File n°22/00519
Court judgment n°168

**PARIS COURT OF APPEAL**

Division 2, Chamber 8
(41 pages)

Delivered publicly on Tuesday 25 June 2024 by Division 2 - Chamber 8 of Criminal Appeals,

On appeal from a judgment of the Paris Court of Justice – 31st Chamber – of 3 December 2021 (PI9220000019).

Appeal lodged on 01/07/2024 by Philip Morris France SAS
Certified copy issued on 02/07/2024 to Maître Van Gaver P0438
Appeal lodged on 01/07/2024 by Philip Morris Products SA
Certified copy issued on 02/07/2024 to Maître Van Gaver P0438
Enforceable copy issued on 02/07/2024 to Maître Raynal Cantangrel P252
Enforceable copy issued on 02/07/2024 to Maître Lévy Rennes

**PARTIES INVOLVED:**

**Defendants**

**The company PHILIP MORRIS FRANCE SAS**
SIREN Number: 712-054-014
23/25 rue Delariviere Lefoullon – 92062 PARIS LA DEFENSE CEDEX

Defendant, calling
***Not appearing and represented by Maître Van Gaver Benjamin, lawyer at the PARIS Bar, vestiaire P0438 (submissions filed)***

**Public prosecutor**
Principal appellant

**Civil parties**
**The association "Les droits des non-fumeurs » (DNF,** in English: Non-Smokers' Rights**)**
1 chemin des Bouvreuils – 68140 GRIESBACH AU VAL
Civil party, calling
***Mr AUDUREAU Gérard, President of the association appearing, represented by Maître RAYNAL CANTANGREL Delphine, lawyer at the PARIS bar, vestiaire P252 (submissions filed)***

**The Comité National Contre le Tabagisme (CNCT,** in English: French National Committee for Tobacco Control)
13 rue d'Uzès – 75002 PARIS
***Not appearing and represented by Maître LEVY Hugo, lawyer at the RENNES bar (submissions filed)***

**Composition of the court during the debates and the deliberation:**

**President:** Claire D'URSO
**Councillors:** Joëlle CLEROY and Thierry PERROT

**Registrar:** Anne-Lise LEPLUMEY for the debates and delivery of the judgment

**Public prosecutor:**
represented at the debates and delivery of the judgment by Claire MALATERRE, Advocate General.

**THE PROCEDURE:**

**Bringing a case to court and prevention**

By bailiff's writs dated on 20 and 22 August 2019, the Comité National Contre le Tabagisme and the association « Les droits des non fumeurs » (DNF) - pour un monde zero tabac have summoned PHILIP MORRIS FRANCE SAS and PHILIP MORRIS PRODUCTS SA as defendants before the 31st chamber of the Tribunal de Grande Instance of Paris. The case was called for the hearing to determine the civil parties' deposit on 2 October 2020, postponed to the hearing to determine the deposit on 8 January 2021 and then dismissed contradictorily for consideration of the merits at the hearing of 3 December 2021.

**The company PHILIP MORRIS FRANCE SAS**

**accused** of ADVERTISING OR PROPAGANDA IN FAVOUR OF VAPING PRODUCTS, between January 2017 and 31/07/20219, in Paris, an offence provided for by Articles L.3515-3 section I11°, L.3513-4 paragraph 1, L.3513-1 of the French Public Health Code and punishable under Article L.3515-3 section I paragraph 1, section II of the French Public Health Code.

**accused** of DIRECT ADVERTISING OR PROPAGANDA IN FAVOUR OF TOBACCO, ITS PRODUCTS OR INGREDIENTS, between January 2017 and 31/07/2019 in PARIS, an offence provided for by Articles L.3515-3 section I1°, L.3512-4 paragraph 1, L.3512-1, L.3512-2 of the French Public Health Code and punishable under Article L.3515-3 section I paragraph 1, section II of the French Public Health Code.

**The company PHILIP MORRIS PRODUCTS SA**

**accused** of ADVERTISING OR PROPAGANDA IN FAVOUR OF VAPING PRODUCTS, between January 2017 and 31/07/20219, in Paris, an offence provided for by Articles L.3515-3 section I11°, L.3513-4 paragraph 1, L.3513-1 of the French Public Health Code and punishable under Article L.3515-3 section I paragraph 1, section II of the French Public Health Code.

**accused** of DIRECT ADVERTISING OR PROPAGANDA IN FAVOUR OF TOBACCO, ITS PRODUCTS OR INGREDIENTS, between January 2017 and 31/07/2019 in PARIS, an offence provided for by Articles L.3515-3 section I1°, L.3512-4 paragraph 1, L.3512-1, L.3512-2 of the French Public Health Code and punishable under Article L.3515-3 section I paragraph 1, section II of the French Public Health Code.

**The judgment**

The Paris Court of Justice – 31st CHAMBER – by contradictory judgement, dated 3 December 2021, declared that:

**PHILIP MORRIS FRANCE SAS**

**PHILIP MORRIS PRODUCTS S.A.**

Were guilty of the acts of which they are accused,

and, in application of the aforementioned articles, has:

ON PUBLIC ACTION

Ordered **PHILIP MORRIS FRANCE SAS** to pay a fine of 75,000 euros.

Ordered **PHILIP MORRIS FRANCE SAS** to pay a fine of 50,000 euros.

Declared this sentence to be suspended in its entirety.

ON CIVIL ACTION

Declared admissible the civil action brought by the Comité National Contre le Tabagisme (CNCT) and the Association "Les droits des non-fumeurs" (DNF) – POUR UN MONDE ZERO TABAC which has now become the Association DNF – Demain sera non fumeur.

Declared SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA to be jointly and severally liable for the damages suffered by the CNCT and the Association DNF.

Ordered SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA jointly and severally to pay the CNCT the sum of 50,000 euros in damages.

Ordered SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA jointly and severally to pay the Association DNF the sum of 50,000 euros in damages.

Ordered SAS PHILIP MORRIS FRANCE to pay the CNCT the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure (CPP).

Ordered SAS PHILIP MORRIS FRANCE to pay the Association DNF the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure (CPP).

Ordered PHILIP MORRIS PRODUCTS SA to pay the CNCT the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure (CPP).

Ordered PHILIP MORRIS PRODUCTS SA to pay the Association DNF the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure (CPP).

Rejected the remainder of the claims made by the CNCT and the Association DNF.

**Appeals**

Appeal lodged by:

The public prosecutor of the Republic, on 13 December 2021 against PHILIP MORRIS FRANCE SAS and the company PHILIP MORRIS PRODUCTS SA (***cross-appeal***)

The company PHILIP MORRIS PRODUCTS SA on 13 December 2021 against the Association "les droits des non-fumeurs" (DNF) and the Comité National Contre le Tabagisme (CNCT), its appeal relating to both criminal and civil provisions (***main appeal***).

The company PHILIP MORRIS FRANCE SAS on 13 December 2021 against the Association "les droits des non-fumeurs" (DNF) and the Comité National Contre le Tabagisme (CNCT), its appeal relating to both criminal and civil provisions (***main appeal***).

The Comité National Contre le Tabagisme (CNCT) on 14 December 2021 against PHILIP MORRIS FRANCE SAS and PHILIP MORRIS PRODUCTS SA, its appeal being limited to the civil provisions (***cross-appeal***).

The Association "les droits des non-fumeurs" (DNF) on 14 December 2021 against PHILIP MORRIS FRANCE SAS and PHILIP MORRIS PRODUCTS SA, its appeal being limited to the civil provisions (***cross-appeal***).

PHILIP MORRIS FRANCE SAS, on 5 January 2022 against the Association "les droits des non-fumeurs" (DNF) and the Comité National Contre le Tabagisme (CNCT), its appeal relating to both criminal and civil provisions (***main appeal***).

PHILIP MORRIS PRODUCTS SA, on 5 January 2022 against the Association "les droits des non-fumeurs" (DNF) and the Comité National Contre le Tabagisme (CNCT), its appeal relating to both criminal and civil provisions (***main appeal***).

**CONDUCT OF THE DEBATES**:

At the public hearing of 30 April 2024, the president noted the absence of the defendants.

The following were heard:

Claire D'URSO was heard in her report.

The Court indicates to the parties' lawyers the future questions that will be raised, which they will be able to answer in their respective pleadings.

Maître RAYNAL CANTANGREL Delphine, lawyer for the Association "les droits des non-fumeurs", in her pleadings and submissions,

Maître LEVY Hugo, lawyer for the Comité National Contre le Tabagisme, in his pleading and submissions,

Maître VAN GAVER Benjamin, lawyer for the defendant company PHILIP MORRIS, in his pleadings and submissions,

Maître LEVY Hugo, lawyer for the Comité National Contre le Tabagisme, has withdrawn his request to ban the product.

PHILIP MORRIS's lawyer may provide contractual and website details at a later date.

Maître RAYNAL CANTANGREL Delphine, lawyer for the Association "les droits des non-fumeurs", in her observations ;

Claire MALATERRE, Advocate General, said she had no observations to make.

Maître RAYNAL CANTANGREL Delphine, in her observations ;

The Court then reserved judgment, and the President declared that the judgment would be delivered at the public hearing on 25 June 2024 at 13H30.

And on this day, pursuant to Articles 485, 486 and 512 of the Code of Criminal Procedure, and in the presence of the Public Prosecutor and the Registrar, Claire D'URSO, President, having attended the debates and deliberations, read out the judgment.

**COURT DECISION**

Deliberated in compliance with the law.

**REMINDER OF THE FACTS AND PROCEDURE**

In the summons dated 20 and 22 August 2019, the Comité National Contre le Tabagisme (CNCT) and the Association Les droits des non-fumeurs (ADNF) had SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS brought before the Paris Criminal Court on 2 October 2020 for having committed, between January 2017 and July 2019, in Paris and throughout France, illegal advertising in favour of tobacco within the scope of Articles L.3512-4 and L.3513-4 of the French Public Health Code by:

- publishing the website **https://fr.iqos.com/frlhome** , which is accessible in France

- affixing small signs mentioning "IQOS service point" or "IQOS partner" and blue stickers featuring a blue hummingbird on the exterior facades of the following tobacconists: 1) La Tabatière - 17 boulevard Montmartre 75002 Paris, 2) La Cave à Cigares - 9 bis boulevard Poissonnière 75002 Paris, 3) Le Petit Duc - 14 boulevard Bonne Nouvelle 75010 Paris, 4) Le Calumet - 47 rue Montorgueil 75002 Paris, 5) La Pia Hour - 27 rue du Faubourg Montmartre 75009 Paris, 6) La Chope - 53 rue du Faubourg Montmartre 75009 Paris, 7) Le Fontenoy - 33 rue Lamartine 75009 Paris, 8) La Cave à Cigares - 20 avenue Bosquet 75007 Paris, 9) Le Vizir - 33 rue de la Chaussée d'Antin 75009 Paris, 10) Le Petit Centre - 11 boulevard Voltaire 75011 Paris, 12) L'Etincelle - 3 rue Saint Sébastien 75011 Paris, 13) Le Balto - 18 rue Oberkampf 75011 Paris, 14) Le Flash - 64 boulevard Voltaire 75011 Paris, 15) La Station - 104 rue Oberkampf 75011 Paris, 16 ) Les Courtilles - 160 rue Oberkampf 75011 Paris, 17) Queen Café - 9 boulevard Saint Martin 75003 Paris, 18) Le Saint Martin - 60 rue René Boulanger 75011 Paris, 19) Le Week-End - 59 rue Turbigo 75003 Paris, 20) Le Brelan - 58 rue Beaubourg 75003 Paris and 21) Etcetera - 10 rue des Halles 75001 Paris.

- and organising appointments with agents responsible for marketing IQOS devices and HEETS tobacco refills.

As a result, they requested that:

- the criminal law be applied,
- the sale, distribution or free offer of IQOS brand products on the national territory be prohibited,
- the CNCT and the ADNF be admitted as civil parties,
- SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS be declared liable for the damages sustained by the CNCT and the ADNF,

- PHILIP MORRIS France and PHILIP MORRIS PRODUCTS be ordered to pay the latter the sum of 1,730,910 euros as compensation for the damage caused to the fight against smoking,
- provisional enforcement of the decision be ordered,
- and PHILIP MORRIS France and PHILIP MORRIS PRODUCTS each be ordered to pay the CNCT and the ADNF the sum of 20,000 euros under Article 475-1 of the Code of Criminal Procedure (CPP).

The CNCT and the ADNF argued that under the terms of Article L.3512-4 of the French Public Health Code resulting from Ordinance n°2016-623 of 19 May 2016 transposing Directive n°2014/40/EU on the manufacture, presentation and sale of tobacco products and related products "direct or indirect propaganda or advertising in favour of tobacco, tobacco products or the ingredients defined in Article L.3512-2, as well as any free distribution or sale of a tobacco product at a price lower than that which has been approved in accordance with Article 572 of the French General Tax Code, are prohibited.

These provisions did not apply to the shop signs of tobacconists, provided that these signs complied with the characteristics defined by interministerial decree.

Nor did they apply:

1. Publications and online communication services published by professional organisations of producers, manufacturers and distributors of tobacco products, intended for their members only, or specialised professional publications, the list of which is drawn up by order signed by the ministers responsible for health and communication, or online communication services published online for a professional matter which are accessible only to professionals in the production, manufacture and distribution of tobacco products;
2. Printed and edited publications and online communication services made available to the public by individuals established in a country that does not belong to the European Union or the European Economic Area, where these publications and online communication services are not primarily intended for the European common market.

