

## E-ALERT

## European Court of Justice landmark ruling confirms that cannabidiol (CBD) is not a narcotic drug and that EU member states may not prohibit its marketing

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Yesterday, the Court of Justice of the European Union (CJEU) delivered its long-awaited decision in Case C-663/18 (*Kanavape*) ruling that a member state may not ban the marketing of cannabidiol (CBD) extracted from the *Cannabis sativa* plant in its entirety. In its judgment, the Court finds that EU law, in particular the provisions on the free movement of goods, precludes national legislation such as the French ban on hemp-derived CBD, leaving the final word in this case to the referring French court (the Court of Appeals of Aix-en-Provence). It is the first time that the highest European Court takes a position on the legality of the marketing of CBD and CBD-based products in Europe.

In its judgment, the Court confirms, as did the Advocate General, that ***“the CBD at issue in the main proceedings is not a drug within the meaning of the Single Convention”*** given that *“CBD does not contain a psychoactive ingredient in the current state of scientific knowledge [...] [and] it would be contrary to the purpose and general spirit of the Single Convention to include it under the definition of ‘drugs’ within the meaning of that convention as a cannabis extract.”*

The Court concludes that ***“[the EU provisions on the free movement of goods] must be interpreted as precluding national legislation which prohibits the marketing of CBD lawfully produced in another member state when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds, unless that legislation is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose.”*** In this respect, the Court underlines that the fact that the French ban does not *“affect the marketing of synthetic CBD that has the same properties as CBD extracted from the Cannabis sativa plant [and] could be used as a substitute for the latter [...] would be such as to indicate that the legislation in the main proceedings was not appropriate for attaining that objective in a consistent and systematic manner.”*

## Underlying French procedure and legal framework

The CJEU's judgment is delivered in the context of a preliminary reference made by the French Court of Appeals of Aix-en-Provence. In the underlying criminal case before the French Court, two former managers of a start-up company have been prosecuted in France since 2014 for selling vaping products containing CBD, a non-psychoactive substance contained in the hemp (*Cannabis sativa*) plant, under the brand name Kanavape®. The CBD used in these products was extracted from entire hemp plants legitimately cultivated in the Czech Republic by a certified laboratory in accordance with applicable Czech and EU legislation, and subsequently imported and sold in France and many other EU countries.

However, the French regulatory framework, as interpreted by the French competent authorities, currently prohibits the marketing of products derived from the hemp plant in its entirety, restricting the use of the plant to only its fibre and seeds, and thus – in practice – bans the marketing of all products containing hemp-derived CBD in France. By contrast, the use of synthetically produced CBD (which is chemically identical) is generally permitted given the absence of a link with the *Cannabis sativa* plant.

In this context, on 23 October 2018, the French Court of Appeals stayed the national proceedings and referred the following question to the CJEU: "Must [EU law, in particular] the principle of the free movement of goods, be interpreted as meaning that [the French regulatory framework], by limiting the cultivation, industrialisation and marketing of hemp solely to its fibre and seeds, impose a restriction that is not in accordance with [EU] law?"

By referring this question to the CJEU, the referring Court sought to understand whether the current French "ban" on hemp-derived CBD is incompatible with EU law and should thus not be applied in the underlying French case.

On 14 May 2020, Advocate General Tanchev presented its opinion before the CJEU advising the Court to rule that the French ban on CBD is contrary to EU law.

## Judgment of the CJEU

In its judgment of 19 November 2020, the Court followed the opinion of the Advocate General and – after leaving aside the regulations relating to the common agricultural policy (CAP) – confirmed three important legal issues:

- CBD should not be considered as a narcotic 'drug'
- CBD benefits from the free movement of goods in the EU
- EU law precludes national legislation such as the French ban on hemp-derived CBD

### CBD is not a narcotic drug

First, the Court confirms unequivocally – for once and for all – that CBD is not a narcotic 'drug', including CBD extracted from the *Cannabis sativa* plant in its entirety.

The Court recalls that CBD is not listed as a 'drug' in Schedule I and II of the Single Convention of the United Nations. Nevertheless, many EU member states and EU institutions, in particular the European Commission, have stubbornly attempted to argue that CBD extracted from the hemp plant should be considered as a narcotic drug because it constitutes a "cannabis extract" within the meaning of Schedule I. The Court sweeps that argument off the table on the basis of a teleological – sensible – reading of the Single

Convention.

