

**THE HAGUE COURT OF APPEAL**  
**Complaints Division in closed session**  
**DECISION**

on the complaint based on Section 12 of the Dutch Code of Criminal Procedure, lodged by:

1 **Mrs Anne Marie van Veen,**  
2 **Ms Lia Breed,**  
3 **the foundation Stichting Rookpreventie Jeugd,**  
4 **the foundation Koningin Wilhelmina Fonds voor de Nederlandse**  
**Kankerbestrijding (Dutch Cancer Society),**  
5 **the association Nederlands Tijdschrift voor Geneeskunde,**  
6 **the foundation ClaudicatioNet,**  
7 **the association Nederlandse Federatie van Kankerpatiëntenorganisaties,**  
8 **Ms Charlotte B.E.J. van Pelt,**  
9 **Mr Joost Walraven,**  
10 **the foundation Het Nederlandse Kankerinstituut-Antoni van Leeuwenhoek**  
**Ziekenhuis,**  
11 **the private company with limited liability Parnassia Groep B.V.,**  
12 **the foundation Stichting Lentis,**  
13 **the foundation FPC Dr. S. Mesdag (Van Mesdagkliniek),**  
14 **the association Verslavingskunde Nederland,**  
15 **the foundation Novadic-Kentron,**  
16 **the foundation Stichting Jellinek,**  
17 **the foundation Verslavingszorg Noord-Nederland,**  
18 **the foundation Brijder Verslavingszorg,**  
19 **the foundation Stichting Tactus Verslavingszorg,**  
20 **the foundation Stichting Mondriaan,**  
21 **the foundation Vincent van Gogh Instituut,**  
22 **the foundation Stichting Antes,**  
23 **the foundation Stichting IrisZorg,**  
24 **the church congregation Leger des Heils (Salvation Army Netherlands),**  
25 **the foundation Kenniscentrum Verslaving Stichting Gericht Scoren,**  
26 **the association Samenwerkende cliëntenorganisaties Het Zwarte Gat,**  
27 **the foundation Stichting Be Aware,**  
28 **the private company with limited liability MC Slotervaart Ziekenhuis B.V.,**  
29 **the foundation Accare,**  
30 **the association Vereniging Praktijkhoudende Huisartsen,**  
31 **the private company with limited liability MC IJsselmeerziekenhuizen B.V.,**  
32 **the association Nederlandse Vereniging voor Kindergeneeskunde,**  
33 **the foundation Stichting KNMT Fonds Mondgezondheid,**  
34 **the association Nederlands Huisartsen Genootschap e.a.,**  
35 **the association Vereniging voor Verslavingsgeneeskunde,**

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Joy Maul-Phillips  
Amsterdam, The Netherlands



- 36 the private company with limited liability **Prinses Maximacentrum voor Kinderoncologie B.V.**,  
37 the association **Nederlandse Vereniging voor Medische Oncologie**,  
38 the foundation **Longfonds Stichting**,  
39 the association **Longfonds patiëntenorganisatie**,  
40 the association **Nederlandse Vereniging voor Obstetrie en Gynaecologie**,  
41 the association **Koninklijke Nederlandse Organisatie van Verloskundigen**,  
42 the association **Nederlandse Federatie van Universitair Medische Centra**,  
43 the foundation **Stichting Inspire2Live**,  
44 the association **Federation of Medical Students Association The Netherlands**,  
45 the association **Koninklijke Nederlandse Maatschappij tot Bevordering der Tandheelkunde**,  
46 the association **Nederlandse Vereniging voor Cardiologie**,  
47 the public limited company **Zorge van de Zaak N.V.**,  
48 the private company with limited liability **Rode Kruis Ziekenhuis B.V.** in Beverwijk, The Netherlands,  
49 the association **Nederlandse Vereniging van Praktijkondersteuners**,  
50 the public authority **the Municipality of Amsterdam**,  
51 the association **Vereniging Clean Air Nederland**,  
52 the association **Koepel van Artsen Maatschappij & Gezondheid**,  
52a the association **Koninklijk Nederlands Genootschapp voor Fysiotherapie**,  
53 the association **Nederlandse Vereniging voor Arbeid- en Bedrijfsgeneeskunde**,  
54 the association **Nederlandse Vereniging voor Verzekeringsgeneeskunde**,  
55 the association **Nederlandse Vereniging voor Artsen voor Longziekten en Tuberculose**,  
56 the **Rudolf Steiner College** in Haarlem, The Netherlands,  
57 the foundation **Stichting Voortgezet Vrijeschool Onderwijs**,  
58 the **GGD Kennemerland** (Public Health Service Kennemerland),  
59 **Ms M.H.F.E. de la Haye**,  
60 the association **Associatie van Nederlandse Tandartsen (ANT)**,

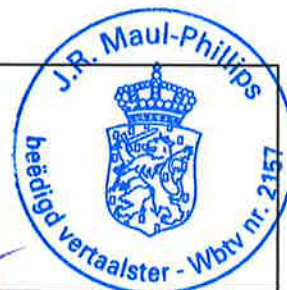
complainants,

choosing domicile in this case at the offices of their counsel *mr. B.L.M. Ficq*, lawyer in Amsterdam.

## 1. The complaint

The application (with annexes) was received by the Court of Appeal on 17 May 2018. The application was supplemented by letters dated 31 May 2018, 25 June 2018, 30 August 2018, 13 September 2018, and 18 September 2018.

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The complaint addresses the decision of the public prosecutor at the National Public Prosecutor's Office for Financial, Economic and Environmental Offences not to prosecute four tobacco manufacturers, specifically:

- **Philip Morris International,**
- **British American Tobacco,**
- **Japan Tobacco International,**
- **Imperial Tobacco Benelux,**

**and the *de facto* executive officers of these tobacco manufacturers, the defendants (hereafter also: the tobacco manufacturers), for attempted murder, alternatively attempted manslaughter and/or attempted and premeditated grievous bodily harm and/or attempted deliberate damage to health and/or falsification of documents and/or sale of tobacco products that do not comply with the statutory requirements (violation of Article 3 in conjunction with Article 2(1) of the Tobacco and Related Products Act and/or violation of Article 17a of the Tobacco and Related Products Act).**

## 2. The Opinion of the Advocates General

In the Opinion (with annexes) of 5 September 2018, the Advocates General proposed that the Court of Appeal should declare that the legal entities filing the complaint had no cause for action.

