



## Reports of Cases

### JUDGMENT OF THE COURT (Fourth Chamber)

2 September 2021 \*

(Reference for a preliminary ruling – Article 267 TFEU – Definition of ‘court or tribunal of a Member State’ – Criteria – Procura della Repubblica di Trento (Public Prosecutor’s Office, Trento, Italy) – Inadmissibility of the request for a preliminary ruling)

In Case C-66/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Procura della Repubblica di Trento (Public Prosecutor’s Office, Trento, Italy), made by decision of 15 January 2020, received at the Court on 24 January 2020, in the proceedings relating to the recognition and execution of a European Investigation Order (EIO) concerning

**XK,**

intervener:

**Finanzamt für Steuerstrafsachen und Steuerfahndung Münster,**

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe (Rapporteur), 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 Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello and E. Figliolia, avvocati dello Stato,
- the German Government, by J. Möller, M. Hellmann and F. Halabi, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes, A. Pimenta, D. Capinha, P. Barros da Costa and L. Medeiros, acting as Agents,

\* Language of the case: Italian.

– the European Commission, by C. Cattabriga and M. Wasmeier, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 11 March 2021,  
gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(c)(ii) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).
- 2 The request has been made in the context of a request for execution, in Italy, of a European Investigation Order ('EIO') issued by the Finanzamt für Steuerstrafsachen und Steuerfahndung Münster (Tax Office for Criminal Tax Matters and Tax Investigation, Münster, Germany; 'the Münster Tax Office for Criminal Tax Matters') concerning XK.

### **Legal context**

#### *EU law*

- 3 Recital 34 of Directive 2014/41 reads as follows:  
  
‘This Directive, by virtue of its scope, deals with provisional measures only with a view to gathering evidence. In this respect, it should be underlined that any item, including financial assets, may be subject to various provisional measures in the course of criminal proceedings, not only with a view to gathering evidence but also with a view to confiscation. The distinction between the two objectives of provisional measures is not always obvious and the objective of the provisional measure may change in the course of the proceedings. For this reason, it is crucial to maintain a smooth relationship between the various instruments applicable in this field. Furthermore, for the same reason, the assessment of whether the item is to be used as evidence and therefore be the object of an EIO should be left to the issuing authority.’
- 4 Article 1 of that directive, entitled ‘The [EIO] and obligation to execute it’, provides in paragraphs 1 and 2:  
  
‘1. [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.  
  
...  
  
2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive.’

5 Article 2 of that directive, entitled ‘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 5 of Directive 2014/41, entitled ‘Content and form of the EIO’, provides in paragraph 1:

‘The EIO in the form set out in Annex A shall be completed, signed, and its content certified as accurate and correct by the issuing authority.

The EIO shall, in particular, contain the following information:

(a) data about the issuing authority and, where applicable, the validating authority;

...’

7 Article 6 of Directive 2014/41, entitled ‘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.’
- 8 Article 9 of that directive, entitled ‘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.’
- 9 Article 11 of that directive, entitled ‘Grounds for non-recognition or non-execution’, lists, in paragraph 1 thereof, the grounds for non-recognition or non-execution of an EIO in the executing State.
- 10 The EIO form set out in Annex A to that directive contains, inter alia, a Section L, in which the details of the judicial authority which validated the EIO must be provided, in so far as necessary.

### ***German law***

- 11 Paragraph 386 of the Abgabenordnung (Tax Code), in the version applicable to the facts in the main proceedings, provides:
- ‘1. Where a tax offence is suspected, the tax authority shall be responsible for investigation. The following shall be regarded as authorities for the purposes of this section: the “Hauptzollamt” [(Principal Customs Office)], the “Finanzamt” [(Tax Office)], the “Bundeszentralamt für Steuern” [(Federal Tax Office)] and the “Familienkasse” [(Family Allowances Office)].
2. The tax authority shall carry out an independent investigation, respecting the limits laid down in Paragraph 399(1) and in Paragraphs 400 and 401, if the facts
- (1) exclusively constitute a tax offence, or
- (2) also breach other criminal laws and that offence concerns church taxes or other revenue governed by public law relating to bases of assessment, taxable amounts or amounts of tax.

