

ARTICLE

Role of the Industry in the Enforcement of the Tobacco Policy

Between Necessary Mistrust and Necessary Cooperation

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Tobacco products are heavily regulated because, in particular, of their acknowledged harmfulness to health, with highly elevated prices as one of the most important means of discouraging consumption. One of the most serious threats to the effectiveness of the tobacco policy comes from the trafficking of illicit tobacco, which is much cheaper, often of lower quality, and which reduces state and EU revenues. The achievement of tobacco policy objectives, in particular the combatting of illicit tobacco trade, depends on the participation of private actors, amongst which big industry plays a crucial role. Yet, the legal landscape of enforcement duties of the tobacco industry is a patchwork of instruments, unevenly affecting different players. In particular it includes controversial agreements between the major tobacco producers and the EU and Member States, to which three out of four major producers are subject. The agreement with the fourth – PMI – was not extended by the Commission in 2016. The decision as to the extension of the remaining agreements is looming.

The objective of this article is to analyse the framework of duties of the tobacco industry in the enforcement of the tobacco policy, especially against illicit tobacco, and to reflect on whether the enforcement model, including the agreements with the tobacco producers, should be kept or abandoned.

Keywords: enforcement; illicit tobacco; tobacco industry; smuggling; counterfeiting; compliance

1. Introduction

For two particular reasons, tobacco products are not like any other products. Firstly, their proven and widely acknowledged harmfulness to the health of smokers and to people affected by tobacco smoke,¹ which is the rationale for intense regulation of production, distribution, advertisement and consumption of tobacco products. This also includes packaging measures which are designed to inform and to discourage consumption. Secondly, and as the result of the first point, the prices of tobacco products are significantly inflated through the imposition of high taxes and other duties, aiming at diminishing demand and providing state revenues to tackle in particular the health consequences of tobacco consumption.

The discrepancy between the costs of production and the final price on the market creates a golden opportunity for criminal activity. Hence, one of the most important threats to the effectiveness of the tobacco policy comes from trafficking of illicit tobacco.² The illicit nature of tobacco products may arise from different

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¹ See for instance: S. Dutta (ed), *Confronting Illicit Tobacco Trade. A Global Review of Country Experiences* (World Bank Working Paper No 133959, 2019) XI; R. Barnett, G. Moon, J. Pearce, L. Thompson, L. Twigg, *Smoking Geographies: Space, Place and Tobacco* (Wiley 2016) 1; Smoke Free Partnership, *SFP Position Paper on Tobacco Control Research* (2018) 3; EU Parliament, '700,000 Deaths A Year: Tackling Smoking in the EU' (*European Parliament News*, 19 May 2016), <www.europarl.europa.eu/news/en/headlines/society/20160518STO27901/700-000-deaths-a-year-tackling-smoking-in-the-eu> accessed 29 April 2021. See also: Preamble and Art 8 of the WHO Framework Convention on Tobacco Control.

² According to EU Commission data, a slight increase in the illicit tobacco market between 2010 and 2015, combined with an overall drop in tobacco consumption, resulted in a significant increase of market penetration by illicit tobacco, see: Commission, 'Technical assessment of the experience made with the Anti-Contraband and Anti-Counterfeit Agreement and General Release of 9 July 2004 among Philip Morris International and affiliates, the Union and its Member States' (Staff Working Document) SWD (2016) 44 final.

sources. One major type of illicit tobacco products are genuine cigarettes (e.g. of major brands) produced in legal factories, but beyond the permitted limits or declared for export outside the EU, which are then sold on the EU market through illegal channels.³ Another category consists of counterfeit tobacco products, in particular of major brands. Yet another category of illicit cigarettes, which takes an increasingly prominent place on the EU market, is so-called 'cheap whites.' These cigarettes are of brands that do not belong to the major producers and may be legally produced outside the EU, e.g. in Ukraine.⁴ The common feature of all these categories is that taxes and customs duties are not paid, and so these cigarettes are significantly cheaper than the legal ones. As a result, the demand-cooling effect of high prices is curtailed, as are the budgetary revenues. Besides that, illicit cigarettes might not comply with quality norms and norms as regards packaging and may infringe trademarks.

The achievement of tobacco policy objectives, in particular combatting trade in illicit tobacco, depends on the participation of private actors, for example producers of raw tobacco, cigarettes, machines, or paper, and gross vendors. Their participation is needed to ensure quality and packaging standards. They play an important role in enforcement through their involvement in the track and tracing system and they are subject *inter alia* to due diligence and record keeping duties. Given the nature of the market and the dominance of four major companies, namely Philip Morris International (PMI), British American Tobacco, Japan Tobacco International and Imperial Tobacco, their cooperation is essential for the success of the tobacco policy within the EU.⁵

However, their relationship with public authorities has a complex history, including major litigation against their involvement in tobacco smuggling.⁶ Instead of completing this litigation, the EU and the Member States opted for agreements with each of these four companies, signed between 2004 and 2010, by virtue of which the companies agreed to a number of enforcement duties and also payments, which could financially support enforcing authorities. Some of the detailed provisions have also stirred up controversy, as did, in general, the effect of the agreements of empowering the tobacco industry.⁷

In the meantime, a number of legislative instruments have been adopted at the international level (Protocol to Eliminate Illicit Trade in Tobacco Products of 2012) and at the EU level (Tobacco Products Directive of 2014), providing similar – although arguably not as far-reaching – measures. However, when the time came to review the first of the four agreements – the one with PMI – the Commission decided not to extend it but rather to focus on the legislative instruments. This decision implied that these instruments impose sufficient duties on the big tobacco producers to achieve the same goals of combatting illicit tobacco trafficking.⁸

As a result, the legal landscape of enforcement duties of the tobacco industry is a patchwork of instruments, unevenly affecting different players. It is a complex mix of different duties and the specific nature of the tobacco market has led to a particular relationship of public-private complementarity.⁹ This mix is composed of cooperation duties, but also – by virtue of the agreements – the industry participates in evaluating seizures of illegal tobacco. If these seized tobacco products are genuine contraband cigarettes of one of the companies which is party to the agreements, that company is obliged to make payments, which can be on a punitive scale. In that sense, the companies become policemen of the area, but potentially subject to sanctions themselves for their policing failures.

The second of the four agreements – with Japan Tobacco International – will expire in 2022. It is, therefore, necessary to reflect on which avenue the Commission should take as regards this agreement, as well

³ Commission, 'Communication from the Commission to the Council and the European Parliament' (Communication) COM (2013) 324 final 5.

⁴ Commission, 'Questions and Answers on: Fighting the illicit trade of tobacco products' (*European Commission*, 14 August 2015) <ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/q_and_a_en.pdf> accessed 29 April 2021.

⁵ S.A. Bialous and S. Peeters, 'A Brief Overview of the Tobacco Industry in the Last 20 Years' (2012) 21 *Tobacco Control* 2 93. See also: Barnett et al., *supra* note 1, 61–73. To complete the picture of companies that dominate the global international market Altria (Phillip Morris USA) should be added, but it is not present in the EU.

⁶ L. Joossens, A. B. Gilmore, M. Stoklosa, H. Ross, 'Assessment of the European Union's illicit trade agreements with the four major Transnational Tobacco Companies' (2016) 25 *Tobacco Control* 3 254.

⁷ *Ibid.*, 257.

⁸ 'The Commission considers that the combination of the Tobacco Products Directive and the Protocol to Eliminate Illicit Trade in Tobacco Products negotiated in the context of the Framework Convention on Tobacco Control (FCTC) are the best instruments to fight illicit trade by regulatory means,' Letter from Budget Commissioner Kristalina Georgieva to the Member States (5 July 2016), stating that there was no need for an extension of the PMI agreement.

