

Analysis

The Complaint against the Tobacco Industry

1. Introductory Comments

On the 29 September 2016, criminal defence lawyer Ms. Bénédicte Ficq filed a complaint against the four largest tobacco companies conducting business within the Netherlands and additionally, against the *de facto* executive managers of the aforementioned companies (collectively hereafter: *the tobacco manufacturers*). The complaint was filed on behalf of three (legal) entities. Subsequently, numerous other (legal) entities were added to the three initial complainants with the request that prosecution proceedings be initiated. Furthermore, the original complaint filed on 29 September 2016 was later supplemented with allegations of additional criminal offences (collectively hereafter: *the complaint*).

The complainants in this case state that, amongst other things, the tobacco manufacturers are guilty of attempted murder or attempted manslaughter and/or attempted severe & premeditated physical assault and/or attempted & premeditated harm to health with intent, as well as forgery.

The Dutch Public Prosecution Service evaluated the complaint (hereafter: *the DPPS*). An assessment took place as to whether there was reason to commence with a criminal investigation and/or if it was possible to establish just cause to initiate prosecution proceedings against the aforementioned tobacco manufacturers. This paper provides a detailed analysis of the aforementioned complaint, the results of the evaluation and the decision as to whether a successful prosecution can be brought against the tobacco industry.

1.1. The Complaint of 29 September 2016

First and foremost, the complaint filed by Ms. Ficq was not against the use of tobacco in general but specifically focused on the use of cigarettes. The manufacturers of these cigarettes are alleged to be guilty of the following:

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- 1.1.1. *Attempted murder or alternatively, attempted manslaughter and/or attempted severe & premeditated physical assault and/or attempted & premeditated harm to health with intent.*

Section 287 Dutch Criminal Code:

Any person who intentionally takes the life of another person shall be guilty of manslaughter and shall be liable to a term of imprisonment not exceeding fifteen years or a fine of the fifth category.

Section 289 Dutch Criminal Code:

Any person who intentionally and with premeditation takes the life of another person shall be guilty of murder and shall be liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category.

Section 303, subsection 1 Dutch Criminal Code:

Aggravated assault committed with premeditation shall be liable to a term of imprisonment not exceeding twelve years or a fine of the fifth category.

Section 300, subsection 4 Dutch Criminal Code:

The intentional harming of health shall be considered as equivalent to assault.

Section 45, subsection 1 Dutch Criminal Code:

An attempt to commit a serious offence shall be punishable if the intention of the offender has manifested itself by a commencement of the performance of the criminal act.

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In short, the complainants allege that by the production and sale of cigarettes, the tobacco manufacturers knowingly and wilfully accepted the significant risk that in using these tobacco products, a significant chance of, if not death, then serious physical harm presented itself or as the case may be, harm in the sense that the health of the users would be damaged, by stimulating addiction and all of the above, with premeditation and intent.

The complainants allege that cigarettes are 'deadly by design': that the tobacco manufacturers "*purposefully designed/manipulated and produced the tobacco products in such a way that addiction was almost immediate and subsequently maintained whereby the 'free will' of the user was restricted. The result is that the user becomes a regular consumer and susceptible to all serious health risks*". By this, it is meant that the addition of various substances (additives) in cigarettes enhanced the attraction to use the product and stimulated addiction, for example by adding a flavour. These additives can be damaging to one's health.¹

Additionally, the complainants allege that the *business model* of the tobacco manufacturers was aimed at creating as many addictive users as is possible and subsequently maintaining this addiction in order to achieve advantageous financial gain. This, while in full awareness of the serious health risks attributed to smoking.

¹ See report: National Institute for Public Health & Environment (Dutch: *RIVM*).

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1.1.2. Forgery

Section 225, subsections 1 & 2 Dutch Criminal Code

1. Any person who makes a false document or falsifies a document that is intended to be used as evidence of any fact, with the intention that he or others shall use it as if it were genuine and unfalsified, shall be guilty of forgery and shall be liable to a term of imprisonment not exceeding six years or a fine of the fifth category.
2. Any person who intentionally uses such a false or falsified document as if it were genuine and unfalsified or intentionally delivers or possesses such a document, while he knows or has reasonable cause to suspect that this document is destined for such use, shall be liable to the same punishment.

Allegedly, the tobacco manufacturers misled smokers by displaying incorrect emission levels of tar, nicotine and carbon monoxide on the packaging of tobacco products. The TNCO levels displayed are not consistent with the emission levels consumed during normal cigarette use. The complainants are of the opinion that the tobacco manufacturers added miniscule perforations in the filter paper, whereby emission levels in tests (ISO) read far lower than is the case during the physical act of smoking. During the tests, the miniscule perforations remain open, but close off when a cigarette is smoked.

According to the complainants, the above acts amount to forgery and there are no grounds for justification or exoneration.

1.2. Counter-argumentation

The complaint against the tobacco manufacturers was published by the parties to the case.² Due to the publication and the subsequent media attention surrounding it, the tobacco manufacturers reacted that it was their wish to provide counter – argumentation to the DPPS.

In their opinion, there were no grounds for the aforementioned allegations. In short, the tobacco manufacturers claimed that:

- There were no grounds for the offence of forgery. Until 2016, the law prescribed the mandatory display of TNCO levels conforming to measured ISO-standards on cigarette packaging;
- There were no grounds for fraud. The perforation holes in the cigarettes were not covertly added and the Dutch government & the EU had been long aware of the existence of the perforation holes; and
- There were no grounds for the attempted homicide offences and other violent offences alleged in the complaint. The product manufactured conformed to both domestic and European regulations. Furthermore, the smokers must have been aware of the health risks caused by smoking, including the fact that smoking is addictive. Both criminal liability and causation are lacking.

Following this, the complainants reacted on the above counter-arguments.³ Additionally, they were given an opportunity to clarify the complaint in more detail during two meetings on 19 December 2016 & 26 April 2017. These discussions took place at their own request.

² The complaint was made public by the parties in the case:
<https://sickofsmoking.nl/wp-content/uploads/2017/03/Complaint-Tobacco-Industry.pdf>
(Dutch: <https://sickofsmoking.nl/rechtzaken/aangifte-poging-tot-moord-doodslag-zware-mishandeling-en-valsheid-geschrifte/>).

³ By letter on 8 February 2017.

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1.3. Additional Allegations

On 31 May 2017, the complainants supplemented the initial complaint with further submissions. In addition to the aforementioned offences, the complainants alleged a violation of Section 3 in conjunction with Section 2, subsection 1 of the Tobacco & Related Products Act:

Section 3, subsection 1 Tobacco & Related Products Act:

It is prohibited to introduce onto the market any liquids containing nicotine, tobacco products and other related products unless pursuant to Section 2, subsections 1, 2 & 5.

Section 2, subsection 1 Tobacco & Related Products Act:

Pursuant to regulations in the interests of public health, there are requirements regarding tobacco products, electronic cigarettes, refill containers and nicotine-containing liquid, with respect to maximum emission levels, ingredients and technical requirements. Exclusive methods of testing can be designated to determine whether or not a product has met the prescribed standards.

On 24 August 2017, the parties submitted the additional violation of Article 17a of the Tobacco & Related Products Act:

Section 17a, subsection 1 Tobacco & Related Products Act:

If manufacturers, importers and distributors of tobacco products and other related products have reason to believe that tobacco products or related products will be introduced or have been introduced into the market in contravention of the orders in this Act, necessary measures must be taken in order to ensure conformity with these requirements by law or alternatively, to remove or recall the offending product from the market.

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The complainants also requested that, by law, the DPPS should consider interim measures under Section 28 of the Economic Offences Act (Dutch law: *WED*) with respect to the three alleged contraventions in the above Sections and subsequently, to request that the court also consider interim measures in regard to Section 29.⁴

Between 20 March 2017 and 21 February 2018, further institutions and persons were added to the complaint. Also, the DPPS received various declarations of support.

⁴ By mail on 28 March 2017, Ms. Ficq stated that in addition to the offences alleged in the original complaint, there were more applicable criminal offences in the Dutch Criminal Code but that she had chosen to only present the most transparent and potentially successful to the DPPS.

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1.4. Health Risks

Before discussion on the judicial analysis & subsequent decision concerning any potential prosecution can begin, it is important to note that the parties and the tobacco manufacturers are in full agreement that serious health risks can be attributed to cigarette smoking.

It is notable that in annually the Netherlands, approximately 20,000 people die from smoking-related diseases. This is an estimated two people per hour, 22 times more than those who die from excessive alcohol use in the Netherlands *per annum*.

Smoking does not only have fatal consequences – it has extremely fatal consequences. Much research has been conducted evidencing that, in an ample 50 percent of cases,⁵ (continuous) smoking leads to death due to a smoking-related disease, such as COPD, heart and vascular diseases & lung cancer. (In Australia, recent research cited the figure to be as high as 66 percent).⁶ An estimated 90 percent of lung cancer cases can be attributed to smoking.⁷

These serious health risks were not contested in the tobacco manufacturer's counter-argumentation and this was also the case regarding the addictive effect of cigarettes. The most significant addictive substance in tobacco is nicotine. This substance has both a physical and psychological addictive effect.

The tobacco manufacturers, against whom the alleged offences were filed, were aware of all the related health risks of smoking and warned users accordingly on cigarette packaging & websites, as prescribed by Dutch law, based on and compliant with European regulations;⁸ insight into the health risks and the harmfulness of smoking is a given:

⁵ Dutch Public Health & Health Care (Dutch: www.volksgezondheidszorg.info) & Dutch Institute of Mental Health & Addiction (*Trimbos Institute: www.trimbos.org*) 'Smoking: A list of facts' July 2015, p.12

⁶ *Emily Banks & others: Tobacco smoking and all-cause mortality in a large Australian cohort study - findings from a mature epidemic with current low smoking prevalence, BMC Medicine, 2015, 13:38.*

⁸ Dutch Institute of Mental Health & Addiction (*Trimbos Institute: www.trimbos.org*) 'Smoking: A list of facts' July 2015, p. 13

⁸ Tobacco & Related Products Regulation & Annex 1 of Directive 2014/40/EU.

