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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

8 December 2020 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European investigation order – Directive 2014/41/EU – Article 1(1) – Article 2(c)(i) and (ii) – Concepts of ‘judicial authority’ and ‘issuing authority’ – European investigation order issued by the public prosecutor’s office of a Member State – Independence from the executive)

In Case C-584/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna, Austria), made by decision of 1 August 2019, received at the Court on 2 August 2019, in the criminal proceedings against

A and Others,

other party:

Staatsanwaltschaft Wien,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan, L. Bay Larsen, N. Piçarra, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, C. Toader, K. Jürimäe (Rapporteur), L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Austrian Government, by J. Schmoll, J. Herrnfeld and C. Leeb, acting as Agents,

- the German Government, by J. Möller and M. Hellmann, acting as Agents,
- the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
- the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and J. Langer, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 2(c) 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 (OJ 2014 L 130, p. 1).

2 The request has been made in the context of a request for execution, in Austria, of a European investigation order in criminal matters issued by the Staatsanwaltschaft Hamburg (Public Prosecutor's Office, Hamburg, Germany) concerning A and other unidentified persons suspected of having falsified bank transfer orders.

Legal context

EU law

3 Recitals 2, 5 to 8, 10 to 12, 15, 19, 21, 22, 34 and 39 of Directive 2014/41 are worded as follows:

‘(2) Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 15 and 16 October 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.

...

(5) Since the adoption of [Council] Framework Decisions [2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ 2003 L 196, p. 45)] and [2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ 2008 L 350, p. 72)], it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary.

(6) In the Stockholm Programme adopted by the European Council of 10-11 December 2009, the European Council considered that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be

further pursued. The European Council indicated that the existing instruments in this area constituted a fragmentary regime and that a new approach was needed, based on the principle of mutual recognition, but also taking into account the flexibility of the traditional system of mutual legal assistance. The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including Framework Decision 2008/978/JHA, covering as far as possible all types of evidence, containing time limits for enforcement and limiting as far as possible the grounds for refusal.

(7) This new approach is based on a single instrument called the European Investigation Order (EIO). An EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO (“the executing State”) with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority.

(8) The EIO should have a horizontal scope and therefore should apply to all investigative measures aimed at gathering evidence. However, the setting up of a joint investigation team and the gathering of evidence within such a team require specific rules which are better dealt with separately. Without prejudice to the application of this Directive, existing instruments should therefore continue to apply to this type of investigative measure.

...

(10) The EIO should focus on the investigative measure to be carried out. The issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which investigative measure is to be used. However, the executing authority should, wherever possible, use another type of investigative measure if the indicated measure does not exist under its national law or would not be available in a similar domestic case. Availability should refer to occasions where the indicated investigative measure exists under the law of the executing State but is only lawfully available in certain situations, for example where the investigative measure can only be carried out for offences of a certain degree of seriousness, against persons for whom there is already a certain level of suspicion or with the consent of the person concerned. The executing authority may also have recourse to another type of investigative measure where it would achieve the same result as the investigative measure indicated in the EIO by means implying less interference with the fundamental rights of the person concerned.

(11) The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of the proceedings, whether the investigative measure chosen is necessary and proportionate for the gathering of the evidence concerned, and whether, by means of issuing the EIO, another Member State should be involved in the gathering of that evidence. The same assessment should be carried out in the validation procedure, where the validation of an EIO is required under this Directive. The execution of an EIO should not be refused on grounds other than those stated in this Directive. However the executing authority should be entitled to opt for a less intrusive investigative measure than the one indicated in an EIO if it makes it possible to achieve similar results.

(12) When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (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.

...

(15) This Directive should be implemented taking into account [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)], which concern procedural rights in criminal proceedings.

...

(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. However, that presumption is rebuttable. Consequently, 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.

...

