

UDC 34

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## **THE PRINCIPLES OF THE USE OF THE SPECIAL INVESTIGATIVE TECHNIQUES**

### **1. Introduction**

The special investigative methods of the criminal intelligence have been established since the 1990's in democratic societies. Following the terrorist attack in 2001, the use this special criminal techniques are widespread in the world.

In democratically functioning states, society is turn with trust in the state's judicial, intelligence and investigative activities. However, this acceptance and trust can be decrease if citizens are experiencing abusive use of the special (covert) investigative methods.

In transparent, democratic societies, special investigative techniques supplement the traditional methods and means of investigation, thus contributing to the detection and investigation of crimes.

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If these special investigative means are not implemented in a professional manner and in accordance with the organization's internal protocols of integrity and control, there may result abuses or obtaining so evidence, that can not be used by the judiciary<sup>1</sup>.

## **2. The legal principles of the use of the the special investigative techniques**

It is essential to lay down and enforce in the use of special investigative measures so principles that ensure the system's continued reliability, stability, integrity and effectiveness.

According to the «Criminal Asset Recovery Project in Serbia» of the Council of Europe, SIMs are those means or techniques used to gather evidence and/or intelligence and information in such a way (covertly) that they do not alert those being investigated. Invariably their deployment will involve a breach of the right to a private life, which will have to be justified by those carrying out/authorising the operation.<sup>2</sup>

Special investigative means often provide invaluable, in other way unavailable results for the investigations, since most times only the use of SIM's can possible to clearly detect and prove the crime. This is particularly true in the area of serious and organized crime, corruption, terrorism investigations.

«In the covert investigation area, professionalism may be aligned with four principles:

–Evidence to sustain a prosecution or intelligence to facilitate investigation management must be obtained in a manner that preserves the integrity of the criminal justice system and its actors.

<sup>1</sup> Larry Laudan: Truth, Error, and Criminal Law, an Essay in Legal Epistemology, Cambridge Studies in Philosophy and Law, Cambridge University Press, 2006.

<sup>2</sup> Council of Europe Office in Belgrade: Deployment of special investigative means, Belgrade, 2013. p. 12-13.

–Statutory rights of the suspect should not be breached except when the following criteria are met in full: the rights are qualified, breach is necessary and there is statutory authority to do so.

–The rights and privacy of those citizens not suspected of criminal conduct must be protected: collateral harm as a consequence of covert investigation should be minimised through effective investigation management.

–The professional integrity of investigators must be demonstrated, or, if necessary, its absence exposed.»<sup>3</sup>

The recommendation of the European Union in defining the concept of special investigative techniques refers to the requirement of proportionality, as the Recommendation states:

«Special investigation techniques means techniques applied by competent authorities in context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons. As the name suggests SIT's are so proactive investigative methods that gives the opportunity to the investigator to detect, ascertain or exclude the suspicion.»<sup>4</sup>

According to the explanatory report<sup>5</sup> by the Council of the European Union, under the competent authorities, the judicial, prosecution and investigative authorities of the Member States can be understood.

The concept of serious crime was not intentionally determined by the recommendation, leaving the interpretation of the national law of the Member States, but as a directive the interpretation of the serious offense provided for in

<sup>3</sup> Clive Harfield and KarenHarfield: Covert Investigation, Oxford University Press, 2nded, 2008. p. 6.

<sup>4</sup> Recommendation Rec (2005) 10 of the committee of Ministers to member states on „ special investigation techniques” in relation to serious crimes including acts of terrorism, p.3.

<sup>5</sup> Explanatory report of the Recommendation Rec (2005) 10 of the committee of Ministers to member states on „ special investigation techniques” in relation to serious crimes including acts of terrorism, p.5.

point 2 (b) of the United Nations Convention against Transnational Organized Crime.

The Convention stipulates that offenses punishable by a criminal offense of imprisonment of four years or more are to be considered as serious offenses. According to the recommendation, offenses related to organized crime and terrorism are among the serious offenses. Special investigative techniques can only be used where there is sufficient reason to believe that a serious crime has been committed or prepared or is being prepared by one or more particular persons or an as yet-unidentified individual or group.

