Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 11 March 2021 [1]

Case C-66/20

XK,
intervener:
Finanzamt für Steuerstrafsachen und Steuerfahndung Münster

(Request for a preliminary ruling from the Procura Distrettuale della Repubblica presso il Tribunale ordinario di Trento (District Public Prosecutor's Office attached to the District Court, Trento, Italy))

(Reference for a preliminary ruling – Right to submit a request for a preliminary ruling under Article 267 TFEU – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order in criminal matters – Issuing authority – Administrative authority designated as a public prosecutor's office in criminal proceedings relating to tax offences – Requirement of judicial validation)

1. Is a German administrative authority, [2] authorised by national law to exercise the rights and responsibilities of a public prosecutor's office in connection with certain offences, entitled to issue a European Investigation Order ('EIO') without the need for validation as required by Article 2(c)(ii) of Directive 2014/41/EU? [3]

2. That, in essence, is the question which an Italian public prosecutor's office referred to the Court of Justice [4] after receiving an EIO, issued by one such German authority, which it must decide whether to recognise and execute. As a first step, before dealing with that question, it is necessary to determine whether the Public Prosecutor's Office, Trento, has the right to use the judicial cooperation mechanism created by Article 267 TFEU.

1 Original language: Spanish.

2 In this case, the Finanzamt für Steuerstrafsachen und Steuerfahndung Münster (Tax Office for Criminal Tax Matters and Tax Investigation, Münster, Germany; 'the Finanzamt, Münster').

3 Directive 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; corrigendum OJ 2015 L 143, p. 16).

4 The Procura Distrettuale della Repubblica presso il Tribunale Ordinario di Trento (District Public Prosecutor's Office attached to the District Court, Trento, Italy; 'Public Prosecutor's Office, Trento').

3. The Court is thus faced once again with the question of the judicial nature of a public prosecutor's office,[5] this time from a perspective that has not been examined before. It will be necessary to determine: (a) whether a public prosecutor's office has the authority to seek a preliminary ruling in connection with an EIO,[6] and (b) whether an administrative body on which national law confers the powers of a public prosecutor's office for the purpose of prosecuting certain offences can be treated as equivalent to a public prosecutor's office, also in connection with an EIO.

I. Regulatory framework

A. EU law – Directive 2014/41

4. Recitals 12 and 15 read as follows:

'(12) When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (the Charter). The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.

…

(15) This Directive should be implemented taking into account Directives 2010/64/EU, [7] 2012/13/EU, [8] and 2013/48/EU [9] …, which concern procedural rights in criminal proceedings.'

5. Article 1 ('The [EIO] and obligation to execute it') is worded as follows:

'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.

5 The Court ruled on the capacity of a public prosecutor's office, acting as a 'judicial authority', to issue a European arrest warrant ('EAW') in the judgments 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; 'judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*'), and of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457). The Court also ruled on the competence of a public prosecutor's office to issue an EIO in the judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002; 'judgment in *Staatsanwaltschaft Wien (Falsified transfer orders)*').

6 A matter on which the Court ruled unfavourably in the judgment of 12 December 1996, *X* (C-74/95 and C-129/95, EU:C:1996:491; 'judgment in *X*').

7 Directive of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

8 Directive of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

9 Directive of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.

2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive.

…'

6. Article 2(c) defines 'issuing authority' in the following terms:

'(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'.

7. Article 6 ('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 ('Recognition and execution') provides:

'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 lists the 'grounds for non-recognition or non-execution'.

B. National law

1. German law – Abgabenordnung (Tax Code)

10. Paragraph 386 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 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.'

11. Paragraph 399(1) states:

'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.'

12. On 14 March 2017, the Permanent Representation of the Federal Republic of Germany to the European Union issued the following statement with regard to EIOs issued by German administrative authorities:

'In accordance with Article 2(c) of … Directive [2014/41], requests from the German administrative authorities are usually validated by the public prosecutor at the regional court in whose district the administrative authority is located. However, the *Länder* are free to assign competence for validation to a court or otherwise determine local jurisdiction for validation by a public prosecutor. Requests from German tax authorities which are entitled to conduct criminal investigations independently under Paragraph 386(2) of the Tax Code do not require validation by a judicial authority or a court. In this case, the tax authorities have the same rights and responsibilities as the public prosecutor's office under Paragraph 399(1) of the Tax Code … and they themselves act as a judicial authority for the purposes of Article 2(c) of … Directive [2014/41].'

