INSIGHT

For a Few Cigarettes More: Comments on AG Saugmandsgaard Øe's Opinion in the *JTI* Case

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ABSTRACT: In his Opinion delivered on 6 December 2018 in case C-596/17, *JTI*, AG Saugmandsgaard Øe argued that Art. 15, para. 1, of Directive 2011/64 authorises Member States to prevent tobacco manufacturers and importers from varying the retail selling price per item or gram for each of their manufactured tobaccos of a certain brand and type in function of the quantity in which the tobacco is packaged. This *Insight* makes the case that the AG's interpretation of the Directive provision is unconvincing, however.

KEYWORDS: tobacco – price regulation – Art. 15, para. 1, of Directive 2011/64 – products – effective competition – the integrity of tax revenue.

I. Introduction

On 1 November 2019, the retail selling price (RSP) for a packet of 20 Camel cigarettes rose to 9.10 euro in mainland France.[1] An RSP is the price the consumer pays for something. The tobacconists actually selling said cigarettes to the consumer did not determine the RSP, however; Japan Tobacco International as the manufacturer of the cigarettes did.

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[1] Art. 1 of and Annex to the French Order of 11 October 2019 approving the retail selling prices of manufactured tobacco in France, excluding the overseas departments, as modified by the French Order of 17 October 2019 modifying the Order of 11 October 2019 approving the retail selling prices of manufactured tobacco in France, excluding the overseas departments. As the name of the order implies and its first article confirms, the annex does not concern RSPs in the French overseas departments. Furthermore, different rules for the determination of RSPs apply to certain retailers and in Corsica (see Arts 2 and 3 of the order and the provisions they refer to).

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This is in accordance with French law. Indeed, manufacturers and licensed suppliers freely determine the RSP for each of their manufactured tobacco (MT) products pursuant to Art. 572 of the French General Tax Code (GTC) read in conjunction with Art. 284 of Annex 2 to the GTC.

The former provision also establishes the "price per 1000 rule", however.[2] The article specifies, more precisely, that the "retail price for each product, expressed as a value per 1000 items or per 1000 grams, shall be unique within the whole territory".[3] For the purpose of this rule, moreover, the word "product" is defined by the combination of a brand and a trade name.[4] Therefore, a manufacturer or licensed supplier must set a single RSP per 1000 items or per 1000 grams (per 1000 units) for all her cigars and cigarillos, cigarettes, fine-cut tobaccos for the rolling of cigarettes, other smoking tobaccos, nasal tobaccos, or chewing tobaccos of the same brand and trade name.[5] This means that such an operator may choose but one unit RSP for each of her products so defined, *i.e.* the relevant RSP per 1000 units divided by 1000.

In this sense, the price per 1000 rule is restrictive. After all, the rule does not permit manufacturers or licensed suppliers to render their MT of the same brand and trade name but sold in larger packets cheaper by the unit in retail.[6] The rule thus averts a financial incentive for consumers to purchase these larger packets, which might have led to an increase in MT consumption. Preventing such a price-induced consumption growth is in fact the very purpose of the price per 1000 rule in Art. 572 of the GTC.[7]

Still, the question is whether such a rule, restrictive as it is, undermines the freedom Art. 15, para. 1, first subparagraph, of Directive 2011/64 guarantees.[8] The directive provision stipulates, more specifically, that "[m]anufacturers or, where appropriate, their representatives or authorised agents in the Union, and importers of tobacco from third countries shall be free to determine the maximum [RSP] for each of their products for each Member State for which the products in question are to be released for consumption".

This provision fulfils multiple purposes. For one thing, the *ad valorem* excise duty on MT products must be proportional to their maximum RSPs,[9] and the directive provision is intended to guarantee that this tax base is determined the same way in all Member

[2] For the expression, see the French version of the Opinion of AG Saugmandsgaard Øe delivered on 6 December 2018, case C-596/17, *Japan Tobacco International and Japan Tobacco International France*, para. 11.

[3] Own translation borrowing elements *ibid*., para. 9.

[4] French Council of State, judgment of 11 October 2017, no. 403911, paras 9 and 10.

