

InfoCuria
Case-law

English (en) ▼

[Home](#) > [Search form](#) > [List of results](#) > [Documents](#)
Language of document : English ▼ ECLI:EU:C:2020:587

Provisional text

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 July 2020⁽¹⁾

Case C-584/19**Staatsanwaltschaft Wien****v****A and Others,
intervener:****Staatsanwaltschaft Hamburg**

(Request for a preliminary ruling from the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria))

(Preliminary-ruling proceedings — Judicial cooperation in criminal matters — European investigation order — Public prosecutor acting as issuing authority — Independence of public prosecutor's office from the executive — Directive 2014/41/EU — Judicial authority authorised to issue a European investigation order — Autonomous concept — Differences between the rules laid down in Directive 2014/41/EU and those laid down in Framework Decision 2002/584/JHA — Protection of fundamental rights — Need for the involvement of a court)

1. The German and Austrian public prosecutor's offices are, respectively, the issuing and executing authorities for the purposes of European investigation orders ('EIOs') processed in accordance with Directive 2014/41/EU. ⁽²⁾

2. In the present case, the Staatsanwaltschaft Hamburg (Public Prosecutor's Office, Hamburg, Germany) issued an EIO requiring the Staatsanwaltschaft Wien (Public Prosecutors' Office, Vienna, Austria) to provide it with certain information regarding a bank account held in Austria. Since, in order to provide that information, Austrian law requires prior authorisation from a court, the Vienna Public Prosecutor's Office sought that authorisation from the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria).

3. That court asks the Court of Justice, in essence, whether the case-law on the independence of public prosecutor's offices in the context of the European arrest warrant ('EAW'), covered by Framework Decision 2002/584/JHA, is applicable to an EIO. ⁽³⁾

I. Legislative framework**A. EU law. Directive 2014/41**

4. Article 1 ('The European Investigation Order and obligation to execute it') reads:

'1. A European Investigation Order (EIO) is 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. The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.

2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive.

3. The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure.

4. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.'

5. Pursuant to Article 2 ('Definitions'):

'For the purposes of this Directive the following definitions apply:

a) "issuing State" means the Member State in which the EIO is issued;

b) "executing State" means the Member State executing the EIO, in which the investigative measure is to be carried out;

c) "issuing authority" means:

a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

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;

d) "executing authority" means an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law.'

6. Article 6 ('Conditions for issuing and transmitting an EIO') provides:

'1. The issuing authority may only issue an EIO where the following conditions have been met:

a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

2. The conditions referred to in paragraph 1 shall be assessed by the issuing authority in each case.

3. Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO.'

B. National law

1. German law. *Gerichtsverfassungsgesetz* (4)

7. Paragraph 146 states:

'The officials of the public prosecutor's office must comply with service-related instructions of their superiors.'

8. Paragraph 147 provides:

'The power of supervision and direction shall lie with:

1. the Federal Minister for Justice and Consumer Protection in respect of the Federal Prosecutor General and the federal prosecutors;

2. the *Land* authority for the administration of justice in respect of all the officials of the public prosecutor's office of the *Land* concerned;

3. the highest-ranking official of the public prosecutor's office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecutor's office of the given court's area of jurisdiction.

...'

2. Austrian law

(a) *Strafprozessordnung* (5)

9. Under Paragraph 4(1), the public prosecutor's office is responsible for conducting pre-trial criminal investigations.

10. When it performs that function, the public prosecutor's office must have prior judicial authorisation to take certain particularly intrusive investigative measures (Paragraphs 101 and 105).

11. Such measures include the obtaining of information about bank accounts and banking transactions (Paragraph 109(4) in conjunction with Paragraph 116(4)).

(b) *Bundesgesetz über die Justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union* (6)

12. Paragraph 55c stipulates that competence for the execution of an EIO lies with the public prosecutor's office in whose district the requested measure is to be carried out.

13. Paragraph 55e provides that the decision of the public prosecutor's office by means of which an EIO is executed must contain: i) information relating to the designation of the public prosecutor, the identity of the suspect, where possible, a description of the acts and their classification, and information about the rights of the person affected by the measure; ii) a description of the measure to be executed; iii) the reasons why that measure is lawful; and iv) a copy of the EIO.

II. Facts and question referred for a preliminary ruling

14. The Hamburg Public Prosecutor's Office is conducting criminal proceedings against A and other unidentified persons, (Z) in which, to clarify the acts at issue and, in particular to identify the perpetrators of those acts, the Hamburg Public Prosecutor's Office sent an EIO to the Vienna Public Prosecutor's Office. The Hamburg Public Prosecutor's Office asked to be provided with copies of certain documents relating to an Austrian bank account for the period from 1 June 2018 to 30 September 2018.

15. In accordance with Paragraphs 109(4) and 116 of the StPO, the Vienna Public Prosecutor's Office asked the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria) for authorisation to access information about the accounts and banking transactions, so that the bank would be obliged to surrender the documents referred to in the EIO.

