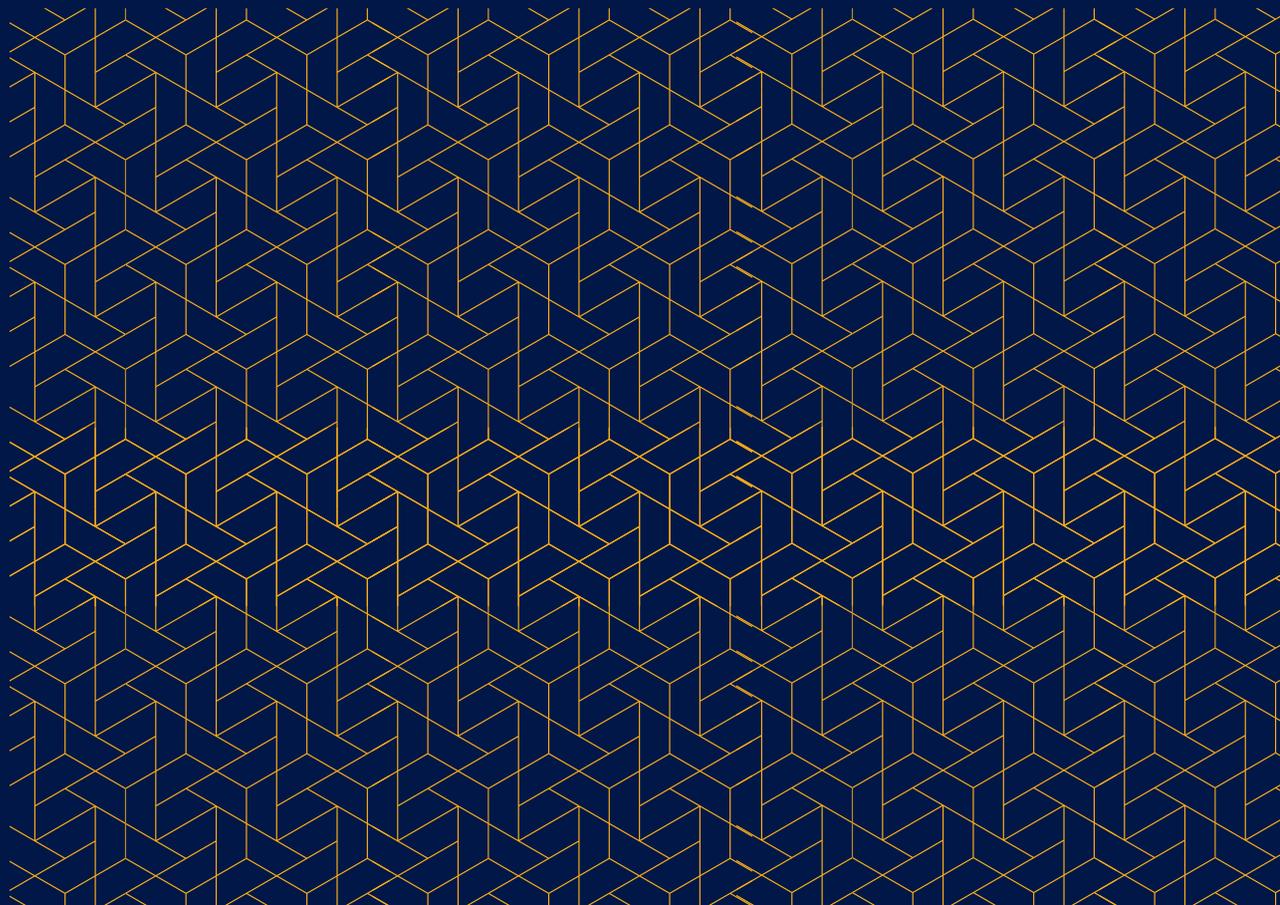


THEMATIC BRIEF

**Counterintelligence
and Law Enforcement
Functions in the
Intelligence Sector**



About this thematic brief

This brief was produced as part of DCAF's Intelligence Reform Assistance Programme.