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- Smoking kills – quit now!
- Tobacco smoke contains over 70 substances known to cause cancer.
- Smoking causes 9 out of 10 lung cancers.
- Smoking causes mouth and throat cancer.
- Smoking damages your lungs.
- Smoking causes heart attacks.
- Smoking causes strokes and disability.
- Smoking clogs your arteries.
- Smoking increases the risk of blindness.
- Smoking damages your teeth and gums.
- Smoking can kill your unborn child.
- Your smoke harms your children, family & friends.
- Smokers' children are more likely to start smoking.
- Quit smoking – stay alive for those close to you.
- Smoking reduces fertility.
- Smoking increases the risk of impotence.

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2. Evaluation into potential prosecution for the criminal offences in the complaint

2.1. Attempted homicide & other violent offences

The foremost allegations in the complaint concerned attempted homicide offences and other attempted violent offences:

- Attempted murder or manslaughter;
- Attempted severe & premeditated physical assault; and/or
- Attempted & premeditated harm to health, with intent.

The DPPS conducted an evaluation to see if there was a realistic chance to successfully prosecute the aforementioned offences in the complaint. In the opinion of the DPPS, it is only possible to successfully prosecute if there is a realistic chance of a judicial finding of fact and a subsequent conviction. The DPPS is not of the view that the alleged attempted homicide offences and other violent offences in the complaint can be successfully prosecuted. This reasoning will be clarified in due course.

2.1.1. Intent

Complainants are of the opinion that in order for intent to be evidenced, 'considerable chance' is sufficient (so-named '*conditional intent*'), in order to prove that the tobacco manufacturers have acted criminally. The tobacco manufacturers are fully aware that smoking has a dangerous effect on health but still choose to produce and sell cigarettes.

By virtue of consistent case law in this area, it is clear that a person acts with intent when they consciously create a situation and act on it. In these situations, conditional intent is evidenced; the legal minimum requirement for intent. This minimum also applies to intent in relation to the attempt to commit a crime (Section 45 Dutch Criminal Code). Whether 'considerable chance' is applicable to a defendant in a specific case, is a question that is not easy to establish in advance. This evaluation is strongly dependant on the individual facts of the case in question. The significance of the conduct and the circumstances under which the conduct is displayed are relevant, *including the conduct of the victim*.

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Until the present, the judgments that the Supreme Court of the Netherlands have conducted about the existence of conditional intent (or lack of), concerned situations where the victim could not have, or almost not have evaded the consequence. This has often concerned situations where the conduct of the offender and the frequently unavoidable consequence, in matter of time, has been in close sequence. Pertinent examples are that of throwing a firework bomb at a police van⁹, a fatal overtaking manoeuvre by a driver¹⁰ or of driving into a member of the police force.¹¹ The latter example concerned a situation where an agent had to jump out of the way with great haste to avoid being driven into. In this 1951 judgment, the Supreme Court accepted conditional intent in the case of the defendant. Per annotator Röling, "the precariousness of the consciously established situation" was decisive.

From the case law, it becomes apparent that the Supreme Court apply strict criteria in determining if conditional intent can be evidenced. A good example of this is the so-called HIV-I judgment¹², where it was opined:

*"The only findings of the court can be that the defendant knew that he was infected with the HIV-virus and as is evidenced by his statement – the court refers to the statement presented on appeal – was aware that unprotected sexual contact presented risks, but despite this, it has been proven that he continued to have sexual contact. The court cannot unreservedly conclude that the defendant – supposedly – consciously acted with the knowledge of 'considerable chance'."*¹³

2.1.2. Causality: The Doctrine of Reasonable Attribution

In addition to (conditional) intent, a causal link must be evidenced between the alleged conduct and the harm to the complainants. Since 1978, the Supreme Court have adopted the doctrine of reasonable attribution, a

⁹ HR 01 December 2015, ECLI:NL:HR:2015:3430. Commentary by P.A.M. Nevis (lack of conditional intent).

¹⁰ HR 15 October 1996, ECLI:NL:HR:1996: ZD0139 (Porsche-judgment: lack of conditional intent)

¹¹ HR 6 February 1951, NJ 1951, 475 (driving into a police constable)

¹² HR 25 March 2003, ECLI:NL:HR:2003:AE9049, NJ 2003, 552. Commentary by Buruma

¹³ HR 25 March 2003, ECLI:NL:HR:2003:AE9049, paragraph 3.8

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criterion that finds its origins in civil law.¹⁴

In 2008, the civil division of the Amsterdam District Court was presented with the question if one of the named tobacco manufacturers in the complaint (British American Tobacco, hereafter: *BAT*) could be held accountable for the damage to health caused by the smoking of cigarettes between 1957 and 1983. The complainant concerned had contracted pulmonary emphysema in 1996 and in both 2002 and 2004, had suffered a stroke. The Supreme Court ruled that the criteria of reasonable attribution could not be met because the health risks caused by smoking had been common knowledge since 1963. The court ruled that in order to attribute criminal liability, it was insufficient that smoking causes damage to health in general and that smoking caused the actual health damage in this particular case. If the average consumer is aware of the health risks of smoking, it cannot be said that cigarettes are more dangerous than was to be expected, taking all circumstances into consideration.

The court concluded that, certainly since 1963 (when the complainant started to smoke), the health risks of smoking were common knowledge. The court based this conclusion on several scientific reports that had been in publication since 1950 and on the wide media attention and the civil discourse the reports had subsequently received. Collectively, the tobacco industry did attempt to trivialize and cast doubt upon the inherent dangers of smoking in their own publications. Although the court found that this alone was objectionable, it was insufficient to attribute accountability – leaving aside the matter as to whether these publications can be attributed to *BAT*. To the court, it was clear that there had been a constant stream of media attention, whereby the average consumer (therefore, also the complainant involved) had sufficient available information to come to a balanced decision as to the dangers of smoking.¹⁵

Additionally, in Denmark in 2014, a civil-court judge (after an action lasting roughly eleven years) specifically excluded accountability of the tobacco manufacturers, pertaining to civil law. The responsibility for damage was

¹⁴ HR 12 September 1978, ECLI:NL:HR:1978:AC2616, *NJ* 1979, 60. Commentary by Th. W. van Veen. This criterion finds its origins in civil law, introduced into criminal law by the criminal division of the Supreme Court of the Netherlands, also see J. de Hullu, *Substantive Criminal Law*, Deventer: Wolters Kluwer 2015, 6th edition, p. 182 (Dutch: *Materieel strafrecht*)

¹⁵ Amsterdam District Court 17 December 2008, ECLI:NL:RBAMS:2008:BG7225, *NJ* 2009/311, *NJF* 2009/21.

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attributed to the consumer, as it was common knowledge that smoking is deadly. Regarding the question of whether damage to the smoker (civil law) could be attributed to the tobacco manufacturers, the Supreme Court of Denmark gave the following judgment (markings added by the DPPS):

"In the end, it was– and still is– the choice of the individual to smoke (or to continue smoking) despite the known danger to health (...) Harm that has occurred as the result of smoking but has taken place after awareness of the health risk, must usually be considered as being caused by the individual decision of the aggrieved party to (continue to) smoke despite the risks of harm. It is possible to stop smoking regardless of the fact that smoking is highly addictive. (...) As already stated, public awareness in respect to the dangers of smoking has gradually increased over the years and the governmental requirements for tobacco manufacturers became stricter over the years that A smoked. On the basis of the argumentation, the Supreme Court has to conclude that in the years 1962/1963, when A resumed smoking after having stopped for two years, it was common knowledge – also for minors – that long-term use of cigarettes brought with it the risk of serious health problems, including lung cancer and heart & vascular diseases. In addition, it was general knowledge that it proves difficult to stop smoking after having done so for several years."¹⁶

Notable here is the fact that the complainant had explicitly stated that he was misled as to the deadliness of the product or at least, that he had consumed a higher amount of TNCO levels than were displayed on the cigarette packaging. The Supreme Court of Denmark dismissed this argument but it will be returned to at a later stage in this analysis, during the evaluation of the offence of deception.

A further analysis of the 'reasonable attribution' criteria adds the following. For reasonable attribution to be applied to the defendant's conduct in this particular case, it must be at least as such that it can be concluded that the aforementioned conduct *could have* formed an indispensable link in the events that led to the consequences, and that it is plausible that the conduct

¹⁶ Judgment: The Supreme Court of Denmark (HØJESTERET), Thursday 20 November 2014, case no. 37/2012 (1st section), A. Jensen v House of Prince A/S & Skandinavisk Holding II A/S. Citation translated from the Dutch translation – see annex 1

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concerned played a substantial role in causing the consequences. To help with answering the question as to whether this is the case, is if the conduct:

- (i) is, in the given circumstances, of the appropriate nature to have brought about the consequences and
- (ii) furthermore, the nature of common sense warrants a presumption that the conduct led the consequences to occur.

Moreover, it should also be taken into consideration (iii) as to what extent, outside the proven conduct, other forms of conduct may have attributed to the consequence.¹⁷

Essential for the issue of causation in this particular case is the question of whether extensive introduction onto the market of tobacco products, of which are known to carry very negative health risks, *could have* formed an indispensable link to the consequences (addiction, ill-health, death) and that if it is plausible that the conduct concerned played a substantial role in causing the consequence of the alleged harm. In this evaluation, it was imperative to discuss the extent to which the tobacco manufacturers manipulated their products, such as additives and the addition of miniscule perforation holes in the cigarette filters and whether the display of potentially misleading information increased the chance of the health damage central to the alleged offences.

There are a few observations particularly notable here. It needs to be proven that cigarettes with the abovementioned additions (additives, perforation holes), termed in the complaint as being *deadly by design* are significantly more dangerous than cigarettes without these additives. The addition of perforation holes and additives must have more than marginally contributed to the dangerousness of cigarettes.

