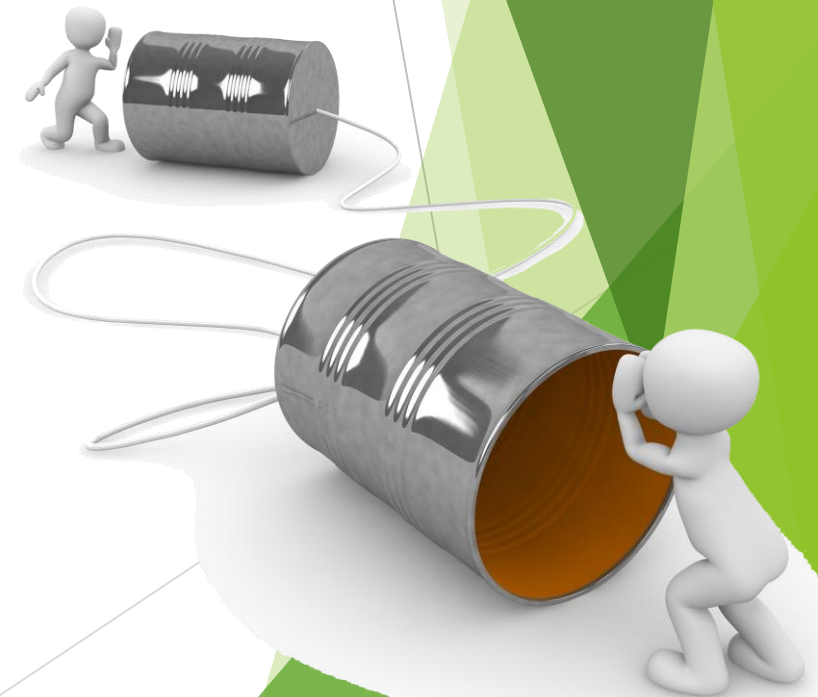


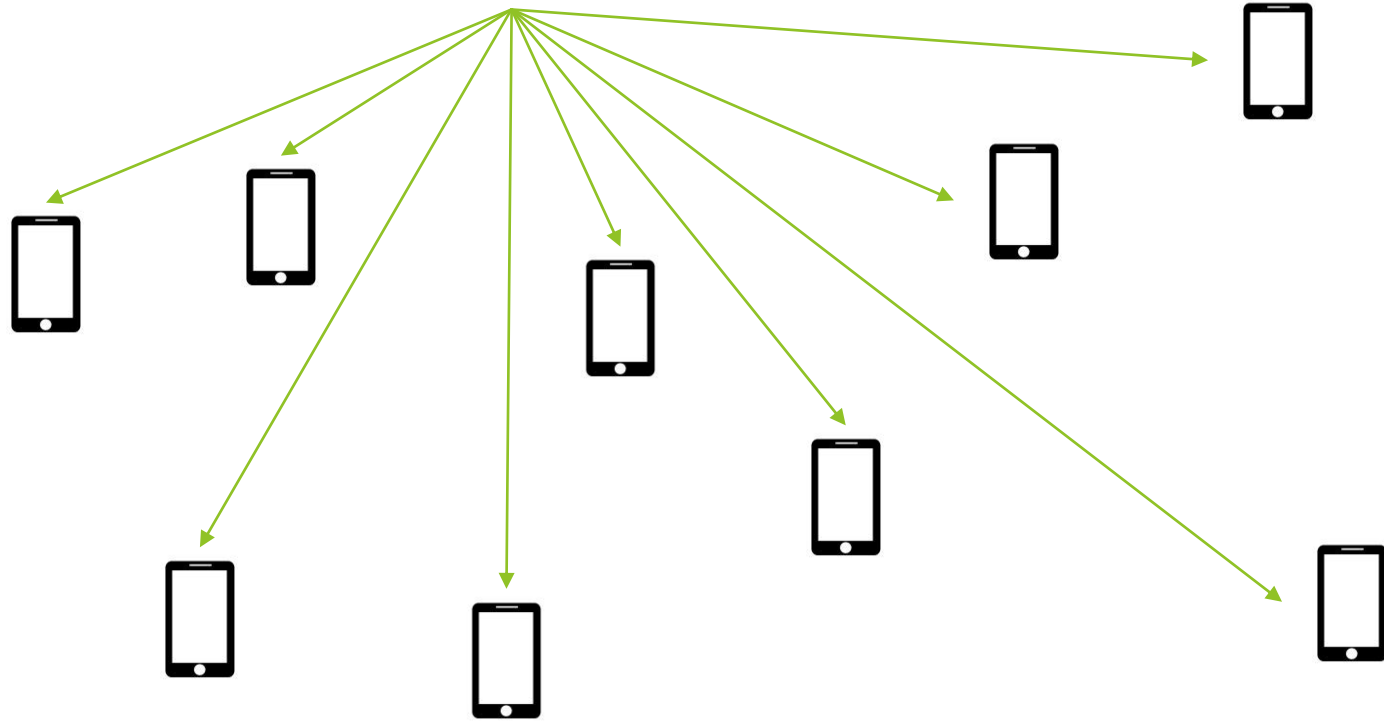
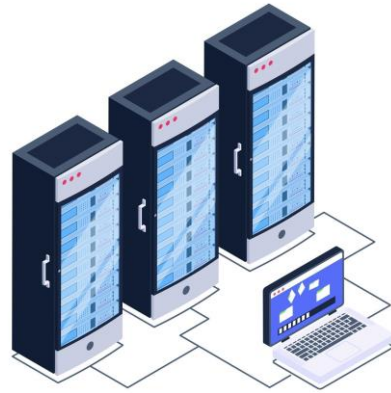
To be or not to be interception, that is the question. The Italian perspective