In the Opinion of 19 September 2018, the Advocates General proposed that the Court of Appeal should dismiss the complaint.

## 3. The documents pertaining to the complaint

Besides the documents already referenced above, the Court of Appeal has taken cognizance of the lawsuit filed on 29 September 2016 (supplemented on 8 February 2017, 31 May 2017 and 24 August 2017) and all annexes, of the written responses to the lawsuit that the counsel to the defendants directed to the public prosecutor, and of the 'Analysis of the Complaint against the Tobacco Industry' by the public prosecutor at the National Public Prosecutor's Office for Financial, Economic and Environmental Offences in Amsterdam dated 22 February 2018.

The Court of Appeal has also taken note of the written pleadings submitted by *mr. N.M.D. van der Aa* on behalf of Van Nelle Tabak Nederland B.V., the pleadings of *mr. R. de Bree* and *mr. F.H.H. Sijbers* on behalf of Philip Morris Holland B.V., the statements of case of *mr. D.R. Doorenbos* on behalf of British American Tobacco, the statements of case of *mr. D.J.P. van Omme* on behalf of JT International

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Company Netherlands B.V. and of the concise written pleadings of *mr. B.L.M. Ficq* on behalf of the complainants.

4. The hearing in chambers

The three-judge division heard the application in chambers on 26 September 2018.

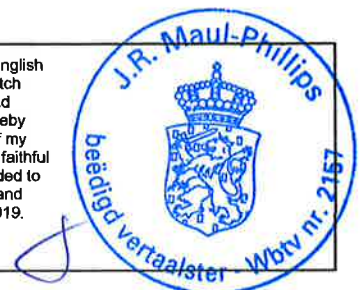
*Morning session of the hearing in chambers:*

The following complainants appeared in chambers (in which the Court of Appeal followed the previous numbering):

- *[name]*, on behalf of complainant 3;
- *[name]*, on behalf of complainant 3;
- *[name]*, on behalf of complainant 3;
- *[name]*, on behalf of complainant 3;
- *[name]*, on behalf of complainant 4;
- *[name]*, on behalf of complainant 4;
- *[name]*, on behalf of complainant 4;
- *[name]*, on behalf of complainant 5;
- *[name]*, on behalf of complainant 10;
- *[name]*, on behalf of complainant 32;
- *[name]*, on behalf of complainant 35;
- *[name]*, on behalf of complainant 38;
- *[name]*, on behalf of complainant 56;
- *[name]*, on behalf of complainant 56;
- *[name]*, on behalf of complainant 56 and
- complainant 59.

Appearing before the court as counsel to the complainants: *mr. B.L.M. Ficq* and *mr. M.E. van der Werf*, lawyers in Amsterdam.

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Counsel to the defendants:

- *mr. R. de Bree* and *mr. F.H.H. Sijbers*, lawyers in The Hague, on behalf of Philip Morris Holland B.V.;
- *mr. D.R. Doorenbos* and *mr. J. Winkels*, lawyers in Amsterdam, on behalf of British American Tobacco, as well as their colleague *mr. S. Verkerk*;
- *mr. D.J.P. van Omme* and *mr. P. van den Berg*, lawyers in Amsterdam, on behalf of JT International Company Netherlands B.V., as well as their colleague *mr. C. van Weerd*;
- *mr. N. van der Aa*, lawyer in Amsterdam, on behalf of Van Nelle Tabak B.V. (operating under the name of Imperial Tobacco),

were present in the closed session in chambers as observers, following special admission to the proceedings granted by the presiding judge.

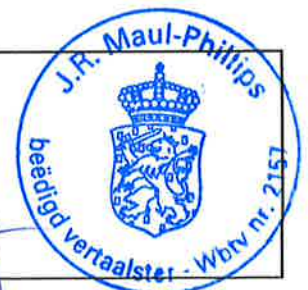
The Court of Appeal also granted special admission to the proceedings to *[name]* (legal assistant at the procurator general's office at the Court of Appeal in Leeuwarden) and *[name]* (intern at the procurator general's office at the Court of Appeal in The Hague) to attend the hearing in chambers for the complaint (both in the morning and in the afternoon).

*Mr. Ficq* has indicated that, since all the standpoints have been exchanged fully (in writing), the complainants primarily want to use the oral proceedings to present their personal story and/or motivation for filing a lawsuit to the Court of Appeal.

Complainants:

- *[name]*, representative of the plaintiff **Stichting Rookpreventie Jeugd** (complainant 3);
- *[name]*, representative of the plaintiff **Antonie van Leeuwenhoek Ziekenhuis/NKI** (complainant 10);
- *[name]*, representative of the plaintiff **Nederlandse Vereniging voor Kindergeneeskunde** (complainant 32);
- *[name]*, representative of the plaintiff **Koningin Wilhelmina Fonds** (Dutch Cancer Society) (complainant 4);
- *[name]*, representative of the plaintiff **Vereniging voor Verslavingsgeneeskunde** (complainant 35);
- **Mylene de la Haye** (complainant 59) and
- *[name]*, representative of the plaintiff **Rudolf Steiner College** (complainant 56),

have elucidated the complaint – whether or not in accordance with their statements of case as submitted.



The statements of case submitted by the complainants and formulated by *mr. Ficq* and *mr. Van der Werf* in advance (to the Court of Appeal, the Advocates General and the counsel to the defendants) shall be considered to be reiterated and included here.

Counsel to the complainants then elucidated the complaint in the hearing.

*Afternoon session of the hearing in chambers:*

All the (aforementioned) counsel to the defendants were present in chambers.