[5] For what constitutes MT for the purpose of the French rules, see Art. 275 A of the GTC.

[6] For a similar observation, see French Council of State, judgment no. 403911/2017, cit., para. 10. Due to rounding, the RSPs for the larger packets may nevertheless be marginally lower by the unit.

[7] *Ibid*.

[8] Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

[9] Arts 7, para. 1, and 9, para. 2, let. b), and 14, para. 1, let. a), of Directive 2011/64, cit.

States.[10] One reason to entrust manufacturers and importers with freely setting these maximum RSPs, moreover, is to ensure effective competition between these operators.[11]

The answer to the question whether a price per 1000 rule restricts this freedom, could have emerged in the *JTI* case. Facing this question, the French Council of State requested a preliminary ruling from the Court of Justice interpreting Art. 15, para. 1, of Directive 2011/64. In his opinion of 6 December 2018, AG Saugmandsgaard Øe subsequently advised the Court to rule that this provision does not preclude a price per 1000 rule.[12] The Court, however, did not pronounce itself on the issue due to the untimely withdrawal of the preliminary questions.

This is regrettable. The correct interpretation of Art. 15, para. 1, of Directive 2011/64 is in fact not obvious. Moreover, an infringement of the provision may not be justified on the ground that it combats smoking and so protects public health.[13] A Court judgment settling the question whether a price per 1000 rule undermines said freedom would therefore have been relevant not only to France but to all Member States imposing a similar requirement.[14]

This *Insight* summarises the AG's opinion (section II), comments on this opinion (section III), and provides a short conclusion (section IV).

II. The AG's Opinion

II.1. Preliminary observations

The AG noted that the first of two preliminary questions concerned the scope of the freedom Art. 15, para. 1, of Directive 2011/64 guarantees manufacturers and importers

[10] Court of Justice, judgment of 21 September 2016, case C-221/15, *Etablissements Fr. Colruyt*, para. 24.

[11] *Ibid*., para. 23. According to this paragraph, however, Art. 15, para. 1, of Directive 2011/64 "provides that manufacturers […] and importers […] are to be free to determine the maximum [RSP] for each of their products for each Member State for which the products in question are to be released for consumption, the aim being to ensure effective competition between them". Because of this phrasing, "them" might technically refer to the manufacturers and importers as well as their products. Yet the Dutch version of the judgment uses the word "hen", which refers to persons. In this case, it must therefore refer to the manufacturers and importers and not their products. For a more elaborate account of the provision's aims, see *Etablissements Fr. Colruyt*, cit., paras 23-26.

[12] Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 72.

[13] See Court of Justice, judgment of 4 March 2010, case C-197/08, *Commission v. France*, paras 49 *et seq*., regarding Art. 9, para. 1, of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco, the relevant subparagraph of which is now Art. 15, para. 1, first subparagraph, of Directive 2011/64, cit. Compare with Court of Justice, judgment of 9 October 2014, case C-428/13, *Yesmoke Tobacco*, paras 35-36, regarding Directive 2011/64.

[14] E.g. Art. 39-quinquies of the Italian Legislative Decree of 26 October 1995, no. 504, as cited in the Written observations of the Italian Government delivered on 30 January 2018, case C-596/17, *Japan Tobacco International and Japan Tobacco International France*, para. 21.

"to determine the maximum [RSP] for each of their products".[15] In particular, the meaning of the expression "each of their products" was in doubt.[16]

The AG presented two options. First, the expression could refer to "each [MT] of a particular brand and type". The cigarette of a certain brand and type would then be an example of a "product". Second, each unit packet or "reference" of such a MT of a given brand and type could constitute a product within the meaning of Art. 15, para. 1, of Directive 2011/64. If so, the packet of 20 and the packet of 25 cigarettes of the same brand and type would be two such products.[17]

In case the first interpretation is correct, the AG believed this would be the end of the matter. Art. 15, para. 1, of Directive 2011/64 would then only require manufacturers and importers to be free to set the maximum RSP for each of their products, defined as MTs of a specific brand and type.[18] The AG thought Art. 572 of the GTC does not undermine this freedom. The argument was that the article does in fact provide for the free determination of the RSPs for the MTs of a certain brand and trade name, with "trade name" corresponding to said "type".[19]

