

## The Netherlands

### The Tobacco Industry: A Caged Bird?

*Ebba Hoogenraad and Sarah Arayess\**

#### I. Tobacco law: Strict Advertising Rules

By the time this Country Report has been published, most people will have probably started to think about their New Year's resolutions. Besides losing weight and adopting a "spend less-save more" budget, the intention to quit smoking is traditionally a good old favourite. In line with this "end of year" tradition, this Country Report is devoted to laws regarding tobacco products. More in particular: the combination of tobacco, advertising and sponsoring. Although, strictly speaking, tobacco is not a food product, the reason for choosing this subject is that this area of law is rapidly developing and is a regular cause for discussion, both at the European and Dutch levels. In Brussels policy makers are discussing whether to introduce plain packaging, a type of packaging that is already obligatory in Australia<sup>1</sup>. Also, Ireland will, in all likelihood, follow in the coming years. In the Netherlands, there are strict rules regarding advertising and sponsoring tobacco products. These rules can be found in the Dutch Tobacco Act ("DTA").

#### II. Legal Framework: Ban on Advertising and Sponsoring

Article 5, section 1 of the DTA states: "*Every type of advertising or sponsoring is prohibited.*" This article in the DTA is based on Directives 98/43 EC and 2003/33/EC. The latter Directive as well as the DTA broadly define what is considered to be advertising. Article 2, sub b of Directive 2003/33/EC states: "*Advertising means any form of commercial communications with the aim or direct or indirect effect of pro-*

*moting a tobacco product.*" The DTA holds an even more comprehensive definition of advertising: "*Any act in commercial settings with the aim of stimulating the sale of tobacco products and any form of commercial communication with the aim or the direct or indirect effect of giving publicity to or promoting a tobacco product, with the inclusion of advertising with which, without expressly mentioning the tobacco product, it is tried to circumvent the ban on advertising by making use of a name, brand, symbol or any other distinguishing feature of a tobacco product.*" This broad definition has the effect that every type of advertising (direct or indirect) is prohibited, unless one of the very few exceptions applies. One of these exceptions is that tobacco stores products should be able to show tobacco products in their shop: the so-called normal presentation-exception. However, the exceptions to the broad prohibition should also be interpreted strictly. One example – that was even brought before the Dutch Supreme Court – concerned the (inconspicuous) display of a tobacco dispenser on the counter. The Supreme Court agreed with the Court of Appeal that this dispenser is no "normal presentation". Normal presentation is limited to showing the products for sale (and their prices) and nothing more. Therefore, according to the Supreme Court, the display of a dispenser is a (prohibited) addition to normal presentation since it (directly or indirectly) aims at advertising tobacco products. Hence, a farther-reaching form of advertising is not allowed.<sup>2</sup>

Also, "sponsoring" has a broad definition in Article 1, section e of the DTA: "*any public or private commercial contribution to an activity, event or person with the aim or the direct or indirect effect of giving publicity to or promoting a tobacco product.*" The definition of sponsoring in Directive 2003/33/EC is slightly different from the Dutch definition, e.g. "*'sponsoring' means any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product.*"

\* Hoogenraad & Haak advocaten, [www.hoogenhaak.nl](http://www.hoogenhaak.nl)

1 <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2014/02/06/beantwoording-kamervragen-over-sigarettapakjes-zonder-merksymbolen-plain-packaging.html>

2 HR 25 november 2011, ECLI:NL:HR:2011:BS8874.

### III. Cigarettes as a Reward for Services also Constitutes Advertising and Sponsoring

In September 2014, the Administrative High Court for Trade and Industry (In Dutch: "CBB") delivered judgment in a case regarding tobacco, advertising and sponsorship in higher instance. The facts in short: the Dutch Food and Consumer Product Safety Authority ("NVWA") started an inquiry in 2010 following a news item about a tobacco company. This article reported that the tobacco company hired a group of creative young people ("*creatives*") to participate in so-called brainstorming sessions and to come up with marketing strategies regarding a specific tobacco product. These creatives were rewarded with 24 or 48 cartons of cigarettes for their services per year. For the non-smokers, this means 240 or 480 packs of cigarettes per year. Furthermore, there were some creatives who were not present at the brainstorming session, but did receive the cigarettes. The NVWA thought this course of practice breached the prohibition in Article 5 DTA and started legal proceedings. The CBB answered two central questions in this judgment: i) is such a reward a proper course of business or does it qualify as a forbidden act of advertising or sponsoring? and ii) is the reward of cigarettes (for the persons that were not present at the brainstorming session but did receive the cigarettes) breaching the ban on giving tobacco products for free?

