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# **COMMITTEE OF EXPERTS ON TERRORISM (CODEXTER)**

## **SUB-GROUP ON SPECIAL INVESTIGATION TECHNIQUES**

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### **DISCUSSION PAPER**

**26<sup>th</sup> Plenary Meeting**

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Secretariat of the Terrorism Division  
Information Society and Action against Crime Directorate, DG I

codexter@coe.int - [www.coe.int/terrorism](http://www.coe.int/terrorism)

## 1. Introduction

On the basis of its Terms of Reference for 2014 – 2015, CODEXTER, at its 25<sup>th</sup> Plenary Meeting examined and discussed a document containing proposals for priority areas for its work in 2014-2015.

These proposals included, among other things, establishing four sub-groups of the Committee which would focus on four separate priorities, namely: special investigation techniques; radicalisation and the receiving of training for terrorism, including via the Internet; terrorists acting alone; and the assessment of possible gaps in the legal framework provided by the Council of Europe international legal instruments in the area of the prevention and suppression of terrorism.

CODEXTER agreed upon the four priorities and the sequence in which they should be dealt with, starting with the topic of “special investigation techniques” (SIT).

Furthermore, the Committee instructed the Bureau to appoint from among its Members four coordinators to be responsible for each of the sub-groups tasked with preparing the deliberations of CODEXTER of the four topics. Ms Yuliia LAPUTINA (Ukraine) was appointed as the Coordinator for the Sub-Group on SIT, which is composed of the following Members (in alphabetical order of member States):

Ms Polina EFTHIVOULOU-EFTHIMIOU (Cyprus)

Ms Sopio KILADZE (Georgia)

Mr Giorgio MANJAVIDZE (Georgia)

Mr Antonios PAPAMATTHAIOU (Greece)

Mr Alexandros STAVROPOULOS (Greece)

Mr Dermot WOODS (Ireland)

Mr Nicola PIACENTE (Italy)

Ms Ana BOŠKOVIĆ (Montenegro)

Mr Dražen BURIC (Montenegro)

The present discussion paper is the outcome of the work of the Sub Group on SIT and is intended to form the basis for the discussions of CODEXTER at the occasion of the 26<sup>th</sup> Plenary Meeting of the Committee.

## **2. The history of Recommendation Rec(2005)10**

Following the terrorist attacks committed on the United States of America on 11 September 2001, the Committee of Ministers of the Council of Europe "agreed to take steps rapidly to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism by, *inter alia*, setting up a Multidisciplinary Group on international action against Terrorism (GMT)."

The GMT was given the task of preparing a Progress Report that included, among other things, additional actions that the Council of Europe could usefully carry out in order to contribute to the international fight against terrorism.

In its final activity report, submitted to the Committee of Ministers in November 2002, the GMT set out a number of priority areas for action that the Council of Europe could begin to implement in 2003. These priorities included special investigation techniques.

The GMT considered that, owing to its complex and secret nature, as well as the technical nature of the area concerned, the investigation of terrorist activities raised serious difficulties. It recalled that these difficulties were accentuated by the frequent links between terrorism and other forms of crime (e.g. money laundering, drug trafficking, illegal arms sales, organised crime, etc.) and by the difficult distinction between legal and illegal activities. The often complex nature of important terrorist actions and therefore of investigations had led to the awareness that these matters could only be effectively and rapidly addressed by making use of special working methods (e.g. undercover agents, electronic surveillance, multidisciplinary approaches and inter-service cooperation). However, the GMT insisted on the fact that, in doing so, it was essential to ensure that human rights guarantees, as enshrined in relevant international legal instruments, were fully respected.<sup>1</sup>

The GMT recommended to the Committee of Ministers that it be given the task of examining, in cooperation with the European Committee on Crime Problems (CDPC), the issues above with a view to developing, where necessary, guidelines to facilitate and increase the effectiveness of pre-trial investigation in cases of terrorism, bearing in mind human rights guarantees.

In February 2003, the Committee of Ministers adopted specific terms of reference for a Committee of Experts on Special Investigations Techniques in relation to Acts of Terrorism (PC-TI).

According to these terms of reference, the PC-TI was requested "to study the use of special investigation techniques respective of European criminal justice and human rights standards, with a view to facilitating the prosecution of terrorist offences and increasing the effectiveness of law enforcement and to make proposals as to the feasibility of preparing an appropriate instrument in this field."