(21) Time limits are necessary to ensure quick, effective and consistent cooperation between the Member States in criminal matters. The decision on the recognition or execution, as well as the actual execution of the investigative measure, should be carried out with the same celerity and priority as for a similar domestic case. Time limits should be provided to ensure a decision or execution within reasonable time or to meet procedural constraints in the issuing State.

(22) 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. In cases where objections against the EIO are submitted by an interested party in the executing State in respect of the substantive reasons for issuing the EIO, it is advisable that information about such challenge be transmitted to the issuing authority and that the interested party be informed accordingly.

...

(34) This Directive, by virtue of its scope, deals with provisional measures only with a view to gathering evidence. ...

...

(39) This Directive respects the fundamental rights and observes the principles recognised by Article 6 [TEU] and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application. ...'

4 Under the heading 'The European Investigation Order and obligation to execute it', Article 1 of that directive states:

'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 [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 Article 2 of that directive, headed 'Definitions', provides:

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

...

(c) "issuing authority" means:

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

(ii) 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 3 of that directive, headed ‘Scope of the EIO’, provides:

‘The EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team ...’

7 Under Article 4 of Directive 2014/41, headed ‘Types of proceedings for which the EIO can be issued’:

‘An EIO may be issued:

(a) with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

...

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and

...’

8 Article 6 of that directive, headed ‘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.’

9 Article 9 of that directive, headed ‘Recognition and execution’, provides, in paragraphs 1 to 3 thereof:

‘1. The executing authority shall recognise an EIO, transmitted in accordance with this Directive, without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless that authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement provided for in this Directive.

2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.

3. Where an executing authority receives an EIO which has not been issued by an issuing authority as specified in Article 2(c), the executing authority shall return the EIO to the issuing State.'

10 Article 10 of that directive, headed 'Recourse to a different type of investigative measure', provides, in paragraphs 1, 3 and 4 thereof:

'1. The executing authority shall have, wherever possible, recourse to an investigative measure other than that provided for in the EIO where:

(a) the investigative measure indicated in the EIO does not exist under the law of the executing State; or

(b) the investigative measure indicated in the EIO would not be available in a similar domestic case.

...

3. The executing authority may also have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO.

4. When the executing authority decides to avail itself of the possibility referred to in paragraphs 1 and 3, it shall first inform the issuing authority, which may decide to withdraw or supplement the EIO.'

11 Article 11 of Directive 2014/41, headed 'Grounds for non-recognition or non-execution', lists, in paragraph 1 thereof, the grounds for non-recognition or non-execution of a European investigation order in the executing State. Those grounds include, in point (f) of that provision, the case where 'there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter'.

12 Article 14 of that directive, headed 'Legal remedies', is worded as follows:

'1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.

2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.

3. Where it would not undermine the need to ensure confidentiality of an investigation under Article 19(1), the issuing authority and the executing authority shall take the appropriate measures to ensure that information is provided about the possibilities under national law for seeking the legal remedies when these become applicable and in due time to ensure that they can be exercised effectively.

4. Member States shall ensure that the time limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases and are applied in a way that guarantees the possibility of the effective exercise of these legal remedies for the parties concerned.

5. The issuing authority and the executing authority shall inform each other about the legal remedies sought against the issuing, the recognition or the execution of an EIO.

6. A legal challenge shall not suspend the execution of the investigative measure, unless it is provided in similar domestic cases.

7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO.’

13 Articles 22 and 23 of that directive contain specific provisions relating to the temporary transfer of persons held in custody to the issuing State for the purpose of carrying out an investigative measure and to the executing State for the purpose of carrying out an investigative measure, respectively.

National law

German law

14 Paragraph 146 of the Gerichtsverfassungsgesetz (Law on the organisation of the courts) provides that the officials of the public prosecutor’s office must comply with service-related instructions of their superiors.

15 Paragraph 147 of that law 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.’

Austrian law

16 Directive 2014/41 was transposed into Austrian law by an amendment to the Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (Federal Law on judicial cooperation in criminal matters with the Member States of the European Union) of 15 May 2018 (BGBl. I, 28/2018).

