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# National ban on cigarette filters: legal assessment under EU law

Study for the Ministry of Infrastructure and Water Management

Dr. Vincent Delhomme, Prof. Dr. Stefaan Van den Bogaert, Emma de Vries LL.M.

## 1. Executive Summary

- Billions of cigarette filters end up in litter each year in the Netherlands. Cigarette filters made of plastic cause environmental harm in two ways. Smoked filters contain toxic substances which leach into the water and affect the health of plants, animals and humans. Further, cigarette filters are composed of non-biodegradable plastic and are a significant source of microplastics. These microplastics also attract and transport additional harmful substances and are ingested by animals.
- Following a motion presented by the Dutch House of Representatives (Tweede Kamer), the Ministry of Infrastructure and Water Management explored policy options to reduce the litter of cigarette filters in the environment and recommended that cigarette filters be banned. Such a ban raises several questions of EU law, both under EU primary and secondary law. This study examines the legal feasibility of a ban on filters for cigarettes adopted by the Netherlands, or any other EU Member State, under EU law.
- The measure envisaged is a ban on the sale of all single-use cigarette filters. The ban applies to sales within the Netherlands and does not prohibit the smoking of cigarettes with filters. This means that smoking filtered cigarettes purchased abroad would still be permitted. To assess the legal feasibility of a national ban on cigarette filters, **it is necessary to distinguish between filters sold as part of a cigarette ('filtered cigarettes') and filters sold separately for roll-your-own (RYO) cigarettes ('separate filters')**. These are two different products subject to distinct legal regimes.
- We find that **the Tobacco Products Directive (TPD) is likely to prevent the Netherlands from prohibiting the sale of filtered cigarettes**. This conclusion is based on the combined application of Articles 7(7) and 24(1) TPD. We consider that the derogations contained in Article 24(3) TPD and Article 114(5) TFEU are unlikely to apply in this case. If the TPD was found not to prevent the Netherlands from acting, Articles 34-36 TFEU would be applicable. In that context, the measure might be found lawful because justified on environmental grounds, although doubts remain regarding its effectiveness and thus proportionality, due to the possibility of consumers purchasing cigarettes abroad or via the illicit market.
- For separate filters, the TPD does not apply and the measure must be assessed under Articles 34-36 TFEU alone. A national ban constitutes a restriction on the free movement of goods within the meaning of Article 34 TFEU but might be justified on environmental grounds. Based on the evidence available and applying the precautionary principle, **a ban on separate filters might be considered proportionate and lawful under Article 34 TFEU**, subject to the aforementioned reservations regarding its practical effectiveness. Any ban on cigarette filters

would need to be notified under the Single Market Transparency Directive (2015/1535).

- Although the regulatory space for a ban on filtered cigarettes is very limited under the TPD, gathering more detailed data on the specific situation in the Netherlands and on the potential health benefits of such a ban could improve chances of success if relying on Article 24(3) TPD or Article 114(5) TFEU. Similarly, collecting more reliable data on the evolution of consumer behaviour following a ban, as well as the consequences for illicit and cross-border tobacco trade, could strengthen the legal justification. We therefore encourage the Dutch government to gather such data.
- Banning cigarette filters would bring substantial environmental benefits and could even help reducing smoking. It is a sound, evidence-based measure also defended by the WHO. A ban would be more effective if adopted at the EU level. We therefore recommend that the Dutch government advocate for the enactment of such a measure at EU level. This approach would alleviate the legal challenges identified in the present assessment, as well as address the problem of cross-border trade. The forthcoming revision cycles of the TPD and the SUP Directive provide an opportune moment to pursue such action.

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## 2. Introduction

A significant number of smoked cigarettes are not correctly disposed of and end up as improper litter. Of particular concern are cigarette filters, which contains (micro)plastics and harmful chemicals. These substances leach into the environment, with adverse effects on human, animal and plant health. The Tweede Kamer has therefore requested the Dutch government to map out how a reduction target of 70% for cigarette filters in litter could be achieved by 2026 compared to 2022 in the Netherlands.<sup>1</sup>

CE Delft conducted a [study](#) on behalf of the Ministry of Infrastructure and Water Management, looking into possible policy options.<sup>2</sup> The study established that the most effective option to reduce the litter of cigarettes filters in the environment would be a ban on disposable cigarette filters. The study identified an EU-wide ban as the best course of action but, in case that would not be possible, mentioned the possibility of adopting the ban at the national level. It nonetheless expressed doubts as to the legality of such a ban under EU law. In its [Kamerbrief](#) of 19 April 2023, the Ministry of Infrastructure and Water Management signalled its intention to further explore the legality of a national ban on cigarette filters.<sup>3</sup>

The present study seeks to answer that question. The analysis is based on a hypothetical ban as described in the CE Delft report (see below Section 3.2).<sup>4</sup> For the reasons exposed in the Kamerbrief, the analysis covers all filters, whether they are made of plastics or biodegradable material.<sup>5</sup> The study evaluates the legality of a national a ban on cigarette filters under EU law (primary and secondary law). It will specifically look into:

- the harmonising effect of the Tobacco Products Directive (TPD, 2014/40)<sup>6</sup> and the Single-Use Plastics Directive (SUPD, 2019/904),<sup>7</sup> as well as the procedural obligations deriving from the Single Market Transparency Directive (2015/1535);<sup>8</sup> and

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<sup>1</sup> Motion submitted by Member Bouchallikht et al. on 3 February 2022 (32852-178).

<sup>2</sup> CE Delft, 'Reduceren van sigarettenfilters in het zwerfafval: Studie naar de grootte van het probleem en analyse van mogelijke beleidsmaatregelen' (2022).

<sup>3</sup> Ministerie van Infrastructuur en Waterstaat, 'Kamerbrief over beleidsopties voor terugdringen van sigarettenfilters in zwerfafval', 19 April 2023.

<sup>4</sup> CE Delft, 'Reduceren van sigarettenfilters in het zwerfafval: Studie naar de grootte van het probleem en analyse van mogelijke beleidsmaatregelen', p. 28.

<sup>5</sup> Although this is theoretically possible, a biodegradable filter would only partially solve the problem of microplastics and would not lead to less litter, but only to a different type of litter. The toxic substances that remain in the biodegradable cigarette filter after smoking would still end up in the environment: *Ibid*, p. 3.

<sup>6</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ L 127/1.

<sup>7</sup> Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155/1.

<sup>8</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241/1.

- the lawfulness of the ban under Articles 34-36 TFEU, with a focus on the proportionality of the ban with regards to environmental protection.

This study also contains an analysis of Dutch law, with the dual purpose of identifying potential obstacles to the introduction a national ban of cigarette filters, and secondly of indicating the amendments to the law to be made if the envisioned ban would be adopted.

### 3. Problem and scientific underpinning of the ban

Note that, unless specified, the figures and evidence presented in this section are taken from the CE Delft report underpinning the national ban on cigarette filters.

#### 3.1. Environmental impact of cigarette filters

Approximately 10,54 billion cigarettes were smoked in the Netherlands in 2021.<sup>9</sup> Around 20% of the Dutch adult population smokes.<sup>10</sup> Estimates consider that at least 90% of the cigarettes smoked in the Netherlands are filtered cigarettes.<sup>11</sup> There is little quantitative data on the number of cigarette filters improperly littered in the country. Estimates vary widely, between 0,2 and 7,1 billion filters per year,<sup>12</sup> which represents between 2% and 67% of all cigarettes smoked in the Netherlands (littered).<sup>13</sup> In any case, it is established that a large number of filters end up as litter on the ground. It is unknown what share of the cigarette filters is not cleaned up and remains in the environment.

Cigarette filters made of plastic cause environmental harm in two ways:<sup>14</sup>

- **Toxicity.** A large proportion of cigarette butts end up in water, either because they are discarded directly, or because they are transported via the sewer system or by wind. Smoked filters contain toxic substances such as heavy metals, polycyclic aromatic hydrocarbons (PAHs), and nicotine. **A single filter contains enough pollutants to contaminate up to 1.000 litres of water.** Filters cause DNA damage and harm to the central nervous system of animals. When cigarette butts end up on agricultural land, they can impair the growth of plants and crops.

