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**122**

**Decree of 4 April 2008, containing a number of further provisions for the enforcement of the Tobacco Act (Decree on the enforcement of smoke-free workplaces, hospitality establishments and other areas)**

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We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc.

On the recommendation of our Minister of Health, Welfare and Sport of 7 December 2007, reference VGP/ADT 2808279;  
Taking account of article 11 A, fourth and fifth paragraph of the Tobacco Act;  
Having consulted the Council of State (opinion of 1 February 2008, no. W13.07.0470/I);  
Having seen the more detailed report of our Minister of Health, Welfare and Sport of 31 March 2008, reference VGP/ADT 2839871;

Have approved and decreed the following:

**Article 1**

In this decree, hospitality establishments shall mean: institutions that are operated by proprietors and enterprises who/that are obliged to register with the Hospitality and Catering Trade Association.

**Article 2**

The obligation, intended in article 11a, first paragraph, of the Tobacco Act, shall not apply:

- a. in areas where no intrusion may be made on personal privacy;
- b. in lockable areas for the smoking of tobacco products, designated and denoted as such;
- c. in the open air.

**Article 3**

1. Those who have control over one of the following buildings shall be obliged to institute, denote and maintain a smoking prohibition in the areas thereof that are accessible to the public:

- a. hospitality institutions, operated by a proprietor without personnel;
- b. covered shopping centres, event halls convention centres and airports.

2. The obligation shall not apply:

- a. in areas where no intrusion may be made on personal privacy;
- b. in lockable rooms or the smoking of tobacco products, designated and denoted as such;
- c. in the open air.

#### **Article 4**

This decree shall take effect from 1 July 2008.

#### **Article 5**

This decree shall be cited as: Decree enforcing smoke-free workplaces, hospitality establishments and other areas.

We order and command that this decree together with the relevant explanatory memorandum shall be published in the Bulletin of Acts, Orders and Decrees.

The Hague, 4 April 2008

Beatrix

The Minister of Health, Welfare and Sport,  
A. Klink

Published on 22 April 2008

The Minister of Justice,  
E.M.H. Hirsch Ballin

The opinion of the Council of State has been made public by lying open for inspection at the Ministry of Health, Welfare and Sport. Furthermore, the opinion together with the documents lying open for inspection shall be published as an insert to the Government Gazette of 13 May 2008, No. 89.

## EXPLANATORY MEMORANDUM

### GENERAL

#### Introduction

This decree is closely associated with making the hospitality industry smoke-free in accordance with the coalition agreement (page 40). The hospitality industry becoming smoke-free is based to a large extent on the termination of the exception for employers in the hospitality sector guaranteeing their employees a smoke-free workplace. For this purpose, the Decree on exceptions to a smoke-free workplace (STB 2003, 561) shall be repealed. This is accomplished in the Decree for the repeal or amendment of a number of governmental decrees in the area dealt with by the tobacco legislation, which shall come into operation simultaneously with the current decree. Certain substantive elements from the decree on exceptions to a smoke-free workplace that are still current and for this reason indispensable, shall be transferred to article 2 of the current decree. Article 3 adds something new to the tobacco regulations, because for the first time use is made therein of the possibilities afforded by article 11a, first paragraph, of the Tobacco Act. This involves the implementation of a smoking prohibition in both catering institutions operated by a proprietor without personnel, as well as in covered shopping centres, event halls, convention centres and airports.

Pursuant to article 12 of the Tobacco Act, a draft of this decree was submitted for preliminary scrutiny to both Houses of the States General on 31 July 2007. The standing committee on Health, Welfare and Sport (VWS) of the Second House subsequently had a general meeting with the Minister of VWS regarding the preliminary draft decisions on 10 October. In so doing, the reactions of social organisations and market parties were taken into account, as well as the reaction of the Minister to this. On 18 October, a continued general meeting was subsequently dedicated to the draft decisions. Ten motions were submitted with this, of which one was adopted. The exchange of ideas with the House led to the draft decision being amended on various points.

#### New policy

##### *Smoking prohibition*

With the termination of the exception to the employers' obligation (article 11a, first paragraph, of the Tobacco Act) for the hospitality sector, this sector would, in principle, become entirely smoke-free, were it not for the fact that there are also catering institutions where no personnel are employed. The estimations of the number of so-called one-man businesses in the hospitality industry range from 6000 to 10,000. This decree extends, inter alia, to making these one-man businesses in the hospitality industry smoke-free. An important motive for this is the avoidance of a dichotomy in the hospitality industry: catering establishments where one may not smoke (to protect employees against exposure to tobacco smoke) and catering establishments where one may smoke (because no employees are involved). The largest employee organisation in the hospitality sector, Koninklijk Horeca Nederland, deems such a dichotomy to be undesirable, because this would lead to an "uneven playing field". If one-man businesses in the hospitality industry were not legally obliged to be smoke-free, this may lead to legal constructs that could result in a number of one-man businesses, in any event on paper, becoming prevalent. More generally, it would not evidence sound policy

if all catering establishments did not become smoke-free simultaneously. This would be unclear to the public and lead to (the appearance of) distortion of competition.

