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DOI: 10.51204/Zbornik_UMKP_25169A
Originalni naučni rad

ABOUT CONSTITUTIVE RULES ONCE AGAIN – DELIBERATION BASED ON THE JUDGMENT OF 30 APRIL 2024 OF THE CJEU IN ENCROCHAT CASE

Abstract: The article provides a comprehensive analysis of the admissibility of evidence under Directive 2014/41/EU, with a particular focus on a newly established constitutive rule for evidentiary action. This rule was recognized by the Court of Justice of the European Union in the significant EncroChat case (C-670/22), which was adjudicated on April 30, 2024. The article begins by summarizing the key components of the ruling in the EncroChat case, which involved the interception of encrypted communications used for criminal activities, and assesses how this ruling sets a precedent for future cases regarding the handling of digital evidence. Following the summary, the article examines the implications of the Court's decision as a foundational source for the new evidentiary (constitutive) rule under the European Investigation Order (EIO). This analysis delves into how the ruling impacts the collection and admissibility of digital evidence across member states, considering the complexities of balancing privacy rights with the need for effective law enforcement. Finally, the article discusses the advantages of integrating constitutive rules into the ongoing dialogue about evidence admissibility in legal proceedings. It underscores how these rules can enhance clarity and consistency in legal standards while also fostering trust in the legal system.

Keywords: constitutive rule, EncroChat, European Investigation Order, admissibility of evidence.

1. At last year's conference organized by the International Criminal Law Association, she had the pleasure of delivering a paper on the issue of constitutive rules and the possibility of relating this concept to criminal procedural actions. The analysis presented then concerned two ECtHR judgments in cases *Gäfgen*

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v. Germany[1] and *Ćwik v Poland*.[2] It was pointed out at the time that the possibility of interpreting the *Gäfgen case* from the perspective of the concept of constitutive rules had already been written years ago by M. Mittagwho operated on the initial version of the constitutive rules by J. Searle.[3] Mittag's conclusions have shown the potential of the indicated theoretical framework but also its certain shortcomings. In last presentation, it was pointed out that a much more operative version of the constitutive rules has now been developed by the Polish school of legal theory, more precisely the Poznan School.[4] Thus, S. Czepita,[5] a Polish legal philosopher, formulated additional assumptions that enabled its application to private law considerations. In turn, B. Janusz-Pohl has used this transformed concept with some additional assumptions for the interpretation of legal actions in criminal proceedings.[6] The proposed versions of the concept of constitutive rules focus on the legal consequences of violating these rules and, thus, on issues relevant to lawyers, for whom the legal status of the rule for performing actions takes on significance from the perspective of its possible legal consequences. In this study, we aim to broaden the scope of the analysis. The CJEU has provided the opportunity to do so. The Court of Justice of the European Union (Grand Chamber) in its judgment of April 30, 2024 (C-670/22), commonly referred to as the EncroChat case or MN case,[7] when elaborating the rule for evidentiary action in frame of the European Investigation Order (EIO) under Directive 2014/41/EU from the European Parliament and the Council, dated April 3, 2014, stated a new rule for admissibility of evidence. Although the Directive does not explicitly introduce a sanction for breach of this rule, the Court has held that this sanction is the nullity of evidence.

2. Since the concept of constitutive rules has already been outlined last year, let us now only briefly recall its assumptions. To be more precise, although the

1 *Gäfgen v. Germany*, App. no. 22978/05, 1 June 2010.

2 B. Janusz-Pohl, „The influence of the ECtHR's jurisprudence on models of evidence admissibility in national criminal proceedings – remarks on the art. 3 of the ECHR", *Zbornik radova sa međunarodne naučne konferencije: Odnos međunarodnog krivičnog i nacionalnog krivičnog prava* (M. Škulić *et al.*), Tom 1, International Criminal Law Association and University of Belgrade – Faculty of Law, Palić, 14–17 Jun 2024a, 101–118;

3 M. Mittag, „A Legal Theoretical Approach to Criminal Procedure Law: The Structure of Rules in the German Code of Criminal Procedure", *German Law Journal*, Vol. 7, 8/2006, 637–645.

