THE CUSTOMS DEPARTMENT AS ACTOR ON THE CRIMINAL JUSTICE SCENE

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The control of transnational economic and financial crime (TEFC) belongs to two distinctly different registers: the judicial and customs. It involves actors who differ not only in their modes of action but even in their conceptions, and who have a history of working separately. The recent tendency to make the customs department a fully-fledged actor on the criminal justice scene is indicative of the gradual interpenetration of customs and criminal police conceptions, producing tension between the two institutions.

When a TEFC takes the form of smuggling, a customs offence, it is liable to the customs code. The latter gives customs officers investigative and law-enforcement powers which have been challenged on the grounds that they violate civil liberties[1]. Indeed, whereas customs is lawfully authorised to control the circulation of goods, action on smuggling involves individuals, by definition. Now these individuals are often deprived of the legal guaranties provided by the judicial authority (the right of defence, for instance). For this reason, French legislators have progressively judicialised the customs code over the last twenty years, thus ratifying points of doctrine and case law. Customs officers have therefore come to view the customs code as a special criminal code.

At the same time, the criminal justice system has been encountering some difficulties in dealing with economic and financial crime, leading it to enrol the competencies of specialised assistants, including customs officers. This concern with efficiently fighting TEFC also led to the attribution of criminal investigation prerogatives to some customs officers. As opposed to the other customs officers, who must rely entirely on the customs code, these criminal investigation customs officers (CICO) act exclusively within the framework of the code of criminal proceedings. The outcome is that the customs department now functions on two distinct normative registers.

This twofold movement, with the judicialisation of customs norms on the one hand and the new means of fighting economic and financial crime granted to the justice system on the other hand, gives the customs department the status of actor in the criminal justice system.

This article is part of a research project conducted in the Provence-Alpes-Côte d'Azur (PACA) region of France, based on analysis of records and interviews with customs officers and judges specialised in economic and financial crime. The present exploratory phase analyses the way the customs department participates in the regulation of TEFC, on the basis of the handling of two types of cases: failure to file a compulsory declaration about physical crossborder transportation of cash and smuggling of cigarettes.

I – Presence of customs officers within the "economic and financial poles"

Given the increase in economic and financial criminality which became evident in the 1970s, judges began to feel powerless because they lacked training in the field. To overcome this shortcoming, a bill – the August 6, 1975 Act – was passed, turning cases of this sort over to specially trained judges grouped in courts specialised in economic and financial matters. In the late 1990s the difficulties encountered in implementing this act led to recourse to specialised assistants.

1°) *Difficulties in using courts specialised in economic and financial matters*

In each court of appeals, in accordance with the August 6, 1975 act, the largest *tribunal de grande instance* (a first level court) of the district is appointed as "court specialised in economic and financial matters". Suits involving customs, foreign exchanges and (since the promulgation of the new code of criminal proceedings in 1994) money-laundering also fall within the jurisdiction of this court. However, this legislation was never enforced, for lack of appropriate means[2].

In 1994, the concern with avoiding having cases of economic and financial crime systematically transferred and relocated led the lawmakers to introduce the concept of *concurrent competency* of the specialised court. Judges originally in charge of complex cases may take the initiative of turning the case over to a specialised court. In practice, however, the fear of appearing incompetent in this field makes the former reluctant to resort to that decision. Moreover, this arrangement supposes greater specialisation of judges of economic and financial cases sitting in these specialised courts. In point of fact, as shown by Accomando and Benech, the existence of such judges and prosecutors is relatively recent, and in courts outside the Paris area there is some fluctuation in the specialisation of courts, depending on the careers of the various individuals, for one thing, and on the politics of the senior court officials, for another. Furthermore, there has been no genuine penal policy in

[1] AICARDI (M.), 1986, *L'amélioration des rapports entre les citoyens et les administrations fiscales et douanières*, Paris, La Documentation Française.

