ECLI:NL:HR:2023:913

Authority	High Council
Judgment date	13-06-2023
Date of publication	13-06-2023
Case number	23/00011 , 23/00010
Formal relationships	Conclusion: ECLI:NL:PHR:2023:477 Conclusion: ECLI:NL:PHR:2023:478
Jurisdictions	Criminal law
Special characteristics	Preliminary ruling
Content indication	Preliminary decision HR, art. 553 Sv. 1. Preliminary proceedings in criminal cases. 2. Answering questions about, among other things, the significance of the (international or interstate) principle of trust for assessing the legality and reliability of results obtained with the application of investigative powers by authorities of a country other than the Netherlands, while jurisdiction has been applied in that other country, and possibilities for defense to investigate legality of obtaining evidence. Ad 1. HR makes introductory comments on preliminary questions to the criminal chamber of HR. Comments mean that a judge who is considering asking a preliminary question gives the parties involved the opportunity to comment on that intention and on the intended content of the question. Because the judge has independent responsibility for the outcome of the procedure, it is up to the judge himself to determine whether art. 553.1 Sv refers to the situation in which preliminary questions are asked if the applicable criteria are met. The judge explains why an answer to a legal question is necessary to decide the case in question and why the question has a transcending importance. The question must also be embedded in a clear (provisional) factual determination and placed in a (succinctly described) relevant legal context. The judge further explains why, in his opinion, the question is suitable for answering in preliminary ruling proceedings. Furthermore, it may be useful for him to give his opinion on (provisional) answer or various (provisional) answers to the question and it is logical that he outlines the consequences of this for legal practice. Ad 2. When discussing the question about the meaning of the principle of trust for assessing the legality and reliability of results obtained with the application of investigative powers by authorities of a country other than the Netherlands, while jurisdiction has been applied in that other country, HR discusses investigation under responsibility from foreign authorities and investigation abroad under the responsibility of Dutch authorities. HR then discusses whether and, if so, in which cases, authorization from RC is required and HR makes some comments about the use of information in other investigations and about Directive 2002/58/EC and Directive (EU) 2016/680 . HR also addresses the principle of equality of arms and assessment of requests to add documents to procedural documents and of requests to inspect documents. HR answers preliminary questions.
Locations	Rechtspraak.nl SR-Updates.nl 2023-0117

NJB 2023/1639
RvdW 2023/691
JIN 2023/125 with annotation by C. van Oort
NJ 2023/279 with annotation by JM Reijntjes
Computerrecht 2023/260 with annotation by SGAM Adams

Enriched pronunciation

Pronunciation

SUPREME COURT OF THE NETHERLANDS

CRIMINAL CHAMBER

Numbers 23/00010 PJV and 23/00011 PJV
Date June 13, 2023

PRELIMINARY DECISION

(Case 23/00010 PJV)
to the legal questions asked by the District Court of Northern Netherlands in the cases of 19 December 2022, numbers 18-018510-21, 18-298097-21 and 18-298079-21

by

[suspect 1],
born in [place of birth] on [date of birth] 1988,

[suspect 2],
born in [place of birth] on [date of birth] 1969,

and

[suspect 3],
born in [place of birth] on [date of birth] 1964,

(Case 23/00011 PJV)

and by the Overijssel District Court by decision of December 30, 2022, numbers 05-035910-21, 05-136177-21, 05-161088-21, 05-119854-21, 05-161202-21, 05-052758-21 , 05-060612-21, 05-028710-21, 08-211438-20 and 05-035913-21, legal questions asked in the cases

by

[suspect 4],
born in [place of birth] on [date of birth] 1988,

[suspect 5],
born in [place of birth] on [date of birth] 1988,

[suspect 6],
born in [place of birth] on [date of birth] 1987,

[suspect 7],
born in [place of birth] on [date of birth] 1971,

[suspect 8],
born in [place of birth] on [date of birth] 1992,

[suspect 9],
born in [place of birth] on [date of birth] 1989,

[suspect 10],
born in [place of birth] on [date of birth] 1962,

[suspect 11],
born in [place of birth] on [date of birth] 1981,

and

[suspect 12],
born in [place of birth] on [date of birth] 1975,

hereinafter: the suspects.

1 Proceedings at the Supreme Court

By decision of December 30, 2022, the Overijssel District Court submitted a preliminary question to the Supreme Court. Written comments have been submitted by the Public Prosecution Service, and by D. Schaddelee and CC Polat, both lawyers in Breukelen, on behalf of the suspect [suspect 6].

Advocate General DJMW Paridaens has delivered his opinion. The Public Prosecution Service responded in writing.

The Northern Netherlands District Court submitted preliminary questions to the Supreme Court in its decision of December 19, 2022. Written comments have been submitted by the Public Prosecution Service, by RBM Poppelaars, lawyer in Breda, on behalf of the suspect [suspect 3], and by JC Reisinger and RDA van Boom, both lawyers in Utrecht, and V. Poelmeijer, lawyer in Amsterdam, on behalf of the suspect [suspect 2].

Advocate General DJMW Paridaens has delivered his opinion. The Public Prosecution Service and counsel Poppelaars, Reisinger and Van Boom have responded in writing.

The Supreme Court sees reason to discuss and answer the preliminary questions asked by the courts of Overijssel and Northern Netherlands in one decision.

2 Table of contents

This preliminary decision consists of the following sections:

3. Introductory remarks on preliminary questions to the criminal chamber of the Supreme Court

A. Preliminary questions by the judge to the criminal chamber of the Supreme Court (3.2)

B. What is a preliminary question? (3.3.1-3.3.2)

C. The relevant factual and legal context (3.4.1-3.4.2)

D. Refraining from answering and binding the Supreme Court to the preliminary question (3.5)

E. Consequences for the progress of the procedure in question (3.6)

F. Summary (3.7)

4. The preliminary questions

5. Factual context

6. Answer to the preliminary question asked by the Overijssel District Court

A. Investigation abroad under the responsibility of foreign authorities (6.3-6.16)

(i) Classical legal assistance (6.3-6.6)

(ii) The action of a joint investigation team (6.7-6.11)

(iii) Issuing an EPO (6.12-6.16)

B. Investigation abroad under the responsibility of Dutch authorities (6.17-6.19)

C. Authorization of the examining magistrate required? (6.20-6.24)

D. Use of information in other studies (6.25)

E. Directive 2002/58/EC and Directive (EU) 2016/680 (6.26-6.27)

F. Completion (6.28)

7. Answering the preliminary questions asked by the District Court of Northern Netherlands

8. Decision

3. Introductory remarks on preliminary questions to the criminal chamber of the Supreme Court

3.1.1 The following provisions from the Code of Criminal Procedure (hereinafter: Code of Criminal Procedure) are important.

- Article 553 of the Code of Criminal Procedure:

"1. The judge may ex officio, at the request of the Public Prosecution Service or at the request of a party involved in the proceedings, ask the Supreme Court to answer a legal question by way of preliminary ruling, if an answer to this question is necessary to decide and to answer this question. special weight can be given, given the cross-cutting interest involved in the question.

2. Before the judge asks the question, the parties involved in the proceedings are given the opportunity to take a position on the intention to ask a question, as well as on the content of the question to be asked.

3. The decision asking the question shall state the relevant factual and legal context and the positions taken by the parties to the proceedings. The decision also contains a justification that the answer to the question complies with the first paragraph.

4. The registrar shall notify the decision to the Supreme Court as soon as possible."

- Article 554 of the Code of Criminal Procedure:

"1. Unless the Supreme Court, after hearing the Attorney General at the Supreme Court, immediately decides not to answer the question, it will give the Public Prosecution Service and the counselor or lawyer of the party involved the opportunity to make comments.

2. The Supreme Court may determine that third parties, through the intervention of a lawyer, are also given the opportunity to make comments within a period to be determined for this purpose. This announcement will be made in a manner to be determined by the Supreme Court.

3. After the period for making comments has expired, the Attorney General at the Supreme Court will deliver a conclusion. The Public Prosecution Service and the counselor or lawyer of the party involved in the proceedings may submit their comments to the Supreme Court after they have been informed of the conclusion.

4. The Registrar of the Supreme Court shall inform the parties involved in the proceedings of the comments received from the other parties involved in the proceedings and third parties, as well as of the conclusion of the Attorney General.

5. The Supreme Court determines within what period and in what manner the procedural documents and comments are provided to the Supreme Court."

- Article 555 of the Code of Criminal Procedure:

"1. After the Attorney General has delivered a conclusion to the Supreme Court, the Supreme Court determines the day on which he will decide.

2. The Supreme Court will refrain from answering the question if it decides that the question is not suitable for answering by way of preliminary ruling or the question is of insufficient importance to justify answering it. The Supreme Court may limit itself to this judgment when stating the grounds for its decision.

3. If the answer to the question, after it has been asked, is no longer necessary for the judge's decision, the Supreme Court may, if it deems it appropriate, nevertheless answer the question.

4. The Registrar of the Supreme Court shall inform the judge who asked the question and the parties involved of the decision. The Registrar of the Supreme Court shall also inform the judge who asked the question of the conclusion of the Attorney General and the comments referred to in Article 554(4).

5. Unless the answer to the question is no longer necessary for a decision, the judge will decide, after giving the parties involved the opportunity to take a position on the ruling of the Supreme Court, taking this ruling into account. "

3.1.2 Section 4.4 ('Preliminary questions to the criminal chamber of the Supreme Court') of the Rules of Procedure of the Supreme Court of the Netherlands reads as follows:

"4.4.1. Scope

4.4.1.1. This section concerns the handling of cases in which a preliminary question has been submitted to the Supreme Court on the basis of Article 553 of the Code of Criminal Procedure.

4.4.2. Commencement of proceedings at the Supreme Court

4.4.2.1. The registrar of the court that has submitted a preliminary question shall immediately send a copy of that decision to the registrar of the Supreme Court. The Registrar of the Supreme Court confirms receipt.

4.4.2.2. (copies of) the documents in the case are attached, insofar as they are necessary for answering the preliminary question in the opinion of the judge who asked the preliminary question. In any case, the minutes of the (hearing) hearings at which the judge asking the question dealt with the case and the documents on the basis of which the parties involved in the proceedings spoke at these (hearing) hearings are necessary to answer the question. has been fed. In addition, correspondence details are provided of the parties involved in the proceedings and of the lawyers who acted for the parties involved in the proceedings before the court that asked the preliminary question.

4.4.2.3. The registrar of the Supreme Court announces receipt of the preliminary question on the website of the Supreme Court.

4.4.2.4. The clerk places the decision in the hands of the second multiple chamber of the Supreme Court and the Attorney General.

4.4.3. Prompt treatment

4.4.3.1. The Supreme Court ensures that the procedure is conducted expeditiously.

4.4.4. Further information

4.4.4.1. The Attorney General and the Supreme Court may at any stage of the proceedings request the court that referred a preliminary question to immediately send copies of documents other than those referred to in Article 4.4.2.2 relating to the case. documents referred to or for further information.

4.4.5. Immediately refrain from answering

4.4.5.1. If the Supreme Court, after hearing the Attorney General, is immediately of the opinion that the question is not suitable for answering by way of preliminary ruling, or that the question is of insufficient weight to justify an answer, the Supreme Court will decide not to answer it. to see.

4.4.5.2. The registrar sends a copy of that decision to the court that submitted the preliminary question, as well as to the parties involved in the proceedings.

4.4.6. Written comments from parties involved

4.4.6.1. If the conditions stated in article 4.4.5.1 are not met. If the case in question occurs that the Supreme Court immediately refrains from answering the preliminary question, the Public Prosecution Service and the counselor or lawyer of the parties involved in the proceedings will be granted a period of 30 days in which to submit written comments. They will be informed of this option by the clerk. The notification shall state how written comments can be submitted.

4.4.6.2. Parties are not given the opportunity to provide a written or oral explanation, except in accordance with Article 4.3.9.3. and following is determined otherwise.

4.4.7. Written comments from third parties

4.4.7.1. The Supreme Court publishes the preliminary question and the period within which third parties, through a lawyer, can submit comments on the Supreme Court's website or in another form.

4.4.7.2. The Supreme Court may determine that persons or institutions are invited to make comments through the intervention of a lawyer. Invitations are made by the clerk by ordinary letter, with a copy sent to the parties involved.

4.4.7.3. The in article 4.4.7.1. publication mentioned and the publication mentioned in article 4.4.7.2. the letter from the Registrar in question shall indicate how and within what period the written comments can be submitted.

4.4.7.4. Third parties are not given the opportunity to provide a written or oral explanation.

4.4.8. Other regulations regarding written comments

4.4.8.1. Written comments that have not been submitted within the specified period or that have not been submitted by a representative of the Public Prosecution Service or a lawyer will be discarded. Article 4.3.3.5. applies mutatis mutandis to the submission of written comments.

4.4.8.2. The Registrar of the Supreme Court informs the parties involved in the proceedings and the judge who asked the preliminary question of the comments received from the other parties involved in the proceedings and from third parties.

4.4.9. Conclusion of the Attorney General

4.4.9.1. After the period for making written comments has expired, the date on which the Attorney General will deliver his conclusion will be set.

4.4.9.2. The Registrar of the Supreme Court informs the judge who asked the question and the parties involved of the Attorney General's conclusion.

4.4.9.3. After being informed of the Attorney General's conclusion, the Public Prosecution Service and the counsel or lawyer of a party involved in the proceedings may submit their written comments on the conclusion to the Supreme Court within a period of 14 days.

4.4.10. Pronunciation

4.4.10.1. At the hearing at which the attorney general's conclusion is reached, the docket judge determines the date on which a ruling will be made and refers the case to the multi-judge chamber.

4.4.10.2. If the Supreme Court does not rule on the set date, the party(ies) involved in the proceedings as well as the victim who has requested this will be notified. The new ruling date will also be announced.

4.4.10.3. The registrar of the Supreme Court informs the judge who asked the preliminary question and the parties involved in the proceedings of the decision on the preliminary question.

4.4.11. Sending invitations, notifications and copies

4.4.11.1. The registrar shall send invitations, notifications or copies referred to in this paragraph to the counselor or lawyer of the party involved in the proceedings. The counselor or lawyer who has acted for the party concerned in the proceedings before the court that referred the question for a preliminary ruling is considered to be a counselor or lawyer for a party involved in the proceedings, unless another lawyer takes his place at the Supreme Court in accordance with the provisions in article 4.3.6.4. If no counselor or lawyer has acted for the party involved in the proceedings before the court that referred the question for a preliminary ruling and if an appointed lawyer is also missing, it will be sent to the party involved in the proceedings itself.

