



Republic of Moldova
CONSTITUTIONAL COURT

JUDGMENT

REGARDING THE CONSTITUTIONALITY CONTROL

**of Article 25 para. (6) of Law No. 278 of December 14, 2007 on
Tobacco Control**

*(Ban on the Marketing of Tobacco Products in the Vicinity of
Educational Institutions and Healthcare Facilities)*

(Complaint No. 52a/2019)

CHIȘINĂU

April 8, 2019

JUDGMENT REGARDING THE CONSTITUTIONALITY CONTROL OF
ARTICLE 25 PARA. (6) OF LAW NO. 278 OF DECEMBER 14, 2007 ON
TOBACCO CONTROL

On behalf of the Republic of Moldova,
the Constitutional Court, making its Judgment with the following members:
Mr. Mihai POALELUNGI, *Chair*,
Mrs. Raisa APOLSCHII,
Mr. Aurel BĂIEȘU,
Mr. Corneliu GURIN,
Mr. Artur REȘETNICOV,
Mr. Veaceslav ZAPOROJAN, *Judges*,
with the participation of Mr. Dumitru Avornic, *Clerk*,

With regard to the complaint submitted on March 13, 2019,
That was registered on the same date,
Having reviewed the above complaint in a public plenary,
Having considered the documents and proceedings of
the file,
Deliberating in the council chamber,

Hereby adjudges the following:

PROCEDURE

1. The reason for the case is the complaint submitted to the Constitutional Court on March 13, 2019, based on Art. 135 para. (1) letter a) of the Constitution, Art. 25 letter g) of the Law on the Constitutional Court and Art. 38 para. (1) letter g) of the Code of Constitutional Jurisdiction, by Mr. Simion Grișciuc, who, at the time when the complaint was filed, held the position of deputy in the Parliament of the Republic of Moldova. Mr. Simion Grișciuc requests a constitutionality control of Article 25 par. (6) of Law no. 278 of December 14, 2007 on tobacco control.

2. The author of the complaint believes that the contested regulation violates the provisions of Articles 9 para. (3), Art. 16, Art. 54 para. (1) and (2), Art. 126 para. (2) letter b) of the Constitution.

3. By Judgment of the Constitutional Court of March 14, 2019, the complaint was declared admissible, without prejudice to the merits of the case.

4. In the process of reviewing the complaint, the Constitutional Court requested the opinions of the President, the Parliament, the Government of the Republic of Moldova.

5. The complainant did not appear at the Court's public hearing. The Parliament was represented by Mr. Valeriu Kuciuk, Head of the

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Representation Service at the Constitutional Court and the law enforcement bodies within the General Legal Directorate of the Parliament's Secretariat. The Government was represented by Mr. Eduard Serbenco, Secretary of State. Also present at the Court hearing was Mr. Ion Șalaru, Head of the Directorate for the Prevention and Control of Noncommunicable Diseases within the National Agency for Public Health, representative of the Ministry of Health, Labor, and Social Protection.

DE FACTO,

6. On May 29, 2015, the Parliament of the Republic of Moldova adopted Law No. 124 on amending and supplementing certain legislative acts, which entered into force (except for certain provisions) on September 17, 2015. By way of the above-mentioned Law, the Parliament amended, *among others*, Law no. 278 of December 14, 2007 on tobacco and tobacco products. Thus, in the Law on Tobacco, the Parliament introduced Article 17⁷ – "Prevention of access of minors to tobacco and tobacco-related products", which set forth certain prohibitions regarding the marketing of tobacco and tobacco-related products: to people and by people up to 18 years of age; by certain commercial facilities; online; without supporting documents; in a package other than the original, or with damaged packaging, etc.

7. Article 17⁷ also laid down certain rules regarding the display of information on the prohibition of the sale of tobacco and tobacco-related products to people up to 18 years of age, as well as the obligation of sellers to require buyers to present their ID or another official document with the photo of the person, attesting to the person's age.

8. Article 17⁷ provided in para. (6) that "establishments with a commercial area of less than 20 m², marketing tobacco and tobacco-related products must be located at a distance of at least 200 m from educational institutions and healthcare facilities."

9. As a result of the republishing of Law No. 278 of December 14, 2007 on September 18, 2015, following the amendments that were made, the text of Article 17⁷ was included in Article 25 of the Law.

10. On June 17, 2016, the Parliament of the Republic of Moldova passed Law No. 138 on the amendment and completion of certain legislative acts, which, in Article XXXI para. (3) sets forth that the restriction provided for in Article 25 para. (6) of Law No. 278-XVI of December 14, 2007 on tobacco control (republished in the Official Gazette of the Republic of Moldova, 2015, No. 258–261, Art. 489) is not applicable to establishments set into operation by the date of entry into force of this law, for the useful life not extending

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beyond January 1, 2019. This Law entered into effect (with the exception of certain provisions) on July 1, 2016.

11. On November 23, 2017, the Government of the Republic of Moldova passed Decision No. 1015, approving the National Tobacco Control Program for 2017-2021, as well as the Action Plan to implement it. In that program, the Government found that smoking significantly contributes to preventable deaths in the population and is considered a major national public health issue (see § 6 of the program). In this regard, the Government aims to take measures to reduce tobacco dependence and to encourage smoking cessation.

