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OPINION OF ADVOCATE GENERAL

TANCHEV

delivered on 11 July 2017 (1)

Case C?462/16

Finanzamt Bingen-Alzey

v

Boehringer Ingelheim Pharma GmbH & Co. KG

(Request for a preliminary ruling from the Bundesfinanzhof (Federal Finance Court, Germany))

(Value added tax — Supply of medicinal products by manufacturer to retailers via wholesalers — Articles 73 and 90 of Council Directive 2006/112/EC on the common system of value added tax — Taxable amount — Statutory obligation on manufacturer to provide a discount indexed to sale price — Member State tax authority treating discount as a reduction in price with respect to supplies made involving statutory (public) health insurance funds but not private health insurance funds — Principles elaborated in Case C-317/94, Elida Gibbs — Principle of equal treatment)

I. Introduction

1.

Boehringer Ingelheim Pharma GmbH & Co. KG (‘Boehringer’) is a manufacturer of pharmaceutical products at the head of a supply chain that is obliged, pursuant to a statutory provision of German law, to provide a price rebate after supply takes place which is indexed to the price of its products. The main proceedings entail determining if it is compatible with EU law for the Finanzamt Bingen-Alzey (Tax Office, Bingen-Alzey: ‘the Member State taxation authority’) to allow Boehringer to take into account this price rebate in calculating the taxable amount for VAT purposes with respect to supplies of pharmaceutical products made in the context of public health insurance but not private health insurance?

2.

This is the question addressed in the order for reference from the Bundesfinanzhof (Federal Finance Court, Germany), and which requires interpretation of Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. (2) The Bundesfinanzhof (Federal Finance Court) takes the view that the ruling of the Court in Elida Gibbs (3) is of central importance to resolving the dispute. In Elida Gibbs it was established that price reductions given by a company at the head of a supply chain to the ultimate consumer of its products in the same supply chain, through recourse to a system entailing presentation by the latter of vouchers in lieu of part of the price, reduced the taxable amount in relation to VAT on the supply made by that company, even though there was no contractual link between it and the ultimate consumer.

3.

According to the national referring court, public health insurance funds are ultimate consumers in the chain of supply of Boehringer's pharmaceutical products, and private health insurance funds are not. Does this difference justify the refusal of the Member State tax authority to reduce the taxable amount with respect to the latter type of supply?

4.

I have reached the conclusion that it does not.

II. Legal framework

A. EU law

5.

Article 73 of Directive 2006/112 states:

'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 supply.'

6.

Article 90(1) of Directive 2006/112 states:

'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.'

B. National law

1. Law on turnover tax

7.

Pursuant to the second sentence of Paragraph 10(1) of the Umsatzsteuergesetz (Law on turnover tax; 'UStG') remuneration is to comprise the recipient's total outlay (net of turnover tax) for the purpose of obtaining the supply in question.

8.

Under the first sentence of Paragraph 17(1) of the UStG, when the basis for assessment of a taxable transaction changes, the trader who made the supply is to adjust correspondingly the amount of tax payable.

2. Law on health insurance

9.

Under the first sentence of Paragraph 2(1) of the Fünftes Buch Sozialgesetzbuch (Fifth Book of the Social Code; 'SGB V'), the (public) health insurance funds are to make the services provided

for in law available to the persons whom they insure. Under the first sentence of Paragraph 2(2) of the SGB V, insured persons are in principle to receive the services as services in kind. Under the third sentence of Paragraph 2(2) of the SGB V, the (public) health insurance funds are to conclude contracts on the provision of services in kind with service providers, such as pharmacies. Under Paragraph 129 of the SGB V, a framework contract on the supply of medicinal products is to exist between the national association of public health insurance funds and the national association of pharmacies.

10.

Under sentences 1 to 4 of Paragraph 130a(1) of the SGB V, the public health insurance funds are to obtain from pharmacies, in respect of the medicinal products issued and chargeable by those funds, a discount in principle of 7% of the pharmaceutical company's sale price, exclusive of VAT. Pharmaceutical companies like Boehringer are required to reimburse the pharmacies for the discount.

11.

Other provisions of Paragraph 130a of the SGB V govern the period allowed for payment and the amount of the discount in particular circumstances.

12.

In contrast, privately insured persons pay for Boehringer's pharmaceutical products themselves at pharmacies, and then request reimbursement of their costs from the private health fund with whom they are insured.

