

## CBD: A short reminder of the French rules governing the use of “legal cannabis”



Over the past few years, it has been observed around the world a global trend towards the liberalization of cannabis, whether for recreational or therapeutic use or as an ingredient in various products. This plant, whose virtues are in fact numerous, is less and less viewed as having only and simply the subversive recreational effects that have been attributed to it in the vast majority of opinions.

While some countries, such as the Netherlands and Spain, have opened the way for widespread recreational use of cannabis, others, such as France, are still debating the opportunity to liberalize such use, given the divergent scientific opinions on the virtues and harmful consequences of unregulated consumption of a product which remains classified as a narcotic drug in accordance with the Single Convention on Narcotic Drugs of 1961, so far ratified by 183 countries.

However, not all the molecules contained in this plant have the same virtues or the same effects. Some, once isolated, do not have the psychoactive effects and addictive power for which cannabis is more particularly known. This applies to CBD, otherwise known as cannabidiol. Initially used for its relaxing, analgesic and anti-inflammatory properties, this molecule is also good for the body and skin, and its use is becoming more widely accepted in Europe outside the constraints of the 1961 Convention, as its use is legal under certain conditions.

Although CBD has long been on the list of authorized substances, the enthusiasm for this product is rather recent and its use is growing rapidly in Europe and therefore in France.

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While the debates on the liberalization of recreational cannabis was still ongoing, a fashion phenomenon has sprung up around CBD, which is now used as an ingredient in sectors of activity as numerous and varied as cosmetics, food, beverages and e-liquids in particular. More and more companies, including major brands in the cosmetics sector, are now including in their catalogues product ranges using CBD and promoted as such.

But this new craze should not make the new economic operators on this market lose sight that CBD comes from a plant classified as a narcotic drug and that the legality of its use as an ingredient remains conditional on compliance with certain rules, which it is worth highlighting.

### CBD, the component of the non-narcotic cannabis plant.

To understand the legal issues related to CBD and its legality, it is important to know that the cannabis plant contains approximately 111 chemical compounds with various effects on the human body: the "cannabinoids". Some of them have psychoactive effects, the most well known and widespread of which being delta-9-tetrahydrocannabinol or THC, whose use by the public is prohibited in France. Other cannabinoids have non-psychoactive (or less) effects on the body; this is the case with CBD, which has been gaining market and public interest in recent years, its use and consumption being legal under certain conditions.

In the last two years, CBD shops selling various products containing CBD have been blooming up in France, and particularly in Paris. Some of them have been just as quickly closed by the administrative authorities and managers prosecuted for drug dealing, in most cases, for reasons related to a lack of knowledge of the legal conditions for the marketing of this product.

While France does not prohibit trade in CBD as such, it does regulate the growing, importing and marketing of the cannabis plant from which it is derived.

Thus, under article R.5132-86 of the Public Health Code, all operations involving cannabis, its plant or resin are prohibited, including the import, possession, use and marketing of cannabis.

This prohibition does not apply to varieties of cannabis containing very few or no psychotropic compounds such as agricultural hemp, whose use for industrial and commercial purposes is authorized.

As to CBD, it must comply, as an ingredient, with the conditions laid down in the Order of 22 August 1990 implementing Article R. 5132-86 of the Public Health Code in order to be legal. Furthermore, products containing CBD must

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comply with their own regulations, such as those relating to cosmetic products or food supplements.

### The conditions of the CBD's legality in France.

The use and sale of the CBD is legal if the CBD is obtained from certain varieties of hemp (otherwise known as Cannabis Sativa L) that are free of narcotic properties, under three cumulative conditions :

- the variety of hemp used is on the list of authorized varieties, restrictively listed in Article 2 of the Order of 22 August 1990 ;
- only the seeds and fibres of the plant may be used. The use of flowers and leaves is prohibited;
- the plant must have a THC level of less than 0.2%.