⁹ Theoretically on 'Smart' public-private cooperation see: L. Senden, "'Smart' Public-Private Complementarities in the Transnational Regulatory and Enforcement Space" in J. van Erp, M. Faure, A. Nollkaemper, N. Philipsen (eds), *Smart Mixes for Transboundary Environmental Harm* (CUP 2019) 25. On that topic see also: M. de Cock Buning and L. Senden, *Private Regulation and Enforcement in the EU* (Hart 2020); M. de Cock Buning, A. Ottow, J. Vervaele, 'Regulation and Enforcement in the EU: Regimes, Strategies and Styles' (2014) 10 *Utrecht Law Review* 5 1.

as the two remaining ones set to expire by 2030. The aim of this article is to contribute to this reflection. The first question it will examine is: what is the difference between the scope of enforcement duties of the tobacco industry in the international and EU instruments and by virtue of the agreements? It will do so by analysing the scope of duties according to the international framework and in the EU (Section 2) and according to the agreements (Section 3), which will then be compared (Section 4). The analysis will show that the scope of duties in the agreements is effectively broader, so there is *prima facie* added value in maintaining these agreements. The second question this article will examine is: in view of that outcome, should the agreements be continued, or should they be abandoned nevertheless? In order to answer this question, the reasoning given by the Commission will be critically analysed and additional arguments will be formulated (Section 5).¹⁰ Section 6 will offer some concluding remarks.

2. Cooperation duties – international and EU framework

2.1. WHO Framework Convention on Tobacco Control

The key piece of international legislation as regards tobacco policy is the WHO (World Health Organization) Framework Convention on Tobacco Control (FCTC) adopted on 21 May 2003 and which entered into force on 27 February 2005. It was the first international treaty negotiated under the auspices of the WHO.¹¹ One hundred and eighty-one countries are party to the Convention, at the moment of writing, with one notable exception: the US.¹²

Most of the Convention is dedicated to the regulatory aspects, but these influence enforcement needs in the ways mentioned above, and few provisions concern enforcement directly. Measures which form the essence of the Convention are divided into demand reduction and supply reduction provisions.

The demand reduction provisions comprise price and tax measures to reduce the demand for tobacco,¹³ and non-price measures. Among the non-price demand reduction measures the following ones are crucial from the perspective of producers' duties: obligations as to packaging and labelling; prohibiting techniques which could create a false impression about the negative effects of smoking on health; mandatory health warnings and information on relevant constituents and emissions of the product;¹⁴ as well as the obligations of manufacturers and importers to disclose to the authorities information as regards the contents and emissions of tobacco products.¹⁵ The Convention significantly curtails the possibility of tobacco advertising, promotion or sponsorship.¹⁶

As to the supply reduction provisions, these are aimed chiefly at: curtailing sales to minors; support for economic alternatives for tobacco workers, growers and individual sellers; and combatting the illicit trade in tobacco products.¹⁷ As to the last-mentioned aspect, besides recognising the importance of eliminating all forms of illicit trade,¹⁸ the measures which the Convention proposes are fairly limited (contained only in one article: Article 15 FCTC). They contain obligations on the part of producers to mark products to assist the authorities in determining the products' origin and to facilitate the tracking of the movement of tobacco products. It is also required that packets and packages for retail and wholesale sold on a domestic market carry statements indicating the intended market, thereby allowing the authorities to determine whether the product is legally able to be sold or not on that market. The Convention did not go so far as to require a fully-fledged tracking and tracing system, but it recommended its development.¹⁹ This crucial tool against the trade in illicit tobacco has developed only with the later legislative instruments.

Other measures that Article 15 FCTC mandates concern the law enforcement aspect of States Parties and include monitoring and collecting data on cross-border trade as well on the storage and distribution of

¹⁰ The article will focus on legal and policy reasoning. No empirical studies have been performed, but the author will refer to available data from other studies.

¹¹ For the analysis of the conception of the Convention see: D. Yach, 'The Origins, Development, Effects, and Future of the WHO Framework Convention on Tobacco Control: A Personal Perspective' (2014) 383 *Lancet* 1771.

¹² Parties to the WHO (World Health Organization) Framework Convention on Tobacco Control (FCTC) <www.who.int/fctc/cop/en/> accessed 29 April 2021.

¹³ Art. 6 FCTC.

¹⁴ Art. 11 (1) and (2) FCTC.

¹⁵ Art. 10 FCTC.

¹⁶ Art. 13 FCTC.

¹⁷ Arts. 15–17 FCTC.

¹⁸ Art. 15 (1) FCTC.

¹⁹ Art. 15 (2) FCTC.

tobacco products, strengthening legislation against the illicit tobacco trade and enabling confiscation of proceeds from that trade.²⁰

The last paragraph of Article 15 FCTC encourages the State Parties to look for more measures to combat the illicit tobacco trade.²¹ In that sense, the Protocol to Eliminate Illicit Trade in Tobacco Products (the Protocol) adopted as a follow-up to the Convention in general, and to this Article in particular, is crucial.

2.2. Protocol to Eliminate Illicit Trade in Tobacco Products

The Protocol adopted on 12 November 2012 in Seoul 'builds upon and complements' Article 15 of the WHO FCTC.²² Its objective is 'to eliminate all forms of illicit trade in tobacco products.'²³ The Protocol entered into force on 25 September 2018 and counts at the moment of writing 62 State Parties, including the European Union, which was instrumental in achieving this Protocol.²⁴ As is clear from these numbers, however, only around a third of the countries that are party to the FCTC are party to the Protocol.²⁵ At the moment of writing 17 EU Member States have ratified the Protocol and some more will probably join.²⁶ A few Member States which are important from the perspective of tobacco production, e.g. Italy, Poland and Romania, have not even signed the Protocol.

The Protocol obliges the States Parties to implement a number of measures of supply chain control, such as licences, tracking and tracing, obligations of due diligence and record-keeping on the persons involved in the tobacco production and trade, as well as certain rules on free zones and duty-free sales. It also provides a list of unlawful conduct, even if it does not define (contrary to the title of Article 14) which unlawful conduct should be considered to be criminal. The Protocol contains some rules regarding seizure and investigation techniques, but a much larger part of the Protocol concerns international cooperation.²⁷ Interestingly, no reservations may be made to the Protocol, similar to the FCTC.²⁸

The Protocol is addressed to the states, but it contains a significant number of duties the States Parties should impose on the private actors in the field. Hence it is possible to infer a picture of what – according to this Protocol – should be the role of the tobacco industry and other parties engaged in the tobacco trade. These duties are generally addressed to natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment, but the duties might be (although only slightly) limited to persons who are obliged to be licensed (see below). The Protocol also includes 'all legal and natural persons engaged in any transaction with regard to tobacco products through Internet-, telecommunication- or any other evolving technology-based modes of sale.'²⁹ It is also worth mentioning that the Protocol obliges the states to ensure 'maximum possible transparency' as regards their interaction with the tobacco industry while implementing the Protocol.³⁰

First of all, the Protocol sets out the framework within which production of tobacco products as well as the manufacturing equipment should be allowed. According to Article 6 (1), manufacture of tobacco products and manufacturing equipment and their import or export should be prohibited, except pursuant to a licence (or equivalent approval) or control system.

Furthermore, the Protocol encourages the States Parties to license (if the activity is not wholly prohibited) certain other activities, such as the growing of tobacco, retailing, 'wholesaling, brokering, warehousing or distribution of tobacco and tobacco products or manufacturing equipment.'³¹

²⁰ Art. 15 (4) FCTC.

²¹ Art. 15 (7) FCTC.