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<sup>1</sup> CM(2002)57, "Progress report on the action which the Council of Europe could usefully carry out in the field of the fight against terrorism".

In its final report, the PC-TI concluded that it would be feasible to draw up a recommendation on the use of special investigation techniques, so as to invite member states to develop common principles governing the use of special investigation techniques reconciling the effectiveness of the fight against serious crime, such as terrorism, with the respect of human rights and the fundamental principles of penal justice. Furthermore, the recommendation should also invite member States to identify best practices with respect to the role of the judicial and law enforcement authorities involved in the use of special investigation techniques and thereby, improve international cooperation in relation with their use.

The PC-TI started its work in October 2004 and completed it in February 2005. At its last meeting, the PC-TI finalised the draft recommendation. It was approved by the CDPC in March 2005 and adopted by the Committee of Ministers of the Council of Europe at its 924<sup>th</sup> meeting on 20 April 2005.

### **3. Brief summary of Recommendation Rec(2005)10**

The recommendation contains three chapters, namely: Chapter I, Definitions and Scope; Chapter II, Use of special investigation techniques at national level; Chapter III, International cooperation. The aforementioned chapters will be summarised separately below.

#### **3.1. Chapter I. Definitions and Scope**

Chapter I sets out the scope of application of special investigation techniques.

Special investigation techniques are defined as techniques applied by the competent authorities in the context of criminal investigations. This means that the use of special investigation techniques in a different context, such as national security, does not fall within the scope of the recommendation; secondly, it points to the fact that special investigation techniques which are being used in the context of criminal investigations are covered by the recommendation regardless of the title or identity of the authorities that have been involved in deciding, supervising or using special investigation techniques.

Paragraph 1 of Chapter I further specifies that special investigation techniques are used “in such a way as not to alert the target persons”. Special investigation techniques are almost always applied covertly, the sole aim of secrecy being not to alter the behaviour of the presumed offender, but to gather as much information as possible without the target person being aware of this, all with a view to preventing a criminal act from taking place and bringing the offender(s) to justice.

#### **3.2. Chapter II. Use of special investigation techniques at national level**

##### **a. General principles**

The provisions in section (a) concern the measures used in order to obtain material and information and to what extent the judicial authorities or other independent bodies that make use of such covert investigations are under adequate control.

The requirements laid down in section (a) must be seen in particular in the context of the protection offered by Article 8 of the European Convention on Human Rights to the right to respect for private and family life.

Section (a) acts as a reminder for the national authorities that the use of special investigation techniques may affect not only the rights of the person who is suspected of having committed or prepared the offence, but also, directly or indirectly, the rights of other persons. In this respect, the appropriateness of a specific special investigation technique may, *inter alia*, depend on the intrusiveness into the rights of other persons.

- In the explanatory memorandum of the Recommendation, the PC-TI suggested in relation to e.g. telephone tapping, that the law should at least set out categories of persons whose telephones may be tapped, the nature of the offences justifying the use of tapping, the duration of the measure, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence, and the circumstances in which they are to be erased or destroyed (in particular following discharge or acquittal of the accused).
- As regards undercover operations, the PC-TI also suggested that there could be control at the beginning, during and at the end of the operation. At the beginning, the launching of the operation would be subject to there being sufficient reasons or suspicions; during the operation, regular reports would be made and, lastly, a precise description of the conduct of the operation would enable ex post facto control.

#### b. Conditions of use

The provisions in section (b) address the criteria and circumstances under which special investigation techniques may be used, if at all necessary. Furthermore, it touches upon whether information or material gained from the use of special investigation techniques can lawfully be produced in the course of a trial before national courts.

The requirements laid down in section (b) can be seen in particular in the context of the European Court of Human Rights with respect to the concept of “reasonable suspicion” within the meaning of Article 5, paragraph 1, c, of the European Convention on Human Rights<sup>2</sup>.

As regards the wording in paragraph 4, “sufficient reasons to believe”, the PC-TI referred to the Court’s interpretation that “having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have

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<sup>2</sup> The wording of that provision is as follows: “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

committed the offence. What may be regarded as “reasonable” will however depend on all of the circumstances”<sup>3</sup>.

Furthermore, the reference to a crime “being prepared” covers situations where, although no offence has been committed, a person has carried or is carrying out an action or actions that could objectively be considered as contributing to the preparation of an offence.

Paragraph 6 of section (b) encourages competent authorities to apply other investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted “with adequate effectiveness”.

