

Chapter 8

Enforcement of Policies Against Illicit Trade in Tobacco Products in the Netherlands



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Abstract This Chapter describes and analyses the theory and practice of the enforcement of policies against illicit trade in tobacco products in the Netherlands. It provides an overview of the applicable Dutch legal framework and the implementation of the WHO Protocol to Eliminate Illicit Trade in Tobacco Products, the relevant authorities with their respective administrative and criminal investigative and sanctioning powers, and national and international cooperation. The main findings of this Chapter are that the Dutch authorities have increased their enforcement efforts concerning the phenomenon of illicit tobacco products, for example via the establishment of a specialised unit which focuses on illegal tobacco, different investigative priorities and enhanced forms of international cooperation with counterparts in other EU Member States. Moreover, the implementation of the WHO Protocol and EU legislation has addressed some of the ‘blind spots’ which complicated the enforcement efforts in previous years. Despite these positive developments, the illicit production and trade in illegal tobacco products remains difficult to combat effectively due to its complex and cross-border character.

8.1 Introduction

In October 2020, investigative officials from the Dutch special investigative service FIOD discovered a large illegal cigarette factory at a remote farm in the eastern part of the Netherlands. Several suspects were arrested and large quantities of cigarettes, tobacco and machinery were seized. According to FIOD, the scale and professionalism of the factory were remarkable and unlike anything the officials came across before: the whole production process—from tobacco leaf to finished package—was located at the farm, and enough materials and equipment were found to manufacture

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millions of illegal cigarettes. Unsurprisingly, the estimated loss of excise duties and other taxes concerned millions of euros.¹

The discovery of illegal factories and large seizures of cigarettes in the Netherlands is not a new phenomenon. The investigative services and mainstream media regularly report on successes in the fight against the illicit trade in tobacco products.² The annual loss of revenue for States due to illegal tobacco is significant, and the Dutch treasury alone lost over €50 million in 2018 according to the FIOD.³ Moreover, governmental efforts to discourage citizens from smoking via high excise duties are frustrated through the availability of cheap illegal tobacco products. Thus, enforcement in the field of tobacco products is essential and receives more attention on the international, European and national levels.

This Chapter describes and analyses the theory and practice of the enforcement of policies against illicit trade in tobacco products in the Netherlands. It provides an overview of the applicable Dutch legal framework and the implementation of the WHO Protocol to Eliminate Illicit Trade in Tobacco Products (the WHO Protocol), the relevant authorities with their respective administrative and criminal investigative and sanctioning powers, and national and international cooperation. The main findings of this Chapter are that the Dutch authorities have increased their enforcement efforts concerning the phenomenon of illicit tobacco products, for example via the establishment of a specialised unit which focuses on illegal tobacco, different investigative priorities and enhanced forms of international cooperation with counterparts in other Member States. Moreover, the implementation of the WHO Protocol and EU legislation has addressed some of the ‘blind spots’—e.g., the lack of licensing for manufacturing equipment—which complicated the enforcement efforts in previous years. Despite these positive developments, the illicit production and trade in illegal tobacco products remains difficult to combat effectively due to its complex and cross-border character.

¹ See: FIOD Belastingdienst (2020) De FIOD rolt grote illegale sigarettenfabriek op (FIOD dismantles large illegal cigarette factory).

² FIOD Belastingdienst (2019) FIOD rolt internationale criminele organisatie op in groot onderzoek met illegale tabak (FIOD dismantles international organised crime group during large investigation into illegal tobacco); FIOD Belastingdienst (2018) FIOD doet 4 aanhoudingen en neemt 45 miljoen sigaretten in beslag (FIOD makes four arrests and seizes 45 million cigarettes), also: Alleman (2019) Staatskas loopt miljoenen mis door illegale sigarettenfabrieken, FIOD breidt aanpak uit na vondsten in Brabant (Treasury loses millions due to illegal cigarette factories, FIOD increases efforts after discoveries in Brabant); Bouma (2018) FIOD neemt 45 miljoen sigaretten in beslag in Zuid-Holland (FIOD seizes 45 million cigarettes in South-Holland; Wassen (2018) FIOD rolt illegale sigarettenfabriek op in Lithoijen (FIOD dismantles illegal cigarette factory in Lithoijen).

³ See: Alleman (2019) Staatskas loopt miljoenen mis door illegale sigarettenfabrieken, FIOD breidt aanpak uit na vondsten in Brabant.

8.2 General Questions

8.2.1 *Basic Parameters for Illicit Trade in Tobacco Products (ITTP)*

The number of smokers in the Netherlands has long been in decline. In recent years, the percentage of people that smoke dropped from 24.2% (2014) to 20.4% (2019) of the population according to data from Statistics Netherlands (*Centraal Bureau voor de Statistiek*).⁴ The percentage of heavy smokers—i.e., people that smoke more than 20 cigarettes a day—also fell from 4.1% (2014) to 2.8% (2019). The percentage of men that smoke is higher than the percentage of women (23.7% and 17.1% respectively in 2019) and the percentage of people with a low social economic status that smoke is considerably higher compared to the percentage of people with the top social economic status (26.5% and 10.7% respectively in 2019).⁵ Each year, around 10,000 people die from smoking-related diseases according to Statistics Netherlands and the National Institute for Public Health and Environmental Protection (*Rijksinstituut voor Volksgezondheid en Milieu*).⁶

Tobacco products are legal in the Netherlands: it is allowed to produce cigarettes, cigars and smoking tobacco and sell them to consumers as long as the applicable legislation is complied with. Legal tobacco products can be bought at various locations such as specialised tobacco shops, supermarkets and gas stations, but also via the internet. It is difficult to establish how many illegal tobacco products—i.e., counterfeits, cheap whites, et cetera—are available in the Netherlands. In 2017, an estimated 950 million illegal cigarettes were brought on the Dutch market. This constituted 7.8% of the total annual consumption. Of the illegal products, 5.1% were cheap whites and 4.6% were counterfeits; the remaining 90.3% were non-categorised illegal cigarettes (see Chap. 3).⁷

8.2.1.1 The Dutch Government's Anti-Smoking Policy

The Dutch government has pursued an anti-smoking policy since the 1990s.⁸ Before that time, the government held the view that the choice to smoke or not to smoke was

⁴CBS Statline (2020) Leefstijl en (preventief) gezondheidsonderzoek; persoonskenmerken.

⁵CBS Statline (2020) Leefstijl en (preventief) gezondheidsonderzoek; persoonskenmerken. The social economic status is established on the basis of the highest level of education that a person has completed. People with a low social economic status have only completed their primary school education (*basisonderwijs*). The top of the social economic ladder consists of people that have obtained a university degree (master or doctorate).

⁶CBS Statline (2020) Overledenen; doodsoorzaak (uitgebreide lijst), leeftijd, geslacht, See: category 'C34 Maligne neoplasma van bronchus en long'.

⁷See also: KPMG (2018).

⁸Kamerstukken II 1998–1999, 26,472, nr. 3, 1; Kamerstukken II 1996–1997, 24,473, nr. 1.

personal and did not warrant influence from the side of the State. The introduction of the right to a smoke-free working space in the (old) Tobacco Act in 2004 is often regarded as a pivotal moment. Smoking has since been banned in an increasing number of public spaces, most notably in restaurants, cafes and other such establishments.⁹

An important development in the context of the anti-smoking policy of the Dutch government is the National Prevention Agreement (*Nationaal Preventieakkoord*) of November 2018.¹⁰ The Agreement constitutes a set of measures and actions that are aimed at enhancing public health in the Netherlands by reducing the number of people that smoke, are overweight or consume problematic amounts of alcohol. The Agreement has been concluded between the Dutch government and more than 70 different parties, such as civil society organisations, health funds, healthcare insurance companies, municipalities, sports associations and the corporate sector; the tobacco industry was not a party to the Agreement. The National Prevention Agreement establishes specific actions for all parties involved to further its goals. For this Chapter, the measures and actions that target smoking are relevant.

The Agreement recognises that smoking is a serious addiction which causes much personal and societal harm, and establishes a clear overall objective: in 2040, the percentage of the Dutch population that smokes should be reduced to 5% and young people and pregnant women should not smoke at all.¹¹ To achieve this aim, the National Prevention Agreement contains an integral set of measures that can be divided into several themes, most notably the creation of a smoke and tobacco free environment wherein tobacco products are made as unattractive and unavailable as possible. This theme is highly relevant in the present context as the National Prevention Agreement provides that a higher price of tobacco products through an increase in the excise duties that are levied is the premier tool to make tobacco products unattractive and unavailable. Therefore, the Dutch government has committed to raise excise duties in the coming years.¹² The Agreement recognises that illicit trade in tobacco products should be addressed and prevented as the effectiveness of increased excise tariffs will be undermined by the availability of illicit products. In that context, the ratification and implementation of the Protocol to Eliminate Illicit Trade in Tobacco Products and the introduction of an EU-wide track and trace system in accordance with Directive (EU) 2014/40/EU are explicitly mentioned.¹³ Thus, the fight against illegal tobacco products is inextricably linked to the goal of a healthy Dutch society and a smoke-free generation in 2040.

⁹Wet van 18 april 2002 tot wijziging van de Tabakswet (Law of 18 April 2002 to change the Tobacco Act), *Stb.* 2002, p. 201; After 1 January 2004, Article 11a of the Tobacco Act (old) established that employers were required to ensure that employees were able to perform their duties without nuisance or hindrance of smoking by others.

¹⁰Ministerie van Volksgezondheid, Welzijn en Sport (Ministry of Health, Welfare and Sport) (2018).

¹¹Ministerie van Volksgezondheid, Welzijn en Sport (2018), p. 13.

¹²Ministerie van Volksgezondheid, Welzijn en Sport (2018), p. 18.

¹³Ministerie van Volksgezondheid, Welzijn en Sport (2018), p. 19.

8.2.1.2 Fight Against Tobacco Products from Civil Society

The government's enduring anti-smoking policy and connected (legislative) actions and initiatives are not the only factors which increasingly marginalise the smoking habit and tobacco products. From civil society pressure is also exercised on both the tobacco industry and the Dutch legislator to limit the availability of tobacco products, or even ban them altogether. Two recent examples of such pressure are found in the case of Association Clean Air Netherlands (*Stichting Clean Air Nederland*) against the State, and an attempt to start criminal proceedings against the tobacco industry by Amsterdam-based lawyer Bénédicte Ficq.

In 2015, Clean Air Netherlands summoned the State before the District Court of The Hague in an attempt to completely ban smoking from restaurants, cafes and other such establishments. Under Dutch law, smoking in such locations was prohibited, but an exception was made for designated smoking areas. In practice, many cafes and bars had a closed-off room where people could smoke. Before the Court, Clean Air Netherlands argued that these designated smoking areas violated the obligation stemming from Article 8 of the WHO Framework Convention on Tobacco Control.¹⁴ That provision establishes that every person who enters indoor public places—e.g., restaurants and bars—should be protected from exposure to tobacco smoke. According to Clean Air Netherlands the existence of designated smoking areas was at odds with this aim, but the District Court did not follow this argument.¹⁵ However, this decision was overturned in appeal in early 2018 when the Court of Appeal of The Hague ruled that designated smoking areas were indeed at odds with the WHO Convention and should be banned.¹⁶ This judgement was confirmed by the Supreme Court of the Netherlands in September 2019.¹⁷

In September 2016, lawyer Bénédicte Ficq reported the four big tobacco companies that are active in the Netherlands—Philip Morris International, British American Tobacco, Japan Tobacco International and Imperial Tobacco Benelux—to the police on behalf of, inter alia, two women suffering from serious illnesses that were caused by smoking. In the report, the tobacco companies were accused of attempted murder or manslaughter, premeditated causing of grievous bodily harm, and forgery of documents. Although Ficq's attempt to have the tobacco industry prosecuted generated a lot of media attention and led to a virulent discussion in Dutch society, it was ultimately unsuccessful. The Public Prosecutor's Office decided not to start

¹⁴See: WHO Framework Convention on Tobacco Control, *Trb.* 2004, p. 269.

¹⁵Rb. Den Haag 14 September 2016, ECLI:NL:RBDHA:2016:11025.

¹⁶Hof Den Haag 13 February 2018, ECLI:NL:GHDHA:2018:172.

¹⁷Hoge Raad 27 September 2019, ECLI:NL:HR:2019:1449. After the judgement of the Court of Appeal, the State Secretary of Health, Welfare and Sport lodged an appeal in cassation. However, the ban of designated smoking areas was also mentioned in the National Prevention Agreement. Regardless of the outcome before the Supreme Court a ban of designated smoking areas was set to be in force in July 2022 at the latest, see: Ministerie van Volksgezondheid, Welzijn en Sport (2018), p. 20.

criminal proceedings and the Court of Appeal of The Hague did not overrule this decision in December 2018.¹⁸

8.2.1.3 The Costs of Tobacco in the Netherlands and Excise Duties

Although the Dutch government pursues an anti-smoking policy and has set the goal of a smoke-free generation in 2040, tobacco products remain legal and may be sold and purchased in the Netherlands. Tobacco products are expensive: a normal pack of 20 cigarettes costs between €7 and €9 in 2020 depending on the brand. This price is heavily influenced by the applicable excise duties and, to a lesser extent, value added tax. As mentioned above, excise duties constitute one of the most important tools to deter people from purchasing tobacco products in the view of the Dutch legislator. Therefore, the excise duties have been increased several times in recent years and are set to be raised further.¹⁹

The excise tariffs for tobacco products are found in the Excise Duty Act (*Wet op de accijns* - WA). Since 1 April 2020, Article 35 (1) Excise Duty Act establishes that the excise duty for cigars constitutes an ad valorem excise of 8% of the weighted average price (WAP). The excise duty of cigarettes is made up by an ad valorem excise of 5% of the WAP and a specific excise duty of €219.25 per 1000 cigarettes. The WAP is established each year by the Dutch Tax and Customs Administration and amounts to €324.47 per 1000 cigarettes since 1 April 2020.²⁰ The total amount of excise duties for cigarettes cannot be lower than €238.31 per 1000 cigarettes. For smoking tobacco—e.g., shisha tobacco—a specific excise duty of €155.97 per kilogram is established which applies since 1 April 2020. Apart from excise duties, a value added tax of 21% is also levied under Dutch law. Consequently, the tax burden on tobacco products is very high.²¹ In 2019, the Dutch treasury received €2.547 billion in excise duties levied on tobacco products; this amount is slightly

¹⁸Hof Den Haag 6 December 2018, ECLI:NL:GHDHA:2018:3334.

¹⁹See: Wet van 20 december 2017 tot wijziging van enkele belastingwetten en enige andere wetten (Belastingplan 2018) (Act of 20 December 2017 to change certain tax legislation and certain other legislation (Taxation Plan 2018)), *Stb.* 2017, p. 517; Articles VIIIB, VIIC and VIID establish that the excise duties will be raised further between 2019 and 2021. For example, the ad valorem tax for cigars will go from 7% in 2019 to 9% in 2021 and the specific tariffs for cigarettes and smoking tobacco are raised from €175.20 and €108.94 in 2019 to €180.32 and €119.59 in 2021 respectively. The National Prevention Agreement states that a normal package of 20 cigarettes should cost €10 in 2023. See: Ministerie van Volksgezondheid, Welzijn en Sport (2018), p. 18.

²⁰See: Belastingdienst (2020) *Tariefenlijst accijns en verbruiksbelastingen 2020*.

²¹For example, cigarettes have a tax burden of 94% in 2020. The calculation is as follows. The excise duty consists of 5% ad valorem excise of €324.47—i.e., €16.22—plus the standard tariff of €219.25 per 1000 cigarettes. This leads to an excise duty of €235.48. However, the minimum is set at €238.31. A value added tax of 21% of the WAP—i.e., €68.14—is then added. The tax burden is €306.45 of €324.47. Thus, it constitutes 94% of the WAP per 1000 cigarettes in 2020.

lower than in the previous year (€2.669 billion), but higher compared to 2015 (€2.222 billion), 2016 (€2.491 billion) and 2017 (€2.397 billion).²²

8.2.2 Strategy to Combat ITTP

8.2.2.1 Competent Authorities in the Context of Tobacco Products: Overview

The Minister of Health, Welfare and Sport (*Minister van Volksgezondheid, Welzijn en Sport*) has been designated as the competent authority within the Tobacco and Related Products Act (*Tabaks- en rookwarenwet*—TRW). This means that the Minister is responsible for enforcing the substantive rules on, inter alia, the quality and technical requirements of tobacco products, the advertisement and sale of such products, and smoking prohibitions at various locations. He can impose administrative fines if the legislation is not complied. De facto, the enforcement tasks are mainly carried out by officials of the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenautoriteit*—NVWA).

Excise duties from the WA constitute state taxes within the meaning of the State Taxes Act (*Algemene wet inzake rijksbelastingen*). Consequently, excise duties fall under the ministerial responsibility of the Minister of Finance (*Minister van Financiën*). In accordance with the Implementing Regulation Tax and Customs Administration 2003 (*Uitvoeringsregeling Belastingdienst 2003*—UrB 2003) the Tax and Customs Administration (*Belastingdienst/Douane*) is tasked with the levy and collection of excise duties. In practice, this task is carried out by the eight regions of the Tax and Customs Administration.²³

In the context of criminal investigations and prosecution the Dutch Public Prosecution Service (*Openbaar Ministerie*—OM) constitutes the central authority.²⁴ The OM falls under the responsibility of the Minister of Justice and Security. The National Public Prosecutor's Office for Financial, Economic and Environmental Offences (*Functioneel Parket van het Openbaar Ministerie*—FP/OM) is specifically charged with criminal investigations and prosecution into large-scale fraud.²⁵ In that role, it leads the investigations of the Fiscal Intelligence and Investigation Service (*Fiscale Inlichtingen en Opsporingsdienst*—FIOD) and the Intelligence and Investigation Service of the Netherlands Food and Consumer Product Safety Authority (*Inlichtingen- en Opsporingsdienst van de Nederlandse Voedsel- en Warenautoriteit*—NVWA/IOD).

²²CBS Statline (2020) Overheid; ontvangen belastingen en wettelijke premies.

²³Uitvoeringsregeling Belastingdienst 2003 (Implementing regulations Tax Administration 2003), *Stcrt.* 2002, p 247; See: Article 3 (3) (a) and (b) UrB 2003.

²⁴For a detailed description of the Dutch OM and its tasks, see: Corstens et al. (2018), p. 120.

²⁵Corstens et al. (2018), p. 128.

The FIOD and NVWA/IOD are so-called special investigation services within the meaning of the Special Investigation Services Act (*Wet op de bijzondere opsporingsdiensten—Wet BOD*).²⁶ In the Wet BOD, four special investigation services were established for the criminal enforcement in particular policy fields which function under the Minister who is responsible for that policy field. The FIOD is tasked with the investigation of, inter alia, fiscal offences and fraud; excise fraud falls within its mandate. Institutionally, the FIOD is part of the Tax and Customs Administration and resorts under the Ministry of Finance. The NVWA/IOD is charged with the investigation of serious crime within the field of competence of the NVWA—e.g., food safety regulation—and functions under the auspices of the Ministry of Economic Affairs.

