

TRIBUNAL JUDICIAIRE DE NANTERRE (Nanterre Judicial Court)

URGENT PROCEEDINGS

ORDER IN URGENT PROCEEDINGS RENDERED ON February 12, 2021

Docket No. 20/00977 - Portalis No. DB3R-W-B7E-VQI4

No.:

PLAINTIFF

**COMITE NATIONAL
CONTRE LE TABAGISME
(French National Committee
for Tobacco Control),
represented by its chair Mr.
Yves MARTINET**

**COMITE NATIONAL CONTRE LE TABAGISME,
represented by its chair Mr. Yves MARTINET**
13 rue d'Uzès
75002 PARIS
represented by Attorney Hugo LEVY, lawyer recognized by
the PARIS Bar, box: P0507

v.

**BRITISH AMERICAN
TOBACCO FRANCE**

DEFENDANT

BRITISH AMERICAN TOBACCO FRANCE
100-110 Esplanade du Général de Gaulle
Coeur Défense
Tour A - COURBEVOIE
92932 PARIS LA DEFENSE CEDEX
represented by Attorney Judith VUILLEZ from
ASSOCIATION CBR & ASSOCIES, lawyers recognized by
the PARIS Bar, box: R139

COMPOSITION OF THE COURT

Presiding Judge: Marie-Odile DEVILLERS, Deputy
Presiding Judge, holding the hearing in summary proceedings
on behalf of the Court's Presiding Judge
Clerk: Delphine LAURENCE

Ruling publicly in first instance by order in the presence of
both parties made available at the court clerk's office, pursuant
to the opinion given at the end of the hearing.

I, the Presiding Judge, after having heard the parties present or their counsel, at the hearing on November 5, 2020, adjourned the matter for deliberation on January 7, 2021, postponed to January 21, 2021 and then to February 4, 2021 and to today:

Comité National Contre le Tabagisme (hereinafter CNCT) is a government-approved public interest association whose mission is to ensure compliance with public policy legislation against smoking and its harmful effects on public health.

CNCT found that British American Tobacco France (hereinafter BAT), a manufacturer of tobacco and tobacco products, in addition to vaping products, is the publisher of a website accessible in France and intended for a French-speaking public at the address “Govype.com/fr”, which aims to market an electronic “vaping” device and associated cartridges called “VYPE ePod.”

It asked the Presiding Judge of the Nanterre Judicial Court to

- Order BAT to delete the site it published at “Govype.com/fr” on penalty of a fine of €10,000 per day late starting from the date the forthcoming order is rendered.
- Order BAT to disclose to CNCT exhaustive data on sales volumes of e-cigarettes and vype cartridges made through the site, as well as the number of subscriptions made and lastly the number of site visits since it went live.
- Order BAT to pay it an advance of €150,000 under its indisputable obligation of compensation based on Paragraph 2 of Article 835 of the French Code of Civil Procedure.
- Order BAT to pay CNCT the sum of €10,000 based on Article 700 of the French Code of Civil Procedure.
- Pronounce the forthcoming decision to be immediately enforceable.

As the hearing on May 4, 2020 was canceled in application of the Nanterre Judicial Court’s continuation of operations plan as part of the COVID-19 epidemic health emergency, the matter was automatically postponed to the hearing on November 5, 2020.

During this hearing, the CNCT reasserted all of its claims.

In the alternative to the claim for deletion of the site, it asked the Court to order BAT to, on penalty of a fine of €10,000 per day late starting from the date the forthcoming order is rendered, delete:

- The videos on “govype.com/fr” captured on page 22 of the court officer’s official report dated December 10, 2019, and page 27 of the official report dated December 20, 2019.
- The language on “govype.com/fr” recorded on pages 14-18, 24-34, 36-38, 40-42 and 44-52 of the report dated December 10, 2019, and pages 14, 25 and 26 of the report dated December 20, 2019.
- The language on “govype.com/fr” recorded on pages 15-22, 24-26, 28-31, 34-44, 51-60, 63-72, 75-77, 80-82 and 84-90 of the report dated October 30, 2020.