3. Subparagraph 2 shall cease to apply as soon as an arrest warrant or detention order is issued against the person sought on the basis of the facts.
4. The tax authority may refer the case to the public prosecutor's office at any time. The public prosecutor's office may take charge of the case at any time. In both situations, the public prosecutor's office may, by mutual agreement with the tax authority, refer the case back to the tax authority.'
- 12 Paragraph 399(1) of that code is worded as follows:  
'Where the tax authority acts independently under Paragraph 386(2), it shall exercise the rights and fulfil the obligations corresponding to the public prosecutor's office at the investigation stage.'
- 13 Under Paragraph 400 of that code:  
'If the investigations raise sufficient grounds for a trial, the tax authority shall ask the court to issue a penalty order if the case can be tried by summary criminal proceedings; otherwise, the tax authority shall hand over the case file to the public prosecutor's office.'

### *Italian law*

#### *The Code of Criminal Procedure*

- 14 Article 257(1) of the Codice di procedura penale (Code of Criminal Procedure) is worded as follows:  
'In accordance with Article 324, the accused person, the person whose assets have been seized and the person entitled to reimbursement may request a review of the seizure order, including a review on the merits.'

#### *Legislative Decree No 108/17*

- 15 Directive 2014/41 was transposed into Italian law by decreto legislativo n. 108 – Norme di attuazione della direttiva 2014/41/UE del Parlamento europeo e del Consiglio, del 3 aprile 2014, relativa all'ordine europeo di indagine penale (Legislative Decree No 108 laying down rules implementing Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the [EIO] in criminal matters), of 21 June 2017 (GURI No 162 of 13 July 2017; 'Legislative Decree No 108/17').
- 16 Article 4(1) to (4) of Legislative Decree No 108/17 provides:  
'1. The public prosecutor attached to the district court in the principal city of the region in which the measures requested are to be carried out shall issue a reasoned order recognising the investigation order within 30 days of receipt thereof, or within such other time frame as may be indicated by the issuing authority, which may not exceed 60 days. The public prosecutor shall inform the procuratore nazionale antimafia e antiterrorismo [(National Anti-Mafia and Counterterrorism Prosecutor)] of receipt of the investigation order for the purpose of coordinating investigations where they relate to offences referred to in Article 51(3a) and (3c) of

the Code of Criminal Procedure. In any event, a copy of the investigation order received shall be sent to the Ministry of Justice.

2. It shall be executed within 90 days, in accordance with such formalities as are expressly requested by the issuing authority, provided that such formalities are not contrary to the principles of the State legal system. Performance of the measures referred to in Articles 21 and 22 shall, in any event, be governed by Italian law.

3. In cases of urgency or necessity, recognition and execution shall be carried out within the shortest period indicated by the issuing authority.

4. The recognition order shall be notified by the secretariat of the public prosecutor's office to the suspect's lawyer within the time limit set for the purposes of the notice to which he or she is entitled under Italian law for the performance of the measure. Where Italian law provides only for the right of the lawyer to be present at the performance of the measure without prior notice, the recognition order shall be notified at the actual time of performance of the measure or immediately thereafter.'

17 Article 5(1) and (2) of that legislative decree is worded as follows:

'1. When the issuing authority requests that the measure be carried out by a judge, or when the measure requested must be carried out by a judge under Italian law, the public prosecutor shall recognise the investigation order and apply to the judge responsible for preliminary investigations for its execution.

2. Upon receipt of the application, the court shall authorise execution after verifying that the conditions for recognition of the investigation order are met.'

18 Article 13 of that legislative decree states:

'1. The suspect and his or her lawyer may lodge an objection against the recognition order before the judge responsible for preliminary investigations within five days of the notification referred to in Article 4(4).

2. The judge responsible for preliminary investigations shall decide by order after hearing the public prosecutor. The order shall be notified to the public prosecutor and served on the person concerned.

3. The public prosecutor shall inform the issuing authority of the decision without delay. If the objection is upheld, the recognition order shall be annulled.

4. The objection shall not have any suspensive effect on the execution of the investigation order or on the transmission of the results of activities carried out. The public prosecutor may, in any event, refuse to transmit the results of activities carried out if serious and irreparable harm could be caused to the suspect, the accused person or any person otherwise affected by the execution of the measure.

5. If the grounds for refusal set out in Article 10 are met, the judge responsible for preliminary investigations, when requested to execute the investigation order under Article 5, shall, also at

the request of the parties, order the annulment of the recognition order issued by the public prosecutor.