8.2.2.2 Enforcement Policy in the Context of Illicit Trade in Tobacco Products

In the Netherlands, enforcement in the context of illegal tobacco products is geared towards supporting the anti-smoking policy of the Dutch government and ensuring the regular flow of excise duties into the treasury.²⁷ Protecting the interests of the tobacco industry and preventing distortion of competition on the market of tobacco products is explicitly *not* striven towards, although trademark counterfeiting of tobacco brands is prosecuted by the authorities.²⁸ The NVWA and the NVWA/IOD have tasks which relate to tobacco products, particularly concerning compliance with administrative obligations stemming from the TRW and its lower legislation. In that regard, the authorities are primarily responsible for ensuring compliance with rules on, inter alia, the quality of tobacco products and smoking prohibitions. Although illegal tobacco products may surface during their monitoring and investigative measures specific enforcement is concentrated with the other authorities in practice. Therefore, the enforcement policies concerning excise fraud of the Tax and Customs Administration, FIOD and FP/OM merit particular attention.

Tax and Customs Administration Each year the Tax and Customs Administration establishes its enforcement priorities in its Enforcement Plan (*Handhavingsplan*). Excise fraud and illegal tobacco products have a place within the plan and are part of the total enforcement efforts. Customs carries out controls based on risk analysis to

²⁶Wet op de bijzondere opsporingsdiensten (Special Investigative Services Act), *Stb.* 2006, p. 285; Aside from the FIOD and NVWA/IOD the Wet BOD also established the Inspectorate Social Affairs and Employment Division Investigation (*Inspectie Sociale Zaken en Werkgelegenheid, Directie Opsporing*) and the Human Environment and Transport Inspectorate Intelligence and Investigation Service (*Inspectie Leefomgeving en Transport, Inlichtingen- en Opsporingsdienst*).

²⁷The Hague, Ministerie van Volksgezondheid, Welzijn en Sport (2018) Nationaal Preventieakkoord. Naar een gezonder Nederland (National Prevention Agreement. Towards a healthier Netherlands).

²⁸Personal interview FIOD (January 2019).

ensure compliance with the applicable legislation at the external borders of the Customs Union, most notably in the Port of Rotterdam. Each year containers with illegal cigarettes are intercepted and ‘cleared’ by Customs. Controls also take place in the interior of the Netherlands, particularly at excise warehouses and excise sales locations (see Sect. 8.3.2). These controls are performed by a specialised group of customs officials that receive regular training, for example to recognise counterfeits.²⁹

Fiscal Intelligence and Investigation Service The FIOD is a highly specialised service with regional teams that perform large-scale criminal investigations into various forms of fraud, including excise fraud. Investigative officials from FIOD can rely upon various investigative powers and can, *inter alia*, perform systematic surveillance of suspects and controlled deliveries (see Sect. 8.6.1). They can also conduct searches, often in cooperation with officials from the Dutch police and the Tax and Customs Administration. Between 2016 and 2018, FIOD has given special focus to the phenomenon of illicit trade in tobacco products in the so-called Smoke Screen Project. The Smoke Screen Project concentrated on analysis and international cooperation. Moreover, the special expertise of the FIOD shifted from investigations into illegal tobacco products with the aim of seizing them towards the organised crime groups which were perceived as the driving forces behind the production of and trade in illicit tobacco products.³⁰ Instead of seizing shipments of tobacco products immediately the FIOD regarded them as valuable starting points for criminal investigations and opted for controlled delivery as often as possible. It should be noted that the aforementioned shift of focus did not mean that *no* cigarettes were seized in the Netherlands. The number of cigarettes seized per annum between 2013 and 2017 are still high at 101,335,720 (2013), 82,887,320 (2014), 123,529,580 (2015), 86,260,480 (2016) and 56,936,877 (2017) cigarettes respectively.³¹ The Smoke Screen Project came to an end in 2018, but the project’s approach has been incorporated into a permanent cluster of the FIOD. Since 1 January 2019, the Smoke Cluster—which is located at the Rotterdam office—focuses on intelligence, analysis, international cooperation and coordination of national investigations concerning illegal tobacco products.³² With the establishment of the Smoke Cluster, the FIOD has invested heavily in the number people working on the fight against illicit trade in tobacco products. Between 2016 and 2018, the Smoke Screen Project consisted of 15–16 fte and was tasked with intelligence, analysis, international cooperation and conducting investigations. From January 2019 onwards, the analysis team of the Smoke Cluster in Rotterdam *alone* has 12–14 fte available. In other words, there is roughly the *same* amount of fte available for *fewer* tasks which can, consequently, receive even more specialised attention. Moreover, an additional 30–32 fte has been

²⁹Reply by Landelijk Kantoor Douane to written questions (January 2019).

³⁰Personal interview FIOD (January 2019).

³¹Data kindly provided by FIOD (November 2018); Data on seizures in 2018, 2019 and 2020 were not available to the author.

³²Personal interview FIOD (January 2019).

allocated to the Smoke Cluster within the broader FIOD organisation for criminal investigations.

Public Prosecution Service The Public Prosecutor at the specialised FP/OM leads the large-scale investigations by FIOD concerning illicit tobacco products. A Designated National Public Prosecutor for Excise Fraud (*Nationaal officier van justitie accijnsfraude*) has been appointed.

8.2.3 Legal Framework of Combatting ITTP

8.2.3.1 National Legislative Framework

First and foremost, the Excise Duty Act (*Wet op de accijns*) and the Tobacco and Related Products Act (*Tabaks- en rookwarenwet*) merit attention. In short, the former establishes rules on, inter alia, excise duties for tobacco products and administrative obligations concerning the location where tobacco products can be produced legally, whereas the latter establishes miscellaneous administrative obligations with regard to, among other things, the quality and technical requirements of tobacco products, the advertisement and sale of such products, and smoking prohibitions at various locations. The WA and TRW are elaborated upon in lower legislation. The Excise Duty Implementing Decree (*Uitvoeringsbesluit accijns—UbA*) and Excise Duty Implementing Regulation (*Uitvoeringsregeling accijns—UrA*) provide further rules and administrative obligations concerning excise duties. Similarly, the Tobacco and Related Products Decree (*Tabaks- en rookwarenbesluit—TRb*) and Tobacco and Related Products Regulation (*Tabaks- en rookwarenregeling—TRr*) build on the TRW and provide additional rules.

In addition to the WA and TRW, other legislation is also relevant. The provisions of the State Taxes Act (*Algemene wet inzake rijksbelastingen—AWR*) apply to excise duties, and the General Customs Act (*Algemene douanewet—ADW*) and the Union Customs Code (UCC) should be complied with if tobacco products are imported to or exported from the EU. The Dutch Criminal Code (*Wetboek van Strafrecht—WvSr*) and the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering—WvSv*) should be mentioned, because they contain provisions on substantive and procedural criminal law that are relied upon for criminal enforcement with regard to illicit trade in tobacco products (see Sects. 8.4 and 8.6.1). Furthermore, some breaches of substantive legislation constitute so-called ‘economic offences’ within the meaning of the Economic Offences Act (*Wet op de economische delicten—WED*) and are governed by its special rules. During administrative proceedings, the rules from the General Administrative Law Act (*Algemene wet bestuursrecht—Awb*) should be taken into account.

8.2.3.2 The Protocol to Eliminate Illicit Trade in Tobacco Products

For this Chapter, the WHO Protocol constitutes an important legal source of international law. The Netherlands signed the Protocol in 2014 and it has become applicable in the Dutch national legal order in 2020.³³ To implement the international obligations stemming from the WHO Protocol the Dutch legislator has adopted or amended various provisions in national legislation. For example, an administrative requirement for manufacturing equipment for tobacco products and a due diligence obligation concerning the sale of tobacco products were introduced into the WA and TRW respectively (see Sects. 8.3.1 and 8.3.2). Most of the new or amended provisions have entered into force on 1 October 2020, but some have been postponed until early 2021.³⁴

8.3 Supply Chain Control and Other Administrative Law Obligations

8.3.1 Administrative Obligations Stemming from the Excise Duty Act

The WA establishes the applicable fiscal legal framework for the context of excise duties and, consequently, for tobacco products. One of the central concepts of the Act is the excise good (*accijnsgoed*) (Articles 1 (1) (f) and 1a (1) (a) WA). Excise duties are levied on certain categories of goods, such as alcoholic drinks, petrol and tobacco products. A tobacco product (*tabaksproduct*) within the meaning of the WA is tobacco which has been processed for consumption in the form of cigars, cigarettes and smoking tobacco.³⁵ For these products, the WA and its delegated

³³ Protocol To Eliminate Illicit Trade In Tobacco Products, *Trb.* 2014, p. 155.

³⁴ Besluit van 31 augustus 2020, houdende vaststelling van het tijdstip van inwerkingtreding van de artikelen II tot en met V van Wet van 8 april 2020 tot goedkeuring en uitvoering van het op 12 november 2012 te Seoul tot stand gekomen Protocol tot uitbanning van illegale handel in tabaksproducten (*Trb.* 2014, 155) (Decision of 31 August 2020 concerning the determination of the moment of entry into force of the Act of 8 April 2020 concerning the approval and implementation of the Protocol To Eliminate Illicit Trade In Tobacco Products) (*Stb.* 2020, 150), *Stb.* 2020, p. 237; Besluit van 15 september 2020, houdende wijziging van het Besluit van 31 augustus 2020, houdende vaststelling van het tijdstip van inwerkingtreding van de artikelen II tot en met V van Wet van 8 april 2020 tot goedkeuring en uitvoering van het op 12 november 2012 te Seoul tot stand gekomen Protocol tot uitbanning van illegale handel in tabaksproducten (*Trb.* 2014, 155) (*Stb.* 2020, 150) (Decision of 15 September 2020 to change the Decision of 31 August 2020 concerning the determination of the moment of entry into force of the Act of 8 April 2020 concerning the approval and implementation of the Protocol To Eliminate Illicit Trade In Tobacco Products) (*Stb.* 2020, 237), *Stb.* 2020, p. 347.

³⁵ See: Articles 29, 30 and 31 WA. Raw tobacco does not fall within any of the three categories of tobacco products and, thus, does not constitute an excise good within the meaning of the WA.

legislation establish various administrative obligations. In that context, it is important to acknowledge at the outset that raw tobacco—i.e., tobacco which has *not* been processed for consumption—does not fall under the aforementioned definition of tobacco products. This has several repercussions that will be addressed below and in other parts of this Chapter.

8.3.1.1 Licensing and Control Systems

Excise Warehouses Under Dutch law, it is prohibited to produce an excise good outside a location that has been designated as an excise warehouse (*accijnsgoederenplaats*) for a particular category of excise goods, for example tobacco products (Article 5 (1) (a) WA). On the basis of Article 39 WA a location can only be used as an excise warehouse if a license has been issued by the Inspector of the Tax and Customs Administration. A request for a license can be made to the Inspector, but not everyone can make such a request when the license concerns an excise warehouse for tobacco products (Article 74 WA). The request should provide details concerning the category or categories of excise goods the excise warehouse will be used for, the amount of excise goods that will be produced annually, the person on whose name the license should be issued, the administration and the administrative organisation regarding the location which is designated as an excise warehouse, and the location and set-up of the aforementioned location. The applicant is not required to provide information concerning documentation or a declaration regarding any criminal records, but a license can be refused if the applicant has been convicted for excise fraud in the 5 years prior to the request (Article 43 WA).³⁶ In accordance with the UbA, the license holder of an excise warehouse is required to maintain an administration which entails an orderly overview of all details and corporate actions that are relevant for a correct levy of the excise duties. This should include, inter alia, the excise goods that have been released for consumption and the invoices that have been received for them.

Manufacturing Equipment For a long time, manufacturing equipment for tobacco products was not covered by administrative obligations such as a license. Consequently, anyone was free to buy, sell or transport such machinery. However, the Dutch legislator introduced specific provisions into the WA concerning manufacturing equipment which is *exclusively* used to produce tobacco products in April 2020.³⁷ These provisions will enter into force on 1 January 2021.³⁸ In short, the

³⁶Kamerstukken II 2019–2020, 35,356, nr 3, p. 18.

³⁷See: Wet van 8 april 2020 tot goedkeuring en uitvoering van het op 12 november 2012 te Seoul tot stand gekomen Protocol tot uitbanning van illegale handel in tabaksproducten (Act of 8 April 2020 concerning the approval and implementation of the Protocol To Eliminate Illicit Trade In Tobacco Products) (Trb. 2014, 155), *Stb.* 2020, p. 150.

³⁸Besluit van 15 september 2020, houdende wijziging van het Besluit van 31 augustus 2020, houdende vaststelling van het tijdstip van inwerkingtreding van de artikelen II tot en met V van Wet

new Article 90a WA establishes that it is not allowed to release in circulation, produce, possess, transport to another Member State or export to third country manufacturing equipment for tobacco products without a license. Exceptions to this requirement are possible in accordance with lower legislation, for example if a producer or importer of tobacco is already in the possession of a license for an excise warehouse. In such cases, the obligations stemming from the WHO Protocol are fulfilled and do not require an additional license which specifically concerns the manufacturing equipment.³⁹

Other Control Systems Aside from licensing, tobacco products are also subjected to miscellaneous systems of control on the basis of national and European legislation. For example, Member States are required to maintain a digital database with relevant economic operators and excise warehouses for the rapid exchange of that information within the EU.⁴⁰ Goods which are imported into or exported from the EU are subjected to customs supervision and require a customs declaration; the customs declaration is used to control and follow goods.⁴¹ The WA provides regulation for the transport of excise goods that have not yet been released for consumption.⁴² This administrative obligation covers, inter alia, the transport of excise goods from one excise warehouse to another or from an excise warehouse to a registered addressee in another Member State. The transport should be covered by an electronic administration document (eAD) which is drawn up and submitted by the license holder of the excise warehouse from which the excise goods are transported (Article 2 UbA). A printed copy of the eAD should be given to the person that accompanies the transported goods and this copy has to be shown to the competent authorities during controls. Lastly, the track and trace system (see Sect. 8.3.2) entails that a unique identification mark is placed upon tobacco products which allow them to be followed.⁴³

8.3.1.2 Raw Tobacco and Other Key Inputs

Raw Tobacco As mentioned earlier, raw tobacco does not constitute an excise good within the meaning of the WA. Consequently, it is not mandatory that raw

van 8 april 2020 tot goedkeuring en uitvoering van het op 12 november 2012 te Seoul tot stand gekomen Protocol tot uitbanning van illegale handel in tabaksproducten (Trb. 2014, 155)(Stb. 2020, 150)(Stb. 2020, 237), *Stb.* 2020, p. 347.

³⁹ Kamerstukken II 2019–2020, 35,356, nr 3, p. 17.

⁴⁰ Kamerstukken II 2019–2020, 35,356, nr 3, p. 15; See also: Council Regulation (EU) No 389/2012, OJ L 121/1.

⁴¹ Kamerstukken II 2019–2020, 35,356, nr 3, p. 15; See also: Article 5 (16) and (13) UCC.

⁴² If goods have been released for consumption, they are no longer covered by these specific regulations on transport. In such cases, the single requirement under the WA is that the excise duties have been levied in accordance with the Act.

⁴³ Kamerstukken II 2019–2020, 35,356, nr 3, p. 16.

tobacco is produced at a location which has been designated as an excise warehouse, and no license is required for its production. The WHO Protocol establishes that all Member States shall endeavour to license, to the extent considered appropriate, the growing of tobacco. The Dutch legislator has opted not to introduce such a license, because tobacco is almost exclusively purchased from abroad and not produced in the Netherlands. Hence, licensing was not appropriate in the eyes of the legislator.⁴⁴ The transport and trading of raw tobacco is governed by administrative obligations. The origin of raw tobacco and tobacco which has been partially processed for consumption should be demonstrated on the basis of documents during transport (Article 35 UbA). Moreover, a person should be in the possession of a special license for trading in raw tobacco (Article 36 UbA). This license will be issued by the Inspector. It should be noted that trading in raw tobacco without a license only constitutes a minor criminal offences, whereas, inter alia, production of excise goods without a license amount to a crime under Dutch law (see Sect. 8.4.1) This has important repercussions. For example, various investigative measures cannot be relied upon (see Sect. 8.6.1).

Other Key Inputs Aside from raw tobacco several key inputs—e.g., cigarette filters and acetate tow—are required to produce tobacco products. Specific rules for key inputs are not found in the WA; they do not constitute excise goods and are not subjected to specific obligations such as the manufacturing equipment. Thus, it is legal to assemble key inputs even when no license to produce tobacco products is obtained. Even though the question could be raised for which ends other than the production of tobacco products the aforementioned materials can be used they are not covered by norms and, consequently, are beyond the enforcement scope of the Dutch authorities. At the moment the raw tobacco and key inputs are brought together through the use of the manufacturing equipment to make cigarettes, an excise good within the meaning of the WA is created. From that moment onwards, the administrative obligations apply in full.

8.3.2 *Administrative Obligations Stemming from the Tobacco and Related Products Act*

8.3.2.1 Sale of Tobacco Products in the Netherlands

In principle, tobacco products can be sold legally anywhere in the Netherlands, also via the internet and at duty-free sale locations.⁴⁵ At present, no specific license is required under Dutch law for the sale of tobacco products within the Netherlands. The WA establishes several administrative obligations regarding excise warehouses, but these warehouses do not correspond to the locations where consumers buy their

⁴⁴ Kamerstukken II 2019–2020, 35,356, nr 3, p. 18.

⁴⁵ Kamerstukken II 2019–2020, 35,356, nr 3, pp. 22–23.

tobacco products, for example specialised tobacco shops, supermarkets and gas stations. Such locations can be referred to as excise goods sale points (*accijnsverkooppunten*) and are not subjected to the same kind of administrative obligations as excise warehouses. Although the WHO Protocol establishes that all Member States shall endeavour to license, to the extent considered appropriate, the sale of tobacco products the Dutch legislator has opted not to introduce such an obligation. This may change in the future as Dutch Ministry of Health, Welfare and Sport will investigate options—including licensing—to limit the number of sale points of tobacco as part of the efforts to restrict the availability of tobacco products.⁴⁶

It should be ensured that only tobacco products for which the excise duties have been paid in accordance with the applicable fiscal legislation are sold at these excise goods sale locations, internet and duty-free sale locations. Additionally, the norms stemming from the TRW and its delegated legislation should be complied with. For example, various locations are mentioned where tobacco products may not be sold—e.g., governmental buildings and schools—and tobacco products should be presented in a neutral and factual manner without any advertisement. It is prohibited to sell tobacco to people below the age of 18. It should be noted that a retailer that offers tobacco products for cross-border distance selling should be registered at the Minister of Health, Welfare and Sport, but the registration does not constitute licensing.⁴⁷

8.3.2.2 Track and Trace System

In 2020, the track and trace system as required by the WHO Protocol and EU law was introduced into the TRW with the implementation of Directive 2014/40/EU.⁴⁸ In 2017, the European Commission adopted Implementing Regulation (EU) 2018/574 and Delegated Regulation (EU) 2018/573 to facilitate the required track and trace system; both instruments apply directly in the Dutch legal order and do not require implementing legislation.⁴⁹ All producers and importers of tobacco products are required to mark the tobacco products they produce or import with a unique identifier (UI) (Article 4a TRW). This UI should provide information on, among

⁴⁶Kamerstukken II 2019–2020, 35,356, nr 3, p. 18.

⁴⁷See: Article 5.5 TRb. In practice, the registration takes place digitally at the website of the NVWA.

