Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 November 2020*

(Reference for a preliminary ruling – Free movement of goods – Common organisation of the markets in the flax and hemp sector – Exceptions – Protection of public health – National legislation limiting the industrialisation and marketing of hemp solely to fibre and seeds – Cannabidiol (CBD))

In Case C-663/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France), made by decision of 23 October 2018, received at the Court on 23 October 2018, in the criminal proceedings against

B S,

C A

intervening parties:

Ministère public,

Conseil national de l'ordre des pharmaciens,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: E. Tanchev,

Registrar: V. Giacobbo, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2019,

after considering the observations submitted on behalf of:

– B S, by X. Pizarro and I. Metton, avocats,

– C A, by E. van Keymeulen, M. De Vallois, A. Vey and L.-M. De Roux, avocats,

– the French Government, by A.-L. Desjonquères and C. Mosser and by R. Coesme, acting as Agents,

– the Greek Government, by G. Kanellopoulos and by A. Vasilopoulou, acting as Agents,

* Language of the case: French.

– the European Commission, by A. Lewis, M. Huttunen and M. Kaduczak, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 34 and 36 TFEU, of Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608), and of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

2 The request has been made in the context of criminal proceedings instituted in France against B S and C A, in relation to the marketing and distribution of a hemp oil electronic cigarette.

Legal context

International law

The HS and the HS Explanatory Notes

– *The HS*

3 The Customs Cooperation Council, now the World Customs Organization (WCO), was established by the Convention establishing a Customs Cooperation Council, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System ('the HS') was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1) ('the HS Convention').

4 Heading 29.32 of the HS Convention, which is contained in Chapter 29 thereof, entitled 'Organic chemicals', is worded as follows:

Heading number	HS code	Description
…		…
29.32		Heterocyclic compounds with oxygen hetero-atom(s) only.
…		…
		– Other:
	2932.95	– – Tetrahydrocannabinols (all isomers)
	2932.99	– – Other

5 Included under heading 57.01 of the HS Convention, now heading 53.02 thereof, is 'True hemp (*Cannabis sativa L.*), raw or processed but not spun; tow and waste of true hemp (including yarn waste and garnetted stock)'.

– *The HS Explanatory Notes*

6 The Explanatory Notes to the HS ('the HS Explanatory Notes') are drawn up within the WCO in accordance with the provisions of the HS Convention.

7 The note relating to Chapter 29 of the HS Convention states:

'As a general rule, this Chapter is restricted to separate chemically defined compounds … A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. … The separate chemically defined compounds of this Chapter may contain impurities.'

8 According to the note relating to heading 53.02 of the HS Convention, that heading covers:

'(1) Raw hemp as harvested, whether or not the leaves and seeds have been removed.

(2) Retted hemp in which the fibres are still attached to the woody part of the plant, but have been loosened by the retting.

(3) Scutched hemp which comprises the isolated fibres, sometimes 2 m or more in length, separated from the plant by scutching.

(4) Combed hemp or hemp fibres otherwise prepared for spinning, generally in the form of slivers or rovings.

(5) Tow and waste of hemp. This includes waste obtained during scutching or combing processes, waste yarns obtained during spinning, weaving, etc., operations, and garnetted stock obtained from rags, scrap rope or cordage, etc. The tow and waste are classified here whether suitable for spinning into yarns (whether or not in the form of slivers or rovings) or suitable only for use as caulking material, for padding or stuffing, paper making, etc.'

The Single Convention

9 Article 1 of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs, 1961, concluded in New York on 30 March 1961 (*United Nations Treaty Series*, vol. 520, No 7515; 'the Single Convention'), provides:

'1. Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout the Convention:

…

(b) "Cannabis" means the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated.

(c) "Cannabis plant" means any plant of the genus Cannabis.

…

(j) "Drug" means any of the substances in Schedules I and II, whether natural or synthetic.

…'

10 The list of narcotic drugs in Table I of the Single Convention includes cannabis, cannabis resin, extracts and tinctures of cannabis.

