



INSIGHT

## FOR A FEW CIGARETTES MORE: THE AG 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 arguments are unconvincing, however.

KEYWORDS: tobacco – price regulation – Art. 15, para. 1, of Directive 2011/64 – products – effective competition – public health.

### 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.<sup>1</sup> An RSP is the price the consumer pays for something. The tobacconists actually selling Camel cigarettes to the consumer did not determine the RSP, however; Japan Tobacco International as the manufacturer of the cigarettes did.

This is in accordance with French law. Indeed, manufacturers and licensed suppliers freely determine the RSP for manufactured tobacco (MT), for each of their products,

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<sup>1</sup> 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 to which they refer).

pursuant to Art. 572 of the French General Tax Code (GTC).<sup>2</sup> For the purpose of this provision, a tobacco product is defined by the combination of a brand and a trade name.<sup>3</sup> A manufacturer may thus set the RSP for her cigarettes of a particular brand and trade name under French law.

Art. 572 of the GTC also establishes the “price per 1000 rule”, however.<sup>4</sup> The article requires, more precisely, that manufacturers and licensed suppliers express the RSP for each of their products as defined above as a single value per 1000 items or per 1000 grams (per 1000 units). For instance, the RSP a manufacturer sets for her cigarettes of a specific brand and trade name must be a single sum per 1000 cigarettes. Such an RSP per 1000 units then applies regardless of though in proportion to the quantity in which the MT is packaged.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

Still, the question is whether this rule, restrictive as it is, undermines the freedom Art. 15, para. 1., first subparagraph, of Directive 2011/64 guarantees.<sup>8</sup> The directive concerns the structure and rates of the excise duty levied on MT.<sup>9</sup> As for the directive provision, it stipulates that manufacturers and importers “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 tobacco products must be proportional to their maximum RSPs,<sup>10</sup> and the directive provision is intended to guarantee that this tax base is determined the same way in all Mem-

<sup>2</sup> Read in conjunction with Art. 284 of Annex 2 to the GTC. Arts 275 A to 275 G of Annex 2 to the GTC clarify what constitutes MT within the meaning of the French legislation.

<sup>3</sup> French Council of State, judgment of 11 October 2017, no. 403911, paras 9 and 10.

<sup>4</sup> 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.

<sup>5</sup> See Art. 572 of the GTC, which adds that one must round the RSP for a packet of tobacco to the closest multiple of 5 eurocents. See also French Council of State, judgment no. 403911/2017, cit., para. 11.

<sup>6</sup> 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.

<sup>7</sup> *Ibid.*

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

<sup>9</sup> Art. 1 of Directive 2011/64. What constitutes MT for the purpose of this directive largely corresponds to what constitutes MT within the meaning of the French legislation. Compare Arts 2-5 of Directive 2011/64 with Arts 275 A to 275 G of Annex 2 to the GTC.

<sup>10</sup> Arts 7, para. 1, 9, para. 2, let. b), and 14, para. 1, let. a), of Directive 2011/64.

ber States.<sup>11</sup> One reason to entrust manufacturers and importers with freely setting these maximum RSPs, moreover, is to ensure effective competition between these operators.<sup>12</sup>

The question whether the price per 1000 rule restricts this freedom gave rise to 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 national legislation as applicable in France.<sup>13</sup> 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, a restriction of the freedom the provision guarantees may not be justified on the grounds that it combats smoking and so protects public health.<sup>14</sup> A Court judgment settling the question whether national legislation such as the price per 1000 rule undermines this freedom would therefore have been all the more relevant, not only to France but to all Member States imposing a similar requirement.<sup>15</sup>

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

<sup>11</sup> Court of Justice, judgment of 21 September 2016, case C-221/15, *Etablissements Fr. Colruyt*, para. 24.

<sup>12</sup> *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.

<sup>13</sup> Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 72.

<sup>14</sup> See Court of Justice, judgment of 4 March 2010, case C-197/08, *Commission v. France*, paras 49-53, regarding the justification of a restriction of the freedom guaranteed in Art. 9(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. For confirmation that arguments similar to those on which the Court relied in this case may be made under Directive 2011/64, see Court of Justice, judgment of 9 October 2014, case C-428/13, *Yesmoke Tobacco*, paras 35-36.

<sup>15</sup> 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.

## 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 “to determine the maximum [RSP] for each of their products”.<sup>16</sup> In particular, the meaning of the expression “each of their products” was in doubt.<sup>17</sup>

The AG presented two options. First, the expression could refer to “each [MT] of a particular brand and type”, for instance “each cigarette of brand X and type Y”. Second, each unit packet or “reference” of each 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.<sup>18</sup>

The AG believed it would solve the referring court's conundrum if the first interpretation were correct. 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 in the sense of each of their MTs of a specific brand and type.<sup>19</sup> The AG thought Art. 572 of the GTC would not undermine this freedom. The argument was that this article does in fact provide for the free determination of the RSP for each MT of a certain brand and trade name (see *supra*, section I), with “trade name” corresponding to said “type”.<sup>20</sup>

The referring court asked the second preliminary question only if the second interpretation prevails, according to the AG.<sup>21</sup> In this case, manufacturers and importers would have to be free to determine the maximum RSP for each of their products in the sense of

<sup>16</sup> Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 20. In this paragraph, 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”, as Art. 15, para. 1, of Directive 2011/64 stipulates. This *Insight* follows his example to avoid tiresome repetition.