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<sup>9</sup> Ibid, p. 10.

<sup>10</sup> Centraal Bureau voor de Statistiek, 'The Netherlands in numbers' (2021), <<https://longreads.cbs.nl/the-netherlands-in-numbers-2021/how-many-adults-smoke/>>.

<sup>11</sup> Rijkswaterstaat Leefomgeving, 'Landelijke zwerfafvalmonitor aanvullende rapportage opschalingskengetallen peuken & kauwgom : jaarrapportage 2022' (2022), <<https://open.rijkswaterstaat.nl/@258332/landelijke-zwerfafvalmonitor-aanvullende/?downloaditmidt=258333>>.

<sup>12</sup> CE Delft, 'Reduceren van sigarettenfilters in het zwerfafval: Studie naar de grootte van het probleem en analyse van mogelijke beleidsmaatregelen', p. 14.

<sup>13</sup> The lower estimate is based on a consumer survey conducted by CE Delft (between 0,2 and 1,4 billion filters per year). Other studies indicate higher numbers (between 1,3 to 7,1 billion filters per year).

<sup>14</sup> CE Delft, pp. 17-18.

- **Waste.** Cigarette filters are composed of non-biodegradable plastic and are a significant source of microplastics. Each filter releases approximately 100 microplastic fibres per day until it has fully degraded. These microplastics also attract and transport additional harmful substances, amplifying their negative environmental impact. Filters that reach aquatic environments have been found in the stomachs of marine animals.

### **3.2. Ban on cigarette filters: rationale, description, expected effects**

Several measures have already been implemented or are being planned that contribute to reducing the number of cigarette filters in litter in the Netherlands. These include both general tobacco control measures, originating from the National Prevention Agreement of 2018 (these include a raise in excise duties, the diminution of tobacco points of sales, the extension of some-free environments),<sup>15</sup> and measures aimed specifically at litter prevention (extended producer responsibility (EPR) for litter, labelling of cigarette packets), in line with the SUPD.

The combined effect of tobacco control measures and autonomous trends in smoking prevalence is expected to result in a reduction in smoking of up to 15% between 2022 and 2026.<sup>16</sup> This provides only a rough indication of the potential decrease in cigarette filters entering the environment, as the correlation is not direct. The two measures specifically aimed at reducing litter (EPR and labelling) are expected to only have a limited impact. As a result, the total reduction in cigarette filters in litter is estimated at no more than 15%, far below the intended 70% reduction target.<sup>17</sup> In combination with other measures (educational campaigns, deposit system, etc.), CE Delft therefore recommended examining the feasibility of introducing a ban on filter cigarettes.

CE Delft describes the measure as follows:

With this measure, all single-use cigarette filters will be prohibited. This means that even filters without plastic in them, including biodegradable filters, will be prohibited. Reusable filters fall outside the scope of the ban.

As a consequence of imposing such a ban, no (single-use) cigarette filters, including filter cigarettes, will be allowed on the Dutch market anymore. The ban is to be written into law. Smokers will have to divert to other options. The ban will not apply to the use of cigarette filters or smoking filtered cigarettes, it will only apply to marketing (selling) them. This means that smoking filtered cigarettes purchased abroad will still be permitted.<sup>18</sup>

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<sup>15</sup> Rijksoverheid, Nationaal Preventieakkoord (2018):

<https://www.rijksoverheid.nl/documenten/convenanten/2018/11/23/nationaal-preventieakkoord>.

<sup>16</sup> In de Volksgezondheid Toekomst Verkenning 2018 is een trendanalyse gedaan waarin het verwachte aantal rokers in 2040 is ingeschat. Dit is de meest recente trendanalyse. In deze analyse is alleen bestaand beleid meegenomen. Uit deze analyse volgt dat de rookprevalentie (dagelijks en incidenteel) afneemt naar 13,6% van de 18-plussers in Nederland : CE Delft p 24.

<sup>17</sup> Ibid., p. 26.

<sup>18</sup> Ibid., p.28.

It is important to highlight two features of the measure, as described in the CE Delft report. First, the ban would apply both to cigarettes sold with filters and to filters sold separately ('disposable filters'), the latter typically being used for roll-your-own cigarettes. Second, the ban would apply to the *sale* of filters, not to their *consumption*. Consumers would therefore remain free to smoke filtered cigarettes purchased abroad.

If such a ban were adopted, cigarettes with filters would no longer be available on the Dutch market. In theory, the measure could therefore be expected to be fully effective. In practice, however, its effectiveness would heavily depend on compliance: whether consumers would have access to, and make use of, an illegal supply, and the extent to which they would purchase filtered cigarettes abroad and smoke them in the Netherlands.

A key question is thus how the ban would affect consumer behaviour. At present, no other countries or regions in the world are known to have introduced such a ban. As a result, no ex-post empirical data exist on how smokers would react under such a regulatory framework. It is important to underline the significance of this question, and of the available evidence, for assessing the legality of the ban under Articles 34–36 TFEU (see Section 4.2).

CE Delft conducted a consumer survey on this issue. In that survey, filter smokers were asked what they would do if such a ban were introduced. The results show that:

- 28% of smokers would comply with the ban but continue smoking (with re-usable filters, without filters or using other products such as e-cigarettes)
- 18% would reduce or quit smoking
- 16% would not comply with the ban (buy cigarettes abroad or from the illegal market)
- 40% are still undecided

Although these results must be interpreted with caution, they show that nearly half of respondents indicate a willingness to comply with the measure by quitting smoking, reducing their consumption or switching to alternatives. The ban can therefore reasonably be expected to have a certain effect on reducing litter, although a high number of smokers seem to be undecided. At the same time, the possibility of purchasing cigarettes abroad should not be underestimated. While cross border distance sales of tobacco are banned in the Netherlands, including online,<sup>19</sup> the country's geography means that it is relatively easy for consumers to source cigarettes from abroad, particularly because EU law allows consumers to purchase significant quantities of tobacco in other Member States.<sup>20</sup> Purchases of cigarettes from abroad, as well as illegal purchases, have increased markedly in the Netherlands. A recent study by the Dutch

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<sup>19</sup> Art 9a Tabaks- en rookwarenwet; art 5.5 Tabaks- en rookwarenbepaling (see below n 76 and 89).

<sup>20</sup> Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast), OJ L 58/4, Article 32.

customs estimated that 45% of all cigarettes consumed in the country had not been subject to Dutch excise duties, either because they were purchased abroad, bought duty free or obtained illegally.<sup>21</sup> Another study analysing the effect of the most recent excise duty increase in the Netherlands found that this latest increase has had a smaller impact on smoking behaviour than the two earlier increases, because many more people started buying their cigarettes abroad. This study found that around 60% of all cigarettes smoked in 2024 came from abroad.<sup>22</sup>

### 3.3. Health impacts of the ban

A ban on cigarette filters, although primarily motivated by environmental concerns, is also likely to have an impact on public health. For smokers who would continue to smoke after the ban, it is important to emphasise that the removal of filters would not increase exposure to harm. Contrary to a widespread misconception that has been promoted for decades by the tobacco industry, filters provide do not reduce exposure to risk. The World Health Organization (WHO) has stressed that, despite industry marketing, there is no evidence that filters have any proven health advantages. The WHO actually calls on policymakers to ban filters in order to protect both public health and the environment.<sup>23</sup>

While some early epidemiological studies suggested that filtered cigarettes were less harmful than unfiltered cigarettes, including findings of lower risks of lung cancer, subsequent evidence has shown no such benefit.<sup>24</sup> Both ventilated and unventilated filter cigarettes have proven to be equally harmful as unfiltered cigarettes.<sup>25</sup> Several factors help explain why filters do not improve health outcomes,<sup>26</sup> including compensatory smoking behaviour,<sup>27</sup> the inhalation of filter materials,<sup>28</sup> and altered combustion chemistry.<sup>29</sup> Public misperception nevertheless remains widespread. A

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<sup>21</sup> Ministerie van Financien, 'Empty Pack Survey 2024'

<<https://www.rijksoverheid.nl/documenten/rapporten/2025/05/29/empty-pack-survey-2024>>.