The statements of case submitted by the defendants and formulated by their counsel in advance (to the Court of Appeal, the Advocates General and counsel to the complainants) shall be considered to be reiterated and included here.

Counsel to the complainants were present in the closed hearing in chambers as observers, following special admission to the proceedings granted by the presiding judge.

The following were heard:

*Mr. R. de Bree*, lawyer in The Hague, on behalf of the defendant **Philip Morris Holland B.V.**

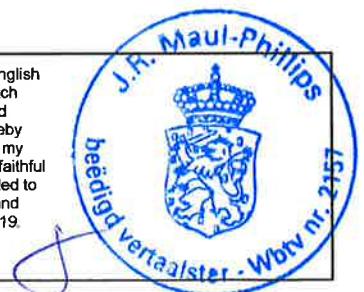
Counsel pled in accordance with the statements of case submitted previously.

*Mr. N. van der Aa*, lawyer in Amsterdam, on behalf of the defendant **Van Nelle Tabak B.V.** (operating under the name of Imperial Tobacco).

Counsel pled in accordance with the statements of case submitted previously.

*Mr. D.J.P. van Omme*, lawyer in Amsterdam, on behalf of the defendant **JT International Company Netherlands B.V.**

Counsel pled in accordance with the statements of case submitted previously. He presented to the Court of Appeal a copy of a decision dated 20 September 2018 of the Netherlands Food and Consumer Product Safety Authority, in response to a request that was submitted on behalf of some of the complainants.



**Mr. D.R. Doorenbos**, lawyer in Amsterdam, on behalf of the defendant **British American Tobacco**.

Counsel pled (in part) in accordance with the statements of case submitted previously.

After the lawyers of the defendants were heard, the complainants appearing as listed above returned to the courtroom, as requested by the presiding judge.

Advocates General *mr. M.E. de Meijer* and *mr. den Hollander* then concluded in chambers by stating – in accordance with their written Opinion – that the legal entities filing the complaint had no case and that the complaint should be dismissed entirely.

A written version of the conclusion expressed by *mr. Den Hollander* was provided by the Advocates General to the Court of Appeal, the complainants and the defendants after the hearing in chambers.

After the complaint was addressed in closed chambers on 26 September 2018, the complainants, the defendants and the Advocates General were given the opportunity to present any additional standpoints to the Court of Appeal and the other parties, no later than 10 October 2018 and 24 October 2018 respectively.

The Court of Appeal has taken cognizance of:

- the response dated 18 October (the court reads: 10 October 2018) by *mr. Ficq* to the standpoints of the Dutch Public Prosecution Service and the counsel to the defendants, with the enclosed written responses from the complainants A. van der Veen (complainant 1) and L. Breed (complainant 2), received on 10 October 2018.
- The Court of Appeal has also taken cognizance of the following responses to the aforementioned letter from *mr. Ficq*:
- the response from the Advocates General in a letter on 22 October 2018;
- the response from *mr. Van Omme*, on behalf of the defendant JT International Company Netherlands B.V., in a letter on 23 October 2018;
- the response from *mr. De Bree*, on behalf of the defendant Philip Morris Holland B.V., in a letter on 23 October 2018;
- the response from *mr. Van der Aa*, on behalf of the defendant Van Nelle Tabak Nederland B.V., in a letter on 24 October 2018;
- the response from *mr. Doorenbos*, on behalf of the defendant British American Tobacco, in a letter on 24 October 2018,

after which the deliberation in chambers was concluded. The Court of Appeal did not consider any documents sent to the court after 24 October 2018.

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4. *[sic]* Admissibility of the complaint

Before proceeding to a substantive evaluation of the complaint, the Court of Appeal must first assess whether the complainants have an admissible complaint.

We will first address whether the complainants can be considered directly interested parties in the sense of Section 12, subsection 1 and 2 of the Dutch Code of Criminal Procedure (hereafter DCCP).

The group of complainants in these proceedings consists of five natural persons (listed under no. 1, 2, 8, 9 and 59), while the rest are legal entities.

The Advocates General concluded in their written Opinion of 5 September 2018 that it can be presumed that the individual complainants have a direct interest and that their complaint is admissible.

The Advocates General also assert that it cannot be stated that the legal entities have a specific direct interest which is particularly affected by a decision not to prosecute the defendants for violent offences and/or violation of the Tobacco and Related Products Act. They advise the court to declare that all legal entities do not have an admissible complaint.

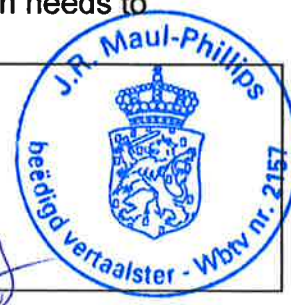
The Advocates General enclosed in their Opinion an overview of all complainants and their stated interests. This overview has been enclosed in the case file.

The counsel to the defendants has indicated in her letter of 18 September 2018 that she does not agree with the conclusion of the Dutch Public Prosecution Service. She states that the absence of prosecution will also affect a specific interest of the legal entities. She states that all the legal entities amongst the complainants can be considered interested parties in the sense of Section 12 DCCP, as there is a personal or characteristic interest that can be determined objectively, and the violated provision under penal law aims to protect this specific interest of the complainants.

The counsel requests that the Court of Appeal declare that all complainants have an admissible complaint.

First, the court notes that major societal and health interests are at play in this current case.

However, the assertion that based on these general interests, prosecution needs to





follow, disregards the discretionary principle. Whether or not there will be prosecution is up to the Dutch Public Prosecution Service. Section 12 DCCP is violated to the extent that those people whose (personal) interests are affected by not prosecuting a specific offence can lodge a complaint against that decision. According to established case law, a direct interest is understood to be an objectively determined and specific personal interest of the complainant.

