

Special methods of investigation against organized crime

PhD (C.) Eliora Elezi
Albanian School of Magistrates

Abstract

International criminal organizations, more and more are using sophisticated communication and action techniques. In many instances of organized crime, for example in corruption, human beings trafficking, narcotics, etc., there is no proof of evidence. These crimes are "without victims" or "without witnesses" and their reporting is rare. Traditional investigative methods and techniques are not always productive, to counteract criminal activity in technological evolution and not just that. This led to the need of using the most efficient ways, such as the special investigation methods, such as: simulation actions, controlled delivery of unlawful cargo, infiltrated agent, alternating with interception of communications and equipment with modern technical means. Better knowledge of these methods is of particular importance to law enforcement institutions but also to the individual who may be vulnerable to violating private life from their illicit use.

Keywords: special methods of investigation, organized crime, proactive investigation, evidence.

Introduction

Organized crime has recently changed dramatically. In addition to what we can call traditional, because it is rooted in a certain territory within branches and contacts with other organizations (Sicilian mafia, Colombian and similar cartels), it's the criminality now termed transnational: it is formed by groups of persons belonging to different countries, different ethnicities, united no longer from common ancestry, but only from common interest and act simultaneously in more than one country (Sciacchitano, 2007, 46). Its forms of expression are numerous, such as: drug trafficking, money laundering, women and children trafficking, illicit fabrication and transportation of firearms, smuggling, etc.

The use of traditional investigative techniques to combat international organized crime in time resulted in insufficient or ineffective (Harfield, 2000, 109). While the implementation of special investigative tools, on the other hand, revealed the potential possibility of violating the fundamental human rights. The right balance can be achieved based on basic principles such as legality, control, public interest, etc. Discussions on these techniques often overcome the legal plan and go to the political and not only. However, it is now accepted that the reactive investigation, that is, on the basis of complaints, is not always effective, especially in cases where witnesses are missing or are less reliable. For many reasons, it was passed to a proactive investigation, which in nature allows prosecuting authorities to detect and detain violators of the law while committing criminal acts, collecting evidence of the "historical" course of crime.

Important institutions of the European Union have been concerned with the progressive increase of organized crime in Europe. For this reason multilateral round tables discussions were held for security and defense policy co-ordination initiatives to be undertaken with a view to reduce potential threats and potential damages in modern democracies.

Also, one of the recommendations of the European Parliament ¹is the importance of their use:

"That the problems associated with these particular methods of investigation should not be silenced, but instead it should be debated in particular - especially at the parliamentary level; thus making every effort to use these methods to give criminal investigation agencies, equal instruments to those used by organized crime. These should always go hand in hand with a weight that equals the level of violation of fundamental civil rights and the possible effects on innocent parties, against prospects and successes as well as the advantages vis-à-vis traditional investigative methods. Their use is necessary and justified, but they should be used only in extremely strict conditions and subject to legal and parliamentary controls in particular as effective measures to prevent their misuse."

In the analysis of the clear definition of these techniques, we will first dwell on the linguistic meaning of the term "technique"², which includes methods, as follows: "The entirety of the methods used in a particular work; the responsible person necessary to carry out this work; the degree of ownership of these methods; someone's capability in a mastery."

In addition to this general and inclusive meaning, another definition is dealt with under the definition of criminological methodology (or method of investigation and prevention of different types of offense) which is: "a system of knowledge on the basis of which technical and tactical recommendations are processed, for the organization, planning and development of the investigation, in accordance with the features that have different types of criminal offenses" (Begeja, 2004, 482).

A more specific definition of "special investigation techniques" is also found in the acts issued at the European Union level."

"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."³

Regardless of the manner of defining these methods known as special investigative actions, special investigative techniques, etc., they are foreseen in most contemporary criminal proceedings legislation. Since it is about measures, which visibly affect the foundations of citizens' rights and freedom, their implementation assumes the prior fulfillment of certain requirements. Their application is limited only when it is not possible to conduct a criminal investigation in any other way, or their implementation implies great difficulties.

¹ Action Plan to combat organized crime (7421/97 C40199/97), 52-56.