16. Before granting the authorisation, that court states that, according to the Court of Justice, (8) since it is exposed to the risk of receiving, directly or indirectly, orders or individual instructions from the executive, a German public prosecutor's office may not be considered to be an issuing judicial authority for the purposes of an EIO. The referring court also states that that conclusion may be applied in order to refuse to execute the EIO issued by the Hamburg Public Prosecutor's Office.

17. Although Directive 2014/41 lists a public prosecutor's office as an issuing authority, not all public prosecutor's offices of the Member States satisfy the condition of independence that is required for courts. If the case-law of the Court of Justice on EAWs is applicable to EIOs, the term 'public prosecutor' in Article 2(c)(i) of Directive 2014/41 should be construed in the sense that it does not include public prosecutor's offices which, like the Hamburg Public Prosecutor's Office, are exposed to the risk of receiving individual instructions from the executive. (9)

18. Against that background, the referring court has referred the following question to the Court of Justice for a preliminary ruling:

'Are the terms "judicial authority" within the meaning of Article 1(1) 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 and "public prosecutor" within the meaning of Article 2(c)(i) of the aforementioned Directive to be interpreted as also including 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, such as the Senator of Justice in Hamburg, in the context of the adoption of a decision on the issuance of a European investigation order?'

III. Procedure before the Court of Justice

19. The reference for a preliminary ruling was received at the Court of Justice on 2 August 2019; it was accompanied by a request that it be dealt with under the expedited procedure and an order was made to that effect.

20. Written observations were lodged by the German, Austrian, Spanish, Netherlands and Polish governments and the European Commission.

IV. Assessment

A. Preliminary observation

21. The referring court must decide whether to authorise the conduct of an investigative measure requested by the Vienna Public Prosecutor's Office. If the German public prosecutor's office had not been involved in instigating that request, it does not appear that there would be any difficulties, under national law, in ruling admissible and, if appropriate, fulfilling that request.

22. Subject to the referring court's own view, I must presume that, if that request from the Vienna Public Prosecutor's Office had been made at the request of the Austrian police (an authority of the executive), that factor alone would not have precluded the referring court from processing the request.

23. That being so, even if it were not possible to classify the German public prosecutor's office as a 'judicial authority' (because it is not independent from the executive), I fail to see what difficulty there would be in the referring court deciding on the request before it, which originated from the Hamburg Public Prosecutor's Office and was received directly from the Vienna Public Prosecutor's Office (acting as 'executing authority' under national law).

24. Moreover, the Austrian public prosecutor's office is not independent from the executive either, as the Court previously had occasion to observe. (10) In my view, that does not preclude it from sending the referring court any requests for investigative measures that it considers appropriate, if the circumstances referred to in Paragraphs 109(4) and 116 of the StPO exist.

25. The same is true of the police and other administrative authorities. (11) The question then is whether the fact that the Austrian public prosecutor's office is not independent would lead the court to refuse to grant a request for access to documents relating to a bank account which, on the initiative of the police or other administrative authorities, is sent to it by the Vienna Public Prosecutor's Office.

26. Indeed, the essential consideration when it comes to the adoption by the referring court of its decision (to authorise or refuse to authorise the investigative measure) is not the origin of the request so much as its own judicial function. Since an EAW issued by an Austrian public prosecutor's office (which is not independent from the executive) can also be effective, following *approval* by the competent national court, (12) which scrutinises its proportionality, that same principle can, a fortiori, be applied to investigative measures whose impact on the life of the person concerned is much lower than that of an EAW.

27. Lastly, it should also be noted that EU law contains provisions which impose on the administrative authorities of the Member States the duty to cooperate with each other in order to obtain from financial institutions certain information concerning bank accounts held with those institutions. (13) That duty of cooperation does not require the requesting authority to be independent of the executive.

28. EU law therefore allows the administrative authorities of a Member State (which are, by definition, not independent) to request from their counterparts in another Member State specific information regarding bank accounts, which the latter have a duty, in principle, to hand over. There is no reason in principle, from that perspective, why the same criterion should not apply to relationships between public prosecutor's offices in that area, when they are acting as EIO issuing or executing authorities.

B. EIO issuing authorities

29. Directive 2014/41 was adopted on the basis of Article 82(1) TFEU, pursuant to which judicial cooperation in criminal matters is to be based on the principle of mutual recognition.

30. An EIO is defined 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. (14)

31. Directive 2014/41, which replaces a number of conventions on legal assistance, (15) is intended to become the sole legislative instrument on the conduct of investigative and evidence-gathering measures at EU level. Its aim is to facilitate and accelerate the gathering and transmission of evidence within the European Union and to improve efficiency in investigative procedures.

32. The most important feature of EIOs, as regards the present reference for a preliminary ruling, is that Directive 2014/41 covers two categories of 'issuing authority':

Judicial authorities, (16) which can only be 'a judge, a court, an investigating judge or a public prosecutor competent in the case concerned' (Article 2(c)(i)), all on an equal footing.

