Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 20 May 2021 [1]

Case C-724/19

Spetsializirana prokuratura
v
HP

(Request for a preliminary ruling from the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria))

(Preliminary-ruling proceedings – Judicial cooperation in criminal matters – European investigation order – Directive 2014/41/EU – Article 2(c) – Issuing authority – Article 6(2) – Conditions of issue – Public prosecutor acting as issuing judicial authority – Power to issue a European investigation order reserved to a judge in similar national proceedings)

1. Is a public prosecutor's office of a Member State competent to issue a European investigation order in a criminal matter ('EIO'), requesting traffic and location data relating to electronic communications, when, in accordance with the national law of the issuing State, only a judge or a court is entitled to authorise the gathering of such evidence?

2. That, in essence, is the uncertainty raised in this reference for a preliminary ruling. In resolving that uncertainty, the Court will have the opportunity to develop its case-law on the concept of an EIO 'issuing authority' for the purposes of Directive 2014/41/EU, [2] in relation to a public prosecutor's office.

I. Legal framework

A. EU law. Directive 2014/41

3. According to recital 30, 'possibilities to cooperate under this Directive on the interception of telecommunications should not be limited to the content of the telecommunications, but could also cover collection of traffic and location data associated with such telecommunications, allowing competent authorities to issue an EIO for the purpose of obtaining less intrusive data on telecommunications. An EIO issued to obtain historical traffic and location data related to

[1] Original language: Spanish.

[2] 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).

telecommunications should be dealt with under the general regime related to the execution of the EIO and may be considered, depending on the national law of the executing State, as a coercive investigative measure'.

4. According to recital 32, 'in an EIO containing the request for interception of telecommunications the issuing authority should provide the executing authority with sufficient information, such as details of the criminal conduct under investigation, in order to allow the executing authority to assess whether that investigative measure, would be authorised in a similar domestic case'.

5. Article 1 ('The European Investigation Order and obligation to execute it') provides:

'1. A European Investigation Order (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.

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.

3. The issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure.

4. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.'

6. Article 2 ('Definitions') stipulates:

'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;

…'

7. Article 6 ('Conditions for issuing and transmitting an EIO') reads:

'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. In accordance with Article 9 ('Recognition and execution'):

'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.

…'

B. National law

1. *Zakon za Evropeyskata zapoved za razsledvane (Law on the European investigation order; 'the ZEZR')*

9. Article 5(1) provides that the competent EIO issuing authority is the public prosecutor in the pre-trial stage of criminal proceedings or the competent court in the trial proper.

2. *Nakazatelno protsesualen kodeks (Code of criminal procedure; 'the NPK')*

10. Article 159a, headed 'Provision of data by companies providing publicly available electronic communication networks and/or services', provides:

'(1) At the request of the court in the trial stage or on the basis of a reasoned order of a judge of the respective court of first instance, made in the pre-trial stage at the request of the supervising public prosecutor, companies providing publicly available electronic communication networks and/or services shall make available the data that are generated in the course of their activities and are required for the purposes of:

1. tracing and identifying the source of the connection;

2. identifying the direction of the connection;

3. identifying the date, time and duration of the connection;

4. identifying the type of connection;

5. identifying the user's end electronic communication device or that acting as the user's end device;

6. establishing the identifier of the cells used.

(2) The data under paragraph 1 shall be collected where required for the purposes of investigating violent intentional crimes.

(3) The request of the supervising public prosecutor referred to in paragraph 1 shall state its reasons and must contain:

1. information concerning the offence whose investigation requires the use of traffic data;

2. a description of the circumstances on which the request is based;

3. details of the persons in relation to whom traffic data are requested;

4. the period of time for which the information is to be collected;

5. the investigating authority to which the data are to be provided.

(4) In the order referred to in paragraph 1, the court shall indicate:

1. the data for which information is to be provided;

2. the period of time for which the information is to be collected;

3. the investigating authority to which the data are to be provided.