PERTINENT LEGISLATION

12. The relevant provisions of the Constitution are the following:

Article 9

Fundamental principles regarding property

- "(1) Property is public and private. It consists of material goods and intellectual property.
- (2) Property may not be used to the disadvantage of human rights, freedoms, and dignity.
- (3) The market, free economic initiative, fair competition are the basic factors of the economy."

Article 16

Equality

- "(1) Respect and protection of the person is a primary duty of the state.
- (2) All citizens of the Republic of Moldova are equal before the law and the public authorities, regardless of race, nationality, ethnicity, language, religion, sex, opinion, political affiliation, wealth, or social origin."

Article 54

Restriction on the exercise of certain rights or freedoms

- "(1) Laws that would suppress or diminish the fundamental rights and freedoms of humans and citizens cannot be passed in the Republic of Moldova.
- (2) The exercise of rights and freedoms may not be subject to restrictions other than those provided for by law, which correspond to the unanimously recognized rules of international law and are necessary in the interests of national security, territorial integrity, economic well-being of the country, public order, in order to prevent mass disturbances and crime, to protect the rights, freedoms, and dignity of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of justice.
- (3) The provisions of paragraph 2 do not allow for the restriction of the rights set forth

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in Articles 20 to 24.

(4) The restriction must be proportionate to the situation which caused it and may not affect the existence of a right or freedom."

Article 126
The Economy

"(1) The economy of the Republic of Moldova is a market economy, socially-oriented, based on private property and public property, engaged in free competition.

(2) The government must ensure:

[...]

(b) the freedom of trade and entrepreneurial activity, the protection of fair competition, the creation of a favorable framework for the improvement of all factors of production;

[...]"

13. The relevant provisions of Law No. 278 of December 14, 2007 on tobacco control are the following:

Article 25
Preventing minors' access to tobacco
products and tobacco-related products

"[...]

(3) Establishments that retail tobacco and tobacco-related products must display in a visible place the information regarding the prohibition of the sale of tobacco and tobacco-related products to persons aged 18 and below and the information on the amount of the fine for not abiding by this prohibition.

(4) In order to ensure that the person purchasing tobacco and tobacco-related products has reached the age of 18, sellers are required to request the buyer to present the ID or another official document with the person's photograph, attesting to their age. If the buyer refuses to present the ID, the seller is not allowed to sell him/her tobacco and tobacco-related products.

(5) A visible display of smoking tobacco and tobacco-related products in publicly accessible commercial spaces is prohibited. The list of smoking tobacco and tobacco-related products available for sale, with an indication of their prices, printed on white paper in black fonts, is to be presented by the seller at the request of adult buyers. The provisions of this paragraph shall apply as of May 20, 2020.

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(6) Establishments with a commercial area of less than 20 m², that sell tobacco and tobacco-related products must be located at a distance of at least 200 m from educational institutions and healthcare facilities.”

14. The relevant provisions of Law No. 138 of June 17, 2016 regarding the amendment and completion of certain legislative acts are the following:

"[...]

Article XXXI.

(3) The restriction provided for in Article 25 para. (6) of Law No. 278-XVI of December 14, 2007 on tobacco control (republished in the Official Gazette of the Republic of Moldova, 2015, No. 258–261, Art. 489) does not apply to establishments put into operation by the date of entry into effect of this law, for the useful life not extending beyond January 1, 2019.

15. The relevant provisions of the Healthcare Regulation on the marketing of unfermented tobacco and fermented tobacco, tobacco, and tobacco-related products, approved by Government Decision no. 1065 of September 19, 2016, are the following:

"12. To prevent minors from accessing tobacco and tobacco-related products:

1) The sale of tobacco and tobacco-related products is prohibited: [...]

b) through the itinerant trade network (except for kiosks, booths, and gazebos), at improvised stands or counters, through vending machines;

[...]

6) Establishments with a commercial area of less than 20 m² that sell tobacco and tobacco-related products must be located at a distance of at least 200 m from educational institutions and healthcare facilities. The 200-meter distance shall be calculated in a straight line from the commercial establishment to the nearest external point of the land belonging to the educational institutions and healthcare facilities;"

16. The relevant provisions of the Nomenclature of commercial establishments involved in retail trade, approved by Government Decision no. 931 of December 8, 2011, are the following:

"For the purposes of this Judgment, the terms used shall be defined as follows:

[...]

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store – stationary commercial establishment with a commercial area larger than 20 m² intended to sell retail goods, which has rooms for the receipt, storage, prior preparation of goods intended for sale and their sale, as well as auxiliary, administrative rooms, and spaces for social use;

itinerant commercial unit – a retail trade establishment built of easily removable construction units, which can be moved from place to place and which, as a rule, does not have space to store products. It sells a limited variety of goods and offers minimum comfort to the consumers. Itinerant commercial units are:

temporary, stationary - gazebo, booth;

itinerant- truck shop, caravan, trailer, stall, stand, counter, cart, automatic vending machine.

II. CLASSIFICATION OF RETAIL COMMERCIAL ESTABLISHMENTS

[...]

