

The Definition of Covert Intelligence and the Examination of Its Efficiency

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The exploration of the dreaded secrets of others, the collection of secret information and intelligence have been present in human communities since ancient times. Acquiring knowledge protected from unauthorised access has, over time, become a monopoly of a society organised into a state, and its implementation has been constrained by strict legislation. However, in addition to legitimacy, an equally important feature of covert intelligence is efficiency, which shows the relationship between the resources expended and the results achieved.

How can their components be defined in an abstract way, can general criteria be named, and how can the results be measured and compared? The study seeks to answer these questions, which is a key part of research examining the relationship between the effectiveness and legitimacy of covert intelligence.

It is also essential to present a complex and intricate system that helps to understand the regulation of covert intelligence and the organisations responsible for its implementation.

Keywords: *covert intelligence, secret information gathering, covert means, surveillance, efficiency, effectiveness*

Introduction

Ascertaining secrets and gathering confidential information are the same age with human communities. The definition and terminology of this activity is different in our country and abroad. The definition of covert intelligence detailed below is destined to describe this complex and diversified activity.

The amended Act XC of 2017 on the Code of Criminal Procedure (CCP) that came into force in Hungary on 1 July 2018 fundamentally changed the system of covert intelligence. The new law regulates not only the covert measures connected to criminal procedures but it affects other laws – especially the Act on the Police² and Act on National Security Services³ – in which intelligence beyond criminal procedure is modulated.

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² Act XXIV of 1994 on the Police.

³ Act CXXV of 1995 on National Security Services.

The interpretation of covert intelligence is twofold. Enforcing the law as well as establishing public order and security by the competent authorities are the rightful expectations of the society. Due to the increasing volume of criminality and the growing threat of terrorism, the authorities – empowered by and strictly observing the applicable regulations – have to inevitably apply such efficient investigative covert means and methods that violate fundamental human rights. The rule of law, the legal certainty and the protection of fundamental rights demand transparent, evident and publicly known legal regulation of law enforcement while maintaining the guarantee of checks and balances.

Between the two expectations, it is necessary to find the narrow border that meets both at the same time. The research of the practical use and efficiency of the new law is premature as well as the judicial case law due to the short space of time passed from the ratification of the CCP.

Moreover, the surrounding mysticism and secrecy further complicate the examination of the topic in question. Consequently certain definitions are vague and even professionals – on the practical and the scientific side – talk at cross-purposes. There is a lack of comprehensive scientific approach of the covert intelligence that might be based on practical experience. This can definitely be perceived in a case where a decades-old regulation has been changed.

I try to make up for this shortcoming when I look at a narrower area of covert intelligence, the fight against organised crime. With a few exceptions, the experience gained here can be applied to general areas, but it also includes specialties that require more thorough study and research. It is indispensable of the examination to define those concepts that partly characterise the investigative activity and its measurability.

The covert intelligence

The activity, the covert intelligence being in the centre of the research is described and regulated differently in the respective legislations. Since I have to handle the definitions and descriptions either in themselves or in summary, therefore, it is necessary to use a collective concept by which possible misunderstandings and misconceptions can be ruled out.

In the practice of the European Union (hereinafter: EU), the law enforcement aspect of the activity I am researching is also referred to as SIM (Special Investigative Means) or SIT (Special Investigative Techniques). However, this means only investigative-related proceedings, i.e. used for crime fighting purposes, while in the domestic practice it is inevitable to investigate and evaluate secret information gatherings under sectoral laws.