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ISBN: 92-9222-549-9

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COUNTERINTELLIGENCE AND LAW ENFORCEMENT FUNCTIONS IN THE INTELLIGENCE SECTOR

BACKGROUND

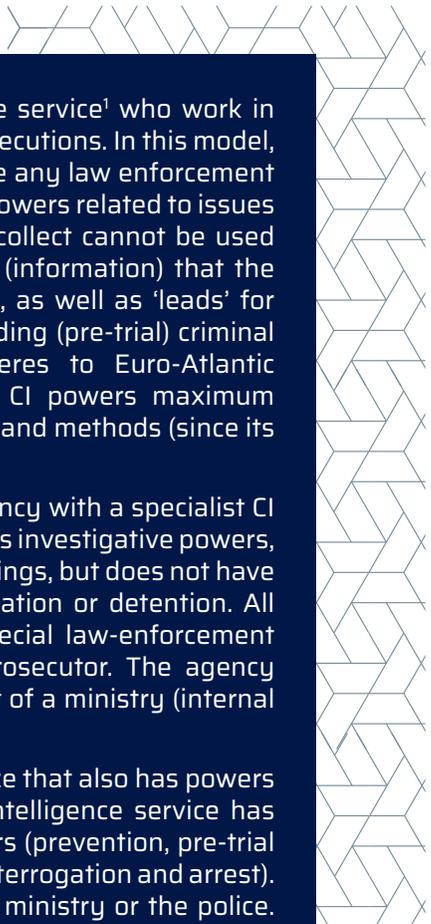
This Thematic Brief examines the use of counterintelligence and law enforcement powers in the intelligence sector. It considers the similarities and differences between the two, explores how such powers are applied by intelligence services, and identifies the main challenges to defining an optimal model for the use of law enforcement and counterintelligence powers by intelligence services, including the clear delineation of competencies between different security agencies; the avoidance of overlaps and redundancies in the powers and functions of agencies with law enforcement and counterintelligence mandates; the introduction of comprehensive internal and external oversight systems, and the establishment of an effective framework for interagency cooperation.

This Thematic Brief is intended to assist states in the process of reforming their intelligence services. Composed of five parts, it explores the relationship between counterintelligence and law enforcement, including as regard functional similarities and differences, processes for transferring powers between the two, and the use of pre-trial investigations. It concludes with reflections on suitable models for defining the authority, role and functions of intelligence agencies in relation to law enforcement powers.

1. Counterintelligence (CI) and Law Enforcement (LE)

Traditionally, CI is defined as operations conducted to identify, deceive, exploit, disrupt, or protect against espionage, sabotage, or assassinations conducted by foreign powers, organizations or persons, or their agents. Put simply, CI involves operations which aim to protect the interests of a state against those that would seek to harm it. The fundamental difference between CI and LE is that the former is therefore concerned with 'national security' while the latter deals primarily with 'public order' and 'safety' through discovering, deterring, rehabilitating, or punishing people who violate the rules and norms governing a society. While the term law enforcement traditionally encompasses the police and corrections (executive branch), and courts (judicial branch), for the purposes of this note, it will refer only to those who engage in activities to dissuade and identify criminal activity, investigate crimes and apprehend offenders.

The relationship between agencies with CI and LE powers is complex and varies depending on several factors, including: the threat level, legal system, level of inter-agency cooperation, desired outcomes as determined by government policy, and the number of agencies and their responsibilities. In general, there are three models for conducting CI operations:

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1. **The Delineated Model:** through an intelligence service¹ who work in conjunction with LE agencies to bring about prosecutions. In this model, intelligence agencies with CI powers do not have any law enforcement functions. They may have limited investigative powers related to issues of national security, but any information they collect cannot be used as evidence in court. They provide intelligence (information) that the executive and other state institutions act upon, as well as 'leads' for police and prosecutors to pursue in any succeeding (pre-trial) criminal investigation. This model most closely adheres to Euro-Atlantic practices, allowing intelligence agencies with CI powers maximum protection for their clandestine collection assets and methods (since its agents and documents do not appear in court).
 2. **The Integrated Model:** through a federal LE agency with a specialist CI division. In this model, the intelligence agency has investigative powers, including to collect evidence for criminal proceedings, but does not have (repressive, coercive) powers of arrest, interrogation or detention. All enforcement is the responsibility of police, special law-enforcement agencies (i.e. anticorruption agency) or the prosecutor. The agency may be an independent state institution, or part of a ministry (internal affairs) or the police.
 3. **The Hybrid Model:** through an intelligence service that also has powers of arrest and prosecution. In this model, the intelligence service has full law enforcement and security-related powers (prevention, pre-trial criminal investigations, surveillance, searches, interrogation and arrest). It may be a stand-alone institution or part of a ministry or the police. This is perhaps the most controversial model as it risks centralizing extraordinary powers in one state agency, and thereby increasing the chances of abuses of power. Such powers could be curbed to some extent through stricter regulations, external oversight measures and safeguards, as well as by limiting the scope of criminal jurisdiction to the most serious cases such as terrorism, subversion and espionage.

