

**SPECIAL INVESTIGATION TECHNIQUES AND DEVELOPMENTS IN
MUTUAL LEGAL ASSISTANCE - THE CROSSROADS BETWEEN POLICE
COOPERATION AND JUDICIAL COOPERATION**

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I. INTRODUCTION

The international community has during many decades looked at police cooperation and judicial cooperation in criminal matters as two separate disciplines. Traditionally, police cooperation has been carried out within the framework of Interpol on a purely bilateral basis. The police have been used to cooperate informally and exchange information, sometimes with a dubious legal basis for doing so. On the other side, judicial cooperation has been an extremely formalised exercise, more looking like international diplomacy than efficient law enforcement.

However, the globalisation, the internationalisation of crime and its development into very serious forms including its spread over the world in many different forms has forced judicial cooperation to meet more and more with police cooperation. It has been realised over the past two decades that police cooperation in itself is not an end and that it must come closer to the finality of the investigation and prosecution of an offender and the stopping of serious criminality such as trafficking in human beings, drugs trafficking and terrorism. On the other hand judicial cooperation has, very slowly, become slightly less formal and more direct, in particular within Europe. It has been understood that modern day investigations cannot be carried out like they were when there was no Internet, no SWIFT transfers or no e-mails.

Therefore, the police cooperation, as it traditionally has been seen, has joined mutual legal assistance and, on the other hand, mutual legal assistance has come much closer to traditional police cooperation. In fact, the border between the two has become blurred and it is no longer possible to distinguish specifically between these forms of cooperation. This development can also be seen in the international legal instruments that have been adopted within the past two decades. It should also be realised that what may be considered to be police cooperation in one country could be predominantly a judicial cooperation measure in another country. Police services may have powers in some countries which are only devolved to judicial authorities in other countries and vice versa. The difference between common law and civil law traditions in this respect is great and has certainly contributed to the relatively disparate picture that one gets when examining international cooperation.

There has also been a shift, in particular in Europe, from traditional judicial cooperation through central authorities or through diplomatic channels, to more direct cooperation between judicial authorities or by transmission through the International Criminal Police Organisation. The recognition or use of Interpol is already laid down in the 1959 Council of Europe Convention on mutual legal assistance in criminal matters and has also been recognised in Article 7, paragraph 8 of the 1988 Convention of the UN.

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It is significant that the UN 1988 Convention deals very little with new forms of cooperation such as special investigative teams. However, Article 9, concerning other forms of cooperation and training than the classical mutual and legal assistance, deals with the enhancement of the effectiveness of law enforcement action to suppress the commission of offences established in accordance with the Convention. It may be considered to be a precursor to what would follow in other Conventions. This Article suggests that on the basis of bilateral or multilateral agreements or arrangements the parties shall cooperate with one and another in conducting inquiries with respect to drugs offences having an international character, concerning the identity, whereabouts and activities of persons suspected of being involved in drug offences, the movement of proceeds of property involved in the commission of these offences and the movement of narcotic drugs. The Convention suggests in Article 9.1.c., in appropriate cases and if not contrary to domestic law, that Joint Teams should be established taking into account the need to protect the security of persons and of operations. Therefore, for the first time the possibility of the creation of so called Joint Investigation Teams has been established in this Convention. However it may be that not many Joint Teams have been established under the provisions of the Convention as it is probably too basic to be able to be implemented properly unless there is complete mutual faith and trust between the Parties.

The developments under international law continued, however, after the 1998 Convention and a number of instruments in Europe began to contemplate the taking of specific measures which may be considered to be special investigative measures. Before examining some of these measures, it may however be useful to consider some terminological and methodological issues.

II. WHAT ARE SPECIAL INVESTIGATION TECHNIQUES?

There is to my knowledge no internationally agreed definition of what constitutes special investigation techniques. It would be possible to make two kinds of definition, one functional definition simply enumerating some techniques which are known in police or judicial cooperation, or to make a generic definition. In literature, one has distinguished between the use of subterfuge and the overt or secret nature of police or judicial action. In addition, it has also been considered the interaction between investigating and prosecuting authorities and the witnesses, suspects and the third parties.

