

17.10.2018

# AFRICAN FORUM ON CYBERCRIME

Policies and Legislation, International Cooperation and Capacity Building

*The jurisdictional challenges of the Electronic Evidence in the cloud*

**Addis Ababa, 16-18 October 2018**



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

**Real world**



**BORDERS**

**Online world**



**criminals**



**LE/Justice**



**NO  
BORDERS**



**BORDERS**

**The main problem**



# The virtual crime scene





## Pending issues in cybercrime Belgium and E.U.

### **Data Retention (annulment of legislation)**

- EUCJ 8th April 2014 (EU Directive 2006/24/EC)
- EUCJ 21st December 2016 (Sweden + UK)
- Belgian Supreme Court 11th June 2015 (old law)
- Belgian Supreme Court 19th July 2018 (new law)

### **Cooperation with ISP's**

Yahoo! – case (subscriber records)

- Court Dendermonde 2nd March 2009
- Court of Appeal Antwerp 20th November 2013

Skype – case (content)

- Court Mechelen 27th Oktober 2016
- Court of Appeal Antwerp 15th November 2017 (now pending @ SC)

### **Transborder Direct Access to e-evidence**

- new Belgian legislation on network searches

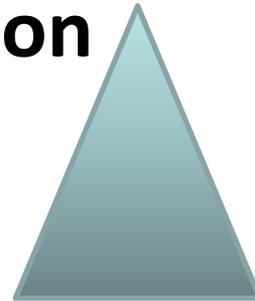


# What do we need and how do we need it?

**Subscriber information**

**Log files**

**Content**



**Quick freeze**

**International collaboration**

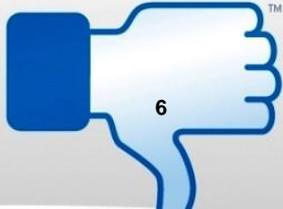
**Single point of contacts (SPOC)**





 You and 82 others don't give a shit.

The  
**Dislike**  
Button





# The Yahoo! case

A Belgian attempt to find a way and to take a position in the war on cybercrime and to cope with the **cyberparadox** of virtual presence and physical absence...





- **The reasoning:**

- Yahoo Inc.! is (virtually and economically) present in Belgium
- MLAT = when you think **extra-territorial**
- Direct request = when you think **territorial**
- Available for consumers = available for justice

- **The result:**

- A Belgian request
- from a Belgian magistrate
- handed over in Belgium
- to an ISP that can be found in Belgium





- **Court of First Instance Dendermonde – March 2<sup>nd</sup> 2009**
  - **Conviction: YAHOO! has to collaborate**
- **Court of Appeal Gent – June 30<sup>th</sup> 2010**
  - **Acquittal...**
- **Supreme Court – January 18<sup>th</sup> 2011**
  - **Cassation: broad interpretation: also foreign ISP's!**
- **Court of Appeal Brussels – October 12<sup>th</sup> 2011**
  - **Acquittal...**
- **Supreme Court – September 4<sup>th</sup> 2012**
  - **Cassation: valid request!**
- **Court of Appeal Antwerp – November 20<sup>th</sup> 2013**
  - **Conviction: YAHOO! has to collaborate**
- **Supreme Court – December 1<sup>st</sup> 2015**
  - **Cassation: Yahoo must deliver BSI at first request of the Belgian prosecutor**



- **Court of First Instance Dendermonde – March 2<sup>nd</sup> 2009:**
  - Commercially present: “even if it may be through the internet or ‘virtually’”
  - Presence for economic purposes = presence in terms of justice
  - Yahoo! is a provider of an electronic communications service according to article 46bis BCCP = clear intention of legislator
  - Yahoo! is free to exclude the IP range of the Belgian IAP
  - Duty of cooperation extends to any ISP that is displaying services in Belgium



- **Supreme Court – January 18<sup>th</sup> 2011:**
  - Not only the Belgian operator
  - “any person providing services of electronic communications, such as inter alia the transmission of communications data”
  - “any person offering a service that entirely or mainly consists in transferring signals through electronic communications networks”



- **Supreme Court – September 4<sup>th</sup> 2012:**

*“The circumstance that the Public Prosecutor sends, from Belgium, his written request as meant in Art. 46bis of the (Belgian) Code of Criminal Procedure, requesting the cooperation of the operator of an electronic communication network or of the provider of an electronic communication service established outside of Belgian territory, to a foreign address, **does not invalidate the request.**”*