17 Paragraph 55(3) of that law provides:

‘Where, in the issuing State, the proceedings are not conducted by a judicial authority, a European investigation order may be executed only if it is possible to bring an action before a court against the order of the issuing authority and the investigation order has been authorised by a judicial authority of the issuing State.’

The dispute in the main proceedings and the question referred for a preliminary ruling

18 The Hamburg Public Prosecutor’s Office is conducting a criminal investigation for fraud against A and other unidentified persons. They are suspected of having, in July 2018, through unlawfully obtained data and with fraudulent intent, falsified 13 transfer orders by which EUR 9 775.05 were, or would have been, transferred to a bank account opened in A’s name with an Austrian bank.

19 For the purpose of investigating that case, on 15 May 2019 the Hamburg Public Prosecutor’s Office issued a European investigation order which it forwarded to the Staatsanwaltschaft Wien (Public Prosecutor’s Office, Vienna, Austria). By that order, the Hamburg Public Prosecutor’s Office requested the Vienna Public Prosecutor’s Office to send it copies of the bank statements in question for the period from 1 June to 30 September 2018.

20 It is apparent from the order for reference that, in accordance with the Strafprozessordnung (Austrian Code of Criminal Procedure), a bank may only be required to forward bank account statements pursuant to an investigative measure, which must be ordered by the public prosecutor’s office on the basis of a court authorisation. Thus, without court authorisation, the Austrian public prosecutor’s office may not order that investigative measure.

21 On 31 May 2019, the Vienna Public Prosecutor’s Office requested the Landesgericht für Strafsachen Wien (Regional Court in Criminal Matters, Vienna, Austria), which is the referring court in the present case, to authorise that investigative measure, so that it could compel the bank concerned to disclose the bank statements referred to in the European investigation order.

22 The referring court is uncertain, however, whether the Hamburg Public Prosecutor’s Office, which issued that order, may be classified as a ‘judicial authority’ within the meaning of Article 1(1) of Directive 2014/41. It is also uncertain whether the Hamburg Public Prosecutor’s Office may be covered by the concept of ‘issuing authority’ within the meaning of Article 2(c) of that directive, and more specifically that of ‘public prosecutor’, referred to in point (i) of that provision, in so far as, in accordance with Paragraphs 146 and 147 of the Law on the organisation of the courts in force in Germany, that public prosecutor’s office may receive instructions, including in individual cases, from the Justizsenator von Hamburg (Senator for Justice, Hamburg, Germany).

23 The referring court notes in that regard that it is apparent from a combined reading of Article 1(1) and Article 2(c) of Directive 2014/41 that, in order to be capable of execution, the European investigation order must either be issued by a judge, a court, an investigating judge or a public prosecutor, or be validated by one of those authorities.

24 The referring court notes, however, that while Directive 2014/41 states that the European investigation order is a ‘judicial’ decision, that directive nevertheless provides that such an order may be issued or validated by a public prosecutor, although not all public prosecutors’ offices of the Member States satisfy all the criteria to be met by judges or courts, in particular the criterion of independence which, externally, presupposes that the body concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever.

25 In that regard, it takes the view that the grounds of the Court’s judgments of 27 May 2019, *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457), concerning the European arrest warrant referred to in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), are applicable to the European investigation order.

26 According to the referring court, Directive 2014/41 and Framework Decision 2002/584 are based on the same principles of mutual recognition and mutual trust. They use the same concepts of ‘judicial authority’ and ‘issuing authority’ and contain an exhaustive list of the grounds on the basis of which the executing State may refuse to execute, respectively, a European investigation order and a European arrest warrant.

27 The referring court notes, however, that, unlike Framework Decision 2002/584, Directive 2014/41 expressly confers on public prosecutors the status of ‘issuing authority’ and allows them to issue or validate European investigation orders. It takes the view that that directive could therefore be interpreted as meaning that the question whether a public prosecutor is exposed to the risk of being subject to individual instructions from the executive is irrelevant in the context of that directive.