13.

However, with respect to prescription only medicinal products, under Paragraph 1 of the Gesetz über Rabatte für Arzneimittel (Law on rebates for medicinal products; 'the AMRabG') of 22 December 2010, pharmaceutical companies like Boehringer are to grant private health insurance funds a rebate when the funds reimburse privately insured persons for prescription drugs, either in part or in full. The rebate afforded to private health insurance funds by companies like Boehringer is described in the order for reference as occurring at the rate of the refund, according to Paragraph 130a(1), (la), (2), (3), (3a) and (3b) of the SGB V.

14.

Under the case-law of the Bundesfinanzhof (Federal Finance Court), the taxable amount, for the purposes of turnover tax, is reduced by the rebates provided by companies like Boehringer to pharmacies and wholesalers with respect to public health insurance funds.

III. The facts in the main proceedings and the question referred for a preliminary ruling

15.

Boehringer is a pharmaceutical company which manufacturers medicinal products and supplies those products, subject to tax, to pharmacies via wholesalers. It did so in 2011, the year at issue in this case.

16.

In Germany pharmacies issue Boehringer's pharmaceutical products to persons with statutory

(public) health insurance pursuant to a framework agreement concluded with the national association of public health insurance funds. The pharmaceutical products are supplied to the public health insurance funds and the latter make them available to persons insured by them. The pharmacies grant the public health insurance funds a discount on the price of the medicinal products. As a pharmaceutical company, Boehringer is required, pursuant to Paragraph 130a(1) of the SGB V, to reimburse the pharmacies — or wholesalers when they are involved — for this discount. For the purposes of turnover tax, the tax authority treats the discount as a reduction in remuneration.

17.

The pharmacies issue pharmaceutical products to persons with private health insurance pursuant to individual contracts with them. Unlike the public health insurance funds, private health insurance funds are not themselves the customer for the medicinal products, but merely reimburse the persons insured by it for the costs incurred when they purchase pharmaceutical products. Pharmaceutical companies like Boehringer are then bound, pursuant to Paragraph 1 of the AMRabG, to grant the private health insurance funds a discount on the price of the medicinal product. The Member State taxation authority does not regard this discount as a reduction in remuneration for the purposes of turnover tax. If a person covered by private insurance does not seek reimbursement, then no rebate has to be paid by companies like Boehringer under Article 1 of the AMRabG read in conjunction with Article 130a of the SGB V. (4)

18.

In the year 2011 Boehringer granted the required discounts to private health insurers and nonetheless took them into account in its turnover tax return as a change in the basis for calculating its supplies of pharmaceutical products to traders in pharmaceutical products. As a result of a special turnover tax check, the Member State taxation authority issued an amended turnover tax assessment in which these discounts were not taken into account as reducing remuneration. An objection to this lodged by Boehringer was unsuccessful.

19.

Boehringer therefore brought an action before the Finanzgericht (Finance Court). The Finanzgericht amended the turnover tax assessment, to take account of the post-sale discount afforded to private health funds, in such a way that the turnover was assessed in Boehringer’s favour on the basis of the annual turnover tax assessment. The Member State taxation authority brought an appeal on a point of law against the judgment of the Finanzgericht (Finance Court) to the Bundesfinanzhof (Federal Finance Court).

20.

The fifth chamber of the Bundesfinanzhof (Federal Finance Court) referred the following question 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 in 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 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in the case where

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it supplies those medicinal products to pharmacies via wholesalers,

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the pharmacies supply those products, subject to tax, to persons with private health insurance,

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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?’

21.

Written observations were filed with the Court by Boehringer, the German and the United Kingdom Governments and the European Commission. There was no hearing.

IV. Summary of arguments

A. Boehringer and the Commission

22.

Boehringer and the Commission argue breach of the principle of equal treatment (the former relying specifically on Article 20 of the Charter of Fundamental Rights of the European Union) for which there is no objective justification.

23.

Independently of this, Boehringer contends that the same result follows from Article 73 of Directive 2006/112 as interpreted in the light of the ruling of the Court in Glawe. (5) In that case the Court held that, in the case of gaming machines which, pursuant to mandatory statutory requirements, were set up in such a way that they paid out as winnings on average at least 60% of the stakes inserted, the consideration actually received by the operator, pursuant to the predecessor to Article 73 of Directive 2006/112, (6) in return for making the machines available, consisted only of the proportion of the stakes the operator could actually take for itself. (7)

24.