Non-judicial authorities, provided that they are competent to carry out investigations in criminal proceedings and to order the gathering of evidence in accordance with national law (Article 2(c)(ii)). (17) EIOs issued by any non-judicial authorities must be validated by a *judicial* authority. (18)

33. Article 2(c)(i) of Directive 2014/41 specifically mentions public prosecutors in the list of (*judicial*) EIO issuing authorities. Until now, there was no doubt that that unambiguous term permitted competent prosecutors (under their national law) to issue EIOs directly.

34. As I stated, the referring court's uncertainties have arisen as a result of the judgment in *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* in connection with the definition of 'judicial authority' in the context of Framework Decision 2002/584. Since that judgment found that a German public prosecutor's office did not have the necessary features of independence required for it to issue an EAW, the national court wonders whether, in addition, a German public prosecutor's office does not have those features for the purposes of issuing an EIO, because it does not have the characteristics of an independent judicial authority. (19)

35. Acceptance of that view would mean that, in Germany, public prosecutors would not be able to describe themselves as issuing authorities for the purposes of Article 2(c)(i) of Directive 2014/41 and that EIOs issued by them would require validation. In other words, they would have to come under Article 2(c)(ii). As an additional consequence, and contrary to the purport of Article 2(c)(ii), they would not be able to act as a validating authority for EIOs issued by other (administrative) authorities either.

36. In the following paragraphs, I shall argue that the term 'judicial authority' does not necessarily have to be construed in the same way in all the instruments concerning judicial cooperation in criminal matters.

37. I do not believe that any requirement that that interpretation must be uniform flows from primary EU law. It might be considered that a single definition of that concept, valid for all aspects of judicial cooperation in criminal matters, would simplify the difficulties of interpretation. However, I believe that the opposite would occur: giving way to that interpretative *temptation* would create more problems than it appears to resolve.

38. The EU legislature has freedom to include within that concept any of the institutions which participate in the administration of justice, provided that it respects the substance of the concept by not applying it to entities that are not part of the administration of justice. Everything will depend on the legislative context into which each type of judicial cooperation fits.

C. The judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*

39. In that judgment, the Court defined the term 'judicial authority' solely in relation to Framework Decision 2002/584, and, in that connection:

The Court indicated that that term is autonomous and must be interpreted uniformly throughout the Union in the light of the wording of the provision interpreted, its legislative scheme and the objective it pursues. (20)

The Court expressly referred to 'the words "judicial authority", contained in that provision [the Framework Decision]'. (21)

The Court referred to 'the concept of a "judicial authority", within the meaning of Article 6(1) of Framework Decision 2002/584'. (22)

The Court examined the 'legislative scheme [of Article 6(1)]'. (23)

The Court took into account the objective of the Framework Decision. (24)

40. In my Opinion in that case, I stated that 'the modalities of [the] participation of the Public Prosecutor's Office in the administration of justice are varied, and mechanisms or solutions intended for one area should not be automatically extrapolated to other areas of a different nature.' (25)

41. I gave the specific example of Article 2 of Directive 2014/41, which included the public prosecutor among the authorities authorised to issue an EIO. I also recalled the Opinion in *Özcelik* in order to emphasise that 'it is not possible simply to equate the action of the Public Prosecutor's Office in one area (that relating to freedom, which is affected by the arrest of the persons concerned) and in another (the collection of evidence). ... its acceptance as a judicial authority in Directive 2014/41/EU, for investigation orders, does not necessarily indicate that it has to be extended also to the Framework Decision, for EAWs.' (26)

42. The judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)* confirmed that a German public prosecutor's office is a 'judicial authority'. (27) The reasons for not treating the German public prosecutor's office as an EIO issuing authority relate to its lack of independence, since it may receive orders from the executive in particular cases. However, essentially, those reasons are based on the fact that the *natural* sphere of EIOs represents a serious intrusion by the public authorities in a person's life: the deprivation of liberty (whether temporary or by final judgment), a right protected by Article 6 of the Charter, must be confined, in one way or another, to *independent courts* in the strict sense. (28)

43. In accepting that proposition (with which I agree and which I previously proposed in my Opinion in that case), I must stress that there is no reason why the approach taken in relation to Article 6(1) of Framework Decision 2002/584 should apply automatically to Directive 2014/41.

44. Moreover, a reading of Article 1(1) of Directive 2014/41 in conjunction with Article 2(c) thereof, taking into account the remaining elements which enable a better understanding of its content, suggests that a public prosecutor's office (any public prosecutor's office of a Member State) should be recognised as a 'judicial authority' in so far as it is a 'body which participates in the administration of criminal justice'.

45. I shall endeavour to set out below some of the reasons why the legal rules governing EIOs cannot be treated as equivalent to those governing EAWs.

D. Comparison of Framework Decision 2002/584 with Directive 2014/41

46. The differences between the legal rules applicable to EAWs and those applicable to EIOs are numerous, as befits their disparate natures and diverse functions in the area of judicial cooperation in criminal matters. However, I shall confine myself to pointing out the differences relating to the authorities with competence to issue and execute EAWs and EIOs.

