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Advocate General's Opinion in Case C-670/22 | Staatsanwaltschaft Berlin (EncroChat)

Advocate General Ćapeta: A public prosecutor may issue a European Investigation Order (EIO) for the transfer of evidence already gathered in another Member State

That is so if the national law of that public prosecutor allows it to order a transfer in a similar domestic case. In such a case, the authority issuing an EIO cannot assess the lawfulness of the gathering of that evidence in the executing Member State

EncroChat was an encrypted telecommunications network offering its users near-perfect anonymity: the device had no camera, microphone, GPS or USB port; its messages were able to auto-delete and users could, after using a special PIN code or after consecutively entering an incorrect password, immediately delete all data on the device. A joint French-Dutch operation developed a piece of Trojan software, which was installed on the terminal devices via a simulated update. EncroChat users in 122 countries were affected by that interception, including approximately 4 600 users in Germany. A German Public Prosecutor's Office issued several EIOs, seeking the use of the intercepted data for criminal proceedings, in relation to the suspicion of illicit trafficking of narcotic drugs by unidentified persons suspected to be part of an organised crime group. A French Criminal Court authorised the EIOs and transmitted the data requested. The German Public Prosecutor's Office then conducted investigations in respect of individualised EncroChat users. The accused in the present case was charged based on the evidence received from France.

Challenges against criminal convictions resulting from the intercepted EncroChat data are making waves across the highest courts in Europe, the Court of Justice being no exception in that regard. The Regional German Court, before which the resulting criminal procedure is pending, has asked the Court of Justice if the EIOs in question were issued in breach of the EIO Directive ¹.

In today's Opinion, Advocate General Tamara Ćapeta recalls that an EIO may only be issued if the investigative measure it entails could have been ordered under the same conditions in a similar domestic case. In the case at hand, a similar domestic case is one where evidence is transferred from one criminal procedure to another within Germany. As the EIO Directive allows a public prosecutor competent in a given case to issue an EIO and German law does not appear to require that a court should authorise a similar domestic transfer, the Advocate General is of the view that **the German Public Prosecutor was entitled to issue the EIOs at issue. In other words, EU law does not require that such EIOs be issued by a judge.**

The Advocate General also finds that because the interception of telecommunications was authorised by French courts, the German authorities **should attribute to that procedural step the same value as they would domestically.** That is so even if in a concrete case a German court would decide differently.

Finally, the admissibility of evidence received potentially in breach of EU law is not a matter of EU, but of national

law, subject to compliance with fundamental rights guaranteed by the EU legal order.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ [Directive 2014/41/EU](#) of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.