

## STUDY

### 1. Control in practice: the particular case of the monitoring of violent extremists

Law No. 2015-912 of 24 July 2015 on intelligence provides that the use of intelligence techniques can only be authorised for the defence or promotion of a limited number of fundamental interests of the Nation.

These fundamental interests are listed in Article L. 811-3 of the French Internal Security Code, which distinguishes seven purposes<sup>1</sup>. Among these purposes is, in point 5), the prevention of attacks on the republican form of institutions (a), the prevention of actions aimed at maintaining or rebuilding dissolved groups pursuant to Article L. 212-1 of the French Internal Security Code (b) and the prevention of collective violence likely to seriously harm public peace (c).

In the previous state of law<sup>2</sup>, only preventing the rebuilding or maintenance of dissolved groups was likely to serve as a basis for a security intercept, alongside reasons relating to national security, the safeguarding of the essential elements of the scientific and economic potential of France, the prevention of terrorism and the prevention of organised crime and delinquency.

The prevention of violent actions carried out by groups classified as "subversive" was then conducted both on the basis, in the broad sense, of "national security", as well as on the prevention of organised crime and delinquency. This finding led the legislator, in 2015, to specify the legal framework by expressly stating two new legal grounds. The aim was not to increase the means of surveillance but rather to define more strictly the areas of intervention of intelligence services by reference to criminal offences defined in the Criminal Code.

The Constitutional Council, in its decision No. 2015-713 DC of 23 July 2015, considered that, in doing so, the legislator had precisely defined the purposes likely serve as a basis for the

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<sup>1</sup> 1) National independence, territorial integrity and national defence; 2) The major interests of foreign policy, the execution of France's European and international commitments and the prevention of any form of foreign interference; 3) The major economic, industrial and scientific interests of France; 4) The prevention of terrorism; 5) The prevention of: a) Damage to the republican form of the institutions; b) Actions aimed at maintaining or rebuilding dissolved groups pursuant to Article L. 212-1; c) Collective violence likely to seriously harm public peace; 6) Prevention of organised crime and delinquency; 7) Prevention of the proliferation of weapons of mass destruction.

<sup>2</sup> See Article 3 of Law No. 91-646 of 10 July 1991 on the secrecy of correspondence issued by means of electronic communications subsequently codified in Article L. 241-2 of the French Internal Security Code.



intelligence techniques and adopted criteria in line with the objective pursued by these administrative police measures.

However, the clarifications provided by the legislator in 2015 do not make it possible to exclude any risk of broad interpretation of the new legal provisions and therefore of any deviations. This is why the balance of the system also relies on the control of their application. This control is the responsibility of CNCTR. It is responsible for ensuring that the decision to use intelligence collection techniques is justified and the techniques chosen are adapted and proportionate to the purpose pursued and the reasons invoked.

The Commission shall examine with particular vigilance requests for techniques submitted on the basis of the purpose provided for in point (5) of Article L. 811-3 of the French Security Code. It underlines this every year in its activity report.

Unlike for other legal purposes, actions likely to be monitored for this purpose typically do not arise from motivations which are intrinsically socially or morally condemnable. Most of these are political motivations which therefore relate, subject to compliance with the general law, to a fundamental freedom: that of expressing and manifesting one's beliefs, including the most "extreme". Moreover, under this preventive policy, which falls under administrative intelligence, the legislator did not wish to include all the criminally reprehensible acts but only the most serious acts. It must be "violent" behaviour of a "collective" nature and provided that it may "seriously" disturb public peace. Therefore, certain acts of "civil disobedience" carried out without violence are therefore not concerned, for example, in compliance with the actions of the law enforcement authorities. Thus, ideological battles or challenging or criticising the institutions in place are not reprehensible acts in themselves, unlike, for example, participation in drug trafficking or the preparation of an attack.

Political or trade union beliefs are not intended to be controlled. This is different when their expression switches to violent action. In other words, only the methods and modes of action used to defend their beliefs can justify surveillance and under no circumstances the beliefs themselves.

The issue of privacy protection is twofold here: the protection of freedom of expression, opinion, association and freedom of demonstration.