The use of subterfuge involves a certain degree of deception: there is a procedure which seems to lead an individual to perform certain acts or reveal certain information by generating a divergence between what is supposed to be the case and what is expressed in a conventional manner or otherwise. Infiltration and pseudo-purchases are examples.

The overt or secret nature is present where an attempt is made to conceal what is being done. The tailing of a person, telephone tapping and filming of persons are by nature secret. The aim of the secrecy is not to alter the behaviour of the presumed offender but to deprive him of his information.

Secrecy is distinguished from deception: the latter involves falsifying information; the former is intended to deprive the suspect of information. The degree of secrecy may vary: the accused may be informed post facto of the results of telephone tapping, tailing and filming while the identity of an infiltrated officer will usually be kept secret up to and including the trial stage.

As for the interaction with the individuals concerned, this is brought into play by the interrogation of a suspect, the questioning of a witness or confrontations.

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Through a combination of these three variables, one can classify criminal investigation procedures under eight headings:

1. Overt investigations with interaction and without deception
(Example: examination by a judge, interrogation, confrontation)
2. Overt investigations without interaction and without deception
(Example: visit to a home, scientific police investigations, expert reports)
3. Secret investigations with interaction and without deception
(Example: use of informants)
4. Secret investigations without interaction and without deception
(Example: tailing information tapping or monitoring of telecommunications)
5. Overt investigations with interaction and deception
(Example: false promises and dissimulation and falsehood in the course of interrogation)
6. Overt investigations without interaction or deception
(Example: subjecting a vehicle to a compulsory road security check in order to search it surreptitiously)
7. Secret investigations with interaction and deception
(Example: undercover operations)
8. Secret investigations without interaction and deception
(Example: use of enticements and traps to enable the commission of an offence)

If one chooses a more generic definition of special investigation techniques they may be considered being “techniques for gathering information systematically in such a way as not to allow the target person to know of them, applied by law enforcement officials for the purpose of detecting and investigating crimes and suspects”.

When the Council of the European Union worked on identifying special investigative techniques it identified a number of categories. The following are some examples:

1. Interception, recording and transcription of telecommunications
2. Interception and recording of other forms of communications
3. Interception, recording and tracing of communications in the area of computer crime
4. Tracing of telecommunications
5. Observation
6. Observation and surveillance by video camera
7. Infiltration
8. Infiltration by an undercover agent of the requested state
9. Infiltration by an undercover agent of the requesting state in the territory of the requested state
10. Infiltration by an informer of the requested state
11. Handling of informers
12. Cross-border observation
13. Cross-border hot pursuit
14. Cross-border tracking

15. Controlled delivery
16. Pseudo purchases

A number of other techniques could also be mentioned such as in general undercover operations including covert investigations, front store operations (for instance undercover companies), controlled deliveries, electronic surveillance of all forms, searches (including on premises or objects), "agent provocateurs", etc... Also the increasing use of so-called Joint Investigative Techniques may be mentioned in this context as a special investigative technique.

There is of course a fine line to be drawn between so-called special investigation methods and police investigation techniques. Police investigation techniques may be applied to back up special investigation methods. They are applied within the same legal framework and according to the same principles, particularly proportionality and necessity. Special police investigation techniques may be used where special investigation methods have been authorised. For instance observation may necessitate the use of particular technologies (such as bugging) but the use of such technologies alone is not per se special investigation methods.

One could also distinguish between whether the special investigation methods used are utilised in proactive or reactive investigations. The question here is whether the special investigation methods could be used in the preparatory phase of criminal investigations, perhaps even before a specific crime has been identified.

The use of a special investigation method in proactive criminal investigations is of course sensitive from the point of view of protecting individual liberties but it appears that in many Member States of the European Union this is a possibility under certain conditions, such as that there should be a legal framework for the method and that there is adequate control, in particular judicial control. In addition, there must be a reasonable suspicion that an offence will be committed and that the investigation method is used exceptionally. In particular the safeguarding of public order needs to be taken into account. There is ample case law from the European Court of Human Rights in relation to when a reasonable suspicion arises. There must be an existence of facts or information which will satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will however depend on all the circumstances, as noted in a judgement on 30 August 1990.