3) GAZEBO – temporary stationary selling facility, made of easy-to-disassemble construction material, with an area larger than 12 m², which has space to store goods.

KIOSK (booth) - factory structure, equipped, with a total area of up to 12 square meters, without any space to store goods.

[...]”

DE JURE

A. ADMISSIBILITY

17. By its Judgment of March 14, 2019, the Court acknowledged that the subject-matter of this complaint was Article 25 para. (6) of Law No. 278 of December 14, 2007 on tobacco control. The review of the constitutionality of such normative act is under its competence *by reason of the matter*, according to Article 135 para. (1) letter a) of the Constitution.

18. Furthermore, according to Articles 25 letter g) of the Law on the Constitutional Court and Art. 38 para. (1) letter g) of the Code of Constitutional Jurisdiction, deputies have the prerogative of notifying the Constitutional Court.

19. The Court acknowledged that the contested regulation was no longer subject to a constitutional review.

20. The Court also noted that the complainant argued that the contested provisions were contrary to Articles 9 para. (3), Art. 16, Art. 54 para. (1) and (2), Art. 126 para. (2) letter b) of the Constitution.

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21. With respect to the applicability of Articles 9 para. (3) and 126 para. (2) letter b) of the Constitution, the Court acknowledged that the regulations in question impose an obligation on government authorities to ensure that businesses can operate on the basis of an undisturbed competition environment. The complainant believes that the ban on the marketing of tobacco products through commercial establishments with an area of less than 20 m² is selective, because it does not affect commercial establishments with a larger area, thus creating a limited competition environment. The Court was of the opinion that the contested provisions could be reviewed in light of the government's constitutional obligation to ensure a free competition environment.

22. With respect to the applicability of Article 16 of the Constitution, which guarantees equality of persons before the law and public authorities, the Court acknowledged that, given that the notion of selectivity, addressed in § 21 *above* is related to discrimination, it will address issues related to discrimination in its analysis of the compliance of the disputed ban with the constitutional obligation of the government to ensure an environment of free competition.

23. The Court considered that it must operate with the provisions of Articles 9 para. (3), Art. 54, and Art. 126 par. (2) letter b) of the Constitution.

24. The Court therefore acknowledged that the complaint could not be dismissed as inadmissible and that there was no other ground for terminating the proceedings, in accordance with Article 60 of the Code of Constitutional Jurisdiction.

B. MERITS OF THE CASE

THE ALLEGED VIOLATION OF ARTICLES 9 PARA. (3), 54, AND 126 PARA. (2) LETTER B) OF THE CONSTITUTION

1. Complainant's arguments

25. In its statement of reasons, the author asserts that the disputed provisions do not ensure free competition between merchants because, although it prohibits the marketing of tobacco and tobacco-related products within a distance of less than 200 m from educational institutions and healthcare facilities, this prohibition is only applicable in the case of commercial establishments with a commercial area of less than 20 m², without prejudice to commercial establishments with a larger area.

26. Consequently, the complainant states that, by failing to apply the prohibition in question to commercial establishments with an area exceeding

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20 m², the latter may sell tobacco products both in the close proximity of educational institutions and healthcare facilities and inside them.

27. Finally, the author believes that the application of the ban on the marketing of tobacco products based on the size of the commercial area is unfair, given that this regulation only affords disadvantages to small and medium-sized businesses, thus establishing a preferential and unjustified treatment compared to large businesses.

28. The author of the complaint believes that Article 25 para. (6) of Law No. 278 of December 14, 2007 on tobacco control is against the constitutional requirements regarding free competition, as provided in Articles 9 para. (3), 54, and 126 para. (2) letter b) of the Constitution.

2. Authorities' arguments

29. In the Court's plenary meeting, the Parliament's representative stated that the disputed regulation does not affect free competition between merchants, since it applies equally to all commercial establishments with a commercial area of less than 20 m². Consequently, setting conditions for the marketing of tobacco products for commercial establishments with a commercial area of less than 20 m², which are different from other commercial establishments, is a matter related to the different activities of these establishments, which does not conflict with free competition. The legitimate purpose of the disputed restriction is to protect the health of minors. Furthermore, after the disputed measure was passed, the legislative body set a transitional period, which allowed commercial establishments to adapt to the new conditions for the marketing of tobacco products.

30. The opinion presented by the Government states that the legitimate purpose of the disputed measure was to protect the health of minors and sick people. Regarding the scaling of the measure, the Government claims that the passing of the disputed provisions did not result in the suspension of or ceasing of the activity of commercial establishments with a commercial area of less than 20 m² because the legislative body established a transition period. With regard to the differentiation of commercial establishments that were subject to the ban, the Government mentioned that, according to the investigations carried out by the National Agency for Public Health in the area of compliance with tobacco control legislation (July 1 - September 30, 2018), it was found that minors purchase tobacco products from kiosks/booths in most cases (58.7%). According to the Government, the main source of procuring tobacco products by minors is commercial establishments with a commercial area of less 20 m². Therefore, the Government considers

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that the disputed regulation does not violate the constitutional requirements relating to ensuring free competition between merchants.