It asked that BAT also be prohibited from putting these videos and language back online.

BAT made a long oral argument in which it asked the urgent applications judge to:

- At the start of the proceeding, declare all of CNCT’s claims inadmissible due to lack of standing.

On the claims for deletion:

- Rule that all of the content challenged by CNCT in its summons is no longer online as of the date of the hearing.

Primarily:

- Rule that the publishing of the vaping product sale website Govype.com/fr is not manifestly illegal and furthermore does not constitute an imminent damage justifying the intervention of an urgent applications judge.

- Rule that the concept of the advertising ban on vaping products does not include acts of communication relating to vaping products published on a legally authorized website selling these products, and that all messages or language challenged by CNCT relate to the method of use and characteristics of vaping products sold by BAT on Govype.com and are of an informational, not advertising, nature.

In the alternative:

- Rule that publishing an eCommerce website containing advertising content for vaping products does not constitute a manifestly illegal disturbance, let alone an imminent damage justifying the intervention of an urgent applications judge, and rule that there are no grounds to issue an urgent ruling as no manifestly illegal disturbance has been established.

In the further alternative:

- Dismiss all of CNCT's claims under the manifestly illegal disturbance.

On the claim for advance payment

- Primarily, rule that CNCT's claim is inadmissible and in any event CNCT does not have grounds to request these urgent measures, and in the alternative rule that as there are no provisions in law or case law on this point, it is not possible to set an advance payment, and dismiss CNCT's claim to obtain an advance payment of €150,000 in urgent proceedings.

- On claim for the interlocutory investigative measure

- Rule that CNCT's claim based on Article 145 of the French Code of Civil Procedure does not apply, and in any event is without lawful cause, and rule that there are no grounds for urgent proceedings based on Article 145 of the French Code of Civil Procedure.

- Dismiss all of CNCT's claims.

- Order CNCT to pay the costs.

GROUNDINGS

On the admissibility of CNCT's suit

BAT asserted that CNCT's standing is limited to the corporate purpose in its articles of association, and that in this case CNCT's articles of association do not mention controlling the consumption of vaping products.

It asserted that the idea of tobacco control as stated in CNCT's articles of association cannot include control of vaping products, insofar as tobacco addiction is a drug addiction resulting from dependency on products manufactured from tobacco leaves, whereas vaping products do not contain tobacco and are a recognized alternative to tobacco addiction.

CNCT asserted that it absolutely has standing to bring legal proceedings to prevent a serious and illegal infringement of public health laws, and that the Court of Cassation found that CNCT has grounds to seek legal relief for infringement of the interests this association aims to defend. It reiterated that it has a legally protected interest, as defined by Article 31 of the French Code of Civil Procedure, to bring legal proceedings to prevent serious and manifest violations of tobacco control laws, and this fight today includes the control of vaping products.

CNCT was bestowed a specific mission of judicial vigilance by the French General Directorate of Health. The legal actions it brings cover various legislative domains, including advertising bans, compliance with health warnings, compliance with the ban on the sale of tobacco products to minors, etc.

In application of Directive 2014/40 of the European Parliament and of the Council, Order 2016-623 of May 19, 2016 added a Chapter III on vaping products to the French Public Health Code under Section 1 "Tobacco Control" of Book V of the third part on combating diseases and addictions, thereby including vaping measures under the "tobacco control" mission of CNCT.

Article L3515-7 of the French Public Health Code provides that "associations whose purpose in their articles of association includes tobacco control may exercise the rights granted to plaintiffs claiming

damages for breaches of the provisions of this Section.” Said Section includes Article L3513-4, which unambiguously states that “direct or indirect propaganda or advertising of vaping products is prohibited.”

CNCT therefore has a legally protected interest, as defined by Article 31 of the French Code of Civil Procedure, to bring legal proceedings to prevent serious and manifest violations of tobacco control laws, a concept which, as of May 19, 2016, includes vaping.