Knowing the legal landscape as set out above, it is interesting to see whether compensating the creatives for their services in cigarettes was also considered to be advertising or sponsoring. The CBB thinks so. The argumentation of the CBB, that goes deeper into the several different aspects of the case, is interesting to discuss.

The tobacco company argued that these cigarettes were made available to the creatives as a reward for their services. Furthermore, according to the company, it was necessary to give these cigarettes as "working materials" and to let the creatives get familiar with the "look and feel" of the product. The CBB found that such a large amount of cigarettes (240 or 480 packs) cannot be considered as "working materials". Remarkably, the company provided cigarettes from a different brand than the marketing campaign that they were working on. Furthermore, it was not possible for the creatives to get compensated with mon-

ey or in another way than in cigarettes. More importantly, in the opinion of the CBB, the sole fact that the cigarettes were seen as a reward for the work of the creatives implies that the cigarettes could not be regarded as working materials.

The CBB concluded that this reward in cigarettes is a type of "promotion of a tobacco product or the brand of this tobacco product(s)". By doing so, the tobacco company ensured that the creatives got familiar with this product. This does not only apply to the creatives themselves, but also to the persons that are able to see the creatives using these cigarettes. The CBB considered that the "promotional effect" of this payment was strengthened by the fact that the tobacco company deliberately hired influential young persons. Those "hipsters" can be considered as trendsetters and establish an example for others in their environment.

To summarize, in the opinion of the CBB, this practice violates both the prohibition on sponsoring as well as advertising tobacco products. The reward in cigarettes is considered to promote and/or advertise the product and/or brand of the tobacco company. Or, according to the CBB, this is a direct or indirect consequence of this reward. Furthermore, by doing so, the tobacco company stimulated the sale of tobacco products in general, which violates Article 5 of the Tobacco Act. The CBB applied its arguments to both advertising and sponsoring and did not make a distinction between these two acts. The financial penalty? EUR 125.000.

### IV. Stretching the Scope of Article 5

Based on the judgment of the CBB, question i) "Does article 5 of the Tobacco Act have such a broad scope that payment in cigarettes is also advertising?" needs to be answered affirmative.

The broad applicability of the CBB's ban on advertising and sponsoring falls in line with last year's approach in the Netherlands: the discouragement of the use of tobacco products. A few years ago, the government introduced a ban on smoking in the workplace, *horeca* (hotels, restaurants and cafes) and in public spaces. As of the 1st of January 2014, the minimum age for buying tobacco products increased from 16 to 18 years. Last summer, a report (assigned by the government) published the results of an investigation on the effects of a new restriction on to-

bacco retail outlets.<sup>3</sup> The “trend” on banning tobacco and tobacco-related products is ongoing and is in line with European developments, such as Tobacco Products Directive 2014/40/EC (“TPD”). This Directive includes several (stricter) rules regarding, for example, the display of warnings on tobacco products, the use of flavouring in cigarettes and e-cigarettes.

## V. Ban on Giving Tobacco Products For Free

In the case discussed in this article, another provision of the DTA played a role. The NVWA found that some of the persons got the reward (cigarettes) without being present at or participating in the first brainstorming session. Article 5, section 5 DTA prohibits to deliver tobacco products without financial consideration or a nominal consideration that directly or indirectly leads to or aims at advertising tobacco products. Because this specific brainstorming session was part of a more encompassing contract with the participants, the CBb found that this course of practice does not fall within the scope of aforementioned Article 5, section 5 DTA. The cigarettes were provided in exchange for services, i.e. not for “free”

(without financial consideration or a nominal consideration). Where the CBb applies a very broad definition of advertising, it narrows the scope of this section of Article 5 DTA. The CBb considered that since the tobacco company did not have the intention to give the cigarettes without financial consideration, this article was not violated. However, Article 5, section 5 of the Tobacco Act does not require the presence of intention to give products for free (or against a nominal consideration). This interpretation of the CBb is good news for the tobacco industry because it leaves some room for exceptions. If there is no intention (which also might be hard to prove) to give tobacco products for free, then there will be no breach of this article. Therefore, the CBb’s answer to question ii) is “no”. The reward of cigarettes (for the persons that were not present at the brainstorming session but did receive the cigarettes) does not violate the ban on giving tobacco products for free.

To conclude, the Tobacco Act has a very broad scope of application. The trend to ban tobacco products (or at least tobacco advertising) is ongoing and expanding. Although it may feel that there is no leeway for tobacco companies, there might be still some room left for specific exceptions, such as illustrated in this article by the CBb’s decision. Even though the bird sometimes feels like it is locked up, it seems there are some possibilities to open the cage – even if it is just for a while.

3 <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/30/economische-effecten-beperken-verkooppunten-tabak.html> (The report is written in Dutch).