Occasionally, specific agencies within Defence ministers are also mandated to deal with espionage against the military. To this end, it should be noted that there exists no "ideal" model - each brings with it advantages and disadvantages. Nevertheless, in the Euro-Atlantic sphere, the Delineated Model is most widely used; based on the common understanding that intelligence services should not have the power to conduct criminal investigations, arrest or detain people. A notable exception can be found in the USA, where the Federal Bureau of Investigation (FBI) has adopted the Integrated Model, with both LE and CI powers. Several intelligence agencies within the Euro-Atlantic sphere - such as Poland's ABW, Denmark's PET, and Ireland's An Garda Síochána - also use the Integrated Model, with CI powers as well as specific legal competencies in the law enforcement domain. Outside of the Euro-Atlantic sphere, the intelligence services of countries such as Brazil (DPF) and Malaysia (MSB) use similar models. In general, however, most intelligence services in this area do not have the

¹ Intelligence services are defined as specialized state agencies responsible for producing intelligence relevant to the security of the state and its people. Intelligence services provide such information to assist political decision-makers to (i) define national interests; (ii) develop national security and military strategies and policies; (iii) determine the mission, doctrine and strategies of the armed forces and other security institutions; (iv); prepare for and respond to national crises; and (v) prepare for a prevent threats to the state and its people. For more information, see: SSR Backgrounder (2015) Intelligence Services: Roles and Responsibilities in good security sector governance. DCAF

power to conduct criminal investigations, with these instead conferred to police, special law enforcement bodies (specializing in high-level criminality and/or corruption) or the prosecutor's office. There are fewer examples of intelligence agencies with extensive powers of arrest and detention, with most falling outside of the Euro-Atlantic area. Nevertheless, as the complex demands of safeguarding national security and maintaining public safety increasingly converge, it may be necessary to re-examine the traditional boundaries between CI and LE, particularly in states affected by conflict or those undergoing intelligence sector reform.

2. Functional Similarities and Differences between Counterintelligence and Law Enforcement

Agencies with counterintelligence powers and those with law enforcement powers both work to provide security. Their interests can coincide in some instances and diverge in others. Their objectives, jurisdiction/authority, priorities, 'sense of timing', standards and procedures, as well as institutional culture can vary significantly. While CI powers are used in pursuit of the broader task of protecting 'national security', agencies with law enforcement powers are primarily responsible for investigating suspected cases of criminality, and for providing the appropriate authorities with the information necessary to enforce the law, and by extension, maintain public order and safety. As such, agencies with CI powers rely heavily on ante-facto prevention and deterring, while agencies with LE powers focus primarily on the post-facto collection of evidence.

