

## Meijering Van Kleef Ficq & Van der Werf



Lawyers

[DISCLAIMER: THIS TRANSLATION OF THE DUTCH COMPLAINT IS NOT DONE BY A LICENSED INTERPRETER; ONLY THE ORIGINAL DUTCH VERSION IS AUTHENTIC]

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*The cigarette should be conceived not as a product but as a package. The product is nicotine ... Think of the cigarette pack as a storage container for a day's supply of nicotine ... Think of the cigarette as a dispenser of a dose unit of nicotine ... Think of a puff of smoke as the vehicle of nicotine ... Smoke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke.<sup>1</sup>*

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Amsterdam, September 29, 2016

Sir,

In the name of and on the explicit request of:

- a. The Stichting Rookpreventie Jeugd [**Dutch Youth Smoking Prevention Foundation**], with its seat in Amsterdam,
- b. Madam **Anne Marie van Veen**, born on [REDACTED]
- c. Madam **Lia Breed**, born on [REDACTED]

chosen domicile at the business address of their lawyer B.L.M. Ficq, at *Meijering Van Kleef Ficq & Van der Werf Advocaten* in Amsterdam, I hereby report a series of crimes committed by the four biggest tobacco manufacturers<sup>2</sup> conducting business in the Netherlands, which are:

1. Philip Morris International (i.a. Marlboro, L&M, Chesterfield, and Philip Morris)
2. British American Tobacco (i.a. Lucky Strike, Pall Mall and Kent)
3. Japan Tobacco International (i.a. Camel and Winston)
4. Imperial Tobacco Benelux (i.a. Van Nelle, Drum, Gauloises and West),

as well against the *de facto* leaders of these tobacco companies,

<sup>1</sup> Hurt RD, Robertson CR. 1998. Prying Open the Door to the Tobacco Industry's Secrets About Nicotine: the Minnesota Tobacco Trial. *The Journal of the American Medical Association* [JAMA], Vol. 280: 1173-1181.

<sup>2</sup> More specifically against the Dutch or foreign legal entities which are governed by the abovementioned tobacco manufacturers and those who are involved in the distribution of tobacco products on the Dutch market.





for attempted murder, alternatively attempted manslaughter and/or attempted severe and premeditated physical abuse and/or attempted deliberate and premeditated injuring of health, the premeditation<sup>3</sup> being the comprehensive, decade-long and continued production and sale of addictive tobacco products in the Netherlands which when used addictively, as intended by the tobacco industry, seriously harm one's health and cause severe physical injury, including death.

In addition, this submission also includes reporting of forgery<sup>4</sup> since the tobacco manufacturers have for years declared emission levels of tar, nicotine and carbon monoxide (TNCO) on the packages of their tobacco products which were lower than the actual emission levels when the tobacco products are used as intended, to which end the tobacco manufacturers have deliberately misled the compulsory laboratory tests.

## **1. A Short Introduction of the Plaintiffs**

- \* The Dutch Youth Smoking Prevention Foundation [De Stichting Rookpreventie Jeugd] was founded in 2009 and has its seat in Amsterdam.

The Foundation seeks to limit and prevent the use of tobacco –especially- by children and youngsters in order to ultimately turn tobacco use into history. A second statutory goal to which the Foundation subscribes is to contribute to civil knowledge and understanding of the dangers of tobacco use as well as the denormalisation of its use.

The Foundation attempts to realize these goals with all legal means possible. The most important of which are to provide public information, to gain support in society, to lobby the government, to collaborate with institutions and companies and to attract funding.

Jointly with others submitting this complaint corresponds seamlessly with the goals of the Foundation as well as the manner through which it seeks to achieve those goals (**Attachment 1**: Bylaws of the Foundation).

More information on the activities of the Foundation can be found on the following websites: [www.stichtingrookpreventiejeugd.nl](http://www.stichtingrookpreventiejeugd.nl), [www.tabaknee.nl](http://www.tabaknee.nl), [www.rookalarm.nl](http://www.rookalarm.nl), [www.nederlandstopt.nu](http://www.nederlandstopt.nu) and [www.sickofsmoking.nl](http://www.sickofsmoking.nl).

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<sup>3</sup> Punishable by article 45 Sr. jo. article 289, 287, 303 Sr. and article 300 jo. 301 Sr.

<sup>4</sup> Article 225 Sr.

- \* Anne Marie van Veen is a young mother of four children. She is 43 years old. In 2014 she has been diagnosed with lung cancer, stage 4. She started smoking when she was 15 years old. At the time she was still a child and did not realize the disastrous impact smoking would have on her as she got older. The reason why she files suit against the tobacco manufacturers is that she is of the opinion that the tobacco industry knowingly sought to make her addicted to tobacco. The most important goal for her in filing this suit is to protect her children and all children from a similar fate.
- \* Lia Breed is a single divorcee aged 66. She started smoking when she was 20 years old and only in 2006 she managed to quit. Numerous prior attempts at quitting failed. In the course of 2000/2001 Lia Breed developed serious complaints of COPD, which forced her to be hospitalized in 2006. Her complaints are now so serious that she is in effect invalidated and confined to her home. In filing this complaint she also seeks to protect teenagers from the devastating consequences of tobacco use.

The statements of fact of Annemarie van Veen and Lia Breed are attached to this complaint as **Attachments 2 and 3** and are to serve in support of this complaint.

## **2. An Overview | The Numbers**

In 2015 24,6 % of the Dutch population aged 12 years or older smoked, of whom 74 % on a daily basis.

In 2015 24,4 % of Dutch adolescents aged between 16 and 20 years old smoked, of whom 55 % on a daily basis.<sup>5</sup>

In 2015 38,1 % of the Dutch youth aged between 20 and 30 years old smoked, of whom 60,1 % on a daily basis

In 2015 30,1 % of the Dutch population aged between 30 and 40 smoked, of whom 75,2 % on a daily basis.

The total number of Dutch smokers (daily or sporadic) aged 12 years and older amounts to circa 3,6 million people in 2015.

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<sup>5</sup> For a comprehensive overview see the data report from April 5<sup>th</sup>, 2016 published by the Central Bureau for Statistics [Centraal Bureau voor de Statistiek] see <http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=83021ned&D1=0-10,19-26&D2=0-13,30-42&D3=0&D4=1&HDR=T&STB=G1>. In addition see the figures for 2014 in the dataset published by the National Expertise Centre for Tobacco Discouragement [Nationaal Expertisecentrum Tabaksontmoediging], April 2015, <https://assets.trimbos.nl/docs/21388531-6303-48f7-9a47-51898fb427df.pdf>.



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It is a known fact that smoking increases the chance of developing disease and ensuing death. Smoking strongly increases the chance of developing the following diseases:

- Cancer in several distinctive parts of the body, predominantly but not limited to the lungs, the mouth cavity, the throat, the larynx, and the oesophagus;
- Cardiovascular diseases: amongst others but not limited to stroke, heart failure, aneurysm and coronary heart diseases;
- Lung diseases and complaints, such as but not limited to tightness of the chest, coughing, pneumonia, asthma and COPD.<sup>6</sup>

Of the total disease burden in the Netherlands 13,1 % is attributable to smoking. As a reference: obesity amounts to 5,2 % of that total and alcohol abuse to 2,9 %.<sup>7</sup>

In 2015 12.217 people were diagnosed with lung cancer. So these are all new cases of lung cancer. Smoking is in ca. 91 % of the cases a year (therefore in 2015 11.117 cases) the cause of lung cancer.

In 2014 48.400 people were diagnosed with COPD. So these are all new cases of COPD. Smoking is in ca. 85 % of the cases a year (therefore in 2014 41.140 cases) the cause of COPD.<sup>8</sup>

More than half of the addicted smokers die because of a disease caused by smoking. It is proven that in the Netherlands around 20.000 people die annually because of a disease caused by smoking.<sup>9</sup> Recent Australian research demonstrates that 2 out of 3 smokers died early because of the consequences of smoking.<sup>10</sup>

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<sup>6</sup> For more information see: [www.rokeninfo.nl/professionals/gebruik-en-gevolgen/ziekte-en-sterfte/ziekte](http://www.rokeninfo.nl/professionals/gebruik-en-gevolgen/ziekte-en-sterfte/ziekte).

<sup>7</sup> See Institute of the Realm for Public Health and Environment [Rijksinstituut voor Volksgezondheid en Milieu], Public Health Future Exploration [Volksgezondheid Toekomst Verkenning (VTV)], [www.eengezondnederland.nl/Heden\\_en\\_verleden/Determinanten](http://www.eengezondnederland.nl/Heden_en_verleden/Determinanten).

