



Neutral Citation: [2026] UKUT 00135 (TCC)

Case Number: UT/2025/000011

**UPPER TRIBUNAL  
(Tax and Chancery Chamber)**

Rolls Building, London

*VALUE ADDED TAX – Article 90(1) Directive 2006/112/EC – whether payments made to Department of Health and Social Care by manufacturer of medicines represents retrospective price reduction on supplies made to wholesalers – if so whether adjustment to output tax declared on supply to wholesalers permissible where supply into final consumption zero rated – appeal allowed*

**Heard on:** 9 – 11 February 2026

**Judgment date:** 26 March 2026

**Before**

**JUDGE SWAMI RAGHAVAN  
JUDGE AMANDA BROWN KC**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**  
**Appellants**

**and**

**BOEHRINGER INGELHEIM LIMITED**  
**Respondent**

**Representation:**

For the Appellants: Mr John Brinsmead-Stockham KC and Ms Sarah Black, both of Counsel, instructed by the General Counsel and Solicitor to His Majesty’s Revenue and Customs

For the Respondent: Mr Kieron Beal KC, Counsel, instructed by PWC LLP

# DECISION

## INTRODUCTION

1. This is an appeal brought by HM Revenue & Customs (**HMRC**) against a decision of the First-tier Tribunal Tax Chamber (**FTT**) issued on 21 October 2024 under neutral citation number [2024] UKFTT 948 (TC) in which the FTT allowed the appeal of Boehringer Ingelheim Limited (**BIL**) allowing claims made pursuant to section 80 Value Added Tax Act 1994 (**VATA**) to recover overpaid output tax on supplies of pharmaceuticals in respect of which it was held there had been a post supply price rebate.

2. BIL operates in the pharmaceutical industry and supplies pharmaceutical products in the United Kingdom. In the course of its business activities, BIL supplies pharmaceutical products, referred to as health service medicines (**Medicines**), to the National Health Service (**NHS**). Those supplies are made either: (a) directly to NHS healthcare services providers (**HSPs**) and retail pharmacies (**Pharmacies**); or (b) indirectly through wholesale distributors (**Wholesalers**). All such sales are liable to VAT at the standard rate. Similarly, sales by Wholesalers to HSPs and Pharmacies will be standard rated. The Medicines will either be used by HSPs in connection with “free at the point of use” NHS services in a hospital setting or dispensed for home use by patients by Pharmacies. Where used in a hospital setting, there is no supply for VAT purposes of the Medicines by the HSP. Where dispensed for a fee, pursuant to the relevant provisions of VATA<sup>1</sup> the supply made for VAT purposes is zero-rated.

3. Pursuant to provisions of the NHS Act 2006 (**NHS Act**) the Secretary of State for Health and Social Care has a duty to promote a comprehensive health service designed to ensure improvement in the health of people in England, and the prevention and diagnosis of illness. Similar obligations are imposed on the devolved Governments for Scotland, Wales, and Northern Ireland. The Secretary of State is under an obligation to ensure that the NHS is adequately funded. Sections 261 – 266 NHS Act, broadly stated, provide for the Secretary of State to impose or permit schemes limiting price and/or profit or to otherwise manage the cost of Medicines purchased for and used by the NHS. In the period 1 April 2014 – 30 September 2020, and hence relevant to the decisions appealed to the FTT, there were two voluntary schemes: the Pharmaceutical Price Regulation Scheme (**PPRS**) and the Voluntary Scheme for Branded Medicines Pricing and Access (**VPAS**) (together **Voluntary Schemes**).

4. BIL made significant payments to the Department of Health and Social Care (**DHSC**) in accordance with what is described under the Voluntary Schemes as the affordability mechanism (**Payments**). BIL considered that the Payments represented a price rebate justifying it to reduce the VAT that it accounted for on the supplies of Medicines to which the Voluntary Schemes applied. BIL made five retrospective claims to recover VAT it considered had been overpaid in consequence of not having recognised the Payments as a price rebate as defined in Article 90(1) of Directive 2006/112/EC (**PVD**). The claims were for each of the VAT prescribed accounting periods starting 1 April 2014 through to that ending on 30 September 2020. The total VAT said to have been overpaid in this period is £21,488,166.66.

