

Project outline: PACO – SIMS

Project title:	PACO – Special investigative means
Duration:	18 months (2002 - 2003)
Project area:	South-eastern Europe
Implementing agency:	Economic Crime Division/ Directorate General I – Legal Affairs / Council of Europe
Inputs required:	EURO 320 000 (of which EURO 100 000 in 2002)
Sources of funding:	Voluntary contributions to PACO / UNITED KINGDOM FCO in 2002

The problem to be addressed

The use of special investigative means (interception of telecommunications, electronic surveillance, undercover operations) proved to be a necessary evil for the efficient fight against corruption and organised crime. It is now widely recognised that special investigative means (SIMS) are a legitimate tool for investigating serious criminal activities. The focus is on how to regulate and control them on the legislative as well as implementation level to avoid abuse and to achieve maximum results.

Past and ongoing technical cooperation and monitoring activities of the Council of Europe (such as OCTOPUS, PACO, GRECO) and its partners in the Stability Pact initiatives against corruption (SPA1) and organised crime (SPOC) have led to the following observations:

- Most countries in the region of South-eastern Europe have developed a legal framework for the use of some forms of SIMS. At the same time, law enforcement agencies apply at least some types of SIMS not regulated by law. In addition, different countries have different (and sometimes inadequate and contradictory) standards regarding the evidentiary value of the information collected by the use of SIMS.
- There is a lack of consensus as to which police activities fall under the term of SIMS (interception of telecommunications, electronic surveillance and observation, undercover agents, pseudo purchases and agents provocateurs, etc.).
- In most countries in the region, there is a lack of experience in the field of regulation and implementation of SIMS for the purposes of criminal law enforcement (in contrast with secret and intelligence services); including a lack of training of the staff/units implementing or directing SIMS in practice. In addition there is a lack of knowledge of evolving human rights standards in this area.
- For understandable historical reasons, the suspicion and resistance of the public and academic community towards the SIMS is higher in South-eastern Europe than in other countries. On the other hand, the possible benefits from the use of SIMS (in comparison to the use of traditional investigative measures) are sometimes overrated by the law enforcement community.
- The importance of internal administrative (in addition to judicial) control and supervision over the use of the special investigative means is not widely accepted in most countries.

As stated above, a comprehensive legal framework (in line with the latest human rights standards in this area) and a proper institutional structure with effective control mechanisms and trained personnel in the area of SIMS is a necessary tool for fighting organised crime and corruption (see also article 23 of the Criminal Law Convention on Corruption). Furthermore, investigations and judicial proceedings of such criminal activity often involves trans-border elements and co-operation of law enforcement in different countries. This calls for a high level of harmonisation (while giving due regards to specifics of different countries) of legislative regulation and especially evidentiary standards in different countries. All this is

reflected in a number of recommendations for each country resulting from assessment carried out within the framework of SPAI.

The proposed project is therefore aimed at ensuring the implementation of these recommendations to develop and/or enhance the regulation and effective implementation of SIMS (with due regards to human rights) in the countries of South-eastern Europe.

Objectives, results and activities

The objective of this project is to enhance the capacities of the countries of South-eastern Europe to investigate and prosecute corruption and organised crime through the use of special investigative means with due regards to human rights and the prevention of abuse.

By applying a regional approach, the project will in addition contribute to a higher level of harmonisation of approaches in the use of SIMS, and thus to enhancing the capacities of the countries to cooperate with each other in complex cross-border investigations.

