Case Review

Update: Evidence obtained via Operation Trojan Shield (ANOM) not inadmissible on constitutional grounds

Review of Federal Constitutional Court, decision from 23 September 2025

BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 23.09.2025 – 2 BvR 625/25; BeckRS 2025, 25383

Michel Hoppe[*]

A. Subject Matter

On 9 January 2025, the German Federal Court of Justice (BGH) first decided that a conviction arrived at by the Regional Court (*Landgericht*) of Tübingen by way of evidence obtained from the United States of America's Operation Trojan Shield or '*ANOM*' had indeed been lawful.[1] In a parallel procedure concerning a sentence handed down by the Regional Court of Mannheim from 31 January 2024, the BGH on 21 May 2025 referred to its earlier decision.[2] The Federal Constitutional Court (*Bundesverfassungsgericht*) now had to decide on a constitutional complaint (*Verfassungsbeschwerde*) filed by the convict against these decisions.

B. Procedural Background and Ruling

As per Article 94 paragraph 1 number 4a of the German Constitution (*Grundgesetz* – GG) and reiterated by section 13 number 8a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*/BVerfGG), anyone may raise such a complaint if they feel their basic rights to have been violated. Basic or fundamental rights in this sense include any of the rights laid down in Articles 1 to 19 (*Grundrechte* - fundamental rights

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[*] Law student, HHU Düsseldorf. Head of the Department for Criminal Law. Student Assistent, Chair of German and Foreign Public Law, European Law and Public International Law (*Lehrstuhl für Deutsches und Ausländisches Öffentliches Recht, Völkerrecht und Europarecht*, Prof. Dr. Kreuter-Kirchhof).

[1] BGH BeckRS 2025, 23 = NJW 2025, 1584 = MMR 2025, 524. For a more in-depth explanation and criticism, see the earlier discussion in Hoppe, 'On the admissibility of evidence obtained via Operation Trojan Shield (ANOM)' (2025) 2 HeineLR 50.

[2] BGH BeckRS 2025, 4477.

in the narrower, proper sense) as well as the other rights enumerated in Article 94 paragraph 1 number 4a GG and section 13 number 8a BVerfGG (*grundrechtsgleiche Rechte*), such as voting rights in federal elections (Article 38 paragraph 1 sentence 1) or *habeas corpus* specifically as it relates to the need for a judicial warrant (Article 104).

Here, the complainant argued that admitting the evidence obtained via *ANOM* constituted a violation of their right to a fair trial (as the subjective component of the rule of law, Article 2 paragraph 1 in conjunction with Article 20 paragraph 3) and their general right of personality (Article 2 paragraph 1 in conjunction with Article 1 paragraph 1). Additionally, the BGH had exceeded the limits of its discretion in handling its duty to refer to the European Court of Justice according to Article 267 paragraph 3 TFEU, in light of questions surrounding the EIO Directive. Considering how the CJEU would, if that allegation turned out to be true, be the responsible judicial body, this omission would be in violation of the complainant's right to their lawful judge (Article 101 paragraph 1).

Any complaint has to be either accepted or refused by the BVerfG (sections 93a and 93b BVerfGG). Grounds for admittance are constituted either by a general constitutional significance of the complaint, or the complaint being appropriate to enforce the rights referred to above. (section 93a paragraph 2 BVerfGG). In and of itself, there is no discretion of the court in this regard. The complaint is dismissed if grounds within the meaning of section 93a paragraph 2 BVerfGG are lacking, and accepted if they are present.[3] In practice, the Court does possess considerable leeway in interpreting the grounds for admittance. Most importantly, any complaint must necessarily be sufficiently substantiated by the complainant (section 23 paragraph 1 sentence 2 and section 93 paragraph 1 sentence 1 BVerfGG). Here, the BVerfG held that these requirements had not been met, thus issuing a decision of nonacceptance (section 93b in conjunction with section 93a BVerfGG).

C. Reasoning

It is reiterated that evidence being rendered inadmissible must remain an exception to the general rule of admissibility, in order not to hinder the judiciary from handing down just verdicts. An exclusion of evidence may be derived either as an accessory to a breach of law in obtaining the evidence or, independently from such, from other principles that speak against the usage in and of itself. Still, inadmissibility may not be inferred from every breach of procedure, and even in the case at hand, the BGH is not to be corrected in having

[3] cf Fabian Scheffczyk, '§ 93a BVerfGG' in Christian Walter (ed), *BeckOK BVerfGG* (19th edn, C.H. Beck 1 June 2025) para 13; Hans Lechner and Rüdiger Zuck, *Bundesverfassungsgerichtsgesetz Kommentar* (8th edn, C.H. Beck 2019) section 93a para 5; Christofer Lenz and Ronald Hansel, *Bundesverfassungsgerichtsgesetz* (4th edn, Nomos 2024) section 93a para 25.

denied the general exclusion of ANOM data from the decision process.

The Constitutional Court reaffirms that, lacking any evidence to the contrary, neither the actions taken by the FBI nor the hitherto unknown third EU member state in which the servers hosting the sensitive personal data was located had breached the rule of law in a way that would result in a stand-alone exclusion of evidence. Most devastatingly, the BVerfG concludes on the basis of the complainant's own extensive description of the *ANOM* method that there was no critical lack of information and therefore no illicit deviation from indispensable fundamental rights standards, or an unfair trial. As expected, any exclusion on grounds of illegality solely according to the law of the foreign jurisdictions concerned is also rejected.

Lastly, the Court denies that the previous court's omission of a reference to the CJEU had been an obviously untenable choice, as the BGH had explicitly based its own decision on the European court's judgement in the *Encrochat* case from 30 April 2024,[4] and had not substantially deviated from that ruling.

D. Criticism

The abstract reasoning on the part of the Court is sound, and its decision leaves claims of inadmissibility within the hitherto recognized case groups unaffected. Among these are, for example, violations of the most intimate private sphere or violations of the rule of law in the form of the authorities themselves provoking criminal acts.[5] However, the decision upholds the restrictive approach taken by the BGH in monitoring the rule of law in cooperating jurisdictions, and in assessing whether administrative assistance is abused just in the individual case or even systematically for the sake of circumventing domestic legal requirements.

This laxity has to be criticized even more harshly, seeing how the apparently Lithuanian court decision authorizing the use of the aforementioned servers had been obtained by the FBI under false premises.[6] Crucially, the questionable assumption that the usage of encrypted communication in and of itself constitutes probable cause for surveillance is also just shrugged off.

[4] Case C-670/22 *M.N. (EncroChat)* (ECJ, 30 April 2024).

[5] cf Thomas C Knierim, 'Anmerkung zu BVerfG Beschluss vom 23.9.2025 – 2 BvR 625/25' (2025) 20 FD-StrafR 817256.

[6] Legal Tribune Online, 'Anom-Daten sind verwertbar' (LTO, 1 October 2025) <www.lto.de/recht/nachrichten/n/2bvr62525-bverfg-anom-daten-verwertbar-strafverfahren> accessed 25 November 2025.