Any sponsorship or patronage operation is prohibited when it is carried out by manufacturers, importers or distributors of tobacco products or when its purpose or effect is direct or indirect propaganda or advertising in favour of tobacco, tobacco products and the ingredients defined in Article L. 3512-2."

They added that Article L.3512-2 of the French Public Health Code defines tobacco products as follows: "tobacco, an additive, and any other substance or element present in a finished tobacco product, including paper, filter, ink, capsules and glues, are considered to be ingredients", it being specified that the aforementioned Ordinance also penalised similar conduct relating to the advertising of vaping products in Article L.3513-4 of the French Public Health Code.

As a result of these provisions, any form of propaganda or advertising in favour of tobacco or vaping products was prohibited, apart from the exceptions listed exhaustively in the law.

The principle of this ban was challenged by tobacco manufacturers, who argued that it violated their freedom of enterprise and freedom of expression.

By decision n°90-283 of 8 January 1991 (OJ, 10 January, p. 524; AJDA 1991, p. 386, Waschmann note; RECP 11), the Constitutional Council rejected the appeal for unconstitutionality against the

law, stating: recently, the principle of this prohibition, reinforced by the law on the modernisation of the healthcare system, was again challenged before the Constitutional Council.

In decision n°2015-727 of 21 January 2016 (OJ n°22 of 27 January 2016), the court dismissed the appeal on the following grounds: “considering that it is open to the legislature to restrict the freedom to undertake which derives from Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789 in line with constitutional requirements or justified by the general interest, provided that this does not result in disproportionate harm in relation to the objective pursued.

Considering that, by adopting the contested provisions of Article 23, the legislator sought to prevent people who do not consume tobacco products from being exposed to advertising in favour of such products which might encourage them to do so; whereas it thus pursued the objective of protecting health ; that these provisions do not prohibit the production, distribution or sale of tobacco or tobacco products; that, insofar as tobacconists may also sell other products and that their customer base include people who do not consume tobacco products, the ban on all advertising in favour of such products in their sales outlets, which is in line with the pursued objective by the legislator, does not constitute a manifestly disproportionate infringement of freedom of enterprise”.

In terms of infringement of freedom of expression, the case law of the Court of Cassation in the fight against smoking was also unequivocal.

The Criminal Chamber has consistently affirmed (Crim. 21 February 1996, n°95-81603; Crim. 21 February 1996, B n°86; Crim. 18 March 2003, B n°69; Crim. 5 April 2011, n°10-87435; Crim. 3 November 2010, n°09-88599 ; Crim. 18 March 2003, B n°69) that "the clear and precise provisions of Articles L.3511-3 et seq. of the French Public Health Code, which prohibit propaganda and direct or indirect advertising in favour of tobacco or tobacco products do not infringe either Article 10 of the European Convention on Human Rights and Fundamental Rights or Article 1 of the Additional Protocol, since they constitute a measure necessary for the protection of health and proportionate to this general interest objective, justifying a restriction on freedom of expression and the right to property”.

The Criminal Chamber, on the basis of the former Article L.3511-3 of the French Public Health Code, defined (Crim. 3 May 2006, *Droit pénal* 2006 n°112,p. 130, obs. Robert, Crim. 26 September 2006 n°05-87.681 ; Crim. 5 December 2006 n°06-84050 ; Crim. 10 January 2008 n°07-13.116 ; Crim. 9 March 2010 n°0888.501 ; Crim.21 September 2010 n°09-87.957 ; Crim. 3 November 2010, n°09-88.598 ; Crim. 3 November 2010 n°09-88.599 ; Crim.5 April 2011 n°10-87.435 ; Crim. 15 June 2011 n°10-995 ; Crim. 20 November 2012, n°12.80-530; Crim. 18 December 2012, n°11-88.535 ; Crim. 23 April 2013, n°12-83.244 ; Crim. 7 January 2014, n°13-80.073 ; Crim. 21 January 2014 n°13-80.075 ; Crim. 21 January 2014 n°1287.889…) advertising in favour of tobacco prohibited as: “Article L.3511-3 of the French Public Health Code prohibits all tobacco advertising, with the exception of tobacco shop signs and posters placed inside these establishments and not visible from the outside, provided that these signs or posters comply with the characteristics defined by ministerial decree ; these provisions clearly prohibit all forms of commercial communication, whatever the medium, with the aim or effect of directly or indirectly promoting tobacco or a tobacco product”.

However, PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS had taken part in a major advertising campaign for the tobacco product IQOS in 2017, 2018 and 2019. This operation took several forms: the launch of a website, a promotional campaign for the IQOS tobacco product at

tobacco shops and the use of a method for marketing and developing customer loyalty that were completely illegal.

**The IQOS tobacco product website**

The website published by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS was intended for the promotion of the IQOS tobacco product and presented the device as follows: “What is IQOS? Choosing to heat tobacco instead of burning it is what differentiates us from traditional cigarettes” (Screenshot n°12).

IQOS was a tobacco product within the scope of Article L.3512-1 of the French Public Health Code. However, it differed from traditional cigarettes in that it was composed of several parts that could be used to heat mini cigarettes sold under the HEETS brand. As can be seen from exhibit n°11 (IQOS Kit acquired by the CNCT), the product was presented as a hybrid cigarette between a traditional cigarette and an electronic cigarette, which PHILIP MORRIS described – itself – as a tobacco product.

According to PHILIP MORRIS, the tobacco product IQOS, manufactured in Malaysia, was composed of three parts:

- the tobacco unit, which contained a single-use tobacco stick designed to be heated and not burnt, and made from tobacco leaves, crushed, reconstituted, crimped and transformed into a tobacco stick,
- the holder into which the tobacco unit was inserted, designed to heat the tobacco to temperatures of up to 350°C, while monitoring its temperature to ensure a consistent taste experience, via an electronically controlled heating blade, with the holder providing heating for six minutes or the equivalent of 14 puffs.
- and the charger (that recharged the holder’s battery) which stored enough energy to recharge it around 20 times and could be recharged from a domestic electrical socket.

The companies presented this product as revolutionary as, just like for an electronic cigarette, it would remove combustion and consequently tobacco smoke and would therefore be “less harmful” than ordinary cigarettes. However, the proof of this lesser harmfulness was not provided, many pulmonologists believed that IQOS was no less harmful than cigarettes (Exhibit n°12). By law, such a claim is prohibited for any tobacco product whatsoever.

The CNCT and the ADNF drew the attention to an article published in the Swiss magazine *Le Régional* entitled: “*Essoufflée, l'industrie du tabac tousses ses dernières cartouches*” [in English: Breathless, the tobacco industry coughs up its last cartridges] (Exhibit n°13) which described the launch of the IQOS tobacco product by PHILIP MORRIS as follows: “To stem the decline in cigarette sales, its manufacturers are disguising themselves as agents of public health with new, supposedly “harm reduction” products that heat tobacco... but several independent studies suggest that one of these – Philip Morris’ IQOS – is potentially as harmful as conventional tobacco. With its marketing plans in disarray, the multinational is digging out its old methods to influence its world.”

PHILIP MORRIS INTERNATIONAL MANAGEMENT (PMI) acknowledged that “this innovation (allowed) PHILIP MORRIS to continue to sell tobacco”, the selling price of a packet of HEETS being the same as that of a packet of Marlboro.

It made no doubt that IQOS was a tobacco product and that its aim was to maintain addiction and to attract non-smokers.

The CNCT and the ADNF provided a bailiff's report regarding the website (Exhibit n°10), which showed that the site was accessible to everyone, and that browsing was possible after answering positively to the question "Are you an adult smoker? (over the age of 18)", accompanied by a legal notice stating that the website was reserved for adults residing in France, no identification document proving the user's age was required.

The website presented the tobacco product IQOS as a new alternative to cigarettes: "thanks to science and our exceptional HeatControl technology, IQOS heats tobacco instead of burning it. No cigarette smell, no ashes and no smoke" (Exhibit n°10, screenshot 3); "HeatControl technology heats tobacco up to 350°C instead of burning it" (Exhibit n°10, screenshot 7).

The website even indicated: "our mission is to offer better alternatives to adult smokers who want to continue using tobacco" (Exhibit n°10, screenshot 9).

The website suggested that users "discover" for themselves why IQOS was a "better alternative to cigarettes" and invited visitors to complete a form that would enable them to be contacted directly by IQOS and "meet with an expert" (Exhibit n°10, screenshot 15).

The website also gave users the option of being assisted by an "IQOS COACH", a "free service offered to all adult IQOS users", providing assistance at every step of the discovery process: an introductory telephone call, assistance with use and personalised answers.

The website also granted a 15-day trial period without any obligation.

According to the CNCT and the ADNF, PHILIP MORRIS could not therefore reasonably claim to be encouraging complete smoking cessation, as implied by the misleading wording on their website: "Delivering a smoke-free future". In its Frequently Asked Questions section (FAQs), the IQOS website answered the question: "Will IQOS help me to stop smoking? If you're concerned about the effects of smoking on your health, it is best to stop using tobacco altogether", thus acknowledging that IQOS is a tobacco product.

**The promotional campaign at tobacconists**

The defendants had also organised a large-scale promotional campaign at many tobacconists, openly flouting the law by placing advertisements for the tobacco product IQOS.

The bailiff's observations regarding the website showed that PHILIP MORRIS France made it easy for Internet users to find a sales outlet (Exhibit n°10, screenshot 22) via the page entitled "Find a store near you", which listed a very large number of retailers in France.

The bailiff's observations also revealed that PHILIP MORRIS France and PHILIP MORRIS PRODUCTS had engaged in illegal advertising at numerous points-of-sale, in particular by displaying small posters on the outside of tobacco shops mentioning "IQOS service point", "IQOS official partner" and affixing a blue sticker featuring a blue hummingbird, a distinctive symbol of the product.

The presence of these small posters and illicit advertising had been observed on 13 February and 19 and 25 July 2019 (Exhibits n°14 and 15) in 21 Paris tobacconists listed in the report, which suggested that these advertisements for IQOS existed in all of the brand's 623 sales outlets.

**The use of active marketing and loyalty-building methods**

The CNCT and the ADNF also claimed that PHILIP MORRIS INTERNATIONAL MANAGEMENT SA (PMI) and PHILIP MORRIS FRANCE (PMF) had recruited hostesses to work in trendy bars and

restaurants in Paris to have future users test the product. Following a fraudulent scheme familiar to cigarette manufacturers, these hostesses were only in possession of the electronic part of the product, i.e. the "IQOS HeatControl Technology" kit (manufactured in Malaysia). This kit could only be used to consume the tobacco sticks HEETS marketed by PHILIP MORRIS FRANCE. The operation was obviously aimed at recruiting "IQOS lovers" at parties.

It was therefore a clear case of propaganda in favour of tobacco, all the more so as PHILIP MORRIS INTERNATIONAL MANAGEMENT and PHILIP MORRIS France combined this operation with the offering of beers to users, as attested by the screenshots on the website Capital (Capital, 13 March 2018, "*Les cigarettiers et Philip Morris draguent les fumeurs en leur oftant de l'alcool"* [in English: Cigarette manufacturers and Philip Morris seduce smokers by offering them alcohol], Exhibit n°16). However, an article published in *Le Parisien* on 12 March 2018 reported that the Directorate-General of Health considered this process to be "totally illegal" (Exhibit n°17).

The strategy used by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS was deployed after the purchase of the IQOS device, which required users to register their product by providing their contact details and e-mail address.

Under the terms of a bailiff's report dated 26 February 2019 (Exhibit n°11), it was observed that Amélie ESCHENBRENNER, who wished to obtain information about the product and had entered her e-mail address, telephone number and department of residence on the website, was contacted by telephone the very next day by an expert offering her a face-to-face appointment to try out the product. This expert addressed Ms ESCHENBRENNER on 21 February 2019 as following: "Good evening Amélie! Clara, IQOS EXPERT. Can you confirm our appointment at *La Tabatière* on 27 February at 14H00? Have a nice evening". The appointment having been confirmed, the bailiff noted that Ms ESCHENBRENNER, who had entered *La Tabatière* tobacco shop located at 17 boulevard Montmartre in Paris at 14H23 empty-handed, had come out two minutes later accompanied by a woman and had sat down with the latter at the nearby terrace of the *Tavern'café*. At 14:34, the woman accompanying her showed her how to use an electronic device for inhaling. The two women then went to the tobacco shop *La Tabatière*, where Ms ESCHENBRENNER came out in possession of two cardboard packets and a credit card receipt, which were handed to the bailiff (Exhibit n°11). The bailiff observed that the product was labelled KIT IQOS, manufacturer PHILIP MORRIS PRODUCTS SA Quai Jean Renaud 3, 2000 Neuchâtel, Switzerland and www iqos.com.

The kit included:

- an IQOS pocket charger,
- an IQOS electronic cigarette,
- a rigid plastic holder,
- an IQOS USB power adapter,
- an IQOS USB cable
- an IQOS cleaning brush,
- IQOS cleaning sticks,
- a booklet bearing the words "IQOS guide d'utilisation",
- a booklet bearing the words "IQOS user guide",
- a small-format document bearing the words "IQOS, informations relatives aux garanties légales du système IQOS,
- and a small-format document bearing the words "IQOS information relating to the legal guarantees for the IQOS™ system.