²² WHO Protocol to Eliminate Illicit Trade in Tobacco Products (the Protocol), <www.who.int/fctc/protocol/illicit_trade/protocol-publication/en/> accessed 29 April 2021, 1.

²³ Art. 3 of the Protocol.

²⁴ OLAF, 'New Action Plan reaffirms Commission in leading role in fight against cigarette smuggling' (OLAF Press Release No 13/2018, 2018).

²⁵ The list of State Parties, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&clang=_en> accessed 29 April 2021.

²⁶ The following Member States have not signed or ratified the Protocol: Bulgaria, Denmark, Estonia, Finland, Greece, Ireland, Italy, Poland, Romania, Slovenia. Verified on 29 April 2021 <www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4-a&chapter=9&lang=en>.

²⁷ A detailed analysis of the Protocol is provided for instance in: Interpol, *Countering Illicit Trade in Tobacco Products. A Guide for Policy-Makers* (Legal Handbook Series 2014).

²⁸ Art. 40 of the Protocol.

²⁹ Art. 11 of the Protocol. Art. 14(f) also includes the clause considering unlawful 'using Internet-, telecommunication- or any other evolving technology- based modes of sale of tobacco products in contravention of this Protocol.'

³⁰ Art. 4 (2) of the Protocol.

³¹ Art. 6 (2) of the Protocol.

Another key element of the framework is the duties imposed on the producers in order to enable effective functioning of the tracking and tracing system. By 25 September 2023 (five years after entering into force) the producers should be obliged to make sure that ‘unique, secure and non-removable identification markings, such as codes or stamps, are affixed to or form part of all unit packets and packages and any outside packaging of cigarettes.’ This obligation is extended to other tobacco products, but with an additional five years for its implementation (2028).³²

With tracking and tracing are linked additional requirements as to making available – either directly or by means of a link – certain information helping to determine the ‘origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status.’³³ The date and location of manufacture, the manufacturing facility and product description, as well as the intended market for retail sales, if available, should be part of the unique identification markings. The other information that should also be made available concerns the machine used, the production shift or time of manufacture, certain information concerning the first customer not affiliated to the manufacturer, any warehousing and shipping, the identity of any known subsequent purchaser, and information about the intended shipment.³⁴

Besides these obligations, Article 8 (12) expressly stipulates that obligations assigned to State Parties concerning the establishment of a global tracking and tracing regime cannot be delegated to or performed by the tobacco industry. However, the industry may be required to bear the costs of the establishment of this system.³⁵ In any case, so far as the implementation of the tracking and tracing system is concerned, the interaction of the authorities with the tobacco industry and persons representing their interests should be limited to what is absolutely necessary.³⁶

The Protocol introduces a number of duties as to record keeping and providing information to the authorities.³⁷ Furthermore, the State Parties must compel the persons licensed according to the above-described rules to provide certain types of information to their national authorities: general information on market volumes, trends, forecasts and other relevant information; the quantities of tobacco products and manufacturing equipment available to the licensee. The provision of further detailed information should be made compulsory in the case of exporting tobacco products or of the manufacturing equipment.³⁸ The Protocol also obliges the State Parties to introduce certain limitations concerning the form of payments on the business activities of those persons who are obliged to have a licence (hereafter ‘licensed persons’).³⁹

Persons engaged in the supply chain should conduct due diligence before the commencement of and during the course of business relationships. Such due diligence should include, in particular, customer identification containing detailed verification of the identity of the customer and establishing whether the person holds a licence as prescribed by Article 6. It may also include obtaining and updating information as regards criminal records, and bank accounts which are to be used in transactions.⁴⁰ It should also contain ‘a description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment’ or – in the case of manufacturing equipment – a description of the location where this equipment is going to be installed and used.⁴¹

Another duty requires persons engaged in the supply chain to ‘monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use.’⁴² With this obligation is linked another one – however, limited to the licensed persons – to supply ‘tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use.’⁴³ The rationale of this obligation is to prevent diversion of tobacco products into illicit trade channels.

Finally, with the above obligations is linked the obligation to ‘report to the competent authorities any evidence that the customer is engaged in activities in contravention of its obligations arising from this

³² Art. 3 of the Protocol.

³³ Art. 8 (4.1.) of the Protocol.

³⁴ Art. 8 (4.1.) and (4.2.) of the Protocol.

³⁵ Art. 8 (14) of the Protocol.

³⁶ Art. 8 (13) of the Protocol.

³⁷ Art. 9 of the Protocol.

³⁸ Art. 9 (3) of the Protocol.

³⁹ Art. 10 (2) and (3) of the Protocol.

⁴⁰ Art. 7 (3) of the Protocol.

⁴¹ Art. 7 (1) (a), (2) of the Protocol.

⁴² Art. 7 (1) (b) of the Protocol.

⁴³ Art. 10 (1) (b) of the Protocol.

Protocol.⁴⁴ The information provided according to this obligation may lead to a designation of a customer as a blocked customer.⁴⁵ Further reporting duties concern licensed persons. They should report to the competent authorities all suspicious transactions, as well as cross-border transfers of cash in certain amounts (to be determined by national law), or cross-border payments in kind.⁴⁶

Enforcement of these provisions is left mostly to the States Parties.⁴⁷ The Protocol has, however, a significant input by providing a list of conduct that should be considered unlawful in national law.⁴⁸ From this list, it is for the States to decide which conduct should be considered criminal.⁴⁹ The Protocol also mandates extending liability to legal persons, without prejudice to the liability of the natural persons for the same acts. This liability may be criminal, administrative or civil.

Most of the obligations enumerated above will fall into one of the categories of unlawful conduct on the list, most of them into the category of manufacturing, wholesaling etc. contrary to the provisions of this Protocol. Other courses of conduct are expressly declared as unlawful, e.g. breaches of rules regarding record keeping, payment limitations or intermingling of tobacco with non-tobacco products in free zones. However, there seems to be some uncertainty as to the inclusion of breaches of some of the duties. Failing to provide information to the authorities is included on the list, but monitoring sales to ensure that the quantities sold are commensurate with the demand, as required by Article 7 (1) (b), are not included. Finally, the obligation to 'report any evidence about a customer' engaging in acts which are unlawful according to this Protocol also does not seem to be included in the list of unlawful acts. One could argue that these acts might be covered by the general provision of manufacturing, wholesaling etc. 'contrary to the provisions of this Protocol,' but the link with these acts might be too slight. It seems to be necessary, however, that while implementing the Protocol into national legislation States Parties make sure to provide sufficient enforcement tools for these obligations to be viable.

2.3. Cooperation duties within the EU framework

The EU framework regulating the tobacco market is composed of a number of legal instruments. The key components are the Tobacco Advertising Directive of 2003,⁵⁰ the Tobacco Products Directive of 2014,⁵¹ and the agreements signed with the four major tobacco producers. At the EU level, the key enforcement body is the European Anti-Fraud Office (OLAF), responsible for customs fraud investigations, as customs fraud damages the EU budget.⁵² Other bodies engaged in the enforcement are Eurojust and Europol in their respective capacities in the field of investigations.⁵³⁻⁵⁴ The European Public Prosecutor's Office (EPPO), should enhance EU enforcement capacities in that respect as regards criminal investigations and prosecutions.⁵⁵

The Tobacco Advertising Directive goes further than the FCTC as it explicitly prohibits tobacco advertising in printed media and information society services, with few exceptions, and on radio. The exceptions concern exclusively professional tobacco publications and publications intended for third countries.⁵⁶ The Directive is complemented by the Audiovisual Media Services Directive (2010/13/EU), which extends this ban to all

⁴⁴ Art. 7 (1) (c) of the Protocol.