2. Italian law – Legislative Decree No 108/17[10]

13. Article 4(1) provides that 'the public prosecutor at 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'.

14. Article 5(1) adds that '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'.

15. Pursuant to Article 10(3), 'an investigation order shall be returned to the issuing authority if it has not been issued or validated by a judicial authority'.

II. Facts, procedure and question referred for a preliminary ruling

16. On 14 November 2019, the Public Prosecutor's Office, Trento, received an EIO issued on the same date by the Finanzamt, Münster, requesting a search of business premises as part of an investigation into tax evasion under Paragraphs 369 and 370 of the German Tax Code.

17. The EIO was signed by the director general of the Finanzamt, Münster, and had not been judicially validated.

18. On 20 December 2019, the Public Prosecutor's Office, Trento, confirmed to the Finanzamt, Münster, that it had received the EIO and sent it a letter requesting a copy of that EIO validated by a judicial authority. The Public Prosecutor's Office, Trento, took the view that validation was necessary on account of the issuing authority's administrative nature.

[10] Decreto legislativo n. 108/17. 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 108/17. Rules implementing Directive 2014/41/EU …) of 21 June 2017 (GURI No 162 of 13 July 2017; 'Legislative Decree No 108/17').

19. On 8 January 2020, the Finanzamt, Münster, informed the Public Prosecutor's Office, Trento, that the EIO did not need to be validated by a judicial authority because, in accordance with Paragraph 399(1) of the Tax Code, the Finanzamt acts as public prosecutor in cases involving tax offences and should be classified as a judicial authority within the meaning of Article 2 of Directive 2014/41.

20. Against that background, the Public Prosecutor's Office, Trento, referred the following question to the Court of Justice 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(1)(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"?'

21. According to the Public Prosecutor's Office, Trento, in the *passive* procedure for recognition of the EIO under Article 9 of Directive 2014/41 and Articles 4 and 10 of Legislative Decree No 108/17, it is tasked with 'ruling on a dispute with complete independence'. It is, therefore, entitled to submit a reference for a preliminary ruling pursuant to Article 267 TFEU.

22. As regards the substance, the Public Prosecutor's Office, Trento, states that the EIO must be adopted or validated by a judicial authority. That is apparent, based on the analogy between EIOs and EAWs,[11] from the judgment of 10 November 2016, *Özçelik*.[12]

23. Accordingly, it is necessary to determine whether an administrative authority like the Finanzamt, which, in certain situations, is authorised by national law to perform duties of a public prosecutor's office, is entitled to issue an EIO without judicial validation.

24. The Public Prosecutor's Office, Trento, submits that the answer must be given by applying the Court's case-law on EAWs, that is, by proceeding on the basis that: (a) the definition of 'judicial authority' is uniform and cannot depend on the different Member States, and (b) that definition includes only bodies which are not subject to external directions or instructions, particularly from the executive.

III. Procedure before the Court of Justice

25. The request for a preliminary ruling was received at the Registry of the Court on 24 January 2020.

[11] 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), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

[12] C-453/16 PPU, EU:C:2016:860.

26. Written observations were lodged by the German, Italian and Portuguese Governments and the Commission.

27. The Court did not consider it necessary to hold a hearing but it invited the parties to reply to two questions concerning judicial scrutiny of EIOs [13] and the applicable Italian law. [14]

IV. Analysis

A. Admissibility of the request for a preliminary ruling

28. In accordance with Article 267 TFEU, only a 'court or tribunal' may – or must – seek a 'preliminary' ruling from the Court of Justice on a question concerning 'the interpretation of the Treaties' or 'the validity and interpretation' of secondary EU law.

