

Legal analysis of the agreements between the European Union, Member States, and multinational tobacco companies

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Executive summary

There are four major publicly available legally binding agreements in effect between the European Union (EU), its Member States (MS), and multinational tobacco companies. The first such agreement was the Philip Morris International Anti-Contraband and Anti-Counterfeit Agreement and General Release (*PMI Agreement*), signed while litigation between the parties was pending in July 2004 as a ‘resolution of all past disputes relating to contraband cigarettes’ and a ‘forward-looking’ arrangement for ‘strong coordinated action’ in combating illicit trade in cigarettes.

The *PMI Agreement* was strongly supported by the European Parliament, and expected to ‘serve as a model for other manufacturers’. Negotiations for similar agreements with Japan Tobacco (JT) and British American Tobacco (BAT) appear to have been underway by at least June 2005. The Japan Tobacco International Cooperation Agreement (*JTI Agreement*) was signed in December 2007, settling pending civil disputes between the parties and initiating a legally binding system of cooperation to combat illicit trade. Most recently, the British American Tobacco Cooperation Agreement (*BAT Agreement*) and Imperial Tobacco Cooperation Agreement (*ITL Agreement*), signed in July and September 2010, do not settle legal disputes between the parties, but establish extensive legally binding systems of anti-illicit trade cooperation. It appears likely that related confidential agreements are in effect at least between the EU, MS and JT, BAT and ITL, and that additional public agreements with other large tobacco manufacturers may be under negotiation.

It should be noted that the EU and MS are not the only Parties to the WHO Framework Convention on Tobacco Control (FCTC) to have entered into agreements with the tobacco industry in relation to illicit trade in tobacco products. Canada and Colombia have also entered into legally binding agreements with tobacco companies, and many states have signed memoranda of understanding (MOUs), which are not legally binding and are sometimes confidential.

Legal obligations of the parties

The parties to the *PMI*, *JTI*, *BAT* and *ITL Agreements* undertake the following obligations:

- the companies undertake similar obligations with respect to their manufacturing, sales, distribution, storage and shipment practices – restrictions on supply and forms of payment for cigarettes, requirements for ‘suspicious transaction’ reporting and other internal compliance procedures, and due diligence and other procedures applicable to business relationships involving sale, distribution, storage, or shipment of more than 25,000,000 cigarettes per year;
- the companies undertake obligations with respect to marking and ‘tracking and tracing’ of their products – these obligations vary according to form of packaging and intended market of retail sale, and, for JT and BAT, are limited to what is ‘commercially reasonable’;

- the companies undertake similar obligations with respect to maintaining records relating to their regulated business relationships and ‘tracking and tracing’;
- the companies undertake obligations, varying between the agreements, with respect to the provision of information to authorities, and the EU and MS agree to maintain the confidentiality of certain information;
- the companies agree to cooperate with authorities in the event of significant seizures of products bearing their trademarks (by inspecting the cigarettes, determining whether they are counterfeit or ‘genuine’, and providing information to OLAF), and to make payments to the EU and MS (ordinarily in the amount of unpaid taxes, with additional payments in certain circumstances) if the seized cigarettes are not counterfeit (subject to exceptions, qualifications, and termination rights which vary between the agreements);
- the companies agree to make additional payments to the EU and MS (up to USD 1.25 billion for PMI, USD 400 million for JT companies, USD 300 million for ITL, and USD 200 million for BAT companies – subject to rights of reduction and termination which vary between the agreements), and the EU and MS agree to discuss with JT and BAT companies and ITL the possible uses of their payments;
- the companies agree to conduct training programmes for their employees, and the companies and the EU and MS agree to meet at least annually to assess the functioning of the agreements – BAT and the EU and MS will also cooperate in other respects, including additional meetings, information sharing, and training conducted by BAT for EU and MS personnel;
- the EU and MS agree to release PMI and JT companies from particular legal claims (the *BAT* and *ITL Agreements* do not contain releases from liability, however ITL may reduce its payments under its agreement if the EU and MS bring particular claims against it; there may also be provisions relating to liability in related confidential agreements);
- the EU and MS agree that PMI, BAT companies and ITL may request more favorable treatment if the EU enters into an agreement (or amends an agreement) with another cigarette manufacturer relating to the same subject matter on more favorable terms; and
- the parties undertake obligations in respect of compliance and dispute settlement – the companies will provide annual compliance reports, and disputes that cannot be resolved informally will be referred to confidential arbitration proceedings.