1. The designation of issuing authorities

47. On the subject of EAWs, Article 6(1) of Framework Decision 2002/584 refers only to the 'judicial authority of the issuing Member State'. However, Directive 2014/41 treats EIO issuing authorities very differently, in that it

lists the *judicial* authorities (in the sense described above) which are authorised to issue EIOs, including, *by name*, public prosecutors. (29)

48. Since the question of whether to include or exclude public prosecutor's offices was not resolved during the procedure leading to the adoption of Framework Decision 2002/584, (30) the explicit (and affirmative) decision, taken by the EU legislature in 2014, to accept public prosecutor's offices as EIO issuing authorities cannot be regarded as coincidental or inadvertent.

49. That decision was intentional and is aimed at including, unequivocally, for the avoidance of doubt, all judicial authorities (specifically, public prosecutors) who, in the procedural landscape of the Member States, lead, direct or play a prominent role in pre-trial criminal investigations.

50. The Explanatory Memorandum to the Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (31) gave prominence, among its specific objectives, to the need to preserve the particular features of national systems and their legal culture.

51. That Memorandum emphasised that the evidence-gathering sector is one which presents the greatest differences between national systems, which are often rooted in a Member State's legal culture as much as in its history. The Memorandum concluded that it is essential to improve cooperation in this area, without affecting any fundamental aspects or the differences between national systems.

52. Therefore, it is no coincidence that Article 2(c)(i) of Directive 2014/41 uses the phrase 'competent in the case concerned' after listing the issuing authorities for EIOs. Nor is it a coincidence that successive provisions of that Directive repeat the words 'in accordance with national law', or similar, to refer to certain aspects of organisation and procedure.

53. Through the use of those terms, the EU legislature sought to exclude any attempt to unify the criminal procedural legislation of the Member States, by respecting the freedom of the Member States to organise their respective institutional systems in accordance with their own national rules.

54. The list of authorities laid down in Article 2(c)(i) of Directive 2014/41 meets that criterion in that it refers, on an equal basis, to 'a judge, a court, an investigating judge or a public prosecutor'. All of these are responsible for the conduct of criminal investigations in the different Member States.

55. Accordingly, since the EU legislature was aware of the great diversity of public prosecutor's offices in existence in the different Member States, the inclusion of public prosecutors among the *qualified* issuing authorities can only be understood as the result of a conscious desire to include all types of prosecutors responsible for criminal investigations in those States, whatever their degree of connection to the executive.

56. Clearly, that (variable) degree of connection could not have gone unnoticed by the EU legislature, which was aware that the majority of the Member States which conferred on public prosecutor's offices responsibility for conducting pre-trial investigations in criminal proceedings maintained a link between those offices and the executive.

57. Directive 2014/41 was adopted to speed up the gathering and transmission of evidence with a cross-border dimension by simplifying the fragmented and complicated legislative framework in force until then. (32) The judicial cooperation instruments which preceded it did not stipulate that a public prosecutor's office should be independent from the executive, as regards its tasks in the area of pre-trial investigations, and there is nothing to suggest — on the contrary — that the EU legislature would opt to lay down that (new) requirement. As in the case of the pre-existing instruments on cooperation in criminal matters, the EU legislature preferred to respect the pre-trial criminal investigation structures of the different Member States.

2. The enhanced position of the executing judicial authority

58. Directive 2014/41 and Framework Decision 2002/584 have in common the possibility that the executing authority may refuse to carry out the request, albeit for different reasons. The particular feature of Directive 2014/41 is that it also provides the executing authority with a broad range of mechanisms for consultation (33) and for adjustment of the scope of an investigative measure.

59. Unlike Framework Decision 2002/584, Article 10 of Directive 2014/41 authorises the executing authority to have recourse to an investigative measure other than that indicated in an EIO. The executing authority may do this where the investigative measure indicated in the EIO 'does not exist under the law of the executing State ... or ... would not be available in a similar domestic case' (34) (paragraph 1), or where the executing authority is able to select another measure which 'would achieve the same result by less intrusive means' (paragraph 3).

60. Framework Decision 2002/584 does not offer that latitude and instead places strict conditions on the actions of EAW executing authorities. An EAW's *centre of gravity* — if I may be permitted to use that expression — rests with the issuing authority, whose position of institutional independence (35) in itself provides the executing authority with a *guarantee* (36) that the restriction of personal liberty is not able to be challenged from that perspective.

61. On the other hand, it is not necessary in relation to EIOs for the issuing authority to have the same degree of independence for the purposes of dealing with the executing authority. Apart from the presumption flowing from the principle of mutual recognition, the executing authority has a range of options for confirming that there is no dysfunction, as I have pointed out.

62. The difference between the legal rules governing EAWs and EIOs is confirmed by the fact that, as a guiding principle for the conduct of executing authorities, EIOs are not only subject to Directive 2014/41 but also to 'procedures applicable in a similar domestic case' (Article 2(d)).