[2] ZANOTTO (J.P.), 2001, Mission de Recherche "Droit et Justice", *Les aspects judiciaires de la lutte contre la délinquance économique et financière en Europe, Actes du séminaire de Villeneuve-lèz-Avignon*, 16-17 novembre 2000, Paris, Ministère de la Justice.

this respect, be it at the national or the local level[3]. This arrangement therefore remained a dead letter.

2°) *The creation of "economic and financial poles"*

Since the earlier arrangements were too unwieldy, a bill was passed institutionalising recourse to specialists: the July 2, 1998 act created the position of specialised assistant. Professionals in this field, be they state-employed or from the private sector, can now be permanently assigned to assist the heads of specialised courts. Those specialised assistants actually holding a post all come from civil service (from the Directorates of various departments: customs, internal revenue, trade, consumer affairs and the fraud squad) and provide technical assistance for the judges. As indicated by their title, they simply assist the latter and have no power of their own.

Concomitantly, the desire to improve the efficiency of the justice system in its handling of economic and financial crime led to the creation of "economic and financial poles" within some specialised courts (see the February 19, 1999 ministerial order).. The objective was to set up an interdisciplinary team of specialists in various aspects of these cases, to support judges on these courts. This provided the judicial authority with the expertise required to handle some types of fraud. Indeed, inasmuch as judges are often poorly equipped to deal with customs law, the specialised assistants are helpful in examining, treating and following up these cases. This is why some judges would apparently like to extend the powers of specialised assistants. Conversely, they fear bureaucratisation of the CICO owing to the weight of hierarchical relations.

Some Prosecutor's Offices in Courts of Appeal, including in particular Marseilles, have impelled regional penal policy advances on economic and financial affairs. The possibility of getting help from customs-competent assistants as well as the new judicial policing powers of customs officers responded to their need for more means for treating this type of criminality.

II – Criminal Investigation Customs Officers

As shown in a case of cigarette smuggling analysed in this study, examining judges have always given customs officers letters rogatory. Theoretically, the customs officers were technical assistants: they gave advice but did not perform any procedural act. In some instances, these officers exceeded their role of technical assistants, and such practices were disapproved by the courts, especially in cases of frauds on European subsidies for farmers. But as is often the case, practice preceded legislation, which ended up giving customs officers criminal investigation prerogatives.

1°) *Turbulent beginnings*

The issue of giving criminal investigation powers to customs officers took shape with a drug affair : in 1990, some customs officers who had made a "controlled delivery" were indicted for having exceeded their competency[4]. The general director of the customs department, followed by the minister of the Budget, Michel Charasse, backed his agents, and also pointed out that giving criminal investigation prerogatives to customs officers is a way of effectively fighting drug trafficking. The minister of the Interior refused to set up a third criminal investigation officers corps, however, while the minister of Justice was opposed to combining competency in judicial and customs matters.

During the parliamentary debates on penal proceedings, in 1992, Michel Charasse, then senator, suggested that some customs officers be given criminal investigation authority so as to combat the most serious frauds (drug trafficking and money-laundering). The amendment was adopted by the Senate but rejected by the National Assembly, which ratified the positions of the ministers of Justice and the Interior.

The January 21, 1995 "guidelines and programs for security" legislation entailed strong customs involvement in domestic security policies, however. It facilitated, to the point of legitimating, the process by which customs officers achieved criminal investigation powers. Particularly so since in 1996, in a bill draft, the ministry of Justice considered giving customs officers criminal investigators' status so that judges would be better armed to deal with economic and financial crime. The dissolution of the National Assembly put an end to the debate.

It was during the drafting of the June 23, 1999 bill that then minister of Justice Elisabeth Guigou, with backing from the secretary of State for the Budget, Christian Sautter, gave customs officers the ability to conduct criminal investigations under certain conditions. As it stood, this reform still responded to a twofold concern: avoiding the establishment of a third police force on the one hand, and on the other hand, combining customs and criminal investigation powers.