For Boehringer this means that the discount furnished by Boehringer to private insurance funds must equally be taken into account, given that the amount of the reduction is clear and fixed in advance, and that Boehringer is bound by German law to reimburse a fixed part of the sale price of its pharmaceutical products to private insurance funds.

25.

Boehringer and the Commission also rely on Article 90 of Directive 2006/112, as interpreted in Elida Gibbs, and refute arguments made in the written observations of Germany and the United

Kingdom to the effect that Elida Gibbs and subsequent rulings such as Ibero Tours (8) (discussed below at points 35 to 39) stand for the proposition that payments made to an entity outside of a supply chain, such as a private insurance fund, cannot be viewed as a reduction in price after the supply takes place under Article 90 of Directive 2006/112.

26.

For Boehringer and the Commission the entity offering the price reduction to the final consumer does not have to be at the start of the value chain. The primary factor in determining the taxable amount is the amount actually received by the supplier and not what the beneficiary of the supply has spent. (9) They both invoke the principle of fiscal neutrality. (10) The Commission notes that, from an economic point of view, there is no difference in the position of private and public health insurance funds.

27.

The Commission submits that the objective of the German law on price reductions for pharmaceutical products is to secure equal treatment between public and private health insurance undertakings. (11) This the Commission argues necessarily has to extend to VAT.

B. Germany and the United Kingdom

28.

As already mentioned, both Germany and the United Kingdom are of the view that the finding in Elida Gibbs to the effect that there need be no contractual relationship between the final consumer and a taxable person, before price discounts provided by the latter to the former can be taken into account in calculating the taxable amount, is subject to the taxable person being within a chain of transactions ending with the final consumer. Germany and the United Kingdom contend that this analysis is supported by the Court's ruling in Ibero Tours (discussed below at points 35 to 39), (12) and the United Kingdom further points out that the principles of Elida Gibbs were reaffirmed in Commission v Germany. (13)

29.

Germany and the United Kingdom recall that there can only be consideration if there is a direct link between the goods supplied and the consideration received, (14) and that no such link exists between Boehringer and private health insurance funds. Article 73 of Directive 2006/112 must be interpreted in conformity with the fundamental principal that the VAT system is aimed at taxing only the end consumer. (15) The taxable amount comprises the consideration actually received by the taxable person, and not a value estimated according to objective criteria. (16) Germany notes that, under the Court's case-law, the determining factor with respect to consideration is the existence of an agreement between the parties for reciprocal performance, the payment received by the one being the real and effective counter-value for the goods furnished to the other. (17) Thus, the consideration received by Boehringer remains, with respect to supplies to privately insured persons, the sum it received from the first customer in the supply chain, its client pharmacies, or wholesalers, as the case may be.

30.

The United Kingdom adds that the payments made by Boehringer cannot be considered subsidies under Article 73 of Directive 2006/112, (18) and that Article 90 of Directive 2006/112 cannot apply to a situation where a national law requires a supplier to pay a contribution, charge, or levy (for

example, to help support the private provision of health care). The United Kingdom argues that private health insurance funds are not customers or third parties. Germany notes that Article 79(b) of Directive 2006/112, which precludes from the taxable amount price discounts and rebates granted to the customer and obtained by him at the time of the supply, is not relevant to the main proceedings, and further argues that the main proceedings are akin to disputes in which the Court has held that the taxable amount in sales paid for by credit card remains the full sale price, when a sum less than this, furnished by the credit provider, is accepted by the taxable person in consideration of the credit card service. (19)

31.

With respect to the alleged breach of equal treatment and fiscal neutrality, Germany and the United Kingdom take the view that the rebate paid by Boehringer to pharmacies (and where pertinent wholesalers) in the supply of pharmaceutical products via public health insurance funds is not comparable to the rebate paid by Boehringer to private health insurance funds. (20) Germany adds that there is no risk of distortion of competition; pharmaceutical products supplied to persons covered by public health insurance are not in competition with pharmaceutical products supplied to privately insured people. Given the two situations are not comparable, there is no need to consider objective justification. The United Kingdom contends that the choice of the EU legislature on the manner in which the supplies should be treated should be respected.

32.

