CONTROLLED DELIVERY OF DRUGS : LEGAL, AND THEREFORE EASIER TO SUPERVISE ?

René LÉVY is research director at the CNRS and director of the CESDIP. He discusses one aspect of his current research on the production of legal norms regulating policing.

French Act n° 91-1264 dated December 19, 1991 "on the reinforcement of the fight against drug trafficking" authorizes police officers, *gendarmes* and customs officials to monitor the transportation of drugs and of products and material used to make them, as well as of funds derived from such activities, in some circumstances. This means that they delay their intervention against traffickers until what they judge to be the most opportune moment, so as to identify and arrest the people behind the transaction or the recipients of the goods, instead of getting only the conveyors. It also stipulates those conditions under which they themselves may, for the same purpose, go beyond simple surveillance and participate, to some extent, in such illicit activities by infiltrating the networks.

Some of the reasons behind this legislation are circumstantial - there was what was known as the "Lyons customs officers affair" - others were structural. Indeed, this reform is part of a sweeping international trend, impelled to a large extent by the United States and written into several international treaties; but above all, it is indicative of the state of the power relations between the traditional French policing agencies (the national police and *gendarmerie*) and customs - along with their respective tutelary ministries - on the one hand, and on the other hand, the Ministry of Justice, in the context of European unification.

The affair that activated the process: the "Lyons customs officers affair"

Between February and April 1991, five cases of drug offenses in which customs officers had been incriminated by the examining judge were reported to the Ministry of Justice. Agents of the Lyons division of the National Bureau for Customs Searches and Investigations (DNRED) were involved in several of these affairs, including the head of the department and a handful of state employees, who had been indicted and in some cases detained. These affairs reached the public eye in early March and elicited parliamentary support of the customs officers by several representatives, as well as some strong supportive statements by the Minister in charge of customs, the Minister of State for the Budget, Michel Charasse, with the backing of Pierre Bérégovoy, Minister of Finance.

Following these events, in March, Minister of Justice Henri Nallet suggested to Michel Charasse that a joint working party be created. This group met on three occasions between mid-April and mid-May, and recommended that an official instruction first be circulated containing a reminder of the legal framework in which "infiltration" operations are authorized, and tending to have them controlled by the public prosecutor's offices (this was done in a ministerial order dated June 1st, 1991, followed by a bill aimed at defining the acts liable to operations of this type. This was achieved very rapidly: contacts were established with the General Directorates of the national police and *gendarmerie* (the DGPN and DGGN) in the first half of June; the final text was transmitted to the Council of State in early July and adopted by the Council of Ministers in early August. The Act was voted on December 19th of the same year, using the emergency procedure. In passing, it amnestied those state employees who had been prosecuted. At the same time, the ministries involved had prepared two rulings and two official instructions for enforcement: the latter were published in Autumn 1992. The entire process took about 18 months, then. Concern with the fate of the prosecuted customs officials prompted this alacrity to a large extent, but it did not prevent the various protagonists from pursuing their own designs.

Repercussions of the international and European context

The technique of controlled deliveries is usually viewed as an American invention, exported in the 1970s and 80s and ratified by international agencies, the purpose being to prevent drugs from reaching the United States whenever possible. If we are to believe Nadelmann[1], operations of this type were already being mounted with the specialized French police services during that early period. The first official reference to this technique is 1984 Ministry of Justice ministerial order demanding that public prosecutor's offices contact the OCRTIS[2] for the implementation of such deliveries, given this agency's experience in the matter. It is difficult, however, to determine the extent to which the public prosecutors actually had control over use of this technique. As we shall see, the new texts are much more explicit thereon.

The main reference in international law is article 11 of the United Nations Vienna Convention of December 19, 1988, which came into effect in France on March 31, 1991 - that is to say, a few weeks after the indictment of the customs officers. In fact, during the debate on ratification in November 1990 the spokesman for the bill at the National Assembly had argued in favor of legislating in this field rather than simply resorting to ministerial orders. Nonetheless, in our opinion the decisive factor, although indirectly so, in the legalization of this technique, is the unification of Europe and its effects on the situation

[1] NADELMANN E., 1993, *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement*, University Park, Pennsylvania State University Press.

[2] The OCRTIS, or Central Bureau for the Repression of Illicit Drug Trafficking, created in 1933, is part of the Central Directorate of the Judicial Police (national police department).

