Issuing Authority in the EIO

Explained through case law

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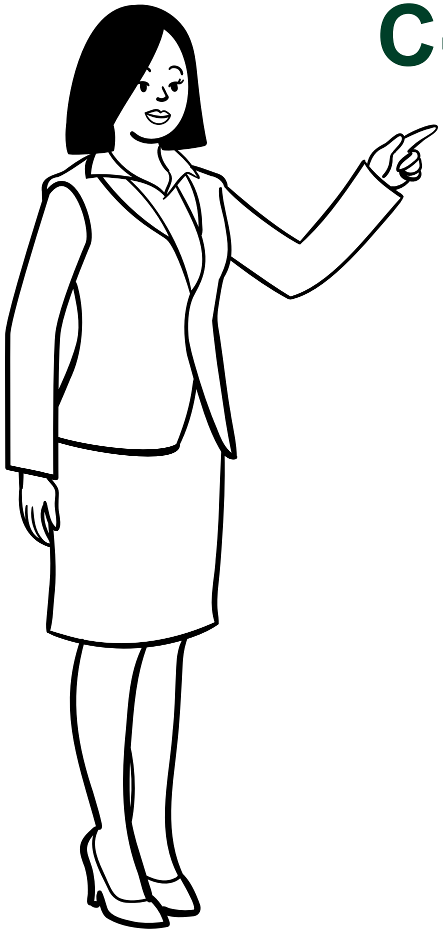


C-584/19

Notion of issuing authority

Facts of the case

German Public Prosecutor's Office conducted a criminal investigation for fraud against A and other identified persons, suspected of unlawfully obtaining data with fraudulent intent, falsifying orders which were, or would have been transferred to a bank account opened in A's name with an Austrian Bank

Facts of the case

German Public Prosecutor's Office issued an EIO requesting Austria to send it copies of the bank statements. Austrian law dictates that a bank may only be required to forward such statements pursuant to an investigative measure, ordered by the PPO via a court authorisation. The Vienna PPO requested authorisation from the Vienna Regional Court in Criminal Matters

The Venna court was however uncertain whether the German PPO, which issued that order may be classified as a judicial authority, issuing authority, and public prosecutor

Article 1(1) EIO Directive

Article 2(c) EIO Directive

Article 2(c)(i) EIO Directive

Facts of the case

The Venna court was however uncertain whether the German PPO, which issued that order may be classified as a judicial authority, issuing authority, and public prosecutor

Article 1(1) EIO Directive

An 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.

Article 2(c)(i) EIO Directive

'issuing authority' means: 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 vali dated, 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;

Preliminary question

Are the terms “judicial authority” within the meaning of Article 1(1) of [Directive 2014/41] and “public prosecutor” within the meaning of Article 2(c)(i) of [that 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?

Application of the case

According to settled case-law, one must consider not only its wording but also the context in which it occurs, and the objectives pursued by the rules of which it is part (para. 49)

Wording

EAW Directive does not specify which authority to describe issuing judicial authority. The EIO Directive on the other hand, specified which authorities: judge, court, investigating judge, and public prosecutor

Context

Issuance or validation of EIO is subject to procedures and guarantees distinct from EAW Dir. Article 6(1) jo. Article 2(c) jo. Recital 11 of the directive requires two things for issuance or validation. First it must be necessary and proportionate for the purpose of the proceedings. Second, the investigative measure(s) indicated in the EIO must be ordered in a similar domestic case

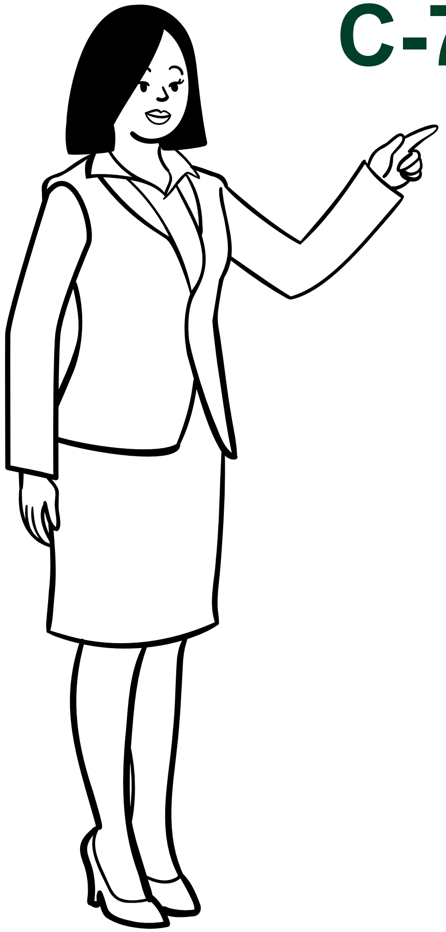
Objective

The objective in an EIO Directive is distinct from that of the EIO Dir. The former seeks the arrest and surrender of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence/detention order. The latter's objective is have one more specific investigative measures carried out to obtain evidence.