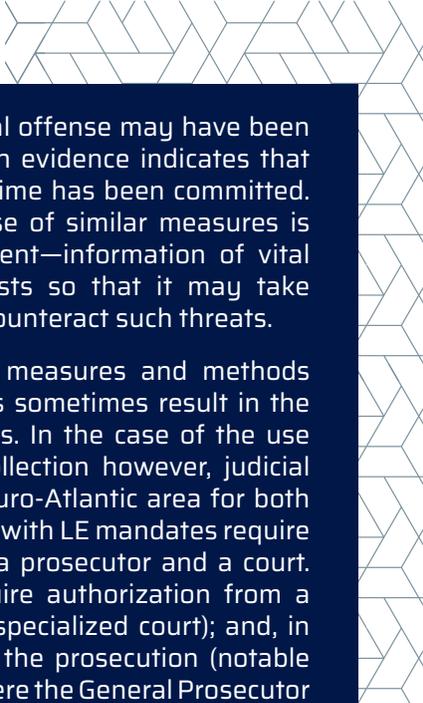
Many countries do not define 'national security', or otherwise frame it in generic and abstract terms. As a result, even crimes traditionally conceived as threats to 'national security' - such as treason, sedation, sabotage and espionage - remain extremely difficult to prosecute, particularly in peacetime. In contrast, enforcing criminal law is, by comparison, relatively straightforward. Agencies with CI powers rely on secrecy and protecting their sources while LE agencies are more transparent and are obliged to reveal investigative information during legal proceedings if it is material to the prosecution. Information collected by agencies with CI powers can be used in court so long as the national legal framework in questions permits so. In such cases, the primary concern for courts will be whether the information has been collected lawfully, rather than the means of the collection itself. In practice, however, information collected by agencies with CI powers may never be intended for use in legal proceedings, but rather to disrupt or simply monitor a perceived threat to national security.

Terrorism is perhaps the most visible example of a security threat with potential consequences at both the state and individual level, meaning that agencies with CI powers and agencies with LE powers are often both involved in related investigations. Agencies with CI powers will seek to prevent terrorist attacks by gaining deeper insights into the intent, nature and overall level of the threat. In contrast, agencies with LE powers usually become involved only once there exists enough grounds to pursue prosecution, meaning that they can generally only play a limited role in preventing attacks.

Regardless of their institutional relationship, sometimes high-level criminality and other security-related crimes call for a coordinated approach

between security agencies with CI and LE powers. Agencies with LE powers operate within a prescribed jurisdiction (city, state) and must meet clear judicial thresholds when acting. Traditionally, agencies with CI powers have enjoyed more freedom to collect information, both on domestic and foreign soil. In recent years, however, this trend has reversed, exemplified by the decision of German Constitutional Court on 19 May 2020 to declare unconstitutional the collection of information by their foreign intelligence service (BND) abroad. And while their standards can vary, both have (special) powers that must conform to regulations that respect individual rights and freedoms according to the law. In general, one can identify the following functional differences between agencies with CI powers and those with LE powers::

- **Disclosure of techniques.** Due to the very nature of LE, agencies with LE mandates are required to disclose their evidence (e.g. in prosecutions), and by extension, the techniques used to acquire it. This is not always the case for agencies conducting CI, whose targets are often state-sponsored, and generally far more sophisticated than criminal networks. This is particularly relevant for cases in which CI is used with the aim of penetrating foreign intelligence networks. If such techniques were to be exposed during criminal proceedings, sources, addresses, meeting places and information on operatives, as well as methods used to gather information, such as the digital interception techniques, could be compromised. This is particularly problematic in cases where information originates from a foreign liaison service. Beyond jeopardising the investigation, such a disclosure could damage bilateral relations, and result in decreased cooperation and information sharing.
- **Security vetting.** Staff working in agencies with CI powers will usually be subject to high-level security vetting, and will therefore be familiar with the intrusive and comprehensive vetting processes. In general, officials working for agencies with LE powers do not undergo such vetting procedures.
- **Communication security.** Due to the nature of LE, agencies with LE powers generally operate a much lower level of communication security as compared to those with CI powers, making them vulnerable to compromise by hostile states and actors. This is the case for both field officers and HQ communication.
- **Different measures and methods.** The core of CI is operational activity based on recruiting and handling human sources, using intrusive methods for information collection, as well as collecting intelligence from operational SIGINT devices and infrastructure. In contrast, LE is based mainly on conducting criminal investigations according to criminal procedures and in the framework of a criminal trial. Any implementation of HUMINT methods by agencies with LE mandates must be done in accordance with the respective criminal code to ensure that the rendered materials and data obtained are admissible as evidence in court. A similar set of measures is also usually applied by agencies with LE mandates, however under different conditions and different legal regimes. The purpose of the application of intrusive methods for information collection, like interception of communications, by agencies with LE powers is to



obtain evidence to indicate that a criminal offense may have been committed, and is applicable only if such evidence indicates that reasonable grounds exist to suspect a crime has been committed. In the case of CI, the purpose of the use of similar measures is to collect—and provide to the government—information of vital importance for national security interests so that it may take informed decisions or actions aiming to counteract such threats.

