

**Case C-635/23**

**Request for a preliminary ruling**

**Date lodged:**

23 October 2023

**Referring court:**

Kammergericht (Berlin, Germany)

**Date of the decision to refer:**

20 October 2023

**Applicant:**

WBS GmbH

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**KAMMERGERICHT (HIGHER REGIONAL COURT, BERLIN)**

**Order**

[...]

In the mutual legal assistance matter concerning

the European Investigation Order issued by the Office for the

Eradication and Prevention of Corruption of the Republic of Latvia on  
25 April 2019,

in the present case only as regards

WBS GmbH,

[...]

the Fourth Criminal Chamber of the Kammergericht (Higher Regional Court),  
Berlin, made the following order on 20 October 2023:

The following question is referred to the European Court of Justice for a  
preliminary ruling under Article 267 TFEU:

Can a European Investigation Order concerning a measure reserved to the courts under the law of the issuing State be issued by another competent authority, within the meaning of Article 2(c)(ii) 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, in collaboration with a non-judicial validating authority, if a court of the issuing State has previously authorised the investigative measure in compliance with the obligations provided for in Directive 2014/41/EU to make assessments and state reasons?

Grounds:

1 A: Facts of the case

On 5 April 2019, the Latvian Office for the Eradication and Prevention of Corruption initiated criminal proceedings for suspected large-scale swindling, large-scale unlawful waste of another persons' property and forgery of documents as well as use of forged documents against officials of a Riga foundation. In the course of its investigations, the Office considered it necessary to search the Berlin business premises of the companies FF GmbH and WBS GmbH and applied to the investigating judge of the Rīgas pilsētas Vidzemes priekšpilsētas tiesa (Riga City Court (Vidzeme District), Latvia) for authorisation of those investigative measures in accordance with Sections 179 and 180 of Latvia's Kriminālprocesa likums (Code of criminal procedure). By her orders of 24 April 2019, the investigating judge approved the application, stating as grounds for her decision that the premises of the aforementioned companies could be expected to contain documents, data carriers and objects relevant to the proceedings; the purpose of the search was to find and seize them, and the search was necessary and proportionate.

2 On 25 April 2019, the Latvian Office for the Eradication and Prevention of Corruption, as another competent authority within the meaning of Article 2(c)(ii) of Directive 2014/41/EU, issued a European Investigation Order ('EIO') by which it requested that the Federal Republic of Germany examine two witnesses and execute the investigating court's search warrants of 24 April 2019, which were attached to the EIO. The Prosecutor General's Office of the Republic of Latvia validated the EIO and sent it to the Berlin Public Prosecutor's Office.

3 Following a corresponding request from the Berlin Public Prosecutor's Office, the Amtsgericht Tiergarten (Tiergarten Local Court) in Berlin also ordered the search of the business premises of FF GmbH and WBS GmbH. The searches subsequently conducted on 13 May 2019 led to the seizure of numerous items of evidence.

4 The legal representatives of FF GmbH and WBS GmbH filed an appeal against the mutual legal assistance measure before the present Chamber, applying, inter alia, for the surrender of the seized evidence to the Republic of Latvia to be

declared not permissible. In respect of FF GmbH, the present Chamber referred the proceedings to the Bundesgerichtshof (Federal Court of Justice, Germany) for clarification of a legal question concerning the admissibility of the judicial remedy; in respect of WBS GmbH, it decided, inter alia, that the surrender of the evidence was permissible with the proviso that certified copies of the documents were to be surrendered instead of the original documents seized. However, the evidence seized from WBS GmbH was not subsequently surrendered, since it was the view of the Berlin Public Prosecutor's Office that the outcome of the review procedure before the Bundesgerichtshof (Federal Court of Justice) should be awaited.

- 5 Following the decision of the Bundesgerichtshof (Federal Court of Justice), the legal representative of WBS GmbH again applied, inter alia, for the surrender of the seized evidence to the Republic of Latvia to be declared not permissible. He is of the opinion that the present Chamber – in accordance with the provisions of national law providing for such a possibility – has to decide again on the permissibility of the surrender, since there has been a change in the legal situation. He submits that, by virtue of the decision of the European Court of Justice of 16 December 2021 in Case C-724/19, an EIO concerning a measure reserved to the courts under the law of the issuing State can only be issued by a court. In his view, the surrender of the evidence seized is therefore now not permissible in any event, since the search measure which preceded the seizure is reserved to the courts in the Republic of Latvia but the EIO was not issued by a court.
- 6 The Berlin Public Prosecutor's Office asked the Prosecutor General's Office of the Republic of Latvia whether the EIO could be re-issued by a court. The Prosecutor General's Office of the Republic of Latvia replied that this was not possible, as there was no legal basis for it in the law of the Republic of Latvia.
- 7 The present Chamber deferred the decision on the request for a fresh ruling on the permissibility of the mutual legal assistance in order to clarify the question raised by the present order and ordered that the surrender of the seized evidence be postponed.
- 8 B. Grounds for the question referred for a preliminary ruling

