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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

2 March 2023 (\*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order – Article 1(1) – Concept of ‘judicial authority’ – Article 2(c) – Concept of ‘issuing authority’ – Order issued by a tax authority without being validated by a judge or public prosecutor – Tax authority assuming the rights and the obligations of the public prosecutor’s office in the context of a criminal tax investigation)

In Case C-16/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Graz (Higher Regional Court, Graz, Austria), made by decision of 21 December 2021, received at the Court on 6 January 2022, in the proceedings relating to the recognition and execution of a European Investigation Order concerning

**MS,**

other parties:

**Staatsanwaltschaft Graz,**

**Finanzamt für Steuerstrafsachen und Steuerfahndung Düsseldorf,**

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- MS, by J. Herbst, Rechtsanwalt,
- the Austrian Government, by A. Posch, J. Schmoll and M.-T. Rappersberger, acting as Agents,
- the German Government, by J. Möller, P. Busche, M. Hellmann and D. Klebs, acting as Agents,
- the European Commission, by S. Grünheid and M. Wasmeier, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of the first subparagraph of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1, and corrigendum OJ 2015 L 143, p. 16).

2 The request has been made in the context of a request for execution, in Austria, of a European Investigation Order ('EIO') concerning MS issued by the Finanzamt für Steuerstrafsachen und Steuerfahndung Düsseldorf (Tax Office for Criminal Tax Matters and Tax Investigation, Düsseldorf, Germany) ('the Düsseldorf Tax Office for Criminal Tax Matters').

## **Legal context**

### ***European Union law***

3 Recitals 5 to 8 of Directive 2014/41 read as follows:

'(5) ... 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 [Council] Framework Decision 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)], 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. ...’

4 Article 1 of Directive 2014/41, headed ‘The European Investigation Order and obligation to execute it’, provides in the first subparagraph of paragraph 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.’

5 Article 2 of Directive 2014/41, 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;

...’

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

‘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;

(b) in proceedings brought by administrative 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;

(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

(d) in connection with proceedings referred to in points (a), (b), and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.’

7 Article 33 of Directive 2014/41, headed ‘Notifications’, provides in paragraphs 1 and 2:

‘1. By 22 May 2017 each Member State shall notify the [European] Commission of the following:

(a) the authority or authorities which, in accordance with its national law, are competent according to Article 2(c) and (d) when this Member State is the issuing State or the executing State;

...

2. Each Member State may also provide the Commission the list of necessary documents it would require under Article 22(4).’

8 The form relating to an EIO, set out in Annex A to Directive 2014/41, contains, inter alia, section K, in which in particular the type of authority which issued the EIO must be indicated, that is to say, whether it is a judicial authority or any other competent authority as defined by the law of the issuing State,. That form also contains section L, in which the details of the judicial authority which validated the EIO are to be indicated, where necessary.

### ***German law***

9 By notification letter of the Permanent Representation of the Federal Republic of Germany to the European Union of 14 March 2017, the Federal Republic of Germany stated, in accordance with Article 33(1) and (2) of Directive 2014/41:

‘In Germany, the issuing or executing authority may – depending on the allocation of responsibilities in the relevant *Land* – be any judicial authority, in particular therefore the Generalbundesanwalt beim Bundesgerichtshof [(Federal Prosecutor General at the Federal Court of Justice, Germany)], the public prosecutor’s offices, the prosecutors general and the Zentrale Stelle in Ludwigsburg [(Central Office of the *Land* Justice Administrations for the Investigation of National Socialist Crimes in Ludwigsburg, Germany)], or any court having jurisdiction in criminal matters.

Administrative authorities responsible for prosecuting and punishing administrative offences under German law can also be issuing and executing authorities.

In compliance with Article 2(c) of [Directive 2014/41], requests from German administrative authorities to other EU Member States must usually be validated by the public prosecutor’s office at the Regional Court (Landgericht) in whose district the administrative authority is based. By way of derogation, the *Länder* are free to assign jurisdiction for such validation to a court, or to regulate the local jurisdiction of the validating public prosecutor’s office in other ways ...