⁴⁵ Art. 7 (4) of the Protocol.

⁴⁶ Art. 10 (1) (a) of the Protocol.

⁴⁷ Art. 16 of the Protocol.

⁴⁸ Art. 14 (1) and Art. 10 (4) of the Protocol.

⁴⁹ Art. 14 (2) of the Protocol.

⁵⁰ Directive of the European Parliament and of the Council 2003/33/EC of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L152.

⁵¹ Directive of the European Parliament and of the Council 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance [2014] OJ L127. Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco [2011] OJ L176 does not create duties for the industry, but has an impact on the price of tobacco products, hence increasing demand for illicit tobacco.

⁵² Regulation of the European Parliament and of the Council (EU, EURATOM) No 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 [2013] OJ L248.

⁵³ Regulation of the European Parliament and of the Council 2018/1727 of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA [2018] OJ L295/138.

⁵⁴ Regulation of the European Parliament and of the Council 2016/794 of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135.

⁵⁵ J. Vervaele, 'The European Public Prosecutor's Office (EPPO): Introductory Remarks' in W. Geelhoed, L. H. Erkelens, A. W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (T.M.C. Asser Press 2018).

⁵⁶ Arts. 3 and 4 of the Tobacco Advertising Directive.

forms of audiovisual commercial communications.⁵⁷ Furthermore, the Tobacco Advertising Directive prohibits sponsorship of 'events or activities involving or taking place in several Member States or otherwise having cross-border effects' with the aim or even indirect effect of promoting a tobacco product.⁵⁸ In addition, sponsoring of audiovisual media services or programmes by tobacco undertakings is forbidden.⁵⁹

Of the instruments mentioned above, it is the Tobacco Products Directive that formulates the broadest duties for the industry. First of all, the Directive provides detailed rules as to the packaging of tobacco products regarding general warnings, health warnings and an information message: 'Tobacco smoke contains over 70 substances known to cause cancer.'⁶⁰

Secondly, it also contains detailed rules aimed at ensuring traceability of tobacco products based on marking all unit packets of tobacco products with a unique identifier, as well as providing security features for these identifiers.⁶¹ All economic operators involved in the trade in tobacco products, except retail outlets, are obliged to record the entry, intermediate movements and the final exit of all unit packets.⁶² Furthermore, it is the duty of the manufacturers of tobacco products to provide the other economic operators before the first retail outlet with the necessary equipment permitting recording of the tobacco products which they handle.⁶³ Another duty imposed on the manufacturers, and also on importers of tobacco products, concerns the concluding of contracts for a data storage facility to host the relevant data. Such a facility has to be physically located on the territory of the EU and the third party providing it must be approved by the Commission.⁶⁴ These provisions are much more detailed than those of the FCTC and the Protocol in this respect.

Thirdly, the Directive imposes a number of different information duties. The duty of manufacturers and importers of tobacco to provide a list of ingredients, their quantities and the emission levels, or even their sales volumes per brand and type, seems relatively obvious.⁶⁵ More interestingly, the same actors should provide studies (internal and external) on market research and preferences, which are available to them. These would contain, for instance, preferences of consumer groups, research on ingredients and emissions and summaries of market surveys preceding the launching of new products.⁶⁶ Furthermore, manufacturers and importers are obliged, in the case of certain additives considered to be a priority by the Commission, to carry out comprehensive studies on their particularities.⁶⁷ The introducing of novel tobacco products leads to information duties, which also include the submission of any available scientific studies. Competent authorities may be entitled to require the carrying out of additional research.⁶⁸

So far as the enforcement of these provisions is concerned, it is left to the Member States to lay down rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive.⁶⁹

3. Agreements with tobacco corporations

The origins of the agreements with the tobacco corporations are to be found in civil lawsuits regarding the industry's participation in the illicit tobacco trade, in particular with Philip Morris International (PMI).⁷⁰ Instead of pursuing the lawsuits, the European Union and the Member States opted for the model consisting of agreements signed by the EU and the Member States with the respective companies. It is important to stress that Member States were sovereign parties to these agreements. The agreements provide payments supporting policies against the illicit tobacco trade and numerous duties with the same aim.⁷¹

⁵⁷ Art. 9 (1) (d) of the Audiovisual Media Services Directive.

⁵⁸ Art. 5 of the Tobacco Advertising Directive.

⁵⁹ Art. 10 (2) of the Audiovisual Media Services Directive.

⁶⁰ Arts. 9 and 10 of the Tobacco Products Directive.

⁶¹ Arts. 15 and 16 of the Tobacco Products Directive.

⁶² Art. 15 (5) of the Tobacco Products Directive.

⁶³ Art. 15 (7) of the Tobacco Products Directive.

⁶⁴ Art. 15 (8) of the Tobacco Products Directive.

⁶⁵ Art. 5 (1) and (6) *in fine* of the Tobacco Products Directive.

⁶⁶ Art. 5 (6) of the Tobacco Products Directive. Similar duties as described in this paragraph concern electronic cigarettes and refill containers: Art. 20 (7).

⁶⁷ Art. 6 (2) of the Tobacco Products Directive.

⁶⁸ Art. 19 (1) and (2) of the Tobacco Products Directive.

⁶⁹ Art. 23 (3) of the Tobacco Products Directive.

⁷⁰ M. Heyward, 'Legal analysis of the agreements between the European Union, Member States, and multinational tobacco companies' (Framework Convention Alliance Report, 2019) <www.fctc.org/resource-hub/cop-4-legal-analysis-of-agreements-between-the-eu-member-states-and-multinational-tobacco-companies/> accessed 29 April 2021

⁷¹ D. Coker, 'Smoking May not Only be Hazardous to Your Health, but also to World Political Stability: The European Union's Fight Against Cigarette Smuggling Rings that Benefit Terrorism' (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 4 350; Heyward, *supra* note 70; Joossens et al., *supra* note 6, 254–255.

Currently, three agreements of this kind are in force: with Japan Tobacco International (JTI) (2007),⁷² with British American Tobacco (BAT) (2010),⁷³ and with Imperial Tobacco Limited (ITL) (2010).⁷⁴ The agreements are not identical, nor are they even similar in their design. They contain, however, similar tools and commitments, so it is possible to present common elements, which define the position of the tobacco industry, by virtue of them.

First of all, the agreements envisage payments of substantial sums of money, which may be used to support the EU, as well as the Member States which participate in the agreements, to combat the illicit tobacco trade.⁷⁵ The funds, however, do not have to be exclusively devoted to this end. The industry cannot decide how these funds are used, but some discussion about it has been anticipated, for instance in the JTI and ITL Agreements.⁷⁶ The sums are to be paid in general in yearly instalments and should total US\$400 million over 15 years for JTI, US\$300 million over 20 years for ITL, and US\$200 million over 20 years for BAT. To this should be added US\$1.25 billion paid by PMI over the course of the 12 years of that agreement. Most of this money goes to the participating Member States' budgets and the rest to the EU budget.⁷⁷

The next crucial element, which also brings significant revenue to the EU and participating States, is the role which the tobacco companies agree to play in seizures of illicit tobacco bearing their respective '[t]rademarks or [...] descriptors, logos or other designs giving the appearance of being' that trademark.⁷⁸ The companies agree to help identify whether the seized cigarettes are genuine contraband cigarettes or counterfeit, in the following way. The company of which the trademark or other design was identified may be given a notice of seizure by OLAF. Upon receipt, the company may inspect the cigarettes and provide a response to OLAF stating whether the cigarettes are indeed of that company or are counterfeit.⁷⁹ If the company does not conduct the inspection, the cigarettes may be deemed contraband tobacco of that brand.⁸⁰ If the company does conduct an inspection, it should also provide documentation and examination results showing how its conclusion was reached.⁸¹ Furthermore, the companies agreement to provide further free technical support to OLAF and/or participating Member States in identifying the origin and other features or in providing information about the contraband cigarettes are mandatory requirements.⁸²

