



Q&A explaining the rigged cigarette and unlawful measurement case

What is the core of this case?

More than half of the smokers who continue to smoke die of a disease caused by smoking. In the Netherlands, that is 19,000 people every year. The health damage caused by cigarettes is caused by harmful substances that are released through the smoke that the smoker inhales, such as tar, carbon monoxide and nicotine. To offer smokers some protection against this, EU legislation and the Dutch Tobacco and Smoking Products Act stipulate that cigarettes may release a maximum of 10 milligrams (mg) of tar, 1 mg of nicotine and 10 mg of carbon monoxide (TNCO). In 2018, the National Institute for Public Health and the Environment (RIVM) established that the measurement method used to measure those TNCO levels [strongly underestimates](#) the amount of harmful substances a smoker actually ingests. Youth Smoking Prevention wants the maximum emissions to be better enforced: 10-1-10 really should be 10-1-10.

How is the tobacco industry cheating on TNCO measurements?

The TNCO emissions from cigarettes are measured with smoke machines that meet standards of the International Standard Organization (ISO), as prescribed in European and Dutch legislation. Tobacco companies put small holes in the filters of cigarettes, so that the smoke machines suck in extra air that dilutes the TNCO emissions from the cigarette. With the ISO method, the measuring machine also takes a puff of 35 millilitres (ml) once per minute. In this way, the emissions remain below the maximum 10-1-10 standard set by law. In reality, smokers (partially) close the holes in the filters with their mouth and fingers and take an average puff of 53 ml every half minute. The 2018 [RIVM study](#) found that smokers inhale two to three times as many toxins as permitted by law.

How are exceedances of the emission standards determined?

In addition to the ISO measurement method, there is an alternative measurement method that better approximates the smoking behaviour of the smoker. This Intense method,

originally developed in Canada and also known as Canadian Intense, involves taping the holes in the filters and taking more frequent and deeper puffs than the ISO method. This method has been validated by the World Health Organization's independent Tobacco Laboratory Network (TobLabNet) and is recommended by the WHO as a WHO TobLabNet SOP1 method (also known as WHO-Intense).

In 2018, RIVM used this Intense method. All but 1 cigarette tested exceeded the legal standards for tar and carbon monoxide by a factor of 2 to 3. The nicotine levels were 1.3 to 2.7 times higher than allowed (see the [results of that study](#)).

In the context of the lawsuit, RIVM repeated this study this year for all filter cigarettes available in the Netherlands. The findings in this study are consistent with those in the previous study and will be published later this year.

How did this case end up in court?

After the RIVM had shown in 2018 that cigarettes emit far more TNCO than legally permitted, Youth Smoking Prevention submitted a request to the Dutch Food and Consumer Product Safety Authority (NVWA) to take enforcement action and to remove all cigarettes that meet the 10-1-10 standard to be withdrawn from the market. The NVWA rejected that request, citing the ISO measurement method prescribed in the EU Tobacco Products Directive and in the Dutch Tobacco and Smoking Products Act. When applying that method, all cigarettes meet the emission standards, so there is no reason for the NVWA to take action, the service stated.

Youth Smoking Prevention lodged an objection to this with the State Secretary for Health, Welfare and Sport. After VWS rejected that objection with the same arguments, Youth Smoking Prevention decided to submit the case to the administrative court in Rotterdam.

How did the European Court of Justice become involved in this case?

Youth Smoking Prevention asked the court to rule that the NVWA should henceforth use the Intense method when checking cigarettes, because it more closely approximates the actual smoking behaviour of a smoker.

A Dutch court may rule on the validity of a Dutch law, but not on the validity of a European law. The EU Tobacco Products Directive (TPD) prescribes both the 10-1-10 standard and the use of the ISO measurement method, which, however, as RIVM has shown, can be manipulated.

Youth Smoking Prevention has therefore immediately argued, when bringing its case before the Rotterdam court, that the case should be referred to the Court of Justice of the European Union in Luxembourg. The judge honoured that request and, via so-called 'preliminary questions', asked the Court for an explanation of the Tobacco Products Directive in light of the enforcement request from Youth Smoking Prevention.

The same parties that were before the court in the Netherlands participate in such a European procedure, but also the European Commission, the EU Council of Ministers and the European Parliament plus the Dutch government.

What did the European Court of Justice rule in this case?

