The challenges of investigation and prosecution in the digital environment

Obtaining evidence in the *cloud*
Internet is globally expanded
Internet is globally expanded

• it is used by **everybody in the planet**

• cybercrime/obtaining of e-evidence must be approached as a **global phenomenon**

• the **international dimension** is essential to a proper understanding of the whole reality of computer criminality/e-evidence
“here” is “no where”
“here” is “no where”

- *Evidence is also global*

- Evidence is not “here”

  • Can be: if stored in *devices*

  • But probably will also be *somewhere in the world*
“here” is “no where”

• Need to obtain evidence outside the borders of the State

• No alternative – crime is no longer “national”
difficult

questions
“difficult” questions:

1 - the **location** of a crime – where it was committed
   - which is the **applicable substantive law**
   - which is the **competent jurisdiction** (police, prosecutor, judge)

2 - **jurisdiction, as a limit** to investigation
   - **cross border** investigations
   - **investigation in the “cloud”** – mainly access to data stored in the “cloud”
Convention on Cybercrime of the Council of Europe - Budapest Convention

• signature on 21 November 2001 / in force since July 2004

• 60 States signed/ratified (by June 2017)
  – most of the 47 Council of Europe Members have already signed the Convention
  – a number of them ratified it
  – all the European Union Member States have signed the Convention
  – Also Canada, Japan, South Africa, the United States, Australia, Panama, Dominican Republic

• 11 more States to ratify / invited to access (by June 2017)
  – from Europe, Africa, Asia, Latin America and Oceania
Article 29
Expedited preservation of stored computer data

Article 30
Expedited disclosure of preserved traffic data

Article 31
Mutual assistance regarding accessing of stored computer data

Article 32
*Trans-border access to stored computer data with consent or where publicly available*

Article 33
Mutual assistance regarding the real-time collection of traffic data

Article 35
*24/7 network of contact points*
Article 32

Trans-border access to stored computer data with consent or where publicly available

A Party may, without the authorisation of another Party:

a - access publicly available (open source) stored computer data, regardless of where the data is located geographically; or

b - access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.
(Açores)
• Unknown location
• Multiples locations
• Location outside a State Party
Police officers find an already know criminal in a public park. They have a legal order to arrest him.
He was online. 
Besides of other, he had two windows opened:
Dear Alexander:

I found, on the Internet the product we have been looking for. I already ordered and paid. You will receive it in a week. Please, proceed like we agreed, and transfer to my account my share.

Thanks.

Pedro
browsing opioids

sort by: bestselling

NY Heroin Stamp Bags (Very potent)
vendor: PCubeSensei
ships to: United States

3 Yr Spanish opium 1g (trad Smokeable Opium) Very High Alk %
vendor: The Scurvy Crew
ships from: Spain
ships to: Worldwide

High Quality! - 500mg Afghan #3 Best in UK! Next Day Delivery! BestOn3
vendor: BestOn3
ships from: United Kingdom
ships to: United Kingdom
Dear Alexander:
I found, on the Internet the product we have been looking for.
I already ordered and paid.
You will receive it in a week.
Please, proceed like we agreed, and transfer to my account my share.
Thanks.
Pedro
Questions:

• Silk Road – unknown location

• Gmail
  - known?
  - USA?
Questions:

• Silk Road – unknown location

• International cooperation?
  • Impracticable

• Options?
  • Budapest Convention – 32b
  • Broader options
Questions

• Gmail – USA?

• International cooperation?
  • Practicable –
    • but slow, bureaucratic and uncertain

• Options?
  • Budapest Convention – 32b
  • Broader options
Broader options
Budapest Convention – 32b

• consent to access:
  • information can be used

Portuguese law

• consent to access:
  • information can be used

• without consent
  • Article 15, 1 and 5 of the Cybercrime Law
  • A Prosecutor can give the order
    • to look at Gmail and the Silk Road profiles
    • and copy information
Recent work of the Council of Europe

• Transborder Access Group
• (2013/2014)
Recent work of the Council of Europe

• Transborder Access Group

  • each day more crime takes place online - more evidence is online

  • stored in foreign or unknown jurisdictions

  • these crimes violate human rights, privacy and other individual rights
Recent work of the Council of Europe

• Transborder Access Group
  • technological developments, including cloud computing, use of multiple devices and platforms, or encryption, render the gathering of electronic evidence for criminal justice purposes highly complex;
  • mutual legal assistance procedures are inefficient and are often not applicable
  • an enormous percentage and cases are abandoned because there is no realistic possibility of obtaining data
Recent work of the Council of Europe

• Cloud Evidence Group
• (2015/2017)

• Proposal of an additional protocol to the Budapest Convention
Cloud Evidence Group (2015.....)

• Revisit the notion of “consented access“ (Article 32, b, Budapest Convention)?

• Is remote access “not consented” admissible?

• Can social networks and webmail services provide information from the users?

• **Scope of the access without consent** – copy, alter, remove?

• Notification?

• Access not consented to data which location is not known?
(Chaves)