63. There follows from that proposition a consequence which I believe is of relevance to the present case, which is referred to in Article 2(d), *in fine*, of Directive 2014/41 and to which I shall return below: 'Such procedures may require a court authorisation in the executing State where provided by its national law.' (37)

64. Where, under the domestic law of the executing State (as in Austria), an investigative measure requires court authorisation, that authorisation provides an additional, properly judicial, element of guarantee. It is for the judge or court designated under the provisions of the executing State to issue that authorisation.

65. Therefore, in those circumstances, *effective* compliance with an EIO is dependent on a court in the executing State, regardless of who the issuing and executing authorities are. Naturally, Directive 2014/41 does not specify in which Member States the national procedural provisions require such judicial authorisation in order to carry out an investigative measure.

E. Safeguarding the rights of a suspected or accused person

66. The national court refers to the protection of the fundamental and other procedural rights of the persons concerned, citing paragraph 67 et seq. of the judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)* as a supplementary argument in its order for reference.

67. The protection of fundamental rights, and of the other procedural rights of persons who are the subject of investigations into criminal activities, is a concern which emerged during the preparatory work for Directive 2014/41 and which was given concrete expression in that directive. (38)

68. The Memorandum made clear that a specific objective was the maintenance of a high degree of protection of the fundamental rights and other procedural rights of suspects. That objective (and its subsequent reflection in the statutory provision) is due to the fact that the collection of evidence in another Member State should not affect the guarantees of suspects, particularly as regards the right to a fair trial. Therefore, Directive 2014/41 is connected to other directives relating to procedural rights in criminal proceedings. (39)

69. Framework Decision 2002/584 and Directive 2014/41 also pursue different purposes in that field:

As I have pointed out, Framework Decision 2002/584 concerns the right which is liable to be most affected by State action aimed at the suppression of criminal activities. The immediate and direct aim of an EAW is to deprive a person of liberty so that he or she can be surrendered to another Member State in order to serve a sentence or be tried in criminal proceedings. (40) The right to liberty is one of the rights protected by the Charter (Article 6) and must therefore have proper judicial protection (Article 47).

Naturally, Directive 2014/41 stresses the protection of the fundamental and procedural rights of a person affected (suspect or accused) by an investigative measure. However, although some investigative measures may, in turn, result in the limitation of a fundamental right, none of those measures has the force of an EAW. Obviously, EIOs must be processed with respect for the fundamental rights, (41) but that does not mean that those rights are thereby limited in every case, whatever the measure ordered.

70. The investigative measures which may be carried out under Directive 2014/41 encompass a broad spectrum ranging from measures which are 'non-coercive' (42) (recital 12 and Article 10(2)) to measures which are coercive and which, as a result, may involve 'interference', to a greater or lesser extent, with certain fundamental rights (recital 10).

71. It is also possible that measures may be ordered at the request of, and, therefore, for the benefit of, the suspected or accused person (Article 1(3)), which means that any negative effects within the sphere of their rights and interests can be discounted.

72. On that basis, I believe that it is useful to deal separately with the protection of a suspected or accused person's rights at the stages of issuing and executing an EIO, paying special attention to the involvement of the public prosecutor's office at both stages.

1. The protection of a suspected or accused person's rights at the stage of issuing an EIO

73. The issuing authority must ensure that the rights of a suspected or accused person are respected: that is the purport of recital 12 of Directive 2014/41 (43) and is also provided for in Article 6(1) and (2).

74. Directive 2014/41 is based on the presumption of compliance with EU law, and, in particular, the fundamental rights, by the other Member States. (44) Accordingly, the EIO form in Annex A to that Directive ('the form') begins with an introduction in which the issuing authority itself must certify that, inter alia other matters, the EIO is necessary and proportionate and that the rights of the suspected or accused person have been taken into account.

75. In its role as guarantor of legality and, by extension, individual rights, where a public prosecutor's office acts as an issuing authority, it must fulfil those requirements. Therefore, it has to complete the form in the most appropriate manner to ensure that the executing authority which receives it is in no doubt that the conditions laid down in Article 6(1) of Directive 2014/41 have been respected.

76. Where national law provides for public prosecutor's offices to be issuing authorities, it may also give courts responsibility for authorising the adoption of certain measures (particularly if those measures are intrusive in nature). Directive 2014/41 does not provide for the need for such authorisation before an EIO can be issued but there is nothing to preclude the legislation of the Member State concerned from requiring this. In those circumstances, there is a double guarantee that the rights of a suspected or accused person are protected from the outset in the issuing Member State. (45)

2. Protection of a suspected or accused person's rights at the stage of executing an EIO

77. The guarantee of fundamental rights in the executing State is referred to in recital 19 (46) of Directive 2014/41 and is given concrete expression in Article 11(1)(f), in accordance with which, 'without prejudice to Article 1(4), recognition or execution of an EIO may be refused in the executing State where ... there are substantial grounds to believe that the execution of the ... measure ... would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

78. The phrase 'without prejudice to Article 1(4)' (47) reveals the importance of that provision of Directive 2014/41, which is one of the general clauses intended to govern the activities of EIO issuing and executing authorities.

