Determination of the taxable amount for VAT where a pharmaceutical company grants discount to a private health insurance company, for the purposes of Article 90(1) of Council Directive 2006/112/EC

By Rosanna Cooper

In the case of Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG (Case C-462/16) there was a **preliminary ruling** by the Court of Justice in connection with the **interpretation of Article 90(1) of Council Directive 2006/112/EC** of 28 November 2006 ('the VAT Directive') to determine the amount of value added tax ('VAT') payable by Boehringer Ingelheim Pharma GmbH & Co. KG for the 2011 tax year.

1. Summary

Discounts were granted to private medical insurance funds. There was **a reduction** of the price under conditions determined by the Member States and a reduction of the **taxable amount**. The governing principles are laid down in the judgment of 24 October 1996, Elida Gibbs (C-317/94, EU:C:1996:400). The specific question referred to the Court is set out in the Judgment below.

2. Facts

There was a **request for a preliminary ruling** under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), to the Court of Justice (Fifth Chamber), in the proceedings of Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co. KG.

By way of background, Boehringer is a pharmaceutical company which manufactures medicinal products and supplies those products, subject to tax, to pharmacies via wholesalers.
With regard to the system of statutory (public) health insurance, **pharmacies deliver medicinal products to persons covered in the context of a framework contract** with the national association of health insurance funds. The medicinal products are supplied to the health insurance funds and the latter make them available to persons insured by them. The pharmacies grant the health insurance funds a discount on the price of the medicinal products. Boehringer Ingelheim Pharma, as a

pharmaceutical company, must reimburse the pharmacies or, where wholesalers are involved, the wholesalers for this discount. For the purpose of VAT, the discount is treated by the tax authority as a reduction in remuneration.

Furthermore, medicinal products intended for persons with private health insurance, the pharmacies issue those products to those persons pursuant to individual contracts with them. The private health insurance company does not purchase medicinal products, but merely **reimburses the persons insured by it**, upon request by them, for the costs they have incurred. In such a case, Boehringer Ingelheim Pharma must grant the private health insurance company a discount on the price of the medicinal product. The tax authority does not treat this discount as a reduction in remuneration for the purposes of VAT.

In 2012, Boehringer Ingelheim Pharma submitted an annual VAT declaration for the 2011 financial year, mentioning, in particular, the taxable transactions and the applicable taxable amounts.
In that declaration, in respect of the transactions relating to medicinal products purchased by insured persons covered by **private health insurance**, Boehringer Ingelheim Pharma corrected the taxable amount by deducting the reimbursements required to be paid by it.

The tax authority considered that there was n**o reason justifying the reduction of Boehringer Ingelheim Pharma's taxable amount in connection with reimbursements of private health insurance companies**. It therefore fixed the VAT that was due on the basis of the taxable amount without the reduction.
Boehringer Ingelheim Pharma lodged, before the Finanzgericht Rheinland-Pfalz (Finance Court, Rhineland-Palatinate, Germany), an appeal against the decision of the tax authority concerning the reimbursements to private health insurance companies.
It submitted that the statutory health insurance fund and the private health insurance company were at the end of the supply chain, so that the taxable amount must be reduced in both cases. It stated that it was not significant, whether they were reimbursements or reductions in price that were granted, both must be treated in the same way from the viewpoint of VAT.

The Finanzgericht Rheinland-Pfalz, upheld Boehringer Ingelheim Pharma's appeal, ruling that it was not necessary t**o make the distinction made by the tax authority between the reductions in price granted to statutory health insurance funds for the medicinal products purchased and the reimbursements made at the time of purchase of those products in the context of a private health insurance regime**.

The tax authority lodged, before the Bundesfinanzhof an appeal on a point of law against the judgment of the Finanzgericht Rheinland-Pfalz.

3. Judgment

The request for a preliminary ruling concerned the interpretation of Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

The request was made in the context of proceedings between the Finanzamt Bingen-Alzey, (the tax authority of Bingen-Alzey, Germany) ('the tax authority') and the pharmaceutical company Boehringer Ingelheim Pharma GmbH & Co. KG concerning **the determination of the amount of value added tax ('VAT') payable by the latter for the 2011 tax year**.