<sup>8</sup> Figures on lung cancer and COPD are retrievable via the Institute of the Realm for Public Health and Environment [Rijksinstituut voor Volksgezondheid en Milieu]: [www.volksgezondheidszorg.info/onderwerp/roken](http://www.volksgezondheidszorg.info/onderwerp/roken).

<sup>9</sup> For more information on the annual death rate see: [www.rokeninfo.nl/professionals/gebruik-en-gevolgen/ziekte-en-sterfte/sterfte](http://www.rokeninfo.nl/professionals/gebruik-en-gevolgen/ziekte-en-sterfte/sterfte).

<sup>10</sup> For more information see: <http://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-015-0281-z>.

In order to put these figures in perspective, in 2014 882 people in the Netherlands died early due to the consequences of (ab)use of alcohol,<sup>11</sup> while 124 people died early due to the consequences of drug (ab)use.<sup>12</sup>

The percentage of annual deaths due to diseases caused by smoking in absolute numbers and in proportion to the overall mortality figures of the same disease provides the following the image:

DISEASE	TOTAL DEATH RATE		DEATH RATE ATTRIBUTED TO SMOKING	
	Male	Female	Male	Female
LUNG CANCER	6.207	4.055	5.594 (90 %)	3.172 (78 %)
CANCER OF THE LARYNX	175	34	150 (86 %)	28 (82 %)
COPD	3.623	2.960	3.105 (86 %)	2.223 (75 %)
ORAL CANCER	188	132	122 (65 %)	72 (55 %)
ESOPHAGEAL CANCER	1.238	429	701 (57 %)	207 (48 %)
BLADDER CANCER	847	330	273 (32 %)	86 (26 %)
KIDNEY CANCER	584	320	122 (21 %)	53 (17 %)
CORONARY HEART DISEASES	5.354	3.912	1.082 (20 %)	422 (11 %)
PANCREATIC CANCER	1.221	1.233	235 (19 %)	175 (14 %)
HEART FAILURE	2.350	4.234	405 (17 %)	400 (9 %)
STROKE (CVA)	3.399	5.292	382 (11 %)	256 (5 %)
DIABETES	1.312	1.585	104 (8 %)	92 (6 %)

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<sup>11</sup> See for more information: [www.volksgezondheidszorg.info/onderwerp/afhankelijkheid-van-alcohol](http://www.volksgezondheidszorg.info/onderwerp/afhankelijkheid-van-alcohol).

<sup>12</sup> See for more information: <https://www.volksgezondheidszorg.info/onderwerp/afhankelijkheid-van-drugs/cijfers-context/sterfte#node-sterfte-door-overdosis-naar-type-drug>.

<sup>13</sup> See for more information: [www.rokeninfo.nl/professionals/cijfers-gebruik-en-gevolgen/ziekte-en-sterfte/1/sterfte](http://www.rokeninfo.nl/professionals/cijfers-gebruik-en-gevolgen/ziekte-en-sterfte/1/sterfte).

### **3. An Overview | The Nicotine Addiction**

The powerful addictive substance in tobacco, used in tobacco products, is nicotine. Nicotine dependence is included in the International Classification of Diseases (ICD-10). Nicotine dependence is also included in the DSM-V [a manual used by physicians to diagnose and classify mental disorders] and consequently considered as a (mental) disorder (tobacco use disorder).

Nicotine is a very addictive substance, on a physical as well as on a psychological level. The strength of the addictive effect of nicotine is equated in scientific literature with that of other substances such as heroin and cocaine. On average, the younger a person starts to smoke the more addicted that person becomes.<sup>14</sup>

Nicotine has an addictive effect on the body and the mind in three manners:

1. Physical addiction
2. Psychological addiction
3. Tolerance (= the user needs more of the substance to create the same effect)

Scientific research has pointed out that there are three types of addicted smokers: the user who is instantly addicted, the user who becomes gradually addicted after regular smoking, and the user who alternates between smoking and not smoking without getting addicted. Nicotine addiction can indeed arise instantly. Especially youngsters are very vulnerable considering that they are going through a biological growth stage during which the brain is still developing and is more sensitive for dopamine: the substance in the brain which is known as the happiness hormone.<sup>15</sup>

By smoking nicotine the substance reaches the brain within 7 seconds which has a stimulating as well as a calming effect. This effect fades away in the course of the following hours after which withdrawal symptoms arise which can have precisely the opposite effect. The smoker can retrieve the stimulating and calming effect by reabsorbing nicotine by smoking the next cigarette.<sup>16</sup>

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<sup>14</sup> For more information see: [www.rokeninfo.nl/professionals/effecten-van%2%ADroken/nicotine/effecten-nicotine-verslaving](http://www.rokeninfo.nl/professionals/effecten-van%2%ADroken/nicotine/effecten-nicotine-verslaving).

<sup>15</sup> See Attachment 3: Expert and Summary Report Nicotine & Cigarette Design, Dr. J.S. Wigand, September 2016.

<sup>16</sup> For more information see: [www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/psychisch-effect](http://www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/psychisch-effect).

Apart from psychological effects nicotine has also physical effects. It stimulates the distribution of adrenaline to the blood. Adrenaline in turn elevates the heart rate, blood pressure and blood glucose level and increases the rate of breath. The smoker experiences this as pleasant or experiences a 'kick'.<sup>17</sup>

The degradation of nicotine takes around 2 to 3 hours. Because of this fast degradation addicted smokers feel a need to smoke multiple times spread over a single day in order to maintain a certain nicotine level in the blood.<sup>18</sup>

#### **4. An Overview | The Composition of the Cigarette and Effects of Tobacco Smoke**

Tobacco manufacturers' use -apart from tobacco- hundreds of different kinds of additives (added substances) in tobacco products. These additives are in many cases used to improve the taste of the cigarette.<sup>19</sup>

As a consequence the tobacco product becomes more attractive to use and the additives advance in that manner the addiction and therefore the consumption of the product. The most frequently used additives are flavour enhancers, such as sugar, vanilla, liquorice, honey and cacao, followed by moisture holding substances such as glycerol. Substances that are harmless in food, do not always remain so when they are added to cigarettes. Upon combustion toxic substances may be created. Some additives –when combusted- are even poisonous and addictive. Cigarettes are for 30 % composed out of added substances.

Additives can influence and enforce the addictive effects of tobacco. Some examples:

- Sugar makes the taste more attractive and moreover one of the combustion products of sugar (acetaldehyde) enhances the addictive effect of nicotine.
- Menthol allows for deeper inhalation of the smoke.
- Added ammonia-based chemicals elevate nicotine intake in the lungs.<sup>20</sup>

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<sup>17</sup> For more information see: [www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/lichamelijk-effect](http://www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/lichamelijk-effect).

<sup>18</sup> See for more information: [www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/afbraak-van-nicotine](http://www.rokeninfo.nl/professionals/effecten-van-roken/nicotine/afbraak-van-nicotine).

<sup>19</sup> Cfr. the subject discussed further below: 'Deadly by Design'.

<sup>20</sup> See for more information: [www.rokeninfo.nl/professionals/effecten-van-roken/effecten-van-overige-stoffen](http://www.rokeninfo.nl/professionals/effecten-van-roken/effecten-van-overige-stoffen) and [www.rivm.nl/Onderwerpen/T/Tabak/Toevoegingen\\_aan\\_tabak](http://www.rivm.nl/Onderwerpen/T/Tabak/Toevoegingen_aan_tabak).



Tobacco smoke contains thousands of different kinds of substances, among which hundreds of substances that are harmful for one's health. Moreover, around 70 substances in tobacco smoke have been proven to be carcinogenic. One of those carcinogens is tar, which is a mixture of substances that are created upon the combustion of tobacco.<sup>21</sup>

## **5. An Overview | Quitting Cigarettes**

Former smokers have on average undertaken 2,5 serious attempts at quitting in the past, while smokers on average have attempted to do the same 2,3 times.

The effort it takes to quit smoking, is in part determined by someone's age when he or she started smoking. The younger a person was when he or she started smoking, the more serious the addiction.

Especially sustaining the quitting-effort is hard: only 4 to 10 % of smokers who had attempted to quit during 2011, had not smoked a single cigarette in 2012.

