

## ESTA Position on the Proposal for an Extended Smoking Ban in the Netherlands

*The European Smoking Tobacco Association (ESTA) represents mainly mid-sized companies including SMEs and several generation-old family-owned businesses. These companies manufacture and distribute fine-cut tobacco, pipe tobacco, traditional European nasal snuff and chewing tobacco. Many ESTA members are still rooted in their original locality and have moved from manufacturing and selling only locally, to truly European companies selling across the EU and beyond. Their traditional and artisan European tobacco products are part of European cultural heritage.*

### **Smokeless Tobacco Products in the Netherlands in perspective**

Smokeless Tobacco Products are niche products and have been in use for centuries. To put the use of traditional European chewing tobacco and nasal snuff in the Netherlands into perspective, these products have a market share of **0.0098%**.<sup>1</sup>

### **Smoking Ban for European Smokeless Tobacco Products**

The European Smoking Tobacco Association understands that the Dutch government is planning to extend the prohibition to smoke in public places, i.e. “het rookverbod” to the use of tobacco products that are not emitting any smoke resulting from combustion of tobacco or those which emit “vapour” resulting from heating of tobacco or nicotine liquids. The products include traditional European chewing tobaccos and traditional nasal snuff.

ESTA always supports smoking bans in effect to protect third parties from tobacco smoke. However, we fail to understand how the use of European traditional chewing tobacco and traditional nasal snuff, which do not emit smoke or vapour, would qualify under the aim to protect third parties against tobacco smoke or vapour.

We note that protection of third parties against environmental smoke resulting from cannabis or other similar substances use is not to fall under the smoking ban. Apparently, possible harmful effects on users or third parties are not a consideration where these products are concerned.

### **Smoking Ban – Legal History in NL**

On 1 April 2014, discussing the implementation of the 2014 Tobacco Products Directive, the then Secretary of State for Health explained the merits for an all-encompassing smoking ban, stating that the main rule of the Tobacco Law is complete protection from tobacco smoke as evidenced also by the legal history of the Tobacco Law (paraphrased).<sup>2</sup>

This is further underlined by the subsequent statement that the smoking ban is an implementation of the Framework Convention on Tobacco Control of the World Health Organisation, which solely is there to protect third parties against tobacco smoke.<sup>3</sup>

<sup>1</sup> Calculated on the basis of the total release for consumption of cigarettes, fine-cut tobacco and smokeless tobacco products in 2017 in NL, in Kg (and stick equivalent), based on the publicly available DG TAXUD’s table: “Release for consumption of fine cut tobacco 2002-2017 (in kg) and of cigarettes (in 1000 pieces)”, July 2018

<sup>2</sup> “de hoofdregel van de Tabakswet is dat volledige bescherming tegen tabaksrook slechts bereikt wordt door een rookverbod. Uniformiteit van het rookverbod is hiermee gewaarborgd. Deze hoofdregel blijkt ook uit de wetsgeschiedenis van de Tabakswet”. <https://zoek.officielebekendmakingen.nl/kst-33791-5.html>

<sup>3</sup> idem



### ***National Prevention Agreement – No reference to Traditional European Smokeless Tobacco Products***

The National Prevention Agreement of November 2018 states that the prohibition to smoke in public (enclosed) spaces will be extended to include the smoking of e-cigarettes (with or without nicotine) and related products. In this Prevention Agreement there is no mention of traditional European chewing tobacco or nasal snuff tobacco, and it clearly refers to products which are being smoked.

The sudden inclusion of European traditional nasal snuff and chewing tobacco under the smoking ban is therefore not founded in any discussion or consideration resulting from the National Prevention Agreement.

### ***Tobacco Free Environment versus Protection of Third Parties from Environmental Tobacco Smoke***

In the Explanation to the Draft Proposal changing the Tobacco Law (“Ontwerp Toeliching” – The Explanation) the new concept of tobacco-free environment is added to that of smoke free environment, but it is not included in the Tobacco Law. But again, in this context the only reference is made to e-cigarettes and novel products being heat-not-burn products.

The National Prevention Agreement does not in anyway explain what is to be understood with a tobacco-free environment. It is unclear how this new concept of tobacco-free environment fits with the Tobacco Law, in particular with that of the smoking ban protecting third parties from second-hand smoke. Secondly, the addition of this undefined concept could de facto lead to a prohibition of possessing any tobacco product in public (enclosed) spaces and the workplace, which would require at the very least a legal justification and definition on such a far reaching prohibition.

### ***The quoted scientific evidence actually concludes the opposite and cautions for its lack of evidence (1/2)***

In the Explanation, banning the use of traditional chewing and nasal snuff tobaccos under the smoking ban is based on the statement that its use is harmful to health. This Explanation departs from the main rule of the Tobacco Law as quoted above. Furthermore, the Explanation refers to a Meta-Study to justify its ban.