⁴⁸Kamerstukken II 2018–2019, 35,204, nr 3, 1 and 4. See also: Wet van 4 december 2019 tot wijziging van de Tabaks- en rookwarenwet houdende implementatie van de artikelen 15 en 16 van Richtlijn 2014/40/EU inzake de procedure en de verkoop van tabaksproducten (Act of 4 December 2019 to change the Tobacco and Related Products Act to implement Articles 15 and 16 of Directive 2014/40/EU concerning the procedure and sale of tobacco products), *Stb.* 2019, p 478; Directive 2014/40/EU, OJ L 127/1.

⁴⁹Kamerstukken II 2018–2019, 35,204, nr 3; See: Commission Implementing Regulation (EU) 2018/574, OJ L 96/7; Commission Delegated Regulation (EU) 2018/573, OJ L 96/1.

other things, the date and place of manufacturing, manufacturing facility and description of the product.⁵⁰ All market parties which are involved in the trade in tobacco products—from the manufacturer to the last economic operator before the first retail outlet—should register the movements of the products (Article 4c TRW). To that avail, they should register the actions which are mentioned in Implementing Regulation (EU) 2018/574, such as the entry of all products into their possession, as well as all intermediate movements and the final exit.⁵¹ The parties which are involved in the supply chain of tobacco products should keep record of all relevant transactions too (Article 4c TRW).

8.3.2.3 Due Diligence and Security and Preventive Measures

Since October 2020, the TRW establishes a due diligence obligation for all producers, importers and exporters of tobacco, tobacco products and manufacturing equipment for tobacco products (Article 11). This obligation entails that producers, importers and exporters should identify their customers before and during their relationship, and should keep an administration concerning sales to assess whether the amount of products which are bought are compatible with the demand for such products on the regular markets. According to the Dutch legislator, due diligence means that producers, importers and exporters should obtain and update information concerning, inter alia, the possession of a license by the customer, the identity of the customer or the location where manufacturing equipment will be placed, and should register that information.⁵² Under Dutch law, customers can be all natural and legal persons.⁵³

As mentioned, the due diligence obligation requires that producers, importers and exporters should keep an administration. This also allows the relevant market parties to identify ‘suspicious transaction’ and report them to the authorities, and allows the authorities to demand such information and identify such transactions themselves.⁵⁴ In that regard, it should be mentioned that several options and obligations to report possible offences to the authorities, for example to report unusual transactions on the basis of the Anti-Money Laundering and Anti-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*) or report criminal offences to the police.⁵⁵

⁵⁰ Kamerstukken II 2018–2019, 35,204, nr 3, p. 10.

⁵¹ Kamerstukken II 2018–2019, 35,204, nr 3, p. 12.

⁵² Kamerstukken II 2019–2020, 35,356, nr 3, p. 19, p. 37.

⁵³ Kamerstukken II 2019–2020, 35,356, nr 3, p. 36.

⁵⁴ Kamerstukken II 2019–2020, 35,356, nr 3, p. 2.

⁵⁵ Kamerstukken II 2019–2020, 35,356, nr 3, p. 22.

8.3.3 Compliance with the Protocol to Eliminate Illicit Trade in Tobacco Products

Based on the aforementioned assessment of the relevant Dutch legislation it can be concluded that national law is largely in compliance with the obligations which can be discerned from the WHO Protocol. In short, the international obligations stemming from the WHO Protocol have been implemented in the Dutch legal order, or will be implemented in the near future. The WA has long featured the obligation of a license for the production of tobacco products, and also establishes rules concerning the transport of tobacco products within the Netherlands. From 1 January 2021, manufacturing equipment for tobacco products will be subjected to licensing as required by the WHO Protocol, but the Dutch legislator has opted not to introduce licensing for the growing of raw tobacco due to its limited relevance for the Netherlands. This is not at odds with the WHO Protocol as it encourages the Member States to take such action when appropriate. The trade in tobacco products is also controlled via miscellaneous systems, for example through customs obligations and the track and trace system. Thus, national law will soon comply with the obligations from Article 6 of the WHO Protocol.

The TRW provides rules on the quality, look and advertisement of tobacco products, but also features a track and trace system. Although the introduction of this system concerned the implementation of Directive (EU) 2014/40/EU it complies with the relevant requirements from the WHO Protocol too (Article 8). Additionally, the TRW establishes the due diligence obligation which is mandatory on the basis of the WHO Protocol (Article 7). This obligation also concerns the primary implementation of the security and preventive measures as required by the Protocol (Article 10). The Dutch legislator has decided not to introduce a license for the sale of tobacco for the time being, but a license may be introduced in the near future as part of an effort to limit the number of tobacco sale points. The Netherlands had opted to regulate the online sale of tobacco products, and the aforementioned rules apply *mutatis mutandis* in such cases; this also applies to duty-free sales (Articles 11 and 13). The Netherlands has no free-trade zones and, thus, cannot implement the relevant obligations stemming from the WHO Protocol.

8.4 Definition of Offences and Sanctions

The phenomenon of illicit trade in tobacco products is broad, complex and many-faceted. At the outset, it is important to stipulate that no specific provision exists under Dutch law which refers to or targets illicit trade in tobacco products as such. Consequently, the term of ‘illicit trade in tobacco products’ is used in this Chapter to describe and refer to the *phenomenon as a whole in all its different forms*. In practice, various criminal and administrative offences are relied upon by the authorities in the enforcement of policies against the production and sale of

illegal tobacco products. The relevant offences do not explicitly recognise that the phenomenon of illicit trade in tobacco products has a distinct transnational character; in short, they are focused on the national Dutch context, but leave room for cross-border aspects to be taken into account when relevant. It will be shown that the relevant offences comply with the international obligations concerning punitive enforcement stemming from the WHO Protocol.⁵⁶

8.4.1 Definition of Offences

8.4.1.1 Illegal Production and Possession of Tobacco Products

The most important *criminal* offence to counter illicit tobacco products is found in Articles 5 and 97 WA. Article 5 (1) (a) and (b) WA states that it is forbidden to produce an excise good outside an excise warehouse without a license, and that it is forbidden to have in one's possession excise goods on which the excise duties have not been levied in accordance with the WA. Article 97 WA establishes that the person that violates this prohibition with intent commits a crime.

Before the different elements of the offence are discussed, two remarks should be made. Firstly, it should be acknowledged that it follows clearly from the wording of Articles 5 and 97 WA that the offence does not target tobacco products in particular, but is applicable to all excise goods equally.⁵⁷ Secondly, in the context of Articles 5 and 97 it is neither relevant which kind of tobacco product is produced or possessed illegally nor under which category of illegal tobacco products—e.g., cheap whites, counterfeit cigarettes or counterfeit cheap whites—the product can be shared.⁵⁸ Instead, it is important that the tobacco products fit the statutory definition of the WA, that they are produced with a license and that the excise duties are paid when the products are brought on the Dutch market. Evidently, this does not mean that cases concerning the illegal production or possession cannot have a cross-border dimension; in fact, the vast majority of cases certainly *do* have such a dimension and concern, inter alia, the smuggling of cigarettes from other Member States or third countries to the Netherlands.

The prohibition of illegal production of excise goods is straightforward. Production constitutes every action through which an excise good is created or which changes the composition of an excise good (Article 1a (1) (w) WA). This production

⁵⁶See: Kamerstukken II 2019–2020, 35,356, nr 3, pp. 24–25.

⁵⁷See, e.g.: Rb. Rotterdam 10 August 2020, ECLI:NL:RBROT:2020:7013 (cigarettes); Hof 's-Hertogenbosch 4 March 2020, ECLI:NL:GHSHE:2020:771 (cigarettes and shisha); Rb. Overijssel 5 December 2019, ECLI:NL:RBOVE:2019:4571 (shisha and smoking tobacco).

⁵⁸See: Hof 's-Hertogenbosch 4 March 2020, ECLI:NL:GHSHE:2020:771; This case concerned the possession of cigarettes and smoking tobacco (shisha). The cigarettes were of the brand Em@il. Em@il is a so-called 'cheap white', but still falls under the scope of the WA. The suspect was prosecuted on the basis of Articles 5 and 97 WA; See: Chap. 3.

can take place legally if a license has been issued by the Inspector (Articles 39 WA). Thus, the production is by definition illegal if such a license is lacking. Possession of excise goods within the meaning of Article 5 (1) (b) WA is more complex. The element of possession is central to the offence and requires that several factors are fulfilled. Firstly, goods should be in the presence of the offender. In this context, it is not required that the goods are in the direct presence of the offender, but rather that the offender has power over them. This power over the goods is the second factor. Consequently, the first two factors are closely connected and are often taken together.⁵⁹ The last factor is the knowledge of the offender as to the possession of the goods. In the context of the WA, the offender should know that he has excise goods in his possession on which the duties have not been levied. Articles 5 and 97 WA apply to illegal production and possession which is committed *intentionally* (*opzettelijk*). This intent can be established when an offender knowingly and deliberately violated the prohibition, but conditional intent also suffices under Dutch law. Conditional intent (*voorwaardelijk opzet*) requires that the person was aware that a real risk existed that the production or possession was illegal, but continued his actions and, thus, accepted this risk.⁶⁰

Since 1998, cases of illegal possession or production of tobacco products where criminal intent cannot be established—e.g., in case of negligence—fall outside the scope of Articles 5 and 97 WA and constitute an *administrative* offence on the basis of the AWR.⁶¹ Excise duties constitute taxes paid on the basis of self-assessment (Article 53 WA). Consequently, the provisions in the AWR concerning such taxes apply *mutatis mutandis* to excise duties. Article 67c AWR establishes that the Inspector can impose a negligence penalty (*verzuimboete*) in the context of taxes paid on the basis of self-assessment if the tax subject does not pay, does not pay in full or does not pay in time.

Difficulties Concerning the Element of Knowledge Articles 5 and 97 WA only apply to illegal production or possession committed with intent. As explained above, this intent should at least concern conditional intent and, thus, requires that the person was aware that a real risk existed that the production or possession was illegal, but continued his actions and accepted this risk. It is not enough that it is established that the suspect knew that he had cigarettes in his possession, but it should be proven that the suspect knew that those cigarettes were *illegal*. It follows from analysed case law that the element of knowledge (*wetenschapsvereiste*) can lead to problems in practice. A good illustration of these problems is found in a

⁵⁹See: Rb. Arnhem 23 February 2012, ECLI:NL:RBARN:2012:BV6496; Rb. Overijssel 4 May 2020, ECLI:NL:RBOVE:2020:1669; Rb. Overijssel 25 June 2020, ECLI:NL:RBOVE:2020:2145.

⁶⁰De Hullu (2012), p 225; See: Rb. Overijssel 25 June 2020, ECLI:NL:RBOVE:2020:2147; Rb. Gelderland 18 June 2015, ECLI:NL:RBGEL:2015:3994.

⁶¹Kamerstukken II 1995–1996, 24,800, nr. 3, p. 3.

judgement of the Supreme Court.⁶² The case concerned a suspect who had been arrested whilst unloading a truck in a warehouse. In the warehouse many boxes filled with cartons of cigarettes were stored. These boxes specified on the cover that they contained cigarettes. When investigative officials opened a box they discovered the cartons did not have excise stamps. The investigative officials stated that they had also seen opened boxes and packs of cigarettes without excise stamps in the warehouse. The suspect was convicted for illegal possession of almost ten million cigarettes, but the Supreme Court overturned that judgement. In its ruling, the Supreme Court stated that the available sources of evidence could not prove that the possession was committed with intent. The circumstance that the suspect was unloading a truck does not warrant the conclusion that he knew that the cigarettes were illegal or was aware that a real risk existed that they were illegal. The fact that the investigative officials saw opened boxes and packages without excise stamps does not mean that the suspect had also seen them, according to the Supreme Court.⁶³ If it would have been established that the suspect *had* seen the cigarettes packs without excise stamps and still continued his work conditional intent would have been proven.⁶⁴

8.4.1.2 Illegal Production or Possession of Manufacturing Equipment for Tobacco Products

As of 1 January 2021 it will constitute a *criminal* offence to release in circulation, produce, possess, transport to another Member State or export to third country manufacturing equipment for tobacco products without a license (Articles 90a and 99 WA).⁶⁵ The offence constitutes a crime if it is committed by a person who knows or should know that the manufacturing equipment is intended to or will be intended to evade excise duties. In the absence of a *mens rea* element, it will constitute a minor criminal offence. If manufacturing equipment is located in an excise warehouse for which a license was obtained it will not be required to apply for an additional license for the equipment.⁶⁶

⁶²Hoge Raad 26 June 2012, ECLI:NL:HR:2012:BW9194; See also: Rb. Rotterdam 10 August 2020, ECLI:NL:RBROT:2020:7015. Nearly 16.5 million illegal cigarettes were discovered in a warehouse which belonged to the suspect, but he stated that he rented the warehouse to a Polish couple. Although it was established that the rental contract was fake it could not be proven that the suspect had known about the production of illegal cigarettes in his warehouse. Therefore, he was acquitted.

⁶³Hoge Raad 26 June 2012, ECLI:NL:HR:2012:BW9194; See also: Opinion A-G Machielse 26 June 2012, ECLI:NL:PHR:2012:BW9194.

⁶⁴HR 7 april 2020, ECLI:NL:HR:2020:602; See also: Opinion A-G Paridaens 18 February 2020, ECLI:NL:PHR:2020:152.

⁶⁵Kamerstukken II 2019–2020, 35,356, nr 3, p. 24.

⁶⁶Kamerstukken II 2019–2020, 35,356, nr 3, p. 25.

8.4.1.3 Miscellaneous Obligations in Excise Matters

As mentioned above, the provisions of the WA are elaborated upon in delegated legislation. The UbA establishes additional administrative obligations with regard to, inter alia, the license for an excise warehouse (Articles 8), the demonstrability of origin during the transport of raw or partially processed tobacco (Article 35) and the requirement of a license for trading in raw tobacco (Article 36). A failure to comply with various norms and duties found in the UbA is prohibited. For example, it constitutes an offence to trade in raw tobacco without a license (Article 42). These offences constitute minor *criminal* offences (*overtredingen*) under Dutch law.

8.4.1.4 Counterfeiting or Forgery of Stamps

Article 216 WvSr establishes that it constitutes a *criminal* offence to counterfeit or forge stamps that have been issued by the State with the intent to use these stamps as real and genuine. The intention (*oogmerk*) mentioned in the Article requires a determinedness to use the counterfeited or forged stamps as real and genuine and, thus, mislead third parties that are unaware of this deceit. In this context, conditional intent is not enough; there should be an awareness of certainty or high degree of probability (*zekerheid- of noodzakelijkheidsbewustzijn*).⁶⁷ Excise stamps fall under the scope of Article 216 WvSr. For example, one judgement shows that a group of suspects brought containers filled with counterfeit cigarettes from China via Antwerp to the Netherlands. In Antwerp or the Netherlands they applied fake excise stamps to the cigarettes to give the impression that the cigarettes were legal and that the excise duties had been paid. However, the suspects were observed by Belgian and Dutch investigative officials and apprehended when they were unloading the illegal cargo at a warehouse. Then, the fake excise stamps were discovered. Subsequently, the suspects were prosecuted on the basis of, inter alia, Article 216 WvSr.⁶⁸

8.4.1.5 Trademark Counterfeiting

Article 337 WvSr concerns trademark counterfeiting. The provision establishes that it constitutes a *criminal* offence under Dutch law to knowingly import, transit, export, sell, offer for sale, deliver, distribute or store false, falsified or unlawfully produced brands.⁶⁹ In the context of illegal tobacco products, the provision can be

⁶⁷ De Hullu (2012), p. 243.

⁶⁸ See, e.g.: Rb. Gelderland 18 June 2015, ECLI:NL:RBGEL:2015:3994.

⁶⁹ Article 337 WvSr only covers private brands. The wording in Dutch of the provision—“merken”—can be understood to refer to both private brands and marks, such as excise stamps. Counterfeiting of the latter does not fall under the scope of Article 337 WvSr, but can be addressed via Article 216 WvSr.

used to address cases which concern counterfeit tobacco products, most notably cigarettes. Such products are by definition not produced by the legitimate holder of the trademark, but by another party that used the trademark to give the impression that the products are real. Article 337 WvSr requires intent. This intent should be established with regard to the actions mentioned in the provision—importing, exporting, selling, et cetera—but should also cover the fact that the goods were false, falsified or unlawfully produced and constituted an infringement of a registered trademark in the Netherlands. Conditional intent suffices.

Although the various categories of illegal cigarettes—i.e., cheap whites, counterfeit cigarettes, et cetera—are irrelevant for the application of Articles 5 and 97 WA, they are important for prosecution for trademark counterfeiting. Cigarette brands such as Jin Ling and Minsk are cheap whites (see Chap. 3) and do not constitute registered trademarks in the Netherlands. Although they can be counterfeited, such counterfeits do not fall within the meaning of Article 337 WvSr.

The investigative authorities assess whether a case also concerns trademark counterfeiting and whether the offender can be prosecuted for that offence too.⁷⁰ Apart from the fact that trademark counterfeiting entails a different criminal accusation than fiscal fraud and, thus, serves the protection of additional legal interests, prosecution on the basis of Article 337 WvSr also paves the way for confiscation of illegally obtained assets via the criminal proceedings. As a rule, confiscation for fiscal offences is not allowed in accordance with Article 74 AWR.⁷¹ Trademark counterfeiting is not a fiscal offence. Therefore, confiscation via the criminal proceedings is available for illegally obtained assets obtained through the counterfeiting. Although this option exists and is technically interesting, the added value is limited in practice.⁷² Additional tax assessments (*fiscale naheffing*) can be imposed in fiscal matters. Those assessments are usually high and will leave no further assets that can be recovered. The illegal cigarettes which have been seized by the authorities will be withdrawn from circulation and are destroyed (see Sect. 8.4.3).

8.4.1.6 Forgery of Documents

Under Dutch law, it constitutes a *criminal* offence to forge a document which is aimed to serve as evidence of a legal act with the intention to use it or have it used by others as a real and unforged document (225 WvSr). Similarly to the counterfeiting or forgery of marks the criminal intention requires a determinedness to use a forged documents as a real documents and, thus, mislead third parties that are unaware of the forgery. Conditional intent is not enough; there should be an awareness of certainty or high degree of probability.⁷³ Practical examples of cases of forgery of

⁷⁰Personal interview FIOD (January 2019).

⁷¹De Zanger (2018), pp. 60–61.

⁷²Personal interview FIOD (January 2019).

