Argumentaire Tobacco Agreements

1. Do we still need the tobacco agreements in light of the Tobacco Products Directive and the FCTC Protocol?

The 2014 EU Tobacco Products Directive ("TPD") is an important legal instrument, but it does not effectively capture cigarettes smuggled into the EU from third countries.

In the medium and long term, the FCTC Protocol will help the EU to better police global smuggling routes. However, we are not there yet, and will have to see to what extent key source and transit countries come on board. Despite all their shortcomings, for the time being, it can be argued that the tobacco agreements are the best instruments to plug the control gap we have at the international level.

2. What is the experience with the PMI Agreement so far?

As laid down in the assessment paper (SWD(2016)44 final), the main objective of the PMI Agreement was to reduce the presence of PMI contraband on the illicit EU market. As the volume of such seized product has declined by 85% between 2006 and 2014, the objective of the Agreement has been effectively met, even if no direct causality can be established.

The Agreement subjects PMI's business to a comprehensive set of regulatory disciplines, including tracking and tracking, due diligence (know your customer) obligations and anti-money laundering measures. Such disciplines do not yet exist anywhere else today. For example, since the beginning of the PMI Agreement, almost 5000 notices of seizure were processed and analysed. For each seizure of genuine products (i.e. contraband) reported by Member States under the Agreement, PMI has issued an official response to OLAF, setting out the available details (factory, customers, intended market of retail sale, shipment details, etc.) pertaining to the seized products.

Moreover, by providing operational information to OLAF and national law enforcement agencies on a regular basis under the framework of the Agreement, PMI has been supporting investigative work and contributed inter alia to the closure of a substantial number of illegal cigarette factories inside the EU.

3. Would a decision to phase out of the PMI Agreement conflict with the wider-EU strategy to fight illicit trade in tobacco? Would it conflict with the other Agreements still in place?

The decision to phase out the PMI Agreement would supplement the EU strategy to fight illicit trade in tobacco. This is also what Member States concluded, in December 2013, when commenting on the 2013 Strategy paper.

In parallel to phasing out of the PMI Agreement, the speedy ratification of the FCTC protocol should be promoted to ensure that the global framework for fighting cigarette smuggling is effective as soon as possible.
Once the moment of phasing out gets closer, the Commission and Member States could then also assess the situation, also taking into account progress with implementation of the TPD as well as the FCTC Protocol, if by then in force.

4. **Some people suggest that the PMI Agreement is akin to "putting the fox in charge of the hen house".**

That would assume that we have a hen house – we don't. The PMI Agreement forces a fairly tight regulatory straightjacket upon PMI. Would the EU's control be better or more effective without the PMI Agreement? – The answer is that without the Agreement there would be no control at all, at least not until tracking and tracing under the TPD and the FCTC Protocol are in force.

5. **Do the anti-fraud agreements address the issue of "cheap whites"? How does the Commission address this issue?**

The Commission is aware of the growing problem of such non-branded cigarettes (so-called 'cheap whites') on the illicit tobacco market in the EU. This issue also featured prominently in the Commission's 2013 Strategy Paper.
Given that these "cheap whites" do not originate from one of the four tobacco majors with which the EU and Member States have anti-fraud cooperation agreements the agreements do not specifically cover "cheap whites".
In addition to the existing Strategy, the Commission continues its reflections on other possible tools to combat cheap whites. Clearly, law enforcement is going to be one of the answers. OLAF in 2015 has (also with operational intelligence provided by the tobacco manufacturers) stepped up its investigations into the illicit tobacco trade. They contributed to a record number of over 600 million cigarettes seized in 2015. Almost all of these seizures were cheap whites.
A tangible part of these seizures are made on the basis of intelligence gathering from the manufacturers.

6. **What are the views of the Member States on a possible prolongation?**

In July 2015 Vice-President Georgieva reached out to the Member States to seek their opinions on a possible prolongation of the Agreement. Overall there is large support to explore a prolongation of the PMI Agreement.
From the 24 replies the Commission has received so far, 21 Member States support testing the terms of a possible prolongation whereas 3 remain neutral.

