

**14 December 2007**

**JT International S.A.  
JT International Holding BV**

**and**

**the European Community**

**and**

**the Participating Member States**

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**COOPERATION AGREEMENT**

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**THIS AGREEMENT** is made on 14 December 2007.

**BETWEEN**

JT International S.A. (*JTI*) and JT International Holding BV (*JTH*), on their own behalf and for and on behalf of all subsidiaries of JTH existing at the date of this Agreement (together *Japan Tobacco Companies*)

and

The European Community (the *EC*) represented by the European Commission (the *Commission*)

and

the Member States of the European Union participating in this Agreement (the *Participating Member States*).

**1. RECITALS**

**WHEREAS**

(A) illicit traffic in Cigarettes is a growing problem for the EC, for Member States and for legitimate trade in tobacco products. It takes the form of trade in both counterfeit Cigarettes and genuine products, which are smuggled into the EC without payment of any applicable EC or Member State tax or duty, or unlawfully introduced from low-tax jurisdictions into higher-tax jurisdictions;

(B) illicit traffic in Cigarettes is against the public interest in tax collection, transparent markets, and the protection of lawful competition. As such, illicit traffic in Cigarettes is against the interests of the EC, the Member States, as well as Japan Tobacco Companies and their stakeholders, including employees, customers, business partners and shareholders;

(C) the problem of illicit traffic in Cigarettes calls for binding cooperative efforts between the tobacco industry, the Member States and the EC aimed at eliminating the flow of contraband and counterfeit and consequent loss of revenues;

(D) Japan Tobacco Companies recognise that creating a system to provide the EC and Member States with the effective and timely ability to track and trace sales of Japan Tobacco Cigarettes is an important component of their commitment to fight the trade in Illegal Product. Japan Tobacco Companies are committed to a continuous process of dialogue and cooperation with the EC and Member States to evaluate and address the trade in Illegal Product, and to making commercially reasonable efforts to implement product tracking and tracing measures that target and are reasonably likely to provide the EC and Member States with substantial additional assistance in their efforts to combat the trade in Illegal Product;

(E) this Agreement is designed to achieve the Parties' joint objective of establishing an ongoing relationship of meaningful cooperation to combat the manufacture, sale, distribution and/or storage of smuggled and/or counterfeit Cigarettes into or through the EC as well as any other related illegal activities and specifically to eliminate the introduction of Japan Tobacco Cigarettes into the illegal market;

(F) the Parties have a joint objective that sales of Cigarettes to persons, corporations and/or distributors that have been found to be unlawfully, knowingly or recklessly engaged in or facilitating the manufacture, sale, distribution and/or storage of smuggled products or any other related illegal activities should be terminated; the Parties recognise that OLAF and the Member States are in a proper position to investigate and take action against such persons, and to prevent and detect such frauds, and that the EC and the Member States should be provided with active and effective support from Japan Tobacco Companies for their efforts to deter any act or practice that favours or facilitates the use of Japan Tobacco Cigarettes in smuggling or as a vehicle to launder illegal proceeds. The information provided by Japan Tobacco Companies to OLAF and the Participating Member States pursuant to this Agreement will contribute to the vigorous pursuit of persons suspected of smuggling Cigarettes, counterfeiting cigarettes and any other related illegal activity throughout the world;

(G) Japan Tobacco Companies recognise that establishing this Cooperation Agreement with the EC and the Participating Member States is in their best interests as it effectively combats the introduction of Japan Tobacco Cigarettes into the illegal market in the EC, enhances the ability of the Parties to resolve any related disputes without recourse to litigation and will benefit and protect Japan Tobacco Companies' brand value and business within the EC.

## **THEREFORE**

the Parties have agreed to enter into this Agreement in consideration of the mutual covenants and other valuable consideration set out below.

## **2. DEFINITIONS AND INTERPRETATION**

2.1 In this Agreement, the following terms shall have the following meanings:

**Additional Payment** means the payment or payments referred to in Clause 7.10.

**Affiliate** means, in relation to any Party, any direct or indirect subsidiary, as may be from time to time.

**Agreement** means this agreement as it may be varied or modified from time to time.

**Audit Order** means the order which the EC may seek from the arbitrator requiring an audit of Japan Tobacco Companies' operations to verify compliance with the Agreement.

**Authorised Individuals** means the personnel designated pursuant to sub-Clause 7.4.

**Blocked Customer or Blocked Contractor** means a Certified Customer, Certified Contractor, Second Purchaser or Subsequent Purchaser who is precluded from conducting business relations with Japan Tobacco Companies for a period of 5 years in accordance with sub-Clauses 5.11 to 5.14 of this Agreement.

**Business Day** means a day other than a Saturday, Sunday, or a statutory public holiday in Belgium or Switzerland.

**Carton** means packaging for approximately 200 Cigarettes, normally contained in 10 Packs.

**Certificate of Compliance** means the report which Japan Tobacco Companies shall provide to OLAF and the Participating Member States pursuant to Clause 11.1, describing Japan Tobacco Companies' fulfilment of the requirements of this Agreement.

**Certified Customer or Certified Contractor** means a First Purchaser or Contractor, respectively, that purchases and/or handles more than 2,500 Master Cases of Japan Tobacco Cigarettes in any 12 month period, and who has been vetted and approved by a Japan Tobacco Company in accordance with the KYC principles referred to in Clause 5 and described in Annex 3, which are reflected in Japan Tobacco's Programmes.

**Chief Compliance Officer** means the individual with responsibility for all compliance issues, including those pursuant to this Agreement.

**Cigarette** means any product that contains tobacco and is intended to be burned or heated under ordinary conditions of use, and includes, without limitation, any "roll-your-own" tobacco which, because of its appearance, type, packaging, or labelling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For the purposes of this Agreement, 0.0325 ounces of "roll-your-own" tobacco shall be considered the equivalent of one individual Cigarette.

**Compliance Order** means the order which the EC may seek from the arbitrator requiring Japan Tobacco Companies to bring themselves into compliance with the Agreement.

**Contraband Cigarettes** means Cigarettes that have been imported into, distributed in, or sold in a Member State, or were en route to a Member State for sale in that Member State, in violation of the applicable tax, duty or other fiscal laws of that Member State or the EC, but, for the purposes of this Agreement, shall exclude Counterfeit Cigarettes.

**Contraband Japan Tobacco Cigarettes** means Japan Tobacco Cigarettes that are also Contraband Cigarettes.

**Contractor** means any individual or business, (other than a First Purchaser or an Affiliate of a Japan Tobacco Company) engaged by Japan Tobacco Companies to provide distribution or storage services for Japan Tobacco Cigarettes, or a non-

Affiliate of Japan Tobacco Companies engaged in the manufacture under license of products bearing Japan Tobacco Trademarks.

**Cooperating Company** means a company that has entered into a binding agreement with the EC and some or all of the Member States which covers cooperation in the fight against counterfeit and contraband cigarettes and which includes obligations in relation to know your customer, track and trace and monetary payments.

**Corporate Responsibility Committee** means the entity within JTI of the same name referred to in Clause 4.1(b).

**Counterfeit Cigarettes** means Cigarettes bearing a trademark of a Cigarette manufacturer that are manufactured by a third party without the consent of that Cigarette manufacturer, but shall in no event include: (i) Cigarettes manufactured by the trademark holder or any affiliate thereof, regardless of the actual or intended market of distribution; (ii) Cigarettes bearing a trademark of a Cigarette manufacturer using tobacco either produced by or sold by that Cigarette manufacturer; or (iii) Cigarettes bearing a trademark of a Cigarette manufacturer that are packaged in genuine packaging of that Cigarette manufacturer, including genuine Cartons and Packs of that Cigarette manufacturer.

**Counterfeit Japan Tobacco Cigarettes** means Cigarettes bearing a Japan Tobacco Trademark that are manufactured by a third party without the consent of Japan Tobacco Companies, but shall in no event include: (i) Cigarettes manufactured by Japan Tobacco Companies or any Affiliate thereof, regardless of the actual or intended market of distribution; or (ii) Cigarettes bearing a Japan Tobacco Trademark using tobacco either produced by or sold by Japan Tobacco Companies, or (iii) Cigarettes bearing a Japan Tobacco Trademark that are packaged in genuine Japan Tobacco Companies packaging, including genuine Japan Tobacco Companies Cartons and Packs, unless Japan Tobacco Companies can demonstrate that such genuine Japan Tobacco Companies packaging materials were stolen from Japan Tobacco Companies.

**Dispute** means a controversy, claim, disagreement or dispute arising out of, or relating to, this Agreement.

**Documentary or Other Substantive Evidence** means: (i) a criminal conviction in any official EC court or tribunal for any offence relating to the manufacture, sale, distribution and/or storage of Illegal Product, or any other related illegal activity; or (ii) a finding by any official EC court or tribunal in any civil case of involvement in the manufacture, sale, distribution and/or storage of Illegal Product, or any other related illegal activity; or (iii) a criminal conviction or a civil finding, as outlined in (i) and (ii) above, in the official court or tribunal of any other jurisdiction which has comparable procedural safeguards and requires a comparable standard of proof to those applicable in the EC.

**Execution Date** means the date that this Agreement becomes binding on all of the Parties, being the later of: (i) the date on which the signatures to this Agreement of the EC and the Participating Member States have been delivered to Japan Tobacco

Companies; or (ii) the date on which the signatures to this Agreement of JTH and JTI have been delivered to the EC.

**First Purchaser** means any individual or business, other than an Affiliate of a Japan Tobacco Company, to whom or to which Japan Tobacco Companies directly sell Cigarettes.

**Governance Meetings** means the meetings referred to in Clauses 8 and 9.

**Illegal Product** means Contraband or Counterfeit Cigarettes.

**Intended Market of Retail Sale** means the market that Japan Tobacco Companies intend as, and have agreed with the Certified Customer will be, the market of either domestic retail or duty-free retail sale for Japan Tobacco Cigarettes when Japan Tobacco Companies sell such Cigarettes to Certified Customers.

**International Japan Tobacco Trademarks** means any and all of the trademarks set out in Annex 1.

**Japan Tobacco Cigarettes** mean Cigarettes carrying Japan Tobacco Trademarks manufactured by any Japan Tobacco Company, any Affiliate of a Japan Tobacco Company or a Japan Tobacco Company licensee or contract manufacturer and, for the avoidance of any doubt, excludes any Cigarettes carrying any other trademarks which were acquired by any Japan Tobacco Company subsequent to 1 April 2007.

**Japan Tobacco Company/Companies** includes and/or means JTI, JTH and all subsidiaries of JTH in existence at the Execution Date and involved in the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes, and each of them individually.

**Japan Tobacco's Programmes** means Japan Tobacco Companies' internal compliance policies that address the manufacture, sale, distribution and/or storage of Cigarettes, including, without limitation, the Code of Conduct available at [www.jti.com](http://www.jti.com).

**Japan Tobacco Trademarks** means any and all of the trademarks set out in Annex 2.

**KYC programme** means the Know Your Customer programme referred to in Clause 5 and described in more detail in Annex 3.

**List of Arbitrators** means the list of arbitrators at Annex 4.

**Master Case** means packaging for approximately 10,000 Cigarettes.

**Member States** means States that are members of the European Union.

**Non-Participating Member States** means those Member States that are not Parties to this Agreement.

**OLAF** means the Anti-Fraud Office of the European Commission, or any successor thereof.

**Pack** means packaging for approximately 20 Cigarettes.

**Participating Member States** means those Member States whose signatures to this Agreement have been delivered to Japan Tobacco Companies by the Execution Date together with those Member States that subsequently accede to this Agreement in accordance with Clause 25.

**Party or Parties** means a party or parties to this Agreement that is/are listed or referred to on the title page of this Agreement and have acceded to this Agreement by executing a signature page but excluding Japan Tobacco Inc..

**Relevant Law** means the relevant laws, statutes, ordinances, rules, regulations or other provisions having the force or effect of law in the EC and/or any Member State which are in effect in each Member State as of its signature date, or are enacted or amended by the EC or a Member State after its signature date.

