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Legal Regulation & Education: Doing the Right Thing?

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Combatting Cybercrime Through 'Hacking' (Back): Cure or Curse?

In May 2013, the Dutch Minister of Security & Justice, Ivo Opstelten, introduced a previously announced proposal to provide law enforcement officials with the legal capacity to remotely infiltrate an automated system as a means to facilitate the fight against cybercrime. Basically, law enforcement would receive the 'power to hack', even if the computer in question is located in another jurisdiction, as a means of discovering and gathering evidence during cybercrime investigations. According to the Minister, the changes in circumstances brought about through developments in the field of cybercrime justify such a change in legal capacity for investigative purposes. The proposal, however, received mixed reviews. And it is safe to say, led to a bit of a controversy in the Netherlands.

Many fear the privacy implications of the proposal whereas others are more concerned about the need to use insecure features, such as software vulnerabilities to actually 'hack' into the computer of a perpetrator. This leads to a conflict of interest, where insecurity may be both a disadvantage as well as an advantage depending on which perspective one takes. As a result, whilst the move to introduce new legislation demonstrates the awareness in the public policy realm of the legal challenges faced by various cyber security stakeholders, there remains unclarity whether this 'solution' is proportional to the problem, especially with respect to the implications for other rights and obligations to individuals and states. Either way the proposal is a crucial first step to commence a policy debate about the legality of certain (technical) countermeasures, and the desire (or lack thereof) to alter the legal landscape.

This paper therefore aims to provide a critical overview of the proposal and to place it within a broader context, as a means to determine, in light of the conference theme, whether this is the 'right' thing to do. If we consider the increased sophistication of perpetrators of cybercrime, is the ability for law enforcement officials to hack the right answer? How does such a change relate to other (fundamental) rights? The central focus shall be on the legislative proposal as a means to answer some of these more fundamental questions. Through a comparison with other jurisdictions, this presentation shall also determine to what extent there is broad support for this type of legal change as a solution.