Requests from German revenue authorities which are independently conducting a criminal investigation pursuant to Paragraph 386(2) of the Abgabenordnung [(German Tax Code, in the version published on 1 October 2002 (BGBl. 2002 I, p. 3866; BGBl. 2003 I, p. 61))] do not require validation by a judicial authority or a court. In this case, the revenue authorities exercise the rights and fulfil the obligations of a public prosecutor's office in accordance with Paragraph 399(1) of the German Tax Code in conjunction with Paragraph 77(1) of the [Gesetz über die internationale Rechtshilfe in Strafsachen (German law on international mutual legal assistance in criminal matters), in the version published on 27 June 1994 (BGBl. 1994 I, p. 1537)], and therefore themselves act as a judicial authority within the meaning of Article 2(c) of [Directive 2014/41].'

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

10 The Düsseldorf Tax Office for Criminal Tax Matters is investigating MS for tax evasion. She, as manager of a private limited company, is suspected of having failed to declare, in the period from 2015 to February 2020, turnover from running a brothel, resulting in a tax impact of approximately EUR 1.6 million.

11 For the purposes of the investigation, that office issued an EIO which it transmitted to the Staatsanwaltschaft Graz (Public Prosecutor's Office, Graz, Austria) on 23 July 2020. By that order, it requested the Public Prosecutor's Office, Graz, to collect, from a bank located in Austria, documents relating to two bank accounts opened in MS's name, concerning the period from 1 January 2015 to 28 February 2020.

12 In section K of the EIO, it was indicated that the EIO was issued by a 'judicial authority'. Consequently, the competent office did not fill in section L of the EIO, in which a judicial authority's details are to be set out if it validates the EIO.

13 It is apparent from the order for reference that, under the Strafprozessordnung (Austrian Code of Criminal Procedure), a bank can be required to provide information concerning bank accounts and to transmit documents relating to those accounts only pursuant to an investigative measure, which must be ordered by the public prosecutor's office on the basis of a judicial authorisation.

14 By order made on 5 August 2020, at the request of the Public Prosecutor's Office, Graz, the Haft-und Rechtsschutzrichterin (detention and judicial protection judge) at the Landesgericht für Strafsachen Graz (Regional Court for Criminal Matters, Graz, Austria) authorised execution of the EIO referred to in paragraph 11 of the present judgment. On 7 August 2020, the Public Prosecutor's Office, Graz, ordered execution of the requested measure.

15 MS appealed against the order of 5 August 2020 to the Oberlandesgericht Graz (Higher Regional Court, Graz, Austria), which is the referring court. Before that court, MS pleads that the Düsseldorf Tax Office for Criminal Tax Matters is neither a 'judicial authority', within the meaning of Article 1(1) of Directive 2014/41, nor an 'issuing authority', within the meaning of Article 2(c) thereof. That office therefore lacks competence to issue an EIO.

16 The referring court states that it is called upon to rule on whether execution of the EIO issued by the Düsseldorf Tax Office for Criminal Tax Matters is lawful. It explains that that order was not validated by a judicial authority, as provided for in Article 2(c)(ii) of Directive 2014/41 where the issuing authority is an authority other than a judge, a court, an investigating judge or a public prosecutor competent in the case concerned. It is therefore necessary to determine whether the tax authority, which is empowered under German law, as regards certain specified criminal offences, to assume the rights and the obligations of the public prosecutor's office, may be equated to a 'judicial

authority’, within the meaning of Article 1(1) of that directive, and to a ‘prosecutor’, within the meaning of Article 2(c)(i) thereof.

17 According to that court, arguments derived from the wording and the rationale of those provisions, as interpreted by the Court in the judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002), and by Advocate General Campos Sánchez-Bordona in his Opinion in *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster* (C-66/20, EU:C:2021:200), militate against its being so equated.