According to the National Institute for Public Health & the Environment (Dutch: *RIVM*), as yet, it has not been demonstrated that the concealed additives named in the complaint have made cigarettes more dangerous.¹⁸

¹⁷ The Supreme Court of the Netherlands 4 April 2017, ECLI:NL:HR:2017:585, *NBStraf* 2017/167, *NJB* 2017/922.

¹⁸ RIVM Report: Revision EU Tobacco Products Directive 2001/37/EG: para. 7.4, p. 53: "According to the WHO, there is no evidence that the reduction of individual ingredients reduces the chance of contracting certain smoking-related diseases (WHO, 2008): 'Science has not established that reduction of any individual toxicant in machine-measured cigarette

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The actual presence of concealed additives has not been evidenced. It has been neither asserted nor is it apparent that the tobacco manufacturers added substances to cigarettes, in contravention of the European Tobacco Product Directive¹⁹ and domestic regulations. (see '*Additives as a 'Fraudulent Means'*')

Recently, the RIVM added extra information to their website about filter ventilation in cigarettes.²⁰ The RIVM concludes that cigarette filters with perforations are at least as harmful as those without perforations. By smoking a cigarette with many perforations, a smoker possibly inhales a higher level of harmful substances than would appear in the ISO tests. However, the RIVM also indicates that individual smoking conduct plays a significant role towards how deadly a cigarette actually is. Cigarettes with perforations are, according to the RIVM, no less harmful than cigarettes without perforations but they do not come to the conclusion that cigarettes with ventilation holes are necessarily more harmful by definition than those without.

An additional observation concerns the role of the injured parties or victims. The purchase & consumption of cigarettes requires an active contribution by the injured party, unlike in the *NAM* case²¹ in Groningen, where the injured parties had to leave their residence to escape the potential danger. In contrast, the injured parties in this analysis had the individual choice to alter their individual conduct. Also, the tobacco manufacturers will argue that their products were armed with adequate warnings to allow consumers to decide not to smoke.

The case law demonstrates that, as is correctly noted in the complaint, the actions of the injured parties concerned must not necessarily break the causal chain between the evidenced conduct and the damaging

smoke, will reduce actual human exposure or disease risk. Mandating lower levels and removing some brands with higher levels from the market do not constitute a statement that the remaining brands are safe or less hazardous than the brands removed, nor does it represent government approval of the safety of the products that remain on the market."

¹⁹ Implementing the Tobacco Products Directive of 2014/40/EU, concerning the mutual implementation of legislation and delegated provisions in respect to the production, presentation and sale of tobacco & affiliated products and the revocation of Directive 2001/37/EG (OJEU 2014 L 127) for Member States.

²⁰ On 24 August 2017, the DPPS was informed by the complainants that the RIVM had added information on filter ventilation to their website:

www.rivm.nl/Onderwerpen/T/Tabak/Filterventilatie.

²¹ Court of Appeal Arnhem-Leeuwarden 20 April 2017, ECLI:NL: GHARL:2017:3248.

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consequences. It may still be plausible that the conduct of the injured parties likely led to the subsequent consequence. Moreover, the nature of the original conduct carries considerable weight (i & ii). As is evidenced in the case law, a role is also played by the wilful & substantial act of the injured party, with respect to the consequences (See iii).

In light of the criteria formulated by the Supreme Court, the choice to smoke and the subsequent choice to keep smoking – despite the addictive effect – are factors that weigh heavily and to such an extent that when assessing causation, it would not be reasonable to attribute the consequences (harm, deterioration to general health, death) to earlier conduct of the tobacco manufacturers, consequences that are at least in part, due to the individual choices made.

Furthermore, it must be remarked upon that despite the undeniably destructive adverse effects, the original conduct of designing a stimulant is of a different nature than that of taking part in an illegal street race where the co-participant is killed,²² or a victim not wearing a seatbelt when a car is hit from behind.²³ These are examples where the injured party's own conduct substantially contributed to the consequence but the earlier conduct of the defendants in these examples was also of an illegal nature and led to the decision that the legal principle of reasonableness could be attributed.

Now that the production and sale of cigarettes as a stimulant is an entirely legal act and that destructive adverse effect principally occur if the victim makes an individual choice first to start and then to continue smoking, it is not reasonable to attribute the negative consequences of smoking to the tobacco manufacturers under criminal law. This fact precludes a successful prosecution for the violent and life-threatening offences named in the complaint.

2.1.3. *Attempt?*

By alleging attempted offences, from the judicial perspective, it does not need to be evidentially proven, in every specific case, that the crime has been completed. For *attempt* to be established, intention has to be

²² The Supreme Court of the Netherlands 27 January 2015, ECLI:NL:HR:2015:129, NJ 2015/224 (Commentary: N. Keijzer).

²³ The Supreme of the Netherlands 11 December 2001, ECLI:NL:HR:2001:AD5285, NJ 2002/62.

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evidenced, which may be reckless intent (*'conditional intent'*; in Dutch: *'voorwaardelijk opzet'*). It can only be established that the conduct is the start of the commissioning of a criminal offence if 'there is an external manifestation that the conduct in question was aimed at actual completion of the crime commissioned.'²⁴

The DPPS is of the opinion that in relation to the conduct that is listed in the complaint in support of attempt: namely, the manner of design, together with the introduction of the product onto the market, the tobacco manufacturers' conduct cannot count as conduct that 'in its visual manifestation' was focused on achieving the violent and life-threatening offences alleged in the complaint. Particularly relevant is that the act of bringing the products onto the market was paired with accompanying warnings of the various health risks in the use of the product. Due to these warnings, the smoker could have adapted their own conduct in order to avoid measurable damage to health.

The complainants allege that cigarettes are 'deadly by design' – in other words: purposely designed in such a way to instigate usage and thereby cause the health damage claimed in the complaint. However, when the products were introduced onto the market, the potential damage to health was explicitly warned of. The visual manifestation of bringing the - under the circumstances - destructive stimulants onto the market cannot be specified as being directed towards the goal of completing the violent and life-threatening offences alleged.

2.1.4. Completed Offences

In the case of complainants [...] and [...], the DPPS evaluated as to whether criminal liability could be established against the tobacco manufacturers for completed offences: complainants started to smoke in 1988 and 1970 respectively, both state to have become addicted almost immediately and are both now seriously ill as a consequence of smoking.

Again, the doctrine of reasonable attribution stands in the way of finding the manufacturers criminally liable for the health damage of the complainants, for the same reasons as mentioned above.

²⁴ The Supreme Court of the Netherlands 24 October 1978, ECLI:NL:HR:1978:AC6373, NJ 1979/52 (commentary: Th.W. van Veen) The so-called Cito case (Dutch: *Uitzendbureau Cito*)

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2.1.5. Conclusion

Given the strict criteria of the Supreme Court in relation to the circumstances in the current case, the DPPS is of the view that in regard to the alleged attempted homicide offences and other attempted violent offences stated in the complaint, the tobacco manufacturers cannot be successfully prosecuted.

Although the tobacco manufacturers offered cigarettes for sale in the knowledge that these were harmful to the health of smokers, this does not automatically mean that the smokers could not (despite the great difficulty) have evaded this harm. According to the complainants, their free will was restricted due to addiction but that does not remove the fact that the smokers, at least in part, can also be held responsible for their own actions.

Criminal law is not concerned with natural 'will' but with 'will' within a social construction, making self-determination and responsibility possible.²⁵ Smoking is accordingly not to be compared with the victims in the cases considered by the Supreme Court in 2.1.1. who were unable to avoid the precarious situation concerned.

Although it is a given that stopping smoking is difficult for the majority of smokers, it is not an impossible task. Research figures²⁶ show that in the last 25 years, the amount of people who smoke²⁷ as well as the average *number of cigarettes smoked per smoker*²⁸ has decreased.

Smoking is addictive and this fact is known by everyone who starts to smoke. Although it cannot be disputed that the availability of cigarettes an important condition is for a smoker's conduct, the DPPS has to simultaneously ascertain that the conduct of the tobacco manufacturers is in accordance with both national and European regulations. In this respect, the

²⁵ See article D. Roef 'How does free will apply to criminal law?' *Consciousness, the brain & responsible capacity* in *Justitiële Verkenningen* 2013, volume 1 (Dutch: 'Welke vrije wil heeft het strafrecht nodig? Over bewustzijn, brein en capaciteitsverantwoordelijkheid').

²⁶ <https://www.volksgezondheidenzorg.info/onderwerp/roken/cijfers-context/trends#node-trend-roken-volwassenen>.

²⁷ Between 1990 and 2015, the *total percentage of smokers* from 18 years old and upwards decreased from 37.5 to 26.1%. The *percentage of every day smokers* decreased from 32.1 to 19.4% in the same period. The number of school children that smoke is in decline: in 1992, 52.9% of pupils between 12 and 16 said they had smoked before and 24.9% in the past month. 13.4% of pupils smoked daily. In 2015, these percentages had dropped to 22.8% who had smoked before, 10.6% in the past month and 3.1% on a daily basis.

²⁸ In 1989, males above 15 years of age smoked 18 cigarettes or roll-ups per day on average and females an average of 16. In 2014, this amount was 13.6 for men and 12.6 for women.

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tobacco manufacturers offer a legal product and additionally, actively warn consumers of the risks of health damage.

Having regard to all the circumstances, the DPPS is of the opinion that it is ultimately the individual smoker - aware of the health risks - that accepts the significant chance of damage to health by starting to smoke or (after having already started) not choosing to stop. Therefore, the conduct of the smoker is an ultimate and indispensable link in the chain of cause and effect and the negative consequences of smoking cannot be attributed to the tobacco manufacturers under criminal law. These circumstances impede a successful prosecution for the homicide offences and the other violent offences in the complaint.

2.2. Forgery

2.2.1. The Complaint

As well as the attempted homicide offences and other violent offences, the complaint also included the allegation of forgery. In short, according to the complainants, tar, nicotine and carbon monoxide levels (TNCO levels) were incorrectly stated on cigarette packages until 20 May 2016.