I. The Fourth Chamber of the Court of Justice of the European Union ruled by its judgment of 16 December 2021 in Case C-724/19 that 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 must be interpreted as precluding a public prosecutor from having competence to issue, during the pre-trial stage of criminal proceedings, an EIO, within the meaning of that directive, seeking to obtain traffic and location data associated with telecommunications, where, in a similar domestic case, the judge has exclusive competence to adopt an investigative measure seeking access to such data. In the instant case, the Bulgarian Public Prosecutor's Office, as an authority within the meaning of Article 2(c)(i) of Directive 2014/41/EU, had issued, without the prior

involvement of a Bulgarian court, four EIOs concerning the collection of traffic and location data associated with telecommunications. These were measures which, in a similar domestic case, the Bulgarian Public Prosecutor's Office could have ordered only following judicial authorisation.

- 9 II. Applying to the present case the principles set out in the Court's decision, the present Chamber would have to find that the surrender of the seized evidence to the Republic of Latvia was not permissible.

The German legislature has set out the provisions of Directive 2014/41/EU on the requirements regarding the competence of the issuing authority as conditions for the permissibility of mutual legal assistance in Paragraph 91d(1) of the Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international mutual assistance in criminal matters, 'the IRG'). Paragraph 91d(1) of the IRG reads as follows:

*(1) The rendering of mutual assistance is only permissible if the requesting Member State uses the form in Annex A or Annex C of the European Investigation Order Directive, as amended, to make its request and the request*

*1. has been issued by a judicial authority within the meaning of Article 2(c)(i) of the European Investigation Order Directive or*

*2. has been issued by an authority other than that referred to in no. 1 which the requesting Member State has designated as competent therefor and it has been confirmed by an authority pursuant to Section L no. 1 of the form in Annex A of the European Investigation Order Directive.*

- 10 Under Paragraph 91d(1) of the IRG, it would not be permissible to surrender the seized evidence to the Republic of Latvia, as the EIO, in so far as it concerned the search measure inseparably connected with the surrender, would have been issued by an issuing authority lacking the competence to do so. In that respect, the Office for the Eradication and Prevention of Corruption would not be an other authority within the meaning of Article 2(c)(ii) of the Directive, as it would not have had the power to order a search in a similar domestic case. Under Sections 179 and 180 of the Latvian Code of criminal procedure, searches may, in principle, be ordered only by a court. The provisions as they relate to the present proceedings have been translated into English as follows (source: <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/lv/lv043en.pdf>):

*Section 179. Searches*

*(1) A search is an investigative action whose content is the search by force of premises, terrain, vehicles, and individual persons for the purpose of finding and removing the object being sought, if there are reasonable grounds for believing that the object being sought is located in the site of the search.*

*(2) A search shall be conducted for the purpose of finding objects, documents, corpses, or persons being sought that are significant in criminal proceedings.*

*Section 180. Decision regarding a Search*

*(1) A search shall be conducted with a decision of an investigating judge or a court decision. An investigating judge shall take a decision based on a proposal of a person directing the proceedings and materials attached thereto.*

*(2) [...]*

*(3) In emergency cases where, due to a delay, sought objects or documents may be destroyed, hidden, or damaged, or a person being sought may escape, a person directing the proceedings may conduct a search with the consent of a public prosecutor. [...]*

11 The finding that the mutual legal assistance was not permissible which would consequently follow from application of the legal principles arising from the decision of the Court in Case C-724/19 would mean that the Berlin Public Prosecutor's Office would have to return the EIO to the Republic of Latvia in accordance with Article 9(3) of Directive 2014/41/EU.

12 III. However, the present Chamber has doubts as to whether the principles arising from the decision of the Court in Case C-724/19 are to be applied unchanged in the present case or whether, on the contrary, it is sufficient that a court of the issuing State authorised the investigative measure in question before the EIO was issued and did so in compliance with the obligations to make assessments and state reasons laid down in Directive 2014/41/EU.