<sup>17</sup> This is clear from the reasoning in the Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 20 *et seq.*

<sup>18</sup> *Ibid.*, paras 21 and 22.

<sup>19</sup> *Ibid.*, paras 20 and 21.

<sup>20</sup> *Ibid.*, paras 24 and 25 and footnote 6. The AG spoke of prices, but Art. 572 of the GTC concerns RSPs. 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.*

<sup>21</sup> Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 23.

each of their unit packets.<sup>22</sup> Yet national legislation such as the price per 1000 rule prevents such operators from changing the RSP per 1000 units for each of their MTs of a particular brand and type between unit packets containing different quantities of MT (see *supra*, section I).<sup>23</sup> Therefore, the second preliminary question was essentially whether such legislation infringes Art. 15, para. 1, of Directive 2011/64 for introducing this restriction.<sup>24</sup>

AG Saugmandsgaard Øe would take on both preliminary questions jointly.<sup>25</sup> 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”.<sup>26</sup>

## II.2. INTERPRETATION IN THE LIGHT OF THE GENERAL SCHEME

The AG first explained with what said products could be equated. 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*”.<sup>27</sup>

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.<sup>28</sup> 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”.<sup>29</sup>

<sup>22</sup> *Ibid.*, para. 22. The AG referred to the *retail price* for each of these unit packets, 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.

<sup>23</sup> Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., para. 23. This is the effect such legislation actually produces that the AG probably had in mind when he described the legislation as depriving “manufacturers and importers of the freedom to set the price differential between unit packets of different quantities”.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, para. 19.

<sup>26</sup> *Ibid.*, para. 34.

<sup>27</sup> *Ibid.*, paras 35 and 36.

<sup>28</sup> 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; Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., paras 37-44.

<sup>29</sup> Opinion of AG Saugmandsgaard Øe, *Japan Tobacco International and Japan Tobacco International France*, cit., paras 45-46.

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 unit RSP for each of their MTs of a given brand and type. Yet, he added, the provision does not guarantee that these operators will be able to vary such a price in function of the quantity of MT packaged.<sup>30</sup>

### II.3. TELEOLOGICAL INTERPRETATION

The AG relied on a teleological interpretation of Art. 15, para. 1, of Directive 2011/64 to support this conclusion. He first presented multiple objectives of both the provision and the directive in general. For the achievement of these objectives, he then stated, manufacturers and importers must be free to set the maximum unit RSP for each of 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 in which the MT is presented.<sup>31</sup>

One objective of Art. 15, para. 1, of Directive 2011/64 received more attention. Citing the Court of Justice, 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]”.<sup>32</sup>

The price per 1000 rule might appear problematic in this light. After all, the rule prevents operators from changing the RSP per 1000 units between their unit packets of MT of the same brand and type. Accordingly, these operators may not offer a relatively more attractive RSP for one of these unit packets, not 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.<sup>33</sup>

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-

<sup>30</sup> *Ibid.*, para. 47. The AG actually referred to the “unit price” and the “price per unit of weight” 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 refer to MTs “of a given brand and type”.

<sup>31</sup> *Ibid.*, paras 49-52. The comments from the previous footnote also apply here.

<sup>32</sup> *Ibid.*, para. 50.

<sup>33</sup> *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 intended to refer 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”.<sup>34</sup>

For this competitive advantage to be maintained, the AG then claimed, 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 national legislation such as the price per 1000 rule.<sup>35</sup>

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.<sup>36</sup> He further explained that a unit RSP—*i.e.* an RSP per 1000 units divided by 1000—is intended to incorporate part of the aggregate cost price of the MTs to which the RSP applies.<sup>37</sup> This cost price includes “the costs associated with the various styles of packaging” of these MTs.<sup>38</sup>

As a result, the AG concluded, “the price per 1000 [...] rule does not prevent manufacturers and importers from passing on in the [RSP] 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”.<sup>39</sup> Because of the rule, however, the same RSP per 1000 units should apply to all unit packets of an operator’s MT of a certain brand and type. The operator must then “spread” any competitive advantage across all these unit packets.<sup>40</sup>

#### II.4. CONCLUSION

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

<sup>34</sup> *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 thought of costs in general.

<sup>35</sup> *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”.

<sup>36</sup> *Ibid.*, para. 63. The AG spoke of the *price* per 1000/1000 units, but in accordance with the actual content of the price per 1000/1000 rule, he presumably had the *RSP* per 1000/1000 units in mind.

<sup>37</sup> *Ibid.*, para. 64. The opinion refers to *primary* costs, though it is obvious from the original French version of his opinion that the AG meant to refer to costs in general.