## **Court of Appeal Antwerp - November 20<sup>th</sup> 2013:**

- Confirms point of view of the Court of First Instance of Dendermonde
- No formalities prescribed for the demand
- Territorial presence (office in Belgium is not needed)
- Yahoo! is a provider of an electronic communications service according to article 46bis BCCP
- Yahoo! Has to bring the information
- No rogatory commission needed
- If Yahoo! doesn't want to collaborate: exclude IP

**Pecuniary penalty of 44.000  
Euros (1/2 suspended  
penalty)**



- **Supreme Court – December 1<sup>th</sup> 2015:**

- Yahoo = territorially present in Belgium
- Submitted voluntarily to Belgian law
- Doesn't require any substantive act abroad
- No extra-territorial jurisdiction = no MLA needed
- Production order (art. 18 CCC) = domestic

**<= Subscriber information: Yahoo!**

**Content data: Skype =>**



## Court of First Instance of Mechelen October 27th 2016: **conviction**

- Official order from the investigating judge on September 7th 2012
- Official refusal to collaborate on August 27th 2013
- Skype is a provider of a electronic communication service
- No extra-territoriality, Skype is economically present
- Standardized reactions of clear non-collaboration
- Technical impossibility was created by Skype itself, no excuse

***“Court considers the crime serious taken in consideration the focus on economical gain without any responsibility towards the Belgian judicial authorities”***



## Court of Appeal of Antwerp November 15th 2017: **conviction**

*The fact that the accused SKYPE is a **provider of an electronic communication service** is apparent from the necessary intervention of SKYPE in the electronic communication by its users in two senses: firstly, all users of SKYPE have to download the software of SKYPE on a computer, tablet, etc. and secondly, at the start of each communication, each user of SKYPE must make a connection with the server of SKYPE, whereupon SKYPE performs a verification and authentication of the relevant users' login data. The fact that the ultimate communication takes place over the Internet and not via a proprietary network of SKYPE does not detract from this position.*



## Court of Appeal of Antwerp November 15th 2017: conviction

*With regard to the obligations..., which entails the obligation to provide technical assistance for the wiretapping measure, the Court considers that the position of the Court of Cassation, as expressed in its judgment dated 01.12.2015, also applies here in full: the technical cooperation must be provided **by the operator of the communication network or the provider of the telecommunications service in Belgium, whenever the Belgian examining magistrate requests this.** Any other interpretation would completely erode this legal obligation and make it unworkable in practice.*



## Court of Appeal of Antwerp November 15th 2017: **conviction**

*SKYPE states in ... its conclusion that it does not have access to the signals sent by its users via the Internet, and that it could not obtain this access "without making at least substantial changes to its software, working method and physical infrastructure". **This implies that, if the necessary modifications were made to its technical installations and its working method, SKYPE could gain access to the signals sent by its users and it could therefore provide technical assistance to the examining magistrate if this were ordered.** For example, the accused SKYPE itself states ... that it has recently begun storing the content of "instant messaging" Communications, being the text messages that can be sent to each other by SKYPE users online.*



## Scope of the Budapest Convention

### Criminalising conduct

- Illegal access
- Illegal interception
- Data interference
- System interference
- Misuse of devices
- Fraud and forgery
- Child pornography
- IPR-offences

+

### Procedural tools

- Expedited preservation
- Production orders
- Search and seizure
- Interception of computer data

+

### International cooperation

- Extradition
- MLA
- Spontaneous information
- Expedited preservation
- MLA for accessing computer data
- MLA for interception
- 24/7 points of contact

Harmonisation





# Budapest Convention

## “International Cooperation Tools”

Crucial cyber power gear:

1. Spontaneous information sharing
2. Expedited preservation and disclosure of data
3. Transborder evidence gathering
4. 24/7 network