The United Kingdom adds that the principle of fiscal neutrality, reflecting the common system of VAT and intended to tax only the final consumer, is not a rule of primary law which on its own enables the taxable amount within the meaning of Article 73 and Article 90 to be determined. (21)

V. Assessment

33.

The question referred is to be answered in the affirmative for the following reason.

34.

I take the view that the essence of the development of the law in Elida Gibbs lay solely in the finding that it is unnecessary for a taxable person to be contractually linked to the direct beneficiary of a discount before that discount can amount to a price reduction after supply takes place for the purposes of Article 90 of Directive 2006/112. (22) The absence, then, of a contractual link between Boehringer and the private insurance funds to whom it is required to afford, under German law, a post-purchase discount indexed to price is equally irrelevant in the main proceedings to the applicability of Article 90 of Directive 2006/112.

35.

In addition to this, I am unable to draw from the ruling of the Court in Ibero Tours (23) any express finding or necessary implication that the Elida Gibbs rule only applies when the recipient of a discount is the final consumer in a supply chain beginning with the taxable person providing the discount. Indeed, the Court has held that there is no indication in the Elida Gibbs ruling that it was intended to be interpreted restrictively, and that the judgment supports the wording of Article 11C(1) of the Sixth VAT Directive (24) (now Article 90 of Directive 2006/112) which presupposes that subsequent modification of contractual relations is not necessary. (25)

36.

Ibero Tours, the taxable person in that case, was a travel agent that provided services as an intermediary between tour operators and the tour operator's clients ('travellers'). Unlike the case to hand, which involves a chain of supply, this entailed a single supply. Ibero Tours received a commission from tour operators for its services as an intermediary in this single supply, and used some of this commission to effectively subsidise travellers, so that the amount received by the tour operator was higher than that paid by travellers. Ibero Tours argued on the basis of Elida Gibbs that the price reductions it afforded travellers should be deducted from the commission Ibero Tours received from the tour operators for the purposes of calculating the taxable amount of Ibero Tours transactions.

37.

In essence Ibero Tours' claim was rejected because it was held by the Court to be an intermediary to a single transaction only, rather than part of a chain of transactions. The Court pointed out in Ibero Tours that the consideration received by the taxpayer at the head of the supply chain in Elida Gibbs was actually reduced by the reduction it granted directly to the final consumer via a voucher scheme, (26) while Ibero Tours was bound to pay the tour operator the agreed price for its travel services, regardless of any discount that Ibero Tours elected to give to the travellers. (27) Nor was there any impact on the consideration received by Ibero Tours for their intermediation service. Accordingly, pursuant to Article 11 A(1)(a) of the Sixth Directive (now Article 73 of Directive 2006/112), such a price reduction did not lead to a reduction of the taxable amount either for the principal transaction or for the supply of services by the travel agent. (28)

38.

I read therefore the reference in the judgment in Ibero Tours to the tour operator 'not being at the head of a chain of operations, as it provides services directly to the final consumer' simply as underscoring the fact that, in that case, Ibero Tours provided only an intermediary service to a single transaction. (29) Manifestly, Boehringer is not in the same position.

39.

Moreover, neither the taxpayer in Elida Gibbs nor Ibero Tours were providing price discounts as a consequence of legislative intervention that bound them to do so, and which was, moreover, indexed to the price of the supply. This appears from the case file to be the case, however, with respect to Boehringer.

40.

I am therefore of the view that, in accordance with the Court's case-law, Boehringer has not had 'freely at its disposal the full amount' of the price received at first sale of its products to pharmacies or wholesalers. (30) At most, Boehringer is a 'mere temporary custodian' (31) of the part of the amount received that it is bound to pay later to public and private health funds as a rebate and which, importantly, is indexed to the price of the pharmaceutical products supplied.

41.

The Court reached a conclusion of this kind in International Bingo Technology, in the context of legislative intervention on the amount paid as winnings for a bingo card game. (32) The Court held that that since 'the proportion of the card price which is paid as winnings to players is fixed in advance and is mandatory, it cannot be regarded as part of the consideration received by the

organiser of the game for the supply of the service provided to players'. (33)

42.

Since both Article 73 and Article 90 of the VAT Directive address the components of 'taxable amount', I can see no reason why the ruling made in the context of the meaning of 'consideration' under Article 73 in International Bingo Technology cannot be applied to the interpretation of 'where the price is reduced' under Article 90. (34) Nor, I would add, does any question arise as to whether Boehringer makes payments to private health funds as consideration for some sort of service. (35) This is clearly not the case.