In these circumstances, it is up to the Commission to ensure that the use of this purpose does not allow for the technical surveillance of targeted individuals due to their political or trade

union activities or their commitment to social mobilisation. Thus, adherence to an ideology, even the most radical, the defence of any cause whatsoever, or the implementation of means of challenge that may be questionable cannot be a basis for an intelligence technique until the actions carried out have reached a certain level of seriousness and, where appropriate, violence.

For nearly seven years, CNCTR has thus endeavoured to trace the scope of action of the intelligence services. First, by interpreting the scope of the legislative provisions it has the task of enforcing (1), and then assessing the necessity and proportionality of the requested intelligence techniques (2).

From this, a doctrine has emerged which this study intends to expose and explain, within the limits imposed by national defence secrecy. This doctrine is not fixed. It takes into account the evolution of threats and behaviours that may be monitored and is based on a case-by-case analysis of each request submitted to the Commission for consideration.

**1. The delimitation of the scope of intervention of the intelligence services: a sometimes delicate exercise of interpretation of the content of the various threats distinguished by the legislator**

CNCTR's doctrine was created in light of the interpretations given by the Constitutional Council in its aforementioned decision of 23 July 2015.

**1.1. The prevention of harm to the republican form of institutions and actions aimed at maintaining or rebuilding dissolved groups: strictly limited purposes, rarely invoked by the services**

*a) Insurgency and conspiracy*

In its decision of 23 July 2015, the Constitutional Council, having been the subject of criticism regarding the imprecise definition of the purposes justifying the use of techniques, considered that the purpose provided for in Article L. 811-3 (5) of Article L. 811-3 of the French Internal Security Code referred to the criminal incriminations of Chapter II ("*Other infringements of institutions of the Republic or the integrity of the national territory*") of Title 1 ("*Infringement of the Fundamental Interests of the Nation*") of Book IV ("*Crimes and Offences against the Nation, the State and public peace*") of the French Criminal Code.

These offences are provided for and punished by Articles 412-1 to 412-8 of this Code. They concern:

- attack, defined as one or more acts of violence likely to jeopardise the institutions of the Republic or to undermine the integrity of the national territory;
- conspiracy, defined as the resolution decided between several persons to commit an attack;
- insurrectional movement, defined as any collective violence likely to jeopardise the institutions of the Republic or to undermine the integrity of the national territory;
- the usurpation of command, either by taking any military command or retaining it against the order of the legal authorities, without right or authorisation;
- the mobilisation of armed forces without order or without authorisation from the legal authorities;
- the provocation to illegally take up arms against the authority of the State.

These are, for the most part, offences punishable by criminal detention, a sanction reserved for crimes qualified as policy crimes<sup>3</sup>. These qualifications, which are among the most serious in the Criminal Code, criminalise civil or military insurrections, or even armed insurrections, likely to jeopardise the institutions or their republican form, or affect the integrity of the territory.

With regard to these criteria, CNCTR adopted a strict interpretation of the scope of application of the purpose provided for in a) of point 5) of Article L. 811-3 of the French Internal Security Code and has delivered few favourable opinions on this matter. In addition, it has regularly been led to automatically modify the purpose of the service to prefer another more realistic purpose with regard to the actions concerned, most often the 5c purpose (prevention of collective violence) or, on a few occasions, the purposes provided for in points 2) (prevention of any form of foreign interference) and 4) (prevention of terrorism) of Article L. 811-3, when the person in question supports foreign movements adopting terrorist modes of action.

Moreover, the number of requests files by the services on the basis of this purpose is extremely low.

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<sup>3</sup> Criminal detention differs from criminal imprisonment, which relates to ordinary law offences.

Since 2015, the requests for which CNCTR has issued a favourable opinion have been motivated by a bundle of several elements making it possible to strongly suspect that an "insurgency" movement, i.e. an uprising that could seriously threaten the stability of the institutions, was being planned. Thus, the Commission held that the threat invoked on the basis of that purpose was sufficiently substantiated when it was shown that individuals indicating their willingness to attack State institutions also participated in military training in survival and fighting, had carried out reconnaissance, attempted to form operational groups on national territory and abroad and were linked to a hostile foreign power.