The Convention on Psychotropic Substances

11 The Convention on Psychotropic Substances, 1971, concluded in Vienna on 21 February 1971 (*United Nations Treaty Series*, vol. 1019, No 14956; 'the Convention on Psychotropic Substances'), provides, in Article 1(e) thereof:

'Except where otherwise expressly indicated, or where the context otherwise requires, the following terms in this Convention have the meanings given below:

…

(e) "Psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedule I, II, III or IV [of the present convention].'

European Union law

Framework Decision 2004/757/JHA

12 Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8) provides, in Article 1 thereof:

'For the purposes of this Framework Decision:

1. "drugs": shall mean any of the substances covered by the following United Nations Conventions:
   (a) the [Single Convention];

(b) the [Convention on Psychotropic Substances]. It shall also include the substances subject to controls under Joint Action 97/396/JHA of 16 June 1997 [adopted by the Council on the basis of Article K.3 of the Treaty on European Union] concerning the information exchange risk assessment and the control of new synthetic drugs [(OJ 1997 L 167, p. 1)].'

13 According to Article 2(1)(a) of Framework Decision 2004/757, each Member State is to take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. Article 2(2) of that framework decision states that the conduct described in paragraph 1 thereof is not to be included in the scope of that framework decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law.

The Convention implementing the Schengen Agreement

14 The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 ('the Convention implementing the Schengen Agreement'), forms part of the Schengen acquis, as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis (OJ 1999 L 176, p. 1).

15 Article 71(1) of that convention provides that the contracting parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.

Regulation No 1307/2013

16 Article 1(a) of Regulation No 1307/2013 provides:

'This Regulation establishes:

(a) common rules on payments granted directly to farmers under the support schemes listed in Annex I ("direct payments")'.

17 Under Article 4(1)(d) of that regulation:

'For the purposes of this Regulation, the following definitions shall apply:

…

(d) "agricultural products" means the products, with the exception of fishery products, listed in Annex I to the Treaties as well as cotton'.

18 Article 32(6) of that regulation provides:

‘Areas used for the production of hemp shall only be eligible hectares if the varieties used have a tetrahydrocannabinol content not exceeding 0.2%.’

19 Article 35(3) of the same regulation provides:

‘In order to preserve public health, the [European] Commission shall be empowered to adopt delegated acts in accordance with Article 70 laying down rules making the granting of payments conditional upon the use of certified seeds of certain hemp varieties and the procedure for the determination of hemp varieties and the verification of their tetrahydrocannabinol content referred to in Article 32(6).’

Regulation No 1308/2013

20 Article 1(1) and (2) of Regulation No 1308/2013 provides:

‘1. This Regulation establishes a common organisation of the markets for agricultural products, which means all the products listed in Annex I to the Treaties with the exception of the fishery and aquaculture products as defined in Union legislative acts on the common organisation of the markets in fishery and aquaculture products.

2. Agricultural products as defined in paragraph 1 shall be divided into the following sectors as listed in the respective parts of Annex I:

…

(h) flax and hemp, Part VIII;

…’

21 Part VIII of Annex I to that regulation mentions in the list of products referred to in Article 1(2) of that regulation, inter alia, ‘True hemp (*Cannabis sativa* L.) raw or processed but not spun; tow and waste of true hemp (including yarn waste and garnetted stock)’.

22 Article 189 of the same regulation, containing special provisions relating to imports of hemp, provides:

‘1. The following products may be imported into the [European] Union only if the following conditions are met:

(a) raw true hemp falling within CN code 5302 10 00 meeting the conditions laid down in Article 32(6) and in Article 35(3) of Regulation [No 1307/2013];

(b) seeds of varieties of hemp falling within CN code ex 1207 99 20 for sowing accompanied by proof that the tetrahydrocannabinol level of the variety concerned does not exceed that fixed in accordance with Article 32(6) and in Article 35(3) of Regulation [No 1307/2013];

(c) hemp seeds other than for sowing, falling within CN code 1207 99 91 and imported only by importers authorised by the Member State in order to ensure that such seeds are not intended for sowing.