<sup>22</sup> Rijksinstituut voor Volksgezondheid en Milieu, 'Gedragseffecten van de accijnsverhoging op tabak in 2024: Voorgenomen versus daadwerkelijke gedragsverandering'

<sup>23</sup> WHO, 'WHO raises alarm on tobacco industry environmental impact' (2022), <<https://www.who.int/news/item/31-05-2022-who-raises-alarm-on-tobacco-industry-environmental-impact>>. See also Karen Evans-Reeves, Kathrin Lauber and Rosemary Hiscock, 'The "Filter Fraud" Persists: The Tobacco Industry Is Still Using Filters to Suggest Lower Health Risks While Destroying the Environment' (2022) 31 Tobacco Control e80.

<sup>24</sup> Shannon Gravely and others, 'Opposition to Banning Cigarette Filters and the Belief That Removing Filters Makes Cigarettes Much More Harmful Among Adults Who Smoke: Findings From the 2022 International Tobacco Control Four Country Smoking and Vaping Survey' (2025) 27 Nicotine & Tobacco Research 1401.

<sup>25</sup> On filter ventilation, see <<https://www.rivm.nl/en/tobacco/filter-ventilation>>.

<sup>26</sup> Shannon Gravely and others (n 24).

<sup>27</sup> Filters and ventilation holes altered smoking patterns, leading to deeper inhalation, longer puff duration, higher puff volume, and increased cigarette consumption.

<sup>28</sup> Filters, commonly made of cellulose acetate, release fibers and microplastics that can become embedded in the lungs.

<sup>29</sup> Filters influence cigarette burning, increasing exposure to tobacco-specific nitrosamines linked to lung cancer. Filters are also ineffective at removing low molecular weight gases such as carbon monoxide.

multi-country study conducted in Australia, Canada, the United States and England found that three quarters of smokers incorrectly believe that removing filters would make cigarettes more harmful. Moreover, the belief that unfiltered cigarettes are ‘much more harmful’ was the strongest predictor of opposition to a filter ban.<sup>30</sup>

### **3.4. Interim conclusion**

Considering the environmental harm caused by cigarette filters, as well as the harm associated with smoking more generally, a ban on cigarette filters appears to be a very defensible course of action, grounded in solid evidence and legitimate public policy concerns. A key policy question nevertheless remains, namely how effective such a ban would be, given that smokers could relatively easily source their consumption from the illicit market or from abroad. One possible response would be to adopt such a policy at the EU level, taking advantage of the upcoming revisions of the TPD and the SUPD. If that is not feasible, the question then becomes whether it could be lawfully pursued at the national level. The following sections explore this question.

## **4. National ban: assessment under EU secondary law**

A ban on cigarette filters falls within the scope of both primary law, namely the TFEU, and secondary EU law. In accordance with the legislative priority rule, or *Tedeschi* principle, ‘where a particular sphere has been the subject of exhaustive harmonisation at Community level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty’.<sup>31</sup> The analysis must therefore begin with secondary law, in order to determine whether it covers the measure at issue and would pre-empt the application of primary law. Only if secondary law does not apply would the measure be assessed under primary law.

It is also important to reiterate, as regards both primary law and secondary law, that the assessment differs whether one considers *filtered cigarettes* or *seperate filters*. This will be further explained below.

### **4.1. Tobacco Products Directive**

#### *4.1.1. Scope of the Tobacco Products Directive*

The Tobacco Products Directive (TPD) regulates the manufacture, presentation and sale of tobacco and related products at the EU level. Its legal basis is Article 114 TFEU, which empowers the EU to adopt ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object

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<sup>30</sup> Gravelly and others (n 24).

<sup>31</sup> Case C-216/11 *Commission v France*, EU:C:2013:162, para 27. See also Case 5/77 *Tedeschi v Denkavit*, EU:C:1977:144.

the establishment and functioning of the internal market'. The TPD is relevant because it applies to tobacco products, including cigarettes.

The first question is whether filters fall within the scope of the TPD. The answer depends on whether the filters are sold as part of a tobacco product or separately. The TPD only covers filters to the extent that they constitute an 'ingredient' of a finished tobacco product.<sup>32</sup> Separate filters, therefore, do not fall within its scope. Filtered cigarettes, however, are regulated under the Directive. Article 7(7) TPD provides that tobacco products must not be placed on the market with filters that have a characterising flavour, such as menthol, and that filters must not contain nicotine or tobacco. Products that comply with these requirements may lawfully be placed on the market.

The second question regarding cigarettes with filters concerns whether the TPD allows Member States to adopt measures that are stricter than those provided for in the Directive, for example in the form of a ban. The relevant provision in this context is Article 24, which states that:

1. Member States may not, *for considerations relating to aspects regulated by this Directive*, and subject to paragraphs 2 and 3 of this Article, prohibit or restrict the placing on the market of tobacco or related products which comply with this Directive.
2. This Directive shall not affect the right of a Member State *to maintain or introduce further requirements*, applicable to all products placed on its market, in relation to the *standardisation of the packaging of tobacco products*, where it is justified on grounds of public health, taking into account the high level of protection of human health achieved through this Directive. [...]
3. A Member State may also *prohibit a certain category* of tobacco or related products, *on grounds relating to the specific situation* in that Member State and provided the provisions are justified by the need to protect public health, taking into account the high level of protection of human health achieved through this Directive. Such national provisions shall be notified to the Commission together with the grounds for introducing them. The Commission shall, within six months of the date of receiving the notification provided for in this paragraph, approve or reject the national provisions after having verified, taking into account the high level of protection of human health achieved through this Directive, *whether or not they are justified, necessary and proportionate to their aim* and whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between the Member States. In the absence of a decision by the Commission within the period of six months, the national provisions shall be deemed to be approved.<sup>33</sup>

According to Article 24(1) TPD, Member States are prevented from enacting further measures that would restrict or prohibit the marketing of products complying with the

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<sup>32</sup> Article 7(7) TPD.

<sup>33</sup> Emphasis added.

Directive, but only ‘for considerations relating to aspects regulated by the Directive’. As explained above, filters are regulated under the Directive. A national ban on cigarette filters would therefore prohibit a product that complies with the TPD. On the basis of Article 24(1), the Netherlands cannot ban the sale of cigarettes with filters on its territory, provided that these cigarettes comply with the Directive. An alternative reading of Article 24(1) could be that environmental considerations are not an aspect regulated under the Directive.<sup>34</sup> Under this interpretation, a measure adopted for environmental reasons, even if it regulates a product or aspect of a product covered by the Directive, could be permitted. However, there is no support for such a broad reading of Article 24(1) in the case law,<sup>35</sup> and it is unlikely that the European Commission or the European Court of Justice (ECJ) would adopt this interpretation.

Articles 24(2) and (3) provide certain derogations to the principle set out in paragraph 1. They allow (i) a Member State to maintain or introduce further requirements regarding the standardisation or plain packaging of tobacco products, and (ii) to prohibit a certain category of products on grounds relating to the specific situation in that Member State. Article 24(2) concerns packaging and is therefore not relevant to filters. Article 24(3) authorises a Member State to ban a certain category of products, on public health grounds relating to the specific situation in that Member State, and could prima facie appear to offer a route to prohibit cigarettes with filters. However, we identify a number of obstacles for relying on this provision in the present case.

**(i)** First, it is doubtful that filtered cigarettes constitute a ‘category’ under the TPD, as this term applies to types of products regulated under the Directive in general, such as cigarettes, roll-your-own tobacco, pipe tobacco, waterpipe tobacco, cigars, cigarillos, chewing tobacco, nasal tobacco or tobacco for oral use.<sup>36</sup> It is true that France and Belgium have recently successfully prohibited disposable electronic cigarettes under Article 24(3), a product that is a subset of electronic cigarettes in general.<sup>37</sup> Yet, as explained above, filters are regulated as cigarette ingredients under Article 7 TPD, so any ban thereof should rather be construed as a regulation of the characteristic of a product, rather than a decision to ban an entire category of products.<sup>38</sup> This is not the case for the batteries of electronic cigarettes, which are not regulated under the TPD.