The referring court asked the second preliminary question only if the second interpretation prevails, according to the AG.[20] In this case, manufacturers and importers would have to be free to determine the maximum RSP for each of their unit packets.[21] Yet a price per 1000 rule prevents these operators from setting different RSPs per 1000

[15] Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 20. The AG does not explicitly specify that manufacturers and importers must be free to determine the maximum RSP for each of their products "for each Member State for which the products in question are to be released for consumption", apart from when he quotes Art. 15, para. 1, of Directive 2011/64 in its entirety. This *Insight* follows his example to avoid tiresome repetition.

[16] This is clear from the reasoning in the Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., paras 20 *et seq*.

[17] *Ibid*., paras 21 and 22.

[18] *Ibid*., paras 20 and 21.

[19] *Ibid*., paras 24 and 25 and footnote 6. The AG spoke of prices rather than RSPs, but Art. 572 of the GTC clearly concerns *retail* prices. Therefore, the AG was most likely thinking of such RSPs. On a different note, Art. 572 of the GTC is restrictive inasmuch as the RSPs determined in accordance with the article serve as both maximum *and* minimum RSPs. As the AG argues, however, this aspect is not the subject of the preliminary questions and it is in any case "of no relevance from the point of view of Art. 15, para. 1, of Directive 2011/64". See the Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., paras 27 *et seq*.

[20] Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 23.

[21] *Ibid*., para. 22. The AG referred to the *retail price* of each reference, though Art. 15, para. 1, of Directive 2011/64 explicitly guarantees the freedom to determine *maximum RSPs*. Therefore, the AG presumably had the latter kind of prices in mind.

units for their unit packets with different quantities of MT of the same brand and type.[22] Therefore, the second preliminary question is essentially whether such a rule infringes Art. 15, para. 1, of Directive 2011/64 for introducing this restriction.[23]

AG Saugmandsgaard Øe would take on both preliminary questions jointly.[24] Suggestive of the first question, however, he observed that the meaning of the expression "each of their products" was not apparent from the wording of Art. 15, para. 1, of Directive 2011/64. For this reason, the AG set out to interpret the provision "in the light of the general scheme of that directive and of the purpose served by that provision and by the directive".[25]

II.2. Interpretation in the light of the general scheme

The AG first explained what said products could be equated with. He recalled that the *ad valorem* excise duty on MT is to be proportional to the maximum RSP manufacturers and importers must be free to determine for each of their products within the meaning of Art. 15, para. 1, of Directive 2011/64 (see *supra*, section I). He therefore believed these products to be MTs "*inasmuch as these are subject to excise duty*".[26]

The AG thereupon undertook to find out what these MTs might be. What followed was a meticulous analysis of the provisions of Directive 2011/64 as well as some provisions of Directive 2014/40.[27] The MTs subject to excise duty and so the "products" to which Art. 15, para. 1, of Directive 2011/64 refers, the AG concluded from this analysis, "are not unit packets […] but cigarettes, cigars, cigarillos and smoking tobaccos as defined in Articles 2 to 5 of Directive 2011/64, irrespective the quantity contained in their packaging".[28]

Finally, the AG turned to the freedom Art. 15, para. 1, of Directive 2011/64 guarantees. He claimed, more precisely, that the article confers on manufacturers and importers "the freedom only to set the [maximum RSP per unit] for their cigarettes, cigars and cigarillos or the [maximum RSP] per unit of weight for their smoking tobaccos of a given brand [and] type, but does not guarantee that they will be able to vary those prices ac-

[22] *Ibid*., para. 23. This is the effect a price per 1000 rule actually produces that the AG probably had in mind when he described the rule as depriving "manufacturers and importers of the freedom to set the price differential between unit packets of different quantities".

[23] *Ibid*.

[24] *Ibid*., para. 19.

[25] *Ibid*., para. 34.