The EU recommendation of 2005 unequivocally terminates the covert measures deployed for the purpose of criminal investigation and intelligence gathering

carried out by national security services (hereinafter: NSS). According to the EU's interpretation, "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". Furthermore, the Council of Europe determines the competent authorities in its interpretative report: "Judicial, prosecuting and investigating authorities involved in deciding, supervising or using special investigation techniques in accordance with national legislation."⁴

Since I am elaborating on the concept comprehensively, the covert activities of the NSS are dealt with in my research correspondingly. Lajos Rácz defines the secret information gathering of the NSS as follows:

"The intelligence – conducted by NSS – is mostly covert (partly overt) cognitive activity that aims at ascertaining risk factors endangering National Security. The intelligence is a goal (subordinated to other strategic and state security goals) while the covert information gathering is a 'means-like' category. [...] The secret information gathering – conducted by NSS if necessary – is a special method for ascertaining state security endangering risk factors."⁵

Based on the above and considering the national conjuncture, I chose *covert intelligence* as my topic. This concept appeared in several scientific publications, such as in the study written by Géza Finszter about the law enforcement administration,⁶ or in Zsolt Hetesy's thesis who wrote the following:

"The professional literature of criminalistics considers this activity a cognitive process of special operative means using intelligence or covert intelligence collectively. The advantage of this solution is that the concept is applicable for all intelligence activities regardless of their method, subject and object while not conflicting with the current legislation system."⁷

In many cases, the term *surveillance* is used, but it has a narrower meaning than the covert intelligence I chose. This does not include, for example, the use of an undercover investigator or an informant or the possibility of using a trap.

The appellation – applied in my research – includes all the covert activities that are carried out by the respective and competent authorities. These measures can be divided into two groups:

a) *The use of covert means* under chapter VI of the CCP.

⁴ Chapter 1 of the 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.

⁵ Lajos Rácz: A titkos információszerezés néhány elméleti kérdése. *KBH Szakmai Szemle*, 3 (2010). 7–8.

⁶ Géza Finszter: *A rendőrség joga. Tanulmány a rendészeti igazgatásról*. Budapest, ORFK, 2012. 365.

⁷ Zsolt Hetesy: *A titkos felderítés*. Doctoral Thesis. Pécsi Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskola, 2011. 9.

- b) The *secret information gathering* as defined in the following sectoral legislation, the legal basis of which is:
- Chapter VII of Act XXIV of 1994 on the Police (i.e. Police Act)
 - Section 53–66 of Act CXXV of 1995 on National Security Services (i.e. NSS Act)
 - Chapter IV of Act CXXII of 2010 on the National Tax and Customs Administration (i.e. NTC Act)
 - Chapter III/A of Act CLXIII of 2011 on the Prosecution Service (i.e. Prosecution Act)

Covert intelligence – due to its character – carries the limitation of fundamental rights that can be permitted within a clearly regulated legal framework. Nevertheless, in addition to the general legal authorisation, individual permissions are required on a case by case basis depending on the given degree of the violation of certain rights. In those cases where the inviolability of fundamental rights of privacy, home and personal contacts are concerned, permission of the judge (in Hungary even ministerial) are required both internationally and nationally.

According to the authorisation levels, we distinguish between procedures that are not subject to external authorisation (i.e. the covert means that the authority can use in its own competence) and those that need a prosecutor's or judge's (ministerial) permission. Although the prosecutor's or judge's (ministerial) consent is missing during the procedure not subject to an external license, a special ad hoc license is still required for the application in the given case, which the professional manager of the given organisation is entitled to grant.

The concept of covert intelligence includes means that can be used both with and without external (prosecutorial, judicial or ministerial) authorisation.

Since my research includes fields beyond Criminal Procedures, correspondingly it is required to identify further organisations in addition to the investigating authorities⁸ that are being engaged in the fight against organised crime. According to my standpoint, these organisations can be divided – depending on the purpose of the intelligence – into three groups:

1. Services, which conduct covert intelligence for *crime fighting* regulated in the CCP:
 - police body established to carry out general policing tasks (i.e. the Hungarian National Police Headquarters, HNPH)
 - organisation performing internal crime prevention and detection (i.e. the National Protective Service, NPS)
 - counterterrorism body (i.e. Counter Terrorism Centre, CTC)

⁸ Pursuant to Section 34 (1) of the CCP, a general investigating authority is the police body established to carry out general policing tasks, in the case of certain criminal offenses specified in Section 34 (2) the National Tax and Customs Board, and in the case of those specified in Section (3), the orders of a commercial vessel or civil aircraft flying the flag of Hungary abroad, the commander of the vessel or aircraft.