The other packet included a tobacco refill bearing the words HEETS Bronze label, 20 sticks of tobacco intended to be heated, HEETS Marlboro with 20 sticks of heated tobacco, marketed by PHILIP MORRIS PRODUCTS.

Following this appointment, Ms ESCHENBRENNER received numerous advertising solicitations by e-mail regarding new IQOS tobacco products, in particular an offer to obtain the IQOS 3 free of charge (Exhibit n°18), the IQOS expert having told her that it was more "customisable and robust", that it could be recharged more easily and that this offer was part of a strategy to develop customer loyalty. The IQOS customer service department had also called her to find out whether she was satisfied with the product or not. Ms ESCHENBRENNER also received two emails informing her that she was eligible for a special offer for Mother's Day and Father's Day.

The CNCT and the ADNF concluded that:

that the companies PHILIP MORRIS France and PHILIP MORRIS PRODUCTS had implemented a large-scale promotional and appeal campaign aimed not only at converting as many smokers as possible to the use of the IQOS tobacco product, but also at reaching a wider public.

With regard to their claim, the CNCT and the ADNF alleged that the fight against smoking had been considerably harmed, since no illegal operation of such sophistication and scale had been carried out since the adoption of the Evin Law in 1991, with the world's leading tobacco manufacturer seeking to portray itself as a defender of public health.

They pointed out that the CNCT was – under the Law of 1901, recognised as an association – declared to be of public interest by the decree of 9 February 1977, and that it was specially authorised, under the terms of Article L.3515-7 of the French Public Health Code, to bring civil actions relating to breaches of the Evin Law, being subsidised for this purpose by the Ministry of Health. The Court of Cassation had accepted that it was entitled to claim damages in the event of a breach of tobacco control provisions (crim. 29 April 1986, B. n°146, p. 373).

The ADNF was recognised as being of public interest by a prefectoral decree dated 9 January 1990, confirmed on 28 August 2012 by the Prefect of the Haut Rhin French department. Just like the CNCT, it was authorised by its articles of association and by law to take legal and civil action for breaches of the Evin law and was subsidised by the Ministry of Health. The ADNF's role with the public was to provide information, training, prevention and support for victims of smoking. Its main aims were to raise awareness of the dangers of smoking, to act to increase awareness of the risks, to ensure the rights of non-smokers to breathe clean air, and to inform people about tobacco control measures.

According to the CNCT and the ADNF, to assess the damage suffered as a result of the harm done to the fight against smoking by the companies PHILIP MORRIS France and PHILIP MORRIS PRODUCTS, it was necessary to determine the value of this harm.

To this end, some jurisdictions have stated that "in the face of media aggression, it would be fair to provide the CNCT, a public interest association, with the financial resources for an advertising counter-offensive of the same scale, promoting a life without tobacco" (TGI Quimper 19 May 1994, Médiapouvoirs, Cahiers Juridiques 1994 p.214, note by GAUTHERON; GESTERMANN, La loi Evin du civil au pénal, LPA 11 Nov. 1994 p. 8 to 12 (1st part); LPA 16 Nov. 1994 p. 23 to 27 (2nd part).

This was the jurisprudential affirmation of the principle of media compensation, according to which the damage suffered as a result of breaches of the law was to be assessed on the basis of expenditure on illegal advertising or propaganda. For every euro illegally spent on promoting

IQOS, one euro should be granted to the CNCT for its communication against smoking. The total cost of the development of IQOS by Philip Morris was approximately 3 billion dollars (article published in the newspapaer *20 minutes* on 13 March 2018, Exhibit n°19).

The CNCT and the ADNF did not possess the details of the amount of money spent by the two companies during the period of prevention, but they knew that they had used several advertising agencies, including Indeed and PFM, which had recruited hostesses and sales representatives, and that 402 "service points" had been set up at tobacconists, providing them with assistance and accessories.

The CNCT and the ADNF proposed to the court that the services rendered by PHILIP MORRIS INTERNATIONAL MANAGEMENT (PMI) and PHILIP MORRIS FRANCE (PMF) be valued at a flat rate of 3,000 euros per tobacconist during the prevention period, and consequently that their loss be 402x3000, i.e. 1,206,000 euros.

With regard to the cost of poster advertising in tobacconists, the small posters appearing, according to them, in all 623 IQOS sales outlets listed on their website, on the basis of the rate applied at the time of the events for a 7-day poster advertising campaign on a network of 470 facades located in Paris, Lille, Lyon and Marseille in the outdoor 60x80 format, i.e. 5,500 euros excluding tax, they estimated the amount spent on this advertising over 72 weeks (52 + 20) at a minimum of 72x5,500 x 623/470 or 524,910 euros (Exhibit n°330: rates displayed on Poster Cloud).

The CNCT and the ADNF therefore requested that the two accused companies be ordered to pay the CNCT and the ADNF the sum of 524,910 euros, as compensation for the damage caused by the small IQOS posters displayed in tobacco shops.

Therefore, the CNCT and the ADNF requested that PHILIP MORRIS France and PHILIP MORRIS PRODUCTS be ordered to pay, at the very least, the total sum of 1,730,910 euros as compensation for the damage they had suffered.

They drew the court's attention to the fact that, despite the significance of this amount, it remained miniscule in comparison with the turnover of the companies, and in particular PHILIP MORRIS INTERNATIONAL, the parent company, with a turnover of €18 billion as of 31 March 2018 (Exhibit n°20).

This figure should also be compared with the cost of smoking in France. According to the Court of Auditors' report on the evaluation of public policies to combat smoking in December 2012 (Exhibit n°21), tobacco was responsible for 73,000 deaths in France and cost the Social Security system 20 billion euros. However, in the absence of at least thirty years' exposure, PHILIP MORRIS France and PHILIP MORRIS PRODUCTS in no way established that their product was less harmful than tobacco.

In support of their claims under Article 475-1 of the Code of Criminal Procedure, they produced invoices for the bailiff's reports.

The CNCT and the ADNF submitted a letter from the *Société Francophone de Tabacologie* [in English: French-speaking Society of Tobacology] dated from October 2018 and focusing on heated tobacco products.

**In a judgment of 2 October 2020, the Paris Court of Justice**, sitting as a single judge and hearing all the parties, set the amount of the deposit due by the CNCT at 1,000 euros and the

amount due by the ADNF at the same amount, these sums having to be paid by 31 December 2020 at the latest, and adjourned the case to 8 January 2021.

**At the hearing on 8 January 2021**, the Court noted that the deposits had been paid and adjourned the case to the hearing on 23 September 2021.

**At the hearing on 23 September 2021**, the ADNF was represented by its counsel.

The same was also the case for the **CNCT**.

**Counsel for the ADNF and the CNCT**, heard in oral argument in support of its conclusions, maintained its claims.
In addition to the arguments set out in the direct summons, it argued that contrary to what the defendants maintained, IQOS was a tobacco product and that its advertising was therefore illegal.

The hearing notes made no mention of any requisition from the **public prosecutor**.

**Counsel for PHILIP MORRIS FRANCE SAS and PHILIP MORRIS PRODUCTS SA**, heard in oral argument in support of its conclusions, mainly sought to have the civil parties' claims dismissed, to have the additional penalty of a ban on the sale of the product IQOS not imposed, to have the civil parties' claims dismissed and, in any event, to have the provisional execution order not enforced.

**Under the terms of a judgment dated 3 December 2021, the Paris Criminal Court**, sitting as a single judge, in a contradictory decision concerning all the parties and at first instance, has:

**On public prosecution:**

**With regard to SAS PHILIP MORRIS France**

- found PHILIP MORRIS France guilty of the alleged offences,
- ordered PHILIP MORRIS France to pay a fine of 75,000 euros,

**With regard to SA PHILIP MORRIS PRODUCTS**

- found PHILIP MORRIS PRODUCTS guilty of the alleged offences,
- ordered the company to pay a fine of 50,000 euros,
- ordered that the sentence be suspended in its entirety.

**On the civil action:**

- found admissible the civil action brought by the CNCT and the ADNF - Pour un monde zéro tabac, which has since become the ADNF - Demain sera non-fumeur,
- found SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS jointly and severally liable for the damage suffered by the CNCT and the ADNF - Pour un monde zéro tabac, now the ADNF - Demain sera non-fumeur,

**Regarding the CNCT**

- ordered SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS jointly and severally to pay the CNCT the sum of 50,000 euros in damages,
- ordered SAS PHILIP MORRIS France to pay the CNCT the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure,

- ordered SA PHILIP MORRIS PRODUCTS to pay the CNCT the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure,

**Regarding the ADNF**

- ordered SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS jointly and severally to pay the ADNF – Pour un monde zero tabac, now the ADNF – Demain sera non-fumeur, the sum of 50,000 euros in damages,
- ordered SAS PHILIP MORRIS France to pay the ADNF – Pour un monde zero tabac, now the ADNF – Demain sera non-fumeur, the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure,
- ordered SA PHILIP MORRIS PRODUCTS to pay the the ADNF – Pour un monde zero tabac, now the ADNF – Demain sera non-fumeur, the sum of 5,000 euros under Article 475-1 of the Code of Criminal Procedure,
- and rejected the remainder of the claims made by the CNCT and the ADNF - Pour un monde zero tabac, now known as the ADNF - Demain sera non-fumeur.

**THE APPEALS**

On 13 December 2021, counsel for SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS lodged a main appeal against the entire decision and requested that the case be examined by the Court of Appeal as a panel.

On the same day, the Public Prosecutor of the Republic lodged a cross-appeal against the two defendants.

On 14 December 2021, counsel for the CNCT and the ADNF lodged a cross-appeal.

**At the hearing on 15 November 2023, SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS** were represented by their counsel.

Their counsel, heard in oral argument in support of their conclusions, requested that:

- The priority question of constitutionality submitted by PHILIP MORRIS PRODUCTS SA and PHILIP MORRIS France SAS be declared admissible,
- the following priority question of constitutionality be referred to the Court of Cassation: "Do Article L.3512-4 of the French Public Health Code and 1° of I of Article L.3515-3 of the French Public Health Code, which impose a fine of 100,000 euros, indiscriminately, as a matter of principle and in advance, on all advertising for emerging tobacco products, infringe the principles of necessity and proportionality of offences and penalties laid down in Articles 5 and 8 of the Declaration of the Rights of Man and of the Citizen, the principle of freedom of information and communication provided for in Article 11 of the Declaration of the Rights of Man and of the Citizen, and the right to protection of one's health provided for in paragraph 11 of the Preamble to the Constitution of 27 October 1946?"
- and that proceedings on the merits of the case be stayed pending receipt of the decision of the Court of Cassation and, where applicable, that of the Constitutional Council.

**The CNCT and the ADNF** were assisted by their counsel.

**Counsel for the CNCT and the ADNF** requested that the Court of Appeal rule that there were no grounds for referring the priority question of constitutionality raised by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS.

**The Public Prosecutor of the Republic** requested that the priority question of constitutionality be declared inadmissible.

**In a decision dated 5 December 2023, the Paris Court of Appeal** ruled that there was no need to transmit the priority question of constitutionality supported by SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS and adjourned consideration of the case to the hearing of 30 April 2024.

**At the hearing on 30 April 2024**, the President of the Association DNF Demain sera non-fumeur appeared, assisted by his counsel. The CNCT was represented by its counsel. A decision should be taken in their respect by means of a contradictory decision.

**Counsel for the ADNF and the CNCT**, heard in oral argument in support of their conclusions, sought confirmation of the judgment on the admissibility of the CNCT's and the ADNF's civil party claims, on the joint and several liability of SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA and on the fines imposed under Article 475-1 of the Code of Criminal Procedure, and reversal of the judgment as to the remainder, order SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA jointly and severally to pay the sum of 1,730,910 euros as compensation for the damage caused to their respective efforts for tobacco control, that SAS PHILIP MORRIS France be ordered to pay the sum of 20,000 euros under Article 475-1 of the Code of Criminal Procedure on appeal to each of the civil parties and that SA PHILIP MORRIS PRODUCTS be ordered to pay the sum of 20,000 euros under Article 475-1 of the Code of Criminal Procedure on appeal to each of the civil parties.

They specified that they were withdrawing their request for a ban on the sale, distribution or distribution free of charge of products under the IQOS brand on national territory.

**Applicable legislation and case law**

They pointed out that Article L.3512-4 of the French Public Health Code provided that "direct or indirect propaganda or advertising in favour of tobacco, tobacco products or the ingredients defined in Article L .3512-2, as well as any free distribution or sale of a tobacco product at a price lower than that which has been approved in accordance with Article 572 of the French General Tax Code, are prohibited.

These provisions do not apply to tobacco shop signs, provided that these signs comply with the characteristics defined by inter-ministerial decree.

Nor do they apply to:

1. Publications and online communication services published by professional organisations of producers, manufacturers and distributors of tobacco products, intended for their members only, or specialised professional publications, the list of which is drawn up by order signed by the ministers responsible for health and communication, or online communication services published online for a professional matter which are accessible only to professionals in the production, manufacture and distribution of tobacco products;

2. Printed and edited publications and online communication services made available to the public by individuals established in a country that does not belong to the European Union or the European Economic Area, where these publications and online communication services are not primarily intended for the European common market.