2. This Article shall apply without prejudice to more restrictive provisions adopted by the Member States, in compliance with the [FEU Treaty] and the obligations arising under the [Agreement on Agriculture, set out in Annex 1A to the Agreement establishing the World Trade Organisation,

approved on behalf of the European Community by the first indent of Article 1(1) of Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1)].'

French law

The Public Health Code

23 Article L. 5132-1 of the Code de la santé publique (Public Health Code), in the version applicable to the dispute in the main proceedings ('the Public Health Code'), provides:

'The following shall be regarded as poisonous substances:

…

2° Narcotic substances;

3° Psychotropic substances;

…

"Substances" means chemical elements and their compounds as they occur in the natural state or as produced by industry, including any additives required for the purpose of placing them on the market.

…'

24 The first subparagraph of Article L. 5132-8 of the Public Health Code provides:

'The production, manufacture, transportation, importation, exportation, possession, supply, transfer, acquisition and use of plants, substances or preparations classified as poisonous shall be subject to conditions defined by decrees of the Conseil d'État [(Council of State, France)].'

25 Article R. 5132-86(1) and (2) of the Public Health Code provides:

'I. – The following shall be prohibited: production, manufacture, transportation, importation, exportation, possession, supply, transfer, acquisition or use of:

1° Cannabis, cannabis plants and cannabis resin, products containing cannabis or products obtained from cannabis, cannabis plants or cannabis resin;

2° Tetrahydrocannabinols, with the exception of delta-9-tetrahydrocannabinol, of tetrahydrocannabinol esters, ethers and salts, and of salts of the aforementioned derivatives, and of products containing them.

II. – Derogations may be granted from the above provisions for research and testing purposes and the manufacture of derivatives authorised by the Director-General of the Agence nationale de sécurité du médicament et des produits de santé [(National Agency for Medicinal Product and Health Product Safety)].

The cultivation, importation, exportation and industrial and commercial use of cannabis varieties not possessing narcotic properties or of products containing such varieties may be authorised, on a proposal from the Director-General of the Agency, by order of the Ministers with responsibility for Agriculture, Customs, Industry and Health.'

The order of 22 August 1990

26 Article 1 of the order of 22 August 1990 implementing Article R. 5132-86 of the Public Health Code in respect of cannabis (JORF of 4 October 1990, p. 12041), in the version applicable to the dispute in the main proceedings ('the order of 22 August 1990'), provides:

'The following shall be authorised under Article R. 5181 of the abovementioned code: cultivation, importation, exportation and industrial and commercial use (fibre and seeds) of varieties of *Cannabis sativa* L. meeting the following criteria:

– the delta-9-tetrahydrocannabinol content of those varieties does not exceed 0.2%;

– the determination of the delta-9-tetrahydrocannabinol content and the sampling for the purposes of such determination is carried out according to the [Union] method laid down in the annex.

…'

The circular of 23 July 2018

27 In the circular of the Ministry of Justice of 23 July 2018 concerning the legal regime applicable to establishments offering cannabis products for public sale (coffee shops) (2018/F/0069/FD2) ('the circular of 23 July 2018'), the order of 22 August 1990 is interpreted as follows:

'The cultivation, importation, exportation and use of hemp shall be authorised only if:

– the plant comes from one of the varieties of *Cannabis sativa* L. provided for by the order [of 22 August 1990],

– only the fibre and seeds of the plant are used,

– the plant itself contains less than 0.2% delta-9-tetrahydrocannabinol.

Contrary to the argument sometimes put forward by establishments offering cannabidiol-based products for sale, the authorised delta-9-tetrahydrocannabinol content of 0.2% applies to the cannabis plant and not to the finished product resulting from it.