43.

I acknowledge that the Court has observed that it 'hardly appears to be appropriate to draw general conclusions' from the taxation of gambling transactions 'in order to apply them to the ordinary taxation of supplies of goods'. (36) However, I do not view these remarks as extending to circumstances in which Member State legislation intervenes to compel the taxpayer to reduce the price it will ultimately receive for a supply in proportion to the price of that supply, through mandatory payments to either the ultimate consumer or a third party. The Court held in Town and County Factors that the full amount of entry fees received by the organiser of a competition, when the organiser elected to pay out a prize, constituted the taxable amount for that competition, partly because there were no mandatory statutory provisions to the effect that a certain percentage of player's stakes had to be paid out. (37)

44.

Indeed, casting privately insured persons as the final consumers in the supply chain, rather than their private health funds, might be viewed as a legal fiction, particularly when the VAT paid by such persons to pharmacies is paid back to them as part of the reimbursement provided by private health funds. After all, the Court has held that 'consideration of economic realities is a fundamental criterion for the application of the common system of VAT". (38)

45.

Thus, payments, made at point of purchase might be viewed as consideration provided by a third party pursuant to Article 73 of Directive 2006/112, when such third parties seek reimbursement from private health insurance funds and Boehringer becomes liable under German law to provide the rebate set by paragraph 1 of the AMRabG. On this analysis, a private health insurance fund can be viewed as the final consumer of a supply made by Boehringer as the taxable person, so that, the amount of VAT to be collected by the tax authority will correspond exactly to the amount of VAT declared on the invoice and paid by the final consumer. (39) The fact that a private insurance fund is not the direct beneficiary of the medicinal products supplied by Boehringer does not break the direct link between the supply of those goods and the consideration received. (40)

46.

The approach I am advocating will avoid a situation in which the tax authorities charge an amount that exceeds the tax paid by Boehringer as the taxable person. (41) It will, moreover, respect the fundamental principle of VAT to the effect that the basis of assessment is the consideration actually received, (42) which translates with respect to Article 90 of Directive 2006/112/EC into a requirement 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. (43)

47.

Finally, given that Article 90 of Directive 2006/112/EC is to be interpreted in conformity with the principle of equal treatment, as reflected in Article 20 of the Charter, this too supports an affirmative answer to the question referred. Irrespective of whether or not there is competition between the supply of publicly funded and privately funded pharmaceutical products, the Court has held that equal treatment is not confined in tax matters to the principle of fiscal neutrality as between competing traders, but may be breached 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. (44) I note that the order for reference states that the two discounts can only be differentiated by their technical characteristics, even though their tax treatment for the purposes of VAT is significantly different.

48.

In the light of the subject matter of Article 90 of Directive 2006/112, and its aim of ensuring that the bases of assessment of VAT is to be the consideration actually received, along with the principles and objectives of VAT law, (45) I take the view that VAT treatment of pharmaceutical supplies to publicly and privately insured persons are comparable situations that are being treated differently, for which there is no apparent objective justification. (46)

49.

In closing, I agree that VAT is an indirect tax on consumption borne by the consumer, and the taxable trader is “‘simply’” acting as tax collector on behalf of the State’. (47) I therefore support the view that ‘in the event of an otherwise irreconcilable difference, the requirement that the amount of VAT levied should be the correct proportion of the actual value finally received by the supplier (and, for the chain as a whole, of the final price) should be given greater weight than structural requirements. In other words, achievement of the end is more important than implementation of the means designed to achieve it’. (48)

VI. Conclusion

50.

I therefore propose the following answer to the question referred by the Bundesfinanzhof (Federal Finance Court, Germany):

On the basis of the case-law of the Court of Justice of the European Union (judgment of 24 October 1996 in 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, a pharmaceutical company which supplies medicinal products is entitled to a reduction of the taxable amount under Article 90 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax in the case where

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it supplies those medicinal products to pharmacies via wholesalers,

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the pharmacies supply those products, subject to tax, to persons with private health insurance,

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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

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the pharmaceutical company is required to pay a ‘discount’ to the private health insurance company pursuant to a statutory provision.

(1) Original language: English.

(2) OJ 2006 L 347, p. 1.

(3) Judgment of 24 October 1996, C?317/94, EU:C:1996:400, ‘Elida Gibbs’.