The level of 0.2% THC is not a threshold for the presence of THC in the finished product but in the plant itself. A circular from the Ministry of Justice in 2018 specified that the level of THC in the finished product (CBD in any form) must be strictly equal to zero.

In order to be able to market a CBD based product in France, a company will thus have to ensure that the CBD ingredient contained in such product complies with the conditions listed above when extracted from the cannabis plant.

However, if the CBD is of a synthetic origin, i.e. it has been created in the laboratory and not extracted from the plant, which is possible, the three conditions do not apply. However, the finished synthetic product should always have a THC content of zero.

Therefore, the legality of natural CBD depends mainly on the part of the cannabis plant from which it was extracted, i.e. only the seeds and fibres. This distinction can be justified from a public health point of view by the fact that THC is mainly concentrated in the flowers and leaves of the plant. Such a restriction takes a much more restrictive approach than the one considered by the EU regulations applicable to industrial hemp, which only make a distinction between the plant varieties, but not between the parts of the plant that are used.

Indeed, through its EU regulation 1308/2013 of 17 December 2013, which includes "raw or processed" hemp among the products covered by the common organisation of agricultural markets (article 1), Europe authorises the production, import and sale of agricultural hemp under two conditions only: that the cultivated plant is derived from an authorised seed and identified as such in the catalogue of agricultural species of the Union, and that its THC

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content is not higher than 0.2% (article 32 paragraph 6 of EU regulation 1307/2013).

The scope of industrial and commercial exploitation of hemp is therefore broader than the one defined by French law, which raises the question of its compliance with European Union law, with regard to the principle of primacy of European law and the principle of the free movement of goods.

### Do French regulations comply with European Union law?

According to the principle of free movement of goods within the European Union, hemp and its legal components, such as CBD, should be able to be imported and traded freely within the European Union, as long as the conditions of the European regulations are complied with. However, the French conditions for marketing CBD are more limited than those prevailing at the European level. This restriction applied by France outside of any exemption granted for this product could therefore constitute a measure restricting the free movement of goods.

While EU Regulation 1308/2013 allows national provisions to restrict imports of hemp, it is only if there is a legitimate interest and the principle of proportionality is respected, which does not appear to be the case

Thus the Court of Appeal of Aix-en-Provence, hearing a case in which it had to rule on two men who had marketed in France an e-cigarette liquid containing CBD and hemp oil imported from the Czech Republic, considered that France did not meet the above-mentioned conditions. On 23 October 2018, the Court referred the matter to the European Union Court of Justice (ECJ) for a preliminary ruling. In this case, the CBD and the hemp oil contained in the e-liquid had been extracted in Czech Republic from parts of the plant prohibited by French regulations (leaves, flowers, floral envelope, tops) and then imported into France and incorporated into the mixture, and the managers were criminally prosecuted in this respect.

The French Court held that the provisions of the Order of 22 August 1990 could be incompatible with European law in that they restrict the free movement of hemp products. The judges thus considered that such a measure, which must be analysed as a restrictive measure to the principle of the free movement of goods, is not justified by a public health objective since the European Union has already taken this objective into account in its regulations by limiting both the varieties and the level of THC authorised, nor can the principle of proportionality of the measure be invoked since these same restriction is not applicable to the synthetic CBD.

Referring therefore to the ECJ for a preliminary ruling, the Court raises the question of the compliance of the Order of 22 August 1990 with European

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Union law in so far as it limits the free movement of products derived from hemp beyond the European restrictions on seeds and THC content, limiting the trade to fibres and seeds alone and not authorizing products derived from the whole plant.

The preliminary question is currently pending before the ECJ, a decision is expected by the end of 2020. The ECJ decision, looked forward to by many players in the CBD market, may well force France to extend its legislation in this field.

In fact, if French law were considered to be non-compliant with European law on this point, the French national market would then be fully open to CBD manufacturers and sellers, who would no longer be subject to specific French constraints.

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