² Dictionary of Albanian Language, (Publication of Academy of Sciences of RPS of Albania, Institute of Linguistics and Literature, Tirana 1980), 1976.

³ 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, 20 April 2005, Rec(2005)10, [Online]. Available at <http://www.refworld.org/docid/43f5c6094.html> (30 September 2017).

Unlike impulsive or opportunistic crimes, some crimes include more covert, complex actions, and consensual activities such as: narcotics, corruption, prostitution, etc. Their investigation is difficult or impossible, if the police remain pending on victims' complaints, statements or witnesses. In order for these crimes to be prosecuted successfully, the police should penetrate their ranks or play the role of criminals.

Such undercover operations are being widely used in many countries. According to sociologist Gary Marx (Jahn, 2009, 155), three types of hidden investigations are identified, distinguished by their different objectives:

- (1) Intelligence or oversight operations, which have the most passive activities;
- (2) Preventive operations, which receive or have more active access, and
- (3) Mitigation Operations, which require more active involvement of the police.

Surveillance operations use secret techniques to gather information about committed, ongoing, or scheduled crimes. The key role of the covert agent is information rather than influencing the events.

Preventive operations use the secretive activity to search for or stop a work being developed. Prevention can be in the form of weakening criminality or by diverting the suspect (for example, a secret agent involved in a political demonstration that provokes violence, may try to dispel the crowd, arguing its non-use).

On the other hand, **mitigating operation**, in contrast to preventative actions, alleviates the effort to encourage the commission of a criminal offense. This can be done by providing help, goods, or encouraging suspects. The role that secret agents play in mitigating operations depends on whether they are presented as collaborators or victims.

Of the three types of secret policing described above, relief operations are more controversial. The possibility of a "trapment" of the police is most likely in a scene where police operates actively, thus encouraging crime. While oversight and deterrence operations are analogous to traditional police, mitigating operations are attempts to keep track of crime and produce more evidence than others.

Historical overview of special methods / techniques

From the historical point of view of the evolution of special investigative techniques, it is noticed that their strings relate to the figure of the provocative agent in the XVII and XVIII century, in France. In fact, it should be made clear that they were more related to the activity of the agent and the secret police in the form of espionage rather than as legal remedies within a criminal proceeding capable of producing evidence. Thus, in the period of absolutism, under the reign of Louis XIV, some state-appointed private informants were formed to capture and hold political opponents under control. These private citizens benefited privileges as well as favors of impunity (Barrocu, 2011, 4).

Subsequently, private investigators were replaced by more sophisticated secret police organizations that carried out their activity as a state-charged task. These forms of intelligence were not enough to gather information, but developed the activity under a more provocative activity, with the aim of arresting the flagrant citizens of suspected insurgents. Subsequent developments elaborated on the figure of the provoking

agent, from the broad and unlawful meaning, in a form that could be allowed to be used within the given legal boundaries. Thus it was distanced in the figure from the promoter that defined the subject suspected of a crime that without his interference would not have been committed.

Economical and-socio-technological changes affected organized crime and the struggle against it, became difficult and complex. Against this background, there was a need to allow the use of special investigative techniques in the investigative activity run by the criminal prosecution bodies, but only under a legal framework limited by respect for human rights and in accordance with the purpose of the use of them.

In Albania, prior to 2001, no special investigation techniques were known.

They were later taught in 2004 in the Criminal Procedure Code. This means that the previous criminal procedural legislation, including the period during the communist system, did not foresee and regulate them.

However, the dictatorial system could not use secret services, and only as sources for informing and suppressing any kind of initiative that opposed the political rush of the single ruling party. Thus the investigator was considered a loving weapon in the hands of the workers' measures for the defense of the party and of the socialist state (Lame, 1987, 19). Under the spirit of idealism, the society was encouraged and educated to provide its assistance in detecting political opponents and criminals.