28 That court also states that the requirement of independence of the issuing authority of a European arrest warrant is justified by the serious interference with the fundamental rights of the person who is the subject of such a warrant, which entails a deprivation of liberty and a transfer of that person to another Member State. According to the referring court, interference of the same kind is entailed by the European investigation order, which covers all investigative measures, including searches, visual or auditory surveillance or surveillance of telecommunications.

29 The referring court also states that, should the Hamburg Public Prosecutor’s Office be regarded as a ‘judicial authority’ within the meaning of Directive 2014/41 and Paragraph 55(3) of the Federal Law on judicial cooperation in criminal matters with the Member States of the European Union, the European investigation order at issue in the main proceedings would have to be executed in Austria, given that all the other conditions laid down by national law are met.

30 In those circumstances, the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna) decided to stay the proceedings and to refer 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] 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?’

Procedure before the Court

31 The referring court requested that the present case be dealt with in accordance with the expedited procedure pursuant to Article 105(1) of the Court’s Rules of Procedure.

32 In support of its request, it submits, in the first place, that there are numerous investigation procedures raising the same question as that raised in the present reference for a preliminary ruling, seeking to determine whether European investigation orders issued by German public prosecutors' offices must be executed. Furthermore, that question is also important for other Member States in which, as in Germany, public prosecutors' offices are exposed to the risk of being subject to individual instructions from the executive. In the second place, as a result of the interference during investigation procedures with the fundamental rights of persons under investigation, such procedures should, as is provided for under Austrian law, be concluded as soon as possible.

33 It follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, decide after hearing the Judge-Rapporteur and the Advocate General that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.

34 On 6 September 2019, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to reject the referring court's request recalled in paragraph 31 above.

35 First, the ground that the request for a preliminary ruling concerns the execution of a European investigation order and, therefore, requires a swift response is not sufficient in itself to justify the application of the expedited procedure referred to in Article 105(1) of the Rules of Procedure to the present case since the latter is a procedural instrument intended to address matters of exceptional urgency (see, by analogy, order of the President of the Court of 20 September 2018, *Minister for Justice and Equality*, C-508/18 and C-509/18, not published, EU:C:2018:766, paragraph 11 and the case-law cited).

36 Secondly, it is clear from the Court's settled case-law that the large number of persons or legal situations which may be affected by the decision that a referring court must give after making a request to the Court for a preliminary ruling does not, as such, constitute an exceptional circumstance justifying the application of the expedited procedure. The same is true where a large number of cases may be stayed pending the preliminary ruling of the Court (order of the President of the Court of 20 September 2018, *Minister for Justice and Equality*, C-508/18 and C-509/18, not published, EU:C:2018:766, paragraph 14 and the case-law cited).

37 However, the President of the Court decided that the present case would be given priority, pursuant to Article 53(3) of the Rules of Procedure.

Consideration of the question referred

38 By its question, the referring court asks, in essence, whether Article 1(1) and Article 2(c) of Directive 2014/41 must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

39 As a preliminary point, it should be recalled that the purpose of that directive, as is apparent from recitals 5 to 8 thereof, is to replace the fragmented and complicated existing framework for the gathering of evidence in criminal cases with a cross-border dimension and that it seeks, by the

establishment of a simplified and more effective system based on a single instrument called the European investigation order, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union to become an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States.

40 In that regard, it follows in particular from recitals 2, 6 and 19 of that directive that the European investigation order is an instrument falling within the scope of judicial cooperation in criminal matters referred to in Article 82(1) TFEU, which is based on the principle of mutual recognition of judgments and judicial decisions. That principle, which constitutes the ‘cornerstone’ of judicial cooperation in criminal matters, is itself based on mutual trust and on the rebuttable presumption that other Member States comply with EU law and, in particular, fundamental rights.

