



## Case 2010-040

No. 4859. C. C., n°2010-040

**Country:** Belgium

**Region:** Europe

**Year:** 2010

**Court:** Constitutional Court [Court Constitutionnelle]

**Health Topics:** Occupational health, Tobacco

**Human Rights:** Freedom from discrimination, Right to favorable working conditions

### Facts

The applicants were three companies selling pre-packaged food items. They challenged the constitutionality of a 2009 law that restricted smoking in publically accessible closed spaces, for the protection of non-smokers and workers in such establishments. The law generally required that establishments either ban smoking or install smoking rooms. Establishments where the primary activity was serving alcoholic drinks or gambling were provided more leniency by allowing clearly designate smoking areas instead of a separate smoking room. If the drinking or gambling establishments only created a separate smoking area, the law stated that only pre-packaged food with an expiry period of at least three months could be served. The food supplied by the applicants did not have an expiry period of three months. The applicants sought to immediately suspend the law (a.k.a. an injunction).

### Decision and Reasoning

The Court dismissed the applicant's claim to suspend the law. In order to immediately suspend a law there were two requirements: (1) the nature of the plea must have been sufficiently serious and (2) the immediate implementation of the disputed provision risked causing grave, irreparable damage.

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The plea alleged that the disputed provision violated principles of equality, as per Articles 10 and 11 of the Constitution, by applying the prohibition on smoking in an unequal manner. The applicants argued that the law had a uniquely negative impact on their business. Their business was highly dependent on supplying pre-packaged food items to establishments that primarily serve alcohol. Many of these establishments were faced with a choice to prohibit smoking or to no longer buy the applicants products.

The principal objective of the law was to protect non-smokers and workers. The Court held that distinguishing between the types of food that could be consumed in establishments where smoking was allowed was not connected to this objective. Additionally, the criteria used by the legislature to distinguish between establishments able to immediately comply with the law versus establishments that required a transition period to build a smoking room was not relevant to the principal objective of the law. The Court held the plea was sufficiently serious.

However, the Court found that the immediate application of the law would not cause grave, irreparable damage to the applicants. The Court stated that the applicants needed to present precise and concrete facts proving serious damage on account of the law. The applicants failed to do so. The applicants estimated that they would lose more than half their revenue on account of the law, and be unable to meet their financial obligations. Additionally, the applicants claimed a number of their clients, whom they contacted by phone, said they would cancel their contracts if forced to choose between allowing smoking and serving the applicant's products. The Court said these findings did not demonstrate immediate, irreparable damage. The claim that revenues would be reduced by more than half was merely speculative, and the evidence from the phone surveys did not indicate the percentage of the clientele interviewed.

### Decision Excerpts

« [F]umer n'est autorisé que dans des établissements horeca où aucune denrée alimentaire n'est emballée dans des contenants ayant une période de conservation d'au moins trois mois sans aucune mesure supplémentaire ne soit utilisée pour prolonger la durée de conservation ».

A la lumière de l'objectif principal de la loi attaquée, à savoir protéger les non-fumeurs et les travailleurs du secteur concerné, la différence de traitement fondée sur la nature des denrées alimentaires qui peuvent être consommées dans un établissement du secteur horeca ne semble pas en rapport avec cet objectif principal. (B.8.1.-8.2.)

Smoking is only authorized in hospitality establishments where no food is sold, except for pre-packaged food having an expiry period of at least three months without any supplementary measures taken to prolong the expiry date.

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In light of the principal objective of the disputed provision, to protect non-smokers and workers in the concerned sector, the different treatment based on the nature of the food that can be consumed in a hospitality establishment does not seem connected to the principal objective. (B.8.1.-8.2.)

Quelle que soit leur valeur probante, ces données ne suffisent pas à démontrer la réalité du préjudice que les parties requérantes risquent de subir. En effet, la première catégorie de documents n'offre aucun aperçu du chiffre d'affaires réalisés après l'entrée en vigueur de la loi attaquée. Les deuxième et troisième catégories de documents n'indiquent pas le pourcentage de la clientèle que représentent les personnes interrogées. (B.14.2.)

Whatever their probative value, the data is not sufficient to demonstrate the reality of serious damage that the applicant parties risk suffering from. In fact, the first category of documents only offers the perceived revenues after the law enters into force. The second and third category of documents do not indicate the percentage of the clientele that the people interrogated represent. (B.14.2.)

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