…

It should be noted that cannabidiol is found mainly in the leaves and flowers of the plant, and not in the fibre and seeds. Consequently, as the applicable legislation stands, it does not appear possible to extract cannabidiol under conditions consistent with the Public Health Code.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

28 B S and C A are the former directors of Catlab SAS, a company formed in 2014 to market Kanavape, alpha-CAT kits for testing the quality of cannabidiol ('CBD') and hemp oil. Kanavape is an electronic cigarette, the liquid in which contains CBD; it was to be distributed via the Internet and a network of sellers of electronic cigarettes. CBD is usually extracted from '*Cannabis sativa*' or 'hemp' since that variety naturally contains a high level of it, whilst containing a low level of tetrahydrocannabinol ('THC').

29 The CBD used in Kanavape was produced in the Czech Republic using the entirety of the *Cannabis sativa* plant, which had also been grown locally. It was imported into France by Catlab, which packaged it in cartridges for electronic cigarettes.

30 Following an information campaign to promote the launch of the Kanavape product run by Catlab in 2014, an inquiry was opened and the matter was referred to the National Agency for the Safety of Health Products ('the ANSM').

31 The ANSM's laboratory tested Kanavape cartridges available on the market and, although significant differences had been found in the CBD content of those cartridges, the level of THC present in the products tested was always below the legally permitted threshold. In July 2016, following a meeting of its Committee on narcotic drugs and psychotropic substances, the ANSM stated that it did not consider Kanavape to be a 'medicinal product'.

32 By a judgment of 8 January 2018, the Tribunal correctionnel de Marseille (Criminal Court, Marseille, France) inter alia found B S and C A guilty on several charges of infringement, including infringements of the legislation on poisonous substances. The applicants in the main proceedings were sentenced to suspended terms of imprisonment of 18 months and 15 months, respectively, together with a fine of EUR 10 000 each. With regard to the civil proceedings, the applicants were ordered jointly and severally to pay EUR 5 000 by way of compensation for the damage suffered by the Conseil national de l'ordre des pharmaciens (National Council of the Order of Pharmacists) and EUR 600 under the Code of Criminal Procedure.

33 The applicants in the main proceedings lodged appeals against that judgment before the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France) on 11 and 12 January 2018, respectively. Before the referring court, they submit, in particular, that the prohibition on the marketing of CBD from the *Cannabis sativa* plant in its entirety is contrary to EU law.

34 The referring court explains that CBD does not appear to have any 'recognised psychoactive effects'. Indeed, it notes that the World Health Organization (WHO), in a 2017 report, recommended removing it from the list of doping substances, that CBD is not listed as such in the Single Convention, that the ANSM concluded, on 25 June 2015, that there were insufficient data to classify it as 'harmful' and, last, that the expert appointed in connection with the criminal inquiry giving rise to the proceedings instituted against the applicants in the main proceedings concluded that it had a '"little or no" effect on the central nervous system'. Moreover, CBD is not expressly referred to either in the texts applying to industrial hemp or in those relating to cannabis as a narcotic drug.

35 Nevertheless, since the CBD present in the Kanavape comes from the *Cannabis sativa* plant in its entirety, it must be regarded as a product derived from parts of that plant other than the seeds and fibre, the marketing of which, according to Article 1 of the order of 22 August 1990, as interpreted by the circular of 23 July 2018, is not permitted.

36 In that context, the referring court questions whether that provision is compatible with EU law, taking the view that 'True hemp (*Cannabis sativa*), raw or processed but not spun; tow and waste of true hemp (including pulled or garnetted rags or ropes)' is listed in Chapter 57 of the HS Convention,

referred to in Annex I to the Treaties, and that it should therefore be regarded as an agricultural product, within the meaning of Article 38 TFEU, which puts in place an internal market based on the free movement of goods.

37 It appears to the referring court that, since the level of THC in the hemp marketed lawfully in other Member States is lower than 0.2%, as is the case in the main proceedings, CBD cannot be classified as a 'narcotic drug'. Indeed, according to the judgments of 26 October 1982, *Wolf* (221/81, EU:C:1982:363), and of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84), only a product whose harmfulness is demonstrated or generally recognised and whose importation and marketing is prohibited in all Member States may be classified as such.