If the seized cigarettes are indeed genuine contraband cigarettes of one of the companies, that company has to pay an additional payment amounting to 100% of 'the taxes and duties that would have been paid' if the tobacco was sold legally in the Member State where the seizure took place. If the number of seized cigarettes of the same company, when added to what had been previously seized in the same calendar year, exceeds a specified amount, the company has to pay an additional 400% of the additional payment due on that seizure.⁸³ Fault on the part of the company is not a condition for the payment.⁸⁴ However, the agreements provide for a number of situations in which payment is not due.⁸⁵

The companies undertake compliance commitments and agree to abide by certain principles or standards of business conduct in line with the agreements.⁸⁶ Each of the companies is required to designate a (chief) compliance officer or a designated manager to make sure that the companies' procedures are in accordance with the agreements and commitments resulting from them.⁸⁷ This person is responsible for

⁷² Agreement between the European Commission and Japan Tobacco International of 14 December 2007 (JTI Agreement) <www.ec.europa.eu/anti-fraud/investigations/eu-revenue/japan_tobacco_2007_en> accessed 29 April 2021.

⁷³ Agreement between the European Commission and British American Tobacco of 15 July 2010 (BAT Agreement) <www.ec.europa.eu/anti-fraud/investigations/eu-revenue/bat_en> accessed 29 April 2021.

⁷⁴ Agreement between the European Commission and Imperial Tobacco Limited of 27 September 2010 (ITL Agreement), <www.ec.europa.eu/anti-fraud/investigations/eu-revenue/imperial_tobacco_en> accessed 29 April 2021.

⁷⁵ Art. 4 ITL Agreement; Art. 8 JTI Agreement; Art. 6.4. BAT Agreement.

⁷⁶ Art. 4 ITL Agreement; Art. 8.4. JTI Agreement.

⁷⁷ For instance, from the PMI payment, Member States received 90.3% and the general EU budget 9.7%, according to: Commission, *supra* note 2, 4.

⁷⁸ Art. 7.2. JTI Agreement.

⁷⁹ Art. 5.2. ITL; Art. 7.5. JTI Agreement; Art. 3.1.-3.3. BAT Agreement.

⁸⁰ Art. 5.2. ITL Agreement.

⁸¹ Art. 5.3. ITL Agreement, Art. 7.6. JTI Agreement, Art. 3.3. BAT Agreement.

⁸² Art. 5.3. ITL Agreement, Art. 7.4. JTI Agreement, Art. 3.3. BAT Agreement.

⁸³ Art. 6.1-6.2. ITL Agreement; similarly: Art. 7.10 JTI Agreement, Art. 3.5. BAT Agreement.

⁸⁴ See expressly on that: Art. 6.3. ITL Agreement.

⁸⁵ Art. 7.11 JTI Agreement, Art. 3.7. BAT Agreement, Art. 6.4. ITL Agreement.

⁸⁶ E.g. Art. 3 JTI Agreement, Art. 4. BAT Agreement, Art. 2.1. ITL Agreement.

⁸⁷ Art. 4.1. JTI, Protocol 7 of Schedule 1 of the ITL Agreement, Art. 8 BAT Agreement.

the yearly issuance of a certificate of compliance stating that the company is fulfilling the requirements of its agreement.⁸⁸ If OLAF considers that the company is failing in complying with its obligations under the agreement, it may issue a statement of non-compliance which, in the case of further disagreements, may involve an arbitrator.⁸⁹

The companies are required to carry out performance reviews of their employees to comply with the respective agreements.⁹⁰ Companies must also put in place whistle-blowing procedures, including the possibility of anonymous whistle-blowing, and are forbidden to take any retaliation against an employee who makes use of such procedures.⁹¹

The companies are to limit their business, in connection with the quantities of cigarettes passing a certain threshold, only to approved contractors. These measures could be compared to know-your-customer procedures in anti-money laundering. In the process of approving the contractors, the companies must conduct due diligence checks on the customers to check whether they are able to honour objectives and practices to which the company is committed by virtue of the agreements.⁹² OLAF may request the termination of business relations with a contractor, if it possesses evidence that that contractor has ‘unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution, storage, or shipment of Contraband Cigarettes or any related Money Laundering.’ In the follow-up, the contractor is to be considered a ‘blocked contractor.’ OLAF may also be able to request the cessation – for similar reasons – of supplying tobacco to subsequent purchasers.⁹³

Additional rules also concern involvement in tracking and tracing,⁹⁴ requests for information⁹⁵ and forms of payment.⁹⁶

As already mentioned, a similar agreement was signed with PMI in 2004, which expired on 9 July 2016 as the EU decided not to extend it.⁹⁷ By virtue of this agreement, PMI was subject to very similar provisions to the three other major corporations. As to the payment which may be spent on anti-illicit tobacco enforcement, the company agreed to US\$ 1.25 billion to be paid in 13 instalments over the course of the 12 years of the agreement’s existence.⁹⁸ This is more than the combined sums to which the other companies agreed.

Moreover, PMI agreed to the obligations and limitations described above, in particular: assistance in identifying seized cigarettes (Article 4); commitments regarding compliance, such as the role of a compliance officer (Vice President for Compliance Systems in this case); the procedure for the certification of compliance and the possibility for OLAF to issue a statement of non-compliance (Article 2.02, Protocol 7 of Appendix B); approved contractors rules, including termination of business relationships with them at OLAF’s request in the case of breaches (Appendix B, Protocols 1–4); participation in the track and tracing regime (Art 5 and Appendix D); duties to respond to requests for information (Protocol 6 of Appendix B); limitations regarding forms of payments (Protocol 5 of Appendix B); as well as performance reviews of employees (Protocol 10 of Appendix B) and anonymous whistle-blowing possibilities (Protocol 13 of Appendix B).

4. Scope of duty of private actors – comparison

It is worth taking a closer look as to whether the new instruments, in particular the Tobacco Directive and the Protocol, do in fact make the agreements obsolete. A number of measures contained in the agreements can now be found in these two instruments. Both envisage a track and trace system. Moreover, Article 8 (12)

⁸⁸ Art. 11.1. JTI Agreement; 2.2. and Art. 7.2. ITL Agreement (the responsible director instead of compliance officer is responsible for the certificate of compliance); Art. 8.3. BAT Agreement.

⁸⁹ Arts. 11.2–11.4 JTI Agreement; Art. 2.2. ITL Agreement; Arts. 8.4.–8.7. BAT Agreement.

⁹⁰ Art. 4.4. JTI Agreement; Art. 8.2. BAT Agreement; Protocol 10 of Schedule 1 of the ITL Agreement.

⁹¹ Arts. 4.6–4.9. JTI Agreement; Protocol 13 of Schedule 1 of the ITL Agreement; Appendix 1, Article 21 of the BAT Agreement.

⁹² Appendix A, Art. 2. of the BAT Agreement; Protocol 2 of Schedule 1 of the ITL Agreement; Art. 5.2.ff JTI Agreement.

⁹³ Protocol 4 of Schedule 1 of the ITL Agreement. Similar provisions are contained in the JTI Agreement (Art. 5.12) and Appendix A of the BAT Agreement (Articles 1 and 2).

⁹⁴ Schedule 2 of the ITL Agreement; Art. 6 JTI Agreement.

⁹⁵ Arts. 9, 10 JTI Agreement; Protocol 6 Schedule 1. ITL Agreement.