Output 1	Recommendations for reforms (legislation, institutions, standards and practices) on the use of SIMS for each of the countries will have been elaborated and implementation will have started	
Activities	Prepare an assessment report with gap analysis and recommendations for reform for all the participating countries: <ul style="list-style-type: none"> - Review information/data on the regulation and use of SIMS already obtained through different technical cooperation and monitoring projects (such as OCTOPUS, PACO, GRECO, SPAI, SPOC); - Develop of the questionnaire to be send to the countries; - Perform gap analysis on the basis of information gathered by the previous two activities. 	July 2002
	Organise one open seminar / general discussion on SIMS in each of the participating countries: <ul style="list-style-type: none"> - Organise, in each country, a two-day seminar for senior officer of the police, the prosecution, the judiciary, different ministries, the Parliament, the Supreme/Constitutional Court, the legal and social scholars, non-governmental organisations. - The aim of the seminar is to present the assessment report and give a comparative and general overview of the regulation of the SIMS, its positive and negative effects, as well as to open a broad discussion on the subject. - Invite international experts from the field of law enforcement and human rights. 	October 2002 – March 2003
	Review progress in the implementation of legal and institutional reform: <ul style="list-style-type: none"> - Review progress made within the framework and explore needs for additional in-country training/seminars/workshops – when necessary through in-country visits and combined meetings with the police, prosecutors and judiciary. 	October – November 2003
Output 2:	A training package on the regulation and implementation of SIMS tailored for police, prosecutors and judges will have been developed	
Activities	Prepare a comprehensive training package with good practices on legislative and implementation level: <ul style="list-style-type: none"> - With the help of in-house and outside experts draft a comprehensive publication on the issue of SIMS addressing issues such as: the different nature of individual SIMS; different legislative and practical implication of specific measures; positive and negative sides of the use of specific SIMSs for specific criminal activity; different institutional and 	March – April 2003

	<p>organisational requirement for the effective and "safe" use of specific measures; human rights issues (especially the right to privacy) associated with the use of covert investigative means (with the emphasis on the ECHR jurisprudence); legal regulation of the use of covert investigative means (including the question of evidence); institutional/organisational setting which can enhance the effectiveness and reduce the possibility of abuse; practical implementation of the use of special investigative means (use of best practices); etc.</p> <p>- A substantial part of the package should be based on concrete case studies.</p>	
Output 3	At least three training events for ten officials from each country will have been implemented	
Activities	<p>Carry out a regional training workshop on SIMS for five senior representatives of police, prosecutors and judiciary from each participating country:</p> <ul style="list-style-type: none"> - Organise a one week regional seminar Organise, for all the participating countries, a two day seminar/workshop for senior officer of the police, the prosecution and the judiciary. - The seminar should include training tailored to different audience (police, prosecutors, judges) to address their respective roles in the implementation of the SIMS. However, a part of the substance should address all audience (general topics on benefits, limits and dangers of SIMS, human rights issues, etc.). - Invite international experts from the field of law enforcement and judiciary, including experts in direct implementation of the SIMS. 	May – June 2003
	<p>Organise a study visits for 3 senior representatives of police, prosecutors and judiciary from each participating country on good practices on SIMS, and a second study visit for 2 operative-police officers from each country on good practices in the practical implementation of SIMS:</p> <ul style="list-style-type: none"> - Organise one general study visit to a country which has good practice in regulating and implementing SIMS for senior officer of the police, the prosecution and the judiciary. - Organise one specific study visit to a selected Special Unit in charge of implementing SIMS in a selected country with good practice for the police officials of the participating countries actually implementing SIMS in practice. 	<p>July 2003 (first study visit) September 2003 (second study visit)</p>

Participants

Participating Countries:

- Countries participating in SPAI and SPOC Initiative: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, "The former Yugoslav Republic of Macedonia", Moldova, Romania, Slovenia and the Federal Republic of Yugoslavia.

Participants in regional seminar and study visits:

- Regional seminar: five participants from each country (two from police, prosecutors, judiciary and Ministry of Justice).
- First study visit: three participants from each country (one from police, prosecutors, judiciary).
- Second study visit: two participants from each country (two from police).

Inputs

The above activities will need to be financed through voluntary contributions to the PACO Programme. Inputs are estimated as follows:

Training adviser 12 month (50%) and short-term experts	80000	
In-country seminars and review missions	90000	
Regional seminar	60000	
2 study visits	70000	
Other cost (including production and translation of documents)	20000	
Estimates in EURO	Total	320000

Contact

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Preliminary recommendations 2002/2003

I. OVERVIEW

Through first phase of the PACO-SIMS project (the analysis of the questionnaire and the missions) I have identified the following issues that (a) hamper the effectiveness of the use of special investigative means in SEE; (b) in some countries open a door to possible abuse and threat the right to privacy under Art. 8 of the ECHR:

1) Legislation

- with few exceptions legislation in most countries still does not allow the use of SIMS for all relevant OC, THB, and corruption related offences;
- many countries limit (to different extent) the evidentiary value of the information gathered by the use of SIMS (e.g. they allow the use of SIMS but only to gather police intelligence not usable in court);
- most countries regulate by law only the use of technical SIMS (e.g. wiretapping), while electronic surveillance, observation and in particular deployment of undercover agents is not regulated by law (which creates at least three interrelated problems: a) possibility for abuse; b) evidentiary value of information gathered by the later SIMS; c) protection of identities of undercover agents giving testimony in court);
- legal provisions for ordering and implementation of different types of SIMS are in some countries so vague as to raise serious doubts of their compliance with ECHR.