4.4.11.2. The registrar of the Supreme Court will determine whether a counselor or lawyer has acted for the party concerned in the proceedings before the court that referred the question for a preliminary ruling on the basis of the correspondence data provided by that court, referred to in Article 4.4.2.2. ”

3.1.3 Articles 553 to 555 of the Code of Criminal Procedure form the First Section of Title X of the Fourth Book of the Code of Criminal Procedure. These provisions entered into force on October 1, 2022 as part of the Act of 22 June 2022 amending the Code of Criminal Procedure to promote innovation on various subjects in the context of the modernization of the Code of Criminal Procedure (Innovation Act Criminal Procedure), Stb . 2022, 276. The history of the development of the Criminal Procedure Innovation Act includes the following.

- The explanatory memorandum:

“3.1 The preliminary ruling procedure at the Supreme Court

Opening up the possibility for the judge (district court or appellate court) to submit an important legal question to the Supreme Court in the context of the handling of a criminal case is a long-standing wish. By asking a so-called preliminary question, the fact-finding judge receives the answer necessary within a short period of time to make the (correct) decision in the case before him. This has a positive effect on legal development and speeds up the adjudication because it is not necessary to wait for the Supreme Court's judgment in cassation. And not only in the specific case in which the preliminary question is asked, but also in all other cases in which the same legal question plays a role. Because the legal question to be answered by the Supreme Court must have a transcending importance, this relevance for other criminal cases is a given. This procedure is therefore important for the broad legal practice: judges, investigating officers, public prosecutors and (lawyers of) the suspect and the victim receive clarity more quickly than before about how rules should be interpreted and applied. This reduces the risk of contradictory rulings by lower courts and long-term legal uncertainty. In appropriate cases, the procedure could also prevent the filing of legal remedies. Finally, the preliminary ruling procedure can promote the speed and efficiency of the criminal process because there is less need to proceed to cassation on the interpretation of legal questions if the Supreme Court answers these at an early stage by way of a preliminary ruling.

(...)

II. ARTICLE BY ARTICLE EXPLANATION

(...)

First Department. Preliminary proceedings before the Supreme Court

Introduction

(...)

The proposed procedure

The aforementioned research into the possibilities of introducing a preliminary ruling procedure in criminal law has revealed a number of conditions that must be taken into account in the preliminary ruling procedure in the criminal process and which are included in the present proposal. According to the research, the starting point should be a "simple" legal regulation, with only the possibility of asking pure legal questions from a specific criminal case that is before the judge. So-called "extrajudicial questions" (questions other than about the specific criminal case) are not included. The legal question must also have a certain importance, so that the answer is or can be helpful for similar criminal cases. As in civil and tax law, the preliminary ruling procedure is open to all procedures, as long as they are provided for in the Code of Criminal Procedure. As a result of the evaluation, consideration will be given to opening up the preliminary ruling procedure more widely, for example to the Surrender Act, the Extradition Act, the DNA Testing of Convicts Act and the Transfer of Execution of Criminal Sentences Act.

The trier of fact and the Supreme Court are both gatekeepers for asking or receiving preliminary questions: together they must ensure that the number of questions is limited and the quality of the questions remains high. The trier of fact and the Supreme Court must also be able to implement a selection policy based on open legal criteria that also enables prioritization and manageability of legal questions to be answered. There is no obligation for the Supreme Court to state reasons for its possible decision not to receive a preliminary question. The trial judge must provide reasons if he rejects a request from the defense or a request from the public prosecutor to ask a question.

As in civil law, the involvement of third parties in the preliminary ruling procedure is possible with the permission of the Supreme Court, which also applies to the victim of the charge. Given the nature of the criminal proceedings and the interest of the suspect to be tried within a reasonable period, a rapid procedure is desirable. The starting point should be that an answer from the Supreme Court to the preliminary question is obtained within a period of six months, and - where possible - shorter. Finally, the researchers note that the costs incurred by the suspect as a result of the preliminary ruling procedure should be eligible for reimbursement (for example, for legal assistance to be provided). The aforementioned conditions were taken into account when designing the criminal law procedure. Where possible, the regulations for the civil preliminary ruling procedure have been followed, with adjustments where justified in view of the nature and structure of the criminal proceedings.

The judge determines when the answer to a legal question is necessary to reach a decision. Moreover, it must be possible to attach special weight to the answer to this legal question, given the cross-cutting importance involved in the question. Compared to civil and tax law, there is a slightly higher threshold for asking questions. The reason for this is the inherent nature of criminal law, which, among other things, plays a role in the fact that the suspect may be remanded in custody and the Supreme Court has a greater range of cases compared to civil and tax law (see I. Giesen et al., De Preliminary Questions to the Supreme Court Act. An interim evaluation in the light of the possible introduction of criminal law, The Hague: Boom legal 2016, p. 197). The latter means that many legal questions may ultimately be addressed by the Supreme Court. The added value of a preliminary ruling procedure lies in particular that an answer to a legal question will be obtained more quickly, whereby the procedural economic gain (prevention of procedures) is expected to be smaller. This fact has been taken into account in a slightly higher threshold for asking questions. Following the example of civil law, the term "legal question" has been chosen (proposed Article 553, first paragraph). Before the judge proceeds to ask questions, he gives the parties the opportunity to respond to the intention to ask questions. He also outlines the questions he wishes to pose. Parties can make use of this option if desired. The judge may, ex officio, at the request of the Public Prosecution Service or at the request of one of the parties involved, ask the Supreme Court for a preliminary ruling. The judge ultimately decides whether and, if so, which questions to submit to the Supreme Court. There is no legal remedy against this decision. This follows from the closed system of legal remedies. However, the judge may be expected to consider the parties' positions where necessary, especially if these differ from the final decision. If the judge decides to ask questions, he will send these questions to the Supreme Court as soon as possible upon ruling, with an explanation and reasons why and why the criterion has been met (see Article 553, third paragraph). The Supreme Court may determine, for example in its procedural rules, that other documents such as the minutes of the hearing must also be sent.

After receiving the documents, the Supreme Court will give the parties the opportunity to make comments, unless the Supreme Court immediately decides not to answer the questions (for the procedure at the Supreme Court, see proposed articles 554 and 555) . The specific period for making comments can be included in the procedural rules of the Supreme Court or determined ad hoc by the docket judge. If desired,

the Supreme Court can decide to request input from third parties. After receiving the comments, the Attorney General (in practice often: an Advocate General) will set a date for conclusion. After the suspect's counsel has been given the opportunity to respond to the conclusion, the Supreme Court will set a date for judgment. The Supreme Court can still decide by judgment that the questions will not be answered.

Article 553 [power to ask preliminary questions]

First member

The first paragraph provides for the power of the judge to ask preliminary questions to the Supreme Court. The judge may ask a question if the answer is necessary for his decision. Moreover, the answer to the question must be of special importance, given the cross-cutting importance involved in the question. The purpose of this arrangement is to enable the judge to submit certain legal questions to the Supreme Court that are of particular importance to the individual case or to various other cases. By being able to pose this legal question in factual proceedings, it can be prevented that an appeal in cassation is lodged and it can be ensured that the answer given by the Supreme Court can be applied in several other cases.

As in the civil preliminary ruling proceedings, it has been decided to open up the procedure "broadly". In principle, questions can be asked to the Supreme Court in all criminal proceedings. In addition to the hearing judge, the council chamber can also ask preliminary questions (if the aforementioned criterion is met). The underlying idea is that legal questions do not only arise in the main proceedings. All judges (including examining magistrate, council chamber, district court, court of appeal) can ask questions in criminal proceedings, i.e. proceedings that fall under the Code of Criminal Procedure.

Legal questions may also arise in separate proceedings regarding the deprivation of unlawfully obtained benefits, in a complaint procedure or in the assessment of a claim for damages, the answer to which is important for several cases. Strictly speaking, on the basis of the proposed scheme, the examining magistrate can also ask a preliminary question to the Supreme Court. Given the legal criterion that a legal question must be of "special importance", it is not obvious that this will occur often. The generally factual nature of the proceedings before the examining magistrate will also usually mean that a preliminary ruling will not arise.

The judge can ask the Supreme Court legal questions, the answer to which is necessary for the decision in the specific case. Given the nature of the criminal proceedings and the presumption of innocence in particular, restraint must be exercised in asking legal questions in which factual elements also play a role (so-called "mixed questions"). In particular, if certain facts are assumed to be established when trying a suspect, this could create tension with the suspect's right to a fair trial, because the impression could be given that the judge is already based on certain facts and is no longer unbiased. and is unapologetic.

The judge may decide to refer a preliminary question to the Supreme Court, either ex officio or at the request of the Public Prosecution Service or at the request of one of the parties involved. For the sake of clarity, this has also been included in the legal text. If a claim or request is made, the judge will decide on it with reasons.

In order to provide the judge with some guidance in which cases asking a question is appropriate, the first paragraph specifies that the answer to the question is necessary "to decide" and "the answer to this question can be given special weight", whereby attention must be paid "to the overarching interest involved in the question". This specification clarifies that the legal question to be asked by the judge is in principle important for several cases. In addition, sufficient weight must be given to the answer to the question. This may, for example, be the number of cases, the nature of the cases and the scope of the cases to which the answer to the legal question can contribute.

Topics on which questions can be asked include the interpretation of a specific description of the offence, the interpretation of a procedural law rule or the interpretation of transitional law. Such questions may arise in various procedures and are of essential importance to the question of whether a suspect has acted criminally and how the criminal proceedings should be conducted. Answering such questions by the Supreme Court can contribute to further legal development, as well as to the effectiveness of and legal protection within the criminal process. As in the civil preliminary ruling procedure, an obligation has been included for the judge to motivate the cross-case nature. This enables the Supreme Court to assess whether the question qualifies for an answer. The Supreme Court has the option, if desired, to reformulate the question asked by the judge. It is not necessary to make this explicit in the law.

The judge who intends to ask a question will have to assess whether and to what extent a legal question has a transcending importance and whether, given the circumstances of the case, it is appropriate to ask a question in this case in particular. The judge will have to take into account in his considerations the extent to which the answer can contribute to procedural economy, that is to say to the expeditious handling of the case at hand and other cases involving the same legal question. He will also have to take into account any disadvantages of the procedure in his assessment, which lie mainly in the prolongation and increasing complexity of the procedure. It is important to handle the criminal proceedings expeditiously within a reasonable period of time. This will require careful consideration in particular if the suspect is in pre-trial detention at the time the question is asked. It is primarily up to the judge who intends to ask a question to make this assessment. Ultimately, however, it is up to the Supreme Court to decide whether there is indeed a legal question of "special importance" (see the explanation to Article 554, first paragraph). In other cases involving similar legal questions and in which the judge deems it necessary to await the answers of the Supreme Court, the judge may decide to suspend the investigation (Article 281).

During the preliminary ruling procedure, the limitation period is suspended (Article 73 of the Criminal Code; Supreme Court 30 May 2006, NJ 2006/366, with reference to PAM Mevis). This suspension of the limitation period only applies to the case in which the question was asked. The suspension does not apply to other cases involving similar legal questions; that would lead to procedural confusion. Judges in other cases do of course have the option to adjourn the case for a certain period of time, so that they can await the answer to the preliminary question by the Supreme Court. If this takes too long, it is advisable to continue the case in the interest of adjudication within a reasonable period. If the answer to the preliminary question takes place after the case has been closed and, in the opinion of a party to the proceedings, it influences the judgment in the case, then recourse to a legal remedy may provide a solution.

Second member

The judge gives the parties involved the opportunity to take a position. This opportunity to take a position concerns both the intention to submit a question and the question itself. It is important that the parties involved in the proceedings can express themselves about the questions to be asked, since they will also have to respond to the Supreme Court in their comments about the answer they want to the question and they also have an interest in the answer to the question. ask. Furthermore, parties can also put forward whether and to what extent they consider it desirable for a question to be asked. For example, it is conceivable that the suspect points out that he does not consider asking a question desirable because this will lead to disproportionate delays in the criminal proceedings while he is in pre-trial detention. After the parties to the proceedings have expressed their intention to ask questions, the judge decides. The parties involved in the proceedings are usually the suspect and the public prosecutor. However, this may be different in special procedures. In a request for compensation under Article 89, the parties involved are a former suspect and the public prosecutor. An Article 12 procedure involves the complainant, the accused and the Advocate General. In an attachment procedure, for example, this concerns an interested party who, in accordance with Article 552a, may possibly complain about the attachment imposed and the Public Prosecution Service. In the event of a confiscation pursuant to Article 36e of the Criminal Code that takes place after the main case, this concerns the convicted person and the Public Prosecution Service.

(...)

When the judge has asked a preliminary question, he can suspend the case until the answer to the question has been received from the Supreme Court. However, it is quite conceivable that the case can continue pending the question before the Supreme Court. The trial judge can, for example, hear experts and witnesses in the main case, order further investigation or hold a hearing. After all, the preliminary ruling procedure concerns legal questions and not an investigation into facts and circumstances. However, the judge will only be able to decide on the point on which he has submitted preliminary questions after the Supreme Court has given its ruling and the parties involved have been given the opportunity to comment on the ruling (see also Article 555, fifth paragraph). . Due to the cross-case importance of the preliminary question to be asked, the answer may also be important for the judge's decision in other cases. It is therefore desirable that in these other cases the judge also has the option to suspend further hearing of the case until the Supreme Court has given its decision. The judge can use the power to suspend the investigation (Article 281 et seq.). It is therefore not necessary to provide for a separate power of suspension in this special scheme.

Third paragraph

The decision asking the question shall state the relevant factual and legal context and the positions taken by the parties involved in the proceedings. This concerns the positions of the parties in the underlying case and with regard to the asking of the preliminary question, insofar as relevant for the Supreme Court to assess and answer the preliminary question. This is in line with the arrangement that applies in civil cases (Parliamentary Papers II 2010/11, 32 612, no. 3, explanation to 392, point 7). Exactly what information the judge includes in the decision is ultimately up to his discretion and depends largely on the circumstances of the case.