During the early 1990's, a number of international developments in Europe could be recorded which had a bearing on special investigative techniques. Such developments were linked with the gradual abolition of the border controls of the Member States (the so-called internal borders of the Union) and the subsequent necessity for the adoption of so-called flanking measures, i.e. measures that were necessary to maintain law and order in a Union which no longer had borders. It may be questioned whether these so-called flanking measures actually were motivated by the abolition of the frontiers or instead whether crime in itself must not be fought?

Be it as it may, in the so-called Schengen Convention of June 1990, implementing the Schengen Agreement of 14 June 1985, on the gradual abolition of checks at common borders, a number of special investigation techniques were included. These measures were applicable only to five Member States in the beginning but were increased to include, in principle, all Member States of the EU, Norway and Iceland.

In article 39 of the Convention, the contracting Parties undertook to ensure that their police authorities shall, in compliance with national legislation, and within the scope of their powers, assist each other for

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the purpose of preventing and detecting criminal offences, so far its national law does not stipulate that the request has to be made by the judicial authorities and provided that the request of the implementation thereof does not involve the application of coercive methods by the requested Contracting Party.

In accordance with Article 40, police officers in one of the Contracting Parties who, within the framework of a criminal investigation, are keeping under observation in their country, a person who is presumed to have taken part in a criminal offence to which extradition may apply, shall under certain conditions be authorised to continue this observation in the territory of another Contracting Party. Even without prior authorisation the police officers may also be authorised to continue beyond the border under certain specified conditions in Article 40 paragraph 2.

There are a number of general conditions that have to be satisfied in order to allow this cross-border surveillance. For instance, the officers carrying out the surveillance must comply with the law of the Contracting Party in whose territory they are operating and obey the instructions of competent local authorities. They must also carry documents certifying that authorisation has been granted and that they are acting in an official capacity. They are allowed to carry service weapons during the surveillance but would not be able to use these weapons except in cases of legitimate self-defence.

Article 41 of the Schengen Convention deals with hot pursuit. This hot pursuit is authorised to continue in the territory of another Contracting Party without prior authorisation where, given the particular urgency of the situation, it is not possible to notify the competent authorities of the Contracting Party prior to the entry into its territory. The hot pursuit could be continued in a specified number of kilometres inside the territory of the other Party.

It should be noted that since these far going international provisions, in effect transfer in certain respects some parts of their sovereignty to the other Contracting Parties, it was felt necessary to solve the issue of responsibility for acts committed by a police officer when operating inside another Contracting Party's country and also to solve the issue of responsibility for damages caused by police officers during the course of their mission. All these measures were also combined with other measures such as the setting up of Joint Police Stations close to the borders and having common training and exchange of officers.

It should also be noted that under Article 53 of the Schengen Convention requests for mutual legal assistance may be made directly between judicial authorities and returned by the same channels. This possibility of direct communication should however not prejudice the possibility of requests being sent and returned between Ministries of Justice or through national central offices of Interpol. The Schengen Convention abolished therefore the old requirement of communication by central authorities contained in the 1959 Convention.

Gradually one may observe in the European Union that Article 53 has now been, to a large extent, implemented and that most judicial cooperation between the Member States of the European Union is now taking place bilaterally.

At the same time as the negotiations on the Schengen Convention and the 1988 Convention of the UN, negotiations were carried out within the framework of the Council of Europe. These negotiations started 1986 with the setting up of a special committee that would elaborate a convention on Laundering, search, seizure and confiscation of the proceeds from crime. The Convention, which was to be included as European Treaty series number 141, was signed on 8 November 1990 and entered into force in 1993. It has now nearly 40 ratifications and may be considered to be at least an equivalent success as that of the 1957 and 1959 Conventions of the Council of the Europe ².

The Council of Europe Laundering Convention contains some language that may be fitted into the section on special investigation techniques. It contains a general obligation for a Party in Article 3 to adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation and to prevent any dealing in, transfer or disposal of such property. In its Article 4 special recognition is given to the so-called “special investigative powers and techniques”. A Party is under this Article obliged to adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out confiscation and investigative and provisional measures. A weaker provision is found in Article 4, paragraph 2, which provides that each party shall consider adopting such legislative and other measures as may be necessary to enable it to use special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto. Such techniques may include monitoring orders, observations, interception of telecommunications, access to computer assistance and orders to produce specific documents.