- National Tax and Customs Administration (NTCA)
- prosecution office

Covert intelligence for crime fighting purposes, which is in practice the application of covert means, is responsible for detecting and interrupting criminal offenses, establishing the identity or arresting of the perpetrator, apprehending evidence and recovering the proceeds of crime. The basic regulation of this is Chapter VI of the CCP, which provides for the use of covert means.

The so-called *preparatory proceeding* has a special mission in the CCP because in this case the purpose of the covert intelligence is the ascertainment or exclusion of the suspicion of crime.

The investigating authority (the HNPH and the NTCA), the prosecution office and – solely in the course of the preparatory proceeding – the NPS as well as the CTC are entitled to apply covert means.

Géza Finszter has the following opinion regarding covert intelligence concerning the investigation:

“...the relevant past is not recognised through evidence, where we intend to convince other subjects of the procedure of the accuracy of the obtained information but by detection, when the authority persecuting [sic!] the crime intends to increase its own knowledge. It is another feature [...] that, contrary to the reconstructing nature of investigation, the available detection methods are suitable for observing the events of the present.”⁹

Special mention should be made of covert intelligence in the context of international law enforcement co-operation. They are based on the suspicion of a crime committed abroad, so it is classically used for crime fighting purposes. If Hungarian jurisdiction does not arise, the implementation of the measures shall be carried out in accordance with the legislation on international law enforcement co-operation. In general, the law on mutual legal assistance in criminal matters¹⁰ applies, while in case of another Member State of the European Union, the relevant law,¹¹ the law promulgating the European Convention on Mutual Assistance in Criminal Matters (Ets. N.030), shall apply.

Judicial authorisation for covert intelligence for crime fighting in the framework of international law enforcement co-operation under the CCP may be made on the basis of a request for mutual assistance or on the basis of a European Investigation Order.

⁹ Géza Finszter: Public Order – Public Security – Legal Certainty (2000–2015). In Géza Finszter – István Sabjanics (eds.): *Security Challenges in the 21st Century*. Budapest, Dialóg Campus Kiadó, 2018. 170–171.

¹⁰ Section 69–70/A of Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters.

¹¹ Section 64/B–65/D of Act CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union.

In international law enforcement co-operation, the implementation the certain measures – e.g. deployment of undercover investigators – is not regulated by the CCP but by the Police Act.

2. The organisations listed below implement covert intelligence on the legal basis of sectoral law for *policing*:
 - the HNPH as regulated in the Police Act
 - the NPS as regulated in the Police Act
 - the CTC as regulated in the Police Act
 - the NTCA as regulated in the NTC Act
 - the Prosecution Office as regulated in the Prosecution Act

In my opinion, the term *policing* is more accurate in indicating the purpose, as the law enforcement commonly used also includes the investigation, detection, prosecution, or execution of criminal sanctions, which is part of the prosecution of crime.

According to Professor Géza Finszter, covert intelligence for policing purposes is nothing more than “the establishment of law enforcement measures to protect, prevent and interrupt violations of public order and public safety”.¹²

The covert intelligence for policing is mainly proactive and preventative. Within the framework of the function of emergency response, its primary task is crime prevention but it can also be applied in the interest of certain special cases (i.e. in witness protection, provision of undercover investigator, integrity testing, search for wanted persons or informant protection and control).

In connection with the definition, Ferenc Szendrei states that: “The subject of covert intelligence for policing cannot be determined simply, as there is typically no suspicion of a criminal offense. In such cases, reconnaissance may focus on all personal and material circumstances that may trigger causal proceedings leading to a criminal offense.”¹³

The covert intelligence for policing is one of the specialties that characterise the fight against organised crime. In the case of the commission or suspicion of a criminal offense, it is typically possible to use disguised means regulated by the CCP in the preparatory proceedings or investigations.