[26] *Ibid*., paras 35 and 36.

[27] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

[28] Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., paras 37-46.

cording to the quantity of those products contained in the packaging in which they are presented".[29]

II.3. Teleological interpretation

The AG relied on a teleological interpretation of the provision to support this demarcation of the freedom. He first presented multiple objectives of both Directive 2011/64 and its Art. 15, para. 1. For the achievement of these objectives, he then stated, manufacturers and importers must be free to set the maximum unit RSP for their MTs of a particular brand and type, but these operators need not be able to vary such a price in function of the unit packet.[30]

One objective of Art. 15, para. 1, of Directive 2011/64 received more attention. Citing the Court, the AG noted that the provision is "intended to maintain the freedom of [the manufacturers and importers] in such a way as to enable them to make effective use of the competitive advantage resulting from any lower cost prices in order to offer more attractive [RSPs]".[31]

The price per 1000 rule might appear problematic in this light. After all, the rule prevents operators from changing the unit RSP between their unit packets of MT of the same brand and type (see *supra*, section I). The operators are therefore not able to offer a relatively more attractive RSP for one of these unit packets, even if the unit packet at issue comes at a relatively lower cost price, for instance because it contains a larger quantity of MT.

The AG insisted, however, that the freedom Art. 15, para. 1, of Directive 2011/64 guarantees is not intended to enable manufacturers and importers to make use of the competitive advantage of one unit packet over another unit packet of their MT of the same brand and type.[32]

AG Saugmandsgaard Øe did in fact delineate the relevant competitive advantage. He first pointed, among other things, to the purpose of the freedom Art. 15, para. 1, of Directive 2011/64 guarantees to ensure effective competition *between manufacturers and importers* (see *supra*, section I). In this context, he then described "the competitive ad-

[29] *Ibid*., para. 47. The AG actually referred to the "unit price" and the "price per unit" of the MTs, but he presumably used these expressions as shorthand for their maximum RSP per unit. After all, Art. 15, para. 1, of Directive 2011/64 explicitly guarantees the freedom to set maximum RSPs. As for the MTs at issue, the opinion refers to MTs "of a given brand or type", yet as is obvious from the original French version of his opinion, the AG meant to write "of a given brand and type".

[30] *Ibid*., paras 49-52. The comments from the previous footnote also apply here.

[31] *Ibid*., para. 50.

[32] *Ibid*., paras 54 and 61. While the English version of the opinion speaks of MT "of a given brand or type", the original French version clarifies that the AG referred to MT of a given brand *and* type.

vantage that must be maintained" as "any advantage in terms of [...] costs which a manufacturer or importer enjoys in comparison with other manufacturers and importers".[33]

The AG then claimed that Art. 15, para. 1, of Directive 2011/64 need not guarantee manufacturers and importers the freedom to vary the maximum unit RSP for each of their MTs of a certain brand and type in function of the quantity in which the MT is packaged, and so the provision need not oppose the price per 1000 rule, for said competitive advantage to be maintained.[34]

To corroborate this claim, the AG directed his attention to this price per 1000 rule. He observed that the rule in fact allows manufacturers and importers to set the RSP per 1000 units for each of their MTs of a specific brand and type.[35] He further explained that the resulting unit RSP—*i.e.* the RSP per 1000 units divided by 1000 (see *supra*, section I)—is intended to incorporate part of the aggregate cost price of the MT at issue. This cost price includes "the costs associated with the various styles of packaging".[36]

As a result, the AG concluded, "the price per 1000 [...] rule does not prevent manufacturers and importers from passing on in the [retail] price for each of their [MTs of a given brand and type] any competitive advantage arising from [...] costs, including packaging costs, which are lower than those of their competitors".[37] Because of the rule, however, the same unit RSP should apply to all unit packets of an operator's MT of a certain brand and type. The operators must then "spread" any competitive advantage across all these unit packets.[38]

II.4. Closing remarks

The AG thus interpreted Art. 15, para. 1, of Directive 2011/64 as guaranteeing manufacturers and importers the freedom to determine the maximum RSP for each of their

[33] *Ibid*., paras 53 and 54. The opinion refers to "primary costs", though it is apparent from the original French version of the opinion that the AG spoke of costs in general.