Insofar as it has long been established that any form of marketing communications for tobacco constitutes a manifestly illegal disturbance, it should therefore be found that advertising and propaganda for vaping products, beyond simple commercialization, also constitutes a manifestly illegal disturbance, the discontinuation of which CNCT is well founded in seeking.

BAT also cannot claim that the “e-cigarette” it sells is an anti-tobacco product and that therefore CNCT has no grounds to prevent the advertising thereof. Firstly, said advertising is expressly prohibited by law; furthermore, on the website, the product is presented as an object that can make you happy and relaxed, but at no point presents it as a method to quit tobacco.

It also cannot claim that the product is not comparable to tobacco when it is just as if not more addictive, according to certain studies, and as BAT encourages said addiction with loyalty programs. It is also indisputable that these products contain nicotine, which despite everything remains one of the toxins contained in cigarettes, and one that tobacco users are not deprived of by using e-cigarettes.

CNCT’s claim to seek the cessation of the manifestly illegal disturbance constituted by a website advertising these vaping products is therefore entirely well founded.

On the claims for deletion:

On the deletion of the website “govype.com/fr”

The law expressly authorizes the sale of vaping products online, as it has even organized certain methods to do so. For example, Article 15 of the Decree of August 22, 2016 provides that: “The notice warning that the sale of vaping products to minors under 18 is prohibited shall be displayed on online sales websites for these products.”

The website “govype.com.fr,” which is a website dedicated to the online sale of vaping products made by BAT, cannot in and of itself constitute a manifestly illegal disturbance based solely on the fact that it presents the products in an attractive light, as presentation of the products being sold is a necessary prerequisite for their sale.

As the manifestly illegal nature of the website has not been established as such, CNCT’s claim for deletion of the website must be dismissed.

However, while the website can present products, it cannot encourage the consumption of these harmful products by advertising propositions that could encourage non-tobacco smokers to directly use vaping products, or encourage excessive consumption.

On the deletion of the clip

In his official report, the court officer noted the presence of a 45-second advertising clip on the website on the merits of the “VYPE ePod” cigarette, which opened on text in large type against a background of fireworks: “Pour une nouvelle expérience ?” [“For a new experience?”], which can clearly be classified as an advertising hook. What’s more, it is difficult to see how this can be considered an encouragement to find a way to quit tobacco!

The images, sound and text: “Le chic sans hic” [“Chic without a glitch”], “toujours prêt” [“always ready”] also unquestionably constitute advertising.

The court officer also observed the presence of a video on the site that plainly advertised the “VYPE” cigarette. This video was filmed during the “Crossover” music festival and featured young consumers extolling the merits of the “Vype” e-cigarette.

BAT is undoubtedly aware of the difficulty of arguing that these clips do not constitute advertisements, as it removed them from the website; therefore, CNCT’s claim for deletion, which was manifestly well founded, no longer applies.

On the deletion of certain language

The court officer found some language on the website pages that CNCT considers advertising propositions: “rougir de plaisir” [“blush with pleasure”] strawberry flavor, “annonce ta couleur” [“announce your color”]. In CNCT’s opinion, these are in violation of the law on the names of food products (strawberry, mango, etc.). BAT believes that it must present the products and therefore their flavors.

While it is normal for a website to present the products it sells, and namely list the various flavors it offers, which may have food flavors, only their presentation is permitted, and the hooks using “tu” [the French informal you] and lines like “rougir de plaisir” that do not describe the product are clearly prohibited and must be deleted.

Similarly, all allusions on the website to Zen advice that would lead one to believe that using vaping products will bring serenity and wellbeing must be prohibited and therefore deleted. While the benefits of these products compared to cigarettes have been recognized by some, including scientists, these products certainly must not be recognized in and of themselves to be products that improve general health without any reference to quitting tobacco.

It should be noted that BAT’s website is in a constant state of development and change, and that most of the language on this website challenged by CNCT has been deleted but may have been replaced by other language.