Any sponsorship or patronage operation is prohibited when it is carried out by manufacturers, importers or distributors of tobacco products or when its purpose or effect is direct or indirect propaganda or advertising in favour of tobacco, tobacco products and the ingredients defined in Article L.3512-2 I."

To anticipate changes in the market, European and national legislators had targeted emerging tobacco products in the adopted provisions.

The Directive n°2014/40/EU on the manufacture, presentation and sale of tobacco products and related products includes a paragraph which reads as follows:
(34) All tobacco products have the potential to cause mortality, morbidity and disability. Accordingly, their manufacture, distribution and consumption should be regulated. It is, therefore, important to monitor developments as regards to novel tobacco products. Manufacturers and importers should be obliged to submit a notification of novel tobacco products, without prejudice to the power of the Member States to ban or to authorise such novel products.

Article L.3512-1 of the French Public Health Code states that "tobacco products are defined as products that can be consumed and are composed, even partially, of tobacco, whether genetically modified or not.
Tobacco products include cigarettes, roll-your-own tobacco, pipe tobacco, water pipe tobacco, cigars, cigarillos, chewing tobacco, snuff, heating tobacco and oral tobacco.
Tobacco products within the meaning of the first paragraph also include new tobacco products which are products other than those mentioned in the second paragraph, and which were put on the market after 19 May 2014."

Article L.3512-2 of the French Public Health Code defines tobacco products as follows: "tobacco, an additive, and any other substance or element present in a finished tobacco product, including paper, filter, ink, capsules and glues, are considered to be ingredients."

Indirect propaganda or advertising was defined by Article L.3512-5 of the French Public Health Code, paragraph 1, which provided as follows: "propaganda or advertising in favour of an organisation, service, activity, product or article other than tobacco, a tobacco product or an ingredient defined in Article L.3512-2 is considered to be indirect propaganda or advertising when, through its graphics, presentation, use of a brand, advertising emblem or other distinctive sign, it is reminiscent of tobacco, a tobacco product or an ingredient defined in Article L.3512-2."

Article R3512-30 of the French Public Health Code also specifies that "all messages, symbols, trademarks, trade names, figurative or other signs are elements and devices that contribute to the promotion of a tobacco product, within the meaning of 1° of I of Article L.3512-21, if they:

- 1° Suggest that a given tobacco product is less harmful than another, aims to reduce the effect of certain harmful components of smoke, has vitalising, energising, curative, rejuvenating, natural or organic properties or has beneficial effects on health or lifestyle, in terms of weight loss, sex-appeal, social status, social life or qualities such as femininity, masculinity or elegance,
- 2° Suggest a taste, an odour, any flavour or any other additive, or the absence thereof,
- 3° Suggest that a given tobacco product is more biodegradable or has other environmental benefits,

- 4° Suggest economic advantages by means of printed coupons, discount offers, free distribution, "two for the price of one" promotions or other similar offers."

As a result of these provisions, any form of direct or indirect propaganda or advertising in favour of tobacco, tobacco or vaping products is prohibited, apart from the exceptions listed exhaustively by law.

Article L. 3515-3 I 1° of the French Public Health Code provides for penalties for breaches of these provisions:

I. A fine of 100,000 euros shall apply:

1° "Any direct or indirect propaganda or advertising in favour of tobacco, a tobacco product or the ingredients defined in Article L.3512-1 in ignorance of the ban provided for in Article L.3512-4.
For the criminal offences referred to in I, the additional penalty of confiscation of the thing that was used or intended to be used to commit the offence or of the thing that is the product of the offence, pursuant to Article 131-21 of the Criminal Code, shall be imposed.
A repeat offence is punishable by a fine of €200,000. In the event of a repeat offence, the court may also impose a ban on the sale of the products involved in the illegal operation for a period of up to five years.
The court shall order, where appropriate, the suppression, removal or confiscation of the prohibited advertising at the expense of the offenders.
The cessation of advertising may be ordered either at the request of the public prosecutor or ex officio by the examining magistrate or the court hearing the case. The measure thus taken is enforceable notwithstanding any means of appeal. It may be revoked by the court which ordered it, or which is seized of the case. The measure ceases to have effect if the case is dismissed or acquitted."

Additional penalties were provided for legal entities under Article L.3515-6 of the French Public Health Code.

Furthermore, Article 1(c) of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), which France had ratified and whose provisions were deemed binding for the European Union and the Member States by the CJEU in a judgment of 4 May 2016 (Case C-547/14), stated that: "tobacco advertising and promotion means any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly." Advertising was thus defined by the purpose of the action, but also by its actual or expected effect.
Article 13 of the Convention states that the Parties must work towards a comprehensive ban on all direct and indirect advertising and promotion in favour of tobacco. It provides that: "as a minimum, and in accordance with its constitution or constitutional principles, each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions."

The guidelines adopted by the Conference Of the Parties for the application of Article 13 introduced a precise definition of advertising and promotion in favour of tobacco: "it is important to note that both "tobacco advertising and promotion" and "tobacco sponsorship" cover promotion not only of particular tobacco products but also of tobacco use generally; not only acts

with a promotional aim but also acts that have a promotional effect or are likely to have a promotional effect; and not only direct promotion but also indirect promotion."

By a decision of 6 October 2018, the Conference Of the Parties had reminded the parties of their commitments under this Convention when considering the challenges posed by emerging tobacco products such as heated tobacco products and devices designed to use products and to consider giving priority to the following measures: "d) to apply measures regarding advertising, promotion and sponsorship of novel and emerging tobacco products in accordance with Article 13 of the WHO FCTC."

The principle of this ban on direct or indirect advertising had been challenged by tobacco manufacturers on the grounds that it infringed the freedom of enterprise and the freedom of expression, but the Constitutional Council, the Court of Cassation and the European Court of Human Rights ruled that it complied with the general principles of law.

In decision n°90-283 of 8 January 1991, the Constitutional Council rejected the appeal for unconstitutionality against the law, stating that: "the prohibition of propaganda and advertising is undoubtedly likely to affect the exercise of a brand's right of ownership over tobacco or tobacco products, but these provisions are based on the constitutional principle of protecting public health."

With regard to the infringement of the freedom of enterprise, the Council specified that: "the law does not prohibit the production, distribution or sale of tobacco products; the possibility of informing consumers inside tobacco shops ; the prohibition of other forms of advertising or propaganda is based on the requirements of public health, which have constitutional value; it follows that Article 3 of the law does not infringe the freedom of enterprise in a way that would be contrary to the Constitution."
Recently, the principle of this ban, reinforced by the law on the modernisation of the healthcare system, was again challenged before the Constitutional Council. In decision n°2015-727 of 21 January 2016, the Council rejected the appeal on the following grounds: "Considering that it is open to the legislator to restrict the freedom of enterprise which derives from Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789 in accordance with constitutional requirements or justified by the general interest, provided that this does not result in disproportionate interference with the objective pursued ; Considering that, by adopting the contested provisions of Article 23, the legislator intended to prevent persons who do not consume tobacco products from being exposed to advertising in favour of such products which might entice them to such consumption, that it thus pursued the objective of protecting health, and that these provisions do not prohibit the production, distribution or sale of tobacco or tobacco products; that, insofar, as tobacconists may also sell other products and that their customers include people who do not consume tobacco products, the ban on advertising for such products in their points-of-sale, which is in line with the objective pursued by the legislator, does not constitute a manifestly disproportionate infringement of the freedom of enterprise.

With regard to the infringement of freedom of expression, the case law of the Court of Cassation was also unequivocal. The Criminal Chamber consistently affirmed (Crim. 21 February 1996, n° 95-81603 ; Crim. 21 February 1996, B n°86 ; Crim. 18 March 2003, B n°69 ; Crim. 5 April 2011, n°10-87435 ; Crim. 3 November 2010, n°09-88599 ; Crim. 18 March 2003, B n°69) that: "The clear and precise provisions of Articles L.3511-3 and following of the French Public Health Code, which

prohibit propaganda and direct or indirect advertising in favour of tobacco or tobacco products, do not infringe Article 10 of the European Convention on Human Rights and Fundamental Freedoms, or Article 1 of the Additional Protocol, since they constitute a measure necessary for the protection of health and proportionate to this objective of public interest justifying a restriction on freedom of expression and the right to property."

The European Court of Human Rights ruled on tobacco advertising on 5 March 2009 (ECHR, 5 March 2009, *Société de conception de presse et d'édition* and Ponson v France, req. n°26935/05), stating that: "Bearing in mind how important it was to protect public health, the pressing need to take steps to protect our societies from the scourge of smoking, and the existence of a consensus at the European level regarding the prohibition of advertising in respect of tobacco products, the restrictions imposed on the applicants' freedom of expression in the instant case had answered a pressing social need and had not been disproportionate to the legitimate aim pursued."
However, the Court noted that the photographs in question were part of an informative article on sportsmen's incomes, pointing out that informing the public cannot be used as a general justification.
It stresses that restricting advertising in favour of tobacco and tobacco products is an essential part of a more global strategy to combat the social scourge of smoking and that overriding public health considerations, on which the State and the European Union have legislated, may take precedence over economic imperatives and even certain fundamental rights such as the freedom of expression.
An equivalent solution was adopted in the Hachette Filipacchi Presse Automobile and Dupuy v France judgment (ECHR, 5 March 2009, Hachette Filipacchi Presse Automobile and Dupuy v France, req n°13353/05).

Both the Court of Cassation and the European Court of Human Rights have been called upon to rule on the prohibition of direct or indirect propaganda and advertising in favour of tobacco, tobacco products and their brands.

The Criminal Chamber has always relied on the ratio legis to give full scope to the provisions in question. Any communication aimed at encouraging the purchase of tobacco products constitutes prohibited advertising or propaganda, because that is the objective of the law. The Criminal Chamber has consistently stated that:

- any diffusion of a written document, image or photograph used to promote tobacco or tobacco products to encourage purchase, constitutes – whoever the author may be – prohibited advertising or propaganda (Crim. 21 February 1996, n°95-81.605).
- Article L.3511-3 of the French Public Health Code not only criminalises propaganda, but also direct or indirect advertising in favour of tobacco or tobacco products. For the purposes of this text, advertising means any act, whatever its purpose, which has the effect of reminding individuals of these products or their brands (Crim. 18 March 2003, n°02-83.740, Bull. Crim. N°72).
- all forms of commercial communication, whatever the medium, with the aim or effect of directly or indirectly promoting tobacco or a tobacco product are prohibited (Crim. 3 May 2006, n°05-85;089 ; Crim. 15 December 2015, n°14-87.439)."

Therefore, direct or indirect advertising in favour of tobacco or tobacco products includes:

- the distribution – during motor sport competitions – of photographs of vehicles and their drivers bearing the names of cigarette brands (Crim. 18 March 2003, n°02-83.740) ;

- the design of packets of cigarettes which associate tobacco with youth, travel and leisure (Crim. 3 May 2006, n°05-85.089)
- the presentation, by a tobacco manufacturer, of a tobacco product in such a way that it tends to lead people to believe that this product would be ecological or natural and therefore less harmful to the user's health (Crim. 15 December 2015, n°14-87.439).
  The distribution of objects with no direct link to tobacco also constituted direct or indirect advertising in favour of tobacco or tobacco products, if its purpose was to encourage the public to buy or consume tobacco.

In a ruling dated 9 March 2010, the Criminal Chamber dismissed the appeal of the *Société nationale d'exploitation industrielle des tabacs et allumettes* (SEITA), which had been convicted for illegal advertising in respect of the distribution of pens when purchasing packets of cigarettes of the Royal Menthol Polaire brand, the pens bearing the words "*une note très fraiche*" [In English: a very fresh note] (Crim. 9 March 2010, n°08- 88501) : "Whereas, in order to declare the defendant guilty of the offence relating to tobacco advertising, the ruling states that the SEITA company wished to promote cigarette packets, by making their presentation more attractive while seeking to build customer loyalty, or by offering a gift with each purchase of a packet of cigarettes. Whereas based on these statements, the Court of Appeal justified its decision; it is clear from article L.3511-3 of the French Public Health Code that all forms of commercial communication, regardless of the medium, and all dissemination of objects whose purpose or effect is to promote tobacco or a tobacco product, are prohibited"
The defendants cited a ruling relating to a campaign by British American Tobacco France involving the handing out pocket ashtrays on the beaches of France, in which the Criminal Chamber dismissed the association's appeal after the company had been acquitted. In this case, in order to acquit the defendant, the Court of Appeal noted that the distribution had been carried out as part of an environmental protection campaign supported by the public authorities, that the ashtrays only featured the company's website, that this website did not feature any products intended to be sold to the public or any advertising that encouraged or praised smoking, and referred to the French government's website: www.tabac.gouv.fr, designed for smokers wishing to stop smoking (Crim. 23 April 2013, n°12-82.327).

**Concerning the actions of the companies**

Counsel for the ADNF and the CNCT insisted on the fact that the companies had taken part in a vast communication operation in favour of the IQOS tobacco heating system, which had taken several forms: a website, a promotional campaign in tobacco shops and a marketing and customer loyalty strategy.

