

## CASE TRANSLATION: FRANCE

Case citation:

**Décision n° 2018-696 QPC du 30 mars 2018**

Name and level of the court:

**Le Conseil constitutionnel (Constitutional Court)**

Date of decision:

**30 March 2018**

President of the court:

**M. Laurent Fabius, President**

Other members of the court: **Mme Claire**

**Bazy Malaurie, MM. Michel Charasse,**

**Lionel Jospin, Mmes Dominique**

**Lottin, Corinne Luquiens, Nicole**

**Maestracci and M. Michel Pinault**

### ***France; encrypted data; right to silence; refusal to reveal key to authorities; criminal offence; constitutional position***

M. Malek B. (Criminalization of the refusal to hand over to the judicial authorities the secret convention of deciphering a means of cryptology)

THE CONSTITUTIONAL COUNCIL WAS SEIZED on 12 January 2018 by the Court of Cassation (Criminal Division, Judgment No. 3478 of 10 January 2018), under the conditions provided for in article 61-1 of the Constitution, of a priority question of constitutionality. This question was put to M. Malek B. by Me Karim Morand-Lahouazi, a lawyer at the Paris Bar. It has been registered at the General Secretariat of the Constitutional Council under the number 2018-696 QPC. It relates to compliance with the rights and freedoms guaranteed by the Constitution of article 434-15-2 of the Penal Code, as amended by Law No. 2016-731 of 3 June 2016, reinforcing the fight against organized crime, terrorism and their financing, and improving the efficiency and safeguards of the criminal procedure.

In view of the following texts:

- the Constitution;
- Ordinance No. 58-1067 of 7 November 1958 on the organic law on the Constitutional Council;
- the Penal Code;
- Law No. 2004-575 of 21 June 2004 on confidence in the digital economy;
- Law No. 2016-731 of 3 June 2016 reinforcing the fight against organized crime, terrorism and their financing, and improving the efficiency and guarantees of criminal proceedings;

- the regulation of 4 February 2010 on the procedure followed before the Constitutional Council for priority issues of constitutionality;

In view of the following parts:

- the observations submitted for the applicant by Me Morand-Lahouazi, recorded on 5 and 20 February 2018;

- the observations submitted by the Prime Minister, recorded on 5 February 2018;

- the observations in intervention submitted for M. Lamine M. by Me Yves Levano, lawyer at the Paris bar, registered on 2 February 2018;

- the observations in intervention submitted for the association La Quadrature du Net by Me Alexis Fitzjean Ó Cobhthaigh, a lawyer practicing at the Paris bar, registered on 5 and 20 February 2018;

- the documents produced and attached to the file;

After hearing from Me Morand-Lahouazi, for the applicant, Me Levano, for M. Lamine M., and Me Fitzjean Ó Cobhthaigh, for the association La Quadrature du Net, interveners, and M. Philippe Blanc, designated by the Prime Minister, at the public hearing on 6 March 2018;

And after hearing the rapporteur;

THE CONSTITUTIONAL COUNCIL BASED ON THE FOLLOWING:

1. Article 434-15-2 of the Penal Code, as amended by the Act of 3 June 2016 referred to above, provides:

‘Shall be punished by three years’ imprisonment and a fine of € 270,000 for anyone who has knowledge of the secret convention of deciphering a means of cryptology that may have been used to prepare, facilitate or commit a crime or offence, to refuse to hand over the said

agreement to the judicial authorities or to implement it on the demand of these authorities issued under Titles II and III of Book I of the Code of Criminal Procedure.

If the refusal is opposed when the surrender or the implementation of the agreement would have prevented the commission of a crime or an offence or to limit the effects, the penalty is increased to five years imprisonment and a € 450,000 fine.'

2. The applicant, joined by the interveners, submits that the contested provisions, in that they sanction the refusal for a person suspected of an offence to hand over to the judicial authorities, or to implement at their request, a decryption key that may have been used to commit that offence, would infringe the right to silence and the right not to incriminate itself. They would thus be contrary to the right to a fair and equitable procedure guaranteed by article 16 of the Declaration of the Rights of Man and the Citizen of 1789 and the principle of presumption of innocence guaranteed by article 9 of the same declaration. Finally, according to the interveners, those same provisions also violate the right to respect for private life and, according to one of the interveners, the secrecy of correspondence, the rights of the defence, the principle of proportionality of penalties and freedom of expression.

3. Therefore, the priority question of constitutionality concerns the first paragraph of article 434-15-2 of the Criminal Code.

4. According to article 2 of the 1789 Declaration, 'The purpose of any political association is the preservation of the natural and imprescriptible rights of man. These rights are freedom, property, safety, and resistance to oppression.' The freedom proclaimed by this article implies the right to respect for private life and the secrecy of correspondence. In order to comply with the Constitution, infringements of these rights must be justified on grounds of general interest and implemented in a manner adequate and proportionate to that objective.

5. According to article 9 of the Declaration of 1789: 'Every man being presumed innocent until he has been found guilty, if it is considered indispensable to arrest him, any rigour which would not be necessary to make sure of his person must be severely repressed by the law'. The result is the principle that no one is

obliged to accuse himself, from which the right to silence is derived.

