

German court unclear whether intercepted EncroChat cryptophone messages are legally admissible

Bill Goodwin : 5-6 minutes : 9/6/2023

Germany's Federal Constitutional Court is waiting to hear five complaints that could decide whether data from the hacked EncroChat phone network can be lawfully used in German courts, but situation remains unclear for now

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Germany's Constitutional Court remains unclear about whether evidence collected by an international police operation...

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Germany's Constitutional Court remains unclear about whether evidence collected by an international police operation to penetrate an encrypted phone network used by organised criminals can be lawfully used to bring prosecutions in Germany.

The Federal Constitutional Court (BVerfG) disclosed in a ruling yesterday that it was waiting to hear five constitutional complaints over the legal admissibility in German trials of data harvested by French police from the EncroChat cryptophone network.

"The constitutional questions associated with the usability of the EncroChat data have not been decided," the court said in a [judgment](#).

The court made the disclosure after rejecting a complaint from an applicant who had been sentenced for five years for illegal trafficking in narcotics on the basis of messages sent and received on an EncroChat encrypted phone.

Police [have arrested more than 6,500 people worldwide](#) and seized nearly €900m after French and Dutch police mounted a joint operation to hack the

EncroChat encrypted phone network, widely used by drug traffickers and other criminals in 2020.

According to the German court ruling, French investigators collected data from the hacked EncroChat phone network as it passed through a server hosted by cloud company OVH in Roubaix, France, between April and June 2020.

The French Gendarmerie, with the assistance of Europol, supplied German investigators with data collected from phones in German territory on the basis of a request for international legal assistance from Germany, according to the judgment.

The appeal was brought by lawyers representing a defendant sentenced for drug trafficking by the Rostock regional court on 23 July 2021. Germany's Federal Court of Justice rejected an appeal against the conviction on 8 February 2022.

The complaint to the Federal Constitutional Court argued that the Federal Court of Justice failed to submit questions about the admissibility of EncroChat data to the Court of Justice of the European Union (CJEU), depriving the defendant of his rights under German law.

Defence lawyers also argued that the French operation against EncroChat violated the defendants' rights under Articles 7 and 8 of the Charter of the European Union, which protect [rights to privacy](#) and [personal data](#).

The Constitutional Court rejected the case on the grounds that the defendant failed to provide the appeal court with enough information to examine claims that the defendants' rights under the EU charter were violated. The court also found that the defendant had not demonstrated that his rights under German law had been violated.

Court 'avoided making substantive decision'

Commenting on the case, German defence lawyer Christian Lödden, said the Federal Constitutional Court had "completely avoided" making a substantive decision on EncroChat by focusing on the formal procedural aspects of the case.

He said it was likely that the Constitutional Court would wait for the CJEU to issue its findings on the admissibility of EncroChat evidence before considering further constitutional appeals.

The [CJEU is due to issue its preliminary](#) ruling after the Landgericht Berlin Regional Court referred a series of questions about the admissibility of EncroChat data in Germany to it in October 2022.

At issue is whether Germany can lawfully use EncroChat messages obtained and supplied by the French Gendarmerie from phones in Germany without first obtaining legal authorisation from the German courts.

The decision could have implications for the prosecution of hundreds of people accused of drug dealing and organised crime on the basis of hacked messages from EncroChat, in cases where EncroChat is the only evidence of criminality, if the CJEU finds EU law has been breached.

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