**(ii)** Second, one must observe that Article 24(3) expressly refers to a public health justification, whereas it is evident that the measure at issue is grounded in environmental

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<sup>34</sup> According to Article 1, the TPD has two objectives: facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health.

<sup>35</sup> Case C-547/14, *Philip Morris Brands*, EU:C:2016:325.

<sup>36</sup> See e.g. Articles 2(14)(a) and 7(12).

<sup>37</sup> European Commission, Commission implementing decision of 18.3.2024 concerning national provisions notified by Belgium prohibiting the placing on the market of disposable electronic cigarettes, C(2024) 1673 final ; European Commission, Commission implementing decision of 25.9.2024 concerning national provisions notified by France prohibiting certain electronic cigarettes, C(2024) 6680 final.

<sup>38</sup> See *Philip Morris Brands*, para. 94.

concerns. As noted earlier, the measure might have incidental health benefits, but that does not change the fact that its primary rationale, as reflected in the Dutch parliamentary motion, the Kamerbrief and the CE Delft study, is environmental.

(iii) Finally, Article 24(3) only allows further measures on grounds relating to the specific situation of the Member State concerned, and it is unlikely that pollution caused by cigarette filters is specific to the Netherlands. It should be noted, however, that this condition has not been applied strictly in recent decisions of the European Commission. For instance, in the cases of Belgium and France, the authorities merely highlighted that the products in question were gaining traction on their national markets and that consumption was increasing, without demonstrating that these developments differed from those in other Member States.<sup>39</sup> In the present case, though, there is no evidence indicating that cigarette filter litter has recently worsened in the Netherlands. Cigarette consumption has declined in recent years.<sup>40</sup> Moreover, the data in the CE Delft report, although limited, do not show that cigarette littering is more prevalent in the Netherlands than elsewhere, and, if anything, suggest the opposite (see Section 3.1).

For all these reasons, while reliance on Article 24(3) cannot be entirely excluded, we consider it a highly uncertain route. If a ban on cigarette filters were to be notified to the Commission under that provision, the Commission would conduct a proportionality assessment comparable to the one under Article 34 TFEU.<sup>41</sup> The elements contained in Section 5.2 below would therefore also be relevant.

#### 4.1.2. Derogation from the TPD

If the TPD itself does not allow the Netherlands to act, the Dutch legislature could consider relying on the general derogation ground contained in Article 114(5) TFEU. Article 114(5) to (7) TFEU provide as follows:

5. [...]f, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on *new scientific evidence* relating to *the protection of the environment* or the working environment *on grounds of a problem specific to that Member State* arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.<sup>42</sup>

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on

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<sup>39</sup> Ibid, pp. 5-6.

<sup>40</sup> Centraal Bureau voor de Statistiek, (n 10).

<sup>41</sup> See the approach defended in Eadaoin Ní Chaoimh, *The Legislative Priority Rule and the EU Internal Market for Goods: A Constitutional Approach* (Oxford University Press 2022) pp. 244-425.

<sup>42</sup> Emphasis added.

trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

Article 114(5) allows a Member State to introduce measures that derogate from a harmonisation measure adopted under Article 114 TFEU, such as the TPD, on environmental grounds. Beyond the requirement that the measure must aim to protect the environment, which is satisfied here, two further conditions must be met: (i) the existence of new scientific evidence that was not available when the harmonising measure was adopted and (ii) the existence of a problem specific to the Member State concerned.

It is doubtful that either of these conditions is met in the present case, particularly in light of the Commission's strict interpretation of Article 114(5) TFEU. Since 1987, only one measure notified under Article 114(5) has been approved by the Commission, out of a total of 13 notifications.<sup>43</sup> With respect to the requirement of new scientific evidence, the detrimental environmental effects of cigarette filters have long been established and cannot plausibly be characterised as new.<sup>44</sup> Although the problem may have intensified over time, Article 114(5) is aimed at situations where the relevant scientific information was genuinely unavailable when the EU measure was adopted.

As for the requirement that the problem be specific to the Member State, the Commission requires clear proof that the situation is 'unique' or otherwise gives rise to 'additional concern'.<sup>45</sup> As noted above in the context of Article 24(3) TPD, there is no indication that the pollution caused by cigarette filters is specific to the Netherlands, and no data have been provided to suggest this. Accordingly, although Article 114(5) might

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<sup>43</sup> See Ellen Vos and Maria Weimer, 'Differentiated Integration or Uniform Regime? National Derogations from EU Internal Market Measures' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017). The data presented here must be complemented with the decision referred to at note 45 below.

<sup>44</sup> Cheryl G Heaton and others, 'Butt Really? The Environmental Impact of Cigarettes' (2011) 20 *Tobacco Control* i1; Dannielle S Green, Andrew DW Tongue and Bas Boots, 'The Ecological Impacts of Discarded Cigarette Butts' (2022) 37 *Trends in Ecology & Evolution* 183.

<sup>45</sup> See the most recent rejection : Commission Decision of 17 October 2012 on the national provisions notified by the Kingdom of Sweden pursuant to Article 114(5) of the Treaty on the Functioning of the European Union concerning the maximum admissible content of cadmium in fertilisers (notified under document C(2012) 7177), OJ L 326/19, para 41.

appear more suitable because it expressly concerns environmental protection, our conclusion is broadly the same as under Article 24(3) TPD. Article 114(5) TFEU is, in our assessment, an unlikely legal basis for a national ban on cigarette filters.

## 4.2. Single-use Plastics Directive

Directive (EU) 2019/904 (the Single-use Plastics Directive or SUP Directive) aims to reduce the impact of certain plastic products on the environment.<sup>46</sup> It is based on Article 192 TFEU. Unlike the TPD, it is not primarily an internal market measure but an environmental instrument. The SUPD applies to tobacco products with filters and separate filters, insofar as they contain plastic.<sup>47</sup> Filters are subject to three kinds of obligations under the SUP Directive.<sup>48</sup>

**Article 7.** Member States shall ensure that single-use plastic products are placed on the market with a marking informing consumers of (i) appropriate waste management options for the product concerned and of (ii) the presence of plastics in the product and the resulting negative impact of littering on the environment.<sup>49</sup>

**Article 8(3).** Member States shall ensure that extended producer responsibility schemes are established for all single-use plastic products. As regard filters, producers must cover at least the following costs: (i) the costs of the awareness raising measures referred to in Article 10 of the Directive, (ii) the costs of cleaning up litter resulting from those products and the subsequent transport and treatment of that litter, and (iii) the costs of data gathering and reporting in accordance with point (c) of Article 8a(1) of Directive 2008/98/EC on waste.<sup>50</sup> In addition, producers must cover the costs of waste collection for those products that are discarded in public collection systems, including the infrastructure and its operation, and the subsequent transport and treatment of that waste.

**Article 10.** Member States shall take measures to inform consumers and to incentivise responsible consumer behaviour and must inform consumers about : (i) the availability of re-usable alternatives, re-use systems and waste management options, as well as best practices in sound waste management carried out in accordance with Article 13 of Directive 2008/98/EC; (ii) the impact of littering and other inappropriate waste disposal

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<sup>46</sup> Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (Text with EEA relevance), OJ L 155/1.

<sup>47</sup> Annex. Under Article 3 (18) SUP, 'tobacco products' means tobacco products as defined in point (4) of Article 2 of Directive 2014/40/EU.

<sup>48</sup> Annex, Parts D, E and G.