38 In addition, the referring court considers Regulations No 1307/2013 and No 1308/2013 to be applicable to hemp.

39 Moreover, although Article 189 of Regulation No 1308/2013 authorises the importation of raw hemp under certain conditions and sets limits relating to certain seeds, that Article 189 is to 'apply without prejudice to more restrictive rules adopted by Member States in compliance with the [FEU Treaty] and the obligations under the [Agreement on Agriculture, included in Annex 1A to the Agreement establishing the World Trade Organization]'.

40 In that regard, it appears to the referring court that the cumulative conditions laid down by the Court of Justice for regarding a 'more restrictive' national measure, within the meaning of that Article 189, as being compatible with the FEU Treaty are not satisfied.

41 The public health objective appears to it to be already taken into consideration in Regulation No 1308/2013 in so far as that regulation limits its scope to varieties providing safeguards to be determined in respect of the content of intoxicating substances and adopts, first, a restriction regarding seeds and, second, a level of 0.2% in respect of the THC content of hemp.

42 Furthermore, it does not appear to it to be possible to rely on the principle of proportionality since, in the circular of 23 July 2018, the French Republic, in justifying the prohibition on natural CBD, relies on a prohibition which could not extend to the marketing of synthetic CBD with the same characteristics and effects.

43 In those circumstances the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Regulations No 1307/2013 and No 1308/2013, and the principle of the free movement of goods, be interpreted as meaning that the derogating provisions introduced by the Decree of 22 August 1990, by limiting the cultivation, industrialisation and marketing of hemp solely to fibre and seeds, impose a restriction that is not in accordance with [EU] law?'

Consideration of the question referred

44 Although the referring court refers, in the wording of its question, to limiting 'the cultivation, industrialisation and marketing of hemp solely to fibre and seeds', it is apparent from its own explanations that the question asked can be relevant to the case in the main proceedings only to the extent that it concerns the conformity with EU law of national legislation which prohibits the marketing of CBD when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.

45 It is therefore necessary to consider that, by its question, the referring court asks, in essence, whether Regulations No 1307/2013 and No 1308/2013 and Articles 34 and 36 TFEU must be interpreted as precluding national legislation to the extent that it prohibits the marketing of CBD when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.

On the interpretation of Regulations No 1307/2013 and No 1308/2013

46 The scope of Regulation No 1308/2013 is defined in Article 1(1) thereof as establishing a common organisation of the markets for agricultural products, that is to say, all the products listed in Annex I to the Treaties with the exception of the fishery and aquaculture products as defined in EU legislative acts on the common organisation of the markets in fishery and aquaculture products.

47 Where the provisions of Regulation No 1307/2013 mention agricultural products, they refer, according to Article 4(1)(d) thereof, to the products, with the exception of fishery products, listed in Annex I to the Treaties, as well as cotton.

48 In that regard, it should be pointed out that Annex I to the Treaties, to which those provisions refer, contains, inter alia, a reference to heading 57.01 of the HS Convention, now heading 53.02 thereof. Included under that heading is 'true hemp (*Cannabis sativa*), raw or processed but not spun; tow and waste of true hemp (including pulled or garnetted rags or ropes)'.

49 According to the HS Explanatory Notes, which are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (judgment of 13 September 2018, *Vision Research Europe*, C-372/17, EU:C:2018:708, paragraph 23), heading 53.02 of the HS Convention covers 'raw hemp as harvested, whether or not the leaves and seeds have been removed', 'retted hemp in which the fibres are still attached to the woody part of the plant, but have been loosened by the retting', 'scutched hemp which comprises the isolated fibres, sometimes 2 m or more in length, separated from the plant by scutching', 'combed hemp or hemp fibres otherwise prepared for spinning, generally in the form of slivers or rovings' and 'tow and waste of hemp'.

50 C A has submitted, without being contradicted by the other interested parties in the proceedings before the Court, that the CBD at issue in the main proceedings was extracted from the *Cannabis sativa* plant in its entirety by the process of carbon dioxide (CO_2) extraction.