(5) The period of time for which the provision of the data referred to in paragraph 1 is requested and authorised shall not exceed six months.

…'

II. Facts, national proceedings and questions referred for a preliminary ruling

11. Following the commencement of criminal proceedings in Bulgaria against HP for the financing of terrorist activities, the public prosecutor's office issued four EIOs, with identical content, for the collection of traffic and location data relating to electronic communications. [3]

12. The four EIOs were issued by the Bulgarian public prosecutor's office without the intervention of, or validation by, a judge or a court and were transmitted to the relevant authorities in Belgium, Germany, Austria and Sweden.

13. The public prosecutor's offices of the Member States to which the EIOs were addressed executed the EIOs without authorisation or validation by a judge or a court, except in the case of the Belgian public prosecutor's office.

14. Based on the evidence gathered, including the information supplied in response to the EIOs, HP and five other persons were charged with financing terrorist acts and being part of a criminal group for the purpose of financing such acts.

15. The Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria), which has to examine the evidence gathered in accordance with the EIOs, questions whether that evidence is lawful since, under national law, that evidence could only have been obtained in Bulgaria following judicial authorisation.

16. Against that background, that court has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a national law … according to which, during the pre-trial stage of the criminal proceedings, the authority competent to issue [an EIO] for the provision of traffic and location data related to telecommunications is a public prosecutor, consistent with Article 2(c)(i) of Directive 2014/41 and the principle of equivalence, provided that in an identical domestic case the competent authority is a judge?

[3] The referring court specifies that the data concerned was traffic and location data requested in accordance with 'recital 30 of Directive 2014/41 … [and] Article 159a(1) of the NPK'.

(2) Does recognition of that [EIO] by the competent authority of the executing State (public prosecutor or an investigating judge) replace the court order required under the law of the issuing State?'

III. Procedure before the Court

17. The reference for a preliminary ruling was received at the Registry of the Court on 1 October 2019.

18. Written observations were lodged by HP, the German and Hungarian Governments, and the Commission.

19. The Court ruled that, instead of a hearing, the parties and those participating in the proceedings would be heard in connection with the possible effects on the dispute of the judgments of 8 December 2020 [4] and 2 March 2021. [5]

20. At the direction of the Court, this Opinion will deal solely with the first question.

IV. Arguments of the parties

21. HP submits that Article 5(1)(1) of the ZEZR is not compatible with Article 2(c) of Directive 2014/41, because the latter does not permit the competence of the courts to be excluded when it comes to ordering acts like those referred to in the order for reference. HP points out, moreover, that, under Bulgarian law, those acts must be adopted by the competent court. The manner in which the information on traffic data was obtained in the main proceedings is, therefore, unlawful under Bulgarian law.

22. The German Government contends that the reply to the question referred is found not in Article 2(c) of Directive 2014/41 but in Article 6(1)(b) of that directive. Regardless of the fact that Article 2(c) permits the separation of competence to order a specific measure from competence to issue an EIO, the fact is that Article 6(1)(b) precludes a request for a cross-border investigative measure from being made subject to conditions that are less strict than those applicable, pursuant to national law, to a similar domestic procedure.

23. The German Government argues that, if the national law of the issuing Member State requires that a judge must approve certain investigative measures, that condition must apply also when such measures are to be executed in another Member State.

24. The Hungarian Government submits that the answer to the first question is linked to compliance with the conditions for issuing an EIO laid down in Article 6(1)(b) of Directive 2014/41. In its view, the mutual recognition which underpins judicial cooperation in criminal matters presupposes that the decision of the issuing Member State has been adopted by a court or an authority that is substantively and territorially competent.

[4] *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002).

[5] *Prokuratuur (Conditions of access to data relating to electronic communications)* (C-746/18, EU:C:2021:152; 'judgment in *Prokuratuur*').

25. The Hungarian Government concludes from this that, in the context of Directive 2014/41, one of the conditions for issuing an EIO is that the measure to which it refers must have been verified by the authority which would be competent to adopt that measure at national level. Otherwise, the guarantees required for investigative measures that are to be carried out in another Member State would be lower than those envisaged for similar measures required to be executed in the issuing State.

