Constitutional Council

Decision n°90-283 DC of 08 January 1991

Law on Smoking and Alcohol Abuse Control

The Constitutional Council was seized, on 13 January 1990, by Messrs Daniel Colin, Willy Diméglio, José Rossi, René Garrec, Arthur Paecht, Alain Griotteray, André Rossi, René Beaumont, Mrs YannPiat, Messrs AiméKergueris, Jean−Marc Nesme, Gérard Longuet, Denis Jacquat, Jean−Yves Haby, LadislasPoniatowski, Jean Brocard, Gilbert Gantier, FrancisquePerrut, Henri Bayard, Michel Meylan, Charles Ehrmann, Georges Durand, Joseph−Henri Maujoüan du Gasset, LéonceDeprez, Alain Madelin, Philippe Vasseur, André Santini, Jacques Toubon, Olivier Dassault, Bernard Debré, Jean−Michel Couve, Jacques Masdeu−Arus, Mrs Christiane Papon, Messrs Jacques Godfrain, Bruno Bourg−Broc, Mme Nicole Catala, MM Claude Dhinnin, Jean−Paul Charié, Didier Julia, Jean−Louis Goasduff, Henri de Gastines, Jean Besson, Philippe Auberger, Arnaud Lepercq, Jean Ueberschlag, René Couveinhes, Lucien Guichon, RégisPerbet, Pierre Raynal, Lucien Richard, Jean−Louis Debré, Pierre Mazeaud, Eric Raoult, Pierre−RémyHoussin, Robert Pandraud, Jean Tiberi, Pierre Pasquini, Pierre Bachelet, Georges Tranchant, Mmes Suzanne Sauvaigo, MichèleAlliot−Marie, Messrs Arthur Dehaine, Alain Cousin,Members of Parliament, within the conditions provided by article 61, second paragraph, of the Constitution, on the conformity of the Law on Smoking and Alcohol Abuse Control to the Constitution;

The Constitutional Council,
Considering the Constitution;
Considering the modified decree n°58-1067 of 7 November 1958 establishing an organic law on the Constitutional Council, in particular chapter II of title II of said decree;
Considering the modified decree n°59-2 of 2 January 1959 establishing an organic law on financial laws;
Considering Law n°76-616 of 9 July 1976 on Smoking Control, modified by article 35 of the Law n°89-18 of 13 January 1989, establishing various social measures;
Considering the Alcoholic Beverage Consumption and Measures Against Alcoholism Code;
Considering the explanatory statement presented by the authors of the claim, registered with the General Secretary of the Constitutional Council on 14 December 1990;
Considering the complementary statement presented by the authors of the claim, registered as above on 21 December 1990;
The rapporteur having been heard;

1. Considering that the Members of Parliament who authored the claim refer to the Constitutional Council the Law on Smoking and Alcohol Abuse Control; that with their claim, they criticize the conformity to the Constitution of its articles 3, 4 and 10;
- ON ARTICLE 3 ON THE PROHIBITION OF DIRECT OR INDIRECT PUBLICITY IN FAVOUR OF TOBACCO:
2. Considering that article 3 of the law is constituted of two paragraphs; that paragraph 1 substitutes a new drafting to that of article 2 of the Law of 9 July 1976 on Smoking Control, which is set to enter into force “as of 1 January 1993”; that, as of this date, according to the first

paragraph of article 2 of this law, "any propaganda or publicity, direct or indirect, in favour of tobacco or of tobacco products as well as any free distribution are prohibited"; that it is however specified, in the new second paragraph of article 2 of the Law of 8 July 1976, that these prohibitions "do not apply to tobacco shop banners, nor to the small posters within such establishments, which are not visible from the exterior, provided that such banners or posters are in conformity to characteristics defined by ministerial decree."; that as provided by the third paragraph added to article 2 of the Law of 9 July 1976, "any sponsorship is prohibited when its objective or effect is direct or indirect propaganda or publicity in favour of tobacco or tobacco products";

3. Considering that paragraph II of article 3 of the law modifies, from the entry into force of the law presently examined and until 1 January 1993, the text of the first paragraph of article 2 of the Law of 9 July 1976; that as a result of this modification, are prohibited not only "direct" propaganda or publicity in favour of tobacco or tobacco products, in the four cases enumerated at article 2 of the law of 1976, but henceforth, "indirect" propaganda or publicity; that, however, the scope of application of the initial article 2 of the Law of 1976 remains unchanged;