- **Different authorization.** Differences in measures and methods used by agencies with CI and LE powers sometimes result in the use of different authorization procedures. In the case of the use of intrusive methods for information collection however, judicial authorization remains the norm in the Euro-Atlantic area for both agencies with CI and LE powers. Agencies with LE mandates require “double-layer” authorization: from both a prosecutor and a court. Agencies with CI powers normally require authorization from a high-level court (supreme, appellate, or specialized court); and, in most cases, without the involvement of the prosecution (notable exceptions exist in some EU countries, where the General Prosecutor authorizes warrants before sending them to the Supreme Court). In some Euro-Atlantic countries, including the UK, senior LE or CI officers, or ministers, may provide authorisation for the use of intrusive surveillance measures. Further, as CI investigations often involve agents and intelligence agencies of foreign countries, different legal standards may exist regarding the need for judicial authorization compared to cases in which agencies investigate their own citizens.

3. Transfer of Counterintelligence Powers to Agencies with Law Enforcement Mandates

Where there is a separation of responsibility between agencies with CI and LE powers, there normally exists a point at which agencies undertaking CI will transfer investigations to LE bodies. The purpose of such a transfer is normally so such bodies can bring about a prosecution, and where possible, collect their own evidence in order to protect sources, staff and the methods used in the original CI operation. Much will depend on each countries’ legal system and requirements for disclosure. When, how and to what extent intelligence agencies endorse a transfer of powers to a police or anti-corruption body depends on the prescribed role of the intelligence agency in question. Such roles vary from country to country. However, a commonly applied standard is that the norms concerning intelligence agencies be as clear and concise as possible so that the tasks that they can lawfully engage in are clearly defined. With clearly defined roles and responsibilities, uncertainties and misunderstandings regarding the transfer of powers from intelligence agencies to bodies with LE powers can be significantly reduced.

When? A transfer of powers will come at a point where explicit action such as the prosecution of groups or individuals is required, and in cases where the operation demands the use of the legal powers of an agency with LE powers, such as the police. It is better described not as a transfer but rather as a change of command. It is more similar to the ‘gold-silver-bronze’ command structure, where overall command can shift but both agencies remain involved. In Spain, for example, it is the judge of the Supreme Court

charged with the judicial control of the CNI who takes decisions on the transfer of a case to an agency with LE powers upon request of the CNI or on the basis of his/her own assessment.

How? The decision to transfer command would normally be made by a senior officer involved in a CI operation, or because of a legal requirement to report criminal activity. The agency in charge of the CI operation would have initiated the investigation and decided at what point LE action is required. For example, the CI operation may have been investigating a foreign powers' attempts to infiltrate critical state infrastructure in order to procure state secrets. The investigation uncovers that a state employee has provided information to a foreign power. The intelligence agency responsible for the CI operation will investigate the individual. When they obtain prima facie evidence for the act of espionage, they would then hand over the case to an agency with LE powers so that the individual can be further investigated, and if necessary, prosecuted. The intelligence agency will continue to investigate the case, both in order to assist their partners in the LE body, and to uncover additional intelligence on the methods used by the foreign power in question. While the intelligence agency will therefore not stop its investigation, it will only bring to the attention of the LE body information relevant to the specific case in question.

In a model in which intelligence agencies are empowered with law enforcement functions of criminal investigations and arresting and detaining persons (referred to in this note as the Hybrid Model), two primary concerns exist:

- first, given the inherently undefined and ambiguous nature of 'national security', past experiences have demonstrated that agencies with CI powers are particularly vulnerable to abuses of power. Therefore, if granted with law enforcement functions, extensive and comprehensive control, oversight and safeguarding measures should be implemented in order to mitigate against such risks; and
- second, there is reasonable concern that combining law enforcement powers with clandestine (special powers) as the potential to over-concentrate power in one agency, thereby creating an omnipotent institution. An all-powerful state security service could potentially unbalance institutional relationships, even in otherwise stable democracies. Of no less concern is the fact that agencies with CI powers generally fall under direct executive authority (president), which could affect public perceptions of the objectivity and independent nature of pre-trial investigations

