

## **ASH media briefing: 14 December 2007**

### **Key features of the agreement on smuggling between the EC, JTI and 26 of 27 Member States**

This Agreement is in line with the 2004 Agreement with Philip Morris International (PMI). The key feature of this agreement[1] is that from now on Japan Tobacco International (JTI), like PMI, will pay a heavy price if it does not control smuggling of its cigarettes. In addition JTI has to pay \$400 million over 15 years, frontloaded over the first five years. This is a legally binding Agreement, subject to mandatory arbitration by the EC and Member States, and enforceable in the courts under the New York Convention.

Control of smuggling will be exercised through:

1. Seizure payments – penalising JTI if any of its products produced anywhere in the world and then smuggled into the EU are seized.
2. Compliance protocols – requiring JTI to tightly control and regulate the contractors it supplies with cigarettes, and to stop supplying them if they are found to be complicit in smuggling.
3. Tracking and tracing protocols – allowing customs to independently identify smuggled cigarettes so that they can be traced back to the contractor who bought them from JTI.

More detail on these controls is set out on the next page.

This agreement serves as a model for a worldwide protocol under the Framework Convention on Tobacco Control.

The agreement does not constitute an admission of liability by JTI, but following its signature the EC, and the other plaintiffs, agree not to pursue their court case against JTI in the US courts. The original court case involved 10 other plaintiffs in addition to the EC. These were the EU Member States Belgium, Finland, France, Greece, Germany, Italy, Luxembourg, Netherlands, Portugal and Spain and these states are all parties to the agreement as are all other Member States except the UK.

The UK can easily become a participating member by executing a copy of the agreement and delivering it to JTI.

The Director of OLAF (the European anti-fraud office) is the designated representative of the EC in the operation of the agreement.

The Agreement will be reviewed annually. If there are any proposed changes which are not agreed by both sides, there will be an independent arbitration process. The Arbitrator has to be acceptable to both OLAF and JTI.

The agreement lasts for 15 years, except for tracking and tracing which will continue. There are specific provisions for negotiations to start on updating the Agreement no later than 2 years before it comes to an end.

#### **Key elements of the Agreement**

##### 1. Seizure payments

- For any seizure of smuggled JTI genuine product JTI pays 100% of all taxes and duties due at member State and at EU level (where the member State is party to the agreement)
- Above an annual baseline calculated at the average of seizures throughout the EU over 2001/2 of 9x40 foot containers = 90 million cigarettes, JTI will pay 500% of taxes due in compensation.
- If cigarettes are seized in an EU state which is not a signatory state then the EU will get its taxes and duties paid but not the non-signatory State level.
- If there is a dispute over whether the cigarettes are genuine or counterfeit they will be sent to an

independent laboratory agreed by OLAF/JTI for testing.

## 2. Compliance protocols

Designed to protect against smuggling and money laundering.

- JTI can only sell to approved contractors – approval on principle of “Know Your Customer”. To be approved JTI has to have visited the customer and place of operation, got details of nos. employed, their DOB passport, tax regulation numbers, assessed their ability to identify subsequent purchasers, have investigated their sales plan, checked for criminal records, got full details of their bank account through which payments must be made etc. Checks must be made on an annual basis
- JTI has to provide invoice and payment details and identify first and any known subsequent purchasers.
- Approved purchasers can only purchase in line with retail demand for the intended market. If there are disputes over what this is it will go to independent arbitration.
- If OLAF has sufficient information that an approved contractor is not complying with the terms of the agreement for example they are in receipt of a criminal conviction or lose a civil action for smuggling/money laundering they become blocked contractors and will no longer be supplied. They are blocked for a minimum of 5 years.
- JTI has to maintain files on approved contractors for 5 years.
- Approved contractors must pay by wire or cheques.
- Compliance reports on all contractors has to be supplied to OLAF every year. There is a full audit and performance review process.

## 3. Tracking and tracing protocols

- Identify date and place of manufacture - Packs and cartons are marked with embossed codes giving date of manufacture, manufacturing facility, machine and production shift.
- Country of intended destination is identified.
- First and any known subsequent customer – master cases have unique machine scannable markings identifying first purchaser (unless already identified because sole purchaser in that market)
- Provide OLAF with multiple copies of the manual with all marks and numbers of all products.
- There will be a query only database of all pack information to enable identification of product and purchaser information for any seizure. This is to be accessible online, by nominated officials at OLAF and in every signatory state. In the event of the database not being online, access must be provided by phone or fax.
- If new technology enables better systems, JTI will implement these where feasible.

## 4. Legal status of the Agreement

Any provisions of this Agreement which are not consistent with the national law of Participating Member States are not applicable to that Member State. Only civil litigation relating to actions taken prior to the signing of the Agreement is discharged by the Agreement, not action taken under tax, administrative, health care or criminal law, such as the Finance Act. This financial agreement does not exempt JTI from criminal charges, or tax or administrative or settle any tax liabilities from before the execution date. Nor does it exempt the company from any legal action arising from its activities after the execution date.

The Agreement lasts for 15 years, until 2022 and there is a provision for negotiations to start on updating the Agreement no later than two years before it comes to an end.

## 5. Differences between JTI and PMI Agreement

- This Agreement guarantees equal access to all Participating Member States to additional payments relating to seizure payments at the relevant local rates of tax and excise duties.
- Tracking and Tracing provisions are more extensive, it covers not just master cases but also cartons with automatic extension to packs if needed and as technology improves.
- Provides for improved controls on subsequent customers and expansion to additional sources of product as needed in future, for example as new factories come online.
- There is a moratorium relating to Gallaher which was bought by JTI in April 2007.

## 6. Specific provisions relating to Gallaher

- Sets out a comprehensive framework and timetable to require JTI to bring Gallaher up to the

standards set out in the JTI Agreement.

- Compels JTI to cooperate with any inquiry into Gallaher by OLAF or Participating Member States.
- Establishes a 'moratorium period' during which the EC and Participating Member States agree to refrain from asserting civil claims against Gallaher while at the same time suspending the statute of limitations with regard to such civil claims.
- Provides that once OLAF decides that JTI is successful in bringing Gallaher up to appropriate standards JTI/Gallaher will be brought within the Cooperation Agreement.
- Nothing in the Gallaher Agreement affects or limits the ability of the Participating Member States to bring criminal, tax, health care or administrative claims at any time.

[1] For full details of the Agreement see OLAF website at:  
[http://ec.europa.eu/anti\\_fraud/budget/cig\\_smug/2007\\_en.html](http://ec.europa.eu/anti_fraud/budget/cig_smug/2007_en.html)

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