The terms "factual and legal context" have been chosen because, unlike in civil and tax preliminary ruling proceedings, it is not possible to rely on facts established (provisionally) by the judge. The determination of facts by the judge in an interim decision can create tension with the presumption of innocence and the requirement of judicial impartiality and independence. Therefore, in principle, the judge will have to exercise restraint in outlining the factual context, with more scope obviously available if the parties agree on the factual context. In addition to the factual context, the judge also outlines the legal context. This in any case includes the underlying request, claim, complaint or charge on which the judge must decide. The judge further explains that the criterion of the first paragraph has been met. For example, the judge can briefly explain the relevant case law that led to the question being asked, partly to substantiate the special weight of the answer to the question. It is logical that the judge, where he has doubts about the factual and legal context, gives the parties the opportunity to express their opinions. In practical terms, this could be done at the same time as submitting the intended questions to the parties, on the basis of the second paragraph.

(...)

Article 554 [opportunity to make comments]

First member

The Supreme Court has the option to immediately decide not to answer the question, because the question is not suitable for answering by way of preliminary ruling or because the question is of insufficient importance to justify answering it. If the Supreme Court makes use of this option, it will suffice to state this opinion. No further justification is required (compare also Article 555, second paragraph).

If the question is considered, the parties involved will be given the opportunity to make comments pursuant to the first paragraph of this article. The term "comments" is in line with the terminology of Article 393, first paragraph, DCCP. The manner in which this is done and within what period is determined by the Supreme Court.

The assistance of a lawyer is required to make comments. That is why the wording used in these and other provisions states that "the counselor or lawyer of the party involved in the proceedings" is given the opportunity to make comments. The underlying idea is that making comments and providing explanations in the preliminary ruling procedure requires special knowledge and experience, which the suspect will usually not possess. The assistance of a lawyer contributes to the quality of the process, making the Supreme Court better able to answer the preliminary questions. The rule provided for in this provision is furthermore in line with the cassation regulation in criminal cases, whereby the suspect himself can lodge an appeal in cassation, but the suspect's counsel will have to submit the cassation letter.

(...)

Article 555 [Supreme Court decision]

(...)

Second member

The Supreme Court decides whether to answer the preliminary question or refrain from answering it because it judges that the question is not suitable for answering by way of preliminary ruling or the question is of insufficient weight to justify an answer. The Supreme Court can decide this immediately (cf. Article 554, first paragraph), but also at a later stage, for example after the Attorney General has reached a conclusion.

For example, the question will not lend itself to an answer if it is too intertwined with the facts of the case. Furthermore, the Supreme Court may refrain from answering if it concerns a legal question that has already been answered by the Supreme Court or a question to which the answer is already clear. The Supreme Court may also refrain from answering the question if the question is of insufficient importance (see Article 553, first paragraph). The arrangement leaves the necessary room for the Supreme Court to assess for itself whether and to what extent an answer to a question is desirable in a given situation, whereby the Supreme Court can also give priority to questions that it considers appropriate, partly in view of its limited capacity. judgment are of greater importance for legal formation and legal development. This is especially desirable if a significant number of questions are asked. The Supreme Court does not have to explain in detail why it refrains from answering the question, but can suffice with a reference to one of the grounds for rejection.

Third paragraph

If answering the question is no longer necessary for the decision to be made by the court, the Supreme Court may refrain from answering the question. This may be the case, for example, if the suspect changes his position and wishes to confess to the charges and indicates this in his comments to the Supreme Court, or if the suspect dies, as a result of which the right to prosecute lapses, and the procedure becomes actual. authority will end due to a declaration of inadmissibility by the public prosecutor.

The Supreme Court may decide to give the judge who asked the question the opportunity to comment on this. For example, the judge may be asked to provide further information about the overarching interest (ECLI:NL:PHR:2016:862). If it deems it appropriate, the Supreme Court may decide to answer a question that is no longer necessary for making a decision. An answer to the question may be desirable, because of the required cross-cutting interest or because of the importance for further legal development. For example, a case is known from the civil preliminary ruling proceedings that the parties had already settled, but the Supreme Court reported that the answer to the question was relevant to several proceedings (ECLI:NL:HR:2016:1087). No further criteria are set for this provision. This leaves the necessary room for the Supreme Court to reach an appropriate decision itself, based on the circumstances at hand.

(...)

Fifth paragraph

The judge decides taking into account the ruling of the Supreme Court. Once the Supreme Court's decision has been made available to the judge, the judge can decide the case after giving the parties involved the opportunity to respond to the Supreme Court's ruling. Since the decision to ask the preliminary question is an interim decision, the parties still have the opportunity to respond. For the sake of clarity, this right has been made explicit, with the text largely derived from Article 394, first paragraph, DCCP. Unlike civil proceedings, this response does not always have to be in writing. In special cases, for example when urgency requires this or when it concerns a relatively simple case, the parties involved can also respond orally to the Supreme Court's ruling."

(Parliamentary Papers II 2020/21, 35869, no. 3, p. 6, 29-36 and 38-39.)

- The note in response to the report:

"We would like to respond to the request of the members of the Christian Union to further clarify the term "special weight". These members are not yet convinced of the necessity of the special weight that must apply before a question can be submitted to the Supreme Court and ask the government to further indicate what is meant by this special weight. This standard is linked to the cross-cutting interests involved in the question. This means that the question is relevant to several things. As also indicated in the explanatory memorandum, this may lie in the number of comparable cases in which the legal question arises, the nature of the cases (think of a question that is of great social importance) or the size of the cases (the question is relevant to answering some very extensive criminal cases). In addition, other aspects may also play a role, in the context of expediency, such as: "a legal question has already been submitted to the Supreme Court for cassation" and "more legal development must first take place in the trial judge" play a role. The term also ties in with the criterion on the basis of which the Supreme Court can reject a question, as the aforementioned members rightly point out. Because the chosen criterion "special weight" is in line with this, the court can, by applying this criterion, avoid as much as possible that questions are submitted to the Supreme Court that the Supreme Court rejects due to insufficient weight. That would lead to unnecessary delays in the criminal proceedings."

(Parliamentary Papers II 2021/22, 35869, no. 6, p. 11.)

A. Preliminary questions by the judge to the criminal chamber of the Supreme Court (3.2)

3.2 In all procedures provided for in the Code of Criminal Procedure, preliminary questions can be submitted to the criminal chamber of the Supreme Court. The (discretionary) power to ask preliminary questions can be used if the judge is of the opinion that in the case referred to in Article 553 paragraph 1 of the Code of Criminal Procedure an answer to the preliminary question is necessary in order to make a decision. Because the judge has an independent responsibility for the outcome of the relevant procedure, it is up to the judge himself (and not the parties involved) to determine whether the applicable criteria are met. This does not alter the fact that the parties involved in the proceedings can request or demand that the court use its power to ask preliminary questions. Before the judge asks a preliminary question, the parties involved in the proceedings are given the opportunity, pursuant to Article 553(2) of the Code of Criminal Procedure, to take a position - possibly in writing - on both the judge's intention to ask a question and on the intended content of the question to be asked. In view of the importance of expeditious handling of the preliminary ruling procedure, the parties involved are given the opportunity as much as possible to simultaneously comment on the judge's intention and on the intended content of the question. The judge himself is responsible for the final formulation of the question to be put to the Supreme Court.

B. What is a preliminary question? (3.3.1-3.3.2)

3.3.1 A preliminary question as referred to in Article 553(1) of the Code of Criminal Procedure is a legal question that can be asked to the Supreme Court if the answer to that question is 'necessary to decide' in the relevant procedure and that answer also has a 'transcending interest' and is therefore in principle relevant to several criminal cases. It is therefore a well-defined and unambiguous question about an issue that is important both for the decision in the relevant procedure and for the development of law. Such an issue could include a new element in a description of the offense that raises questions of interpretation or a new procedural requirement. The legislative history of the Criminal Procedure Innovation Act emphasizes that 'extrajudicial questions' (questions other than those about the specific criminal case) cannot be regarded as preliminary questions. Such questions are not 'necessary to decide' in the relevant procedure.
The judge who is considering asking a preliminary question can check whether there is a question to which the answer has a transcending importance by, for example, consulting with (judges of) other courts that adjudicate cases involving a similar issue. Whether the answer to a particular question has a transcending importance is determined not only by the fact that the issue in question may also be discussed in other criminal cases, but also by the 'special weight' that is attached to the answer to the question. The question must be 'of particular importance to the individual case or to various other matters'. In the context of the importance for the individual case, the judge must assess whether - including in light of the suspect's right to be tried within a reasonable period - it is 'opportune' to grant a preliminary ruling in the case submitted to him. to set. With regard to the importance for various other cases, the legislator has particular regard to the number of comparable cases in which the legal question arises, the nature of the cases or the scope of the cases.

3.3.2 A preliminary question is in principle a 'pure question of law'. Partly in view of the purpose of the preliminary ruling procedure in criminal cases - it is about obtaining clarity on cross-cutting issues - a question can be considered that is of general application and can (therefore) be abstracted from the circumstances of the case. As stated in 3.3.1, this may, for example, involve an assessment of the definition of an element that appears in a description of the offence. The legislative history of the Criminal Procedure Innovation Act emphasizes that the judge must be reluctant to ask 'mixed questions' (in which factual elements also play a role). Restraint is especially advised when dealing with questions that require a (provisional) determination of the facts related to the suspect's criminality. This does not alter the fact that a legal question also includes a question about a legal issue that is important for the investigation into the facts to be conducted by the judge.

C. The relevant factual and legal context (3.4.1-3.4.2)

3.4.1 The preliminary question asked by the judge forms the basis for the preliminary ruling procedure. The Supreme Court must therefore have access to the information necessary to determine the cross-cutting importance of the answer to the preliminary question and to assess whether the answer to the question is necessary for the court to be able to decide in the relevant procedure. . These data are also important to be able to provide that answer expeditiously. The judge therefore describes why the answer to the question is necessary to decide, and he explains the cross-case importance of that answer. Pursuant to Article 553(3) of the Code of Criminal Procedure, the judge also states the 'relevant factual and legal context'. How that context should be described depends on the nature of the problem that is submitted to the Supreme Court as a preliminary question. In cases where it concerns the interpretation of a legal element of the offense, this could include, for example, a representation or summary of the indictment as a (hypothetical) factual basis and the positions that the parties to the proceedings have (provisionally) taken on the question of whether the charged

offense can be declared proven. **1** In cases where the application of criminal procedural law is concerned, this may include - in addition to a representation of the indictment - an overview of the relevant procedural activities carried out in the case and (a brief overview of) the actions taken in that case. activities, applicable legal and treaty provisions and case law. **2**
It therefore always comes down to the fact that the judge, taking into account what was considered under 3.3.2, bases his preliminary question on the basis of his preliminary question as concretely and completely as possible. It is this factual determination that the Supreme Court takes as a starting point in answering the preliminary question. This factual determination can therefore in principle no longer be questioned by the parties involved in their comments to be made on the basis of Article 554 of the Code of Criminal Procedure. Those comments must be aimed at answering the preliminary question in the light of the factual context established by the court. The answer to that question by the Supreme Court may subsequently lead to a further determination of facts by the judge in the relevant criminal case.
The description of the factual and legal context must also include an explanation of the reasons that led the judge to ask preliminary questions. **3**It may be useful for the judge to state in the decision in which the preliminary question is asked what the (provisional) answer or the various (provisional) answers to that question should be in his opinion. In that context, it is also logical that the judge outlines the consequences for legal practice of the possible answers to the preliminary question.

3.4.2 It should be noted that the judge's presentation of the information referred to in 3.4.1 does not in itself constitute grounds for a challenge. **4**

D. Refraining from answering and binding the Supreme Court to the preliminary question (3.5)

3.5 The preliminary question forms the basis for the decision to be taken by the Supreme Court, although it should be noted that the Supreme Court is not strictly bound by the wording of the question submitted. Pursuant to Article 555(2) of the Code of Criminal Procedure, the Supreme Court refrains from answering the question asked by the judge if it judges that the question is not suitable for answering a preliminary ruling. The Supreme Court may reach that judgment because the question is too intertwined with the facts of the case, has insufficient connection with the case or because it concerns a question that has already been answered by the Supreme Court or to which the answer is already given. is clear. Furthermore, the Supreme Court may refrain from answering the question if it judges that the question is of insufficient importance to justify an answer. When stating the grounds for its decision, the Supreme Court may limit itself to the opinion that one of these cases occurs.

E. Consequences for the progress of the procedure in question (3.6)

3.6 The judge is not obliged to suspend the hearing of the relevant procedure until the answer to the preliminary question from the Supreme Court has been received. In this context, legislative history has pointed out that the hearing judge can, for example, hear experts and witnesses, order further investigation or hold a hearing. However, the judge can only decide on the point on which he has submitted preliminary questions after the Supreme Court has given its ruling and the parties involved have been given the opportunity to comment on the ruling. Due to the cross-cutting importance of the preliminary question, legislative history has further recognized that in other cases in which the same legal question is at issue, the judge also has the option to suspend further proceedings until the Supreme Court has delivered its decision. It is up to that judge to make a decision in the light of the interests at stake in the case in question. Pursuant to Article 73 of the Criminal Code (hereinafter: Criminal Code), the limitation period is suspended by 'suspension of criminal proceedings in connection with a preliminary ruling dispute'. This suspension of the limitation period only applies to the case in which the preliminary question has been asked and not also in other cases in which further proceedings have been suspended until the Supreme Court has ruled on the preliminary question.

F. Summary (3.7)

3.7 The above comments mean that the judge who is considering asking a preliminary question to the criminal chamber of the Supreme Court, gives the parties involved the opportunity to comment on that intention and on the intended content of the question. Because the judge has an independent responsibility for the outcome of the relevant procedure, it is up to the judge himself to determine whether the situation referred to in Article 553(1) of the Code of Criminal Procedure exists in which preliminary questions are asked if the applicable criteria are met. . The judge explains why the answer to the legal question in question is necessary to decide the case in question and why the question has a transcending importance. The question must also be embedded in a clear (provisional) statement of facts and placed in the (succinctly described) relevant legal context. The judge further explains why, in his opinion, the question is suitable for answering in a preliminary ruling procedure. Furthermore, it may be useful for him to give his opinion on the (provisional) answer or the various (provisional) answers to the question and it is logical that he outlines the consequences for legal practice.

4 The preliminary questions

4.1 The Overijssel District Court has asked the following preliminary question:

"May the Dutch court, in view of the interstate principle of trust, assume that an investigative power has been lawfully deployed abroad and that the reliability of its results is given, as long as the (un)lawfulness of that investigative tool and the (un)reliability of that results have not been irrevocably established in law in that country?"