In order to make one-man businesses in the hospitality industry smoke-free, article 11 A, first paragraph, of the Tobacco Act is being utilised for the first time. This article offers the statutory basis for making all categories of buildings smoke-free, which – mindful of articles 10 and 11 of the Tobacco Act – could not be brought under the operating domain of the Decree on the limitation on sale and use of tobacco products and to which article 11a, first paragraph, of the Tobacco Act also does not apply, because this does not always involve an employer-employee relationship. One-man businesses in business sectors other than hospitality are often operated in a manner that cannot, or can hardly, be separated from the private domain of the proprietor. Consider a tax consultant who operates from home or a small office adjacent to his home. His clients often comprise, to some extent, personal relationships. All things considered, such a setting appears to be strongly situated in the private domain that due to the associated problems cannot be monitored in an orderly manner, which is why it was decided to dispense with a legal smoking prohibition in this context.

Article 3, first paragraph, of this decree stipulates that one-man businesses in the hospitality industry as well as covered shopping centres, event halls, convention centres and airports must be smoke-free.

#### *Coffee shops*

A separate point to dwell on involves the position of the coffee shops. Coffee shops are obliged to register with the Hospitality and Catering Trade Association, in accordance with the legislation of that trade association. Because of this, they fall under the definition of a hospitality institution. It is primary that all employees deserve equal protection, that the legislation must be as unambiguous and clear as possible, and that exceptions must be legally vulnerable. For this reason, coffee shops belong under the same regimen as regular catering establishments. Furthermore, a smoking room can be set up in coffee shops.

#### *Penalty*

With all of this, the question can arise about the penalty for transgressions of this type. According to the legal schedule to the Tobacco Act, containing the penalty rates for transgressions, the penalty for a (first) transgression for failing to monitor compliance with the smoking prohibition is €300.

#### **Evaluation against the EU Treaty**

The limitation on the possibilities of using tobacco products in specific buildings or places accessible to the public (smoking prohibition) raises the question of whether this can withstand an evaluation against article 28 of the EU Treaty regarding the free trade in goods. Article 28 of the EU Treaty requires the repeal of every limitation on the free trade in goods, even if such limitation applies without distinction to national and foreign products. According to established case law, such impediments must be regarded as all measures that prohibit, impede or render the exercising of these fundamental freedoms less attractive.

In the view of the government, such a measure that impedes trade is justified with a view to protecting public health, all of this in accordance with article 30 of the EU Treaty. The

use of tobacco products indeed forms a significant cause of death in our country. Annually, approximately 19,000 people die from the consequences of (active) smoking and several thousand people from the consequences of passive smoking. Furthermore, (passive) smoking leads to many (debilitating) health disorders and the costs of care associated therewith. Moreover, this involves an avoidable cause of death. If we wish to promote the health of our population – and that is a duty that the Constitution imposes on us – then reducing the use of tobacco and exposure to tobacco smoke has a high priority because this will lead to less disease and death, and accordingly to health gains.

All of this must be considered in light of the fact that the measures are limited to (only) a portion of the areas accessible to the public. Nowhere do these measures extend to the open air or to interior areas that can be regarded as private. Accordingly, the limiting measures comply with the requirement of proportionality in relation to the protection of public health interests. This applies all the more because the objectives cannot be achieved with a less extensive remedy. Against this background the government has cause to conclude that these measures are justified in the light of the EU Treaty.

#### **Notification of European Committee (guideline 98/34/EU)**

On 30 November 2007, the draft decree was (again) submitted to be Committee of the European Communities, in compliance with article 8, first paragraph, of guideline no. 98/34/EU of the European Parliament and the Council of 22 June 1998, regarding an information procedure in the domain of standards and technical provisions (Pb EG L 204), as amended by guideline no. 98/48/EU. Notification of the European Committee is essential because the draft decree contains technical provisions within the meaning of guideline 98/34/EU. No remarks were received in response to this.

#### **Administrative burden and effects on the business sector**

With regard to the question of whether the current decree will entail administrative burdens for citizens or the business sector, it can be noted that this will hardly be the case. Aside from the new obligations that arise from article 2, section b, and article 3 – the designation of (optional) smoking rooms and smoking prohibitions respectively – neither citizens nor business sectors are subject to information obligations by the current decree. The Advisory Board for the reviewing of administrative burdens (Actal) made it known on 1 July 2007 that the decree has not been selected for the reviewing of administrative burdens.