4. Considering that for the authors of the claim "the absolute prohibition of propaganda or publicity on tobacco" is of such a serious nature that it distorts the meaning and scope of the right to property; that it consists, according to them, "of an actual expropriation"; that the entrepreneurial freedom would be similarly distorted; that is alleged a violation of article 1 of the Declaration of the Rights of Man and of the Citizen as well as of its article 16;

. Regarding the claim alleging the infringement of the right to property:

5. Considering that according to the claim, the prohibition set out by article 4 of the law infringes the right to property in as much as it does not allow for the normal exploitation of a brand, an element of the right to property and a support for a legal product, freely accessible to the consumer; that there would be, furthermore, transfer of a right to property element to the State through an expropriation that should minimally involve a right to compensation;

6. Considering that article 2 of the 1789 Declaration classifies property as a human right; that article 17 of the same Declaration proclaims: "Property is an inviolable and sacred right, no one can be deprived of it apart from a legally established public necessity that requires it and under the condition of a just and prior compensation";

7. Considering that the purposes and conditions within which the right to property can be exercised have undergone, since 1789, an evolution characterized by an extension of its application scope to new fields; that amongst these is included the right for an owner of a trademark or service mark to use it and protect it within the framework defined by law and France's international commitments;

8. Considering that the evolution the right to property has undergone has also been characterized by limitations to its exercise required in the name of general interest; that are in particular targeted the measures aimed at guaranteeing to all, pursuant to the eleventh paragraph of the Preamble of the Constitution of 27 October 1946, "the protection of public health";

9. Considering that the right to property of a regular trademark lodged in a regular manner is not affected in its existence by the provisions of article 3 of the law; that these do not in any way transfer property included in the scope of article 17 of the Declaration of the Rights of Man and of the Citizen;

10. Considering without a doubt that the prohibition of publicity and propaganda in favour is tobacco is likely to affect the exercise of the right to property of a trademark concerning tobacco or products of tobacco;

11. But considering that such provisions derive from the constitutional principle of the protection of public health; that even so, the law reserves the possibility to advertise within tobacco shops; that the prohibition provided by article 3 of the deferred law will not produce all its effects until 1 January 1993;
12. Considering that results from what precedes that the limitation brought upon by article 3 to certain conditions within which the right to property can be exercised is not contrary to the Constitution;
. Regarding the claim alleging a violation of entrepreneurial freedom:
13. Considering that the authors of the claim assert that article 3 infringes upon entrepreneurial freedom on the ground that its exercise involves the power to submit tobacco products to market and competition laws; that this implies informing the consumer and a possibility of broadcasting the products;
14. Considering that entrepreneurial freedom is neither general nor absolute; that it is open to legislature to impose limitations required by the general interest on the condition that they do not result in jeopardising its scope;
15. Considering that article 3 of the law does not prohibit nor the production, the distribution or sale of tobacco and tobacco products; that is reserved the possibility to inform the consumer within tobacco shops; that the prohibition of other forms of publicity or propaganda is based on the requirements of the protection of public health, which are of constitutional value; that it therefore follows that article 3 of the law does not infringe upon entrepreneurial freedom in a manner that would be contrary to the Constitution;
. Regarding the claim alleging the infringement of articles 1 and 16 of the Declaration of the Rights of Man and of the Citizen:
16. Considering that according to the authors of the claim article 3 of the law results in an infringement upon the unrestricted use by an individual of his or her patronymic name; that would result from this a violation of a constitutionally protected right pursuant to articles 1 and 16 of the Declaration of the Rights of Man and of the Citizen;
17. Considering that article 3 of the law has no impact on the patronymic name taken as an individualisation and identification element for a physical person; that therefore and that in any case, the means from the violation of articles 1 and 16 of the Declaration of the Rights of Man and of the Citizen are irrelevant;
- ON ARTICLE 4 OF THE LAW MODIFYING ARTICLES 1, 3, 9, 12, 16 AND 18 OF THE LAW OF 9 JULY 1975:
18. Considering that article 4 of the deferred law substitutes new provisions to those of many articles of the law of 9 July 1976; that the new wording of article 1 of this text specifies what must be understood by tobacco products; that the new article 3 of the law of 1976 explains the notion of indirect publicity; that the main purpose of the new article 9 of the same law is to draw conclusions from directives of the Council of the European Communities on the labelling of tobacco products and the maximum tar contents of cigarettes; that the objective of the new wording of article 12 of the law of 1976 is to punish as criminal law offences under the provisions of title I of this law; that the new article 16 of the law of 9 July 1976 establishes the principle of the prohibition of smoking in public places, in particular school premises, and in public transportation, “except in locations expressively reserved to smokers”; that finally, pursuant to the new article 18 of the law of 1976, is open the possibility, under certain conditions, for associations whose statutory purpose includes the fight against tobacco, to exercise the rights recognized for the civil parties for offences under the provisions of the law;

