



EncroChat Webinar

3rd March 2021

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Investigatory Powers Act 2016

SECTION 3 – Offence of unlawful interception

(1) A person commits an offence if—

(a) the person intentionally intercepts a communication in the course of its transmission by means of—

- (i) a public telecommunication system,
- (ii) a private telecommunication system, or
- (iii) a public postal service,

(b) the interception is carried out in the United Kingdom, and

(c) the person does not have lawful authority to carry out the interception.



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SECTION 4 - Interception in relation to telecommunication systems

(1) For the purposes of this Act, a *person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if—*

- (a) the person does *a relevant act* in relation to the system, and
- (b) the effect of the relevant act is to make any content of the communication available, at a relevant time, to a person who is not the sender or intended recipient of the communication.

...

(4) In this section “*relevant time*”, in relation to a communication transmitted by means of a telecommunication system, means—

- (a) *any time while the communication is being transmitted, and*
- (b) *any time when the communication is stored in or by the system (whether before or after its transmission).*

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SECTION 99 - Warrants under this Part: general

(1) There are *two kinds of warrants which may be issued under this Part—*

- (a) *targeted equipment interference warrants (see subsection (2));*
- (b) targeted examination warrants (see subsection (9)).

(2) A targeted equipment interference warrant is a warrant which authorises or requires the person to whom it is addressed to secure interference with any equipment for the purpose of obtaining—

- (a) communications (see section 135);
- (b) equipment data (see section 100);
- (c) any other information.

(3) A targeted equipment interference warrant—

- (a) must also authorise or require the person to whom it is addressed to secure the obtaining of the communications, equipment data or other information to which the warrant relates;
- (b) may also authorise that person to secure the disclosure, in any manner described in the warrant, of anything obtained under the warrant by virtue of paragraph (a).

(4) The reference in subsections (2) and (3) to the obtaining of communications or other information includes doing so by—

- (a) monitoring, observing or listening to a person's communications or other activities;
- (b) recording anything which is monitored, observed or listened to.

(5) A targeted equipment interference warrant also authorises the following conduct (in addition to the conduct described in the warrant)—





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SECTION 56 - Exclusion of matters from legal proceedings etc.

(1) ***No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—***

(a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—

(i) any content of an intercepted communication, or

(ii) any secondary data obtained from a communication, or

(b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.

This is subject to Schedule 3 (exceptions).

(2) ***“Interception-related conduct” means—***

(a) ***conduct by a person within subsection (3) that is, or in the absence of any lawful authority would be, an offence under section 3(1) (offence of unlawful interception)***



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SCHEDULE 3 - Disclosures of lawfully intercepted communications

Section 2

(1) Section 56(1)(a) ***does not prohibit the disclosure of any content of a communication, or any secondary data obtained from a communication, if the interception of that communication was lawful by virtue of any of the following provisions—***

(a) ***sections 6(1)(c) and 44 to 52;***

(b) sections 1(5)(c), 3 and 4 of the Regulation of Investigatory Powers Act 2000;

(c) section 1(2)(b) and (3) of the Interception of Communications Act 1985.

(2) Where any disclosure is proposed to be, or has been, made on the grounds that it is authorised by sub-paragraph (1), section 56(1) does not prohibit the doing of anything in, or for the purposes of, so much of any proceedings as relates to the question whether that disclosure is or was so authorised.

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SECTION 6 - Definition of "lawful authority"

(1) For the purposes of this Act, *a person has lawful authority to carry out an interception if, and only if—*

(a) the interception is carried out in accordance with—

(i) a targeted interception warrant or mutual assistance warrant under Chapter 1 of Part 2, or

(ii) a bulk interception warrant under Chapter 1 of Part 6,

(b) the interception is authorised by any of sections 44 to 52, or

(c) *in the case of a communication stored in or by a telecommunication system, the interception—*

(i) *is carried out in accordance with a targeted equipment interference warrant under Part 5 or a bulk equipment interference warrant under Chapter 3 of Part 6,*

(ii) is in the exercise of any statutory power that is exercised for the purpose of obtaining information or taking possession of any document or other property, or

(iii) is carried out in accordance with a court order made for that purpose.

(2) Conduct which has lawful authority for the purposes of this Act by virtue of subsection (1)(a) or (b) is to be treated as lawful for all other purposes.

(3) Any other conduct which—

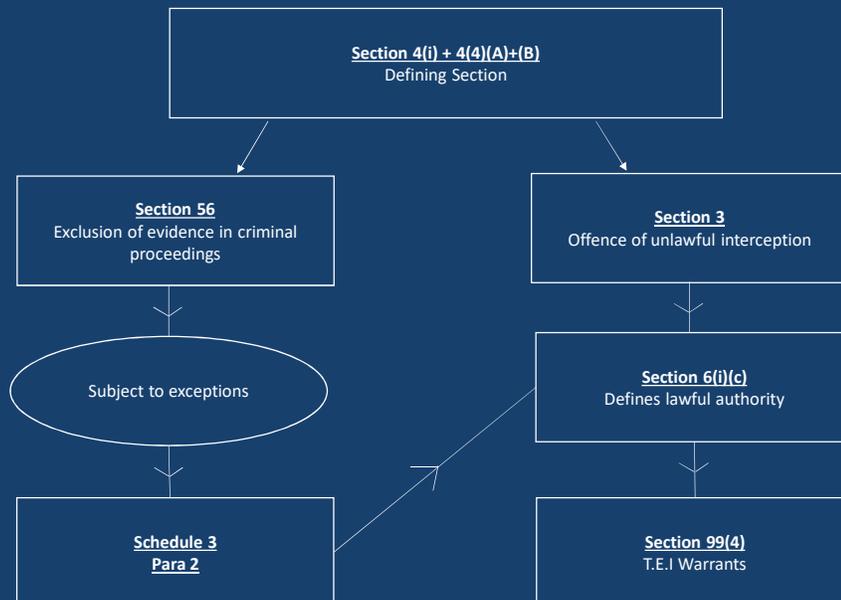
(a) is carried out in accordance with a warrant under Chapter 1 of Part 2 or a bulk interception warrant, or

(b) is authorised by any of sections 44 to 52,

is to be treated as lawful for all purposes.



The Investigatory Powers Act 2016



List of Potential Outstanding Challenges

- A) Can the evidence be said to be reliable at all? The Crown has not provided sufficient material to demonstrate that the system was reliable and the data accurate.
- B) The failure by the French to comply with its own legal code and the consequent breaches of the Human Rights Act (1996) means the evidence should be excluded under section 78 PACE.
- C) Does the Schedule 3(2) exception relate to disclosure only and not to evidence? If so, evidence may be subject to the section 56 rule excluding it from criminal proceedings.
- D) Should a bulk warrant and not a targeted warrant, have been applied for? If the intercepting of all EncroChat communications was indiscriminate (bulk) then a Part 6 warrant would have been required, and not a Part 5. As such the intercept was unlawful under section 3.
- E) Is it possible to attribute the number to the Defendant? Very much case specific, but EncroChat data provides less scope for effective attribution compared to conventional phones, concerns regarding missing data and clustered timestamps help in challenging attribution.
- F) Await the judgment from the Supreme Court. The case may not be certified by the Court of Appeal yet and even if it is, not certain that the Supreme Court will agree. Any such appeal would likely be many months before being heard.