2) Implementing regulation

- SIMS require a comprehensive set of implementing regulations (by-laws) which must in detail specify different practical aspects of: a) the internal (within the police and/or prosecution service) approval procedure; b) the implementation (e.g. the procedures for establishing a "Legend", obtaining forged documents, internal reporting on its implementation; scope of the permissible conduct of the undercover agent, etc); c) handling of the material/information collected (how to record and preserve a chain of evidence, etc.);
- many of the above is lacking in many surveyed countries...which seem to have an additional negative effect in some countries: the judiciary is deeply susceptible to the credibility and evidentiary value of information gathered by SIMS.

3) Equipment

- with very few exception countries are in lack of the equipment to intercept and monitor new forms of communication (there are countries where police does not have equipment at all to intercept mobile phones and are stuck with old styles Soviet equipment);
- where equipment exist it is in the hands of the State Security services, not the public law enforcement agencies;
- while it is unrealistic to expect that this will change soon in most countries, the emphasis could be given to non-technical SIMS (e.g. deployment of undercover agents).

4) Training

- there has been close to NONE training activities on the SIMS (except some general seminars like ours and even ours were the first international seminar on the topic in many countries);
- exception are some sporadic American lead seminars on how to conduct undercover operations – those in my humble opinion are actually counter-productive as the US style of handling undercover operations is quite different from the European standards.

5) Oversight

- with the exception of one or two countries there are no external oversight mechanisms as known in many European countries (e.g. parliamentary or other special committees).

II. TA OPPORTUNITIES

The results of the first phase of PACO-SIMS are quite informative for the identification of targets for future TA in the framework of CARDS (if nothing else, we at least identified general as well as country-specific problems and started the discussion on the topic). Apart from strengthening legislation, which is a general activity (and as we know a protracted one) I would advocate focused, practical and intensive activities for the police on selected SIMS (*non-technical SIMS*) as technical are conditioned by the “expensive equipment factor”; in addition the former are proved to be even more successful than the high-tech ones).

I list a couple of possible activities (in order of importance – in my opinion):

- ***Strengthening of general legislation on SIMS – in the CPC as well as in by-laws / implementing regulations (see above for reasons and topics).***
- ***In-country focused training activities for the police on how to handle undercover operations – deployment of undercover agents and low-tech electronic surveillance*** (topics could include: by-law regulation of undercover activities; selection and training of undercover agents; handling and protection of undercover agents; establishing of the fake identity – “Legend”; permissible conduct of undercover agents / *agents provocateurs*; securing / recording the chain of evidence / credibility of obtained information / evidence; protecting the identity of undercover agents giving testimony in court; etc.); could include study visits.
- ***In-country focused training activities for the police on how to regulate and conduct low-tech electronic surveillance*** (topics could include: by-law regulation of electronic surveillance and in particular securing / recording the chain of evidence / credibility of obtained information / evidence; protecting the identity of undercover agents giving testimony in court; etc.); could include study visits.
- ***General seminar on cross-border use of SIMS and international cooperation in this area*** (cross-border controlled delivery; country-exchange of undercover agents, evidentiary value of information gathered in foreign countries etc.)
- ***Seminars on high-tech SIMS and CyberCrime*** (needed only in some more “developed” countries; Germany and UK seem to have excellent practice on this – from legal, institutional and practical perspective).
- ***General seminars on oversight / control mechanisms*** (I don’t know how it could fit into the CARDS project as it is more a HR / Venice Commission area, but I can assure you it would be greatly beneficial if there would be a study visit for all participating countries to e.g. Germany’s or even Slovenian Parliamentary Oversight Committee).
- ***Witness protective measures*** (it is not SIMS, but is closely related, especially regarding undercover agents).
- ***Seminar on police intelligence gathering methods / activities*** (in many countries there is an unclear line between the Intelligence Services / Law Enforcement in this field; as a consequence some countries don’t count intelligence gathering and analysis as part of their activities).