Leuven - 26 March 2024

Oscar Calavita



ENCROCHAT - SKY ECC



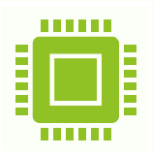
NOTION OF INTERCEPTION




The talk must be **confidential** and the participants wish to exclude others from it



The interception must be conducted by **third parties** involved in the conversation



The interception must occur **simultaneously** with the communication and employ mechanical or electronic tools that are capable of **circumventing sensitive capabilities**



No one can hear us! Keep it a secret

Lips sealed

INTERCEPTION ACCORDING TO EIO DIRECTIVE (ART. 30 AND 31)

- ▶ Interception of telecommunications **with** technical assistance
- ▶ Interception of telecommunications **without** technical assistance



INTERCEPTION WITH TECHINAL ASSISTANCE (ART. 30)

- ▶ MS A (France) cannot intercept without the assistance of MS B (Germany)
- ▶ **Ordinary EIO procedure:** issuing, transmission, recognition, execution
- ▶ **Additional** ground for **refusal** where the investigative measure would not have been authorised in a similar domestic case



INTERCEPTION WITHOUT TECHINICAL ASSISTANCE (ART. 31)

- ▶ MS A can **technically** do everything by itself (e.g. **trojan**)
- ▶ MS A must (**legally**) **notify** MS B it is willing to intercept a person located in its territory
- ▶ MS A must (**legally**) **notify** MS B as soon as it is aware the target is in territory of this latter
- ▶ NO ordinary procedure needed
- ▶ Within **96 hours**, if interception would not be authorised in a similar domestic case, the notified authority may notify:
 - ▶ (a) that the interception may not be carried out or shall be terminated;
 - ▶ (b) where necessary, that any material already intercepted while the subject of the interception was on its territory may not be used, or may only be used under conditions which it shall specify
- ▶ **NO answer = interception allowed**



STORED CHATS

- ▶ Interceptions requires simultaneously
- ▶ Reading an ongoing flow of communications (dynamic data) = interceptions
- ▶ Reading previous **stored chat** (static data)?



