

Case C-16/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 January 2022

Referring court:

Oberlandesgericht Graz (Austria)

Date of the decision to refer:

21 December 2021

Appellant:

MS

Other party:

Staatsanwaltschaft Graz

Subject matter of the main proceedings

European Investigation Order (EIO), issuing authorities and judicial authorities

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Must the first sentence of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters be interpreted as meaning that a German tax office for criminal tax matters and tax investigation which is empowered under national rules to exercise the rights and fulfil the obligations of the public prosecutor's office in relation to certain offences is to be regarded as a 'judicial authority' and an 'issuing authority' within the meaning of those provisions of EU law?

Provisions of EU law relied on

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters ('Directive 2014/41'), in particular the first sentence of Article 1(1) and Article 2(c)(i) and (ii)

Provisions of national law relied on

Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (Austria, Federal Law on judicial cooperation in criminal matters with the Member States of the European Union; 'the EU-JZG')

Abgabenordnung (Germany, General Tax Code; 'the AO')

Gesetz über die internationale Rechtshilfe in Strafsachen (Germany, Law on international mutual assistance in criminal matters, 'the IRG')

Succinct presentation of the facts and procedure in the main proceedings

- 1 The Finanzamt für Steuerstrafsachen und Steuerfahndung Düsseldorf (Tax Office for Criminal Tax Matters and Tax Investigation, Düsseldorf, Germany; 'the Tax Office') is investigating the defendant, MS, on suspicion of tax evasion. The accused person, as managing director of a limited liability company, is alleged to have failed to declare turnover from a brothel business in the period from 2015 to February 2020, with an estimated tax impact of EUR 1.6 million.
- 2 In order to clarify the facts of the case, the Tax Office issued a European Investigation Order ('EIO'), which it transmitted to the Staatsanwaltschaft Graz (Public Prosecutor's Office, Graz, Austria) on 23 July 2020. The Tax Office asked the Public Prosecutor's Office to request from an Austrian bank documents relating to two accounts held in the name of the accused person.

- 3 The EIO was signed by the Leitender Regierungsdirektor (Senior Government Director) of the Tax Office. In Section K of the EIO ('Details of the authority which issued the EIO'), the 'judicial authority' box was ticked.
- 4 In accordance with the Austrian Strafprozessordnung (Code of Criminal Procedure), a bank may be required to provide information on back accounts and to forward bank account statements only pursuant to an investigative measure, which must be ordered by the public prosecutor's office on the basis of a court authorisation. Without court authorisation, the Austrian public prosecutor's office may not order such an investigative measure.
- 5 On 3 August 2020, the public prosecutor's office, Graz issued an order for the execution of the EIO. The execution was authorised by the Landesgericht Graz (Regional Court, Graz, Austria) on 5 August 2020 and the Public Prosecutor's Office, Graz ordered the execution of the measure on 7 August 2020.
- 6 The accused person appealed against the order of the Regional Court, Graz of 5 August, by which execution was authorised. An appeal brought by the accused person in Germany had been unsuccessful.

The essential arguments of the parties in the main proceedings

- 7 The accused person takes the view that the Tax Office is not an issuing authority and judicial authority within the meaning of Article 1(1) and Article 2(c) of Directive 2014/41 and is therefore not authorised to issue an EIO. He submits that the Tax Office lacks the autonomy, independence and freedom from instruction that are required of a judicial authority. The Tax Office is not comparable to a public prosecutor's office, but, rather, the officials of the tax investigation office are to be regarded merely as auxiliary officials of the public prosecutor's office. Nor can the Tax Office be regarded as an issuing authority, since the EIO was not validated by a judicial authority within the meaning of Article 2(c) of Directive 2014/41.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 The referring court refers to a decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) of 2 June 2020, in which the latter held that, in proceedings under the German AO, German tax offices exercise rights and fulfil obligations of public prosecutors' offices and thus act as judicial authorities within the meaning of Article 2(c) of Directive 2014/41. Consequently, they must be regarded as 'issuing authorities' within the meaning of Directive 2014/41.
- 9 The relevant German legislation states the following in that regard:

Paragraph 386(2) of the AO:

‘The tax authority shall carry out an independent investigation ... where the facts exclusively constitute a tax offence ...’

Paragraph 399(1) of the AO:

‘Where the tax authority acts independently under Paragraph 386(2), it shall exercise the rights and fulfil the obligations corresponding to the public prosecutor’s office at the investigation stage.’