Conclusion

Article 1(1) jo. 2(c) of the EIO Dir. must be interpreted to mean that the **concepts of a judicial authority** and issuing authority, includes the public prosecutor (office) of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or PPO and the executive of that MS, 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 a European investigation order.

→ The interpretation of Article 6(1) of the EAW Dir. which interprets the issuing judicial authority to not cover the public prosecutor’s office of a MS is not applicable in the context of the EIO Dir.

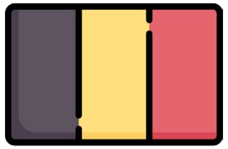


C-724/19 HP

Public Prosecutor acting as issuing authority

Facts of the case

Bulgarian issued four EIOs to collect traffic and location data from Belgium, Germany, Austria and Sweden. HP was suspected of financing terrorist activities, and in that context, had phone conversations with persons residing in the aforementioned Member States.



Transmitted a decision recognising the EIO

Did not transmit a decision recognising the EIO

Based on evidence gathered, including evidence from the replies of the executing Member States concerned, HP was charged, along with five others, with illegally financing terrorist activities and participating in a criminal organisation seeking to finance those activities.

Facts of the case

The Belgian referring court needed to determine whether the accusation is well founded, and asked

~ whether it is lawful to request the collection of traffic and location data associated with telecoms by means of four EIOs

~ whether it may use the evidence gathered by means of those orders to establish the offence by which HP is accused.

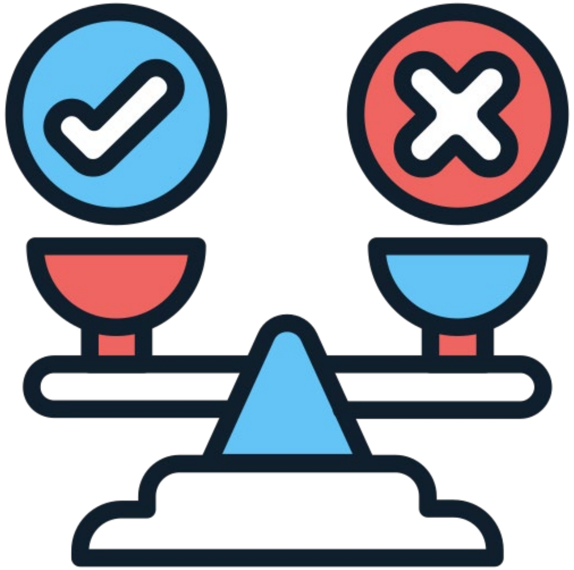
The Bulgarian Criminal Court requested a preliminary ruling on the interpretation of Article 2(c) of the EIO Directive.

Preliminary Question

The Bulgarian Criminal Court requested a preliminary ruling on the interpretation of Article 2(c) of the EIO Directive.

‘(1) Is a national law, according to which, during the pre-trial stage of the criminal proceedings, the authority competent to issue [an EIO] for the provision of traffic and location data related to telecommunications is a public prosecutor, consistent with Article 2(c)(i) of Directive 2014/41 and the principle of equivalence, provided that in an identical domestic case the competent authority is a judge?

(2) Does recognition of that [EIO] by the competent authority of the executing State (public prosecutor or an investigating judge) replace the court order required under the law of the issuing State?’



Application of the Case

The first question asks whether Article 2(c)(i) of the EIO Directive must be interpreted as precluding a public prosecutor form having the 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

- Article 2(c) defines the concept of 'issuing authority'. Article 2(c)(i) specifies which authority and Article 2(c)(ii) refers to any other competent authority as defined by the issuing state, acting in its capacity as an investigating authority in the criminal proceedings with competence to order the gathering of evidence

- Article 2(c)(i) must be interpreted by considering the context and objectives of the Directive

Application of the Case

CONTEXT

Article 6(1)(a) jo. Recital 11 of the directive, imposes an obligation the issuing authority to assess the necessity and proportionality of the investigative measure which is the subject of the EIO. In the context of certain specific investigative measures, the issuing authority must provide some additional explanations, and to be able to do so must be an investigative authority in the criminal proceedings

Recital 5 and 8 of the Directive seeks to establish a simplified single instrument to facilitate judicial cooperation with high level of trust between MS as its basis.

OBJECTIVES

Issuing authority

- Must indicate reasons why the requested information is of substantial value
- Must have the competence to order the gathering of evidence.

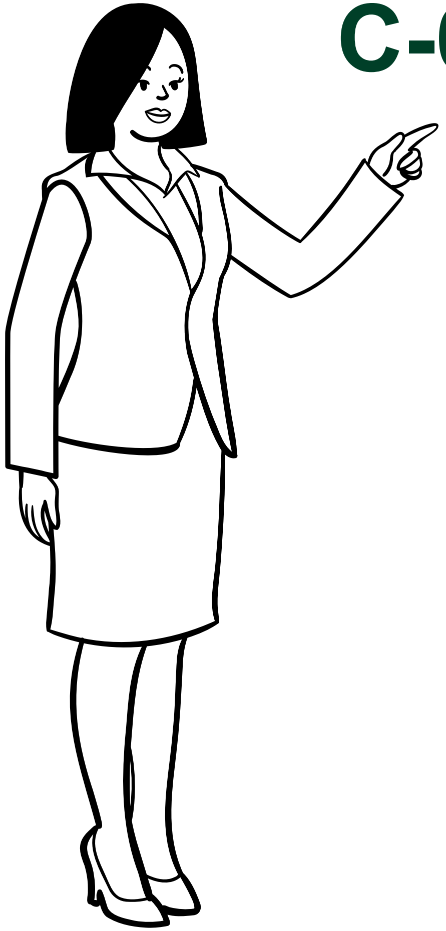
Conclusion of the case

Question 1

Article 2(c)(i) of Directive 2014/41 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.