⁷³De Hullu (2012), p. 243.

documents in the context of illicit tobacco products concern, inter alia, establishing a lawful company in a notarial deed with the aim of using that company as a cover for criminal activities or using a forged bill of lading.⁷⁴

8.4.1.7 Obstruction of the Authorities and Failure to Provide Information

The person who intentionally refuses to comply with an order or demand of the authorities or intentionally prevents, obstructs or foils their lawful actions commits a *criminal* offence (Article 184 WvSr). In tax and customs legislation, special provisions are found which also concern the obstruction of the authorities. For example, it constitutes a minor offence if a person does not comply with various administrative obligations from the UCC (Articles 10:6 and 10:7 ADW). On the basis of Article 47 AWR, the Inspector can request information for the purpose of the establishment of the tax debt. The Article provides that every person is obliged to provide the Inspector with the data and information which may be relevant with regard to the levy of his taxes, and the books, records and other information carriers or its content the consultation of which may be relevant for the establishment of the facts that are relevant for the levy of taxes. In accordance with Article 49 AWR, the data and information should be provided in a clear, firm and unconditional manner within the term set by the Inspector. If the person who is under the obligation to provide (access to) the information and materials mentioned in Article 47 does not comply or provide the Inspector with false information, this constitutes a minor *criminal* offence (*overtreding*) on the basis of Article 68 AWR. If the person refuses—i.e., with *intent*—to provide the required information he commits a crime in accordance with Article 69 (1) AWR.⁷⁵

8.4.1.8 Offences Relating to Obligations from the Tobacco and Related Products Act

The administrative obligations stemming from the TRW and its lower legislation—e.g., the rules concerning the quality of tobacco products, their presentation to the public and advertisement, track and trace, and due diligence—are enforced via administrative *and* criminal law. In short, it constitute an *administrative* offence to breach obligations from the TRW and its lower legislation which can lead to the imposition of an administrative fine (Article 11b). However, breaches of the TRW

⁷⁴See: Rb. Midden-Nederland 4 April 2017, ECLI:NL:RBMNE:2017:2290 and Hof Arnhem-Leeuwarden 21 February 2018, ECLI:NL:GHARL:2018:1580 (forged notarial deed); Hoge Raad 7 April 2020, ECLI:NL:HR:2020:627; Rb. Rotterdam 22 June 2017, ECLI:NL:RBROT:2017:6211; Hof 's-Hertogenbosch 9 May 2008, ECLI:NL:GHSHE:2008:BD8167 (forged bill of lading).

⁷⁵Bakker (2019), p. 287.

also concern minor *criminal* offence on the basis of Article 1⁰⁴ WED.⁷⁶ It should be noted that a choice has to be made between the two enforcement tracks in a particular case; it is not allowed to impose an administrative fine *and* opt for criminal prosecution in the same case (see Sect. 8.5.2).

8.4.1.9 Attempt to Commit Crimes

The attempt to commit a crime constitutes a *criminal* offence if the intention of the offender has become clear through overt acts towards the commission of an offence which have been carried out by the offender (Article 45 (1) WvSr). An attempt is only possible for *crimes*, ie, the grave offences for which a custodial sentence can be imposed; an attempt to commit a minor criminal offence is not possible. Moreover, the attempt should not concern a general intention to commit crimes, but rather the intention to commit a *specific* crime.

The central criterion of Article 45 (1) WvSr is that the intention of the offender has become clear through overt acts towards the commission of an offence which have been carried out by the offender. Thus, emphasis is placed on the facts and circumstances of the case and—in particular—the actions of the offender. The Supreme Court has ruled that overt acts towards the commission of an offence are acts that aimed at committing the offence on the basis of their external appearance.⁷⁷

Attempt to Illegally Produce or Possess Excise Goods An attempt can be committed with regard to all *crimes*. Article 45 WvSr does not feature a limitation as to the character or elements of the crime; it suffices that an offence is a crime under Dutch law. An interesting question is whether it is possible to commit an attempt in the context of all crimes *in practice*. The opinions of legal scholars have long differed on this topic, especially with regard to so-called formally defined crimes (*formeel omschreven misdrijven*). Formally described crimes are offences that are committed when a specific act is performed or state exists without requiring a subsequent effect.⁷⁸ A good example in the context of this Chapter is found in the illegal production or possession of excise goods or, in the future, manufacturing equipment for tobacco products. Because formally defined crimes criminalise an act or state it has been held that the room for an attempt to commit such a crime is very limited or even impossible. In 2015, the Supreme Court confirmed that an attempt to commit a formally defined crime is possible when it passed judgement in a case concerning an attempt to possess a firearm and upheld the conviction by the Court of Appeal.⁷⁹

⁷⁶Kamerstukken II 2019–2020, 35,356, nr 3, p. 39.

⁷⁷HR 24 October 1978, ECLI:NL:HR:1978:AC6373; See: De Hullu (2012), p. 378; Ter Haar et al. (2018), p. 249.

⁷⁸See: Vetzo (2016), p. 843; Ter Haar et al. (2018), p. 249.

⁷⁹Hoge Raad 30 June 2015, ECLI:NL:HR:2015:1769.

Although an attempt to produce or possess illegal tobacco products is possible, an analysis of case law shows that it is sometimes difficult to prove such an attempt. An illustration of the problems is found in a recent case before the Court of Appeal of 's-Hertogenbosch. The suspect was arrested in a warehouse in which, among other things, manufacturing equipment, raw tobacco, cigarette filters and cigarette packages were found; in short, all the required means to produce cigarettes were present in the warehouse. The suspect did not possess a license to produce excise goods at the warehouse. It could not be established that the suspect himself had assembled the production means and the Court of Appeal argued that the mere fact that the suspect had the key to the warehouse and was present when investigative officials from FIOD entered the premises was not enough to prove that he had made an essential contribution to overt acts towards the illegal production of cigarettes.⁸⁰

8.4.1.10 Preparatory Acts Concerning Crimes

In accordance with Article 46 WvSr preparatory acts constitute a *criminal* offence if they concern a crime for which the statutory maximum of the custodial sentence is set at 8 years or more. The Article provides a limitative list of preparatory acts: with intent acquiring, producing, importing, transiting, exporting or possessing objects, substances, information carriers locations or means of transportation which are destined for committing a crime. It follows from the wording of the provision that preparatory acts are only applicable with regard to the most serious crimes (*ernstige misdrijven*); other crimes and minor criminal offences are excluded. Consequently, it can be concluded that preparatory acts with regard to the relevant offences in the context of this Chapter cannot lead to criminal liability for preparatory acts under Dutch law. It will be shown that the statutory maximum custodial sentence for all offences is well below the required threshold of 8 years. Moreover, several offences do not constitute crimes.

8.4.2 Sanctions and Other Measures

8.4.2.1 Criminal Law Sanctions

In accordance with Article 9 WvSr, the main penalties under Dutch law are: (i) custodial sentence, (ii) detention, (iii) community sentence, and (iv) the pecuniary fine (*geldboete*). A combination of sanctions is possible. The custodial sentence is temporary or for life and the maximum pecuniary fine depends on the applicable fine

⁸⁰Hof 's-Hertogenbosch 12 June 2018, ECLI:NL:GHSHE:2018:2471.

category of Article 23 WvSr.⁸¹ The maximum penalties that can be imposed for an offence are found in its statutory provision. It follows from Articles 5 and 97 WA that a person that illegally produces or possesses tobacco products with intent can be punished with a custodial sentence for a maximum of 4 years and/or a fine of category four (€20,750). If the amount of the excise duties which have not been paid is higher than the statutory maximum fine of category four, the maximum of the fine is raised to that amount instead. The maximum penalties for trademark counterfeiting (Article 337 WvSr) and forgery of documents (Article 225 WvSr) are set at one-year imprisonment and/or a fine of category five (€83,000), and 6 years imprisonment and/or a fine of category six (€830,000) respectively. A maximum of 6 years imprisonment and/or a fine of category five can be imposed for counterfeiting or forgery of stamps (Article 216 WvSr) and participation in a criminal organisation (Article 140 WvSr) is threatened with a maximum custodial sentence of 6 years and/or a fine of category five. The refusal to provide required information on the basis of Article 47 AWR can be punished with a custodial sentence of 4 years and/or fine of category four. If the amount of taxes lost exceeds the statutory maximum the amount is raised to the amount of taxes lost instead.

8.4.2.2 Administrative Fines

Administrative fines are punitive sanctions concerning the imposition of a fine by an administrative authority (Article 5:40 Awb).⁸² The maximum amount of administrative fines is established in accordance with the law. Article 11b TRW features for which breaches of the TRW administrative fines can be imposed, and which *maximum* amount applies. For example, violations of the rules on, inter alia, markings with an UI for track and track (Articles 4a and 4b) and due diligence (Article 11) are threatened with a maximum fine of €450,000, if the offence is committed by a producer, wholesaler or importer of tobacco products; in all other cases, the maximum penalty is €4500. The *actual* amount of the administrative fine which is imposed, follows from the Annex to Article 11b TRW. All administrative offences are placed in a category of offences and each category has a fixed fine amount which can be increased in specific circumstances. Administrative fines for violations of the TRW can be imposed by the NVWA or the Tax and Customs Administration.⁸³

⁸¹ In accordance with Article 23 WvSr, the maximum pecuniary fines that can be imposed are set at €415, €4150, €8300, €20,750, €83,000, and €830,000 for categories one to six respectively. Article 23 (7) WvSr provides additional punitive potential for legal persons: if a legal person is convicted and the applicable statutory maximum does not offer an adequate punishment, the first higher category can be applied. If the highest category does not offer adequate punishment, a maximum fine of 10% of the annual turnover of the legal person in the previous year can be imposed.

⁸² Lamp et al. (2019), pp. 84–85.

⁸³ Kamerstukken II 2019–2020, 35,356, nr 3, pp. 8–9.

The negligence penalty within the meaning of Article 67c AWR also constitutes an administrative fine.⁸⁴ In accordance with the provision, the maximum amount of the negligence penalty is set at €5278. The Inspector decides on the amount of the fine on the basis of the Administrative Fine Tax and Customs Administration Decree (*Besluit bestuurlijke boeten Belastingdienst*—BBBB). The Inspector should, as a rule, impose a fine of 10% of the taxes that have not been levied (§ 24 BBBB and Article 67c AWR). This percentage can be lowered, but the fine may never be less than €50 or higher than the statutory maximum of €5278. Next to the administrative fine taxes which have not been levied will also be demanded through an additional tax assessment.

8.4.2.3 Seizure and Confiscation of Illegally Obtained Assets

Under Dutch law, seizures constitute taking possession or going to take possession of objects by for the purpose of criminal investigations (Article 134 WvSv).⁸⁵ Article 94 WvSv defines with which aim goods can be seized during a criminal investigation: to establish the truth and confiscate illegally obtained assets, or for the purpose of forfeiture or removal from circulation. Tobacco products constitute goods within the meaning of the aforementioned provisions and can be seized, most notably to destroy them. The *power* to seize goods is found in various provisions, for example in the WvSv and AWR (see Sect. 8.6.1).

The confiscation of illegally obtained assets on the basis of Article 36e WvSr is not allowed for fiscal offences in accordance with Article 74 AWR.⁸⁶ The fact that confiscation is excluded in fiscal matters is not problematic as the taxes that have not been levied as a result of an offence can be recovered via an additional tax assessment.⁸⁷ The additional tax assessment constitutes an administrative tax procedure. In accordance with Article 53 WA excise duties constitutes a tax on the basis of self-assessment. Therefore, the general provisions concerning such taxes from the AWR apply: the Inspector can impose an additional tax assessment for the amount of taxes which has not been paid (Article 20 AWR). It should be noted that the tax procedure can take place if no criminal proceedings are started and—even when taking place simultaneously—constitutes a separate procedure with an autonomous aim.

Illegal tobacco products that are seized during an investigation will be withdrawn from circulation in accordance with Article 36c WvSr and subsequently destroyed. Article 117 WvSv establishes that confiscated goods should be destroyed under the authorisation of the OM if they are of such a nature that their uncontrolled possession violates the law or the general interest. Illegal tobacco products fall under the scope

⁸⁴Boezelmans and Gijsen (2019), pp. 268–269.

⁸⁵Corstens et al. (2018), pp. 559–560.

⁸⁶De Zanger (2018), pp. 60–61; See also: Hoge Raad 4 July 2017, ECLI:NL:HR:2017:1229.

⁸⁷Cf. Van Bleeck et al. (2013), p. 248.

of this criterion and it follows from the wording of Article 117 WvSv that it is not possible to bring illegal tobacco products back on the market.⁸⁸ In accordance with Article 118 WvSv and the Confiscated Goods Decree goods such as illegal cigarettes and manufacturing equipment are stored and destroyed by the State Property Service Movable Goods (*Domeinen Roerende Zaken van het Ministerie van Financiën*).⁸⁹

Seizures in Practice

In recent years, the FIOD and the OM have not focused on the seizure of illegal cigarettes. Instead, the capacity and expertise of the FIOD is used to investigate the criminal networks that are behind the illegal tobacco products with the aim of dismantling them. There are several reasons for this approach.⁹⁰ Firstly, the extremely high profit margin of illegal tobacco makes a focus on seizure unfeasible and ineffective. Although many containers with cigarettes are intercepted, others make it through; the enormous number of goods that are transported within the EU and imported from third countries make the control of all containers and lorries impossible. The profit margin of illegal tobacco ensures that criminal organisation will still make profit if shipments of cigarettes are seized. Secondly, a focus on seizures may also constitute an obstacle for international cooperation. Illicit trade in tobacco products is an international phenomenon and requires cooperation between the authorities of different countries to adequately address the criminal activities and organisations. If enforcement authorities focus on the seizure of tobacco in their national jurisdiction and measure their investigative effectiveness on the basis of the number of seizures, they will be less willing to be involved in international operations focusing on, inter alia, the controlled delivery of illegal tobacco. Instead, the cigarettes are seized within the confined national sphere and without taking enforcement action against the international organisations that are behind the shipments. The FIOD and the OM propagate a change in the investigative approach and share experiences with their counterparts in other European countries; in several other countries, the focus on seizure is indeed abandoned, for example in Sweden and the United Kingdom.⁹¹

⁸⁸ Article 117 (2) WvSv provides that goods of such a nature that their uncontrolled possession violates the law or the general interest can only be authorised to be destroyed (*wordt slechts een machtiging tot vernietiging verleend*).

⁸⁹ Besluit inbeslaggenomen voorwerpen, *Stb.* 1995, p 699 (amended by *Stb.* 2012, p 603); See: Article 1 (i) Besluit inbeslaggenomen voorwerpen.

⁹⁰ Personal interview FIOD (January 2019).

⁹¹ Personal interview FIOD (January 2019).

8.4.3 Relation to Other Offences

8.4.3.1 Participation in a Criminal Organisation

Participation in a criminal organisation (Article 140 WvSr) is a *criminal* offence which is highly relevant in the context of this Chapter. Criminal organisations play a central role in the production and possession of illegal tobacco and, thus, are often the subjects of criminal investigations. The large-scale production and sale of illegal tobacco products requires logistics, technical expertise, manpower and financial means that are virtually impossible to assemble alone (see Chap. 3). An analysis from case law shows that many cases which are prosecuted before Dutch criminal courts concern criminal organisations, albeit on different scales and in various forms. For example, one case concerned an organised crime group of 12 suspects which was involved in the large-scale production and possession of counterfeited cigarettes, whereas another case ‘only’ concerned an organisation of two natural persons and one company.⁹²

It follows from Article 140 WvSr that a criminal organisation entails an organisation which has the intention to commit crimes. It follows from Dutch case law that an organisation within the meaning of the provision entails an association with a certain durability and structure between the suspect and at least one other person.⁹³ Durability and structure are closely connected; a rather loose association of people that have worked together for a long time and a well-structured yet recent association can both fit the definition of an organisation. Secondly, the organisation should have the intent to commit *crimes*. It is neither required that this intention has been explicitly stipulated when the organisation started, nor that the intention concerned specific crimes, nor that all members of the organisation had the intention to commit the crimes which were committed.⁹⁴ In practice, the intention of the organisation can be seen as a ‘common aim’ which is established based on the facts and circumstances of the case; particular relevance is attributed to the actions of the suspects. For example, recorded telephone calls where the suspects repeatedly talk about the purchase and sale of cigarettes far below the legal price and the absence of excise stamps points towards the existence of an organisation with the *intent* to commit crimes.⁹⁵ Lastly, the suspect should participate in the organisation. In that regard,

⁹²See: Rb. Rotterdam 10 August 2020, ECLI:NL:RBROT:2020:7013. See also: Hof Arnhem-Leeuwarden 21 February 2018, ECLI:NL:GHARL:2018:1580; Rb. Midden-Nederland 4 April 2017, ECLI:NL:RBMNE:2017:2290.

⁹³De Hullu (2012), p. 424; If the suspect has only worked together with his accomplices once the existence of a criminal organisation cannot be proven due to the lack of a durable and structured association, see: Rb. Gelderland 18 June 2015, ECLI:NL:RBGEL:2015:3994; Rb. Leeuwarden 22 November 2011, ECLI:NL:RBLEE:2011:BU5655.

⁹⁴De Hullu (2012), p. 424.

⁹⁵Rb. Rotterdam 10 August 2020, ECLI:NL:RBROT:2020:7013; See also: Hof Arnhem-Leeuwarden 21 February 2018, ECLI:NL:GHARL:2018:1580; Rb. Midden-Nederland 4 April 2017, ECLI:NL:RBMNE:2017:2290. The suspect stated that he and his accomplice worked

two general criteria have to be fulfilled: the offender should be part of the organisation, and he should have a share in or support the activities which serve or are directly connected to realising the intention of that organisation. Participation also presupposes (unconditional) intent on the part of the suspect. In other words, the suspect should know that the organisation he participates in has the intent to commit crimes.⁹⁶

8.4.3.2 Human Trafficking

During investigations in the context of illegal tobacco products the FIOD and OM consider and assess the possibility of human trafficking, especially if the case concerns the production of tobacco products.⁹⁷ No examples of prosecution for human trafficking (Article 273f WvSr) in the context of illicit tobacco trade are found in Dutch case law. This does not mean that human trafficking is unthinkable, especially in the light of the deplorable living conditions of workers in illegal factories (see Chap. 3). On the other hand, specific expertise is required for operating the manufacturing equipment used to produce cigarettes which may render workers less vulnerable. Many of the people that have been arrested whilst working in illegal cigarette factories in the Netherlands have previously worked in legal factories in (Eastern) Europe, South America or Asia and had special qualifications to work in the tobacco sector.⁹⁸

8.4.3.3 Money Laundering

Title XXXA WvSr concerns various forms of money laundering. Money laundering is relevant in the context of illegal tobacco products. The illegal activities are lucrative. Most of the business is conducted in cash and large sums are sometimes found during searches. Examples of prosecution for money laundering can be found in case law.⁹⁹ The offence is also used to prosecute money couriers that are not directly involved in the production or possession of illegal tobacco products.¹⁰⁰

together to establish a company which they would use to ‘remain under the radar’ during the production of illegal cigarettes. Additionally, the suspect and his accomplice performed various illegal activities. Based on the facts and circumstances the court established the intent of the criminal organisation to which both suspects (and the legal person) belonged.

⁹⁶De Hullu (2012), p. 378; Cf. Hoge Raad 18 November 1997, ECLI:NL:HR:1997:ZD0858.

⁹⁷Personal interview FIOD (January 2019).

⁹⁸Personal interview FIOD (January 2019).

⁹⁹See: Rb. Arnhem 23 August 2012, ECLI:NL:RBARN:2012:BX5533.

¹⁰⁰Personal interview FIOD (January 2019).

