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**Information**

Date **29 SEP. 2023**  
Subject update measurement tar, nicotine and carbon monoxide

**Our reference**

3671922-1053010-VGP

**Your reference**

**Enclosure(s)**

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*All correspondence  
addressed to the postal  
address quoting date and  
reference of this letter.*

Dear Commissioner Kyriakides,

I would like to inform you about two recent developments regarding tobacco control in the Netherlands:

- i) the results of a recent investigation performed by the Dutch National Institute for Public Health and the Environment (RIVM) into the levels of tar, nicotine, and carbon monoxide (TNCO) emission from cigarette smoke, measured using the WHO TobLabNet method (attachment 1) and;
- ii) the judicial procedure in the Netherlands about the unsuitability of the ISO method, as prescribed in the Tobacco Products Directive (TPD)<sup>1</sup>, for measuring the levels of TNCO emission from cigarette smoke.

The previous State Secretary of Health, Welfare and Sport has reached out to you<sup>2</sup> and Commissioner Andriukaitis<sup>3</sup> on this subject before.

**Measurement methods**

The WHO TobLabNet method uses a better approximation for a smoker's cigarette use behavior and patterns of use, by covering the small holes in the filter and using a higher frequency and intensity of puffs. In 2018, RIVM examined emissions from filter cigarettes in the Netherlands using the WHO TobLabNet method and established that when the WHO TobLabNet method is applied, almost all filter cigarettes significantly exceed the maximum TNCO emission levels laid out in Article 3 of the TPD. The results from a follow up investigation by RIVM in 2023 show that the emissions of all filter cigarettes on the Dutch market still exceed the maximum TNCO emission levels when measured using the WHO TobLabNet method.

These findings once again underline the importance of implementing a method of measuring in the TPD that better reflects the exposure of smokers to harmful components of cigarette smoke. Considering the European Commission exclusive right of initiative, I would like to ask you to consider these new results, especially

<sup>1</sup> Directive 2014/40/EU.

<sup>2</sup> Letter of 2 March 2020, reference 165163S-202230-IZ.

<sup>3</sup> Letter of 22 June 2018, reference 1369203-178340-VGP.



now the evaluation and revision process of the TPD has started. In my view, it is essential that a method of measuring that takes account of the way in which a cigarette filter is used, such as the WHO TobLabNet method, will be implemented in Article 4 of the TPD. I would also like to refer in this regard to the WHO information sheet for measurement priority contents and emissions in tobacco and related products (attachment 2) where it is stated that testing methods for product regulation should have no industry involvement and that using ISO-methods will result in misleadingly low levels of the measured compounds.

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### **Judicial proceedings on measurement methods in the Netherland**

On June 8<sup>th</sup> of 2023, an appellate hearing took place at the Trade and Industry Appeals Tribunal, the highest court in the field of economic administrative law in the Netherlands, regarding the ruling of the District Court of Rotterdam<sup>4</sup> about a request of enforcement based on a different method of measuring for maximum emissions of TNCO in smoke of filter cigarettes (attachment 3).<sup>5</sup> Based on the CJEU's preliminary ruling<sup>6</sup>, the District Court ruled that the methods of measuring (ISO) used to determine whether filter cigarettes being placed on the market in the Netherlands comply with the maximum emissions for TNCO is not in line with the TPD, because it does not measure the emission levels according to the intended use of a cigarette. The District Court states that it is up to the European Commission to implement a method of measuring that complies with the TPD. As long as no other method of measuring is implemented in the TPD, the Court cannot determine if filter cigarettes exceed the maximum emission levels of TNCO or not. Until then, it is not guaranteed that the cigarettes currently being placed on the market comply with the maximum emission levels set out in Article 3 TPD. Therefore the request to take enforcement actions against the filter cigarettes should not have been rejected by the NVWA, according to the District Court.

During the hearing at the Appeals Tribunal, the State of the Netherlands, as represented by me and the Netherlands Food and Consumer Product Safety Authority (NVWA) has expressed our wish to take strong action against cigarettes that exceed maximum emission levels when measured with the WHO TobLabNet method, and the producers, importers, and distributors who place them on the market. However, this requires a solid legal foundation. I hope that the final decision of the Appeals Tribunal will provide us with greater legal clarity to address the issue. A possible outcome of the final ruling can be that almost all filter cigarettes would have to be removed from the Dutch market.

<sup>4</sup> ECLI:NL:RBROT:2022:9297.

<sup>5</sup> Factsheet with background information on this judicial procedure.

<sup>6</sup> Point 79 of the preliminary ruling: The method used 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, while the accuracy of the measurements obtained by means of that method must be verified by laboratories approved and monitored by the competent authorities of the Member States as referred to in Article 4(2) of the TPD.



The Appeals Tribunal indicated during the hearing that it intends to render a decision in the case no later than November 7<sup>th</sup> of 2023. Although the Appeals Tribunal's final decision may be delayed in case the Appeals Tribunal would seek a further preliminary ruling of the ECJ.

Yours sincerely,

Maarten van Oort  
State Secretary of Health, Welfare and Sport

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