When a cigarette is smoked, among other things, tar, nicotine and carbon monoxide are emitted²⁹ and the maximum emission levels are prescribed in law. To ascertain if cigarettes comply with prescribed TNCO levels, the RIVM uses a smoke machine during testing, as is pictured on page 30 of the complaint. The complainants allege that the tobacco manufacturers purposefully manipulated test results by adding miniscule ventilation holes in the filter. The holes remain open during RIVM testing with the smoke machine. Due to this, the smoke that is sucked in by the smoke machine is thinned out by the oxygen that enters through the ventilation holes. Whilst smoking however, the ventilation holes are (partly) closed by fingers or the lips when a cigarette is physically smoked. Therefore, the smoker inhales higher TNCO levels than the amounts measured during the test and subsequently, are displayed on cigarette packets. According to the complaint, the abovementioned perforations led to a further result that more nicotine

²⁹ 'Emissions': substances that are released when a tobacco or related product is used as intended, such as substances found in smoke, or substances released during the process of using smokeless tobacco products (Article 2: 21) TPD2).

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could be added to the cigarette than the maximum permitted amount. It was also alleged that smokers inhaled deeper causing nicotine addiction to commence more rapidly. The result is that smokers inhaled not only higher levels of nicotine but also more tar and carbon monoxide than stated on the cigarette packets, state the complainants.

2.2.2. Mandatory legislative display of 'manipulated' test results

National and European regulations on tobacco wares impede the chance of successful prosecution. The regulations make it mandatory to use ISO tests as the means of measuring the emission levels of cigarettes. Using any other alternative form of testing is prohibited. The law also prescribes that only the results of these tests are to be displayed on packaging. This will be clarified in due course.

Both the current and previous European Directive relating to tobacco products (TPD1³⁰ & TPD2³¹) makes it compulsory for member states to draft domestic law regarding the production, presentation and sale of tobacco & tobacco-related products. The current Directive has been implemented into Dutch domestic legislation by way of the Tobacco & Related Products Act the Tobacco & Related Products Decision the Tobacco & Related Products Regulation. (Dutch: *de Tabaks- en rookwarenwet, het Tabaks- en rookwarenbesluit & de Tabaks- en rookwarenregeling*). For the implementation of the abovementioned TPD 2 on 20 May 2016, the stratification of the tobacco laws from 1990 onwards were amalgamated into various regulatory frameworks.³²

The tobacco regulations stipulate the requirement that TNCO levels are measured according to ISO-standards. The prescribed ISO tests are used not only by the industry in the designing of cigarettes but also by the authorities that control the TNCO levels. In the Netherlands, this is the National Institute for Public Health & the Environment. (Dutch: *RIVM*). From 1994 to 20 May

³⁰ Directive 2001/37/EG of 5 June 2001, concerning the mutual implementation of legislation and delegated provisions in respect to the production, presentation and sale of tobacco products (*OJEU 2001 L 194*).

³¹ Directive 2014/40/EU of 3 April 2014, concerning the mutual implementation of legislation and delegated provisions in respect to the production, presentation and sale of tobacco & affiliated products and the revocation of Directive 2001/37/EG (*OJEU 2014 L 127*) for Member States.

³² The Tobacco Act, Tar Yield Decision, Tobacco Product Labelling Decision, Decision on Maximum levels of tar, nicotine & carbon monoxide in cigarettes & leaf tobacco and the Regulation on Testing Methods for tar, nicotine & carbon monoxide in cigarettes & leaf tobacco.

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2016, tobacco regulations made it compulsory for manufacturers to state ISO test results on cigarette packets. This method of measurement was (and still is) the exclusive method of measurement to ascertain that the maximum TNCO levels are not exceeded. The results of all tests are required to be displayed on cigarette packaging.

Until 20 May 2016, the tobacco regulations attached in Annex 2 of this analysis prescribed that the results of the smoke machine tests had to be stated on cigarette packaging. It was not said in plain terms in the complaint, nor by other means, that the TNCO levels displayed on the packaging were any other than the TNCO levels from the aforementioned tests. The manner of determining the TNCO levels, as well as the requirement as to which levels must be mandatorily displayed on the packaging are exclusively prescribed. Thus, it is impossible to conclude that the display of these TNCO levels constitutes a forgery.

As the regulatory measures dictated that the test results had to be displayed on cigarette packages, it proves onerous to speak of forgery. This mandatory obligation also affects the culpability to a substantial degree of a more intellectual deception, where the alleged manipulation of the test results is the key element. Although the involved authorities are aware that the ISO tests are influenced by the ventilation holes, neither the regulatory measures nor the test method regarding this has been subject to amendment. This last aspect affects the potential culpability of the tobacco manufacturers.

2.2.3. Forgery by 'omission'

The question is whether forgery by 'omission' can be evidenced. On the alleged facts, the tobacco manufacturers refrained from stating the 'truth' of the maximum emission levels on cigarette packaging.

Forgery in the form of 'an omission', or otherwise said: a 'passive' falsification or false drafting demands additional evidence as regards intent. In an 'active' forgery, intent is often evidenced by the nature of the individual forgery. To be liable for not providing information, a duty of care must first be established, if no legislative requirement of a such a duty already exists. If this duty exists, an evaluation can begin as to whether the duty has been breached with intent.

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In this regard, the observation should be made that the tobacco manufacturers were correct in their counter-arguments to argue that it was mandatory to state the TNCO levels resulting from the aforementioned tests on the said cigarette packaging. Trading in contravention of these obligations by displaying more realistic emission levels on cigarette packets may have been potentially less misleading for smokers but would, at the same time, have been a criminal offence in itself under the law for economic offences.³³

Moreover, as mentioned above, it is evident that relevant governmental institutions were aware that the ventilation holes in cigarette filters unduly influenced the ISO test results from the smoke machine. In these circumstances, the tobacco manufacturers cannot be accused of committing forgery by omitting to declare the 'truth' of the emission levels on cigarette packets.³⁴

2.2.4. Conclusion

Taking the above evaluation into consideration, the DPPS hereby conclude that they are unable to commence prosecution proceedings against the tobacco manufacturers for forgery concerning the emission levels displayed on cigarette packaging between 1990 and 20 May 2016. The TNCO levels stated were tested in accordance with ISO standards but it is possible that the smokers did not inhale the same levels that were displayed. The aforementioned regulatory obligation regarding the information displayed on the cigarette packaging impairs both the intent and criminal liability to a substantial degree in respect of the offences in the complaint.

³³ Violations of provisions pursuant to Sections 2, 3, 3a, 3b, 3c, 3e, 4, 5, 5a, 7, 8, 9, 9a, 10, 17a en 18 of the Tobacco & Related Products Act have been criminalised under Section 1, subsection 4 of the law on economic offences.

³⁴ This reasoning follows the findings of the Overijssel Court in a criminal case where a BRZO-company had been accused of violating safety regulations (Overijssel Court 24 July 2017, ECLI:NL: RBOVE:2017:2944).

The following was held: "*The authorised authorities, including the SZW Inspectorate, were aware of this and allowed this way of working to stand. The risks of this working method were perceived as having been acceptable. In these circumstances, the court cannot conclude that (the company) had taken insufficient measures to prevent Ethylene oxide reacting explosively*".

2.3. In Contravention of the Tobacco & Related Products Act

In light of the above, it is the opinion of the DPPS that neither is there a contravention in relation to Section 3 in conjunction with Section 2 subsection 1 of the Tobacco & Related Products Act because the results of the ISO-tests with the smoke machine are otherwise than that physically inhaled by smokers. The law specifically prescribes how the emission levels are to be tested and these provisions appear to have been complied with.

Pursuant to Section 2.1. of the Tobacco & Related Products Decision, the maximum emission levels of a cigarette produced and brought onto the market must remain under the levels stated in Article 3 section 1 of the European Tobacco Directive (TPD 2). Correspondingly, Article 4 section 1 of this Directive, pursuant to Section 2.1 subsection 3 of the Tobacco & Related Products Decision in conjunction with Section 2.1 subsection 1 of the Tobacco & Related Products Decision prescribe that emissions are to be in accordance with the ISO standards of 4387 (tar), 10315 (nicotine) and 8454 (carbon monoxide). These testing methods are pursuant to the latter stipulations and decisive for the determination of whether a cigarette is within the maximum emission levels. Therefore: if research demonstrates that a cigarette falls within the maximum emission levels in accordance with ISO standards, then the legal requirements are satisfied and a contravention of Section 3, subsection 1 of the Tobacco & Related Products Act cannot be evidenced.

Therefore, there is no evidence that there are products that are not in accordance with or pursuant to the Tobacco & Related Products Act Section 17a, subsection 1.

2.4. Application Section 28 and/or 29 Economic Offences Law

As no serious charges can be brought against the tobacco manufacturers for committing an economic offence – in relation to a contravention of the Tobacco & Related Products Act – it is not possible to bring charges for economic offences under Section 28 and 29 pursuant to the law on economic offences.

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3. Evaluation into a potential prosecution for additional offences

Further, the DPPS evaluated if a successful prosecution could be brought for criminal offences other than those named in the complaint.

3.1 Fraud

Firstly, it was evaluated if the tobacco manufacturers had committed fraud.

Section 326, subsection 1 Dutch Criminal Code:

Any person who, with the intention of benefitting himself or another person unlawfully, either by assuming a false name or a false capacity, or by 'a fabrication' or by 'cunning artifice' induces a person to hand over any property, to render a service, to make data available, to incur a debt or relinquish a claim, shall be guilty of fraud and shall be liable to a term of imprisonment

Although the legal obligation to cite the results of the ISO tests prevents a prosecution for the offence of fraud, conduct that leads to specific results – such as the introduction of ventilation holes – could still be perceived as a fraudulent means under certain circumstances as defined in Section 326, subsection 1 of the Dutch Criminal Code.

