision 2005/214/JHA. The recovery of administrative fines abroad, for instance, costs money. Therefore, important issues to be considered here include who should cover these costs and who receives the proceeds from the recovery. Moreover, the way in which the imposition and collection of administrative fines is implemented can be relevant – particularly the question whether the authority for recovery and/or imposition rests with many bodies or if it is centralised. In the latter case, it is much more likely that (expected) important factors for a successful cross-border recovery, namely expertise and budget, are available. Finally, one could consider the practical question of to what extent the existing instruments are known to all relevant actors.

Based on the responses obtained in this study, it must be strongly doubted that a European legal instrument for the recovery of administrative fines will be supported by all (and in any case all researched) countries for a European regulation for the recovery of administrative fines. The need for this is felt neither in the UK nor in Germany. In Belgium however, in as far as conclusions can be drawn based on the interviews conducted in this study, there is support for such regulation.

Therefore the question arises to what extent a ‘recovery problem’ actually exists (at the moment), or whether it concerns a specific national problem that depends on the national context. This study shows that it is certainly true that problems can arise in the cross-border recovery of administrative fines. However, the magnitude of this problem depends on several factors that have been addressed above and that vary greatly in the countries studied in this report.