

# Fact sheet about the EU Agreements with tobacco manufacturers to control the illicit trade in cigarettes

## Introduction

The EU has signed Agreements with two tobacco manufacturers on illicit trade in cigarettes, covering both smuggled and counterfeit cigarettes, firstly in 2004 with Philip Morris International (PMI), and secondly at the end of 2007 with Japan Tobacco International (JTI). The Framework Convention Alliance has drafted this fact sheet to answer queries raised about the status and content of these Agreements. The answers are derived from an analysis of the content of the detailed Agreements which can be found on the web.<sup>1 2</sup>

### 1. How did the Agreements between the EU and the tobacco companies, PMI and JTI, come about?

**Answer:** In 2000 the European Commission (EC) and ten Member States took a number of tobacco companies to court in the US using the Racketeer Influenced and Corrupt Organisations (RICO) legislation as well as other legal mechanisms, accusing the companies of *'an ongoing global scheme to smuggle cigarettes, launder the proceeds of narcotics trafficking, obstruct government oversight of the tobacco industry, fix prices, bribe foreign public officials, and conduct illegal trade with terrorist groups and state sponsors of terrorism.'* The original case was dismissed on jurisdictional grounds and went to appeal. The case was unresolved when on 9 July 2004 the EC and the Member States agreed to drop their case against PMI in return for the Agreement. The Agreement does not constitute an admission of liability by PMI. JTI, through its ownership of RJ Reynolds International operations, was also involved in the EC's legal action and after two years' negotiations, on 14 December 2007, it was announced that JTI had signed an Agreement along very similar lines to the PMI Agreement. The UK is the only country in the EU which has not signed these Agreements. The European Commission and 26 out of 27 Member States are all signatories.<sup>3</sup>

### 2. What are the key elements of the Agreements?

**Answer:** Under the PMI Agreement<sup>1</sup> the company agreed to pay the EC \$US1 billion over 12 years. PMI is also required to control future smuggling of its cigarettes through a range of measures. These measures include controlling the distribution system and the contractors it supplies with cigarettes and tracking and tracing measures, which allow authorities to independently trace smuggled cigarettes back to

the contractor who purchased them from PMI. PMI has to make additional payments if smuggled PMI cigarettes continue to be seized by the authorities. For the first 90 million (the equivalent of 9 forty foot container loads) of smuggled PMI cigarettes seized each year, PMI has to pay all taxes and duties due. For any additional amount seized PMI has to pay 500% of all taxes and duties due (which amounts to, on average, an additional 7.5 million euros for each additional container, or \$US11 million dollars at current exchange rates). Under the Agreement, PMI also agrees to limit its sales to volumes commensurate with legitimate market demand. The JTI Agreement is very similar. JTI has to pay the EC \$US400 million over 15 years, control smuggling of its product in the same way as PMI, and make payments at the same level as PMI for any smuggled product that is seized.

**3. Do the Agreements mean that the companies and their executives are immune from any more litigation so that they can no longer be taken to court for any smuggling, fraud, tax evasion or money laundering activities?**

**Answer:** No. The exemption from litigation only relates to civil litigation relating to conduct prior to the signature date and that was covered by the US litigation, not to any other conduct prior or post the dates the Agreements were signed. In other words the Agreements do not exempt the companies or their employees from any criminal, tax, administrative, or healthcare claims relating to conduct that took place before the Agreements were signed or for any liability relating to conduct taking place after the signing of the Agreements. The Agreements do not therefore limit in any way the proper law enforcement powers of the EC or signatory Member States.

**4. How should these agreements be viewed in light of Article 5.3 of the FCTC?**

**Answer:** Article 5.3 states that 'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.'<sup>4</sup> These are legally binding Agreements made in settlement of the litigation that the EC and Member States were taking against the tobacco companies in the US courts and require the companies to control smuggling of their product or make heavy payments if they fail to do so.

**5. What is the difference in legal status between these Agreements and the Memoranda of Understanding British American Tobacco has negotiated and signed with numerous governments?**

**Answer:** The Agreements are legally binding, subject to mandatory arbitration by the EC and participating Member States, which is enforceable in the courts under the New York Convention.<sup>5</sup> BAT's Memoranda of Understanding are not legally enforceable and the company can withdraw from them at any time.

**6. Which parts of the Agreements might be useful precedents for a protocol on illicit trade?**

**Answer:** Elements of the Agreements provide a useful precedent for some elements of the illicit trade protocol, such as basic tracking and tracing, control over the distribution system and seizure payments. In particular, the seizure payments penalize the companies for allowing smuggling of their cigarettes to take place. In the absence of the seizure payments, the tobacco companies would benefit from smuggling as they profit from the sale of products that are diverted to the smuggled market. Smuggled products can be sold at a lower price without tax, leading to increased sales.

## 7. When are PMI and JTI required to make seizure payments under the Agreements?

For each seizure of 50,000 or more PMI or JTI cigarettes in one of the 26 participating Member States, PMI or JTI is required to make a payment to compensate the EC and the Member State where the cigarettes were seized, for their lost taxes and duties and other costs. Seizure payments do not apply to counterfeit cigarettes. In the case of dispute as to whether seized products are counterfeit or not, an independent laboratory makes a binding determination. Between the implementation of the PMI agreement and the end of June 2007, more than 1000 seizures of PMI cigarettes were reported, totalling over 900 million cigarettes, with about 80% of these cigarettes found to be counterfeit.<sup>6</sup> Around 180 million seized PMI cigarettes led to seizure payments.

## 8. If the EU has these Agreements why would it want an illicit trade protocol?

**Answer:** Illicit trade is a global problem and needs a global solution. The Agreements are company-specific and region-specific, only applying to the EU and to PMI and JTI. The 151 Parties to the FCTC cover 80% of the world's population, 70% of tobacco leaf growers, 70% of cigarette production, 70% of cigarette consumption and over 60% of cigarette exporters.<sup>7</sup> The Agreements also apply only to cigarettes, and not to other tobacco products. A protocol to the FCTC has the potential to control illicit trade in tobacco products at a global level.

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<sup>1</sup> PMI Agreement: [http://ec.europa.eu/anti\\_fraud/budget/agreement.pdf](http://ec.europa.eu/anti_fraud/budget/agreement.pdf)

<sup>2</sup> JTI Agreement: [http://ec.europa.eu/anti\\_fraud/budget/cig\\_smug/cooperation\\_agreement.pdf](http://ec.europa.eu/anti_fraud/budget/cig_smug/cooperation_agreement.pdf)

<sup>3</sup> The following Member States are participating Member States under the Agreement: Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, and Spain.

<sup>4</sup> WHO Framework Convention on Tobacco Control. Adopted 23 May 2003, entered into force 27 February 2005. <http://www.who.int/tobacco/framework/download/en/index.html>

<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Adopted 10 June 1958, entered into force 7 June 1959. [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)

<sup>6</sup> World Health Organization, Existing agreements and arrangements relevant to the objective of the Intergovernmental Negotiating Body, FCTC/COP/INB-IT/INF.DOC./1, 12 December 2007, page 8, available at [http://www.who.int/gb/ctc/PDF/it1/FCTC\\_COP\\_INB\\_IT1\\_ID1-en.pdf](http://www.who.int/gb/ctc/PDF/it1/FCTC_COP_INB_IT1_ID1-en.pdf)

<sup>7</sup> WHO Tobacco Free Initiative Tobacco Factsheet, June 2007.

[http://www.who.int/tobacco/framework/cop/facts\\_and\\_figures\\_about\\_tobacco.pdf](http://www.who.int/tobacco/framework/cop/facts_and_figures_about_tobacco.pdf)