19. Considering that the authors of the claim critic the definition of indirect publicity given by article 3 of the law of 9 July 1976 in its wording resulting from article 4 of the deferred law; that pursuant to the wording of the first paragraph of the new article 3 of the law of 1976: "Is considered as constituting propaganda or indirect publicity any propaganda or publicity in favour of an organism, service, activity, product or product other than tobacco or a product of tobacco when, by its graphics, presentation, use of trademark, advertising material or any other distinctive sign, reminds of tobacco or of a product of tobacco";
20. Considering that the authors of the claim assert that these provisions violate the right to property as well as entrepreneurial freedom;
21. Considering that the legislator, by defining propaganda and indirect publicity aimed to eliminate the possibility to defeat the prohibition provided by article 3 of the deferred law; that the details provided appear as the corollary of the provisions of said article 3; that it is relevant to point out that even so, the new second paragraph of article 3 of the law of 9 July 1976, in its wording resulting from article 4 of the law currently analysed, extends in time the effects of the transitory measures provided by article 35 of the law nº89-18 of 13 January 1989;
22. Considering that the motives described above about article 3of the deferred law, the provisions of article 4 of the same law are not contrary nor to the right to property nor to entrepreneurial freedom;
- ON ARTICLE 10 MODIFYING THE ALCOHOLIC BEVERAGE CONSUMPTION AND MEASURES AGAINST ALCOHOLISM CODE:
23. Considering that article 10 of the law, included in title II entitled "Provisions on Measures Against Alcoholism", includes 14 paragraphs on the subject; that the authors of the claim critic only paragraph IV and paragraph V of article 10;
24. Considering that the objective of paragraph IV of article 10 is to confer to article L. 17 of the Alcoholic Beverage Consumption and Measures Against Alcoholism Code a new wording in effect as of 1 January 1993;
25. Considering that the new article L. 17 includes two paragraphs; that the first paragraph enumerates in a limitative manner the seven cases in which are authorised direct or indirect propaganda or publicity in favour of alcoholic beverages of which the manufacturing and sale are not otherwise prohibited; that the second paragraph of the same article provides that "any sponsorship is prohibited when its objective or effect is direct or indirect propaganda or publicity in favour of alcoholic beverages";
26. Considering that paragraph V of article 10 of the deferred law supplements the Alcoholic Beverage Consumption and Measures Against Alcoholism Code with an article L. 17-1; that this article, at paragraph 1, transposes to alcoholic beverages the applicable definition of indirect propaganda or publicity, pursuant to article 4 of the law, to tobacco and products derived from tobacco; that the second paragraph of article L. 17-1 of the previous Code includes measures reserving the case of products put on the market before 1 January 1990 following modalities analogous to those provided by article 4 of the deferred law, as concerns the marketing of tobacco;
27. Considering that in their initial claim, the authors questioned the provisions of articles 10-IV and 10-V of the law in view of the right to property, of entrepreneurial freedom and of the right to a patronymic name; that in a complementary statement they estimate that paragraph IV of article 10 is questionable on other grounds and in particular in view of the equality principle;
. Regarding the claim alleging the infringement of paragraphs IV and V of article 10 that prohibit certain forms of publicity or propaganda in favour of alcoholic beverages:

