

# Berlin Regional Court's EncroChat Battle – Third Round



Thomas Wahl

News

In an [order of 4 July 2024](#), the ECJ dealt with procedural effects of the EncroChat case. The reference for preliminary ruling ([Case C-288/24, M.R. v Staatsanwaltschaft Berlin or “Stegmon”](#)) only indirectly concerns the criminal investigations related to EncroChat. The question was rather whether the refusal by the referring court to continue the criminal proceedings on the substance of the case until the response of the ECJ has been provided was legal. Thus, the question at issue actually concerns the interpretation of Art. 267 TFEU – the provision in the Treaties on the preliminary ruling mechanism.

## Background of the reference for preliminary ruling and key question

The EncroChat case became famous because law enforcement authorities in France and the Netherlands were able to crack the end-to-end encryption communication provided by EncroChat devices. This revealed chats between criminals that led to a series of follow-up criminal prosecutions in the EU Member States, including Germany (→ [eucrim 1/2021, 22-23](#)).

The Regional Court of Berlin (*Landgericht Berlin*), Germany, is one of the few courts that has opposed the law enforcement approach and questioned admissibility of the detected chats as evidence in criminal proceedings. It filed two references for a preliminary ruling to the ECJ seeking guidance on the compatibility of the EncroChat law enforcement operation with the Directive regarding the European Investigation Order in criminal matters. The first reference ([Case C-670/22, M.N.](#)) was lodged in 2022 (→ [eucrim 3/2022, 197-198](#)) and decided by the ECJ on 30 April 2024 (→ [eucrim 1/2024, 40-43](#)). The second reference was lodged in November 2023 and entered into the CJEU's register as [Case C-675/23 \(M.R. v Staatsanwaltschaft Berlin or “Staatsanwaltschaft Berlin II”](#) → [eucrim 1/2024, 44](#)).

This latter reference is indirectly the subject of the reference for preliminary ruling at issue ([Case C-288/24, Stegmon](#)). The referring Regional Court of Berlin defends itself against a request for recusal of the presiding judge of the chamber that decides on the criminal charge of M.R. – an accused person following the EncroChat hack. This request was brought forward by the Berlin Public Prosecutor's Office (*Staatsanwaltschaft Berlin*). It argued that the presiding judge of the court chamber failed to schedule a date for a trial hearing and persistently ignored orders by the appeal court (the Higher Regional Court of Berlin – *Kammergericht Berlin*) to proceed with the criminal proceedings against M.R. on the substance and put an arrest warrant against him into effect.

In contrast, the referring Regional Court of Berlin argued that, in accordance with CJEU case law, it is obliged to stay the proceedings during the preliminary ruling procedure and take procedural steps to safeguard the person's rights, including the suspension of arrest warrants. This must also apply to criminal proceedings

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despite the duty under German law that such proceedings should be proceeded expeditiously. The referring court wished that the ECJ clarifies that the instructions of the Higher Regional Court and the requests by the Berlin Public Prosecutor's Office are contrary to Art. 267 TFEU.

### The ECJ's decision

In its order of 4 July 2024, the ECJ confirms the following:

- Art. 267 TFEU precludes a national court from continuing the main proceedings pending the ECJ's reply to questions referred by the national court, by carrying out procedural steps which have a connection with the questions referred for a preliminary ruling.
- Art. 267 TFEU precludes a recusal in respect of a judge from being obtained on the sole ground that that judge is awaiting the decision of the ECJ in relation to the request for a preliminary ruling which that judge has brought before it where the main proceedings concern a person in custody.

### Put in focus

The ECJ confirmed that the Regional Court of Berlin was right when it stayed the national criminal proceedings and adopted alternative measures to detention as long as a reference for preliminary ruling before the CJEU is pending. The ECJ made clear that its settled case law on the consequences of references for preliminary rulings is equally applicable in criminal matters.

In addition, the ECJ clarified that neither appeal courts nor public prosecution offices can call into question such references, e.g. by pursuing recusal proceedings against the judges of the referring court.

The case encourages the judges at the Regional Court of Berlin to continue its struggle against the phalanx of the Federal Court of Justice and Higher Regional Courts in Germany which have ruled that the EncroChat law enforcement operation does not pose problems on the admissibility of the gathered evidence and criminals must be convicted (→ [eucrim 1/2021, 22-23](#) and [eucrim 1/2022, 26-37](#)).

The decision in *Stegmon*/*"M.R. II"* nevertheless led the Regional Court of Berlin to withdraw its underlying reference for preliminary ruling – the second one in the EncroChat case (Case C-675/23, *"M.R. I"* → [eucrim 1/2024, 44](#)). Hence, the court must deduce the consequences for the criminal case before it from the ECJ's first judgement in EncroChat handed down on 30 April 2024 (→ [eucrim 1/2024, 40-43](#)).

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