18 In that context, the referring court points out that the institutional position of the tax authority, which is not referred to in the list of judicial authorities set out in Article 2(c)(i) of Directive 2014/41 as an issuing authority, is clearly different from that of the public prosecutor’s office, which is referred to in that list.

19 Thus, unlike the public prosecutor’s office, the tax authority is an administrative entity, forming part of the executive, having competence in tax matters and integrated into the hierarchical structure of the German Ministry of Finance without possessing any autonomy, independence and freedom of action. It is vested with the power to conduct a criminal investigation autonomously solely in respect of certain specified criminal offences, and only until such time as it itself surrenders such a case to the public prosecutor’s office or the latter takes over the case, which is possible at any time and without a specific reason. When the public prosecutor’s office conducts the investigation, the tax authority has only the same rights and obligations as those accorded to the police authorities. When the tax authority conducts the investigation autonomously, it merely ‘assumes’ the rights and the obligations of the public prosecutor’s office in the criminal investigation, without possessing them itself.

20 By contrast, the institutional position of a public prosecutor’s office is characterised by the fact that it acts before the courts as guarantor of legality, it in fact participates in the administration of justice and it serves the general interest as to observance of the law.

21 However, the referring court concedes that it is also possible take the view that the tax authority, in assuming the rights and the obligations of the public prosecutor’s office, is equated to a ‘judicial authority’ and an ‘issuing authority’ within the meaning, respectively, of Article 1(1) and Article 2(c)(i) of Directive 2014/41.

22 The referring court states that it is apparent from the judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraphs 51 and 56 to 73), that the sole condition, for the purpose of classifying an entity referred to in Article 2(c)(i) of Directive 2014/41 as an ‘issuing authority’, relates to its competence in the case in question and to issue of the EIO in compliance with the safeguards provided for by that directive.

23 In those circumstances, the Oberlandesgericht Graz (Higher Regional Court, Graz) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the first [subparagraph] of Article 1(1) and Article 2(c)(i) of [Directive 2014/41] 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?’

## Consideration of the question referred

24 By its single question, the referring court seeks, in essence, to ascertain whether the first subparagraph of Article 1(1) and Article 2(c)(i) of Directive 2014/41 must be interpreted as meaning that a tax authority of a Member State which, while being part of the executive of that Member State, conducts, in accordance with national law, criminal tax investigations autonomously, instead of the public prosecutor's office and assuming the rights and the obligations vested in the latter, can be classified as a 'judicial authority' and an 'issuing authority', within the meaning, respectively, of each of those provisions.

25 For the purpose of interpreting those provisions, it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they form part (see, to that effect, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 49 and the case-law cited).

26 In the first place, as regards the literal interpretation, it should be pointed out that the first subparagraph of Article 1(1) of Directive 2014/41 defines an EIO as a judicial decision which has been issued or validated by a judicial authority of a Member State to have one or several specific investigative measure(s) carried out in another Member State to obtain evidence, in accordance with that directive.

27 The concept of 'judicial authority' used in that provision is not defined there. That provision must therefore be read in conjunction with the other provisions of Directive 2014/41, and in particular with Article 2(c) thereof.

28 Article 2(c) of Directive 2014/41 defines what is meant, for the purposes of the directive, by 'issuing authority'. Thus, as set out in Article 2(c)(i), 'a judge, a court, an investigating judge or a public prosecutor competent in the case concerned' is an issuing authority. As set out in Article 2(c)(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' is also an issuing authority. It is apparent, furthermore, from the latter provision that, where an EIO is issued by any 'other authority' of that kind, it must be validated by a judicial authority, that is to say a judge, a court, an investigating judge or a public prosecutor in the issuing State, before it is transmitted to the executing authority.