Figures compiled by Continuous Research on Smoking habits [Continu Onderzoek Rookgewoonten (COR)] furthermore showed that:

- Annually approximately 29 % of (former) smokers attempt to quit smoking (data from 2014). In absolute figures this amounts to one million Dutch smokers who have tried to quit that year and almost two million quitting attempts annually.
- In 2014 81 % of smokers planned to quit in the future; approximately two thirds of them (65 %) had already made a serious attempt in the past.
- In 2014 40 % of smokers had during the past year used an aid device or aid method in an attempt to quit. This represents a higher figure compared to the previous years (figures vary between 33 à 34 % annually during the period between 2001 and 2013). This difference can be explained because of the sharp increase in the use of e-cigarettes as an aid device to quit smoking.
- Nicotine replacing aid devices or medical resources were used in 2014 by 22 % of (former) smokers. 5 % of the last serious attempts at quitting relied on advice or guidance.

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<sup>21</sup> For more information see: [www.rokeninfo.nl/professionals/effecten-van-roken/effecten-van-overige-stoffen](http://www.rokeninfo.nl/professionals/effecten-van-roken/effecten-van-overige-stoffen).



Written quitting-guides were used by 5 % of the (former) smokers in their last serious attempt at quitting in the past year.<sup>22</sup>

## **5. An Overview | The Science of the Tobacco Industry**

The tobacco industry evidently is fully knowledgeable about the serious health harms the use of their tobacco products causes. That is demonstrated by what the tobacco manufacturers ('the big four') state on their websites:

British American Tobacco:

*"Along with the pleasures of smoking there are real risks of serious diseases such as lung cancer, respiratory disease and heart disease, and for many people, smoking is difficult to quit."*<sup>23</sup>

Japan Tobacco International:

*"Smoking is a cause of serious diseases including lung cancer, coronary heart disease, emphysema and chronic bronchitis."*<sup>24</sup>

Philip Morris:

*"Smoking causes serious diseases and is addictive."*<sup>25</sup>

Imperial Tobacco Benelux:

*"Smoking is a cause of serious diseases for smokers among which lung cancer, heart conditions and emphysema."*

*"Smoking cigarettes is addictive and it can be very difficult to quit."*<sup>26</sup>

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<sup>22</sup> Reproduced from: [www.rokeninfo.nl/professionals/stoppen-met-roken/stoppogingen](http://www.rokeninfo.nl/professionals/stoppen-met-roken/stoppogingen).

<sup>23</sup> Reproduced from: [www.batbenelux.com/group/sites/BAT\\_A6EGJV.nsf/vwPagesWebLive/DO9T5KKJ?opendocument](http://www.batbenelux.com/group/sites/BAT_A6EGJV.nsf/vwPagesWebLive/DO9T5KKJ?opendocument).

<sup>24</sup> Reproduced from: [www.jti.com/how-we-do-business/smoking-and-health/active-smoking/](http://www.jti.com/how-we-do-business/smoking-and-health/active-smoking/).

<sup>25</sup> Reproduced from: [www.pmi.com/nld/our\\_products/health\\_effects\\_of\\_smoking/pages/health\\_effects\\_of\\_smoking.aspx](http://www.pmi.com/nld/our_products/health_effects_of_smoking/pages/health_effects_of_smoking.aspx).

<sup>26</sup> Reproduced from: [www.imperial-tobacco.nl/standpunten/roken-en-gezondheid](http://www.imperial-tobacco.nl/standpunten/roken-en-gezondheid). [This link is no longer accessible, to see the last known version visit <https://web-beta.archive.org/web/20160513013956/http://imperial-tobacco.nl/standpunten/roken-en-gezondheid>; the page with the quote on addiction is no longer retrievable.]

## **7. A Closer Look I Deadly by Design and Misleading Tests as well as Consumers**<sup>27</sup>

A cigarette is a biomedical scientifically developed product aimed at delivering a substance (nicotine) as fast as possible, (a drug delivery device) linked to refined marketing, lobbying and publicity strategies.

Modern-day tobacco products cannot be compared to the tobacco smoked by Native American tribes during their ceremonial rituals. The tobacco that was used by Native American tribes, contains relatively the same quantity of nicotine, but was not chemically treated to ameliorate its inhalability nor to significantly increase the potency of nicotine. Native American tribes did NOT inhale when using tobacco, in contrast with modern-day use of highly modified tobacco products where inhalation does take place because the tobacco manufacturers have done everything conceivable to make inhalation possible.

The nicotine in the modern cigarette reaches the brain within 6 to 8 seconds.

The Tobacco Industry (TI) purposefully and very precisely controls that influx of nicotine to induce, quicken, and maintain an addiction.

*The cigarette design:*

- a) A cigarette with a filter is made up out of a number of key components. Which are a cigarette rod with tobacco, a column which contains tobacco material, an adapted filter (generally spoken made from cellulose acetate), blotted-paper that connects the tobacco rod with the filter and porous 'plug wrap' (material).<sup>28</sup>
- b) Tobacco '*blend*'. The tobacco blend which makes up the tobacco rod contains '*burley*' (high nicotine level, low sugar level), '*flue cured*' (moderate nicotine level, high sugar level) and '*oriental*' (low nicotine level with aromatic taste elements). In addition, there is also 'expanded tobacco' (et), the stem of the tobacco plant and small strips of '*lamina*' (small layers of the tobacco plant's tissue).
- c) On average a '*king size*' (ks) cigarette is 85 mm in length and 25 mm across and contains around 750 mg tobacco material.

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<sup>27</sup> Attachment 4 Expert and Summary Report Nicotine & Cigarette Design, Dr. J.S. Wigand, September 2016.

<sup>28</sup> See for more information: [www.jeffreywigand.com/cigarette.php](http://www.jeffreywigand.com/cigarette.php).



- d) Elevated nicotine levels serve as selection criteria for the use of specific 'lamina' with high concentrations of nicotine; in other words 'burley' tobacco.
- e) Elevated nicotine yield gives more 'freebased' nicotine in gaseous state from smoking the cigarette rod.
- f) An elevated yield of nicotine to the lungs of the smoker (between 1999 and 2011 that yield has been elevated with 14,5 %).

*Additives: numb the sharpness/elevate the nicotine delivery:*

- a) Menthol numbs the throat and decreases sensitivity to smoke.
- b) Levulinic acid diminishes the sharpness of the smoke in order for it to be less irritating.
- c) pH scale altering chemicals are added, for example ammonia-based chemicals that sublimate nicotine faster in order to create a 'quick fix'. The cigarette is thus designed to be more addictive and thus 'tastier'.
- d) Changes in the pH scale of a cigarette facilitate the nicotine movement in the tobacco rod, it sets the nicotine contained in the 'blend' free and causes a faster sublimation of the nicotine and in turn a faster delivery to the reward centre in the brain. Thus it is all the more addictive.
- e) The higher the pH scale, the stronger the nicotine 'kick', the faster the delivery of nicotine in gaseous form occurs in the brain.
- f) A larger part of the nicotine contained in the blend thereby becomes available in 'free based' form (gaseous).
- g) Added sugars

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- i Pyrolysis (combustion) of sugars form an addictive carcinogen, acetaldehyde.
- ii Acetaldehyde reacts with nicotine and strengthens the addictive effects of nicotine by making the receptors of nicotine in the brain more receptive for nicotine.
- iii Sugars make it easier to inhale smoke.

#### *Ventilation holes of the cigarette*

- a) See (proof 1-3)<sup>29</sup> and [www.jeffreywigand.com/FTCmethod.php](http://www.jeffreywigand.com/FTCmethod.php).
- b) The laser-made perforations (holes) are made in the profile of the filter so that the fingers and/or lips of the smokers, physically block the holes.
- c) Blocking the ventilation holes elevates the delivery of tar and nicotine to the smoker.
- d) Laser ventilation holes are virtually invisible to the smoker but easily visible under a microscope.
- e) The to the naked eye almost invisible laser-made holes mislead the consumer because it leads to lower values for tar and nicotine in the tests which use the (FTC/ISO) methods. The smoking machines which are used in these tests do not close the holes, in contrast to the lips of a smoker. Because of that the measurements do not deliver a reliable image: it would seem as if a cigarette is less harmful than the real danger it represents to a smoker.

#### *The physics of aerosols*

The smoke particles (aerosols) are made so small that they are able to penetrate the lungs more efficiently and deliver the nicotine to the bloodstream (millions of capillaries next to millions of alveoli). Nicotine reaches the brain in around 7 seconds because of its size in an aerosol condition and because of additives to the tobacco blend which are set free upon combustion.

