EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Two applications concerning remote retrieval of EncroChat user data and their transfer to UK authorities declared inadmissible

In its decision in the case of A.L. and E.J. v. France (applications nos. 44715/20 and 47930/21) the European Court of Human Rights has unanimously declared the applications inadmissible. The decision is final.

Both applications concerned the remote retrieval of user data from the encrypted telecommunications tool EncroChat and their sharing with the United Kingdom law-enforcement authorities. EncroChat was an encrypted mobile-phone telecommunications tool, for which more than 66,000 handsets had been distributed covertly in 122 countries from 2016 to 2020.

The Court noted that that the EncroChat user data had been collected at the French authorities' initiative by means of a data retrieval measure that had been ordered in the context of criminal proceedings opened by the specialised inter-regional division of the Lille criminal court. The data relating to EncroChat users located in the UK had been transferred, as evidence already in the French authorities' possession, for use in other criminal cases pursuant to a European Investigation Order (EIO) issued by the UK Crown Prosecution Service. Remotely retrieved data had thus been included as prosecution evidence in proceedings against both applicants in the UK.

The Court observed that under Article 694-41 of the French Code of Criminal Procedure, the applicants could have applied for the exclusion of the evidence obtained through the enforcement, in France, of the EIO of 11 March 2020 decided by the UK authorities, and that they could have done so under the same conditions and in accordance with the same procedures as a person under judicial investigation in France, arguing that they were in a comparable procedural situation and that the transferred data stemmed from a data retrieval measure which was incompatible with the requirements of Article 8 of the Convention

The Court concluded that there had been a remedy available to the applicants in France by which they might have effectively challenged the data transfer measure taken pursuant to the EIO issued by the UK authorities, together with the data retrieval measure. The applicants had failed to avail themselves of any remedy in the French courts, however, and had not put forward any particular circumstance that might have exempted them from doing so.

Taking the view that the applicants had not satisfied the requirement to exhaust domestic remedies, the Court declared their applications inadmissible.

A legal summary of this case will be available in the Court's database HUDOC (link)

Principal facts

The applicants, A.L. and E.J., are British nationals who were born in 1990 and 1965 respectively and are both currently imprisoned in the United Kingdom.

On 7 December 2018 the prosecutor's office at the specialised inter-regional division (*juridiction interrégionale spécialisée* – "JIRS") of the Lille criminal court opened a preliminary investigation into EncroChat and its users. Investigations conducted by a specialised investigation service (the French *gendarmerie*'s Anti-Cybercrime Centre (*Centre de lutte contre les criminalités numériques*)) had established that several criminal organisations operating in France had converted to using this encrypted telecommunications tool. It became apparent that EncroChat operated as a closed network, using modified smartphones that were connected to a server located in France. In the

investigators' view, the technical characteristics of this telecommunications tool and its distribution methods indicated that it was used for criminal purposes.

Subsequent investigations enabled technical means to be developed by which to retrieve data from these devices remotely and transfer them to the French authorities in unencrypted form.

In a series of decisions taken from 30 January to 31 March 2020 the liberties and detention judge of the Lille *tribunal judiciaire* authorised a measure to retrieve data remotely from all devices connected to the EncroChat network.

In parallel, various police and judicial co-operation mechanisms were deployed to allow the French and Dutch authorities to work together. A file on EncroChat was also opened at the European Union Agency for Criminal Justice Cooperation (Eurojust). Assistance was provided by the European Union Agency for Law Enforcement Cooperation (Europol). The French and Dutch authorities informed their UK counterparts of the planned data retrieval operation and offered to make the data of users located on their territory available to them for law-enforcement purposes. On 11 March 2020 the Crown Prosecution Service (CPS) issued a European Investigation Order (EIO) for the transfer of all data that the French authorities were able to retrieve from devices located on UK soil.

Data retrieval began on 1 April 2020. Data retrieved from UK territory were transferred to the UK law enforcement authorities pursuant to the EIO of 11 March 2020.

During the night of 12-13 June 2020 EncroChat informed all its users that their phones had potentially been compromised and urged them to destroy their handsets immediately.

Data retrieval ceased on 2 July 2020, having been carried out on a total of 39,571 handsets.

EuroChat's dismantling led to the arrest of 6,558 suspects and the seizure of 103 tonnes of cocaine, 163 tonnes of cannabis and 3.3 tonnes of heroin worldwide, in addition to the seizure of weapons, explosives and proceeds of crime. The UK Government indicated that the data transferred by the French authorities had enabled the UK law-enforcement authorities to make 746 arrests and seize 54 million pounds sterling (64 million euros) in cash, several tonnes of drugs and 77 weapons.

A.L. and E.J. were prosecuted in two separate cases in the UK based on their use of EncroChat.

A.L. was arrested on 18 June 2020. He was charged with conspiracy to import cocaine and heroin illegally and with conspiracy to possess with intent to distribute cocaine and heroin.

E.J. was arrested on 16 June 2020. He was charged with conspiracy to supply cocaine and heroin, conspiracy to commit three murders and blackmail.

In both cases communications over EncroChat were included in the prosecution evidence.

Complaints, procedure and composition of the Court

The applications were lodged with the European Court of Human Rights on 5 October 2020 and 20 September 2021. The Court found it appropriate to examine them jointly in a single decision.

Relying on Article 8 (right to respect for private life), the applicants complained about the French authorities' remote retrieval of data from all handsets connected to the EncroChat network and about the transfer of the data collected in the United Kingdom to the UK authorities. They questioned both the quality of the legislative provisions on remote data retrieval and the necessity of such interference.