(4) According to the written observations of Germany.

(5) Judgment of 5 May 1994, C?38/93, EU:C:1994:188.

(6) Namely Article 11A(1)(a) of 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 VAT Directive’).

(7) Judgment of 5 May 1994, C?38/93, EU:C:1994:188, paragraph 9. Boehringer also refers to paragraph 12 of the same judgment, and judgments of 17 September 2002, Town & County Factors, C?498/99, EU:C:2002:494, paragraph 30; of 27 March 2014, Le Rayon d’Or, C?151/13, EU:C:2014:185, paragraph 29; and Elida Gibbs, paragraph 27. In the latter, the Court noted that it was settled case-law that ‘consideration is the “subjective” value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria’.

(8) Judgment of 16 January 2014, C?300/12, EU:C:2014:8.

(9) Here Boehringer refers to paragraphs 29 and 35 of the judgment of the Court of 27 March 2014, Le Rayon d’Or, C?151/13, EU:C:2014:185, and paragraph 28 of Elida Gibbs. The Commission refers to the judgments of 3 July 1997, Goldsmiths, C-330/95, EU:C:1997:339, paragraph 15; and of 26 January 2012, Kraft Foods Polska, C?588/10, EU:C:2012:40, paragraph 20.

(10) The Commission relies on the order of 9 December 2011, Connoisseur Belgium, C?69/11, not published, EU:C:2011:825, paragraph 21, and the judgment of 8 June 2006, L.u.P., C?106/05, EU:C:2006:380, paragraph 48 and the case-law cited.

(11) The Commission refers to Document of the Bundestag 17/3698, pp. 60 and 61 (http://dipbt.bundestag.de/dip21/btd/17/036/1703698.pdf).

(12) Judgment of 16 January 2014, C?300/12, EU:C:2014:8.

(13) Judgment of 15 October 2002, C?427/98, EU:C:2002:581.

(14) Germany cites the judgment of 21 November 2013, Dixon’s Retail, C?494/12, EU:C:2013:758, paragraph 33 in support of this argument. The United Kingdom refers to judgments of 5 February 1981, Coöperatieve Aardappelenbewaarplaats, C?154/80, EU:C:1981:38, paragraph 12; of 23 November 1988, Naturally Yours Cosmetics, C?230/87,

EU:C:1988:508, paragraph 11; and of 8 March 1988, Apple and Pear Development Council, C?102/86, EU:C:1988:120, paragraphs 11 and 12.

(15) Germany cites the judgment of 7 November 2013, Tulic? and Plavo?in, C?249/12 and C?250/12, EU:C:2013:722, paragraph 34 in support of this argument.

(16) Ibid., paragraph 33.

(17) Germany relies on the judgment of 15 May 2001, Primbrack, C?34/99, EU:C:2001:271, paragraph 25.

(18) The United Kingdom relies on judgment of 22 November 2011, Office des produits wallons, C?184/00, EU:C:2001:629, paragraph 18.

(19) Germany refers to the judgments of 25 May 1993, Bally, C?18/92, EU:C:1993:212, paragraph 16, and of 15 May 2001, Primback, C?34/99, EU:C:2001:271, paragraph 38.

(20) Germany refers, among others, to the judgments of 10 April 2008, Marks & Spencer, C?309/06, EU:C:2008:211, paragraph 49; of 19 July 2012, Lietuvos geležinkeliai, C?250/11, EU:C:2012:496, paragraph 45; and of 6 November 2014, Feakins, C?335/13, EU:C:2014:2343, paragraphs 49 and 51.

(21) The United Kingdom cites the judgments of 15 November 2012, Zimmermann, C?174/11, EU:C:2012:716, and of 19 December 2012, Grattan, C?310/11, EU:C:2012:822 in support of this argument.

(22) See the Opinion of Advocate General Kokott in Grattan, C?310/11 EU:C:2012:568, point 32, where the Advocate General observed that ‘in Elida Gibbs the Court found for the first time that a reduction on the basis of assessment is potentially to be accepted even where the contractually defined consideration is not modified at all.’ I also note that, as pointed out in the written observations of Boehringer, an important observation made by Advocate General Wathelet at point 29 of his Opinion in Ibero Tours, C?300/12, EU:C:2013:502, was not contradicted by the Court in that case. Advocate General Wathelet observed that even ‘though the Court regarded the taxable person as “the first link in a chain of transactions”, that is a reference to the facts of the case leading to the judgment in Elida Gibbs, in which the manufacturer offering the price reduction to the final consumer was at the start of the value chain, rather than a statement of a prerequisite for benefiting from the reduction in the taxable amount.’