A directly interested party can be the victim, their surviving relatives or relatives or legal entities that can represent an interest due to their purpose and actual activities, which are particularly affected by the absence of prosecution. The protected interest must have been harmed due to violation of a concrete penal provision. The actual activities must clearly pertain to interests protected by the penal provisions. Representing a societal interest endorsed by an organisation governed by public law is, according to established case law, insufficiently specific to qualify directly as personal interest as intended by law.

The Court of Appeal shares the opinion of the Advocates General that an interest of the aforementioned individual complainants has been affected that concerns them specifically, and they can therefore qualify as directly interested parties in the sense of Section 12 DCCP.

Pertaining to the legal entities amongst the complainants, the Court of Appeal deliberated as follows.

The application stated that one category of complainants collectively represents the general practitioners and virtually all of the medical specialists in the Netherlands, including medical sectors that have to deal with the effects of smoking on a daily basis, such as oncology, pulmonary diseases, cardiovascular diseases, gynaecology and dentistry. Another category of complainants represents the addiction care sector. Occupational medicine and insurance medicine are also amongst the complainants. The municipality of Amsterdam represents the biggest urban agglomeration of the Netherlands.

In the letter of 18 September 2018, counsel indicated that the legal entities amongst the complainants comprise 8 separate categories. She explained per category what their direct interest is, in her opinion.

After studying the application and the documents submitted on behalf of the complainants in these complaint proceedings, the Court of Appeal shares the opinion of the Advocates General that the sole fact that a complainant has defined



as its purpose the intention to improve (overall) health does not suffice.

The Advocates General have concluded that the stated interests have been formulated in such general and broad terms that they do not fulfil the specific interest requirement as demanded by the current proceedings. Societal interests, the interests of public policy, medical interests or a collection of interests of a particular group of patients or clients cannot automatically be considered the equivalent of an interest under criminal law or an interest in prosecuting the defendants. The Court of Appeal agrees with this view. The Court of Appeal holds the opinion that these complainants have not been affected by an interest that specifically affects them as a result of the lack of prosecution of the defendants.

However, in the opinion of the Court of Appeal, it is possible to deduce from certain objectives of some of the legal entities amongst the complainants that the relevant legal entities do have interests that would appear to be directed against the tobacco industry and/or the consumption of smoking products, specifically complainants 3 and 51. In contrast to the Advocates General, the Court of Appeal holds the opinion that their objectives are sufficiently distinctive and that they have complied with the specific interest requirement of Section 12 DCCP.

The preceding leads to the conclusion that only complainants 1 (A.M. van Veen), 2 (L. Breed), 3 (the foundation Stichting Rookpreventie Jeugd, 8 (C.B.E.J. van Pelt), 9 (J. Walraven), 51 (the association Vereniging Clean Air Nederland) and 59 (M.H.F.E. de la Haye) are admissible in their complaint. In the opinion of the Court of Appeal, the other complainants are inadmissible. This inadmissibility does not preclude a consideration of the substance of the case.

## 5. The facts and standpoints

### 5.1

On 29 September 2016, *mr.* B.L.M. Ficq filed charges with the National Public Prosecutor's Office for Financial, Economic and Environmental Offences in Amsterdam on behalf of three plaintiffs (complainants 1, 2 and 3) against the four largest tobacco manufacturers operating in the Netherlands, and against the *de facto* executive officers of these tobacco manufacturers (the defendants) regarding attempted murder or attempted manslaughter and/or attempted severe and premeditated physical assault and/or attempted and premeditated harm to health with intent and/or falsification of documents, criminalised under Section 45 in

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conjunction with Sections 289, 287, 303 of the Dutch Criminal Code (hereafter DCC) and Section 300 in conjunction with Sections 301 and 225 DCC, due to, concisely stated, purposefully designing and manipulating the tobacco products in such a way that addiction was almost immediate and subsequently maintained whereby the 'free will' of the user was restricted and serious health risks could result.

The tobacco manufacturers were also accused of allegedly misleading for years smokers by displaying incorrect (too low) emission levels of tar, nicotine and carbon monoxide on the packaging of tobacco products, which gave consumers the impression that they reflected the reality. To that end, they misled the laboratory tests required in advance by placing so-called ventilation holes, according to the plaintiffs' allegations.

## 5.2

On 8 February 2017, 31 May 2017 and 24 August 2017, the complaint was substantively supplemented, including allegations of violation of Article 3 in conjunction with Article 2(1) of the Tobacco and Related Products Act and/or violation of Article 17a of the Tobacco and Related Products Act. In addition, many natural persons and legal entities joined the original lawsuit in the period between 29 September 2016 and 15 May 2018.

All the complaints are also collectively referred to as the Complaint against the Tobacco Industry. It should be noted here that the complaint does not cover all tobacco, instead focusing solely on cigarettes.

## 5.3

The four tobacco manufacturers against whom the complaint was filed (the defendants) already made their views on the complaint known to the Dutch Public Prosecution Service in writing at the end of 2016. These letters are included in the case file. In the opinion of the tobacco manufacturers, there were no grounds for the criminal offences alleged in the complaint.

They assert – in brief – that:

- There were no grounds for the offence of forgery. Until 2016, the law prescribed the mandatory display of TNCO levels conforming to the 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 long been aware of the existence of the perforation holes;
- There were no grounds for the attempted homicide offences and other violent offences alleged in the complaint. The product manufactured by the tobacco manufacturers conformed to both national and European regulations.

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Furthermore, 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.

The serious health risks of smoking are not contested in the counter-argumentation presented by the tobacco manufacturers. 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 defendants display warnings regarding these health risks on their cigarette packages and websites, as prescribed by the Dutch laws based on the European regulatory framework.

#### 5.4

The Dutch Public Prosecution Service subjected the Complaint against the Tobacco Industry to very extensive analysis and concluded that the aim of the plaintiffs was to stop or in any case to reduce the harm to health caused by smoking. Above all, the plaintiffs seek to prevent young people from starting smoking. Part of this pursuit is to incite criminal prosecution of the tobacco manufacturers. The Dutch Public Prosecution Service concurs with the plaintiffs' conclusion that smoking is damaging to health, but that successful criminal prosecution of the tobacco manufacturers is not feasible in view of the current laws and regulations and case law. It is the opinion of the public prosecutor that criminal law cannot make the intended contribution to the pursuit of the plaintiffs.