Question 2

Article 6 and Article 9(1) and (3) of Directive 2014/41 must be interpreted as meaning that recognition, on the part of the executing authority, of an EIO issued with a view to obtaining traffic and location data associated with telecommunications may not replace the requirements applicable in the issuing State, where that EIO was improperly issued by a public prosecutor, whereas, in a similar domestic case, **the judge has exclusive competence to adopt an investigative measure** seeking to obtain such data.



C-66/20 XK

Public Prosecutor acting as issuing authority

EIPA European Institute of Public Administration

Facts of the case

An EIO was issued by the German Tax Office requesting from the Italian PPO, a search of XK's business premises as part of an investigation into income tax evasions. Section L of the form regarding the details of which judicial authority validated the investigation was incomplete. The Italian PPO thus requested a copy of the EIO validated by a judicial authority. The German Tax Office replied that no validation was needed, since it considered itself as a judicial authority based on their national law and within the meaning of Article 2(c) of the EIO Directive.

- The German Tax office specifically argues that it can issue an EIO, signed by its director-general, as an administrative authority, without needing that decision to be validated by a judge or public prosecutor, on the ground that it can exercise the same rights and responsibilities as a German PPO, in accordance with their national law

- The Italian PPO questioned whether and to what extent Article 2(c) of the EIO Directive authorises a MS to transmit an EIO issued by an administrative authority in the case where that decision has not been validated by a judicial authority.

Preliminary question

Validation Interpretation

In so far as it provides that "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", may also be regarded as an issuing authority, but also provides that, in that case, "before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State", **is Article 2(c)(ii) of Directive [2014/41] to be interpreted as allowing a Member State to exempt an administrative authority from the obligation to have the EIO validated by defining it as a "judicial authority for the purposes of Article 2 of the Directive**"?

Application of the case

Question of Eligibility

The request for a preliminary ruling from the Italian PPO was considered inadmissible.

WHY?

There were doubts as to whether the PPO in Trento has the status of a court or tribunal within the meaning of Article 267 TFEU. According to settled case-law, the Court takes account of a number of factors such as whether the body:

- Is established by law
- Is permanent
- Has compulsory jurisdiction
- Its procedure is *inter partes*
- It applies rules of law
- It is independent

C-274/14

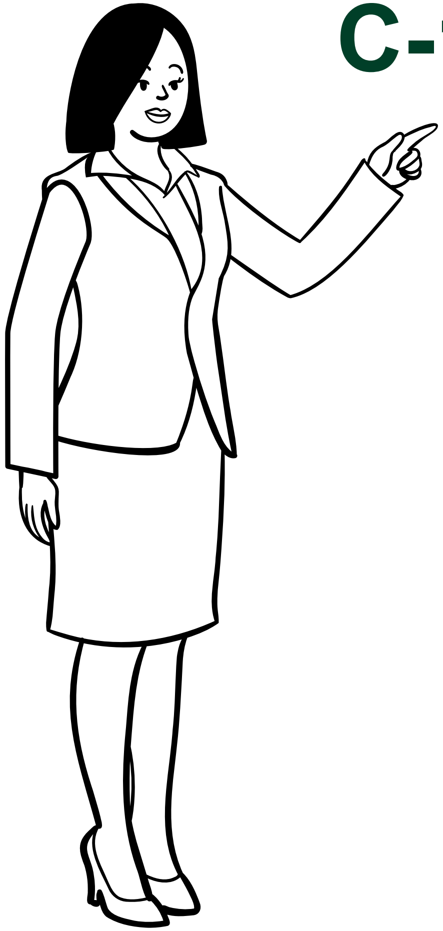
Application and Conclusion of the case

Question of Eligibility

The court also considers whether the PPO, Trento, is acting in exercise of a judicial function for the purpose of Article 267 TFEU.

→ When an office of an Italian public prosecutor, such as the one referred to in this case, acts as an authority for the execution of an EIO within the meaning of Article 2(d) of the EIO Directive, it is not called upon to rule on a dispute, and cannot be regarded as exercising judicial function

READ Article 1(1) jo. Article 1(2) jo. Article 9(3) and Recital 34 of the EIO Directive



C-16/22 MS

Public Prosecutor acting as issuing authority

EIPA | European Institute of Public Administration

Preliminary question

THE LATEST

Must the first sentence of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU 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?

UPDATE YET TO COME