51 Thus, as the Advocate General observed in point 35 of his Opinion, that product constitutes neither raw hemp, since it is not harvested, nor retted or scutched hemp, or bast fibres, since the extraction process does not involve separating the fibre from the rest of the plant.

52 Contrary to what the applicants in the main proceedings claim, it must therefore be held that CBD extracted from the *Cannabis sativa* plant in its entirety cannot be regarded as coming under heading 57.01 of the HS Convention, now heading 53.02 thereof, referred to in Annex I to the Treaties.

53 That being so, it must be noted that Chapter 29 of the HS Convention includes organic chemicals and that heading 29.32 thereof lists the heterocyclic compounds with oxygen hetero-atoms only, including THC, and cannabinoids such as CBD.

54 According to the HS Explanatory Notes, Chapter 29 of the HS Convention covers separate chemically defined compounds, those compounds being substances consisting of one molecular species whose composition is defined by a constant ratio of elements, which may be represented by a single structural diagram and may contain impurities.

55 Thus, in so far as the product at issue in the main proceedings is presented in such a way that it contains no compounds other than CBD, apart from impurities, it comes under heading 29.32 of the HS Convention.

56 It follows from the foregoing that, since the list of agricultural products referred to in Annex I to the Treaties does not mention heading 29.32 of the HS Convention, the CBD present in the entire *Cannabis sativa* plant cannot be regarded as an agricultural product and, therefore, cannot be regarded as a product covered by Regulations No 1307/2013 and No 1308/2013.

57 Indeed, as the Advocate General observed in point 36 of his Opinion, only those products referred to in Article 4(1)(d) of Regulation No 1307/2013 and in Article 1(1) of Regulation No 1308/2013 are covered by those regulations.

58 In those circumstances, it should be concluded that Regulations No 1307/2013 and No 1308/2013 must be interpreted as not applying to CBD.

On the interpretation of Articles 34 and 36 TFEU

59 As a preliminary point, it should be borne in mind that, since the harmfulness of narcotic drugs, including those derived from hemp, such as cannabis, is generally recognised, there is a prohibition in all the Member States on marketing them, with the exception of strictly controlled trade for use for medical and scientific purposes (judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, paragraph 36).

60 That legal position complies with various international instruments which the Member States have cooperated on or acceded to, such as the Single Convention and the Convention on Psychotropic Substances. The measures provided for by those instruments were subsequently strengthened and supplemented by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, concluded in Vienna on 20 December 1988 (*United Nations Treaty Series*, vol. 1582, No 1-27627), to which all the Member States and the European Union are parties. That legal position is also justified in the light of EU law and, in particular, of Framework Decision 2004/757 and Article 71(1) of the Convention implementing the Schengen Agreement (see, to that effect, judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, paragraphs 37 to 40).

61 It follows that narcotic drugs which are not distributed through channels which are strictly controlled by the competent authorities to be used for medical and scientific purposes are, because of their very nature, subject to a prohibition on importation and offering for sale in all the Member States (judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, paragraph 41).

62 As narcotic drugs which are not distributed through such strictly controlled channels are prohibited from being released into the economic and commercial channels of the European Union, persons who market those products cannot rely on the freedoms of movement or the principle of non-discrimination, in so far as concerns the marketing of cannabis (judgment of 16 December 2010, *Josemans*, C-137/09, EU:C:2010:774, paragraph 42).

63 It is therefore necessary to determine whether the CBD at issue in the main proceedings constitutes a narcotic drug within the meaning of the case-law cited in paragraphs 59 to 62 of the present judgment.

64 In that regard, it should be noted that that substance is not covered by the Convention on Psychotropic Substances or by Joint Action 97/396, referred to in Article 1(1)(b) of Framework Decision 2004/757.

65 Therefore, it should be determined whether the CBD at issue in the main proceedings is covered by the Single Convention, which is mentioned in Article 1(1)(a) of Framework Decision 2004/757 and which is also referred to in Article 71(1) of the Convention implementing the Schengen Agreement.