[34] *Ibid*., para. 62. Surely, this is the conclusion the AG meant to convey. It is more in keeping with both his arguments and earlier conclusions than his presumably imprecise statement that "an interpretation of that provision which does not guarantee manufacturers and importers the freedom to vary the prices of their manufactured tobaccos according to the quantity thereof contained in their packaging [...] does not have the effect of eliminating such a competitive advantage".

[35] *Ibid*., para. 63. The AG spoke of the *price* per 1000 units, but in accordance with the actual content of the price per 1000 rule, he presumably had the *RSP* per 1000 units in mind.

[36] This is clear from the reasoning *ibid*., para. 64.

[37] *Ibid*., para. 66. The AG referred to the price for each of an operator's MTs, though he was surely thinking of the *retail* price for each of such an operator's MTs *of a given brand and type* since the price per 1000 rule he is describing does in fact concern such prices. Also, while the English version of the opinion speaks of "primary costs", the original French version clarifies that the AG referred to costs in general.

[38] *Ibid*., para. 66.

products, defined as "cigarettes, cigars or cigarillos and smoking tobacco of a particular brand and type, irrespective of the quantity contained in their packaging".[39]

The AG concluded, consequently, that the directive provision does not preclude national legislation as applicable in France.[40] He explained that such legislation does allow manufacturers and importers to determine the RSP for each of their MTs of a given brand and type, albeit as a single value per 1000 units.[41] It is then immaterial, the AG implied, that this RSP may not vary in function of the quantity in which these MTs are packaged.[42]

The AG stopped short of going one step further. More precisely, he left open the question whether Member States *must* in fact prohibit variation of the maximum unit RSP for each MT of a specific brand and type according to the quantity packaged.[43] In this respect, he cited the Italian Government's submission that variation of such a price in function of the unit packet would affect the calculation of excise duty and might so undermine the integrity of tax revenue.[44]

III. Comment

III.1. Interpretation in the light of the general scheme

The AG's interpretation of Art. 15, para. 1, of Directive 2011/64 in the light of the general scheme of the directive resulted in two assertions. The AG first defined products within the meaning of the provision as MTs, *i.e.* cigarettes, cigars, cigarillos and smoking tobaccos. He then claimed that, pursuant to this provision, manufacturers and importers must only be free to set the maximum unit RSP for each of their MTs *of a given brand and type* (see *supra*, subsection II.2).

The AG's second assertion does not logically follow from his first one, however. While the products to which Art. 15, para. 1, of Directive 2011/64 refers may very well be MTs, this does not in itself imply that such a product refers to a MT *of a given brand and type*, as the AG's second assertion suggests. Neither do the provisions of Directive 2011/64 corroborate such an implication in any obvious way. Indeed, none of them ex-

[39] *Ibid*., para. 68.

[40] *Ibid*., paras 69 and 72.

[41] *Ibid*., para. 72.

[42] *Ibid*., para. 72. See also *ibid*., para. 69.

[43] *Ibid*., para. 70.

[44] *Ibid*., footnote 35. Even though the citation seems to target "the setting of a different price for each unit packet" of a MT of a particular brand and type, it may be assumed that what is meant is variation of the maximum RSP per unit of such a MT. After all, it is the maximum RSP of MT that affects the calculation of excise duty (see *supra*, section I). Moreover, the argument is meant to support the claim that the maximum RSP of a MT of a certain brand and type should remain the same by the unit, which necessarily implies that the maximum RSP of a unit packet should be a function of the quantity of MT the packet contains. Therefore, the argument more plausibly concerned variation of the maximum RSP *per unit* than *per unit packet* of MT of the same brand and type.

plicitly distinguishes MTs or products on the basis of a brand or a type. In fact, the word "brand" does not appear in the directive at all.[45]

Consequently, it is not apparent that Member States only have to confer on manufacturers and importers the freedom to determine the maximum RSP per unit for each of their MTs of a specific brand and type and that there is no need to allow these operators to vary such a price in function of the unit packet pursuant to Art. 15, para. 1, of Directive 2011/64.