4 P. Kwiatkowski, M. Smolak (eds.), *Poznań School of Legal Theory*, Brill, Leiden, 2021.

5 Cf. S. Czepita, „O koncepcji czynności konwencjonalnych w prawie", *Wykładnia konstytucji. Aktualne problemy i tendencje* (ed. M. Smolak), Wolters Kluwer, Warsaw, 2016, 138–139; S. Czepita, *Reguły konstytutywne a zagadnienia prawoznawstwa*, Uniwersytet Szczeciński, Studia i Rozprawy, vol. 223 (CCXCVII), Szczecin 1996, 146 *et seq*.

6 B. Janusz-Pohl, *Definitions and Typologies of Lega Acts: Perspective of Conventionalisation and Formalisation,* Poznań, 2017a, 23–24 and the literature referred therein; B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim*, Poznań, 2017b, *passim.*

7 ECLI:EU:C:2024:372.

concept originates from the well-known philosopher of language J. Searle, a much more adequate version of it for the consideration of lawyers was proposed by the Polish legal philosopher Stanisław Czepita.[8] This author has developed Searle's concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules[9]. Recall that whereas Searle distinguished between constitutive rules (which determine the validity of a given act) on the one hand, and regulatory rules (which encompass the other rules relating to the performance of a given act) on the other, Czepita focused on the consequences of violating both types of rules. In Czepita's version, therefore, the essential was that both types of rules have been divided into two other types: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules) and effectively (formalisation rules). On the contrary, consequential rules indicated legal consequences of infringements of construction rules. This is because Polish philosophers of law have noticed that in traditional legal deliberations, it is crucial to focus on the violation of the rules of performing a given act, as lawyers are interested in a given act when there is an assumption of its defectiveness. Therefore, developing such a perspective B. Janusz-Pohl has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc* and the non-futility (in case of breach of formalisation rules).[10] Besides, it is to be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, the so-called *lex imperfectae*.

Let us therefore recall, therefore, abruptly, one could ask, what is the main contribution of this concept to legal sciences? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes, does not cause any negative legal consequences. The concept also has two other important features relevant to the interpretation of legal actions; namely, it allows for imposing the sanction of nullity and non-existence (in the legal sense)/*negotia nulla, nogotia non existens*/in systems that do not provide a statutory sanction of nullity. It is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity (*nullity ex tunc*) of an act performed in violation of a given constitutive rule, **even when at the level of statutory regulation, such a sanction does not exist.** An example of the lack of nullity sanction in reference to the mechanism of the

8 See more: B. Janusz-Pohl (2017a), *op. cit.*, 25.; See also J. R. Searle, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge University Press, London, 1969, *passim*; J. R. Searle, *Czynności mowy. Rozważania z filozofii języka*, Instytut Wydawniczy PAX, Warsaw, 1987, *passim*.

9 Cf. C. Czepita (2016), *op. cit.*, 138–139; S. Czepita (1996), *op. cit.,*146 *et seq.*

10 This approach was given by B. Janusz-Pohl (2017b), *op. cit., passim*.

European Investigation Order (EIO) is also present in the case of the CJEU analyzed in this article.

Naturally, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope of this discussion.[11] At this point, we can point out that constitutive rules, as rules of validity, refer to what, on the background of the concept at hand, is called the material substrate for a given conventional action (legal action), so-called primary constitutive rules. In addition, constitutive rules concern the existence of competence in the legal system to perform an action of a given type; in some cases, these rules may have the status of temporal rules or rules of other modalities of the given action – so-called secondary constitutive rules.[12]

