



Compelled Decryption

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What do you find most invasive?

- A. Having to provide your password to Law Enforcement Authorities (LEA)?
- B. Having your device hacked by LEA?
- C. Knowing that service providers (WhatsApp, Skype ...) are obliged to disclose certain information to LEA?

Suspect X uses a password to unlock his phone, suspect Y uses a fingerprint.

- A. Only suspect X can be forced to unlock his phone.
- B. Only suspect Y can be forced to unlock his phone.
- C. Both suspects can be forced to unlock their phones.
- D. Both suspects enjoy equal protection and cannot be forced.

Overview

- Introduction
- European framework: fair trial & right to remain silent
- National frameworks
 - Compelled decryption in Belgium
 - Compelled decryption abroad
- The use of evidence in court
- Discussion

Right to a fair trial

Reasonable
time



Independent
and impartial
judge



Presumption
of innocence

(Right to remain
silent or privilege
against self-
incrimination)

...

Compulsion?

E.g. sanctions
when
refusing to
cooperate

Does the privilege against
self-incrimination apply?

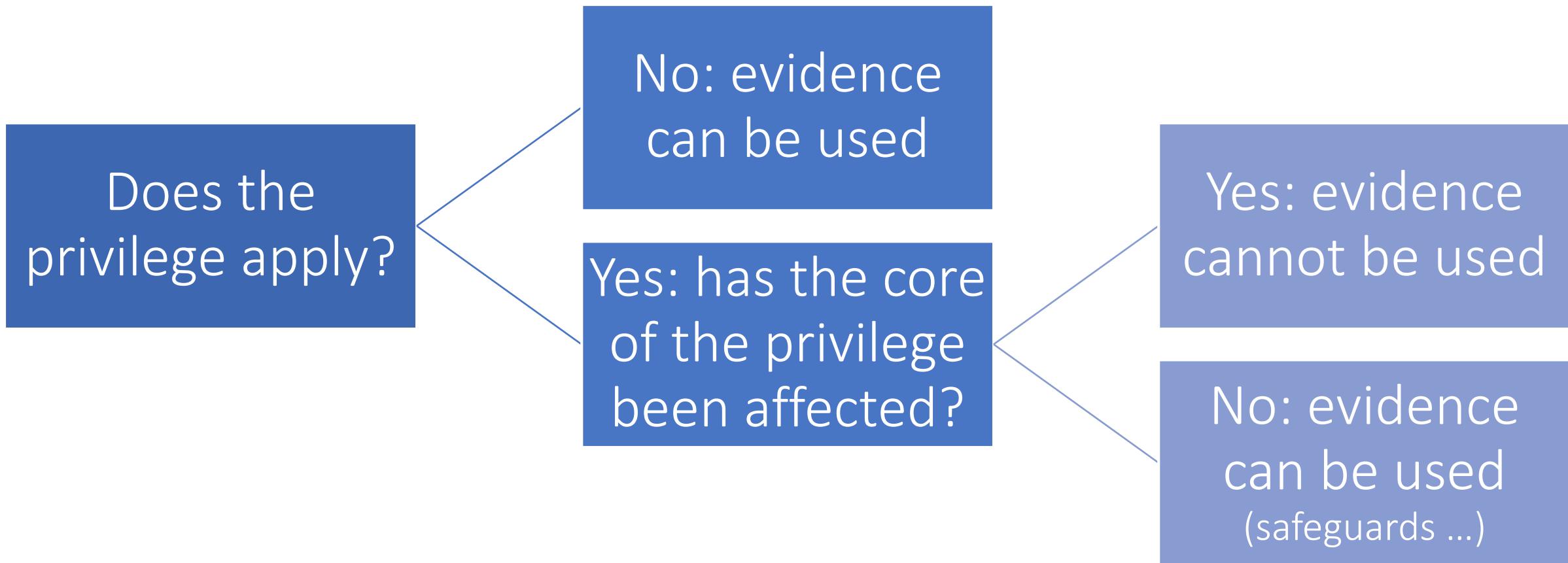
Incriminating
evidence?

Not: facts

In the scope?

Dependent of
the will of
the suspect

~~Documents~~
~~Urine~~
~~Blood~~
~~Hair (DNA)~~





Investigation
Public prosecutor
= Procureur des Konings/ du
Roi/ Parket/ Openbaar
Ministerie/ Officier van justitie



Investigating judge
Onderzoeksrechter/ juge
de l'instruction/
rechter-commissaris



Trial

Police Court

Correctional Court

Assize Court

Decryption order in Belgium

Art. 88^{quater} CCP

Duty to provide information

Suspects included? YES

Duty to actively cooperate

Suspects and family members
explicitly excluded

Court of Cassation 4 February 2020, [AR P.19.1086.N](#)

Constitutional Court 20 February 2020, [nr. 28/2020](#)



Compulsion?

Prison
sentence

Does the privilege against
self-incrimination apply?

Incriminating
evidence?

Cass.: access codes
are neutral

Proportionality?

Unreliable
evidence?

In the scope?

Cass. and Constitutional Court:
access codes exist independent
of the will of the suspect

Approved

- Belgium: 2 highest courts
- France: Constitutional Court

Less clear

- USA: Fifth Amendment
- UK: Section 49 RIPA 2000

Not (yet) allowed

- The Netherlands: draft was not adopted
- Germany: draft under discussion

The Police Can Probably Break Into Your Phone

At least 2,000 law enforcement agencies have tools to get into encrypted smartphones, according to new research, and they are using them far more than previously known.



[The Widespread Power of U.S. Law Enforcement to Search Mobile Phones](#)

**MOTHERBOARD**

TECH BY VICE

Encrochat Hack That Brought Down Hundreds of Criminals Faces Legal Challenges

Defense teams across the U.K. are arguing that chat messages obtained by law enforcement malware should not be used as evidence in court.

By [Joseph Cox](#)

October 20, 2020, 3:00pm



IMAGE: YOUTUBE

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JOSEPH COX

08.12.20

[Tech](#)**Sinaloa Cartel Used Encrypted Phone Network Hacked By Police, FBI Document Says**

Has evidence been legally obtained?

Yes: evidence can be used in court

No: has the right to a fair trial been respected in the case as a whole?

Yes: evidence can be used

No: evidence has to be excluded or reduction of sentence ...

Sources

- C. CONINGS & J. KERKHOFS, “U hebt het recht te zwijgen. Uw login kan en zal tegen u worden gebruikt? Over ontsleutelplicht, zwijgrecht en *nemo tenetur*”, *NC* 2018, 457-4725.
- C. CONINGS & R. DE KEERSMAECKER, “To save but not too safe: hoogste Belgische rechters zien geen graten in het decryptiebevel voor de verdachte”, *T.Strafr.* 2020, 163-175.
- D. VAN TOOR e.a., “De ontgrendelplicht in rechtsvergelijkend perspectief (deel 1 en 2)”, *Computerr.* 2020, nr. 131 en 179.
- S. ROYER & W. YPERMAN, “Wankele argumenten van hoogste Belgische hoven in uitspraken over decryptiebevel”, *NC* 2000, 441-445.
- M. HORSEELE & A. CLAES, “Nemo tenetur ontsleuteld (deel 1 en 2)”, [LCPL blog](#).
- ...

Up to you ...

- How expensive and time consuming is hacking an IT system?
- Is it possible to keep parts hidden from Law Enforcement Authorities (LEA) when providing your password? Can kill codes easily be implemented in IT systems?
- Would you feel safer or less safe if LEA would no longer be allowed to hack our IT systems?
- Should a suspect who discloses his or her password, benefit from a lower sentence?