

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

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-identified 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.