4.2 The Northern Netherlands District Court has asked the following preliminary questions:

"1. Does the interstate principle of trust automatically apply to evidence obtained through the deployment of an investigative tool abroad, in the context of a JIT in which the Netherlands is a partner?

• More generally: how does the (degree and intensity of) (legal and/or factual) cooperation between the Netherlands and (an) other EU member state(s) play a role in cross-border (digital) detection and interception? the assessment of an appeal to the interstate principle of trust?

• To what extent is it important, in a situation in which there is a Joint Investigation Team, for the application of the interstate principle of trust, that the investigation results have been obtained from abroad in a different investigation (26Lemont and/or 26Argus) than the investigation in which the court has judgment (the Shifter investigation)?

• Could play a role in the fact that the starting information in the Shifter investigation comes from the 26Lemont and 26Argus investigations and/or that the results from the 26Lemont and 26Argus investigations had a decisive influence on the course of the investigation and/or the prosecution of the suspects in the Shifter case?

2. Does the interstate principle of trust apply (in full) if, as in the Shifter case, the users of the telecommunications services from which data is intercepted are (always) on Dutch territory, while the interception and/or securing of data in/from a takes place in another EU Member State?

3. Does the interception and/or securing of data in/from abroad of telecom data for which it is clear that the users of the telecom services are (also) on Dutch territory require authorization from a Dutch court?

• If this is the case, can [article] 126uba, 126nba Sv or any other article of law serve as a basis for such an authorization?

4. How does the international principle of trust relate to the equality of arms principle that follows from Article 6 of the ECHR and the possibilities for the defense to investigate the legality of the evidence-gathering process, more specifically in the Shifter case, the defense's requests to add documents to the file relating to the evidence gathering process abroad and documents relating to the Joint Investigation Teams?

• The principle of equality of arms entails that, even in proceedings involving cross-border (digital) investigation and international cooperation between EU Member States, knowledge and insight into the foreign digital evidence gathering process must be provided by the prosecuting authorities or can be provided by the Should the defense first be required to provide concrete clues or strong indications that there has been a procedural error before requests to add further documents to the file can be honored?

• How does the international principle of trust relate to the responsibility that each member state of the ECHR has to guarantee the rights arising from that treaty, including the principle of equality of arms?

• Is it important in this case that the research results were obtained from abroad in a different study (26Lemont and/or 26Argus) than the study in which the court must give a judgment (the Shifter study)?

• Could it play a role in this case that the starting information in the Shifter investigation comes from the 26Lemont and 26Argus investigations and/or that the results from the 26Lemont and 26Argus investigations had a decisive influence on the course of the investigation into and/ or the prosecution of the suspects in the Shifter case?

• To what extent can the defense be required to put forward concrete evidence that there has been a procedural error, or can the Public Prosecution Service be required to first submit the relevant documents for assessment?

5. If the interstate principle of trust does not apply in full, are (possible) defects in the evidence gathering process and the interception and/or securing of data from abroad 'covered' by the authorizations of the examining magistrates, such as the authorization of the examining magistrate in Rotterdam dated March 27, 2020 and the authorizations of the examining magistrates in Amsterdam dated 7 and 11 February 2021 (and any follow-up authorizations)?

6. If there are strong indications that there are shortcomings in the foreign investigation, in the light of statements by the country where that investigation is taking place, what are the consequences for the application of the interstate principle of trust?

• To what extent and according to what standards should the Dutch criminal court conduct further investigation into this?

Storage and use of data

7. Is a legal basis required for the retention and use of the metadata and communications of users of an electronic communications service by the Dutch authorities, for the purpose of the investigation and prosecution of criminal offences, if this has been obtained from another Member State, after it has been other Member State has intercepted this data?

• If so, what is the legal basis for this and is it important whether there is a specific suspicion regarding one of these users?

• Under what conditions can this data be used and is authorization from the examining magistrate required for this?

5 Factual context

The Overijssel District Court and the Northern Netherlands District Court ask the aforementioned preliminary questions in cases in which, in short, the investigation conducted abroad also consisted of the interception of encrypted messages. These messages were sent and received using services offered by the companies Encrochat and SkyECC.

The criminal case at the Overijssel District Court is related to the Elrits investigation. The criminal case at the Northern Netherlands District Court is related to the Shifter investigation. Both of these investigations relate to (international) trafficking in narcotics. Information was obtained from studies that focused on (users of) Encrochat and SkyECC (the 26Lemont study and the 26Argus study).

The facts established by the courts further include the following.

Encrochat

- Encrochat is the name of a company that offered an encrypted messaging service. Encrypted messages could be sent with an Encrochat mobile phone. In addition to these telephones, Encrochat provided a package of services that provided access to a communications network within which encrypted text and voice messages and images could be sent to and received from other users of Encrochat devices. The devices had a specially developed operating system and included functionalities for quickly and easily deleting messages, while there was no possibility to link the device or the SIM card to a user account.

- On September 25, 2017, the Public Prosecution Service started the 26Bismarck investigation, because devices from this company had been found in various Dutch and foreign investigations since 2017 on suspects of serious crimes. In this investigation, which focused on the company Encrochat, several copies of that company's infrastructure were obtained via a European Investigation Order (hereinafter: EPO) addressed to France.

- In France, research has also been conducted into the company Encrochat. That investigation revealed that the server used by Encrochat was located in Roubaix (France) at server company OVH. On January 30, 2020, the French court granted authorization for the installation of an interception device.

- On February 10, 2020, the Public Prosecution Service started the 26Lemont investigation, which arose from the 26Bismarck investigation and focused on the Encrochat company, the directors of that company, the resellers and the users of Encrochat devices. In the context of this investigation, a joint investigation team has been established and an agreement on this joint investigation team has been concluded with France. This agreement stipulates that all information and evidence collected for the joint investigation team will be included in a joint investigation file.

- On April 1, 2020, the interception device was placed on the server in Roubaix. This interception device was designed by the Service Technique National de Captation Judiciaire and is a French state secret.

- Live information from Encrochat telephones was collected by the French authorities in the period from April 1 to June 14, 2020. This information has been shared with the Netherlands as a partner in the joint investigation team and added to the joint investigation file.

- The Dutch police copied data from users of Encrochat devices from April 1 to June 24, 2020, whereby the collected new data from the Encrochat devices was copied to the research network of the Dutch police with the smallest possible delay.

- In the 26Lemont investigation, the Public Prosecution Service submitted a request to the examining magistrate on March 13, 2020 - prior to the installation of the interception device and the collection of information by the French authorities - for authorization to issue an order to intrude and conduct research into an automated device, as referred to in Article 126uba of the Criminal Code, and to record (tele)communications, as referred to in Article 126t of the Criminal Code. The examining magistrate granted this authorization on March 27, 2020. The examining magistrate set conditions in order to frame the privacy violation as much as possible and to prevent so-called 'fishing expeditions'. These conditions include the following:

"1. The manner in which the automated system(s) will be invaded will be recorded on the basis of logs and in a descriptive report of findings, insofar as an already approved means of detection has not been used. intervention and with the exception of cases in which there is no obligation in another jurisdiction to provide insight into the operation of a technical means used to intrude;

2. A description of the software used will be available for research and must be able to be used at any later time in a simulation or demonstration of the intrusion of the system(s), insofar as it has not been used. of an already approved means of intervention and with the exception of cases in which there is no obligation in another jurisdiction to provide insight into the operation of a technical means of intrusion;

3. The information collected is stored in such a way that it can be checked and examined on the basis of hash values or otherwise in a manner that guarantees integrity;

4. The information/communication collected can only be investigated using the search keys (word lists) recorded in an official report, which will be stored and preserved for the purpose of possible later reproduction or research, with the exception of the investigations in which it has already been established that there are criminal offenses committed in an organized context, which investigations are listed on a list to be submitted to the examining magistrate before the use of the drug;

5. The information/communication collected will be examined for the presence of so-called persons entitled to confidentiality in that communication on the basis of search keys in which at least the well-known names of lawyers, telephone numbers and/or e-mail addresses provided by them will be used for communication with clients. included;

6. After the investigation, the information/communication collected will be presented to the examining magistrate after a maximum of two weeks, using the aforementioned search keys, to check the content, scope and relationship to the criminal offenses allegedly committed or to be committed and will not be made available earlier. are submitted to the Public Prosecution Service or the police for the purpose of (criminal) investigations;

7. The information/communication collected will only be made available for investigations into criminal offenses that by their nature, committed or planned in an organized context, constitute a serious breach of the legal order, or crimes with a terrorist aim, all this for insofar as these investigations do not belong to those listed on the list submitted to the examining magistrate before the commencement of the use of the drug."

- The authorization issued by the examining magistrate was subsequently extended and tested. After analyzing the information obtained, the case prosecutors in the 26Lemont investigation gave permission under Article 126dd of the Criminal Code to share information with, among others, the Elrits investigation team and the Shifter investigation team, whereby that information was first submitted to the examining magistrate for the requesting permission to share the information. The datasets made available consisted of Encrochat messages from specific users and various counter-users in the period from April to June 2020.

SkyECC

- The company SkyECC also offered an encrypted messaging service. Pre-programmed devices were offered for this purpose, with functionalities for various forms of communication and their automatic destruction. The devices were traded completely anonymously and only for cash or cryptocurrency.

- On October 30, 2018, the 13Yucca investigation was started in the Netherlands, following several ongoing criminal investigations which allegedly showed that persons who were part of criminal associations that were involved in planning and committing serious crime, in the period from August 2015 for encrypted communications using SkyECC telephones and software.

- Prior to the 13Yucca investigation, Dutch investigators had already established that SkyECC's servers were located in Roubaix (France) at hosting company OVH. Together with the Belgian authorities, who also intended to conduct a criminal investigation into SkyECC, the French authorities were contacted and an exploratory consultation took place. The aim of the consultation was to provide an explanation of EIOs yet to be issued and to obtain clarity as to whether France would be able to conduct the investigations.

- On December 6, 2018, the Netherlands sent an EOB to France to obtain an 'image' of the servers, so that the technical design of the servers could be examined with a view to further investigation (including in the form of tapping and decrypting the communications conducted via the servers), and thus gaining insight into the

organization of SkyECC. Furthermore, the EPO was aimed at providing information on historical and future customer data of SkyECC and providing technical data of the server.

- Prior to sending this EOB, on November 30, 2018, the examining magistrate granted authorization for the public prosecutor to make a claim as referred to in Article 126ug, paragraph 2 of the Code of Criminal Procedure, in short, to claim data that has been stored in an automated work of a provider of a public or non-public telecommunications service, while that data is not intended for or originates from that provider. The examining magistrate thus gave permission for an 'image' to be made, with the restriction that the information collected could only be used for investigating the technical possibilities for tapping and decryption. The content of any messages found on the servers may not be used in a criminal investigation without the express permission of the examining magistrate.

- A similar EOB was sent by Belgium to France on 21 November 2018.

- France has implemented the EIOs. The architecture of the servers was analyzed. Following this investigation, the French public prosecutor opened an investigation in which permission was requested and granted by the French judge (on June 14, 2019) for the interception, recording and transcription of communications between the SkyECC servers.

- IP taps were placed on the two SkyECC servers on June 24 and 26, 2019. The Dutch authorities, who were not present when these taps were installed, were informed about this on July 8, 2019. On July 11, 2019, the data from the IP taps became available for the Netherlands. A second EOB from the Netherlands to France states that the Netherlands has learned that France has connected a tap and tapped data traffic between the SkyECC servers, with this EOB aimed at providing the obtained data to the Netherlands.

- It has further emerged that the intercepted data was transferred by the examining magistrate of the Lille District Court on his own initiative to two Dutch public prosecutors, on the basis of Article 26 of the Convention on the Suppression of Criminal Offenses Connected to Electronic Networks (hereinafter: the Cybercrime Convention) and – as the Supreme Court understands – Article 7 of the Agreement, established by the Council in accordance with Article 34 of the Treaty on European Union, on mutual legal assistance in criminal matters between the Member States of the European Union, Trb. 2000, 96 (hereinafter: EU Legal Assistance Agreement). A request was made to feed back the findings based on the data to France.

- The 26Werl investigation was started on November 1, 2019, with the suspicion focused on the SkyECC company. On December 13, 2019, the Netherlands, Belgium and France concluded an agreement for a joint investigation team, of which the 26Werl investigation became part. From that moment on, the data intercepted by France was provided to the joint investigation team and thus shared with the Dutch authorities, among others.

- Following further research, the possibilities for decrypting the data from the IP taps were explored, including a (successful) test with some of the group messages. Dutch technicians have developed a technique within the joint research team to make a copy of the working memory of one of the SkyECC servers without it going offline. France deployed this technique on May 14 and June 3, 2020.

- The Netherlands subsequently developed a technique ('man in the middle') that made decrypting message traffic possible. This technology was connected and activated on December 18, 2020, after the French advisory committee that must give an opinion on equipment that can infringe on privacy and the secrecy of correspondence, granted permission for this.

- The 26Argus investigation started on December 11, 2020. This investigation focused on NN users of SkyECC who planned and committed serious criminal offenses in an organized context using the SkyECC application.

- In the 26Argus investigation, on December 15, 2020, examining magistrates granted an authorization to issue an order under Article 126t of the Criminal Code (tapping authorization) and on February 7 and 11, 2021, authorizations to issue an order under Article 126uba. Sv (authorization for intrusion into an automated work). In an official report of findings, the supervisory judges involved considered that, although it has not been established in advance that a decision by the Dutch examining magistrate is necessary for the legality of the use of the SkyECC data, an assessment of proportionality by the examining magistrate is appointed with a view to protecting the privacy of those involved. The examining magistrates have imposed conditions in order to frame the violation of privacy as much as possible and to prevent so-called 'fishing expeditions'. These conditions include the following:

"1. The collected and decrypted information may only be examined using search keys submitted in advance to the examining magistrate, such as:

- information about SkyECC users (and their counter-contacts and possibly their counter-contacts) from ongoing investigations into criminal associations;

- search terms (keywords) and/or images that by their nature point to serious criminal activities in an organized context;

2. The investigation with the search keys must be organized in such a way that, if desired, it can be reproducible and verifiable afterwards for the court and defense as to which results/data set the search has yielded, and therefore which data have been made available for the relevant investigation;

3. The investigation takes into account the right of non-disclosure of secret holders, including lawyers. Communication with secret holders is actively filtered out as much as possible;

4. The examining magistrate is given access to the underlying French judicial decisions;

5. After the investigation as described above, the information collected will be submitted to the examining magistrate to check its content and scope and to assess the relationship to specific suspected criminal offences;

6. The information collected will only be made available to the Public Prosecution Service or the police for the purpose of (further) criminal investigation after explicit permission from the examining magistrate. In addition, (in view of condition 2) it must be clear which data the consent relates to and which data is provided to the research team;

7. The information collected will only be made available for investigations into criminal offenses that by their nature, committed or planned in an organized context, constitute a serious breach of the legal order, or crimes with terrorist intent."