⁹⁶ Protocol 5 Schedule 1. ITL Agreement; Art. 23. Appendix A of BAT Agreement.

⁹⁷ Anti-Contraband and Anti-Counterfeit Agreement and General Release between Philip Morris International, the European Commission, and Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain of 9 July 2004 (PMI Agreement) <www.ec.europa.eu/anti-fraud/philip-morris-international-2004_en> accessed 29 April 2021.

⁹⁸ Art. 3 of the PMI Agreement and summary of the agreement: <www.ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/summary.pdf> accessed 29 April 2021. After deduction of legal fees, the EU and the Member States benefitted by approximately US\$ 1 billion. See: Commission, *supra* note 2, 26.

of the Protocol excludes outsourcing the creation of this system to the tobacco industry, hence cancelling earlier efforts by PMI to take a lead in this respect (by providing a system called 'Codentify').⁹⁹ However, it is worth noting that the PMI agreement expired in 2016. The track and tracing regime of the 2014 Directive became operational only from May 2019 and the most important elements of the Protocol on the same issue will come into force in 2022 or 2023 at the earliest.¹⁰⁰ This leaves a gap of between three and seven or more years, when critical measures do not have to be applied.

As to further similarities, the Protocol provides for information duties, record keeping obligations, payment limitations, as well as duties regarding due diligence, reporting of customers and monitoring of sales levels.

The key difference is the presence in the agreements of the seizures measures and payments linked with them. Furthermore, compliance commitments in the agreements are more detailed than in the Protocol, as are rules on approved contractors. The latter give OLAF, at least potentially, a more direct influence. Finally, the agreements provide for a payment by the tobacco companies of a significant sum of money, without formally giving the tobacco industry any influence on how that money is to be spent. It is true that the agreements contain clauses according to which the parties agree to discuss the use of these funds,¹⁰¹ but the payment is unconditional and does not depend on the companies' wishes being fulfilled. This payment does not, per se, create an obligatory situation of dependence on the tobacco industry any more than the fact that the tobacco industry pays taxes or excise duties. This situation might arise, however, if the EU were to provide an opportunity for the industry's involvement, but it is not inevitable.

It can thus be seen that the Protocol and the Directive have not made the agreements wholly obsolete. A significant difference between, on the one hand, the Protocol and the Directive and, on the other hand, the agreements is in the enforcement technique. Both the Directive and the Protocol depend on implementation by the Member States/States Parties in that respect, requiring them to make sure that necessary measures are in place to ensure liability for breaches of the duties stemming from these instruments. In comparison the agreements use arbitration, which also, through specific provisions, significantly limits accessibility to the courts.¹⁰² Furthermore, the agreements contain a set-off clause further limiting the possibility of litigation by EU authorities. However, the question is whether litigation against the tobacco industry is necessarily the best way of assuring its cooperation, as the Assessment of the Commission points out.¹⁰³

The real issue seems to be the implementation and effective enforcement of the relevant provisions, as regards the EU or international instruments or the agreements. Even the Commission admits to having insufficient monitoring of the agreements.¹⁰⁴ Hence in this field the problem does not seem to be with the regulation, but with the enforcement. The reality of the duties and the viability of cooperation depends especially on that.

In sum, it is possible to point out valid reasons for maintaining the agreements, potentially renegotiated. On the one hand, they can make up for the permanent lack of resources for law enforcement, in particular in the light of the still significant illicit tobacco trade. On the other hand, they provide for a number of additional duties of the tobacco industry, which are not mandatory according to the EU or international law standards.

5. Reasons to continue or discontinue the agreements with the tobacco industry

If it is possible to point out valid reasons for maintaining the agreements, why has the EU decided not to extend such a beneficial agreement as the PMI agreement? In the run-up to the decision, the Commission published a technical assessment of the experience with the functioning of this agreement.¹⁰⁵ It results from the analysis of this document that the decision not to extend the agreement seems to have been taken on

⁹⁹ See: WHO, 'The Protocol to Eliminate Illicit Trade in Tobacco Products: Questions and Answers. 8.2 What are the key elements in an effective tracking and tracing regime for tobacco products?' <www.who.int/fctc/protocol/faq/en/index2.html> accessed 29 April 2021. See also: A. B Gilmore, A. W.A. Gallagher, A. Rowell, 'Tobacco Industry's Elaborate Attempts to Control a Global Track and Trace System and Fundamentally Undermine the Illicit Trade Protocol' (2018) 28 Tobacco Control 2 1.

¹⁰⁰ Commission, supra note 2, 6.

¹⁰¹ Art. 6.5. BAT Agreement; Art. 8.3. JTI Agreement; Art. 4.1. ITL Agreement.

¹⁰² Art. 12.2. (f) of the ITL Agreement; Art. 14.10 of the JTI Agreement; Art. 11.22 of the BAT Agreement.

¹⁰³ Commission, supra note 2, 28.

¹⁰⁴ Commission, supra note 2, 24.

¹⁰⁵ Commission, supra note 2.

political rather than substantive grounds. The assessment remains quite clearly indecisive as to the added value of extending the agreement, as demonstrated by, for example, this conclusion: 'The PMI Agreement made an important contribution to fight PMI illicit trade in the past. The market and legislative framework have changed significantly since the entry into force of the Agreement.'¹⁰⁶ The assessment also admits the impossibility of establishing a sufficiently clear causal link between changes in the illicit tobacco trade and the implementation of the agreement.¹⁰⁷

The assessment points out a number of positive experiences with the agreement, in particular the implementation of the track and trace system by PMI, PMI's reaction to notices on seizures, and its fulfilment of information duties, including the provision of requested information to OLAF.¹⁰⁸ There is also no complaint about any lack of cooperation or lack of fulfilment of duties on the part of PMI stemming from the agreement. On the negative side, the report points out the problem with the rules on seizures, as they are triggered only if five master cases or more are seized, hence at least 50,000 cigarettes. However, seizures often concern smaller quantities and are hence not reported.¹⁰⁹ It should be noted, however, that these thresholds can be potentially renegotiated, as was the case with the BAT agreement, where a subsequent agreement lowered the threshold to 7,500 cigarettes.¹¹⁰ Furthermore, a baseline amount that would trigger the 400% payment (mentioned in Section 3) seems impossible to reach in current circumstances, hence losing its deterrent function.¹¹¹ Furthermore, the assessment points out the reputational cost of continuing to use a cooperation agreement with a major tobacco producer such as PMI.¹¹²

The question whether the main objective – 'a notable decline in the contraband of PMI products smuggled into the EU' – was attained is difficult to answer.¹¹³ It is a fact that '[s]eizures of genuine PMI products have dropped by more or less 85% since 2006.'¹¹⁴ This may well point towards a decline of contraband, or a decline in enforcement (or both). Overall, seizures of cigarettes in terms of volume declined by around 25% between 2005 and 2014,¹¹⁵ but this decline does not sufficiently explain the decline in seizures of PMI products. However, in any case, a decline in seizures does not mean a decline in the illicit market, particularly in relative terms. Estimates point towards a slight increase of the illicit cigarette market from 64 billion to 66 billion cigarettes between 2010 and 2015. These figures, combined with the overall decline in tobacco consumption, point towards a significant increase in the rate of penetration of the tobacco market by illicit tobacco, namely from 9.7% to 13.3%.¹¹⁶

The assessment makes, however, some contradictory statements. It points out that cheap whites became a significant part of the market, but 'contraband volumes of market leader PMI with well-known brands like Marlboro are still comparatively high, and with price differences between certain EU and neighbouring markets of up to 1:10, the economic incentives driving smuggling remain strong.'¹¹⁷ Furthermore, the overall volume and availability of illicit tobacco products remains significant, from which the assessment deduces that 'there was no positive effect on public health stemming from the Agreement.'¹¹⁸ While the deduction seems correct, it may well point towards the need for more enforcement, including resources for that enforcement which could come from the payments made by the companies.