On the other hand, the Commission holds that the only proclaimed vague desires, including in radical terms, to overturn the institutions in place, even if they are shared within a group of people who adhere to the same ideology, are not in themselves sufficient to characterise a risk of harm to the republican form of institutions within the meaning of the law.

In isolation, belonging to a movement or small group calling for institutions to be overturned, participation in disputed demonstrations, hostility displayed towards Republican values and the French State, and the installation of "experimental" community forms are not, in themselves, sufficient to justify the implementation of an intelligence technique on the basis of this purpose. In these different cases, CNCTR has held that despite the radicality of the speech potentially advocated by the target, there was too much of a gap between the capacity of action of the target and the reality of the threat of a reversal of the institutions.

*b) The reconstitution of dissolved leagues*

The purpose set out in paragraph b) of point 5) of Article L. 811-3 of the French Internal Security Code is the prevention of actions aimed at maintaining or rebuilding dissolved groups pursuant to Article L. 212-1 of the French Internal Security Code. This Article provides for a procedure for the administrative dissolution of associations or de facto groups and distinguishes seven grounds for dissolution. The maintenance and reconstruction of dissolved groups pursuant to these provisions constitutes offences provided for and punished by Articles 431-13 to 431-21 of the French Criminal Code.

The scope of this purpose is defined in a clear and precise manner by law and refers to groups that have already been the subject of dissolution decisions. Thus, the objective limitation of the scope of this purpose simplifies its interpretation.

The number of applications submitted on the basis of this purpose, although greater than those submitted under (a), remains limited. In most cases, the threat represented by individuals wishing to rebuild a violent group also overlaps with the purpose of preventing collective violence, which is preferred by the services.

In practice, CNCTR distinguishes two main cases. On the one hand, individuals belonging to a group or movement monitored on the basis of this last purpose due to their violent actions. The subsequent dissolution of the group to which they belong justifies, in this case, continuation of the monitoring on the basis of the prevention of the reconstitution of dissolved groups, in substitution or in addition to the purpose of preventing collective violence.

These may be, on the other hand, individuals who have not been subject to any surveillance but whose actions subsequent to dissolution suggest that they are participating in the reconstitution of the group concerned.

In both cases, CNCTR strives, first of all, to verify that sufficient elements suggest that the new entity, regardless of its form and name, is a continuation of the previous one. To this end, the service must highlight an identity of ideology, operating methods, or even organisation with the dissolved group, as well as the claim of the same heritage. The permanence of the members of the group is also a criterion taken into account by the Commission.

Second, the person must actively participate in the reconstruction process. The mere adherence to the ideas of the dissolved group or the relationship maintained with some of the members of the dissolved entity are therefore not decisive by themselves.

Finally, the actions must not already be the subject of legal proceedings on the basis of the criminal provisions sanctioning the reconstitution of dissolved groups.

The unfavourable opinions issued by CNCTR were justified both by the absence of elements making it possible to characterise in a sufficiently plausible manner a specific involvement in the rebuilding process of the group, but also due to the fact that legal proceedings were ongoing for the same facts

1.2. The prevention of collective violence likely to seriously harm public peace: diffuse and scalable threats requiring careful work of legal qualification

In its decision of 23 July 2015, the Constitutional Council considered that the legislator had intended to define the purpose provided for in paragraph c) of point 5) of Article L. 811-3 of the French Internal Security Code by reference to the criminal offences provided for in Articles 431-1 to 431-10 of the French Criminal Code.

These provisions are set out in Chapter I ("*Infringement of Public Peace*") of Title III ("*Infringement of State Authority* ") of Book IV ("*Crimes and Offences against Nation, State and Public Peace*") of the French Criminal Code. They concern the following offences:

- obstacles to freedom of expression, work, association, meeting or demonstration in a concerted manner and with the help of threats, coups, violence, assault, destruction or damage;
  - participation in a mob, without weapons and after summons, or with weapons, with possible aggravation due to concealment of the face, a mob being defined as any gathering of persons on the public highway or in a public place likely to disturb public order;
  - direct provocation to armed assembly, followed or not followed by an effect;
- the organisation of an unlawful demonstration on the public highway, either without prior declaration or prohibited, or participation in a public event or meeting while carrying a weapon;
- concealing one's face within or around an event during or at the end of which disturbances to public order are likely to be committed.