**Request for Termination** means a written request pursuant to Clause 5.13 from OLAF that a Certified Customer, Certified Contractor or a Second or Subsequent Purchaser be terminated.

**RJR Entities** means Reynolds American Inc., R.J. Reynolds Tobacco Company (a North Carolina corporation), R.J. Reynolds Tobacco Company (a Delaware corporation), R.J. Reynolds Tobacco Company (a New Jersey corporation), RJR Nabisco Inc., R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp., Nabisco Group Holdings Corp., RJR Nabisco Holdings Corp., R.J. Reynolds Tobacco Holdings, Inc., R.J. Reynolds Global Products, Inc., and all their affiliates and subsidiaries existing on May 12, 1999 or acquired thereafter (which, for the avoidance of doubt, does not include any Japan Tobacco Group Companies).

**Second Purchaser** means any individual or business to whom or to which First Purchasers directly sell one thousand or more Master Cases of Cigarettes in any 12 month period.

**Statement of Non-Compliance** means the statement which OLAF shall provide to Japan Tobacco Companies pursuant to Clause 11.2 if it reasonably believes that they are failing to perform their obligations under the Agreement.

**Subsequent Purchaser** means any individual or business to whom or to which Second Purchasers directly or indirectly sell one thousand or more Master Cases of Cigarettes in any 12 month period.

**Termination Notice** means a notice pursuant to Clause 12, served pursuant to the processes in Clause 15 specifying the nature of any material breach in sufficient detail so as to enable the Party in receipt to evaluate what action it should take.

**Trier Laboratories** means the laboratory located at JT International GmbH, Diedenhofener Strasse 20, 54294 Trier, Germany.

2.2 Save where the context requires otherwise:

- (a) references to any clause, sub-clause or annex without further designation shall be construed as a reference to the clause, sub-clause or annex to or of this Agreement so numbered;
- (b) clause and annex headings are for convenience only and shall not be taken into account in the interpretation of this Agreement; and
- (c) reference to any gender shall include all genders and reference to the singular shall include the plural and vice versa.

### **3. COMMITMENTS OF JAPAN TOBACCO COMPANIES**

#### *General Commitment*

3.1 Japan Tobacco Companies confirm their ongoing commitment and obligation to comply with all applicable laws, including those of the EC and the Member States and, in particular, those governing their conduct relating to:

- (a) the payment of import duties, value added tax, excise duty, and other imposts payable in relation to Japan Tobacco Cigarettes;
- (b) the handling of payments which are received from Certified Customers, Certified Contractors, licensees, and other obligors in respect of Japan Tobacco Cigarettes;
- (c) currency reporting and record-keeping requirements in relation to Japan Tobacco Cigarettes; and
- (d) trade restrictions or prohibitions in relation to Japan Tobacco Cigarettes.

3.2 In the event that Japan Tobacco Companies acquire new manufacturing facilities after the Execution Date that would have been subject to this Agreement if they had been a part of Japan Tobacco Companies on the Execution Date and which would, but for this clause, be subject to the terms of this Cooperation Agreement, the Parties agree that the obligations of JTH and JTI shall be to make commercially reasonable efforts to implement within 12 months of such acquisition, the requirements of this Agreement in those new manufacturing facilities and after the expiry of that 12-month period, those new facilities shall be considered part of Japan Tobacco Companies for the purposes of this Agreement. Should JTH and/or JTI reasonably require additional time for the implementation of the requirements of this Agreement in any such new manufacturing facilities, JTH and/or JTI may make a reasoned request to OLAF for an extension. The EC and Participating Member States agree that consent to a reasoned request for a reasonable extension under this sub-Clause shall not be unreasonably withheld.

3.3 In the event that a company or group of companies engaged in the manufacture, sale, distribution and/or storage of Cigarettes carrying non-Japan Tobacco Trademarks is acquired by or merged into Japan Tobacco Companies subsequent to the Execution Date or any Japan Tobacco Company otherwise obtains, directly or indirectly, ownership of such a company or group of companies with the



ability to exercise direct management control over it, Japan Tobacco Companies and the EC shall, as soon as reasonably practicable, meet to discuss the extent to and the time frame within which, the provisions of this Agreement and any other agreement between the Parties coming into force at or immediately prior to the Execution Date, might reasonably be applied, by agreement to the acquired company or group of companies.

3.4 Without prejudice to sub-Clause 3.3, in the event that a company or group of companies engaged in the manufacture, sale, distribution and/or storage of Cigarettes carrying non-Japan Tobacco Trademarks is acquired by or merged into Japan Tobacco Companies subsequent to the Execution Date or any Japan Tobacco Company otherwise obtains, directly or indirectly, ownership of or the ability to exercise direct management control over such a company or group of companies, Japan Tobacco Companies undertake to apply each of the obligations set out in sub-Clauses 3.5 to 3.12, Clause 4 and sub-Clause 5.1, to all entities which thereby become Japan Tobacco Companies with effect from 2 years from the date that such company is acquired with respect to all Cigarettes sold by any Japan Tobacco Company carrying any trademark owned or controlled by the acquired company or group of companies and being under the management control of any Japan Tobacco Company as a result of that acquisition. With respect to any such entity, any time limits in sub-Clauses 3.5 to 3.12, Clause 4 and sub-Clause 5.1 for the implementation of the obligations set out in those sub-Clauses, shall be extended to 2 years from the date that the entity was acquired.

#### *Japan Tobacco's Programmes*

3.5 Japan Tobacco Companies shall retain and enforce programmes substantially in the form of Japan Tobacco's Programmes and providing, in aggregate, a degree of compliance and ethical standards not materially less than those arising from Japan Tobacco's Programmes as defined at the Execution Date of this Agreement.

3.6 Japan Tobacco Companies shall make commercially reasonable efforts to ensure compliance by their officers, employees and agents with the principles and requirements of this Agreement and Japan Tobacco's Programmes.

3.7 Japan Tobacco Companies shall enhance Japan Tobacco's Programmes continually to reflect material changes in international practice and developments in technologies and procedures and shall inform OLAF of any material changes in those Programmes when submitting its Certificate of Compliance.

3.8 Conduct that is unlawful or that violates this Agreement or Japan Tobacco's Programmes shall not be condoned under any circumstances. This includes conduct that occurs in a country that does not enforce a restriction or prohibition contained in this Agreement or Japan Tobacco's Programmes in its own law or in which such a violation is not subject to public criticism or censure.

3.9 After detecting any violation of this Agreement or Japan Tobacco's Programmes, Japan Tobacco Companies shall make all commercially reasonable efforts to prevent and/or penalise further similar conduct.

3.10 Japan Tobacco Companies acknowledge that the fact that a competitor or other company may appear to be engaged in an illegal activity without incurring any penalties does not mean that Japan Tobacco Companies can be involved in such illegal activity or condone the involvement of their Certified Customers or Certified Contractors or anyone associated with Japan Tobacco Companies in such illegal activity.

3.11 Within 6 months of the Execution Date of this Agreement, Japan Tobacco's Programmes shall be revised to incorporate the relevant components included in this Agreement. In the event of any inconsistency between Japan Tobacco's Programmes and this Agreement, the latter shall prevail.

#### *Internal Communication*

3.12 Japan Tobacco Companies shall make the following available to all Japan Tobacco Companies' employees on Japan Tobacco Companies' internal website:

- (a) this Agreement;
- (b) Japan Tobacco's Programmes, as revised as a result of this Agreement;
- (c) frequently asked questions and answers relating to this Agreement;
- (d) frequently asked questions and answers relating to the revisions made to Japan Tobacco's Programmes; and
- (e) a link to the reporting system established pursuant to sub-Clauses 4.6 to 4.7.

### **4. INTERNAL COMPLIANCE ORGANISATION**

#### *Japan Tobacco Companies' Compliance Officer*

4.1 For the purposes of this Agreement, JTI shall maintain in place at all times a Chief Compliance Officer for Japan Tobacco Companies who shall report directly to the Board of JTH. The Chief Compliance Officer shall have the authority and be responsible for:

- (a) reviewing Japan Tobacco Companies' practices relating to the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes;
- (b) defining, with the Corporate Responsibility Committee of JTI, the various compliance objectives of Japan Tobacco Companies;
- (c) undertaking and executing any and all of the commitments made under this Agreement by Japan Tobacco Companies;
- (d) overseeing and investigating compliance by Japan Tobacco Companies with Japan Tobacco's Programmes and the Agreement;
- (e) developing and reviewing education and training programmes for employees relating to the manufacture, sale, distribution and/or storage of Japan Tobacco

Cigarettes in accordance with Japan Tobacco's Programmes and the Agreement; and

- (f) serving, directly and/or through appropriate staff, as a contact point for communication between Japan Tobacco Companies and the EC and the Participating Member States.

4.2 Japan Tobacco Companies shall, within 12 months of the Execution Date of this Agreement, appoint field compliance officers or their equivalent and regional compliance officers or their equivalent, with responsibility for monitoring and measuring compliance with Japan Tobacco's Programmes and fulfilling the responsibilities set out therein. These field and regional compliance officers will report, through the compliance management structure, to the Chief Compliance Officer. Japan Tobacco Companies shall provide OLAF with a comprehensive and up-to-date list of its appointed field and regional compliance officers on the first anniversary of the Execution Date and on each anniversary of the Execution Date thereafter.

#### *Delegation of Authority*

4.3 Substantial discretionary authority relating to the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes, or the establishment of policies and business practices relating to them, shall be delegated by Japan Tobacco Companies only to Japan Tobacco Companies' employees that Japan Tobacco Companies reasonably believe, after the exercise of due diligence, have demonstrated the ability and commitment to act in full compliance with all applicable laws, Japan Tobacco's Programmes as revised, the KYC programme and the requirements of this Agreement.

#### *Performance Reviews*

4.4 Japan Tobacco Companies shall have in place and shall continue to update procedures to review on an annual basis, the performance of employees whose activities relate to the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes and to take effective and appropriate steps, against the employee and/or vis-à-vis the authorities, in the event that an employee fails to comply with Japan Tobacco's Programmes.

#### *Training Programmes*

4.5 Japan Tobacco Companies shall have in place, and shall continue to update, mandatory training programmes for their employees whose activities involve the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes, or the establishment of the policies and business practices relating to these activities. The curriculum for such training programmes shall cover this Agreement and its application to the policies and business practices relating to the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes, and shall be notified to OLAF and the Participating Member States. The employees responsible for designing and implementing the training programmes covered under this sub-Clause shall, at least once a year, either conduct or participate in training programmes designed to

educate and inform Japan Tobacco Companies' employees about their compliance obligations under Japan Tobacco's Programmes and this Agreement, with supplemental training to be required if necessary, at the discretion of the Chief Compliance Officer. At least once a year, a representative of OLAF shall participate in the training for Japan Tobacco Companies' employees.

*Reporting of Suspicious Activity*

4.6 Japan Tobacco Companies shall require any employee of Japan Tobacco Companies who suspects that there has been a violation of Japan Tobacco's Programmes or this Agreement by another employee or by a Certified Customer or Certified Contractor, promptly to report the activity to a field compliance officer or the Chief Compliance Officer and/or in-house legal counsel. To the extent permitted by law, the identity of the reporting employee will be kept confidential, if so requested by the employee.

4.7 The Chief Compliance Officer shall create a reporting system that will allow employees of Japan Tobacco Companies to report either in confidence or, to the extent permitted by law, anonymously to an appointed contact person, including by e-mail, regular mail, or telephone, any suspicious transactions, including, but not limited to, cash transactions in an amount greater than \$10,000, or any suspected involvement of Japan Tobacco Companies' employees, Certified Contractors or Certified Customers in:

- (a) the manufacture, sale, distribution and/or storage of Illegal Product;
- (b) any related illegal activity; or
- (c) transactions that do not correspond to ordinary commercial practices, violate this Agreement or Japan Tobacco's Programmes, or make Japan Tobacco Cigarettes vulnerable to diversion into illegal trade channels.

To the extent permitted by law, if the reporting employee so requests, the identity of the reporting employee shall be kept confidential at all times by any appointed contact person and shall not be disclosed when informing the field compliance officer, Chief Compliance Officer and/or in-house legal counsel of the suspicious transaction(s).

