
EUROPEAN COMMISSION
Budget and Human Resources
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Brussels, 10 June 2016

Dear Vice-President Georgieva,

First of all, we would like to thank you for your letter dated from 18 April 2016.

We are very pleased to note that we hold a common belief in the fundamental importance of fighting against cigarette smuggling in order to protect public budgets and public health.

Guided by this very same belief, the European Parliament, by a resolution adopted on 9th March 2016, asked the European Commission not to renew, extend or renegotiate the *Anti-Contraband and Anti-Counterfeit Agreement and General Release* of 9 July 2004 among Philip Morris International (PMI) and affiliates, the Union and its Member States (PMI Agreement). Moreover, Dr Vera da Costa e Silva, Head of Secretariat of the World Health Organisation's Framework Convention on Tobacco Control, the United Nations public health agency in charge of tobacco control, has raised concerns about the renewal.

If the PMI Agreement was, maybe, an innovative instrument against the illicit tobacco trade when first concluded, it is today ineffective because of the substantial changes experienced by the market and the regulatory environment since.

These changes should prevent the Commission to renew, extend or renegotiate the PMI Agreement.

In your letter, if you stressed that, currently, there is no negotiation with PMI you also recognized that *"The Commission has not yet taken a decision on the future of the PMI Agreement"*.

This implies that, for the European Commission, the renewal, extension or renegotiation of the PMI Agreement are possible options. This is confirmed by the analysis and insights you set out and put forward in your letter.

Beside the fact that the renewal of the PMI Agreement would send a damaging and counterproductive message to third-party countries that the European Union engages in inappropriate interactions with the tobacco industry, it would be, in any case, ineffective. Moreover, from a legal point of view, the renewal of the PMI Agreement would appear dubious at best.

Firstly, the renewal of the PMI Agreement would be ineffective for tackling the illicit tobacco trade.

If the Commission's technical assessment published 24th February 2016 seems to show that the PMI Agreement has met effectively its objective of reducing the prevalence of PMI contraband on the illicit EU tobacco market, the Commission questions the causality of this result, and also stresses the fact that the reduction in PMI contraband has not led to an overall reduction in the number of illicit products on the EU market.

Moreover, as it is stated in the technical assessment, *"there is a gradual process of displacement of illicit tobacco products on the illicit EU market whereby an ever increasing share of smuggled cigarettes are not contraband from the big four manufacturers (...) non-branded ("cheap whites") cigarettes."*

Thus, the PMI Agreement is no longer suited to face the emerging issues.

Secondly, the regulatory environment has change especially with the 2014 Tobacco Products Directive (TPD) and the WHO Protocol to Eliminate Illicit Trade In Tobacco Products (FCTC Protocol).

Your position is to say that the FCTC Protocol has not yet entered into force and thus, its provisions are not binding. This would especially be the case for the article 8.12 of the FCTC Protocol which specify that: *"Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry."*

Given the fact that the European Union has signed and ratified the FCTC Protocol, the general principle of international law of good faith prohibits the European Commission to defeat the object and the purpose of the FCTC Protocol. The extent of this rule is detailed notably by article 18 of the Vienna Convention on the Law of Treaties concluded in 1969 : *"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."*

Therefore, even if the FCTC Protocol has not yet entered into force, the European Commission cannot renew the PMI Agreement without violating International Law and more generally cannot take any measure undermining the FCTC Protocol, including acts of secondary legislation as directives.

Lastly, the renewal of the PMI Agreement would also violate Article 5.3 of the WHO Framework Convention on Tobacco Control (FCTC).

This article establishes that: *“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”*

As a renewed PMI Agreement would deal with traceability, the exemption for legally binding and enforceable agreements contained in the WHO FCTC Guidelines on implementation of Article 5.3 FCTC would be irrelevant in this case. Indeed, according to guidelines, *“Parties should not allow acceptance by any branch of government or the public sector of political, social, financial, educational, community or other contributions from the tobacco industry or from those working to further its interests, except for compensations due to legal settlements or mandated by law or legally binding and enforceable agreements.”* Thus, only legally binding and enforceable agreements providing compensations can be concluded. This wouldn't be the case of the PMI Agreement.

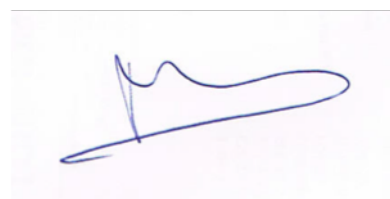
Even if the PMI Agreement would be analysed as providing compensations, the FCTC Protocol would strictly apply on the basis of the principle *lex specialis derogate*, meaning that the most specific text prevails over the most general one. In our case, Article 8.3 of the FCTC Protocol concerning only traceability is more specific than Article 5.3 of the FCTC.

Both material and legal issues justify therefore, that the European Commission does not renew, extend or renegotiate the PMI Agreement.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'C. Ruiz', with a long horizontal stroke extending to the right.

Prof. Carlos Jimenez-Ruiz
Chair of the ERS Tobacco Control Committee

A handwritten signature in blue ink, appearing to read 'F. Rodríguez Lozano', with a long horizontal stroke extending to the right.

Dr. Francisco Rodríguez Lozano
President of ENSP