66 As regards the interpretation of an international convention such as the Single Convention, it should be recalled that, in accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties (*United Nations Treaty Series*, vol. 1155, p. 331), and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations (*Official Records of the Conference of the United Nations on the Law of Treaties between States and International Organisations or between International Organisations*, vol. II, p. 91), which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to that effect, judgment of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 40).

67 It follows from the preamble to the Single Convention that the parties declare themselves to be, inter alia, concerned with the health and welfare of mankind and conscious of their duty to prevent and combat drug addiction.

68 According to Article 1(1)(j) of the Single Convention, the term 'drug' means any of the substances in Schedules I and II of that convention, whether natural or synthetic. Listed in Schedule I of that convention are, inter alia, cannabis, cannabis resin and cannabis extracts and tinctures.

69 In addition, the terms 'cannabis' and 'cannabis plant' are defined in Article 1(1)(b) and (c) of the Single Convention as 'the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated', and as 'any plant of the genus Cannabis', respectively.

70 In the case at hand, it is apparent from the information in the file before the Court that the CBD at issue in the main proceedings is extracted from the *Cannabis sativa* plant in its entirety and not solely from the seeds and leaves of that plant, to the exclusion of its flowering or fruiting tops.

71 In those circumstances, 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.

72 However, it must be observed that it follows from the elements in the file before the Court, which are summarised in paragraph 34 of the present judgment, that 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. Moreover, according to those elements in the file, the cannabis variety from which that substance was extracted, which was grown in the Czech Republic lawfully, has a THC content not exceeding 0.2%.

73 As is apparent from paragraph 67 of the present judgment, the Single Convention is based, inter alia, on an objective of protecting the health and welfare of mankind. It is therefore appropriate to take that objective into account when interpreting that convention's provisions.

74 Such an approach is all the more compelling since a reading of the commentary on the Single Convention published by the United Nations relating to the definition of 'cannabis' for the purposes of that convention leads to the conclusion that, having regard to the purpose and general spirit of that

convention, that definition is intrinsically linked to the state of scientific knowledge in terms of the harmfulness of cannabis-derived products to human health. By way of illustration, it is thus apparent, in particular, from that commentary that the exclusion from the definition of cannabis set out in Article 1(1)(b) of the same convention of flowering or fruiting tops from which the resin has been extracted was justified by the fact that those tops contain only a negligible quantity of psychoactive ingredient.

75 In the light of those factors, which it is for the referring court to verify, it must be held that, since CBD does not contain a psychoactive ingredient in the current state of scientific knowledge recalled in paragraph 34 of the present judgment, 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.

76 It follows that the CBD at issue in the main proceedings is not a drug within the meaning of the Single Convention.

77 Furthermore, it is also important to add that, as the Commission has also pointed out, the CBD at issue in the main proceedings was lawfully produced and marketed in the Czech Republic.

78 In the light of all the foregoing considerations, it must be concluded that Articles 34 and 36 TFEU are applicable to the CBD at issue in the main proceedings.

79 In that regard, it should be recalled that the free movement of goods between Member States is a fundamental principle of the FEU Treaty which is expressed in the prohibition, set out in Article 34 TFEU, of quantitative restrictions on imports between Member States and all measures having equivalent effect (judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 119).

80 According to settled case-law, the prohibition of measures having equivalent effect to quantitative restrictions on imports laid down in Article 34 TFEU covers any measure of the Member States that is capable of hindering, directly or indirectly, actually or potentially, intra-Union trade (judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 120).

81 Further, a measure, even if it has neither the object nor the effect of treating goods coming from other Member States less favourably, also falls within the scope of the concept of a 'measure having equivalent effect to quantitative restrictions', within the meaning of Article 34 TFEU, if it hinders access to the market of a Member State of products originating in other Member States (judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 121).

82 In the case at hand, it is not disputed that the prohibition on marketing 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 – constitutes a measure having equivalent effect to quantitative restrictions within the meaning of Article 34 TFEU.