The agreements and the WHO Framework Convention on Tobacco Control

The EU and all but one MS are subject under the WHO Framework Convention on Tobacco Control (FCTC) to legally binding international obligations with respect to tobacco control. Certain aspects of the agreements with multinational tobacco companies raise issues with respect to the obligations of the EU and MS under article 5.3 of the FCTC, as well as related obligations under article 12 and article 13.

Transparency and accountability

Article 5.3 requires parties, in setting and implementing their ‘public health policies with respect to tobacco control’, to ‘act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law’. Under article 15, parties recognize that ‘the elimination

of all forms of illicit trade in tobacco products’ is an ‘essential component’ of tobacco control and undertake obligations towards this end. Building on the provisions of article 15, parties are in the process of negotiating a protocol to the FCTC which mirrors key aspects of the EU agreements. While the measures provided for in the agreements have a range of objectives, including protection of tax revenue and law and order, they are also clearly ‘public health policies with respect to tobacco control’. To the extent that the negotiation, execution and implementation of the agreements involve setting and implementing public health policies with respect to tobacco control, they should meet the requirements of article 5.3.

The guidelines for implementation of article 5.3 recognize that fulfillment of the obligation to protect tobacco control policies from tobacco industry interests requires parties to be accountable and transparent in their dealings with the industry – they should interact ‘only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products’, and should ensure that any necessary interactions are conducted transparently. Further, article 12 requires parties to promote public access to a wide range of information on the industry, and to promote awareness and participation of organizations not affiliated with the industry in developing and implementing tobacco control programmes and strategies.

The extensive negotiations which led to the execution of the agreements may not all have been strictly necessary to enable the EU and MS to effectively regulate the companies and their products. Some of the outcomes of the negotiations might have been achieved through direct regulation; others may not have been ‘strictly necessary’ for effective efforts to combat illicit trade. To the extent that the interactions were necessary to achieve the desired regulatory outcomes, recognizing that EU political processes can make direct regulation a slow process, there are questions as to the extent to which they were conducted transparently. There were very limited opportunities for participation by relevant organizations not affiliated with the industry or for provision of information to the public. The possibility that there are additional confidential agreements with the companies, and confidential documents and correspondence provided at execution that impact directly on the companies’ right to terminate or reduce their payments under the agreements, is also a matter of concern.

Interactions provided for under the agreements (such as meetings between the EU, MS and the tobacco companies, and training programmes or workshops involving both tobacco company employees and government officials), to the extent that they involve setting and implementing relevant policies, should also meet the standard necessary to comply with article 5.3 – that is, they should be strictly necessary for effective regulation and should be conducted transparently. The arrangements for BAT to meet with and conduct training programmes for EU and MS officials are of particular concern in this respect, as are the dispute settlement provisions of all four agreements, which require confidentiality and therefore could prevent access to important information about failures in implementation.

Partnerships and corporate social responsibility

The guidelines for implementation of article 5.3 state that parties should not accept, support or endorse ‘partnerships’ with the tobacco industry in any initiative linked to setting or implementing public health

policies, and that any necessary interactions with the industry should be carried out ‘in such a way as to avoid the creation of any perception of a real or potential partnership or cooperation’ (and, if the industry creates such a perception, parties should act to correct it). The ‘cooperative approach’ of the agreements is a concern in relation to this aspect of effective implementation of article 5.3. While some interaction with the industry is necessary to effectively combat illicit trade (for example, in relation to identification of counterfeit cigarettes), not all of the matters regulated under the agreements strictly require cooperation with tobacco companies. The agreements are not drafted, and have not been portrayed to the public, in such a way as to avoid the creation of perceptions of cooperation or partnership. The EU has promoted the agreements as establishing arrangements whereby tobacco companies and European law enforcement agencies ‘combine their resources and enhance their coordination’, and the EU and MS have allowed the companies to promote the agreements as establishing partnerships between the industry and the EU and MS.