4.8 Japan Tobacco Companies shall immediately investigate any report of any potential suspicious transaction as referred to in sub-Clause 4.7 that is not spurious and shall provide OLAF with a report, to the extent permitted by law, if on investigation, there are reasonable grounds for believing that there has been an infringement.

4.9 Japan Tobacco Companies shall, to the extent permitted by law, encourage its employees and/or agents to make themselves available, and specifically ensure that the Chief Compliance Officer or an appropriate employee will make themselves available, to OLAF and any relevant Participating Member State for interviews and for the purposes of giving sworn statements, as reasonably requested and required by OLAF and the Participating Member States, relating to matters which are covered by this Agreement and that have arisen after the Execution Date of this Agreement. Any

such interviews and/or statements by Japan Tobacco Companies employees and/or agents shall be with or without the assistance and/or presence of representatives of Japan Tobacco Companies, as the employee/agent shall request.

## **5. CERTIFIED CUSTOMER AND CERTIFIED CONTRACTOR RELATIONS**

### *Supply Obligation*

5.1 Japan Tobacco Companies shall supply Japan Tobacco Cigarettes only in quantities that are commensurate with legitimate consumption in the Intended Market of Retail Sale and shall refuse to supply Cigarettes that exceed such consumption.

### *KYC programmes*

5.2 Within six months of the Execution Date of this Agreement, Japan Tobacco Companies shall undertake, on a worldwide basis, to apply this Agreement, as relevant, and their KYC programmes to any contracts with any new First Purchaser or Contractor that may be expected to purchase and/or handle more than 2,500 Master Cases of Japan Tobacco Cigarettes in any 12 month period at any time during the first two years of doing business with Japan Tobacco Companies, or who subsequently does purchase and/or handle more than 2,500 Master Cases of Japan Tobacco Cigarettes in any 12 month period at any time during the course of this Agreement, so that those First Purchasers or Contractors become Certified Customers or Certified Contractors.

5.3 Within one year of the Execution Date of this Agreement and to the extent permitted by law, Japan Tobacco Companies shall, on a worldwide basis, undertake to apply this Agreement, as relevant, and their KYC programmes to contracts with all of their existing First Purchasers and Contractors, that as of the Execution Date of this Agreement, purchase and/or handle, or are reasonably expected to continue to purchase and/or handle, more than 2,500 Master Cases of Japan Tobacco Cigarettes in any 12 month period so that those First Purchasers or Contractors become Certified Customers or Certified Contractors.

5.4 Japan Tobacco Companies shall, to the extent permitted by law, require their Certified Customers and Certified Contractors to adhere to the principles of this Agreement, as relevant, and Japan Tobacco's Programmes as a condition of obtaining certification as such.

5.5 Japan Tobacco Companies shall, to the extent permitted by law, conduct regular reviews, on an *ad hoc* basis but at least once a year, as a condition of renewing the certification of Certified Customers and Certified Contractors. These reviews shall be conducted by reference to this Agreement, as relevant, and Japan Tobacco's Programmes.

5.6 Japan Tobacco Companies' representatives shall, to the extent permitted by law, carry out regular documented visits to Certified Customer and Certified Contractor sites to inspect their operations to ensure the application of this Agreement, as relevant, and Japan Tobacco's Programmes.

5.7 If Japan Tobacco Companies discover that a Certified Customer or a Certified Contractor materially no longer complies with the principles of this Agreement or Japan Tobacco's Programmes, and cannot adjust its position so as to comply within a reasonable time frame which shall not exceed 6 months, they shall take all reasonable steps open to them, to the extent permitted by law, to terminate the relationship within a reasonable time. Should Japan Tobacco Companies reasonably require additional time for a Certified Customer or Certified Contractor to renew compliance with the requirements of this Agreement, Japan Tobacco Companies may make a reasoned request to OLAF for an extension. The EC and Participating Member States agree that consent to a reasoned request for a reasonable extension under this sub-Clause shall not be unreasonably withheld.

5.8 Japan Tobacco Companies shall, to the extent permitted by law, keep full up-to-date records on all Certified Customers and Certified Contractors for at least five years including:

- (a) material commercial documents relevant to this Agreement, such as invoices, correspondence of a material nature to and from said Certified Customer or Certified Contractor, internal correspondence of a material nature relating thereto, contracts, credit analysis, cargo manifests, declarations to any relevant authorities, transport documents and other shipping documents;
- (b) documents obtained by Japan Tobacco Companies as part of the KYC procedures;
- (c) any inquiries from and responses to government agencies regarding the Certified Customer, the Certified Contractor or their businesses; and
- (d) all records relating to payments made by First Purchasers for Japan Tobacco Cigarettes.

*Certified Customer and Certified Contractor Contract Terms*

5.9 In all new, revised or renewed contracts with Certified Customers and Certified Contractors, Japan Tobacco Companies shall require that the following principles are adhered to:

- (a) full compliance at all times with all applicable laws governing the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes;
- (b) full compliance with the principles of Japan Tobacco Companies' Code of Conduct, available at [www.jti.com](http://www.jti.com);
- (c) Japan Tobacco Cigarettes must be delivered for sale into the Intended Market of Retail Sale;
- (d) Japan Tobacco Cigarettes' packaging must not be altered in any way;
- (e) full cooperation with any EC and/or Participating Member State investigations relating to Illegal Product, to the extent permitted by law;

- (f) express and unconditional consent to be granted to Japan Tobacco Companies to terminate the business relationship if any Japan Tobacco Company comes into possession of reasonable evidence that the Certified Customer or Certified Contractor has, after the Execution Date of this Agreement, unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution and/or storage of Illegal Product, or any other related illegal activities;
- (g) express and unconditional consent to be granted, to the extent permitted by law, to Japan Tobacco Companies to disclose the terms and conditions of any sale of Japan Tobacco Cigarettes to the First Purchaser and any related information in response to a valid and specific governmental inquiry relating to Illegal Product; and
- (h) not to sell or resell Japan Tobacco Cigarettes to any person or entity:
  - (i) whom the Certified Customer knows or reasonably should know is engaged in any illegal trade; or
  - (ii) where the Certified Customer has obtained Documentary or Other Substantive Evidence that the person/entity is engaged in any illegal trade; or
  - (iii) who is a Blocked Customer or a Blocked Contractor.

5.10 Japan Tobacco Companies shall make commercially reasonable efforts to ensure that substantively equivalent provisions are inserted progressively on the first practicable occasion into the contracts entered into by First Purchasers with Second Purchasers and by Second Purchasers with Subsequent Purchasers.

*Termination of Contracts with Certified Customers/Contractors*

5.11 Japan Tobacco Companies shall, to the extent permitted by law, terminate their business relationship with any Certified Customer or Certified Contractor upon Japan Tobacco Companies coming into possession of Documentary or Other Substantive Evidence that the Certified Customer or Certified Contractor has, after the Execution Date of this Agreement, unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution and/or storage of Illegal Product or any other related illegal activities. Any Certified Customer or Certified Contractor so terminated shall become a Blocked Customer or a Blocked Contractor, respectively, and OLAF shall be so notified.

5.12 In the event that OLAF provides Japan Tobacco Companies with, or Japan Tobacco Companies otherwise come into possession of, Documentary or Other Substantive Evidence that a Second Purchaser or Subsequent Purchaser has, after the Execution Date of this Agreement, unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution and/or storage of Illegal Product, Japan Tobacco Companies shall make commercially reasonable efforts, including termination of the business relationship, if appropriate and to the extent permitted by law, to require the First Purchaser to cease supplying Japan Tobacco Cigarettes to

such Second Purchaser (or in the event of a Subsequent Purchaser, via Second and Subsequent Purchasers, as needed, down to the immediate supplier of Japan Tobacco Cigarettes to the relevant Subsequent Purchaser).

5.13 OLAF may request in writing that:

- (a) a Certified Customer or Certified Contractor; or
- (b) a Second or Subsequent Purchaser;

be terminated if OLAF obtains credible evidence that any such person or entity has, after the Execution Date of this Agreement, unlawfully, knowingly or recklessly engaged in or facilitated the manufacture, sale, distribution and/or storage of Illegal Product. Within 45 days of receiving a Request for Termination, Japan Tobacco Companies shall provide a response to OLAF giving its decision as to the Request for Termination. In the event that Japan Tobacco Companies reject the Request for Termination, they shall provide the reasons for that decision. In the event that OLAF, after considering Japan Tobacco Companies' response, remains of the view that the relevant person or entity should be terminated, OLAF and the relevant Japan Tobacco Companies shall meet and confer in a good faith effort to resolve the dispute. If the dispute has not been resolved within 30 days of this meeting or within 90 days of the Request for Termination, whichever is earlier, OLAF may bring the dispute before the arbitrator in accordance with Clause 14 of this Agreement and request an order from the arbitrator requiring that Japan Tobacco Companies terminate the business relationship with the relevant person or entity, and that the person or entity so terminated be listed as a Blocked Customer or a Blocked Contractor.

If it is determined under this Clause that a Second Purchaser or Subsequent Purchaser is to be terminated, that determination shall be treated by Japan Tobacco Companies as Documentary or Other Substantive Evidence and Japan Tobacco Companies shall proceed under Clause 5.12 above on that basis.

5.14 To the extent permitted by law, Japan Tobacco Companies shall maintain a list of Blocked Customers and Blocked Contractors. Unless otherwise agreed to by Japan Tobacco Companies and OLAF, a Blocked Customer or a Blocked Contractor shall remain so designated for 5 years after the termination of Japan Tobacco Companies' business relationship with such Blocked Customer or Blocked Contractor and no such Blocked Customer or Blocked Contractor shall be permitted to conduct business with Japan Tobacco Companies, directly or indirectly, relating to the manufacture, sale, distribution and/or storage of Japan Tobacco Cigarettes during that time. After the expiration of the 5-year period, a Blocked Customer or a Blocked Contractor may reapply to become a Certified Customer or Certified Contractor and, at that time, shall be subject to the then applicable KYC programmes.

#### *Accountability for Payments*

5.15 Japan Tobacco Companies shall adhere to anti-money laundering policies, which are designed to ensure that they receive payment for Japan Tobacco Cigarettes solely from legitimate sources. The policies developed by Japan Tobacco Companies to monitor all payments made for Cigarettes sold and/or distributed by Japan Tobacco



Companies shall include measures designed to prevent the use of the proceeds of any illegal activity, in any form whatsoever, as payment for Cigarettes.

5.16 Japan Tobacco Companies shall only accept payments from Certified Customers or Certified Contractors in conformity with the invoice for the Japan Tobacco Cigarettes concerned.

5.17 Japan Tobacco Companies shall require all Certified Customer and Certified Contractor payments to be made in the same currency and same amount as the invoice issued by Japan Tobacco Companies, and from bank accounts which have been identified pursuant to the KYC component of Japan Tobacco's Programmes.

5.18 Payments for each invoice or group of invoices due shall be made by a single payment instrument.

5.19 Japan Tobacco Companies shall accept only the following methods of payment:

- (a) wire transfers or cheques from a bank account nominated during the KYC process and in the name of the Certified Customer or Certified Contractor or from a bank account in the name of a proven affiliate of the Certified Customer or Certified Contractor;
- (b) cashier's cheques and bank drafts issued by a bank of good standing in the country in which the Certified Customer or Certified Contractor is located; or
- (c) cash payments, but only where the nature and scale of the Certified Customer's or Certified Contractor's business is such that it is not commercially feasible under local conditions to use any other form of payment.

5.20 Exceptions to the requirements of sub-Clauses 5.15 to 5.19 may be made on a case-by-case basis and must be approved in advance and in writing by the Chief Compliance Officer. The reasons for granting any exception shall be documented, and shall become part of the Certified Customer or Certified Contractor records kept pursuant to sub-Clause 5.8.

## **6. TRACKING & TRACING PROCEDURES**

6.1 Japan Tobacco Companies shall make commercially reasonable efforts within a reasonable time period, to develop and implement highly effective tracking and tracing procedures in order to combat Contraband Japan Tobacco Cigarettes. Towards this end, Japan Tobacco Companies shall maintain an ongoing research programme into new and/or enhanced Master Case, Carton and Pack marking technologies.