7. **Under the tobacco agreements, what have the financial implications been for the Union and the Member States, including the fines over the period the agreements were in force?**

   Total payments (annual payments plus seizure payments) made by the four manufacturers have so far surpassed EUR 1.1 billion including around EUR 100 million in seizure payments (and excluding the lawyer fees).
   Annual payments are scheduled according to each respective agreement. Of these annual payments, 90.3% go to national budgets whilst the EU receives 9.7% (which ultimately leads to a reduction of what Member States pay annually into the EU budget).
   Seizure payments offer a financial incentive for manufacturers to improve measures to avoid their genuine products falling off the supply chain and being smuggled. The manufacturers make substantial additional payments every time their genuine products are detected and seized in the illicit EU market. Almost all of the money collected from a particular seizure goes to the Member State that made the seizure.
   In the EU, the funds go into the EU's general budget without any earmarking. This is in line with the principle of the universality of the budget.

8. **By signing agreements with PMI, the Commission legitimises the actions by a clandestine company. What are your comments?**

   The PMI Agreement was not signed to legitimise any alleged wrong-doing by PMI, but to gain control over their international business.
   The Agreement forces PMI to apply relatively strict sectoral obligations. Those obligations fall almost unilaterally onto PMI.

9. **Is the Commission/ are the Member States paid by the tobacco companies?**

   What is important is that the payments received by the EU general budget are not earmarked, in line with the principle of the universality of the EU budget. OLAF does not receive any money from the manufacturers.
   The payments going to the Member States are transferred to their budgets. The Commission does not monitor the use of these funds by the Member States.
   Member States are encouraged to use part of their annual budgets to boost the fight against illicit tobacco trade. At Commission level, for example, the Hercule Programme is used to support Member States fight fraud, corruption and other illegal activities. The new anti-fraud Programme Hercule III entered into force in March 2014 and it will make available an amount of EUR 104.9 million of support for the period 2014-2020. Hercule helps finance concrete projects such as the purchase by national authorities of x-ray scanners and other technical equipment to stamp out smuggling and other criminal activities against the EU's financial interests.

10. The agreements are not implemented in a transparent way- what do you say?

The Commission listens very carefully to concerns raised by stakeholders. Some of the concerns about the management of the tobacco agreements have already been addressed by the Commission (see Assessment paper).
For example, there is now a new independent laboratory, the Commission has made available many more documents than before in the interest of transparency and is also working towards having better and more comprehensive statistics.

11. The tobacco companies (ab)use the "cooperation agreements" to present themselves as partners of the regulator vis-à-vis smaller states and simultaneously apply pressure onto them. What are your comments?

The agreements do not treat the companies as 'partners' but unilaterally subject them to stringent disciplines. These disciplines allow national and European customs investigators to exercise some degree of control of the companies' global operations. We are not "cooperating" with PMI but controlling them. At the same time, the Commission attaches utmost importance to the integrity of policy and law making. Accountability and transparency of contacts with representatives of interests are key in that respect, and the Commission has a series of rules in place to that end.

12. Why are the total seizure numbers in the EU declining?

Many factors, such as changed market conditions or the overall declining level of cigarette consumption in the EU, influence the annual volumes of seizures across the Member States and it is difficult to identify one single reason. It should also be noted that total EU seizures have risen again in 2014 to 3.4 billion sticks (compared to 3.1 billion sticks in 2013) which may reflect that investigators are stepping up their efforts against the illicit trade in tobacco.

FCTC Protocol:

13. What is the Commission doing to get more countries to ratify the FCTC Protocol?

The Commission systematically raises this with key countries, like China, Russia, Ukraine, Serbia, Montenegro, etc. The Commission is also supporting the FCTC Secretariat, and is planning a conference together with the incoming Slovak Presidency to further raise awareness about the Protocol, especially among our neighbouring countries.

14. Are the tobacco Agreements in conformity with Art. 5.3. FCTC?

The Commission's Legal Service has confirmed that the tobacco agreements are compatible with Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC) which calls on the Parties to protect their public health policies from commercial or vested interests. The WHO FCTC Guidelines about the implementation of Article 5.3 FCTC contain an exemption for legally binding and enforceable agreements, such as the EU's tobacco agreements.