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<sup>29</sup> Attachment 1: Expert and Summary Report Nicotine & Cigarette Design, Dr. J.S. Wigand, September 2016.



Because you are feeling bad under withdrawal symptoms and because you get an acute nicotine kick after smoking which leads to a temporary disappearance of the withdrawal symptoms, a connection is created to what you are doing in that moment, the Pavlov reaction: the psychological connection to everything what a smoker does during the day, for example an act (drinking a cup of coffee) or an environment (sitting on the couch). This is an important cause of relapse into the old smoking behaviour for a smoker who quit for a longer period.

The increase in the stimulation of the trigeminus nerve (the fifth brain nerve) in the mouth cavity and the higher respiratory tracts enforces these automatically/unconsciously-conditioned processes through the effect of nicotine on the reward centre in the brain.

#### *'Reconstituted Tobaccos' (RECON)*

- a) RECON is made out of recycled tobacco material, such as the stem of the tobacco plant, a finished tobacco product for the market that has passed its expiration date, factory waste, etc.
- b) RECON is produced through 'band casting' or with methods to manufacture paper (Schweitzer process) to arrive at a tobacco resembling material which is a chemical delivery system for an individual cigarette.
- c) RECON is used to clean nicotine in the finished tobacco rod, to change the pH scale of smoke and to deliver strong "free base" nicotine or deprotonated nicotine. It is important to understand that nicotine in the natural system (in the plant) has a solid form, but that the free nicotine takes on an aerosol condition because of which it can reach the brain and have its effect.



*Conclusions:*

1. A cigarette delivers highly addictive nicotine in addition to 4000 to 8000 toxic by-products produced with the combustion of tobacco material and added substances.
2. The tobacco industry consciously designs a cigarette which creates addiction and maintains that addiction by using chemical additives which diminish the sharpness of tobacco smoke and which optimise the addictive dose of nicotine.
3. The use of pH altering substances in the additives (equally in RECON as when directly used in tobacco material) elevates the addictive potency by generating 'free base' nicotine, deprotonated nicotine (related to 'free base nicotine'). Free base nicotine is a gas which arrives faster in the brain (in 7 seconds) and induces addiction. The faster nicotine reaches the brain and the more gaseous its state when it reaches the brain, the more addictive it is.
4. The manufacturing of laser perforated ventilation holes in the profile of the cigarette rod misleads the testing methods of the ISO & FTC on cigarettes by thinning the cigarette smoke which leads to severely reduced measurements of tar- and nicotine levels with a smoking machine in contrast to human smokers.
5. The laser-perforations are blocked because the smoker puts his or her lips or mouth on the holes when inhaling. This leads to an elevation of tar- and nicotine levels.
6. Compensation causes the smoker to inhale the smoke deeper into the lungs, just like the tar.

## **8. The Violent Crimes**

Plaintiffs accuse the tobacco industry in general, especially the four biggest tobacco manufacturers in the Netherlands, that they by producing and selling tobacco products willingly and knowingly accept the significant chance/the significant risk that the –by that same tobacco industry intended- addictive use of these tobacco products leads to death or severe physical harm, or intended harm to the health of the consumers, all of these acts being committed intentionally.

This accusation focuses specifically on the fact that the aforementioned tobacco manufacturers have consciously designed/manipulated and produced their tobacco products in such a way that addiction to the tobacco product is introduced rapidly and is further maintained, because of which the free will of the consumer is limited and regular use is a consequence including its serious health harms: *deadly by design*.

In this context it is important to remember that the business model of the tobacco manufacturers is aimed at creating and maintaining as many as possible addicted consumers of tobacco products in order to obtain the highest possible profits, while these tobacco manufacturers are fully aware of the enormous health risks addictive use of their tobacco products results in.

Furthermore, the tobacco industry has misled the consumer for years by disclosing emission levels of tar, nicotine, and carbon monoxide on packaging of tobacco products which do not match the actual emission levels when the tobacco products are used as intended. The tobacco manufacturers have to that end misled the obligated lab tests by applying minuscule and for the naked eye nearly invisible perforations in the filter paper of the filter because of which the emission levels resulting from the tests (ISO) were far lower than with normal human smoking behaviour. In the opinion of the plaintiffs these acts constitute forgery given the fact that the emission levels printed on the packages of tobacco products suggest to consumers that these measurements correspond with reality, which they do not.



## **9. The Defences of the Tobacco Industry**

- *Smoking is a Free Choice.*

Over 80 % of smokers started smoking before his or her 18th birthday. A child is addicted within four weeks. Nicotine is as addictive as heroin and cocaine the sole difference being that nicotine can be purchased in regular shops.

A cigarette is furthermore designed to addict children and other starting users as fast as possible by, among other things, adding substances among which sugar, liquorice, honey and ammonia: *deadly by design*.

The so-called free choice is thus intentionally limited by the very addiction created by those tobacco products and the acts of the tobacco manufacturers cannot be justified considering the nature and severity of the consequences of their actions.

One should know that it is possible to wash nicotine –the most addictive substance- out of tobacco, but when nicotine would be removed from tobacco nobody would smoke anymore, because there would be no addiction and as a consequence the business model of the tobacco industry would collapse.

- *The Production and Sale of Tobacco Products is Legal.*

It is true that the Tobacco and Smokers' Requisites Law [Tabaks- en Rookwarenwet] and related legislative instruments regulate the production and sale of tobacco products in the Netherlands, however, nowhere in the Tobacco and Smokers' Requisites Law it is stipulated that murder, manslaughter, causing severe physical harm or the intentional harm of health (or an attempt to that end) is permitted.

At the same time there is no ground for legal justification to be found in the Tobacco and Smokers' Requisites Law neither in the Penal Code which would justify the acts of the tobacco manufacturers. Considering the devastating effect that tobacco products have on the health of the users of those products it is also simply inconceivable that a ground for legal justification could be found.

In addition, the maximum TNCO levels permitted under the Tobacco and Smokers' Requisites Law are transgressed. The sale is thus not in accordance with the aforementioned law.



- *A high-fat diet and drinking a lot of alcohol could also lead to disease and death*

It goes without saying that such a statement has some veracity to it, yet, the number of serious disease victims and deaths as a result of smoking is many times higher than the disease victims and deaths resulting from a fat diet and drinking a lot of alcohol. The figures do not even come close to these figures related to smoking.

Tobacco manufacturers thus a much greater endangerment than the manufacturers of food and alcoholic beverages and even a much greater endangerment than the manufacturers and sellers of for example cocaine, heroin, and marijuana who for their part can be held criminally accountable from the perspective of protecting public health.

Thereby, again, it needs to be considered that the tobacco manufacturers specifically design their tobacco products in order to intentionally increase the addictive effect –and with that thus implicitly the devastating effect-.

### **10. The Violent Crimes Elaborated Legally**

*Death, severe physical and intentional harm of health*

*Death* requires no further elaboration given the fact that half of the addicted smokers die as a consequence of a disease caused by smoking.

*Severe physical harm* - article 82, paras. 1 and 2, of the Dutch Penal Code is generally interpreted as follows:

- Disease which does not allow full recovery, continued disability to exercise professional duties, and expulsion or death of a woman's fruit.
- Obstruction of the cognitive capabilities lasting longer than four weeks.

Case law of the Dutch Supreme Court [Hoge Raad; short HR] has furthermore provided that:

- The answer to the question whether certain harm qualifies as severe physical harm is for the better part the prerogative of the trial judge (HR February 14, 2006, ECLI:NL:HR:2006:AU8055).



- Temporary and recoverable harm may qualify as severe physical harm (HR November 17, 1992, NJ 1993/726).
- It is not a precondition that the harm in question constitutes an incurable disease.<sup>30</sup>

It is beyond doubt that lung cancer qualifies as severe physical harm. The same is true for COPD considering that COPD according to current medical standards cannot be cured to the level of full recovery.

The law does not provide for an elaboration on its definition of *intentional harm of health*. It is general legal consensus that every act which harms physical and/or psychological health may fall within this definition. Considering that *nicotine dependence* has been included in the ICD-10 as well as in the DSM-V, the inducement of nicotine dependence may be qualified as a harm to health.

### **10.1 Causality**

The most important legal question which has to be answered is whether serious health complaints that addicted smokers may suffer may be attributed to the tobacco manufacturers, who produce tobacco products and make them available on the market.

It needs no explanation that the production and sale of tobacco products constitutes a *conditio sine qua non*<sup>31</sup> for the aforementioned health complaints; however that still leaves us with the need to deal with the question of causality.

