

# German Federal Constitutional Court: Use of EncroChat Data in Criminal Proceedings Admissible

Thomas Wahl

On 1 November 2024, the German [Federal Constitutional Court](#) rejected a constitutional complaint against a criminal conviction for dealing in narcotics in a non-negligible quantity, which was based on the use of EncroChat data as evidence. The complaint was directed against the decision of the Federal Court of Justice (*Bundesgerichtshof*) of 2 March 2022, which in turn confirmed the conviction of the Hamburg Regional Court (→ [eucrim 1/2022, 36-37](#)). The Federal Court of Justice explained in detail that German law does not preclude the use of the data that French and Dutch authorities read by infiltrating the EncroChat encryption service in 2020 (for details on the operation → [eucrim 1/2021, 22-23](#)).

[Background of the case: the 2022 Federal Court of Justice's decision in EncroChat](#)

The Federal Court of Justice also approved the procedure whereby the data collected by the French authorities was transmitted via Europol to the German Federal Criminal Police Office and the Central Office for Combating Internet Crime at the General Public Prosecutor's Office in Frankfurt am Main had the transmission "subsequently" confirmed by the French investigating judge via a European Investigation Order. The decrypted data, insofar as it concerned users in Germany, was then forwarded to the regionally competent public prosecutors, who then opened and conducted individual criminal proceedings.

[Inadmissibility of the constitutional complaint](#)

The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected the constitutional complaint against the conviction as [inadmissible](#), stating that the complaint did not meet the requirements for presentation and substantiation (*Darlegungs- und Substantiierungsvoraussetzungen*). The complainant could not claim a violation of the right to be heard that was relevant to the decision, nor a violation of the guarantee of the lawful judge, nor a violation of fundamental rights. In detail, the Federal Constitutional Court justifies the rejection of the constitutional complaint as follows:

[No violation of the right to be heard](#)

The fact that the Hamburg Regional Court did not expressly rule on the defendant's objection to the use of the EncroChat data does not violate the right to be heard. Moreover, the violation of the right to be heard was remedied by the Federal Court of Justice's extensively reasoned decision on appeal.

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## No violation of the right to one's lawful judge

In the context of the complaint of a violation of the guarantee of the lawful judge, the Federal Constitutional Court deals with the obligation of the German courts to refer the matter to the ECJ. The Federal Constitutional Court agrees with the complainant that the compatibility with EU law (Directive relating to the European Investigation Order) was a preliminary question that needed to be clarified and was relevant to the decision on appeal. The Federal Court of Justice should have referred the matter to the ECJ. However, the complainant should have updated his constitutional complaint after the ECJ's decision of 30 April 2024 in Case C-670/22 (→ [eucrim 1/2024, 40-43](#)), which concerned the interpretation of the EIO Directive in EncroChat cases. Since he did not do so, he failed to fulfil his obligation to present the case.

But even if the matter were to be taken to court, the violation of the obligation to submit a preliminary reference would be unsuccessful. Indeed, the ECJ does deviate from the Federal Court of Justice to the extent that the judges in Luxembourg demand an examination of whether the transfer of evidence that is already in the possession of the competent authorities of the executing state is only possible if it could have been ordered under the same conditions in a comparable domestic case. The Federal Court of Justice had, however, carried out the ECJ's test incidentally in its ruling: it had referred to an online search pursuant to Sec. 100b of the German Code of Criminal Procedure (StPO), the findings of which were subject to the most restrictive limitation on use under criminal procedure in Sec. 100e(6) StPO. This is not constitutionally objectionable.

## No violation of privacy right

Ultimately, the Federal Constitutional Court sees no violation of fundamental rights, in particular the general right of privacy. Insofar as information from the core area of private life is not used, a restriction of the general right of privacy is permissible for the protection of overriding general interests if it is carried out by or on the basis of a law that sufficiently and clearly describes the conditions and scope of the restriction and satisfies the principle of proportionality.

In this context, the Federal Constitutional Court approves the case-law of the ordinary courts: The principle of judge's free evaluation of evidence provided for in Sec. 261 StPO is the constitutional legal basis for the use of evidence in criminal proceedings. In this regard, no special rules apply to the use of evidence that has been introduced into German criminal proceedings from abroad. If information has been obtained unlawfully, there is no constitutional rule that would always prohibit the use of the information obtained. Criminal court practice rightly assumes that the question of whether evidence may be used must be decided in each case according to the circumstances of the individual case. The assumption that evidence may not be used is an exception.

The fact that the Federal Court of Justice assessed the usability according to national law and based its decision on the time of use is just as unobjectionable as the fact that the Federal Court of Justice rejected a violation of the essential principles of the German legal system by the collection of evidence carried out in France.

## Put in focus

The German Federal Constitutional Court rejected the constitutional complaint against EncroChat evidence primarily on formal grounds, but for the first time it has also taken a clear position on the substance. As a result, the case law of the ordinary criminal courts in Germany, the majority of which have ruled against the ineligibility of the data obtained by the French operation using surveillance software against the EncroChat encryption service (→ [eucrim 1/2021, 22-23](#)), is not to be criticised. Although further constitutional com-

plaints regarding EncroChat are still pending, the debate in Germany has been possibly ended for the time being. Contrary to many critical voices, the Federal Constitutional Court clarified that the actions of the French investigators did not violate fundamental human and European legal values.

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