Under the Convention the Parties are obliged to assist each other in the identification and tracing of instrumentalities, proceeds and property liable to confiscation. As already has been mentioned, there is a possibility for Parties to forward information spontaneously; this was the first time to my knowledge that provisions concerning spontaneous information were contained in an international instrument. The background to this provision was that the drafters of the Convention looked at some conventions on exchange of information in tax matters and drew the parallel to conventions on judicial cooperation in criminal matters.

The development of mutual legal assistance in the European Union did not stop with the setting up of the European Judicial Network, the adoption of the Joint Action concerning best practices in mutual legal assistance and the development of Eurojust, i.e. the new European Union prosecuting agency having its seat in The Hague. On 29th May 2000, the Council adopted a new convention on mutual assistance in criminal matters between the Member States of the European Union and decided to include a number of special investigative measures into the Convention. Among these measures is the spontaneous exchange of information, hearing by video conference, hearing of witnesses and experts by telephone conference, controlled delivery, joint investigation teams, and covert investigations.

The most important, and most difficult, measure of special investigative techniques that was included in the Convention was the interception of telecommunications. It took the Council nearly two years to negotiate the five articles concerning this highly sensitive topic. Moreover it turned out that the technologies changed all the time so that, for instance, certain types of telecommunications were made available during the negotiations and certain companies involved in satellite communications went into bankruptcy, etc. The complexity of the issue is clear when reading the headings of article 19 and 20: interception of telecommunications on national territory and interception of telecommunications without the technical assistance of another Member State. The first type of interception is in connection with the use of service providers. It will not be possible in the context of this paper to go more deeply into the various measures. It is sufficient to note that although the European Union is by definition an area of freedom, security and justice where the Member States have a high level of trust in each other, still the provisions concerning special investigative techniques show that some mistrust or at least caution has been required in the drawing up of these provisions. No doubt this has to do with the fact that this special

² A full description of the work of the Convention is found in Criminal Law Forum 1991, Volume 2 number 3, by the author of this paper, with the title “the Council of Europe laundering convention - a recent example of the developing international law”.

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investigative technique is so intrusive and necessitates judicial control in conformity with the Member State's constitutions and the European Convention on human rights.

The negotiations in the European Union had a direct impact also on the negotiations of the Palermo Convention. This is clear from article 19 which concerns Joint investigations and article 20 which concerns special investigative techniques. One may however note that the UN context has considerably watered down the provisions in that for the Joint Investigations the States Parties "shall consider concluding" bilateral or multilateral arrangements or arrangements and they shall ensure that sovereignty in the other State Party whose territory such investigation is to take place is fully respected. Therefore a simple legal framework, really an exhortation without any substantive operationality, has been included.

The same may be said for the special investigative techniques included in article 20. There are safeguards relating to the fact that the techniques must be permitted by the basic principles of the domestic legal systems, safeguards relating to the fact that they must be within the possibilities of a State Party and under the conditions prescribed by its domestic law. Controlled delivery is one of the measures and, where it is appropriate, also the use of other special investigative techniques are contemplated. States Parties are encouraged to conclude when necessary appropriate bilateral or multilateral agreements for using the special investigative techniques.

III. CONCLUSION

Crime evolves and the international conventions with them. However with the present pace and reticence among the international community, it is not sure that we will manage to fight 21st Century criminals with the tools that are adapted to the society of today. Ratification of conventions is slow, political will is lacking in some quarters of the planet and resources are unfortunately scarce in many States. At the same time the criminals use more and more sophisticated techniques, modern means of telecommunications, e-mails and the Internet, and have vast resources due to their criminal acts.

The truth of the matter is that law enforcement will always be behind modern day criminals. However, law enforcement has at its disposal special investigative techniques, which may be very efficient. These techniques need however, to be used with caution: a balance has to be found between the respect for individual rights and the need to safeguard the collective interests. Investigative means require a legal basis and its effects must be foreseeable. Investigations must be necessary and the results impossible to achieve by other means interfering less with individual rights and freedoms.

There must also be a certain margin of appreciation in deciding what measures to take, both in general and in particular cases those that should be left to the national authorities. In doing so there must be fair balance between the individuals' fundamental rights and the democratic societies' legitimate rights to protect it against criminal activities. This balance is not always easy to find.