8.4.3.4 Miscellaneous Offences

The offences that have been mentioned above all play a central role in the enforcement against illegal tobacco products and feature often in case law. However, other offences could also be applicable in certain cases. In that regard, general offences such as assault (Article 300 WvSr) and intimidation (Article 285a WvSr) can be mentioned. Bribery of an official (Article 177 WvSr) could also play a role although no such cases are known in the context of illegal tobacco.¹⁰¹ The same applies with regard to participation in a terrorist organisation (Article 140a WvSr).¹⁰²

8.4.4 Liability of Legal Persons

Legal persons can be held criminally liable in the Netherlands (Article 51 WvSr). This option is relevant for the enforcement against illicit trade in tobacco products. An analysis of Dutch case law shows that legal persons can be involved in the offences, particularly as a 'cover' for the illegal activities. For example, a company was involved in the import of firewood and other wood products according to its registration with the Chamber of Commerce, but it was used to smuggle cigarettes into the Netherlands in practice.¹⁰³

The criteria to decide on the criminal liability of a legal person are found in Dutch case law. In 2003, the Supreme Court gave a landmark judgement in which the previous case law on the criminal liability of legal persons was clarified, summarised and elaborated.¹⁰⁴ In that ruling, the Supreme Court established that the main criterion for liability of a legal person is whether the acts which constitute an offence can be reasonably attributed to the legal person.¹⁰⁵ This will depend on the particular facts and circumstances, including the nature of the acts. According to the Supreme Court, it is not possible to formulate a general rule, but an important point of orientation for reasonable attribution will be whether the acts have taken place or have been performed within the sphere of the legal person. As a rule, such acts can be reasonably attributed. The Supreme Court provides a non-exhaustive list of scenarios in which an act can take place or be performed in the sphere of the legal person: (i) an employee or a person that otherwise works for the legal persons commits or omits an act, (ii) an act fits within the normal operations of the legal person, (iii) the

¹⁰¹ In the context of drugs examples can be found. See, e.g.: Rb. Rotterdam 4 July 2017, ECLI:NL:RBROT:2017:5125.

¹⁰² See, e.g.: Article 140a (3) WvSr. Financial contributions to a terrorist organisation could originate from gains made via the production of illegal tobacco products.

¹⁰³ See: Hof Arnhem-Leeuwarden 21 February 2018, ECLI:NL:GHARL:2018:1580; Rb. Midden-Nederland 4 April 2017, ECLI:NL:RBMNE:2017:2290.

¹⁰⁴ De Hullu (2012), p. 164.

¹⁰⁵ Hoge Raad 23 October 2003, ECLI:NL:HR:2003:AF7938; See: Ter Haar et al. (2018), p. 296.

act has been beneficial to the operations of the legal person, and (iv) the legal person could decide whether the acts were committed and the actual course of events shows that the acts were accepted.¹⁰⁶

8.4.5 *Practical Application: Overview*

In the Netherlands, there is no specific offence under criminal or administrative law which explicitly refers to or targets “illicit trade in tobacco products”. Instead the various offences that have been described above are used to address the diverse forms of the phenomenon. Of course, it depends on the facts and circumstances of the case which offences are applicable. In practice, the central offence is certainly illegal production or possession of tobacco products. The offence is found in almost every case. However, an analysis of case law shows that suspects are not prosecuted *exclusively* for illegal production or possession.¹⁰⁷ In most cases, prosecution is also started for several other offences, such as trademark counterfeiting, forgery of documents and—most importantly—participation in a criminal organisation.¹⁰⁸

In recent years, the number of cases of illegal production and possession and connected offences has increased. This might be ascribed to an overall increase in the phenomenon in the Netherlands, but also to more attention for this form of crime on the side of the enforcement authorities and a different investigative approach (see Chap. 3). On average, the FIOD deals with around 15 serious cases of illegal production or possession annually. Because these cases almost always concern organised crime groups, the number of individual suspects that are tried before a court is higher. It is important to underline that the vast majority of cases are not allocated to the FIOD. For example, each year many small violations of the WA are discovered at Schiphol Airport. These small cases are not dealt with by the FIOD and are disposed of without the involvement of a criminal court. Consequently, the total number of cases concerning illegal tobacco products is estimated to be higher than 100 per year.¹⁰⁹

¹⁰⁶Hoge Raad 23 October 2003, ECLI:NL:HR:2003:AF7938; See also: Hoge Raad 23 February 1954, ECLI:NL:HR:1954:3.

¹⁰⁷For this report, the online database of Dutch case law (www.rechtspraak.nl) has been used. It should be noted that not *all* judgements by Dutch courts can be found in this database. The case law which has been found should be seen as an illustration instead of an exhaustive list of all relevant or existing cases in the Netherlands. For an overview of the criteria for publication of judgements on www.rechtspraak.nl, see: <https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx>. Accessed 19 August 2021.

¹⁰⁸See: Rb. Breda 26 April 2006, ECLI:NL:RBBRE:2006:AW4430 (5 and 97 WA and 140 WvSr); Hof ‘s-Hertogenbosch 9 May 2008, ECLI:NL:GHSHE:2008:BD8143 (5 and 97 WA and 140 WvSr); Rb. Leeuwarden 22 November 2011, ECLI:NL:RBLEE:2011:BU5661 (5 and 97 WA and 140, 225 and 337 WvSr); Rb. Rotterdam 4 April 2017, ECLI:NL:RBROT:2017:2290 (5 and 97 WA and 140 and 225 WvSr).

¹⁰⁹Personal interview FIOD (January 2019).

Although examples can be found of the prosecution of legal persons, the vast majority of perpetrators which feature in Dutch case law are natural persons.¹¹⁰ As mentioned, these natural persons are often part of a criminal organisation. Almost every case has a cross-border aspect, although the character of this aspect varies. Examples that are found in case law concern, *inter alia*, the transport of illegal tobacco from Member States or third countries to the Netherlands and internationally operating organised crime groups.¹¹¹ Non-nationals that work at illegal production locations in the Netherlands also allow a cross-border link to be established.

The penalties that are imposed differ from case to case. In this regard, the facts and circumstances of the case—e.g., the combination of several offences, the number of illegal cigarettes in the suspect's possession, the amount of excise duties lost, time between the moment the offence was committed and the trial, *et cetera*—play an important role.¹¹² Penalties vary from a community sentence of 120 h to an unconditional custodial sentence of 3 years.¹¹³ In many cases, a combination of a pecuniary fine and a custodial sentence is seen. Additionally, tobacco products and other goods are withdrawn from circulation in accordance with Article 36c WvSr to be destroyed.¹¹⁴

8.4.5.1 Recent Developments

Two recent developments merit particular attention, because they are highly relevant for this Chapter: the shift towards illegal production of cigarettes in the Netherlands, and the sharp increase of illegal smoking tobacco, most notably shisha tobacco (see Chap. 3).¹¹⁵ Since 2016, the FIOD has noted a shift from the transport of cigarettes

¹¹⁰Rb. Midden-Nederland 4 April 2017, ECLI:NL:RBMNE:2017:2289; In this case, both the legal person *and* the natural persons behind it were prosecuted.

¹¹¹See, e.g.: Hof 's-Hertogenbosch 9 May 2008, ECLI:NL:GHSHE:2008:BD8143 (transport of cigarettes from Poland and/or Germany to the Netherlands); Rb. Leeuwarden 22 November 2011, ECLI:NL:RBLEE:2011:BU5661 (transport of cigarettes from China via Germany to the Netherlands), Hof Arnhem-Leeuwarden 12 October 2016, ECLI:NL:GHARL:2016:8086 (Dutch suspect arrested in Lithuania); Hof Amsterdam 21 June 2017, ECLI:NL:GHAMS:2017:3633 (Shipment of cigarettes from Lithuania to the Netherlands).

¹¹²In one case, the fact that the suspect was shot in the leg by his former companions and would suffer from this serious injury for the rest of his life was taken into account by the court. See: Rb. Breda 9 June 2009, ECLI:NL:RBBRE:2010:BM8655.

¹¹³See, e.g.: Rb. Rotterdam 4 April 2017, ECLI:NL:RBROT:2017:6211 (Articles 5 and 97 WA, community sentence of 120 h); Hof Amsterdam 21 June 2017, ECLI:NL:GHAMS:2017:3633 (Articles 5 and 97 WA, fine of €3500); Rb. Gelderland 18 June 2015, ECLI:NL:RBGEL:2015:3994 (5 and 97 WA, 216 and 337 WvSr, custodial sentence of 18 months).

¹¹⁴This is also possible in cases where the suspect is not convicted. See: Rb. Leeuwarden 22 November 2011, ECLI:NL:RBLEE:2011:BU5661.

¹¹⁵Within the EU, these changes are also noted. In 2017, the European Commission recognised the increased production in Member States and smoking tobacco as important developments in the fight against illicit tobacco products. See: Progress report on the implementation of the Commission

produced in other countries to the Netherlands to production in the Netherlands itself. Each year, several illegal factories are discovered and dismantled during criminal investigations. The annual number of factories that are found is increasing. A plausible reason for the shift is that increased enforcement efforts at the external borders of the EU in Eastern and Southern Europe make smuggling operations riskier and, consequently, render production closer to the intended market more worthwhile (“waterbed effect”). Another reason which is brought forward for the shift towards Western Europe is that illegal production of tobacco products has become even more lucrative as excise duties are high in the Netherlands as well as in the surrounding countries such as the United Kingdom.¹¹⁶

Although the majority of illegally produced or possessed tobacco products are cigarettes, smoking tobacco has become more important in recent years. In 2018, the FIOD has conducted several investigations into illegal smoking tobacco, most notably shisha tobacco. Compared to the production of cigarettes, shisha tobacco is easy and cheap to produce; it does not require specific technical expertise, special machinery or expensive resources, and the key inputs can be obtained easily and legally. Moreover, shisha tobacco has a significant excise value compared to its low production cost: for an estimated production cost of €10 to €15, an excise good with a value of €155,97 per kilogram is created.

8.5 Administration of Justice

8.5.1 *Authorities Responsible for Enforcing Policies Against ITTP*

In the Netherlands, several authorities are responsible for the enforcement of policies against illegal tobacco products: the NVWA, the Tax and Customs Administration, the OM, and the special investigative services FIOD and NVWA/IOD (see Sect. 8.2.2).

Netherlands Food and Product Safety Authority The NVWA is charged with the primary enforcement of the rules stemming from the TRW. Its specialised officials are competent to monitor compliance and conduct administrative investigation concerning rules on, inter alia, the quality of tobacco products, the prohibition to sell tobacco products at specific locations, and the presentation and advertisement of

Communication “Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – a comprehensive EU strategy (COM (2013) 324 final of 6.6.2013” COM (2017) 235 final.

¹¹⁶Personal interview FIOD (January 2019); See also: Progress report on the implementation of the Commission Communication “Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – a comprehensive EU strategy (COM (2013) 324 final of 6.6.2013” COM (2017) 235 final, 8.

tobacco products. The NVWA can also impose administrative sanctions if the applicable legislation is breached (see Sect. 8.4.2).

Tax and Customs Administration The Tax and Customs Administration is tasked with the levy and collection of excise duties. In that regard, it is competent to monitor compliance with excise and customs legislation, and conduct administrative and small criminal investigations.¹¹⁷ The authority is also charged with fulfilling enforcement duties concerning the rules on UIs, track and trace and due diligence from the TRW and can impose administrative fines for breaches it discovers; its competence overlaps with the NVWA in that regard.¹¹⁸ In practice, officials of the Tax and Customs Administration carry out many controls per year. These controls concern on-the-spot checks and inspections of the administration. At the external borders of the EU, controls take place on the basis of risk assessments. In the interior of the Netherlands, Customs officials focus on license holders and so-called ‘other subjects and objects of customs supervision’. This last category is broad and covers, inter alia, controls at excise sale points, the logistic chain and storage and transshipment locations. Around 3500 controls are carried out annually and are performed by designated customs officials.¹¹⁹

Public Prosecution Service The OM is tasked with the criminal enforcement in the Dutch legal order. All Public Prosecutors are part of the OM; they lead criminal investigations, and are competent to prosecute criminal offences. For this Chapter, the specialised FP/OM is particularly relevant, because it is responsible for large investigations concerning illicit tobacco products. A Designated National Public Prosecutor for Excise Fraud (*Nationaal officier van justitie accijnsfraude*) who leads the criminal investigations into excise fraud concerning illegal tobacco and supervises the investigative activities of the FIOD has been appointed at the FP/OM.

Special Investigative Services The FIOD and NVWA/IOD are the special investigation services of the Tax and Customs Administration and NVWA respectively. FIOD is tasked with the investigation of, inter alia, serious cases of excise fraud and connected criminal offences, whereas the NVWA/IOD is responsible for criminal investigations within the field of competence of the NVWA, including the rules on tobacco products. In practice, investigations into illicit tobacco products are performed almost exclusively by FIOD. As mentioned before, the FIOD has given special focus to excise fraud and illegal tobacco products in the Smoke Screen Project. Between 2016 and 2018, the Smoke Screen Project concentrated on the analysis, the international cooperation and investigation into organised crime groups that are involved in illicit trade of tobacco products. Since 1 January 2019, the investigative approach from the temporary project has been incorporated into the permanent Smoke Cluster of the Rotterdam office. The Smoke Cluster focuses on

¹¹⁷ Uitvoeringsregeling Belastingdienst 2003, *Stcrt.* 2002, p 247; See: Article 3 (3) (a) and (b) UrB 2003.

¹¹⁸ See: Kamerstukken II 2019–2020, 35,356, nr 3, p. 8.

¹¹⁹ Reply by Landelijk Kantoor Douane to written questions (January 2019).

intelligence, analysis, international cooperation and coordination of national investigations. In practice, most investigations into excise fraud are performed by regional FIOD teams, but sometimes the Smoke Cluster is also involved in that regard.¹²⁰ During criminal investigations, the investigative powers from the WvSv and specific legislation can be called upon. These will receive more attention later in this Chapter (see Sect. 8.6.1).

8.5.2 Relationship Between Administrative and Criminal Enforcement

Under Dutch law, the Tax and Customs Administration, the FIOD and the FP/OM all play major parts in the enforcement policy against illegal tobacco products; their tasks are closely connected and together they form an integral team. The NVWA and NVWA/IOD play a less prominent role, but can still be involved in monitoring and investigations, often in close cooperation with other aforementioned authorities. Because the authorities' efforts are inextricably linked, cooperation and coordination are essential. In practice, the relationship between the authorities is particularly relevant in the context of (i) operational cooperation in the fight against illegal tobacco products, (ii) coordination in the phases of investigation and prosecution, and (iii) cooperation with regard to the recovery of lost excise duties via the additional tax assessment. These elements will be analysed in turn.

8.5.2.1 Operational Cooperation

Although the precise competences of the administrative and investigative authorities differ, they cooperate often on an operational level. This cooperation can take different forms. Most notably, the Tax and Customs Administration and the FIOD share information and intelligence. If an authority becomes aware of information which might be relevant to the other authority—e.g., during an investigation or on the basis of information received from abroad—this will be communicated. As such, information received from the Tax and Customs Administration can be the starting point of a criminal investigation of the FIOD. Similarly, findings of the FIOD can lead to an administrative investigation by the Tax and Customs Administration to recover the unpaid excise duties via an additional tax assessment. In practice, it also often occurs that officials from the FIOD and the Tax and Customs Administration perform investigative actions together, for example an on-the-spot inspection or search. Similarly, officials of the NVWA can inform their counterparts at other authorities when they discover facts and circumstances which point towards excise

¹²⁰Personal interview FIOD (January 2019).

fraud. It is also possible that officials from the NVWA and the Tax and Customs Administration perform controls together.

8.5.2.2 Coordination in the Phases of Investigation and Prosecution

As mentioned before, the FIOD is tasked with conducting criminal investigations into serious cases of excise fraud, and OM can prosecute such criminal offences before a court or decide to handle a case without the involvement of a court through means of a penalty order (*OM strafbeschikking*) (see Sect. 8.6.5). However, tax offences can also be investigated and handled by the Tax and Customs Administration without the involvement of the FIOD, the OM or a criminal court. In short, all cases wherein the official report concerning tax offences is not sent to the Public Prosecutor, the Board of the State Taxes (*bestuur van 's Rijks belastingen*) can impose a fiscal penalty order (*fiscale strafbeschikking*) (Article 76 AWR). A similar rule is found in the context of customs offences (Article 10:15 ADW). Similarly, the FP/OM and NVWA should coordinate enforcement with regard to the substantive rules from the TRW. Breaches of several provisions from the TRW constitute administrative *and* criminal offences at the same time, and the specific expertise of the NVWA/IOD and FP/OM should be used optimally as well. Consequently, a choice should be made for punitive enforcement through means of an administrative fine (NVWA) or criminal prosecution (FP/OM) (see Sect. 8.6.4).

Coordination Concerning Excise Fraud As a rule, all official reports concerning tax offences are first sent to the Board of the State Taxes for evaluation (Article 80 AWR).¹²¹ In practice, it is not the Board itself that evaluates the official reports, but a designated official known as the penalty fraud coordinator/contact official (*boete-fraudecoördinator/contactambtenaar*—BFC/CA). In total, six BFC/CA's are appointed in the Netherlands; each BFC/CA is responsible for one or more regions and deals with all the officials reports from that region. Official reports concerning fiscal offences *can* be sent to the OM by the BFC/CA if he or she finds further investigation by FIOD or prosecution by the Public Prosecutor appropriate. It is not required to send in officials reports and discretion is given to the BFC/CA regarding the preferred allocation and handling in a particular case. In that context, the Protocol Registration and Settlement of Fiscal Offences and Offences in the Field of Customs and Surcharges (*Protocol aanmelding en afdoening van fiscale delicten en delicten op het gebied van douane en toeslagen*—Protocol AAFD) is relevant.¹²²

¹²¹The BFC/CA always sends the reports to the Public Prosecutor if a suspect was taken into police custody (*inverzekeringstelling*) or placed into pretrial detention (*voorlopige hechtenis*) or if a dwelling was entered contrary to the will of the occupant (Article 80 (2) AWR).

¹²²Protocol aanmelding en afdoening van fiscale delicten en delicten op het gebied van douane en toeslagen (Protocol registration and settlement of fiscal offences and offences in the field of customs and surcharges) *Stcrt.* 2015, p. 17271; For a detailed analysis, see: Crijns (2019), pp. 644–646.

The Protocol constitutes a formal agreement between the OM and the Tax and Customs Administration which provides rules to decide to which authority a specific case should be allocated for further investigation or prosecution. The Protocol establishes criteria to assess which cases qualify for prosecution by the Public Prosecutor. Officials of the Tax and Customs Administration that discover a case concerning excise fraud with regard to illegal tobacco products should report the case to the BFC/CA if it falls within the parameters of the Protocol: a loss of taxes of €10,000 and €15,000 for natural and legal persons respectively. The BFC/CA assesses the case and considers whether it should be registered in the so-called tripartite coordination meeting (*tripartiete overleg*) of the Tax and Customs Administration, FIOD and FP/OM. The Protocol establishes that a case should be registered if the loss of taxes amounts to €100,000 or more and a suspicion of intent exists.¹²³ A case should also be registered if the loss of taxes amounts to less than €100,000, but a suspicion of intent exists and one or more of the additional weighting criteria give cause for registration.¹²⁴

The tripartite coordination meeting takes place every 6 weeks. The fact that a case is registered in the tripartite coordination meeting does not mean that the case will ultimately be brought before a criminal court by the Public Prosecutor. The final decision on the allocation is made by the OM, the FIOD and BFC/CA together. In short, only the most serious cases will be allocated to the OM and the FIOD for investigation and prosecution. Smaller cases will be dealt with by the Tax and Customs Administration. For example, each year many small violations of the WA are discovered by customs officials at Schiphol Airport, but these are not brought into the tripartite coordination meeting.

Coordination Concerning the Tobacco and Related Products Act Regarding violations of the administrative obligations stemming from the TRW, the NVWA and OM should also decide which authority investigates and handles cases. In that regard, the General Intervention Policy (*Algemeen interventiebeleid*) of the NVWA is relevant as it establishes the basic parameters to decide upon the allocation of cases.¹²⁵ It provides a general categorisation of violations of the TRW and the warranted intervention for each category, for example criminal or administrative sanctions, increased administrative monitoring, or a warning. This is elaborated

¹²³ Crijns (2019), p. 645; The term “loss of customs duties” (*fiscaal nadeel*) corresponds to the requirement to extent (*strekingsvereiste*) from Article 69 AWR. Therefore, the case law of the Hoge Raad concerning this term is also relevant in the context of the Protocol AAFD in customs matters. Cf: Valkenburg (2010), p. 41; Bakker (2019), p. 287.