Paragraph 7 aims at ensuring that, where appropriate, information or material gained from the use of special investigation techniques can be lawfully produced in the course of a trial before national courts. However, it mentions in the second sentence of the paragraph, that evidence gained from the use of special investigation techniques should not be submitted in such a way as to jeopardize the right of the accused to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights.

- The PC-TI mentioned in the explanatory memorandum the *Lüdi and Teixeira de Castro* cases where the Court considered that supervised operations and controlled operations were compatible with the rights of the accused only if those operations were conducted in the framework of a judicial investigation and the identity and role of the infiltrated officer were known to the judge. Conversely, action taken without judicial supervision would be unfair and would taint the procedure from the outset.
- The use of anonymous informants during a preliminary investigation does however not present a problem unless the information obtained is used at the trial.

### c. Operational guidelines

The provisions in section (c) involve the retention and the preservation of traffic and location data during an investigation into serious crime, including acts of terrorism.

The aim of this section is to encourage the member States to provide the competent authorities with the required technology, human and financial resources with a view to facilitating the use of special investigation techniques.

Paragraph 10 of section (c) calls for traffic and location data to be retained and preserved in accordance with “national legislation and international instruments.”<sup>4</sup> Paragraph 10 should however not be read or interpreted in a way that imposes any obligation on member states to introduce

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<sup>3</sup> Application no. 12244/86; 12245/86; 12383/86 Judgment delivered by the European Court of Human Rights on 30 August 1990 in the case of *Fox, Campbell and Hartley v. the United Kingdom*, paragraph 32.

<sup>4</sup> As regards the international instruments referred to, these are the European Convention on Human Rights (CETS No 5) and the Convention for the protection of individuals with regard to automatic processing of personal data (CETS No 108).

legislation on retention and preservation of traffic and location data that goes beyond obligations that already exist under international or national law.

Furthermore, paragraph 11 calls for interception of communication to meet “minimum requirements of confidentiality, integrity and availability”. These requirements mean that the information should be accessible only to certain authorised persons (confidentiality), that the information should be authentic and complete, thus granting a minimum standard of reliability (integrity) and that the technical system in place to intercept telecommunications is accessible whenever necessary (availability).

#### d. Training and coordination

The provisions in section (d) touch upon the need for adequate training of competent authorities in charge of deciding to use, supervising and using special investigation techniques.

The PC-TI suggested that such training should comprise of training on technical and operational aspects of special investigation techniques and training on criminal procedural legislation in connection with them and relevant training in human rights.

### **3.3. International cooperation**

The provisions in Chapter III aim at encouraging member States and their competent authorities to make better use of their international networks of contacts in order to exchange information on national regulations and operational experience with a view to facilitating the use of special investigation techniques in an international context.

Furthermore, the provisions encourage the member States to promote compliance of technical equipment with internationally agreed standards with the hopes that common technical references in the field of special investigation techniques should ease international cooperation.

## **4. Some considerations concerning the possible updating of Recommendation Rec(2005)10 or, alternatively, the possible drafting of a new recommendation focussing on counter-terrorism aspects of the use of special investigation techniques**

### **4.1. Underlining the legal framework**

The main aim of applying special investigation techniques in terrorism cases is to prevent terrorist attacks and gather evidence, which is admissible in court and hence contributes in a decisive manner to bringing terrorists and legal entities supporting them to justice and deprive them of relevant assets in accordance with the requirements of Security Council resolution 1373 (2001), while fully

respecting the rights of the defendant to a fair trial, cf. Article 6 of the European Convention on Human Rights<sup>5</sup>, and the rule of law.

This fundamental principle is already enshrined in Chapter II, section a (“general principles”), of Recommendation (2005) 10, but the text could be further developed and clarified, stressing *inter alia* the need to observe the principles of legality, proportionality, independent (including judicial) control and accountability (including access to an effective remedy before a national authority), in the application of special investigation techniques.

Moreover, the right of the defendant to a fair trial and the right to respect of private life, contained in Articles 6 and 8<sup>6</sup> respectively of the European Convention on Human Rights, could be more explicitly underlined with a view to clarifying the sometimes delicate balance between the legitimate need for the competent authorities of member States to be able to provide security, including through the use of special investigation techniques, with the obligation for the same authorities not to interfere with the aforementioned rights, except where explicitly allowed by, and under the specific conditions laid down in, the European Convention on Human Rights.