5. Further claims have been submitted and are the subject of appeals to the FTT for periods post 30 September 2020. Those appeals are stayed pending the outcome of this appeal. We were also informed that there are also a large number of appeals made by other pharmaceutical manufacturers in the UK in respect of similar claims made by them.

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<sup>1</sup> Section 30 and Item 1 Group 12 Schedule 8

6. HMRC rejected the overpayment claims and BIL appealed to the FTT. So far as relevant to the matters on appeal before us, the FTT held that the Payments reduced the taxable amount of BIL's supplies. It so concluded because it considered that the DHSC functioned as the economic final consumer having ultimately borne the cost of the Medicines through its funding of NHS England and the devolved systems. That economic reality meant that the Payments reduced the "consideration obtained" by the BIL for VAT purposes. The FTT rejected HMRC's reliance on the zero-rating of downstream supplies of Medicines, holding that Article 90(1) of the PVD nonetheless required a corresponding reduction in the taxable amount. It also rejected characterising the Payments as a tax-like impost or as unconnected with the underlying supply.

7. HMRC sought and were granted permission to appeal the FTT decision on grounds which we summarise as follows:

(1) The FTT incorrectly held that pursuant to the terms of Article 90 the Payments reduced the taxable amount of BIL's supplies of goods to HSPs, Pharmacies and Wholesalers. In reaching that conclusion the FTT made further errors of law in that it incorrectly applied the relevant Court of Justice of the European Union (CJEU) jurisprudence:

(a) in determining that DHSC was to be treated as a final consumer;

(b) when considering the nature and effect of the payment made by BIL to DHSC; and

(2) In the event that the FTT was correct to hold that Article 90 applied it was incorrect to determine that a post supply adjustment was possible where the supply into final consumption was zero-rated for VAT purposes. In particular, the FTT failed to apply relevant CJEU jurisprudence confirming that no adjustment is possible in those circumstances.

8. We were grateful to both parties' Counsel for their clear skeletons, submissions, and responses to our questions. For the reasons set out below we have determined that the FTT erred in law and that its decision should be set aside. We remake the decision on the basis of the test we consider correctly applies to the facts found by the FTT and allow HMRC's appeal.

## **RELEVANT LAW**

### **NHS Act**

9. For the purposes of this judgment, we need only summarise the relevant NHS Act provisions:

(1) Section 261 confers powers on the Secretary of State and the industry body (under s266(6) this is a body which appears to the Secretary of State to represent manufacturers and suppliers, the relevant body here being the Association of the British Pharmaceutical Industry) to agree a scheme which: (a) limits the prices which may be charged by manufacturers or suppliers of Medicines; (b) limits the profits which may accrue to manufacturers or suppliers on a supply of Medicines; or (c) otherwise provides for the manufacturers or suppliers to pay an amount calculated by reference to sales or estimated sales of Medicines. A manufacturer or supplier is bound to comply with such a scheme only if it has consented.

(2) Section 262 empowers the Secretary of State, following consultation with the industry body, to impose statutory price controls on Medicines and to require repayment of sums charged above the permitted level. The power is residual. It may not be exercised in relation to a manufacturer or supplier, and Medicine, which is for the time being covered by an applicable voluntary scheme.

(3) Section 263 authorises the Secretary of State, after consultation, to make a statutory scheme controlling prices, profits, or requiring payments linked to sales of Medicines. The scheme may include repayment obligations and restrictions on price increases. Where a medicine is covered by a voluntary scheme applying to its manufacturer or supplier, the statutory scheme may not operate concurrently, preserving mutual exclusivity.

(4) Section 266 contains supplementary provisions governing the exercise of powers under sections 261 to 264. Powers may be exercised by regulations or by directions to specific manufacturers or suppliers. Controls can only be exercised by reference to the prices, profits, or payments that would be reasonable in all the circumstances, taking account of access to medicines on reasonable terms and the costs of research and development.