While this implicit reference to "crimes and offences against the nation, the State and public peace" makes it possible to understand the "type" of acts covered by the legislator in 2015, the requests submitted for examination by CNCTR need to specify the nature and constituent elements of the act of violence for which surveillance is intended to prevent the occurrence.

CNCTR therefore attempted, through its opinions, to draw up a doctrine which determines the contours of the violent action and specifies the nature of the behaviour likely to fall within the scope of purpose 5c with regard to two criteria expressly laid down by law: the seriousness of the infringement likely to be committed against public peace by the violent act (1.2.1) and its collective dimension (1.2.2).

- 1.2.1. Actions that would have the effect, if they were carried out, of seriously harming public peace

The severity of the threat is an essential criterion for assessing requests (a). It allows CNCTR to determine the scope of violent behaviour likely to characterise the threat (b).

*a) The legislator explicitly emphasised the seriousness of the infringement of public peace.*

The text provides that the threat must, first of all, be against public peace, recalling that the implementation of intelligence techniques is only justified for the defence of the fundamental interests of the Nation.

The legislator has not defined the concept of "public peace". However, parliamentary work reveals that it preferred it to that of "national security". The latter concept, which is probably more restrictive, would have limited the use of intelligence techniques to the prevention of threats jeopardising the security of French people with the goal of destabilising Republican institutions.

Since "public peace" is at issue, attacks against State institutions are not the only ones concerned. This purpose may also include the prevention of damage to the country's economic life, in the form of sabotage or violent intrusion into industrial sites.

The concept of "public peace" is also distinguished from that of "public order", although both may, in some cases, be partially covered. Thus, all breaches of public order do not constitute a disturbance to public peace. On the other hand, certain behaviours do not fall within public order but may disturb public peace. It is the seriousness of the threats in question that makes it possible to trace the demarcation line.

*b) It is in light of this criterion of gravity that CNCTR defined the nature of the behaviour likely to fall within the scope of the purpose of preventing collective violence.*

**Physical or psychological violence.** Violence is naturally understood as behaviour likely to harm the physical integrity of people, such as beatings or the use of a weapon. This includes, of course, the action of groups that strive to degenerate demonstrations, political or trade union gatherings, with the aim of attacking law enforcement.

A risk of damage to moral integrity, by a particularly serious act of intimidation or threat, may also justify authorisation of technical surveillance. This is the case, for example, of the planning



of an intimidation visit orchestrated by several individuals to the home of another or threats of death addressed to one person as well as to his or her family members.

**Damage to property.** CNCTR also admits that damage to property can be described as violence within the meaning of this purpose. The reference to the provisions of the French Criminal Code also invites this, since assault, destruction or damage are expressly referred to in Article 431-1 of this Code.

However, all damage to property cannot be equated with violence. The Commission distinguishes between graffiti on a building and serious damage, the seriousness of which shows the determination of their perpetrator and the risk of escalation in violence.

Damage to property may also be a basis for technical surveillance when it is intended to cause clashes with other persons, in particular law enforcement or members of rival groups, or when it intrinsically presents a risk to persons, such as intentional fires or damage to infrastructure whose failure would pose a danger to persons (penetration of a nuclear power plant, construction of roadblocks preventing the intervention of law enforcement or emergency services, and actions generating risks of major collective accidents aimed at protected installations).

Damage to property may also justify surveillance when the person has participated in damage that has caused particularly significant economic, social and financial damage and jeopardises the normal exercise of a legal activity (destruction of machinery, major sabotage, etc.).

On the other hand, slight damage committed in the context of activist activities is not considered by CNCTR as violence within the meaning of purpose 5c (tags, paint attacks, for example).