26. The Commission submits that the referring court's uncertainties relate to two different areas: the authority competent to issue an EIO (Article 2(c) of Directive 2014/41), on the one hand, and the conditions for issuing an EIO (Article 6 of that directive), on the other.

27. The Commission observes that, as a result of the requirement of competence 'in the case concerned' (Article 2(c) of Directive 2014/41), the issuing authority must have an institutional role in the original criminal proceedings. However, EU law does not specify whether that authority must be fully in charge of the proceedings or whether its involvement has to relate solely to the specific investigative measure concerned: Directive 2014/41 affords the Member States flexibility in that regard.

28. This means that, in the Commission's submission, the answer to the question referred is found in Article 6(1)(b) of Directive 2014/41. In accordance with that provision, if the measure calls for the intervention of a judge at national level (as occurs in Bulgaria), the execution of that measure in another Member State by means of an EIO also requires that the issuing of that EIO must be reserved to a court.

V. Analysis

A. Preliminary considerations

29. The views of the parties and of those who have participated in the preliminary-ruling proceedings on the implications for this case of two recent judgments of the Court (that of 8 December 2020[6] and the judgment in *Prokuratuur*) have been heard.

30. Even though the referring court's questions in this reference do not directly relate to the subject matter of the dispute in those two judgments, there is nothing to prevent the Court from providing the referring court with information, based on the case files and the observations submitted, about matters not dealt with in the reference for a preliminary ruling if it considers this necessary in order to improve its cooperation with the referring court.

31. The judgment of 8 December 2020 dispelled the uncertainties concerning the competence of a public prosecutor's office to issue an EIO even if its *status* is such that it is not fully independent of the executive.[7]

[6] *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002).

[7] *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:1002, paragraph 75 and operative part): 'Article 1(1) and Article 2(c) of Directive 2014/41 must be interpreted as meaning that the concepts of "judicial authority" and "issuing authority", within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.'

32. Therefore, whatever the institutional status of the Bulgarian public prosecutor's office may be under domestic law, its right, in general terms, to issue an EIO is not barred under Directive 2014/41.

33. Although the judgment in *Prokuratuur* does not directly concern an EIO but rather a purely national investigative measure with no cross-border dimension (pursuant to which the public prosecutor's office of a Member State ordered the collection of traffic and location data relating to certain electronic communications), it is of greater relevance to this case.

34. In that judgment, the Court held that Directive 2002/58/EC, [8] in conjunction with Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union '[precludes] national legislation that confers upon the public prosecutor's office, whose task is to direct the criminal pre-trial procedure and to bring, where appropriate, the public prosecution in subsequent proceedings, the power to authorise access of a public authority to traffic and location data for the purposes of a criminal investigation'.

35. The Court's arguments on that point were, inter alia, the following:

– 'It is essential that access of the competent national authorities to retained data be subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime.' [9]

– 'As the Advocate General has observed, in essence, in point 105 of his Opinion, one of the requirements for that prior review is that the court or body entrusted with carrying it out must have all the powers and provide all the guarantees necessary in order to reconcile the various interests and rights at issue. As regards a criminal investigation in particular, it is a requirement of such a review that that court or body must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access.' [10]

– 'In particular, in the criminal field, as the Advocate General has observed, in essence, in point 126 of his Opinion, the requirement of independence entails that the authority entrusted with the prior review, first, must not be involved in the conduct of the criminal investigation in question and, second, has a neutral stance vis-à-vis the parties to the criminal proceedings.' [11]

– 'That is not so in the case of a public prosecutor's office which directs the investigation procedure and, where appropriate, brings the public prosecution. The public prosecutor's office has the task not of ruling on a case in complete independence but, acting as prosecutor in the proceedings, of putting it, where appropriate, before the court that has jurisdiction.' [12]

[8] Directive 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).