The Dutch Public Prosecution Service also evaluated whether a successful prosecution could be brought against the tobacco manufacturers for fraud (Section 326 of the Dutch Criminal Code), deceptive trading (Section 329 DCC) or wilful or negligent sale of goods that endanger personal health (Sections 174 and 175 DCC). The Dutch Public Prosecution Service concluded that, also in these instances, the 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 tobacco manufacturers have committed a criminal offence, nor can it be the case, in the opinion of the Dutch Public Prosecution Service, that the de facto executive officers have evidenced such conduct as is named in the complaint.

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5.5

Counsel indicates in the application that the complaints are not restricted to the specified sections. Criminal offences such as fraud and violation of Sections 174 and 175 of the Dutch Criminal Code may be mentioned in passing in the complaints, but are not developed in further detail.

In the discussion of the complaints, the Dutch Public Prosecution Service devoted more explicit attention to those offences. The conclusions that the Dutch Public Prosecution Service drew to reject the complaints were not shared by the plaintiffs.

In the application, the counsel to the complainants adopts the position that the application in combination with the complaint clearly shows that the reasons provided by the Dutch Public Prosecution Service for not pursuing prosecution do not hold water.

Counsel argues that the European regulatory framework as well as the Tobacco and Related Products Act require the actual emission levels to be measured based on the use as intended by a smoker. A party that purposefully offers a manipulated product for the test, as a result of which falsified test values are produced, is guilty of misleading the test and therefore committing falsification, according to counsel. Until 20 May 2016, that deception led to the display of falsified levels on the packages, and to this day have led to a situation in which all filter cigarettes available for purchase fail to comply with the maximum emission standards established by law.

Counsel also argues that it has been established that filter cigarettes are more harmful than the tests show and more harmful than the tobacco industry attempts to present. The assertion of the Dutch Public Prosecution Service that the harmfulness of filter ventilation has not been sufficiently established is unfounded, according to counsel. As a result, prosecution on the grounds of Sections 174 and 175 of the Dutch Criminal Code and for the attempted homicide and other violent offences would be reasonable.

Counsel further asserts that by adopting the position that the illness and death of active and passive smokers cannot reasonably be attributed to the tobacco industry, the Dutch Public Prosecution Service fails to acknowledge the addictive nature of nicotine and the intentions of the tobacco industry in continuing to sell this product. In particular for the passive smokers, young people, smokers who keep smoking, and those who do not successfully manage to stop smoking or take decades to do so, it cannot in any way be maintained that the harmful effects on their health cannot be attributed to the tobacco industry, according to counsel.

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Counsel further argues that the Dutch Public Prosecution Service is unjustified in its opinion with regard to the violent offences that there is no causality due to the freedom that people have to choose to start smoking, to continue smoking, and not to stop smoking.

## 5.6

The defendants have reiterated their positions in the written pleadings that they submitted. Each of them states – in brief – that the complaint is not the proper instrument for a ban on tobacco products and that the criminal court is not the proper authority. In their opinion, the decision of the Dutch Public Prosecution Service should be upheld, since prosecution is not feasible in view of the fact that the Dutch Public Prosecution Service has been asked to prosecute a matter which is not punishable by law and which also cannot be prohibited within the European legal structure.

## 5.7

Counsel to the complainants has indicated in her statements of case that the plaintiffs expressly stand by the positions adopted in the complaint and the supplementary documents. The application focuses on the health-threatening and deadly effects of smoking, the addictive nature thereof, and the vitiated consent that it entails in attempts to stop smoking. It has also – according to counsel – been shown that the tobacco manufacturers wilfully and knowingly modulate their products to be as addictive as possible, and the alleged falsifications were addressed again.

Counsel asserts that one topic appears to have been insufficiently considered, specifically the position of the defendants that the existence of filter ventilation has allegedly been generally known for some time now. According to the complainants, this position is not correct. The government has seemingly only become aware that something is seriously after the complaint was filed (29 September 2016), according to counsel. For that reason alone, it could not be considered a generally known fact. That applies even more so in relation to the public, the smokers. Accordingly, this fact which is wrongly presumed by the tobacco manufacturers to be general knowledge cannot have caused a shift in the attribution of causality. After all, counsel argues, it cannot be stated that the consumers who smoked such overdosed cigarettes have ever wilfully and knowingly chosen to smoke these overdosed cigarettes.

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## 5.8

In their Opinion of 19 September 2018, the Advocates General addressed all aspects of the complaint. They determined that the substance of the complaint – briefly summarised – amounts to the following:

- Smoking poses a life-threatening hazard.
- Smoking cigarettes is extremely addictive.
- The filter ventilation in cigarettes has a negative influence on the prescribed ISO tests, resulting in compensatory behaviour by the smoker.
- As a result, the smoker is exposed to much higher levels of tar, nicotine, and carbon monoxide (hereafter: TNCO levels) than the maximum amount permitted by law.
- Cigarettes are allegedly ‘deadly by design’, which means that tobacco manufacturers are alleged to have intentionally designed or manipulated them in such a way that addiction to the tobacco product is achieved, expedited and maintained, which refers to the addition of additives that promote addiction.

From that fact, the complainants conclude that the production and sale of cigarettes under those conditions and with criminal intent results in criminal offences.

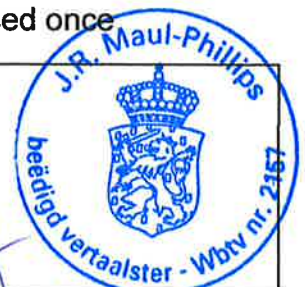
The Advocates General assessed the substantive legal merits of each point of the complaint in their written Opinion.