The new language “préparez-vous pour le grand frisson” [“prepare yourself for the big chill”], “la fraîcheur est à l’honneur” [“coolness comes before honor”] are also advertising propositions and are not useful for describing a menthol flavor; the title itself is sufficient. And a phrase like “il ne reste qu’à vous lancer!” [“all you have to do is get started!”] is unquestionably an advertising slogan that encourages consumption, not a description.

BAT asserted that the presence of these posters and propositions on the website are in keeping with the authorization on the presence of small advertising posters in stores, and reiterated that, in accordance with the provisions of Directive 2014/40/EU, the law expressly states that the advertising ban does not apply to “small posters relating to vaping products displayed inside establishments that sell them.”

It should be noted that an advertisement is perceived totally differently by a customer when they are in the store to make a purchase, compared to by an internet user who may only go on the website to make a purchase. The impact of the online advertisement is also totally different than that of a poster. If the law, which authorized online sales, had wanted to allow advertisements similar to posters on websites, it would have been free to do so; since it did not, it must be considered prohibited.

Therefore, CNCT’s entire claim for the deletion of the language found by the court officer should be found admissible.

However, in general, such websites should only contain a list of products with a short presentation (without mentioning their “exceptional” or comparative qualities), prices (which may be adjusted depending on the quantities), and legally required language. It should not contain photos, sounds or slogans that would present these products as a source of pleasure, praising their taste or ease of use, except as a product that would allow a person to quit tobacco.

As the site clearly did not contain purely “informational” information, BAT’s claim to have it be found that the website only contained informational elements must therefore be dismissed.

On the claim for advance payment for damages

CNCT asserted that, due to the severity of the offense, BAT must be ordered to pay a heavy fine. While the offense cannot be disputed, it is not possible, in urgent proceedings, to assess the severity and actual impact of the illegal advertising done by BAT on a website that remains legal. Therefore, the advance payment for damages should be limited to €1000.

Unofficial Translation

On the claim to disclose certain data

CNCT requested the disclosure of certain data based on Article 145, but did not justify whether the data would not be disclosed of its own accord if necessary or the intention of bringing legal proceedings.

Therefore, this claim shall be dismissed.

On the claim based on Article 700 of the French Code of Civil Procedure

It was following CNCT's well-founded suit that BAT deleted the clips and language that were overt advertisements from its website, and its behavior forced the Committee to incur irrecoverable costs. It therefore appears equitable to grant CNCT the sum of €5,000 based on Article 700 of the French Code of Civil Procedure.

FOR THESE REASONS

Refer the parties to appeal on the substance of the dispute.

Provisionally reserve judgment as to the parties' claims.

Note the deletion by British American Tobacco France of the two clips that were overt advertisements that were present on govype.com at the time of the court officer's report dated December 10, 2019.

Order, if it still exists, the deletion of the language on "govype.com/fr" recorded on pages 14-18, 24-34, 36-38, 40-42 and 44-52 of the report dated December 10, 2019, and pages 14, 25 and 26 of the report dated December 20, 2019, and pages 15-22, 24-26, 28-31, 34-44, 51-60, 63-72, 75-77, 80-82 and 84-90 of the report dated October 30, 2020.

Order British American Tobacco France to pay Comité National Contre le Tabac the sum of €1,000 as an advance payment on its claim for damages.

Dismiss Comité National Contre le Tabac's claim for the disclosure of data on sales volumes of e-cigarettes and vype cartridges made through the site, as well as the number of subscriptions made and the number of site visits since it went live.

Dismiss all other claims by the parties.

Order British American Tobacco France to pay Comité National Contre le Tabac the sum of €5,000 based on Article 700 of the French Code of Civil Procedure.

Order British American Tobacco France to pay the costs.

ISSUED IN NANTERRE, on **February 12, 2021**.

THE COURT CLERK

THE PRESIDING JUDGE

Delphine LAURENCE

Marie-Odile DEVILLERS, Deputy Presiding Judge