6.2 Japan Tobacco Companies shall make commercially reasonable efforts to develop and implement such tracking and tracing technologies and procedures, provided that such are proven to be commercially and technologically feasible, to enable them progressively to mark Master Cases, Cartons and/or Packs of Japan

Tobacco Cigarettes carrying International Japan Tobacco Trademarks with labels, codes or other information that allow for the complete identification of the:

- (a) Intended Market of Retail Sale;
- (b) First Purchaser name and order number;
- (c) shipment date;
- (d) shipment destination;
- (e) point of departure;
- (f) consignee;
- (g) product description;
- (h) date of manufacture of the product;
- (i) manufacturing facility at which the product was manufactured;
- (j) machine on which the product was manufactured; and
- (k) production shift during which the product was manufactured.

6.3 The implementation of tracking and tracing technologies and procedures will exclude any products which are manufactured, sold or distributed in promotional packaging for promotional purposes, provided that the total volume of promotionally packaged Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks:

- (a) for any specific market, shall not exceed 175 million Cigarettes in any calendar year, and
- (b) for all markets, shall not exceed 750 million Cigarettes in total in any calendar year.

Should Japan Tobacco Companies reasonably require an increase in the volume thresholds for promotionally packaged Japan Tobacco Cigarettes excluded from implementation of tracking and tracing technologies and procedures under this sub-Clause, Japan Tobacco Companies may make a reasoned request to OLAF for such an increase. The EC and Participating Member States agree that consent to a reasoned request for a reasonable increase under this sub-Clause shall not be unreasonably withheld.

#### *Master Cases*

6.4 Japan Tobacco Companies shall make commercially reasonable efforts to implement, within 6 months of the Execution Date, tracking and tracing technologies and procedures to mark all Master Cases of Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks manufactured within the Member States and

sold within or into those countries with unique machine-scannable and human-readable tracking codes that allow for the complete identification of the information as outlined in sub-Clause 6.2 above.

6.5 Subject to sub-Clause 6.6 below, the same process outlined in sub-Clause 6.4 above will be implemented for Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks sold within or into the Member States but manufactured outside the EC within 12 months of the Execution Date.

6.6 Japan Tobacco Companies shall make commercially reasonable efforts to implement within 18 months of the Execution Date, tracking and tracing technologies and procedures to mark all Master Cases of Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks manufactured in or sold into the countries listed in Annex 6 with unique machine-scannable and human-readable tracking codes that allow for the complete identification of the information as outlined in sub-Clause 6.2 above, save that for Switzerland, the relevant period shall be 24 months.

6.7 If, during any 12 month period after the Execution Date, OLAF learns of at least 5 seizures of Contraband Japan Tobacco Cigarettes, each totalling at least 4 million Cigarettes and each concerning the same Japan Tobacco Trademark and the same Intended Market of Retail Sale, OLAF may provide Japan Tobacco Companies, subject to the constraints of applicable law, with specific information concerning the seizures. After consultation with OLAF, Japan Tobacco Companies shall determine whether any further action is required. If, during any subsequent 12 month period, OLAF learns of 3 further seizures, each of which totals at least 4 million Cigarettes, and each of the same Japan Tobacco Trademark and Intended Market of Retail Sale, Japan Tobacco Companies shall implement tracking and tracing technologies and procedures to mark all Master Cases of Japan Tobacco Cigarettes carrying the particular Japan Tobacco Trademark for the Intended Market of Retail Sale in question, with unique machine-scannable tracking codes that allow for the complete identification of the information as outlined, in sub-Clause 6.2 above, within a reasonable time frame not to exceed 12 months, provided that to do so would not result in economically disproportionate consequences for Japan Tobacco Companies. Japan Tobacco Companies and the EC shall meet and confer and attempt to resolve in good faith any dispute relating to whether implementation of tracking and tracing technologies pursuant to this sub-Clause would result in economically disproportionate consequences for Japan Tobacco Companies. If the dispute has not been resolved within 60 days of this meeting, any of the Parties may bring the dispute before the arbitrator in accordance with Clause 14 of this Agreement.

6.8 Should Japan Tobacco Companies reasonably require additional time for the implementation of additional tracking and tracing programmes pursuant to sub-Clause 6.7 Japan Tobacco Companies may make a reasoned request to OLAF for such an extension. The EC and Participating Member States agree that consent to a reasoned request for a reasonable extension under this sub-Clause shall not be unreasonably withheld.

### *Cartons and Packs*

6.9 Japan Tobacco Companies shall make commercially reasonable efforts to implement, within 30 months of the Execution Date, tracking and tracing technologies and procedures to mark Cartons and: (i) where and when needed; and (ii) as agreed by both OLAF and JTI, Packs of Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks manufactured within the Member States and sold within or into those countries with unique machine-scannable, and, where practicable, human readable tracking codes that allow for the complete identification of the information as outlined in sub-Clause 6.2 above. This implementation schedule shall be extended by one year for any product sold within or into the Member States but manufactured outside the Member States. Should Japan Tobacco Companies reasonably require additional time to implement tracking and tracing technologies and procedures to mark Cartons and/or Packs pursuant to this sub-Clause, Japan Tobacco Companies may make a reasoned request to OLAF for an extension. The EC and Participating Member States agree that consent to a reasoned request for a reasonable extension under this sub-Clause shall not be unreasonably withheld.

6.10 Japan Tobacco Companies shall make commercially reasonable efforts to implement, within 42 months of the Execution Date, tracking and tracing technologies and procedures to mark Cartons and: (i) where and when needed; and (ii) as agreed by both OLAF and JTI, Packs of Japan Tobacco Cigarettes carrying International Japan Tobacco Trademarks manufactured in or sold into the countries set out in Annex 6 with unique machine-scannable and where practicable, human readable tracking codes that allow for the complete identification of the information as outlined in sub-Clause 6.2 above. Should Japan Tobacco Companies reasonably require additional time to implement tracking and tracing technologies and procedures to mark Cartons and/or Packs pursuant to this sub-Clause, Japan Tobacco Companies may make a reasoned request to OLAF for an extension. The EC and Participating Member States agree that consent to a reasoned request for a reasonable extension under this sub-Clause shall not be unreasonably withheld.

### *Scanning Technologies & Databases*

6.11 Japan Tobacco Companies shall make commercially reasonable efforts to implement technologies which are capable of scanning all Master Cases, Cartons and/or Packs, within 3 months of becoming subject to marking pursuant to sub-Clauses 6.4 to 6.10 above, in order to capture and record the information as outlined in sub-Clause 6.2 above by means of the unique tracking codes and to link that information in a tracking and tracing database as described below.

6.12 Japan Tobacco Companies shall make commercially reasonable efforts to provide OLAF and the Participating Member States with access to code reading technologies to enable the scanning of Master Cases, Cartons and/or Packs. Upon implementation of Master Case, Carton and/or Pack scanning pursuant to Section 6.11 above, Japan Tobacco Companies shall make commercially reasonable efforts to provide OLAF and the Participating Member States with remote automated access to the dedicated searchable tracking and tracing database referred to above.

6.13 Electronic records created and stored within the dedicated tracking and tracing database shall be retained for at least five years.

6.14 The Parties agree that information contained on the tracking and tracing database is confidential business information, which must be used only for the purposes specified in this Agreement and must not be disclosed to third parties, unless required by law.

6.15 The Parties agree that, at the appropriate time, having received the necessary information from Japan Tobacco Companies, OLAF will be responsible for making all reasonable efforts to train and inform all authorised persons and entities with access to the tracking and tracing databases about the handling and importance of the secrecy and confidentiality of the passwords, security features and information contained in the tracking and tracing databases. In the case of a knowing and wilful breach of the confidentiality of the tracking and tracing databases or of the information contained therein by any duly authorised law enforcement authorities, or other EC or Participating Member State agent or representatives who receive tracking and tracing information pursuant to this Agreement, other than a person acquiring the tracking and tracing data through compulsory legal process, Japan Tobacco Companies may set off against payments due under i) Clause 7 to the relevant Participating Member State; and, ii) to the extent necessary, under Clause 8 hereinafter any demonstrable and material loss or damage to it resulting from any claims made against Japan Tobacco Companies as a result of damages sustained due to the unauthorised use or disclosure by the EC or Participating Member States of passwords, security features or information contained in the tracking and tracing databases. The Parties agree that the mere fact that information provided to the EC and/or the Participating Member States has been made public shall not, in and of itself, constitute conclusive evidence of a breach of the confidentiality of the tracking and tracing database information. Any dispute as to: (i) whether the breach was knowing and wilful; (ii) whether Japan Tobacco Companies have suffered demonstrable loss or damage resulting from the unauthorised use of passwords, security features or information contained in the tracking and tracing databases; (iii) whether such a loss is significant or *de minimis*; or (iv) the amount of such loss or damage, shall be settled, if not agreed by the Parties, by the arbitrator in accordance with Clause 14 of this Agreement.

#### *Further Sales*

6.16 Japan Tobacco Companies, OLAF and Participating Member States recognise that in certain circumstances, effective tracking and tracing to prevent the trade in Illegal Product can be enhanced when First Purchasers maintain additional databases that are similar to the tracking and tracing database to be maintained by Japan Tobacco Companies, regarding Second Purchaser sales or Subsequent Purchaser sales. For this purpose, Japan Tobacco Companies shall make commercially reasonable efforts to develop and expand the scope of their tracking and tracing database technology to cover the sales of First Purchasers, Second Purchasers and Subsequent Purchasers (where feasible) and to give OLAF and Participating Member States access to any such database. In any event, Japan Tobacco Companies shall make commercially reasonable efforts to deploy their tracking and tracing technology

to those First Purchasers, Second Purchasers and Subsequent Purchasers that voluntarily request such deployment.

#### *Intended Market of Retail Sale Manuals*

6.17 Japan Tobacco Companies shall provide information on markings and markets on the Execution Date. Such information shall include 30 copies of a reference manual designed to allow for the determination of the Intended Market of Retail Sale of all Japan Tobacco Cigarettes sold worldwide.

6.18 For the avoidance of doubt, none of the tracking and tracing obligations of Japan Tobacco Companies contained in this Clause 6 shall apply:

- (a) to any tobacco product in any non-Cigarette form, including “roll-your-own” tobacco;
- (b) to countries where, under local statutory laws in existence at the Execution Date, a system of tracking and tracing is applicable and is in operation in relation to the production of Japan Tobacco Cigarettes which provides substantially equivalent information to that required under sub-Clause 6.2, as certified by Japan Tobacco Companies. Japan Tobacco Companies shall make commercially reasonable efforts to integrate any information as outlined in sub-Clause 6.2 above, captured and recorded under any local system of tracking and tracing, into the dedicated searchable tracking and tracing database referred to in sub-Clause 6.12 and to provide OLAF and the Participating Member States with remote automated access to the same; and
- (c) to Japan Tobacco Cigarettes carrying Japan Tobacco Trademarks or International Japan Tobacco Trademarks, which are manufactured by Japan Tobacco Companies or a Certified Contractor and are intended to be sold only in an Intended Market of Retail Sale where there is a single First Purchaser for that Intended Market of Retail Sale and the Carton and/or Pack markings in operation for that market indicate the Intended Market of Retail Sale and the place of manufacture. Upon execution of this Agreement Japan Tobacco Companies shall provide OLAF with a list of any markets excluded pursuant to this sub-Clause, and update that list as appropriate.

## **7. ILLEGAL PRODUCT SEIZURES**

7.1 It is the practice of OLAF to maintain, for five years, detailed records of all seizures that are notified to OLAF. As such, this practice would be equally applicable to all seizures of Japan Tobacco Cigarettes that are notified to OLAF after the Execution Date. It is also the current practice of OLAF to answer fully and promptly any request that companies cooperating with OLAF may make for information on seizures of their products, or information related to such seizures, from OLAF, to the extent permitted by law and provided that doing so would not jeopardise any Member State or EC activity. As such, this practice would be equally applicable to all requests made by Japan Tobacco Companies for such information on seizures of Japan Tobacco Cigarettes, or information related to such seizures of Japan Tobacco Cigarettes. In addition, such information, insofar as it is relevant to Japan Tobacco

Companies' activities to control Illegal Product, may, at OLAF's option, be made available to Japan Tobacco Companies or be presented at the annual meetings between Japan Tobacco Companies, OLAF and the Participating Member States pursuant to sub-Clause 9.4.