Interestingly, the assessment reveals (indirectly) a troubling reality in that respect. OLAF states, on page 28, that the costs of managing the PMI Agreement on the enforcement side are very low and quickly recovered by virtue of the agreement. However, on page 29, the report asks: 'In this context and in times of shrinking resources in the Commission/OLAF overall, the question is also whether it is adequate to allocate the required resources to managing the PMI Agreement.' On pages five and twenty-four the assessment also

¹⁰⁶ Ibid, 31.

¹⁰⁷ Ibid, 21.

¹⁰⁸ Ibid, 23, 24 and 26 (respectively).

¹⁰⁹ Ibid, 21.

¹¹⁰ See, in that respect, the exchange of letters between BAT and OLAF, <www.ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/bat_agreement_01082014_en.pdf> accessed 29 April 2021.

¹¹¹ Commission, *supra* note 2, 26.

¹¹² Ibid, 29.

¹¹³ Ibid, 19.

¹¹⁴ Ibid, 20.

¹¹⁵ Ibid, 11.

¹¹⁶ Ibid, 10.

¹¹⁷ Ibid, 6.

¹¹⁸ Ibid, 6.

complains about the lack of resources at EU level. It seems that the vast sums of money received by the EU and the Member States are not being wholly allocated to fighting the illicit tobacco trade. Maybe the agreement would make more sense if it was mandatory to allocate (at least a defined portion of) the payments received to this task.¹¹⁹

In a letter sent to the Member States explaining the lack of need for extending the agreement, the then Budget Commissioner Kristalina Georgieva focused on the market and legislative changes. As to the first aspect, cheap whites as well as counterfeit of cheap whites took a prominent place within the illicit market, which supposedly breaks the link with PMI (or other corporations).¹²⁰ The second aspect refers to the adoption of international and EU instruments (all analysed above), which were not in force when the agreement was signed. Hence the focus should be on 'cheap whites, strict law enforcement and strengthened international cooperation and implementation of the Protocol to Eliminate Illicit Trade in Tobacco Products to the WHO Framework Convention on Tobacco Control.'¹²¹

The decision not to prolong the PMI Agreement was in accordance with the EU Parliament's view,¹²² and was welcomed by the anti-tobacco sector of civil society.¹²³ The agreements had already been subject to criticism by this sector and by academia.¹²⁴ This criticism focused on: the lack of transparency in dealings between OLAF and the companies;¹²⁵ the lack of transparency in the use of money received from the tobacco industry and the lack of guarantee that it is used for enforcement against the trade in illicit tobacco;¹²⁶ excessively high thresholds for seizure measures;¹²⁷ and the lack of an independent laboratory to verify tests made by the companies which have an interest in demonstrating that the cigarettes seized are counterfeit so as to avoid payment.¹²⁸

However, these problems can be remedied as was shown to be the case by the renegotiation of the thresholds for seizure. As to the lack of an independent laboratory to verify tests made by the companies, this has possibly been remedied by the establishment of the Joint Research Centre – Institute for Reference Materials and Measurements (JRC-IRMM) in Geel (Belgium), which is a facility tasked with testing seized cigarettes.¹²⁹

The argument regarding the market transition towards cheap whites does not necessarily negate the need for the agreements. It has been stated many times that major brands profit even from counterfeiting of their cigarettes, as smoking of these cigarettes creates or maintains addiction, hence adding to the overall demand for tobacco products. When the resources of some of the (addicted) smokers increase, those smokers will probably move towards legal cigarettes from the sale of which the four companies are most likely to profit. The same reasoning applies to cheap whites. Thus, an argument may be built in the same way in connection with cheap whites which justifies the companies' participation in efforts to curb the trade in illicit tobacco.

If there is or can be effective value in having the agreements, then the reason to discontinue them must lie somewhere else. Even if the Commission does not say so out loud, it seems to be the moral reservation and political consequences linked with it that are the real drivers of this decision. This issue can be divided into at least two dilemmas. Firstly, is it moral to take money from the tobacco industry knowing that this money

¹¹⁹ This was also pointed out by civil society. See, for example, Smoke Free Partnership, 'Factsheet about the Agreement Between the EU and Philip Morris International' (*Smoke Free Partnership* 25 April 2016) <www.coppt.pt/attachments/322_Factsheet%20%20sobre%20o%20Acordo%20PMI.pdf> accessed 29 April 2021.

¹²⁰ Commission, supra note 2, 29.

¹²¹ Letter from Budget Commissioner Kristalina Georgieva to the Member States (5 July 2016).

¹²² European Parliament, 'European Parliament resolution of 9 March 2016 on the tobacco agreement (PMI agreement)' 2016/2555(RSP), para. 12.

¹²³ E.g.: Smoke Free Partnership, 'Press release: European Commission rejects renewal or extension of the controversial agreement with tobacco multinational Philip Morris International (PMI) on tackling illicit trade,' (*Smoke Free Partnership* 6 July 2016) <www.smokefreepartnership.eu/news/sfp-press-release-european-commission-rejects-renewal-or-extension-of-the-controversial-agreement-with-tobacco-multinational-philip-morris-international-pmi-on-tackling-illicit-trade> accessed 29 April 2021.

¹²⁴ The initial enthusiasm of the EU Parliament for the formula of agreements is worth noting, see: European Parliament, 'European Parliament resolution of 11 October 2007 on the implications of the agreement between the Community, Member States and Philip Morris on intensifying the fight against fraud and cigarette smuggling and progress made in implementing the recommendations of Parliament's Committee of Inquiry into the Community Transit System' 2005/2145(INI), paras. 31, 37, 38. However, even in that document one can spot the beginning of the Parliament's dissatisfaction, e.g. as regards the distribution of payments received from PMI (paras. 32–33).

¹²⁵ Joossens et al., supra note 6, 256.

¹²⁶ Smoke Free Partnership, supra note 119, 2.

¹²⁷ Joossens et al., supra note 6, 256; Factsheet, supra note 119, 2. Reflected in the BAT Agreement amendment of 2014 to 7,500 cigarettes.

¹²⁸ Joossens et al., supra note 6, 256; Factsheet, supra note 119, 3.

¹²⁹ Commission, supra note 2, 17 and 20–21.

comes from selling cigarettes which, inevitably in the long run, has left a trail of dead smokers? Secondly, and more broadly, is it moral to cooperate with these companies?

As to the first question, and linked to what was said above, if receiving payments from the tobacco industry is to be considered immoral, then taxing cigarettes should also be considered immoral, which leads to the paradoxical conclusion that the authorities should not touch one cent of the money raised from the sale of cigarettes. Clearly that is not a desirable outcome.