Under the terms of article 121-2 paragraphs 1 and 3 of the French Penal Code, "Legal entities, with the exception of the State, are criminally liable, in accordance with the distinctions made in Articles 121-4 to 121-7 and in the cases provided for by the law or regulations, for offences committed on their behalf by their bodies or representatives…"

For example, in the case of British American Tobacco Manufacturing BV, manufacturer, and British American Tobacco The Netherlands BV, distributor (Crim. 3 November 2010, n°09-88.598), in which British American Tobacco Manufacturing BV invoked the principle of personal application of criminal law and challenged its liability on the grounds that it had merely carried out instructions given by British American Tobacco The Netherlands BV and that it had no decision-making power with regard to the labelling, packaging and wrapping of cigarette packets, upheld the decision of the Court of Appeal, which had stated that it was established that British American

Tobacco The Netherlands BV was responsible for marketing the products and that it had a common interest, objective and profit-seeking relationship with British American Tobacco Manufacturing, with the former directing the manufacture and marketing of the products and the latter carrying out the latter's instructions, and had convicted the two companies as joint perpetrators of the illegal advertising offences.

In this case, Philip Morris Products SA was responsible for manufacturing the IQOS product. It was also clear from the bailiff's findings that the product packaging bore the name of Philip Morris Products SA and the address of its head office in Switzerland. Philip Monis France SAS distributed and marketed the product in France. It was also the publishing director of the www.iqos.com website. The link between the two companies was such that each page of the website bore the words Philip Morris Products SA at the bottom of the page and the photograph appearing on the website was none other than the head office of the said company.
IQOS was also a priority product for the Philip Morris Group and its promotion was part of a group strategy. Thus, in an article from 28 September 2023, published on the Philip Morris Products SA website, the Philip Morris International Group announced that its objective was that by 2030 smoke-free products should represent 2/3 of its profits, given that the IQOS product represented 86.67% of the group's sales of smoke-free products.

Thus, there was a community of interests, objectives and profit-seeking between the two companies.

The companies' industrial strategy consisted in presenting IQOS as a perfectly neutral product, which would not be a tobacco product but which, nonetheless, would be less harmful than cigarettes. In support of their claims, the defendants cited a decision by the US Food and Drug Administration (FDA), which denied them a harm reduction order but granted them a modified exposure order on the grounds that there was no evidence of harm reduction. The civil parties pointed out that the request for authorisation related to the IQOS tobacco product, as a cigarette in the tobacco category, within the meaning of the US legislation.

There is no clinical or epidemiological evidence of harm reduction. In a document entitled "Interministerial strategy for mobilisation against addictive behaviours 2023-2027", the French Interministerial Mission for Combating Drugs and Addictive Behaviours stated that: "under no circumstances should heated tobacco be used as an aid to quit smoking, as the substances inhaled during its use are the same as in conventional tobacco, even if the concentrations of toxic substances are lower than in smoked tobacco."

The promotion of IQOS, therefore, constituted a direct or indirect promotion of tobacco or a tobacco product, contrary to the companie' claims that the disputed communications related to consumer information as part of a general policy of purely informative communication with no promotional intent.

Proof of this was that the companies presented the IQOS product as a new alternative to cigarettes, with IQOS heating tobacco instead of burning it. The user guide for this product stated that the system for heating tobacco worked exclusively with compatible tobacco sticks available from authorised sales outlets. The application made to the US FDA to obtain marketing authorisation as a harm reduction tobacco product was also indicative of the nature of this product.

In a recent communication, the WHO pointed out that the WHO FCTC recognised heated tobacco products as a tobacco product, containing tobacco and emitting nicotine and other toxic substances, and specifically named IQOS.

This was also the conclusion reached by Chamber 2-9 of the Paris Court of Appeal in a ruling dated 20 March 2024, which stated: "It is clear from the documents in the file and the discussions at the hearing that the product in question consists of several elements presented in the video as forming a whole: an electronic device, an electronic cigarette and a packet of refills bearing the name HEETS. In this respect, it should be noted that the product known as IQOS does contain a part that can be consumed and is composed, even partially, of tobacco.

The separate sale of the IQOS product and its refills was not an obstacle to the companies' conviction, as the promotion of the former was linked to that of tobacco, without which it was of no use. On the website, the product was presented as having many benefits, and the website's intrinsic link with tobacco was announced right from the access page, as the following question was asked: Are you an adult smoker (over 18)? Then the following sentence appeared: This site contains information about a product for use with tobacco. The product was defined as follows: IQOS is an electronic device used exclusively with compatible heating tobacco sticks and presented as an alternative to cigarettes.

The IQOS brand in its semi-figurative form was registered in class 34, which included tobacco, raw or manufactured, tobacco products, including cigars, cigarillos, roll-your-own tobacco, pipe tobacco, chewing tobacco, snuff, electronic devices and parts thereof for heating cigarettes or tobacco to produce aerosols containing nicotine for inhalation.

All of the evidence provided by the civil parties showed that all the instances of the IQOS brand, its logos and all the wordings used to describe it were used for the direct or indirect promotion of tobacco or a tobacco product.

The promotion of a tobacco heating system necessarily implied an indirect promotion of tobacco use.
The defendants criticised the court for finding that the companies presented the IQOS product as consisting of three parts: a heated tobacco unit containing a stick, a holder into which the tobacco unit is inserted and a charger. Yet this is how they described the product in the file submitted to the FDA. As noted by the court, the product is presented on the website as having many benefits (no cigarette smell, no ashes, no smoke). The aim was to encourage people to smoke, but to smoke better, in a less ordinary, more modern, in a more in touch way. This objective is clearly stated, since under the slogan "Delivering a smoke-free future", it is stated: our mission is to offer better alternatives to adult smokers who want to continue using tobacco. The laudatory language (best alternative, exceptional technology) and the presentation of the product in terms of scientific progress and medical reassurance were part of this advertising.

In a study published in the scientific journal *Toxics* by the MPDI website on 6 September 2023, the authors concluded that heated tobacco products had acute harmful effects on the function of the small airways, even exceeding those of traditional cigarettes.

To attract consumers, the companies offered the opportunity to discover and try out the products with the help of experts who would assist buyers by telephone and even in person in the Paris

region and in the Alpes-Maritimes region. The website invited Internet users to fill in a form that would enable them to be contacted directly by IQOS and meet with an expert.

The website also made it possible to buy IQOS products online or to find a point-of-sale.

The accused companies had also organised a large-scale promotional campaign in a number of tobacconists outlets, where small posters were affixed to the outside facade, mentioning “IQOS service point”, “IQOS partner”, or featuring a sticker featuring a blue hummingbird, the figurative sign of the IQOS brand.

Yet companies specialising in the sale and manufacture of tobacco were perfectly familiar with the applicable legislation.

**Concerning the damage**

There was no doubt that the offences committed undermined the public health interests that the CNCT and the ADNF were protecting. However, the damages awarded appeared insufficient.

The civil parties recalled that the Court of Cassation (Crim. 26 September 2006, no. 05-87.681) had validated the decision of a court of appeal which had ordered a representative of the SEITA company to pay the tobacco control association the sum of 147,600 euros in damages, on the basis of the number of packets of cigarettes sold, pointing out that this was a matter for the court’s sovereign discretion.

In this case, the civil parties had not experienced an operation of such sophistication and scale since the adoption of the Evin law in 1991. In its 2023 report, the Philip Morris Group noted that its marketing strategy was successful, with the number of IQOS consumers growing to 33 million.

Courts had already considered that, in the face of such media pressure, it was fair to provide public interest associations with the financial means to mount an advertising counter-offensive on the same scale (TGI Quimper, 19 May 1994). This was the jurisprudential affirmation of the principle of media compensation, according to which the loss suffered should be assessed on the basis of the advertising expenditure incurred by the defendants. The total cost of developing IQOS was approximately 3 billion dollars. The civil parties had asked a communications agency to conduct an audit of the launch of Philip Morris’s new brand, IQOS, to assess the cost of designing and producing a digital promotional launch campaign. The agency concluded that it would have cost between 548,200 and several million euros.

The civil parties also proposed a flat-rate valuation of the services rendered by the companies at 3,000 euros per tobacconist. The loss thus amounted to 1,206,000 euros, based on the existence of 402 sales outlets.

As regards the cost of small poster advertising in the 623 IQOS sales outlets, based on the cost of a 7-day poster advertising campaign of 5,500 euros excluding tax, the amount spent on this advertising over 72 weeks was at minimum of 524,910 euros.

These figures were miniscule compared with the turnover and profits of the accused companies. On 31 December 2018, PHILIP MORRIS France had a turnover of 582,460 million euros and a profit

of 13,438 million euros, and on 31 December 2020, a turnover of 564,916 million euros and a profit of 11,952 million euros. PHILIP MORRIS INTERNATIONAL had total turnover of 18 billion euros on 31 March 2018, with IQOS accounting for 18.7% of their worldwide turnover by 2021.

These figures also had to be compared with the cost of smoking in France. According to the Court of Auditors' report of December 2012, smoking was responsible for 73,000 deaths in France and was estimated to cost the Social Security system 20 billion euros.

Counsel for the Association undertook to communicate a judgment relating to shisha, a judgment of the Paris Criminal Court dated 6 October 2021, which was communicated on 1 May 2024.

**The Advocate General** indicated that she had no observations to make.

**SAS PHILIP MORRIS FRANCE and PHILIP MORRIS PRODUCTS SA** were represented by their counsel. It is appropriate to rule against them in a contradictory decision.

**Counsel for the companies**, heard in oral argument, sought to have the judgment set aside in its entirety, to have Philip Morris France SAS and Philip Morris Products SA acquitted, and to have all the civil parties dismissed.

As a preliminary point, he recalled that Philip Morris France was created in 1972 as a company of the Philip Morris International group, responsible for marketing the group's products in France, and notably a brand of heated tobacco called HEETS, and an electronic device called IQOS for heating purposes. The IQOS electronic device had been designed and manufactured by another Group company, Philip Morris Products, which features a research, development and scientific evaluation centre since 2009.

For several years, the group's global strategy has been to develop alternative products to cigarettes, with 99% of its Research and Development expenditure allocated to them, representing 18.7% and 32.1% of its sales in 2021 and 2022 respectively. The aim was to offer alternatives with lower levels of harmful components than traditional cigarettes. There was scientific consensus on the fact that the temperatures over 600°C – required to burn the tobacco in cigarettes – generated smoke containing thousands of chemical substances, including high levels of harmful components, which are the main causes of smoking-related illnesses.
The IQOS electronic device was designed to heat refills to a maximum temperature of 350°C, which is below the combustion threshold. The US FDA approved its marketing, observing that the product considerably reduced the production of harmful chemicals.

The device consisted of two parts: a pen used to heat a compatible tobacco refill by means of a heating blade placed inside and activated by a button, and a charger allowing the pen to be recharged and put away after each use. It was to be used with compatible tobacco refills from the HEETS range.

The product was first launched in Japan and Italy in 2014, followed by Switzerland in 2015 and France in May 2017. It was supported by an online sales website. To date, IQOS has been marketed in approximately 82 countries, including most of the European Union. Over 20.8 million adult smokers worldwide had opted for IQOS.

In France, the IQOS electronic device, marketed inside and outside the tobacconist network, through online sales, at the current price of 99 Euros, constituted an everyday consumer product and was not subject to the State sales monopoly. HEETS tobacco refills, on the other hand, were only sold by tobacconists or authorised retailers in accordance with the State monopoly, and are subject to excise duty, the first references having been notified to ANSES (French Agency for Food, Environmental and Occupational Health & Safety) on 1 November 2016 for a launch date in May 2017.

The Criminal Court found the companies guilty of tobacco advertising, on the grounds that the IQOS electronic device was a tobacco product since its use required the insertion of a HEETS tobacco refill to be heated, and that the companies were inciting the consumption of the latter. The Court overturned the judgement, stating that no offence could be held to have been committed because Philip Morris Products SA was not responsible for the facts, the IQOS electronic device was not a tobacco product, and the communications in question did not constitute advertising but rather information of limited access to adult smokers on the essential characteristics of IQOS in compliance with the French Consumer Code, the effect of the judgment was to prohibit any communication on technological advances, a prohibition that constituted a disproportionate infringement of consumers' freedom of expression and information regarding the products they consume.

**Philip Morris Products' failure to be held liable**

The Court based the company's liability on the existence of a community of interest with Philip Morris France SAS, the former manufacturing the product and the latter marketing it. However, this criterion had no legal basis, the principle being that of personal criminal liability. Contrary to what the civil parties maintained, the decision of the Criminal Chamber of the Court of Cassation on 3 November 2010 did not establish a new method of attributing offences. It upheld the conviction of two companies, British American Tobacco Manufacturing BV and British American Tobacco The Netherlands BV, for what it considered to be appealing labelling on packets of cigarettes, applying correctly the principle of personal liability, one company being liable for the manufacture of the packaging and the other for directing the manufacture of the packets of cigarettes and marketing them in France, the companies also being bound by a manufacturing contract.

In this case, Philip-Morris Products SA's main activity was the industrial manufacture of products developed by the Philip Morris Group and it could not be held liable for any positive act of participation in the acts in question, especially as Philip Morris Products SA was not the Group's parent company and therefore could not be held liable for a strategy decided at Group level. The Criminal Chamber recalled: "Whereas, in acquitting Alain X... of this offence and dismissing the claim brought by the *Comité national contre le tabagisme*, a civil party, against the defendant and the civilly liable party, the judgment under appeal states that it has not been established that Philip Morris France contributed in any way whatsoever to the advertising commissioned by Philip Morris Holand, a company incorporated under Dutch law ; the judges at second instance add that, even if the French company had benefited from the illegal advertising, its director could not be held criminally liable. The fact that Philip Morris Products SA was the manufacturer and may have had an interest in the alleged advertising was therefore insufficient to engage its personal criminal liability.