However, in the interest of crime prevention, according to the Police Act, it is possible to continue to collect secret information subject to judicial authorisation if it results in the acquisition of information related to organised crime or the identification of organised criminal groups.¹⁴

The law provides an exception only for the NPS, which performs internal crime prevention and detection tasks. According to the amendment of the Police Act, which entered into force on 1 January 2019, it is possible to do so even if “information is

¹² Géza Finszter: Szabályozott felderítés – titkosított büntetőeljárás. *Miskolci Jogi Szemle*, 2, Special Issue (2019). 281.

¹³ Ferenc Szendrei: A rendészeti célú titkos információgyűjtés. *Rendőrségi Tanulmányok*, 3 (2020). 65.

¹⁴ Section 72 (1) of the Police Act.

expected to be obtained in connection with the disruption of the unaffected operation of the protected body or the influence of the service of its members or a group of personnel, which will later substantiate the use of a covert means regulated in CCP¹⁵

Before the new CCP's entry into force – based on Section 18 of the Prosecution Act – the Prosecution Office had been empowered to conduct covert information gathering outside of criminal procedure, according to the current Police Act. Due to the amendments of 1 July 2018 this has been ceased. Nevertheless – in accordance with the provisions for the other organisations – it became possible that the prosecution office is authorised to conduct secret information gathering to place or remove a technical means or data used in the course of using a covert means subject to permission of a judge, and in order to control, involve and protect the informant.¹⁶ For the latter, the Prosecution Office cannot use a covert means subject to judicial permission.¹⁷

3. Organisations conducting covert intelligence relating to *national security*:
 - among the civilian national security services, the Constitution Protection Office (CPO), the Information Office (IO) and the Special Service for National Security (SSNS) based on the NSS Act
 - the Military National Security Service (MNSS) based on the NSS Act
 - in certain cases the CTC authorised by the Police Act but regulated in the NSS Act

In the spring of 2022, the management of the national security services and, in part, their system of tasks changed significantly. The new government structure has placed civilian national security services under the control of the Cabinet Office of the Prime Minister. At the same time, the Counter Terrorism Information and Crime Analysis Centre established in 2016, has been renamed the National Information Centre (NIC).

In addition to the professional tasks, according to the new regulations, the national security services already perform the internal crime detection and crime prevention tasks of their organisation, and the CPO – taking over the previous tasks of the NPS – carries out the reliability inspection of the government sector. In order to perform these tasks, each service, including the NIC, is entitled to secret information gathering.¹⁸

The question may arise as to whether, if the activity of the organisation performing internal crime detection and crime prevention tasks (NPS) is the collection of secret information for policing purposes, can this task of the national security services also be considered for policing purposes? In my view, since implementation is still under the NSS Act, therefore it can be considered to be for national security purposes in all circumstances.

¹⁵ Section 72 (1a) of the Police Act.

¹⁶ Section 25/B of the Prosecution Act.

¹⁷ Section 25/B (3) of the Prosecution Act.

¹⁸ Section 9 (1) of Act IV of 2022 on Act II of 2022 on the List of Ministries of Hungary amending certain laws related to the law.

The purpose of covert intelligence relating to national security is the successful operation of the concerned services. This primarily involves intelligence activity aiming at ascertaining and countering criminal acts that may endanger the independence, constitutional order, national defence of Hungary as well as political or economic interests.

Among these tasks of the above services, there are special ones that are connected to Intelligence activity focusing on organised crime, either concretely indicated (IO, MNSS) or offences closely related to them, like unlawful drug or arms trafficking and economic crime. The reason for it is one of the – internationally agreed and accepted – features of the organised crime which are the acquisition of political and economic power or the influence of the decision-making process by other ways.