Perhaps the following statement in the quoted Meta-Study should have been heeded: *Conclusions about a product’s use and risks in one country may not be transferable to similar products in other countries.*<sup>4</sup>, and, *However, drawing conclusions about the health consequences of different types of ST products....based on limited data from a small sample set from specific localities could be very misleading.*<sup>5</sup>

It is necessary to clarify that the used quotes of the Meta-Study **do not** refer to European traditional nasal snuff or chewing tobacco, but the following quote of the same Meta-Study on traditional nasal snuff does: ***Existing studies on nasal use of snuff have not provided conclusive evidence of a relationship with cancer.***<sup>6</sup>

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<sup>4</sup> National Cancer Institute and Centers for Disease Control and Prevention. Smokeless Tobacco and Public Health: A Global Perspective. Bethesda, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention and National Institutes of Health, National Cancer Institute. NIH Publication No. 14-7983; 2014. Page 119

<sup>5</sup> Idem. Page 105

<sup>6</sup> Idem. Page 131



***The quoted scientific evidence actually concludes the opposite and cautions for its lack of evidence (2/2)***

To qualify in general the conclusions drawn in the Explanation that smokeless tobacco use causes various types of cancers, the following extensive quote from a Study referred to in the Meta-Study is helpful:

*A systematic review of the epidemiologic literature on the health effects of smokeless tobacco (ST) and its relevance to the harm reduction model for smoking was undertaken. Published epidemiologic studies, from the US and European countries, meeting defined inclusion criteria and assessing the health effects of smokeless tobacco products were examined. ST use showed evidence of a slightly increased risk for all-cause mortality. Little evidence was found to support a causal relationship between ST use and risk of oral, pancreatic or lung cancer. ST use was not associated with an increased risk of cardiovascular disease or stroke incidence, but evidence suggested ST use was associated with increased mortality from these diseases.....Overall, epidemiologic studies have not shown strong evidence of elevated tobacco-related disease risks with ST use.<sup>7</sup> This statement refers to smokeless tobacco products in general, whereas the earlier quotes from the Meta-Study clarify the scientific evidence in more particular for traditional European products.*

Furthermore, the parts of the Meta-Study that are of relevance for Europe, conclude that: ... *studies in Sweden have not observed that snus use among youth leads to cigarette use among adults, and, Little evidence is available about whether ST use precedes cigarette smoking in other countries, and transitioning from using ST to smoking is likely to depend heavily on social norms and tobacco industry marketing.<sup>8</sup>*

The Explanation includes statements that it could be conceivable that tobacco companies will use marketing strategies to make these products popular with youths. This statement not only lacks fact, it is far-fetched as the smokeless products in question fall under the Tobacco Law that does not allow any commercial communication (compared to the US where this statement refers to in the quoted Study), cannot be sold to minors, carry health warnings and will fall under the display ban at point of sale if put in place. These measures are also embedded in the Prevention Agreement.

It is entirely unclear to us how Dutch users of smokeless tobacco products would contribute to diminish the motivation of themselves or others to quit smoking (paraphrased).<sup>9</sup> The reference to Sweden stating that Dutch consumers may switch to snus is also a constructed argument without any evidence as clearly concluded in the studies referred to in the Explanation. In any case, and following the argument for the sake of it, switching of products would already have happened when the 2008 smoking ban came into place and this has not materialised.

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<sup>7</sup> Abstract: An epidemiologic review of smokeless tobacco health effects and harm reduction potential. <https://www.ncbi.nlm.nih.gov/pubmed/19796662>

<sup>8</sup> National Cancer Institute and Centers for Disease Control and Prevention. Smokeless Tobacco and Public Health: A Global Perspective. Bethesda, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention and National Institutes of Health, National Cancer Institute. NIH Publication No. 14-7983; 2014. Page 131/132

<sup>9</sup> Op deze manier kunnen deze producten er aan bijdragen dat de motivatie om met roken te stoppen wordt verminderd. Het is daarom van belang om ook deze producten onder het rookverbod te brengen. Toelichting uitbreiding rookverbod. Page 4.



### ***Proportionality***

To ban the use of a product, it is necessary to demonstrate that such a ban is proportionate to its effect. Since there is no effect of use on third parties, and since no evidence is presented that Dutch or European minors have started or would start using these products in absence of a ban of use under the smoking ban, or that smokeless tobacco use undermines quit rates of smokers, only assumptions remain. In absence of any discussion under the National Prevention Agreement and to justify a ban on use of a product based on assumptions does not constitute appropriate law making or good governance, i.e. principles of good care, fair-play, and justification.<sup>10</sup>

### ***Conclusion***

Concluding, the legal history of the Dutch Tobacco Law clearly defines the legal concept of the smoking ban being that to protect third parties against (tobacco) smoke. The National Prevention Agreement does not mention the inclusion of traditional chewing tobacco and traditional nasal snuff into the smoking ban and the webpage for the Consultation does not refer to it either. Only in two paragraphs of the Explanation to the changes to the Tobacco Law is it clarified that all tobacco products fall within the ban.

The Explanation justifies this inclusion based on studies that refer to other non-traditional European smokeless products, other (US) markets where commercial communication is still allowed, and totally ignores the experience of the use of traditional European smokeless tobacco products in Sweden. Importantly, the Explanation ignores the evidence that there is no relationship with cancer for traditional European nasal snuff and the lack of scientific evidence overall as clearly explained in the quoted Meta-Study.

**Given the above, ESTA holds that the reason for the inclusion of European traditional chewing tobacco and traditional nasal snuff under the ban is not substantiated by fact, not by the legal history of the Tobacco Law, not substantiated by scientific evidence, not proportional, not following the principles of good governance and is not a justifiable restriction as defined by EU Law.**

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<sup>10</sup>Algemene rechtsbeginselen, beginselen van behoorlijke wet- of regelgeving en beginselen van van behoorlijkbestuur: materiële zorgvuldigheidsbeginsel en evenredigheidsbeginsel