10. Sections 261 and 263 were amended with effect from 7 August 2017. Prior to that date the provisions provided only for voluntary and statutory schemes for controlling prices and/or profits; the ability for a scheme expressly to require payments linked to sales was not, prior to then, available.

## **PVD**

11. There is no dispute between the parties that the legislation relevant to the determination of this appeal is solely contained in the provisions of the PVD. Those provisions set out the substantive basis on which the taxable amount of a supply is determined. The domestic charging provisions of VATA apply to the taxable amount.

12. The VAT said to have been overpaid, and the subject of the appeal, all predates 31 December 2020 and hence was overpaid when the UK was part of the European Union. In consequence of the provisions of European Union (Withdrawal) Act 2018, the Retained EU Law (Revocation and Reform) Act 2023 (both as amended), and Finance Act 2024 s28, CJEU jurisprudence issued prior to 31 December 2020 is binding on us. CJEU case law issued after that date is not binding but we may have regard to it.

13. The relevant articles of the PVD are as follows:

### “Article 73

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.

### Article 78

The taxable amount shall include the following factors:

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

...

#### Article 90

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.

...

14. We note, as it is relevant when we come to consider the case law of the CJEU, that Article 73 reflected the predecessor VAT Directive<sup>2</sup> Article 11A(1)(a), Article 78 reflected Article 11A(2) and Article 90, Article 11C(1).

#### **CJEU case law**

15. The issue in this appeal concerns the correct interpretation and application of the CJEU jurisprudence on Articles 73 and 90. To put the FTT's reasoning and the detail of the parties' competing submissions in the appeal, which we come onto, in their proper context it is convenient to start with that. Accordingly, in this section we outline the principles to be derived from the case law of the CJEU beginning with the Court's early case-law on what counts as "consideration", and how a direct link between supply and value is identified, through to later cases which apply those principles to rebates paid within or alongside distribution chains. As will be seen, some of the later authorities concern reimbursement schemes in the pharmaceutical industry, including cases involving other Boehringer Ingelheim group companies and such schemes in other countries. In order to trace the evolution of the CJEU's approach we will consider these cases chronologically. The parties were largely agreed on the core substance of these principles and where that is the case we shall deal with the case briefly. Certain cases however require more detailed discussion given their centrality to the dispute between the parties.

#### ***Staatssecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA*<sup>3</sup> (Dutch Potato Growers)**

16. This case concerned the concept of "consideration" as an essential feature of the scheme of VAT. The question referred arose in the context of payments made by potato growers in the Netherlands who were part of a co-operative running a warehouse. No charges had been made for storage in the warehouse, but the value of the growers' share in the co-operative had reduced. The question arose as to whether the diminution in value of the share represented consideration for the supply of warehousing under what is now Article 73. The CJEU determined that consideration was an EU law concept. Consideration required a "direct link" with the services provided.<sup>4</sup> Consideration was assessed by reference to its subjective value. Where there was no subjective value agreed between buyer and seller there was no consideration and therefore no assessable supply.<sup>5</sup>

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<sup>2</sup> Sixth Council Directive 77/388/EEC

<sup>3</sup> C 154/80

<sup>4</sup> Paragraphs 12

<sup>5</sup> Paragraphs 13 - 15

***Naturally Yours Cosmetics Ltd v CCE*<sup>6</sup> (NYC)**

17. A UK supplier sold goods at a reduced monetary price on condition that recipients used the goods for demonstration. The issue for determination was whether the consideration was limited to the reduced price.

18. The Court confirmed that the direct link test identified in the *Dutch Potato Growers* case was also required where there was a supply of goods. In the circumstances presented in *NYC* it was necessary to assess whether the condition giving rise to the discounted price (that the goods were used for demonstration) represented value assessable as consideration. The Court considered that if performance of the condition was valuable to the supplier, then there would be a direct link to the reduction in the cash price.<sup>7</sup>