31. In addition to the Government's opinion, the National Agency for Public Health, which reports to the Ministry of Health, Labor, and Social Protection, issued an opinion stating that the ban on the marketing of tobacco products in the proximity of protected groups complies with the constitutional requirements for ensuring free competition between merchants because it is equally applicable to all commercial establishments with a commercial area of less than 20 m². All businesses wishing to market tobacco products through commercial establishments with an area of less than 20 m² must comply with the requirement to locate the establishments in question at a distance of at least 200 m from protected groups. The restriction was directed against commercial establishments with a commercial area of less than 20 m² because, unlike commercial establishments with a larger area, the former are the most accessible to protected groups. The legitimate purpose of the disputed restriction is to protect the health of minors and public health in general. Finally, it is mentioned that in the case of commercial establishments with a commercial area of less than 20 m², the buyer's visibility is reduced, which creates difficulties in complying with the ban on marketing tobacco products to minors.

32. The Constitutional Court also received an impartial, voluntary opinion from the Center for Healthcare Policy and Analysis. The Court encourages and appreciates the submission of such opinions by the specialized organizations of the Republic of Moldova in cases that arouse a special public interest.

33. In its impartial, voluntary opinion, the Center states that the legitimate purpose of the disputed measure is not to restrict competition between merchants, but to protect the health of children in educational institutions and of patients in healthcare facilities. The Center also mentions that the disputed ban should be extended to all merchants, as their location near protected groups is a tool to promote smoking among young people and people visiting healthcare facilities. At the same time, the Center refers to a study developed by the National Agency for Public Health, according to which young people often buy tobacco products from temporary commercial establishments (kiosks/booths), because they cannot buy those products from stationary commercial establishments (stores, supermarkets etc.) due to their age. The condition regarding the buyer's age can be more easily observed in the case of stationary commercial establishments because the seller stands face-to-face with the buyer, while in the case of temporary commercial establishments, the buyer's visibility is reduced, which allows for circumventing this condition.

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34. The Constitutional Court received an involuntary, impartial opinion from Mr. Rodion Gavriloi, a member of the National Coordinating Council in the field of tobacco control. The opinion states that restricting the access of young people and people visiting healthcare facilities is based on the obligation taken on by state authorities to reduce tobacco use. The purpose of the disputed measure is to protect public health. The legislative body directed the disputed ban against temporary commercial establishments, as they do not ensure sufficient visibility of the buyer by the seller, which allows for the ban on the sale of tobacco products to minors to be circumvented.

35. The President of the Republic of Moldova did not present his/her opinion with regards to the complaint.

3. The Court's Findings

36. The Court acknowledges that Article 9 para. (3) of the Constitution sets forth the elements that the economy is based on, namely: the market, free economic initiative, and fair competition. With regard to the latter, the Constitution expressly provides that the government must ensure that fair competition is protected [see Article 126 para. (2) letter b)].

37. In its case-law, the Court acknowledged that competition is an indispensable condition for the existence of a market economy, a true regulatory force thereof. It can be defined as the confrontation between businesses having the same or similar activities, exercised in areas open to the market, for the gain and retention of customers, in order to make their business profitable. Freedom of competition is a prerequisite for the development of trade relations and a guarantee for progress. It also mentioned that, in the development of trade relations, competition fulfills the following important functions: it guarantees a market economy; it facilitates the free movement of goods and services; it stimulates the market participation initiative (HCC [Hotărârea Curții Constituționale -- Constitutional Court Judgment] No. 11 of May 28, 2013, §§ 31-32).

38. In the present case, the Court notes that the issue addressed by the complainant concerns the allegedly selective nature of the measure imposed by the legislative body with respect to commercial establishments with a commercial area of less than 20 m² and the alleged damage to free competition guaranteed by the Constitution. In order to review the constitutionality of the measure passed by the legislative body, the Court will clarify the following issues: (i) whether the disputed measure is "stipulated by the law"; (ii) whether the disputed measure seeks to achieve a legitimate purpose; (iii) whether the differential treatment is objectively and reasonably justified.

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(i) Whether the disputed measure is "provided by the law"

39. The Court notes that the disputed measure is provided for in Article 25 para. (6) of Law No. 278 of December 14, 2007 on tobacco control, which stipulates the following:

"Establishments with a commercial area of less than 20 m², that sell tobacco and tobacco-related products must be located at a distance of at least 200 m from educational institutions and healthcare facilities."

40. The wording "stipulated by law" not only requires that the interference have a legal basis in national law, but also refers to the quality of the law in question. The law must be accessible and its effects must be predictable (HCC No. 16 of June 4, 2018, § 44).

41. In order to determine whether the disputed text of the law measures up to the test of the quality of the law, the Court must determine whether its interpreter (*i.e.*, the courts) and its addressees can understand which commercial establishments fall within the scope of the measure adopted by the legislative body.

42. Thus, the Court notes that the Nomenclature of commercial retail establishments approved by Government Decision No. 931 of December 8, 2011 [see § 16 of this Judgment] provides for two commercial establishments whose area is smaller than 20 m², *i.e.*, the gazebo (with an area larger than 12 m²) and the kiosk/booth (with a total area of up to 12 m²). At the same time, the above-quoted Nomenclature establishes that the store is a commercial establishment with a commercial area larger than 20 m².