Both the guidelines for implementation of article 5.3 and the guidelines for implementation of article 13 (which requires parties to implement a comprehensive ban on tobacco advertising, promotion and sponsorship, unless prevented from doing so by their constitutions or constitutional principles) also recommend regulation of ‘socially responsible’ practices of the tobacco industry – recognizing that parties should not support or participate in tobacco company ‘corporate social responsibility’ efforts, should make all branches of government and the public aware of their true purpose, and should prohibit public dissemination of information about such activities (except where strictly necessary). The use of the agreements as a form of ‘corporate social responsibility’ is a matter of particular concern in relation to the *BAT and ITL Agreements*, which the Commission has publicly stated were ‘initiated by’ the companies, and which do not settle formal legal disputes between the parties. The additional payments under these agreements can be understood as a form of tobacco sponsorship within the meaning of articles 1 and 13 of the FCTC – a contribution ‘with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly’. The publicisation of information about the agreements as ‘socially responsible’ business practices, such as occurs on the BAT and JTI websites, should also be prohibited.

Possible conflicts of interest

The guidelines for implementation of article 5.3 recognize that payments by the tobacco industry to government institutions ‘can create conflicts of interest’ which may threaten tobacco control policies. The payments to the EU and MS under the agreements are mandated by legally binding and enforceable agreements, and therefore not subject to the guidelines’ express recommendation against acceptance of contributions from the tobacco industry. However, without further information about the circumstances in which the payments under the *JTI, BAT and ITL Agreements* may be terminated by the companies, it is not possible to determine whether the payment arrangements give rise to possible conflicts of interest.

Unlike PMI, JT and BAT companies and ITL have the ongoing right to terminate the provisions of their agreements requiring them to make payments if there are significant failures of their ‘reasonable expectations’ as to their benefits under the agreements. Because these expectations are to be assessed by reference to documents, correspondence and agreements which are not publicly available, the breadth of

the circumstances in which the EU and MS might risk termination by the companies cannot be determined. It is possible that the aim of continuing to receive annual payments from JT and BAT companies and ITL might influence the decisions of EU and MS officials with respect to relevant policies while the agreements are in force. This risk is greater with respect to the *BAT Agreement*, under which the largest payment of EUR 23,000,000 is scheduled in 2029, significantly increasing the importance of keeping the agreement in force. The risk of influence is increased by JT companies, BAT and ITL's rights under the agreements to discuss the possible uses of their payments with the EU and MS.

The agreements and the draft FCTC protocol to eliminate illicit trade in tobacco products (draft FCTC ITP)

The adoption of an FCTC protocol to eliminate illicit trade in tobacco products has been a political priority for the EU. EU negotiators have worked to secure the inclusion of a number of elements of the *PMI, JTI, BAT* and *ITL Agreements* in the draft protocol to be considered by COP-4. Should an FCTC ITP be agreed, it may contain the provisions on which consensus was reached by the INB or similar provisions. Relevant 'consensus' provisions include that dealing with tracking and tracing (draft article 7), and those relating to information sharing and cooperation in training and capacity building (draft articles 20, 21, 22, 23 and 28).

Draft article 7 would require the EU and MS, if they became parties to an FCTC ITP, to extend their requirements for product marking and 'tracking and tracing' beyond those required by the agreements – all manufacturers would be required to mark all tobacco product packaging, and the markings would be linked to additional information. Some changes may be required in practices of interaction established pursuant to the agreements, to ensure that authorities, in participating in the protocol's global tracking and tracing regime, interact with the industry 'only to the extent strictly necessary' in the implementation of article 7. With respect to the proposed requirements relating to information sharing and cooperation in training and capacity building, the agreements give rise to a number of possible concerns – certain information provided to other parties to a protocol may be determined by the industry, the extent to which relevant information can be shared may be limited, information provided by other parties to the EU and MS may be shared with the industry, and EU and MS participation in international capacity building and training efforts may be influenced by the interactions provided for under the agreements. It should be noted, however, that such concerns are not limited to the EU and MS, and would also arise in relation to other potential parties to an FCTC ITP.

The agreements and international customs, trade and criminal cooperation agreements

The definitions used in the *PMI, JTI, BAT* and *ITL Agreements* – including, in particular, 'counterfeit' and 'contraband' – are generally consistent with the terminology used in existing agreements and arrangements relating to customs and trade. The definition of 'cigarette' includes a number of tobacco products classified separately under the World Customs Organization (WCO) Harmonized System, but this does not appear to impact other agreements and arrangements relating to classification of tobacco products. The provisions of the agreements dealing with provision and protection of information may have some limited impacts, similar to those noted above in relation to the draft FCTC ITP, on EU and MS implementation of existing commitments relating to information sharing with other countries – including, for example, under mutual administrative assistance and criminal justice cooperation treaties.