41 In that context, Article 1(1) of Directive 2014/41 defines a European investigation order as a judicial decision which has been issued or validated by a judicial authority of a Member State in order to have one or several specific investigative measures carried out in another Member State to obtain evidence in accordance with that directive, including evidence that is already in the possession of the competent authorities of that Member State.

42 Article 2(c) of that directive defines what is meant, for the purposes of that directive, by ‘issuing authority’, stating, in point (ii) of that provision, that, where a European investigation order is issued by a competent authority of the issuing Member State other than one of those referred to in point (i) thereof, that order must be validated by a ‘judicial authority’ before being transmitted to the executing authority.

43 Under Article 1(2) of Directive 2014/41, Member States are to execute a European investigation order on the basis of the principle of mutual recognition and in accordance with the provisions of that directive.

44 In particular, under Article 9(1) of Directive 2014/41, the executing authority is to recognise a European investigation order, without any further formality being required, and to ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State. However, under that provision, that authority may decide not to execute a European investigation order in reliance on one of the grounds for non-recognition or non-execution or on one of the grounds for postponement provided for in that directive.

45 Moreover, Article 9(3) of Directive 2014/41 provides that, where an executing authority receives a European investigation order which has not been issued by an issuing authority within the meaning of Article 2(c) of that directive, the executing authority is to return the European investigation order to the issuing State.

46 It follows from the foregoing considerations, first, that a European investigation order may be executed only if the authority which issued it is an ‘issuing authority’ within the meaning of Article 2(c) of that directive and, secondly, that, where such an order is issued by an issuing authority other than one of those referred to in point (i) of that provision, it must be validated by a ‘judicial authority’ before being transmitted for the purposes of its execution in another Member State.

47 In the present case, the question referred concerns, in essence, whether a public prosecutor of a Member State or, more generally, the public prosecutor’s office of a Member State satisfies the

concepts of ‘judicial authority’ and ‘issuing authority’, within the meaning, respectively, of Article 1(1) and Article 2(c) of Directive 2014/41, even though that public prosecutor or public prosecutor’s office is in a relationship of legal subordination to the executive of that Member State, resulting in exposure to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

48 That question arises in so far as, as follows from paragraph 25 above, the referring court is uncertain as to the applicability, in the context of Directive 2014/41, of the case-law stemming from the judgments of 27 May 2019, *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 90), and of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457, paragraph 57), in which the Court interpreted the concept of ‘issuing judicial authority’, set out in Article 6(1) of Framework Decision 2002/584, as meaning that, in connection with the adoption of a decision to issue a European arrest warrant, it does not cover public prosecutors’ offices of a Member State which are exposed to such a risk.

49 According to the Court’s settled case-law, for the purpose of interpreting a provision of EU law it is necessary to 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 (judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, EU:C:2020:142, paragraph 21 and the case-law cited).

50 As regards, in the first place, the wording of the provisions referred to in paragraph 47 above, it should be noted that, whereas Framework Decision 2002/584, in particular Article 6(1) thereof, uses the concept of ‘issuing judicial authority’ without specifying the authorities covered by that concept, Article 2(c)(i) of Directive 2014/41 expressly provides that the public prosecutor is included among the authorities which, like a judge, court or investigating judge, are understood to be an ‘issuing authority’.

51 The latter provision makes classification as an ‘issuing authority’ subject to the sole condition that the court and the persons acting as judge, investigating judge or public prosecutor has competence in the case concerned.

52 Accordingly, in so far as, under national law, the public prosecutor of a Member State or, more generally, the public prosecutor’s office of that Member State, has competence to order measures of investigation in order to obtain evidence in a given case, that public prosecutor or public prosecutor’s office is covered by the concept of ‘issuing authority’ within the meaning of Article 2(c)(i) of Directive 2014/41.

53 It also follows from the wording of Article 2(c)(ii) of that directive that the public prosecutor is one of the ‘judicial authorities’ which are empowered to validate a European investigation order before it is forwarded to the executing authority, where that order has been issued by an issuing authority other than one of those referred to in point (i) of that provision.