The dilemma regarding the general cooperation with the tobacco industry seems to present a stronger case against the agreements.¹³⁰ The existence of these agreements enhances the position of the tobacco industry and helps their publicity strategy, while it is widely considered that in view of the nature of that business, they should be denied a reputable status.¹³¹ At the same time the media still report the efforts of the major tobacco companies to circumvent regulation, for instance the advertisement ban, by using Instagram influencers to promote their products.¹³² Moreover, while the companies want to be considered a partner of the EU institutions, they (PMI and BAT as applicants and ITL and JTI as interested parties and interveners) did not hesitate to bring a legal case against Directive 2014/40.¹³³ Continuous involvement of the tobacco industry in illicit trade has also been reported.¹³⁴ Finally, particular attention should be given to Article 5 (3) of the FCTC mandating the protection of 'health policies from commercial and other vested interests of the tobacco industry' and Article 5 (2) of the Protocol requiring 'maximum possible transparency with respect to any interactions [the Parties] may have with the tobacco industry' while implementing the Protocol. The agreements were already considered to be in violation in particular of Article 5 (3) FCTC.¹³⁵

Perhaps it is simply impossible to trust the tobacco industry because the conflict is inherent and unavoidable. The public policy objective is to have as few smokers as possible, which is the exact opposite of what the tobacco industry obviously wants. That is seemingly the real reason for the controversy surrounding the participation of the industry in the fight against the trade in illicit tobacco. There is no easy way out of it, if there is one at all. If one takes the above reasoning to its logical conclusion, the tobacco industry should be banned altogether. That is the real conundrum and the moment when the problem becomes political and no longer moral. As long as this is a legal business, which provides jobs and pays taxes, there will be a paradoxical ambiguity in the states' attitude towards the industry. Any kind of cooperation necessarily gives legitimacy to this business, but it is a legitimate business as it stands and there are also pragmatic reasons not to ban it (consider the dilemmas regarding legalisation of recreational drugs or the unfortunate history of prohibition).¹³⁶

6. Conclusions

The role of the tobacco industry in the enforcement of the tobacco policy, especially against the illicit tobacco trade, is placed between necessary mistrust of the industry and its necessary cooperation. The framework of duties is an uneven patchwork as, within the EU, a duality persists (and will persist at least until 2030), with three of the four tobacco companies remaining subject to their respective agreements and PMI being free of those obligations. In particular, as not all the EU Member States have ratified the Protocol, the duties which this instrument lays down may not apply (yet) to PMI but, as they also stem from the agreements,

¹³⁰ See on this problem e.g.: Ching-Fu Lin, 'Toward a More Rounded Strategy to Eliminate Illicit Trade in Tobacco Products' (2017) 51 *Journal of World Trade* 2 275.

¹³¹ Joossens et al., supra note 6, 257. See also, for example, on the tobacco industry's lobbying efforts, including sponsoring numerous research initiatives: F.J. Chaloupka, 'Taxes, Prices and Illicit Trade: The Need for Sound Evidence' (2014) 23 *Tobacco Control* e1, and articles cited there; Marc C Willemsen, *Tobacco Control Policy in the Netherlands. Between Economy, Public Health, and Ideology* (Palgrave 2018) 185ff; A.W.A. Gallagher, K.A. Evans-Reeves, J.L. Hatchard, A.B. Gilmore, 'Tobacco Industry Data on Illicit Tobacco Trade: A Systematic Review of Existing Assessments' (2018) 28 *Tobacco Control* 1; E. Savell, A.B. Gilmore, G. Fooks, 'How Does the Tobacco Industry Attempt to Influence Marketing Regulations? A Systematic Review' (2014) 9 *PLOS ONE* 1.

¹³² A. Rowell, 'Despite Being Banned, Big Tobacco is Still on Social Media' (*Independent* 3 February 2020), <www.independent.co.uk/health_and_wellbeing/big-tobacco-cigarettes-facebook-ban-instagram-influencers-a9309971.html> accessed 29 April 2021; S. Marsh, 'British American Tobacco Circumventing Ad Ban, Experts Say' (*Guardian*, 17 March 2020) <www.theguardian.com/business/2020/mar/17/british-american-tobacco-circumventing-ad-ban-experts-say> accessed 29 April 2021.

¹³³ Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325.

¹³⁴ Joossens et al., supra note 6, 257.

¹³⁵ See for instance the discussion at the Conference of the Parties to the WHO Framework Convention on Tobacco Control in 2012: WHO Framework Convention on Tobacco Control, 'Conference of the Parties to the WHO Framework Convention on Tobacco Control, Fifth Session, Verbatim Records of Plenary Meetings' (12–17 November 2012), FCTC/COP/5/REC/1 <apps.who.int/gb/fctc/PDF/cop5/FCTC_COP5_REC1_150413_COMPLETE.pdf> accessed 29 April 2021.

¹³⁶ Wayne Hall, 'What are the policy lessons of National Alcohol Prohibition in the United States, 1920–1933?' (2010) 105 *Addiction* 7 1164.

they do apply to the other three companies. These are, for instance, due diligence duties and the approved contractor regime as well as record keeping, payment limitations and information duties. To this should be added participation in the analysis of seized cigarettes and potentially resulting payments. The question as to whether such a system is fair is not easy to answer. While the fact that the four biggest companies are subject to enhanced duties in comparison with smaller actors can be justified by their market position, this reasoning does not hold up against the fact that PMI is the biggest player of them all. Yet, the agreements come with the benefit of the set-off clause further limiting the possibility of litigation by EU authorities, which PMI does not have anymore. However, it is not certain that potential litigation puts that corporation in real danger.¹³⁷

A reflection as to the future of the agreements in general is needed, as by 2022 the decision has to be made regarding the agreement with JTI. As was demonstrated above, from the legal point of view there are good reasons to maintain the agreements and their deficiencies can be remedied. The decision to extend these agreements or not is a political one. The cozy relationship with the tobacco industry could be avoided through sufficient rules, and the agreements and their enforcement could be toughened up in that respect. The industry could be subject to duties without necessarily becoming a fully recognised partner working hand-in-hand with the law enforcement authorities. In addition, as causality (e.g. between the agreements and drops in seizures) is difficult to prove, the existence of this discrepancy between the framework for PMI and for the other companies offers an excellent opportunity to observe the real benefits of the agreements or the lack of them. In this sense this period of time should be used as a laboratory to test – as far as possible – which of the frameworks of tobacco industry involvement brings the most satisfactory results.

Similarly, as with other harmful industries (e.g. those which cause pollution), cooperation with the producers is not an unproblematic matter. However, there are certainly tasks with which the tobacco industry may provide excellent complementarity to public enforcement, such as their role in seizures, provided that it is well monitored. Tracking and tracing is another important tool to curtail the contraband trade in tobacco products. The industry has access to information which is crucial for effective enforcement. Finally, payments from the tobacco industry may reinforce the capacities of law enforcement.

A thorough implementation of the EU Framework, as well as of the Protocol, should be the priority of public policy in this field, including making use of the duties for the private actors. If the agreements are to be allowed to lapse, this should not be presented as a panacea curing the malaise of the illicit tobacco trade. It should not be used either to cover up the insufficient engagement by states in combatting the illicit tobacco trade,¹³⁸ which itself is linked with the lack of resources and insufficient prioritisation, especially as regards the resources and the competences of OLAF.¹³⁹

Competing Interests

The author has no competing interests to declare.

¹³⁷ See doubts expressed about it in the Commission, *supra* note 2, 28.

¹³⁸ See for instance: Commission, 'Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products - A comprehensive EU Strategy' (Communication) COM (2013) 324 final, 11–16; L. Gruszczynski, 'The WHO Protocol to Eliminate Illicit Trade in Tobacco Products: A Next Step in International Control of Tobacco Products' (2013) 4 *European Journal of Risk Regulation* 91, 96.

¹³⁹ These are also linked with the general limitations of OLAF. On that problem see: M. Luchtman, A. Karagianni, K. Bovend'Eerdt, 'EU Administrative Investigations and the Use of Their Results as Evidence in National Punitive Proceedings' and J. Vervaele, 'Lawful and Fair Use of Evidence from a European Human Rights Perspective', both in F. Giuffrida and K. Ligeti (eds.), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings* (2019) <https://orbilu.uni.lu/bitstream/10993/40141/1/ADCRIM_final_report.pdf> accessed 29 April 2021.

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