In December 2016, the Supreme Court of the Netherlands carried out a so-called 'correction ruling' (Dutch: *overzichtsarrest*) that included, amongst other things, a definition of the miscellaneous means of fraud in Section 326, subsection 1.³⁵

The Supreme Court began with a question concerning the definition of the means of fraud in Section 326 and what the minimum requirement is for 'fraudulent conduct'. The Supreme Court held the following:

"An important common feature of the various kinds of fraudulent means is that the suspect, by a specific & sufficiently serious form of deceptive

³⁵ The Supreme Court of the Netherlands, 20 December 2016, ECLI:NL:HR:2016:2889, NJ 2017/158 (Commentary: N. Keijzer, paragraph 2.3.1.)

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*conduct, wishes to take advantage of another by creating a misrepresentation of the facts.*³⁶

3.1.1 Introduction of ventilation holes as a means of committing fraud

Therefore, applied in the present case, it is necessary to evaluate if (i) the introduction of ventilation holes in the cigarette filters by the tobacco manufacturers can be perceived as being a specific and sufficiently serious form of deceptive conduct (ii) by doing this, chose to use an incorrect representation of the facts (iii) with a view to advantageous gain. The aforementioned advantage – for the tobacco manufacturers advantageous – would be in the form of a higher volume of cigarette sales. This, so follows the reasoning, would be because smokers bought and consumed more cigarettes than would have been the case, had the correct emission levels been displayed. The cited emission levels arose due to the ventilation holes that manipulated the test results.

It is noted that the ventilation holes in cigarettes are a pre-war invention. Before the existence of European regulations prescribing that testing had to conform with ISO standards,³⁷ these ventilation holes had already been added to cigarettes, specifically the filter. The application of ventilation holes was therefore known and permitted. For this reason, adding these ventilation holes to cigarettes, more specifically to the filter, can not be defined as fraud.

From the patents dating back to 1942, 1961 and 1972, it emerges that the purpose of the ventilation holes was the enhancement of the smoking experience and a reduction in the volume of harmful substances. In the abovementioned Danish case it was found that the ventilation holes yield a reduction in production costs by influencing the speed and way in which a cigarette combusts, which in turn reduces the amount of tobacco required. Based on the findings in the judgment, the conclusion can be reached that most smokers do not even close the holes whilst smoking. These circumstances also lead to the conclusion that there can be no question of fraud. We will explain this in more detail below.

³⁶ The Supreme Court of the Netherlands, 20 December 2016, ECLI:NL:HR:2016:2889, NJ 2017/158 (commentary: N. Keijzer, paragraph 2.3.1.)

³⁷ Article 3 Directive 89/622/EEG of 13 November 1989, OJEU 8 December 1989, L 359/1 (see Annex).

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Neither the complaint nor the views of the industry offer any verifiable information on the background, the history or the purpose of the perforation holes. The abovementioned Danish case and the patents below do provide further information. In brief, it appears to be the case that the ventilation holes, as part of the general design of a cigarette, are intended to influence the speed and way in which a cigarette combusts, the strength and composition of the mainstream 'smoke' that is released on combustion, and to balance the smoking experience from lighting up to finishing the cigarette.

An advanced internet search³⁸ of the terms 'filter ventilation' & 'cigarette' brought up miscellaneous patents, including those of the tobacco manufacturers against whom the complaint has been filed. The patents go back to the 1930's and contain illustrations of the cigarettes, the ventilation holes and the aim of the different forms of ventilation holes or as the case may be, the perforated paper.

One of the oldest patents is U.S. 2. 304,009, from 1 December 1942. This patent relates to ventilation holes that are placed over the entire length of the cigarette. The description of this patent includes the following passages (markings added by the DPPS):

"The invention relates to cigarettes and has for an object to reduce the effects of smoking which are detrimental to health, and to enhance the pleasure of smoking.

In the case of a normal cigarette, the wrapper filled with tobacco acts almost as a retort that is incomplete combustion takes place in view of the lack of oxygen, which, on the one hand, causes the valuable aromatic resins to smoulder and to be converted into unpleasant combustion products, and, on the other hand, produces such high temperatures immediately behind the burning zone that, for example, nicotine salts and ammonium compounds are evaporated as colloids, depositing in a most finely divided state in the cooler part of the cigarette.

At the beginning of the next draw, these condensates are particularly easily evaporated if too high a temperature acts on them again, and they thus reach the breathing organs of the smoker undecomposed. This phenomenon, known as nicotine rush is not only detrimental to health,

³⁸ (http://www.google.nl/advanced_patent_search)

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but also imparts a pungent, biting taste to the smoke. The effects of this phenomenon become particularly undesirable as the smoking of the cigarette progresses. (..)

According to the present invention all these difficulties are overcome by choosing the size of the holes provided in the wrapper at each of the different distances from the mouth end in accordance with the draught resistance of the cigarette, which changes with the distance from the mouth end, the size decreasing towards the mouth end.(..)

The fresh air which, on principle enters at the burning zone and which can be accurately dosed by the size of the holes, prevents, on the one hand, the formation of detrimental carbon oxide in-view of its oxygen contents, which is now immediately oxidized into innocuous carbon dioxide in the zone which is still hot. and, on the other hand, the formation of the unpleasant products of incomplete combustion, i.e., 'smouldering.'

According to the above patent, the aim of the ventilation holes is to influence the (incomplete) combustion process and to mix the substances the smoker inhales with oxygen, in such a way that the experience during smoking does not substantially change. When a cigarette has just been lit, both the amount and the substance of the smoke are other than when a cigarette has almost been smoked in its entirety. It is explicitly stated that perforating the paper also has the aim of reducing the harmful effects (*detrimental to the health*) of the smoke.

U.S. 2, 992,647 of 18 July 1961 states with respect to both invention and aim (markings added by the DPPS):

"The invention relates to cigarettes and more specifically to a cigarette provided with a cigarette paper which will prevent the combustion temperature of the cigarette from going above a certain temperature no matter how vigorously the smoker 'attempts to draw air through the cigarette. 'It is, thus, a thermostatically controlled cigarette. The invention relates to cigarettes and to the method of making the same with a paper wrapper with openings which may be referred to as perforations, holes, pores, slits or the like that have been filled with a material of low melting or vaporizing point that will melt out or sublime as the cigarette is smoked. The melting or vaporizing point of the

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material filling the holes or pores is such that the holes, pores or slits open up for some distance in advance of the combustion area, and admit air which does not pass through the burning area of the cigarette. (...)

The primary object of this invention is to provide a cigarette in which combustion temperature may be regulated in order to control the types and quantities of materials formed during the combustion process; or in other words, the type and 'amounts of various materials that constitute the smoke. The production of certain cancer producing chemicals which are formed during the high temperature combustion of any organic material can thus be minimized, since the combustion temperature controls the amounts and kinds of chemicals that 'are formed."

At the start of the 1960's, cigarettes were introduced into the market that only had perforation holes in the paper around the filter. See Patents U.S. 2, 980,116 of 18 April 1961 & U.S. 2, 988,088 of 13 June 1961.

Patent U.S. 4, 174,719 of 20 November 1979 shows a diagram of a cigarette with holes in the filter that resemble the filters attached to the complaint and also attached to the subsequent written submissions to the DPPS on 19 December 2016. This patent explains that the placing of perforation holes into the paper around the filter of the cigarette can result in a decrease in the undesirable and harmful components of the cigarette smoke:

"While the heretofore known ventilated cigarettes reduce the delivery of total particulate matter and gas phase constituents in the cigarette smoke, they do not provide the degree of selective reduction desired with regard to some of the more undesirable constituents in cigarette smoke, such as carbon monoxide. Moreover, they tend to reduce nicotine yields to a similar extent as other constituents such that at maximum total reductions achievable, the nicotine level in the smoke is drastically reduced. With increased public concern over the amount of carbon monoxide present in cigarette smoke, this constituent has become of increasing importance to the industry. This invention offers an alternate means to either macro-perforated or ultra-porous tipping for achieving air dilution at the filter while at the same time achieving heretofore unobtainable selective reductions of carbon monoxide without excessive reduction of nicotine in the cigarette smoke."

From the patents mentioned above and from the stated aims of the pre-war invention of the ventilation holes, it emerges that the enhancement of the smoking experience but also a reduction in the volume of harmful substances belong to these aims. Before the existence of European regulations prescribing that testing had to conform with ISO standards,³⁹ these ventilation holes had already been added to cigarettes, specifically the filter.

In the above-mentioned Danish civil law case, witnesses testified concerning the aim and the consequences of the ventilation holes during the factual ruling at the Court of Appeal. In the judgment, several passages of the expert witnesses were inserted. This judgment is attached to Annex 1 of this analysis.

From the expert witness testimony, it can be deduced that the ventilation holes are only one of many factors that contribute to the amount of TNCO levels inhaled by a smoker. TNCO levels that are inhaled by a smoker are never identical to the actual levels in a cigarette. As well as the addition of the ventilation holes, the amount of tobacco, the filter length and the way a person smokes a cigarette also have a significant influence. The expert witness testimony in the Danish case show that compensatory conduct occurs, particularly when smoking 'mild' or 'light' cigarettes. The lower amount of nicotine can lead to a smoker inhaling more deeply to compensate.

As mentioned previously, the Danish judgment also specifically discussed the ventilation holes. The following questions and answers were included:

"QUESTION 9 III"

As is apparent from the case file, the 'Prince cigarette' has undergone a series of constructional changes, the most recent being the introduction of the filter ventilation in 1989. In the response to question AD, the phrasing is as such that a higher level of filter ventilation results in a more effective restriction of the nicotine content.

The independent expert witnesses have been requested to further clarify the meaning behind the ventilation holes in respect to the total required restriction, including the question if the ventilation holes are, in the

³⁹ Article 3 Directive 89/622/EEG of 13 November 1989, OJEU 8 December 1989, L 359/1 (see Annex).

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opinion of the independent expert witness, a necessary form of construction irrespective of the effect of other constructional changes.

...

RESPONSE

To start with, the ventilation holes are not a necessity because the restriction of the nicotine content could have been easily achieved by the other constructional changes to the cigarette.