¹²⁴ Crijns (2019), p. 645; The additional weighting criteria are mentioned in section 2.2 of the Protocol and concern (a) the extent of the impact on society and balanced law enforcement, (b) the status of the suspect or his exemplary function, (c) recidivism, (d) redress is impossible, (e) a combination of offences, (f) assistance of an advisor, expert or customs expeditor, (f) responsiveness, (h) impossibility of the imposition of an administrative fine, (i) truth-finding, and (j) thematic strategy.

¹²⁵ Algemeen Interventiebeleid Nederlandse Voedsel- en Warenautoriteit (General intervention policy Netherlands Food and Consumer Product Safety Authority), *Stcrt.* 2016, p. 35103.

upon for the various policy fields for which the NVWA is competent. For this Chapter, the Specific Intervention Policy for tobacco products (*Specifiek interventiebeleid tabak en roowaren*) merits attention as it provides a categorisation of the various offences from the TRW and lower legislation and establishes how they should be handled.¹²⁶

In principle, only the most serious breaches (category A) are allocated to the NVWA/IOD and the FP/OM for investigations and prosecution. Such cases are reported to the OM which makes an autonomous assessment of the case and is free to decide upon prosecution. No offences from the TRW are placed in category A. Consequently, most breaches are handled by the NVWA through means of an administrative fine or non-punitive interventions such as increased monitoring or increased controls. In specific cases, it is possible for the NVWA to report cases to the OM if administrative enforcement is not deemed appropriate, for example if the economic gains which were obtained through an offence are more than the maximum administrative fine (Article 11b (3) TRW). Additionally, the OM and NVWA can designate specific policy fields which qualify for criminal prosecution more often.

8.5.2.3 Cooperation Concerning the Additional Tax Assessment

Cooperation between the Tax and Customs Administration and the investigative authorities is also essential with regard to the recovery of lost excise duties. Although the WvSr establishes that illegally obtained assets can be confiscated this figure has been *excluded* in fiscal matters (Article 74 AWR).¹²⁷ This does not mean that recovery is impossible. As mentioned before, taxes that have not been levied as a result of a fiscal offence can be recovered by the Tax and Customs Administration via an additional tax assessment (*fiscale naheffing*). The additional tax assessment constitutes a fiscal procedure with an autonomous character; it is not strictly connected to the criminal proceedings and can take place even if such proceedings are not pursued by the OM or Tax and Customs Administration.¹²⁸

8.5.3 Cooperation with the Tobacco Industry

The enforcement against illegal tobacco products in the Netherlands is geared towards supporting the anti-smoking policy of the Dutch government and ensuring the correct flow of excise duties into the treasury. Preventing distortion of

¹²⁶ Specifiek interventiebeleid tabak en rookwaren (Specific intervention policy tobacco and related products), *Stcr.* 2020, p. 34452.

¹²⁷ De Zanger (2018), pp. 60–61.

¹²⁸ Cf: Van Blicke et al. (2013), p. 248.

competition on the market of tobacco products and, consequently, protecting the interests of the tobacco industry is explicitly *not* an aim. Therefore, there is hardly any contact between the competent authorities and the tobacco industry.¹²⁹ Nevertheless, the Netherlands is part to the EU Agreements with the tobacco industry.

8.6 Investigation of Unlawful Conduct and Related Procedural Aspects (Criminal and Administrative)

8.6.1 *Investigative Techniques or Powers Used to Investigate Offences Related to ITTP*

8.6.1.1 Administrative Investigations Concerning Illicit Trade in Tobacco Products

Under Dutch law, the Awb provides general rules for administrative proceedings, including powers for the purpose of monitoring and investigations. However, in various policy fields specific powers have been introduced. For example, in excise matters officials from the Tax and Customs Administration can call upon the competences from the AWR and WA instead of the Awb. In turn, the TRW does not feature many special rules, and officials of the NVWA should refer to the general powers from the Awb during their investigations.

Before addressing the administrative powers, it is important to recognise they apply *mutatis mutandis* in both the punitive and non-punitive settings. In other words, the same substantive powers are relied upon in tax matters to establish the correct tax debts (non-punitive) and investigation for the purpose of imposing an administrative fine (punitive). The main difference is not found in the substantive powers that are available, but rather in the applicability of procedural guarantees. The same powers are available to the administrative authorities in both contexts, but during punitive proceedings several procedural guarantees should be complied with, such as the right not to incriminate oneself and the right to remain silent.¹³⁰

Excise Duties Act The Inspector is competent to subject all parts of a building, excluding private dwellings, and the grounds to an inspection (Article 83 WA).¹³¹

¹²⁹ Personal interview FIOD (January 2019).

¹³⁰ Michiels et al. (2016), p. 44.

¹³¹ Before 1 January 2018, the power to inspect did not cover *all* premises and grounds. It was limited to excise warehouses and other locations that were subjected to restricting provisions (*accijnsplaatsen en plaatsen die onderworpen zijn aan beperkende bepalingen*). In practice, this meant that the inspector could not inspect a warehouse that was not an excise warehouse even if he or she had good reason to believe that goods were stored there which were relevant for the levy of excise duties. In such cases, only the FIOD was competent. This was undesirable and in 2017 the WA was changed. Cf. Kamerstukken II 2017/2018, 34,786, nr. 3, pp. 17–18, p. 70.

Means of transport also fall under the scope of the provision. It follows from the legislative history that the inspection of premises, grounds and means of transport also covers the goods that are found there.¹³² The inspection of buildings, grounds and means of transport is not limited to specific hours, but can be carried out during the day and the night. The person who uses a building or grounds is under an obligation to give access to all parts of the building and grounds to the Inspector in so far as this is necessary for an inspection on the basis of the tax legislation (Articles 83 WA and 50 AWR). The Inspector, or an official who has been appointed by him, can also demand that a ship or another means of transport is immediately slowed down and brought to a halt by the captain or driver. Afterwards, the ship or means of transport can be brought to a nearby location. The Inspector can use equipment or animals during the inspection of buildings, grounds and means of transport. The Inspector or an official who performs the inspection can require that one or more samples of goods is/are provided (Article 84 WA).

State Taxes Act The Inspector can request information for the purpose of the establishment of the tax debt (Article 47 AWR). Every person is obliged to provide the Inspector with the data and information which may be relevant with regard to the levy of the person's taxes, and the books, records and other information carriers or its content which consultation may be relevant for the establishment of the facts that are relevant for the levy of taxes, including fines.¹³³ In that regard, it is also relevant that persons are required to keep an administration (Article 52 AWR). Data and information should be provided in a clear, firm and unconditional manner within the term set by the Inspector (Article 49 AWR). If the requested information is not provided or incorrectly provided a tax offence is committed on the basis of Articles 68 or 69 AWR.

General Administrative Law Act The Awb attributed several investigative powers to the 'supervisor': the person who is charged with monitoring compliance with substantive legislation in accordance with the law. For the purpose of the TRW, officials of the NVWA constitute the primary supervisors although customs officials are also competent with regard to the track and trace and due diligence obligations.¹³⁴ On the basis of the Awb, officials from the NVWA can, inter alia, enter all premises except for private dwellings, demand information from anyone, demand access to corporate data and documents and make copies of them, and take samples of goods.¹³⁵ An obligation to cooperate applies for the person concerned (Article 5:20). With regard to the due diligence obligation for producers, importers or exporters

¹³² See: Kamerstukken II 1989/1990, 21,368, nr. 3, pp. 66–67.

¹³³ Van Blicke et al. (2013), p. 157.

¹³⁴ See: Article 7.1 TRr; Besluit aanwijzing toezichthoudende ambtenaren douane en mandaat en machtiging in verband met het voorkomen van illegale handel in tabak (Decision to appoint supervising customs officials and mandate and authorisation concerning the prevention of illegal trade in tobacco), *Stcrt.* 2020, p. 33598.

¹³⁵ Lamp et al. (2019), p. 91.

of tobacco, tobacco products and manufacturing equipment officials from the NVWA are competent to demand all evidence concerning, inter alia, the possession of a license by the customer, the identity of the customer or the location where manufacturing equipment will be placed, and should register that information.¹³⁶

8.6.1.2 Criminal Investigations

Under Dutch law, the powers that can be relied upon during a criminal investigation are primarily found in the WvSv and include, inter alia, the power to search premises and seize objects, and the power to demand documents for the purpose of seizure.¹³⁷

The power to seize is also found in other criminal law legislation; the procedural rules are often less stringent compared to the general rules, but the power can only be used for specific offences. For example, Article 81 AWR establishes that investigative officials of the fiscal authorities are competent to seize all objects which can be seized in accordance with Article 94 WvSv (see Sect. 8.4.3). An important difference compared to the general competence from the WvSv is that the officials can also demand from anyone—including a *suspect*—that objects are surrendered to them; those goods can then be seized. Similar special rules are found to seize goods in the context of ‘economic offences’ (Article 18 WED) and customs offences (Article 11: 4 ADW).

Special Investigative Powers In practice, the so-called special investigation powers from the WvSv are often relied upon during criminal investigations into illegal tobacco products and connected criminal offences, although they are not reserved to that context. Compared to the regular investigative competences from the WvSv the conditions that need to be fulfilled are more numerous and generally feature higher thresholds. For example, most powers require prior judicial authorisation and can only be relied upon if the offence for which the measure is deployed can lead to pre-trial detention. In short, offences which are threatened with a custodial sentence of 4 years or more can lead to pre-trial detention (Article 67 WvSv). In the context of illicit tobacco products, this means that all minor criminal offences cannot lead to the deployment of special investigative powers. For example, a person who transports raw tobacco without a license only commits a minor criminal offence under Dutch law (Articles 36 and 42 UbA) and, thus, cannot be subjected to systematic surveillance (see Sects. 8.3.1 and 8.4.1). Of course, administrative offences cannot lead to the use of special investigative powers. Examples of special investigative powers are systematic surveillance (Article 126g), infiltration (Article 126h), the interception of

¹³⁶ Kamerstukken II 2019–2020, 35,356, nr 3, p. 37.

¹³⁷ The Public Prosecutor can search premises for the purpose of seizure if an offence is caught in the act (Articles 96c and 97). He can also demand information from anyone, except the suspect (Article 96a). Similar competence are attributed to the investigative judge (*rechter-commissaris*). The judge can perform searches for the purpose of seizure in all circumstances and can also require the surrender of documents to him (Articles 104 and 105). See: Corstens et al. (2018), p. 559.

telecommunication (Article 126m) and controlled delivery (Article 126ff). Although it is unfeasible to analyse all powers in detail, systematic surveillance and infiltration are elaborated upon and serve as examples of the overall structure of the special investigation powers. Focus is also given to controlled delivery, because in combination with the aforementioned measures it constitutes one of the most important tools during investigations into illicit tobacco products.

Systematic Surveillance In practice, systematic surveillance is one of the most important investigative powers in the context of criminal enforcement with regard to illegal tobacco products. The power allows the investigative officials to follow a suspect for a specific time and see which activities he or she performs.¹³⁸ The Public Prosecutor can order an investigating official to follow or observe a person systematically if a reasonable suspicion of a crime exists and if it is in the interest of the criminal investigation. If this reasonable suspicion concerns a crime for which the suspect can be placed in pre-trial detention and constitutes a serious breach of the legal order the Public Prosecutor can order that a locked premises excluding a dwelling is entered without the consent of the owner to give effect to the investigative actions.¹³⁹ The Public Prosecutor can also decide to use a technical device, for example a beacon.

Infiltration Infiltration is another investigative measure which can be relevant in the context of criminal enforcement against illegal tobacco. It is not known whether and, if so, how often this investigative power is used by FIOD and OM. Under Dutch law, the Public Prosecutor can order an investigating official to partake in or cooperate with a group of persons from which it can reasonably be suspected that crimes are being prepared or committed if there is a reasonable suspicion which concerns a crime for which the suspect can be placed in pre-trial detention—for example, illegal production or possession of tobacco products—and constitutes a serious breach of the legal order, for instance due to the large amount of excise duties which will be lost or the adverse effect on the Dutch government's anti-smoking policy (see Sect. 8.2.1).

Controlled Delivery As mentioned before, controlled delivery is one of the most important investigative measures to combat illicit trade in tobacco products for FIOD and OM. Instead of focussing on intercepting shipments and seizing illicit tobacco products when they are discovered a controlled delivery is attempted if possible: cigarettes are used as a starting point for further investigative actions, for example the systematic surveillance of the persons and/or vehicles which transport the illegal goods. This approach brings the authorities closer to the persons or—in most cases—criminal organisations that are behind the illegal tobacco trade, and allows

¹³⁸Not every form of observing a suspect constitutes “systemic surveillance” within the meaning of the WvSv. See: Corstens et al. (2018), p. 529; See also: HR 19 December 1995, ECLI:NL:HR:1995:ZD0328; HR 20 January 2009, ECLI:NL:HR:2009:BF5603; HR 26 October 2010, ECLI:NL:HR:2010:BN0004.

¹³⁹Corstens et al. (2018), p. 531.

the Dutch or foreign authorities to dismantle the organisation and seize the goods with the aim of confiscating the goods.¹⁴⁰ The legal basis for this measure is found in Article 126ff WvSv.¹⁴¹ The provision establishes that the investigating official who is tasked with executing an order of the Public Prosecutor is, in principle, obliged to use his statutory power to seize goods if the possession of those goods is prohibited on the basis of the law. However, the Public Prosecutor can order that this power is not used if a compelling investigative interest exists. In such cases, seizure can be postponed with the intention to seize the goods at a later time. While the mandatory seizure is postponed the authorities can continue their investigation. Due to the special character of the investigative measure the College of Procureurs-General of the OM should provide prior written consent for controlled delivery (Article 140a WvSv).

8.6.2 Precautionary Measures Regarding the Illicit Tobacco Products and/or the Gains from the ITTP

As mentioned before, Article 94 WvSv defines with which aims goods can be seized during a criminal investigation: to establish the truth and confiscate illegally obtained assets, or for the purpose of forfeiture or removal from circulation. Consequently, the provision does not establish the investigative *power* to seize goods. That power can be based on several statutory provisions stemming from, inter alia, the WvSv, AWR, ADW and WED (see Sect. 8.6.1). Evidently, tobacco products constitute goods within the meaning of the aforementioned provisions and can be seized; this also applies to cash which is discovered during investigations. In practice, illegal tobacco products and cash are regularly discovered and seized by the competent authorities (see Sect. 8.4.3).

8.6.3 Statute of Limitation

Under Dutch law, minor criminal offences (*overtredingen*) have a statute of limitation of 3 years (Article 70 WvSr).¹⁴² In case of a crime (*misdrif*) the statute of limitation will vary depending on the maximum applicable penalty: offences which are threatened with a maximum penalty of 12 years have no statute of limitation, crimes with a maximum custodial sentence of more than 8 years have a statute of limitation of 20 years, crimes with a maximum custodial sentence of more than 3 years have a statute of limitation of 12 years, and crimes that are threatened with a

¹⁴⁰ Personal interview FIOD (January 2019).

¹⁴¹ Corstens et al. (2018), pp. 538–539.

¹⁴² See: Corstens et al. (2018), pp. 222–228.

pecuniary fine, detention or a custodial sentence for a maximum of 3 years will be time-barred after 6 years. For the context of illicit trade in tobacco products this means that the relevant criminal offences have different statutes of limitation. For example, the intentional illegal production or possession of tobacco products is time-barred after 12 years, whereas trademark counterfeiting becomes time-barred after 6 years. In case law, no examples have been found where criminal offences concerning illicit trade in tobacco products were time-barred and, consequently, could not be prosecuted.

Administrative offences have their own statute of limitation. In principle, the option to impose an administrative fine ceases to exist after 5 years, but administrative offences become time-barred after 3 years if the maximum fine which can be imposed is less than €340 (Article 5:45 Awb). Consequently, the statute of limitation for breaches from the administrative obligations from the TRW which constitute administrative offences—eg, failure to fulfil the due diligence obligation or comply with the requirements of track and trace—is set at 5 years (see Sect. 8.4.1). The statute of limitation for the administrative negligence penalty in tax matters is slightly different: it is set at 5 years after the end of the *calendar year* in which the tax debt originated (Article 67c (3) AWR).

8.6.4 Rules on Ne Bis In Idem and Their Practical Consequences

8.6.4.1 Ne Bis In Idem in National Criminal and Punitive Administrative Cases

In the Netherlands, the principle of ne bis in idem is enshrined in several provisions with their own scope. Article 68 WvSr establishes that no one can be tried a second time for an offence in respect of which a Dutch criminal court has given a final judgement (*onherroepelijk is beslist*).¹⁴³ Protection is offered if there is a final judgement within the sphere of *criminal law* and does not extend to an accumulation of criminal sanctions and administrative fines. In the context of the penalty order, Article 255a WvSv establishes that prosecution is no longer possible if a penalty order has been issued and fully executed.¹⁴⁴ The ne bis in idem principle also applies to administrative fines: an administrative authority cannot impose a fine if a fine has already been imposed for the same administrative offence (Article 5:43 Awb).¹⁴⁵

It can be concluded that the aforementioned provisions do not prevent a combination of administrative fines and criminal sanctions for the same offence; they

¹⁴³ For an in-depth analysis of the ne bis in idem principle in the Dutch legal order, see: Corstens et al. (2018), pp. 209; Crijns (2019), p. 629.

¹⁴⁴ Corstens et al. (2018), pp. 229–230.

¹⁴⁵ See: Michiels et al. (2016), p. 258; Michiels and Widdershoven (2013), p. 116.

rather protect against an accumulation of multiple criminal sanctions and multiple administrative fines respectively. This does not mean that the Dutch legal system allows double punishment via both criminal and administrative law. The Dutch legislator has introduced a so-called *una via* system which dictates that a choice should be made for punitive administrative *or* criminal enforcement in a particular case (Articles 5:44 Awb and 243 (2) WvSv).¹⁴⁶ The *una via* system flows from the principle of *ne bis in idem* and it implements the prohibition of an accumulation of administrative and criminal sanctions.¹⁴⁷

In the context of enforcement of policies against illicit trade in tobacco products the aforementioned rules are relevant. As seen before, the OM and Tax and Customs Administration can both prosecute the criminal offences from the WA, for example illegal possession or production of tobacco products. The OM can bring the case to court or handle the case through a penalty order, whereas the Tax and Customs Administration is competent to impose a so-called fiscal penalty order (see Sect. 8.6.5). It would be at odds with the *ne bis in idem* principle if they both prosecute the same case and impose criminal penalties. Therefore, the authorities should coordinate their enforcement efforts and decide which authorities handles a particular case in accordance with the Protocol AAFD. Similarly, the OM and NVWA should coordinate enforcement with regard to the substantive rules from the TRW (see Sect. 8.5.2). Breaches of, *inter alia*, the due diligence obligation and the track and trace system constitute administrative (Article 11b TRW) *and* criminal offences (Article 1⁰⁴ WED). In such cases, the *una via* system dictates that a choice is made for one of the enforcement tracks.

