

**Case C-66/20****Request for a preliminary ruling****Date lodged:**

24 January 2020

**Referring court:**Procura della Repubblica di Trento (Public Prosecutor's Office,  
Trento, Italy)**Date of the decision to refer:**

15 January 2020

**Validation procedure for a European Investigation Order issued against:**

XK

---

**Procura Distrettuale della Repubblica (District Public Prosecutor's Office)**

at the Tribunale Ordinario di Trento (District Court, Trento)

**[...] REFERENCE FOR A PRELIMINARY RULING TO THE COURT OF JUSTICE OF THE EUROPEAN UNION**

- Article 267 TFEU, Article 94 of the Rules of Procedure –

The public prosecutor's office,

[...] submits the following reference for a preliminary ruling to the Court of Justice of the European Union pursuant to Article 267 TFEU and Article 94 of the Rules of Procedure:

**The main proceedings**

On 14 November 2019, the Procura della Repubblica di Trento (Public Prosecutor's Office, Trento) received a European Investigation Order (EIO) issued on the same date by the Finanzamt für Steuerstrafsachen und Steuerfahndung Münster (Tax Office for Criminal Tax Matters and Tax Investigation, Münster, Federal Republic of Germany), requiring a search to be undertaken of XK's business premises as part of an investigation into income tax evasion conducted under Sections 369 and 379 of the German Tax Code. The EIO had been signed

by the [...] head of the Finanzamt. Section L of the EIO, which has to be completed by the judicial authority in order to validate an EIO issued by an administrative authority, had been left blank (Annex 1). On 20 December 2019, the Trento Public Prosecutor's Office sent the Münster Finanzamt confirmation of receipt of the EIO (Annex 2) and a letter requesting that it forward a copy of the EIO in which section L had been validated by a judicial authority, noting that the Finanzamt is an administrative authority and that administrative authorities cannot issue EIOs unless they are endorsed by a judicial authority (Annex 3).

On 8 January 2020, the Münster Finanzamt sent an email to the Trento Public Prosecutor's Office stating that the EIO did not have to be validated by a judicial authority, since, under Section 399(1) of the German Tax Code, the Finanzamt acts as public prosecutor in cases involving [Or.2] tax offences. As such, it had to be regarded as a judicial authority within the meaning of Article 2 of the Directive (Annex 4).

#### **Italian domestic law:**

Article 4(1) of decreto legislativo 108/17 (Legislative Decree No 108/17), published in Official Journal No 162 of 13 July 2017, entitled 'Rules implementing Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters', provides that 'the public prosecutor at the district court in principal city of the region in which the measures requested are to be carried out shall issue a reasoned order recognising the investigation order within 30 days of receipt thereof, or within such other time frame as may be indicated by the issuing authority, and in any event within no more than 60 days'.

Article 5(1) of Legislative Decree No 108/17 adds that 'when the issuing authority requests that the measure be carried out by a judge, or when the measure requested must be carried out by a judge under Italian law, the public prosecutor shall recognise the investigation order and apply to the judge responsible for preliminary investigations for its execution'.

Article 10 of Legislative Decree No 108/17, entitled 'Grounds for refusal and return', provides in paragraph 3 thereof that 'an investigation order issued by an authority other than a judicial authority **or not validated by such an authority** shall be returned to the issuing authority'.

#### **German domestic law:**

On 14 March 2017, the Permanent Representation of the Federal Republic of Germany to the European Union issued the following statement with regard to EIOs issued by German administrative authorities: 'In accordance with Article 2(c) of the Directive, applications from the German administrative authorities are usually validated by the public prosecutor at the regional court in whose district the administrative authority is located. However, the *Länder* are free to assign competence for validation to a court or otherwise determine local

jurisdiction for validation by a public prosecutor. Requests from German tax authorities which are entitled to conduct criminal investigations [Or.3] independently under Section 386(2) of the Tax Code do not require validation by a judicial authority or a court. In this case, the tax authorities have the same rights and responsibilities as the public prosecutor's office under Section 399(1) of the Tax Code, in conjunction with Section 77(1) [of the] Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Cooperation in Criminal Matters, the IRG), and they themselves act as a judicial authority for the purposes of Article 2(c) of the Directive'.

### **European Union law:**

On 3 April 2014, the European Parliament and the Council issued Directive 2014/41/EU regarding the European Investigation Order in criminal matters.

Article 1 of the Directive defines the European Investigation Order (EIO) as 'a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive'.