6. The first paragraph of article 434-15-2 of the Penal Code punishes with a sentence of three years imprisonment and a fine of 270 000 euros the fact for 'anyone' having knowledge of the secret convention of decryption of a means of cryptology, which may have been used to prepare, facilitate or commit an offence, to refuse to issue it or to implement it. It follows from the settled case-law of the Court of Cassation, as it appears from the order for reference of the priority question of constitutionality, that that obligation applies to everyone, including the person suspected of having committed the infringement of the using this means of cryptology.

7. In the first place, by requiring the person who has knowledge of a secret convention of decryption of a means of cryptology to hand over the said agreement to the judicial authorities or to implement it only if this means of cryptology is likely to have been used to prepare, facilitate or commit a crime or an offence and only if the request originates from a judicial authority, the legislator has pursued the objectives of constitutional value of crime prevention and search of the offender, both necessary safeguarding rights and principles of constitutional value.

8. Secondly, under the first sentence of article 29 of the Act of 21 June 2004 mentioned above the means of cryptology is 'any hardware or software designed or modified to transform data, that it act of information or signals, using secret conventions or to carry out the opposite operation with or without secret convention'. The provisions criticized impose on the person suspected of having committed an offence, using a means of cryptology, to issue or to implement the secret decipherment agreement only if it is established that he has knowledge of it. They are not intended to obtain confessions from him and carry neither recognition nor presumption of guilt but only allow the decryption of encrypted data. In addition, the investigation or instruction must have identified the existence of data processed by means of cryptology that may have been used to prepare, facilitate or commit a crime or offence. Finally, these data, already fixed on a support, exist independently of the will of the suspected person.

9. It follows from the foregoing that the contested provisions do not affect the right not to accuse oneself of the right to respect for private life and the secrecy of correspondence.

10. The first paragraph of article 434-15-2 of the Penal Code, which also does not disregard the rights of the defence, the principle of proportionality of sentences and the freedom of expression, nor any other right or freedom that the Constitution guarantees, must be declared in conformity with the Constitution.

#### THE CONSTITUTIONAL COUNCIL DECIDES:

Article 1. - The first paragraph of article 434-15-2 of the Penal Code, as amended by Law No. 2016-731 of 3 June 2016 reinforcing the fight against organized crime, terrorism and their financing, and improving the effectiveness and guarantees of criminal procedure, is in accordance with the Constitution.

Article 2. - This decision will be published in the Official Journal of the French Republic and notified under the conditions provided for in article 23-11 of the aforementioned ordinance of 7 November 1958.

Judged by the Constitutional Council in its meeting of 29 March 2018, where sat: M. Laurent FABIUS, President, Mme Claire BAZY MALAURIE, MM. Michel CHARASSE, Lionel JOSPIN, Mmes Dominique LOTTIN, Corinne LUQUIENS, Nicole MAESTRACCI et M. Michel PINAULT.

JORF n°0076 du 31 mars 2018 texte n° 111

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## Commentary

By

**Pauline Martin**

An encryption operation aims to turn a computer file, readable and searchable by all, into an encrypted file, therefore unreadable, thanks to an encryption key.<sup>1</sup>

On 12 January 12, 2018, the French Constitutional Council was faced with a priority question of constitutionality relating to the conformity of the article 434-15-2 of the Penal Code resulting from Law No. 2016-731 to the rights and freedoms guaranteed by the French Constitution. The purpose of that law is to fight organized crime, terrorism and their financing, and aims to improve the efficiency of criminal proceedings.

The purpose of the disputed article was to compel a suspected person in criminal proceedings to provide investigators with the ability to decipher a means of cryptology that may have been used to prepare, facilitate or commit a crime or an offense.

The applicant appealed to the Constitutional Council with a priority question of constitutionality, arguing that such an obligation was contrary to several of his rights. He invoked the violation of his right to a fair and equitable procedure, the presumption of innocence, the right to respect for private life, the confidentiality of correspondence, the rights of the defence, the principle of proportionality of penalties and the freedom of expression. The applicant relied on articles 2 and 9 of the Declaration of the Human and Citizen Rights.

The Constitutional Council, in its decision of 30 March 2018 rejected this request for several reasons. On the one hand, such provisions are justified by the constitutional objectives to prevent offences being committed, and the search for offenders, which are necessary for the protection of constitutional rights and principles (in accordance with the requirements of the Constitution). On the other hand, the Constitutional Council held that the provisions criticized are not intended to obtain confessions from the person suspected of having committed an offense. Thus, they do not carry a presumption of guilt. They are simply intended to allow the decryption of encrypted data.

The Constitutional Council concluded by indicating there is no violation of the right to protect against self-incrimination, the right to respect privacy, or any other right mentioned by the applicant.

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<sup>1</sup> For more detail, see *Electronic Signatures in Law* (4th edn, Institute of Advanced Legal Studies for the SAS Humanities Digital Library, School of Advanced Study, University of London, 2016), chapter 14.