They concluded once again that there is no indication of attempted homicide and other violent offences which the complainants reported and that successful prosecution for those offences is not feasible. In addition, they endorse the grounds stated by the public prosecutor which led to the decision to refrain from prosecution regarding the specified offences involving falsification and/or any offences under the Economic Offences Act and alternatively violation of the Tobacco Act. Furthermore, the Advocates General do not consider criminal prosecution to be opportune. They indicate that the current complaint is *de facto* intended to force the imposition of a ban on the production and sale of cigarettes outside of the proper channels through the criminal court, and that the criminal court does not feel called upon to do so, nor is it equipped for that purpose. They refer to the fact that the entire society is pervaded by smoking-related problems in countless ways and that it is now up to the parliament and politicians to make the next move, not the criminal court.

## 5.9

After the hearing in chambers, the counsel to the complainants emphasised once

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more the purpose of the Complaint against the Tobacco Industry in a final written response of 10 October 2018. She asserts that the aim of the complainants is the prosecution and adjudication of the defendants with all penal uses that are incorporated in the criminal proceedings. An additional effect of the conviction of the defendants could be an end to the production and sale of cigarettes in the Netherlands, but – contrary to the defendants’ assertion – that does not make it the aim of the complaint.

The complainants state that there is sufficient legal basis in the current case for allowing the complaint and/or for more in-depth investigation.

The counsel to the complainants further argues that there is a difference of opinion between the complainants and the defendants regarding the scope of the TPD2 directive (the current European Tobacco Directive). According to the counsel to the complainants, the defendants assert that the Directive aims to regulate the internal market and to that end prescribes a uniform measuring method. The complainants, on the other hand, argue that the Directive aims to protect public health and requires that the emission levels are measured in a situation in which the cigarette is used as intended. In the scenario of the defendants, a product is sold in conformity with the Directive, and in the scenario of the complainants, a manipulated product is offered, causing the test results to seem to be in conformity with the Directive, while that is not actually the case, which leads to various criminal offences. Counsel asserts that this difference of opinion justifies a more in-depth investigation.

Regarding the filter ventilation, counsel has once again emphasised that the average consumer does not have knowledge about filter ventilation and that the consumer has also not been warned about this on the packages. Moreover, counsel states that the effect of filter ventilation is not known to the consumer.

Counsel also states that a certain degree of danger in smoking is generally known, but that the actual dangers are seriously underestimated. The continued development of filter ventilation and the increasingly advanced application of additives that promote addiction make cigarettes far more harmful to health than is assumed. The assertion of the defendants that the causal chain has been broken requires further investigation, according to counsel.

The counsel to the complainants asserts again that the defendants are not selling a legal product, since the filter cigarette is not in conformity with the Directive, and that the intent to abuse consumers, at least conditional intent, seems to have been

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established. She notes that wilful intent in offences involving physical assault can also be based on intentionally failing to comply with a duty of care on the part of the accused. The defendants allegedly continued to sell cigarettes in the knowledge and awareness that more people would be harmed as a result. Should it eventually become apparent that the filter cigarettes were in fact in conformity with the Directive, the counsel argues that it would not eliminate the issue of intent.

Finally, the counsel to the complainants emphasises in the context of the discretionary principle that the significant interests of society and public health involved in this case and the high number of people harmed every year certainly justify a public debate in open court, possibly preceded by intensive investigation by one or more experts.

#### 5.10

The Advocates General indicated in their letter of 22 October 2018 that this final written response from *mr. Ficq* does not yield any new viewpoints and that they stand by their previous position as formulated in their advisory opinion of 19 September 2018, as further elucidated in the oral proceedings.

#### 5.11

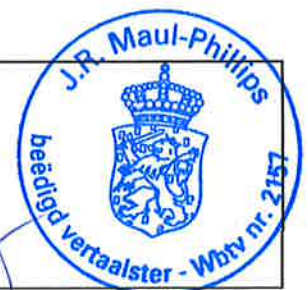
*Mr. Van Omme* indicated on behalf of the defendant JT International Company Netherlands B.V. in a letter of 23 October 2018 that the letter from *mr. Ficq* does not involve any assertions that had not already been refuted in the standpoints previously presented on behalf of the defendant.

#### 5.12

*Mr. De Bree* indicated on behalf of the defendant Philip Morris Holland in a letter of 23 October 2018 that none of the arguments additionally presented by *mr. Ficq* can lead to the conclusion that investigation or prosecution would be appropriate. Counsel further argues that the complainants' response does not acknowledge that regulation under the TPR is all-encompassing and filter ventilation is permitted, and that the additives used are permitted and regulated, and that both topics (filter ventilation and additives) and the aspects presented by the complainants are sufficiently known to the national and European regulatory authorities.

#### 5.13

*Mr. Van der Aa* indicated on behalf of the defendant Van Nelle Tabak Nederland B.V. in a letter of 24 October 2018 that all the arguments presented by *mr. Ficq* on behalf



of the complainants in the letter of 10 October 2018 have already been addressed extensively in the previous written documents and during the oral proceedings on 26 September 2018.

#### 5.14

*Mr. Doorenbos* indicated on behalf of defendant British American Tobacco in a letter of 24 October 2018, with regard to the assertion by the complainants that filter ventilation cannot be considered a generally known fact, that a generally known fact is not defined by what everyone knows or is aware of, but what everyone could know or be aware of. The fact that cigarettes are equipped with filter ventilation holes is, according to counsel, something that has been able to be identified without noteworthy difficulty for decades. He also asserts that, with regard to the point of the presence of filter ventilation (and ventilation holes) and the effects thereof on the prescribed test method, the European Commission has already clearly stated that it was sufficiently familiar with this information and that it does not see any reason to intervene in the current state of affairs.