8.6.4.2 Ne Bis In Idem in a Transnational Context

Foreign judgements by criminal courts fall under the scope of Article 68 WvSr which provides that prosecution will be barred if the foreign decision entails an acquittal, discharge from further prosecution, conviction followed by the full

¹⁴⁶Michiels et al. (2016), p. 261.

¹⁴⁷The *una via* system is enshrined in Articles 5:44 Awb and 243 (2) WvSv. Article 5:44 (1) Awb establishes that an administrative authority will not impose an administrative fine if criminal prosecution has been started against the offender and the trial has started, or if a penalty order has been imposed. If this is not the case and the committed breach constitutes both a finable and criminal offence the administrative authority should present that breach to the Public Prosecutor but it can be established by law or in agreement with the Public Prosecutor that this is not required. If a breach has been presented to the Public Prosecutor the administrative authority is only allowed to dispose of the case if the Public Prosecutor states that the case will not be prosecuted or if he does not respond within 13 weeks. On the criminal procedural side of the *una via* system, Article 243 (2) WvSv states that if an administrative fines has been imposed or a statement has been made by the Public Prosecutor that the breach will not be prosecuted this will have the same legal effects as a notice of discontinuation of prosecution. This means that criminal prosecution is no longer possible, because the Public Prosecutor becomes inadmissible. See: Kamerstukken II 2003/04, 29,702, nr. 3, p 137; Corstens et al. (2018), p. 211; Crijns (2019), pp. 636–640.

execution, pardon, limitation, or if an offence has been finally disposed of in a foreign state through the fulfilment of conditions. In a cross-border context, the case law of the Court of Justice concerning Article 54 Convention Implementing the Schengen Agreement (CISA) and Article 50 Charter of Fundamental Rights of the EU (CFREU) should be taken into account.¹⁴⁸ Article 5:43 Awb does not extend its protective scope beyond the borders of the Netherlands and has a distinctly national character. Within the EU, Article 50 CFREU may be applicable in such cases.¹⁴⁹ No examples have been found of cases wherein the principle of *ne bis in idem* caused problems.

8.6.5 Alternatives to Prosecution (e.g., Negotiated Settlements) and Plea-Bargaining

In the Netherlands, the vast majority of cases concerning excise fraud are disposed of without the involvement of a criminal court.¹⁵⁰ As explained, the Protocol AAFD (see Sect. 8.5.2) is used to decide whether cases are allocated to FIOD and OM for investigation and prosecution, or whether they are handled by the Tax and Customs Administration instead. If a case is allocated to the FIOD and OM the option to prosecute the case before a criminal court exists, but this does not mean that every case *is* dealt with by a court. The OM also has the competence to handle a case through means of a penalty order (Article 257a WvSv).¹⁵¹ The Board of the State Taxes can impose a so-called fiscal penalty order (Article 76 AWR).¹⁵² This task is performed by the competent BFC/CA in practice.

The choice between prosecution before a court and a penalty order is made by the OM on the basis of the Sentencing Orientation Points (*Oriëntatiepunten voor straftoemeting*) concerning fraud of the National Consultations concerning the Subject Matter of Criminal Law (*Landelijk Overleg Vakinhoud Strafrech—LOVS*). As a rule, the OM will bring a case to court if the Sentencing Orientation Point establish that an unconditional prison sentence of more than 12 months constitutes the appropriate penalty.¹⁵³ Such a penalty is warranted in cases that concern an amount of lost excise duties of €250,000 or more. If the amount is lower a penalty order will be imposed. However, grounds to increase or reduce the sentence

¹⁴⁸De Hullu (2012), p 518; HR 10 October 2017, ECLI:NL:HR:2017:2796.

¹⁴⁹See: Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105. See also: Luchtman (2013), p. 39.

¹⁵⁰See: Aanwijzing OM-strafbeschikking (Instruction Public Prosecution Service penalty order), *Stcr.* 2017, p. 42314. See also: Hartmann (2013), p. 174.

¹⁵¹Corstens et al. (2018), p. 1047; Crijns (2019), p. 621.

¹⁵²Corstens et al. (2018), p. 1047; In customs matters, the option to impose a fiscal penalty order also exists. It is attributed to the Inspector, but it is implemented by the BFC/CA in practice.

¹⁵³Personal interview FIOD (January 2019).

have to be taken into account and can lead to the use of a different modality; recidivism may particularly lead to a higher penalty.

The penalty order requires the Public Prosecutor or BFC/CA to make an autonomous determination of the guilt of the suspect and constitutes a non-consensual and direct way of imposing a sanction upon him; the imposition of a penalty order amounts to criminal prosecution under Dutch law.¹⁵⁴ It is worth underlining that the fiscal penalty order has much in common with the administrative fine which can also be imposed on the basis of the tax legislation. Both sanction modalities are imposed by an administrative authority and they both constitute a criminal charge within the meaning of Article 6 ECHR. However, one fundamental difference should be acknowledged between the administrative fine and the fiscal penalty order: the former is an *administrative* modality, whereas the latter constitutes a *criminal* sanction and an act of prosecution under Dutch law even if it is imposed by an administrative authority.¹⁵⁵ It should also be noted that the penalty order has begun to replace the transaction (Article 74 WvSr) in phases for various policy fields since 2008.¹⁵⁶ Unlike the penalty order, the transaction is consensual and allows the OM to propose a sanction which should be accepted by the offender. Although the transaction is set to be replaced altogether, both modalities are still in force and, thus, overlap. In principle, all cases to which both modalities apply should be disposed of via the penalty order. This is different in exceptional cases.¹⁵⁷

8.6.6 Measures for Whistleblowers, Incentives for Cooperation of Offenders or Protection of Witnesses

Dutch law has provisions concerning the protection of threatened witnesses and promises to witnesses that are also suspects. These rules can play a role in the context of illicit trade in tobacco products, for example if members of a criminal organisation want to cooperate with the authorities and give evidence against their former accomplices, or if persons from legal tobacco companies want to inform the authorities of serious wrongdoing in their sector. In such cases, the investigative judge can order that the identity of a witness is not disclosed if a witness or another person feels threatened and can reasonably fear for his or her life, health or safety or disruption of family life or livelihood because of his statement (Article 226a WvSv). The Public Prosecutor also can make a deal of a reduced sentence with a suspect that is willing to give evidence against another suspect (Article 226g WvSv). No examples of

¹⁵⁴ Corstens et al. (2018), p. 1046.

¹⁵⁵ Corstens et al. (2018), p. 1047; Michiels et al. (2016), pp. 120–121.

¹⁵⁶ Corstens et al. (2018), p. 1046.

¹⁵⁷ Aanwijzing OM-straftbeschuikking, *Stcrt.* 2018, p. 67767.

whistleblowers have been found in Dutch case law and the investigative authorities declined to comment on the matter.¹⁵⁸

8.7 Transnational/International Cooperation Between Judicial and Administrative Authorities

8.7.1 *Rules on Jurisdiction Regarding Offences Relative to ITTP*

In accordance with Dutch criminal law legislation jurisdiction is established if, inter alia, a person commits an offence in the Netherlands, or if a Dutch national commits an offence in another country when this offence constitutes a criminal offence under Dutch law and a penalty can be imposed for the offence in the other country. Case law shows that non-nationals are indeed prosecuted in the Netherlands for violation of Articles 5 and 97 WA and that Dutch citizens are prosecuted for tobacco related offences under Dutch law that have been committed in another country. For example, a Dutch citizen was arrested by the Lithuanian authorities when transporting a large quantity of illegal cigarettes. He confessed that he intended to bring those cigarettes to the Netherlands and sell them. The suspect was prosecuted before the Court of Appeal of Arnhem-Leeuwarden for violation of Articles 5 and 97 WA even though the products were never brought into the Netherlands.¹⁵⁹

8.7.2 *International Cooperation and Exchange of Information Between Law Enforcement Agencies*

8.7.2.1 Administrative Assistance in Excise Matters

In the Netherlands, no general procedural rules for mutual administrative assistance exist. Although the option to incorporate such provisions into the Awb was seriously considered by the Dutch legislator the rules have not been codified in a single framework.¹⁶⁰ Instead, the provisions on international cooperation are found in sectorial laws that implement the duty to cooperate. Cooperation is often directly based on EU Regulations. In excise matters, mutual administrative assistance is

¹⁵⁸ Personal interview FIOD (January 2019).

¹⁵⁹ See: Hof Arnhem-Leeuwarden 12 October 2016, ECLI:NL:GHARL:2016:8086.

¹⁶⁰ See: Boswijk et al. (2009), p. 323.

based on Regulation (EU) 389/2012 on administrative cooperation in the field of excise duties.¹⁶¹

Cooperation on the Basis of Regulation (EU) 389/2012 For this Chapter, only the rules from Regulation (EU) 389/2012 which concern administrative cooperation on request and spontaneous requests merit attention.¹⁶² When a request is made on the basis of the Regulation the requested authority will communicate all information, including relevant documents, which is necessary for the enforcement of excise legislation. A reasoned request for specific administrative enquiries to be performed can also be part of the request. Officials from the requesting authority may participate in administrative controls performed by officials of the requested authority. During the administrative control, the visiting officials have no powers of their own; they cannot exercise the administrative powers of the national officials and operate under supervision of those officials (Article 12). The Regulation also provides that the automatic exchange of all information necessary to ensure the correct application of excise legislation without a prior request is mandatory in specific circumstances (Article 15).¹⁶³ Examples are that an irregularity or infringement of excise legislation has occurred or is suspected to have occurred in another Member State, or may have repercussions there. Moreover, sharing of relevant information for the correct application of the excise legislation without prior request is also allowed in other cases (Article 16).

Practice of Mutual Administrative Assistance In accordance with the Regulation a national competent authority is designated in all Member States. In the Instruction International Mutual Assistance Customs and Excise Matters (*Voorschrift internationale wederzijdse bijstand douane en accijnzen*—the Instruction) the Customs Information Centre (*Douane Informatie Centrum*—DIC) of the Tax and Customs Administration has been appointed as the national cross-border liaison office for the Netherlands for administration cooperation in the field of excise matters.¹⁶⁴ The DIC is located in Rotterdam and deals with incoming and outgoing

¹⁶¹ Regulation (EU) 389/2012 is applicable to *harmonised excise goods* within the meaning of Directive 2008/118/EC concerning the general arrangements for excise duties. Directive 2008/118/EC has harmonised the excise procedures—e.g., the rules on the moment on which an excise duty is to be levied in cross-border cases—for, inter alia, processed tobacco products. For the sake of completeness, it should be noted that administrative cooperation concerning non-harmonised excise goods can take place on the basis of the Naples II Convention.

¹⁶² Council Regulation (EU) No 389/2012, OJ L 121/1.

¹⁶³ For this purpose, a computerised system has been established on the basis of Decision 1152/2003/EC.

¹⁶⁴ *Voorschrift internationale wederzijdse bijstand douane en accijnzen* (Instruction international mutual assistance customs and excise), *Stcrt.* 1999, 97. Regulation (EU) 389/2012 is not mentioned in the Instruction. Instead, Directive 77/799/EEC is referred to as the basis for administrative cooperation in excise matters. When the Instruction entered into force in 1999, the Directive was the relevant legal instrument. However, it has since been replaced by Regulation (EC) 2073/2004. At present, Regulation (EU) 389/2012 is the appropriate instrument. The Instruction has not been updated since its introduction. All references to the Directive should be understood as references to

requests for all forms of cooperation. It follows from the provisions on practical routing in the Instruction that the DIC assesses whether requests comply with the formal requirements on the basis of the Regulation. If this is the case, requests are passed on to the designated foreign authority (outgoing) or to the competent region of the Tax and Customs Administration (incoming). Request are dealt with by customs officials in the regions. Each year, many requests are received and send out; they form the vast majority of annual cases of mutual administrative assistance. Foreign officials seldom come to the Netherlands to participate in controls in the field of excise.

8.7.2.2 General Rules on International Cooperation in Criminal Matters

Book 5 of the WvSv is entitled “International and European cooperation in criminal matters” (*Internationale en Europeesrechtelijke strafrechtelijke samenwerking*) and covers, inter alia, mutual legal assistance between the Netherlands and other States and the application of mutual recognition instruments within the EU. For this Chapter, the rules on ‘classic’ mutual assistance merit attention, particularly those concerning outgoing and incoming request.

Outgoing Requests With regard to outgoing requests for mutual legal assistance, the WvSv clarifies that the Public Prosecutor, the investigative judge, and the court determining questions of fact are all competent to make a request to foreign authorities.¹⁶⁵ Under Dutch law, a request can only be made if the procedural requirements for the requested investigative action that would apply in the Netherlands are fulfilled.¹⁶⁶ Consequently, the rule is straightforward: if a Dutch investigative authority would be able to perform an investigative action in the Netherlands—eg, conduct a search or order systematic surveillance—they are also able to request that action to be carried out in a foreign state.

Incoming Requests If an incoming request is made in accordance with a treaty effect should be given to it as much as possible.¹⁶⁷ If a request is not made on the basis of a treaty or if a treaty does not demand compliance, effect should be given to the request if that is not contrary to any statutory provision or at odds with public interest. Thus, the existence of a mutual legal assistance treaty is not *required* under Dutch law but does make giving effect to foreign request much easier (Article 5.1.4

the most recent Regulation. See: List of competent authorities referred to in Article 3(2) of Council Regulation (EU) No 389/2012 (administrative cooperation in the field of excise duties), OJ L 484/34.

¹⁶⁵ Kamerstukken II 2015–16, 34,493, nr. 3, p. 24.

¹⁶⁶ Article 5.1.3 WvSv; See also: HR 29 September 1987, ECLI:NL:HR:1987:AC9986; HR 25 June 1996, ECLI:NL:HR:1996:ZD0493.

¹⁶⁷ Article 5.1.4 WvSv; See also: HR 2 June 2015, ECLI:NL:HR:2015:1450.

(2) WvSv).¹⁶⁸ If a treaty provides that a request can be communicated to the competent judicial authorities directly, the Public Prosecutor should assess whether the request can be granted (*inwilliging*). This is different if a decision should be made by the Minister of Security and Justice in accordance with Article 5.1.5 WvSv. This provision establishes a limited number of refusal grounds; some can only be decided upon by the Minister.¹⁶⁹ If the incoming request for mutual legal assistance can be granted, the Public Prosecutor will take care of its swift implementation (*uitvoering*). As a rule, investigative officials will perform the necessary measures, but sometimes the involvement of the investigative judge is also required. Investigative powers can be relied upon in so far as those powers could also be used on the basis of the WvSv in a Dutch investigation into the same facts (see Sects. 8.4.1 and 8.6.1). Investigative powers which can only be used with judicial authorisation of an investigative judge are only to be relied upon if the request was made by *judicial authorities* of the foreign State, ie, a foreign investigative judge or court, but not the Public Prosecutor.¹⁷⁰ Materials, documents and data that are collected during the investigation are given to the Public Prosecutor and forwarded to foreign authorities (Article 5.1.10 WvSv). Sometimes the person involved can file a written complaint within 14 days against, inter alia, the transfer of seized goods or data. If the person concerned is not informed in the interest of the investigation, an authorisation by the court (*verlof van de rechtbank*) is required if the results of the investigation have been obtained through the application of the special investigative powers, such as the interception of telecommunications.

8.7.2.3 Mutual Legal Assistance Treaties: The Naples II Convention

In accordance with Articles 93 and 94 of the Dutch Constitution a treaty has primacy over national statutory acts, and these national acts should not be applied if they

¹⁶⁸ Kamerstukken II 2015–16, 34,493, nr. 3, p. 15; See also: Hoge Raad 22 May 2012, ECLI:NL:HR:2012:BV9212; The Explanatory Memorandum recognises that, in practice, most foreign requests are made on the basis of a treaty.

¹⁶⁹ The refusal grounds are: (i) compliance with the request would constitute cooperation in prosecution or adjudication which violates *ne bis in idem*; (ii) a request is made with regard to the investigation against a person that is being prosecuted in the Netherlands and consultation with the foreign authorities has shown that compliance with the request is at odds with the Dutch interests in prosecution or would lead to a violation of *ne bis in idem*; (iii) compliance with the request would lead to a flagrant denial of justice of the fundamental rights of the person concerned; (iv) there are grounds to believe that the request is made in the context of a criminal investigation which is started to prosecute, punish or otherwise harm the person concerned on the basis of his religious, ideological or political views, nationality, race or population group of which he is part; and (v) the investigation concerns political offences or offences related thereto. Only the Minister of Security and Justice is competent to make a decision if the last two refusal grounds come into play.

¹⁷⁰ Kamerstukken II 2015–16, 34,493, nr. 3, p. 19; See: Reijntjes (2015), p. 820.

conflict with the treaty.¹⁷¹ The Convention drawn up on the basis of Article K.3 of the Treaty on European Union on mutual assistance and cooperation between customs administrations (Naples II Convention) constitutes the premier instrument of mutual legal assistance in criminal matters in, inter alia, the field of excise matters between the Netherlands and EU Member States.¹⁷² The Convention is applicable to prosecuting and punishing infringements of both national and Community customs provisions. Excise duties constitute customs provisions within the meaning of the Convention.

As seen before, Regulation (EU) 389/2012 is relied upon in the administrative context of *harmonised* excise duties. However, the wording of the Naples II Convention covers both *administrative* and *criminal* investigations and provides that investigative powers should be available in either context.¹⁷³ In this regard, the competences and investigative powers under *national* law that are given to the competent customs authorities within the meaning of the Convention are relevant. Under Dutch law, most of the investigative powers mentioned are available during criminal investigations and can only be performed by the FIOD.

In the Netherlands, the central service that is responsible for the coordination of the request for mutual legal assistance is the DIC of the Tax and Customs Administration.¹⁷⁴ In principle, incoming and outgoing requests for mutual legal assistance from are sent to the DIC and then passed on to the liaison offices in other Member States (outgoing) or the competent authority in the Netherlands, ie, the FIOD (incoming). The Convention allows direct contact between the customs authorities of the Member States without the direct involvement of the liaison office (Article 5 (2)). As the FIOD is a customs authority within the meaning of the instrument it can directly communicate with foreign counterparts.¹⁷⁵

General Forms of Cooperation Firstly, the Naples II Convention deals with assistance on request and spontaneous assistance. For example, an applicant authority can request all information which may enable it to prevent, detect and prosecute infringements of excise legislation. A request can be made by an applicant authority for surveillance and an enquiry concerning operations which constitute or seem to

¹⁷¹ Kamerstukken II 2015–16, 34,493, nr. 3, p. 6; See also: HR 13 January 2009, ECLI:NL:HR:2009:BF0837.

¹⁷² Personal interview FIOD (January 2019).

¹⁷³ The Naples II Convention is applicable in the administrative context for other fields of law, for example non-harmonised excise duties and transfrontier shipment of waste.

¹⁷⁴ Voorschrift internationale wederzijdse bijstand douane en accijnzen, *Stcrt.* 1999, p. 97.

¹⁷⁵ Goedkeuring van de op 18 december 1997 te Brussel totstandgekomen Overeenkomst opgesteld op grond van artikel K.3 van het Verdrag betreffende de Europese Unie inzake wederzijdse bijstand en samenwerking tussen de douaneadministraties (Approval of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on mutual assistance and cooperation between customs administrations) (Trb. 1998, 174), Kamerstukken II 1999–2000, 26,869, nr. 3, p. 7; The Convention explicitly refers to ‘customs authorities’ and not to ‘customs administration’. Thus, only the customs authorities *sensu stricto* can have direct contact. Other authorities that could be involved but are not part of the Tax and Customs Administration should always use the DIC.

constitute infringements respectively. The Convention establishes that the requested authority shall always comply with requests in so far it is possible. Interestingly, the Convention also feature the option to perform surveillance and share information *without* a prior request, and establish a positive obligation for the customs authorities (Article 17).