The question of the sources of constitutive rules is particularly intriguing. Currently, it seems that the understanding is that, depending on the type of legal system, these sources must be legitimized within that system. However, due to the unique nature of constitutive rules, their existence often requires a detailed interpretative process. For legal systems based on statutory law, a constitutive rule must be grounded in statutory law, although its existence can be inferred from the broader set of norms. An example of the establishment of a constitutive rule can, therefore, be the interpretation of a court, especially a court that is the guardian of rights and values. The institutional position of the CJEU as a court of a higher order, whose task is to ensure the axiological coherence of the legal systems of the EU Member States with the treaties, allows it to be considered competent to create constitutive rules. The current discussion will not focus on determining the competence of the Court of Justice of the European Union (CJEU) regarding such creations. It will also not address whether referring to a rule derived from the legal system as a "constitutive rule" implies its establishment – akin to exercising law-making authority – or if it simply represents a form of functional interpretation that suggests bringing the rule to life. Determining the latter issue is indeed very complex, as it is a question of the admissible limits of legal interpretation in the judicial application of the law, an issue that obviously goes beyond the scope of this study.[13]

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11 B. Janusz-Pohl, „Rozważania o źródłach reguł konstytutywnych w prawie karnym. Uwagi na tle art. 3 EKPC (przykłady spraw Gäfgen v. Niemcy oraz Ćwik v. Polska)", *Hominum causa omne ius constitutum sit. Księga jubileuszowa Profesora Piotra Hofmańskiego* (eds. P. Czarnecki *et al.*), Wolters Kluwer, Krakow, 2024b, 754–765.

12 About primary and secondary constitutive rules see: B. Janusz-Pohl, „Theoretical Approaches to VOM through the Prism of Polish regulations", *Hominum Causa Omne Ius Constitutum Sit. Collection of Scientific Papers of the Polish-Hungarian Research Platform* (eds. W. Marcin, B. Oręziak), Volume 1, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, Warsaw, 2024c, 97–128; and B. Janusz-Pohl, „Theoretical and methodological foundations for consensual models based on Polish example", *Consensual Mechanisms in Criminal Proceedings – Integrative and Comparative Perspective* (ed. S. Pawelec), Peter Lang Publishing Group, 2023, 9–50.

13 See also B. Janusz-Pohl (2024a), *op. cit.*, 101–118; B. Janusz-Pohl (2024b), *op. cit.*, 754–765.

In our analysis, we will focus on the constitutive rule as interpreted by the Court of Justice of the European Union (CJEU) and the related sanction of nullity, commonly referred to in legal literature as the exclusionary rule. The constitutive rule we are examining pertains to the modality, specifically the manner in which procedural actions are performed regarding the transmission of evidence in a special procedure related to the execution of a European Investigation Order (EIO). In the ruling we will further analyze, the CJEU not only clarified the procedures for issuing and executing an EIO, but also emphasized its commitment to ensuring the effectiveness of judicial cooperation tools. Additionally, the Court highlighted the importance of guaranteeing fair trial rights, particularly concerning the rights of the defendant. It ruled that any evidence obtained in violation of these rights must be excluded from criminal proceedings. This judgment establishes a new approach to evidence admissibility and acknowledges the CJEU's authority to create a new state of affairs through the introduction of a new constitutive rule.

3. The entire theoretical framework will be compared with the example of evidentiary actions, specifically the modalities of these actions and their outcomes as elaborated by the Grand Chamber of the CJEU in the EncroChat case, also known as the MN case (C-670/22). It is essential to consider the context surrounding this ruling, as it stems from a previous legal conflict among German courts regarding the admissibility of using EncroChat data as evidence in criminal cases.

To summarize the factual background of this case, it is important to mention that it involved EncroChat, a French service provider that facilitated end-to-end encrypted communication through specially modified smartphones. During an investigation conducted by French authorities, it was discovered that the individuals were utilizing encrypted mobile phones operating under an 'EncroChat' license to engage in activities primarily associated with drug trafficking. These mobile devices were equipped with unique software and modified hardware that allowed for end-to-end encrypted communication through a server located in Roubaix (France), which could not be accessed through traditional investigative methods.