### 6. Assessment of the complaint

#### 6.1

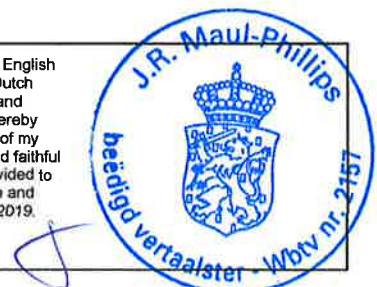
The matter for consideration is whether the public prosecutor's decision not to initiate prosecution of the defendants was based on proper grounds.

The Court of Appeal has taken note of the many – often personal – stories of the complainants, including (addicted) smokers, patients, doctors, experts and people with first-hand knowledge, which are part of the case file and have been presented by several complainants during the hearing in chambers. The complainants emphasise in particular the consequences of smoking, the severity of the addiction, and the fact that the emission levels of cigarettes are (allegedly) much higher than indicated.

The Court of Appeal notes that the public debate regarding this theme (i.e. smoking) has received a new boost in response to the Complaint against the Tobacco Industry. That is apparent from all the media attention and the fact that so many legal entities (including hospitals, patient organisations and schools) have joined the original lawsuit.

Public opinion regarding smoking and its inherent hazards has changed significantly over the years. Where smoking used to be considered completely acceptable, even by medical professionals, it is now increasingly discouraged and

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restricted. At more and more locations and venues, it is no longer possible to smoke cigarettes, and cigarettes are no longer allowed to be sold to minors. Moreover, it is now mandatory for tobacco manufacturers to warn people about the risks of smoking, and cigarette packages are covered with horrifically dissuasive photos and texts.

The statement that smoking is hazardous to health, entails serious health risks, can lead to serious diseases and even death, and is also extremely addictive, can in the opinion of the Court of Appeal be seen as a generally known and recognised fact, and is also not disputed by the defendants. The defendants offer cigarettes in the full knowledge that they are addictive and can be hazardous for the health of active and passive smokers. The Court of Appeal operates on the assumption that the defendants do so for the purpose of making a profit.

The Court of Appeal respects the wish of the complainants and many others to eradicate cigarette smoking, in particular by young adults, and as a result to create a smoke-free generation. However, regardless of the significance of the impact on societal and general health interests in this case, the Court of Appeal has no other choice than to assess the complaint on its legal merits.

In order to be able to successfully prosecute the defendants with any chance of success, certain legal conditions have to be met. In short: there must be sufficient legal basis to merit criminal prosecution or criminal investigation regarding the reported offences.

## 6.2

The Court of Appeal states first and foremost that in the past the legislator has consciously<sup>1</sup> made the decision to refrain from criminalising the sale of cigarettes, even though Dutch (and European) governments have known of the risks and hazards for a very long time. The Tobacco Products Directive<sup>2</sup>, like its predecessor<sup>3</sup>, also does not have a general prohibition on sale, production and presentation, but does impose (strict) regulatory oversight. The 2014 Directive mentioned above (TPD2) aims to improve the functioning of the internal market for tobacco and related products, which is based on a high standard of protection for

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1 For instance, the Explanatory Memorandum to the Tobacco Act of 1990 reads: "Regardless of the severity of interests of public health, smoking cannot be banned from our society right away. (...) The government therefore opts for a longer-term policy which has as its main objectives the restriction of tobacco use and in particular the protection of the youth and the non-smokers. (Tobacco Act, 1984-1985, no 3

2 Directive 2014/40/EU regarding the production, presentation and sale of tobacco and related products.

3 Directive 2001/37/EC



public health, in particular for children and youth, and ultimately to comply with the obligations of the European Union arising from the WHO Framework Convention for Tobacco Control — FCTC, Article 1).

The Member States are not allowed to prohibit or restrict the sale of tobacco or related products that comply with this Directive, as stipulated in Article 24(1) of the Directive for reasons related to aspects that are arranged by this Directive. Article 24(3) offers Member States the option to prohibit certain tobacco products in specific cases, but the Dutch government has not implemented any of these.

The guiding principle is therefore that tobacco manufacturers that are operating in compliance with the provisions of the Directive, and the national laws and regulations based on that Directive, cannot be successfully prosecuted.

### 6.3

The Court of Appeal will now address the question of whether there are indications that tobacco manufacturers are not operating in compliance with the Directive, as the complainants have argued. To that end, the Court of Appeal will focus on the principal grounds for the complaint.

#### 6.3.1

The complainants argue that the tobacco manufacturers use hundreds of different types of additives (added substances), in many cases to enhance the flavour of the cigarette. According to the complainants, the tobacco product becomes more attractive to use as a result, so these substances are facilitating addiction and thus promoting consumption of the product. Approximately seventy substances in tobacco smoke have been proven to be carcinogenic, according to the complainants. The tobacco manufacturers are allegedly deliberately manufacturing a product that can be designated as 'deadly by design'. In doing so, they are allegedly committing one or more of the life-threatening offences specified in 5.1.

#### 6.3.2

The Court of Appeal notes that the matter at hand is the production of stimulants. The risks, health hazards and addictive effects as a consequence of using these stimulants have been known for a very long time, as mentioned before. As already found under 6.2, the legislators have not opted to prohibit the production and sale

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of these stimulants. However, they are strictly regulated, in which the personal responsibility of the smoker also plays a role. For instance, cigarette packages need to display clear warnings, including horrifically dissuasive images, which present a clearer warning than for instance specifying the emission levels of tar, nicotine and carbon monoxide (the TNCO levels). An age limit (18 years) has also been imposed for the sale of cigarettes. The fact that people (including adults) choose to circumvent that age limit or to aid and abet in such activity cannot lead to a situation in which the tobacco manufacturers can be held criminally liable for the damaging effects of that choice.

Regarding the addition of numerous substances (additives), the tobacco manufacturers are subject to strict reporting obligations in accordance with the Directive, and it has not been plausibly shown in any way that they failed to comply with those requirements. In other words: the addition of additives has taken place under the watchful eye of the Dutch government. There is no evidence that the government (and by extension: the consumer) has been deluded or that there has been any other breach of the regulations. It is the opinion of the Court of Appeal that prosecution based on the grounds discussed here (life-threatening offences) has no reasonable chance of success.