[3] It should be recalled that the "Convention for the application of the Schengen agreement", ratified by the French Parliament during this period as well, including article 73 stating that each country must "take measures to enable controlled deliveries in illicit drug trafficking" in accordance with its own legal system, did not take effect until 1995.

of the various administrations involved[3].
It is in fact not by coincidence that the customs department was in the front line in the early 1990s. It had been obliged to do a thorough rethinking of its strategies and means of action to cope with the abolition of internal borders within the European Union, programmed for 1993. This restructuring produced a redeployment of means – from the borders between European countries to France's portion of the outer borders of the Union (essentially the coasts and airports) – and a much more proactive stance, focused on increased mobility and greater selectivity, mostly intelligence-based.

The stakes of the reform

One aspect of the strategy designed by the customs department and its tutelary ministry consisted in making its agents' positions more like those of the general policing agencies (the national police (NP)) and *gendarmerie* (NG)) and in particular, in obtaining the status of criminal police officers (CPO) for its agents. It is not an exaggeration to say that it tried to gain recognition as a third police force on the national level. For quite a while, however, this undertaking encountered the opposition of the other administrations involved.
To clarify what was at stake here, it must be recalled that the customs department already had enormous powers of constraint, even greater than those available to the police (its officers could search vehicles, individuals and homes, retain suspects and pay informers) as well as the ability to negotiate financial transactions with persons guilty of fraud, who might then escape prosecution, but it functioned independently of any judicial control. Nonetheless, it had the obligation to turn any affair that took on a criminal character (as was often the case in large-scale trafficking) over to the police or the *gendarmerie*.
The customs department had been negotiating unsuccessfully with the Ministry of Justice for two years when the affair of the customs officers was vented. In support of its demand, the department advanced three arguments:
- heightened international cooperation with customs departments in other European countries, whereas the latter have a better legal status;
- the possibility of investigating offenses "intellectually connected" with customs offenses (drugs, firearms, counterfeiting, trafficking in works of art) and of following up customs investigations by inquiry required by an examining judge.
- more generally, the need "to respond to the decline in the means of control available to customs officers in the future due to the elimination of borders within the European Union, and to the foreign exchange control".

In other words, the customs department wanted the capacity to combine customs investigations and criminal police investigations so as to be able to finalize cases without having to transfer them to the police or the *gendarmerie* once the customs side of the investigations was over. This would mean that the customs officers would have double competency and be able to act in different capacities.
But we may also perceive a less noble motivation for this demand, one that is illustrated by the affair of the Lyons customs officers: the illicit action of the customs officials was uncovered by police investigations taking the relay of customs operations. The latter's legal situation had not enabled them to obtain complete control of the records, or to put it more sociologically, to complete the legal reconstruction required by any procedure, and which was in fact a subject of great concern for the authors of the new legislation.
At the time the Ministry of Justice advanced a series of objections to these arguments, and made it a point to demonstrate that if some customs officers were given the status of CPO, this would have negative repercussions for the department as a whole, both in terms of the prerogatives they might exert and of the organization of the agency. In particular, it refused the idea of giving customs officials multiple capacities, which would be tantamount to giving them powers enabling them to change registers ad lib, alternately playing police officer or customs officer depending on their interests, and more generally, to do without any collaboration with the police and *gendarmerie*. It favored a radical separation between ordinary customs officers and JPO-customs officers, with the latter being governed by the common law of the code of criminal proceedings (CCP), and supervised by the public prosecutor's office. This would require the division of customs services into two categories of agents with differing competencies, and would mean that the JPO-customs officers would have much less power than their non-CPO colleagues, including restricted territorial competency (like the other CPO). This would cause serious organizational difficulties for their administration, and would entitle the public prosecutor's office to inspect their work, which would be untenable for the customs department.
The Direction des Affaires Criminelles et des Grâces (the Direction of Criminal Affairs and Pardons, or DCAP) therefore suggested an intermediate solution consisting of maintaining the present competency *ratione materiae*, while granting some specially empowered customs officers the ability to act on the basis of letters rogatory in the framework of the CCP (like some of the Ministry of the Economy personnel working on monopolistic practices). This would have the advantage of reinforcing the position of examining judges in some highly technical areas. This fallback solution would amount to giving limited satisfaction to the customs department, but under the strict control of the judicial authority. This is more or less the solution that was to be adopted subsequently, following a number of incidents, with the June 23, 1999 act which did create a new CPO corps within the customs department, but placed it under stricter judicial control than the other JPOs.

The compromise on controlled deliveries

In this context, the affair of the customs officers gave the Ministry of Justice the lead in a four-handed game involving not only customs and the Justice department, but also the NP and to a lesser extent the NG. It was to enable the Justice department to impose its conception of the relations between the police and the justice system to the detriment, primarily, of the Ministry of the Interior.

