

# AG: German Public Prosecutor's Office Can be Considered "Judicial Authority" to Issue EIOs

Thomas Wahl

In case [C-584/19](#) (*Staatsanwaltschaft Wien v A and Others*), the CJEU was requested to answer the question of whether its case law on the independence of the (German) public prosecutor's office in relation to the European Arrest Warrant (see [eucrim 1/2019](#), pp. 31-33) could be applied to the European Investigation Order (EIO). On 16 July 2020, Advocate-General *Manuel Campos Sánchez-Bordona* presented his [opinion on the case](#).

## *Facts of the case*

In the present case, the Hamburg Public Prosecutor's Office was conducting criminal proceedings against A and other unknown perpetrators, during the course of which it forwarded a European Investigation Order to the Vienna Public Prosecutor's Office for further clarification of the facts. In accordance with Directive 2014/41, it requested the transmission of various documents relating to an Austrian bank account. The Vienna Public Prosecutor's Office applied to the Vienna Regional Court for Criminal Matters for authorisation to access information on bank accounts and banking transactions with the aim of obliging the bank to hand over the required account documents.

## *The referring court's argumentation and question*

When examining whether this authorisation should be granted, the Vienna Regional Court pointed out that, because the German Public Prosecutor's Office was in danger of being directly or indirectly subject to orders or individual instructions from the executive, it could not, according to CJEU case law, be regarded as the issuing authority for a European Arrest Warrant. This conclusion could be applied to the EIO issued by the Hamburg Public Prosecutor's Office, which could then be refused. Although Directive 2014/41 on the European Investigation Order names the Public Prosecutor as the issuing authority, not all public prosecutors' offices in the Member States meet the requirement of independence applicable to courts. If the CJEU case law on the EAW were to apply to the EIO, the term "public prosecutor" within the meaning of Directive 2014/41 would have to be interpreted as meaning that public prosecution offices that are in danger of being subject to individual instructions from the executive – like the Hamburg Public Prosecutor's Office – would not be covered by it. The Vienna court asked the CJEU to clarify this.

## *The AG's conclusion*

AG *Sánchez-Bordona* concluded that Directive 2014/41 on the European Investigation Order contains comprehensive regulation of the relations between the authorities issuing an EIO and the authorities executing it. These rules shall respect the fundamental rights and other procedural rights of the suspected or accused

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person at all times. In addition to the presumption underlying the principle of mutual recognition, the system of judicial cooperation in criminal matters in this area provides sufficient guarantees for the protection of the rights of such persons. This regulatory framework was broad enough to cover the public prosecution services of all Member States, irrespective of their institutional position vis-à-vis the executive as an issuing authority. The executing authority would have to examine whether the requested EIO met the conditions for its execution in each individual case. Directive 2014/41 provides for appropriate legal remedies against this decision.

The fact that the public prosecutor's office of a Member State may be subject to individual instructions from the executive is therefore not sufficient to enable a systematic refusal to execute such EIOs. On the contrary:

- Each executing authority would have to ensure that the issuing public prosecutor's office was not bound by such instructions. This would probably lead to considerable legal uncertainty and to delays in investigation procedures with a cross-border dimension, thus making it more difficult to achieve "quick, effective and coherent cooperation between Member States in criminal matters;"
- Non-recognition would lead to a covert amendment of Directive 2014/41, in that the public prosecution services of certain countries would be degraded to "administrative authorities" that need judicial validation. This would mean that they would also not be able to validate the decisions of other administrative authorities issuing EIOs;
- The distribution of competences of the issuing authorities in the Member States would have to be redefined, which would amount to a distortion of the intentions of the Union legislator, who did not want to change the institutional and procedural systems of the Member States in force when Directive 2014/41 was adopted.

The AG therefore proposed that the CJEU reply to the Vienna Regional Court as follows: "Public prosecutor's offices of the Member States that have been designated as issuing authorities may be classified as issuing authorities under Article 2(c)(i) of Directive 2014/41/EU".

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