According to the recommendation, special investigative techniques may be used by authorized authorities when: «having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. The European Court of Human Rights respected this concept.

Based on the case-law of the Court<sup>6</sup>, supervised or controlled covered operations/ special investigative means will be consistent with the protection of human rights when operations are carried out through criminal investigations (supervised by the judiciary) and the defendant or the defender has the opportunity to control the credibility of the anonymous witness.

At the initial stage of the surveillance, the use of anonymous informants, civilian persons or undercover detectives are allowed, but at court hearing, the use of their testimonies may be problematic, and judgment can not be based solely on their testimony.

Under the Belgrade Document of the European Council, and the case-law of the Court, special investigative methods may be used in the European Union if there is an express basis in accessible, national law that provides for it, and

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<sup>6</sup> Lüdi and Teixeira Castro vs Switzerland, 1988, ECHR 24.

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there is a proper framework in place for authorisation and oversight, and its use is necessary and proportionate.

The final report<sup>7</sup> of the European Union similarly define the basic principles of the use of SIM's.

The basic principles of the application are *necessity, proportionality* (with the gravity of the offense and the smallest possible restriction) and the applicant must demonstrate *reasonable suspicion* of crime being committed that falls within the threshold of allowing surveillance as a special investigative technique.

### 3. Operating principles

The operation and management of the criminal intelligence involve the planning of detection and investigation, the protection of the source, the acquisition and exploitation of the information. During the operation of the system, with the tactical planning and organization of the detection/investigation must take into account that the sources, tools and tactics used are so sensitive informations which into the criminal process may cause the disclosure of the investigation and the source life risk or physical damage.

Of course, the above threats can be eliminate or avoided based on the methodologies operated by sectoral laws, internal regulators and the rules of the current and new criminal procedure law.

According to some foreign law enforcement intelligence model descriptions<sup>8</sup>, the most appropriate way to make intelligence "product" is by creating and operating a dedicated intelligence unit. An effective, secure intelligence system that is in line with internal integrity must have four main

<sup>7</sup> Di Nicola Andrea - Gounev Philip - Levi Michael - Rubin Jennifer: Study on paving the way for future policy initiatives in the field of fight against organised crime: The effectiveness of specific criminal law measures targeting organised crime, Final report, February 2014, Brussel, p. 243.

<sup>8</sup> Association of Chief Police Officers: Guidance on the National Intelligence Modell, Bedford, 2005.

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elements: adequate information resources (technical, human), properly trained intelligence officers, access to the "professional knowledge base" and "intelligence system products" (databases, analyzes, etc.) range.

The information sources of the intelligence unit can be wide-ranging: citizens' indications, signals from other service branches, law enforcement signals, perceptions, accusations, witnesses, criminals, informants etc.

According to the so-called "White paper on transnational Organized Crime" issued by European Comitee on Crime Problems,<sup>9</sup> the special investigative tools are used in most Member States by assigned special intelligence-analysis units. The duties of these units go beyond only gathering information for the purpose of proving criminal offenses, as they need monitoring the activities of organized criminal groups in their territory to prevent and controll the development of crime opportunities and criminals. To this end, criminal intelligence positions should be established in the area of crime.

Implementing intelligence tasks that are appropriate for effective, legitimate and internal integrity and the transmission of results can be facilitated by separating different positions within the unit. The intelligence unit should be headed by a senior management who, prior to the approval of the proposed special investigative measure, can decide whether the particular case and the special investigative means that is intended to be used comply with the goals specified as priorities of the organization. These priorities are based on strategic planning/strategic criminal intelligence<sup>10</sup> and target selection.

The purpose of strategic criminal intelligence is to provide a solid foundation for strategic decision making. Strategic decision making is necessary because of the significant changes which have already taken place or are to be

<sup>9</sup> European Comitee on Crime Problems: White paper on transnational organised crime, Strasbourg, 2014.

<sup>10</sup> Nyeste Péter: Criminal Strategic Intelligence, National Security Rewiev, 2015/2. p. 92-104.