Nor did intra-group links with the seller make the manufacturer a co-perpetrator of the offence. In the case law produced on this point by the civil parties, manufacturers had been convicted either because they were in charge of marketing or because of laudatory statements on the packets of cigarettes they manufactured.

The fact that Philip Monis Products SA was mentioned on the packaging of IQOS or on the pages of the website could not be construed as an act of personal involvement of any kind, since that company was not responsible for marketing the group's products in France, had no prerogative over the content of the website, was neither its publisher nor its host, and had played no role in the recruitment of consultants or the affixing of small posters at tobacco shops.

**An offence not constituted**

The judgment had wrongly classified IQOS as a tobacco product. Contrary to what the Court had said, the companies had never presented the product as being composed of three parts containing a tobacco stick and as being a tobacco product. However, the prevention only concerned the IQOS electronic device, and it had not been shown that its presentation constituted a promotion for HEETS tobacco refills, as the disputed communications did not contain any textual references or images of HEETS refills. This device was not itself a tobacco product, under the terms of Article L.3512-1 of the French Public Health Code, which was interpreted strictly, including in the eyes of the ANSES. It was to be considered equivalent to accessories used for the use of tobacco products, such as pipes, shishas, lighters, cigarette holders, ashtrays, etc., which could be used with tobacco products but were not tobacco products and were not covered by any specific regime defined by the French Public Health Code.

The civil parties added to the proceedings a judgment handed down on 20 March 2024 by Chamber 9 of Division 2 of the Paris Court of Appeal, which was not final because of the appeal to the Supreme Court, stating: "It is clear from the documents in the file and the discussions at the hearing that the product in question issue consists of several elements presented in the video as forming a whole: an electronic device, an electronic cigarette and a packet of refills bearing the name HEETS," whereas this product consisted exclusively of two parts.

The judgment found that certain references on the website (alternative to cigarettes, heating tobacco, use of tobacco) meant that the companies themselves recognised that IQOS was a tobacco product. However, these references did not refer to a legal regime, but to a function of the device and informed the consumer.

It also relied on the FDA's decision to authorise the marketing of IQOS and three HEETS refill variants as modified risk tobacco products, even though this was a designation derived from the US law, which provides that tobacco accessories belong to the category of tobacco products. The term "tobacco product" referred to any product made from or derived from tobacco and intended for consumption.

The companies emphasised that the minutes recording the role of the IQOS consultants had been initiated by Ms ESCHENBRENNER, director of communications and spokesperson for the CNCT, the purpose of the meeting being to obtain the IQOS electronic device and HEETS refills, independently of any intervention by the IQOS expert. Furthermore, as the bailiff was unable to enter the tobacco shop, he was unable to observe any encouragement to purchase the device

and the refills. It was clear from the bailiff's report of 10 January 2019 that the mission of the IQOS experts was to present the IQOS device and how it worked to adult smokers who had requested this information via the website and to enable users to test the IQOS device, not to sell it, and even less so the HEETS refills, which could only be sold at tobacconists. These facts were solely part of Philip Morris France SAS' right to inform consumers about the essential functions and characteristics of the IQOS device.

The promotion at Parisian parties was based on an extrapolation of a press article dated 12 March 2018.

As for the IQOS website, which was exclusively intended for adult smokers and presented in accordance with current standards, with an opt-in procedure, it did not state that the device was less harmful than ordinary cigarettes, nor did it offer a 15-day trial with no obligation, nor did it make it easy to find a point-of-sale, as the report only mentioned points-of-sale in the Ile-de-France region, contrary to what the Court indicated.

In addition, the bailiff's reports drawn up at the request of the civil parties were limited to reports dated 13 February 2018 (small posters on 9 shopfronts in Paris), 19 and 25 July 2018 (small posters on 11 shopfronts in Paris), 10 January 2019 (website www.iqos.fr), 26 February 2019 (purchase of the electronic device IQOS in Paris) and 15 July 2021 (small posters on 2 shopfronts in Paris), the Court could not convict for acts committed between January 2017 and July 2019 in Paris and on national territory.

**Inappropriate legal characterisations adopted by the Court**

The French Public Health Code made a distinction between tobacco products and vaping products, but no other specific rules governed devices for using tobacco products, such as cigarette holders, pipes, lighters, pocket ashtrays, cigarette cases, etc., which were governed by the general law applicable to consumer goods. Such devices were available in many shop windows.

This was the case with shisha, as stated on the government's "tabac-infoservice.fr" website: "It is forbidden to sell vaping and tobacco products or their ingredients, including paper and filters, to minors under the age of 18 in all tobacconists, shops or public places. However, this does not apply to the device itself."

However, under the terms of article L.3512-4 of the French Public Health Code, only advertising for tobacco, tobacco products or ingredients was prohibited, these products and ingredients being defined by article L.3512-l of the French Public Health Code.

The 2014 European Directive also failed to cover electronic devices for heating tobacco.

The texts derived from the WHO FCTC were not applicable as they did not create rights that could be directly invoked before the national courts, but rather guidelines for the development of national legislation and policies in the field of tobacco control. CJEU judgment C-547/14, Philip Morris Brands SARL of 4 May 2016 thus stated: "it is correct that the FCTC guidelines do not have binding force." Furthermore, the FCTC, as ratified by the States Parties, did not include either heated tobacco or electronic devices in the definition of tobacco products.

The report published on 30 September 2020 by Mr Armando Peruga, consultant to the WHO Regional Office for Europe, was not binding in any way, being in fact no more than a study carried out within the WHO.

The Court wrongly classified the acts in question as "advertising" and ignored the principle of strict interpretation of criminal law by considering the essential information on an ordinary consumer product to be an incitement to indirectly consume the tobacco refills. However, information on the essential characteristics of the product met the legal requirements of the consumer law. The Court of Cassation limited the scope of repression to the dissemination of information that went beyond what was strictly necessary to present objectively, in the context of marketing, the essential characteristics, within the meaning of the Consumer Code, of a product, including "its nature, composition, usefulness, conditions of use or terms of sale."

In a judgment of 5 May 2011, the CJEU drew a clear distinction between advertising and a general communication policy intended to inform consumers. The Court held that: " The question whether a dissemination of information has a promotional objective must be determined by undertaking a detailed examination of all the relevant circumstances of the case, which is for the national court" and that "As regards the identity of the person disseminating information relating to a medicinal product, although it is undeniable that the manufacturer of that medicinal product has a financial interest in marketing its product, the fact that the manufacturer disseminates such information itself cannot, as such, lead to the conclusion that it has an advertising purpose. It is also necessary, for such a fact to be a conclusive factor in favour of the classification of that dissemination as advertising, that the conduct, action and approaches of the manufacturer disclose its intention to promote, via such dissemination, the prescription, supply, sale or consumption of that medicinal product."

Communications relating to the IQOS product played a major part in this objective, since the public was not accustomed to the operation of a new and innovative device. This was the minimum information required to bring an emerging product to market.

The counsel insisted that the website did not include any laudatory mention of a tobacco product and that at no time did it claim that the IQOS product was less harmful than a cigarette. The benefits referred to on the website were exclusively those attributed to the use of the electronic device and were merely a reflection of scientific reality. Moreover, the case law relating to products equivalent to cigarettes was not transposable, since IQOS was a device that differed from cigarettes. The services offered on the website contained no incitement to use tobacco products. The Court criticised the website for guiding consumers in the use of the product and in finding a sales outlet, offering to discover and try out the product, online sales and an after-sales coaching service. However, all these services were perfectly legal, being an everyday consumer product, whose sale was authorised, and did not exceed the limits of what consumer law allows. Alternatively, it should be considered that any marketing of a product that is even remotely similar to tobacco should be prohibited insofar as it encourages tobacco use.

Nor did the use of IQOS experts constitute illegal advertising in favour of tobacco, as the Court had ruled. Firstly, the reality of the recruitment of hostesses in bars was in no way demonstrated by the press articles relating to isolated behaviours presented by the civil parties.

As for the use of IQOS experts to present the electronic devices to adult smokers who had expressly requested them on the website, this did not constitute advertising within the scope of Article L.3512-4 of the French Public Health Code.

With regard to the small posters displayed on tobacco shop fronts, the bailiff found that many small posters mentioned “IQOS service point”, which was merely an indication and did not include any reference to tobacco.

The companies disputed that IQOS was the acronym for “I Quit Ordinary Smoking.” The blue hummingbird used as a distinctive sign was alien to the world of tobacco.

Consequently, the contested communications as a whole cannot constitute direct or indirect advertising in favour of tobacco or a tobacco product.

Alternatively, counsel argued that the repression of such communications amounted to a ban on all communications about technological products such as IQOS, a wholly disproportionate infringement of consumers’ freedom of expression and freedom of information, a plea to which the Court did not respond.

The right to freedom of expression, as enshrined in both national and European case law, did not make this right conditional on participation in a debate of public interest.

The Conseil d’Etat, the European Court of Human Rights (ECHR) and the Constitutional Council considered that infringements of fundamental freedoms were only admissible in the case of serious health risks, such as those posed by traditional cigarettes. In the case of products currently being assessed by the French health authorities, the principle of proportionality required that the restrictions placed on fundamental freedoms be mitigated by allowing manufacturers to provide objective information about these products in the light of their freedom to inform, the obligations to inform consumers as set out in the French Consumer Code and the freedom of smokers to be informed of the existence of a product that is less harmful to their health.

The Conseil d'Etat, faced with the restriction on the harvesting, importing and marketing of CBD, carried out an in concreto analysis of the proportionality of these measures with regard to the properties of the flowers and leaves of cannabis varieties with a delta-9-tetrahydrocannabinol (THC) content of less than 0.30%, on the basis of existing scientific data, and concluded: “While 0.30% delta-9-tetrahydrocannibinol is not a harmless threshold, there is no evidence in the files that flowers and leaves of cannabis varieties with a delta-9-tetradyrocannibinol content of less than 0.30% present risks to public health that would justify a general and absolute ban on their marketing and a restriction on the harvesting, importing and marketing for industrial production of hemp extracts.” The Conseil d’Etat dismissed the government’s argument that the resemblance between CBD and cannabis varieties with narcotic properties would undermine the effectiveness of anti-narcotics policy, on the grounds that “the protection of public order and the risks to public health posed by other cannabis varieties with a similar appearance cannot, in any event, justify restricting the use of the flowers and leaves of varieties with a delta-9-tetrahydrocannabinol content of less than 0.30% solely to the industrial production of hemp extracts’ (CE, 1st - 4th joint Chambers, 29 December 2022, n°444887, section 19. 13° ld., section 20).

When the ECHR was called upon to rule on infringement with respect to the freedom of expression in the event of a conviction for illegal advertising in favour of tobacco, in a case where a cigarette brand appeared on the disputed publication, it based its decision on the existence of a European consensus on the wish to strictly regulate the advertising of tobacco consumption: “paramount public health considerations, on which the State and the European Union have legislated, may take precedence over economic imperatives and even certain fundamental rights such as freedom of expression.” Conversely, in the absence of a European consensus on heated tobacco or electronic devices, it is all the more necessary to carry out a proportionality review. (ECHR, 5

March 2009, *Société de conception de presse et d'édition* and Ponson v France, req. n°26935/05, sections 52.45).

Counsel also pointed out that, under Article 10 section 1 of the European Convention, freedom of expression included freedom to receive or impart information or ideas. The civil parties put forward the objective of public health; however, if smokers were not informed of existing alternatives to cigarettes, they would not change their habits. Any form of communication relating to a new product could not be prohibited, otherwise the state of the market would remain unchanged, giving undue advantage to older products, in this case cigarettes, which were known to be harmful (ECHR Kalda v. Estonia, appeal n°17429/10, 19 January 2016, section 41 and following).

In any case, counsel for the companies pointed out that in the French criminal law any economic result of the offence could not be taken into account in calculating the quantum of the penalty, but only the seriousness of the facts and the disturbance to public order. Moreover, the rationale underlying the investments made by the Philip Morris Group was far removed from any alleged intentional breach of the law, since the aim was to design and manufacture smoke-free products as an alternative to cigarettes, the levels of harmful components of which were lower than those of cigarettes. If the guilty verdict was upheld, it was therefore appropriate to reduce the amount of the fines.

The claims for damages and a ban on the sale of the disputed product were unfounded.

The CNCT is asking for punitive damages to be awarded, in defiance of the principles governing compensation for victims of offences who, under the terms of Article 2 of the Code of Criminal Procedure, can only claim compensation for the harm caused by the acts in question, and even though, contrary to what the civil parties maintained, the companies' approach did not consist solely in the pursuit of financial gain but in developing less harmful alternative products. The assessment of the harm done to the fight against smoking could not be based on the cost of the resources used and the companies' profits. However, the fundamental principles of compensation law were based on the principle of full compensation, according to which the law aimed to re-establish as accurately as possible the balance that had been lost as a result of the damage, and to put the victim back in the situation in which he or she would have been had the harmful act not occurred.