<sup>49</sup> See the further specifications contained in Commission Implementing Regulation (EU) 2020/2151 of 17 December 2020 laying down rules on harmonised marking specifications on single-use plastic products listed in Part D of the Annex to Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment (Text with EEA relevance), OJ L 428, 18.12.2020, pp. 57

<sup>50</sup> Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), OJ L 312/3.

on the environment, in particular on the marine environment; and (iii) the impact of inappropriate means of waste disposal on the sewer network.

Unlike other single-use plastic products, for which suitable and more sustainable alternatives that were also affordable existed at the time the Directive was adopted,<sup>51</sup> tobacco filters are not prohibited under the SUP Directive.<sup>52</sup> The SUP Directive does not regulate the placing on the market of filters and does not prevent Member States from enacting a ban on cigarette filters. Furthermore, because it is adopted on the basis of Article 192 TFEU, the SUP Directive is a measure of minimum harmonisation, unlike the TPD, meaning that Member State action is not pre-empted.

### **4.3. Single Market Transparency Directive**

Notwithstanding the significant legal hurdles identified above, if the Netherlands were to adopt a ban on cigarette filters, the measure would have to be notified to the European Commission under the Single Market Transparency Directive. This Directive requires national authorities to inform the European Commission of any draft technical regulations on products before they are adopted into national law. Its purpose is to prevent the creation of new trade barriers ex-ante, before they are enacted by Member States.

There is little doubt that such a ban, at least with respect to filtered cigarettes, constitutes a ‘technical specification’ and hence a ‘technical regulation’ within the meaning of Article 1(1)(c) and (f) of the Directive. Consequently, the draft of the proposed measure would need to be notified to the European Commission,<sup>53</sup> and its adoption would need to be postponed pending the Commission’s evaluation of its legality.<sup>54</sup> Failure to comply with these procedural obligations would render the measure unenforceable against third parties,<sup>55</sup> effectively negating the effect of the ban on the national territory.

### **4.4. Interim conclusion**

We find that the TPD prevents the Netherlands from prohibiting the marketing of cigarettes with filters that comply with the provisions of the Directive. This conclusion is based on the combined application of Articles 7(7) and 24(1) TPD. The derogations in Article 24(3) of the Directive and Article 114(5) TFEU are, in our assessment, unlikely to be applicable in this case. Regarding Article 24(3) TFEU, we doubt that a ban on filtered cigarettes can be construed as a ban on a ‘category’ of products under the TPD. Further, the Netherlands would need to demonstrate not only that the situation in the country is distinct from that in other Member States and thus justifies a specific national exception,

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<sup>51</sup> Recital 15,

<sup>52</sup> *Ibid*, Article 5 and Annex, Part B.

<sup>53</sup> Article 5.

<sup>54</sup> Article 6.

<sup>55</sup> Case C-194/94, *CIA Security International*, EU:C:1996:172.

but also, regarding Article 114(5) TFEU, that new evidence regarding the harmfulness of filters has emerged since the adoption of the TPD. While not entirely impossible, this represents a high evidential threshold to meet.

The TPD does not apply to separate filters. Therefore, such a ban must be examined directly under primary EU law.

## 5. National ban: assessment under EU primary law

If the ban on filtered cigarettes was interpreted as not falling within the scope of the TPD, or if a derogation was permitted under Article 114(5) TFEU, it would still have to be compliant with EU primary law, more precisely Article 34 TFEU. As regards separate filters, Article 34 TFEU is the sole applicable norm.

### 5.1. Restrictive effect of the ban

Firstly, there can be no doubt that cigarettes and filters are both considered ‘goods’ within the meaning of the TFEU. Goods have been defined by the Court (ECJ) as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions’.<sup>56</sup> Additionally, cigarettes have been included in the EEC-Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff<sup>57</sup>, which indicates the consideration of cigarettes as goods. In a case between the European Commission and France, cigarettes were, for the purpose of tax differentiation between dark tobacco cigarettes and light tobacco cigarettes, undeniably cast as ‘goods’.<sup>58</sup>

The proposed ban on separate filters and filter cigarettes is thus a measure that falls within the scope of the free movement of goods. More specifically, the ban would amount to a quantitative import or export restriction or a measure having equivalent effect to such a restriction. According to Articles 34 and 35 of the TFEU, measures of this kind are prohibited to ensure the free movement of goods.

A general ban on filters and filter cigarettes in the Netherlands can be classified as a genuine quantitative restriction on the import of those goods, within the meaning of Article 34 TFEU. In the *Geddo* case of the CJEU, the Court held that the prohibition of quantitative restrictions ‘covers measures which amount to total or partial restraint of, according to the circumstances, imports, exports or goods in transit’.<sup>59</sup> In *Henn & Darby*,

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<sup>56</sup> Case C-7/68, *Commission v Italy*, EU:C:1968:51.

<sup>57</sup> Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ L 256/1.

<sup>58</sup> Case C-302/00 *Commission v France*, EU:C:2002:123.

<sup>59</sup> Case 2/73, *Geddo*, EU:C:1973:89, para. 7.

the Court held that an import ban (in that case on pornographic articles) in a Member State is ‘the most extreme form of restriction’ and is thus covered by Article 34 TFEU.<sup>60</sup>

The envisioned ban with which this advisory report is concerned is not, however, an absolute ban as it would only apply to the sale of cigarette filters and filter cigarettes on the Dutch market. The ban would still allow for purchasing the concerned goods in another state and consuming them in the Netherlands. The proposed ban should thus be regarded not as an outright import ban, but as a measure having equivalent effect to such a ban, which is also prohibited under Article 34 TFEU. In *Dassonville*, the CJEU held that ‘all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions’.<sup>61</sup> This applies to the ban in question. It is therefore undisputed that the proposed ban on cigarette filters and filter cigarettes constitutes a restriction of the free movement of goods.

## **5.2. Justification and proportionality**

Government measures that constitute a restriction of the free movement of goods are not necessarily violations of that fundamental right to free movement, provided that they can be justified. To be justified, the measures in question must pursue a legitimate aim and must be proportionate to the legitimate aim pursued. Any exception to the rule laid down in Article 34 TFEU (or to any right to free movement included in the TFEU) must be interpreted restrictively. Purely economic objectives cannot be invoked as grounds for justification.<sup>62</sup>

In principle, there are two categories of justifications. First, the justifications listed in the TFEU itself. Article 36 TFEU stipulates that prohibitions or restrictions on the import, export or transit of goods may be justified ‘on grounds of public morality, public policy or public security; the health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property’. Article 36 TFEU further stipulates that these prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. The latter does not appear to be the case here. The second category of justifications was developed by the Court itself. In *Cassis de Dijon*, the Court added a number of additional grounds of justification.<sup>63</sup> Unlike the exhaustive list of grounds included in Article 36 of the TFEU, this list of urgent requirements in the public interest, often referred to as the ‘rule of reason’, is open-ended.

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<sup>60</sup> Case 34/79, *Henn & Darby*, EU:C:1979:295, para. 12.

<sup>61</sup> Case 8/74 *Procureur du Roi v Dassonville*, EU:C:1974:82, par. 5.

<sup>62</sup> Case C-499/23 *Commission v Hungary*, EU:C:2025:875, para. 84.

<sup>63</sup> Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42, para. 8.

The protection of public health has been recognised as a justification both under the TFEU and in the case law of the Court.<sup>64</sup> This was initially not the case for the protection of the environment. However, the Court has now explicitly recognised environmental protection as an overriding requirement in the public interest.<sup>65</sup> More recently, the Court ruled that national measures that benefit environmental protection also contribute to the protection of the health and life of persons, animals or plants, the protection of which is considered a legitimate aim under Article 36 TFEU.<sup>66</sup> The protection of the environment is the main reason for proposing a ban on the sale of cigarette filters in the Netherlands, even when such a measure clearly constitutes a restriction of the free movement of goods. The proposed measure could thus be justified on the basis of environmental protection considerations, both under Article 36 TFEU (as it is connected to the protection of the health and life of persons, animals and plants) and on the basis of overriding requirements in the public interest, i.e. the protection of the environment itself.

