

AG: Prosecutor Has Limited Competence to Issue EIOs

Thomas Wahl



News

Advocate General (AG) *Manuel Campos Sánchez-Bordona* concluded that a public prosecutor is not entitled to issue a European Investigation Order (EIO) if the underlying investigative measure (here: collection of traffic and location data associated with telecommunications) can only be ordered by a court in purely domestic cases.

The case (*C-724/19 – Spetsializirana prokuratura v HP*) concerns four identical EIOs that were issued by a Bulgarian public prosecutor in the course of criminal investigations against HP and others for terrorist financing. The EIOs requested the collection of traffic and location data from electronic telecommunications in Germany, Austria, Belgium and Sweden. After execution of the EIOs, the Bulgarian criminal court, which had to examine the evidence, cast doubts on the lawfulness of the collection because traffic and location data can only be obtained on the basis of a court order in domestic cases. However, the Bulgarian law implementing Directive 2014/41 regarding the European Investigation Order (EIO Directive) simply provides that the prosecutor is the competent authority to issue EIOs in the pre-trial phase whereas the court is the competent authority in the trial phase. Thus, frictions exist with the protection of fundamental rights by the provisions in the Bulgarian Criminal Procedure Code.

According to the AG, the principle of equivalence as stipulated in Art. 6(1) lit. b) EIO Directive prohibits the issuance of an EIO by the public prosecutor if national law requires a court order for the investigative measure that is subject of the EIO. The principle of equivalence also impacts the question of competence within the meaning of Art. 2 lit. c) EIO Directive. It follows from the synopsis of both provisions that the judicial authority (judge or public prosecutor) which, within the meaning of Art. 2 lit. c) (i) EIO Directive, “is competent in the case concerned” is the one empowered under national law to order, in a purely domestic matter, the same measure that is the subject of the EIO whose adoption is at issue. The AG argues in this context that the EIO – like the European Arrest Warrant – does not allow the prosecution service to do something in cross-border cases that it is prevented from doing at the domestic level.

The case will give the CJEU the opportunity to further refine its case law on the competences of judicial authorities to issue EIOs. Recently, the CJEU decided that the German public prosecutor’s office is to be considered “issuing judicial authority” in the EIO context (→ [eucrim 4/2020, 294](#)).

It is also noteworthy that AG *Sánchez Bordona*’s opinion comes shortly after the opinion of his colleague *Michal Bobek* who recommended in Case C-852/19 (*Ivan Gavanozov II*) that the CJEU decide that Bulgarian authorities cannot issue EIOs unless Bulgaria introduces remedies against investigative measures (→ [related link](#)).

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