43. Based on the review of the commercial areas of the commercial establishments referred to in § 42, the gazebo and the kiosk/booth are commercial establishments that fall within the scope of the disputed measure because their commercial area is less than 20 m², as required by the disputed law.

44. With regard to the clarity of the method used of calculating the 200 m distance imposed between the commercial establishment selling tobacco products and educational institutions and healthcare facilities, the Court notes that for this situation the Government has established that the distance in question must be calculated in a straight line from the commercial establishment to the nearest external point of the land adjacent to educational institutions and healthcare facilities [see Healthcare Regulation on the marketing of unfermented tobacco and fermented tobacco, of tobacco and tobacco-related products, approved by Government Decision No. 1065 of

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September 19, 2016, Item 12].

45. The Court therefore notes that the disputed legislative measure is accessible and clear both in terms of the business establishments covered by it and in terms of the method for calculating the 200 m distance imposed between the business establishment marketing tobacco products and the education institutions and healthcare facilities. In conclusion, the contested measure is "stipulated by the law."

(ii) If the disputed measure seeks to achieve a legitimate purpose

46. The Court is of the opinion that the regulation of the distance which must exist between commercial establishments wishing to market tobacco products and educational institutions and healthcare facilities may be regarded as a "buffer zone." The density of commercial establishments that sell tobacco products generates the accessibility of these products, and accessibility in turn leads to the habit of smoking. Furthermore, the density of commercial establishments that sell tobacco products near educational institutions is linked to the high prevalence of smoking among students (see Wing C. Chan, Scott T. Leatherdale, *Tobacco retailer density surrounding schools and youth smoking behaviour: a multi-level analysis*, Tobacco Induced Diseases, vol. 9, no. 9, 2011, pp. 1 and 2).

47. At the same time, a study conducted in the United States shows that the large number of commercial establishments that sell tobacco products near schools or other places frequented by young people is associated with higher rates of young smokers, higher rates of cigarettes smoked per day, and lower rates of smoking cessation among young people (see Amy Ackerman *et al*, *Reducing the Density and Number of Tobacco Retailers: Policy Solutions and Legal Issues*, Nicotine & Tobacco Research, vol. 19, no. 2, 2017, p. 134). Also, according to studies published in Canada, the proximity of establishments selling tobacco products facilitates the purchase of tobacco products, which causes people who have never smoked before and people who occasionally smoke to become smokers. The large number of establishments selling tobacco products is associated with a higher prevalence of smokers in healthcare facilities (see M.O. Chaiton. *et al*, *Tobacco Retail Outlets and Vulnerable Populations in Ontario, Canada*, International Journal of Environmental Research and Public Health, vol. 10, no. 12, 2013, p. 7306).

48. The Court acknowledges that the reason why the legislative body considered it appropriate to regulate a "buffer zone" between establishments selling tobacco products and educational institutions and healthcare facilities

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is based on scientific data. For this reason, in this case, in order to determine whether the disputed measure seeks to achieve a legitimate purpose, the Court will take into account scholarly studies. The relevance of scholarly studies helps form an opinion on the observance by the legislative body of the precautionary principle when it passed the disputed measure. According to the case law of the Court of Justice of the European Union, "the legislative body [...] must follow the precautionary principle, according to which, if specific uncertainties persist as to the existence or extent of risks to human health, protective measures may be taken without having to wait for the full demonstration of the real and serious nature of these risks. Where the existence or extent of the alleged risk is impossible to determine with certainty because of the inconclusive nature of the results of the studies that were carried out, but the likelihood of actual harm to public health persists under the hypothesis that the risk can become real, the precautionary principle justifies the implementation of restrictive measures" (cases *Swedish Match AB v. Secretary of State for Health*, C-151/17, November 22, 2018, § 38; *Giovanni Pesce et al. v. Presidenza del Consiglio dei Ministri et al*, C-78/16 and C-79/16, June 9, 2016, § 47; *Neptune Distribution SNC v. Ministre de l'Économie et des Finances*, C-157/14, December 17, 2015, §§ 81-82).

49. Thus, the Court considers that the data referred to in §§ 46 and 47 of this Judgment are sufficiently convincing to draw a conclusion that, by the disputed measure, the legislative body aimed at achieving two purposes: the protection of young people's health and the protection of the general health of the community. These two purposes can fall under the purpose of protecting the rights, freedoms, and dignity of others, provided by Article 54 para. (2) of the Constitution.

50. With regard to the existence of a rational link between the disputed measure and the legitimate aim pursued, the Court finds that scholarly studies have shown that one third of young smokers in Canada have stated that they would smoke fewer cigarettes if they have to go a larger distance to obtain them (see Wing C. Chan and Scott T. Leatherdale, *Tobacco retailer density surrounding schools and youth smoking behavior: a multi-level analysis*, quoted in § 46 above, p. 5). In this context, in order to help reduce smoking rates among young people, several US states such as Illinois, California, Louisiana, and New York have banned the marketing of tobacco products in the vicinity of schools. As a result, it was found that banning the marketing of tobacco products at a certain distance from schools had the effect of reducing the number of such commercial establishments and lowering the rate of young smokers (see Amy Ackerman, *et al*, *Reducing the Density and Number of Tobacco Retailers: Policy Solutions and Legal Issues*, quoted in §

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47 *above*, p. 134). The Court, therefore, acknowledges, including in light of these studies, that there is a rational connection between the removal of establishments marketing tobacco products from educational institutions and the protection of human health. This measure can reduce the number of smokers.