It recognises that “*it is true that a literal interpretation of the provisions of the Single Convention might lead to the conclusion that, in so far as CBD is extracted from a plant of the Cannabis genus and that plant is used in its entirety – including its flowering or fruiting tops – it constitutes a cannabis extract within the meaning of Schedule I of that convention and, consequently, a ‘drug’ within the meaning of Article 1(1)(j) of that convention.*” However, the Court emphasises that the objective of the Single Convention, *i.e.*, the protection of health and welfare of mankind, must be taken into account when interpreting its provisions and concludes that “*since CBD does not contain a psychoactive ingredient in the current state of scientific knowledge [...], it would be contrary to the purpose and general spirit of the Single Convention to include it under the definition of ‘drugs’ within the meaning of that convention as a cannabis extract.*”

Consequently, the Court confirms that CBD is not a drug within the meaning of the International Conventions and thus EU law (which refers to these Conventions through the Council Framework Decision on illicit drug trafficking and the Convention implementing the Schengen agreement).

### CBD benefits from the free movement of goods in the EU

According to settled EU case law (Case C-137/09, *Josemans*) narcotic drugs which are not distributed through strictly controlled channels (with a view to use of medical or scientific purposes) do not benefit from the free movement of goods in the EU.

However, given that CBD should not be considered a narcotic drug under the International Conventions, the Court logically confirms that CBD benefits from the free movement of goods in the EU, *i.e.*, “*Articles 34 and 36 TFEU are applicable to the CBD at issue in the main proceedings.*”

### EU law precludes national legislation such as the French ban on CBD

The Court further finds that the provisions on the free movement of goods preclude legislation such as the French ban on hemp-derived CBD at issue.

The Court first recalls that it is not disputed that the prohibition on marketing CBD lawfully produced in another member state constitutes a measure having equivalent effect within the meaning of Article 34 TFEU. While such measure may be justified, in light of Article 36 TFEU, for example, on grounds of protection of health and life of humans (as claimed by the French government), the Court underlines that “*this is only the case if such measure is appropriate for securing the achievement of the objective pursued and does not go beyond what is necessary to attain it.*”

In light of established case law, the referring national court (*i.e.*, the Court of Appeal of Aix-en-Provence) should carry out this assessment, but it is for the Court of Justice of the EU (CJEU) “*to provide the national court with all necessary information with a view of offering guidance in determination.*” In this respect, the CJEU provides some very clear pointers for the national court to come to the conclusion that the French hemp-derived CBD ban does not meet the proportionality test and is therefore contrary to EU law, in particular:

- **As regards the appropriate character of French regulations** – The Court underlines that the fact that the French ban does not “*affect the marketing of synthetic CBD that has the same properties as CBD extracted from the Cannabis*

*sativa plant [and] could be used as a substitute for the latter [...] would be such as to indicate that the legislation in the main proceedings was not appropriate for attaining [the] objective [of protecting public health] in a consistent and systematic manner.* This is indeed the case as the French Ministry of Justice guidance of 2018 clearly confirmed that synthetic CBD is not covered by the current prohibition.

- **As regards the necessity of the French ban on hemp-derived CBD** – In this respect, it is emphasised that a decision to prohibit marketing – such as the French ban – constitutes the most restrictive obstacle to trade in legitimate goods. *“It is for the referring court to assess the scientific data available and produced before it in order to make sure [...] that the real risk to public health alleged does not appear to be based on purely hypothetical considerations.”* In this respect, it should be underlined that the World Health Organisation (WHO)'s Expert Committee on Drug Dependence (ECDD) has confirmed at multiple occasions that *“CBD does not appear to have abuse potential or cause harm”* and *“there is no evidence of [...] any public health-related problems associated with the use of pure CBD.”*

In light of these considerations, the Court replied to the question referred that:

*“Articles 34 and 36 TFEU must be interpreted as precluding national legislation which prohibits the marketing of CBD lawfully produced in another Member State when it is extracted from the Cannabis sativa plant in its entirety and not solely from its fibre and seeds, unless that legislation is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose. Regulations No 1307/2013 and No 1308/2013 must be interpreted as not applying to such legislation.”*

Given the clear legal reasoning by the Court and the available scientific evidence to date, leaving very little room of manoeuvre to the referring French judge, it is hardly conceivable that the latter would come to the conclusion that the French ban on hemp-derived CBD meets the proportionality test.