In light of current legal standards the causality needs to be adjudged in line with the doctrine of reasonable attribution.

The doctrine of reasonable attribution considers the question whether it is reasonable to attribute the consequence (i.e. the health complaints) of the acts of the suspect (i.e. the tobacco manufacturers). Following consistent case law of the Supreme Court answering this question of attribution needs to take the circumstances of the specific case into account, whereby

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<sup>30</sup> See Text and Comments Penal Law, remark 2 with article 82 Sr.

<sup>31</sup> The actions of the tobacco manufacturers have to reasonably constitute an indispensable condition of the appearance of the (health-related) consequence.

actions of and mistakes by the victim do not necessarily preclude the acceptance of a causal connection.

It will be no surprise that the tobacco industry will respond by arguing that the smoker him/herself has broken the causality chain. It will be alleged that the smoker is informed of the serious health risks involved and is not under any obligation to begin smoking and is able to quit smoking at any time. They will allege that it is precisely the behaviour of the smoker him/herself which allows the negative health consequences to take effect and not the actions of the tobacco manufacturers for which reasons it is not possible to attribute those health effects to the tobacco manufacturers.

Plaintiffs oppose the view that acts or failure to act of the smoker him/herself would in and by itself take away any criminal liability of the tobacco manufacturers. In this context the following needs to be kept in mind.

The causality theories in literature and case law do not exclude at all reasonable attribution is pertinent even if harmful consequences occur partly due to acts of failure to act of the victim himself. The victim's own fault is not necessarily blocking attribution to a third party, except in case the victim's own doing would be so decisive in causing the harmful consequences that it would not be proportional nor reasonable to attribute the consequences to the suspect, i.e. the tobacco manufacturers.

In this context it is relevant to consider the nature and seriousness of the acts of the tobacco manufacturers, especially their intentionally bringing tobacco products on the market which are manipulated in such a way that addiction is induced faster (*deadly by design*), while the great risk of serious negative health consequences is known and while the entire business model of the tobacco manufacturers nonetheless is designed to generate as many addicts as possible.

In contrast with the tobacco industry's behaviour we consider the individual addicted smoker, who in 80 % of cases began smoking before reaching the age of 18, who over the years has been encouraged by marketing efforts to expressly begin or continue smoking and who meanwhile because of addiction needs many attempts at quitting in order to be able to quit without any guarantee of success.

Part of the relation between the tobacco industry and the consumer is a duty of care on the part of the tobacco industry which relates to the quality of their products which are put on the market for purely commercial reasons. That duty of care is violated in a grave manner considering that the product is designed in such a way that it leads as quickly as possible to the intended use (= the addicted use), while precisely that intended use causes the most serious health effects.

In this context the tobacco industry has over the course of many years misled the consumer by putting incorrect emission levels of tar, nicotine and carbon monoxide on the packages of tobacco products which levels do not correspond with the actual ones resulting from normal use of those tobacco products.

The purposeful intention of the tobacco industry aimed at the addictive use of tobacco products and the “conditional intent” [as meant in the Dutch Penal Code] the tobacco industry has with respect to the subsequent serious health effects of the addictive use, while precisely these health effects are entirely foreseeable for the tobacco industry, is equally an important factor to not refrain from attributing the criminal responsibility for those health effects to the tobacco industry.

This causality question merits, considering the aforementioned facts and circumstances, judicial review.

## **10.2 Intent**

The legal figure of ‘conditional intent’ fits the underlying facts best. The Supreme Court requires the presence of the following elements in order to be able to qualify certain acts or failure to act as ‘conditional intent’:

*A precondition for the existence of conditional intent aimed at a certain consequence is that the suspect has wilfully and knowingly exposed himself to a considerable chance that this consequence will take place. The answer to the question whether certain behaviour creates the considerable chance for a certain consequence depends on the circumstances of the case, whereby meaning is to be given to the nature of the acts and the circumstances under which these took place.*

The first question to be answered is whether the - by the tobacco industry - intended addictive use of their tobacco products creates the considerable chance



that the user becomes addicted (intentional harm of health), and develops lung cancer and /or COPD and/or other serious physical conditions and eventually dies early because of smoking.

That question is to be answered affirmatively. More than half of the addicted smokers in the Netherlands dies early as a consequence of a severe disease caused by smoking. In the abovementioned Australian research study this percentage is even higher: 66%. A chance of 50 to 66 % is commonly considered to qualify as very considerable.

The second question is whether and to what extent the tobacco industry is aware of the aforementioned considerable chance. That question is easily answered in the affirmative. The tobacco industry is entirely aware of the serious health risks posed by the use of tobacco products. Indeed, this is a generally known fact.

The third question is whether the tobacco industry accepts the aforementioned considerable chance. That question is also simply answered in the affirmative given that the tobacco industry despite its acceptance and understanding of the serious health risks continues to produce and market their tobacco products and, indeed, continues to design a cigarette which activates addiction in the brain as fast as possible (see 'deadly by design') and thus causes serious health problems.

### **10.3 Premeditation**

The tobacco industry is a clear cut example of premeditation. After all, the alleged acts of the tobacco industry are in no way identifiable as the results of impulsive and/or strong emotional decisions, but they are rather the result of an elaborate thought-through company policy of which the design of their tobacco product, the marketing of the tobacco product and the lobbying activities concerning laws and regulation in the area of tobacco production and sale are the core elements and have as ultimate goal to addict as many users as possible to tobacco products.

It needs, again, to be stressed that conditional intent does not block the possibility of the existence of certain acts being premeditated.

#### **10.4 Criminal Attempt**

To begin with, now that attempted murder/manslaughter and attempted premeditated serious maltreatment are outright punishable under the Dutch Penal Code, the same is true for attempted premeditated intentional injury of health.

Although Article 300, para. 5, of the Dutch Penal Code states that attempted maltreatment is not punishable, from the Supreme Court’s Judgement of 8 November 1949 (HR November 8, 1949; NJ 1950/129) it follows that this is not the case for attempted, premeditated, simple maltreatment and, therefore the same is true for attempted, premeditated, intentional injury to health.

Plaintiffs have opted for the punishable attempt-approach considering that the attempt-approach now most aptly formulates that the alleged actions of the tobacco industry are indispensable elements for the severe health problems which are the consequence of the addictive use of tobacco products, while in addition on an evidentiary level it provides that not in every single case the completion of the crime needs to be proven.

For a punishable attempt it suffices to establish that the intention of the tobacco industry has been demonstrated by a initiation of execution according to Article 45 of the Dutch Penal Code.

Intention implies intent, including conditional intent as detailed above.

The initiation of execution is demonstrated by the manner in which the tobacco industry designs its tobacco product (see ‘deadly by design’), the actual production of its tobacco product and the active introduction of its product on the marketplace.

#### **10.5 Illegality**

The tobacco manufacturers will in all probability argue that their acts do not constitute illegal behaviour, because it is legitimized by the Tobacco and Smokers’ Requisites Law and the related Decisions and Regulations. Because how, they will argue, can acts of the tobacco manufacturers conflict with the law if there is a lawful foundation for those actions? Also, they will probably argue that –as long as the tobacco manufacturers act in conformity with current tobaccolaws- their actions *cannot* be illegal.



This defence is however not complete nor decisive. What if trading in tobacco products, indeed, does not violate the Tobacco and Smokers' Requisites Law, but at the same time this trading violates another regulation? In such a case the trading would be nonetheless illegal under the other regulation. In other words, acts which are not illegal under the Tobacco and Smokers' Requisites Law, may be illegal under the rules of another regulation.

As set out above, the plaintiffs are of the opinion that the sale of tobacco in the Netherlands and the manner by which the tobacco products are advertised constitutes in any event attempted murder (Article 289 in combination with Article 45 of the Dutch Penal Code) and/or premeditated serious maltreatment (Article 302 in combination with Article 303 of the Dutch Penal Code) and/or premeditated harm of health (Article 300 in combination with Article 301 of the Dutch Penal Code), as well as forgery (Article 225 of the Dutch Penal Code). In that sense the acts of the tobacco manufacturers are illegal under a variety of criminal offences.