29. The meaning of 'court or tribunal' in that context is a matter which has to be resolved exclusively under EU law: the requirements of unity and uniformity in the application of EU law mean that 'court or tribunal' is an autonomous concept which is independent of the different national legal systems. [15]

30. When the Court defines the term, it traditionally takes into account a number of factors which were first outlined in the judgment in *Vaassen-Göbbels*. [16] The status of 'court or tribunal' is reserved to bodies which have been permanently established by law, apply rules of law using an *inter partes* procedure, exercise compulsory jurisdiction and are fully independent. [17]

31. In principle, only courts or tribunals which are part of each Member State's judicial system satisfy all of those conditions. However, the Court has been relatively flexible when assessing compliance with those conditions, which has enabled it to recognise institutions that are not part of the judicial system as being a 'court or tribunal', such as an appeals committee of a professional association [18] or a municipal appeals committee. [19]

32. The Court's antiformalism in this area has been criticised, with complaints that the criteria laid down in the judgment in *Vaassen-Göbbels* have ultimately become 'distorted'. [20] However, the Court recently corrected its previous, excessively permissive stance. [21]

[13] The parties were asked whether, under EU law, if a decision not to recognise an EIO is adopted by an 'executing authority' within the meaning of Article 2(d) of Directive 2014/41, which is not a judge or a court, that decision must be subject to judicial review.

[14] The Italian Government was asked to explain the procedure for recognition and execution of an EIO by a public prosecutor's office, indicating when a judge or a court may be called on to intervene in that procedure and when the public prosecutor's office alone is involved in it. The Italian Government was also asked to explain the remedies laid down by national law in the event of non-recognition and non-execution of an EIO.

[15] Judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17; 'judgment in *Banco de Santander*').

[16] Judgment of 30 June 1966 (C-61/65, EU:C:1966:39; 'judgment in *Vaassen-Göbbels*').

[17] Judgment in *Banco de Santander* (paragraph 51 and the case-law cited).

[18] Judgment of 6 October 1981, *Broekmeulen* (246/80, EU:C:1981:218; 'judgment in *Broekmeulen*').

[19] Judgment of 29 November 2001, *De Coster* (C-17/00, EU:C:2001:651).

[20] That was the complaint made by Advocate General Ruiz-Jarabo Colomer in the Opinion in *Umweltanwalt von Kärnten* (C-205/08, EU:C:2009:397; 'Opinion in *Umweltanwalt von Kärnten*'; point 25). He took the view that the development of case-law meant that those criteria 'encompass a diverse amalgam of institutions which is not always in keeping with the judicial spirit underlying Article [267 TFEU]'. In so doing, he took the same line as he did in his Opinion in *De Coster* (C-17/00, EU:C:2001:366; 'Opinion in *De Coster*'; point 14).

[21] Judgment in *Banco de Santander* (paragraph 55).

33. In fact, the Court's case-law takes account of the underlying reason on which the judicial cooperation mechanism laid down in Article 267 TFEU is based: 'to ensure that the specific characteristics and the autonomy of [the EU] legal order are preserved'. [22]

34. That objective is met by a judicial system which 'has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of *securing uniform interpretation of EU law* …, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'. [23]

35. The reason why the procedure laid down in Article 267 TFEU is framed as a 'dialogue between one court and another' is that it is the courts which *generally* give the *final* decision on the rules which make up the Member States' legal systems. Where provisions of EU law affect those legal systems – and any subsequent disputes – a reference to the Court of Justice is intended to prevent the crystallisation of final solutions which, from the perspective of EU law, are inappropriate. [24]

36. That explains why national courts approach the Court of Justice in search of answers to questions which arise in relation to the correct interpretation of EU provisions having a bearing on a dispute.

37. The different interpretations of the law adopted by non-judicial appliers (including administrative bodies) of domestic law are, via review mechanisms, reduced to a single whole in the national courts. Ultimately, only interpretations approved by national courts will be valid, and therefore it is logical that Article 267 TFEU should make those courts the natural (and sole) interlocutors of the Court of Justice.

38. However, there is more. As I pointed out above, the objective is to safeguard the 'uniform interpretation of EU law'. [25] Article 267 TFEU is, of course, intended to enable national courts to interpret provisions of EU law which they have to apply when adjudicating on disputes before them. However, it also serves the purpose of ensuring that the authorised interpretation of the Court is available for all provisions of EU law.

39. The aim is to prevent, through the use of Article 267 TFEU, the *entrenchment* in national legal systems of interpretations of EU law for which it has not been possible to obtain the approval of the Court. If that were the case, there would, in addition to the risk of misinterpretation, be the almost inevitable multiple *readings* of EU provisions in different Member States, with the

[22] Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014 (EU:C:2014:2454; 'Opinion 2/13'; paragraph 174).

[23] Opinion 2/13 (paragraph 176). Italics added.

