

EncroChat Turns into a Case for the CJEU

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News

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Published in
2022, Vol. 17(3) [eucrim pp 197 – 198](#)
ISSN: 1862-6947
<https://eucrim.eu>

Two years ago, French and Dutch law enforcement authorities, with the support of Europol and Eurojust, [succeeded in infiltrating the encrypted phone network](#) provided by the enterprise EncroChat. The law enforcement authorities were thus able to read the chat messages of thousands of users in real time, including those who used the network for criminal activities. This action led to numerous follow-up investigations in many European countries. In Germany, the Higher Regional Courts and the Federal Court of Justice backed the approach taken by the police forces and judicial authorities and confirmed the admissibility in German criminal proceedings of the evidence collected by means of the infiltration (→ [eucrim 1/2021, 22-23](#) and [eucrim 1/2022, 36-37](#)). By contrast, NGOs, defence lawyers, and several academics [voiced deep concerns](#) over the rule of law and infringements of the right to a fair trial by the action.

In its [decision of 19 October 2022](#), the Regional Court of Berlin (*Landgericht Berlin*) suspended a trial against a defendant who was being prosecuted for drug trafficking on the basis of the skimmed EncroChat data. The Berlin court is the only German court that deviates from the upper German courts, and it had already taken a decision in 2021 that advocated the inadmissibility of the collected EncroChat data in criminal proceedings (→ [eucrim 2/2021, 106](#)). Now, the same court has referred several questions to the CJEU on interpretation of the [Directive regarding the European Investigation Order in criminal matters](#). The Regional Court wishes to clarify whether the receipt of the data by the German authorities from their French counterpart via a European Investigation Order (EIO) was lawful and can thus serve as a valid basis for criminal proceedings against EncroChat users in Germany. The questions particularly concern:

- The admissibility of the EIO pursuant to Art. 6(1) EIO Directive;
- Interpretation of Art. 31 EIO Directive, which regulates the surveillance of telecommunications without the technical assistance of a Member State;
- The consequences of a possible infringement of EU law for the national criminal proceedings.

In total, the judges in Berlin posed 14 questions to the CJEU. They include, for instance, the question of whether the German EIO was proportionate and necessary, considering that it related to the receipt of all EncroChat data of users on German territory without individual suspects having been specified beforehand. Furthermore, they are in doubt as to whether the German EIO was compatible with Art. 6(1)(b) EIO Directive, because the investigative measure could not have been authorised in a similar case in Germany.

Regarding the consequences generated by a possible violation of EU law, the Regional Court believes that the Union principles of effectiveness and equivalence (which limit the procedural autonomy of the Member States in evidence-related issues) as interpreted by previous CJEU case law result in the inadmissibility of



evidence in the case at issue. In this context, the court highlighted the lack of transparency on the part of the law enforcement authorities: first, due to non-disclosure of the technical approach by France, the integrity of the required data could not be assessed; second, the EU agencies' and German law enforcement authorities' refusal to hand over parts of the file to the defence made the investigation of facts even more difficult in the trial.

Lastly, according to the Regional Court of Berlin, other German courts erred when they attached higher importance to the objectives of criminal law enforcement than to the infringements of the individuals' fundamental rights. According to the referring judges, the reasoning of the CJEU's case law prohibiting the general and indiscriminate retention of data - even for purposes of combating serious crimes (→ [eucrim 3/2020, 184-186](#)) - must also apply here and result in the inadmissibility of evidence.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



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