

Criminal Investigators' Access to Existing Information in Electronic Communication Devices

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Summary

Coercive measures in criminal procedure (e.g., detention, seizure, house search, and body search) play a key role when it comes to investigating crimes. The use of coercive measures in criminal procedure frequently also entails severe interferences with human rights and fundamental freedoms—such as the right to private life—which are protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). Since Swedish legislation must be designed in accordance with the requirements of the European Convention, an urgent research task in this context involves more closely analyzing the demands communicated by the European Court of Human Rights in its interpretation of the articles of the European Convention.

The question of whether the regulation of coercive measures is compatible with the European Convention is also relevant from an efficiency perspective. Unclear legislation risks leading to law enforcers having to spend a great deal of time interpreting the legislation as well as the risk that uncertain decision-makers do not dare use existing law. If Swedish law does not contain the procedural safeguards required in the European Convention, it also becomes urgent to use a solution strategy that does not result in significant efficiency losses.

This report aims to analyze the Swedish regulation of criminal investigators' access to existing information in electronic communication devices. This overall aim may be separated into four research questions:

1. Which paths are open to criminal investigators in terms of getting access to existing information in electronic communication devices according to the internal Swedish regulation of coercive measures?

2. Which requirements are articulated in Article 8 of the European Convention regarding this regulation of coercive measures?
3. To what extent does the Swedish regulation of coercive measures fulfill the requirements of the European Convention?
4. How to ensure that Swedish law is more in accordance with the requirements of the European Convention?

Electronic communication devices refer to all sorts of equipment that can be used to communicate electronically (e.g., computers and mobile phones).

The coercive measures discussed in the report are those capable of giving criminal investigators access to existing information in electronic communication devices: (1) seizure, (2) searches, (3) remote searches, and (4) covert data reading. Seizure is the only regulation that allows criminal investigators to physically seize the actual electronic communication device, while all four coercive measures to varying extents enable examining the information stored in or accessible through electronic communication devices. In addition, searches and covert data reading give access to the premises where the electronic communication devices are located. Seizures and searches only give access to such information that is stored locally in electronic communication devices, while remote searches exclusively focus on externally stored data. Covert data reading is the only set of regulations that allows for accessing information through technical tools such as installing software to circumvent a required authentication process or circumventing some form of system protection to get access to systems. One difference here is that covert data reading is a secret coercive measure, while the other three sets of regulations are open. This also means that secret data reading—which is typically more intrusive—constitutes a coercive measure subject to more procedural safeguards (e.g., that a court is normally the one to decide on the use of this measure). In addition, stricter conditions are in place for using covert data reading (e.g., suspicion of more serious crimes) compared to the other coercive measures.

In Article 8, everyone's right to respect for (1) home, (2) correspondence, (3) family life, and (4) private life is protected. The use of searches and similar coercive measures in order to get access to information in electronic communication devices could primarily be an

interference with the right to respect for home, correspondence, and private life, but in some cases also family life. If there is an interference with some of these rights, three conditions must be fulfilled if said interference is to be in accordance with the European Convention: the measure must be (1) in accordance with the law, (2) necessary in a democratic society, and (3) motivated by certain urgent interests, which are listed in the convention text.

In all three areas above, the examined Swedish regulation—of seizure, searches, and remote searches—might come into conflict with the European Convention requirements regarding lawfulness and necessity. First, the regulations of seizure, search, remote search, and covert data reading contain uncertainties that may come into conflict with the demands made by the European Court concerning understandable legislation of coercive measures. Second, the lack of judicial review—something that characterizes the Swedish regulation of seizure and, above all, search and remote search—might violate the European Court requirements that certain coercive measures must be subjected to judicial review, either before or after the decision to use coercive measures has been executed. Third, decisions to use searches and remote searches might risk being insufficiently specified to fulfill the demands made by the European Court.

There are different ways of solving the above-mentioned problems, namely (1) legislation, (2) developments in terms of case law, (3) treaty-compliant interpretations, and (4) internal authority measures. A general solution strategy is to adopt new legislation or change the existing one. In certain cases, however, so-called treaty-compliant interpretations (i.e., interpreting the Swedish regulation in a way that is compatible with the European Convention) may be a useful strategy. In addition, developments with regard to case law sometimes solve problems insofar that cases from, for instance, the Supreme Court specify the legal status. Finally, different kinds of internal authority measures undertaken by police or prosecutors, such as guidelines and education efforts, constitute fruitful solutions.

The efficacy of the different solutions differs depending on the problem at hand. With respect to the results of this study, the following recommendations on what is needed to satisfy the demands of the European Court while at the same time promoting an effective criminal investigation process include:

Recommendations to the legislator (cabinet and parliament)

1. Perform a review of the legislation regarding coercive measures from the perspective of comprehensibility.
2. Perform a review of which coercive measures, according to the European Court, entail overly limited legal possibilities with regard to judicial review. One possible solution is to reform the legislation in such a way that has been done in Finland regarding searches (i.e., to maintain the decision order while introducing a right to judicial review afterward).

Recommendations to decision-makers (mainly the courts and criminal investigators)

1. Apply a kind of precautionary principle when deciding on coercive measures (i.e., in favor of those who are affected by these coercive measures).

Recommendations to criminal investigators (police and prosecutors)

1. Prioritize educational efforts regarding the use of coercive measures. It is desirable to achieve a higher degree of knowledge regarding how decisions on searches must be specified.
2. Enlighten the person who has been affected by a seizure regarding the possibility of judicial review, so that he or she has enough time to request a review before the coercive measure has ended.

About the author

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