

## Digital evidence – admissibility

To orient you briefly about the Norwegian legal situation, I will shortly answer three questions:

1. During an investigation, what digital evidence are the police allowed to collect?
2. What parts of the collected digital evidence may be presented in court?
3. Are there any rules that prevent the collected digital evidence from being presented in court?

I might as well start with the last question, since the answer is simple: In Norway, there are in principle no general rules, that makes any kind of evidence inadmissible. Even if the police collect evidence without the courts acceptance, or contrary to the court's decision - or even in an illegal way - it still will be valid as evidence. The Norwegian situation is not as in UK or in US, where evidence may be found inadmissible due to several reasons.

In Norway, the principle of free evaluation of evidence contains that both the prosecutor and the defense lawyer have right to present all the evidence they have, independent of how they have been collected. In that way the case is supposed to be more enlightened and the court will have a better foundation for its decisions. Of course, the court has to consider if the evidence has sufficient relevance and probative weight before building a judgment upon it.

In our Criminal Procedure Act section 294, we find one side of this principle:

The court shall in its official capacity ensure that the case is fully clarified. For this purpose it may decide to obtain new evidence and to adjourn the hearing.

The section describes that the court is responsible for the case to be fully clarified, and not the parties. Therefore the court shall have every relevant evidences brought its table. It is not possible to hide away evidence by declare it inadmissible due to its type, or to the way it has been collected. Therefore, the answer on the question is that there is no law that prevents the collected digital evidence – or others – from being presented in court.

Of course, there is no rule without exceptions. The Criminal Procedure Act gives the court power to declare evidence inadmissible in some special situations. First off all, the court may stop presentation of available evidence when it has got enough. According to section 292 the court may stop evidence that

- are of no significance of the substance of the judgment, or
- relates to matters that already have been adequately proved, or
- obviously has no probative force.

Further on, the European Human Rights and Norwegian law protecting human rights will work as an outer limit. I suppose the court will have to declare digital evidence inadmissible, if it violates the client's right to a fair trial. This has not happened yet, as far as I am aware of.

As you will understand, it is not hard to answer the second question neither; what parts of the collected digital evidence may be presented in court? The general answer is simple: All collected evidence might be presented in court. There is no general rule against it. But if the presentation in the court maintains a break of European Human Rights, it might be stopped. These days, our Supreme Court has denied the prosecutor to present information collected about a client, from a lawyer's computer.

The first question is a bit more complicated to answer short; what digital evidence are the police allowed to collect? Basically, the legal situation is as in the rest of Europe (since Norway is committed to adapt mostly of the legislation from EU). This has already been a point at the conference, and therefore I will not follow the question now.

\*\*\*

Since the Norwegian legislation do not declare any kind of digital evidence inadmissible, the balance between the prosecutor and defense lawyer gets worse. A defense lawyer has not the same practical possibility to collect, manage or analyze digital evidence - as the prosecutor and the police have.