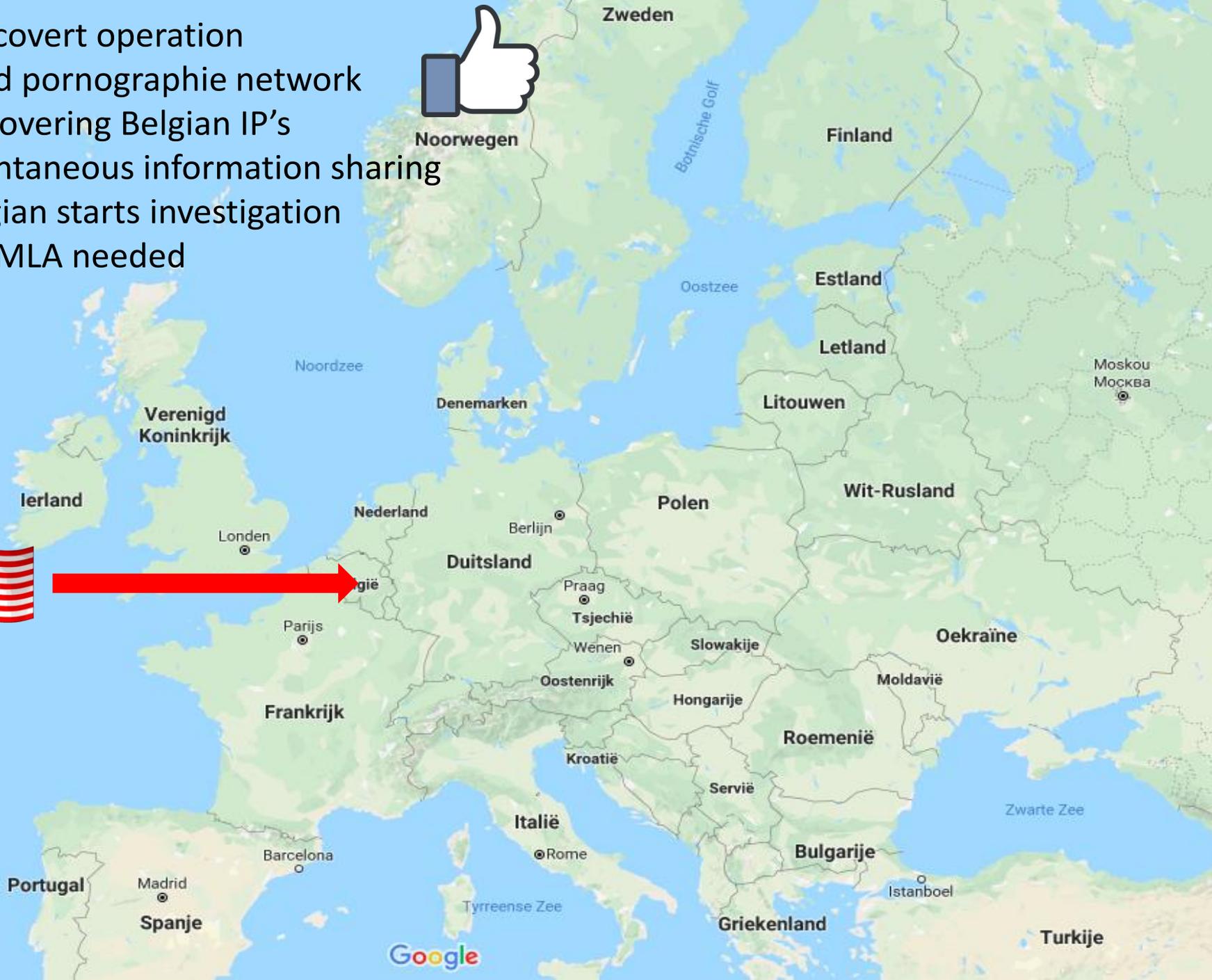




## ***Spontaneous Information (Article 26 – Budapest Convention)***

- The authorities from a Party, within an internal investigation, discover that some of the information they obtained must be forwarded to the authorities of other Party
- It can be done if the information seems to be useful or necessary to the beginning or the developing of an investigation respecting to a criminal offence in the framework of the Convention
- According to Article 26, 2, this dispatch of information can be submitted to certain conditions, mainly of confidentiality

- FBI covert operation
- Child pornographie network
- Discovering Belgian IP's
- Spontaneous information sharing
- Belgian starts investigation
- NO MLA needed



- Belgian investigation on target
- IP's all over Europe
- Spontaneous information sharing
- NO MLA needed