The referring court stated that:

- 'when a manufacturer of a product who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ends with that final consumer, grants the final consumer a price reduction, the **taxable amount for VAT purposes** must, in accordance with the case-law of the Court, be reduced by that reduction (see to that effect, the judgments of the Court of Justice of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraphs 28 and 31, and of 16 January 2014, Ibero Tours, C 300/12, EU:C:2014:8, paragraph 29)…'

  It observed that the Court of Justice had ruled that there should be no reduction when a travel agent, acting as an intermediary, grants to the final consumer, on the travel agent's own initiative and at its own expense, a price reduction on the principal service provided by the tour operator (judgment of 16 January 2014, Ibero Tours, C 300/12, EU:C:2014:8, paragraph 33). **The Court relied on the point that the travel agent is not part of a supply chain leading from the tour operator to the final consumer**.

- Case-law must be understood as meaning that **price reductions that an operator grants to a third party which is not contractually linked to it can reduce the taxable amount for VAT due on the supply made by that operator only where a chain of transactions leads from the company to the third party entitled to a discount**. In the present case, the discounts in favour of private health insurance companies do not therefore reduce the taxable amount for VAT due in respect of the supplies made by Boehringer Ingelheim Pharma, since private health insurance companies who benefit from the discount are not part of the supply chain leading from that company to the final consumer.

- It is incompatible with the general principle of equal treatment enshrined in Article 20 of the Charter of Fundamental Rights of the European Union for discounts for private health insurance companies not to reduce the taxable amount, unlike discounts in connection with statutory health insurance, even though the **pharmaceutical company is encumbered in the same way by both discounts**. Since comparable situations are involved, the referring court wondered what the objective justification was for that unequal treatment.

- Although infringement of the principle of fiscal neutrality may be envisaged only as between competing traders, infringement of the general principle of equal treatment may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects (judgments of 10 April 2008, Marks & Spencer, C 309/06, EU:C:2008:211, paragraph 49, and of 25 April 2013, Commission v Sweden, C 480/10, EU:C:2013:263, paragraph 17). It followed that the principle of equal treatment, in matters

relating to tax, does not coincide with the principle of fiscal neutrality (judgment of 25 April 2013, Commission v Sweden, C 480/10, EU:C:2013:263, paragraph 18).

In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
'On the basis of the case-law of the Court of Justice of the European Union (judgment of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraphs 28 and 31) and having regard to the principle of equal treatment under EU law, is a **pharmaceutical company which supplies medicinal products entitled to a reduction of the taxable amount under Article 90 of the VAT Directive** in the case where:

- it supplies those medicinal products to pharmacies via wholesalers
- the pharmacies supply those products, subject to tax, to persons with private health insurance
- the insurer of the medical expense insurance (the private health insurance company) reimburses the persons insured by it for the costs of purchasing the medicinal products; and
- the pharmaceutical company is required to pay a "discount" to the private health insurance company pursuant to a statutory provision?'

3.1 Court of Justice

Consideration of the question referred by the Court of Justice:
By its question, the referring court asked, in essence, whether, in the light of the principles defined by the Court in the judgment of 24 October 1996, Elida Gibbs(C 317/94, EU:C:1996:400, paragraphs 28 and 31), regarding the determination of the taxable amount for VAT and having regard to the principle of equal treatment under EU law, Article 90(1) of the VAT Directive must be interpreted as meaning that the discount granted, in accordance with national law, by a pharmaceutical company to a private health insurance company results, for the purposes of that article, in a reduction of the **taxable amount in favour of that pharmaceutical company**, when it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures.

3.2 European Union law

In order to reply to that question, the **Court of Justice** stated that it must be pointed out first of all that in accordance with European Union law, Article 73 of the VAT Directive on taxable amount states that:

'In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the

supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.'

Under Article 78 of the VAT Directive it states that:

'The taxable amount shall include the following factors:

(a) taxes, duties, levies and charges, excluding the VAT itself;

…'

Under Article 79 of the VAT Directive it states that:

'The taxable amount shall not include the following factors:

(a) price reductions by way of **discount for early payment**;

(b) price discounts and r**ebates granted to the customer and obtained by him at the time of the supply**;

(c) amounts received by a **taxable person from the customer**, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.'

