

Stehlin & Associés

Independent business law firm



CJEU rules that the restrictive French regulatory position on CBD-based products is contrary to European law

Stehlin & Associés and the Cannabis Law Team of Mackrell.Solicitors revisit the Kanavape case, following Thursday's decision (19 November 2020) by the Court of Justice of the European Union ("CJEU") in case C-663/18 (Kanavape) regarding the distribution of electronic cigarette cartons containing cannabidiol (CBD) in France.

In the original "Kanavape" French case, the owners of a French company (Catlab SAS) were prosecuted for the illegal marketing of vaping liquid containing CBD oil imported from the Czech Republic, where the hemp plant was grown and where CBD was extracted – using all parts of the hemp plant in accordance with the Czech and the EU regulation.

The charge against the French owners is based in the fact that current French regulation (ordinance of August 22, 1990) only allows the marketing of CBD-derived products extracted from the fibres and seeds of the hemp plant, and ban CBD products derived from the flowers and the leaves of the same plant.

As a result, the owners of Catlab were first convicted by the criminal court of Marseille in 2017 for drug trafficking and violation of drug legislation. They appealed the first level decision to the Aix-en-Provence Court of Appeals, which noted that synthetic CBD (with identical characteristics and effects as natural CBD) is legal in France and that other member states have more permissive legislation regarding CBD.

The Court of Appeal, therefore, referred a preliminary question to the CJEU for a preliminary ruling on the conformity of the French regulations with European Union law. This question is analysed here.



In our previous joint article of July 17, 2020, we had analysed the position of the Advocate General before the CJEU. As could be expected, this decision of the CJEU follows the position of the Advocate General, which opposed a *“national regulation prohibiting the marketing of cannabidiol (CBD) legally produced in another Member State, when it is extracted from the sativa cannabis plant in its entirety and not only from its fibers and seeds”*.

The CJEU’s decision reminds us in a much-awaited way that the free movement of goods between Member States under Article 34 of the Treaty on the Functioning of the European Union (“TFEU”) is a fundamental principle that can only be limited by Article 36 of the TFEU. On the basis of the latter, the CJEU reiterated that *“it is for the national authorities which invoke it to demonstrate in each case, taking account of the results of international scientific research, that their legislation is necessary in order effectively to protect the interests referred to in that provision, and, in particular, that the marketing of the products in question poses a genuine threat to public health that must undergo an in-depth assessment”*.

Furthermore, in its decision, the CJEU went further and examined the narcotic nature of CBD and noted that CBD *“does not appear to have any psychotropic effect or any harmful effect on human health on the basis of the available scientific data. Moreover, according to these elements of the dossier, the variety of cannabis from which this substance was extracted, which was legally cultivated in the Czech Republic, has a THC content not exceeding 0.2%”* (French legal maximum THC content for the plant from which CBD originates). As such, *“since the CBD does not contain a psychoactive principle in the current state of scientific knowledge [...], it would be contrary to the purpose and general spirit of the Single Convention¹ to include it in the definition of “narcotic drugs”, within the meaning of that Convention, as an extract of cannabis”*. The CJEU, therefore, concluded that it does not

consider the CBD in question to be a narcotic within the meaning of the Single Convention.

However, the CJEU fully understood that, in order to protect *“the health and life”* of individuals, a Member State may establish cautionary principles to *“take protective measures without having to wait until the reality and seriousness of those risks have been fully demonstrated”*. The risks in question must not be based solely on *“purely hypothetical considerations”*.

Indeed, in its ruling, the CJEU remained cautious in specifying that the regulation must be *“suitable for ensuring the attainment of the objective of public health protection and must not go beyond what is necessary to achieve it”*. The CJEU then left it to the referring court to ensure, on the basis of the available scientific data, *“that the real alleged risk to public health does not appear to be based on purely hypothetical considerations”*.

As such, without any scientific proof of a difference between a CBD product originating from the whole plant or only its fibers/seeds, the French regulation is not in position to demonstrate any distinction between the products resulting from these two manufacturing processes.

This long-awaited decision is of particular importance for all stakeholders in the CBD market in France and EU-wide. Indeed, particularly France should now be forced to open its market to CBD-based products extracted from the entire plant.

The absence of restrictions on the use of plant parts for the French and other EU markets is more than beneficial for companies in the sector wishing to integrate into the French market and go one step further in beginning to create a more harmonised EU-wide industry for CBD.

Indeed, this flexibility makes it possible to standardise and harmonise the entire manufacturing process, from seed to shelf, for



CBD companies in the European Union. Thus, the decision of the CJEU should, in particular, considerably improve the efficiency of the sector's industrial logistics, and create a standard for safety and quality.

Although this decision should improve the offer on the French market, it should have a neutral effect on the consumption habits since French rules about the THC level, whether it is the THC maximum level of the plant from which CBD originates (0.2%) or the THC level in the finished product (0%) should remain unchanged.

We must also remember that UN delegates are due to convene in December and vote as to whether CBD should be treated as a narcotic, in reference to The Single Convention. However, taking into consideration the CJEU's comments on this point we would hope that the UN

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delegates will also come to the same conclusion.

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