For the foregoing, the line of the party was considered the line of measures and encouraged the active and comprehensive attraction of society, in detecting criminality and protecting socialist legality. These documentary facts, as well as recent historical developments, provide clear evidence that despite the fact that special techniques have been legally legislated in Albania, they are used to gather information and evidence by utilizing, private informants and state intelligence sources

For the foregoing, the line of the party was considered the line of measures and encouraged the active and comprehensive attraction of society, in detecting criminality and protecting socialist legality (Oga, 1987, 118). These documentary facts, as well as recent historical developments, provide clear evidence that despite the fact that special techniques have been legally legislated in Albania, they are used to gather information and evidence by utilizing, private informants and state specific intelligence sources, used by law enforcement agencies.

Types of Special Investigation Methods in the European Union

According to an analysis with the EU states, special investigation techniques are distinguished by "instruments within the judiciary" (eg, witness protection) and special "investigative means" used by law enforcement agencies. There are a number of investigative techniques known as:

- Surveillance;
- Interception of communications;
- Secret Investigations;
- Controlled submissions;
- Informants;
- Joint investigative teams;

- Tracing in the state of flagrancy (Hot pursuit);
- Witnesses protection;

In the framework of this paper, we will analyze in general terms these techniques, trying to define them as well as outlining relevant legislation.

Surveillance - otherwise known as the surveillance term, is envisaged by the Schengen Convention⁴, the Prüm Decision⁵, the Convention on Mutual Assistance and Co-operation between the Member States (Naples II)⁶ and the EU Convention on Mutual Assistance in Criminal Matters between the Member States.⁷ Usually applies in cases of organized crime, smuggling, trafficking in human beings, illegal weapons, drugs and excise goods (example: tobacco)⁸.

Cross-border Surveillance⁹ is one of oversight types, but it extends jurisdictions in some countries. It is carried out upon the request of the authorities of a State to be authorized to continue the surveillance initiated on a person suspected of committing an extraditable offense in the territory of another state.

Communications interception is provided by the Privacy Directive 97/66 / EC,¹⁰ the Electronic Privacy Directive 2002/58 / EC¹¹, the Data Retention Directive 2006/24 / EC,¹² the European Inquiry Directive 2014/41 / EU.¹³ There are different forms of communication's interception: eavesdropping, eavesdropping, etc. Tapping usually refers to tapping the mobile and landline phones.¹⁴

Secret investigations are provided by the Naples II Convention and the Convention on Mutual Assistance in Criminal Matters. The secret investigation is considered a "last" problematic and high-risk investigative tool and as a result, usable after exhaustion of tools in other investigations. "Secret Investigation" is the term

⁴ Council of the European Union (1990).

⁵ Council of the European Union (2008a).

⁶ Council of the European Union (2000b).

⁷ Council of the European Union 0(2000a).

⁸ Andrea, Di Nicola, Philip, Gounev, et al., 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), (European Commission, 2015) 231. [Online]. Available at https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/elibrary/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf. (3 April 2017).

⁹ The Police Cooperation Convention for Southeast Europe, Article 16 "Officers of one of the Contracting Parties who, as part of a criminal investigation, keep under surveillance in their country a person who is presumed to have participated in an extraditable offense shall be authorized to continue their surveillance in the territory of another Contracting Party under bilateral Implementation Agreements concluded in accordance with Article 34, paragraph 1 of this Convention, in those cases where the latter has authorized cross-border surveillance in response to a request made in advance

¹⁰ Council of the European Union (1997).

¹¹ Council of the European Union(2002a).

¹² Council of the European Union (2006).

¹³ Council of the European Union (2014).

¹⁴ Andrea, Di Nicola, Philip, Gounev, et al., 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), (European Commission, 2015) . 250 [Online]. Available at https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/elibrary/docs/20150312_1_amoc_report_020315_0_220_part_1_en.pdf. (3 April 2017).

commonly used in European legislation to refer to the use of secret officers¹⁵. There are two common types of covert investigations: one is "infiltration" carried out with authorized law enforcement officers under covered identities and the second has different denominations such as "pseudo-test service" or "sting operations"¹⁶, which refers to the simulated purchase of illegal goods (illicit drugs, firearms, etc.).

The controlled deliveries are provided by the Naples II Convention, the Schengen Convention and the Convention on Mutual Assistance in Criminal Matters. They are mainly used for cross-border drug trafficking cases but can also be used in cases of smuggling.