## Impact of the Judgment

This long-awaited decision of the Court of Justice of the EU (CJEU) – the first one related to the marketing of CBD – is a landmark decision for the CBD industry in Europe, the development of which has been hindered significantly by the inadequate and fragmented legal framework across member states, which is difficult to navigate for both industry and consumers.

The judgment provides a binding interpretation of EU law for EU member states and EU institutions even if they were not directly involved in the specific preliminary ruling. The CJEU's considerations are thus not only binding on the referring French court or regulators but have much wider EU implications.

### Direct implications for the French regulatory framework

If the referring French court (the Court of Appeal of Aix-en-Provence) indeed confirms that the French ban on hemp-derived CBD is contrary to EU law – which is very likely in light of the clear guidance provided by the CJEU – it will exclude the application of the relevant French regulations in its resolution of the pending underlying criminal case against Antonin Cohen and Sébastien Béguerie in France. Likewise, French judges that are faced with

similar pending proceedings are required to take into account the CJEU's interpretation of EU law, which is likely to lead to acquittals of other CBD entrepreneurs and companies being prosecuted on the basis of the present French rules.

In addition, the French Government will have to remedy this non-compliance and bring the French provisions in line with EU law by abolishing the present ban on hemp-derived CBD and replace it by less restrictive — more proportionate — measures. As suggested by the Advocate General in its opinion of 14 May 2020, such measures could take the form of maximum concentrations or recommended daily dosages depending on the type of CBD product, which would permit a risk-based approach. The French regulator could also consider imposing specific labelling and/or consumer information requirements, mandatory product notifications or regulated sales channels (to name just a handful of examples) which would arguably be more effective to protect consumers than the present ban.

Even though any change in the relevant regulations is likely to take some time, it can be expected that active enforcement of the French rules and prosecution of CBD businesses will be suspended until the French government has taken a clear position on the way forward. If France continues to apply and enforce national regulations that are considered contrary to EU law, it could ultimately risk becoming the subject of an infringement procedure before the EU courts.

### Crucial step towards legal certainty and harmonisation of regulations in Europe

However, the impact of this decision goes way beyond France. The Court's decision sets a binding 'precedent' with European reach: its interpretation of EU law is binding on the European institutions, including the European Commission – the key EU regulator – and other EU member states.

By means of this decision, the CJEU settles the never-ending debate whether CBD should be considered a narcotic 'drug', as most recently revived by the European Commission in the context of the novel food discussions. This unexpected turnaround in position by the Commission, which threatened to shut down the entire CBD market in Europe, seems to have become untenable in light of yesterday's judgment. The Court's ruling thus confirms that the use of hemp-derived CBD in, amongst others, cosmetic and food products, should not be prohibited on the basis that the use of "cannabis extracts" in such products is prohibited given the reference(s) of the respective regulations to the Single Convention.

In addition, the judgment may encourage/require other EU member states to (re)assess their national rules applicable to the marketing of hemp-derived CBD in light of the clear conditions regarding free movement restrictions emphasised in this decision. It also opens a door for industry players to – successfully – challenge overly restrictive and arbitrary national regulations before the respective national courts in light of the free movement of goods in the EU.

Ultimately, this decision could even have a wider global reach as it may influence the position of the EU member states at the United Nation's upcoming vote in early December on the classification of cannabis in international law.

**This decision is therefore a crucial – and long overdue – step towards more legal certainty and regulatory harmonisation in Europe, which is indispensable for the further development of the EU CBD industry. In addition, and most importantly, a**

clear and proportionate, risk-based regulation of CBD-based products will ultimately benefit EU consumers.

The CJEU decision is available in English ([here](#)) and in French ([here](#)).

*Disclosure: Eveline Van Keymeulen, Head of Allen & Overy's Life Sciences Regulatory and Cannabis practices, represented Antonin Cohen in the proceedings before the CJEU.*

## Contact



**Eveline Van Keymeulen**

Cannabis Sector Lead  
Head of the Life Sciences Regulatory Practice

Tel +33 1 40 06 54 00  
[eveline.vankeymeulen@allenovery.com](mailto:eveline.vankeymeulen@allenovery.com)

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