- On January 11, 2021, the authorization under Article 126t of the Code of Criminal Procedure was extended, whereby the conditions under which additional permission can be obtained for the use of the data were further elaborated.

- Based on the authorizations obtained, the public prosecutor has issued an order to analyze the obtained data within the conditions set by the examining magistrate. The examining magistrate subsequently granted additional permission for access to and use of incoming and outgoing communications from a (data) set of Sky IDs. On January 3, 2022, the case prosecutors in the 26Argus investigation gave permission under Article 126dd of the Criminal Code to share information from that investigation with the Shifter investigation team. The investigation revealed 26Argus SkyECC accounts that could be linked to Encrochat users.

6. Answer to the preliminary question asked by the Overijssel District Court

6.1 The Overijssel District Court asked the preliminary question stated under 4.1 in connection with the investigation requests submitted by the defense. These investigative wishes are essentially aimed at obtaining documents in order to investigate whether the Encrochat and SkyECC messages that, according to the Public Prosecution Service, can be linked to suspects in this case, were obtained lawfully. The preliminary question asked by the court concerns the significance of the (international or interstate) principle of trust for the assessment of the legality and reliability of the results obtained with the application of an investigative power by the authorities of a country other than the Netherlands, while that authority has been applied in that other country. This preliminary question means that the court of the Supreme Court wants to know what the relevant assessment framework entails in a general sense if in a criminal case the public prosecutor - in particular with a view to the use of those results for proof - examines the results of research carried out abroad adds to the documents.

6.2 When discussing the preliminary question, the Supreme Court makes a distinction between the situations in which the results obtained with the application of an investigative power by the authorities of a country other than the Netherlands have come into the hands of the Dutch authorities (i) in in the context of so-called classical legal assistance (small legal assistance), (ii) in connection with the action of a joint investigation team, and (iii) by means of the issuance of an EPO.
It is also important whether the research conducted abroad was carried out under the responsibility of the foreign authorities or under the responsibility of Dutch authorities. The Supreme Court first discusses investigation under the responsibility of foreign authorities under 6.3-6.16. The investigation abroad under the responsibility of Dutch authorities is then discussed in 6.17-6.19. The Supreme Court then addresses the question of whether and, if so, in which cases authorization from the examining magistrate is required (under 6.20-6.24), and the Supreme Court makes some comments about the use of information in other investigations (under 6.25) and on Directive 2002/58/EC and Directive (EU) 2016/680 (under 6.26 and 6.27).

A. Investigation abroad under the responsibility of foreign authorities (6.3-6.16)

(i) Classical legal assistance (6.3-6.6)

6.3 Results that have been or will be obtained with the application of an investigative power or a coercive measure by the authorities of a country other than the Netherlands, can first of all be transferred to the Dutch criminal proceedings authorities through traditional legal assistance and therefore become part of the file. a criminal case pending in the Netherlands. In this context, traditional legal assistance includes those forms of criminal justice cooperation between the Netherlands and another country, whereby the results of criminal investigations conducted in that other country are transferred at the request of the Netherlands or

spontaneously by the other country. **5** This may concern the results of (criminal) investigation that has already been carried out on the own initiative of that other country, but also the results of (criminal) investigation that has been carried out at the request of the Netherlands - and, as a rule, on the basis of a treaty – is being implemented in that other country. In the latter case, *a.* the requested State itself decides, also taking into account what is regulated in the relevant treaty, whether to implement the request, and *b.* the investigation carried out upon request is usually carried out by and under the responsibility of the authorities of that country, on the basis of the national law of that country and in accordance with the provisions of the applicable treaty.

6.4 In the context of traditional legal assistance, the Netherlands may only make a request to foreign authorities if the requirements that apply under the Code of Criminal Procedure for the application of the powers requested in the request for legal assistance in a national investigation into this have been met. illegal acts. **6** It is up to the judge in the Dutch criminal case, in which the results of the investigation conducted abroad are used as evidence, whether those conditions have been met. **7** This test is not required if there is spontaneous transfer of the results of criminal investigations conducted in the other country.

6.5.1 When it comes to the assessment of defenses relating to the *legality* of investigative acts that have taken place abroad, as follows from the judgment of the Supreme Court of 5 October 2010, ECLI:NL:HR:2010:BL5629, the nature and scope of the judicial review of the legality of those investigative acts, depending on whether these investigative acts were carried out under the responsibility of the foreign authorities or under the responsibility of the Dutch authorities. In the event that the investigative acts have been carried out under the responsibility of the foreign authorities - as stated in 6.3, this is usually the case in the context of traditional legal assistance - and this also concerns the authorities of a state that has signed the European Convention to the protection of human rights and fundamental freedoms (hereinafter: ECHR), the following applies.

6.5.2 It is not the task of the Dutch criminal court to assess whether the manner in which the investigation was carried out under the responsibility of the foreign authorities is in accordance with the legal rules that apply in the country in question for carrying out that investigation. If the Dutch criminal court were to carry out such an assessment, it would constitute a violation of the sovereignty of that country. In addition, to the extent that the conduct of the investigation under the responsibility of the foreign authorities would involve a violation of any right guaranteed by the ECHR, the suspect has the right to an effective legal remedy as referred to in Article 13 ECHR for an agency of the country in question. For these reasons, the decisions of the foreign authorities underlying the investigation are respected and the investigation is considered to have been conducted lawfully. This is only different if it has been irrevocably established in the country in question that the investigation was not conducted in accordance with the applicable legal rules. In that case, the Dutch criminal court will assess - on the basis of the assessment factors referred to in Article 359a paragraph 2 of the Code of Criminal Procedure, including the importance of the violated provision and the specific disadvantage still remaining for the suspect and even after use of the legal remedy in the foreign country in question - or that irrevocable determination gives rise to the attachment of a legal consequence to the relevant default.

6.5.3 Het vorenstaande brengt in relatie tot het recht op eerbiediging van het privéleven, zoals dat wordt gewaarborgd door artikel 8 lid 1 EVRM, met zich dat de Nederlandse strafrechter niet beoordeelt of in het recht van het land onder wiens verantwoordelijkheid het onderzoek is verricht, al dan niet een toereikende wettelijke grondslag bestond voor de eventueel bij het verrichten van het onderzoek gemaakte inbreuk op het recht van de verdachte op respect voor zijn privéleven, en ook niet of die inbreuk geacht kan worden noodzakelijk te zijn, zoals bedoeld in het tweede lid van artikel 8 EVRM. Zo'n beoordeling zou immers vergen dat de Nederlandse rechter aan het buitenlandse recht toetst. Daaraan staat in de weg wat onder 6.5.2 is overwogen.

6.5.4 Waar het gaat om het recht van de verdachte op een eerlijk proces, zoals dat wordt gewaarborgd door artikel 6 EVRM, is het volgende van belang. Uit de rechtspraak van het Europees Hof voor de rechten van de mens (hierna: EHRM) volgt dat het EVRM op zichzelf niet eraan in de weg staat dat in een strafzaak gebruik wordt gemaakt van de resultaten van in het buitenland verricht onderzoek, maar dat het gebruik van dergelijke resultaten voor het bewijs niet in strijd mag komen met het recht op een eerlijk proces dat door artikel 6 EVRM wordt gewaarborgd.**8** Ook als van de resultaten van het onder verantwoordelijkheid van buitenlandse autoriteiten verrichte onderzoek in de strafzaak tegen de verdachte gebruik wordt gemaakt voor het bewijs, moet de rechter de 'overall fairness' van die strafzaak waarborgen. Dat betekent dat de rechter alleen aandacht besteedt aan de wijze waarop die resultaten zijn verkregen, als die wijze van verkrijging van belang is voor de beoordeling of het gebruik voor het bewijs van de resultaten in overeenstemming is met het recht op een eerlijk proces.**9**

6.6 The foregoing relates to (the assessment of) the *legality* of the investigation conducted under the responsibility of foreign authorities. When it comes to the *reliability* of research results used for evidence, the judge, when answering the question of whether the charge can be proven, only uses evidence that he considers reliable and useful. There may be grounds for exclusion of evidence if irregularities have occurred that have materially affected the reliability and accuracy of research results. **10** In principle, it makes no difference whether those research results were obtained under the responsibility of foreign authorities or in a Dutch criminal investigation. However, this does not alter the fact that the judge in the criminal case may take the starting point that research carried out under the responsibility of foreign authorities was carried out in such a way that the results obtained through that research are reliable. However, if there are concrete indications to the contrary - whether or not as a result of a defense to that effect - the judge is obliged to investigate the reliability of those results. To this end, he can, for example – with the intervention of the Public Prosecution Service – obtain further information about the manner in which the investigation under the responsibility of the foreign authorities was conducted and the (procedural) guarantees that were observed; all this insofar as this is important for the assessment of the reliability of the results obtained by those authorities. This further information may, for example, relate to the guarantees taken into account when obtaining data in relation to the reliability, integrity and/or traceability of that data. This obligation to investigate the reliability of the results is related to the suspect's right under Article 6 of the ECHR to dispute the authenticity and reliability of the evidence and to oppose its use. **11**

(ii) The action of a joint investigation team (6.7-6.11)

6.7 The EU MLA agreement provides the basis for the action of a joint investigation team in Article 13. An almost identical arrangement is included in Article 1 of Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ 2002, L 162/1. **12** The Code of Criminal Procedure contains some regulations regarding the actions of a joint investigation team in Article 5.2.1-5.2.5 of the Code of Criminal Procedure.

6.8.1 Pursuant to Article 13(1) of the EU MLA Agreement, the competent authorities of two or more Member States of the European Union may mutually agree to set up a joint investigation team for a specified purpose and for a limited period of time, which may be extended by mutual agreement, in order to to conduct criminal investigations in one or more of the Member States establishing the team. The arrangement for the actions of the joint investigation team basically entails the following.

6.8.2 Article 13(3) EU MLA sets out some general conditions under which the joint investigation team is active in the territory of the Member States that established the team. A joint investigation team is headed by a representative of an authority of the Member State where the team is currently active. **13** The leader of the team acts within the limits of his authority under national law (Article 13, paragraph 3, opening words and (a), EU Mutual Assistance Agreement). The joint investigation team shall act in accordance with the law of the Member State in which it operates (Article 13(3)(b) of the EU MLA Agreement). It is possible that members of the joint investigation team who come from Member States other than the Member State where the team is operating - the so-called seconded members - may be charged by the leader with the implementation in accordance with the law of the Member State where the team is operating of certain investigative acts, to the extent that this has been approved by the competent authorities of the Member State where the action is taking place and that of the seconding Member State (Article 13(6) EU MLA). Under the conditions set out in Article 13(7) of the EU MLA Agreement, seconded members may request their own competent authorities to carry out investigative actions. Those actions shall be considered in the Member State concerned under the conditions that would apply if the investigative actions were requested in the context of a national investigation. In addition, Article 13(8) of the EU Mutual Assistance Agreement provides for the possibility of submitting a request for legal assistance to a Member State other than a Member State participating in the joint investigation team or to a third state.

6.8.3 Article 13(9) and (10) EU MLA provides rules for the provision of data to the Joint Investigation Team and the use in the participating Member States of data obtained by the Joint Investigation Team. Article 13 paragraph 10 of the EU Legal Assistance Agreement means the following:

"Information which a Member or a seconded Member lawfully obtains while part of a joint investigation team and which is not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes:

a. for the purpose for which the team was established;

b. without the prior consent of the Member State from which the information originates, for the detection, investigation and prosecution of other criminal offences. Such authorization may only be refused in cases where such use jeopardizes criminal investigations in the Member State concerned or in respect of which that Member State may refuse legal assistance;

c. (...);

d. for other purposes, as agreed between the Member States establishing the team."

6.9 The Code of Criminal Procedure includes the following provisions with regard to the establishment and operation of joint investigation teams.

- Article 5.2.1 (establishment of joint investigation team):

"1. To the extent provided by a treaty or in implementation of a framework decision of the Council of the European Union, the public prosecutor may, for a limited period, for the purpose of jointly conducting criminal investigations, jointly with the competent authorities of other countries set up research team.

2. The establishment of a joint investigation team shall be agreed in writing by the public prosecutor with the competent authorities of the countries concerned.

3. The agreement referred to in the second paragraph shall in any case specify the purpose, the period of existence, the place of establishment and the composition of the joint investigation team, the activities carried out by Dutch officials on foreign territory and the activities carried out by foreign investigating officers on Dutch territory. investigative powers to be exercised, as well as the obligation for foreign investigating officers to comply with a summons as referred to in Article 210 or a summons as referred to in Article 260, is laid down."

- Article 5.2.2 (exercise of powers):

"The exercise of investigative powers on Dutch territory for the purpose of the investigation by the joint investigation team, referred to in Article 5.2.1, shall take place in compliance with the provisions of and pursuant to this Code and the treaties applicable between the countries involved in the joint investigation team."

- Article 5.2.3 (evidence):

"Documents drawn up by foreign members of the joint investigation team, referred to in Article 5.2.1, regarding official acts relating to investigation and prosecution that they have carried out abroad in the context of the investigation by the investigation team, have the evidentiary value in the Netherlands that is entitled to documents concerning corresponding acts performed by Dutch officials in the Netherlands, on the understanding that their evidentiary value does not exceed that which they have under the law of the state from which the foreign members originate."

6.10 In its decision of 22 April 2022, ECLI:NL:HR:2022:612, the Supreme Court considered that the national law of the Member State where the investigative power on behalf of a joint investigation team is exercised is leading in the conduct of a joint investigation team. , and that – in short – the provision of (technical) assistance from the Dutch police in the exercise of an investigative power by the authorities of another participating Member State does not change this. After all, providing such assistance does not involve exercising investigative powers on Dutch territory or collecting documents, objects or data in the Netherlands.