Informers are provided for in the Schengen Convention, Convention on Mutual Assistance in Criminal Matters, Council Framework Decision 2006/960/JHA.

Europol sets out an informant as "a human being who is treated confidentially and provides information or provides help to secret services for law enforcement." So the term "informer" carries a broad meaning that includes: individuals (criminals or associates) who provide information; individuals who provide information that does not derive from a relationship (eg, a neighbor agrees to provide the police with data); individuals who provide information to the police on the basis of professionally legitimate duty (employees reporting suspicious transactions on money laundering), financial officers, accountants, notaries, administrators, etc.

Joint investigative teams¹⁷ are provided for by the EU Convention on Mutual Assistance in Criminal Matters (2000 / C 97/01); Council Framework Decision on Joint Investigative Teams (2002/465 / JHA) of 13 June 2002. It is defined as:

*"A joint investigation team is a team composed of judges, prosecutors and law enforcement authorities, established for a specific period and a specific purpose by means of a written agreement between the States involved, to conduct criminal investigations in one or more of the states involved."*¹⁸

Hot pursuit -is enshrined in the Schengen Convention (Article 41), the Naples II Convention, the UN Convention on Maritime Law. "Tracing in the state of flagrancy" is a legal arrangement that enables the authorities of a state to pursue the suspect for committing a criminal offense in flagrancy across the border of that state. It differs from "cross-border supervision" because the latter allows officers to continue overseeing suspected persons across borders, but without the possibility of temporary arrest.

The protection of witnesses¹⁹ is provided by the United Nations Convention against

¹⁵ The EU Convention "On Mutual Legal Assistance in the Criminal Matters" sets forth as secret investigations, investigations into crimes by officials acting with hidden identity (Article 14).

¹⁶ Andrea, Di Nicola, Philip, Gounev, et cited , 266.

¹⁷ "Joint Investigation Team Manual", Council of the European Union no. 13598/09, 23 September 2009.

¹⁸ Annual Report Eurojust (2015). [Online]. Available at <http://www.eurojust.europa.eu/doclib/ry/corporate/eurojust%20Annual%20Reports/Annual%20Report%202015/Annual-Report-2015-EN.pdf> (16 April 2017).

¹⁹ The European Witness Protection Manual (Europol, 2013) uses the Witness Categories as ('any person who possesses relevant information on the criminal proceedings for which he / she has and / or provides evidence ... which is not included in the definition of "justice collaborator" '), a collaborator of justice (" any person who faces criminal charges or has been convicted of participating in a criminal offense or other criminal organization of any kind ... who agrees to cooperate with the judiciary ') and the victim (' any person who is subject to a crime but not necessarily required to give

Transnational Organized Crime, the UN Convention against Corruption. The material significance of the evidence, explanations or information provided by them in criminal proceedings is the recognition of the facts or subjects of a criminal case. In other important cases, the use of surveillance techniques, secret agents and controlled delivery have provided basic information on all international crime networks, their structures, the way of operating criminal groups (*modus operandi*), the identification of offenders, helpful information on the preparation of future crimes and "recognition of goals" to prevent other offenses²⁰. In this way, special investigation techniques are a proactive approach to probe, providing evidence, which would probably have been impossible with less refined techniques

Evolution of Special Investigation Methods / Techniques in Albania

Special investigative techniques, especially intelligence and secret agents, are other effective means used in the fight against organized crime, particularly international trafficking. In Albania, they are mainly used in these directions:

- To investigate criminal offenses in the field of narcotics;
- To investigate criminal offenses in the field of illicit trafficking;
- To investigate criminal offenses in the field of financial crime;
- To investigate criminal offenses in the field of terrorism;

In most European legal systems, including Albanian legislation, changes to criminal and procedural material law have been made, in accordance with the concept of "bellum justum"²¹, by adopting more severe measures; extending the powers of the investigative bodies and using special investigative techniques, such as interception of communications of all kinds. Criminal Procedure Code recognizes as probation tools 4 forms: examinations, controls, sequestrations and interceptions. They are located in Chapter III of it. With the changes made to this Code in 2004²² in the second part after the "Preliminary Investigations" and under Chapter IV titled "*Initiative of the Judicial Police*", two articles were added respectively 294 / a "*simulation actions*" and 294 / b "*Infiltrated police officer*". The placement in this chapter has raised discussions about their suitability at the place where they were placed in the code and the fact that they might have been correctly positioned in the search tools.