13 1. Those doubts arise, first, from the fact that the decision of the Court concerned an authority within the meaning of Article 2(c)(i) whereas, in the present case, an 'other competent authority as defined by the issuing State' within the meaning of Article 2(c)(ii) acted as the issuing authority. The present Chamber cannot clearly infer from the Court's decision whether the principles it sets out apply equally to EIOs issued under Article 2(c)(ii). In paragraphs 29 and 30 of its decision, the Court held as follows:

*'29 It is thus apparent from the wording of that provision that the issuing authority must, in all situations covered by that provision, be competent in the case concerned, either as a judge, court, investigating judge or public prosecutor, or, where it is not a judicial authority, as an investigating authority.*

*30 By contrast, an analysis of the wording of that provision does not, in itself, make it possible to determine whether the words "competent in the case concerned" have the same meaning as the words "with competence to*

*order the gathering of evidence in accordance with national law” and, therefore, whether a public prosecutor may be competent to issue an EIO seeking to obtain traffic and location data associated with telecommunications, where, in a similar domestic case, the judge has exclusive competence in respect of an investigative measure seeking access to such data.’*

- 14 In the view of the present Chamber, that could be understood as meaning that an other authority within the meaning of Article 2(c)(ii) can also be the competent issuing authority where ordering such measures is reserved to the courts under national law and that the involvement of a court – clearly still required in that situation – can occur at a different point.
- 15 2. Second, the present situation differs from that which gave rise to the Court’s decision in that, before the EIO was issued, the investigative measure reserved to the courts under the law of the issuing State had been authorised by a court of the issuing State which deemed it necessary and proportionate. In the view of the present Chamber, this means that the considerations underlying the Court’s decision largely do not apply in the present case.
- 16 It is the present Chamber’s understanding that the Court essentially bases its decision on the following three arguments:
- (1) Only the authority competent under national law to order the measure in question can usefully fulfil the obligations laid down in the directive to make assessments (Article 6(1)(a)) and state reasons (cf. paragraphs 32 to 34).
  - (2) By virtue of Article 6(1)(b) of Directive 2014/41, the issuing authority may only issue an EIO where the investigative measure referred to in the EIO could have been ordered under the same conditions in a similar domestic case (paragraph 35).
  - (3) A distinction between the authority which issues the EIO and the authority which is competent to order investigative measures in the context of domestic investigative procedure would complicate the system of cooperation, thereby jeopardising the establishment of a simplified and effective system (paragraph 36 to 38).
- 17 (a) In the view of the present Chamber, considerations (1) and (2) are irrelevant to the present case. The assessment obligations under Article 6(1)(a) of the directive were fulfilled by the authority with competence under national law in respect of the investigative measure before the EIO was issued; the competent investigating judge stated in her order that the searches to be carried out in Berlin were necessary and proportionate. Unlike in the situation which gave rise to the Court’s decision in Case C-724/19, there were no special requirements in the present case in respect of the statement of reasons. The issuing authority also issued the EIO under the conditions under which the investigative measure could have been

ordered in a similar domestic case; it requested the search from a court beforehand, and the court authorised the search before the EIO was issued.

- 18 (b) It is the present Chamber's understanding that, consequently, only consideration (3) remains.

(aa) In that regard, first, the present Chamber believes that the consideration must be analysed in a nuanced manner. In its view, having the authority issuing the EIO necessarily coincide with the authority competent under national law to order the measure may result in complications as well as simplifications. That applies, in particular, to Member States – such as in the German legal system – in which the investigating court does not play a central role in the investigative procedure but comes into contact with the investigation only sporadically, such as for the execution of certain investigative measures requested by the Public Prosecutor's Office or the ordering and confirmation of enforcement measures which are reserved to the court under national criminal procedural law. In the German legal system, in any event, the fact that the investigating court has competence only for certain points means that it only has the case file at the time of its decision and, moreover, is familiar neither with areas of investigation that do not concern its decision nor with developments that occur after its decision. Consequently, in the event that it is classified as an issuing authority and the executing authority raises follow-up questions, as it might, for example, under the first sentence of Article 6(3) of the Directive, the investigating court must first request the case file and (re)familiarise itself with the investigations and their current status. This leads to delays in the flow of mutual legal assistance.

- 19 It must also be considered that situations are conceivable in which the EIO – as in the present case – concerns not only investigative measures the ordering of which is reserved to the court but also measures for which that is not the case. In such a situation, it seems feasible that there would be an option for each authority to issue a separate EIO for the area within its competence. The executing State would then be in contact with different issuing authorities in respect of two EIOs relating to a single set of facts. This may also, in the view of the present Chamber, complicate the system of cooperation.

- 20 (bb) Second, the present Chamber wonders whether consideration (3) may justify the restriction of Member States' discretion in the implementation of Directive 2014/41 which attaches to the principles arising from Case C-724/19. The present Chamber's doubts in this regard are rooted in part in comparison with the legal situation relating to the European arrest warrant, under which it is considered permissible for the issuing authority to be different from the authority having the equivalent competence under national law (cf. judgment of the Grand Chamber of the Court of 27 May 2019, C-509/18), irrespective of the objective, likewise important in that context, of simplifying a previously complicated system of cooperation among the Member States (cf. recital 5 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States).

21 The present Chamber therefore asks as follows:

[...][repetition of the question referred for a preliminary ruling]

[...]

WORKING DOCUMENT