[9] Judgment in *Prokuratuur*, paragraph 51.

[10] Ibid., paragraph 52.

[11] Ibid., paragraph 54.

[12] Ibid., paragraph 55.

– 'The fact that the public prosecutor's office may, in accordance with the rules governing its powers and status, be required to verify the incriminating and exculpatory evidence, to guarantee the lawfulness of the pre-trial procedure and to act exclusively according to the law and the prosecutor's convictions cannot be sufficient to confer upon it the status of a third party in relation to the interests at issue as referred to in paragraph 52 of the present judgment.' [13]

36. In summary, the Court does not regard a public prosecutor's office as an impartial third party if it combines the functions of directing the pre-trial procedure, on the one hand, and bringing the public prosecution in subsequent proceedings, on the other. Therefore, it cannot be recognised as having competence to authorise access to traffic and location data held by suppliers of electronic communications services.

37. The interpretation of Directive 2014/41 cannot elude the influence of the judgment in *Prokuratuur*.

38. Recital 30 of Directive 2014/41 recognises that the interception of electronic communications is an invasion of privacy. That is precisely why a number of Member State make that investigative measure subject to the prior authorisation of a judge or a court, to the exclusion of other authorities including the public prosecutor's office.

39. As I shall explain below in more detail, Article 6 of Directive 2014/41 provides that the issuing authority is authorised to issue an EIO only if the investigative measure requested in the EIO could have been ordered under the same conditions in respect of a similar domestic case.

40. It is now necessary to supplement that condition with the condition laid down in the judgment in *Prokuratuur* for situations in which, cumulatively: (a) the authority issuing an EIO forms part of a public prosecutor's office which satisfies the twofold condition mentioned above (it directs the investigation and subsequently brings the prosecution); and (b) the EIO includes a measure for the interception of electronic communications with the force of the measure examined in that judgment.

41. In those circumstances, the EIO may not be issued by the public prosecutor's office even if the law of its Member State permits it to adopt the measure for the interception of electronic communications itself, without a prior judicial review in the strict sense.

B. Assessment

42. The referring court requests the interpretation of the term 'competence' (or 'competent'), as used in each of the two points of Article 2(c) of Directive 2014/41.

43. Article 2(c) defines an EIO 'issuing authority' from a twofold perspective:

– In point (i), the term refers to 'a judge, a court, an investigating judge or a public prosecutor *competent in the case concerned*'. [14]

[13] Ibid., paragraph 56.

[14] Italics added.

– In point (ii), the definition is expanded to include '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*'. [15]

44. In the referring court's view:

– If the term 'competence' (or 'competent') has the same meaning in both points, this means that Directive 2014/41 has fully assigned the determination of the authority competent to issue an EIO to national law.

– As a result of that assignment to national law in Bulgaria, Article 5(1)(1) of the ZEZR granted the public prosecutor's office general competence to issue EIOs, regardless of their subject matter.

– Since, under Bulgarian law, only a judge is entitled to order the gathering of certain evidence in national criminal proceedings, the ZEZR may infringe the principles of equivalence and equal treatment: in certain purely domestic scenarios, citizens have the guarantee of judicial intervention, which is prohibited to them where the evidence is obtained by means of an EIO.

45. I can agree that, in principle, the word 'competence' (or 'competent') has the same scope in the two points of Article 2(c) of Directive 2014/41. Both concern the right granted to an authority to perform, in criminal proceedings, the powers conferred on it by law.

46. The distinction between points (i) and (ii) of Article 2(c) of Directive 2014/41 is not really (or is not directly) the *competence* for 'the case concerned' or 'the specific case' but rather the *authority* which exercises that competence in each case.

47. The real difference between those two points lies in the fact that each one covers categories of 'issuing authority' which are not identical: on the one hand, *judicial* authorities (point (i)), and, on the other hand, *non-judicial* authorities (point (ii)), [16] all of which are *competent* to exercise their respective areas of authority in criminal proceedings:

– Point (i) designates as an 'issuing authority' for the purposes of an EIO 'judicial authorities' which, in the exercise of their powers, act in relation to a specific criminal case.