Bearing this in mind, it could be considered to reflect, in particular, provisions I (States’ obligation to protect everyone against terrorism), V (collection and processing of personal data by any competent authority in the field of State security), VI (measures which interfere with privacy), IX (legal proceedings), and XVI (respect for peremptory norms of international law and for international humanitarian law) of the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism from 2002.

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<sup>5</sup> Article 6 is worded as follows:

**Article 6 – Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

<sup>6</sup> Article 8 is worded as follows:

**Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



Likewise concerning the interpretation of Article 8 in relation to the use of special investigation techniques, the judgment of the European Court of Human Rights in the case of *Klass and others v. Germany* from 1978<sup>7</sup> contains valuable guidance to member States as to what is legally acceptable in terms of the application of special investigation techniques which could be reflected in the recommendation, namely that:

*“Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime. As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field [...]. Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the grounds of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.”*

Introducing language reflecting the aforementioned guidelines and the reasoning of the Court in the case of *Klass and others v. Germany* into the text of the recommendation would not only further align the recommendation with the positions taken by the various bodies of the Council of Europe on combating terrorism in other instruments and case law, but also make the competing interests inherent in the use of special investigation techniques of providing security, on the one hand, and respecting human rights and the rule of law, on the other hand, more obvious to the reader.

#### **4.2. Taking into account technological developments since 2005**

Whereas the legal arguments of the Court in the case of *Klass and others v. Germany* cited above still hold true, to a certain degree the basic presumptions about how private communications take place (“mail, post and telecommunications”) and the ability of public authorities to interfere with such communications, have fundamentally changed since 1978.

The last decade has seen dramatic technological improvements in communication devices enabling individuals to communicate cheaply, instantly and globally via the Internet and via mobile telephony. In response to this development, the technical capabilities for carrying out covert surveillance, potentially interfering with the right to private life, have also been improved.

This “new” situation raises a number of challenges when considering the issue of how to use special investigation techniques and their effectiveness, which were not necessarily addressed when the recommendation was drafted:

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<sup>7</sup> Application no. 5029/71 Judgment delivered by the European Court of Human Rights on 6 September 1978.

Firstly, the vast numbers of persons having access to the Internet and mobile telephony the world over has significantly increased the number of potential suspect communications which need to be monitored, including through the use of special investigation techniques. If such monitoring is to be effective, it must be properly targeted and based on clear indications that the person under surveillance is engaged in criminal activities. Mounting a general “fishing expedition” with a view to gathering potential evidence through the use of special investigation techniques is neither effective, nor, as a rule, compatible with the right to private life enshrined in Article 8.

Secondly, gathering information through the use of special investigation techniques on the Internet comes with its own set of legal complications in terms of jurisdiction. This is a sensitive issue which requires further consideration in order to avoid potential legal conflicts and provide for durable solutions which respect the principle of rule of law. The issue itself cannot be regulated through a recommendation, but the recommendation could include a call for member States to bear in mind these concerns when applying special investigation techniques on the Internet.

#### **4.3. Further improving cooperation between competent authorities at national and international levels**

Similarly, the issue of how to further improve cooperation on information gathering and sharing between the different competent authorities involved in combating terrorism at both international and national level could be addressed.

The timely passing of information between authorities that may not cooperate on a regular basis is crucial to preventing terrorist attacks from taking place, but may sometimes be hampered by lack of mutual trust.

Introducing into the text of the recommendation a call for member States to further facilitate cooperation between the various competent authorities involved in combating and preventing terrorism by using special investigation techniques, also at national level, could be considered as adding value to the already existing text, which focusses exclusively on international cooperation.

#### **4.4. Further perspectives in the use of special investigation techniques**

Given the importance of preventing and stopping the financing of terrorism and the role played by legal persons in this regard, it could be considered to make specific reference in the recommendation to the use of special investigation techniques vis-à-vis legal persons, including for the purposes of freezing and confiscating assets belonging to legal (or natural) persons who support terrorism.

#### **4.5. Updating Recommendation Rec(2005)10 or drafting a new recommendation focussing on the use of special investigation techniques in a counter-terrorism context?**

Provided that CODEXTER reaches the conclusion that an update is indeed necessary, the Committee could discuss whether it prefers to amend Recommendation (2005) 10, or if it would make more sense to initiate work on a new recommendation focussing specifically on the use of special investigation techniques in a counter-terrorism context.