Special Forms of Cooperation The Naples II Convention also features “special forms of cooperation” and establishes special investigative powers which can be relied upon in a cross-border context: hot pursuit (Article 20), cross-border surveillance (Article 21), controlled delivery (Article 22) and covert investigations (Article 23). These investigative measures all concern criminal powers under Dutch law and will be carried out by FIOD under supervision of the FP/OM.¹⁷⁶ Cross-border cooperation is permitted in a limited number of cases to prevent, investigate and prosecute infringements of customs provisions in case of, inter alia, the illicit cross-border commercial trade in taxable goods to evade tax. The requested authority should apply to the judicial authorities in his Member State for a judicial warrant, if that is required under national law (Article 19).

For the purpose of this Chapter, the option to perform a controlled delivery merits particular attention in lights of its relevance for Dutch investigations concerning illicit trade in tobacco products (see Sects. 8.2.2 and 8.6.1). Requests for a controlled delivery may be made on the basis of Article 22 of the Naples II Convention. The measure can only be relied upon for criminal investigations into extraditable offences under national law. The controlled delivery will take place in accordance with the national law and procedures of the requested Member State. In accordance with the Naples II Convention, the requested authority takes over control of the delivery when the goods cross the border or at an agreed hand-over point in order to avoid any interruption of surveillance.¹⁷⁷ The authority will ensure that the goods are kept permanently under surveillance during the rest of the journey to ensure that it has the possibility of arresting the perpetrators and seizing the goods.

8.7.2.4 Mutual Legal Assistance: Practice and Approach

The FIOD and the OM cooperate often with their counterparts in other EU Member States, almost exclusively on the basis of the Naples II Convention.¹⁷⁸ As mentioned

¹⁷⁶Goedkeuring van de op 18 december 1997 te Brussel totstandgekomen Overeenkomst opgesteld op grond van artikel K.3 van het Verdrag betreffende de Europese Unie inzake wederzijdse bijstand en samenwerking tussen de douaneadministraties (*Trb.* 1998, 174), Kamerstukken II 1999–2000, 26,869, nr. 3, p. 8; It is also possible that the police carries out some of these powers under supervision of the OM.

¹⁷⁷Explanatory Report on the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations, O J L 189/1, 22.2.

¹⁷⁸Personal interview FIOD (January 2019).

before, most cases of serious excise fraud and connected offences concerning illegal tobacco products have a transnational aspect. For example, the cigarettes are brought into the Netherlands from abroad or the suspects are from foreign countries. International cooperation is essential in such cases. Thus, information is shared and operations are performed on a regular basis following incoming request; of course, requests for information and investigative actions are also made by the Dutch authorities. The vast majority of requests concern cooperation with authorities from Poland, Germany, France, Belgium, the United Kingdom and Ireland. Cooperation with non-European countries does occur on an occasional basis. For example, requests for information are incidentally communicated to the authorities of the United Arab Emirates. As a rule, cooperation is more challenging with regard to third countries.¹⁷⁹

Three developments are especially noteworthy in the context of mutual legal assistance and illicit tobacco products within the EU. Firstly, it has been mentioned that the FIOD and the OM have not focused on the seizure of cigarettes in recent years. Instead, the products are used as a link on which further criminal investigations can be based to identify and round up the criminal organisation that are behind the illicit trade in tobacco products. This focus on criminal organisations means that the Dutch authorities often opt for cross-border controlled delivery on the basis of the Naples II Convention. This has bolstered international cooperation. Secondly, the FIOD has increased the sharing of information *proprio motu*. As seen, the Naples II Convention entails a positive obligation to immediately share all relevant information with the competent authorities in other Member States. The provision is relied upon by the FIOD to actively communicate relevant information on a regular basis and without a prior request. From the outset, the FIOD and the OM have adopted the basic stance that they trust the integrity and professionalism of their regular foreign counterparts ('proactive mutual trust').

Lastly, Europol has assumed a central facilitating and coordinating role in the investigation of cross-border cases of serious excise fraud, for example because cross-border sharing of information by the FIOD and the OM takes place via the Secure Information Exchange Network Application (SIENA) of Europol. Recently, the agency's role has been bolstered with the establishment within the Europol framework of an Operational Task Force (OTF) for excise fraud and illegal tobacco. The OTF focuses on the sharing of information and identifying high value targets (HVTs), ie, organised crime groups. At present, the Netherlands (FIOD), the United Kingdom (Her Majesty's Revenue and Customs—HMRC) and Europol participate in the OTF, but other Member States can join. The real-time information which is assembled within the OTF can be accessed and analysed at Europol by designated officials of the participating national investigation services that are part of the Trusted Expert Community (TEC). Thus, the intelligence will flow to investigations in the Member States and can lead to (cross-border) operational cooperation during

¹⁷⁹ Personal interview FIOD (January 2019).

investigations into, inter alia, organised crime groups which are involved in large-scale production of illegal cigarettes.¹⁸⁰

Obstacles in the Cross-Border Setting The experiences of the Tax and Customs Administration, the FIOD and the OM concerning international cooperation are positive: in most cases, foreign authorities are most willing to provide assistance and cooperation is smooth. Of course, problems do arise occasionally, for example because national legislation creates obstacles to cooperation or the national organisation of the enforcement authorities is different compared to the Netherlands.¹⁸¹ However, the main obstacle which was reported did not concern operational difficulties, but the inherent delays caused by national borders within that framework.¹⁸² The disappearance of internal borders within the EU is not fully reflected in the enforcement realm. In general, enforcement is still concentrated at the Member State level and the powers of the competent authorities are reserved to the national territory. In practice, this means that authorities like the FIOD cannot take investigative actions proprio motu when confronted with cross-border criminal activities. Inevitably, this leads to significant delays; it may take days or weeks before a request for information or investigative actions yields results. Moreover, FIOD has indications that the criminal organisations that have been identified during investigations into serious cases of excise fraud intentionally spread their activities across several jurisdictions; cigarettes are produced in one country, stored in another and brought onto the market in a third for example.¹⁸³

8.7.3 *Extradition and Surrender*

The Netherlands does not extradite, unless a treaty exists. In accordance with the Dutch Extradition Act (*Uitleveringswet*—UW) extradition for fiscal offences is excluded, unless a treaty explicitly provides otherwise (Article 11 (4) UW). Fiscal offences constitute all offences concerning taxes, such as the violations of regulations of excise and customs law.¹⁸⁴ In practice, the provisions of the relevant extradition treaty between the Netherlands and another country will be decisive in establishing whether a person can be extradited.¹⁸⁵ Since 1 October 2020, the WHO Protocol itself can function as a legal basis for extradition between the Netherlands

¹⁸⁰ Personal interview FIOD (January 2019).

¹⁸¹ An example is the strict division in the investigative competences of authorities in other Member States.

¹⁸² These problems are not exclusive to the illicit tobacco trade. Cf: Luchtman (2008); Luchtman and Vervaele (2014), p. 2.

¹⁸³ Personal interview FIOD (January 2019).

¹⁸⁴ Cf: Kamerstukken II 1965/1966, 8054, nr. 10, p. 5.

¹⁸⁵ Glerum (2013), p. 120.

and all other States which are parties to the instrument (Article 51a UW).¹⁸⁶ The European Convention on Extradition (ECE) also merits attention as that instrument is still in force between the Netherlands and various European countries that are not Members of the EU, e.g., Ukraine and the Russian Federation.¹⁸⁷ The Treaty provides that the Contracting Parties will extradite for offences in connection with taxes, duties, customs and exchange if the offence, under the law of the requested Party, corresponds to an offence of the same nature. In this regard, it is relevant that the essential constituent elements of the offence correspond.¹⁸⁸

Between the Member States of the EU, extradition has been replaced by surrender on the basis of a European Arrest Warrant (EAW) in accordance with Framework Decision 2002/584/JHA. In the Netherlands, the Framework Decision has been implemented in the Surrender Act (*Overleveringswet*—OLW). Articles 3 tot 4bis of the Framework Decision provides a limitative list of refusal grounds. The fiscal character of an offence does not feature in the list. Consequently, surrender for fiscal offences is allowed if the offence can be brought under the list of Article 2 (2) of the Framework Decision, or if the requirement of double criminality is fulfilled.¹⁸⁹

8.7.4 Cooperation with OLAF, Eurojust and Europol

8.7.4.1 OLAF

On the basis of Regulation (EU) 883/2013, the European Anti-Fraud Office (OLAF) is entrusted with the investigation of fraud, corruption and any other illegal activities that affect the financial interests of the Union.¹⁹⁰ The financial interests of the Union include revenues, expenditures and assets that are covered by the budget of the EU. Excise and customs duties are part of the Union's traditional own resources and fall under the scope of the financials interests of the EU within the meaning of the Regulation.¹⁹¹ Consequently, OLAF may be competent to start an investigation into cases of fraud concerning illegal tobacco products. Dutch authorities may be required to take investigative action on behalf of the Office or officials of OLAF can undertake such actions themselves in the Member State concerned. These investigations can produce evidence of offences and, thus, lead to recovery and administrative or criminal sanctions imposed in the Member State.

¹⁸⁶ Kamerstukken II 2019–2020, 35,356, nr 3, p. 33.

¹⁸⁷ It should be noted that extradition for fiscal offences is also allowed on the basis of various bilateral treaties between the Netherlands and non-European countries, eg, the United States, Canada, Australia and Hong Kong. Cf: Sanders (2014), p. 120.

¹⁸⁸ Glerum (2013), p. 697; Cf: Hoge Raad 4 February 2003, ECLI:NL:HR:2003:AF0451; Hoge Raad 7 October 2003, ECLI:NL:HR:2003:AK3589.

¹⁸⁹ Glerum (2013), p. 699.

¹⁹⁰ Article 1 Regulation (EU, Euratom) No 883/2013, OJ L 248/1.

¹⁹¹ See: Council Decision of 26 May 2014, OJ L 168/105.

OLAF in the Netherlands OLAF relies on information from the Member States and also shares relevant findings. The Dutch authorities—the Tax and Customs Administration and FIOD—send information to the European agency on a regular basis and also receive it in return. Apart from the sharing of information, OLAF is also provided with several investigative competences that it can use during the investigation of breaches. In the Netherlands, the involvement of OLAF in excise cases takes place in close cooperation with the Dutch authorities. As a first step, the national authorities are notified of the object, purpose and legal basis of the investigations by OLAF. The Anti-Fraud Coordination Service (AFCOS) was established in 2013 as a specialised unit of the DIC to be the partner for OLAF.¹⁹² Nowadays, OLAF's notification is sent to and dealt with by the AFCOS.

The AFCOS checks whether information which is required on the basis of the Regulation has been provided by OLAF and, if that is the case, takes steps to facilitate the administrative investigation. The existence of a prior national inspection does not preclude an investigation by OLAF. In such circumstances, the agency will assess if the scheduled investigation leads to a repetition of moves.¹⁹³ When the investigation can take place, OLAF, AFCOS and the national supervisor meet to establish the time-table for the investigation.¹⁹⁴ In the Netherlands, a representative of AFCOS and a national supervisor will always attend the investigation.¹⁹⁵ The administrative investigation itself is carried out by the officials of OLAF.

OLAF will communicate any fact or suspicion relating to an irregularity to the national authorities as soon as possible after the conclusion of the administrative investigation. The report is admissible evidence in national administrative or judicial proceedings and has the same evidentiary value as national reports drawn up by national officials. It is possible that findings during an administrative investigation by OLAF give rise to a reasonable suspicion of a criminal offences under Dutch law. In such cases, the officials from the European agency should interrupt the inspection and the competent BFC/CA of the Tax and Customs Administration is contacted. He or she should assess whether there is a reasonable suspicion. If this is the case, OLAF should stop its investigation.¹⁹⁶ In such cases, FIOD will start a criminal investigation.¹⁹⁷ Evidence which is gathered by OLAF during an administrative investigation

¹⁹²Under Regulation 2013/883, Member States are required to designate an anti-fraud coordination service (AFCOS); See: Article 3 (4) of Regulation (EU) 2013/883. After 1 April 2016, the AFCOS was officially split from the DIC, but remained located in Rotterdam. In January 2018 the unit was brought under the National Customs Tactical Centre (*Douane Landelijk Tactisch Centrum*) of the National Office (*Landelijk Kantoor*) in Rotterdam, see: Bovend'Eerd (2018), p 124; Graat (2017), pp. 92–93.

¹⁹³Customs Manual 2016, 45.00.00, section 4.2.3.

¹⁹⁴Customs Manual 2016, 45.00.00, section 4.2.6.

¹⁹⁵Customs Manual 2016, 45.00.00, section 4.3.1.

¹⁹⁶Graat (2017), p. 96.

¹⁹⁷Customs Manual 2016, 45.00.00, section 4.3.5; In practice, this rarely occurs. In recent years, there has been one example of a case in which the investigation of OLAF had to be terminated due to the rise of a reasonable suspicion, see: Graat (2017), pp. 96–97.

can be relied upon for the purpose of imposing an administrative fine, but also during criminal proceedings. The investigation should not be repeated.

8.7.4.2 Europol and Eurojust

Europol is an essential partner for the FIOD and OM during cross-border investigations into illegal tobacco trade. Europol has a Focal Point for large-scale excise fraud and performs a central facilitating and coordinating role. As mentioned, this role has been bolstered with the establishment of the OTF for excise fraud and illegal tobacco within the framework of Europol (see Sect. 8.7.2). In the OTF, information can be shared and analysed in real-time and intelligence will flow directly to the competent national authorities. The number of participating Member States is expected to increase in the near future and Europol has indicated that it intends to implement the figure of the OTF in other fields of crime as well.¹⁹⁸ The FIOD and the OM often rely upon the expertise of Eurojust in the context of cross-border investigations; the contacts of Eurojust is another EU Member States and its coordination in transnational cases are valuable.¹⁹⁹

8.7.5 Joint Customs Operations

The Netherlands participates in joint customs operations (JCO) in the context of illegal tobacco products, especially when it concerns maritime operations.²⁰⁰ For example, in 2014 Dutch authorities were involved in Operation Warehouse. This JCO targeted, among other things, illegal tobacco products crossing the external borders of the Customs Union and entailed cooperation between authorities from, inter alia, the Netherlands, Lithuania, Poland, Belgium, the UK and Italy as well as involvement from Europol and OLAF.²⁰¹ In this context, it should be noted that Dutch Customs and the FIOD also contribute actively to the Customs Cooperation Working Party (CCWP).

¹⁹⁸ Personal interview FIOD (January 2019).

¹⁹⁹ Personal interview FIOD (January 2019).

²⁰⁰ Reply by Landelijk Kantoor Douane to written questions (January 2019).

²⁰¹ See: Operation “Warehouse”: How Joint Customs Operations help to protect the EU’s financial interests (Press release, European Commission, 21 January 2014).

8.8 Conclusions

The government of the Netherlands has pursued an active anti-smoking policy since the early 1990s. Although tobacco products remain legal, their visibility and availability in Dutch society have been significantly reduced and are set to be limited further in the near future. In this context, an increase of excise duties is one of the most important tools for the Dutch government. Illicit trade in tobacco products undermines the anti-smoking policy and leads to the loss of excise duties. In 2020, most obligations from the WHO Protocol to Eliminate Illicit Trade in Tobacco Products were implemented in Dutch law through the amendment of existing legislation and the adoption of new provisions concerning, *inter alia*, a track and trace system, a due diligence obligation, and related administrative and criminal offences. The Dutch legislator has opted not to introduce licensing for raw tobacco, key inputs and tobacco sale points at this point, but the sale, production, possession, transport or export of manufacturing equipment for tobacco products will be subjected to a license in January 2021. Thus, a notable ‘blind spot’ for the authorities—the manufacturing equipment—has been addressed, but others—raw tobacco and other key inputs—remain beyond their investigative scope. Nevertheless, it can be concluded that Dutch legislation will comply with the WHO Protocol from that moment onwards.

In recent years, the enforcement efforts against illegal tobacco products have increased in the Netherlands and the authorities have invested in both manpower and expertise to address this form of crime. In that regard, the special investigative service FIOD merits particular attention due to its Smoke Screen Project (2016–2018) and the subsequent incorporation of the characteristic approach into the permanent Smoke Cluster since 1 January 2019. Although the NVWA, Tax and Customs Administration, the FIOD and the OM all have their specific competences in the fight against illicit trade in tobacco products they form an integral team which works closely together during investigations and prosecution. For example, relevant information is actively shared and operational cooperation also takes place. Moreover, lost excise duties are recovered by the Tax and Customs Administration via an additional tax assessment, because confiscation of illegally obtained assets is not allowed for fiscal offences.

Investigations of the FIOD focus on serious excise fraud and the criminal organisations that are behind the large-scale production, transport and sale of illegal tobacco products. Connected crimes—eg, forgery of documents and trademark counterfeiting—are also prosecuted. In recent years, the Dutch investigative efforts have not targeted the seizure of as many cigarettes as possible. Instead, shipment of illegal tobacco products are used as a tool to identify and apprehend the responsible organised crime groups through means of a controlled delivery in the Netherlands or abroad. Aside from this different approach on the part of the investigative authorities the phenomenon of illicit tobacco products in the Netherlands has also been subjected to changes. Since 2016, a shift to production can be seen, and an increasing number of illegal factories is discovered during criminal investigations. Although

the majority of illegally produced or possessed tobacco products are cigarettes, smoking tobacco—most notably shisha tobacco—has become important too. Compared to the production of cigarettes, shisha tobacco is easy and cheap to make and the value increase is high.

The illicit trade in tobacco products is not a national phenomenon: it has a distinctly international character. Indeed, case law shows that various cases in recent years have cross-border dimensions and concern, for instance, possession of illegal cigarettes that are brought into the Netherlands from other EU Member States or third countries. Organised crime groups also operate across borders. Therefore, international cooperation is essential to adequately address this form of crime. The Dutch authorities cooperate successfully with their counterparts in other EU Member States; information is shared and cross-border operations are carried out on a regular basis. The instruments that are relied upon serve the needs of the authorities. The Napels II Convention merits special mentioning, because it constitutes the primary instrument for cooperation during large-scale criminal investigations and allows the competent authorities to, *inter alia*, perform cross-border controlled deliveries and share information *proprio motu*. In the cross-border setting, Europol has adopted a central facilitating and coordinating role during criminal investigations. Sharing of information takes place via the SIENA system and the establishment of an OTF for excise fraud and illegal tobacco within the framework of Europol constitutes an important development in the cross-border fight against illicit tobacco products.

The findings of this Chapter show that enforcement in the field of illicit trade in tobacco products has the attention of the competent authorities in the Netherlands. In recent years, important gains have been made. The implementation of the WHO Protocol in national legislation, and the investment in manpower and expertise at the national and European level—e.g., the Smoke Cluster and the OTF—should be regarded as positive developments in the fight against illegal tobacco. Of course, obstacles to enforcement continue to exist in the national and cross-border setting. This Chapter has identified and addressed several of those issues from the Dutch perspective, for example the enforcement gaps in the context of raw tobacco and precursors, and the lingering difficulties in international cooperation.

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