However, the proposed ban must additionally meet the requirements of the principle of proportionality. In concrete terms, this means that the proposed measure must be suitable for achieving the legitimate aim pursued and must be necessary for that purpose, in the sense that there are no viable, less restrictive alternatives available through which the aim pursued may also be achieved.<sup>67</sup> Proportionality must also be assessed in relation to the restrictive effect of the measure on the freedom to conduct a business enshrined in Article 16 of the EU Charter of Fundamental Rights.<sup>68</sup>

On paper, at least, a ban on the sale of separate filters and filtered cigarettes seems to be an appropriate measure to prevent filters from being discarded in the environment and causing damage. Such a ban should, in principle, make it possible to achieve the stated objective of a 70% reduction in harmful filter waste. The fact that the proposed sales ban is part of a whole package of accompanying or additional measures that pursue the same goal (see Section 3.2) significantly strengthens the argument that the objective is being pursued in a coherent and systematic manner and that the measure is therefore appropriate.<sup>69</sup>

However, it could be argued that, based on the survey conducted by CE Delft (see Section 3.2), there are doubts about the actual suitability of the measure: 4 out of 10 respondents indicated that they do not yet know whether they would refrain from consuming filter cigarettes, and 1 in 6 already indicate that they would continue from consuming such products (hence purchased from abroad or from the illicit market). In total, that is more than half of those surveyed. Questions thus arise concerning the effectiveness of the

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<sup>64</sup> Ibid.

<sup>65</sup> Case C-379/98, *Preussen-Elektra*, EU:C:2001:160, para. 76.

<sup>66</sup> Case C-242/17, *LEGO*, EU:C:2018:804, para. 65.

<sup>67</sup> Case C-499/23 *Commission v Hungary*, EU:C:2025:875, paras 69-70.

<sup>68</sup> See Case C-128/22, *Nordic Info*, EU:C:2023:951.

<sup>69</sup> Ibid, para 70.

proposed ban, especially because it would remain possible to purchase filters and filtered cigarettes abroad and consume them in the Netherlands. As mentioned above, it is estimated that 60% of all cigarettes smoked in the Netherlands are purchased from abroad.

In any case, a total ban on the sale of filters and filter cigarettes is a very drastic measure to achieve the legitimate aim pursued, i.e. environmental protection by reducing the number of filters that end up in the environment. Such a ban would mean that filters and filter cigarettes could no longer be legitimately traded in the Netherlands in any way. The question that arises is whether the same result could not be achieved by using less restrictive means.

If the government consider that no less restrictive means are available, it will have to demonstrate this. This means that the government will have to provide sufficient arguments and evidence to show that the proposed measure is appropriate and necessary to achieve the legitimate aim pursued.<sup>70</sup> On the basis of the elements exposed in Section 3, we believe that such evidence is readily available. Further, this burden of proof cannot be so heavy that the Member State must demonstrate positively that no other conceivable measure can ensure the achievement of that objective under the same circumstances.<sup>71</sup> In this context, and under the precautionary principle, the Netherlands may act even if uncertainty remains regarding the consequences of a ban on cigarette filters in relation to achieving the intended objective,<sup>72</sup> linked for instance to the development of cross-border and illicit trade.

In view of the whole range of measures already taken by the Netherlands, which are still far from having the desired effect, and considering the urgency and scale of the problem, we consider that the proposed ban on cigarette filters in the Netherlands does not go beyond what is reasonably necessary to achieve the desired environmental objective.

### **5.3. Interim conclusion**

Insofar as the proposed measure must be assessed in the light of the Treaty provisions on the free movement of goods, the ban on the sale of filters and filter cigarettes in the Netherlands is a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 34 TFEU. However, this restriction on the free movement of goods can be justified on grounds of environmental protection.

The proposed measure, which makes it impossible to legally trade separate filters and filtered cigarettes in the Netherlands, is clearly suitable for achieving the environmental aim. This measure is also the latest in a series of existing government measures, all of which were introduced with a view to achieving said objective. The legitimate aim in

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<sup>70</sup> Case C-333/14, *Scotch Whisky Association*, EU:C:2015:845, para 54.

<sup>71</sup> Case C-110/05 *Commission v Italy*, EU:C:2009:66, para. 66; *Scotch Whisky Association*, para. 55.

<sup>72</sup> *Scotch Whisky Association*, paras 57-58. See also *Nordic Info*, paras 82, 90 and 97.

question is therefore being pursued in a coherent and systematic manner. However, precisely because these combined measures are far from sufficient to achieve the stated objective, the introduction of a measure such as the proposed sales ban also seems necessary.

Questions could nonetheless be raised about the actual effectiveness of the ban: after all, it remains possible to purchase separate filters and filtered cigarettes abroad and to consume them in the Netherlands. Evidence shows that this is a widespread phenomenon. From that perspective, adopting a general ban on the *consumption* of all single-use cigarette filters cigarettes in the Netherlands could be a stronger alternative measure. It would be in principle more effective, subject to how it would be enforced in practice (using filter cigarettes in the Netherlands would become illegal). Thus, our preference would go for an EU-wide ban on the sale of all single-use cigarette filters, which would alleviate most of the practical and legal difficulties identified in Sections 4 and 5 of the report.

## 6. Applicable Dutch law

### 6.1. Introduction and preliminary remarks

This section consists of an analysis of Dutch law, with the dual purpose of identifying potential obstacles to the introduction a national ban of cigarette filters, and secondly of indicating the amendments to the law to be made if the envisioned ban would indeed be adopted. It should be noted that Dutch law must comply with the requirements set out in the EU legal framework discussed in the previous sections, due to the direct effect and primacy of EU law. A national ban on cigarette filters is likely incompatible with the obligations that the Netherlands has as a Member State of the EU under secondary EU law, as has already been explained in Section 4.

Nevertheless, in order to gain a complete picture of the scope for introducing a national ban on cigarette filters, it is useful to also take stock of Dutch law, not least because the EU directives that have been transposed in the national legal system are supplemented and fleshed out in national rules (where there is scope for this and supplementation is considered appropriate by the Dutch government).<sup>73</sup>

This section is structured as follows. We first briefly introduce the Commodities Act (Section 6.2),<sup>74</sup> in particular the provisions relating to the exclusion of goods from the Dutch market based on safety considerations. Section 6.3 focuses on the Tobacco and

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<sup>73</sup> See Section 6.2.

<sup>74</sup> Wet van 28 december 1935, houdende voorschriften betreffende de hoedanigheid en aanduiding van waren (hereunder: de Warenwet).

Smoking Products Act,<sup>75</sup> the Tobacco and Smoking Products Regulation<sup>76</sup> and the Tobacco and Smoking Products Decree.<sup>77</sup> These instruments serve to transpose the TPD into the Dutch legal system and supplement and complement the Directive. Finally, the Single-Use Plastics Directive is also relevant in relation to the proposed ban (Section 6.4). This Directive has been transposed in the Dutch legal system in the Single-Use Plastic Products Decree (not applicable to tobacco products with filters),<sup>78</sup> the Ministerial Regulation on Single-Use Plastic Products (applicable to tobacco products with filters)<sup>79</sup> and the Packaging Management Decree (does not deal with tobacco products)<sup>80</sup>.

Two final preliminary remarks are in order. Firstly, if the sale of filtered cigarettes (or filters intended to tobacco products in general) is no longer permitted, the classification of tobacco products in the Excise Tax Act will also need to be amended.<sup>81</sup> Secondly, and this is a more fundamental point in relation to the proposed ban on cigarette filters, the introduction of such a ban must take into account the freedom of contract as enshrined in Article 3:40 of the Civil Code<sup>82</sup> and the freedom of enterprise.<sup>83</sup> The freedom of enterprise is enshrined in Article 16 of the Charter of Fundamental Rights of the European

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<sup>75</sup> Wet van 10 maart 1988, houdende maatregelen ter beperking van het tabaksgebruik, in het bijzonder ter bescherming van de niet-roker (hereunder: Tabaks- en rookwarenwet).