#### *Justification grounds Available?*

After the facts have been proven, the illegality of violations of Articles 225, 302 en 289 of the Dutch Penal Code may be waived if a justification ground would be available. As is generally accepted the evidence regime under Article 300 of the Dutch Penal Code deviates somewhat from that principle, since under that provision the element 'maltreatment' is interpreted as a qualifying element by the Supreme Court, which implies that maltreatment can only be proven if (in case of violation of para. 4, as in the present case) the health has been actually harmed and if there exists no ground for justification. The difference is legally important to ascertain the applicable regime of evidence, but as to the content of the present complaint it matters little. The crucial issue with respect to all the aforementioned crimes is whether at any given point the tobacco manufactures may invoke a justification ground, which would prevent the acts in question to be illegal or which would take away the illegality.

#### *Legal Justification Grounds or the Absence of Material Illegality?*

There is no need to, at this point, discuss the legal justification grounds of Articles 40-43 of the Dutch Penal Code, since they don't play a role in the present case.

The tobacco manufacturers are also not able to invoke the absence of material unlawfulness, simply because the jurisprudential criteria for such approach have not been met.





### *Permission?*

In theory there is still one other justification ground available, being: permission.

To begin with, with respect to the violations of Article 225 of the Dutch Penal Code none of the plaintiffs or other smokers have given permission to commit this crime. Obviously, part of this particular complaint is that because of the underreported emission levels on the packages smokers have consumed more TNCO than for which they could possibly have given permission. Therefore the violation of article 225 of the Dutch Penal Code does not need any further consideration under this subject. We do need to go into this matter with respect to the category of violent crimes.

Permission comes in many shapes and forms. Relevant questions which are of importance when considering whether lawful permission, which may lead to a legal justification ground, is present are the following:

- a) To what extent is the permission relevant in light of the seriousness of the acts of the tobacco manufacturers?
- b) Who gives the permission?
- c) To what extent can we speak of permission when someone is addicted?

Ad a):

To a certain extent it is conceivable that someone may give permission to a perpetrator to commit an act of violence against him or her. Clearly, this option is not available for all situations or under any and all circumstances. A victim-to-be can in no way give someone justifying permission for attempted murder or manslaughter against him or her. For that part of the current complaint permission can never constitute a justification ground.

It is not possible to provide for a clear-cut demarcation between consequential acts for which permission can and cannot be given. Important elements for such demarcation would be: Who is committing the violent acts? Against who? In what context? Based on what kind of permission?

The most serious form of violence –not committed by the government- for which justifiable permission can be given, is generally committed by medical doctors, during surgery or euthanasia. Permission for committing violence between

'ordinary' citizens is only justified in the context of sports and games (soccer, boxing, SM-encounters etc.). If this violence takes on forms that violate the acts sanctionable by the rules of the sport or the game or are disproportionable, they become punishable nonetheless. The courts and tribunals have taken a casuistic approach towards such violence.

Obviously, a person who gives permission needs to do so well-considered and 'informed' in order for it to be a valid permission. Preceding surgery the medical doctor discusses the possible risks and consequences with the patient, before the patient gives his or her permission. The soccer player studies the rules of the game before he or she enters the field. The SM-partners discuss with each other what is considered acceptable and what is not as well as which signals are to be considered as a stop sign.

The seriousness of the consequences of the acts of the tobacco industry stands in the way of a possibly justifying permission. The same is true for the lack of knowledge of the starting smoker of the consequences of smoking. The combination of these two factors certainly ensures that –in so far a smoker would be assumed to be able to give permission at all- that permission does not justify the acts of the tobacco manufacturers. After all, the tobacco manufacturers must be aware that their actions have such harmful consequences that a possible permission given by the smoker does not take away their criminal responsibility. This argument is all the more valid, since the tobacco manufacturers must also be fully aware that the smoker does not understand the consequences completely or underestimates them.

Ad b):

Where permission plays a role it is, of course, essential that that permission must be given by the victim him/herself. Permission by a third party in principle does not constitute a valid justification ground. Therefore, in as far as the tobacco manufacturers would also want to argue that the government through the Tobacco and Smokers' Requisites Law has created a justification ground, that argument thus fails.

Which is all the more true considering that the Tobacco and Smokers' Requisites Law obviously cannot serve as a justification ground for maltreatment and killing people, without any connection to medical, honourable or lawful purposes. Committing violence is after all – when legally regulated- only permitted when covered by a legal or extra-legal justification ground, or when they serve an



accepted noble goal –as for example is the case with certain medical treatments- or when they take place within a certain cadre of sports or games. All of that is not at stake in this case.

Another relevant element is the question whether a minor can give a valid permission to let him/herself be maltreated by the tobacco industry. What has previously been argued with respect to adults –namely that the severe consequences of smoking and the ignorance apparent with a beginning smoker does not constitute a valid justification ground - is all the more true with respect to minors. It is generally known that a teenager-brain is less capable than the adult-brain to weigh pros and cons and to make well-reasoned decisions. In addition, the teenager-brain does not or only slightly consider the future when making choices (at this stage in life one still deems oneself to be immortal) and it is furthermore very sensitive to addiction. In addition youngsters want to be seen as ‘tough’ and do not want to fall outside their peer group. Still more than is the case regarding adults, tobacco manufacturers should not trust minors to have given ‘informed consent’.

The rule which prohibits the sale of tobacco to persons younger than 18 years old is an indication that the government is also of the opinion that minors are not capable of deciding for themselves whether they should be smoking or not. The increase of the age limit from 16 to 18 years took place as part of the prevention policy of the government. In the Memorandum of Public Information [MvT] the Minister stated among other things that amongst others the position that teenagers are sensitive for experimenting, sensitive to addiction and easy to influence. The same MvT shows that the Minister is aware that individuals above 18 years do not start smoking as quickly as teenagers<sup>32</sup>, which clearly says a lot about the irrational choice that teenagers make when it comes to smoking.

Ad c):

Who can probably be held even less responsible for their choices are addicts, i.e. addicted smokers.

In as far as it would be possible to argue that an adult starter when smoking his or her first cigarette or cigar gives a justified permission for the disastrous consequences of smoking, this is certainly no longer the case after a couple of weeks.

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<sup>32</sup> See for more information: MvT with changes to Tobacco and Smokers’ Requisites Law (Kii 33590).

By that time the smoker is already addicted. The addiction to smoking is very stubborn and very hard to get rid of. The addict shows all characteristics of a junky. He denies the addiction; comes up with excuses to smoke, to avoid quitting etc. In addition he suffers from withdrawal symptoms when he does not smoke. Getting rid of addiction to tobacco is extremely difficult. Medical support programs are offered to aid people who are trying to quit. The addictive substances and the consequences of addiction are listed in the report of Dr. Wigand and in the literature to which reference is made in the complaint and its attachments.

In other words, with every cigarette or cigar which the smoker lights up, the smoker is continuously maltreated and his health is damaged and increasingly threatened. The moment the smoker becomes addicted, the permission which the smoker is supposed to provide becomes less decisive. After all, he almost doesn't have another choice.

#### *Conclusion as to Justification*

The previous arguments may raise the following question: how is it possible that the government through the Tobacco and Smokers' Requisites Law still makes it legally possible for tobacco manufacturers to commit the crimes that are central to this complaint. Historical aspects probably in part explain this, given that smoking has been accepted for a very long time and only in the course of the 20<sup>th</sup> century the facts of the deadly consequences of smoking came to light. It apparently takes a long time before the lawmakers become aware of these insights. Another explanation for this interlegal discrepancy may be the fact that the State enjoys considerable tax revenues from the sale of tobacco products. Whatever the case, this all does not create a valid justification ground and thus does not take away the illegality of the (committed) crimes.

#### **10.6 Principle of Legitimate Expectation**

The manufacturers will probably — in the alternative – argue, under the assumption that no valid justification grounds would exist, that the government cannot just give them permission on the one hand to market their products while on the other hand take them to court. They will argue that they should, in as far as they comply with the statutes of the Tobacco and Smokers' Requisites Law and related regulations, in any case be able to legitimately trust that they also comply to all of the other laws in force.

Prosecution would then be a violation of the principle of legitimate expectation.

The plaintiffs are of the opinion that there is no merit in invoking the principle of legitimate expectation with respect to any of the punishable facts, that are central to the present complaint.

In as far as invoking the principle of legitimate expectation would at all interfere with prosecution, such invocation is without any doubt not valid for the offences of Articles 225 and 326 of the Dutch Penal Code. The present complaint earlier explained that the false – underreported- TNCO values provided on the packages does not solely give rise to the aforementioned crimes, but constitutes also a violation of certain provisions in the Tobacco and Smokers' Requisites Law. Therefore, invoking the principle of legitimate expectation is impossible if forgery or deception are at stake.

