Problems in using digital evidence in Latvia

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Any digital evidence contains the requirement to ensure the capability of an independent third party to reach the same result when to verifying the relevant evidence or its result based on the same facts as done by prosecution.

On the basis of mentioned issue and according to the practice of defence lawyers, currently two digital evidence groups can be distinguished:

1) Photos in digital format,
2) Records of persons` conversations in digital format.

As regards the photos acquired from files obtained by using digital cameras, the main problem arises because of two reasons:

1) it is not specified in what format pictures are allowed to be taken – this leads, for example, to the fact that inspection of scene of action, items of evidence are photographed in such format, which is being modified already during the shooting, and in which the signs of modification can be hardly detected, while the RAW format, which is defined as the only allowed format in many countries, is not being used at all.

2) only photos, which often are black-and-white, are added to the criminal case materials; there is no requirement to attach the files with the respective photos in digital format, meaning that in case of doubt there is no possibility to verify or compare the photos, not to mention more detailed research.

The said issue is not resolved. Latvian courts completely ignore the defence objections regarding inadmissibility of such evidence, and currently there are no indications for any positive changes in legislation in the near future.

When it comes to persons` conversations in digital format (records obtained by means of interception) there are more problem issues:

One group consists of the following:

1) The access to full records of conversations is denied (only fragments of conversations are attached to the criminal case);
2) The access to all conversations obtained in the result of interception is denied (for instance – only one from ten conversations).

These restrictions hinder proving the context in which the certain phrases are being spoken.

Secondly, often full records of conversations allow involved persons to restore the course of events more precisely and completely.

In reply to court and lawyers` requests to deliver all full records, the investigatory institutions reply claiming that undelivered records are protected by the State secret.
Courts accept such responses.
Currently the work on development of new Law on Investigatory Operations is taking place, and there is struggle for the regulation to be included, which would provide an opportunity for the person subject to interception to receive records of all his/her (the respective person`s) conversations, which were recorded by the investigatory institutions.

It has to be noted that the Law on Investigatory Operations is adopted in 1993 and is still effective in Latvia.

From technical perspective problem of verification of conversation records are caused by the fact that:

-recording of the large part (maybe all) telephone conversations is performed by the Constitution Protection Bureau, but since the activity of this institution is protected by the Law on State Secret, it is impossible to find out what kind of equipment was used for recording of the conversations.

If there is no information on the recording equipment, then it is impossible to determine the signs of editing, because it is impossible to make sure which record is the main or original one and which is only a coy.
It is so because such records are mostly without metadata and it is not possible to verify the authenticity thereof.
Any defence lawyer can make sure of existence of such metadata by using such simple web-to-find program as Hex.Editor.

The following is possible if the one is being dishonest:
- one record is being edited (A)
- it is played and a brand new record is recorded with the aid of radio microphone (B)
- the third record is made of it (C).
When the record C is delivered to expertize the authenticity thereof is being proved by disc B.

The positive progress:

In 2008 the Methodology for Carrying out Expert Examination was approved, which shall be mandatory for the experts when carrying out expert examination.
One must admit that for some time the defence did not pay enough attention to the said methodology, but during the last year together with considerable increase of evidence in the format of conversation records the respective methodology is being more often used, however it shall be concluded that the respective experts still ignore the procedure stipulated in the methodology.

The methodology requires:
-the recording equipment to be identified,
-the recording conditions to be specified.

The methodology determines, for instance, that:

-for digital records signal amplitude coding using 8 bit resolutions shall be inadmissible during any of sound processing stages,
-the digital record quality indices shall be not less than 16 bit 8 kHz, mono,
-the use of voice activation function for recording equipment is inadmissible.

According to the methodology the copies converted from one format to another (from WAV to CDA, from WMA to WAV) shall be considered as being the copies according to which it is impossible to determine whether the record has been edited or not, as well as if the record discrediting frequency is being altered.

Currently the deference is paying extremely high attention to mentioned issues, and use inobservance of these requirements for contesting the respective evidence, however the court, in most cases, recognizes inobservance of the Methodology requirements as irrelevant.

I can only express my hope that at some point the court shall respect both the spirit and letter of law, and shall respect relevant conclusions of European Court of Human Rights in its decisions.

Regards,

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