The final arrangement

Following a genuinely collective drafting process within the Ministry of Justice, with exchanges between the magistrate in charge of drawing up the text and his superiors at various levels, and with a panel of chief public prosecutors and representation of other ministries involved, a gradual clarification is the consecutive drafts, with respect to authorized practices, supervisory authority , means of control and scope of the legal excuse.
The first drafts authorized police officers, *gendarmes* and customs officers either to proceed with controlled deliveries (surveillance of the conveying) or, with the consent of the public prosecutor or the examining judge, to transport or possess drugs, or again, to provide traffickers with means of transportation or storage, provided such acts do not incite them to break the law (in accordance with case law tradition regarding incitement). In the final version, controlled delivery may involve not only drugs but also their precursors, the material for making drugs or the money derived from trafficking, but the public prosecutor must be informed beforehand. Hence, the extension of the prerogatives went hand in hand with reinforcement of control by the judicial authority.
Regarding infiltration, prior judicial authorization is still necessary, but here too, the list of utilizable means was lengthened. Agents were allowed not only to convey and store drugs, but to acquire and deliver various substances, funds or material, as well as to provide help of a legal nature or means of communication. The requisite of non-incitement to break the law subsists, meaning that, as a rule, an agent cannot acquire drugs and then look for customers.
The official instructions for enforcement – and especially the Ministry of Justice order dated April 14, 1992 – spell out the conditions under which the public prosecutor may grant authorization to proceed with infiltration, and they reflect real concern with having the latter keep such operations under close surveillance. Indeed, to obtain an authorization the investigating services must meet several requirements :
- there must be a written request by a senior official "habitually competent in fighting large-scale trafficking or money-laundering", and the public prosecutor's office must check with the OCRTIS, the OCRGDF[4] or the DNRED to ascertain that no other agency is already working on the particular case;
- prior communication to the public prosecutor's office of "factual elements establishing or indicating a presumption of the existence of offenses defined by the December 19, 1999 Act and evidencing suspicious activities in individuals previously known to have committed similar acts or to be susceptible of committing them";
- demonstration of the appropriateness of the infiltration technique in the particular case, and of the lack of an alternate method;
- identification of the agents involved;
- description of the practical details of the operation and ongoing information on how the operation is proceeding, in ways prescribed by the judge;
- possibility for the public prosecutor's office to interrupt the operation at any time, and to proceed with the exfiltration of the agents "without jeopardizing their security".

The positions of the other administrations

The gradual lengthening of the list of goods involved (now including drugs, precursors, material and money), in several phases, was the outcome of demands by the police, the *gendarmes* and customs officers, sometimes against the will of the DCAP. Conversely, the demand for reinforced control comes from public prosecutors who, when consulted, were mostly opposed to the project. This reflects deep-seated distrust of the customs department.
However, the most striking fact that came out during the drafting process was the marked hostility of the Ministry of the Interior, which vainly sought – at every stage of the process – the insertion of a reference to the OCRTIS in its previously recognized role of manager and coordinator of such operations. The Ministry of the Interior was most probably all the more intent on asserting its pre-eminence since a comparison of the amounts of drugs seized respectively by its agents and by customs revealed the weakness of its position. This led it to refer to the assimilation, in practice, of customs officers to CPO as "untimely" and "quite unacceptable" during the ultimate arbitration between ministries.

*

At first sight, the drafting of the 1991 act seems paradoxical: despite the vulnerability of the customs department with respect to the justice system (its officers were accused of incitement, there was an urgent need to put an end to their prosecution and to clear them), it succeeded in gaining ground on the other policing agencies by obtaining powers equivalent to those of the CPO for some operations. This was because the Ministry of Justice viewed this as an opportunity to reinforce its own position by gaining control, not only over customs operations, on which the public prosecutor's office had no hold until then, but also over all of the agencies involved. The "Lyons customs officers affair" thus opened a window of opportunity for the justice department, and behind the clash one perceives the existence of a negotiation in which the Ministry of the Interior is the main loser, despite the fact that its services also gained a degree of legal security.
In 1999, the customs department finally won their battle: the creation of a long-desired corps of CPO customs officers. But here too, the Ministry of Justice played its hand well, since it obtained closer control over this new category of CPO than over the police and *gendarmerie* CPO. This corps is placed under the administrative authority of a magistrate; its agents can only act at the request of the public prosecutor's office or of the examining judge, and above all, they cannot avail themselves of the powers granted by the customs code (such setting cases) when they act in their quality of CPO. The line defined by the Chancellery in 1990-1991 has prevailed, then.

René LÉVY
(rlevy@ext.jussieu.fr)

[4] The Central Bureau for the Repression of Major Financial Crime, attached to the national police department.