There are definite limits as far as the construction and design of a cigarette goes in making the product attractive for consumers (technical requirements as well as in relation to the resulting taste). If a filter is too long, it restricts the flow of the smoke and ensures that smokers have to take stronger drags. For smokers, this is both unpleasant and undesirable.

A restriction in the tobacco strength (i.e., tobacco with a lower yield would alter the flavour of the brand). Withholding this consistency of flavour was one of the most essential goals of the tobacco producers, as detailed by Jacob Bierre.....An increase of the permeability of the cigarette paper provides for an increase in the amount of oxygen levels available for the combustive part of the cigarette and therefore, increases the combustion speed of the tobacco...A higher combustion speed in respect of the smouldering in between the drags leads to a relative decrease in how much tobacco is available for consumption during each drag. The advantage of the ventilation holes (perforated cigarette papers) is that they demonstrate the same restriction in levels of nicotine and tar as transparent paper but have no influence on the combustion speed. Perforating the filter paper also provides a general increase in the airflow and therefore, neutralises the air restriction that can be attributed to the filter. Therefore, ventilation holes close to the filter complement the other measures well (transparency of the paper and more filter). It makes it possible to use less tobacco (in comparison to transparent paper) but to still have the same amount of (mainstream) smoke. In short, the cigarette products are far more cost effective to produce. These facts are detailed in and taken from the book 'Tobacco Production, Chemistry & Technology'...chapter 11B 'Cigarette Design & Materials', by Alan Norman. All things considered, the ventilation holes are maybe not a

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'necessary construction', but in general, do contribute towards the creation of an attractive product for smokers and make cigarettes cheaper to produce.

...

QUESTION BC

...

6. Are the independent expert witnesses in agreement that the results from both production AAAX and the Canadian research - as aforementioned in question 11 III by the appellant - indicate that in the case of the vast majority of smokers - respectively 85% & 75.9% - the ventilation holes are not closed off?

RESPONSE

Yes, according to the two trials undertaken, the vast majority of smokers do not close off the ventilation holes. In production AAAX, figure 4, it is demonstrated that the majority of smokers, up to 85%, do not close off the holes whilst smoking (75.9% in the case of 'light' cigarettes). It should be noted that the accuracy of the tests is not really known: the colouring method using Ninhydrin solution potentially contributes to the accuracy of the shown distribution. But the results in production AAAX are persuasive in that all of the raw data concerning the measurements is given."

Based on the findings in the judgment with respect to the ventilation holes, the DPPS are of the opinion that the conclusion can be reached that most smokers do not even close the holes whilst smoking. Additionally, it would appear that the ventilation holes as well as the transparent paper have the aim of influencing the combustion speed, restricting the amount of tobacco used and consequently, producing cost effective cigarettes that are no less 'attractive'.

In short, it does not appear by evaluation of the aforementioned patents and judgment that the tobacco manufacturers attempted to misstate matters by the addition of the ventilation holes nor to take advantage of such. The documentation does not evidence that with the introduction of the ventilation holes, there was any other aim or purpose than that stated. Therefore, to

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conclude that the tobacco manufacturers used a 'fraudulent means' (in particular, 'a fabrication') is out of the question.

3.1.2 Additives as a 'fraudulent means'

Also, in respect of the additives named in the complaint, it does not appear that a 'fraudulent means' can be evidenced.

The European Tobacco Products Directive clearly prescribes the conditions under which it is both permitted & prohibited to add substances into tobacco products. Manufacturers must present a list of all added ingredients to the licensed authorities. Reasons must be provided as to why an ingredient has been added, the toxicological information and a detailed description of their properties.⁴⁰ In this way, the authorities are able to control if prohibited ingredients have been added.⁴¹ It has neither been argued nor become evident by any other means that the tobacco manufacturers were in violation of European and domestic regulatory frameworks by the – fraudulent – addition of substances into the cigarettes.

3.1.3 Conclusion

As tobacco manufacturers offer cigarettes that are in accordance with the applicable regulations, there can be no question of fraud as defined in article 321 Dutch Criminal Code. Criminal prosecution for fraud is also not possible for that reason.

⁴⁰ Article 5 Directive 2001/37/EC concerning the mutual implementation of legislation and delegated provisions in respect to the production, presentation and sale of tobacco products (OJEU 2001 L 194) for Member States.

⁴¹ Article 7 Directive 2001/37/EC of 5 June 2001, concerning the mutual implementation of legislation and delegated provisions in respect to the production, presentation and sale of tobacco products (OJEU 2001 L 194) for Member States.

3.2 Deceptive Trading

The Dutch Criminal Code also provides stipulations on deceptive trading:

Section 329, subsection 1 Dutch Criminal Code:

A seller who deceives a buyer:

- 1°. by intentionally delivering to this buyer an object other than the specifically designated object he purchased;
 - 2°. by employing a fabrication with respect to the nature, condition, quality or quantity of the goods delivered;
- shall be liable to a term of imprisonment not exceeding one year or a

The DPPS evaluated if it was possible for deceptive trading to be evidenced, as defined in Section 329, subsection 2. The fact that Section 329 specifically sets out that consumer deception by a trader does not necessarily impede a potential prosecution of the tobacco manufacturers. Within the purposes of Section 329, the manufacturers are likely not 'traders' but pursuant to Section 329, 'status offences' (Dutch: 'kwaliteitsdelichten') can also be committed in a form of joint-enterprise by one who does not possess this certain 'status' (Dutch: 'kwaliteit'). The Supreme Court of the Netherlands ruled on this matter in 1926 in the judgment of the *Warehouse Assistant* case.⁴² The wilful act or intention of the co-perpetrator has to be as such that it not only fulfils the elements of the main offence but also fulfils the 'status' requirement. It is required that all persons possessing this particular 'status' – in this case, the 'traders' – are also guilty of committing the crime – in this case, the offence of trader deception ex. Section 329 of the Dutch Criminal Code.

However, the provision that trader deception is an offence under Section 329 is still the same as in Section 326 of the Dutch Criminal Code. A 'fraudulent means' has to be evidenced, namely 'cunning artifice.' The same elements are necessary as detailed above under 3.1. Consequently, it cannot be

⁴² The Supreme Court of the Netherlands, 21 June 1926, ECLI:NL:HR:1926:BG9433, NJ 1926, p. 955, commentary: L.Ch. Besier: The Warehouse Assistant case (Dutch: *Magazijnbediende*).

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evidenced that the tobacco manufacturers have used the fraudulent means of 'cunning artifice.'

3.3 Sections 174 & 175 Dutch Criminal Code

Additional provisions evaluated by the DPPS in the above analysis are those in Sections 174 & 175 of the Dutch Criminal Code:⁴³

Section 174 Dutch Criminal Code

1. Any person who sells, offers for sale, delivers or hands out goods, knowing that these goods are harmful to life or health, and fails to disclose their harmful nature, shall be liable to a term of imprisonment not exceeding fifteen years or a fine of the fifth category.
2. If the offence results in the death of a person, the offender shall be liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category.

Section 175 Dutch Criminal Code

1. Any person who, through negligence, causes the sale, delivery or handing out of goods harmful to life or health, while the buyer or recipient of such goods is unaware of their harmful nature, shall be liable to a term of imprisonment not exceeding one year or a fine of the fourth category.
2. If the offence results in the death of a person, the offender shall be liable to a term of imprisonment not exceeding two years or a fine of the fourth category.

⁴³ These articles are both included in Book 2, Part VII: "*Crimes where the personal safety of persons or property is endangered.*"

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The above Sections acknowledge human health and the protection of life against traders who knowingly introduce dangerous products onto the market without stating the nature of the harm.⁴⁴

The facts and circumstances as set out in the complaint state that the complainants allege that the tobacco manufacturers failed to disclose that higher levels of nicotine, tar & carbon monoxide were inhaled than the levels displayed on the cigarette packets. Furthermore, the complainants allege further non-disclosure concerning dangerous substances added to the cigarettes. In reality, the product was more dangerous than the smokers had been made aware of. Due to this allegation, it was also assessed if it was possible to prosecute under Sections 174 & 175 of the Dutch Criminal Code.

Despite the fact that the dangerous nature of a product is generally known, conduct may be still be punishable, as demonstrated in past judgments from both Amsterdam⁴⁵ and Maastricht⁴⁶ District Courts. Even if a buyer is aware that taking cocaine has potentially dangerous consequences, a dealer is nevertheless guilty of an offence under Section 175 of the Dutch Criminal Code if sells the more dangerous 'white heroine' as cocaine, concluded the court in Amsterdam in 2016.⁴⁷ The guilt of the dealer was attributed to the fact that the tourist had taken a particularly dangerous amount of white heroine, namely in a dose and a manner that is customary in the use of cocaine. Reasonably, this was preventable by the dealer. The same reasoning was applied by the court in Maastricht in relation to contaminated ecstasy. The buyer concerned should have been aware that using ecstasy (MDMA) can cause harm but the ecstasy he bought was shown to have contained the more dangerous PMMA. The seller had not made the buyer aware of this fact.⁴⁸

However, in the latter case, the defendant was acquitted on appeal.⁴⁹ The Court of Appeal ruled that it was unable to establish with sufficient certainty

⁴⁴ C.P.M. Cleiren et al (eds.) *Criminal Law: Text & Commentary*, Wolters Kluwer 2016, 11th edition, p. 1197.

⁴⁵ Amsterdam District Court, 23 February 2016, ECLI:NL:RBAMS:2016:850 (white heroine).

⁴⁶ Maastricht District Court, 27 February 2012, ECLI:NL:RBMAA:2012:BV7023 (hazardous ecstasy).

⁴⁷ Amsterdam District Court, 23 February 2016, ECLI:NL:RBAMS:2016:850 (white heroine).

⁴⁸ Maastricht District Court, 27 February 2012, ECLI:NL:RBMAA:2012:BV7023 (hazardous ecstasy).