79. Therefore, it is the responsibility of public prosecutor's offices, in Member States which have designated public prosecutor's offices as executing authorities, to comply with those requirements, which may even result in

refusal by the public prosecutor's office to recognise or execute an EIO.

80. While Directive 2014/41 does not arrive at such a drastic solution, it does confer on public prosecutor's offices, where these are designated as executing authorities, the power to modify the execution of an EIO, relying either on Article 10 (investigative measures other than those requested) or on the mechanism for consultation with the issuing authority (Articles 6(3) and 9(6)).

81. In short, by the time an EIO is executed, protection of the fundamental rights and the other procedural rights of a suspected or accused person has passed through a series of filters and 'safeguards' (48) which help to dispel any doubt in that connection.

82. The circle of protection of those rights is closed, in the scheme of Directive 2014/41, by the requirement to establish 'legal remedies', as referred to in recital 22 (49) and given concrete expression in Article 14.

83. In both the issuing State and the executing State, (50) those remedies fill, so to speak, the *gap* which was noticeable in Framework Decision 2002/584 and which led to questions referred for a preliminary ruling by other courts, which the Court was required to answer. Therefore, the concerns expressed, in that regard, in the order for reference, do not reflect the terms of Directive 2014/41.

3. Possible (supplementary) action by a court of the executing State where the public prosecutor's office is the executing authority in that State

84. In accordance with Article 2(d) of Directive 2014/41, the execution of an EIO is carried out 'in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law.'

85. In the present case, the referring court is responsible for authorising the measure requested by the Vienna Public Prosecutor's Office, since that is provided for by the StPO. Therefore, Directive 2014/41 does not require the referring court to intervene although, out of respect for national procedures, that directive does not preclude it from doing so. However, the referring court's involvement does not transform that court into the executing authority. (51)

86. In the scheme of Directive 2014/41, when the competent court examines the request for authorisation, it does not replace the executing authority of that Member State. The latter (in the present case, the Vienna Public Prosecutor's Office) is solely responsible for giving effect to the measure sought.

87. Therefore, the national court, which is responsible for granting judicial authorisation to access information relating to the bank account, does not need to consider what links exist between the Hamburg Public Prosecutor's Office (which acted as issuing authority) and the executive in the issuing State. Otherwise, that court would be establishing an additional condition, not laid down in Directive 2014/41, which is not even required of national investigating authorities.

88. In other words, and returning to the start of this analysis, it follows from the scheme of Directive 2014/41 that the referring court must deal, for the purposes of its admissibility, with the EIO received from the Hamburg Public Prosecutor's Office via the Vienna Public Prosecutor's Office just as it would a request for the authorisation of measures sought by the Austrian public prosecutor's office in an Austrian criminal investigation.

F. Corollary

89. Directive 2014/41 contains a complete set of rules governing the relationship between EIO issuing and executing authorities. Those rules take account at all times of the need to respect the fundamental rights and the other procedural rights of suspected or accused persons. In addition to the presumption inherent in the principle of mutual recognition, the system of judicial cooperation in criminal matters provides, in this area, sufficient guarantees that the rights of such persons will be protected.

90. That legislative framework is sufficiently broad to include as issuing authorities the public prosecutor's offices of all the Member States, whatever their institutional position vis-à-vis the executive. In every instance, the executing authority must evaluate whether the EIO sought satisfies the conditions for execution. Directive 2014/41 provides for appropriate judicial remedies against the executing authority's decision.

91. Therefore, the fact that a public prosecutor's office of a Member State may receive specific instructions from the executive is not sufficient for the purposes of systematically refusing to execute EIOs issued by it. Otherwise:

Every executing authority would have to make sure that the issuing public prosecutor's office is not subject to those instructions. That would, in all likelihood, create significant legal uncertainty and a delay (52) in the conduct of criminal investigations with a cross-border dimension, impeding 'quick, effective and consistent cooperation between the Member States in criminal matters'. (53)

There would be a covert amendment of Directive 2014/41, making it necessary to exclude the public prosecutor's offices of certain countries from Article 2(c)(i) thereof and insert them into Article 2(c)(ii), which would also mean that they would not be able to validate the decisions of other EIO issuing authorities either.

This would necessitate a redefinition of the distribution of powers between the issuing authorities in the Member States, (54) which would lead to distortion of the intentions of the EU legislature, which was seeking not to alter but to respect the institutional and procedural systems of the Member States that were in force when Directive 2014/41 was adopted.

V. Conclusion

92. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria):

'Public prosecutor's offices of the Member States that have been designated as issuing authorities may be classified as issuing authorities under 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.'

Original language: Spanish.

2 Directive 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).

3 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

4 Law on the organisation of the courts.

5 Code of criminal procedure ('StPO').

6 Federal Law on judicial cooperation in criminal matters with the Member States of the European Union.

7 The basis for the investigation is that, in July 2018, using unlawfully obtained data, the suspects falsified 13 transfer orders by means of which they transferred to a bank account (held in the name of A at an Austrian bank) the amount of EUR 9 775.04.