29 It is thus apparent from the clear wording of Article 2(c) of Directive 2014/41 that that provision draws a distinction between two categories of issuing authority, respectively referred to in Article 2(c)(i) and Article 2(c)(ii).

30 Thus, Article 2(c)(i) of Directive 2014/41 expressly designates judges, courts, investigating judges or public prosecutors as 'issuing authorities', subject to the sole condition that they have competence in the case concerned (see, to that effect, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraphs 50 and 51).

31 Those four authorities share the characteristic that they may all participate in the administration of justice (see, by analogy, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 60). Furthermore, in accordance with that assessment, they are, as is apparent from

Article 2(c)(ii) of Directive 2014/41, classified as ‘judicial authorities’, within the meaning of that directive.

32 Moreover, as is apparent from the very wording of Article 2(c)(i) of Directive 2014/41, in particular from the use of the coordinating conjunction ‘or’, that provision lists those four authorities in an exhaustive manner.

33 That interpretation is supported by Article 2(c)(ii) of Directive 2014/41, which provides that a second category of authorities falls within the concept of ‘issuing authority’. That category covers any authority ‘other’ than those referred to in Article 2(c)(i) of that directive, provided that such an authority is competent to act as an investigating authority in criminal proceedings (see, to that effect, judgment of 16 December 2021, *Spetsializirana prokuratura (Traffic and location data)*, C-724/19, EU:C:2021:1020, paragraph 29). An EIO issued by such an authority must, before being transmitted to the executing authority, be validated by a ‘judicial authority’ falling within Article 2(c)(i) of the directive.

34 Consequently, the reference to ‘any other ... authority’, made in Article 2(c)(ii) of Directive 2014/41, indicates clearly that any authority which is not a judge, a court, an investigating judge or a public prosecutor, mentioned in Article 2(c)(i) of that directive, must be examined in the light of Article 2(c)(ii) thereof. A non-judicial authority, such as an administrative authority, is, therefore, capable of falling within the concept of an ‘issuing authority’, within the meaning of Article 2(c)(ii) of Directive 2014/41, under the conditions noted in paragraph 33 of the present judgment.

35 It follows that Article 2(c) of Directive 2014/41 reflects, in points (i) and (ii) thereof, the distinction, inherent in the principle of the separation of powers which characterises the operation of the rule of law, between the judiciary and the executive. Judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities, which are within the province of the executive (see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35).

36 It follows from the foregoing that, in the light of its wording, Article 2(c) of Directive 2014/41 distinguishes between two categories of issuing authorities, which are mutually exclusive. The situation of any authority which is not explicitly referred to in the list set out in Article 2(c)(i) must be examined pursuant to Article 2(c)(ii).

37 The tax authorities of the Member States are not among the authorities that are exhaustively listed in Article 2(c)(i). They must, accordingly, be regarded as issuing authorities within the meaning of Article 2(c)(ii) of that directive, provided that the conditions laid down in that provision are met.

38 In the second place, the context of Article 2(c) of Directive 2014/41 and the objective of the directive also support the literal interpretation of that provision set out in paragraph 36 of the present judgment.

39 As regards the contextual interpretation, it should, first, be observed that Article 4 of Directive 2014/41, which determines the types of procedures for which an EIO can be issued, identifies, for that purpose, both proceedings brought by a ‘judicial authority’ and proceedings brought by ‘administrative authorities’. That article thus bears out the relevance of the distinction between those two types of authorities in the legal framework established by that directive and, more specifically, in Article 2(c) thereof.



40 Second, it is apparent from reading as a whole the provisions set out in the first subparagraph of Article 1(1) and Article 2(c) of Directive 2014/41 that issue of an EIO, which is a judicial decision, requires action of a judicial authority in any event. Such an order must either be issued by such an authority itself, or be validated by such an authority when it has been issued by any ‘other authority’, within the meaning of Article 2(c)(ii) of that directive.

41 Like the wording of those provisions, their context results in the judicial authorities being clearly distinguished from the other authorities that may issue an EIO.