7.2 It would be the normal practice of OLAF, to the extent permitted by law, and provided that doing so would not jeopardise any Member State or EC investigation or activity, to provide Japan Tobacco Companies within 30 days of notification to OLAF by a Participating Member State, with a notice of seizure by a Participating Member State of 50,000 or more Cigarettes bearing Japan Tobacco Trademarks or bearing descriptors, logos and other designs giving the appearance of being Japan Tobacco Trademarks, including:

- (a) the date, time and location of the seizure;
- (b) the brand of seized Cigarettes indicated on the packaging and, if available, any indication of the Intended Market of Retail Sale;
- (c) the quantity of seized Cigarettes; and
- (d) any identification markings that appear on the Master Cases or Cartons of the seized Cigarettes.

7.3 To the extent permitted by law, Japan Tobacco Companies shall be permitted to inspect such seized Cigarettes in the condition they were in at the time of seizure within 30 days of the notice of seizure, and to select random samples of the seized Cigarettes for examination. The seizing authority may also select samples that Japan Tobacco Companies must examine.

#### *Trier Laboratories*

7.4 Japan Tobacco Companies shall give full free technical support to OLAF and/or the Participating Member States in identifying Illegal Product connected with any Japan Tobacco Company activities and its sources and will provide services from their laboratories in Trier to OLAF and the Participating Member States for this purpose in the following manner:

- (a) OLAF will receive designations made by the Participating Member States of up to 5 specific services, agencies or departments per Participating Member State who shall each be entitled, together with OLAF, to call upon the services of Japan Tobacco Companies' Trier laboratories through the Authorised Individuals;
- (b) OLAF will provide Japan Tobacco Companies upon request, and prior to any service or agency or department having use of the services of the Trier laboratories, with the names of the personnel within each of these organisations and within OLAF entitled to request such use, being no more than 5 for OLAF and up to 5 for each service, agency or department designated by a Participating Member State;

- (c) prior to OLAF and/or a Participating Member State having use of such services, Japan Tobacco Companies must be provided with a written request. Japan Tobacco Companies shall then make efforts that are commercially reasonable in the light of the number of such requests being received from the multiplicity of services, agencies and departments amongst the Participating Member States and the resources of the Trier Laboratories as at the Execution Date, to provide such services within 15 Business Days of any such written request provided in accordance with the provisions of Clause 15. The EC and Participating Member States understand that, if the volume of such requests reaches unforeseen levels, a delay may be inevitable in Japan Tobacco Companies' granting of any particular request and in such case such inevitable delay will not be considered a breach of the letter or spirit of this Agreement;
- (d) Authorised Individuals, OLAF and Participating Member States:
  - (i) must protect the confidentiality of any information obtained from the laboratories;
  - (ii) must not disclose this information to any unauthorised personnel; and
  - (iii) must not share the information obtained with any third parties except with appropriate law enforcement agencies or in court proceedings or as otherwise required by law; and
- (e) in the event that OLAF and/or Participating Member States need to make public information obtained from the Trier laboratories, OLAF and/or Participating Member States shall use best efforts with Japan Tobacco Companies to reach an agreed form of communication.

7.5 Within 60 days of any notice of seizure provided to Japan Tobacco Companies pursuant to sub-Clause 7.2 above, or within 30 days of the inspection of the seized cigarettes pursuant to sub-Clause 7.3 above, whichever comes first, Japan Tobacco Companies shall provide a written response to OLAF and the seizing Participating Member State authority stating, whether the Cigarettes are Japan Tobacco Cigarettes or Counterfeit Japan Tobacco Cigarettes.

7.6 Where a notice of seizure has been delivered reasonably in accordance with the requirements of sub-Clause 7.2 above, if the Cigarettes are determined by Japan Tobacco Companies to be Counterfeit Japan Tobacco Cigarettes, their response as required under sub-Clause 7.5 shall include documentation and examination results demonstrating that conclusion. The determination whether Cigarettes are Counterfeit Japan Tobacco Cigarettes or Japan Tobacco Cigarettes shall involve consideration of the following factors, which may be amended by agreement between the Parties as new technologies and techniques are developed:

- (a) the look, shape, colour, and size of the packaging;
- (b) the materials used in the packaging;



- (c) the size, font, colour, language and content of the text appearing on the packaging;
- (d) the markings, codes, and stamps appearing on the packaging;
- (e) the look, shape, colour, and size of the Cigarettes;
- (f) the markings on the Cigarettes;
- (g) the materials used in the Cigarette paper and filter;
- (h) the nature and quality of the tobacco; and
- (i) all the ingredients of the Cigarettes.

7.7 If OLAF or any Participating Member State takes issue with the determination that the seized Cigarettes are Counterfeit Japan Tobacco Cigarettes, the matter will be referred to an independent laboratory designated by mutual agreement of the Parties by the Execution Date. The determination of the independent laboratory, which shall take into account the factors listed in sub-clause 7.6 above and any other physical factors it considers relevant, shall be final. Any costs associated with the decision by the independent laboratory shall be paid by the non-prevailing Party.

7.8 Where a notice of seizure has been delivered reasonably in accordance with the requirements of sub-Clause 7.2 above, if the seized Cigarettes are Contraband Japan Tobacco Cigarettes manufactured after the Execution Date, Japan Tobacco Companies' response as required under sub-Clause 7.5 shall include as much information as is available to them concerning:

- (a) the place of manufacture of the seized Cigarettes;
- (b) the date of manufacture of the seized Cigarettes;
- (c) the Intended Market of Retail Sale of the seized Cigarettes;
- (d) any intervening warehousing and shipping;
- (e) the identity of the First Purchaser of the seized Cigarettes;
- (f) the identity of any known Subsequent Purchaser of the seized Cigarettes;
- (g) invoices to the First Purchaser that relate to the seized Cigarettes; and
- (h) payment records from the First Purchaser for any Cigarettes seized.

7.9 The Participating Member States of seizure shall dispose of all Japan Tobacco Counterfeit Cigarettes, according to any requirements of applicable law, and endeavour to ensure that any such Japan Tobacco Counterfeit Cigarettes are not returned to the market in violation of applicable law. Furthermore, Japan Tobacco Companies may request the return of all or some of the genuine seized product or the sale of genuine seized product to them, at their expense, and Participating Member

States will seek to respond favourably to such a request, subject to the requirements of applicable law.

7.10 Upon making the response required under sub-Clause 7.5 above, Japan Tobacco Companies shall make the following Additional Payment(s) for any seizures of 50,000 or more Contraband Japan Tobacco Cigarettes by Participating Member States:

- (a) if the Cigarettes are Contraband Japan Tobacco Cigarettes, in an amount equal to 100% of the taxes and duties that would have been paid on identical legal product or, if identical legal product is not sold in the Participating Member State of seizure, the taxes and duties that would have been paid on similar legal product in the Participating Member State of seizure at the time of seizure less any amount of taxes and duties already paid to the EC or any Member State(s) in relation to those Contraband Japan Tobacco Cigarettes; and
- (b) if the Cigarettes are Contraband Japan Tobacco Cigarettes, and the Contraband Japan Tobacco Cigarettes seized, when added to the number of Contraband Japan Tobacco Cigarettes already seized in the EC in the same calendar year results in a total number that exceeds 90 million total Cigarettes, a second amount shall be due in relation to those seized Contraband Japan Tobacco Cigarettes in excess of the 90 million total, equal to 400% of the taxes and duties that would have been paid on identical legal product; or, if identical legal product is not sold in the Participating Member State of seizure, 400% of the taxes and duties that would have been paid on similar legal product in the Participating Member State of seizure at the time of seizure.

7.11 No Additional Payment under sub-Clause 7.10 shall be due and those seized Contraband Japan Tobacco Cigarettes shall not be included in the calculations under sub-Clause 7.10(b):

- (a) for any Contraband Japan Tobacco Cigarettes seized for a second or subsequent time;
- (b) if any Participating Member State sells, resells, or authorises the sale or resale of seized Contraband Japan Tobacco Cigarettes and, if paid in relation to those seized Cigarettes, any such payment shall be refunded by the respective Participating Member State;
- (c) on any seizures made acting on specific information provided by Japan Tobacco Companies;
- (d) where the notice of seizure has not been delivered reasonably in accordance with the requirements of sub-Clause 7.2 above;
- (e) where Japan Tobacco Companies have not been permitted to inspect the seized Japan Tobacco Cigarettes;

- (f) where the total amount seized is below 50,000 Contraband Japan Tobacco Cigarettes;
- (g) where the Contraband Japan Tobacco Cigarettes were manufactured before the Execution Date;
- (h) where Japan Tobacco Companies have reasonably demonstrated, through production of the relevant insurance claim documentation or any other satisfactory evidence, that the Contraband Japan Tobacco Cigarettes seized were stolen by a third party;
- (i) where the Contraband Japan Tobacco Cigarettes were seized outside the customs area of the EC and the greater weight of the evidence provided by Japan Tobacco Companies or any Party suggests that they were not destined for the EC; or
- (j) where Japan Tobacco Companies can reasonably demonstrate that such Contraband Japan Tobacco Cigarettes were sold, distributed and stored in accordance with all applicable fiscal and legal requirements of the EC and a Participating Member State or were sold at retail. For the purposes of this Agreement, the amount of seized genuine Cigarettes deemed to have been “sold at retail” in relation to any particular seizure qualifying for an Additional Payment shall only include:
  - i. the portion of any seizure which comprises, for any brand and Intended Market of Retail Sale, less than 7,500 Cigarettes from any one production run; and/or,
  - ii. the portion of any seizure on which there are valid tax stamps from a Member State.

Any amounts of genuine product deemed to have been “sold at retail” pursuant to Clause 7.11(j)(i) or (ii) shall be deducted from the total seizure amount for purposes of calculation of the Additional Payment under Clause 7.10(a) and/or (b). The amounts remaining in a seizure after deduction pursuant to this Clause 7.11(j) shall give rise to Additional Payments even if the remaining total amount of the seizure is less than 50,000 Cigarettes but shall not be taken into account for the purposes of reaching the threshold of 90 million Cigarettes under Clause 7.10(b).

7.12 After the first anniversary of the Agreement, the Parties may periodically review the application of Section 7.11(j) and, in the event any Party believes that there is a serious and persisting imbalance in the Agreement arising out of the application of Section 7.11(j), such a Party may propose adjustments to Section 7.11(j) in order to eliminate or alleviate the serious imbalance (the ‘Proposed Adjustments’). The Parties shall meet and confer within 30 days of notification of the Proposed Adjustments in a good faith attempt to agree on the adjustments to be made to Section 7.11(j), if any. If the Parties cannot agree on the Proposed Adjustments to be made, after 60 days of the notice of Proposed Adjustments, any Party may apply to the arbitrator for a final determination of whether or not the Proposed Adjustments are

appropriate in light of the totality of circumstances. The arbitrator shall order the Parties to adopt the Proposed Adjustments or any adjustments to Section 7.11(j) deemed by the arbitrator to be appropriate.

7.13 Any Additional Payments due under sub-Clause 7.10 shall be made quarterly for such amounts as agreed by OLAF and Japan Tobacco Companies, on the following dates: 1 January, 1 April, 1 July and 1 October. Accordingly, any Additional Payments to be made pursuant sub-Clause 7.10 shall not accrue to the benefit of any Party until the next quarterly payment date after the date of the response under sub-Clause 7.5 above. Japan Tobacco Companies shall create a schedule specifying the individual additional payments to be made, pursuant to sub-Clause 7.10, on any of these quarterly dates, and shall forward any such schedule to OLAF along with a confirmation of the payment having being made, as appropriate. All payments shall be made directly to the EC in the same way as those made pursuant to sub-Clause 8.1 to 8.2 below.

