

Article 15

A question of balance

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presentation agenda

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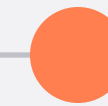
**General
requirements
under the Article
15**

2



**EAP 2013 Article
15 study**

3



**Evaluating
progress:
Updated Article
15 Study (2017)**

Article 15

What is it all about?

Convention on Cybercrime

**substantive
criminal
law**

**procedur
al law**

**jurisdiction,
Internation
al
cooperation**

Article 15

Effectiveness of law enforcement while safeguarding human rights

Article 15 – Conditions and safeguards

(1) Each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Section are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties, including rights arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality.

(2) Such conditions and safeguards shall, as appropriate in view of the nature of the procedure or power concerned, inter alia, include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure.

(3) To the extent that it is consistent with the public interest, in particular the sound administration of justice, each Party shall consider the impact of the powers and procedures in this section upon the rights, responsibilities and legitimate interests of third parties.

Article 15

Horizontal application

ARTICLE 16
Expedited preservation of computer data

ARTICLE 16
Expedited preservation and partial disclosure of traffic data

ARTICLE 16
Production order

ARTICLE 16
Search and seizure of stored computer data

ARTICLE 16
Real-time collection of traffic data

ARTICLE 16
Interception of content data

ARTICLE 15: CONDITIONS AND SAFEGUARDS

Article 15

Which conditions and safeguards?

**Convention
on
Cybercrime**

**European
Convention for
the Protection
of Human
Rights and
Fundamental
Freedom
(ECHR)**

**Case-law of the
European Court
for Human
Rights (ECtHR)**

Conditions and safeguards

In a nutshell



Procedural powers must **comply with the rule of law**



Procedural powers must **pursue legitimate aim(s)**



Procedural powers must **be necessary in a democratic society**

Conditions and safeguards

Compliance with the rule of law

01 legal basis
There should exist a legal basis for a restriction in national law

02 accessibility
National legal must be accessible

03 precision & foreseeability
National law must be stipulated in precise and foreseeable terms

04 safeguards
National law must contain adequate safeguards against arbitrary application

Conditions and safeguards

National law pursues legitimate aims

01 criminal law arena

In accordance with laws on criminal procedure, police duties and powers, operative and detective activities, ...

02 national security arena

In accordance with laws on national security and intelligence

Conditions and safeguards

Necessity & proportionality in democratic society

01 suitability

Procedural power is suitable to achieve the aim pursued

02 necessity

Aim pursued cannot be achieved by a power of lower intensity

03 Proportionality in the strict sense

Proper relation must be established between benefits for the law enforcement and the harm to the human rights and freedoms

Article 15 Study (2013)

Overview

Timeline

- **Autumn 2012: Questionnaire among project countries**
- **November 2012: Conference in Baku, Azerbaijan**
- **December 2012: Roundtable discussion in Strasbourg, France**
- **October 2013: Report presented in Kyiv, Ukraine**

Aims

- **To analyze implementation of Convention's procedural powers in project countries**
- **To assess whether the requirements set under Article 15 are fulfilled**
- **To give recommendations to the project countries**

Article 15 Study (2013)

Main findings

Expedited preservation (Art. 16) and partial disclosure (Art. 17)

None of the project countries implemented it as a standalone measure

Two countries demonstrated that they use production order or search and seizure in an expedited manner to give effect to Article 16

Preservation order in Moldova modelled mostly upon the Convention, but significantly limited in scope

Article 15 Study (2013)

Main findings

Production order (Art. 18)

Most of the project countries did not implement it as a standalone measure

Most of the countries apply search and seizure power to give effect to Article 18 of the Convention

Conditions and safeguards sometime too burdensome on the law enforcement

Article 15 Study (2013)

Main findings

Search and seizure of stored computer data (Art. 19)

None of the countries had specific provisions on computer-related search and seizure. In all countries, traditional search and seizure (referring to “objects” or premises) were used

Powers to expeditiously extend search to system lawfully accessible from the initial one (Article 19/3) and computer related seizure (19/4) were not implemented

In general, there existed sufficient level of conditions and safeguards. Absence of judicial review in the Belarus was noted, however it was concluded that this issue is more general in nature and touches upon criminal procedure system as a whole

Article 15 Study (2013)

Main findings

Real-time collection of traffic (Art. 20) and interception of content data (Art. 21)

Some countries had data retention systems in place, while in others real-time monitoring of traffic data was not possible

In general, most important conditions and safeguards were implemented. However, there were also noted significant gaps (little differentiation between surveillance of traffic and content data, possibility to apply interception order to overly broad catalogue of offences, absence of proper supervision in some countries, ...)

Article 15 Study (2013)

Main findings

Main problems

- Preservation and production orders not adequately implemented. This limited the ability of law enforcement to use less intrusive measures instead of search and seizure
- In general, inadequate differentiation between various categories of data (computer data in general, subscriber information, traffic data, communication content data)
- Inadequate implementation of Article 19 para 3 and 4 (extended search, seizure of data)
- Operation of surveillance systems not transparent enough. Safeguards not on the optimal level

Article 15 Study (2013)

Overview

Main challenges

- **Sometimes limited access to national sources of law (inadequate translations, working on excerpts instead of complete statutes, etc.)**
- **National laws constantly amended, with different stakeholders involved**
- **Generally, low level of implementation of procedural powers made it difficult to assess whether conditions and safeguards, as a horizontal requirement, are adequately set**

Updated version of Article 15 study

Why do we need it?

Developments in the project countries (EAP)

- In the last 5 years, laws of project countries have undergone significant changes
- Council of Europe has provided extensive assistance in harmonization with the Convention
- There is much better understanding of the procedural powers and corresponding human rights safeguards
- It is necessary to evaluate the progress made in recent years

Developments in the CoE and the EU

- Landmark cases decided by the ECtHR, significantly influencing law enforcement surveillance operations in the light of human rights requirements (Zakharov v Russia, Szabó and Vissy v. Hungary)
- Developments in the EU data retention systems and its impact on other countries
- Human rights safeguards are now different than they were 5 years ago!

**Questions,
comments?**

Thank you!