***Tolsma v Inspecteur der Omzetbelasting*<sup>8</sup> (Tolsma)**

19. A barrel organ player was assessed to VAT on the sums collected from passersby as he played. The Court was called on to determine whether the sums so collected represented consideration for VAT purposes. Citing the *Dutch Potato Growers* case and *NYC* the Court reiterated that consideration for VAT purposes required a direct link between the supply of goods or services and that said to have been received in respect of the supply. The Court confirmed that a sum represented consideration only where there is “a legal relationship ... pursuant to which there is reciprocal performance, the remuneration received by the provider of the services constituting the value actually given in return for the service supplied to the recipient.”<sup>9</sup>

***Elida Gibbs Ltd v CCE*<sup>10</sup> (Elida)**

20. Elida Gibbs operated two promotion schemes: a money off coupon and a cash back. Under the money off coupon the final consumer of products would present the coupon to the retailer and pay a reduced price for the goods i.e. 15p off a tube of toothpaste otherwise costing £1.20. The retailer receiving the coupon was then paid the 15p by Elida. The cash back scheme entitled the final consumer with proof of purchase to receive the cashback i.e. 15p which was paid to them directly by Elida. A question arose as to whether the 15p paid under either scenario met the terms of what is now, Article 90 i.e. a post supply price rebate.

21. The Court started by observing that the basic principle of the VAT system was that it was intended to tax only the final consumer such that the taxable amount which serves as the basis for the VAT to be collected, cannot exceed the consideration actually paid by the final consumer. It is that amount i.e. the amount paid and borne at final consumption which forms the basis of VAT to be collected. In that context, and as VAT is intended to be neutral for every taxable person in the chain of a taxable supply, each taxable person in the chain was required to account to the tax authorities proportionately to the value added by it.<sup>11</sup>

22. In the circumstances presented in *Elida* it was therefore observed that because the manufacturer refunded the value of the coupon or cash back to, or for the benefit of, the final consumer the VAT paid at final consumption was the amount net of the rebate. Accordingly,

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<sup>6</sup> C 230/87

<sup>7</sup> Paragraphs 14 and 18

<sup>8</sup> C-16/93

<sup>9</sup> Paragraphs 13 and 14

<sup>10</sup> C-317/94

<sup>11</sup> Paragraph 19 - 24.

to have collected VAT from the manufacturer on the amount paid to it by the wholesaler without taking account of the refunded sum would cause the manufacturer to have accounted for VAT on more than its value added and the VAT collected in the chain of transactions would exceed that paid by the final consumer thus breaching the principle of neutrality. Thus whilst the language of what is now Article 90 naturally lent itself to a price reduction in a bilateral situation it also applied to a longer distribution chain.<sup>12</sup> Critically, the Court considered that it was permissible for there to be a rebate adjustment at the top of the chain of distribution without the need to adjust down the supply chain as each participant in the supply chain had properly accounted for its value added.<sup>13</sup>

### ***Argos Distributors Limited v CCE*<sup>14</sup> (Argos)**

23. The judgment in *Argos* was released by the Court on the same day as *Elida*. It concerned the sale of gift vouchers at a discount. The supply of a voucher was not, at that time, a supply for VAT purposes. VAT was accounted for on the face value of the voucher when redeemed. The issue for the Court was whether Argos was permitted to treat the discount on the sale of the voucher as a discount on the sale of the goods when the voucher was redeemed. The Court concluded that the proper basis of assessment of the consideration received on the sale of goods when the voucher was presented was the money actually paid when the voucher was issued. The Court emphasised that it was for Argos to demonstrate the amount of money actually received.<sup>15</sup>

### ***CCE v Primback*<sup>16</sup> (Primback)**

24. A furniture retailer, Primback, sold goods under “interest-free” credit; the credit provider paid the retailer less than the full retail price, while the customer paid the full price to the credit company. Primback contended that it discounted the supply made to the consumer. The Court considered the “determining factor” in the assessment of the taxable amount was the “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.”<sup>17</sup> It considered that Primback had supplied the furniture at full price to the consumer but had agreed to offset a charge by the credit provider to the retailer which represented the consideration for its supply of credit on interest free terms. Thus, the Court rejected Primback’s contention that to collect tax on the full price of the retail goods failed to take account of the commercial reality that it, in fact, did not receive the full retail price of the goods.<sup>18</sup> The Court assessed that the customer bore VAT on the full retail price of the goods such that “if the tax authorities were able to charge VAT only on a fraction of the price invoiced to the purchaser and payable by him ... a portion of the advertised price of the goods sold to the final consumer would not be subject to tax, with the result that the principle of fiscal neutrality would be infringed.”<sup>19</sup>

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<sup>12</sup> Paragraphs 28 – 31.