6.11 It also follows from the foregoing that the actions of the joint investigation team are always governed by the law of the Member State in which the team operates, with the leader of the joint investigation team acting within the limits of his competence under the national law of the Member State in which it operates. joint investigation team is active. Furthermore, it follows that, to the extent that investigative acts are carried out on behalf of the joint investigation team in another Member State, those acts may be carried out upon request in compliance with the law of that other Member State. This system therefore means that investigative acts are always carried out under the responsibility of the authorities of the Member State where the investigative acts take place. When it comes to assessing the legality and reliability of the results obtained from the research by the joint investigation team, the system discussed above under 6.5 and 6.6 also applies. The regulation of the actions of joint investigation teams as included in Article 13 of the EU Legal Assistance Agreement does not give reason to arrive at a different system.

(iii) Issuing an EPO (6.12-6.16)

6.12 Within the European Union, Member States may issue an EIO, in accordance with Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters (OJEU 2014, L 130/1; hereinafter: Directive 2014/41/ EU). An EIO concerns a judicial decision of one Member State (the issuing Member State) which aims to have one or more specific 'investigative measures' carried out in another Member State (the executing Member State) with a view to obtaining evidence. An EIO can also be issued to obtain evidence already in the possession of the competent authorities of the executing Member State.

6.13 The EPO system is based on the principle of mutual recognition and the related principle of mutual trust between the Member States of the European Union. **14** This means that the room to refrain from recognizing and executing an EIO is limited. Only if one of the grounds for refusal included in Directive 2014/41/EU applies will recognition and execution of an EIO be refused (cf. Articles 9 and 11 of Directive 2014/41/EU and the preamble under 11, as well as Article 5.4.4 Sv). It is up to the issuing Member State

to assess whether there are grounds to issue an EIO (cf. Article 6 Directive 2014/41/EU). It is also up to the issuing Member State to determine which investigative power is most appropriate for the purpose of obtaining evidence and whether the application of that power is proportionate having regard to the seriousness of the criminal offense (cf. Articles 5(1) and 6 Directive 2014/ 41/EU and the preamble under 11), except to the extent that Directive 2014/41/EU leaves room for the executing Member State to determine the choice or manner of application of a power (cf., inter alia, Article 10 of Directive 2014/41 /EU). The substantive grounds for issuing the EIO can only be challenged in the issuing Member State (cf. Article 14(2) of Directive 2014/41/EU). **15**

6.14 Article 6(1) of Directive 2014/41/EU and Article 5.4.21(2) of the Code of Criminal Procedure contain the conditions that must be met for *the issuance of an EIO* . One of those conditions means that the investigative measure(s) indicated in the EIO could have been ordered in the same circumstances in a comparable domestic case. The executing Member State may not independently assess whether that condition is met; that Member State must, if it has reason to believe that that condition is not met, consult the issuing authority (cf. Article 6(3) of Directive 2014/41/EU). It is also important that this condition of Article 6(1) of Directive 2014/41/EU and Article 5.4.21(2) of the Code of Criminal Procedure only applies if the EPO serves to ensure that investigative measures are applied, and therefore not if the EIO is issued solely for the purpose of providing evidence. already in the possession of the competent authorities of the executing Member State.

6.15 When it comes to *the execution of the EIO* , Article 9(1) of Directive 2014/41/EU provides – insofar as relevant here – that the execution shall take place in the same manner and under the same conditions as if the investigative measures concerned had been ordered by an authority of the executing Member State. In addition, the executing authority shall comply with the procedural requirements and procedures expressly indicated by the issuing authority, unless Directive 2014/41/EU provides otherwise and provided that such procedural requirements and procedures do not conflict with fundamental legal principles of the executing Member State (cf. Article 9(2) Directive 2014/41/EU). When executing the EIO, the executing Member State may, under the conditions set out in Article 10 of Directive 2014/41/EU, apply an investigative measure other than that referred to in the EIO or not provide the requested assistance.

6.16.1 In the event that the judge in the criminal case uses for evidence the result of investigative measures applied on the basis of an EIO issued by a Dutch authority competent for this purpose under Article 5.4.21 paragraph 1 of the Code of Criminal Procedure, the following applies: interest.

6.16.2 When it comes to the decision to issue the EPO, the judge in the criminal case is competent to assess whether that decision has been taken in accordance with Article 5.4.21 paragraph 2 of the Code of Criminal Procedure. This includes an assessment of the material grounds for issuing the EIO. After all, the authorities of the executing Member State are not free to intervene in this assessment. To the extent that the issuance of the EPO has already been decided by the examining judge, the hearing judge in the criminal case can assess whether the examining magistrate could reasonably have reached his opinion on that issuance.

6.16.3 De rechter in de Nederlandse strafzaak moet zich echter onthouden van een toetsing van de wijze waarop, na uitvaardiging van het EOB, de resultaten zijn verkregen. Voor zover het EOB zich beperkt tot het verkrijgen van bewijsmateriaal dat al in het bezit is van de bevoegde autoriteiten van de uitvoerende lidstaat, zijn daarvoor dezelfde gronden van belang als onder 6.5.2 genoemd. Voor zover het EOB ertoe strekt dat één of meer specifieke onderzoeksmaatregelen worden uitgevoerd met het oog op het verkrijgen van bewijsmateriaal, geldt dat het aan de autoriteiten van de uitvoerende lidstaat is om te bepalen of die uitvoering mogelijk is gelet op de hiervoor onder 6.15 besproken voorschriften van Richtlijn 2014/41/EU. Daarbij is van belang dat op grond van artikel 14 lid 1 Richtlijn 2014/41/EU de lidstaten erin moeten voorzien dat op de in het EOB aangegeven onderzoeksmaatregelen rechtsmiddelen toepasselijk zijn die gelijkwaardig zijn met die welke in een vergelijkbare binnenlandse zaak mogelijk zijn. Mede gelet hierop moet ervan worden uitgegaan dat in de uitvoerende lidstaat wordt of kan worden getoetst of de bevoegdheid waarmee uitvoering is gegeven aan het EOB, wat betreft de aan die bevoegdheid verbonden formaliteiten, rechtmatig is toegepast.**16**

6.16.4 Waar het gaat om het beoordelen van het door middel van een EOB verkregen bewijsmateriaal, geldt dat de rechter in de strafzaak waarborgt dat het gebruik van dit bewijsmateriaal in overeenstemming is met het recht op een eerlijk proces en de rechten van de verdediging (vgl. artikel 14 lid 7, tweede volzin, Richtlijn 2014/41/EU). Dat betekent dat bij het gebruik van dat bewijsmateriaal de rechter de 'overall fairness' van die strafzaak moet waarborgen (zie ook onder 6.5.4). Waar het gaat om de betrouwbaarheid van het bewijsmateriaal dat door middel van een EOB is verkregen, geldt verder hetzelfde als onder 6.6 is overwogen over de beoordeling van de betrouwbaarheid van de onderzoeksresultaten die zijn verkregen onder verantwoordelijkheid van buitenlandse autoriteiten.

B. Opsporing in het buitenland onder verantwoordelijkheid van Nederlandse autoriteiten (6.17-6.19)

6.17 Kenmerkend voor de hiervoor besproken vormen van internationale en Europese samenwerking tussen (lid)staten is dat de onderzoekshandelingen telkens onder verantwoordelijkheid van de buitenlandse autoriteiten – van de staat die de klassieke rechtshulp verleent, van de lidstaat waar het gemeenschappelijk onderzoeksteam actief is, respectievelijk van de lidstaat die uitvoering geeft aan een EOB – worden uitgevoerd. Dit neemt niet weg dat de situatie zich kan voordoen dat buiten Nederland onderzoekshandelingen worden verricht onder verantwoordelijkheid van Nederlandse autoriteiten. Op grond van artikel 539a lid 1 Sv kunnen Nederlandse opsporingsambtenaren de hun bij de Nederlandse wet toegekende opsporingsbevoegdheden ook in het buitenland uitoefenen. Of in een concreet geval van die mogelijkheid gebruik kan worden gemaakt, wordt mede bepaald door het toepasselijke verdragsrecht en Unierecht (vgl. artikel 539a lid 3 Sv).**17**

6.18 In de situatie dat de verantwoordelijkheid voor de uitvoering bij de Nederlandse autoriteiten ligt, vindt artikel 359a Sv toepassing op vormverzuimen die zich eventueel in verband met die uitvoering voordoen met betrekking tot de toepassing van de hun op grond van het Nederlandse recht toekomende bevoegdheden. De verantwoordelijkheid voor de uitvoering ligt bij de Nederlandse autoriteiten (i) als onder gezag van de (Nederlandse) officier van justitie in het buitenland overeenkomstig artikel 539a Sv door Nederlandse opsporingsambtenaren toepassing wordt gegeven aan de hun bij de Nederlandse wet toegekende opsporingsbevoegdheden, of (ii) als een zodanig nauwe samenwerking bestaat tussen Nederlandse en buitenlandse autoriteiten bij de opsporing dat het gezag daarover feitelijk volledig of in overwegende mate toekomt aan de (Nederlandse) officier van justitie. De onder (i) bedoelde situatie doet zich niet voor in het geval dat een Nederlandse opsporingsambtenaar slechts betrokken is bij de uitvoering van een opsporingsbevoegdheid in het buitenland die in overeenstemming met het recht van dat land en onder verantwoordelijkheid van de buitenlandse autoriteiten wordt uitgeoefend.**18** Van de onder (ii) bedoelde situatie is geen sprake op grond van de enkele omstandigheid dat Nederlandse opsporingsambtenaren aanwezig mogen zijn bij de uitvoering van een onderzoekshandeling door een buitenlandse autoriteit,**19** of door Nederlandse opsporingsambtenaren technische assistentie wordt verleend aan een buitenlandse autoriteit.**20**

6.19 Hierbij is nog van belang dat een eventuele inbreuk op de soevereiniteit van de staat binnen de grenzen waarvan is opgetreden, geen belang van de verdachte betreft maar alleen van de staat op het grondgebied waarvan is opgetreden. De vraag of door de Nederlandse opsporingsambtenaren bij het verrichten van opsporingshandelingen in het buitenland het toepasselijke verdragsrecht en Unierecht is nageleefd, is in het kader van de strafzaak tegen de verdachte in zoverre niet relevant.**21**

C. Machtiging van de rechter-commissaris vereist? (6.20-6.24)

6.20 De vaststellingen van de rechtbanken houden in dat door de Franse autoriteiten en met machtiging van de Franse rechter een interceptiemiddel is geplaatst bij de server in Roubaix waarvan Encrochat gebruikmaakte, en dat de op die wijze door de Franse autoriteiten verkregen informatie vervolgens (live) is gedeeld met de Nederlandse autoriteiten op grond van de overeenkomst die is gesloten in verband met de oprichting van het gemeenschappelijk onderzoeksteam. De vaststellingen van de rechtbanken houden tevens in dat, voorafgaand aan het plaatsen van dit interceptiemiddel, door het (Nederlandse) openbaar ministerie een machtiging van de rechter-commissaris is gevorderd voor het geven van een bevel tot het binnendringen van en het doen van onderzoek in een geautomatiseerd werk en het opnemen van (tele)communicatie.
Waar het gaat om het onderzoek naar gebruikers van SkyECC heeft het (Nederlandse) openbaar ministerie voorafgaand aan het door de Franse autoriteiten aansluiten en activeren van de in Nederland ontwikkelde techniek die het ontsleutelen van het berichtenverkeer mogelijk maakte, een machtiging van de rechter-commissaris gevorderd voor het geven van een bevel tot het opnemen van telecommunicatie. Daarnaast zijn machtigingen gevorderd voor het geven van een bevel tot het binnendringen van en het doen van onderzoek in een geautomatiseerd werk.
De Hoge Raad merkt het volgende op over de vraag of en, zo ja, in welke gevallen het openbaar ministerie gehouden is een machtiging van de rechter-commissaris te vorderen.

6.21.1 If the application of an investigative power abroad takes place under the responsibility of a foreign authority, the requirements that apply under Dutch criminal procedural law for the application of the relevant power in a national investigation into the criminal offenses only need to be met if the application of the investigative power takes place at the initiative of the Dutch authorities. This means: at the request of the Netherlands - whether or not in connection with the actions of a joint investigation team - or on the basis of an EPO issued by the Netherlands. **22** If the relevant jurisdiction under Dutch criminal procedural law requires authorization from the examining magistrate, this authorization must be obtained before the foreign authority is requested to exercise an investigative power, or with a view to the execution of an investigative measure, an EIO is issued. **23**

6.21.2 When granting an authorization for the exercise of a power in the context discussed here, the examining magistrate is free to attach conditions to the use of that authorization. However, in relation to both traditional legal assistance and the issuance of an EIO, the execution of the mutual assistance request or the execution of the EIO takes place in accordance with the law of the country or Member State to which the request is addressed or to which the EIO has been issued. , and that the authorities of that country or Member State are not directly bound by those conditions set by the examining magistrate. This does not alter the fact that the stated formal requirements and procedure will be observed as much as possible when executing the request for legal assistance or the execution of the EPO. **24**

6.22 The requirement for authorization from the examining magistrate referred to in 6.21.1 does not apply in the event that the investigation in question takes place or has already taken place at the initiative of the foreign authorities, after which those authorities - whether or not at the request of the Dutch authorities or after the Dutch authorities have issued an EPO to that effect – make the results of the investigation available. After all, the law does not require that an authorization from the examining magistrate be issued for the sole use in a criminal case in the Netherlands of the results of research that is carried out or has already been carried out on the initiative and under the responsibility of the foreign authority.

6.23.1 It is also important here that in relation to international cooperation in criminal cases, special arrangements have been made with regard to the interception of telecommunications. Article 20 of the EU Legal Assistance Agreement and Article 31 of Directive 2014/41/EU are particularly important in this regard. These regulations, among other things, provide regulations for the case in which telecommunications are being intercepted in one country, while the telecommunications address of the person to be intercepted or intercepted is in use in the territory of another country. In such a case, obligations arise for one country to provide the other country with certain data, while the other country can allow the continuation of the interception or have it terminated.