[24] It is, in short, judges who, by definitively stating the law (*ius dicere*) in a particular case, ensure that the regulatory and decision-making procedure leading to the ultimate application of the general and abstract provisions of the legal system has been carried out in the manner laid down by the latter. In that connection, I refer to my Opinion in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:337, point 66). In the same vein, in the Opinion in *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:338, point 27), I stated that a judge's task 'is to deliver the *final decision* representing the application of the legal system, in such a way that the decision, which has the status of *res judicata*, is in accordance with the law and, to that extent, valid'. A judge's role is determined to such an extent by the competence to guarantee the validity of that final decision on the legal system that 'it could … be said that the [latter] is not a *means* for the judge, but rather an *end* in itself. More precisely, it is *the sole end*' (ibid., point 28).

[25] Opinion 2/13 (paragraph 176).

resulting damage to the unity of EU law. Therefore, Article 267 TFEU not only authorises national courts of last instance to refer questions for a preliminary ruling, but requires them to do so.

40. I believe that that aim is the reason why, throughout its case-law, the Court has taken a functional approach when admitting references from institutions that are not strictly speaking judicial. Where there is no judicial remedy against the decisions of such institutions under national law, there is a risk that final interpretations of EU law become settled without the Court's involvement.

41. As I stated above, it is the courts which, *as a general rule*, give the final decision in the legal systems of the Member States.[26] That is why Article 267 TFEU refers to courts as, I repeat, the *natural* interlocutors of the Court of Justice.

42. Where the risk of varied interpretations of EU law is identified, that rule may be moderated in exceptional cases in which judicial intervention in the strict sense is not possible in the light of the characteristics of the national legal system.

43. Advocate General Ruiz-Jarabo Colomer put it like this: 'the judicial system in a Union composed of 27 Member States reflects a wide variety of criteria and objectives', making it 'difficult to conceive of a blueprint setting out a common description of the judiciary in so many countries'. That is why the interpretation of the criteria laid down in the judgment in *Vaassen-Göbbels* has been so 'generic and broad'.[27]

44. The Court has proceeded, therefore, on the basis of an ideal blueprint defined by the features which typically distinguish courts (in short, those set out in the judgment in *Vaassen-Göbbels*).[28] However, over the years, the Court has been seised of cases which have led it to reduce the importance of the criteria laid down in that judgment where that was necessary in order to include in the definition of 'court or tribunal' institutions which, while operating outside the judicial system, exercised jurisdiction.[29]

45. However, what has never been compromised is the requirement that a body which makes a reference for a preliminary ruling must *materially* exercise jurisdiction; in other words, it must definitively state the law in a particular case.

46. As I have pointed out, the Court readily classified an appeals committee of a professional association as a 'court or tribunal', even though its decisions could be challenged before the courts. The latter fact should have been sufficient to support the finding that those courts would,

[26] The principles of the rule of law include the requirement that courts must give the final decision, since it is the enabling of the judicial scrutiny of all acts of the public authorities, without reservation, which ensures that those authorities are subject to the rule of law. In addition to that guarantee is the guarantee afforded to individuals as holders of the right to an effective remedy, enshrined in Article 47 of the Charter. A recent provision of EU law defines 'the rule of law' as 'the Union value enshrined in Article 2 TEU', which includes, among other principles, the principle of 'effective judicial protection … by … courts, also as regards fundamental rights' (Article 2(a) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1)).

[27] Opinion in *Umweltanwalt von Kärnten* (point 35). The Court has thus made 'an effort to involve the common constitutional traditions in the creation of a European judicial dialogue' (ibid., point 36).

[28] Including, curiously, the criterion of judicial independence. Advocate General Ruiz-Jarabo Colomer pointed out in the Opinion in *De Coster* (point 17) that the requirement of independence first appeared in the judgment of 11 June 1987, *X* (14/86, EU:C:1987:275), and was not adopted unconditionally until the judgment of 30 March 1993, *Corbiau* (C-24/92, EU:C:1993:118).