54 It is clear that neither point (i) nor point (ii) of Article 2(c) makes the classification of the public prosecutor as an ‘issuing authority’ or ‘judicial authority’, for the purposes of Directive 2014/41, subject to there being no relationship of legal subordination to the executive of the Member State to which the public prosecutor belongs.

55 It is also apparent from a combined reading of Article 1(1) and Article 2(c)(i) and (ii) of Directive 2014/41 that the issuing or validation of a European investigation order by a public prosecutor confers on that order the status of a judicial decision.

56 As regards, in the second place, the context of those provisions, it should be noted, first, that the issuing or validation of a European investigation order is subject, under Directive 2014/41, to a procedure and to guarantees distinct from those governing the issuing of a European arrest warrant. That directive lays down specific provisions intended to ensure that the issuing or validation of a European investigation order by a public prosecutor such as that in Article 2(c) of that directive is accompanied by guarantees specific to the adoption of judicial decisions, specifically those relating to respect for the fundamental rights of the person concerned and, in particular, the right to effective judicial protection.

57 First of all, under Article 6(1) of Directive 2014/41, read in conjunction with Article 2(c) and recital 11 of that directive, such issuing or validation is subject to the twofold condition, first, that it must be necessary and proportionate for the purpose of the proceedings, in particular criminal proceedings, referred to in Article 4 of that directive, taking into account the rights of the suspected or accused person, and, secondly, that the investigative measure or measures indicated in the European investigation order could have been ordered under the same conditions in a similar domestic case.

58 Thus, when he or she issues or validates a European investigation order, a public prosecutor such as the one referred to in Article 2(c) of Directive 2014/41 must ensure compliance with national procedural guarantees, which must comply with the directives, set out in recital 15 of that directive, relating to procedural rights in criminal proceedings.

59 Likewise, as is moreover recalled in recitals 12 and 39 of that directive, the public prosecutor must ensure respect for the rights enshrined in the Charter, in particular the right to the presumption of innocence and the rights of the defence provided for in Article 48 thereof. Furthermore, any limitation placed on the exercise of those rights by an investigative measure ordered in accordance with that directive must comply with the requirements laid down in Article 52(1) of the Charter, which presupposes, *inter alia*, that the limitation in question must, subject to the principle of proportionality, be necessary and genuinely meet an objective of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

60 Next, Article 14(1) of Directive 2014/41, read in the light of recital 22 thereof, imposes a general obligation on Member States to ensure that legal remedies at least equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the European investigation order.

61 In accordance with Article 14(3) of that directive, the issuing authority must ensure that the persons concerned by such an order are given sufficient information as to the remedies and time limits for challenging that order laid down by national law, in order to guarantee that their right to a remedy can be exercised effectively.

62 Lastly, under Article 14(7) of that directive, the issuing State must take into account a successful challenge against the recognition or execution of a European investigation order in accordance with its own national law. Thus, without prejudice to national procedural rules, Member States must ensure that in criminal proceedings in the issuing State the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through a European investigation order.

63 It follows from the provisions of Directive 2014/41 referred to in paragraphs 57 to 62 above that a public prosecutor, such as the one in Article 2(c) of that directive, who issues or validates a European investigation order must take into account the principle of proportionality and the

fundamental rights of the person concerned, in particular those enshrined in the Charter, and that the order must be capable of being the subject of effective legal remedies, at least equivalent to those available in a similar domestic case.

64 Secondly, although the European investigation order is indeed an instrument based on the principles of mutual trust and mutual recognition, the execution of which constitutes the rule and refusal to execute is intended to be an exception which must be interpreted strictly (see, by analogy, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 45 and the case-law cited), the provisions of Directive 2014/41 however allow the executing authority and, more broadly, the executing State to ensure that the principle of proportionality and the procedural and fundamental rights of the person concerned are respected.