III.2. Teleological interpretation: effective competition

Still, AG Saugmandsgaard Øe stated that the objectives of both directive and article did not warrant a different conclusion (see *supra*, subsection II.3).

His discourse focused on one of the provision's purposes in particular. As mentioned, the provision is "intended to maintain the freedom of [the manufacturers and importers] in such a way as to enable them to make effective use of the competitive advantage resulting from any lower cost prices in order to offer more attractive [RSPs]". Relevant in this respect, the AG clarified, is "any advantage in terms of [...] costs which a manufacturer or importer enjoys in comparison with other manufacturers and importers" (see *supra*, subsection II.3).

Such a competitive advantage might result from the unit packet in which MT is presented. Indeed, if a manufacturer or importer reduces the unit cost for a MT of a certain brand and type by having it packaged in a particular unit packet, then this unit packet might, by extension, come at a relatively lower cost price than the packets of MT from competing manufacturers and importers. In this event, the operator would enjoy a competitive advantage resulting from lower costs than those of the competitors. He should thus be able to make effective use of this advantage in order to offer more attractive RSPs.

The same operator might not be able to do so, however, if he may only set one maximum unit RSP for his MT of the brand and type at issue. The reason is that this price would also apply to the unit packets with a relatively higher cost price. Setting a maximum unit RSP that is actually more attractive might therefore entail selling these unit packets at a loss. Costly as this construction might be, it could hardly be considered an *effective* use of aforementioned competitive advantage.

This observation calls into question the AG's interpretation of Art. 15, para. 1, of Directive 2011/64. After all, according to this interpretation, the provision would only require

[45] The AG actually referred to Art. 5, paras 1 and 6, of Directive 2014/40 in which both the terms "brand" and "type" appear. See the Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., footnote 6. According to the paragraphs cited, Member States shall require manufacturers and importers of tobacco products, among other things, (1) to submit specific information on ingredients and emissions "by brand name and type" and (2) to report their sales volumes "per brand and type".

manufacturers and importers to be free to set one maximum unit RSP for each of their MTs of a particular brand and type. The provision would thus not oppose a price per 1000 rule (see *supra*, subsection II.3). Considering said observation, however, the AG's interpretation seems contrary to the provision's aim of maintaining the freedom of manufacturers and importers in such a way as to enable them to make effective use of the competitive advantage resulting from any lower cost prices in order to offer more attractive RSPs.

III.3. Teleological interpretation: the integrity of tax revenue

Be that as it may, the AG also cited one of the Italian Government's submissions as a potential argument for the claim that manufacturers and importers must only be free to set one maximum unit RSP for each of their MTs of a specific brand and type. The Government argued, more precisely, that if the maximum unit RSP for a MT of a specific brand and type could vary in function of the unit packet, this variation would have an impact on the calculation of excise duty and might thus undermine the integrity of tax revenue (see *supra*, subsection II.4).

Still, such variation does not undermine the integrity of tax revenue in the slightest. The Italian Government's argument is reminiscent of the Court's case law pursuant to which the maximum RSP determined in accordance with Art. 15, para. 1, of Directive 2011/64 must be observed as a maximum price "at every stage of the distribution chain" so that "the integrity of tax revenue is not undermined by the exceeding of imposed prices".[46] Since the proportional excise duty is calculated on the basis of this maximum RSP, exceeding this price would indeed cheat the treasury out of taxes on the surplus. In this respect, the extent to which a maximum RSP varies is immaterial; it must simply be respected as a maximum price.

IV. Conclusion

The AG held that Art. 15, para. 1, of Directive 2011/64 does not preclude a price per 1000 rule. However, his interpretation of the directive provision is unconvincing. A future judgment from the Court of Justice should settle the matter. In fact, the Court of Justice could already have done so in the *JTI* case. It is regrettable, therefore, that a pair of good preliminary questions in this case went up in smoke after their withdrawal.

[46] *Etablissements Fr. Colruyt*, cit., para. 25.