Article 2(1)(c) defines 'issuing authority' as:

'(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; [or]

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority, the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6(1), by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO.'

Article 9(3) of the Directive provides that 'where an executing authority receives an EIO which has not been issued by an issuing authority as specified in Article 2(c), the executing authority shall return the EIO to the issuing State'.

[Or.4]

### **The reasons for the reference for a preliminary ruling**

According to Directive 2014/41/EU, the EIO needs to be a judicial decision. Article 2 of the Directive states that the issuing authority must be a judicial

authority, or that it may be an administrative authority, but only if the order is subsequently validated by a judicial authority.

The reason why the EIO must necessarily be a judicial decision, taken by a judge or a public prosecutor ('a judge, a court, an investigating judge or a public prosecutor', according to the wording of Article 2), is fully explained in the judgment delivered by the Court of Justice on 10 November 2016, in Case C-453/16PPU (ECLI:EU:C:2016:860) on the subject of the European arrest warrant.

In this judgment, the Court of Justice first noted that, 'since the public prosecutor's office constitutes a Member State authority responsible for administering criminal justice (see, to that effect, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 39), the decision of such an authority must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision'.

In the same judgment, the Court of Justice added that 'the confirmation of the national arrest warrant by the public prosecutor's office provides the executing judicial authority with an assurance that the **European arrest warrant is based on a decision that had undergone judicial approval. Such confirmation, therefore, justifies the high level of confidence between the Member States**, mentioned in the previous paragraph. It follows that a decision of a public prosecutor's office, such as that at issue in the main proceedings, is covered by the term "judicial decision", within the meaning of Article 8(1)(c) of the Framework Decision'.

Therefore, the Court of Justice has previously ruled, with regard to the European arrest warrant, that the high level of confidence between the Member States is based on the fact that a measure is subject to validation by a judicial authority.

[Or.5]

The Münster Finanzamt, which is an administrative authority, claims that under German law it is empowered to send an EIO, signed by its administrative director, without validation by a public prosecutor, because this is authorised by a domestic provision of the law of the Federal Republic of Germany, namely Section 399(1) of the German Tax Code, which provides that the tax authorities have the same rights and responsibilities as the public prosecutor's office.

The Permanent Representation of the Federal Republic of Germany to the European Union seems to share this interpretation, since, on 14 March 2017, it issued a statement to the effect that tax offices, which have the same powers as the public prosecutor's office, should be considered a 'judicial authority for the purposes of Article 2(c) of the Directive'.

The question that this reference for a preliminary ruling puts to the Court of Justice is whether Article 2 of the Directive, which requires the EIO to be a

judicial decision in all circumstances (directly or by validation), allows a Member State to exempt the EIO of an administrative authority from validation by a judicial authority by defining that administrative authority as a ‘judicial authority for the purposes of Article 2 of the Directive’.

On the subject of the European arrest warrant, the Court of Justice has previously addressed the question of the freedom granted to Member States to define what constitutes a ‘judicial authority’ as a matter of EU law.

Specifically, in its judgment of 27 May 2019, in Joined Cases C-508/18 and C-82/19 PPU (ECLI:EU:C:2019:456), the Court of Justice held that ‘although, in accordance with the principle of procedural autonomy, the Member States may designate, in their national law, the “judicial authority” with the competence to issue a European arrest warrant, **the meaning and scope of that term cannot be left to the assessment of each Member State** (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraphs 30 and 31, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraphs 31 and 32). **That term requires, throughout the European Union, an autonomous and uniform interpretation**, which, in accordance with the settled case-law of the Court, must take into account the wording of Article 6(1) of Framework Decision 2002/584, its legislative scheme [Or.6] and the objective of that framework decision (see, to that effect, judgments of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 32, and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 33)’.

In the same judgment, the Court of Justice added what are the essential characteristics that a state body must possess in order to be defined as a ‘judicial authority’, stating that ‘the “issuing judicial authority”, within the meaning of Article 6(1) of Framework Decision 2002/584, must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive (see, to that effect, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 42)’. It further added that ‘the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive’.

Ultimately, under the European arrest warrant system:

- the concept of judicial authority is uniform throughout the European Union and cannot depend on the internal rules of the individual Member States;
- in order for a public body to be regarded as a ‘judicial authority’ as a matter of EU law, it must have the essential characteristic of not being exposed to the risk of its decision-making powers being subject to external directions or instructions, particularly from the executive.