With authorization from a judge, French police managed to obtain data from a server in 2018 and 2019. This data enabled the formation of a joint investigation team, which included experts from the Netherlands, to develop a piece of Trojan software. With the approval of the Tribunal Correctionnel de Lille, this software was uploaded to the server in the spring of 2020 and was subsequently installed on mobile phones through a simulated update. Out of a total of 66,134 subscribed users, approximately 32,477 users across 122 countries were affected by this software, including around 4,600 users in Germany. In March 2020, police officers from various European countries were briefed about the findings related to EncoChat during a videoconference organized by the European Union Agency for Criminal Justice Cooperation (Eurojust). As a result, many investigations were initiated across Europe. Notably, on June 2, 2020, the Frankfurt Public Prosecutor's Office, which serves as the issuing authority, requested authorization

from the French authorities, acting as the executing authority, to use the data from the EncroChat service without restrictions in criminal proceedings. The tribunal correctionnel de Lille executed the EIO and authorized the transmission and use of the requested data. Further data were transmitted subsequently on the basis of two supplementary EIOs dated 9 September 2020 and 2 July 2021. This evidence was then used in proceedings against *MN*. During these proceedings, the lawfulness of the procedure of the EIOs was contested by German courts. As a consequence the Landgericht Berlin (Regional Court, Berlin) decided to stay the proceedings and to refer the questions to the Court of Justice for a preliminary ruling.

The request concerned 5 areas including the interpretation of the provisions of the Directive 2014/41:[14]

1) The interpretation of the concept of "issuing authority" under Article 6(1) in conjunction with Article 2(c);
2) The interpretation of Article 6(1)(a) in respect to precluding an EIO for the transmission of data already available in the executing State: a) when the EIO seeks the transmission of the data of all terminal devices used on the territory of the issuing State, and there was no concrete evidence of the commission of serious criminal offences by those individual users either when the interception measure was ordered and carried out or when the EIO was issued; b) when the integrity of the data gathered by the interception measure cannot be verified by the authorities in the executing State by reason of blanket secrecy;
3) The interpretation of Article 6(1)(b) regarding the inadmissibility of an EIO for the transmission of telecommunications data already available in the executing State (here France) where the executing State's interception measure underlying the gathering of data would have been inadmissible under the law of the issuing State (here Germany) in a similar domestic case (**equivalence principle**);
4) The interpretation of the meaning of "interception of telecommunications" based on Article 31(1) and (3), specifically whether this notion includes a measure entailing the infiltration of terminal devices for the purpose of gathering traffic, location and communication data of an internet-based communication service. Additionally, this question covers the issue of whether Article 31 also assumes compliance with the administrative national rules for individual telecommunications users concerned.

14 See also L. Bernardini, „On encrypted messages and clear verdicts – the EncroChat case before the Court of Justice (Case C-670/22, MN)", *EU Law Live*, 21/05/2024, *https://eulawlive.com/op-ed-on-encrypted-messages-and-clear-verdicts-the-encrochat-case-before-the-court-of-justice-case-c-670-22-mn-by-lorenzo-bernardini/,* 01. March 2025.
R. Merkevičius, „Judgment of the Court of Justice of the European Union of 30 April 2024 in the "EncroChat case" (case No. C-670/22): does this judgment really legitimise Forum Shopping in criminal proceedings, and how will it impact Lithuanian criminal proceedings?", *Teise*, vol. 132, 2024, 20–36.

5) In our discussion on the emergence of **a new constitutive rule**, the most critical aspect was the final question concerning the legal ramifications of acquiring evidence in contravention of EU law. This encompasses not only the regulations outlined in the Directive, but also insights from Trites and, particularly, the Charter of Fundamental Rights.

Regarding the admissibility of using evidence the following sub-questions were formulated in a request for a preliminary ruling:

'(a) In the case where evidence is obtained by means of an EIO which is contrary to EU law, can a prohibition on the use of evidence arise directly from the principle of effectiveness under EU law?