In essence, the question to the Court was which should weigh most heavily: the legally defined emission standards (10-1-10) or the ISO measurement method also prescribed in the TPD? One of the arguments put forward by Youth Smoking Prevention stated that although the ISO method is indicated in the law with a production number, the ISO regulation itself is

not included in the law and has not been published in a formally correct manner. In other words: an unpublished regulation may not be used against the citizen.

The Court turned out to be sensitive to this approach and ruled in its [judgment of 22 February 2022](#) that the ISO method may indeed not be used against citizens. The Court decided that the Dutch competent authority must itself designate a measurement method that “must be appropriate in the light of scientific and technical developments or internationally agreed standards, for measuring the levels of emissions released when a cigarette is consumed as intended, and must take as a base a high level of protection of human health, especially for young people.”

At the same time, the Court ruled that the ISO method can still be used by industry, but for practical purposes: mutual comparison and harmonisation. For Youth Smoking Prevention, the ruling of the EU Court was therefore a very important victory.

What did the Rotterdam District Court rule in its judgment?

Due to the explanation of the European Court in its [judgment of 4 November 2022](#), the Rotterdam District Court came to the conclusion that in the absence of a replacement measurement method prescribed by law, it cannot yet be determined that the cigarettes available in the Netherlands meet the legal requirements, but that given the RIVM study from 2018, it could be assumed that this is not the case. The court ruled in favour of Youth Smoking Prevention and the NVWA was instructed to start enforcement.

Before which court will the appeal be lodged on June 8?

An appeal has been lodged against the judgment of the Rotterdam District Court of 4 November 2022 with the Trade and Industry Appeals Tribunal (CBb). In cases such as these, the CBb is the highest authority that can pass judgment.

Who are the counterparties of Youth Smoking Prevention in the appeal?

The counterparties of Youth Smoking Prevention in this procedure are:

- The Netherlands Food and Consumer Product Safety Authority (the NVWA) and the Ministry of Health, Welfare and Sport (VWS), jointly represented by the State Attorney
The NVWA and VWS have been the direct counterparty of Youth Smoking Prevention in the enforcement case since 2018;
- The Association of Dutch Cigarette and Cut Tobacco Manufacturers (VSK), represented by director Jan Hein Sträter
VSK intervened in the preservation proceedings as an interested party and in that capacity also acted as a party to the Rotterdam District Court and participated in the proceedings before the Court of Justice in Luxembourg;
- Philip Morris Benelux B.V. and Philip Morris Investments B.V., represented by Wladimiroff Advocaten
- British American Tobacco International (Holdings) B.V., represented by Hogan Lovells
- JT International Company Netherlands B.V., represented by Freshfields Bruckhaus Deringer
- Van Nelle Tabak Netherlands B.V. h.o.d.n. Imperial Tobacco Netherlands, represented by Allen & Overy

It was only when the Rotterdam District Court ruled in 100% favour of Youth Smoking Prevention that these four tobacco multinationals showed themselves in the proceedings and each of them filed an appeal against the decision of the Rotterdam District Court as an interested party.

What is the appeal about?

In a letter to the House of Representatives on December 6, 2022, State Secretary Van Ooijen (VWS) said that he, like the NVWA, is very concerned about the rigged cigarettes and that his wish is “to be able to take strong action against these cigarettes as soon as possible. and the producers, importers and distributors (hereinafter: tobacco industry) who are responsible for this.” In the letter, he stated that he would still appeal against the decision of the court in Rotterdam, which makes this strong action possible. Despite the fact that the EU Court has indisputably created room for using a measurement method other than the ISO method, VWS and NVWA want to prevent tobacco manufacturers from making billions of claims with a final ruling from the CBb. The main aim of this appeal is to ensure that the CBb better explains and confirms the judgment of the EU Court, so that VWS and NVWA can confidently use a different measurement method for enforcement.

On the contrary, the tobacco parties hope to achieve that the Tribunal in one way or another renders the effectiveness of the judgment of the EU Court ineffective.

Youth Smoking Prevention was completely satisfied with the decision of the Rotterdam court. The aim in this appeal is therefore to defend the correctness of the court's decision and to defend the interpretation given by Youth Smoking Prevention of the decision of the highest court of the European Union.

When is an appeal decision expected?

As a rule, the CBb issues a decision within 6 weeks of the day of the hearing. For this case, that would be July 20. However, it is possible that the CBb needs more time, in which case the decision will be postponed for another 6 weeks, until August 31 at the latest. No appeal is possible against the decision of the Trade and Industry Appeals Tribunal. The decision of the CBb is therefore final.