<sup>76</sup> Besluit van 14 oktober 2015, houdende samenvoeging van de algemene maatregelen van bestuur op basis van de Tabakswet tot één besluit (Besluit uitvoering Tabakswet, ofwel Tabaks- en rookwarenbesluit).

<sup>77</sup> Regeling van de Staatssecretaris van Volksgezondheid, Welzijn en Sport van 10 mei 2016, kenmerk 966398-150196-WJZ houdende regels inzake de productie, de presentatie en de verkoop van tabaksproducten en aanverwante producten (Tabaks- en rookwarenregeling).

<sup>78</sup> Article 3 van het Besluit van 17 juni 2021, houdende regels inzake aangewezen kunststofproducenten voor eenmalig gebruik, producenten van oxo-degradeerbare kunststoffen en kunststofhoudend vistuig en houdende wijziging van het Besluit beheer verpakkingen 2014 (hereunder: Besluit kunststofproducten voor eenmalig gebruik).

<sup>79</sup> Regeling van de Staatssecretaris van Infrastructuur en Waterstaat, van 29 maart 2022, nr. IENW/BSK-2022/50452, houdende regels inzake aangewezen kunststofproducten voor eenmalig gebruik (hereunder: Regeling kunststofproducten voor eenmalig gebruik); NB: this regulation's legal basis is Article 9.5.2, paragraph 7, of the Wet milieubeheer (allows for delegation).

<sup>80</sup> Besluit van 27 oktober 2014, houdende regels voor verpakkingen en verpakkingsafval (hereunder: Besluit beheer verpakkingen).

<sup>81</sup> Wet van 31 oktober 1991, houdende vereenvoudiging en uniformering van de accijnswetgeving (Wet op de accijns); In connection to the envisioned ban on cigarette filters, Articles 31 and 35 of the law would have to be slightly altered.

<sup>82</sup> Contract freedom is considered one of the core principles of Dutch civil law. The principle covers, among other things, the self-development by means of cooperation with others. See C.A. Hage, "2.2.1.1 Contractvrijheid", in C.A. Hage *Handhaving van privaatrecht door toezichhouders* (Recht & Praktijk, nr. CA17), 2017 (online via Kluwer InView).

<sup>83</sup> The European norm in essence encompasses contract freedom. J.H. Nieuwenhuis, "1: Contractvrijheid, een weerbarstig beginsel", in: T. Hartlief & C.J.J.M. Stolker (red.), *Contractvrijheid*, Deventer: Kluwer 1999, p. 30; Freedom of enterprise in principle concerns being able to act freely in terms of economic decision-making, which freedom is delimited by both European and national provisions. See F. Eikelboom, "7.3 Handvest en de vrijheid van ondernemerschap", in F. Eikelboom *De (onmiddellijke) voorzieningen van de enquêteprocedure* (Uitgaven vanwege het Instituut Voor Ondernemingsrecht (IVOR), no. 105) 2017 (online via Kluwer InView); Article 19 of the Dutch Constitution potentially plays a role as well. That provision concerns the freedom to choose one's profession, which applies to people who are self-employed, although the enjoyment of that right may be subject to legal limitations in the public interest (Kamerstukken II 1985/86, 19 376, nr. 1-2, p. 4).

Union and, as such, also applies in the Dutch legal system when the Dutch government implements EU law.

## **6.2. The Dutch Commodities Act**

The Dutch Commodities Act lays down rules that concern the safety of goods, such as foodstuffs, in relation to public health and safety. The Act transposes into the Dutch legal system various EU legal instruments, such as Regulation (EC) No 178/2002 (general principles and requirements of food law) and Regulation (EU) 2023/998 (product safety). The Act thus applies to goods in general, although for some specific goods – like foodstuffs – it contains specific rules. The Commodities Act leaves little room for measures taken in other interests than public health and product safety. So, if the Commodities Act is to be used, it is advisable to address those interests. Incidentally, the Commodities Act can be used to protect the environment if a binding European rule requires it;<sup>84</sup> as exposed in the previous sections, that is not the case here. Because the Commodities Act does not specifically apply to tobacco products, nor leaves much room for measures taken in the interest of environmental protection, it has little relevance for the adoption of a national ban on cigarette filters.

In line with what has been argued in the preceding sections, the Commodities Act, more specifically Article 13c, explicitly gives priority to EU law. The provision reads: ‘If a legal provision established pursuant to this Act refers to an EU directive, an amendment to that EU directive shall apply for the purposes of that provision with effect from the date on which the amendment in question must be implemented...’. This means, among other things, that the scope for excluding goods from the Dutch market<sup>85</sup> depends on the degree of harmonisation reached in EU law. As indicated in the previous sections, the scope of action is limited in the context under discussion, due to the TPD.<sup>86</sup> In any case, the Commodities Act does not contain provisions preventing a national ban on cigarette filters nor does it seem that any of the provisions will need to be altered should the envisioned ban be imposed.

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<sup>84</sup> Article 4 of the Act encompasses the general requirements for banning goods from the Dutch market, largely in the interest of human health and safety. Article 13 leaves room for adopting measures or imposing rules related to goods in the interest of environmental protection. So, if rules are in future laid down at the European level concerning banning cigarette filters, and if, on the basis of those European rules, filters are then (or have to then be) banned at the national level, one could do so on the basis of Article 13 of the Commodities Act in the interest of environmental protection.

<sup>85</sup> On the basis of Article 4 of the Act.

<sup>86</sup> Having said that, if the envisioned national ban on cigarette filters is indeed imposed at some point, then potentially some underlying decisions based on the Commodities Act would have to be amended depending on their substance. None of these are specifically concerned with tobacco products. An overview can be found here: <https://wetten.overheid.nl/BWBR0001969/2025-07-12/0/informatie#Bevoegdheid>.

### 6.3. Tobacco legislation

As mentioned above, the Dutch legislative and regulatory framework on tobacco and smoking products essentially consists of three related instruments: the Tobacco and Smoking Products Act, the Tobacco and Smoking Products Decree and the Tobacco and Smoking Products Regulation. Together, they form the implementation in Dutch law of the TPD.<sup>87</sup> The TPD, and therefore also the legislation and regulations implementing it, is primarily aimed at protecting public health. Unsurprisingly, the standards in the national tobacco and smoking products legislation and regulations are largely similar to that of the TPD, except for those points where EU Member States have been given leeway to supplement some rules of the TPD. These points, although limited, are highlighted below, along with a few other points for consideration in light of the proposed ban.

#### 6.3.1. *Tobacco and Smoking Products Act*

The Tobacco and Smoking Products Act contains rules on the production, presentation and sale of tobacco products, as well as related products such as electronic cigarettes. The Act first provides a number of definitions, following the TPD. The filters used in filter cigarettes are considered a (potential) ‘ingredient’, though not a standard component of a cigarette.<sup>88</sup> With regard to tobacco products, including ingredients, further rules may be laid down in order to protect public health.<sup>89</sup> The Act also includes various trade restrictions that again relate to the protection of public health, as well as sales restrictions and smoking bans. Flavoured or aromatic filters are already prohibited in the TPD, and therefore also in the Tobacco and Smoking Products Act.<sup>90</sup>

When implementing the TPD, the Dutch government took on board the recommendation to introduce an age limit for the sale of nicotine-containing electronic cigarettes; this limit was set at 18 years of age.<sup>91</sup> This aligns with the age limit that already applied to the sale of tobacco products. On this point, the government went further than it was obliged to in implementing the TPD. Another example of a measure that the Dutch government adopted of its own, is that of plain packaging.<sup>92</sup>

Compared to the European framework discussed in the previous sections, the Tobacco and Smoking Products Act does not impose additional barriers on the government to impose a ban on filters. The obstacles arising from Dutch legislation and regulations are the same as those arising from the Tobacco Products Directive itself.

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<sup>87</sup> Kamerstukken II, 2014-2015, 34234, nr. 3, p. 1.

<sup>88</sup> Article 1 Tabaks- en rookwarenwet.

<sup>89</sup> Article 2 Tabaks- en rookwarenwet.

<sup>90</sup> Kamerstukken II, 2014-2015, 34234, nr. 3, p. 4.