This choice may affect the working methods to be used, including which other committees to involve and in what capacity. Thus an amendment of Recommendation Rec(2005)10 would likely require the involvement of the European Committee on Crime Problems (CDPC) and possibly other Committees in a co-authoring role, whereas opting for a new dedicated counter-terrorism instrument would require CODEXTER to take the lead in the drafting thereof.

In the view of the Sub-Group the most obvious of these choices is to amend Recommendation (2005)10, thereby retaining the majority of the text as it stands, but, where necessary in view of bringing the recommendation up to date, introducing new text to supplement the recommendation, including on the issues outlined above.

To this end, the Sub-Group would suggest that CODEXTER initiates contacts with CDPC and MONEYVAL with a view to obtaining their opinions and determining possible next steps in the procedure to amend the recommendation. One possibility, which could be further explored, is to set up a working group composed of representatives of the three Committees to prepare the draft amendments for examination and finalisation by the three Plenaries. In due time, the draft amendment to the recommendation, as agreed by all three Committees could then be presented to the Committee of Ministers for formal adoption.

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## APPENDIX

### **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**

*(Adopted by the Committee of Ministers on 20 April 2005  
at the 924th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity among its members;

Recalling that in Resolution No. 1 on combating international terrorism adopted at the 24th Conference of European Ministers of Justice (Moscow, 4-5 October 2001), the Committee of Ministers was invited to adopt urgently all normative measures considered necessary for assisting states to prevent, detect, prosecute and punish acts of terrorism;

Considering that the final report of the Multidisciplinary Group on International Action against Terrorism (GMT) and the subsequent decisions of the Committee of Ministers recognise the use of special investigation techniques as a priority area of the Council of Europe's legal action against terrorism;

Recalling that in Resolution No. 1 on combating terrorism, adopted at the 25th Conference of European Ministers of Justice (Sofia, 9-10 October 2003), the Committee of Ministers was invited, *inter alia*, to pursue without delay work with a view to adopting relevant international instruments on the use of special investigation techniques;

Bearing in mind the final report on special investigation techniques in relation to acts of terrorism prepared by the Committee of Experts on Special Investigation Techniques in relation to Acts of Terrorism (PC-TI) and the opinions of the Committee of Experts on Terrorism (CODEXTER) and of the European Committee on Crime Problems (CDPC) thereon;

Bearing in mind the surveys on “best practices” against organised crime carried out by the Group of Specialists on Criminal Law and Criminological Aspects of Organised Crime (PC-S-CO), as well as the reports adopted in the framework of the Council of Europe's technical cooperation programmes for the fight against corruption and organised crime;

Taking into account Recommendation No. R (96) 8 on crime policy in Europe in a time of change and Recommendation [Rec\(2001\)11](#) concerning guiding principles in the fight against organised

crime;

Taking into account the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, 28 January 1981) and its Additional Protocol on Supervisory Authorities and Transborder Data Flows (ETS No. 181, 8 November 2001); Recommendation No. R (87) 15 regulating the use of personal data in the police sector; and Recommendation No. R (95) 4 on the protection of personal data in the area of telecommunication services, with particular reference to telephone services;

Taking into account the existing Council of Europe conventions on cooperation in the penal field, as well as similar treaties which exist between Council of Europe member states and other states;

Mindful of the Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002;

Mindful of the obligation on member states to maintain a fair balance between ensuring public safety through law enforcement measures and securing the rights of individuals, as enshrined in the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights in particular;

Considering that special investigation techniques are numerous, varied and constantly evolving and that their common characteristics are their secret nature and the fact that their application could interfere with fundamental rights and freedoms;

Recognising that the use of special investigation techniques is a vital tool for the fight against the most serious forms of crime, including acts of terrorism;

Aware that the use of special investigation techniques in criminal investigations requires confidentiality and that any efforts to pursue the commission of serious crime, including acts of terrorism, should where appropriate be thwarted with secured covert means of operation;

Aware of the need to reinforce the effectiveness of special investigation techniques by developing common standards governing their proper use and the improvement of international cooperation in matters related to them;

Recognising that the development of such standards would contribute to further build public confidence as well as confidence amongst relevant competent authorities of the member states in the use of special investigation techniques,

Recommends that governments of member states:

i. be guided, when formulating their internal legislation and reviewing their criminal policy and practice, and when using special investigation techniques, by the principles and measures appended to this Recommendation;

- ii. ensure that all the necessary publicity for these principles and measures is distributed to competent authorities involved in the use of special investigation techniques.