(iii) If the differential treatment is objectively and reasonably justified

51. In this case, the Court must determine whether, in order to protect the health of young people and the community at large, it was necessary to differentiate between commercial establishments which are prohibited from marketing tobacco and tobacco-related products within the scope provided by the law.

52. The Court notes that the protection of the population's health is an interest of the utmost importance in order to coexist in a society. Consequently, the restrictions imposed by the legislative body to protect this interest can be justified even if they affect the economic interests of individuals. However, as required by the government's constitutional obligation to protect competition, the above-mentioned measure must not constitute a means of arbitrary discrimination between merchants.

a) With regard to the existence of less restrictive alternative measures

53. The test of less restrictive measures verifies whether the legislative body could pass legislative measures that would achieve, in an equally effective manner, the legitimate pursued purpose, and that would limit the protected fundamental right less than the disputed measures (HCC No. 26 of October 30, 2018, § 55).

54. The Court finds that the ban on the marketing of tobacco products in the vicinity of educational institutions and healthcare facilities is the only measure passed by the legislative body which seeks to limit the access of protected groups to the products in question. The Court shall review whether the other measures can equally effectively prevent protected groups from accessing tobacco products.

55. With regard to the impact of the ban on smoking in public places (Article 26 of the Tobacco Control Act), the Court finds that recent studies show that passing this measure contributes, in general, to reducing the frequency of smoking among young people (see S.S. Hawkins *et al*, *Impact of Tobacco Control Policies on Adolescent Smoking*, Journal of Adolescent Health, vol. 58, No. 6, 2016, p. 683).

56. With regard to the ban on advertising tobacco products [Section 19 of

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the Advertising Act] and the obligation to print health warnings [Section 16 of the Tobacco Control Act], the Court notes that their impact on reducing the consumption of tobacco products is moderate (see Steven J. Hoffman, Charlie Tan, *Overview of systematic reviews on the health-related effects of government tobacco control policies*, BMC Public Health, vol. 15, 2015, p. 6).

57. With regard to measures to raise awareness and educate the public about the risks of smoking [Article 31 of the Law on Tobacco Control], the Court finds that they can have an effective impact in reducing tobacco product use among young people only if they are applied at the same time with other measures such as sanctioning the marketing of tobacco products under conditions prohibited by law (see L. Richardson *et al*, *Preventing Smoking in Young People: A Systematic Review of the Impact of Access Interventions*, International Journal of Environmental Research and Public Health, vol. 6, No. 4, 2009, pp. 1490 and 1491).

58. However, measures such as the ban on marketing of tobacco products to people under the age of 18 and an increase in tobacco prices can be considered to be effective. Raising prices, for example, has a considerable impact, especially for young people belonging to vulnerable social groups. On the other hand, the ban on marketing of tobacco products to minors can only be considered effective if strict law enforcement is ensured (see Steven J. Hoffman, Charlie Tan, *Overview of systematic reviews on the health-related effects of government tobacco control policies*, quoted in § 56 above, p. 7).

59. By looking at the alternative measures, the Court acknowledges that even the most effective of them, (i.e., a ban on the marketing of tobacco products to minors or an increase in prices) cannot be compared with the effects of a ban on the sale of tobacco products in the proximity of protected groups, as its specificity is to establish a "buffer zone" between commercial establishments and educational institutions and healthcare facilities.

60. The Court also notes that the ban on the marketing of tobacco products in the vicinity of protected groups reduces the density of commercial establishments and lowers the rate of young smokers (see § 50 above). Thus, the ban can be considered one of the most effective measures to help discourage smoking among young people (see Douglas A. Luke *et al*, *Tobacco retail policy landscape: a longitudinal survey of US states*, Tobacco Control, vol. 25, no. 1, 2016, p. 47).

61. Furthermore, the Court notes that measures to discourage tobacco use can be effective and can truly address the concerns of state health protection authorities only if they are implemented in a coherent and systemic manner

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(see the case *Swedish Match AB v. Secretary of State for Health*, C-151/17, November 22, 2018, § 59). In this case, the Court acknowledges that eliminating the "buffer zone" between establishments marketing tobacco products and the protected groups undermines the coherence of measures to discourage the consumption of tobacco products. Moreover, the Court notes that limiting access to tobacco products is part of the Government's action plan to implement the National Tobacco Control Program for 2017-2021 [see Annex No. 2 to Government Decision No. 1015 of November 23, 2017, quoted in § 11 *above*].