## **8. PAYMENTS BY JAPAN TOBACCO COMPANIES**

### *Payments*

8.1 Japan Tobacco Companies agree to make payment of US \$400,000,000 to such bank account as nominated by the Commission in Brussels.

8.2 The first payment of \$50,000,000 will be made by Japan Tobacco Companies within five days of the Execution Date and four subsequent payments of the same amount will be made on each of the first, second, third and fourth anniversaries of the Execution Date. Furthermore, ten subsequent payments of \$15,000,000 will be made on each of the fifth through fourteenth anniversaries of the Execution Date, in each case, unless, on that day, banks are not open for business in Brussels, in which case payment will be made on the next subsequent day when banks are open for business in Brussels.

8.3 Japan Tobacco Companies, the EC and the Participating Member States understand that these funds may be used, subject to applicable law, in the pursuit of eliminating Illegal Product in line with the objectives of this Agreement and the Parties agree to discuss at the Governance Meeting the possible use of such funds, subject to applicable law.

8.4 The Parties agree that no part of any of the payments made pursuant to this Agreement is being paid as (or in settlement of actual or potential claims for) fines or penalties, civil or criminal, or enhanced, multiple or punitive damages awards of any kind in any jurisdiction.

## **9. MUTUAL EXCHANGE OF INFORMATION AND COOPERATION**

### *General Commitment*

9.1 Subject to applicable law, and without prejudice to the provisions of Clause 4, Japan Tobacco Companies shall pro-actively disclose to OLAF and/or the

Participating Member States, all material information coming into their possession after the Execution Date relating to potentially Illegal Product, including information relating to their competitors.

9.2 It is the practice of OLAF, to the extent permitted by law and provided that doing so would not jeopardise any Member State or EC investigation or activity, to answer fully and promptly any reasonable request from a Cooperating Company for information to enable them to take action against Illegal Product. As such, this practice would be equally applicable to any reasonable requests from Japan Tobacco Companies to enable Japan Tobacco Companies to take effective action to prevent Illegal Product.

#### *Governance meetings*

9.3 At least once every 12 months, the designated representatives of the Japan Tobacco Companies and OLAF will meet to confer and assess the functioning of the Agreement. At that meeting, Japan Tobacco Companies and OLAF may each present any suggestions they may have to improve the functioning of the Agreement and OLAF and Japan Tobacco Companies may communicate to each other concerns relating to any Party's activities in connection with their commitments and obligations under the Agreement.

9.4 Japan Tobacco Companies, OLAF and the Participating Member States will meet once every 12 months, provided that this meeting could also coincide with the meeting provided for in sub-Clause 9.3.

9.5 Japan Tobacco Companies will be entitled to meet OLAF also on the occasion of the OLAF annual Task Group meeting or its equivalent to the extent that any representative of a Cooperating Company is invited to participate. To the extent appropriate, OLAF may invite Japan Tobacco Companies to participate in other meetings.

#### *Responding to enquiries*

9.6 Japan Tobacco Companies shall make commercially reasonable efforts to respond within 20 Business Days to specific requests for information from the EC and/or Participating Member States about their products, the tracking and tracing programmes implemented pursuant to the Agreement, and Certified Customer sales necessary for the fight against Illegal Product. If necessary to the request, Japan Tobacco Companies shall also disclose client confidential information (insofar as they are permitted to do so under the applicable laws of existing contracts), provided those requests are for the sole purpose of combating Illegal Product.

9.7 Within 5 Business Days of receipt by Japan Tobacco Companies of a written request by OLAF or any Participating Member State, Japan Tobacco Companies shall, subject to applicable data protection and secrecy laws, provide OLAF or the requesting Participating Member State, if any, with the following:

- (a) the list of Certified Customers, Certified Contractors, Blocked Contractors and Blocked Customers as of the date of the request;

- (b) sales volumes to Certified Customers for any quarter period after the Execution Date;
- (c) reasonable estimates of the annual retail demand, sale or consumption or any other available estimates, projections or forecasts of retail demand for any domestic or duty free market, for any period after the Execution Date, if necessary, in a non-confidential version;
- (d) information relating to the storage and shipment of Japan Tobacco Cigarettes for any market of retail or duty free sale after the Execution Date;
- (e) any KYC information on Certified Customers and Certified Contractors; and
- (f) any Certified Customer or Certified Contractor records created after the Execution Date relating to activity occurring on or after that date.

*Fast Track Provision*

9.8 Subject to applicable law, in the event that OLAF or the Participating Member States make a seizure of Contraband Japan Tobacco Cigarettes, and OLAF seeks information regarding other Japan Tobacco Cigarettes that may be in transit, Japan Tobacco Companies shall make commercially reasonable efforts promptly (i.e. as soon as possible during the next Business Day) to provide, at OLAF's request, the information listed in sub-Clauses 7.8(a)-(h), to the extent available, for all shipments of Japan Tobacco Cigarettes to the same First Purchaser associated with the seized Contraband Japan Tobacco Cigarettes for a period encompassing three months prior to and three months subsequent to the date of shipment of the seized Contraband Japan Tobacco Cigarettes.

**10. INFORMATION ON PRODUCT IN CUSTOMS WAREHOUSES & PRE-SHIPMENT NOTIFICATION**

10.1 Japan Tobacco Companies shall, upon receiving a reasonable request from OLAF or any Participating Member State, inform OLAF and/or the requesting Participating Member State, if any, of quantities of Japan Tobacco Cigarettes kept in stock as of the date of the request in tax and customs warehouses in the possession, custody or control of Japan Tobacco Companies in the Member States under the regime of transit or duty suspension. In particular, such a request may include:

- (a) the date of the shipment from the last point of Japan Tobacco's physical custody of the Japan Tobacco Cigarettes;
- (b) details concerning the Japan Tobacco Cigarettes shipped (brand, amount, warehouse);
- (c) the intended shipping destination;
- (d) the identity of the person to whom the Cigarettes are being shipped;
- (e) the mode of transportation, including the identity of the transporter;

- (f) the expected date of arrival of the shipment at the intended shipping destination; and
- (g) the Intended Market of Retail Sale.

## **11. CERTIFICATE OF COMPLIANCE**

11.1 Each year, on the anniversary of the Execution Date, Japan Tobacco Companies shall provide OLAF and the Participating Member States with a Certificate of Compliance, signed by the Chief Compliance Officer, describing Japan Tobacco Companies' fulfilment of the requirements of this Agreement and any exceptions granted to any provision of the Agreement.

11.2 If, after receipt of any Certificate of Compliance, OLAF reasonably concludes that Japan Tobacco Companies are failing to perform their obligations under the Agreement, it may, but by no later than 60 days after OLAF has received the Certificate of Compliance, provide Japan Tobacco Companies with a Statement of Non-Compliance clearly describing the areas where OLAF reasonably believes that Japan Tobacco Companies are failing to perform their obligations under the Agreement, the reasons for that belief, and what measures OLAF believes Japan Tobacco Companies must take in order to perform their obligations under the Agreement.

11.3 OLAF may also provide Japan Tobacco Companies with a Statement of Non-Compliance at any other time OLAF reasonably believes that Japan Tobacco Companies are significantly failing to adhere to the Agreement and such failure could likely result in a significant increase in the volume of Illegal Product.

11.4 Within 30 days of receiving a Statement of Non-Compliance, Japan Tobacco Companies must provide OLAF with a written response. Thereafter, authorised representatives of Japan Tobacco Companies and OLAF shall meet and confer and attempt to resolve in good faith any dispute relating to the Statement of Non-Compliance. If the dispute has not been resolved within 60 days of Japan Tobacco Companies receiving a Statement of Non-Compliance, the Commission may bring the dispute before the arbitrator in accordance with Clause 14 of this Agreement and may seek an order from the arbitrator requiring Japan Tobacco Companies to bring themselves into compliance with the Agreement (a Compliance Order), as the case may be, or an order requiring an audit of Japan Tobacco Companies' operations to verify compliance with the Agreement (an Audit Order).

11.5 In any proceedings brought under this Clause, the arbitrator may issue a Compliance Order against Japan Tobacco Companies only when it has been proven by the greater weight of the evidence that: (i) Japan Tobacco Companies have materially failed to adhere to the Agreement; (ii) such failure was identified by OLAF in a Statement of Non-Compliance; and (iii) such failure has not been adequately remedied by the time of the arbitration hearing.

11.6 The arbitrator may issue an Audit Order under this Clause specifically to require Japan Tobacco Companies to do the following for the limited purpose of assessing compliance with the terms of this Agreement:

- (a) if OLAF seeks entry into premises, to allow OLAF entry to any of Japan Tobacco Companies' business premises or business premises of its Affiliates, for the purpose of observing business operations, provided that OLAF provides Japan Tobacco Companies with reasonable notice of where and when it seeks to do so; and
- (b) if OLAF seeks to review documents, Japan Tobacco Companies shall provide OLAF with specified business records created after the Execution Date, that OLAF reasonably believes will assist in its anti-contraband and anti-counterfeit efforts.

## **12. EXPIRY AND TERMINATION OF PAYMENTS**

12.1 This Agreement shall expire 15 years after the Execution Date, unless otherwise mutually agreed in writing, duly signed, by all the Parties.

12.2 The arbitrators shall terminate this Agreement, on an application by JTI and/or JTH, made after the service of a Termination Notice, if they determine that the EC or any Participating Member State is in material breach of this Agreement, or there is a sustained and substantially complete failure of the reasonable expectations of JTI and/or JTH of the benefits to that Party of said agreement due to the behaviour of the other Party, save that they shall not terminate this Agreement if such breach or failure of reasonable expectations has been substantially remedied through subsequent action of the Parties, or could be addressed adequately through an order of the arbitrators and the Party in default complies with that Order, or a reasonable amendment of the Agreement to which all Parties can agree.

12.3 The reasonable expectations of JTI and/or JTH are to be assessed by reference to the terms of this Agreement and related agreements, documents and all other correspondence between the Parties and/or their counsel provided and/or executed at or immediately prior to the Execution Date.

12.4 Termination of the Agreement by the arbitrators shall only include termination of the pecuniary payment provisions contained in Clauses 7 and 8.

12.5 If the arbitrators determine that there is a basis for termination, the Agreement shall terminate in accordance with Clause 12.4 as to the EC and all of the Participating Member States save that where the precipitating cause of the termination is clearly confined in its application to a particular Participating Member State or particular Participating Member States, in which case the arbitrators shall determine termination with regard to any such particular Participating Member State. In such circumstances:

- (a) all amounts payable by Japan Tobacco Companies under this Agreement will be reduced by the amounts that would have otherwise been due to any and all former Participating Member States.
- (b) after partial termination of the Agreement with respect to any particular Participating Member State(s), such former Participating Member State(s)



shall not be entitled to receive from Japan Tobacco Companies any of the non-pecuniary benefits of this Agreement.

12.6 With regard to termination of the Agreement under this Clause, if a Termination Notice is filed by JTI and/or JTH:

- (a) the relevant funds due thereafter from the Japan Tobacco Companies shall be held in escrow, on the terms set out in Annex 5, until the issue of termination is resolved and the arbitrator(s) order(s) the release of said funds to the appropriate Party or Parties;
- (b) all other obligations of the Parties pursuant to this Agreement will remain in effect unless so ordered by the arbitrators;
- (c) unless the Parties agree to the termination within one month of the delivery of a Termination Notice, the claim for termination made in the Termination Notice shall be deemed to be a Dispute for the purposes of Clause 14;
- (d) should the Dispute proceed to arbitration and the arbitrators determine that JTI and/or JTH did have a right to terminate, such termination will have effect from the date ordered by the arbitrators, and (i) no financial sums shall be due from Japan Tobacco Companies which fell due after the date the Termination Notice was delivered to the Parties; and (ii) any payments held in escrow as per clause 12.7(a) above shall be released to Japan Tobacco Companies;
- (e) should the Dispute proceed to arbitration and the arbitrators determine that JTI and/or JTH did not have the right to terminate, the Agreement shall be in full force and effect and any payments held in escrow shall immediately be released and paid to the EC; and,
- (f) should the Dispute proceed to arbitration and the arbitrators determine that JTI and/or JTH did have a right to terminate, and such termination was only with regard to a particular Participating Member State or States, the Agreement shall continue in full force and effect as to the remaining Parties and any payments held in escrow as per clause 12.6(a) above shall be immediately released and paid to the EC after appropriate reduction, if any, in accordance with the terms of Clause 12.5(a) above. Any remaining escrowed amounts shall be released and paid to Japan Tobacco Companies.