65 First of all, it follows from Article 2(d) of Directive 2014/41 that the procedure for executing a European investigation order may require a court authorisation in the executing State where that is provided for by its national law. As is apparent from the order for reference, that is the case under Austrian law, which makes the execution of certain investigative measures, such as a request for disclosure of information relating to a bank account, subject to court authorisation.

66 Next, under Article 6(3) of that directive, where the executing authority has reason to believe that the conditions set out in paragraph 1 of that article have not been met, in particular the condition that the investigative measure is necessary and proportionate to the purpose of the proceedings for which it was issued, taking into account the rights of the person concerned, it may consult the issuing authority on the importance of executing the European investigation order, which may lead, where necessary, to the withdrawal of that order by the issuing authority.

67 Under Article 10 of that directive, the executing authority may also have recourse to an investigative measure other than that indicated in the European investigation order. That possibility is available, in particular, where, as is apparent from paragraph 3 of that article, read in the light of recital 10 of that directive, that authority considers that the other investigative measure would achieve the same result as the measure indicated in the European investigation order by means involving less interference with the fundamental rights of the person concerned.

68 Lastly, in accordance with Article 11(1)(f) of that directive, recognition or execution of a European investigation order may be refused in the executing State where there are substantial grounds to believe that the execution of the investigative measure indicated in the European investigation order would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

69 In the light of the factors mentioned in paragraphs 57 to 68 above, Article 1(1) and Article 2(c) of Directive 2014/41 form part of a normative framework comprising a set of safeguards both at the stage of the issuing or validation and of the execution of the European investigation order, whose aim is to ensure the protection of the fundamental rights of the person concerned.

70 As regards, in the third place, the objective of Directive 2014/41, it seeks to guarantee, as noted in paragraphs 39 and 40 above, simplified and effective cooperation between the Member States by ensuring the mutual recognition of decisions taken by the judicial authorities of those Member States for the purpose of gathering evidence in criminal cases with a cross-border dimension.

71 As stated in recital 34 thereof, that directive deals with provisional measures only with a view to gathering evidence. In addition, under Article 1(3) of that directive, the issuing of a European investigation order may be requested by a suspected or accused person, or by a lawyer on his or her behalf. As the Advocate General observes in point 71 of his Opinion, such a measure may thus be ordered for the benefit of the person concerned.

72 It should also be noted that the European investigation order governed by Directive 2014/41 pursues, in the context of criminal proceedings, a distinct objective from the European arrest warrant governed by Framework Decision 2002/584. While the European arrest warrant seeks, in accordance with Article 1(1) of Framework Decision 2002/584, the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European investigation order, under Article 1(1) of Directive 2014/41, is to have one or several specific investigative measures carried out to obtain evidence.

73 It is true that, as is apparent from Articles 3 and 4 of Directive 2014/41, a European investigation order may, in principle, cover any investigative measure for the purposes, inter alia, of criminal proceedings. Some of those measures may be intrusive, in so far as they entail an interference, in particular, with the right to privacy or the right to property of the person concerned. However, as all the interested parties which have submitted observations to the Court have stated, except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure, which is the subject of specific guarantees in Articles 22 and 23 of Directive 2014/41, the European investigation order, unlike a European arrest warrant, is not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter.

74 In the light of the textual, contextual and teleological differences noted in the foregoing considerations between Framework Decision 2002/584 and Directive 2014/41, the Court's interpretation of Article 6(1) of Framework Decision 2002/584 in the judgments of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457), according to which the concept of 'issuing judicial authority', within the meaning of that provision, does not cover the public prosecutor's offices of a Member State which are exposed to the risk of being subject to individual instructions from the executive, is not applicable in the context of Directive 2014/41.

75 In the light of all of the foregoing, the answer to the question referred is that Article 1(1) and Article 2(c) of Directive 2014/41 must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1(1) and Article 2(c) 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 meaning that the concepts of ‘judicial authority’ and ‘issuing authority’, within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor’s office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor’s office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor’s office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

[Signatures]

* Language of the case: German.