The same is true for violent crimes. Invoking the principle of legitimate expectation will eventually fail with respect to violent crimes also. The Tobacco and Smokers' Requisites Law offers –expressively phrased- the opportunity to maltreat the smoker up to the prescribed maximal TNCO values. If the actual TNCO values transgress the legally maximal values, the smoker actually is more severely mistreated than the maximal allowed levels. This complaint clearly shows that when the ISO test measurements border on the maximum norms (while the ISO test results in underreported measurements up to 2.5 times lower than the true values), the maximum norms are transgressed. Thus, also with respect to the seriousness of the maltreatment of the smoker the tobacco industry is violating the law.

In case of all of the crimes at stake in this case, the tobacco manufacturers do not hold themselves to the prescribed norms provided in the Tobacco and Smokers' Requisites Law. Therefore, one cannot call upon that same law in support of invoking principle of legitimate expectation. Simply, one cannot invoke the principle of expectation if the expectation is not provided or if the relevant rule of law is abused.

Finally and somewhat redundant the plaintiffs would like to state that, in as far as invoking the principle of legitimate expectation would merit any chance of success, it does not do away with the illegality of the acts of the tobacco manufacturers. The legitimate expectation discussed here would result in not being prosecuted. Invoking that legitimate expectation only comes into play after the Public Prosecutor has established that indeed serious crimes have been

committed.

Meijering Van Kleef Fiq & Van der Werf      ▽ *Advocaten*

## **11. Forgery**

Article 2.1., para. 1, Tobacco and Smokers' Requisites Law states:

*The maximum emission levels of a traded or produced cigarette conform to article 3, first clause, of the Tobacco Manufacturers products directive.*

The Tobacco and Smokers' Requisites law holds as a regulating guideline the directive 2014/40/EU of the European Parliament and the Counsel of April 3, 2014 relating to the reciprocal changes of the legal and governmental stipulations of the member states concerning the production, the presentation and the sale of tobacco and related products and to repeal Directive 2001/37/EG (PbEU 2014, L 127).

Article 3, first clause, of Directive 2014/40/EU states:

*The emission levels from cigarettes placed on the market or manufactured in the Member States ('maximum emission levels') shall not be greater than:*

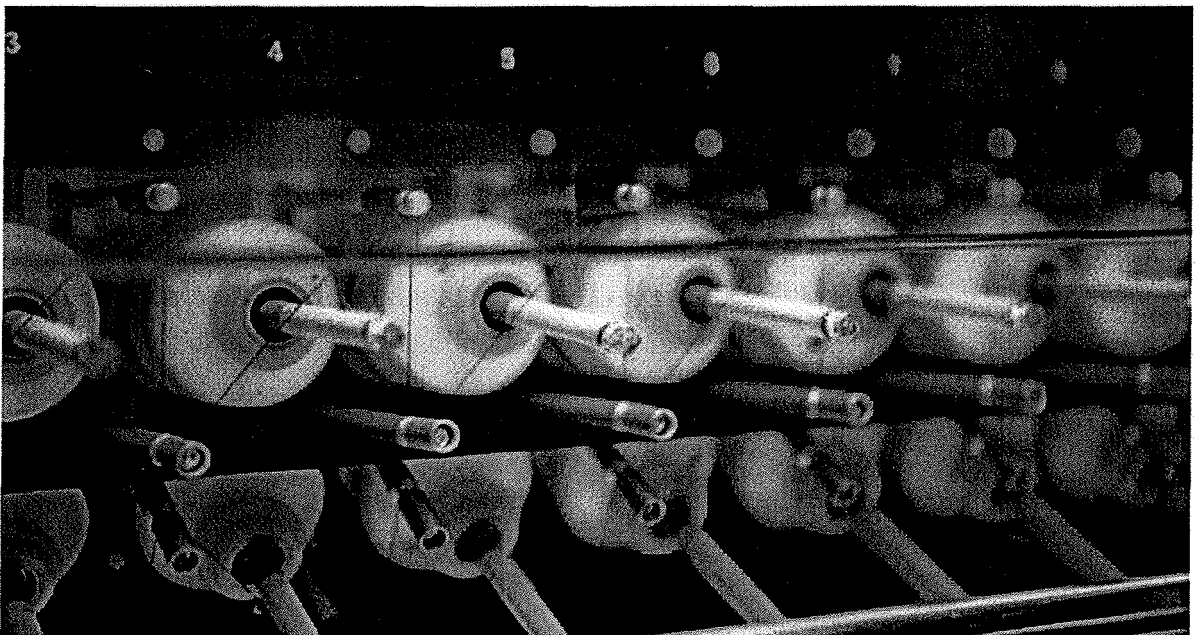
- a) 10 mg tar per cigarette;*
- b) 1 mg nicotine per cigarette;*
- c) 10 mg carbon monoxide per cigarette.*

The emission levels of tar, nicotine en carbon monoxide of cigarettes (hereafter: TCNO-levels) have to be measured following the ISO-norm 4387 (tar), ISO-norm 10315 (nicotine) and ISO norm 8454 (carbon monoxide). The exactness of the measurements concerning tar, nicotine and carbon monoxide are determined based on ISO-norm 8243.

The tobacco manufacturers were from 2002 until May 2016 obligated to disclose the TNCO levels of the tobacco products on the packages. The TNCO levels imprinted on the packages were determined by smoking machines.

To ascertain the TNCO levels the tobacco manufacturers and the Institute of the Realm for Public Health and Environment [Rijksinstituut voor Volksgezondheid en Milieu (RIVM)] use smoking machines as shown below. The end of the filter is placed in a rubber mouth, after which the machine sucks up smoke.

The RIVM researches the composition of cigarettes. They use a machine to analyse cigarette smoke.



During the measurements the largest part of the filter is not covered by this rubber mouth.

The RIVM states on its website the following on the smoking machine:

*Reinskje Talhout worked as a researcher from 2004 onwards at the RIVM. She researches the chemical composition of tobacco products and their toxic, addictive and attractive qualities. In the centre for Health Protection stands a smoking machine, with which the emission of different substances from cigarettes is measured. Data on the composition of cigarettes per brand and type are detailed on the following website [Tabakinfo.nl](http://Tabakinfo.nl).*

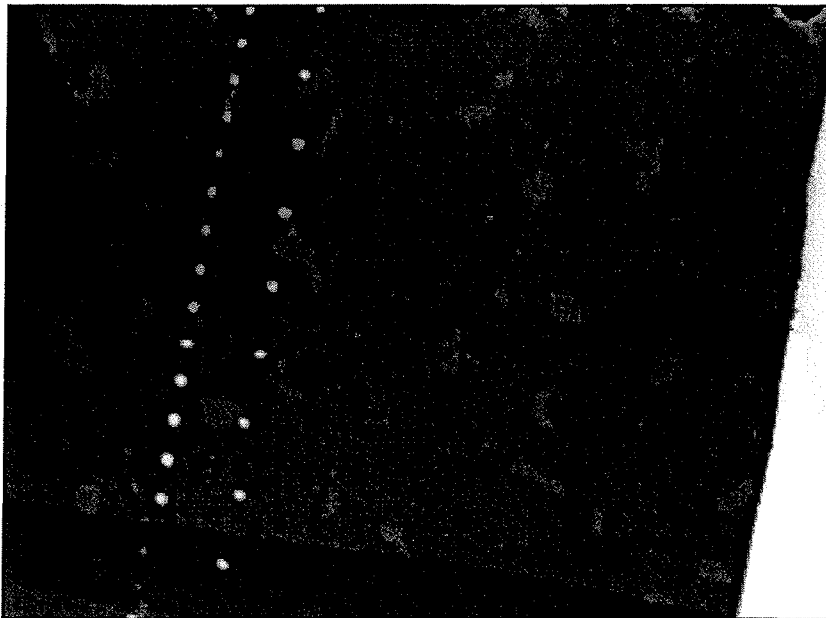
The expert witness engaged by the plaintiffs, Dr. J.S. Wigand, has pointed out that in every filter paper, starting roughly in the middle of the filter, minuscule for the naked eye almost invisible ventilation holes have been pierced. In some filters a circle with many holes



is to be found, in other filters there are even two to three circles to be found just above or next to each other.

Because the applied ventilation holes are *not* covered during the measurements with the smoking machine, the machines also suck in fresh air apart from true smoke.. Because of this the TNCO levels are influenced. Indeed, the smoke is thinned, which leads to lower values of tar and nicotine than would be the case if the machines would suck in undiluted smoke.

