Electronic Evidence

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Electronic Evidence

Procedural Rights in the Context of Evidence-Gathering

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Online investigations and the challenges of dealing with electronic evidence in criminal proceedings

- Principles of dealing with electronic evidence
- Common procedures for recognizing and handling evidence on digital devices in Germany
- International investigations (search and seizure – obtaining evidence from the Internet, admissibility)
- challenges and possible solutions

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quick introduction

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- different kinds of electronic evidence - examples

→ Think of digital devices in your daily life

incl. :

- many SIM cards in moderns cars,
- smart home devices,
- smart phones,
- smart refrigerators,
- washing machine and other electronic / smart devices

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Principles of dealing with electronic evidence

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- no specific regulations in the (German) Criminal Procedure Code
- various (soft) regulations within different authorities (e.g. police, federal authorities like the German Federal Office for Information Security (BSI))
- best practices and efforts to certificate certain IT forensic software
- general principles of dealing with analogue evidence also apply to digital / electronic evidence

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Principles of dealing with electronic evidence

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key aspect:

- ensuring authenticity of digital data
- chain of custody
- proper and detailed documentation of access to data, its storage, copying and analysis
- analysis and further work with digital data is only done with a copy, not the original set of data
- proper documentation of the police staff that is involved and the IT forensic software that is being used

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How is digital evidence handled in court??

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limited categories of evidence

- witness testimony
- expert testimony
- documentary evidence
- evidence by inspection(e.g. photos, videos, tangible objects like a gun)

▶ Digital evidence has to be presented in one of those categories.

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How is digital evidence handled in court??

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- case examples (WhatsApp messages, child porn files, telecommunication data)
- extra note on IT expert witnesses
- analysis of Bitcoin evidence - extra group of Landeskriminalamt (state police) to collect and analyse bitcoin evidence across many cases

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Procedural rights (1)

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- challenging the gathering of evidence
- Challenging authenticity of e-evidence
- motion to call extra (expert) witness
- cross-examination
- motion not to admit certain evidence

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International investigations

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- **Increased relevance of electronic evidence in criminal investigations**
  - increased volume of cross-border requests submitted by EU authorities to OSPs in 2019 with a large majority of them issued by Germany (37.7% of requests), France (17.9%) and the UK (16.4%)
  - requests to access electronic data doubled in Poland and nearly tripled in Finland. Furthermore, emergency disclosure requests increased by nearly half in one year.

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International investigations (search and seizure – obtaining evidence from the Internet, admissibility)

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- case: Online webshop for selling drugs
- European Investigation Order to seize date in The Netherlands
- here: especially bank data or records of orders of the webshop
- first step: seizure of data according to national law
- second step: transfer – how? digital - by which means or analogue: print out?

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International investigations / admissibility

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- case law by the German Federal Court: based on the idea of mutual trust – evidence obtained by means of MLA / EIO is in general admissible
- if requirements under German procedural law are fulfilled
- and international cooperation according to law on mutual cooperation has been applied

- how about direct access to online data? →

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Proposed EU order

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European production and preservation order (EPO)

- relates to specific telecommunication data and social media files
- doesn't address the regular access to electronic evidence in other countries
- example: access to digital data seized from a webserver in France or Spain
- controversy discussion at the European Parliament; see e.g.: *review of Stanislaw Tosza in* Eucrim 4/2018

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another example: access to Facebook data

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- *access to an open account*
- *access to a closed account of a suspect*
  - *invitation to any other user (e.g. "Micky Mouse")?*
  - *restricted access – undercover agent needed?*
- *suspect/ witness opens his account to be used by police*

▶ *for more details see: Eucrim 3/2012 (p. 137 et seq.)*

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Challenges and solutions

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- **challenges in retrieving relevant data from abroad**
  - **length of relevant procedures in place**
  - **language barrier**
  - **different legal procedures and competences**
  - **very limited time that data is stored**
  - **different standards on cooperation by private companies**
  - **encrypted communication**
  - **sophisticated means of communication**

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Challenges and solutions

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- **Training, knowledge exchange and a centralised approach**
  - technical training of judges / lawyers
  - hiring more and better trained staff at the police (and in judiciary)
  - technical equipment in court
  - special point of contacts with private companies
  - GPEN – network of the IAP
  - SIRIUS – exchange platform of Europol

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Challenges and solutions

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- **issues at domestic level**
  - similar issues as before
  - technical equipment in court
  - technical training of judicial staff
  - massive volume of data
  - new legal tools to deal with encryption?
  - despite specific rules on electronic evidence – its presentation and admission is mostly not a problem

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Procedural rights (2)

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- limited challenges to cross-border gathering
- motion not to admit certain (internationally gathered) evidence
- in theory possible: motion to gather additional / exculpatory evidence across borders

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Questions / Comments?
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For any comments or questions, please feel free to contact me:
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