12.7 The termination provisions in this Clause shall apply to companies acquired by or merged into Japan Tobacco Companies subsequent to 1 January 2007, but these termination provisions shall only extend to the acquired company if the aggregate EC market share of such acquired company has never been more than 2 percent. For the avoidance of doubt, the termination provisions shall not cover any RJR Entities.

### **13. SET OFF**

13.1 Without prejudice to the overriding nature of the provisions in Clause 12, or to the effect of any waivers or releases given by the EC and Participating Member States in any documents executed in connection with this Cooperation Agreement, in the

event that the EC or any Participating Member State brings disputes or claims of a monetary nature in any jurisdiction against any Japan Tobacco Companies in connection with any alleged misconduct relating to the manufacture, sale, shipment or storage of Japan Tobacco Cigarettes before the Execution Date, Japan Tobacco Companies shall have the right to set off against any payments due under Clause 7.10 or 8, the amount of any damage, loss, liability, interest, reasonable court costs, expenses, or penalty of a monetary nature incurred, or suffered by Japan Tobacco Companies in connection with such disputes or claims.

13.2 Before exercising any right to set off, Japan Tobacco Companies shall provide formal notice to the EC of its intention to do so. All obligations on Japan Tobacco Companies under Clause 7.10 or 8 above to make payment of the amount for which the right of set off has been claimed shall be suspended for a period of 90 days from the date of receipt of such notice. Upon receipt of such notice, Japan Tobacco Companies and the EC shall immediately make a good faith effort to agree as to whether set off is appropriate and, if so, what the amount of the set off should be. If Japan Tobacco Companies and the EC have not agreed within 90 days of notice being received by the EC, either Party may make an application to the arbitrator in accordance with Clause 14 to determine whether, and to what extent, a right of set off exists.

13.3 In the event such a dispute or claim is brought by a Party and the losses, if any, to Japan Tobacco Companies have not been determined as of the time any monetary payment suspended pursuant to Clause 13.2 is due under this Agreement, such suspended amount shall be held in escrow, in accordance with the escrow procedures set out in Annex 5, until such a time as the amount of the loss is determined by the arbitrator.

13.4 If the arbitrator determines that a set off right existed, he shall order the escrowed amounts be paid to Japan Tobacco Companies up to the amount of the set off right, and the arbitrator shall order that any remaining amounts in escrow be paid to the EC. If the arbitrator determines that no set off right existed, he shall order the escrowed amounts be paid to the EC.

13.5 The set off provisions provided for in this Section, shall also apply to claims made in regard to companies acquired by or merged into Japan Tobacco Companies subsequent to 1 January 2007, but they shall only extend to claims against the acquired company if the aggregate EC market share of such acquired company has never been more than 2 percent. For the avoidance of doubt, this set off provision shall never cover any RJR Entities.

#### **14. DISPUTE RESOLUTION**

14.1 It is the intention of the Parties to settle amicably, by negotiation or agreement, any differences of opinion on matters of performance, procedure and management arising out of this Agreement.

14.2 Without prejudice to the provisions of Clause 11, in the event of a Dispute, the Dispute shall be notified to the other Parties in writing, and shall be dealt with in the first instance by the Head of Legal Affairs for OLAF, and the Head of the Legal

Department of JTI. These designated representatives shall discuss and attempt to resolve the Dispute in good faith.

14.3 If such good faith discussions fail to resolve the Dispute within 30 Business Days of notification, then the Dispute shall be escalated to the Senior Vice President, Chief Legal Officer of JTI and the Director level or equivalent for the EC and each Participating Member State, who shall meet as soon as reasonably practicable thereafter to attempt to resolve the Dispute in good faith.

14.4 Nothing communicated in any discussions, negotiations or offers of settlement made during, or arising from, the Dispute escalation process pursuant to sub-Clause 14.2 or 14.3 above shall be admissible in any way in any litigation or arbitration.

14.5 Any Dispute which remains unresolved 60 Business Days after the date of the written notice provided pursuant to sub-Clause 14.2, may be referred to arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force as amended by this Clause. The place of the arbitration proceedings shall be determined by the arbitrator(s), but shall be within the EU or Switzerland. The seat of the arbitration shall be deemed to be Geneva, Switzerland. The language to be used in the arbitral proceedings shall be English.

14.6 Subject to sub-Clause 14.7, there shall be a sole arbitrator. The arbitrator shall be the highest-listed accepting and available individual on the List of Arbitrators at Annex 4. If all of the individuals on the List of Arbitrators decline or are unable to accept the appointment as arbitrator within 30 Business Days of the date of the Dispute being referred to arbitration pursuant to sub-Clause 14.5, the sole arbitrator shall be appointed on an ad hoc basis by agreement of the Parties. Should the Parties not have agreed on a sole arbitrator within 45 days of the Dispute being referred to arbitration pursuant to sub-Clause 14.5, the sole arbitrator shall be appointed by i) the first-named arbitrator on the List of Arbitrators, which appointment shall be made in 5 Business Days, failing which ii) the process set out in i) shall be followed by each arbitrator on the List of Arbitrators in turn until a sole arbitrator is appointed. The Commission and Japan Tobacco Companies may add to, remove from, or reorder the list of arbitrators at Annex 4 at any time by mutual agreement in writing.

14.7 Notwithstanding sub-Clause 14.6, any party to a Dispute under Clauses 7, 8, 12 and 13 of this Agreement, referred to arbitration pursuant to sub-Clause 14.5 shall, upon written notice to the other parties to the Dispute within 10 Business Days of the date of the Dispute being referred to arbitration pursuant to sub-Clause 14.5, have the right to have the Dispute referred to and finally resolved by a tribunal of three arbitrators. Within 30 Business Days of receipt of such written notice, each party shall appoint one arbitrator. The third arbitrator shall be the highest-listed individual on the List of Arbitrators unless all of the individuals on the List of Arbitrators decline or are unable to accept the appointment as arbitrator. If all of the individuals on the List of Arbitrators decline or are unable to accept the appointment as arbitrator within 40 Business Days of the date of the Dispute being referred to arbitration pursuant to sub-Clause 14.5, the third arbitrator shall be appointed on an ad hoc basis by agreement of the Parties. Should the Parties be unable to agree on a third arbitrator within 45 days of the Dispute being referred to arbitration pursuant to sub-Clause

14.5, the third arbitrator shall be appointed by i) the first-named arbitrator on the List of Arbitrators, which appointment shall be made in 5 Business Days, failing which ii) the process set out in i) shall be followed by each arbitrator on the List of Arbitrators in turn until a third arbitrator is appointed. The third arbitrator shall act as the presiding arbitrator of the tribunal.

14.8 Where there are multiple parties to the Dispute, whether as claimant or respondent, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an arbitrator pursuant to sub-Clauses 14.6 and 14.7.

14.9 The arbitral proceedings shall be conducted in accordance with the UNCITRAL Arbitration Rules, subject to the following:

- (a) No amicus curiae or “friend of the court” briefs may be filed in the arbitration; and
- (b) Subject to any disclosure obligations of any of the Parties under any applicable law or regulation, or the rules of any securities exchange on which Japan Tobacco Companies’ securities are listed, the arbitration proceedings shall be confidential, and the parties shall not disclose the nature or scope of the proceedings or any documents or information obtained in or arising out of the proceedings.
- (c) When three arbitrators have been appointed, the award may be given by majority decision.

14.10 By agreeing to refer Disputes to arbitration pursuant to Clause 14.5, to the extent permitted by law, the Parties irrevocably waive their right to any form of appeal, review or recourse to any State court or other judicial authority, save that the final decision by the arbitrator(s) shall be exclusively appealable to the Federal Supreme Court of Switzerland.

## **15. NOTICES AND DESIGNATED REPRESENTATIVES**

15.1 Any notice to be given by one Party to any other Party under, or in connection with, this Agreement shall be in writing and signed by or on behalf of the Party giving it, save that any notice to any Participating Member State will be validly served for the purpose of this Agreement if it is served on OLAF in accordance with the terms of this Clause. It shall be served by sending it to the representative set out below by e-mail or fax or delivering it by hand, or sending it by pre-paid recorded delivery, special delivery or registered post, and in each case marked for the attention of the relevant representative specified below (and as otherwise notified from time to time in accordance with the provisions of this Clause 15). Any notice so served by hand, e-mail, fax or post shall be deemed to have been duly given:

- (a) in the case of delivery by hand, when delivered;
- (b) in the case of fax or e-mail, at the time of transmission, which shall be confirmed as evidenced by the same; or

- (c) in the case of prepaid recorded delivery, special delivery or registered post, at 10am on the second Business Day following the date of posting,

provided that in each case where delivery by hand by e-mail or by fax occurs after 6pm on a Business Day or on a day which is not a Business Day, service shall be deemed to occur at 9:00 am on the next following Business Day.

References to time in this Clause are to local time in the country of the addressee.

15.2 The relevant contact details are:

- (a) The Director of OLAF, or his or her designee, at 30 Rue Joseph II, 1000 Brussels, Belgium, with a copy of any notice provided under Clause 14 to be sent simultaneously to the Director-General of the Legal Service of the European Commission, at Rue de la Loi 200, Berlaymont 1/21, B-1049 Brussels, Belgium;
- (b) The Head of the Legal Department, JTI, 14 Chemin Rieu, 1211 Geneva 17, Switzerland, with a copy of any notice provided under Clause 14 to be sent simultaneously to the Head of the Dispute Resolution Department, Freshfields Bruckhaus Deringer, 65 Fleet Street, London EC4Y 1HS, UK.

15.3 The Parties agree to exchange and update contact lists for the purposes of this Agreement.

## **16. CONFIDENTIALITY**

16.1 The EC and Participating Member States acknowledge that Japan Tobacco Companies waive no rights in relation to any of their commercially sensitive, or business secret information and undertake not to release any such information to any private company, and specifically not to any competitor, without the express written prior consent of JTH or JTI, unless required by law. That consent will not be unreasonably withheld where the disclosure is proportionate in relation to the interests of the common goals of this Agreement and all necessary measures have been taken to limit the impact on the business of Japan Tobacco Companies of any disclosure.

## **17. AUTHORITY TO EXECUTE AND PERFORM**

17.1 The Parties expressly represent and warrant that the execution and performance of, and compliance with, their respective obligations under this Agreement is fully authorised by each of them and their subsidiaries that the persons executing the Agreement have the necessary and appropriate authority to do so.

## **18. FURTHER ASSURANCE**

18.1 At any time each of the Parties shall at its own cost execute all such documents and take such steps and do all such acts or things as may be reasonably required for the purpose of giving effect to the provisions of this Agreement and in particular to ensure that its terms are binding on or enforceable against each of the Parties in any relevant jurisdiction.

## **19. COSTS**

19.1 Each Party shall bear its own respective legal and other costs to date, including the costs of proceedings, disputes, negotiations, and inspections incurred which relate to the subject matter of the Agreement, as well as any costs incidental to the negotiation and execution of this Agreement.

## **20. INVALIDITY/SEVERABILITY AND LEGALITY**

20.1 If any provision of this Agreement shall be held to be illegal or unenforceable, whether in whole or in part, or in relation to any of the Parties, the validity and enforceability of the remainder of the Agreement, or its validity and enforceability as against other Parties, shall not be affected. The Parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the intent and purpose of such void or unenforceable provision.

20.2 All obligations under this Agreement are subject to Relevant Law. Without prejudice to the rights of the Parties under this Agreement, the Parties agree that to the extent that any obligation of any Party under this Agreement would violate Relevant Law, that Party shall be excused from performing such obligation only to the extent that performance would violate such law and shall not incur any liability as a result thereof.

