

# ECJ: EIOs by Tax Authorities Need Validation

Thomas Wahl



## News

In its [judgment of 2 March 2023](#), the ECJ clarified that a German tax office responsible for criminal matters and tax investigation (*Steuerfahndung*) cannot issue European Investigation Orders (EIOs) without a judge, a court, an investigating judge or a public prosecutor having validated the EIO in advance.

### Background of the case and legal question

The underlying [Case C-16/22](#) (*MS v Staatsanwaltschaft Graz*) concerns a question referred by the Higher Regional Court of Graz (Austria). The main proceedings deal with the issuing of an EIO on suspicion of tax evasion by the Düsseldorf Tax Office for Criminal Tax Matters with regard to the provision of information and transmission of documents relating to the Austrian bank accounts of a defendant. The defendant appealed against the decision of the Graz Regional Court to grant enforcement of the EIO. Since the tax office was not a judicial and issuing authority within the meaning of Directive 2014/42, she claimed that it lacked competence to issue the EIO.

The referring Higher Regional Court of Graz pointed to the complex German law under which the tax authorities are vested with the power to conduct criminal investigations autonomously with regard to certain specified criminal (tax) offences. In this case, the tax authority assumes the rights and the obligations of the public prosecutor's office. However, a public prosecutor can take over the case at any time and without a specific reason. The Higher Regional Court wondered whether the German tax office responsible for criminal tax matters can claim to be regarded as "judicial authority" within the meaning of Arts. 1(1) and 2 (c)(i) of the EIO Directive.

### The ECJ's ruling

The ECJ emphasised that the Directive draws a clear distinction between Art. 2 lit. c (i), which exhaustively lists judges, courts, investigating magistrates and public prosecutors as judicial authorities, and Art. 2 lit. c (ii), which covers any other authority. Given that Art. 2 lit. c reflects the distinction, inherent in the principle of separation of powers, between the judiciary and the executive, already the wording indicates that tax offices must be examined pursuant to the second category (Art. 2 lit. c (ii)).

In addition, the Directive precludes a functional interpretation by which the German tax offices for criminal tax matters are equated with public prosecution offices if they are vested with the rights and obligations of the latter. This would not only be counter to the distinction between executive and judicial authorities but also give rise to legal uncertainty. This is not compatible with the objective of the EIO Directive, i.e. to establish a simple and effective cooperation scheme for gathering evidence.

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As a result, the German tax offices as administrative authorities can be classified as an issuing authority, provided that the requirements of Art. 2 lit. c (ii) of Directive 2014/42 are met, i.e. it is necessary that the EIO issued by it is validated by a judicial authority before being transmitted to the executing authority.

#### Put in focus

The question, which was now decided in substance, was already on the agenda before the ECJ. However, the previous reference for a preliminary ruling by the prosecutor's office of Trento (Italy), was declared inadmissible in September 2021 (→ [eucrim 2/2021, 162](#)). In this case (C-66/20), the AG came to the same conclusion as the ECJ now in the case in Graz (→ [eucrim 1/2021, 37](#)).

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