28. Considering that the authors of the claim reclaim towards the provisions limiting direct or indirect propaganda or publicity in favour of alcoholic beverages an argumentation similar to the one developed regarding articles 3 and 4 of the deferred law that prohibit the publicity in favour of tobacco and products derived from tobacco;
29. Considering that the objective of the restrictions imposed by the legislator to propaganda or publicity in favour of alcoholic beverages is to avoid an excess in alcohol consumption, in particular amongst young people; that such restrictions are based on a public health protection imperative, a principle of constitutional value; that the legislator who aimed to prevent an excessive consumption of alcohol confined himself to limiting the publicity in this field, without prohibiting it in a general and absolute manner; that, furthermore, the provisions of article L. 17 of the Alcoholic Beverage Consumption and Measures Against Alcoholism Code, as resulting from article 10-IV of the law, will not be in effect before 1 January 1993; that moreover, subsequently to this date, article 11 of the deferred law provides that, by way of derogation to article L. 17, "the execution of ongoing contracts as of 1 January 1991 on advertising campaigns within drinking establishments is continued until 31 December 1993";
30. Considering that, under such conditions, the means from the restrictions set out by articles 10-IV and 10-V would be contrary to both the right to property and entrepreneurial freedom, they cannot be received;
31. Considering furthermore that the alleged violation to the unrestricted use by an individual of his or her patronymic name is irrelevant;
. Regarding the claim alleging the infringement of article 10-IV, as it authorizes certain forms of publicity or propaganda in favour of alcoholic beverages:
32. Considering that the first paragraph of article L. 17 of the aforementioned Code, as results from article 10-IV, includes as situations in which propaganda or publicity in favour of alcoholic beverages is authorized: "1º in the written press, except for publications intended for the youth, defined at the first paragraph of the first article of the law nº49-956 of 16 July 1949 on publications intended for the youth; 2º by way of audio broadcasting for the radio categories and within the time frames determined by a decree from the Council of State; 3º as posters and signs in production zones, as placards and objects within specialised shops, under the conditions defined by a Council of State decree"; that like 3º, the other cases targeted by article L. 17 correspond to the legislator's concern of permitting an alcoholic beverage distribution and an information about them without inciting to an excessive consumption;
33. Considering that, for the authors of the claim, the definition of cases in which publicity or propaganda are authorised is to be criticised on three grounds; that it infringes the equality principle between advertisers and disadvantage advertising companies; that the legislator disregarded the scope of its jurisdiction; that the constraints imposed on advertising companies created a rupture in equality before public functions;
- Regarding the claim alleging the infringement of the equality before law principle:
34. Considering that the equality principle is not opposed to the legislator dealing with different situations in a different manner nor to him derogating to equality for general interest reasons as long as, in either case, the resulting difference in treatment is related to the objective of the law that establishes it;
35. Considering that the objective of the provisions of article L. 17 of the aforementioned Code is to define in a limitative manner the cases in which propaganda or publicity can be authorised, in light of the greater objective of combatting excessive consumption of alcohol, esspecially in the case of the youth; that in light of this pursued objective, the legislator can differentiate between the many advertising materials by taking into account their format and the different publics likely

to be affected; that, as a result, the new article L. 17did not infringe upon the equality before the law principle, by permitting the recourse to advertising in favour of alcoholic beverages only within production zones or for promoting traditional festivals and fairs or events of a nature similar to those defined in 6º and 7º of this article;

- Regarding the claim that the legislator infringed on the scope of its own jurisdiction:

36. Considering that article 34 of the Constitution provides, in its second paragraph, that "the law establishes the rules concerning…, the fundamental guarantees granted to citizens for the exercise of public freedoms" and, in its fourth paragraph, that the law "determines the fundamental principles… of the property regime"; that, on the grounds of these provisions, it is the legislator's prerogative to determine the cases in which propaganda or publicity in favour of alcoholic beverages can be authorised; that it is, however, the prerogative of the regulatory powers to implement, the case being, the provisions of the law under the condition of not altering its scope;

37. Considering that the authorisation of direct or indirect propaganda or publicity in favour of alcoholic beverages "by way of audio broadcasting for the radio categories and within the time frames determined by a decree from the Council of State" must be interpreted in light of the objective of the law which tends to ensure the protection of public health, more specifically that of the youth; that it will then fall to the regulatory powers to ensure the implementation of the law in consideration of this objective; that it will be its responsibility, for the determination of radio and time frame categories, to take into consideration, as a priority, the proportion of youth indeed affected by the relevant radio shows;