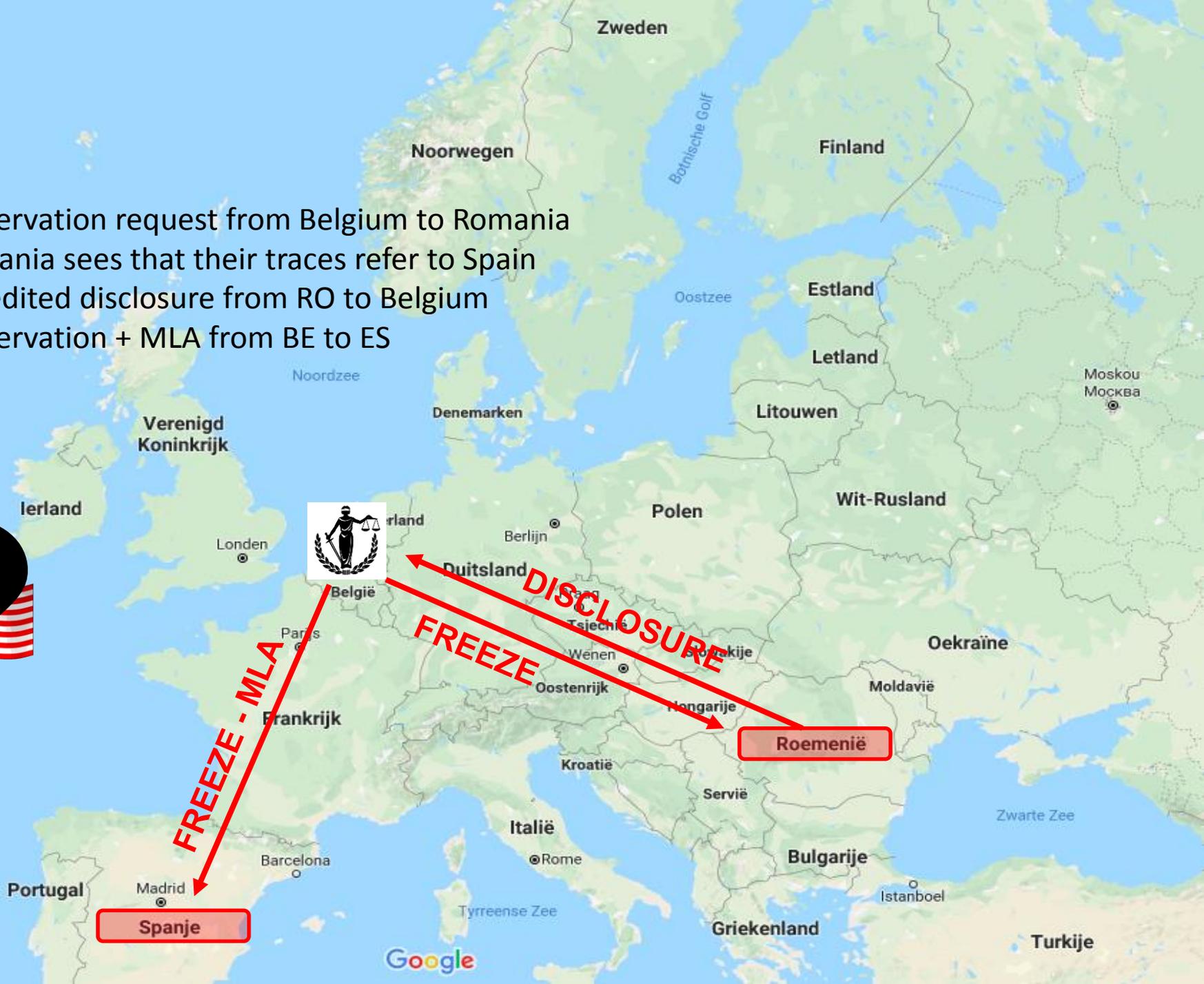




***Expedited preservation and disclosure of data  
stored in a computer system  
(Article 29 and 30 – Budapest Convention)***



- Preservation request from Belgium to Romania
- Romania sees that their traces refer to Spain
- Expedited disclosure from RO to Belgium
- Preservation + MLA from BE to ES





## ***Trans-border access to stored computer data (Article 32 – Budapest Convention)***

- *Possibility given to law enforcement from a Party to obtain evidence stored in a computer physically located in other Party's territory*
- *Without any request of international cooperation if, during a concrete investigation, the officers in charge*
  - *need to obtain **open source** information from a computer located in a foreign country; or*
  - *access data with the **lawful and voluntary consent** of the lawfully authorised person*

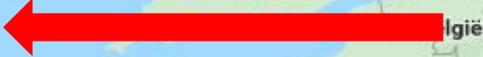


## No OSINT – No voluntary consent?

- House search
- The screen of the computer is open
- You see the evidence is there
- Stored on a foreign server (webmail, cloud storage, ...)
- **What do you do?**



- Search warrant in Belgium
- Computer is open
- Hotmailaccount is open
- Do you go in?
- Without voluntary consent?
- Without MLA?