6.23.2 In this context, Article 5.1.13 of the Code of Criminal Procedure provides for a provision in the event that, on the basis of a treaty, a notification is made by the competent authorities of another state about the intention to intercept or record telecommunications of a user who is located on Dutch territory. In short, this arrangement means that the public prosecutor will then request authorization from the examining magistrate to grant consent to the aforementioned intention. If this authorization is granted, the consent is conveyed to the competent authorities of that other state, subject to the conditions referred to in Article 5.1.13 paragraph 4 of the Code of Criminal Procedure. If the authorization is not granted, the public prosecutor will inform those competent authorities that the intention is not accepted and, if necessary, demand that the interception be stopped immediately. Article 5.4.18 of the Code of Criminal Procedure contains a similar provision in the event that a notification of the recording of telecommunications is made by the authorities of another Member State using the form in Annex C to Directive 2014/41/EU.

6.23.3 It must be assumed that these regulations only apply if the tapping or recording of telecommunications by foreign authorities does not take place at the initiative of the Dutch authorities. After all, if it concerns the tapping or recording of telecommunications on the initiative of the Dutch authorities, this will already - in the light of what was discussed under 6.21.1 and in view of Article 126m paragraph 5 and 126t paragraph 5 of the Code of Criminal Procedure - be authorized. of the examining magistrate.

6.23.4 It is also important that the regulations described under 6.23.1 and 6.23.2 are not written to protect the specific interests of the person to be intercepted or intercepted, but are related, in short, to the sovereignty of the countries involved and the The associated principle is that it is up to the authorities of a country to determine which investigative activities take place on its own territory, even if the activities also have an effect in other countries. It is also important that these regulations are limited to the tapping or recording of telecommunications, as is regulated in the Netherlands in (among others) Article 126m and 126t of the Criminal Code.

6.24.1 Apart from the cases discussed under 6.21 and 6.23, the Public Prosecution Service is free to (unobligatedly) request authorization from the examining magistrate. The system of the Code of Criminal Procedure does not prevent the public prosecutor from requesting authorization to issue an order to penetrate and conduct research into an automated work and/or to record (tele)communications and that the examining magistrate grants this authorization, even if the authorization is not requested with a view to obtaining information by the Dutch authorities. The space that the legal system offers here can be used, for example, if technological developments occur that are relevant to investigation, also in a cross-border context, while the existing (legal) regulations - and thus the standardization of the relevant forms of investigation – are still only tailored to these developments to a limited extent.

6.24.2 In the context of large-scale collection of data related to (crypto)communications, the reason for claiming such an authorization may be that (i) foreign authorities have already or will proceed on their own initiative to carry out the data under their responsibility applying comparable powers, (ii) while large amounts of data have been or will be obtained that, on the one hand, can be of great value not only for the investigation in which the authorization is requested but also with a view to other (future) criminal investigations and, on the other hand, data (may include persons who, at the time of their acquisition, are not (yet) identified as suspects by the investigative authorities, and (iii) where it has been agreed that the data thus obtained will be shared widely with the Dutch authorities with a view to the processing of those data for the current investigation and any other investigations. A reason may also be that the Dutch Public Prosecution Service is aware that foreign authorities will on their own initiative tap or record telecommunications and that there is a real possibility that the telecommunications address of the person to be tapped or tapped is in use in the Netherlands. This may also be a reason - in light of the regulations discussed under 6.23 - to request authorization in advance from the examining magistrate.

6.24.3 The (unmandatory) requesting and granting of an authorization can, among other things, contribute to the establishment of frameworks by the examining magistrate in the form of conditions to be attached to the authorization for the use of the data provided by the foreign authorities. are collected from the moment the Dutch authorities receive them. Conditions may be attached to the authorization of the examining magistrate that must guarantee the possibility of testing the authenticity and reliability, and/or that are related to the method of selection of data before it is used in a specific criminal investigation, including: with a view to the protection of the interests of third parties - including in particular persons who are not (yet) suspected of involvement in a criminal offense - and the interests associated with the right of non-disclosure.

6.24.4 The following comment deserves further comment. It does not follow from the case law of the ECHR, which was discussed in the Opinion of the Advocate General in case number 23/00010 under 5.7.2-5.7.11, that the public prosecutor's office in cases referred to under 6.24.2 automatically there is an obligation to request authorization from the examining magistrate. After all, that case law does not apply to the interception of data in the context of a criminal investigation into the providers of services with which messages can be sent encrypted, and to the users of those services, in connection with the charges that have arisen in relation to the offering and use suspicions. **25** However, this does not alter the fact that requesting and having been granted such an authorization can constitute a guarantee for the right to protection of personal privacy.

D. Use of information in other studies (6.25)

6.25 After data obtained under the responsibility of foreign authorities have been made available to the Dutch authorities, this data can in any case be used for the investigation in which - with a view to obtaining that data - the request for legal assistance has been made or an EPO has been issued, or that have been spontaneously transferred for the purpose of that investigation. Data obtained by a (seconded) member of a joint investigation team may also be used for the purpose for which the joint investigation team was established. The possibility of retaining and/or using that data for other criminal investigations may be limited on the basis of what is regulated about that use in the relevant legal instruments, for example because further use is subject to the condition of obtaining consent, **26** or Dutch legislation, including the Police Data Act and the Judicial and Criminal Procedure Data Act. In addition, Article 126dd of the Code of Criminal Procedure applies mutatis mutandis when it concerns data obtained through the exercise of powers exercised abroad that correspond to the powers mentioned in that provision. **27** Finally, in the event that an authorization has been granted by the examining magistrate that includes conditions regarding the use of data (see under 6.24), the Public Prosecution Service is bound by the relevant conditions.

E. Directive 2002/58/EC and Directive (EU) 2016/680 (6.26-6.27)

6.26 Partly in response to the written comments that have been made, the Supreme Court considers the following about the (possible) importance of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications; hereinafter: Directive 2002/58/EC), and of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on protection of natural persons in connection with the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties, and on the free movement of such data and repealing Framework Decision Council Directive 2008/977/JHA (hereinafter: Directive (EU) 2016/680). **28**

6.27.1 Directive 2002/58/EC aims to protect the fundamental rights and legitimate interests of natural and legal persons who are subscribers to a publicly available electronic communications service. **29** This Directive provides for the harmonization of the laws of the Member States necessary to ensure an

equal level of protection of fundamental rights and freedoms - in particular the right to privacy and confidentiality - in, inter alia, the processing of personal data in the electronic sector to ensure communication. **30** Pursuant to Article 3 of Directive 2002/58/EC, this Directive applies to 'the processing of personal data in connection with the provision of publicly available electronic communications services on public communications networks in the Community, including public communications networks supporting data collection and identification systems '. To this end, this Directive contains rules aimed at ensuring the confidentiality of the personal data of subscribers and users and of information relating to communications by these subscribers and users. Directive 2002/58/EC does not apply to (inter alia) activities of the state in the field of criminal law (Article 1(3)). **31**

6.27.2 Directive 2002/58/EC is, in view of the scope of application of this directive outlined above, important, among other things, if the application of criminal proceedings results in an obligation on a provider of a publicly available electronic communications service to containing personal data - for example traffic or location data - to store and/or provide. **32** However, this does not mean that Directive 2002/58/EC applies in all cases where the exercise of criminal law powers leads to the criminal law authorities having access to such information. Measures that infringe the principle of confidentiality of electronic communications without imposing processing obligations on providers of electronic communications services fall outside the scope of Directive 2002/58/EC. **33** In the ruling La Quadrature du Net, the Court of Justice of the European Union considers this:

"On the other hand, where Member States directly apply measures that infringe the principle of confidentiality of electronic communications, without imposing processing obligations on providers of electronic communications services, the protection of the data of the persons concerned is not governed by Directive 2002/58, but exclusively by national law, subject to the application of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities with the aim of preventing, the investigation, detection and prosecution of criminal offenses or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89), which means that the measures concerned must, in particular, comply with national constitutional law and with the requirements of the ECHR." **34**

6.27.3 It follows from the findings of the courts that no research results were obtained in the present cases on the basis of processing obligations imposed on the companies Encrochat and SkyECC. On the other hand, these cases concern the exercise by criminal prosecution authorities of powers by which data relating to encrypted messaging have been directly obtained. This means that Directive 2002/58/EC is not relevant here. Moreover, it follows from the findings of the courts that the companies Encrochat and SkyECC both offered an encrypted messaging service, where the users of that service did not have to reveal their identity - and therefore no personal data - and where communication was only possible between the users of the service in question. Insofar as this concerned the provision of public electronic communications services over public communications networks, it follows from the findings of the courts that there was no processing of personal data by those companies. For these reasons too, Directive 2002/58/EC is not relevant here. This Directive is aimed at protecting personal data that are recorded or otherwise become known through the use of publicly available electronic communications services, including by further standardizing in which cases - on the basis of Article 15 of Directive 2002/58/EC and under what conditions such data may be retained or access to such data may be granted to government authorities. **35**

6.27.4 Directive (EU) 2016/680 concerns the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offenses or the execution of criminal penalties. **36** This directive has been implemented in the Netherlands by amending the Police Data Act and the Judicial and Criminal Procedure Data Act, as well as the Police Data Decree, the Judicial and Criminal Procedure Data Decree and the Police Data Decree on special investigative services. **37** These regulations are important if (personal) data obtained under the responsibility of foreign authorities and subsequently made available to the Dutch authorities are processed in the Netherlands for the purpose of investigation or prosecution. However, Directive (EU) 2016/680 does not contain any provisions that are specifically relevant to answering the questions referred for a preliminary ruling.

F. Completion (6.28)

6.28 The question asked by the Overijssel District Court can, taking into account what has been considered above, be answered positively in the sense that:

- that the decisions of the foreign authorities on which the investigation conducted abroad is based must be respected by the judge in the Dutch criminal case, that it is assumed that the investigation has been

conducted lawfully, and that this is only different as in the country in question has irrevocably established that the research in question was not conducted in accordance with the applicable legal rules;

- that the judge only pays attention to the manner in which the results of the research conducted abroad were obtained, if that manner of acquisition is important for the assessment of whether the use of those results for evidence is in accordance with the right to a fair trial;

- that the judge in the criminal case takes the starting point that research carried out under the responsibility of foreign authorities has been carried out in such a way that the results are reliable, and that he is only obliged to investigate the reliability of the results if - whether or not not in response to a defense to that effect - there are concrete indications to the contrary.

The Supreme Court hereby points out that in connection with the application of an investigative power abroad under the responsibility of a foreign authority, authorization from the Dutch examining magistrate is only required if the cases described under 6.21 and 6.23 occur. Outside of this, the Public Prosecution Service is not obliged to request authorization from the examining magistrate. This does not alter the fact - as emerged under 6.24 - that there may also be grounds for requesting authorization from the examining magistrate, partly in view of - in short - the manner in which the data obtained are processed for for and used in Dutch criminal investigations. Requesting and having been granted such an authorization can constitute a guarantee for the right to protection of personal privacy.

7. Answering the preliminary questions asked by the District Court of Northern Netherlands

7.1 The court has proceeded to ask preliminary questions in connection with the investigation requests submitted by the defense. These investigative wishes are essentially aimed at obtaining documents in order to investigate whether the Encrochat and SkyECC messages that, according to the Public Prosecution Service, can be linked to suspects in this case, were obtained lawfully.

7.2 The *first* and *sixth* preliminary questions concern the significance of the (international or interstate) principle of confidentiality for the assessment of the legality and reliability of the results obtained with the application of an investigative power by the authorities of a country other than the Netherlands, in in particular where those results have been obtained in the context of the action of a joint investigation team. To answer these questions, the Supreme Court refers to the considerations under 6.3-6.16 and in particular 6.7-6.11.

7.3.1 Insofar as the court raises the issue in the first preliminary question that information and research results from other studies (26Lemont and/or 26Argus) were involved in the Shifter study, the Supreme Court also notes the following.

7.3.2 Data obtained by a (seconded) member of a joint investigation team may also be used for a criminal prosecution purpose other than that for which the joint investigation team has been established, with due observance of the framework shown in 6.25.

7.3.3 When it comes to the application of Article 359a of the Criminal Code, the basic principle is that that application is limited to, in short, procedural errors that took place in the preparatory investigation against the suspect with regard to the offense charged against him, which the judge referred to in Article 359a of the Criminal Code is meant, has to judge. However, under certain circumstances, a legal consequence may be attached to a procedural error by an official charged with investigation and prosecution, but which was not committed during the preliminary investigation against the suspect, or to an unlawful act against the suspect by another official or person. than an investigating officer. The general criterion is that a legal consequence may be appropriate if the relevant procedural error or unlawful act has had a decisive influence on the course of the investigation into and/or the (further) prosecution of the suspect for the offense charged. **38**

7.3.4 The mere circumstance that a procedural error has been committed in an investigation other than the preparatory investigation against the suspect in relation to the offense charged against him, while the results of that other investigation play a role as initial information or (possible) evidence, therefore in itself does not rule out that a legal consequence will be attached to that omission, insofar as that omission has had a determining influence in the sense referred to in 7.3.3. However, insofar as this concerns results obtained under the responsibility of foreign authorities, it is important what has been considered under 6.3-6.16 about the discretion of the Dutch court when it comes to obtaining such research results.

7.4 The *second* preliminary question concerns - as the Supreme Court understands - the situation, as has arisen according to the findings of the court in this case, in which the interception of telecommunications traffic abroad (France) and under the responsibility of the authorities of that country takes place while (some) users of the telecommunications service in question are on Dutch territory. The question essentially concerns whether the latter circumstance gives rise to a different or modified assessment framework for the investigation conducted under the responsibility of foreign authorities. The Supreme Court answers that

question in the negative, in view of the answer given to the preliminary question from the Overijssel District Court.

7.5 The *third* and *fifth* preliminary questions essentially concern the question of whether and, if so, under what circumstances, authorization from the examining magistrate is required for the exercise of an investigative power under the responsibility of a foreign authority. For the answer to this question, the Supreme Court refers to what was considered under 6.20-6.24.

7.6 The *seventh* preliminary question concerns the retention and use of the research results obtained by the foreign authorities, in the event that the research consisted of the interception of telecommunications traffic. With regard to the use of this data, the Supreme Court refers to what was considered under 6.25. Where it concerns the retention of such research results, Article 126cc of the Code of Criminal Procedure applies mutatis mutandis when it concerns data obtained through the exercise of powers exercised abroad that correspond to the powers mentioned in that provision (and which may or may not have not been carried out in the context of research into a computerized work).