– Point (ii) confers the status of EIO 'issuing authority' on 'any other competent authority … in the specific case'. Clearly, that *other* authority, will not be 'judicial' and an EIO issued by it may be transmitted to the executing State only after it has been validated by a judge, a court or a public prosecutor.

48. The 'other … authority' referred to in point (ii) must be authorised under national law to act 'in its capacity as an investigating authority in criminal proceedings' and 'to order the gathering of evidence'. In other words, it must be authorised to exercise in criminal proceedings *areas of competence* associated with certain administrative authorities (such as, for example, the police), where their respective legal rules so provide.

[15] Italics added.

[16] As in the Opinion in *Staatsanwaltschaft Wien (Falsified transfer orders)* (C-584/19, EU:C:2020:587; 'Opinion in *Staatsanwaltschaft*'; point 32 (footnote 16)), I am using the adjectives 'judicial' and 'non-judicial' for reasons of simplicity because they reflect the nature of the institutions covered by both categories.

49. Points (i) and (ii) of Article 2(c) of Directive 2014/41 therefore use the concept of *competence* in a unitary sense (as a range of powers granted to a public institution) before proceeding immediately to draw a line between the *particular areas of competence* of the different authorities referred to in each point. On the basis of what these areas of competence are, the issuing of an EIO is subject to different conditions.

50. There is no doubt that a public prosecutor *competent* in a particular criminal case can be an 'issuing authority' for the purposes of any EIO under Article 2(c)(i) of Directive 2014/41.

51. Similarly, and in accordance with Article 2(c)(ii), a non-judicial authority to which, as I have already observed, national law assigns investigative tasks in criminal proceedings or grants the power to order the gathering of evidence, may also be an 'issuing authority'.

52. The status of 'issuing authority' alone is not sufficient for bodies treated as such to be entitled to issue an individual EIO and to transmit it to the executing State. Again, it is necessary to distinguish between judicial and non-judicial authorities, as referred to in Article 2(c) of Directive 2014/41.

53. As I explained on another occasion,[17] 'while Member States are recognised as having the power to designate the [non-judicial] 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'.[18]

54. In other words, national law may confer on a non-judicial authority which is authorised to order the collection of evidence the general status of EIO 'issuing authority'. However, any EIO issued by such an authority may be transmitted to the executing Member State only after it has been validated by a judicial authority.

55. In the case of a judicial authority – whether a judge or a public prosecutor – Directive 2014/41 does not require *validation* by a third party of the decision to issue each specific EIO; instead, it makes the EIO subject to two conditions and it is for the judge or public prosecutor intending to issue that EIO to verify compliance with those conditions.

56. Under the heading 'Conditions for issuing and transmitting an EIO', Article 6(1) of Directive 2014/41 provides that the issuing authority may decide to issue an EIO only if the following two conditions are satisfied:

– First, the issuing of the EIO must be 'necessary and proportionate',[19] and in addition account must be taken of the rights of the suspected or accused person (Article 6(1)(a)).

– Second, the EIO must concern a measure which 'could have been ordered under the same conditions in a similar domestic case' (Article 6(1)(b)).

[17] Opinion delivered in *Finanzamt für Steuerstrafsachen und Steuerfahndung* (C-66/20, EU:C:2021:200).

[18] Loc. cit., point 75. Italics added.

[19] 'Necessity' and 'proportionality' must be examined in relation to the aims of the proceedings referred to in Article 4 of Directive 2014/41. These include 'criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State' (Article 4(a)).

57. The second condition is of particular relevance here. Directive 2014/41 creates an element of *parallelism* by making the issuing of an EIO subject to the conditions laid down by national law for the adoption of an equivalent measure.

58. To my mind, those conditions concern the rules for assessing appropriateness and the rules on procedure, as laid down in national law, but also, and in particular, the *competence* conferred by national law to adopt, at domestic level, a measure equivalent to that which the EIO requests be carried out.

