

CONTROLLED DELIVERY

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I. INTRODUCTION

Controlled delivery is a tool employed by the criminal prosecution authorities which is indispensable to effectively detect international organized crime. In Germany, we understand by this controlled importation, controlled exportation and controlled transit.

Controlled delivery is not governed by law in Germany. In practice, it is subject to the tactical discretion of the criminal prosecution authorities. Individual provisions can be found in guidelines issued to the criminal prosecution office, which is the authority in charge of the investigation proceedings. The police must follow the instructions of the office (sections 161 and 163 of the Code of Criminal Procedure [StPO]). This has worked smoothly in practice in Germany for years; this also applies to cooperation with the police authorities in the neighbouring European states. The success of the investigations is frequently spectacular.

II. PRINCIPLES AND FRAMEWORK

The principle of mandatory prosecution applies in Germany, which is derived from the rule of law principle (sections 152, 161 and 163 of the Code of Criminal Procedure). Accordingly, the criminal prosecution authorities are obliged to initiate the measures necessary for prosecution without delay, in particular to solve the crime, when they gain knowledge or form a suspicion of the commission of a criminal

offence. This means that they have no discretion as to whether to initiate criminal proceedings; they are obliged to take the necessary investigative measures.

Furthermore, the duty to act 'within a reasonable time', as prescribed in Article 6 para 1 of the European Human Rights Convention, applies in Germany. This means that the necessary criminal prosecution measures are to be taken without delay.

It is however not possible to deduce from these principles an instruction to intervene immediately in the sense of, for instance, search or seizure, or indeed apprehension without delay. Rather, the public prosecution office has tactical discretion as to which measure to take at what point in time to solve a crime; the highest principle is only that rapid detection may not suffer as a result of this tactical discretion.

The principle of mandatory prosecution does not entail a duty to take a specific investigation and intervention measure unless a specific danger otherwise exists that the criminal prosecution would suffer were this measure not to be taken, and that in particular items of evidence would be lost.

There is also no statutory requirement in Germany that the offender is to be brought before a court in Germany. It is sufficient to ensure that the offender is sentenced at all. On the whole, this means: The principle of mandatory prosecution, the principle of acting within a reasonable time and controlled delivery do not contradict but complement one another in

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a harmonious manner. This becomes clear if one realises that too early, too rapid or too intensive intervention, too early seizure or too early apprehension may be detrimental to the investigative proceedings in individual cases because it restricts the possibilities available for detection. This would mean in practice that it would contradict a correctly understood principle of mandatory prosecution if - depending on the facts of the individual case - controlled delivery were not to be used, but one were to intervene too early. The principle followed is: too early intervention is just as detrimental as the criminal prosecution authorities intervening too late, because it would reduce the potential success of the investigations.

There are naturally cases in which the principle of mandatory prosecution and the principle of acting within a reasonable time force one to reject or abort controlled delivery. Such a case is, for instance, where the implementation of controlled delivery would be too dangerous for the officers involved. Another case in which controlled delivery is not implemented or must be aborted is that of endangerment to the goods being transported, as is the case with trafficking in human beings.

III. INDIVIDUAL QUESTIONS

On the basis of these considerations, Nos. 29 a to 29 d of the guidelines on criminal proceedings stipulate the following, in the main:

A. 29 a

Controlled delivery is the illegal transportation of narcotics, arms, stolen goods and property, etc., from a foreign country through domestic territory to a third country, monitored by the criminal prosecution authorities; controlled exportation is illegal transportation from

domestic territory to a foreign country; controlled importation is monitored illegal transportation from a foreign country to domestic territory.

B. 29 b

Such controlled transportation can only be considered if the ringleaders cannot otherwise be identified or distribution channels uncovered. Monitoring is to be carried out such that it is ensured that the offenders and items involved in the offence can be accessed at all times.

Moreover, the following declarations by the foreign states must be provided for delivery and exportation:

- (i) assurance to monitor transportation continuously;
- (ii) assurance to strive to investigate couriers, ringleaders and buyers, to seize the narcotics, arms, stolen goods and property and the like, and to attempt to convict the offenders and execute their sentences; and
- (iii) assurance that the German criminal prosecution authorities will be continually informed of the respective state of the proceedings.

C. 29 c

With controlled delivery, if as yet there are no investigative proceedings pending with a German public prosecution office in respect of the offence, the public prosecutor is on principle responsible for the proceedings who is responsible for the border crossing via which the items related to the offence are brought onto domestic territory. This also applies to controlled importation. With controlled exportation, the proceedings are on principle operated by the public prosecutor from whose district the transportation is initiated.

D. 29 d

The decision as to the permissibility of controlled transportation is taken by the responsible public prosecutor. He/she informs the public prosecutor from whose district the transportation is likely to leave domestic territory. The public prosecutor responsible for the place of importation is also to be informed if another than this one is operating the proceedings.

The authorities and officers of the police and customs service on principle approach the responsible public prosecutor if they need decisions and information.

These relatively strict guidelines, which are binding on the public prosecution office and the police, ensure that controlled delivery is only employed if it is expedient. They also ensure that, in accordance with the principle of mandatory prosecution and the principle of acting within a reasonable time, the offenders will be sentenced at home or abroad without delay.

IV. OUTLOOK

I stressed at the beginning that controlled delivery in Germany is a continually functioning practice with good detection rates. My information has, I hope, also demonstrated that no statutory provision is needed.

It is an unmistakable fact that controlled delivery is gaining ever greater significance as internationally operating organized crime increasingly expands trade channels over the world. Effective detection is only possible if controlled delivery is possible and practised the world over in a network formation.

One should also not overlook the fact that controlled delivery becomes all the more complicated the more complex the links and trade channels of organized crime

become. It is also made more difficult if organized crime becomes less accessible. Here, controlled delivery overlaps with other investigation methods, such as the use of undercover investigators. These are frequently involved in controlled delivery. If organized crime becomes even less accessible, it will become more and more difficult to infiltrate organisations with undercover investigators. However, if this becomes more difficult, it will also become more difficult to identify illegal transportation of criminal goods at the outset and to take early measures necessary for controlled delivery. I only wish to touch on this problem here. We can perhaps discuss this later.