

CAN THE MOVEMENT OF CBD WITHIN EUROPEAN MEMBER STATES BE PROHIBITED IF IT IS DERIVED FROM PROHIBITED ELEMENTS OF THE PLANT?

On 14th May 2020 the Advocate General (Tanchev) of the Court of Justice of the European Union (CJEU) delivered their Opinion on the above question.

The result is both a “Yes” and a “No”: National restrictions by Member States are possible, but such restrictions as are sought to be enforced must be (a) justified and (b) no more than necessary in order to achieve the justified aim.

THE OPINION OF AN ADVOCATE GENERAL

1. Advocates General are Members of the Court of Justice of the EU and have an advisory role. As a matter of principle, the opinion of an Advocate General is sought in almost every case tried by the Court of Justice (CJ). Advocates General consider the interpretive alternatives and various options of deciding on a case, before proposing their own solution. The CJ is not bound by these opinions, but in the absence of dissenting opinions filed by the CJ judges, the opinions of the Advocates General inevitably play an important role. According to empirical research, the Opinion of the Advocate General is followed by the Court in the significant majority of cases. In the light of these factors, the Opinion of the Advocate General is to be viewed as being the best indication of the likely interpretation of the Court of Justice, but not necessarily so.

WHAT WAS THE CASE ABOUT?

2. On 2018/10/23 the Cour d’appel d’Aix-En-Provence (France) requested that the Court of Justice of the European Union (CJEU) deliver a preliminary ruling on the interpretation of the principle of the free movement of goods, as predicated upon Articles within the Common Agricultural Policy (CAP) and Common Organisation of the Markets (COM) in agricultural products.
3. The question referred to the Court is whether those Articles must be interpreted as meaning that the derogating provisions introduced by French law in 1990 (which limit the cultivation, industrialisation and marketing of hemp solely to fibre and seeds), impose a restriction that is not in accordance with European law?

4. In simplistic terms, the question is: Can national definitions of Cannabis Sativa L. and individual national restrictions in respect of it be compatible with wider European Union law and the free movement of goods?
5. The French restriction to the use of fibre and seeds within Cannabis-derived products, in essence, prevents the legitimate marketing of CBD-based products that are derived from the entire hemp plant (i.e. from the leaves, buds and flowers). One may have thought that this approach is not justifiable given that CBD is not a controlled substance, CBD-based products do not have any psychotropic effect and no endemic risk to public health has been reported (as confirmed by international scientific evidence, including the World Health Organisation (WHO)), but the Court has been required to address the issue following a referral from the National Court.
6. The case relates to CBD obtained from hemp plants grown, in accordance with CAP rules (i.e. at a strength of less than 0.2% THC in the whole plant), in the Czech Republic. The hemp was lawfully grown and the CBD was from a lawful source. The issue is whether the specific element of the lawful source that was utilised in the product makes the end product itself unlawful, such that the restrictions to the free movement of goods within the European Union (as consequent under French law) is justified on the basis of public health grounds.

EUROPEAN LAW AS BETWEEN MEMBER STATES AND THE UNION

7. Where there is a Regulation on the Common Organisation of the Markets (COM) in a given sector, Member States are under an obligation to refrain from taking any measures which might undermine or interfere with its proper functioning. Nevertheless, the establishment of a Common Market Organisation (COM) does not prevent the Member States from applying National rules intended to attain an objective relating to the general interest other than those covered by that Common Market Organisation (COM), even if those rules are likely to have an effect on the functioning of the internal market in the sector concerned.
8. All measures of a Member State which are **capable** of hindering (directly or indirectly, actually or potentially), trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions on imports

APPLICABILITY: TO THIS CASE AND CBD PRODUCTS GENERALLY

9. National legislation prohibiting the importation of CBD oil from another Member State, where that oil is extracted from the whole plant, interferes with the proper functioning of the common organisation of the market in hemp and constitutes a quantitative restriction (or equivalent). Therefore, Member States are prohibited from adopting legislation prohibiting the importation of CBD products from another Member State, where that product is extracted from the whole plant, unless that legislation pursues a genuine and realistic public-interest objective.

10. Furthermore, although it is for the Member States to decide the level of protection they wish to afford to the health and life of humans, the fact remains that legislation that is capable of restricting a fundamental freedom guaranteed by the FEU Treaty, such as the free movement of goods, can be justified on grounds of the protection of the health and life of humans only if that measure is appropriate for securing the achievement of the objective pursued and does not go beyond what is necessary in order to attain it.

11. The French Government contend that, given the lack of scientific certainty regarding the harmful effects of CBD, the precautionary principle allows it to adopt legislation such as that at issue. The AG's Opinion acknowledges that, where there is scientific uncertainty as regards the existence or scope of the real risks to public health, a Member State may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated. In that regard, however, the AG's Opinion identifies the application of the principle presupposes:
 - a. Firstly, identification of the potentially negative consequences for health of the substances or food concerned; and,
 - b. Secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research.

12. In the light of the information provided, the AG's Opinion is that it is hard to consider that the French Government has clearly identified the harmful, in particular psychotropic, effects involved in the use of CBD oil in electronic cigarettes, even less that it has carried out a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research.

13. The Advocate General has concluded that the relevant Articles preclude legislation which prohibits the importation of CBD oil where it is extracted from the whole hemp plant, since, in the current state of scientific knowledge, it has not been established that CBD oil has psychotropic effects. It is, however, for the National Court to satisfy itself that no risk associated with, inter alia, non-psychotropic effects of CBD has been identified or been the subject of a comprehensive scientific assessment, and if it were to find that such a risk existed ***and*** that there were such an assessment, to satisfy itself that an alternative measure, less restrictive on the free movement of goods, could be adopted.

OPINION ON THE DETRIMENTAL HEALTH IMPACTS OF CBD PRODUCTS

14. The Advocate General has concluded that CBD oil appears not to possess any psychotropic effects and the legislation at issue is not therefore appropriate for protecting human health from that perspective. They observed that ***it is for the National Court to ensure that no risk associated with any harmful effects***, in particular, effects *apart from psychotropic effects*, arises from the use of CBD oil and, if such risk exists, that the legislation does not go beyond what is necessary in order to protect human health.

OTHER MATTERS

15. The European Commission challenged the French Government's assertion that there is a risk that CBD oil might have harmful effects apart from psychotropic effects, i.e. the Commission's view was that there are no such harmful effects. This is something which will be of interest to market participants during the Novel Food Authorisation process, but is also something which might cause Member States to revisit what is necessary in the context if adverse health effects emerge from the aggregate Novel Food toxicity data during the relevant Authorisation applications.

SYNTHETIC CBD IS NOT AFFECTED AT ALL BY THE LEGALITY ISSUE DECIDED

16. It is perhaps of some note that products which contain synthetic CBD are not covered by the relevant legal prohibition because they do not have a link to any plant, let alone the prohibited parts of such plants. There is, therefore, currently no inhibitor to their sale in France.

THE NATURE OF AN OPINION BY THE ADVOCATE GENERAL

17. An Advocate General's Opinion does not constitute a final determination of European law, it is the CJEU's interpretation of European law which is binding. When it is delivered, it will be binding on all Member States, even if they were not directly concerned by the specific Ruling and will serve as a precedent in all such subsequent cases before National Courts.

Remember what we always say: Be Careful who you listen to!