The ventilation holes in the filter paper are depicted below:



The for the naked eye virtually invisible ventilation holes are fitted at a crucial place: namely there where the smoker holds his cigarette with his fingers and which is also often enclosed by the lips. Because of that the ventilation holes are covered to a certain extent by the fingers or the lips of the smoker. Because of that the smoke arrives in most cases unfiltered from the filter of a smoked cigarette into the lungs of the smoker. The smoker inhales higher emission levels of tar, nicotine and carbon monoxide than the emission levels which are produced through the smoking tests.



The expert witness Dr. J.S. Wigand discusses this in connection to possible double values. In other words: numerous smokers believed they were only smoking one pack a day when it comes to emission levels, while they are in effect smoking two. Also see the report of Dr. Wigand which has previously been cited and referenced to and which is attached to this complaint.

The RIVM has also already declared in its report entitled Revision EU-Tobacco Products Directive 2001/37/EG<sup>33</sup> in 2012 that the TCNO levels which are derived from smoking test do not conform to the real levels:

The TNCO-levels on a cigarette pack are determined by letting a smoking machine smoke a cigarette according to a determined protocol. In the Netherlands and the rest of the EU the so-called ISO-method is applied (for more details see paragraph 6.6).

Humans smoke in a different manner than smoking machines. The ISO-method appears thus to not make out a good reflection of the more intensive human manner of smoking. A study of 132 smokers of cigarettes with nicotine levels between 0,8-1,2 mg showed that these smokers take bigger puffs with shorter breaks than what is prescribed by the ISO-protocol (44-49 ml versus 35 ml and 19-21 seconds versus 60 seconds). These smokers thus inhale more smoke than an 'ISO-smoker'. The smokers are exposed to almost 2,5 times more nicotine and tar than an 'ISO-smoker' and to almost two times the levels of other harmful substances (benzo[a]pyrene and 4-(methylnitrosamino)-1(3-pyridyl)-1-butanon) Djordjevic et al., 2000).

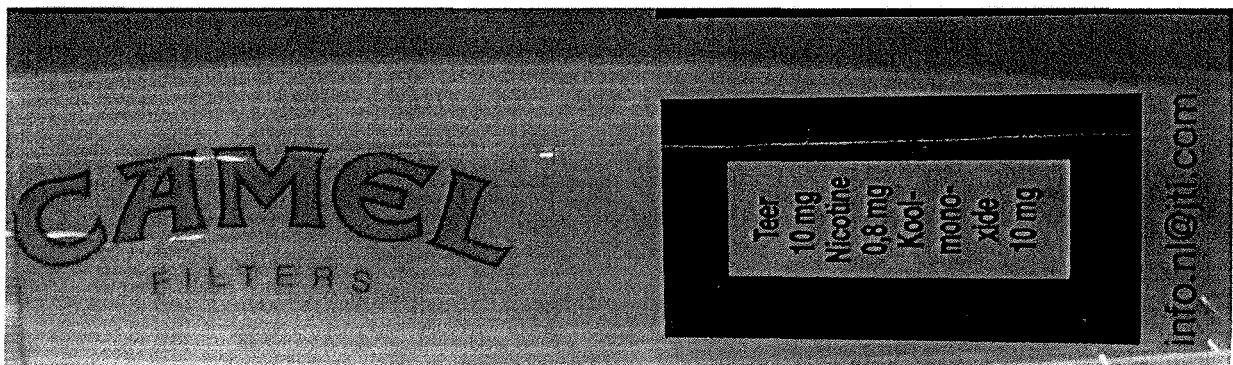
With cigarettes who when smoked by machines deliver low tar and nicotine levels the discrepancy is even larger. Filter ventilation seems the most important way to lower mechanized measurements of TNCO levels (Kozlowski, et al., 1998; Kozlowski and O'Connor, 2002; Stephens, 2007). When the smoking takes a 'puff', air flows inside through the holes in the filter which dilutes the tobacco smoke. In comparison to a cigarette with a filter without holes, the TNCO levels will thus be lowered when the cigarette is smoked by a smoking machine. In addition, the combustion speed, the quantity of tobacco, the kind of tobacco and the paper porosity are also of importance (Kozlowski and O'Connor, 2002; Stephens, 2007).

Smokers have need of a certain amount of nicotine to maintain their addiction. When people smoke a ventilated cigarette, they will knowingly or unknowingly apply a number of compensation tactics to nonetheless take in the desired quantity of nicotine. The smoker can close the ventilation holes with his/her lips or fingers, take larger puffs, take more puffs from one cigarette, can inhale deeper, can smoke the cigarette further down the rod, or can smoke more cigarettes in a day (Hammond, et al., 2006a). A review on compensating smoking behaviour concluded that smoking behaviour differs strongly from person to person (Scherer, 1999). Cigarettes with higher TNCO-yields are smoked less intensively than cigarettes with lower TNCO-levels. When smokers change brands they compensate on average 50-60 % of the difference in nicotine levels. The most frequently used of the compensation mechanisms would be the taking of larger puffs.

<sup>33</sup>For more information see: [www.rivm.nl/bibliotheek/rapporten/340610003.pdf](http://www.rivm.nl/bibliotheek/rapporten/340610003.pdf).

No other reason can be found for the tobacco manufacturers' conduct than that they must have placed the holes in order to influence the TNCO levels, knowing that this would cause the machines to register lower values. In that way they could use higher TNCO levels in their product, what certainly has to have led to a violation of the maximum values which are proscribed in the Tobacco and Smokers' Requisites Law and associated (European) regulation.

Indeed, the actual values of normal smoking usage are not imitated during the measurement by the machine, in part because of the air that is sucked in through the holes, while there are several types of cigarettes which according to the figures imprinted on the packages already virtually contain the maximum values based on the manipulated mechanical smoking tests.



The fact that the tobacco manufacturers have never informed their consumers of these intentionally placed smoke-diluting, virtually invisible ventilation holes, points to malicious intent on their part. If there had been a warning on the packages like, 'by covering the holes in the middle of the filter with your fingers and/or lips it is possible that you possibly inhale double the amount of nicotine, tar etc. as indicated on the packages', or something similar, or if a visible line would have been added around the place where the holes are situated in order to draw attention to these holes, then, possibly, there could be some doubt on the maliciousness nature of the intentions of the tobacco manufacturers. Clearly with this side note that this would only be so if the TNCO levels indicated on the packages would not have been presented as facts, which is what actually happened.



Ina any event, the smoker has never known that the values shown on the packages were false and that the package of cigarettes bought and smoked by the smoker possibly contained up to twice as much tar, nicotine, and carbon monoxide.

Those TNCO levels are of great importance for many smokers. An internet search, for example on fora where smokers communicate with each other, shows that the TNCO levels put on the packages often decide the choice of smokers for a certain brand of cigarettes. In other words: the emission levels shown on the packages are very seriously considered by the consumer. They have and were led to consider the provided values of tar, nicotine, and carbon monoxide as facts [without any nuance], certainly so, now that the tobacco manufacturers do not mention on the packages of tobacco products that the values do not correspond with reality, while those same tobacco producers have manipulated the aforementioned values by adding minuscule holes in the filter paper.

In the eyes of the plaintiffs, providing these false and in reality non-existent lower TNCO levels by the tobacco manufacturers constitutes forgery.

## **12. Expert Witness Dr. J.S. Wigand**

The plaintiffs have found dr. J.S. Wigand (MA, PH.D, MAT, SC.D.) willing to serve as an expert witness for this complaint. Dr. Wigand has prepared a short report for this complaint which has been added to the complaint as **attachment 4** and to which the complaint has referenced and has cited from.


Dr. Wigand is willing to provide additional information or to be examined as an expert witness in the case of a preliminary or preparatory investigation by the Public Prosecutor's Office. The curriculum vitae of Dr. Wigand is attached as **attachment 5** to this complaint.



### **13. Conclusion**

The plaintiffs are of the opinion that tobacco manufacturers and their *de facto* executive officers can be considered as suspects of the punishable facts enumerated above. Therefore, the plaintiffs request that the Office of the Public Prosecutor proceeds to prosecute the aforementioned suspects. If the Office of the Public Prosecutor were to come to the conclusion that the facts and circumstances as presented are insufficient to at this point start the prosecution, the plaintiffs request that the Public Prosecutor would in any case start a preparatory investigation in order to collect evidence against the aforementioned legal entities and their *de facto* executive officers against whom the plaintiffs submit this complaint.

Hoggachtend,



Bénédicte L.M. Ficq