6. The investigation order shall not be executed if the recognition order has been annulled.

7. The suspect or the accused person, his or her lawyer, the person whose evidence or property has been frozen, and the person entitled to its restitution may also lodge an objection to a decision recognising the investigation order in respect of the freezing of evidence. The judge shall decide in chambers in accordance with Article 127 of the Code of Criminal Procedure. In such cases, the judge's decision may be appealed on a point of law by the public prosecutor's office and the persons concerned for infringement of the law within 10 days of its notification or service. The Court of Cassation shall decide in chambers within 30 days of the date of the appeal. The appeal shall not have any suspensory effect.'

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

- 19 On 14 November 2019, the Procura della Repubblica di Trento (Public Prosecutor's Office, Trento, Italy) ('the Public Prosecutor's Office, Trento') received an EIO issued on the same day by the Münster Tax Office for Criminal Tax Matters requesting a search of XK's business premises as part of an investigation into income tax evasion under provisions of the German Tax Code.
- 20 Section L of that EIO, in which the details of the judicial authority which validated the investigation order must be provided, in so far as necessary, was incomplete.
- 21 By a letter of 20 December 2019, the Public Prosecutor's Office, Trento, requested the Münster Tax Office for Criminal Tax Matters to send to it a copy of the EIO validated by a judicial authority.
- 22 By email of 8 January 2020, the Münster Tax Office for Criminal Tax Matters informed the Public Prosecutor's Office, Trento, that the EIO did not need to be validated by a judicial authority. It explained that, since it acted, in accordance with Paragraph 399(1) of the Tax Code, as public prosecutor in cases involving tax offences, it had to be classified as being itself a judicial authority within the meaning of Article 2(c) of Directive 2014/41.
- 23 In its order for reference, the Public Prosecutor's Office, Trento, states that the EIO must necessarily be a judicial decision in the sense that, in accordance with Article 2(c) of Directive 2014/41, it must either be adopted by a judicial authority or adopted by an administrative authority and validated by a judicial authority.
- 24 As is apparent, by analogy, from the judgment of 10 November 2016, *Özcelik* (C-453/16 PPU, EU:C:2016:860), which concerned the European arrest warrant governed by 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), the high level of confidence between Member States would imply the intervention of a judicial authority in the context of the adoption of an EIO.

- 25 In the present case, the Münster Tax Office for Criminal Tax Matters, which is an administrative authority, argues that it can issue an EIO, signed by its director-general, without that decision having to be validated by a judge or public prosecutor, on the ground that it can exercise the same rights and responsibilities as the German public prosecutor's office, in accordance with Paragraph 399(1) of the German Tax Code.
- 26 Accordingly, the Public Prosecutor's Office, Trento, points out that the case in the main proceedings raises the question of whether and to what extent Article 2(c) of Directive 2014/41 authorises a Member State to transmit an EIO issued by an administrative authority in the case where that decision has not been validated by a judicial authority.
- 27 In that regard, the Public Prosecutor's Office, Trento, takes the view that the considerations set out by the Court in the 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, paragraphs 48 and 49), which concerned Framework Decision 2002/584, are applicable in the context of Directive 2014/41, since an EIO, although having no effect on individual liberty, is nonetheless a highly invasive measure.
- 28 Furthermore, the Public Prosecutor's Office, Trento, takes the view that it may request the Court to give a preliminary ruling, notwithstanding the fact that, under the terms of Article 267 TFEU, a request for a preliminary ruling may be made only by a 'court or tribunal of a Member State'.
- 29 It is true that the Court has previously held, in the judgment of 12 December 1996, *X* (C-74/95 and C-129/95, EU:C:1996:491), that the Italian Public Prosecutor's Office was not entitled to submit a request for a preliminary ruling. However, that judgment is not relevant in the present case, since the case that gave rise to that judgment concerned criminal proceedings opened before a public prosecutor whose role was not to rule on an issue in complete independence, but to submit that issue, if appropriate, for consideration by the competent judicial body.
- 30 The Public Prosecutor's Office, Trento, has pointed out that it is not a party to the investigations being conducted in Germany by the Münster Tax Office for Criminal Tax Matters. In addition, it cannot bring criminal proceedings in Italy in respect of the acts referred to by the EIO at issue in the main proceedings or bring that EIO before a court, because, under Italian law, the public prosecutor's office, and not the judge, has competence to recognise an EIO and, consequently, to execute it or, where appropriate, refuse to recognise it. Accordingly, no court or tribunal is involved in the procedure for recognition of such an order.
- 31 Thus, in the context of the procedure for enforcement of the EIO, the Italian Public Prosecutor's Office should be classified as a body tasked with ruling 'on an issue in complete independence', and, thus, as a 'court or tribunal' within the meaning of Article 267 TFEU.
- 32 It is in those circumstances that the Public Prosecutor's Office, Trento, decided to refer the following question to the Court for a preliminary ruling:

'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”?’