62. As there are no measures which would have less impact on free competition between merchants for the time being, but which would achieve equally effectively the legitimate pursued purpose, the Court will consider that the test of minimum interference is exhausted.

b) With regard to the need to apply the restriction in a differentiated way,

63. The Court finds that commercial establishments with a commercial area larger than 20 m² (i.e., shops, department stores, mixed shops, etc.) are stationary, which means that their operation must comply with the requirements for their special equipment; location in buildings and constructions intended for commercial activity; the existence of a closed circuit construction system rigidly connected by foundation with the adjacent land; connection to stationary engineering networks [see the Nomenclature of commercial establishments carrying out retail trade, approved by Government Decision No. 931 of December 8, 2011]. In view of these requirements, the Court acknowledges that relocating stationary business establishments may be difficult.

64. However, the issue of relocation is not the most important item in the context of the ban on the marketing of tobacco products in the vicinity of educational institutions and healthcare facilities. In fact, the costs of relocating the business establishment are not a convincing reason for not extending the prohibition in question to stationary business establishments.

65. In identifying other reasons which led the legislative body to not prohibit stationary businesses from marketing tobacco products even if they are in close proximity to educational institutions and healthcare facilities, the Court notes that the visibility and accessibility of the products in question in these commercial establishments must also be taken into account. Consequently, unlike gazebos, kiosks, or booths, tobacco products are not visible from the entrance to the stationary commercial establishments. The visibility of tobacco products may lead to their purchase by people who practice occasional smoking,

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but also by those who have never smoked (see D. Spanopoulos *et al*, *Tobacco display and brand communication at the point of sale: implications for adolescent smoking behaviour*, Tobacco Control, vol. 23, no. 1, 2014, p. 68). In this respect, the Court believes that, in terms of the visibility of tobacco products, stationary commercial establishments show a low risk in making protected groups buy tobacco products.

66. The Court also believes that stationary commercial establishments have several guarantees that may reduce the risk of marketing tobacco products to persons under 18 years of age. For this purpose, video cameras can be installed in the stationary commercial establishments, which would allow the subsequent monitoring of the sellers' compliance with the ban on the marketing of tobacco products to minors.

67. Another element that may discourage a potential smoker from the protected group to buy tobacco products from stationary commercial establishments may be the excessive crowds of people that are present in these establishments. In fact, the activity of the commercial establishments in question focuses predominantly on the sale of food items and non-food items of regular use. Consequently, tobacco products are not the main product of these commercial establishments. Thus, both from the perspective of the visibility of tobacco products to the general public and from the perspective of their accessibility, the Court considers that stationary commercial establishments cannot be considered the most popular sources for the purchase of tobacco products.

68. Unlike stationary commercial establishments, the Court notes that temporary commercial establishments (i.e., the gazebo, kiosk/booth) may operate in less drastic conditions than those established for stationary commercial establishments (see § 63 *above*). Therefore, the status of temporary construction means that it is easily dismantled, it can be moved from place to place, and, as a rule, does not have room for storing products [see the Nomenclature of Retail Businesses, referred to in § 16 *above*]. The fact that temporary commercial establishments are easily dismantled and can be moved from place to place includes two aspects. On the one hand, the commercial establishment in question may be placed in the most accessible and crowded place for the groups protected by the disputed measure. On the other hand, unlike stationary commercial establishments (i.e., shops, supermarkets, department stores, etc.), temporary commercial establishments can be relocated to a different location without requiring insurmountable efforts. This means that the restriction on the marketing of tobacco products at a distance of less than 200 m from the protected groups can be overcome without insurmountable efforts by the temporary

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commercial establishments by relocating them at a distance of more than 200 m.

69. Although, at a first impression, the relocation puts merchants in unequal situations in terms of customers flow, as stationary commercial establishments get an advantage, the Court notes that temporary commercial establishments also have other attributes that even out this difference.

70. By comparing the level of visibility of tobacco products in the context of the two commercial establishments, the Court acknowledges that while tobacco products are not visible from the entrance to stationary commercial establishments, the reverse is true for temporary commercial establishments. Due to the characteristics of temporary commercial establishments, tobacco products can be displayed in a way that ensures greater visibility for the general public and, in particular, for protected groups. Thus, the Court notes that the reason why the legislative body directed the disputed ban against temporary commercial establishments must be reviewed in the context of the findings that persons attending educational institutions often tend to obtain tobacco products from small commercial establishments (see M. Stead *et al.*, *Young people's exposure to point-of-sale tobacco products and promotions*, Public Health, vol. 136, 2016, p. 8). The explanation for this trend is based on the fact that temporary commercial establishments ensure a higher visibility of tobacco products (see D. Spanopoulos *et al.*, *Tobacco display and brand communication at the point of sale: implications for adolescent smoking behavior*, op. quoted in § 65 above, p. 65).

71. The level of accessibility of temporary commercial establishments is also higher than in the case of stationary commercial establishments, as the former can be located in the most accessible and crowded location for protected groups. Thus, although the kiosks/booth cannot be located at a distance of less than 200 m from the protected groups, the features of this commercial establishment ensure a higher sales volume of tobacco products than in shops, supermarkets, department stores, etc.