Next, it must also be recalled that Article 90(1) of the VAT Directive, **which relates to cases of cancellation, refusal or total or partial non-payment**, or where the price is reduced after the supply takes place, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. That provision embodies one of the fundamental principles of the VAT Directive, according to which the taxable amount is the consideration actually received and the corollary of which is that the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received (judgment of 15 May 2014, Almos Agrárkülkereskedelmi, C 337/13, EU:C:2014:328, paragraph 22 and the case-law cited).

In accordance with Article 90 of the VAT Directive it states that:

'1. In the case of cancellation, **refusal or total or partial non-payment**, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

2. In the case of total or partial non-payment, Member States may derogate from paragraph 1.'

3.3 German Law

According to German Law on Umsatzsteuergesetz (turnover tax)

Paragraph 10(1) states that:

'For supplies and other services (first sentence of Paragraph 1(1), point 1) and for intra-Community acquisitions (Paragraph 1(1), point 5), turnover shall be calculated in accordance with the remuneration received. Remuneration is everything which the recipient of the supplies expends in order to acquire the supply, but **after deduction of turnover tax**. Anything that a person other than the beneficiary of the supply pays to the trader for the supply is also included in remuneration. …'

Paragraph 17(1) defines 'Adjustment of the basis for assessment' as:

‘When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1), point 1, has changed, the trader who made the supply shall adjust correspondingly the amount of tax payable. …’

3.4 Fünftes Buch Sozialgesetzbuch (Fifth book of the social code)

According to paragraph 2 of the Fünftes Buch Sozialgesetzbuch (Fifth book of the social code) in relation to the **statutory health insurance cover by the public health insurance funds** (‘the SGB V’):

‘1. The health insurance funds make available the services covered in Chapter III to the persons whom they insure in compliance with the principle of good administration (Paragraph 12), to the extent that those insured persons are not themselves liable for those supplies The particular treatment methods, medicines and medicinal remedies are not excluded. The quality and efficacy of the services must meet generally accepted standards of medical knowledge and take into account medical advances.

2. The insured persons shall receive supplies in the form of supplies in kind or in service, without prejudice to the derogations laid down in this Book V or Book IX. Upon request, the services may also be provided in the form of a participation in a “Multi-branch personal budget” according to the combined provisions of Paragraph 17(2) to (4) of Book IX, the regulation on the budget and Paragraph 159 of Book IX. The provision of supplies in kind and in services is the object of contracts that the health insurance funds conclude with service providers under the provisions of Chapter IV.’

3.5 *SGB V*

Under paragraph 130a(1) of the SGB V it states that:

‘For medicinal products provided at their cost with effect from 1 January 2003, the health insurance funds receive from pharmacies a discount of 6% on the pharmaceutical company’s sale price, exclusive of VAT. **Pharmaceutical companies are required to reimburse the pharmacies for the discount. Where wholesalers are covered under paragraph 5**, the pharmaceutical companies are required to reimburse the discount to wholesalers. The discount must be reimbursed to pharmacies and wholesalers within 10 days of the day on which the request has been made. …’

3.6 Versicherungsvertragsgesetz (Law on insurance contracts)

Under paragraph 192 of the Versicherungsvertragsgesetz (Law on insurance contracts) in the version of 23 November 2007 entitled ‘Contractual supplies by the insurer’ regarding persons covered by private health insurance it provides that:

‘(1) In the insurance of healthcare costs, the insurer is required, within the agreed limits, to reimburse the expenses of necessary medical treatment for an illness or resulting from an accident and of all other supplies agreed, including those of pregnancy and childbirth and medical appointments for screening for diseases under programmes put in place by the law.