### **Admissibility of the request for a preliminary ruling**

- 33 In their written observations submitted to the Court, the German Government and the Commission have expressed doubts as to whether the Public Prosecutor’s Office, Trento, has the status of a ‘court or tribunal’ within the meaning of Article 267 TFEU.
- 34 According to the Court’s settled case-law, in order to determine whether a body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51 and the case-law cited).
- 35 As regards the criteria relating to the question of whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it is independent, and whether it applies rules of law, the case file before the Court does not contain any information capable of establishing that the Public Prosecutor’s Office, Trento, does not fulfil those criteria.
- 36 However, it is also necessary to examine whether, in the context of the procedure that led it to refer the matter to the Court, the Public Prosecutor’s Office, Trento, is acting in the exercise of a judicial function for the purposes of Article 267 TFEU.
- 37 In that regard, it is apparent from the Court’s settled case-law that, although Article 267 TFEU does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers the questions for a preliminary ruling, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (judgment of 28 February 2019, *Gradbeništvo Korana*, C-579/17, EU:C:2019:162, paragraph 34 and the case-law cited).
- 38 However, when the office of an Italian public prosecutor, such as the Public Prosecutor’s Office, Trento, acts as an authority for the execution of an EIO within the meaning of Article 2(d) of Directive 2014/41, it is not called upon to rule on a dispute and cannot, therefore, be regarded as exercising a judicial function.
- 39 Article 1(1) of that directive defines an EIO 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.

- 40 Under Article 1(2) of Directive 2014/41, Member States are required to execute an EIO on the basis of the principle of mutual recognition and in accordance with the provisions of that directive. Under Article 9(1) of that directive, the executing authority is required to recognise an EIO, 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. Under that provision, that authority may decide not to execute an EIO 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. Moreover, Article 9(3) of Directive 2014/41 provides that, where an executing authority receives an EIO which has not been issued by an issuing authority as specified in Article 2(c) of that directive, the executing authority is required to return the EIO to the issuing State (see, to that effect, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)*, C-584/19, EU:C:2020:1002, paragraphs 43 to 45).
- 41 As is apparent from recital 34 of that directive, the investigative measures provided for by an EIO are provisional in nature. The sole purpose of their execution is to obtain evidence and, if the necessary conditions are met, to transmit it to the issuing authority, referred to in Article 2(c) of that directive.
- 42 In those circumstances, the executing authority, within the meaning of Article 2(d) of that directive, which recognises and executes an EIO, cannot be regarded as being entrusted to ‘give judgment’ within the meaning of Article 267 TFEU. In that regard, it is exclusively for the competent judicial authorities of the issuing Member State to reach a final decision on that evidence in the context of the criminal proceedings opened there.
- 43 Therefore, when the office of an Italian public prosecutor, such as the Public Prosecutor’s Office, Trento, acts as an authority for the execution of an EIO within the meaning of Article 2(d) of Directive 2014/41, it does not act in proceedings which are intended to result in a judicial decision, within the meaning of the case-law of the Court referred to in paragraph 37 of the present judgment.
- 44 That finding is not called into question by the fact, mentioned by the body submitting the request and by the Italian Government in its observations and the replies submitted to the Court, that Legislative Decree No 108/17 did not provide for any judicial review of the decision of the public prosecutor’s office not to recognise an EIO.
- 45 Such a fact, which, moreover, is confined solely to the case of non-recognition of an EIO, is irrelevant for the purposes of determining whether the office of an Italian public prosecutor, such as the Public Prosecutor’s Office, Trento, exercises a judicial function within the meaning of Article 267 TFEU when it is called upon to adopt a decision on the recognition and execution of such an EIO. In particular, that fact does not affect the finding, set out in paragraphs 41 and 42 of the present judgment, that the investigative measures provided for by an EIO are provisional in nature and that decisions on the recognition and execution of such an EIO are therefore not equivalent to judicial decisions.
- 46 In the light of all of the foregoing considerations, it must be held that the request for a preliminary ruling from the Public Prosecutor’s Office, Trento, is inadmissible.

## Costs

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

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

**The request for a preliminary ruling from the Procura della Repubblica di Trento (Public Prosecutor's Office, Trento, Italy), made by decision of 15 January 2020, is inadmissible.**

[Signatures]