REMOTE SEARCHES

- ▶ Provisional measure under **Art. 32** EIO Directive
- ▶ The issuing authority may issue an EIO in order to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence
- ▶ The issuing authority may ask for the transmission of the evidence
- ▶ **Ordinary EIO procedure** → executing authority should remotely (physically if not possible) search and seize the content of the device



WHAT ABOUT ENCROCHAT AND SKY ECC?

- ▶ **Trojan interception** for **ongoing flows** of communications made by the issuing authority → **notification** to the executing State under **Art. 31** EIO Directive
- ▶ **Stored data** on the phone/app → (remote) **search and seizure** carried out by the executing State under **ordinary EIO procedure**
- ▶ **Cumbersome** legislative framework



PROPOSAL FOR THE FUTURE



- ▶ Introduction of an **Article 32 bis** EIO Directive
- ▶ Aim: **mirroring the 'interception rules'**, as remote searches and seizures can be carried out directly by the issuing authority → NO ordinary procedure
- ▶ Content: **notification** to interested State prior to the remote searches and seizures or as soon as the target gets in another EU State
- ▶ Within **96 hours**, if remote searches and seizures would not be authorised in a similar domestic case, the notified authority may notify:
 - ▶ (a) that the remote searches and seizures may not be carried out or shall be terminated;
 - ▶ (b) where necessary, that any material already remote seized while the subject of the interception was on its territory may not be used, or may only be used under conditions which it shall specify
- ▶ **NO answer = searches and seizures allowed**
- ▶ Huge hamper to the right of respect of private life (Art. 7 Charter and 8 ECHR) → **rule of law** and **jurisdictional decision** required





REQUEST FOR GATHERED DATA

- ▶ MS C (Italy) needs evidence already gathered via EIO in MS A (France)
- ▶ NO detailed regulation in the EIO Directive
- ▶ **General principles** of Art. 6 applicable:
 - ▶ Necessity and proportionality of the order
 - ▶ **Equivalence**
- ▶ Opinion of **AG Ćapeta in *M.N. (Staatsanwaltschaft Berlin)*, C- 670/22**: “when an EIO is issued for the transfer of evidence already in the possession of another State, the reference to a **similar domestic case** under Article 6(1)(b) of the EIO Directive requires the issuing authority to establish whether and under what conditions the relevant national law allows for a transfer of evidence gathered through the interception of communication between criminal procedures domestically

ITALIAN CASE LAW

- ▶ Lawyers: illegal interception because in contrasto with Articles 30 and 31
- ▶ Supreme Court:
 - ▶ document (Article 234 Code of Criminal Procedure - CPP)
 - ▶ informatic document (Article 234 bis CPP)
 - ▶ seizure of informatic data (art. 254 bis CPP)
 - ▶ result of interceptions (Article 270 CPP)
 - ▶ request for documents involving telecommunications (Article 45 Legislative Decree no. 108/2017)
- ▶ *Sezioni Unite*: the transfer of evidence gathered abroad via EIO follows the same rules provided for similar domestic cases → **principle of equivalence**





WHAT ABOUT THE GAVANOZOV II DOCTRINE?

- ▶ Gavanozov II **obliges MS to have effective legal remedies** against every EIO
- ▶ Gavanozov II **forbids to issue EIOs if there are no effective remedies** in the internal legislation of a MS
- ▶ As a consequence, the **executing authority** has the **duty to refuse** an EIO according to Art. 11(f)
- ▶ Neither Germany nor Italy raised this issue
- ▶ In **Italy** requests for evidence already in the possession of the executing State cannot be autonomously challenged → the **EIO shouldn't have been issued**
- ▶ Why? Lack of knowledge of Gavanozov II?

A magnifying glass with a black handle and silver rim is positioned over a yellow sticky note. The note is placed on a light blue background with several other colorful sticky notes (orange, pink, green) visible in the top left corner. A black pen with a silver tip is lying on the right side of the yellow note. The text 'Thank you For your Attention' is written in a black, cursive font on the yellow note. The background features a green-to-blue gradient on the right side.

*Thank you
For your
Attention*