(23) Judgment of 16 January 2014, C?300/12, EU:C:2014:8.

(24) Judgment of 29 May 2001, Freemans, C?86/99, EU:C:2001:291, paragraph 33.

(25) Ibid.

(26) Judgment of the Court of 16 January 2014, Ibero Tours, C?300/12, EU:C:2014:8, paragraph 29.

(27) Ibid., paragraph 31.

(28) Ibid., paragraph 32.

(29) Ibid., paragraph 30.

(30) Judgment of 19 July 2012, International Bingo Technology, C?377/11, EU:C:2012:503,

paragraph 31. See also the judgments of 5 May 1994, Glawe, C?38/93, EU:C:1994:188 and of 24 October 2013, Metropol Spielstätten, C-440/12, EU:C:2013:687.

(31) Judgment of 19 July 2012, International Bingo Technology, C?377/11, EU:C:2012:503, paragraph 19. This suggestion was made by the national referring court in that case.

(32) The Court reached this conclusion in the context of the predecessor to Article 73 of Directive 2006/112, namely Article 11A(1)(a) of the Sixth VAT Directive.

(33) Judgment of 19 July 2012, International Bingo Technology, C?377/11, EU:C:2012:503, paragraph 28.

(34) I also note that the rebates paid by Boehringer do not fall within the matters precluded in calculation of the taxable amount appearing in Article 79 of Directive 2006/112.

(35) As has been held to occur when credit card services intervene in a retail sale between customers and stores. See, for example, judgment of 15 May 2001, Primback, C?34/99, EU:C:2002:271.

(36) Judgment of 29 May 2001, Freemans, C?86/99, EU:C:2001:291, paragraph 30. See also the Opinion of Advocate General Stix-Hackl in Town and County Factors, C?498/99, EU:C:2001:494, point 74. Advocate General Jacobs in Glawe, C-38/93, EU:C:1994:81, observed at point 16 that ‘gaming transactions are ill-suited to value added taxation.’

(37) Judgment of 17 September 2002, Town and County Factors, C?498/99, EU:C:2002:494, paragraph 30. See also the Opinion of Advocate General Kokott in Grattan, C?310/11, EU:C:2012:568, point 45.

(38) Judgment of 7 October 2010, Loyalty Mangement, C-53/09 and C-55/09, EU:C:2010:590.

(39) Judgment of 10 July 2008, Koninklijke Ahold, C?484/06, EU:C:2008:394, paragraph 36, citing Elida Gibbs, paragraph 24.

(40) See, by analogy, judgment of 27 March 2014, Rayon d’Or, C?151/13, EU:C:2014:815, paragraph 35.

(41) E.g. judgment of 26 January 2012, Kraft Foods Polska SA, C?588/10, EU:C:2012:40, paragraph 27 and the case law cited; and of 7 November 2013, Tulic? and Plavo?in, C?249/12 and C?250/12, EU:C:2013:722, paragraph 36.

(42) My emphasis. See e.g. the judgment of 26 January 2012, Kraft Foods Polska, C?588/10, EU:C:2012:40, paragraph 27 and the case-law cited.

(43) See judgments of 15 May 2014, Almos Agrárkülkereskedelmi, C?337/13, EU:C:2014:328, paragraph 22 and the case-law cited; and of 19 December 2012, Grattan, C?310/11, EU:C:2012:822, paragraph 35, with respect to the predecessor to Article 90 of Directive 2006/112, namely Article 11C(1) of the the Sixth VAT Directive

(44) Judgment of 25 April 2013, Commission v Sweden, C?480/10, EU:C:2013:263, paragraph 17 and the case law cited.

(45) Judgment of 7 March 2017, RPO, C?390/15, EU:C:2017:174, paragraph 42 and the case-law cited.

(46) See order for reference.

(47) Opinion of Advocate General Kokott in Di Maura, C?246/16, EU:C:2017:440, point 21 and the case law cited.

(48) See the Opinion of Advocate General Jacobs in Commission v Germany, C?427/98, EU:C:2001:457, point 110.