*Appendix to Recommendation Rec(2005)10*

## **Chapter I – Definitions and scope**

For the purpose of this Recommendation, “special investigation techniques” means techniques applied by the competent authorities in the 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.

For the purpose of this Recommendation, “competent authorities” means judicial, prosecuting and investigating authorities involved in deciding, supervising or using special investigation techniques in accordance with national legislation.

## **Chapter II – Use of special investigation techniques at national level**

### **a. General principles**

1. Member states should, in accordance with the requirements of the European Convention on Human Rights (ETS No. 5), define in their national legislation the circumstances in which, and the conditions under which, the competent authorities are empowered to resort to the use of special investigation techniques.
2. Member states should take appropriate legislative measures to allow, in accordance with paragraph 1, the use of special investigation techniques with a view to making them available to their competent authorities to the extent that this is necessary in a democratic society and is considered appropriate for efficient criminal investigation and prosecution.
3. Member states should take appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review.

### **b. Conditions of use**

4. Special investigation techniques should 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 of individuals.
5. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured. In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation technique used should be made.
6. Member states should ensure that competent authorities apply less intrusive investigation

methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.

7. Member states should, in principle, take appropriate legislative measures to permit the production of evidence gained from the use of special investigation techniques before courts. Procedural rules governing the production and admissibility of such evidence shall safeguard the rights of the accused to a fair trial.

### **c. Operational guidelines**

8. Member states should provide the competent authorities with the required technology, human and financial resources with a view to facilitating the use of special investigation techniques.

9. Member states should ensure that, with respect to those special investigation techniques involving technical equipment, laws and procedures take account of the new technologies. For this purpose, they should work closely with the private sector to obtain their assistance in order to ensure the most effective use of existing technologies used in special investigation techniques and to maintain effectiveness in the use of new technologies.

10. Member states should ensure, to an appropriate extent, retention and preservation of traffic and location data by communication companies, such as telephone and Internet service providers, in accordance with national legislation and international instruments, especially the European Convention on Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

11. Member states should take appropriate measures to ensure that the technology required for special investigation techniques, in particular with respect to interception of communications, meets minimum requirements of confidentiality, integrity and availability.

### **d. Training and coordination**

12. Member states should ensure adequate training of competent authorities in charge of deciding to use, supervising and using special investigation techniques. Such training should comprise training on technical and operational aspects of special investigation techniques, training on criminal procedural legislation in connection with them and relevant training in human rights.

13. Member states should consider the provision of specialised advice at national level with a view to assisting or advising competent authorities in the use of special investigation techniques.

## **Chapter III – International cooperation**

14. Member states should make use to the greatest extent possible of existing international arrangements for judicial or police cooperation in relation to the use of special investigation techniques. Where appropriate member states should also identify and develop additional

arrangements for such cooperation.

15. Member states are encouraged to sign, to ratify and to implement existing conventions or instruments in the field of international cooperation in criminal matters in areas such as exchange of information, controlled delivery, covert investigations, joint investigation teams, cross-border operations and training.

Relevant instruments include, *inter alia*:

- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988;
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141);
- the Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173);
- the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 (ETS No. 182);
- the Convention on Cybercrime of 23 November 2001 (ETS No. 185);
- the United Nations Convention against Transnational Organised Crime of 15 November 2000 and the Protocols thereto;
- the United Nations Convention on Corruption of 31 October 2003.

16. Member states are encouraged to make better use of existing relevant international bodies, such as the Council of Europe, the European Judicial Network, Europol, Eurojust, the International Criminal Police Organisation (Interpol) and the International Criminal Court, with a view to exchanging experience, further improving international cooperation and conducting best practice analysis in the use of special investigation techniques.

17. Member states should encourage their competent authorities to make better use of their international networks of contacts in order to exchange information on national regulations and operational experience with a view to facilitating the use of special investigation techniques in an international context. If needed, new networks should be developed.

18. Member states should promote compliance of technical equipment with internationally agreed standards with a view to overcoming technical obstacles in the use of special investigation techniques in an international context, including those connected with interceptions of mobile telecommunications.

19. Member states are encouraged to take appropriate measures to promote confidence between their respective competent authorities in charge of deciding to use, supervising or using special investigation techniques with a view to improving their efficiency in an international context, while ensuring full respect for human rights.



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