<sup>13</sup> Paragraph 32 – 33.

<sup>14</sup> C-288/94

<sup>15</sup> Paragraphs 18 – 21.

<sup>16</sup> C-34/99

<sup>17</sup> Paragraph 25

<sup>18</sup> Paragraphs 35 - 37

<sup>19</sup> Paragraph 48

## *Commission v Germany*<sup>20</sup>

25. In these infraction proceedings the EU Commission challenged Germany's implementation of what is now Article 90. German legislation permitted an adjustment for a rebate only in a bilateral situation and did not provide for adjustment in respect of money off coupons.

26. This case is critical to HMRC's second substantive ground of appeal. The parties did not agree on the principles to be derived from the case, particularly in that context. We therefore need to address the case including the Advocate General's (AG) Opinion in some detail.

### *Opinion of AG Jacobs*

27. The Opinion starts with a review of, and observations on, the VAT system. The AG notes that the underlying principles and mechanics of the VAT system are intended to tax the final consumer. However, the means by which tax is assessed, along the chain of transactions, is that VAT is to be accounted for on the value received for the supply after deduction of the VAT borne at the preceding stage such that:

“4. ... By its operation, a chain of transactions builds up, in which the net amount payable in respect of each link is a specified proportion of the value added at that stage. When the chain comes to an end, the total amount levied will have been the relevant proportion of the final price.

5. That approach also ensures the 'neutrality' of VAT as regards taxable persons ... they do not in principle bear the burden of any tax themselves; only the final consumer at the end of the chain of supply in fact bears that burden”.

28. The AG used a simplified example of the sale of goods from manufacturer to wholesaler to retailer to final consumer assuming that the transactions in question were successive sales of an item with an increase in price at each stage but considered that the principles he discerns did not depend on that assumption.<sup>21</sup> He then overlaid the example with a variety of scenarios to test the effect on taxable amount of a “leapfrog” payment (i.e. one that does not simply pass down the chain of transactions).

29. The Commission contended that where a leapfrog payment is made a “global” view of the transaction chain should be taken.<sup>22</sup> The assessment of VAT along the supply chain started with identifying how much VAT was borne by the final consumer following a rebate to that consumer or for its benefit. Collection of VAT exceeding this sum was considered to be a breach of the principle of neutrality. The German (and UK as intervener) Governments, argued various difficulties arose with the Commission's view on the operation of Article 90, as applied in *Elida*.

30. When outlining the competing positions, the AG emphasised<sup>23</sup> that neutrality is achieved where the total tax levied on the chain of supply reflects the final net price paid by the final consumer with each taxable person in the chain paying over the VAT on its value added. The payments made at each stage taken together must equal the VAT borne by the final consumer. Where part of the price payable by that final consumer is rebated, the value add of the party making that rebate then needs to be adjusted. Thus, in the normal course of events output tax

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<sup>20</sup> C-427/98

<sup>21</sup> Paragraph 30 - 31

<sup>22</sup> Paragraph 40 - 42

<sup>23</sup> See paragraphs 50, 52 also 58.

accounted for by the first party in the chain will equal input tax claimed by the next party. However, where there is a price reduction by way of leapfrog payment the matching of output tax declared and input tax claimed at each link in the chain is not necessary, as long as overall the total tax collected matches that paid by the final consumer.

31. Having set that basic picture, the AG then addressed each of the specific concerns of Germany.

32. The first concerned difficulties associated with accounting and control where outputs did not match inputs down the chain.<sup>24</sup> In response the AG explained:

“60. ... Value added tax is what it says — a tax on the value added at each stage. At each stage, the amount payable to the tax authorities is based on the difference between inputs and outputs. The actual value of the transactions, although relevant to verifying whether the total amount of tax has been correctly levied, does not affect that difference. From that point of view, it seems to me immaterial whether, if A's output tax is retroactively adjusted, B's input tax is also adjusted or not, provided that the difference between B's input and output taxes amounts to tax at the correct rate on the value actually added by B. ...”