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anticipated both at domestic and at international levels. Strategic criminal intelligence and analysis supports the detection of these processes and the appropriate responses to these challenges. Strategic criminal intelligence facilitates the establishment of crime forecasts and prognoses by investigating various Hungarian and international tendencies. By identifying the best practices regarding European security challenges in the member states of the EU, it plays a vital role in the preparation mechanisms of the decisions of the government and of the ministry of internal affairs.

The main target area of strategic intelligence gathering and analysis is transnational crime in its various forms, certain categories of organised crime and of course, terrorism. Due to their nature, these forms of crime are priority areas of the analysis and assessment organs of law enforcement and national security forces.

At the strategic level of the investigation, when conducting special investigative measures, it is necessary to crystallize in which cases which covert tools can be applied by the authority. The authority have to decide which types of crimes, and what degree of threats are justify the use of special investigative measures to protect society, and to ensure the success of criminal proceedings.

Such a planned, step-by-step, analytical, evaluated procedural protocol can have a direct impact on the frequency of application of special investigative means, the methodologies to be developed, and indirectly affect the whole of the police, public trust in the police and special investigative techniques, and the functioning of the justice system.<sup>11</sup>

At the intelligence analyst unit, internal, organizational integrity and professionalism can be ensured within the organization as separate functions and responsibilities. The intelligence officers are responsible for obtaining information and evidence that meets the demands of the intelligence gaps. If the

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<sup>11</sup> Clive Harfield: The governance of covert investigation, Melbourne University Law Review, vol.34. p. 785.

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evidence gathering is the purpose of the detection, the result must be obtained in accordance with the rules of criminal procedure and ensure that the lawfulness of the procurement is verifiable, both in the process and after obtaining the result.

According to foreign recommendations, in the process of use of special investigative measures should be create within the intelligence unit, intelligence manager, informant controller, data manager and team supervision positions. These positions and tasks - by their nature - are capable of performing professionally by senior, highly experienced intelligence officers and analysts. Their task is not to implement internal security controls, but to ensure legality, professionalism and organizational priorities on the contrary. Of course, in small units, these functions can be managed by the head of the unit. For larger intelligence units, a data manager can enter information and data into analytical systems that support criminal intelligence, and also allow access to data.

The data manager must also support the work of analysts. It must be ensured that analysts have enough time to compile quality analyzes.

The new criminal intelligence model of the XXI century<sup>12</sup> proposes a radical transformation of the former intelligence model as a model of network-based information use similar to military operational information access. According to the model descriptions, it is essential requirement of police to create a wide-ranging network of users that are made up of different levels of policing at different levels and needs. A minimum requirement is to provide general and immediate access to basic intelligence assessments and to summarised background information about persons, criminals, locations, and

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<sup>12</sup> Alfred Rolington: Stratégiai hírszerzés a XXI. században, a mozaikmódszer (Strategic Intelligence for the XXI'st Century, The Mosaic Method), Antal József Tudásközpont, 2015. p. 173.

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motor vehicles involved in the case. This model seems a little utopian yet, but complying with the challenges of the future.

If the criminal intelligence model provides access for the prosecutor to the preliminary information, the prosecutor can also have current, up-to-date information all phase of the investigation and may exercise control over the police measures. Following the forthcoming entry into force of the new Hungarian Criminal Procedure Code and the planned government decree regulating the investigation and the implementation of the preparatory procedure, criminal intelligence should be based on new criminal intelligence model.

When developing the legal, efficient, professional operating principles and organizational systems of the new investigative model, it is worthwhile to rely on the basics of these European and international recommendations and to redesign the current organizational system, internal protocols and new methodological recommendations.

### **Summary**

In this study I examined the legal and operational principles of the use of the special investigative techniques on the basis of the European and international recommendations, and descriptions of criminal intelligence models.

It can be stated, that the new Hungarian Criminal Procedure Code and the planned government decree regulating the investigation and the implementation of the preparatory procedure, criminal intelligence should be based on the international recommendations, standards and criminal intelligence models.

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*The principles of the use of special investigative techniques*

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It can be stated, that the new Hungarian Criminal Procedure Code and the planned government decree regulating the investigation and the implementation of the preparatory procedure, criminal intelligence should be based on the international recommendations, standards and criminal intelligence models.

**Key words:** special investigative techniques, criminal intelligence, legal and operational principles, criminal intelligence model.