Relying on Articles 6 (right to a fair trial) and 13 (right to an effective remedy), they also submitted that there had been no remedy available to them by which they might have effectively challenged the decisions authorising the data retrieval complained of.

The decision was given by a Chamber of seven judges, composed as follows:

Lado **Chanturia** (Georgia), *President*,
Mattias **Guyomar** (France),
María **Elósegui** (Spain),
Kateřina **Šimáčková** (the Czech Republic),
Mykola **Gnatovskyy** (Ukraine),
Stéphane **Pisani** (Luxembourg),
Úna **Ní Raifeartaigh** (Ireland),

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Article 8

The Court found first of all that France's jurisdiction was established. It noted that the acts complained of had been committed in France by means of a remote data hack conducted in the context of investigations that had been entrusted to French investigators acting under the authority of judges and prosecutors at the Lille *tribunal judiciaire*. Furthermore, this hack had been launched from a server located in France. The Court therefore regarded it as established that the data had also been stored and shared from within French territory.

Secondly, the Court acknowledged that both applicants had victim status before it. While it considered that, given the characteristics of this encrypted telecommunications system, it fell to the applicants to prove that they were part of the group of people targeted by the data retrieval operation, it noted that they had been arrested in the wake of that operation, that they had been accused of using EncroChat in the prosecution brought against them in the UK and that they had shown that the prosecution had produced evidence obtained by means of that retrieval operation. The Court took the view that such proof was sufficient to confer victim status on the applicants. Requiring them to prove that they had been EncroChat users at the relevant time would effectively amount to compelled self-incrimination, given that proceedings against them were pending in the UK.

Thirdly, the Court examined the question whether domestic remedies had been exhausted.

In this connection, it noted that the EncroChat user data had been collected at the French authorities' initiative by means of a data retrieval measure that had been ordered in the context of criminal proceedings opened by the Lille JIRS. The data pertaining to individuals who used EncroChat in the UK had then been transferred, as evidence already in the French authorities' possession, for use in other criminal cases pursuant to an EIO issued by the United Kingdom CPS. This had been the case for both applicants.

In the Court's view, neither the fact that the applicants lived outside France nor the fact that they had not freely chosen to come under the respondent State's jurisdiction were such as to exempt them from their duty to exhaust the domestic remedies open to them in that State.

The Court went on to examine whether a remedy that satisfied the requirements of Article 35 of the Convention had been available to the applicants in France.

It noted that Article 694-41 of the Code of Criminal Procedure provided that a legal challenge, an action for exclusion of evidence or any other type of remedy could be used against a measure taken in French territory pursuant to an EIO, provided that a remedy could have been used against that measure if it had been ordered in domestic proceedings. The Court noted that the provisions of this Article applied to any "person concerned". These provisions transposed into domestic law Article 14 of Directive 2014/41, which provided that member States were to ensure that legal remedies

equivalent to those available in a similar domestic case were applicable to the investigative measures indicated in an EIO. The Court observed that they seemed to be consistent with the case-law of the Court of Justice of the European Union according to which member States were required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter of Fundamental Rights in the procedure for issuing and executing an EIO (judgment of 11 November 2021, *Gavanozov II*, C-852/19, paragraphs 28-29).

The Court noted, moreover, that in a purely domestic situation, a person under judicial investigation or committed to stand trial before the criminal courts could apply for the exclusion of evidence. Accordingly, it found that under Article 694-41 of the Code of Criminal Procedure, the applicants could have applied for the exclusion of the evidence obtained through the enforcement of the EIO of 11 March 2020 under the same conditions and in accordance with the same procedures as a person under judicial investigation in France, arguing that they were in a comparable procedural situation and that the retrieval measures in question were incompatible with the requirements of Article 8 of the Convention.

The Court further observed that this remedy did not require the applicants to incriminate themselves since domestic case-law accepted that such applications for exclusion from evidence were admissible when they were lodged by persons who were accused of using EncroChat in proceedings against them.

The Court inferred from this that a remedy had been available to the applicants by which to challenge the lawfulness and proportionality of the retrieval of the data and their transfer to the UK authorities for inclusion as evidence in their criminal cases.

As to the means of redress afforded by this remedy, the Court observed, firstly, that, if successful, it could lead to the finding of a breach of Article 8 of the Convention and to the exclusion, in France, of the evidence obtained through the enforcement of the EIO. In addition, Article D47-1-16 of the Code of Criminal Procedure provided that the issuing member State was to be informed of the existence and outcome of this remedy. Lastly, Article 14 § 7 of Directive 2014/41 required the issuing State to take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. In the Court's view, such means of redress, which derived both from EU law and from the provisions transposing it into French law, were to be regarded as appropriate.

In conclusion, the Court took the view that there had been a remedy available to the applicants by which they might have effectively challenged the data transfer measure taken pursuant to the EIO issued on 11 March 2020, together with the data retrieval measure. The applicants had failed to avail themselves of any remedy in the French courts and had not put forward any particular circumstance that might have exempted them from doing so.

The Court therefore found that they had not satisfied the requirement to exhaust domestic remedies and declared the complaint under Article 8 inadmissible.

Articles 6 and 13

The Court noted that it had been established that an effective remedy against this measure had been available to the applicants. It followed that their complaint was manifestly ill-founded and should be rejected as inadmissible.

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.