# Competence for collection of evidence in another country

- The explanatory report of the Convention on Cybercrime:  
*“293. The issue of when a Party is permitted **to unilaterally access computer data stored in another Party without seeking mutual assistance** was a question that the drafters of the Convention discussed at length. There was detailed consideration of instances in which it may be acceptable for States to act unilaterally and those in which it may not. The drafters ultimately determined that it was not yet possible to prepare a comprehensive, legally binding regime regulating this area. (...) They agreed not to regulate other situations until such time as further experience has been gathered and further discussions may be held in light thereof. In this regard, Article 39, paragraph 3 provides that **other situations are neither authorised, nor precluded.**”*
- **Additional protocol** under construction!





## The Belgian example

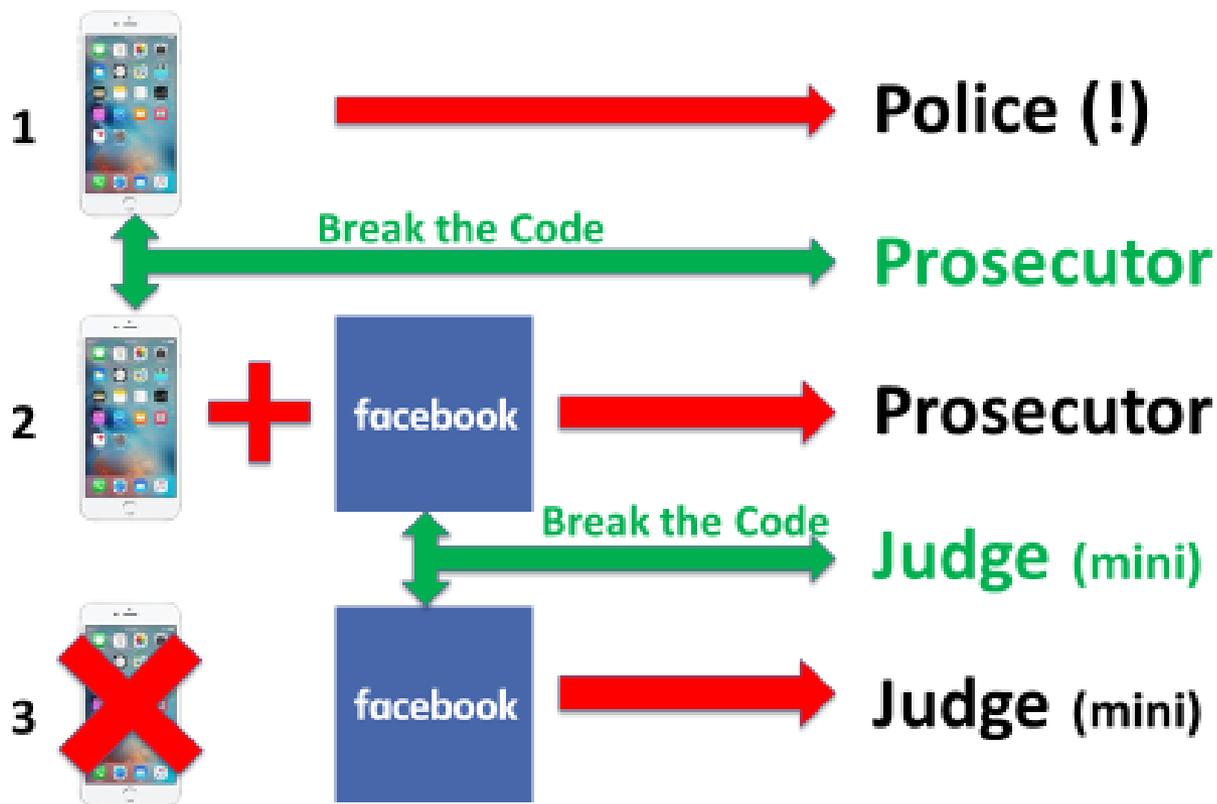
### Article 39bis Belgian Criminal Procedure Code:

- Competence of a magistrate
- Can order search in computer system
- Can extend the search to another computer system or to a part of another computer system which is located elsewhere
- **When it seems that the data which is discovered is not stored on Belgian territory, the data is only copied:**
  - Ministry of Justice informs the State involved, if it can reasonably be determined





## Transborder Direct Access: e-evidence on device & network searches





# 24/7 Network (Article 35 – Budapest Convention)

- Obligation to create a contact point available 24x7
- General objectives of these contact points
  - to facilitate international co-operation
  - giving technical advisory to other contact points
  - activating the proper mechanism to expedited preservation of data
  - urgently collecting evidence
  - identifying and discovering suspects



- Preservation request from Belgium to Romania
- Romania sees that their traces refer to Spain
- Expedited disclosure from RO to BE
- Preservation + MLA from BE to ES