7.7.1 The *fourth* preliminary question concerns, in short, the possibilities for the defense to investigate the legality of the acquisition of evidence, given the principle of *equality of arms* . The following is important to answer this question.

7.7.2 The principle of *equality of arms* , as "one of the features of the wider concept of a fair trial", means that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *" -à-vis* his opponent". **39** The ECtHR has considered, among other things, the following about the significance of this principle for the handling of criminal cases:

"77. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defense. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (... *)* . In addition, Article 6 § 1 requires that the prosecution authorities disclose to the defense all material evidence in their possession for or against the accused (...).

78. However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (...). In some cases it may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6 § 1 (...). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (...).

(...)

80. More specifically, Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defense" and therefore implies that the substantive defense activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organize his defense in an appropriate way and without restriction as to the possibility to put all relevant defense arguments before the trial court and thus to influence the outcome of the proceedings (...). Furthermore, the facilities which should be enjoyed by everyone charged with a criminal offense include the opportunity to acquaint himself, for the purposes of preparing his defense, with the results of investigations carried out throughout the proceedings (...). The issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (...).

81. Failure to disclose to the defense material evidence which contains such particulars as could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defense, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention (...). The accused may, however, be expected to give specific reasons for his request (...) and the domestic courts are entitled to examine the validity of these reasons (...)." **40**

7.7.3 When it comes to adding documents to the procedural documents and obtaining access to documents, the Supreme Court considered, among other things, the following in its judgment of 28

June 2022, ECLI:NL:HR:2022:900:

"The criterion for assessing a request to join documents to the procedural documents is, on the basis of Article 315 paragraph 1 of the Code of Criminal Procedure in connection with Article 415 of the Code of Criminal Procedure, whether the necessity of the requested has been proven. When making its decision on this matter, the judge must take into account that, on the basis of Article 149a, paragraph 2, of the Code of Criminal Procedure, all documents must in principle be added to the file that could reasonably be important for the decisions to be taken by him at the hearing. This concerns the relevance of those documents. (Cf. HR 16 February 2021, ECLI:NL:HR:2021:218.)

The defense can - partly in view of the right of the suspect guaranteed in Article 6 paragraph 3, opening words and (b) of the ECHR, to have the time and facilities necessary for the preparation of his defense and with a view to conducting a request to add documents to the file - make a reasoned request for access to specifically described documents. During the preliminary investigation, such a request can be made in accordance with the procedure laid down in Article 34, paragraphs 2-4 of the Code of Criminal Procedure. After the start of the investigation at the hearing, the hearing judge decides - if necessary on the basis of the findings of further investigation carried out by someone other than the hearing judge, for example the examining magistrate, into the nature and content of the relevant documents and data - whether and, if so, to what extent and in what manner, such access can be permitted." **41**

In addition to this, the Supreme Court notes the following. In order to assess whether a request from the defense to add documents to the case documents is sufficiently substantiated, it is also important whether and, if so, how the Public Prosecution Service has already offered the defense facilities to consult available digital databases. Where it concerns the assessment by the examining judge on the basis of Article 34 paragraph 4 of the Code of Criminal Procedure or the execution by the examining judge of the further investigation ordered by the hearing judge, no legal rule prevents this from happening, in the event that specific technical knowledge is required for consulting or examining large digital databases, the examining magistrate is assisted by a person with expertise in that field.

7.7.4 When assessing both requests to add documents to the procedural documents and requests to inspect specifically described documents, it is important, among other things, to what extent those documents are (or can be) relevant to the decisions to be taken by the judge. To the extent that such requests are related to the manner in which the investigation was carried out by and under the responsibility of foreign authorities, the court may take into account what was considered under 6.3-6.16 regarding the assessment of the legality of the acquisition of the investigation results. and the reliability of those results, and the discretion that the Dutch criminal court has in this regard. If a request to add documents to the procedural documents or to obtain access is related to (the substantiation of) a defense on a point on which the Dutch criminal court is not entitled to judge, there will generally be no grounds for granting that request exists. In addition, it follows from the foregoing that such a request must be substantiated, whereby that substantiation must relate to the importance of joinder or access in the light of the decisions that can and must be taken in the criminal case.

8 Decision

The Supreme Court answers the preliminary questions in the manner shown under 6 and 7.

This decision was given by vice-president V. van den Brink as chairman, and counselors ALJ van Strien, MJ Borgers, AEM Röttgering and T. Kooijmans, in the presence of the acting clerk HJS Kea, and pronounced at the public hearing on 13 June 2023 .

---

1 Cf. HR 14 December 2021, ECLI:NL:HR:2021:1841, legal consideration 2.1.

2 Cf. HR 5 April 2022, ECLI:NL:HR:2022:475, legal considerations 4 to 6.

3 Cf. HR 14 December 2021, ECLI:NL:HR:2021:1841, legal consideration 4, and HR 5 April 2022, ECLI:NL:HR:2022:475, legal consideration 6.2.5 and 6.7.

4 Cf. HR 3 November 2020, ECLI:NL:HR:2020:1726, legal considerations 3.3 and 3.4.

5 Cf. article 5.1.1 Sv.

6 Cf. article 5.1.3 Sv.

7 HR 29 September 1987, ECLI:NL:HR:1987:AC9986, legal consideration 4.4.1, and HR 25 June 1996, ECLI:NL:HR:1996:ZD0493, legal consideration 6.4.

8 ECHR 27 June 2000, no. 43286/98 (Echeverri Rodriguez/Netherlands): "the Court considers that the Convention does not preclude reliance, at the investigating stage, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defense rights guaranteed in the Convention have been disrespected."

9 Cf. ECtHR 27 October 2011, no. 25303/08 (Stojkovic v France and Belgium), recital 55: "La Cour consider que si la restriction du droit en cause n'était pas, à l'origine, le fait des autorités françaises, il apart from the cells, the defect in the motif impérieux of the justification, the veil is not compromised by the procedure of the procedure. With due care, the argument for the restriction resulting from the application system of the dispositional dispositions is inoperable and sufficient to conclude on a defect in the article 6 of the Convention (see above, Salduz, précité, § 56, et, mutatis mutandis, Boz c. Turquie, no 2039/04, § 35, 9 February 2010). La Cour note de meurant que les rules de droit international applicables, en voir desquelles la partie requise fera exécuter les commissions rogatories dans les formes prévues par sa législation (voir paragraphe 26 ci-dessus), ontété modifiées peu après (voir paragraphe 27 ci-dessus) -dessus). Moreover, according to the cause, the legal regime for the litigious audit is subject to the French authorisations, the examiner's ensuite is open to the accomplie and conformity of the principles based on the principles of the procedure and the application, the case is échéant , remède. Certes, les conditions légales dans lesquelles l'audit litigieuse a été réalisée ne sont pas imputables aux autorités françaises, lesquelles étaient soumises, en vertu de leurs engagements internationaux, à l'application des dispositions internals belges. Pour autant, en vertu de l'article 1 de la Convention, aux terms duquel « [l]es Hautes Parties contractantes reconnaissent à toute personne relevant de leur jurisdiction les droits et libertés définis au titre I de la presentente Convention », la mise en œuvre et la sanction des droits et libertés garantis par la Convention revient au premier chef aux autorités nationales (Scordino c. Italie (no 1) [GC], no 36813/97, § 140, CEDH 2006-V). It is incomprehensible that additional jurisdictional penalties are involved in the assurance process in Belgium and are not subject to compliance with the violation of the defense and security procedures involved in the procedure. s'appréciant en principle au regard de l'ensemble de la procédure (voir, notamment, Pélissier et Sassi c. France [GC], no 25444/94, § 46, CEDH 1999-II, Miailhe c. France (no 2) , 26 September 1996, § 43, Recueil 1996-IV, et Imbrioscia, précité, § 38)."

10 Cf. HR 1 December 2020, ECLI:NL:HR:2020:1889, legal consideration 2.4.5.

11 Cf. ECtHR 11 July 2006, no. 54810/00 (Jalloh/Germany), recital 96: "In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defense have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy."

12 See also Article 20 of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, Trb. 2008, 157.

13 Management may also change during the investigation. See Explanatory Report to the Agreement of 29 May 2000 on mutual legal assistance in criminal matters between the Member States of the European Union, OJ 2000, C 379/18: "Paragraph 3 provides that the leader of an investigation team is a representative of the investigation by participating competent authority of the Member State where the team is active. This means that team leadership will change for certain purposes if the team conducts investigations in more than one Member State."

14 Cf. on that principle of mutual trust in particular CJEU 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, recital 191: "Secondly, it should be noted that the principle of mutual trust between the Member States Union law is essential as it makes it possible to create and maintain an area without internal borders. That principle requires, in particular as regards the area of freedom, security and justice, that each of the Member States, save in exceptional circumstances, assumes that all other Member States comply with Union law and, more specifically, the fundamental rights recognized by that law (see, to that effect, judgments in NS and Others, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and Melloni, EU:C:2013:107, paragraphs 37 and 63)."

15 Cf. HR 21 December 2021, ECLI:NL:HR:2021:1940, legal consideration 4.2.1. See also CJEU 16 December 2021, case C-724/19, ECLI:EU:C:2021:1020 (Spetsializirana prokuratura (Traffic and location data)), recital 53.

16 Cf. for the mirror-image case, which concerns the assessment by the Dutch complaints court in the event that an EPO has been issued to the Netherlands, HR 21 December 2021, ECLI:NL:HR:2021:1940, legal consideration 4.2.2.

17 This must also concern a case in which it can be assumed that the Netherlands has jurisdiction under Articles 2 to 8 of the Criminal Code if it were to prosecute for the offense to which the investigation relates. Cf. Parliamentary Papers II 2015/16, 34372, no. 3, p. 43.

18 Cf. Article 13(6) EU Legal Assistance Agreement.

19 Cf. Article 13(5) EU MLA Agreement and Article 9(4) and 5 of Directive 2014/41/EU.

20 Cf. HR April 22, 2022, ECLI:NL:HR:2022:612.

21 Cf. HR 5 October 2010, ECLI:NL:HR:2010:BL5629, legal consideration 4.4.2.

22 This follows from Article 5.1.3 of the Code of Criminal Procedure and Article 5.4.21, paragraph 2, opening words and under b, of the Code of Criminal Procedure; see also under 6.4 and 6.14. Cf. also Article 6(1), opening words and (b), Directive 2014/41/EU. Where the action of a joint investigation team is concerned, a request to one of the participating Member States to take investigative actions shall be made by the members seconded to the team by that Member State. See Article 13(7) of the EU Legal Assistance Agreement.

23 Cf. with regard to the EPO also CJEU 16 December 2021, case C-724/19, ECLI:EU:C:2021:1020 (Spetsializirana prokuratura (Traffic and location data)), recitals 35 and 38, which considers that the issuing authority must be the authority responsible for the investigation in the context of the criminal proceedings in question and which is therefore competent under national law to order the collection of evidence.

24 Cf. Article 4(1) EU MLA Agreement and Article 9(2) Directive 2014/41/EU.

25 Cf. ECtHR 25 May 2021, nos. 58170/13, 62322/14 and 24960/15 (Big Brother Watch and others v United Kingdom), recital 322 and ECtHR 25 May 2021, no. 35252/08 (Centrum för rättvisa/Sweden), recital 236. See also CJEU 20 September 2022, cases C-793/19 and C-794/149, ECLI:EU:C:2022:702 (SpaceNet and Telekom Deutschland), consideration 125: "In those judgments the interception of enormous amounts of data related to international communications. Therefore, in those judgments - as the Commission noted at the hearing - the ECtHR did not rule on the answer to the question whether a general and indiscriminate retention of traffic and location data on the national territory or even the large-scale interception of that data is compatible with the ECHR for the purpose of preventing, detecting and investigating serious criminal offences."

26 Cf. in connection with the spontaneous exchange of information, the regulation of Article 7 of the EU Legal Assistance Agreement, and in connection with the actions of a joint investigation team, Article 13, paragraph 10, opening words and (b), of the EU Legal Assistance Agreement. See also the regulation of Article 26 of the Cybercrime Convention.

27 Article 126dd of the Code of Criminal Procedure also extends to data obtained in the exercise of the powers referred to in that provision in the context of an investigation into a computerized work. Cf. Parliamentary Papers II 2015/16, 34372, no. 3, p. 109.

28 OJ 2002, L 201/37 and OJ 2016, L 119/89.

29 Preamble under 12.

30 Article 1 paragraph 1 Directive 2002/58/EC.

31 See also the Preamble, point 11: "[This Directive] does not change (...) the existing balance between the right of individuals to privacy and the possibility for Member States to implement the measures referred to in Article 15(1) of this Directive to take the measures referred to, which are necessary for (...) law enforcement in the field of criminal law."

32 Cf. HR 5 April 2022, ECLI:NL:HR:2022:475, legal consideration 6.2.1.

33 Cf. HR 5 April 2022, ECLI:NL:HR:2022:475, legal consideration 6.2.1. The example of the investigation into seized telephones is mentioned there. See also the Opinion of Advocate General Campos Sánchez-Bordona in case C-548/21, paragraph 37: "In the present case, police services directly attempted to gain access to data in the context of a criminal investigation. There was no intervention by providers of electronic communications services or a request addressed to them to provide personal data. Directive 2002/58 is therefore not applicable."

34 CJEU 6 October 2020, C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791 (La Quadrature du Net and others v Premier ministre and others), recital 103.

35 On the principles that apply here, see, among others, CJEU 20 September 2022, C-793/19 and C-794/19, ECLI:EU:C:2022:702 (SpaceNet and Telekom Deutschland), considerations 49-75.

36 Article 1 paragraph 1 Directive (EU) 2016/680.

37 Stb. 2018, 401 and Stb. 2018, 496.

38 Cf. HR 1 December 2020, ECLI:NL:HR:2020:1889, legal considerations 2.2.1-2.2.2.

39 See, among others, ECtHR 26 January 2017, no. 60802/09 (Faig Mammadov v Azerbaijan), consideration 19.

40 ECHR 6 March 2012, no. 59577/08 (Leas v Estonia). See also ECtHR 4 April 2017, no. 2742/12 (Matanović v Croatia), considerations 151-158, ECtHR 4 June 2019, no. 39757/15 (Sigurður Einarsson and others v Iceland), considerations 85-86, and ECtHR 25 July 2019, no. 1586/15 (Rook/Germany), recitals 56-59.

41 Legal consideration 4.4.3.