



**Unlike a European arrest warrant, a European investigation order may be adopted by the public prosecutor's office of a Member State exposed to the risk of being subject to individual instructions from the executive**

*The fundamental rights of the person who is the subject of the European investigation order are sufficiently protected both at the stage of issuing that order and at the stage of its execution in another Member State*

A criminal investigation for fraud was initiated against A and several unidentified persons by the Staatsanwaltschaft Hamburg (Public Prosecutor's Office, Hamburg, Germany). Those persons were all suspected of having, in July 2018, falsified thirteen bank transfer orders using unlawfully obtained data, thus enabling the probable transfer of around € 9 800 to a bank account opened in A's name with an Austrian bank. In May 2019, during the investigation of that case, the Hamburg Public Prosecutor's Office issued a European investigation order,<sup>1</sup> which it forwarded to the Staatsanwaltschaft Wien (Public Prosecutor's Office, Vienna, Austria), and by which it requested the latter to send it copies of the bank statements in question for the relevant period. However, under the Austrian Code of Criminal Procedure, the Austrian public prosecutor's office may not order such an investigative measure without prior court authorisation. Accordingly, at the end of May 2019, the Vienna Public Prosecutor's Office requested the Landesgericht für Strafsachen Wien (Regional Court in Criminal Matters, Vienna, Austria) to authorise that investigative measure.

Noting inter alia that, under German law on the organisation of the courts, the Hamburg Public Prosecutor's Office may receive instructions, including in individual cases, from the Justizsenator von Hamburg (Senator for Justice, Hamburg, Germany), that court was uncertain whether that European investigation order should be executed by the Austrian authorities. Its uncertainty related, more specifically, to the applicability, in the context of the European Investigation Order Directive, of the Court's recent case-law relating to the concept of 'issuing judicial authority' of a European arrest warrant (EAW),<sup>2</sup> within the meaning of Framework Decision 2002/584.<sup>3</sup> Consequently, that court decided to ask the Court whether the public prosecutor's office of a Member State may be regarded as a 'judicial authority' having competence to issue a European investigation order, within the meaning of that directive, in spite of the fact that it is exposed to a risk of being subject to individual instructions or orders from the executive when adopting such an order.

<sup>1</sup> That European investigation order was issued in accordance with Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1) (the 'European Investigation Order Directive').

<sup>2</sup> Judgments of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, paragraph 90), and *PF (Prosecutor General of Lithuania)* (C-509/18, paragraph 57); see also Press Release [No 68/19](#). In paragraph 90 of the judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, relating to German public prosecutor's offices, the Court ruled that the concept of 'issuing judicial authority', within the meaning of Framework Decision 2002/584, does not cover the public prosecutor's offices of a Member State which are exposed to the risk of being directly or indirectly subject to orders or individual instructions from the executive, in connection with the adoption of a decision to issue a European arrest warrant.

<sup>3</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) (the 'EAW Framework Decision').

## Findings of the Court

The Court, sitting as the Grand Chamber, rules that the concepts of ‘judicial authority’ and ‘issuing authority’, within the meaning of the European Investigation Order Directive, include the public prosecutor of a Member State or, more generally, the public prosecutor’s office of a Member State, even though they are in a relationship of legal subordination to the executive of that Member State, which exposes them to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

In that regard, the Court notes, as a preliminary point, that, under that directive, a European investigation order may be executed only if the authority which issued it is an ‘issuing authority’,<sup>4</sup> and that, where such an order is issued by an issuing authority other than a judge, a court, an investigating judge or a public prosecutor competent in the case concerned, it must be validated by a ‘judicial authority’ before being transmitted for the purposes of its execution in another Member State.

That clarification being made, the Court notes, first of all, that, unlike what is provided for in the EAW Framework Decision, which uses the concept of ‘issuing judicial authority’ without specifying the authorities covered by that concept, the European Investigation Order Directive expressly provides<sup>5</sup> that the public prosecutor is included among the authorities which, like a judge, court or investigating judge, are understood as an ‘issuing authority’. Furthermore, the Court points out that, in that directive, the public prosecutor is also one of the ‘judicial authorities’ empowered to validate a European investigation order before it is forwarded to the executing authority, where that order has been issued by an issuing authority other than a judge, court, investigating judge or public prosecutor competent in the case concerned.<sup>6</sup> The Court states that, in that directive, the classification of the public prosecutor as an ‘issuing authority’ or ‘judicial authority’ is not made subject to there being no relationship of legal subordination to the executive of the Member State to which the public prosecutor belongs.

Next, the Court emphasises that the issuing or the validation of a European investigation order is subject to a procedure and to guarantees distinct from those governing the issuing of an EAW. In particular, it notes that, pursuant to the European Investigation Order Directive, the public prosecutor who issues or validates such an order must take into account the principle of proportionality and the fundamental rights of the person concerned and that the order must be capable of being the subject of effective legal remedies, at least equivalent to those available in a similar domestic case. The Court also notes the possibility offered by that directive to the executing authority and, more broadly, to the executing State, of ensuring, by various mechanisms, that that principle and the fundamental rights of the person concerned are respected. The Court concludes that, both at the stage of the issuing or validation and of the execution of the European investigation order, the European Investigation Order Directive contains a set of safeguards to ensure the protection of the fundamental rights of the person concerned.

Lastly, the Court states that the objective pursued by a European investigation order is distinct from that pursued by an EAW. While the EAW seeks the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European investigation order is to have one or several specific investigative measures carried out to obtain evidence. Thus, while some of those investigative measures may be intrusive, a European investigation order is not, however, unlike an EAW, such as to interfere with the right to liberty of the person concerned.

Therefore, in the Court’s view, in the light of all those differences between the EAW Framework Decision and the European Investigation Order Directive, the interpretation in its recent

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<sup>4</sup> Within the meaning of Article 2(c) of the European Investigation Order Directive.

<sup>5</sup> This is provided for in Article 2(c)(i) of the European Investigation Order Directive.

<sup>6</sup> This is set out in Article 2(c)(ii) of the European Investigation Order Directive.

judgments<sup>7</sup> – according to which the concept of ‘issuing judicial authority’ within the meaning of that framework decision does not cover the public prosecutor’s offices of a Member State which are exposed to the risk of being subject to individual instructions from the executive – is not applicable in the context of the European Investigation Order Directive.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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<sup>7</sup> Judgments in *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)* and *PF (Prosecutor General of Lithuania)*, see footnote 2.