<sup>38</sup> This is clear from the reasoning *ibid.*

<sup>39</sup> *Ibid.*, para. 66. The AG referred to the price for each of an operator’s MTs, though he was surely thinking of the RSP for each of such an operator’s MTs of *a given brand and type* since the price per 1000/1000 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 meant to refer to costs in general.

<sup>40</sup> *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”.<sup>41</sup>

The AG concluded, consequently, that the directive provision does not preclude national legislation as applicable in France.<sup>42</sup> 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.<sup>43</sup> It is then immaterial, the AG implied, that such an RSP may not vary in function of the quantity in which the MT is packaged.<sup>44</sup>

### III. COMMENT

#### III.1. INTERPRETATION IN THE LIGHT OF THE GENERAL SCHEME

After his analysis of multiple directive provisions, the AG made a couple of assertions. From his analysis, for one thing, he concluded that products within the meaning of Art. 15, para. 1, of Directive 2011/64 refer to MTs, *i.e.* cigarettes, cigars, cigarillos and smoking tobaccos. He subsequently claimed that, pursuant to this provision, manufacturers and importers need 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. Products within the meaning of Art. 15, para. 1, of Directive 2011/64 may very well refer to MTs. Yet this does not in itself imply that each such product is also defined by the combination of *a brand and a 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 explicitly 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.<sup>45</sup>

Since the AG did not explain how his first assertion should support his second one, consequently, he did not conclusively demonstrate that Art. 15, para. 1, of Directive 2011/64 guarantees manufacturers and importers the freedom only to determine the maximum unit RSP for each of their products in the sense of each of their MTs of a specific brand and type.

<sup>41</sup> *Ibid.*, para. 68.

<sup>42</sup> *Ibid.*, paras 69 and 72.

<sup>43</sup> *Ibid.*, para. 72.

<sup>44</sup> *Ibid.*, para. 72. See also *ibid.*, para. 69.

<sup>45</sup> For both the terms “brand” and “type”, the AG actually referred to Art. 5(1) and (6) of Directive 2014/40. 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”.



### III.2. TELEOLOGICAL INTERPRETATION

Still, AG Saugmandsgaard Øe stated that the objectives of both Directive 2011/64 and its Art. 15, para. 1, did not warrant a different interpretation of the provision (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]". Since this freedom is guaranteed so as to ensure effective competition between manufacturers and importers, the AG clarified, only the advantage in terms of costs one of these operators enjoys over other manufacturers and importers is relevant (see *supra*, subsection II.3).

The freedom Art. 15, para. 1, of Directive 2011/64 guarantees should then enable manufacturers and importers to offer more attractive RSPs *than the competitors over whom they enjoy this advantage*. A different interpretation of this freedom would make little sense if the idea is indeed to ensure effective competition between manufacturers and importers, as the AG suggested.

Now, a competitive advantage as the AG defined it might result from the unit packet in which MT is presented. After all, if a manufacturer or importer reduces the cost per unit of his MT of a given brand and type by having it packaged in a particular unit packet, then this unit packet might 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 these competitors.

Yet the same operator might not be able to offer a more attractive RSP than these competitors if he may only set one unit RSP for his MT of the brand and type at issue. The reason is that this unit RSP would apply to all packets containing this MT. If the operator wishes to use the competitive advantage resulting from the relatively lower cost price of some of these packets by setting a more attractive unit RSP than his competitors, therefore, any packets of his MT of the same brand and type but with a relatively higher cost price might need to be sold at a loss. The losses from selling the latter packets might even outweigh the profits from selling the former packets. In such circumstances, setting a more attractive unit RSP might only be a theoretical option and the manufacturer or importer enjoying said competitive advantage might not be able to make *effective* use of it. In fact, setting a more attractive unit RSP might not be an option at all since national law may prohibit the sale of MT at a loss.<sup>46</sup>

National legislation preventing manufacturers and importers from varying the relative RSP for each of their MTs of a particular brand and type in function of the unit packet in which the MT is presented, might thus impair the competitive advantage that

<sup>46</sup> *Commission v. France*, cit., para. 53.

must be maintained according to the AG. Since national legislation such as the price per 1000 rule has the same effect, the AG should have considered such legislation incompatible with Art. 15, para. 1, of Directive 2011/64.<sup>47</sup> His argument that the directive provision need not oppose such legislation for said competitive advantage to be maintained (see *supra*, subsection II.3), is unconvincing.

#### IV. CONCLUSION

The AG held that Art. 15, para. 1, of Directive 2011/64 does not preclude national legislation such as the price per 1000 rule. However, his arguments are unconvincing. Since the *JTI* case did not culminate in a judgment from the Court of Justice, the Court might have to settle the matter in a future case.

<sup>47</sup> Cf. *ibid.*, para. 38, where the Court held that a system of minimum RSPs for tobacco products must ensure *in any event* that the competitive advantage manufacturers and importers may enjoy as a result of lower cost prices is not impaired for the system to be compatible with Art. 9, para. 1, of Directive 95/59, the relevant subparagraph of which is now Art. 15, para. 1, first subparagraph, of Directive 2011/64.