Recent developments in EIO case law: the MN (EncroChat) judgment (C-670/22)

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Background to the case

- Encrypted messaging service through specific mobile phones
- Server located in Roubaix, France → January 2020: interception authorisation granted by French court
- February 2020 JIT between FR and NL authorities → system infiltrated via malware that was disseminated to devices as a simulated software update
- 9 March 2020: videoconference organised by Eurojust in which FR + NL authorities give information about their investigations, GER authorities interested in data of German users
- Live information from EncroChat phones collected (by French authorities) 1 April 2020—14 June 2020 → in that timeframe GER authorities retrieved data from Europol server daily
- Starting June 2020 PPO Frankfurt issues EIOs requesting authorisation from FR authorities to use those data → Lille Criminal Court authorises
- PPO Frankfurt divides national proceedings + reassigned investigations to local PPOs → MN to Berlin

Questions referred by Landgericht Berlin

1. Concept of **issuing authority?** → judge?
2. + 3. **Conditions** for issuing and transmitting an EIO: where such evidence was gathered through **interception** on the **territory of the issuing MS** of telecommunications of **all users** of the communication service
4. Is infiltration of terminal devices an **interception of telecommunications**? Which **authority** must be notified? Does Art. 31 Dir. 2014/41 also protect **individual** telecommunications users regarding use of the data for criminal prosecution in notified state?
5. Legal consequences of obtaining evidence in a manner contrary to EU law → **prohibition** to use?

Answers of the CJEU — 1st set of questions

- Art. 2(c) Dir. 2014/41 defines '**issuing authority**' as judge, court, investigating judge, public prosecutor competent in the case concerned or any other competent authority which acts as an investigating authority and is competent to gather evidence (validation!)
    - **C-584/19 Staatsanwaltschaft Wien**
    - **C-16/22 Staatsanwaltschaft Graz**
    - **C-724/19 Spetsializiarana Prokuratura**

- EIO for the transmission of evidence already in the possession of the competent authorities in the executing MS need not necessarily be issued by a judge, if (although underlying measure would have to be ordered by a judge) **transmission** of evidence gathered can be ordered by a prosecutor (C-670/22, MN, § 77), (Op. AG § 63)

Answers of the CJEU — 2nd+3rd sets of questions

- Again distinction between EIO to gather evidence and EIO for **transmission** of evidence already in possession of the executing authorities
  - issuing authority may not review lawfulness of **separate procedure** by which evidence sought to be transmitted was gathered (C-670/22, MN, § 100); mutual recognition! (Op AG § 48)
  - otherwise: more complicated and less effective system, undermining objective of Dir. 2014/41
  - Only condition: EIO must satisfy requirements under national law of the issuing MS for the transmission of such evidence in a purely domestic case (C-670/22, MN, § 106)

Answers of the CJEU — 4th set of questions

- "Telecommunications" ex Art. 31(1) Dir. 2014/41 → all processes of remote transmission of information (C-670/22, MN, §§ 111-112)
- EncroChat infiltration = **interception of telecommunications** (C-670/22, MN, § 114)
- Authority competent to receive notification not specified by Dir. 2014/41, thus: MS must **designate**, if intercepting authority not able to identify → notification to *any* authority considered appropriate (in case that authority must forward to actually competent authority) (C-670/22, MN, §§ 117-118)
- Art. 31 Dir. 2014/41 does not only guarantee respect of sovereignty but **also intended to protect the rights of persons affected by the measure** (C-670/22, MN, §§ 124-125)

Answers of the CJEU — 5th set of questions

- In principle, it is for national law to determine rules on the admissibility and assessment of evidence (C-670/22, MN, § 128)
- Procedural autonomy: MS have to establish procedural rules to safeguard the rights that individuals derive from EU law (rules no less favourable than those governing a similar domestic case → **principle of equivalence**) and do not render impossible/excessively difficult the exercise of such rights (**principle of effectiveness**)
- Article 14(7) Dir. 2014/41 requires that in criminal proceedings in the issuing MS the rights of the defence and fairness of the proceedings are respected when assessing evidence obtained through an EIO
- Information and evidence must be **disregarded** if a party is **not able to comment effectively** and the information/evidence is likely to have a **preponderant influence on the findings of fact** (C-670/22, MN, §§ 130-131)

Some points to be mentioned

- **Distinction**: EIO for gathering evidence and for **transmitting** evidence that is already in the possession of the competent authorities of the executing MS → see also Opinion of AG Ćapeta, § 19

- Art. 31 Dir. 2014/41 is not only a **guarantee** for sovereignty but also **for individual rights at stake** (right to respect for private life and communications)

- **Common concept of interception missing**, investigative measures in EncroChat are heterogeneous and interception, decryption, digital searches in serves, informatic interception, transfer of already collected evidence… we are lost in translation and lost in legal categories → minimum harmonisation of investigative measures needed

- Despite procedural autonomy in this field, CJEU states obligation to **disregard evidence** if person concerned is not in a position to effectively comment and if that evidence is likely to have a preponderant influence on findings of fact

Some thoughts

- Focus not on underlying measure, but on the **transfer** → entails the risk of circumventions (forum shopping?)
- Does this approach open the door to increasing reliance on informal exchange of information and cooperation during investigations and formal cooperation (EIO) only once evidence is already gathered?
- Consider also: increasing technical possibility of intercepting remotely (from abroad)
- Is it (always) justified to treat evidence already in the possession of the executing authorities differently from evidence that is still to be gathered as a consequence of the EIO?
  - Based on assumption that further transfer does not lead to a **new interference/an aggravation of the original interference** of fundamental rights at stake at the execution of the underlying measure, for which a judge's control is necessary → this is especially the case with traffic, location and communication data
- Should domestic transfer and cross-border transfer be considered as equivalent?
  - Op. AG §§ 64-65

Outlook

- CJEU decision in MN echoes decision handed down in La Quadrature du Net et al (Joined Cases C-511/18, C—512/18 and C-520/18)
  - Confirms that judicial scrutiny must be available → C-852/19 Gavanozov II judgment
  - Compare Op. AG Ćapeta, Dutch Hoge Raad and Italian Court of Cassation
- But what does “comment effectively” mean?
- Does the fact that it needs to “predominantly impact” the findings reduce this part of the judgment to a case-by-case analysis → flexible concept?
- Lack of clarity due to lack of common standards among EU MS on evidence admissibility
- Last bastion of judicial control, advantages also from an efficiency point of view → more structured guidelines for common basis would be needed

Thank you for your attention!

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