**Public order disturbances without violence.** By its very wording, the law excludes non-violent acts and behaviour, even if they disturb public order, and even if they could be qualified as crimes. The Commission thus ensures compliance with a clear dividing line between the 5c purpose and the ordinary management of public order problems, which cannot justify, by virtue of the choice made by the legislator, the use of intelligence techniques. This applies, for example, to acts of civil disobedience and "*coup de poing*" actions designed to alert public opinion, if they do not intrinsically present the risk of degenerating into violence. The same

analysis applies to the illegal occupation of spaces, if it is not accompanied by a desire to defend it by violence. Propaganda actions aiming to denounce in a vindictive or even virulent manner the policy of the Government cannot, on their own, be qualified as collective violence within the meaning of Article L. 811-3 of the French Internal Security Code.

**Participation in an event.** Participation in an event, even if it could degenerate into violence, also does not make it possible to characterise a violent threat. The service must provide evidence to suggest that the target is likely to be personally involved in clashes. This demonstration can be made by indicating that the target has expressed such a will, that he or she has in the past participated in violence during gatherings, that his or her presence is regularly observed, in processions, in the company of violent individuals within a violent block, or that he or she participates in the organisation of events that systematically degenerate into violence. The same applies *a fortiori* when the target took part in voluntary clashes with the police (ambushes, blockages, etc.). CNCTR thus strives to distinguish demonstrators from those individuals who can be regarded as assailants.

#### 1.2.2. The collective nature of violence

The violent threat must have a collective dimension for the use of purpose 5c to be justified. CNCTR thus strives to verify that the planned violent action involves several persons, either in the preparation phase or during the taking of the action as such.

This legal requirement, which appears in the very title of purpose 5c, also results from the reference to the provisions of Articles 431-1 to 431-10 of the French Criminal Code, which all define charges involving collective action.

The surveillance of a person for purpose 5c therefore assumes that the person acts in the context of a group, or a movement with which he or she is affiliated or of which at least he or she shares beliefs and objectives.

The simultaneous nature of several violent individual actions may raise questions. Without going as far as to require that a community of action and intent be established, like the criminal notion of co-action, the law requires the demonstration of a joint or at least shared plans. Some situations are on the line between the threat posed by a group and the aggregation of individual plans, including virtual "communities" that multiply with the development of social networks, and must be reviewed on a case-by-case basis.

Finally, the case arises of perfectly isolated individuals whose activity, particularly on social networks, shows the existence of a terrorist threat. Faced with this profile of the "lone wolf", CNCTR automatically reclassifies the request of the service, by substituting for purpose 5c the purpose of preventing terrorism (point 4) of Article L. 811-3), which does not have a collective dimension.

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The Commission thus focused on the definition of a doctrine of interpretation of the law ensuring the reconciliation desired by the legislator between the protection of public peace and the protection of freedoms (the first being, moreover, a necessary condition for the proper exercise of the second.) It must then compare this doctrine with the presentation of requests for techniques built on the basis of indicators, suspicions and fragmentary elements, which are inherent in a prevention approach. Finally, verification of the proportionality of the techniques requested is particularly necessary in the case of acts of a political nature.

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## **2. Clarification and completeness of the motivation of requests: a necessary dialogue with the services**

CNCTR ensures that the threat risks invoked by the services in their requests are plausible enough to justify the use of a technique. The facts and arguments set out therein must allow it to assess both the nature of the threat and the plausible nature of its occurrence (2.1) and to assess the degree of involvement of the person referred to in a concerted plan of violence (2.2).

The aim is to find the balance between, on the one hand, the prevention of attacks on Republican institutions and violent abuses and, on the other hand, the protection of individual freedoms, which include, with regard to this sensitive purpose of intelligence, political freedoms. This involves a work of appreciation which is, by construction, delicate.

Unlike the judicial police, which acts for the repression of established offences, the intelligence services have the sole task of **preventing** threats. They are therefore engaged in anticipation work, which takes time and begins on the basis of suspicions, assumptions and indications.

CNCTR, for its part, needs to be sufficiently informed to assess the merits of the claim.

The resolution of this contradiction involves a special effort on the part of the services. They are invited not only to present their suspicions but also to shed light on the context, the relationship of the target, recall his or her past actions and submit to the file all the concrete elements at their disposal, leaving it to the Commission to assess their relevance. The anticipation of a threat must be supported by objective elements in relation to the purpose invoked. On the other hand, the Commission cannot admit the implementation of an intelligence technique for the mere "elimination of doubt", an approach which would consist of verifying the person's "harmlessness" on the basis of simple unsubstantiated suspicions. This kind of reversal of the burden of proof, in a procedure which cannot by definition be contradictory, would expose certain political and trade union circles to the risk of penetration, a risk which the law has specifically intended to guard against.