These conclusions, which relate to the European arrest warrant system (Framework Decision 2002/584/JHA), may also be applied to the European Investigation Order [Or.7] system (Directive 2004/41/EU), because, although this has no impact on personal liberty, it is still a highly invasive measure since an EIO can be used to order searches or the interception of telecommunications, for example.

Since the Court of Justice stated in its judgment of 24 October 2019 in Case C-324/17 (ECLI:EU:C:2019:892) that ‘it is apparent from the wording of Article 5(1) of Directive 2014/41 that the issuing of an EIO presupposes the completion and signing of the form referred to in Annex A to that directive and the certification of its content as accurate and correct’, and since in this case section L of the EIO (validation by the judicial authority) has not been completed, the proceedings are stayed and the Court of Justice is asked to clarify whether Article 2(1)(c)(ii) of Directive 2014/41/EU is to be interpreted as allowing a Member State to exempt an administrative authority from the obligation to have the EIO validated by a judicial authority.

### **The right of the public prosecutor’s office to submit a reference for a preliminary ruling**

The public prosecutor’s office is aware that, under Article 267 TFEU, a reference for a preliminary ruling may be made by a ‘**court or tribunal** of a Member State’.

In its judgment of 30 June 1966 in Case 61/65 (ECLI:EU:C:1966:39), the Court of Justice identified the requirements for courts or tribunals within the meaning of Article 267 TFEU: (a) they must have a legal basis, established by law and not by an agreement between the parties; (b) they must be permanent, that is to say they must function on a permanent and non-occasional basis; (c) their jurisdiction must be compulsory, which excludes alternative remedies; (d) they must apply rules of law; (e) proceedings before it must be *inter partes*; (f) they must be independent and neutral with regard to the parties to the proceedings.

With regard in particular to the position of the public prosecutor’s office in the Italian legal system, the Court of Justice found that it did not have the right to make a reference for a preliminary ruling in its judgment of 12 December 1996, in Joined Cases C-74/95 and C-129/95 (ECLI:EU:C:1996:491).

However, that case concerned a question raised by the public prosecutor's office in criminal proceedings before it, which the public prosecutor had to decide whether or not **[Or.8]** to bring to the attention of the court. On that occasion, the Court of Justice ruled that the public prosecutor's office was not entitled to raise the question under Article 267 TFEU, because in those proceedings its role was 'not to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body'.

This reasoning does not apply here, since the Italian prosecution service is not involved in the criminal proceedings brought in Germany before the Münster Finanzamt, it cannot bring criminal proceedings in Italy in respect of that offence, and it has no option of bringing the EIO issued by the Münster Finanzamt before a court, because under Italian law (Article 4 of Legislative Decree No 108/17), the public prosecutor's office, and not the judge, has competence to recognise (or refuse to recognise) the EIO and to execute it in Italy.

Indeed, under Italian procedural law (Article 247 of the Code of Criminal Procedure), the measure requested in this case (a search) cannot be executed by the judge, but comes under the jurisdiction of the public prosecutor's office. Therefore, according to Articles 4 and 5 of Legislative Decree No 108/17, the authority responsible for recognising (or refusing to recognise) the EIO is the public prosecutor's office. No court or tribunal is involved in the recognition procedure.

It follows that in the passive procedure for recognition of the EIO under Article 9 of the Directive and Articles 4 and 10 of Legislative Decree No 108/17, the public prosecutor's office is the body tasked with ruling 'on an issue in complete independence', and is therefore the body of the Member State entitled to submit a request pursuant to Article 267 TFEU.

#### ON THOSE GROUNDS

#### THE PUBLIC PROSECUTOR'S OFFICE

REFERS THE FOLLOWING QUESTION TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING:

'In so far as it provides that "any other competent authority **[Or.9]** as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law", may also be regarded as an issuing of authority, but also provides that, in that case, "before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State", is Article 2(1)(c)(ii) of Directive 2014/41/EU of the

European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters, to be interpreted as allowing a Member State to exempt an administrative authority from the obligation to have the EIO validated by defining it as a “judicial authority for the purposes of Article 2 of the Directive”?

STAYS THE PROCEEDINGS PENDING A PRELIMINARY RULING BY THE COURT OF JUSTICE

[...] ANNEXES: 1. European Investigation Order dated 14.11.2019; 2. Acknowledgement of receipt; 3. Letter requesting clarification dated 20.12.2019; 4. Letter in reply to the clarification dated 8.1.2020.

Trento, 15 January 2020

[...]

WORKING DOCUMENT