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Transborder access to electronic evidence

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The Criminal Procedure Act of 1981

- General provisions, electronic evidence not regulated specifically
- No Norwegian case law available regarding transborder search for electronic evidence



Section 192:

"If any person is with just cause suspected of an act punishable pursuant to statute by imprisonment, a search may be made of his residence, premises or storage place in order to undertake an arrest or to look for evidence that may be seized or on which a charge may be created. (...)"

Does this apply also to transborder search?



Section 203:

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"Objects that are deemed to be significant as evidence may be seized until a legally enforceable judgement is passed. The same applies to objects that are deemed to be liable to confiscation or to a claim for surrender by an aggrieved person."

The term "objects" include electronic evidence, bank accounts, domain names etc.



Section 210

- "A court may order the possessor to surrender objects that are deemed to be significant as evidence if he is bound to testify in the case. (...)

If delay entails a risk that the investigation will be impaired, an order from the prosecution authority may take the place of a court order. The decisions of the prosecution authority shall be submitted to the court for approval as soon as possible."



Section 208

- "Every person who is affected by a seizure may immediately or subsequently require the question whether it shall be ratified to be brought before a court. The prosecuting authority shall ensure that any such person shall be informed of this right."



Legal theory

- The issue of transborder search for electronic evidence in criminal cases is not discussed in Norwegian legal theory, with a few exceptions.
- According to "Lov og rett i cyberspace", Inger Marie Sunde 2006, page 274, Norwegian law enforcement may access electronically stored data in the same way as the account owner legally could, as long as there is a valid search warrant, and as long as the user name and access codes are available.
 - The "lock and key-analogy": can the police use a key that is found during a search?
 - The "cell phone-analogy": can the police answer a phone that is found during a search?



Practice regarding transborder access

- No numbers are available
- The typical case of access to data stored in other countries: e-mail and/or social media, access is based on consent from the suspect, in accordance with Article 32
- A smaller number of cases: requests for expedited preservation, followed by a request for mutual legal assistance.
 - Example 1: the Haugerud murder case (Facebook data)
 - Example 2: the July 22 investigation against Anders Behring Breivik (various data)



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Specific issues

- Password and user name found on a piece of paper during a search
- "Always on" cloud services on smartphones etc: the "drug dealer in the park"-scenario
- Businesses with thin clients: all data stored in a different country



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