#### 2.1. Careful examination of the threats invoked by the services in their requests

CNCTR first assesses **the adequacy between the threat**, as described by the requesting service, and **the legal basis** on which it relies for the use of a technique.

Sometimes a threat relates to several purposes at once.

For example, extremist groups, known for their violence and participation in trafficking, may be placed under surveillance in order to prevent collective violence as well as to hinder their criminal activities, for the prevention of organised crime, the purpose of the intelligence provided for in Article L. 811-3 (6) of the Code. In the latter case, the Commission will ensure that the monitoring action carried out by the services in the context of this purpose is suspended as soon as judicialisation is possible.

CNCTR then verifies **that the risk of collective violence is sufficiently substantiated**.

As noted above, the use of intelligence techniques is intended to prevent threats, which can only be described at the request stage as a plausible hypothesis. Unlike legal proceedings, the administrative procedure for the authorisation of intelligence techniques does not fall within the scope of the system of proof and is neither inquisitorial nor contradictory. The question of the plausibility of the threats set out in the requests for techniques is therefore a determinative

one, since CNCTR can only rely on the elements brought to its attention by the services. The experience gained by the Commission, including its relative familiarity with the fields of action of the services and the lessons learned from its "*a posteriori*" control, i.e. on the product of the implementation of the techniques it has authorised, however allows it to have the proper capacity to assess the likelihood of certain threats. The elements invoked must be reliable, objective and exhaustive and must not be presented in too general, elliptic or truncated manner.

This examination may lead the Commission to engage in a dialogue with the service, when it receives a request which cannot be rejected a priori or accepted given its current motivation. It then asks the service for additional information, if necessary on certain specific points of the motivation. This procedure suspends the examination period available to the Commission. This starts to run again according to the diligence of the service which will respond.

CNCTR thus assesses each of the facts or arguments put forward by the services to justify their requests, ensuring, before giving its opinion, that the risk of collective violence can be regarded as sufficiently plausible and established, and not simply possible. It shall carry out these verifications on a case-by-case basis, while ensuring the consistency of its opinions, in order to be predictable vis-à-vis the services in its assessment of their requests.

With this aim of consistency, it has undertaken internal work to formalise and consolidate its doctrine, materialised in the form of a collection of doctrines, which are regularly updated and disseminated within CNCTR as a reference tool intended to facilitate the prior examination of requests. The intelligence services were sent the portion of this collection dedicated to the prevention of collective violence.

The same concern has led to requests submitted on the basis of the prevention of collective violence that are not subject to collegial formation generally to be exchanged with the president of the Commission, before the designated magistrate issues his or her opinion.

## 2.2. A demanding assessment of the target's involvement from a body of indicators

Subject to special provisions making it possible to put under surveillance those persons in close contact with an individual monitored by the intelligence services as the primary target, a person may be subject to technical surveillance only if he or she appears to be personally involved in



a process that could lead to collective violence. With regard to the administrative police, there is no question of bringing charges or assessing his or her "culpability". But it must be ensured that he or she can reasonably be regarded as a perpetrator of actions likely to lead to violence.

This assessment will result from the evaluation of all the indicators provided by the service.

The Commission will look at whether the person's past attests to an inclination to violence. In this regard, it will make a distinction between an established involvement (in particular through the existence of criminal convictions) and presumptions that are too vague (there is a significant difference in scope between the finding that the person participated in various demonstrations that have been accompanied by violence and the fact that he/she was in the process of taking part in such violence). An interest in firearms and shooting, common among members of certain extremist groups, will obviously be taken into account. The same will of course be true of the person's role in the preparation of actions leading to violence: is he or she one of the organisers? Is he or she at least close to the latter? Is he or she part of the branch of the group specially in charge of violent actions? Has he or she already provided logistical support for these actions, for example by providing materials that can be used against law enforcement?

This assessment exercise requires, more than any other, an examination on a case-by-case basis of requests.