<sup>91</sup> Kamerstukken II, 2014-2015, 34234, nr. 3, p. 8; The Dutch government did not decide, by way of example, to impose a permit system for the introduction of new tobacco products. Kamerstukken II, 2014-2015, 34234, nr. 3, p. 11.

<sup>92</sup> Tabaks- en rookwarenregeling, par. 3.

### 6.3.2. *Tobacco and Smoking Products Decree and Tobacco and Smoking Products Regulation*

In addition to the Tobacco and Smoking Products Act, the Decree and the Regulation also contain a number of provisions, again in light of the implementation of the TPD. Both instruments contain, among other things, product requirements. The Decree does not explicitly mention anything about filters. The Tobacco and Smoking Products Regulation, on the other hand, regulate the requirements that cigarettes must meet in order to be admitted to the Dutch market. Article 2.7a stipulates that if a cigarette contains a filter, the filter itself must be white, and the paper surrounding the filter must be either white or covered with imitation cork (light brown). If a ban on cigarette filters were to be imposed, this would possibly be one of the provisions that would need to be amended, in the sense that the requirement would become that no cigarette containing a filter or accompanied by a filter may be placed on the Dutch market. Similarly to the Act, the Tobacco and Smoking Products Decree nor the Tobacco and Smoking Products Regulation contains any additional obstacles to a ban on cigarette filters, compared to the European framework.

### **6.4. Rules on single-use plastics (disposable plastics)**

Finally, the Dutch rules on single-use plastics (disposable plastics) deserve brief attention. Unlike the Commodities Act and the Tobacco and Smoking Products Act (and related regulations), which are geared towards protecting human health, these rules are primarily aimed at protecting the environment. Dutch regulations on disposable plastics are again largely based on European law. The Single-use Plastics Directive has been implemented in the Dutch legal system in two decrees, namely the Single-use Plastic Products Decree and the Packaging Management Decree, as well as in the Ministerial Regulation on Single-use Plastic Products. The Single-use Plastics Decree does not apply to tobacco products,<sup>93</sup> and the Packaging Management Decree is also irrelevant to a ban on cigarette filters. In what follows, we will therefore focus on the Ministerial Regulation on Single-use Plastics.

Tobacco products with plastic<sup>94</sup> filters and plastic filters sold (separately or) in combination with tobacco products fall within the scope of the regulation.<sup>95</sup> Electronic cigarettes and vapes, even if they have a plastic filter, do not fall within the scope of the Ministerial Regulation.<sup>96</sup> The producers of plastics that fall within the scope of the

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<sup>93</sup> Article 3 of Besluit kunststofproducten voor eenmalig gebruik.

<sup>94</sup> Plastic means: polymere materials that fall under the scope of the SUPD. Cigarette filters tend to fall into that category, given that they are often made of cellulose acetate.

<sup>95</sup> Staatscourant 2022, nr. 8376, 29 maart 2022, toelichting bij de Regeling van de Staatssecretaris van Infrastructuur en Waterstaat, van 29 maart 2022, nr. IENW/BSK-2022/50452, houdende regels inzake aangewezen kunststofproducten voor eenmalig gebruik (Regeling kunststofproducten voor eenmalig gebruik), p. 19 (toelichting).

<sup>96</sup> Ibid.

Ministerial Regulation must comply with what is known as Extended Producer Responsibility (EPR), in accordance with the provisions of the SUPD (see Section 4.3).<sup>97</sup> If a national ban on cigarette filters were introduced, the responsibilities that producers have according to the Ministerial regulation would slightly need to be revamped, as the responsibilities will be different in substance once filters are no longer allowed on the Dutch market.

## **6.5. Interim conclusion**

As mentioned above, much Dutch law relevant to a possible ban on cigarette filters is transposed directly from European law. Nevertheless, these standards are now enshrined in national rules and are therefore part of Dutch law. These national rules would need to be amended with the introduction of a national ban on cigarette filters. This section briefly outlined which national laws and regulations may impose additional restrictions on the national legislator with regard to imposing a national ban on cigarette filters and which parts would need to be amended if such a ban were to be introduced. We conclude that there are no further obstacles under Dutch law preventing the measure at issue, that would not exist under EU law.

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<sup>97</sup> In relation to tobacco products with plastic filters, this responsibility encompasses an obligation to pay a fee per filter, to an implementing organisation designated by the responsible Minister, Staatscourant 2022, nr. 8376, 29 maart 2022, p. 25; At the moment, 'Verpact' is the organization getting paid the money owed by the producers and engaging in cleaning up litter and raising awareness. Via: <https://www.afvalcirculair.nl/zwerfafval-microplastics/wegwerpplastic/vergoeding-gebiedsbeheerders-bijdrage-producenten/>; The fee owed by the producers is partly related to the costs incurred by area managers for taking measures raising awareness to combat excess litter and to prevent tobacco and smoking products from ending up as litter in the environment, in addition to the costs incurred for cleaning up that litter; those costs must also be reimbursed by the producers in accordance with their (estimated) share in the creation of litter. Producers are also expected to contribute to public collection systems and are required to take measures to raise awareness about the damaging effects of their products should they end up in the environment. Staatscourant 2022, nr. 8376, 29 maart 2022, p. 25 & 29 & 33.

## 7. Overall conclusion and recommendations

### Conclusion

- The following assessment is based on the measure described in the CE Delft report (see Section 3.2). The measure envisaged is a ban on the sale of all single-use cigarette filters. The ban applies to sales within the Netherlands and does not prohibit the smoking of cigarettes with filters. This means that smoking filtered cigarettes purchased abroad would still be permitted.
- To assess the legal feasibility of a national ban on cigarette filters, **it is necessary to distinguish between filters sold as part of a cigarette and filters sold separately for roll-your-own (RYO) cigarettes**. These are two different products subject to distinct legal regimes.
- We find that **the Tobacco Products Directive (TPD) is likely to prevent the Netherlands from prohibiting the sale of filtered cigarettes**. This conclusion is based on the combined application of Articles 7(7) and 24(1) TPD. We consider that the derogations contained in Article 24(3) TPD and Article 114(5) TFEU are unlikely to apply in this case, because of the specific conditions set in both provisions, that we believe are not met in this case. If the TPD was found not to prevent the Netherlands from acting, Articles 34-36 TFEU would be applicable. In that context, the measure might be found lawful because justified on environmental grounds, although doubts remain regarding its effectiveness and thus proportionality, due to the possibility of consumers purchasing cigarettes abroad or via the illicit market.
- For separate filters, the TPD does not apply and the measure must be assessed under Articles 34-36 TFEU alone. A national ban constitutes a restriction on the free movement of goods within the meaning of Article 34 TFEU but might be justified on environmental grounds. Based on the evidence available and applying the precautionary principle, **a ban on separate filters might be considered proportionate and lawful under Article 34 TFEU**, subject to the aforementioned reservations regarding its practical effectiveness.
- Any ban on cigarette filters would need to be notified under the Single Market Transparency Directive, and, if applicable, under Article 24(3) TPD or Article 114(5) TFEU.

### Recommendations

- Although the regulatory space for a ban on filtered cigarettes is very limited under the TPD, gathering more detailed data on the specific situation in the Netherlands and on the potential health benefits of such a ban could improve chances of success if relying on Article 24(3) TPD or Article 114(5) TFEU. Similarly, collecting more reliable data on the evolution of consumer behaviour following a ban, as well

as the consequences for illicit and cross-border tobacco trade, could strengthen the legal justification. We therefore encourage the Dutch government to gather such data.

- Banning cigarette filters is a measure advocated for by the WHO, which would bring substantial environmental benefits and could even help reducing smoking. It would be more effective if adopted at the EU level. **We therefore recommend that the Dutch government advocate for the enactment of such a measure at EU level.** This approach would alleviate the legal challenges identified in the present assessment, as well as address the problem of cross-border trade. The forthcoming revision cycles of the TPD and the SUP Directive provide an opportune moment to pursue such action.

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