72. This is confirmed by scholarly studies according to which tobacco products are a major product for small businesses (see J. Paynter *et al.*, *An intervention to reduce the number of convenience stores selling tobacco: Feasibility study*, Tobacco Control, vol. 25, no. 3, 2016, p. 5). The availability of small businesses selling tobacco products reduces the need to look for them and consequently makes tobacco products more accessible to minors (see A. Sanders-Jackson *et al.*, *Convenience store visits by US adolescents: Rationale for healthier retail environments*, Health & Place, vol. 34, 2015, p. 63). Research conducted in Japan and the United States has shown that there is a considerable causal link between smoking and visiting

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small businesses. Thus, the prevalence of smoking is higher in people who visit small businesses at least once a week (see I. Watanabe *et al.*, *Personal Factors Associated with Smoking Among Marginalized and Disadvantaged Youth in Japan: A Strong Relationship Between Smoking and Convenience Store Use*, *International Journal of Behavioral Medicine*, vol, 20, no. 4, 2013, p. 511; Lisa Henriksen *et al.*, *Association of Retail Tobacco Marketing With Adolescent Smoking*, *American Journal of Public Health*, vol. 94, no. 12, 2004, p. 2081). Compared to stationary commercial establishments, the temporary ones (kiosks/booths) can be considered the most popular source for purchasing tobacco products.

73. With regard to the risk of marketing tobacco products to people under the age of 18, the Court notes that temporary commercial establishments do not have the same guarantees as those existing in stationary commercial establishments (compare to § 66 *above*). Consequently, starting with the assumption that stationary commercial establishments more strictly comply with the ban on the sale of tobacco products to minors than temporary establishments, the restriction on the marketing of tobacco products near schools may be considered necessary (see William J. McCarthy *et al.*, *Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students*, *American Journal of Public Health*, vol. 99, no. 11, 2009, p. 2012).

c) With regard to an adaptation period

74. The Court notes that the restriction on the marketing of tobacco products by temporary commercial establishments in the close proximity of protected groups was passed by Law no. 124 of May 29, 2015, and entered into effect on September 17, 2015 (see § 6 *above*).

75. Subsequently, on June 17, 2016, the legislative body passed Law No. 138, suspending the action of the disputed restriction until January 1, 2019 for commercial establishments starting their operation by July 1, 2016 (see § 10 *above*).

76. Thus, in view of the fact that the ban in question was passed in 2015 and became effective on January 1, 2019, the Court considers that the four-year term is a sufficient period of time for commercial establishments that started operating by July 1, 2016 to adapt to the new requirements (see, *mutatis mutandis*, DCC No. 64 of June 19, 2018, §§ 24 and 26).

d) Conclusions

77. The Court acknowledges that, although the ban on the marketing of tobacco products in the vicinity of protected groups applies based on the

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commercial area of the business establishment, temporary business establishments cannot be considered disadvantaged compared to stationary business establishments, as the former have the following features that prove the existence of a fair balance in the differential treatment invoked:

- (i) they may operate under more flexible conditions than those set forth for stationary business establishments (see § 68 of this Judgment);
- (ii) they can be relocated without requiring insurmountable efforts (see § 68 of this Judgment);
- (iii) they ensure a higher visibility of tobacco products (see § 70 of this Judgment);
- (iv) the level of accessibility of the tobacco products is higher than in the case of stationary commercial establishments, which ensures a higher sales volume (see § 71 of this Judgment);
- (v) they may be located in the most accessible and crowded places for the protected groups (see § 68 of this Judgment);
- (vi) persons attending educational institutions often tend to purchase tobacco products from small businesses (see § 70 of this Judgment);
- (vii) the temporary commercial establishments do not have guarantees against the risk of marketing tobacco products to minors (see § 73 of this Judgment).

78. Furthermore, the Court acknowledges that the alternative measures do not ensure that the purpose aimed at is achieved as effectively (see §§ 55-62 of this Judgment). On the contrary, eliminating the "buffer zone" between establishments marketing tobacco products and the protected groups undermines the coherence of measures to discourage the consumption of tobacco products (see § 61 of this Judgment). At the same time, the legislative body granted sufficient time to the temporary commercial establishments to adapt to the new conditions regarding the marketing of tobacco products (see §§ 74-76 of this Judgment).

79. The Court therefore notes that the ban on the marketing of tobacco products by temporary commercial establishments in the vicinity of educational institutions and healthcare facilities is not against the constitutional provisions on free competition [Articles 9 para. (3) and 126 para. (2) letter b)], nor against those relating to the restriction of the exercise of certain rights or freedoms [Article 54].

For these reasons, based on Articles 135 para. (1) letter a) and 140 of the Constitution, Art. 26 of the Law on the Constitutional Court, Art. 6, Art. 61, Art. 62 letter a) and Art. 68 of the Code of Constitutional Jurisdiction, the Constitutional Court

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HEREBY DECREES THE FOLLOWING:

1. The complaint submitted by Mr. Simion Grişciuc, who held the position of Deputy in the Parliament of the Republic of Moldova at the time of the complaint, *is hereby rejected.*

2. Article 25 para. (6) of Law No. 278 of December 14, 2007 on tobacco control *is hereby constitutionally acknowledged.*

3. This judgment is final, may not be subject to any appeal, it shall enter into effect on the date it was made, and it shall be published in the Official Gazette of the Republic of Moldova.

Chairman

Mihai POALELUNGI

Chişinău, April 8, 2019
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Docket No. 52a/2019