59. If, among the conditions laid down in respect of a similar domestic case, the law of the issuing State provides that only a judge or a court are *competent* to adopt a particular investigative measure, that measure may be the subject of an EIO only if that EIO is issued by a court. [20]

60. In that connection, Article 6(1)(b) of Directive 2014/41 defines the scope of 'competence' as referred to in Article 2(c)(i) of the directive.

61. It follows from those two provisions taken together that the *judicial authority* (judge or public prosecutor) '*competent* in the case concerned', to which Article 2(c)(i) of Directive 2014/41 refers, is that authorised under national law to order, in a purely domestic case, the same measure as that referred to in the EIO the issue of which is concerned.

62. In other words, the competence to issue an EIO is exactly the same as the competence required to adopt, under national law, an order with similar content and scope in strictly domestic proceedings.

63. The 'competence' referred to in Article 2(c)(i) of Directive 2014/41 can therefore be broken down into: (a) competence to act in criminal proceedings, on the one hand, and (b) competence to adopt a particular measure in those proceedings, on the other.

64. Even though the rules governing the European arrest warrant ('EAW') [21] and those governing the EIO are different, the latter instrument does not enable a public prosecutor's office to carry out at cross-border level something that it is prohibited from doing at national level. [22]

65. In this case, the EIOs issued by the Bulgarian public prosecutor's office concerned the adoption of measures which, in a purely domestic case, national law provides may only be adopted by a judge or a court. In particular, as pointed out above, there were four EIOs relating to the transmission of traffic and location data relating to certain electronic communications.

[20] Furthermore, recital 30 of Directive 2014/41 accepts that, from the executing State's point of view, the interception of electronic communications 'may be considered, depending on the national law of the executing State, as a coercive investigative measure'.

[21] 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).

[22] I dealt with the differences between the legal rules governing EAWs and those governing EIOs in the Opinion in *Staatsanwaltschaft*, points 46 to 65. I have maintained that a public prosecutor's office may not 'ratify [as a necessary condition for the adoption of an EAW] a police arrest warrant whose conditions and effects go beyond those of the arrests which it may itself order' (Opinion delivered in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* (C-508/18 and C-82/19 PPU, EU:C:2019:337, point 54)). It would, in effect be paradoxical 'if it were not able to do the lesser act (issuing an NAW [national arrest warrant] for a short period of time) but able to do the greater act (issuing an EAW which could lead to a much longer period of detention)' (loc. cit., point 76). In my view, it would be just as paradoxical if a public prosecutor's office were able to request per se in another Member State the gathering of evidence for which, in its own Member State, it would require the authorisation of a court.

66. The Bulgarian legislation which, in those circumstances, reserves to a court (and not to the public prosecutor's office) responsibility for the decision to require access from a telephony operator to traffic and location data relating to electronic communications is perfectly compatible with EU law.

67. As regards the tasks of the public prosecutor's office in relation to that specific investigative measure, the judgment in *Prokuratuur* confirms, where necessary, the appropriateness of that legislation.

68. In summary, the Bulgarian public prosecutor's office may not issue and transmit an EIO to another Member State for the purpose of gathering evidence when, if that evidence were gathered in Bulgaria, the power to make such an order would be reserved to a court. That public prosecutor's office lacks the 'competence' which, in accordance with Article 2(c)(i) of Directive 2014/41, in conjunction with Article 6(1)(b) thereof, is the condition for its recognition as an 'issuing authority' within the meaning of that provision.

VI. Conclusion

69. In the light of the foregoing considerations, I propose that the first question referred for a preliminary ruling by the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) should be answered as follows:

Article 2(c)(i) in conjunction with Article 6(1)(b) 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 is to be interpreted as meaning that a public prosecutor's office of a Member State may not issue a European investigation order for the purposes of collecting traffic and location data relating to electronic communications where, under the national law of that Member State, in a similar domestic case, exclusive competence to order the gathering of that evidence is reserved to a judge or a court.