[29] This is despite the fact that national law explicitly categorised them as administrative bodies. That occurred, for example, in relation to the Tribunal Català de Contractes del Sector Públic (Catalan Public Sector Contracts Board), an administrative institution under Spanish law, which the judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664), deemed to be a 'court or tribunal' for the purposes of Article 267 TFEU.

where necessary, have to submit any reference for a preliminary ruling. However, the fact that, in practice, court actions were not brought against decisions of the committee was sufficient for the Court to find that those decisions were de facto judicial in nature. [30]

47. What matters, therefore, in the context of Article 267 TFEU, is that those who give the final decision under national law are permitted to access the Court where the interpretation of EU provisions is involved. That applies to courts in the strict sense and to other bodies which, while they do not have that quality, exercise, by way of exception, de facto final jurisdiction in a dispute. Both must be permitted the opportunity to approach the Court so that it may *state* the authorised interpretation of EU law.

48. It can thus be appreciated that the phrase 'give judgment', used by Article 267 TFEU, has been interpreted broadly, thereby seeking to prevent 'many procedural questions from being regarded as inadmissible and from being *unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law* that the referring court is required to apply'. [31]

49. The Court's concern with being the final decision-maker which interprets the whole of EU law led, therefore, to the adoption of the two exceptions indicated by Advocate General Ruiz-Jarabo Colomer at the relevant time: (i) where there is no remedy before the courts, and (ii) the allocation of judicial duties to quasi-judicial bodies in accordance with the constitution. [32]

50. The objections to the admissibility of the reference submitted by the Public Prosecutor's Office, Trento, can be dealt with on that basis. That institution fulfils the criteria of establishment by law, permanence, compulsory jurisdiction and the application of rules of law.

51. Even if the procedure for recognition and execution of the EIO were not *inter partes*, which is doubtful, the Court reduced the importance of that feature by pointing out that it is not an 'absolute criterion'. [33]

52. Therefore, all the indications are that the first of the exceptions to which I referred above applies since, according to the information supplied by the Public Prosecutor's Office, Trento, and the Italian Government, [34] although a decision of the Public Prosecutor's Office to *recognise* the EIO may be the subject of judicial review, there is no judicial remedy which would enable court proceedings to be brought to challenge a decision to *refuse* to afford the EIO the recognition necessary for its execution.

53. In those circumstances, I believe that the Public Prosecutor's Office, Trento, should be recognised as having the authority to make the reference for a preliminary ruling.

[30] Judgment in *Broekmeulen* (paragraph 17): 'in the absence, in practice, of any right of appeal to the ordinary courts, the appeals committee', whose decisions 'are in fact recognised as final, must, in a matter involving the application of [EU] law, be considered as a court or tribunal of a Member State within the meaning of Article [267 TFEU]' (italics added).

[31] Judgment of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162; 'judgment in *Gradbeništvo Korana*'; paragraph 35) (italics added).

[32] Opinion in *Umweltanwalt von Kärnten* (points 40 to 49).

[33] Judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 31).

[34] That is the explicit sense of the Italian Government's written reply (paragraph 8) to the question addressed to it by the Court, transcribed in footnote 14 of this Opinion.

54. However, it may be countered that, if the Public Prosecutor's Office recognises the validity of the EIO, its decision could be challenged before a court and that court would give the final decision, with the result that the right to make a preliminary ruling would be reserved to that court.

55. At the present stage of the proceedings in which the reference has arisen, the Public Prosecutor's Office, Trento, has not yet been able to decide whether the EIO, on which it must also give a decision regarding recognition, is viable. Further, the reason it has not been able to do so is because it is uncertain whether, in accordance with Directive 2014/41, the conditions for recognition of the EIO at issue are satisfied.

56. In that connection, the Public Prosecutor's Office, Trento, could only bring about the intervention of a court if it decided to recognise the EIO *regardless of the fact that, in its view, it is an EIO issued by a body lacking competence* (the Finanzamt, Münster). In short, it would be forced to adopt a decision which it knew might be incorrect while trusting that a court would become involved, something which, moreover, cannot be guaranteed.

57. The Public Prosecutor's Office, Trento, would be able to give a decision based on the best of its knowledge only if it had a guarantee that a decision to refuse to recognise the EIO would also be subject to judicial review. As regards the purpose served by Article 267 TFEU, it is immaterial whether that review is conducted by a court of the Member State of origin of the EIO (Germany) which will always have the option of seeking a preliminary ruling from the Court of Justice. [35]

58. However, the EIO at issue here was not issued by a court but rather by an administrative body which cannot access the Court of Justice by means of Article 267 TFEU either.