(b) In the case where evidence is obtained by means of an EIO which is contrary to EU law, does the principle of equivalence under EU law lead to a prohibition on the use of evidence where the measure underlying the gathering of evidence in the executing State should not have been ordered in a similar domestic case in the issuing State and the evidence obtained by means of such an unlawful domestic measure could not be used under the law of the issuing State?

(c) Is it contrary to EU law, in particular the principle of effectiveness, if the use in criminal proceedings of evidence, the obtaining of which was contrary to EU law precisely because there was no suspicion of an offence, is justified in a balancing of interests by the seriousness of the offences which first became known through the analysis of the evidence?

(d) In the alternative: does it follow from EU law, in particular the principle of effectiveness, that infringements of EU law in the obtaining of evidence in national criminal proceedings cannot remain completely without consequence, even in the case of serious criminal offences, and must therefore be taken into account in favour of the accused person at least when assessing evidence or determining the sentence?'

Upon examining the questions posed by the German court, it becomes clear that the CJEU aimed to determine whether the rule prohibiting the use of evidence collected in violation of EU law is directly connected to the principle of effectiveness (which relates to the application and primacy of EU law), rather than being based on national regulations. What role does the principle of equivalence play in this context? Does it permit the exclusion of evidence obtained under the European Investigation Order (EIO)? Furthermore, should the acceptance of evidence gathered in accordance with EU law depend on the severity of the crime, or can potentially invalid evidence be used to benefit the accused?

In our analysis, we will focus specifically on the CJEU's position, highlighting the elements that will help us determine whether this ruling establishes a foundation for a new constitutive rule. As previously mentioned in our preliminary assumptions about constitutive rules, acknowledging certain rules as constitutive implies that if an activity is conducted in violation of such a rule, the sanction of nullity *ex tunc* will apply, regardless of whether this sanction is explicitly stated in the relevant legal framework.

4. In the EncroChat ruling, responding to 5 main questions, the CJEU stated that Article 6(1) of Directive 2014/41 does not determine the nature of the authority that may issue the EIO. Additionally, an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State need not necessarily be issued by a judge where, under the law of the issuing State, in a purely domestic case in that State, the initial gathering of that evidence would have had to be ordered by a judge, but a public prosecutor is competent to order the transmission of that evidence. Additionally, Article 6(1) of Directive 2014/41 must be interpreted as not precluding a public prosecutor from issuing an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State where that evidence has been acquired following the interception, by those authorities, on the territory of the issuing State, of telecommunications of all the users of mobile phones which, through special software and modified hardware, enable end-to-end encrypted communication, provided that the **EIO satisfies all the conditions that may be laid down by the national law of the issuing State for the transmission of such evidence in a purely domestic situation in that State.** As a side note, it shall be added that the CJEU stated that Article 31 of Directive must be interpreted as being intended also to protect the rights of those users affected by a measure for the 'interception of telecommunications' within the meaning of that article.[15]

In the last point refers to the question of whether the principle of effectiveness requires national criminal courts to disregard information and evidence obtained in breach of the requirements of EU law. When "translating" this question into the language of the constitutive rules concept, one shall ask if the principle of effectiveness itself could be observed by the national criminal court as a source for the constitutive rule for excluding products of evidentiary actions. What is noticeable is that the Luxembourg Court remarked first that there is no need for this question to be answered unless the referring court comes to a conclusion, on the basis of the replies to previous points (1 to 4), that the EIOs were made unlawfully.

Furthermore, the Court of Justice of the European Union (CJEU) affirmed that the current EU law upholds the principle of procedural autonomy for member states. This means that each state is responsible for establishing its own rules regarding the admissibility and evaluation of information and evidence obtained in ways that contravene EU law in criminal proceedings.[16] Consequently, the Court has consistently upheld the established line of adjudication regarding the enforcement of rights under EU law. In situations where there are no specific EU regulations governing a particular matter, it is the responsibility of the national legal systems of each Member State to develop and implement procedural rules that facilitate actions aimed at protecting the rights individuals derive

