

CBD | THE EUROPEAN COURT OF JUSTICE FINDS FRENCH REGULATIONS CONTRARY TO EUROPEAN UNION LAW (CJEU C-663/18, 19 NOVEMBER 2020)

In a ruling dated November 19, 2020, the European Court of Justice found that French CBD regulations are contrary to European Union law ([link](#) to the ruling).

1. Applicable French regulations

The standard rule under French law is the prohibition of the commercialization of cannabis. More specifically, Article R-5132-86 of the French Public Health Code provides for a general prohibition of all operations involving cannabis, and notably its importation, production, offering and use:

- of cannabis, its plant and its resin, of products containing them or those which are obtained from cannabis, its plant or its resin; and
- of tetrahydrocannabinols, ("THC" - the most abundant cannabinoid present in the cannabis plant that is responsible for its psychotropic effects).

However, the same Article R-5132-86 of the French Public Health Code provides for an exception to the general rules prohibiting operations involving cannabis. Pursuant to the Decree dated 22 August 1990 implementing the exception to the above-mentioned general prohibition, the importation, exportation, growing and use of the seeds and fibers of specific varieties of *Cannabis sativa* L. (i.e., hemp plant) for industrial and commercial purposes are allowed if the following cumulative conditions are met:

- The variety of *Cannabis sativa* L. used is one of the authorized varieties; and
- Only the seed and the fibers can be used; and
- The *delta 9-tetrahydrocannabinol* (THC) content of the plant variety does not exceed 0.20%.

In 2018, following the rapid expansion in the French market of new products presented as containing cannabidiol ("CBD" - a cannabinoid present in cannabis that does not produce psychotropic effects), a debate arose as to whether end products containing CBD obtained from authorized hemp varieties could contain THC levels below the 0.20% threshold.

The French authorities consequently clarified their approach:

- a statement issued on 11 June 2018 on the dedicated government website on drugs which provides an overview of applicable rules, as reviewed by the Interministerial Mission Against Drugs and Drug Addiction, specifies that the end product obtained from the varieties of hemp listed in the Decree dated 22 August 1990 (as set out above) must not contain any THC ([link](#)).

- on 23 July 2018 the French Ministry of Justice issued an internal policy stating, in particular, that entities which sell products derived from cannabis containing THC and/or that do not meet the cumulative conditions set forth in the Decree dated 22 August 1990, can be prosecuted under the drug-related offences of the French Criminal Code ([link](#)).

The internal policy also states that CBD *“is found mainly in the leaves and flowers of the plant, and not in the fiber and seeds. Consequently, as the applicable legislation stands, it does not appear possible to extract (CBD) under conditions consistent with the Public Health Code”*.

As a result, it is particularly difficult for economic operators to market CBD-based products while complying with French regulations.

2. The ruling of the Court of Justice of the European Union

In 2018, the criminal court of Marseille sentenced two business owners for marketing an electronic cigarette whose liquid contained CBD produced in the Czech Republic using the entirety of an authorized variety of hemp, in violation of French regulations which only allow products derived from the seeds and fibers of authorized varieties.

The two business owners lodged an appeal against the ruling before Aix-en-Provence Court of Appeal arguing, in particular, that the prohibition on the marketing of CBD from the Cannabis sativa L. plant in its entirety does not comply with EU law.

The Court of Appeal of Aix-en-Provence, therefore, referred a preliminary question to the Court of Justice.

In essence, the question was whether the derogating provisions introduced by the Decree of August 22, 1990, limiting the growing of hemp, its industrial use and marketing, solely to fibres and seeds, were contrary to EU law and in particular to the principle of free movement of goods.

The Court of Justice answered this question positively in its ruling of 19 November 2020:

“ (...) the answer to the question referred is 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 fiber 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. (...)” ([§96 of the ruling](#)).

Two conclusions can be inferred from this decision:

- France will have to amend the Decree of August 22, 1990 and delete the provision limiting the use of hemp to fibers and seeds.

It is indeed unlikely that France will be able to justify this restriction by a public health objective since the Court of Justice noted in its ruling that, even obtained from leaves and flowers, *“the CBD at issue in the main proceedings does not appear to have any psychotropic effect or any harmful effect on human health on the basis of available scientific data.”* (§72 of the ruling).

- It is also appears likely that the French authorities will have to review their approach of banning CBD-based products containing traces of THC below 0.20%.

Indeed, the maximum THC threshold of 0.20% set by European regulations¹, reproduced by the decree of August 22, 1990, applies to the plant and not to the end product.

Yet, it is indeed very difficult, not to say impossible, to obtain CBD free of all traces of THC. Imposing a maximum threshold of 0.20% THC in the end product amounts, in fact, to prohibiting the importation of CBD-based products, despite their being legally manufactured in other European Union Member States.

This restrictive approach of French authorities could therefore also be deemed to exceed what is necessary for the objective of protecting public health and contrary to European Union law, in particular to the principle of the free movement of goods.



CONTACTS



Laura Castex
Counsel
Paris
T +33 (0)1 40 75 94 15
castex@gide.com



Mehdi El alem Champeaux
Associate
Paris
T +33 (0)1 40 75 26 01
mehdi.elalemchampeaux@gide.com

You can also find this legal update on our website in the News & Insights section: [gide.com](https://www.gide.com)

This newsletter is a free, periodical electronic publication edited by the law firm Gide Loyrette Nouel (the "Law Firm"), and published for Gide's clients and business associates. The newsletter is strictly limited to personal use by its addressees and is intended to provide non-exhaustive, general legal information. The newsletter is not intended to be and should not be construed as providing legal advice. The addressee is solely liable for any use of the information contained herein and the Law Firm shall not be held responsible for any damages, direct, indirect or otherwise, arising from the use of the information by the addressee. In accordance with the French Data Protection Act, you may request access to, rectification of, or deletion of your personal data processed by our Communications department (privacy@gide.com).

¹ On October 23, 2020, the European Parliament adopted an amendment to a Commission's proposal for a regulation on strategic plans under the CAP (2018/0216 COD). This amendment raises the THC limit in authorized varieties of hemp to 0.30% ([link](#)). The text as amended must now be discussed within the Council of the European Union.