From 1 July 2020, the SSNS, in addition to its earlier existing services of the use of special means and methods, are authorised to covert information gathering – not bound to external permission – in the course of their activity being conducted in relation to electronic information safety.¹⁹

However, the covert information gathering subject to external permission remains limited for the operative protection for its facilities and conduct the national security vetting of its personnel and other persons within its competence.²⁰

The CTC has a unique position in this regard because it operates under the scope of the Police Act but its certain tasks are regulated in the NSS Act.²¹

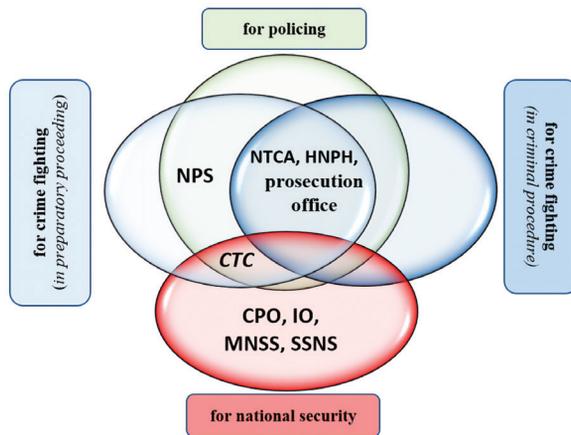


Figure 1: Grouping of organisations authorised to conduct covert intelligence based on its purpose

Source: Compiled by the author.

¹⁹ Section 8 (3) of the NSS Act.

²⁰ Section 8 (4) of the NSS Act.

²¹ Section 63 (7) of the Police Act.

Analysing the above diagram it is clearly visible that:

- there is no organisation that can be entitled to conduct covert intelligence only for policing, or only for crime fighting
- only the CTC is authorised to conduct covert intelligence for all of the above purposes
- the organisations implementing national security-purposed intelligence – except the CTC – are not entitled to carry out covert intelligence for policing or for crime fighting

The efficiency of covert intelligence

Efficiency is one of the parameters – both in the economic and governmental area – its measurement and examination have been gaining more and more priority in recent years. More dissertations have been prepared about the measurement of the performance of organisations and their members that were based on the efficiency of human labour. Only those data may be exploited to the measurement that can objectively be determined.

This concept is the most difficult one to determine since no metric or statistical data present it in an abstract way.

Efficiency is typically an economic concept that is connected to production and operation. Consequently, most of the definitions are related to these elements, approaching them from two sides.

According to one of the widely accepted views: “Efficiency generally reflects how much value or added value can be produced by certain units of inputs.”²² Based on this approach, efficiency is the ratio of the input and output sides.

The other approach disregards the measurable results of the output side but it considers the ratio of the whole amount of inputs and the inputs that are de facto utilised.²³ Ergo – according to the second point of view – the proportion of the utilised and the totally invested inputs shows the efficiency of a given activity i.e. the more inputs are utilised the more efficient a given activity is.

The concept of the efficiency of Intelligence may be determined by a governmental approach, according to which: “Efficiency – most generally – is the relation between the result and the used resources; a given action, namely services being conducted by the intervention of the state and the invested resources.”²⁴

²² Éva Pallai: Közigazgatási szervezési és vezetési ismeretek. In József Kókényesi – Szilvia Andriska (eds.): *Közigazgatási szakvizsga. Általános közigazgatási ismeretek*. Budapest, Kormányzati Személyügyi Szolgáltató és Közigazgatási Képzési Központ, 2010. 300.

²³ András Nábrádi – Károly Pető: *A különböző szintű hatékonysági mutatók*. Debrecen, Agrárgazdaság, Vidékfejlesztés, Agrárinformatika nemzetközi konferencia, 2007. 483.

²⁴ László Vértsey: *Az állami beavatkozás joga és hatékonysága*. Budapest, Nemzeti Közszolgálati Egyetem, 2014. 103.