### 6.3.3

The complainants have also argued that the tobacco manufacturers are not in compliance with the prescribed emission levels. According to the complainants, they are therefore allegedly guilty of falsification of documents (by displaying incorrect emission values on the packages), fraud and violation of the articles of the Tobacco and Related Products Act mentioned under 5.2.

### 6.3.4

This part of the complaint relates to filter cigarettes. According to the complainants, the tobacco manufacturers have allegedly applied minuscule perforations in the filter paper that are not closed off while testing the cigarettes, but are closed off by smokers (e.g. with their fingers) while smoking. As a result, the emission levels recorded on tests are allegedly much lower than the actual emissions.

### 6.3.5

The Court of Appeal notes that the practice of applying perforations has existed for decades and was and is known to European and national regulatory authorities. The tobacco laws and regulations impose mandatory obligations for how the



manufacturers must measure TNCO levels (ISO method). Until 2016, that regulatory framework mandated the manufacturers to include the results of those tests on cigarette packages. Government authorities were aware that the ventilation holes influenced the test results. In addition, the regulators were fully aware that this test of the emissions did not reflect the actual results of the individual smoking behaviour for every smoker; a response to parliamentary questions by the European Commission on 25 July 2018 shows that it is very difficult in practice to assess a measurement method that is actually able to do so (in accordance with “use as intended” as the Directive indicates). Scientific and technical research on this topic is still ongoing and has (apparently) not yet reached a stage that has led to intervention by the Commission. Accordingly, the legislator has opted to require the manufacturers to use the ISO method of measuring, which has been in use for some time (and, until 2016: to specify the test results on the packages).

The assertion of the complainants that the use of another method (the Canadian Intense method) results in higher levels than the maximum emissions specified in the Directive does not lead to the conclusion that the tobacco manufacturers have allegedly committed the offences discussed here. The State Secretary of Public Health, Welfare and Sports presented a letter to the Dutch House of Representatives on 6 May 2018 explaining why the legislator is unable to unilaterally deviate from European agreements regarding measurement methods.

Just very recently (on 20 September 2018), the Dutch Food and Consumer Product Safety Authority (Dutch: NVWA) rejected a request by some of the complainants to take enforcement action and “to ensure that the cigarettes offered in the Netherlands comply with the maximum TNCO emission levels, using a measuring method different than the legally prescribed method which is widely scientifically regarded as the method best approaching ‘use as intended’”. The Food and Consumer Product Authority stated that it was required to use the maximum emission levels and measuring methods prescribed by the TPD (the court notes: Directive 2014/40/EU). The following was added to that:

*“The products comply with the requirements for the TNCO emission levels if, when measured using the method prescribed by the TPD, emission levels remain below the maximum levels. That was confirmed once again last year by the State Secretary of Health, Welfare and Sport to the House of Representatives.”*

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It must be concluded that there is no basis for any suspicion that the tobacco manufacturers have not acted in conformity with the Directive in this respect. Accordingly, there is no legal basis for prosecution of the defendants for the alleged offences discussed here.

In short, both the addition of additives and the existence and effect of the ventilation holes are known to the regulatory authorities and have been accepted in the current system. In the opinion of the Court of Appeal, there is no indication of manipulated or fraudulent cigarettes, as asserted by counsel.

#### 6.4

The assertion of the complainants that, even the actions were in conformity with the Directive, it is still possible to prosecute the tobacco industry for committing general criminal offences, is deemed to be incorrect by the Court of Appeal, as considered in 6.2 above. In the current situation, the Dutch government is not free to prohibit or restrict the sale of cigarettes that comply with the Directive.

#### 6.5

Finally, in view of the above, the Court of Appeal will not address the discretionary principle, since there is no case to answer regarding the suspicion that criminal offences were allegedly committed.

### 7. The conclusion

The Court of Appeal concludes – having seen and heard all positions and taken into account all facts and circumstances – that the disputed decision not to prosecute is well-founded, since the description of the offences in the sections of the Dutch Criminal Code mentioned in the lawsuit and in the complaint cannot be applied to the actions of the defendants. The Court of Appeal also sees no violation of any other penal provisions that could provide any legal basis for criminal prosecution.

It is therefore the opinion of the Court of Appeal that it is not feasible to pursue criminal prosecution of the tobacco manufacturers with any chance of success, in view of current Dutch and European laws and regulations, nor does the court expect that further investigation would yield sufficient legal basis for initiating successful criminal prosecution of the defendants.

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The complainants have chosen to place a societal problem regarding public health in the framework of criminal law. The Court of Appeal shares the opinion of the Dutch Public Prosecution Service that criminal law cannot provide a solution in this matter. Radical measures, such as a ban on the production and sale of tobacco that has been manufactured according to the Directives, can only be decided by the legislator – after due consideration of all interests. The ultimate goal pursued by the complainants, specifically to eradicate cigarettes and create a smoke-free generation, will not be achieved through criminal law, regardless of how societally relevant that pursuit is. To pursue that goal, they will have to appeal to the national and European legislators.

In short, since criminal prosecution of the defendants is not feasible in these proceedings, the complainants will have to look elsewhere for their complaint to be addressed.

In view of the above, it must be concluded that the complaint should be dismissed.

8. The decision

The Court of Appeal:

Declares that complainants 1, 2, 3, 8, 9, 51 and 59 have an admissible complaint.

Declares that the other complainants do not have an admissible complaint.

Dismisses the complaint.

This judgment, which is no longer open to ordinary forms of legal review, was passed by *mr.* H.C. Plugge, presiding judge, *mr.* A.E. Mos-Verstraten and *mr.* L. Verheij, judges, in the presence of *mr.* M.M. Bakker-Otjens, court clerk, and has – due to the absence of the court clerk – only been signed by the presiding judge.

[signature]

[stamp]

**For photocopy in accordance with:  
The court clerk of The Hague Court of Appeal**

[signature]

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