59. With regard to the context in which the reference for a preliminary ruling has been made, the Public Prosecutor's Office, Trento, inclines to the view that the EIO issued by the Finanzamt, Münster, requires the validation at issue. That being so, what it is asking from the Court is confirmation of its interpretation of Directive 2014/41.

60. If the reference for a preliminary ruling were ruled inadmissible, the Public Prosecutor's Office, Trento, would be able to act in accordance with its own interpretation of Directive 2014/41 and refuse the recognition sought by the Finanzamt, Münster. Since, I repeat, the latter would not be entitled to seek a preliminary ruling either and there is no certainty that the EIO was ordered to be issued in the course of judicial proceedings, [36] the outcome would be that no court would be able to approach the Court of Justice for a ruling on the interpretation of that directive.

[35] The Court accepted that a court of the State of origin could rely on Article 267 TFEU in relation to the interpretation of EU law adopted by the authorities of the executing Member State in the judgment of 25 July 2018, *AY (Arrest warrant – Witness)* (C-268/17, EU:C:2018:602). At that time, the fact that the interpretation of EU law in one Member State could result in the withdrawal by a court of another Member State of an EAW addressed to the former Member State led the Court of Justice to find that 'the claim cannot be made that the questions submitted are unrelated to the actual facts or the object of the proceedings pending before the referring court, or that the problem is hypothetical' (loc. cit., paragraph 27).

[36] The German Government asserts in its written observations (paragraph 54) that the EIO issued by the Finanzamt, Münster, was preceded by a search order signed by the Amtsgericht Münster (Local Court, Münster, Germany). However, no details are provided as to whether the EIO merely transcribes the wording of that court order – in which case, the EIO could be attributed to the Amtsgericht Münster (Local Court, Münster) – or whether the EIO served as a general basis for the adoption of a decision the wording of which is the Finanzamt's own. In any event, EIOs issued by administrative bodies before court proceedings are formally commenced cannot be ruled out.

61. The generalisation of that approach and a finding that the Public Prosecutor's Office, Trento, is not entitled to make a reference for a preliminary ruling would create a *blind spot* in the interpretation of a provision of EU law. That is precisely what must be avoided for the sake of the unity of EU law, as emphasised in the judgment in *Gradbeništvo Korana*.

62. Moreover, the fact that, at one time, the Court held that the Public Prosecutor's Office, Turin, did not have the status of a court authorised to seek a preliminary ruling (judgment in *X*) does not in itself determine the approach to be taken here.

63. Admittedly, the case-law laid down in the judgment in *X* remains fully valid. However, when that case-law is applied it must be borne in mind that the fact that the Public Prosecutor's Office is a body or an institution is not the only relevant fact, and that instead the role it performs as an executing authority in the procedure laid down in Directive 2014/41 is also relevant.

64. Unlike the situation at issue in the judgment in *X*, where the Public Prosecutor's Office, Turin, was acting as a *party* in criminal proceedings before a court, the Public Prosecutor's Office, Trento, is now intervening as a body which makes the *final* decision at national level on the application of an EU provision. Functionally, it acts in the same way as a court and no appeal would lie against its decision to refuse to recognise the EIO. Since it acts in that capacity, I do not believe that there are any obstacles to accepting its status as a 'court or tribunal' within the meaning of Article 267 TFEU.

65. In my view, a final consideration is necessary.

66. The fact that the Public Prosecutor's Office, Trento, acts *materially or functionally* as a court could reveal a certain dysfunctionality in national law because, in principle, the judicial review of all acts of the public authorities has to be possible. [37]

67. However, that is not an issue on which the Court is required to rule now, since it is unconnected with the subject matter of the reference. Even if, hypothetically, national law were required to provide for a judicial remedy against a decision of the Public Prosecutor's Office, Trento, not to recognise the EIO (a question which, I stress, is outside the scope of these proceedings and which, furthermore, the Commission and the Italian Government contend should be answered in the negative), [38] that would not resolve the difficulty represented by the lack of a route to access the Court of Justice *in the specific factual context which has given rise to this reference for a preliminary ruling*.

68. In summary, since the Public Prosecutor's Office, Trento, is established as a 'court or tribunal' for the purpose of deciding, with no subsequent appeal, whether to refuse the EIO in the terms set out above, it has the capacity to refer the present question to the Court of Justice for a preliminary ruling.