- 10 The referring court is required to assess the permissibility of the execution of the Tax Office’s EIO under the EU-JZG, specifically under Paragraphs 55 to 55m of the EU-JZG, which transposed Directive 2014/41 into national law. Paragraph 55(3) of the EU-JZG provides as follows: ‘Where, in the issuing State, the proceedings are not conducted by a judicial authority, a European investigation order may be executed only if it is possible to bring an action before a court against the order of the issuing authority and the investigation order has been authorised by a judicial authority of the issuing State.’ If those requirements are not met, the execution of an EIO is impermissible under point 9 of Paragraph 55a(1).
- 11 According to a statement issued by the Permanent Representation of the Federal Republic of Germany to the EU, it is provided that, in accordance with Article 2(c) of Directive 2014/41, EIOs issued by the German administrative authorities to other Member States of the European Union are, in principle, validated by the public prosecutor attached to 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 independently under Paragraph 386(2) of the AO do not require validation by a judicial authority or a court. In such cases, the tax authorities exercise the rights and fulfil the obligations of a public prosecutor’s office under Paragraph 399(1) of the AO, in conjunction with Paragraph 77(1) of the IRG, and they themselves act as a judicial authority for the purposes of Article 2(c) of Directive 2014/41.
- 12 Since the EIO was not validated by a judicial authority in accordance with the second sentence of Article 2(c)(ii) of Directive 2014/41, the question arises as to whether, with regard to the issuance of an EIO, the Tax Office can be equated with a judicial authority within the meaning of Article 1(1) of Directive 2014/41 and with a public prosecutor within the meaning of Article 2(c)(i) thereof. If that question is answered in the negative, the execution of that EIO in Austria is impermissible.
- 13 In particular, the following arguments militate against regarding a German tax office, which, under national law, exercises the rights and fulfils the obligations of public prosecutors in respect of certain offences, as an issuing authority and judicial authority within the meaning of Directive 2014/41:

According to the first sentence of Article 1(1) of that directive, a European Investigation Order is a judicial decision which has been issued or validated by a judicial authority. In accordance with Article 2(c)(ii), an EIO may be issued not only by a judge or a public prosecutor, but also by 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 such cases, however, the EIO is to be validated by a judge or a public prosecutor in the issuing State before it is transmitted to the executing authority.

Accordingly, in Case C-584/19 (*Staatsanwaltschaft Wien*, EU:C:2020:1002), the Court stated, in paragraph 46, that an EIO may be executed only if the authority which issued it is an issuing authority within the meaning of Article 2(c)(i) or if such an order is validated by a judicial authority before being transmitted.

Consequently, the EU legislature has conferred on the issuing authorities referred to in Article 2(c)(i) of Directive 2014/41 (judges and prosecutors) a special status which the authorities referred to in point (ii) of that provision do not have. Therefore, before they are transmitted, EIOs issued by investigating authorities must be validated, that is to say, their content must be examined, in the light of the principles set out in recitals 11, 12 and 15 and Article 6(1) of Directive 2014/41.

In Case C-584/19, the Court held that Article 1(1) and Article 2(c) of Directive 2014/41 must be interpreted as meaning that the concepts of issuing authority and judicial authority include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting an EIO.

Financial crime authorities, on the other hand, are not referred to in Article 2(c)(i) of Directive 2014/41 and differ significantly from a public prosecutor's office, since a financial crime authority is an administrative authority which forms part of the executive branch and lacks autonomy, independence and freedom from instruction. A German tax office is empowered to conduct criminal investigations independently only in the case of certain offences, and the proceedings can be taken over by the public prosecutor's office at any time and without justification.

In his Opinion of 11 March 2021 in Case C-66/20, Advocate General Campos Sánchez-Bordona stated that a public prosecutor's office acts as a guarantor

of legality before the courts, is a real participant in the administration of justice, and is not exclusively or primarily concerned with the public authorities' interest but rather with the general interest in compliance with the law. The rationale behind Article 2 of Directive 2014/41 is that administrative authorities have to require validation from judicial authorities in order to issue an EIO, and that rationale would cease to exist if authorities forming part of the executive were placed on the same footing as judicial authorities.

- 14 However, arguments militating in favour of regarding a tax office as an issuing authority and judicial authority within the meaning of the first sentence of Article 1(1) and Article 2(c)(i) of Directive 2014/41 can also be found in the judgment of the Court in Case C-584/19:

Article 2(c) of Directive 2014/41 makes classification as an issuing authority subject to the sole condition that the court and the persons acting as judge, investigating judge or public prosecutor have competence in the case concerned.

Directive 2014/41 lays down specific provisions intended to ensure that the issuing of an EIO is accompanied by guarantees specific to the adoption of judicial decisions (for example, respect for fundamental rights and effective judicial protection).

The sole aim of the issuing of an EIO is to have one or several specific investigative measures for obtaining evidence carried out in an expedited manner, which are not such as to interfere with the right to liberty of the person concerned.