#### *Smoke-free hospitality industry effects on business*

In the political and social discussion on the hospitality industry becoming smoke-free attention was paid, amongst other matters, to the commercial economic effects thereof. In the discussion on the Decree on exceptions to a smoke-free workplace in 2003, Koninklijk Horeca Nederland stated that making the hospitality industry smoke-free would lead to a very large loss of turnover and work opportunities. Experience with a smoke-free hospitality industry outside Europe, however, has indicated otherwise, as appears from, inter alia, a publication in the journal Tobacco Control in 2003: "Review of the quality of studies on the economic effects of smoke-free policies on the hospitality industry" (M. Scollo et al.)

Since 2003 an increasing amount of experience has also been gained in Europe with a smoke-free hospitality industry. After Ireland led the way on 29 March 2004 as the first (European) country to implement this, others like Norway Sweden and Italy followed. The European experiences confirmed that making the hospitality industry smoke-free has no negative effects on turnover or work opportunities. Chapter 3 of the report "*Lifting the smoke-screen: 10 reasons for a smoke-free Europe*" (2006) offers a good overview of experiences and studies on this point in overseas countries. All institutions in the area of hospitality, sport and art and culture becoming smoke-free also brings positive business effects in consequence of a reduction in cleaning costs.

#### *Business effects on other smoke-free areas*

The business effects on covered shopping centres, event halls, convention centres and airports will also be limited. Firstly, this has to do with the fact that part of the covered shopping centres, event halls, convention centres and airports are already smoke-free on the basis of self-regulation. Additionally, the said categories of areas that are not yet smoke-free becoming smoke-free will involve hardly any costs whatsoever. Possible additional costs are primarily associated with the organising of the monitoring of compliance with the smoking prohibition. In practice, these additional costs appear to be negligible because use will often be made of pre-existing facilities in the form of camera monitoring, security officers, and suchlike. The expectation is therefore justified that matters will be implemented quietly and without many additional costs.

On 15 June 2007, the Proposed Legislation Reporting Centre agreed to the Effects on Business Test being implemented.

#### BY SUBSECTION

##### **Article 1**

This article describes what is understood by hospitality institutions in this decree. On this point, this article is substantively equivalent to the corresponding section in article 1 of the Decree on exemptions on smoke-free workplaces that will expire when this decree and the Decree for the repeal or amendment of a number of governmental decrees on the area of the tobacco legislation come into effect. The definition of hospitality institutions is still necessary in connection with article 3, first paragraph, section 8, of this decree. The formulation "proprietors or enterprises that are obliged to register with the Hospitality and Catering Trade Association" was chosen to make it clear that this decree also pertains to proprietors or enterprises that have not (yet) registered with the Trade Association, despite the obligation to register.

##### **Article 2**

This article contains certain, still relevant, substantive remnants of the "old" Decree on exceptions to a smoke-free workplace. Sections a to and including c are substantively the same as sections g to and including i of article 2 of the Decree on exceptions to a smoke-free workplace. Section b contains two amendments in respect of the old article 2, section h.

For purposes of the clarity of the current decree, the relevant sections of the memorandum to the Decree on exceptions to a smoke-free workplace from 2003 are repeated here in abbreviated form.

#### *Section a*

For fundamental and practical reasons it is difficult to control people smoking in their own private domain. Consequently, it is difficult for employers, whose employees carry out work activities with people in a private environment, to guarantee that their employees can do their work without the hindrance or nuisance of tobacco smoke. There are various examples of employees who carry out (part of) their work activities in homes or other areas that can be regarded as private. Here, one can think of people who work in home care, maternity assistance, maintenance people and people who visit customers. Furthermore, this involves living areas in, for example, care centres, health institutions and judicial institutions where occupants of such institutions do not have to share the facilities with other occupants. In these locations, the employer may indeed have opportunities to enforce a smoke-free working environment, but that this would form an unreasonable imposition on the personal privacy of the people involved. For this reason, an exception is made in this regard in section a.