[37] On that matter, see point 41 above.

[38] The Commission expressed that view in its written reply to the question of the Court transcribed in footnote 13 of this Opinion. That is also the position of the Italian Government (paragraphs 22 to 30 of its reply).

B. The substance

69. In accordance with Article 1(1) of Directive 2014/41, an EIO is a 'judicial decision'.[39] According to Article 2(c) of that directive, such a decision may be adopted and issued by a judge or a public prosecutor[40] and, in addition, by a body 'acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence'.[41]

70. In the latter situation, an EIO issued by such an 'investigating authority' must undergo a prior 'examination … by a judge, court, investigating judge or a public prosecutor',[42] in other words, by persons or bodies entitled to issue an EIO of their own motion.

71. The wording of Article 2(c)(ii) of Directive 2014/41 appears to me to be conclusive for the purpose of giving a negative reply to the question referred. Therefore, I agree with the position of the Italian and Portuguese Governments, and the Commission.

72. I consider the reasons put forward by the German Government to justify the conferral on the Finanzamt of the investigative powers it holds in the field of taxation, by virtue of national law, to be compatible with EU law.

73. In particular, that conferral of powers complies with Article 2(c)(ii) of Directive 2014/41, which refers to 'any other competent authority *as defined by the issuing State*' which '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*'.[43]

74. However, that is not the issue.

75. The issue is that, while Member States are recognised as having the power to designate the authorities authorised to conduct investigations in criminal proceedings and to order the gathering of evidence, Article 2(c)(ii) of Directive 2014/41 does not assign to the authorities so designated any task other than that of adopting the decision to issue an EIO which, 'before it is transmitted to the executing authority … shall be validated'. Furthermore, the EIO must be validated specifically by a court, a judge or a public prosecutor.

76. The Finanzamt, Münster, is unequivocally an administrative body, meaning that, under Directive 2014/41, it is not authorised to issue an EIO by itself. To be more precise, it is not authorised to 'transmit' an EIO to the executing authority without first having the EIO validated by a judicial authority, which, in accordance with Article 2(c)(ii) of Directive 2014/41, means a court, a judge or a public prosecutor.

[39] The German Government has observed (paragraphs 38 to 43 of its written observations) that, unlike the other language versions, the German version of the provision does not use the adjective 'judicial' ('justizielle') and instead uses the term 'court' ('gerichtliche'). I do not believe the difference to be relevant, since the explicit reference to public prosecutors in Article 2(c) of Directive 2014/41 makes clear that the EIO is not conceived as a decision given in all cases by a body exercising jurisdiction in the strict sense.

[40] To be specific, according to point (i), by 'a judge, a court, an investigating judge or a public prosecutor competent in the case concerned'.

[41] Article 2(c)(ii) of Directive 2014/41.

[42] Loc. ult. cit.

[43] Italics added.

77. The German Government maintains that, in the exercise of its procedural autonomy, it tasked the Finanzamt, in the area of taxation, with carrying out typical duties of a public prosecutor's office, assigning to it the traditional rights and obligations of that office. This is an exception laid down by law, which derogates from the exclusive responsibility of the public prosecutor's office for the conduct of criminal investigations.

78. Does that conferral of powers make the Finanzamt a 'public prosecutor' for the purposes of Directive 2014/41? In my view, it does not.

79. The fact that, in the area of the prosecution of tax offences, national law assigns to the Finanzamt investigative powers equivalent to those of a public prosecutor's office is not sufficient for treating the two institutions in the same way within the scheme of Directive 2014/41.

80. As the Commission points out, the Finanzamt is an administrative authority responsible for dealing with tax matters and it is part of the executive. Although German legislation grants it limited powers to investigate certain offences, there is a clear distinction between the tax authorities and the public prosecutor's office. The Finanzamt does not have all the powers of a public prosecutor's office and therefore it cannot be equated with a public prosecutor's office as an EIO-issuing authority.

81. The rationale behind Article 2 of Directive 2014/41 is that administrative authorities, whatever their spheres of competence under national law, have to require validation from judicial authorities (including public prosecutors) in order to issue an EIO.

82. That rationale would cease to exist if Member States could permit authorities forming part of the executive to transmit EIOs which had not been validated by judicial authorities (including public prosecutors) simply by placing the former on the same footing as the latter for those purposes.