83 However, it is apparent from settled case-law that such a measure can be justified on one of the grounds of public interest laid down in Article 36 TFEU or by imperative requirements. In either case, the provision of national law must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 122).

84 Further, a restrictive measure can be considered to be an appropriate means of securing the achievement of the objective pursued only if it genuinely reflects a concern to secure the attainment of that objective in a consistent and systematic manner (judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 37).

85 In so far as the French Republic claims that the aim of its legislation prohibiting the marketing of products derived from parts of the *Cannabis* plant other than its fibre and seeds is to protect public health as set out in Article 36 TFEU, it must be recalled that the health and life of humans rank foremost among the assets and interests protected by the FEU Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion (judgment of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 30).

86 That discretion relating to the protection of public health is particularly wide where it is shown that uncertainties continue to exist in the current state of scientific research as to certain substances used by consumers (see, to that effect, judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 86).

87 Since Article 36 TFEU contains an exception, which must be narrowly interpreted, to the free movement of goods within the European Union, 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 (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraphs 87 and 88).

88 A decision to prohibit marketing, which indeed constitutes the most restrictive obstacle to trade in products lawfully manufactured and marketed in other Member States, can be adopted only if the real risk alleged for public health appears sufficiently established on the basis of the latest scientific data available at the date of the adoption of such a decision. In such a context, the object of the risk assessment to be carried out by the Member State is to appraise the degree of probability of harmful effects on human health from the use of prohibited products and the seriousness of those potential effects (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 89).

89 In exercising their discretion relating to the protection of public health, the Member States must comply with the principle of proportionality. The means which they choose must therefore be confined to what is actually necessary to ensure the safeguarding of public health; they must be proportional to the objective thus pursued, which could not have been attained by measures which are less restrictive of intra-Community trade (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 90).

90 It is true that the assessment which a Member State is required to make may reveal a high degree of scientific and practical uncertainty in that regard. Such uncertainty, which is indissociable from the concept of precaution, influences the extent of the discretion of the Member State and thus has an impact on the means of applying the proportionality principle. In such circumstances, it must be acknowledged that 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. However, the assessment of the risk cannot be based on purely hypothetical considerations (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 91).

91 A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of the substance at issue and, second, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 92).

92 Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective (judgment of 28 January 2010, *Commission* v *France*, C-333/08, EU:C:2010:44, paragraph 93).

93 Certainly, it is in the light of the case-law cited in paragraphs 83 to 92 of the present judgment that it is for the referring court to determine whether the prohibition on marketing 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 – is appropriate for securing the attainment of the objective of protecting public health and does not go beyond what is necessary for that purpose. However, it is for the Court of Justice to provide the national court with all necessary information with a view to offering guidance in that determination.

94 As regards the determination of whether that prohibition is appropriate for securing the attainment of the objective of protecting public health, it should be borne in mind that it became apparent, during the hearing, that that prohibition would not affect the marketing of synthetic CBD that had the same properties as CBD extracted from the *Cannabis sativa* plant in its entirety and that could be used as a substitute for the latter. It is for the referring court to verify that circumstance, which, if proved, 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.

95 As regards the necessity of a prohibition on the marketing of CBD where it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds, it should be pointed out that the French Republic is not required to demonstrate that the dangerous property of such a product is identical to that of narcotic drugs such as the substances listed in Schedules I and II of the Single Convention. The fact remains that it is for the referring court to assess the scientific data available and produced before it in order to make sure, in the light of the case-law cited in paragraphs 88 to 92 of the present judgment and in the light of the considerations set out in paragraph 72 of this judgment, that the real risk to public health alleged does not appear to be based on purely hypothetical considerations.

96 In the light of all the foregoing considerations, 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 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.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Articles 34 and 36 TFEU must be interpreted as precluding national legislation which prohibits the marketing of cannabidiol (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. Regulation (EU)

No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 and Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 must be interpreted as not applying to such legislation.

[Signatures]