In an opinion issued on 9 February 2023, the Conseil d'Etat maintained its position and expressed "strong reservations" on the creation of a civil penalty for lucrative misconduct, which would be likely "to compromise conventional requirements relating to the accessibility and foreseeability of the law on penalties as well as the rules governing proceedings."

This principle was also reiterated by the Court of Cassation (Cass. Civ. 23 January 2003, 01-00.200), which stated: "In so ruling, the Court of Appeal, which did not place the victim in the situation in which he or she would have been had the harmful act not occurred, violated the aforementioned text; (...) Damages granted to a victim must compensate for the harm suffered without resulting in either loss or profit for the victim."

In addition, the civil parties did not prove any concrete prejudice in connection with the facts in dispute.

The media damage claimed by the civil parties had no legal or case-law basis. They relied on an isolated decision of the Quimper Tribunal de Grande Instance dated 19 May 1994, which had been

commented on by Mr Gestermann, Public Prosecutor at the Tribunal de Grande Instance, who had stated that “this judgment is undoubtedly not objectively destined to pass into posterity”, a reversal decision by the Court of Appeal (CA Rennes 6 April 1995, n°691195) and two decisions by the Criminal Chamber of the Court of Cassation (Cass. crim. 22 January 1997 n°95-82.674, Bull. crim. 1997 n°29, p.74; Cass. crim. 29 June 1999 n°98-81.962, Bull. crim. 1999, n°164, p.459; Cass. crim. 18 June 2002 n°01-84.437, unpublished) which excluded compensation for media damage.

The Paris Court of Appeal had expressly refused to recognise this type of damage in two similar cases, in which it stated: “On the claims for compensation submitted by the Comité National Contre le Tabagisme: bearing in mind that the CNCT claims damages which it has evaluated at the sum of 271,440 euros for the Marlboro Classics signs and 2,412,550 euros for the clothing reproducing the Marlboro Classics brand ; that it is asking that MEG France be ordered to pay these sums corresponding to ‘media compensation’ enabling the CNCT to have the financial means to conduct an information campaign on the same scale as the indirect advertising denounced and promoting a tobacco-free life ; Bearing in mind that, in the current state of positive law, the civil party can only demand compensation for the loss it has itself suffered, and that to envisage media compensation, the assessment of which is uncertain, would in reality create compensation for a loss that is not provided for by any law” (Paris Court of Appeal 25 October 2007 n°07102937 and Paris Court of Appeal 25 October 2007 n°07102935).

The civil parties also claimed that they were applying the formula “one euro spent = one euro allocated” to seek total compensation of close to 1.8 million euros, while admitting that they did not know the amount of the expenses incurred by the group and proposing an entirely approximate estimate via an audit. In addition, the civil parties claimed that the small posters displayed in tobacco shops existed in all 623 IQOS sales outlets in France, even though the report did not cover all the points-of-sale.

Lastly, it was necessary to confirm the rejection of the application for a ban on the sale, distribution and gratuitous offering of the IQOS HeatConfrol Technology kit, as such a ban is not provided for by law and the CNCT itself acknowledges in the direct summons that it is not prohibited to sell or promote the IQOS HeatConfrol Technology kit. In any event, such a measure would be disproportionate, since it has not been established that any acts were committed that would justify a conviction outside Paris, on the French territory.

Counsel for the companies undertook to provide, during the deliberations, any information relating to the observations concerning the small posters affixed at tobacconists, the employees responsible for marketing the product and the development and maintenance of the website. On 17 May 2024, it submitted a memorandum for deliberation in which it argued that the facts that gave rise to the judgment submitted for deliberation were not comparable to the facts in the present case, since the publication in question stated that “you could smoke peacefully on your sofa”, and it was this reference to tobacco that had been sanctioned, whereas in the present case no reference to the HEETS tobacco refills was made in the contested communications. He added that the judgment made a distinction between tobacco products and water pipes.

With regard to the documents requested by the Court of Appeal, counsel for the companies stated that the website was hosted by Amazon Web Services as part of an IT service provided under a contract between Adobe Systems Software Ireland Limited and PMI IT Service Center SARL, a subsidiary of the Swiss company PHILIP MORRIS BRANDS SARL, itself a subsidiary of the American company PHILIP MORRIS INTERNATIONAL INC, with no link to PHILIP MORRIS PRODUCTS.

He added that there was no contract concerning the small posters affixed at tobacconists.

Finally, regarding the agents responsible for the marketing of IQOS products, PHILIP MORRIS France had used the services of a provider, GR EVENEMENTS, under the terms of a contract dated 8 July 2019, which was attached.

**HAVING REGARD TO THE AFORESAID**

**ON THE ADMISSIBILITY OF THE APPEALS**

Counsel for SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS has lodged a main appeal against the judgment delivered by the Paris Criminal Court on 3 December 2021, in a statement filed with the court registry on 13 December 2021.

These formal appeals, lodged within 10 days of the decision, are admissible under Articles 498 and 502 of the Code of Criminal Procedure (CCP).

The same applies to the cross-appeals lodged in the same form by the Public Prosecutor on the one hand and legal counsel for the ADNF and the CNCT on the other hand, on the same day and on 14 December 2021 respectively, pursuant to Articles 498 and 500 of the Code of Criminal Procedure.

**ON THE MERITS**

**<u>On public prosecution</u>**

**On guilt**,

The Court of Appeal recalls the legislation in force during the prevention period.

Under Article L.3512-4 of the French Public Health Code, "direct or indirect propaganda or advertising in favour of tobacco, tobacco products or the ingredients defined in Article L .3512-2, as well as any free distribution or sale of a tobacco product at a price lower than that which has been approved in accordance with Article 572 of the French General Tax Code, are prohibited.

These provisions do not apply to tobacco shop signs, provided that these signs comply with the characteristics defined by inter-ministerial decree.

Nor do they apply to:

1. Publications and online communication services published by professional organisations of producers, manufacturers and distributors of tobacco products, intended for their members only, or specialised professional publications, the list of which is drawn up by order signed by the ministers responsible for health and communication, or online communication services published online for a professional matter which are accessible only to professionals in the production, manufacture and distribution of tobacco products;

2. Printed and edited publications and online communication services made available to the public by individuals established in a country that does not belong to the European Union or the European Economic Area, where these publications and online communication services are not primarily intended for the European common market.

Any sponsorship or patronage operation is prohibited when it is carried out by manufacturers, importers or distributors of tobacco products or when its purpose or effect is direct or indirect

propaganda or advertising in favour of tobacco, tobacco products and the ingredients defined in Article L.3512-2."

Article L.3512-5 of the French Public Health Code states that "propaganda or advertising in favour of an organisation, service, activity, product or article other than tobacco, a tobacco product or an ingredient defined in Article L.3512-2 is considered to be indirect propaganda or advertising when, through its graphics, presentation, use of a brand, advertising emblem or other distinctive sign, it is reminiscent of tobacco, a tobacco product or an ingredient defined in Article L.3512-2.

However, these provisions do not apply to propaganda or advertising in favour of a product other than tobacco, a tobacco product or an ingredient defined in Article L.3512-2 which was put on the market before 1 January 1990 by an undertaking which is legally and financially distinct from any entity which manufactures, imports or markets tobacco, a tobacco product or an ingredient defined in Article L.3512-2. The creation of a legal or financial link between these undertakings renders this derogation null and void."

Article L.3512-1 of the French Public Health Code states that "tobacco products are defined as products that can be consumed and are composed, even partially, of tobacco, whether genetically modified or not.

Tobacco products include cigarettes, roll-your-own tobacco, pipe tobacco, water pipe tobacco, cigars, cigarillos, chewing tobacco, snuff, heating tobacco and oral tobacco.

Tobacco products within the meaning of the first paragraph also include new tobacco products which are products other than those mentioned in the second paragraph, and which were put on the market after 19 May 2014."

Lastly, Article L.3512-2 of the French Public Health Code states that "tobacco, an additive, and any other substance or element present in a finished tobacco product, including paper, filter, ink, capsules and glues, are considered to be ingredients."

The Court also pointed out that, under Article 111-4 of the French Criminal Code, criminal law is subject to strict interpretation.

In the present case, the parties agree that the website accessible in France at the following address: **https://fr.iqos.com/fr/home**, as well as the small posters mentioning "IQOS service point" or "IQOS partner" and the sticker featuring a blue hummingbird, affixed to the outside of 21 tobacco shops, and appointments with agents, related to the IQOS device.

This also emerged from the bailiff's reports regarding the website, the points-of-sale and the appointment with an IQOS expert.

As shown in the bailiff's report from 26 February 2019, this kit consists of a pocket charger, an electronic cigarette, a rigid plastic holder, a USB power adapter, a USB lead, a cleaning brush, cleaning tips, a user guide and information on legal guarantees.

It therefore meets neither the definition of tobacco products nor that of ingredients set out in Articles L.3512-1 and L.3512-2 of the French Public Health Code.

These Articles exclusively apply to products composed – even partially – of tobacco and which may be consumed, and to any other element present in a finished tobacco product, such as an additive or a filter.

Contrary to the claims of the civil parties, the devices used to smoke tobacco do not constitute tobacco or an ingredient within the meaning of the aforementioned articles.

If such were the case, the sale of these devices would come under the State monopoly and could only take place at authorised tobacconists.

Yet the **https://fr.iqos.com/fr/home** website, by communicating on the IQOS device, constantly evokes tobacco to its visitors.

The bailiff's report from 10 January 2019 shows that access to the website is only granted after answering the question: "Are you an adult smoker?"

The product is presented as an alternative to cigarettes for smokers wishing to continue smoking, in that it heats tobacco instead of burning it.

On 13 February and 19 and 25 July 2019, the bailiff observed the presence of signs mentioning "IQOS service point" or "IQOS partner" and stickers featuring a blue hummingbird on the exterior facades of 21 Parisian tobacconists.

However, both this brand and this logo refer to the IQOS kit and, consequently, to the tobacco that it enables to be consumed, especially as these brands and logos are affixed precisely at tobacconists.

The purpose of the appointment organised by the IQOS expert with Ms ESCHENBRENNER on 27 February 2019 at "*La Tabatière*" was to test the product and consequently to use tobacco. This appointment resulted in the purchase of the IQOS device and its HEETS tobacco refill.

Contrary to what PHILIP MORRIS France and PHILIP MORRIS PRODUCTS claim, the website, as well as the small posters and the appointments, aim to advertise IQOS by creating a website dedicated to the product, widely publicising its advantages over cigarettes, clearly identifying its points-of-sale and helping users to discover the product.

This advertising is part of a commercial strategy aimed at circumventing the ban on tobacco advertising by focusing the communication on the IQOS product, which enables tobacco use, and not on the HEETS tobacco refills themselves.

All of these communications relating to the IQOS device, which inevitably refer to the tobacco that can be consumed with this product, therefore constitute illegal indirect tobacco advertising within the scope of Article L.3512-5 of the French Public Health Code."

The Court noted that although – as the companies argued – the bailiff's reports relating to these communications took place between 10 January and 25 July 2019 in Paris and not between January 2017 and July 2019 throughout France, legal counsel for the companies indicated in its submissions that the IQOS product had been launched in France, in May 2017, and had been supplemented by an e-commerce website.

Thus, the infringement applies to the period spanning from May 2017 to 25 July 2019, but not to the period from January to April 2017.

However, as the marketing took place via the website, the direct summons was right to target an offence committed throughout France.

Contrary to what the companies state, the ban on such advertising is not contrary to Article 10 of the European Convention on Human Rights.

Given the public interest objective of safeguarding public health, the need to combat the social scourge that smoking constitutes in our societies, the overriding social need to take action in this area and the existence of a European consensus on the ban on tobacco advertising, the restrictions placed in this case on companies' freedom of expression meet such a need and are not disproportionate to the legitimate aim pursued.

The Court observed that PHILIP MORRIS France did not dispute its responsibility for the litigious communications, bearing in mind that it belongs to the Philip Morris International group and that it is responsible for marketing the group's products in France, in particular the HEETS brand of heating tobacco product and the IQOS electronic device used for heating it.

It thus acknowledged that it was the publisher of the website and, in its note for deliberation, its counsel also indicated that, with regard to the experts responsible for marketing the IQOS product, it was PHILIP MORRIS France that had called upon a service provider, GR EVENEMENTS, as attested by the attached contract dated 8 July 2019.

Regarding PHILIP MORRIS PRODUCTS, the advertising for IQOS that it designed and manufactured was inevitably developed in tandem with the company.

As mentioned above, this advertising operation focused on the technology of IQOS.

It is therefore necessary to:

- Overturn the judgment on guilt, insofar as it found PHILIP MORRIS France and PHILIP MORRIS Products guilty of having – between January 2017 and July 2019 – in Paris and throughout France, committed illegal tobacco advertising within the meaning of Article L.3512-4 of the French Public Health Code by:
    - Publishing the website **https://fr.iqos.com/fr/home** accessible in France,
    - By affixing signs stating "IQOS service point", "IQOS partner", and a sticker featuring a blue hummingbird to the exterior of 21 tobacco shops,
    - And by organising appointments with agents responsible for marketing IQOS devices and HEETS tobacco refills,
- Dismiss PHILIP MORRIS France and PHILIP MORRIS Products from the proceedings for the period from January to April 2017,
- And to declare the companies PHILIP MORRIS France and PHILIP MORRIS PRODUCTS guilty of having – between May 2017 and 25 July 2019 – in Paris and throughout France, committed illegal tobacco advertising within the meaning of Article L. 3512-4 of the French Public Health Code by:
    - Publishing the website **https://fr.iqos.com/fr/home** accessible in France,
    - By affixing signs stating "IQOS service point", "IQOS partner", and a sticker featuring a blue hummingbird to the exterior of 21 tobacco shops,
    - And by organising appointments with agents responsible for marketing IQOS devices and HEETS tobacco refills.