38. Considering also that the authorisation of propaganda or publicity provided by 3ºof article L. 17 "in the form of posters and banners in production zones, in the form of small posters and objects within specialised shops, under the conditions defined by a decree from the Council of State", must be understood in relation to the objective of article L. 17; that it will then fall to the regulatory powers, acting on decree from the Council of State, to ensure the implementation of the law according to objective data applicable to all alcoholic beverages; that must be respected the norms adopted, within their jurisdictions, by the authorities of the European Communities;

39. Considering that results from what precedes that the legislator, by authorising, according to the pursued goals, the cases in which publicity or propaganda in favour of alcoholic beverages are possible, did not remain below its jurisdiction emanating from article 34 of the Constitution;

- Regarding the claim alleging that the rupture of equality before public charges to the detriment of the advertisers:

40. Considering that it is claimed that the legislator imposed to advertising companies specific constraints in the name of the fight against alcoholism;

41. Considering that as mentioned above, article L. 17 of the Alcoholic Beverage Consumption and Measures Against Alcoholism Code does not infringe upon the principle of equality before the law; that in any case, interested parties are free, in cases where they consider that the implementation of the examined law would cause them an abnormal and special prejudice, to seek legal redress.

- ON ARTICLE 12 IMPLEMENTING A CONTRIBUTION ON ADVERTISING EXPENSES AND AFFECTING ITS PRODUCT:

42. Considering that article 12 of the law includes two paragraphs; that pursuant to the first paragraph: "Is created a contribution equal to 10% without taxes of the advertising expenses in favour of alcoholic beverages. For this purpose, financial records are kept separately for advertising campaigns for alcoholic beverages. The product of this contribution is allocated to a fund managed collectively within conditions determined by decree of the Council of State by representatives of the minister in charge of health and representatives of relevant professional

organisations, to finance sanitary education and alcoholism prevention actions."; that the second paragraph of article 12 provides that: "Each year, the Government is accountable to the Parliament for the campaigns realised through this fund and its management.";

43. Considering that pursuant to the second paragraph of article 34 of the Constitution "the law sets the rules relating to… the base, rate and modalities for collection for taxations of any nature"; that the contribution implemented by article 12 has the status of a taxation; that it is the prerogative of the legislator to determine, not only the rules relating to the rate, but, in the name of the definition of the income tax base, the categories of taxpayers; that is also within the jurisdiction of the law to set the modalities for collection; that by restraining from stating the categories of taxpayers as well as the modalities for collection of the new income tax, the legislator failed to implement the scope of its jurisdiction emanating from the second paragraph of article 34;

44. Considering that according to the fifth paragraph of article 34, "the financial laws determine the resources and responsibilities of the State within the conditions and under the reservations provided by an organic law"; that the first paragraph of article 47 of the Constitution provides that: "The Parliament votes on financial bills within the conditions provided by an organic law";

45. Considering that results from article 18 of the order nº59-2 of 2 January 1959 establishing an organic law relating to financial laws that, subject to specific procedures provided by article 19, the assignment of a State revenue to an expense can only result from a financial bill; that article 12 of the law infringes upon such prescription by attributing to a "fund" that is not a legal entity and for which the management is under the responsibility of the Government the product of a taxation collected for the benefit of the State;

46. Considering that the order nº59-2 of 2 January 1959 reserves, in its first paragraph, second paragraph, to a financial bill the stating of the "legislation provisions whose aim is to organise the information and control of Parliament on the management of public finances"; that such requirements are infringed upon by the provisions of the second paragraph of article 12 of the law that impose to the Government the responsibility of being accountable to the Parliament for campaigns on the management of a fund financed by a public resource;

47. Considering that results from what precedes that article 12 of the deferred law must be declared contrary to the Constitution on the grounds that, on the one hand, the legislator remained below its jurisdiction in fiscal matters and, on the other hand, the irregularity of the procedure for the adoption of the provisions under the exclusive field of intervention of financial laws;

48. Considering that in this case there is no need for the Constitutional Council to invoke any other question of conformity to the Constitution as concerns the other provisions of the law submitted to its examination;

Decides:

First article:

Article 12 of the Law on Smoking and Alcohol Abuse Control is declared contrary to the Constitution.

Article second:

The other provisions of the Law on Smoking and Alcohol Abuse Control are not contrary to the Constitution.

Article third:

This decision will be published in the Official Journal of the French Republic.

Official journal of 10 January 1991, p. 524

Compendium, p. 11
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