## **21. COUNTERPARTS & EFFECTIVENESS**

21.1 This Agreement may be executed in any number of counterparts, and all of such counterparts taken together, shall be deemed to constitute one and the same instrument. This Agreement shall become effective on the Execution Date.

## **22. SUCCESSION AND ASSIGNMENT**

22.1 Except as otherwise specifically provided in this Agreement, this Agreement shall be binding upon and shall inure for the benefit of the Parties and their legal representatives, successors and assigns.

## **23. MODIFICATION AND WAIVER**

23.1 This Agreement may be modified, waived or amended only by the written agreement of authorised representatives of the Parties.

## **24. ENTIRE AGREEMENT**

24.1 This Agreement, including the annexes, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior drafts of this Agreement and any prior understandings reached between the Parties during negotiation of this Agreement, whether oral or written. Notwithstanding the foregoing, each of the Parties and any arbitrator may rely upon express representations made in any letter from, and/or provisions of any other agreement with, another Party or their counsel provided and/or executed at or immediately prior

to the Execution Date relating to the Agreement including, but not limited to identifying the reasonable expectations of any Party with respect to this Agreement for the purposes of Clause 12.

**25. ADDITIONAL MEMBER STATE SIGNATORIES**

25.1 A Member State may become a Participating Member State only by executing this Agreement and all related agreements in the appropriate form and delivering a counterpart to JTH, JTI and each of the other Parties.

25.2 The Commission will use its best endeavours to encourage Non-Participating Member States also to become signatories to this Agreement.

**26. CONSENT TO JURISDICTION AND ENFORCEMENT**

26.1 The Parties hereby unconditionally and irrevocably consent to jurisdiction under this Agreement and agree not to claim any immunity from any and all forms of proceedings or execution, enforcement or attachment to which they, their property, assets or revenue (or an instrumentality, agent, subdivision or organ thereof, or their property, assets or revenue) is now or may hereafter become entitled under the laws of any jurisdiction and declares that such waiver shall be effective to the fullest extent permitted by such laws provided only that this Clause only applies for the specific purpose of the Parties enforcing a right specifically and expressly granted by this Agreement or an award made pursuant to Clause 14 and for no other purpose.

**27. GOVERNING LAW**

27.1 The construction, interpretation, operation and effect of this Agreement and any and all claims, controversies or disputes arising out of or related thereto shall be governed by and construed in accordance with the laws of New York, U.S.A, without regard to choice of law doctrine.

**28. EXECUTION**

28.1 IN WITNESS WHEREOF this Agreement has been executed on behalf of the Parties hereto with effect from the date specified on the first page of this Agreement.

Annex One

**INTERNATIONAL JAPAN TOBACCO TRADEMARKS**

Camel

Winston

Mild Seven

Salem

Monte Carlo

More

Gold Coast

Club

This list will be updated as appropriate and/or as agreed by the Parties.



## Annex Two

### JAPAN TOBACCO TRADEMARKS

<b>Country</b>	<b>Brand</b>
Albania	Camel, Winston, Monte Carlo
Andorra	Camel, More, Salem, Vantage, Winston, YSL
Aruba	Camel, Salem, Winston
Belarus	Camel, Winston, Mild Seven, Epique, Magna, Monte Carlo, More, Wings by Winston
Bosnia-Herzegovina	Winston, Monte Carlo
Croatia	Camel, Winston
Kosovo	Winston, Monte Carlo, More
Macedonia	Winston, Camel, Monte Carlo
Moldova	Camel, Winston, More, Monte Carlo
Montenegro	Winston, Monte Carlo
Morocco	Camel, Winston
Nigeria	Winston, Aspen, Club
Panama	Camel, Winston, Salem, More, Vantage, YSL
Russia	Camel, Winston, Wings by Winston, Mild Seven, Salem, Epique, Lucia, More, Russky Styl, Magna, Monte Carlo, Peter I, Belomorkanal, Golden Leaf, Kosmos, Lutch, Nasha Prima, Nevskie, North Star, Prima
Serbia	Camel, Winston, More, Gold Coast, Monte Carlo
Switzerland	Camel, Winston, Salem, More, Time, YSL
Syria	Camel, Winston, Winchester, More
Turkey	Camel, Winston, Salem, More, Monte Carlo, Anadolu, Wings by Winston
UAE	Camel, Winston, Mild Seven, Salem, More, YSL, Gold Coast, Dorchester, Hi-Lite
Ukraine	Camel, Winston, Seven Stars, Epique, More, Magna, Monte Carlo, Golden Leaf

<b>EU Member states</b>	<b>Brand</b>
Austria	Camel, Winston, More
Belgium	Camel, Winston, St. Michel, Monte Carlo, More, Salem, YSL
Bulgaria	Camel, Monte Carlo, More, Salem, Winston
Republic of Cyprus	Camel, More, Winston
Czech Rep.	Camel, Winston, More, Monte Carlo, Club, Slavia
Denmark	Camel
Estonia	Camel, Winston, Monte Carlo, More, Salem
Finland	Camel, Salem, Winston
France	Camel, More, Salem, Winston, Time, Sakura, YSL
Germany	Camel, Winston, Reyno, M, YSL, Mercedes, Club, Overstolz, Monte Carlo
Greece	Camel, Winston, Salem, More, Vantage, Monte Carlo
Hungary	Camel
Ireland	Camel, More

Italy	Camel, Winston, Salem, More, Sakura, Amadis
Latvia	Camel, Winston, Epique, Premier, Monte Carlo, More
Lithuania	Camel, Winston, Salem, Premier, Gold Coast, Monte Carlo,
More	
Luxembourg	Camel, Winston, St. Michel, Vantage, Monte Carlo, More,
	Salem, YSL
Malta	Winston, Camel, Monte Carlo
Netherlands	Camel, Winston, Time, Vantage, Monte Carlo, More, Salem,
	YSL
Poland	Camel, Salem
Portugal	Camel, Winston
Romania	Camel, Winston, Seven Stars, Salem, Monte Carlo, More,
	Winchester
Slovakia	Camel, Winston
Slovenia	Camel, Winston, Monte Carlo
Spain	Camel, Winston, Salem, Wings by Winston, More, Gold Coast,
	Vantage
Sweden	Camel
UK	Camel, More, Salem, Winston

This list will be updated as appropriate and/or as agreed by the Parties.

## Annex Three

### KNOW YOUR CUSTOMER AND CONTRACTOR PROGRAMMES

**1. Certified Customers and Contractors.** Japan Tobacco Companies shall apply its KYC programmes to existing and/or potential First Purchasers or Contractors. Such programmes shall include, but shall not be limited to, the collection, verification and regular updating of the following information and documentation:

(a) where the First Purchaser or Contractor is an individual, information regarding his or her identity, including but not limited to, full name, business registration number (if any), date and place of birth, applicable tax registration numbers and a copy of their current official identification and/or passport;

(b) where the First Purchaser or Contractor is a company or other entity, information regarding its identity, including but not limited to, full name, business registration number, date and place of incorporation, share capital, applicable tax registration numbers, copies of its articles of association or equivalent documents, its relevant corporate Affiliates, the names of its officers and directors, the names of any designated representatives and copies of their official identification and/or passports;

(c) where the individual/company is seeking to become a First Purchaser, a description of the Intended Market of Retail Sale of the Cigarettes to be purchased from Japan Tobacco Companies. This description shall be updated as needed by the First Purchaser and will include, if known and as practicable, identification of the Subsequent Purchasers to whom the First Purchaser will sell Japan Tobacco Cigarettes;

(d) information regarding the number of persons employed by the applicant at the date of the request for information;

(e) information and documentation regarding any criminal offences, or any charges filed by governmental agencies, against the applicant or any of its managers, directors, and/or legal representatives;

(f) complete identification of the bank accounts through which the payments for the Cigarettes sold to the applicant shall be made, including but not limited to the complete name and address of the bank, the complete name and address of the account holder, and all information concerning the identification of the account. In addition to the foregoing information, if the bank account to be used to pay Japan Tobacco Companies belongs to an Affiliate of the applicant, full disclosure of the precise relationship between the Affiliate and the applicant (or subsequently, the Certified Customer or Certified Contractor) shall be required to be made to Japan Tobacco Companies prior to the acceptance of any payment from such an Affiliate;

(g) the KYC programme applied by the applicant to its customers shall be reviewed to verify that the applicant's KYC programme is consistent with this Agreement and Japan Tobacco's Programmes, and that it requires the applicant's customers to do the same with their customers; and

(h) any other documentation or information that Japan Tobacco Companies shall request in order to complete the certification process.

**2. Due Diligence.** On an ad hoc basis but at least once a year, and initially, prior to certification, due diligence procedures will be carried out and shall include, but shall not be limited to, the following:

(a) periodic visits to the applicant's, the Certified Customers or Certified Contractors place(s) of business and operation(s) by a representative of Japan Tobacco Companies in order to continually assess the applicant's, the Certified Customer's or the Certified Contractor's ability and commitment to maintain its certification status through compliance with the components of this Agreement and Japan Tobacco's Programmes applicable to it;

(b) maintaining periodic written correspondence with Certified Customers or Certified Contractors to ensure that the information and documentation collected during the certification process is up to date and that any changes have been duly reported to and updated by Japan Tobacco Companies;

(c) ongoing monitoring of Certified Customer's purchases to ensure that the quantities of such purchases are commensurate with the demand for Japan Tobacco Cigarettes within the Intended Market of Retail Sale;

(d) review and verification of the KYC Programme with each Certified Customer and Certified Contractor to:

(i) reiterate the requirements under the same;

(ii) communicate the commitment by Japan Tobacco Companies to cooperate with OLAF and the Participating Member States on these matters;

(iii) create an occasion and an opportunity to answer any questions regarding this Agreement, Japan Tobacco's Programmes, and the Certified Customer or Certified Contractor requirements thereunder;

(iv) provide the Certified Customer or Certified Contractor with information on any updates or changes to this Agreement or Japan Tobacco's Programmes relevant to the Certified Customer or Certified Contractor; and

(e) the creation of reports detailing the results of due diligence procedures.

Annex Four

**LIST OF ARBITRATORS**

1. Walter van Gerven  
Cermarsinstraat 42  
B-3012 Wilsele  
Belgium
  
2. Hans Van Houtte  
Institute for International Trade Law  
Faculty of Law  
B-3000 Leuven  
Belgium

## Annex Five

### ESCROW NOTICE

1. Any funds held in escrow pursuant to sub-Clause 12.6 and/or sub-Clause 13.3-13.4 of this Agreement shall be paid by Japan Tobacco Companies into an interest bearing deposit account (the *Escrow Account*) at a bank nominated by the Commission in Brussels (the *Bank*) in the joint names of Japan Tobacco Companies and the EC. Japan Tobacco Companies shall irrevocably release these funds to the order of the escrow agent appointed by the arbitrator (the *Escrow Agent*).

2. The Escrow Agent shall hold the funds on trust for Japan Tobacco Companies and the EC in accordance with the terms set out below:

(a) Any reasonable bank or other charges arising on the Escrow Account, and any reasonable fees and expenses arising out of the appointment of the Escrow Agent, shall be charged to the Escrow Account;

(b) Any interest or profit generated on the Escrow Account (subject to any bank or other charges/fees properly charged to the Escrow Account) (the *Income*) shall accrue to and form part of the Escrow Account. Each time part of the funds in the Escrow Account is paid out, it shall have added to it the corresponding proportion of the Income.

3. The Escrow Agent shall make payments out of the Escrow Account only pursuant to a written order of the arbitrators, in accordance with sub-Clause 12.6 and/or sub-Clause 13.3-13.4 of this Agreement. Any such payments shall be made to the accounts of Japan Tobacco Companies and the EC as may be notified in writing to the Escrow Agent by Japan Tobacco Companies or the EC from time to time.

\* MATERIAL OMITTED DUE TO A REQUEST FOR CONFIDENTIAL TREATMENT

Annex Six

**LIST OF COUNTRIES FOR TRACK AND TRACE IMPLEMENTATION**

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This list will be updated as appropriate and/or as agreed by the Parties.

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