8 Judgment of 27 May 2019, *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)*, C-508/18 and C-82/19 PPU, EU:C:2019:456 ('judgment in *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)*').

9 The Hamburg Public Prosecutor's Office comes under the organisational control of the Hamburg Justizsenator (Senator of Justice) who is part of the executive and can issue instructions to the Hamburg Public Prosecutor's Office in particular cases.

10 Judgment of 9 October 2019, *NJ (Vienna Public Prosecutor's Office)*, C-489/19 PPU, EU:C:2019:849, paragraph 40: '... in the case of the Austrian Public Prosecutor's Offices, Paragraph 2(1) of the StAG states that they are directly subordinate to the higher public prosecutor's offices and subject to their instructions and that the latter are in turn subordinate to the Federal Minister of Justice. Given that the necessary independence requires that there be statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a European arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive, the Austrian Public Prosecutor's Offices cannot be regarded as satisfying that requirement (see, by analogy, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraphs 74 and 84).' No italics in the original.

11 Expressly excluded by the Court from the list of authorities participating in the administration of criminal justice (paragraph 50 of the judgment in *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)*).

12 Judgment of 9 October 2019, *NJ (Vienna Public Prosecutor's Office)*, C-489/19 PPU, EU:C:2019:849, operative part: '... European arrest warrants issued by the public prosecutor's offices of a Member State fall within that concept, despite the fact that those public prosecutor's offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive ... provided that those arrest warrants are subject ... to endorsement by a court which reviews independently and objectively ... the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form.'

13 Article 8(3a) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1). See judgment of 14 April 2016, *Sparkasse Allgäu*, C-522/14, EU:C:2016:253.

14 EIOs can cover almost all means of evidence: it is sufficient if the measure requested exists in the legal system of the executing State (Article 10 of Directive 2014/41).

15 Article 34 of Directive 2014/41. Compared with those earlier instruments, the principle of mutual recognition has been relaxed and certain limits are now allowed.

16 The adjectives 'judicial' and 'non-judicial' do not appear as such in the list of definitions in Article 2 of Directive 2014/41. I am using them for reasons of simplicity because, really, they reflect the nature of the institutions covered by both categories.

17 The secretariat of the European Judicial Network drew up a list of competent authorities, updated on 30 September 2019, which shows the diversity of the criteria used in 24 Member States. The majority (16) do not provide for the participation of non-judicial issuing authorities, whose involvement requires validation. States which do provide for the participation of non-judicial issuing authorities include in that category administrative authorities with competence in taxation, customs and administrative matters in general (https://www.ejn-crimjust.europa.eu/ejn/EJN_RegistryDoc/EN/3115/0/0).

18 In Germany, administrative authorities authorised to prosecute administrative offences may issue EIOs, while responsibility for validating those EIOs rests with the public prosecutor's office for the same district. However, as regards tax authorities, Finanzamts take the view that, under Paragraph 399(1) of the German Tax Code, such

authorities perform the duties of the public prosecutor's office in criminal proceedings for tax offences and therefore they should be treated as EIO issuing authorities for the purposes of Article 2(c)(i) of Directive 2014/41. On the difficulties created by that issue, see the reference for a preliminary ruling in Case C-66/20, *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster*.

19 An additional difficulty as regards the definition of 'judicial authority' is that Article 1(1) of the German version of Directive 2014/41 uses the expression *gerichtliche Entscheidung*, which appears to denote action by a court (*Gericht*). The Commission (paragraph 28 of its observations) and the German Government (paragraph 42 of its observations) therefore suggest use of the term *justizielle Entscheidung*.

20 Judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*, paragraph 49.

21 *Ibid.*, paragraph 50.

22 *Ibid.*, paragraph 51.

23 *Ibid.*, paragraph 52.

24 *Ibid.*, paragraphs 49 and 56.

25 Opinion in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*, (EU:C:2019:337), points 37 to 40.

26 Opinion in *Özçelik* (C-453/16 PPU, EU:C:2016:783, point 51). In particular, the treatment of a public prosecutor's office as a judicial authority in relation to an EAW is restricted to Article 8(1) of Framework Decision 2002/584, in so far as it is an authority authorised to issue the 'judicial decision' provided for in Article 8(1)(c) (national arrest warrant), which precedes the issue of an EAW. In addition, in the Opinion in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*, I pointed out that, in other areas of cooperation in criminal matters, a public prosecutor's office is considered to be a 'judicial authority' (point 38).

27 Judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*, paragraphs 50 to 63: 'the words "judicial authority", contained in that provision, are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State' (paragraph 50). In the circumstances examined in that case, the Court held that '[German] public prosecutors' offices [participate] in the administration of criminal justice' (paragraph 63), from which it concluded that they are judicial authorities.

28 Judgment of 9 October 2019, *NJ (Vienna Public Prosecutor's Office)*, C-489/19 PPU, EU:C:2019:849, paragraph 35: '... since the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection'.

29 As I have explained, it also includes the possibility of treating authorities which perform administrative, customs and taxation functions as issuing authorities, subject to validation by *judicial* authorities.