In fact, even though these activities involve the judicial police, I maintain the idea that they should have been placed immediately after the articles that sanction the means of probation. The question as to whether these methods are probation tools, I find it more responsive than they are a particular category of investigation, on the basis of which it is required to obtain data and legitimate evidence, to be used in criminal proceedings. In different countries, it is often evidence in a criminal proceeding ').

²⁰ UNODC, Operational training manual to combat trafficking in persons forth coming in 2008. [Online]. Available at link www.unodc.org. (5 May 2017)

²¹ Latin term known as a "just war".

²² Law no.9187, dated 12.02.2004 "On some additions and amendments to Law no.7905 dated 21.03.1995" Criminal Procedure Code of the Republic of Albania ".

envisaged in special laws due to special criteria in use and implementation.²³ It is noted that in the Criminal Procedure Code, that is still today widely applied, there is no regulation of a special technique known as controlled delivery. It is foreseen in Law no. 8750, dated 26.01.2001 "On prevention and fight against narcotic and psychotropic substances trafficking" and is one of the most effective techniques in this field.

Meanwhile, according to another source, the Joint Instruction between the General Prosecutor and the Minister of Public Order²⁴ special methods of investigation will be considered:

- a. The stimulated purchase method;
- b. Controlled delivery method;
- c. undercover agent method;
- d. The method of the infiltrated police officer;

Conclusions and Recommendations

Such investigative techniques are particularly invasive. They are envisaged in the legislation of many European countries also at the level of the *acquis communautaire*. In Albania, legal framework was relatively late. Amendments' of Criminal Procedure Code of 2004 allowed using investigative tools in these directions investigate criminal offenses against: narcotics, illicit trafficking, financial crime and terrorism. The practical implementation of these techniques appears problematic, mainly in the field of human rights. For the foregoing, their recognition increases efficiency and reduces abuse.

References

- Barrocu, G. (2011). *Le indagini sotto copertura*. Jovene editore.
- Bianku, L. (2007). *The jurisprudence of the Strasbourg Court*.
- Block, L. (2011). *EU joint investigation teams: Political ambitions and police practices*. London: Routledge. 2011.
- Harfield, C. (2000). Pro-activity, partnership and prevention: the UK contribution to policing organised crime in Europe. "The Police Journal".
- Cutting, P. D. (1998). *The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic drugs and psychotropic substances*.
- Di Nicola, A. Gounev, Ph. et al. (2015). *Study on paving the way for future policy initiatives in the field of fight against organized crime: the effectiveness of specific criminal law measures targeting organised crime*.
- Halim, I. Hoxha, A. Panda I. (2011). *Criminal Procedure*. Tiranë.
- Kruisbergen, E. De Jong, W. Kleemans, E. (2011). *Undercover Policing. Assumptions and Empirical Evidence*.
- Lame, Q. (1987). *Investigation - a beloved weapon in the hands of the working measures for the defense of the party and of the socialist state" Investigation - a loving weapon in the hands of the working masses*. Tirana.
- La Rue, F. (2017). *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*.
- Laurentiu, G. (2013). *Special methods and techniques for investigating drug trafficking in*

²³ For example. Bulgaria "Special Investigation Tools Act 2013"

²⁴ On the use of special methods of investigation of crimes against drugs.(April 2003)

International Journal of Criminal Investigation.

Mahney, P. (2001). Right to a fair trial in crimiminal matters, under article 6 E.C.H.R" National Judicial Conference Dublin.

McDermott, P. A. (2008). Undercover Investigations ë Human Rights in 9-th Annual National Prosecutors Conference.

Scalici, M. (2014). Operazioni sotto copertura ed equo processo in Archivio Penale.

Sciacchitano, Giusto ".Fight against Transnational Organized Crime in the European Legal and Judicial Area "Italy - Albania: Legal Instruments and Techniques for Combating Transnational Organized Crime. "Face to face experiences., UNICRI, 2007.