This reform is part of a trend towards harmonising the powers of the customs administrations of member States of the European Union, since many of these already have such prerogatives. It also responds to structural needs. Indeed, English, Finnish and Spanish customs officers have had criminal investigation powers for many years, and actually send requests for cooperation to the French customs department. The latter, being unable to comply, passed the requests on to the *gendarmerie* or the police, for whom they did not represent a priority. This placed France in a difficult position with respect to its European partners.

Henceforth, the customs administration can bring to completion the treatment of customs offences, counterfeiting and related penal offences previously handled by the police. It can also break up criminal networks, which was not the case previously, since customs action was often confined to the simple material observation of goods-connected offences.

2°) *An unfinished reform*

To avoid having the customs administration control both criminal police and customs procedures, the CICO are attached to the national department of customs-related intelligence and investigations (the DNRED), which is subordinated to the authority of a judge acting as a supervisor and advisor for the criminal investigation missions of customs officers. The novelty here is that these judges function directly as heads of a criminal investigation service, and are in the position of having to inculcate a judicial perspective in civil servants imbued with an administrative conception of the law as a state prerogative, that has developed outside all the trends in national and international law. The customs department, proud of how rapid, discrete and efficient customs procedures are, has no wish for any outside control. Thus, the issue arises of the cohabitation, within the DNRED, of officers controlled in some cases by the administration, in others by the judicial authorities. This problem may explain why some people suggest that investigative customs work be removed from the DNRED and directly attached to the general directorate of the customs department.

To avoid any competition with police squads specialised in economic and financial affairs, only 300 CICO were to be created. 60 were empowered by Paris' Chief Prosecutor in November 2001. As opposed to the CIPO, the CICO can only act on demands from the public prosecutor's office or on letters of request issued by the examining judge, both of which must

[3] ACCOMANDO (G.), BENECH (A.), 2000, La spécialisation de la justice pénale en matière économique et financière, *Revue Pénitentiaire et de Droit Pénal*, 1, 52-74.

[4] LÉVY (R.), 2003, Controlled delivery of drugs: legal, and therefore easier to supervise ?, *Penal Issues*, 14, 11-14. DOMINGO (B.), 2002, *Douane et coproduction de sécurité, Missions, dispositif et territoire*, Paris, IHÉSI.

be sent to the judge assigned to investigative customs missions, who centralises all judicial requests. These are immediately transmitted to the head of the DNRED, who then designates those specially empowered CICO who will accomplish the required acts, under the control of a judge. The system may seem unwieldy and difficult to implement. This probably explains why judges, disconcerted by this arrangement, still resort to CICO so rarely. Some judges feel that the complexity of this reform is a source of considerable difficulties and are reluctant to make use of a process viewed as overly long and not adapted to the reality of the judicial system. Thought is being given to making the system easier to use.

Furthermore, on another plane, customs and criminal police conceptions differ. Indeed, inasmuch as the customs department views itself as a part of the tax administration, it tends to assess investigative customs work exclusively on the basis of its financial productivity; that is, on its ability to recover sums lost due to duty and tax evasion. Now by definition, penal action cannot be judged exclusively on its financial productivity, since its function is also dissuasive and disciplinary in an area where effects are not measured in terms of funds recovered thanks to trials.

All in all, the CICO status was created by the ministry of Justice and the customs department for the improved fulfilment of their mission; this marked the birth of a new economic police force, whose competencies may be extended in the near future. This still incomplete arrangement comes up against two difficulties, however. On the one hand, judges are insufficiently familiar with customs law and seem disconcerted by the new procedure and the new possibilities for action it entails.. On the other hand, the customs department will certainly find it difficult to adjust its fiscal approach to a judicial rationale.

It is of course too early to evaluate these measures. It will be interesting to complete these initial observations, to see whether the conflicts over the conception of this reform carry over to its implementation, and to detect the possible restructuring effects on the professional practices of the various actors involved.

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