30 I refer to my Opinions in *Özçelik* (C-453/16 PPU, EU:C:2016:783), points 39 to 41, and *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:338), points 36 to 46.

31 Document 9288/10 ADD 2 of the Council of 23 June 2010 ('Memorandum'), p. 22.

32 Recitals 5 and 6 of Directive 2014/41.

33 Article 6(1) of Directive 2014/41 assigns to the issuing authority the task of assessing whether the issuing of the EIO is necessary and proportionate and whether the rights of the suspected or accused person have been observed, and also the task of checking whether the measures could have been ordered under the same conditions in a similar domestic case. If the executing authority has any doubts regarding the fulfilment of those conditions, it may, under Article 6(3), consult the issuing authority. The executing and issuing authorities may consult each another during execution of the EIO (Article 9(6) of Directive 2014/41).

34 That reservation again meets the criterion of not altering the domestic rules on criminal procedure of each Member State. However, the executing authority may not exercise the power granted to it by Article 10(1) in the cases stipulated in Article 10(2).

35 Judgment in *OG and PI (Lübeck and Zwickau public prosecutor's offices)*, paragraph 73: '... [it] must be capable of [issuing an EIO] 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'.

36 Ibid., paragraph 74: '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.'

37 However, I am not ruling out that other EU legislation may require prior judicial authorisation in some situations. In Case C-746/18, the Court of Justice will have to determine if that is true with regard to access to data relating to electronic communications. See the Opinion of Advocate General Pitruzzella of 21 January 2020 in that case (EU:C:2020:18).

38 Reference is made to the fundamental rights, from different perspectives, in recitals 10, 12, 18, 19 and 39. As regards the enacting terms, the fundamental rights are explicitly mentioned in Article 1(4), '[The] Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings', and also in Article 14(2). See points 83 and 84 above.

39 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1), Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1) and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

40 Moreover, it is a specially qualified restriction because, in addition to the burden of the loss of liberty, there is also the forced journey to another Member State which removes the person concerned from the surroundings in which his personal and social life take place, which brings with it the need to mount a tactical defence in a territory with a different legal system.

41 Recital 12: the issuing authority is required to '[ensure] full respect for the rights as enshrined in Article 48 of the Charter ... The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.'

42 Recital 16: 'Non-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law.' Point 5.4, *in fine*, of the Joint Note of Eurojust and the European Judicial Network on the practical application of the EIO states that 'most Member States do not have a definition of 'non-coercive measures' in their legislation, but they see the term rather as a common concept that is defined in everyday legal language, incorporating measures that do not affect fundamental rights, and often not requiring a court order' (11168/19, http://eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Joint%20note%20of%20Eurojust%20and%20the%20EJN%20on%20the%20practical%20app06-Joint_Note_EJ-EJN_practical_application_EIO_ES.pdf).

43 Transcribed in footnote 41.

44 Recital 19: 'The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights.'

45 The German Government submits (paragraphs 61 and 62 of its observations) that this is the approach in its legislation. In response to a question from the Court, the German Government clarified that, in this case, the Hamburg public prosecutor's involvement was not preceded by the decision of a court because of the nature of the measure requested.

46 '... if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.'

47 Transcribed in footnote 38.

48 That term is used in the heading of Chapter III ('Procedures and safeguards for the executing State') of Directive 2014/41.

49 'Legal remedies available against an EIO should be at least equal to those available in a domestic case against the investigative measure concerned. In accordance with their national law Member States should ensure the applicability of such legal remedies, including by informing in due time any interested party about the possibilities and modalities for seeking those legal remedies ...'

50 The reference for a preliminary ruling which gave rise to the judgment of 24 October 2019, *Gavanozov*, C-324/17, EU:C:2019:892, concerned remedies. At paragraph 37 of the judgment, the Court merely stated that the form sent does not need to contain 'a description of the legal remedies, if any, that are available in the issuing Member State against the issuing of an EIO'. Accordingly, the Court did not address whether '... Article 14 of that directive ... precludes national legislation which does not provide for any legal remedy against the substantive grounds for issuing an EIO'. In his Opinion in that case (EU:C:2019:312), Advocate General Bot maintained that that article '[precludes] the legislation of a Member State, such as the Bulgarian legislation, which does not provide for a legal remedy against the substantive reasons for an investigative measure indicated in an EIO, and the issuance of an EIO by the authorities of that Member State.'

51 The task of the court which authorises the investigative measure is not equivalent to *validation* within the meaning stipulated for issuing authorities in Article 2(c)(ii) of Directive 2014/41.

52 Point 4 of the Memorandum states that the swift resolution of criminal cases is a key element for the purposes of the effectiveness and the quality of the system. Undue delays must be avoided because they have a negative effect on the quality of evidence. In addition, any accused person has the right to be tried within a reasonable period.

53 Recital 21 in the preamble to Directive 2014/41.

54 The Joint Note of Eurojust and the European Judicial Network on the practical application of the EIO shows that, on a comparative overview, Member States, for the most part, designate public prosecutor's offices as an issuing authority.