…’

12 As regards those persons with the right to reimbursement of their medical expenses under the law on public servants, Paragraph 80 of the Bundesbeamtengesetz (German Law on federal public

servants) in the version of 14 November 2011 (BGB1. 2011 I, p. 2219), entitled 'Treatments in the event of illness, care and childbirth', provides:

'(1) The following benefit from reimbursement:

1. Public servants who have the right to remuneration or who are on parental leave,

…

(2) Only those expenses incurred that are necessary and economically reasonable are capable of reimbursement

1. in cases of illness and care

…

(3) the reimbursements are awarded in the form of a reimbursement of at least 50% of the expenses capable of being reimbursed.

…'

3.7 Gesetz über Rabatte für Arzneimittel (Law on the discounts granted for medicines)

Paragraph 1 of the Gesetz über Rabatte für Arzneimittel (Law on the discounts granted for medicines), in the version of 22 December 2010 (BGBl. 2010 I, p. 2262), provides:

'**Pharmaceutical companies shall grant private medical insurance companies** and [bodies paying those costs under the law on public servants] in respect of prescription only medicinal products, the cost of which they have reimbursed the insured in part or in full, discounts according to the sharing of the costs in the proportions provided for in Paragraph 130a(1), (1a), (2), (3), (3a) and (3b) of the SGB V. …'

3.8 Principle of Neutrality

The Court of Justice held:

- That one of the principles on which the VAT system was based was neutrality, **in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain** (judgment of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraph 20).

- In the present case, the order for reference states that the pharmaceutical company is required, under national legislation, **to grant to private health insurance companies, in respect of prescription only medicinal products the cost of which the latter have reimbursed the insured persons in part or in full**, discounts according to the sharing of the costs in the same proportions as provided for statutory health insurance companies. The tax authority does not regard this discount as a reduction of the taxable amount.

- Thus, as a result of that legislation, Boehringer Ingelheim Pharma could dispose of a sum corresponding to the price of the sale of those products to pharmacies, reduced by that discount. It would not therefore be in conformity with the VAT Directive for the **taxable amount used to calculate the VAT chargeable to the pharmaceutical company, as a taxable person, to exceed the sum finally received by him**. If that were the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the pharmaceutical company is one, would not be complied with (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraph 28).

- Consequently, the taxable amount applicable to Boehringer Ingelheim Pharma as a taxable person must be made up of the amount corresponding to the price at which it **sold the medicinal products to pharmacies**, reduced by the discount made to private health insurance companies when they reimbursed the expenses incurred by their insured persons when purchasing those products.

- It is true that the Court held, in paragraph 31 of the judgment of 24 October 1996, Elida Gibbs (C 317/94, EU:C:1996:400), that Article 11C(1) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes

    - Common system of value added tax:
        - uniform basis of assessment (OJ 1977 L 145, p. 1) ('the Sixth Directive'), which corresponds to Article 90 of the VAT Directive, refers to the normal case of contractual relations entered into directly between two contracting parties, which are modified subsequently.

- Therefore, as held in paragraph 31 of that judgment, the Court stated that that provision is an expression of the principle of neutrality and, consequently, its application must not undermine the achievement of that principle (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraph 31).

- In the second place, it is clear from the case-law of the Court that Article 90(1) of the VAT Directive does not presuppose such a subsequent modification of the contractual relations in order for it to be applicable. **In principle, it requires the Member States to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person**. Moreover, there is no indication that in its judgment of 24 October 1996, Elida Gibbs (C 317/94, EU:C:1996:400), the Court wished to restrict the scope of application of Article 11C(1) of the Sixth Directive which corresponds to Article 90 of the VAT Directive. On the contrary, it is apparent from the facts of the Elida Gibbs case that there had been no modification of the contractual relations. Nevertheless, the Court held that Article 11C(1) of the Sixth Directive was applicable (see, to that effect, the judgment of 29 May 2001, Freemans, C 86/99, EU:C:2001:291, paragraph 33).

- Furthermore, the fact that, in the case in the main proceedings, the direct beneficiary of the supplies of the medicinal products in question was not the private health insurance company which reimbursed the insured persons but the insured persons themselves, is not such as to break the direct link between the supply of services made and the consideration received (see, by analogy, the judgment of 27 March 2014, Le Rayon d'Or, C 151/13, EU:C:2014:185, paragraph 35).