Anna Orbán detailed this further and determined the formula of the governmental efficiency as follows:

$$\text{efficiency} = \frac{\text{output}}{\text{input}} \quad \text{or} \quad \text{efficiency} = \frac{\text{outcome}}{\text{input}}$$

In the above formula:

- *input* is the source that indicates the resources (financial, human, material, organisational, regulatory means) used for a given purpose
- *output* indicates the directly measurable results of a given action (products or services)
- *outcome* is the result that includes all the alterations supervised by the impact of the activity. It may have two elements:
 - *result* is the direct, immediate impact of the action
 - *impact* is the indirect, long-term effect of the action (i.e. economy, society, environment)²⁵

Accordingly, the measurable features – on both the input and output sides – have to be identified when we examine the efficiency of the covert intelligence. Nevertheless, these inputs are not materialised or instrumentally measurable, rather certain characteristics and circumstances that present the summarised value of the input. Among these there are general features (valid for all cases within a given period of time) and individual ones case by case.

The regulation and the system of conditions have to be highlighted among the general features, while the gradualness, currency, proportionality and justification are the main characteristics to be evaluated in the individual cases.

Regulation

The legal authorisation of appropriate level is indispensable concerning covert intelligence. More requirements can be mentioned to the regulation but as for the efficiency, the modernity is one of the most important. Both the activity and the applicable law have to keep up with the changing world while being suitable to regulate new phenomena of the developing technics, information technology and society.

Suffice it to think, for example, that the advent of mobile phones and the World Wide Web in the 1990s, and thus the proliferation of electronic mail (e-mail) anywhere – alongside landline phones and phone boxes – pushed paper mail or fax machines into the background. While the law governing enforcement only allowed

²⁵ Anna Orbán: Az e-közigazgatás hatékonysága. *Társadalom és Honvédelem*, 20, no. 2 (2016). 140.

access to the contents of a letter or postal item, secret reconnaissance could not extend to new means and forms of communication, despite professional expectations.²⁶

More tools and programs have been used on a daily basis in recent years that were unknown earlier. Services and applications of the smart devices, the digital footprints of IT devices, the autonomous control of vehicles, financial transactions in the virtual world are all such phenomena that facilitate the efficiency of covert intelligence but – as Snowden²⁷ presented – they may be abused by the current authority. The regulation of the above issues is the important question and characteristics of covert intelligence.

The quality of the conditionality

One of the crucial factors of Intelligence is whether duly trained and experienced human resources are available as well as the required material-technical means are given to the tasks.

It is indispensable to have adequately trained and skilful personnel if a successful Intelligence activity is expected. This provides the acquisition of more and more pieces of information that are obtainable during the covert intelligence as well as the preservation of lawfulness and conspiracy.

The advancement of information technology and technics necessitates the regular development of the means being used for the implementation of covert intelligence as well as financial resources are required. The latter is a crucial element of the system of conditions.

Individual characteristics referring to concrete cases

One of the essential features of legitimacy is how the current legislation prevails in the course of the implementation. The legality of Intelligence – in addition to all the general and particular preconditions – is typified as itemised below:

- *inevitability*, i.e. covert intelligence is initiated only (for example by different measures of the criminal procedure) if the required result cannot be accomplished by other means
- *gradualness and proportionality during observance*, i.e. only such methods are applied during the inevitably launched covert intelligence that cause the least violation of interest while reaching the desired result

²⁶ The surveillance of the Internet or computer correspondence was made possible by an amendment to the Police Act that entered into force on 1 September 1999.

²⁷ Edward Snowden (1983–), a former employee of the U.S. National Security Agency (NSA) and the Central Intelligence Agency (CIA), is the source of articles published in *The Guardian* in 2013 revealing mass surveillance by intelligence services.

- *currency*, i.e. the deployment of covert intelligence is implemented in due course and for the factually required period of time only

Elements of the output side of covert intelligence

The mission of covert intelligence is complex and it goes beyond the identification of the perpetrator or proving his/her culpability. It would be a false approach if we drew a conclusion about the efficiency of covert intelligence on the basis of statistical data reflecting the indicators of the results of investigations only.