⁴⁹ Court of Appeal 's-Hertogenbosch 16 November 2012, ECLI:NL:GHSHE:2012:BY3413, *NJFS* 2013/28.

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that damaging consequences to life or health could have occurred in any use of the ecstasy tablets supplied by the defendant which he should have reasonably considered. This as prescribed in Section 174 of the Dutch Criminal Code.

Herewith, the above court followed the findings of the Supreme Court in respect of the 'dangerous nature' as defined in Sections 174 & 175 of the Dutch Criminal Code: *To determine 'dangerous nature' it is not required that the harm has to occur with every (normal) use by every possible consumer. It is sufficient that harm can occur as a consequence of the use, which must be reasonably considered.*⁵⁰

In order to bring a successful prosecution under Section 174 and/or 175 of the Dutch Criminal Code in the current case, it must also be proven that the actual emission levels inhaled are more harmful than the TNCO levels. Until 20 May 2016, the TNCO levels – the result of measurements in conformity with ISO standards - were displayed on cigarette packets.

It would appear that this higher level of harm is caused by the addition of ventilation holes in the cigarettes. Due to this fact, the smoker allegedly inhaled a higher amount of TNCO levels than measured by the smoke machine and consequently, displayed on the cigarette packaging. However, available research results demonstrate that light cigarettes and also cigarettes with lower nicotine levels cause compensatory smoking conduct. Smokers inhale deeper and take longer drags on the cigarette. This has the result that a 'light' cigarette is just as harmful as a 'normal' cigarette. Therefore, the authorities made the decision to not only ban the display of the TNCO levels on cigarette packaging but to ban the display of the words 'light cigarette.' It was hoped that this clarity would remove any illusion that some cigarettes are less damaging than others.

To establish whether cigarettes with ventilation holes really are more harmful than those without, and if so as to what extent, further (scientific) investigation is necessary. In this context, it needs to be pointed out that the abovementioned patents suggest that the aims of the ventilation holes were actually advantageous to health. The perforations were for the purpose of reducing the harmful substances inhaled. However, it cannot be ruled out

⁵⁰ The Supreme Court of the Netherlands, 18 March 2003, ECLI:NL:HR:2003:AF0732, *NJ* 2003/623.

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that in addition to the clearly stated aims in the patents, other less dignified reasons exist for the addition of the ventilation holes. Nevertheless, in light of the aforementioned goals, it is doubtful if an unworthy motive can be found.

The same applies to the undisclosed additional substances. The report by the RIVM - referenced in the complainant - states that these substances do not make cigarettes more harmful.⁵¹ However, it should be noted that the RIVM reference a 2008 WHO report and that perhaps now, more is known as to the actual health risks of these substances. Recently, the DPPS received two publications⁵² from the complainant indicating that the ventilation holes possibly make cigarettes deadlier than those without the addition of the aforementioned perforations.

Moreover, the abovementioned Danish case makes apparent that the degree to which the perforations lead to the inhalation of higher amounts of TNCO is highly dependent on individual smoking conduct. Research has shown, amongst other things, that the vast majority of smokers do not cover the holes. Additionally, the TNCO intake is also dependant on the amount of tobacco, the rate the tobacco burns in between 'drags' and the desire to inhale more deeply in compensation when smoking 'light' cigarettes. The expert witness testimony during the Danish case indicated that, amongst other things, ventilation holes contribute to a higher rate of combustion due to oxygen, resulting in residually less tobacco. The complexity in the cigarette construction of which ventilation holes and ingredients are only one part, makes it difficult to prove that the ventilation holes always increase the deadly nature of a cigarette.

As discussed in paragraph 2.1.2 with respect to filter ventilation, the RIVM recently added more information as to their position to their website but did not reach the conclusion that ventilated cigarettes are more harmful.

⁵¹ RIVM Report: Amendment EU Tobacco Products Directive 2001/37/EG: paragraph 7.4, p. 53: "According to the WHO, there is no evidence that the reduction of individual ingredients reduces the chance of contracting certain smoking-related diseases (WHO, 2008): 'Science has not established that reduction of any individual toxicant in machine-measured cigarette smoke, will reduce actual human exposure or disease risk. Mandating lower levels and removing some brands with higher levels from the market do not constitute a statement that the remaining brands are safe or less hazardous than the brands removed, nor does it represent government approval of the safety of the products that remain on the market.'"

⁵² M-A Song et al, 'Cigarette Filter Ventilation and its Relationship to Increasing Rates of Lung Adenocarcinoma' & J.M. Samet & L. Aladadyan, 'Should the FDA Ban Cigarette Filter Ventilation?', both from *JNCI J Natl Cancer Inst* (2017) 109(12): djx075.

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Prosecuting under Section 174 /or & 175 of the Dutch Criminal Code does not present the issue of causation as is the case in a prosecution for fraud (ex. Section 329) but presents a set of entirely different issues: it has to be evidenced that cigarettes are more harmful in nature than was indicated by the tobacco manufacturers. For this fact to be proven, further investigation would need to be conducted.

In the previously mentioned Danish judgment it can be deduced that it is not realistic to isolate one specific part of a cigarette and to only find this part harmful when various factors influence the level of harm including individual smoker conduct. It is questionable whether it is even possible to conclude that cigarettes are more harmful due to the placing of ventilation holes.

Besides this, it is applicable here – as with the alleged offence of forgery – that the legal obligations in respect to tobacco products likely exculpate the tobacco manufacturers. Again, it is the case that the regulations prescribed exactly what is/was required to be displayed on cigarette packaging (warnings, photographs and TNCO levels) and how TNCO levels were to be measured. Within the context of Sections 174 & 175, it would be rather peculiar to blame the industry for non-disclosure as to the harmful effect of their product, despite having followed the legal prescriptions within the Tobacco legislation to the letter.

4. De Facto Executive Management

The complainants filed the complaint against the four largest companies (legal entities) currently conducting business in the Netherlands for the production & sale of cigarettes, and against the *de facto* executive managers of the aforesaid tobacco manufacturers. It is only possible 'for someone to accuse executive management of a criminal offence' if it can be proven that actual illegal conduct has taken place by the (corporate) legal entity. Following this, the DPPS finds that there is insufficient evidence to reasonably suspect that a criminal offence has been committed by the legal entities. As a result, there cannot be a case against the natural persons named in the complaint.

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5. Summary

- It is not up for discussion whether there is a connection between smoking cigarettes and serious health risks. Tobacco manufacturers are well aware of the obvious dangers. These risks are also displayed on the packaging.
- Tobacco manufacturers offer a legal product in accordance with domestic and European regulations and actively warn users of the health risks. The fact that smoking is addictive is also widely known by those who start to smoke.
- With respect to attempted homicide and the other violent offences, it is ultimately the individual smoker – aware of the health risks – who accepts the considerable chance of damage to health by starting to smoke or (once started) do not stop. Therefore, the conduct of the smoker an ultimate and indispensable link in the chain of cause and effect. The negative consequences of smoking cannot be attributed to the tobacco manufacturers under criminal law. These circumstances prevent a successful prosecution against the tobacco manufacturers for attempted homicide and the other violent offences.
- Legislation and regulatory frameworks made it compulsory for tobacco manufacturers to state TNCO levels from the ISO tests on cigarette packaging until 20 May 2016. These obligations mean that there is no case to answer for forgery nor for a violation under Section 3 of the Tobacco & Related Products Act.
- In addition to the criminal offences named in the complaint, the DPPS evaluated if a successful prosecution could be brought against the tobacco manufacturers for fraud (section 326 Dutch Criminal Code), deceptive trading (section 329 Dutch Criminal Code) or wilful or negligent sale of goods that endanger personal health (sections 174 and 175 Dutch Criminal Code). However, also in these instances circumstances, such as the absence of causality or compliance with applicable regulations, stand in the way of a successful prosecution of the tobacco manufacturers.
- As there are insufficient grounds to reasonably suspect that the

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tobacco manufacturers have committed a criminal offence, nor can it be the case that the *de facto* executive managers have evidenced such conduct as is named in the complaint.

6. Conclusion

Taking all of the above into consideration, the Dutch Public Prosecution Service is unable to start prosecution proceedings against the tobacco manufacturers and natural persons named in the complaint.

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Annex 1: Judgment of The Supreme Court of Denmark (*HØJESTERET*) of 20 November 2014, case no. 37/2012 (1st section) A. Jensen v House of Prince A/S & Skandinavisk Holding II A/S. Citation translated from the Dutch translation of the judgment.

No English translation available

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Annex 2: Overview of tobacco regulations with respect to emission measurements & the display of test results

STAGE ONE

Tobacco Product Labelling Decision - Cigarettes & Leaf Tobacco (The Commodities Act) (Decision of 29 April 1981, Bulletin of Acts and Decrees (Dutch: *Stb*) 1981, 329) (in effect from 1 January 1982)

Section 1, subsections 1 & 2:

1. In the case of packaged cigarettes that are to be provided to or are appropriate for consumer use, the packaging has to display the following specifications:
 - a. (...)
 - b. 1°. The nicotine content, specified by the word 'nicotine', in tenths of milligrams per cigarette,
2°. The tar yield, specified by the word 'tar', in milligrams per cigarette.
2. As prescribed by subsection 1 under b, 1° & 2°, the levels in question should be determined by a method prescribed by Our Ministers of Public Health & the Environment, of Agriculture, Nature & Food Quality & of Economic Affairs.

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STAGE TWO

Directive 89/622/EEC of 13 November 1989, OJEU 8 December 1989, L 359/1

Article 3, sections 1 & 2:

1. The tar and nicotine yields that must be indicated on cigarette packets shall be measured on the basis of the ISO 4387 and ISO 3400 methods.
2. The accuracy of the indications on packets shall be verified in accordance with ISO standard 8243.

Mandatory transposition into domestic law by 31 December 1991.

Directive 90/239/EEC of 17 May 1990, OJEU 30 May 1990, L 137/36

Article 2, section 2:

2. The tar content of cigarettes placed on the market in Member States shall not be greater than
 - 15 mg per cigarette as from 31 December 1992, and
 - 12 mg per cigarette as from 31 December 1997.