**On the sentence**

Article L.3515-3 of the French Public Health Code, in force at the time of the events, provides for a fine of 100,000 euros for the offence in question, it being specified that, pursuant to Article 131-38 of the French Criminal Code, the maximum fine applicable to legal entities is five times the fine provided for natural persons by the law punishing the offence.

Under the terms of Article 132-1 paragraph 3 of the French Criminal Code "within the limits set by the law, the court shall determine the nature, quantum and regime of the sentences imposed according to the circumstances of the offence and the personality of the offender, as well as their material, family and social situation, in accordance with the purposes and functions of the sentence set out in Article 130-1."

These purposes and functions of sentencing are reiterated in Article 130-1 of the French Criminal Code, which states that "in order to ensure the protection of society, to prevent the perpetration of new offences and to restore social equilibrium, while respecting the interests of the victim, the functions of sentencing are to punish the offender and promote their reformation, integration or rehabilitation."

In this case, the illegal indirect tobacco advertising carried out by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS is part of a veritable strategy aimed at circumventing the ban on tobacco advertising by focusing their advertising on the device used to heat tobacco and not on the tobacco refills as such.

This illegal advertising operation was carried out for nearly two years and two months.

It was carried out with full knowledge of the facts, since these two companies, both belonging to the world's largest group of cigarette manufacturer, were fully advised and aware of the legislation in force.

It is therefore an economic calculation that has had a definite impact on tobacco use, in particular in view of the share of IQOS in the sales of the PHILIP MORRIS group, i.e. 18.7% in 2021 and 32.1% in 2022, according to the conclusions of the counsel for the two companies.

Despite the Court's requests, the companies have not provided any information on their respective financial situations.

On 8 November 2011, PHILIP MORRIS France had already been sentenced by the Paris Criminal Appeals Chamber to a fine of 50,000 euros for illegal tobacco advertising.

However, PHILIP MORRIS PRODUCTS' criminal record bears no mention of this whatsoever.

Under these circumstances, the sentences imposed on PHILIP MORRIS France and PHILIP MORRIS PRODUCTS by the Court appear to be insufficient in light of the circumstances of the offence and its impact, the situation of these two companies and their previous convictions.

The ruling should therefore be overturned, and PHILIP MORRIS France should be fined 500,000 euros and PHILIP MORRIS PRODUCTS 400,000 euros.

**<u>On the civil action</u>**

**Regarding the association ADNF - Demain sera non-fumeur**

***On the admissibility of the civil action***

Under the terms of Articles 2 paragraph 1 and 3 of the Code of Criminal Procedure, "the civil action for compensation for damage caused by a crime, offence or contravention belongs to all those who have personally suffered damage directly caused by the offence."
"The civil action may be brought at the same time as the public action and before the same court. It will be admissible for all types of damage, whether material, physical or moral, resulting from the acts that are the subject of the proceedings."

Article L.3515-7 of the French Public Health Code states that "associations whose statutory purpose includes tobacco control, and which have been regularly registered for at least five years at the time of the events may exercise the rights granted to civil parties in respect of breaches of the provisions of this title.

The same rights may be exercised by consumers associations referred to in Article L.421-1 of the French Consumer Code and by family associations referred to in Articles L.211-1 and L.211-2 of the French Social Action and Family Code."

In the present case, it is clear from the documents filed by the association that the ADNF Demain sera non-fumeur is authorised by its statutes to bring civil actions in proceedings brought under the Evin Law and that it was recognised as being of public interest by prefectoral decree dated 9 January 1990.

Under the terms of established jurisprudence, it follows from these texts that, for a civil claim to be admissible, it is sufficient that the circumstances on which it is based allow the judge to accept as possible the existence of the alleged loss and its direct link with a criminal offence.

Such is the case here, since the financial loss claimed by the association is proven by the role incumbent upon it under its statutes and is the direct result of the indirect advertising committed by the companies PHILIP MORRIS France and PHILIP MORRIS PRODUCTS.

The judgement should, therefore, be confirmed insofar as it found that the civil action brought by the ADNF was admissible.

***On liability***

The acts for which PHILIP MORRIS France and PHILIP MORRIS PRODUCTS are found guilty render them civilly liable and oblige them to compensate for the harmful consequences, pursuant to Article 1240 of the French Civil Code, which states that only the damage directly caused by the infringement entitles the parties to compensation.

Pursuant to Article 480-1 of the Code of Criminal Procedure, defendants who are guilty of the same offence or of offences that are interrelated or unrelated are jointly and severally liable for damages, without considering the personal liability of each defendant, which is not a matter for the criminal judge to determine.

However, the joint liability set out in this Article does not apply to the payment of non-recoverable costs under Article 475-1 of the Code of Criminal Procedure, which do not constitute damages.

In this case, as the companies were found guilty of the same offence, the judgment should be confirmed insofar as it found SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS to be jointly liable for the damages suffered by the ADNF Demain sera non-fumeur.

***On the claim for compensation***

The ADNF Demain sera non-fumeur claims only financial damages.

It estimates its loss at the cost of an advertising campaign of the same nature as the one developed by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS, via the website and the tobacconists' network.

The association's direct and present personal prejudice cannot be assessed on the basis of costs borne by third parties in connection with a product development campaign unrelated to the association's purpose.

Given its very nature, the association has a role to play in informing, educating and preventing the public from smoking, a role that has inevitably been thwarted by the massive advertising campaign put in place by the companies.

Having regard to the average cost of an information or prevention campaign, the Court of first instance correctly assessed the damage resulting directly from the defendants' criminal conduct.

The judgment on the damages awarded should therefore be upheld.

It also seems fair to grant the sum of 10,000 euros, under Article 475-1 of the Code of Criminal Procedure, for the costs not covered by the State incurred in the first instance and to have each of the companies bear half of these costs.

The judgment should also be confirmed on this point.

Lastly, it seems fair to apply the provisions of Article 475-1 of the Code of Criminal Procedure to the appeal in favour of the civil party, which was obliged to defend its case before the Court on the appeal lodged by the defendant.

As a result, PHILIP MORRIS France and PHILIP MORRIS PRODUCTS will also be ordered to pay to the party, each, an indemnity of 5,000 euros for the costs not covered by the State incurred in the appeal.

**Regarding the association CNCT**

***On the admissibility of the civil action***

Under the terms of Articles 2 paragraph 1 and 3 of the Code of Criminal Procedure, "the civil action for compensation for damage caused by a crime, offence or contravention belongs to all those who have personally suffered damage directly caused by the offence."
"The civil action may be brought at the same time as the public action and before the same court. It will be admissible for all types of damage, whether material, physical or moral, resulting from the acts that are the subject of the proceedings."

Article L.3515-7 of the French Public Health Code states that "associations whose statutory purpose includes tobacco control, and which have been regularly registered for at least

five years at the time of the events may exercise the rights granted to civil parties in respect of breaches of the provisions of this title.

The same rights may be exercised by consumers associations referred to in Article L.421-1 of the French Consumer Code and by family associations referred to in Articles L.211-1 and L.211-2 of the French Social Action and Family Code."

In the present case, it is clear from the documents filed by the CNCT that it is an association declared to be of public interest by decree of 9 February 1977 and authorised by its statutes to bring civil actions in proceedings brought on the basis of the Evin Law.

Under the terms of established jurisprudence, it follows from these texts that, for a civil claim to be admissible, it is sufficient that the circumstances on which it is based allow the judge to accept as possible the existence of the alleged loss and its direct link with a criminal offence.

Such is the case here, since the financial loss claimed by the CNCT is proven by the role incumbent upon it under its statutes and is the direct result of the indirect advertising committed by the companies PHILIP MORRIS France and PHILIP MORRIS PRODUCTS.

The judgement should therefore be confirmed insofar as it found that the civil action brought by the CNCT was admissible.

***On liability***

The acts for which PHILIP MORRIS France and PHILIP MORRIS PRODUCTS are found guilty render them civilly liable and oblige them to compensate for the harmful consequences, pursuant to Article 1240 of the French Civil Code, which states that only the damage directly caused by the infringement entitles the parties to compensation.

Pursuant to Article 480-1 of the Code of Criminal Procedure, defendants who are guilty of the same offence or of offences that are interrelated or unrelated are jointly and severally liable for damages, without considering the personal liability of each defendant, which is not a matter for the criminal judge to determine.

However, the joint liability set out in this Article does not apply to the payment of non-recoverable costs under Article 475-1 of the Code of Criminal Procedure, which do not constitute damages.

In this case, as the companies were found guilty of the same offence, the judgment should be confirmed insofar as it found SAS PHILIP MORRIS France and SA PHILIP MORRIS PRODUCTS to be jointly liable for the damages suffered by the CNCT.

***On the claim for compensation***

The CNCT claims only financial damages.

It estimates its loss at the cost of an advertising campaign of the same nature as the one developed by PHILIP MORRIS France and PHILIP MORRIS PRODUCTS, via the website and the tobacconists' network.

Its direct and present personal prejudice cannot be assessed on the basis of costs borne by third parties in connection with a product development campaign unrelated to the association's purpose.

Given its very nature, it has a role to play in informing, educating and preventing the public from smoking, a role that has inevitably been thwarted by the massive advertising campaign put in place by the companies.

Having regard to the average cost of an information or prevention campaign, the Court of first instance correctly assessed the damage resulting directly from the defendants' criminal conduct.

The judgment on the damages awarded should therefore be upheld.

It also seems fair to grant the sum of 10,000 euros, under Article 475-1 of the Code of Criminal Procedure, for the costs not covered by the State incurred in the first instance and to have each of the companies bear half of these costs.

The judgment should also be confirmed on this point.

Lastly, it seems fair to apply the provisions of Article 475-1 of the Code of Criminal Procedure to the appeal in favour of the civil party, which was obliged to defend its case before the Court on the appeal lodged by the defendant.

As a result, PHILIP MORRIS France and PHILIP MORRIS PRODUCTS will also be ordered to pay to the party, each, an indemnity of 5,000 euros for the costs not covered by the State incurred in the appeal.

**ON THESE GROUNDS**,

The Court, ruling publicly, by a contradictory judgment with regard to the ADNF Demain sera non-fumeur, the CNCT, the company PHILIP MORRIS France SAS and the company PHILIP MORRIS PRODUCTS SA and in the final instance,

- Declares the appeals of PHILIP MORRIS France SAS, PHILIP MORRIS PRODUCTS, the public prosecutor, the ADNF Demain sera non-fumeur and the CNCT admissible,

**On public actions**

- Overturns the judgement,
- Dismisses from the proceedings PHILIP MORRIS France SAS and PHILIP MORRIS PRODUCTS SA for the period from January to April 2017,
- Declares the companies PHILIP MORRIS France SAS and PHILIP MORRIS PRODUCTS SA guilty of having committed, between May 2017 and 25 July 2019, in Paris and throughout France, illegal advertising in favour of tobacco as defined by Article L.3512-4 of the French Public Health Code,
- Orders PHILIP MORRIS France SAS to pay a fine of 500,000 euros,
- Orders PHILIP MORRIS PRODUCTS SA to pay a fine of 400,000 euros,

**On civil action**

- Upholds the judgment in all its provisions,
- Orders PHILIP MORRIS France SAS to pay the ADNF Demain sera non-fumeur the sum of 5,000 euros on appeal, pursuant to Article 475-1 of the Code of Criminal Procedure,
- Orders PHILIP MORRIS PRODUCTS SA to pay the ADNF Demain sera non-fumeur the sum of 5,000 euros on appeal, pursuant to Article 475-1 of the Code of Criminal Procedure,

- Orders PHILIP MORRIS France SAS to pay the CNCT the sum of 5,000 euros on appeal, pursuant to Article 475-1 of the Code of Criminal Procedure,
- Orders PHILIP MORRIS PRODUCTS SA to pay the CNCT the sum of 5,000 euros on appeal, pursuant to Article 475-1 of the Code of Criminal Procedure.

This court judgement has been signed by Claire D'URSO, President, and Anne-Lise LEPLUMEY, Registrar.

**SIGNATURE OF THE PRESIDENT**

**SIGNATURE OF THE REGISTRAR**

***This decision is subject to a fixed procedural fee of 169 euros payable by each of the convicted parties. This amount is reduced by 20% if payment is made within one month:***

- ***from the day the decision is handed down if it is an adversarial decision***
- ***from the date of the notification if the ruling is to be served by both parties or by default***

**STAMP OF THE PARIS COURT OF APPEAL**

*As a result, the French Republic instructs and orders all bailiffs who are required to enforce the aforementioned ruling, the Public Prosecutors at a Court of Appeal and the Public Prosecutors of the French Republic at the judicial courts to enforce it, and all commanders and officers of the police force to provide assistance when legally required to do so. In witness whereof, this ruling has been signed by the President and the Registrar. This executory clause has been signed by the Registrar of the Paris Court of Appeal.*