83. In addition to that argument there is another which relates to the role performed by judicial authorities in the strict sense (including public prosecutors) with regard to EIOs.

84. According to recital 12 of Directive 2014/41, an issuing authority is required to pay particular attention to guaranteeing fundamental rights, since 'the presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice'.

85. Therefore, the EU legislature stressed that 'any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the *necessity, proportionality and objectives* that it should pursue, in particular the *protection of the rights and freedoms* of others'. [44]

86. In that connection, Article 6(1) of Directive 2014/41 provides that an EIO may be issued only if it is 'necessary and proportionate … taking into account the rights of the suspected or accused person'. Further, in accordance with Article 6(2), the issuing authority must take account of a number of directives concerning procedural rights in criminal proceedings. [45]

[44] Italics added.

[45] Directives 2010/64, 2012/13 and 2013/48. See point 4 and footnotes 7, 8 and 9 of this Opinion.

87. Therefore, to enable a proper balancing of the general interest and any fundamental rights which may be affected, an authority issuing an EIO is required to carry out an assessment of necessity and proportionality which requires a different institutional position from that of an administrative body.

88. Even though an administrative body like the Finanzamt may have been allocated powers typical of a public prosecutor's office, that allocation of powers does not transform it into a 'judicial authority', within the meaning of Directive 2014/41, which is entitled to conduct that assessment of necessity and proportionality.

89. The qualified material competence which led the German legislature to confer powers relating to the investigation of tax offences on Finanzamts shows that these bodies are highly specialised in that specific field. However, that specialisation is not sufficient, in the scheme of Directive 2014/41, to recognise Finanzamts as having either the perspective or the more general competence which is required to balance rights and interests before deciding to issue an EIO.

90. The Court has held that the term 'judicial authority' is not limited 'to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State', [46] while excluding in all cases administrative authorities, which are part of the executive. [47]

91. While it does not necessarily have the independence which characterises a court, a public prosecutor's office is not an institution under the control of the executive branch in the way that administrative authorities are under the control of and subordinate to the executive. It is true that, in some legal systems, public prosecutors may receive individual instructions from the executive, but, even so, they have an autonomous status which distinguishes them from bodies of the executive branch. [48]

92. The institutional position of the public prosecutor's office as guarantor of legality before the courts makes it a real participant in the administration of justice, in that the public prosecutor's office is not exclusively or primarily concerned with the public authorities' interest but rather with the general interest in compliance with the law. That is why Article 2 of Directive 2014/41 places the public prosecutor on an equal footing with judges. [49]

93. The performance, on a case-by-case basis, of investigative functions similar to those of the public prosecutor's office does not mean that the Finanzamt ceases to be an administrative body and, as such, subject structurally and functionally to the hierarchy of the administration and, in particular, lacking the competence necessary to conduct the assessment of necessity and the

46 Judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)* (paragraph 50).

47 Judgment of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858, paragraph 35).

48 The fact that a public prosecutor's office is subject to individual instructions from the executive branch means that it cannot issue an EAW (judgment in *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*), but does not preclude it from issuing an EIO (judgment in *Staatsanwaltschaft Wien (Falsified transfer orders)*).

49 In the judgment of 2 March 2021, *Prokuratuur (Conditions of access to data relating to electronic communications)* (C-746/18, EU:C:2021:152), specifically in the case of access to traffic and location data for the purposes of a criminal investigation, the Court interpreted Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), as meaning that it precludes national legislation that confers power on the public prosecutor's office to authorise such access, in so far as that office directs the criminal investigation procedure and brings the public prosecution.

balancing exercise required by Directive 2014/41. That assessment and that balancing exercise go beyond concern with the specific interest of the tax authority and encompass the general interest of the entire State and the guarantee of citizens' fundamental rights.

V. Conclusion

94. In the light of the foregoing considerations, I propose that the Court reply as follows to the Procura Distrettuale della Repubblica presso il Tribunale Ordinario di Trento (District Public Prosecutor's Office attached to the District Court, Trento, Italy):

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 must be interpreted as meaning that it does not allow a Member State to exempt national administrative authorities with competence in matters of taxation, including where those authorities are authorised to conduct investigations in certain criminal proceedings, from the obligation to require, before transmission of a European Investigation Order to the executing authority, validation of that order by a judge, a court, a public prosecutor or an investigating judge of the issuing State.