15 See L. Bernardini, *op. cit.*; R. Merkevičius, *op. cit.*, 20–36.

16 See judgment of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU: C: 2020: 791.

from EU law. Importantly, these national procedural rules must adhere to two critical principles: first, they must be no less favorable than the rules that apply to similar domestic legal actions (this is known as the principle of equivalence); and second, they must not render the practical exercise of rights conferred by EU law either impossible or excessively burdensome. This dual requirement ensures that individuals can effectively assert their rights within the framework established by European Union legislation, thereby maintaining a balance between national procedural autonomy and the protection of EU rights (the principle of effectiveness).[17]

Article 14(7) of Directive 2014/41 explicitly requires Member States to ensure that, in criminal proceedings within the issuing State, the rights of the defense and the fairness of the proceedings are maintained when assessing evidence obtained through the European Investigation Order (EIO). This means that any evidence a defendant cannot effectively comment on must be excluded from the criminal proceedings. In response to question no. 5, the Court of Justice of the European Union (CJEU) clarified that Article 14(7) must be interpreted to mean that national criminal courts are obligated to disregard information and evidence if the individual involved cannot effectively comment on that information or evidence. Additionally, such information and evidence must be likely to have a significant influence on the findings of fact.

Regarding the substantive requirements for issuing a European Investigation Order (EIO), the Court emphasized that any assessment of proportionality and necessity must derive from national law and should be conducted specifically by the competent national authorities. According to the principle of mutual recognition, issuing authorities cannot apply their own domestic standards of proportionality and necessity to investigative measures that have already been conducted, nor can they reassess their legality. In this situation, the German authorities are only permitted to evaluate the proportionality and necessity of the transmission itself, rather than the methods employed by the French authorities to collect the evidence. Additionally, the right to seek reassessment is ensured both during the issuance and execution of the European Investigation Order (EIO), as outlined in Article 14 of the Directive. Challenges regarding the legality, proportionality, and necessity of an EIO's issuance can be raised in the courts of the issuing State. Conversely, any legal remedies related to its recognition and execution should be addressed by the judicial authorities in the executing State (as referenced in Article 14). Therefore, the principle of mutual recognition, founded on mutual trust, facilitates the sequential application of national laws and the available systems of remedies. The MN ruling highlights a significant

17 In light of the principle of procedural autonomy, Member States are entrusted with the competence to establish procedural rules for actions aiming at safeguarding rights deriving from EU law, on condition that they conform with the principles of equivalence and effectiveness. See judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188 and of 6 October 2020, *La Quadrature du Net and Others*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791.

shift toward concrete minimum standards for evidence admissibility, while the essence of mutual recognition remains intact.[18] Yet, the MN case serves as definitive evidence of the Court's commitment to establishing a heightened level of protection for the defendant, which is in accordance with the overarching objectives of the Union's legislation[19].

As previously indicated, researchers have referred to the issue of constitutive rules in relation to ECtHR rulings.[20] It is notably apparent that the Court of Justice of the European Union (CJEU), in the case at hand, deliberately sets itself apart from the more reserved and cautious stance adopted by the European Court of Human Rights (ECtHR) concerning the principles of fair trial and defense rights. To delve deeper into the formation of the constitutive rule in this context, it is essential to consider whether this rule emerged in response to the EncroChat ruling or if the CJEU simply revitalized it by incorporating a layer of axiology, or value-based reasoning. In the NM case, the CJEU took a significant and assertive step by explicitly authorizing national courts to impose sanctions of nullity. This marks a pivotal development in the jurisprudence surrounding EU law, as it empowers national judges to not only identify breaches but also to impose substantive consequences in the form of nullifying evidence. Moreover, the CJEU does not limit its involvement to merely formulating interpretive guidelines for compliance or pinpointing specific infringements. Instead, it has autonomously determined the inadmissibility of evidence as a direct consequence of breaches of EU law, thereby establishing a proactive judicial approach that reinforces the authority of EU legislation.