Article 3:

The tar content of cigarettes shall be measured on the basis of ISO standard 4387 and 3400. Verified in accordance with ISO standard 8243.

Mandatory transposition into domestic law by 31 December 1992.

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Tobacco Act (10 March 1988, Bulletin of Acts & Decrees 1988, 342) (Dutch: *Stb*) (in effect from 1 January 1990)

Section 2, subsections 1 & 2:

1. By Orders in Council (Dutch: *AMvB*) and in the interest of public health, where supplied to consumers, tobacco products must comply with requirements in regard to specifications on packaging. In the event that the specification concerns product composition, the Order can designate an exclusive measurement method to determine that correct specifications are used in respect of the product.
2. By Orders in Council and in the interest of public health, requirements shall be set for tobacco products in regard to composition i.e., nicotine levels and the amounts of tar and carbon monoxide that are emitted during combustion. To this purpose, exclusive measurement methods can be designated to determine that correct specifications are used in respect of the product.

Cigarette Tar Yield Decision (Decision of 21 March 1994, Bulletin of Acts & Decrees, 1994, 239, (Dutch: *Stb*) concerning the implementation of Directive 90/239/EEC & Section 2, subsection 2 of the Tobacco Act) (in effect from 1 July 1994)

Article 4:

To determine if the tar yield of a cigarette meets the requirements in this decision, the exclusive testing method shall be in accordance with ISO standards 4387 and 3400. Verification in accordance with ISO standard 8243.

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Tobacco Products Decision (Decision of 15 September 1994, Bulletin of Acts & Decrees, 1994, 718, (Dutch: *Stb*) concerning the implementation of Directive 89/622/EEC & Section 2, subsection 1 of the Tobacco Act) (in effect from 12 October 1994) (Repealed: Decision Tobacco Product Labelling - Cigarettes & Leaf Tobacco (Commodities Act))

Section 1, subsection 3:

3. It is required to state the following on the packaging of cigarettes that are made available to consumers:
 - a. the nicotine yield specified by the word 'nicotine' in tenths of milligrams per cigarette,
 - b. the tar yield specified by the word 'tar', in milligrams per cigarette.

Article 3:

The amounts referred to in Section 1, subsection 3 shall be measured on the basis of ISO standard 4387 & ISO standard 3400. The accuracy of the measurements shall be verified in accordance with ISO standard 8243.

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STAGE THREE

Directive 2001/37/EC of 5 June 2001, OJEC 18 July 2001, L 194/26 (in effect as of 18 July 2001)

Whereas (14): For the measurement of tar, nicotine and carbon monoxide yield in cigarettes, reference should be made to ISO standards 4387, 10315 and 8454, which are the only internationally recognised standards. This in the proviso that subsequent research and technological progress is to be encouraged and should make it possible to develop and use more precise and reliable measurement methods for cigarette yield and to develop measurement methods for the other tobacco products.

Article 4, section 1:

1. The tar, nicotine and carbon monoxide yields of cigarettes shall be measured on the basis of ISO standards 4387 for tar, 10315 for nicotine, and 8454 for carbon monoxide. The accuracy of the tar and nicotine indications on packets shall be verified in accordance with ISO standard 8243.

Article 5, section 1:

1. The tar, nicotine and carbon monoxide yields of cigarettes measured in accordance with Article 4 shall be printed on one side of the cigarette packet in the official language or languages of the Member State where the product is placed on the market, so that at least 10 % of the corresponding surface is covered (...)

Mandatory transposition into domestic law by 30 September 2002.

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Decision pertaining to amendments of the Decision Cigarette Tar Yield & Decision Tobacco Product Labelling – Cigarettes & Leaf Tobacco (Decision of 21 January 2002, Bulletin of Acts & Decrees. 2002, 83, (Dutch: *Stb*) concerning the implementation of Direction 2001/37/EC) (in effect from 1 May 2002)

Section 4 of the Decision on the maximum levels of tar, nicotine and carbon monoxide (= new name of the Decision Cigarette Tar Yield):

By regulation from Our Minister, exclusive methods of measurement shall be designated to determine if the levels of tar, nicotine or carbon monoxide in cigarettes are in accordance with requirements.

Section 3 Tobacco Product Labelling Decision

By regulation from Our Minister, exclusive methods of measurement shall be designated to determine if the levels of tar, nicotine or carbon monoxide in cigarettes are in accordance with requirements.

Regulation Testing methods in respect to the yield of tar, nicotine & carbon monoxide in cigarettes and leaf tobacco (Regulation of 19 April 2002, Government Gazette (Dutch: *Stcrt*)2002,78) (in effect from 1 May 2002)

Section 1, subsections 1 & 2:

1. To determine if a cigarette meets the legal requirement for tar, nicotine and carbon monoxide content, the exclusive testing methods shall be in accordance with the following standards:
 - a. ISO 4387 for tar;
 - b. ISO 10315 for nicotine;
 - c. ISO 8454 for carbon monoxide.

2. The accuracy of the maximum levels and indications on packets in respect to of the tar and nicotine in Section 2 of the Decision maximum amounts of tar, nicotine & and carbon monoxide in cigarettes and leaf tobacco pursuant to Section 1, subsection 3 under a, b & c of the Decision on Tobacco Product Labelling shall be verified in accordance with ISO standard 8243.

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STAGE FOUR

**Directive 2014/40/EU of 3 April 2014, OJEU 29 April 2014, L 127/1
(in effect from 19 May 2014)**

Whereas (11): For measuring the tar, nicotine and carbon monoxide yield in cigarettes (hereinafter referred to as 'emission levels'), reference should be made to the relevant, internationally recognised ISO standards (...).

Whereas (25): The labelling provisions should also be adapted to new scientific evidence. For example, the indication of the emission levels for tar, nicotine and carbon monoxide on unit packets of cigarettes has proven to be misleading as it leads consumers to believe that certain cigarettes are less harmful than others (...).

Article 4, section 1:

1. The tar, nicotine and carbon monoxide emissions from cigarettes shall be measured on the basis of ISO standard 4387 for tar, ISO standard 10315 for nicotine, and ISO standard 8454 for carbon monoxide. The accuracy of the tar, nicotine and carbon monoxide measurements shall be determined in accordance with ISO standard 8243.

Article 7, section 7:

7. Member States shall prohibit the placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Filters, papers and capsules shall not contain tobacco or nicotine.

Article 13, section 1 (a):

The labelling of unit packets and any outside packaging and the tobacco product itself shall not include any element or feature that:

- (a) promotes a tobacco product or encourages its consumption by creating an erroneous impression about its characteristics, health effects, risks

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or emissions; labels shall not include any information about the nicotine, tar or carbon monoxide content of the tobacco product.

Mandatory transposition into domestic law by 20 May 2016.

Decision on the implementation of the Tobacco Act (Decision of 14 October 2015, Bulletin of Acts & Decrees. 2015, 398, (Dutch: *Stb*) (in effect from 1 January 2016) (repealed: *inter alia* Tobacco Product Labelling Decision and the Decision on the maximum levels of tar, nicotine and carbon monoxide in cigarettes and leaf tobacco)

Section 2.2

Exclusive measurement methods shall be designated by Our Minister to determine if required levels of tar, nicotine and carbon monoxide yield in respect to cigarette or leaf tobacco are met.

Amendment to Tobacco Act (26 April 2016, Bulletin of Acts & Decrees 2016, 176(Dutch: *Stb*) concerning the implementation of Directive 2014/40/EU) (in effect from 20 May 2016, excluding one irrelevant provision)

Section 2, subsection 1 Tobacco & Related Products Act (= new name of the Act):

1. By way of ministerial regulation and in the interest of public health, there are requirements for tobacco products, electronic cigarettes, refill containers and liquids containing nicotine in relation to maximum emission levels, ingredients and technological requirements. Exclusive measurement methods can be designated to determine if a product may or may not meet the legal requirements.

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Amendment to the Decision concerning the implementation of the Tobacco Act (Decision of 4 May 2016, Bulletin of Acts & Decrees 2016, 176 (Dutch: *Stb*) (excluding the provisions below, in effect from 20 May 2016)

Section 2.1, subsections 1 & 3 Tobacco & Related Products Decision (= new name of the Decision):

1. The maximum emission levels of cigarettes introduced onto the market or produced cigarettes shall conform to Article 3, section 1 of the Tobacco Product Directive. (...)

3. By way of Ministerial regulation, exclusive testing methods shall be determined in relation to leaf tobacco or cigarettes pursuant to subsections 1 & 2.

Tobacco & Related Products Regulation (Government Gazette 2016, 25446 (Dutch: *Stcrt*) in effect from 20 May 2016) (repealed: Regulation on testing methods with respect to tar, nicotine and carbon monoxide levels in cigarettes and leaf tobacco)

Section 2.1, subsections 1 & 2:

1. The exclusive testing methods to determine if a cigarette meets requirements pursuant to Section 2.1, subsection 1 of the Decision, shall be in accordance with the following standards:
 - a. NEN ISO 4387: 2000/A1:2008 Cigarettes - Cigarettes - Determination of total and nicotine-free dry particulate matter using a routine analytical smoking machine with respect to the emission level of tar;
 - b. NEN-ISO 10315:2013 Cigarettes - Determination of nicotine yield in smoke condensates - Gas-chromatographic method, for the emission levels of nicotine

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- c. NEN ISO 8454: 2007/A1:2009 Cigarettes - Determination of carbon monoxide in the vapour phase of cigarette smoke - NDIR method, for the emission levels of carbon monoxide.
 2. The results of the measurements shall be verified in accordance with NEN-ISO 8243:2013 Cigarettes – Sampling.
-

Section 3.1:

The labelling of the unit package or the outer packaging of a tobacco product introduced onto the market must not include any symbol, name, brand, figurative characters or any other element of features as listed in Article 13, section 1 of the Tobacco Products Directive.