42 As for the objective of Directive 2014/41, it must be pointed out that that directive is intended, as is apparent from recitals 5 to 8 thereof, to replace the fragmented and complicated framework that existed until that directive’s adoption for the gathering of evidence in criminal cases with a cross-border dimension and seeks, by the establishment of a simplified and more effective system based on a single instrument called the EIO, to facilitate and accelerate judicial cooperation with a view to contributing to the attainment of the objective set for the European Union of becoming an area of freedom, security and justice, and has as its basis the high level of trust which must exist between the Member States (judgment of 16 December 2021, *Spetsializirana prokuratura (Traffic and location data)*, C-724/19, EU:C:2021:1020, paragraph 36 and the case-law cited).

43 In that regard, the objective relating to simplified and effective cooperation between the Member States requires simple and unequivocal identification of the authority which has issued an EIO for the purpose of determining whether or not such an order must be validated by a judicial authority pursuant to Article 2(c)(ii) of Directive 2014/41. The interpretation, adopted in paragraph 36 of the present judgment, under which the two categories of issuing authorities, within the meaning of Article 2(c) of that directive, are mutually exclusive enables that objective to be achieved, since it makes it possible to determine unequivocally whether an issuing authority falls within Article 2(c)(i) or Article 2(c)(ii).

44 It follows from the foregoing that both the wording of Article 2(c) of Directive 2014/41 and that provision’s context and the objective pursued by the directive preclude the functional interpretation discussed by the Austrian and German Governments, under which, where, pursuant to national law, a tax authority assumes the rights and the obligations vested in the public prosecutor, that authority must be equated to the latter and, therefore, be classified as an ‘issuing authority’ within the meaning of Article 2(c)(i) of the directive.

45 That interpretation would have the consequence that a tax authority would, depending on the legal framework within which it exercises its powers, be an issuing authority referred to either in Article 2(c)(i) of Directive 2014/41 or in Article 2(c)(ii) thereof. Furthermore, that interpretation would blur the clear distinction drawn by the directive between judicial authorities and administrative authorities. It would also have the consequence, where such an authority falls within the first of those provisions, of enabling an EIO to be issued by a tax authority forming part of the executive without any action of a judicial authority at all. The adoption of such an approach would thus give rise to legal uncertainty, and could make the system for implementing the EIO more complex and, in so doing, jeopardise the establishment of a simplified and effective system of cooperation between the Member States in criminal matters.

46 In the light of all the foregoing considerations, the answer to the question referred is that the first subparagraph of Article 1(1) and Article 2(c)(i) of Directive 2014/41 must be interpreted as meaning that:

- a tax authority of a Member State which, while being part of the executive of that Member State, conducts, in accordance with national law, criminal tax investigations autonomously, instead of the public prosecutor’s office and assuming the rights and the obligations vested in the latter, cannot be classified as a ‘judicial authority’ and an ‘issuing authority’, within the meaning, respectively, of each of those provisions;
- such an authority is, on the other hand, capable of falling within the concept of an ‘issuing authority’ within the meaning of Article 2(c)(ii) of that directive, provided that the conditions set out in that provision are met.

### **Costs**

47 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 (Third Chamber) hereby rules:

**The first subparagraph of Article 1(1) and Article 2(c)(i) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters**

**must be interpreted as meaning that:**

- a tax authority of a Member State which, while being part of the executive of that Member State, conducts, in accordance with national law, criminal tax investigations autonomously, instead of the public prosecutor’s office and assuming the rights and the obligations vested in the latter, cannot be classified as a ‘judicial authority’ and an ‘issuing authority’, within the meaning, respectively, of each of those provisions;
- such an authority is, on the other hand, capable of falling within the concept of an ‘issuing authority’ within the meaning of Article 2(c)(ii) of that directive, provided that the conditions set out in that provision are met.

[Signatures]

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\* Language of the case: German.

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