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Judgment of the Court in Case C-670/22 | M.N. (EncroChat)

EncroChat: the Court of Justice clarifies the conditions for the transmission and use of evidence in criminal cases with a cross-border dimension

In the context of criminal proceedings in Germany concerning illegal drug trafficking involving the use of the encrypted telecommunications service EncroChat, the Court of Justice clarifies certain conditions for the transmission and use of evidence under the Directive regarding the European Investigation Order (EIO) in criminal matters.

Thus, an EIO for the transmission of evidence already gathered by another Member State may, under certain conditions, be issued by a public prosecutor. The conditions applicable to the gathering of evidence in the issuing State do not need to have been satisfied in order for the EIO to be issued. It must, however, be possible for compliance with the fundamental rights of the persons concerned to be judicially reviewed subsequently. Moreover, an interception measure carried out by one Member State on the territory of another Member State must be notified in good time to that other Member State. Information and evidence obtained in breach of the directive must, under certain conditions, be disregarded by the criminal courts.

The French police were able, with the assistance of Dutch experts and the authorisation of a French court, to infiltrate the encrypted telecommunications service EncroChat. The service was being used worldwide on encrypted mobile phones for the purpose of illegal drug trafficking. The German Federal Criminal Police Office was able, via a Europol server, to retrieve the intercepted data relating to EncroChat users in Germany.

Acting on the EIOs issued by the German public prosecutor's office, the French court authorised the transmission of those data and their use in criminal proceedings in Germany.

The Regional Court of Berlin, before which criminal proceedings were brought, queries the lawfulness of those EIOs. It therefore submitted to the Court of Justice a series of questions for a preliminary ruling on the Directive regarding the European Investigation Order in criminal matters ¹.

The reply given by the Court of Justice is that **an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State** (in this case, France) **does not necessarily need to be issued by a judge. It may be issued by a public prosecutor** if he or she is competent, in a purely domestic case, to order the transmission of evidence that has already been gathered.

Furthermore, **the issuing of such an EIO is subject to the same substantive conditions as those that apply to the transmission of similar evidence in a purely domestic situation. It does not, however, need to satisfy the same substantive conditions as those that apply to the gathering of evidence.** The fact that, in this case, the French authorities gathered the evidence in Germany and in the interest of their German counterparts is, in that respect, in principle irrelevant. However, **a court before which an action against that EIO is brought must be able to review compliance with the fundamental rights of the persons concerned.**

The Court of Justice also makes clear that **a measure entailing the infiltration of terminal devices** for the

purpose of gathering traffic, location and communication data of an internet-based communication service **must be notified to the Member State in which the subject of that measure is located** (in this case, Germany). The competent authority of that Member State then has the right to indicate that that interception of telecommunications may not be carried out or must be terminated, if it would not be authorised in a similar domestic case. Those rights and obligations are intended not only to guarantee respect for the sovereignty of the notified Member State but also to protect the rights of the persons concerned.

Information and evidence obtained in breach of the directive must be disregarded by the national criminal courts if the person concerned is not in a position to comment on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

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 EU law or the validity of an EU 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 and, as the case may be, an abstract](#) of the judgment 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.