

Published on 7 March 2022



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Customs' inspection at the premises of postal service providers and express freight companies is not conditioned to the finding of prior evidence of the commission of an offence

Imagine that customs officers enter your premises to carry out checks on potential offences without any prima facie evidence concerning these hypothetical offences.

The customs' right of inspection provided for under Article 66 of the French Customs Code allows this practice.

Using the customs' right of inspection, the customs officers of Marseille discovered packages that contained counterfeit products at the premises of Chronopost and UPS.

An individual considered to be the recipient of these counterfeit products was then prosecuted for possession of counterfeit goods without proper supporting documentation, importation of goods bearing a counterfeit trademark for commercial purposes, and sale or offering for sale of goods bearing a counterfeit trademark on an online public communication network.

First instance judges granted the plea of nullity raised by the counsel of this individual and invalidated the reports on findings that had been drawn up and the entire subsequent procedure on the ground that these reports did not mention the existence of prior information allowing to establish that the companies' premises contained or were likely to contain shipments that included products that were constitutive of an offense under

the French Customs Code.

The Public Prosecutor's Office, the French customs authorities and the company whose products were counterfeit lodged an appeal against the first instance judgment.

In a decision dated January 27, 2021, the Court of Appeals of Aix-en-Provence sentenced the recipient of these counterfeit products to an 18-month prison term, six months of which were suspended, a 5-year ban from managing a business, a customs fine and confiscation measures.

The convicted individual appealed against this decision.

As such, the question that arose was whether the inspection allowed under Article 66 of the French Customs Code is conditional on the prior finding of *prima facie* evidence suggesting the presence of contentious shipments or the characterization of an offence under the French Customs Code?

In a ruling handed down on January 26, 2022, the *Cour de Cassation* (French Supreme Court) answered no to this question.

In its decision of January 27, 2021, the Court of Appeals of Aix-en-Provence had considered that customs officers have an administrative law enforcement power that allows them to control any packages/parcels in order to investigate possible offenses without having to specify their knowledge as to the presence of contentious shipments or having to characterize in what way the opening of the packages/parcels would be necessary because of the existence of any particular pieces of evidence.

This position was confirmed by the judges of the *Cour de Cassation*.

To define this law enforcement power, French case law uses a purposive criterion that takes into account the intent of the police forces. *"There is, therefore, an administrative law enforcement measure or a criminal law enforcement measure depending on whether the decisions or operations (or even omissions) to be characterized relate to a specific criminal offence or not. If they are related to such an offence, they are a matter of criminal law enforcement (CE, sect., May 11, 1951, Consorts Baud). If not, they are a matter of administrative law enforcement (T. confl. June 7, 1951, Dame Noualek)"*^[1].

A general right to inspect goods

As such, by visiting the premises of postal services in order to investigate possible offenses, the customs officers were carrying out an administrative law enforcement task. Indeed, the indeterminate nature of the sought offense makes it possible to understand this power conferred upon customs officers. The *Cour de Cassation* confirmed this analysis and specified that customs officers have a general right of inspection of goods which can be inferred from the parliamentary work that had been carried out when Article 66 of the French Customs Code was amended by the Law of March 11, 2014 (which was intended to regulate this very broad right) and from Article 60 of the French Customs Code which sets out a general right of inspection and which provides that:

“For purpose of applying the provisions of this code and with a view to searching for fraud, customs officers may inspect goods, means of transport and individuals”[2].

As such, the *Court de Cassation*, just like the Court of Appeals of Aix-en-Provence, confirmed that it is possible to carry out a customs inspection, as provided for under Article 66 of the French Customs Code, without the need for prima facie evidence of the perpetration of an offense.

This position confers an extraordinary power to customs officers who, subject to compliance with the formal requirements set by Article 66 of the French Customs Code, may enter private premises to investigate offenses under the French Customs Code without the need to prove the existence of prima facie evidence suggesting the commission of such offenses.

A customs inspection at the premises of postal service providers and express freight companies – which could be assimilated to a kind of search or even perquisition – does not benefit from the guarantees offered by the former (a preventive search under Article 78-2-2 of the French Code of Criminal Procedure must be carried out, for example, on the basis of a written request from the Public Prosecutor), nor from offered by the latter (which only allows an inspection without the consent of the suspect in the context of a flagrante delicto investigation).

This ruling raises questions about the extent of customs powers, even if the general right of inspection of customs officers, which French legal scholars describes as *“the most ostensible form of the activity of customs officers”*[3], is something familiar under French law.

A general right of inspection that does not apply to letters of correspondence

Finally, it should be noted that the *Cour de Cassation* specified that the general right of inspection of customs officers provided for under Article 66 of the French Customs Code does not apply to letters containing correspondence. Indeed, for these letters, French courts have already ruled in the past that the seizure of postal correspondence addressed to a private individual in order to open the envelopes and check their contents is comparable to a search or a home inspection. Therefore, outside the scope of the provisions of Article 66 of the French Customs Code, the control of the contents of a postal item by customs officers in front of the addressee’s home is unlawful in the absence of a flagrant customs offense[4].

The absence of information about an offense under the French Customs Code is not a ground for nullity of a customs inspection carried out under Article 66 of the French Customs Code

In any case, it appears, as French positive law stands, that the existence of a prior information allowing to establish that the premises of the companies contained or were likely to contain shipments that included goods that were constitutive of an offense under the French Customs Code is not necessary for the customs officers to carry out a customs inspection on the basis of Article 66 of the French Customs Code. Consequently, the absence of such information prior to the customs inspection carried out under Article 66 of the French Customs Code does not constitute a ground for nullity of such inspection.

[1] Guidance Fact Sheet, Administrative Law Enforcement, Dalloz 2021

[2] Article 60 of the French Customs Code

[3] *v. Rép. pén. Dalloz, vo Douanes*, by C.-J. Berr, No. 140

[4] Criminal Chamber of the *Cour de Cassation*, March 4, 1991, No. 90-82.002

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