In taking this stance, the Court has demonstrated a willingness to go beyond established norms by boldly shaping a new exclusionary rule. This represents a significant departure from the opinions of the Advocate General, showcasing the CJEU's commitment to upholding the integrity of EU law and ensuring that violations carry meaningful consequences in judicial proceedings. Such an assertive approach not only enhances the accountability of national courts but also serves to strengthen the overall framework of rights and protections under EU law.[21] Based on the principle of effectiveness, the Court has brought to life the constitutive rule for the legal action of the transmission of evidence (products of evidentiary actions) that was "hidden" in Article 14 (7) of the Directive. In its recent judgment, the Court recognized the constitutive nature of the rule in

18 L. Bernardini, *op. cit.*; R. Merkevičius, *op. cit.*, 20–36.

19 See comments Andreas Kanakakis, *The EncroChat Judgment (Case C 670/22, MN): CJEU Steering a Bold Course through the Symplegades of Evidence Admissibility* on The EncroChat Judgment (Case C-670/22, MN): CJEU Steering a Bold Course through the Symplegades of Evidence Admissibility | UKAEL, *https://ukael.org/2024/07/01/the-encrochat-judgment-case-c-670-22-mn-cjeu-steering-a-bold-course-through-the-symplegades-of-evidence-admissibility/,* 01. April 2025.

20 M. Mittag, *op. cit.*, 637–645. See also B. Janusz-Pohl (2024a), *op. cit.*, 101–118; B. Janusz-Pohl (2024b), *op. cit.*, 754–765.

21 See opinion of the AG Ćapeta, points 116–131.

question, thereby affirming its significance in legal proceedings. This recognition allows national courts to declare evidence null and void in domestic cases when the defendant is unable to provide effective commentary or challenge on the manner in which the evidence was collected. The Court's ruling emphasizes that national courts have a duty to disregard any evidence obtained in violation of EU law, which is crucial for safeguarding the fundamental rights of the defense and ensuring the fairness of legal proceedings. This principle is firmly rooted in Article 47 of the EU Charter of Fundamental Rights, which guarantees the right to an effective remedy and a fair trial. Moreover, this interpretation seeks to balance the inherent flexibility involved in the issuance and execution of European Investigation Orders (EIOs) as governed by national laws. The principle of effectiveness, which mandates that legal protections must be applied in practice, has implications for all authorities engaged in these proceedings, whether they are in the issuing state or the executing state. As a result, national courts must rigorously assess the admissibility of evidence obtained in such contexts, thereby reinforcing the integrity of the judicial process within the EU.

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5. To summarize, it is important to note that the discussion surrounding the concept of constitutive rules has not yet been fully integrated into the legal interpretation related to using specific rules for performing an act to deduce sanctions for violations. As previously mentioned, the execution of a procedural act is governed by a comprehensive set of directives. Researchers have pointed out that these rules have varying statuses, and for some of them, there is no clear sanction (*leges imperfecta*). At the same time, for each procedural action, we can identify a set of constitutive rules, even if they are minimal. The existence of these rules inherently legitimizes the potential for sanctions of invalidity (nullity), which would come into play if a constitutive rule is violated. Until now, scholarly literature has raised questions about the criteria for determining whether a particular rule can be classified as constitutive. This is controversial, especially when we have no systemic hint, i.e. the system does not operate a sanction for its violation. Upon analyzing the jurisprudence of the European courts, particularly the rulings issued by the European Court of Human Rights (ECtHR) and the landmark decision in the EncroChat case by the Court of Justice of the European Union (CJEU), we can determine that these judicial bodies possess the authority to formally recognize a legal rule as fundamentally constitutive. This recognition is significant as it often shapes the interpretation and application of law across member states. However, this observation raises several pertinent questions regarding the conditions that such a ruling must satisfy. For instance, what specific legal precedents or principles must be upheld to ensure the validity of the ruling? Additionally, is it essential for these courts to maintain a coherent and consistent line of interpretation in their decisions to establish legitimacy and

stability in legal frameworks? By addressing these questions, we can gain deeper insight into the role and impact of these judicial entities in shaping European law.

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