While it is realisable to present statistical data of the proportion of successfully investigated criminal offences or the supporting applied covert means, it is hardly feasible to detect the prevention of a planned crime or the “not committed ones”. Although these constitute the same result and success as the subsequent investigative measures and require the same amount of tasks and responsibilities.

The examination of efficiency is even more difficult in the fight against organised crime. The decomposition of organised crime groups as well as the obstruction of their strengthening, the identification of new methods of perpetration and the prevention of their expansion may be crucial results, but these features are not measurable by numerical data.

The output side consists of more relevant elements that are affected by the covert intelligence both directly and indirectly. The examination of these elements and the recognition of their alteration provide assistance in the detection of efficiency.

The direct result of covert intelligence are:

- acquisition of data that have not been known earlier and could not have been obtained by other means
- the adaptability of the obtained data in the course of the procedure as well as their evidential value
- the preservation and sustenance of the security of the applied resources, means and methods

The indirect – grounded on direct long-term – results (impact):

- the discontinuity, investigation and the proving of criminal offences that include the identification of the perpetrator, the retrieval of evidence, location and arrest of wanted suspects
- detection of newly developed forms of criminal acts
- detection of latent criminal acts
- enhancement of asset recovery
- arrest of wanted persons – repression of criminality
- efficient crime prevention

The process and relationships are illustrated in the figure below:

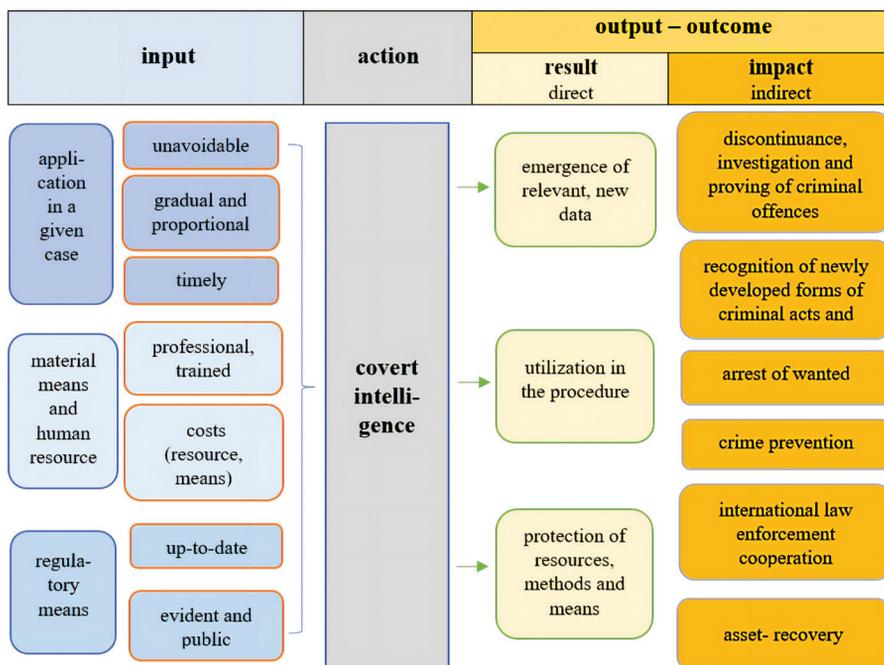


Figure 2: Efficiency diagram of the covert intelligence

Source: Compiled by the author.

Based on what has been described, the efficiency of covert intelligence shows how the elements of the output result and the expenditure on the input side have changed as a result of the CCP, and how the output and input side relate to each other.

The covert intelligence becomes more efficient if the unchanged input results in improving output–outcome or the same level of outcome may be reached by less input.

This conclusion applies both to covert intelligence for crime fighting purposes, and to secret information gathering for policing and for national security purposes related to organised crime.

I hope that the consequence of my research facilitates the substantive examination and measurement of the efficiency of Intelligence and the use of these data may help determine the required resources and the more adequate regulation.

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