- As the Advocate General observed in points 44 and 45 of his opinion, the payments made at the point of purchase of the medicinal products must be regarded as consideration provided

by a third party within the meaning of Article 73 of the VAT Directive when those third parties, namely insured persons, requested reimbursement by the private health insurance companies and the latter obtained, in accordance with the national law, the discount owed to them by the pharmaceutical company**. Therefore, having regard to the facts at issue in the main proceedings, the private health insurance companies must be regarded as being the final consumer of a supply made by a pharmaceutical company**, which is a taxable person for the purposes of VAT, such that the amount payable to the tax authority may not exceed that paid by the final consumer (see, to that effect, the judgment of 24 October 1996, Elida Gibbs, C 317/94, EU:C:1996:400, paragraph 24).

- Consequently, it was held that, in the case in the main proceedings, since part of the consideration is not received by the taxable person because of the discount granted by the latter to private health insurance companies, there has in fact been a reduction in price after the time at which the supply took place, in accordance with Article 90(1) of the VAT Directive.

- Moreover, as regards the discount at issue in the main proceedings, it must be held that that discount is fixed by the law and that the pharmaceutical company is obliged to grant it **to private health insurance companies which have reimbursed the persons they insure for the expenses incurred by those persons when purchasing medicinal products. As has been stated in paragraph 35 above**, in those circumstances, the pharmaceutical company was not able freely to dispose of the full amount of the price received on the sale of its products to pharmacies or to wholesalers (see, to that effect, the judgment of 19 July 2012, International Bingo Technology, C 377/11, EU:C:2012:503, paragraph 31).

- In that regard, the Court held, in paragraph 28 of the judgment of 19 July 2012, International Bingo Technology (C 377/11, EU:C:2012:503), concerning a legal requirement for the payment of winnings in a bingo game, that since the part of the sale price of the cards which is distributed as winnings to players is fixed in advance and is mandatory, it cannot be regarded as forming part of the consideration received by the organiser of the game for the supply of the service provided to players.

- As the Advocate General observed in point 42 of his opinion, even though, in that judgment, the Court's analysis concerned the interpretation of Article 73 of the VAT Directive, the interpretation that the judgment provided of the notion of 'consideration' laid down in that provision may apply in respect of the words 'where the price is reduced' used in Article 90 of the directive, given that both provision and Article 73 of the directive address the components of the taxable amount.

- Having regard to the foregoing considerations, the answer to the question referred is that, in the light of the principles defined by the Court in the judgment of 24 October 1996, Elida Gibbs (C 317/94, EU:C:1996:400, paragraphs 28 and 31), regarding the determination of the taxable amount for VAT and having regard to the principle of equal treatment under EU law, Article 90(1) of the VAT Directive must be interpreted as meaning that the discount granted, under national law, by a pharmaceutical company to a private health insurance company

results, for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, **where it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures**.

3.9 Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, t**he decision on costs is a matter for that court. Costs incurred in submitting observations to the Court**, other than the costs of those parties, are not recoverable.

3.10 Final Ruling

On those grounds, the Court (Fifth Chamber) hereby rules:

In the light of the principles defined by the Court in the judgment of 24 October 1996, Elida Gibbs (C 317/94, EU:C:1996:400, paragraphs 28 and 31), regarding the determination of the taxable amount for value added tax and having regard to the principle of equal treatment under EU law, Article 90(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the discount granted, under national law, by a pharmaceutical company to a private health insurance company results, **for the purposes of that article, in a reduction of the taxable amount in favour of that pharmaceutical company, where it supplies medicinal products via wholesalers to pharmacies which make supplies to persons covered by private health insurance that reimburses the purchase price of the medicinal products to persons it insures**.

4 Commentary

With regard to the determination of the taxable amount for VAT where a pharmaceutical company grants discount to a private health insurance company, for the purposes of Article 90(1) of Council Directive 2006/112/EC, the Court has ruled that a reduction of the taxable amount is in favour of that pharmaceutical company, where it supplies medicinal products via wholesalers to pharmacies which in turn supply persons covered by private health insurance and reimburses the purchase price of the medicinal products to the persons insured.

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