#### *Section b*

Employers can decide to set up and designate lockable rooms, denoted as such, for the smoking of tobacco products. The smoking rooms must be lockable, so that possible hindrance or nuisance of tobacco smoke outside of these rooms is kept to a minimum. The smoking rooms are first and foremost intended to offer smokers in a business the opportunity to smoke from time to time without hindering or causing nuisance to others by so doing. In principle, non-smokers do not have to enter these rooms. This does not detract from the fact that the people will also have to carry out work activities in the smoking rooms. For example, one can think of cleaning and maintenance personnel in this regard. Even when they carry out their cleaning and maintenance work activities when smoking is not taking place in the smoking room, this still involves exposure to tobacco smoke. Indeed, this remains hanging in the room for several hours after smoking has taken place. One can also consider the care personnel in, for example, institutions for mental health care, who have to deal with patients in special smoking rooms. Other examples are trial or test locations in the tobacco industry or in specialist tobacco businesses. Finally, the exception for smoking rooms also pertains to areas that in conformity with article 2, third paragraph, of the (amended) Decree on the limitation of sales and use of tobacco products are exempted from the smoking prohibition. An aspect which requires further explanation is the deletion of the word "special" in article 2, section h of the Decree on exceptions to a smoke-free workplace. In the draft decree that was submitted for preliminary scrutiny on 31 July, the word "special" was replaced by "exclusive". The exchange of ideas with the House led to neither of these words occurring in article 2, section b, of the current decree. The current formulation expresses that smoking rooms are indeed intended to smoke in, but also that more is permitted than smoking in smoking rooms. Particularly with regard to the hospitality industry, this means that one may take food and drink into smoking rooms. Conversely, it is clear that the personnel may not enter these rooms in the context of performing at normal hospitality industry activities, such as serving customers.

With the insertion of the words "and designated as such" in front of "areas" it was intended to achieve clarity for all at a glance that this is designated as a particular area for the smoking of tobacco products. This also applies to the monitoring of the compliance by the Food and Consumer Product Safety Authority (VWA).

### *Section c*

People, and therefore also employees in the execution of their work activities, can also be subjected to hindrance by or the nuisance of other people's tobacco smoke. However, it would be going too far to make the specific obligation in article 11a paragraph 1 of the Tobacco Act applicable to work activities that are performed in the open air. The hindrance or nuisance that would then be experienced could then simply be avoided, for example, by moving a few steps away from the person causing the hindrance or nuisance. In buildings and covered interior areas this is not an option, because smoke continues hanging there.

In the preparation of this decree, extensive consideration was given to the question of how the concept "terrace" must be seen in relation to the concept "open air" employed here. According to the Van Dale Groot Woordenboek Hedendaags Nederlands a terrace is a "separate space in the open air, with seats where one can relax or consume something".

Terraces are of many types and dimensions. The partitioning of some terraces consists of nothing more than a demarkation in the paving (another colour, another form, and another material, a line of paint, etc.) or a single planter. Other terraces have more substantial partitioning in the form of side partitions (for example glass walls or canvas) and/or coverings (awnings, umbrella-like constructions, etc).

It was decided that smoking on a terrace remains possible, even under an awning or an umbrella-like construction, as long as the terrace is not enclosed on all sides (top and sides). Furthermore, it is evident that no hindrance or nuisance may arise in the catering facility due to smoking on the terrace. Additionally, a "Code of Practice" guideline, will be developed in conjunction with the hospitality sector to arrive at a clearer definition of this aspect.

### **Article 3**

#### *First paragraph, section a*

For an explanation of the acceptance of a smoking prohibition in hospitality institutions operated by a proprietor without personnel, reference is made to the general section of this explanation, under New Policy, smoking prohibition.

#### *Section b*

Additionally, a smoking prohibition is instituted for publicly-accessible areas of covered shopping centres, event halls, convention centres and airports. The Food and Consumer Product Safety Authority (VWA), which monitors compliance with the Tobacco Act, has established in recent years that the situation in, for example, covered shopping centres requires improvement. The shop owners are responsible for their own shop personnel, but not for the common areas (open areas, always, passages, etc.) in such complexes, where work activities



are often performed. In consequence of this decree it is those who have control over such buildings. Depending on the specific circumstances, this is those who have control: the manager, proprietor, lessor, principal lessor or owner. For the sake of clarity: the smoking prohibition in, for example, a covered shopping centre includes both the shops as well as the common areas, where commercial activities do not ordinarily take place, such as open areas, hallways and passages. Work activities are also performed in these common areas. One can consider the security, information points, delivery of post, stocking of shops, etc. Furthermore, in these – completely covered – buildings there are often hospitality institutions in which the terraces are situated in the covered area. It would be illogical if a smoking prohibition applied to the terrace but not to the section adjacent to the terrace. Nevertheless both are indeed in the same covered area.

Finally, it is noted that in, for example, unmanned parking garages no smoking prohibition has to be implemented on the basis of this decree. A motion to this effect has been implemented, which was adopted on 18 October (following the continued general meeting of the same date).

*Second paragraph*

Here too, the possibility of a smoking room is included in section b, and this in the discretion of the proprietor concerned, who will have to weigh up for himself whether the implementation of a smoking room is commercially justified in respect of the investment to be made. In other respects, reference is made to the explanation in article 2 of this decree.

The Minister of Health, Welfare and Sports,  
A. Klink