4. Conducting Pre-trial Investigations

It is not unusual for intelligence agencies to have a role in tackling high-level (complex) crimes or national security offenses which are difficult to prosecute. The UK's Security Service (MI5) once actively supported police and law enforcement investigations regarding 'serious crimes'. In addition, models exist in which agencies with CI powers enjoy direct legal competencies in leading or conducting pre-trial criminal investigations. It is worth noting that the practice generally varies in accordance with the range of means available to the intelligence agency in question. For example, in Portugal, the national intelligence service—the Security Intelligence Service (SIS)—cannot apply intrusive methods for data collection, such as communication interception. This is the exclusive prerogative of the criminal police (Policia Judiciaria). There are several concerns regarding the extent to which agencies with CI powers are granted with pre-trial investigative powers, including:

- Overlaps or discrepancies with other agencies which have LE powers. Problems could easily emerge if both are involved in the same case or in a related investigation leading one to blindside the other or conflicts over jurisdiction or authority.
- The risks of using inappropriate methods, such as covert intelligence collection, for pre-trial evidence collection. For example, for the purposes of a criminal investigation it would generally be unacceptable to employ intrusive and other clandestine CI measures. In addition, agencies with CI powers may also come under pressure to reveal their sources in court proceedings, thereby potentially jeopardizing the ongoing investigation;
- The potential effects on constitutional civil liberties, rights and public policies resulting from providing an intelligence agency with law enforcement functions.

Ensuring the transparency of criminal trials resulting from investigations conducted by agencies with LE mandates also has the benefits of reassuring the general public that the government is not deploying covert methods and their intelligence services in pursuit of political opponents. While for the purposes of prosecution, the agencies with CI powers would hand the case over to a LE body, it would **normally continue to be involved in assisting the pre-trial investigation**. However, it is **involvement would be limited**; the extent of which would depend on a countries' individual laws, the specific case and other facts such as the ability of staff from the intelligence agency to provide evidence anonymously. In addition, the role of any agency with CI powers in a pre-trial investigation should be explicitly linked to and limited by the nature of the tasks it is mandated to undertake. The specific tasks of the agency in question can be further narrowed by focusing on a significantly limited set of crimes like terrorism and espionage. Another option is to strictly limit the intelligence agency's function to a support role where it conducts pre-trial investigations under the lead of other agencies with LE mandates (police and/or anticorruption agency). For example, the agency with CI powers could be limited to providing the critical information needed for other LE bodies to launch investigations. This would allow the former to better protect its agents, sources and methods, as due process in criminal cases risks revealing these key assets.

5. Conclusion

As outlined at the beginning of this note, there exist three general models for defining the authority, role and functions of intelligence agencies in relation to law enforcement powers. These are characterized as follows:

- The Delineated Model: through an intelligence service who work in conjunction with LE agencies to bring about prosecutions;
- The Integrated Model: through a federal LE agency with a specialist CI division;
- The Hybrid Model: through an intelligence service that also has powers of arrest and prosecution.

Any attempt to define an optimal model for counterintelligence and law enforcement should be considered in the security context. Whichever model a country in transition chooses, it will bring certain advantages and certain disadvantages. The decision should therefore be based both on an assessment of current CI threats, as well as concerns related to oversight and control. As has been noted, the main challenges of devising a model for counterintelligence and law enforcement will be to clearly delineate competencies, avoid overlap and redundancies, and establish an effective framework for inter-agency cooperation. In most countries within the Euro-Atlantic sphere, the work of agencies with CI powers and those with LE powers in the area of counterintelligence has been driven by counterintelligence threats and shaped by respective national legislation. Nevertheless, the Delineated Model is most widely used; based on the common understanding that intelligence services should not have the power to conduct criminal investigations, arrest or detain people.

DCAF Geneva Centre
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Governance

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DCAF - Geneva Centre for Security Sector Governance

Chemin Eugène-Rigot 2E

P.O. Box 1360

CH-1211 Genève 1