33. In other words, the steps at each stage of the supply chain did not matter; what was important was to ensure that the total tax collected across the supply chain is no more and no less than the amount paid by the final consumer.

34. In addressing Germany's submission that any leapfrog rebate was to be taxed as third party consideration the AG noted that at the final retail stage that analysis was correct. Whether the retailer received the full retail price because it came in two parts (the amount paid by the customer and reimbursement of a money off coupon) or by payment of the price by the customer who later received cashback, VAT was accounted for by the retailer on the consideration it received. However, in the AG's view that did not affect the nature of the payment made by the manufacturer.<sup>25</sup>

35. The second challenge concerned the potential loss of tax revenue argued to arise from an adjustment to the manufacturer's taxable amount where the AG noted:

“76. It must be borne in mind here that tax revenue is not lost merely because it is lacking. Tax revenue is lost only where it should have been collected but was not.”

36. The AG explained that there was no loss of tax where a manufacturer paid away a rebate to the final customer and adjusted its output tax. Rather VAT was collected “having regard to the actual value received by [the manufacturer] and the total economic value of the chain” (our emphasis) so that across the supply chain the tax paid to the tax authorities in total equated to the tax borne by the final consumer.<sup>26</sup>

37. The AG then considered specific examples to demonstrate that Article 90, as interpreted by *Elida*, achieved neutrality.

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<sup>24</sup> Paragraphs 54 - 74

<sup>25</sup> Paragraphs 66 - 68

<sup>26</sup> Paragraph 78

38. The first example was “exempt exports” i.e. supplies of goods made outside the EU. Under the terms of the VAT directives, whilst such supplies were exempt from the charge to output tax, input tax attributed to such supplies was nevertheless recoverable. The AG observed that if the wholesale or retail supply were exempt exports any adjustment by the manufacturer of its output tax would result in an absolute tax loss. However, on his analysis of Article 90 and *Elida*, the manufacturer would not be entitled to make such an adjustment. And therefore, there would be no loss of tax. He specifically noted that the *Elida* adjustments were permissible where “the price paid by [the final consumer] is inclusive of VAT, so that any reduction in it may also be deemed to include a proportion of VAT”. However, “where ... an item [was] exported from the Community free of VAT ... no Community VAT is included in any price charged at that or any subsequent stage in the chain. Thus, any payment made by [the manufacturer] to a subsequent recipient outside the Community could not be deemed to include any amount of VAT which could give rise to a reduction in [the manufacturer’s output tax].”<sup>27</sup> The AG continued:

“84. It should not be prohibitively difficult to ensure that [the manufacturer] cannot deduct what would be a fictitious amount of VAT from his output tax in such cases. In order to make such a deduction in the normal course of events, [the manufacturer] must at the very least keep proper accounts which show where payments have been made.”

39. The second class of exempt transactions considered to be problematic by the German Government were exempt supplies made within the Community at the end of a chain of taxable supplies. As with exempt exports, the AG considered that the correct interpretation of Article 90 would preclude a manufacturer’s adjustment to its output tax as the recipient of the exempt supply (and thereby the recipient of the leapfrog payment) had not borne VAT on the supply to it. A leapfrog payment to, or for the benefit, of the recipient of the exempt supply, did not, in the AG’s opinion, include any element of VAT and “[the manufacturer] cannot adjust his output tax.”<sup>28</sup>

40. The next problem identified by the German Government and addressed by the AG concerned leapfrog payments made to a taxable person i.e. where the party notionally at the end of the supply chain was not a final consumer. The AG acknowledged that if the manufacturer were to adjust its output tax in circumstances where the person at the end of the supply chain had recovered its input tax and made no adjustment to the input tax so claimed there would be a tax revenue loss i.e. less output tax would be paid in the chain than the input tax claimed across the supply chain. The AG considered this scenario too could also be effectively managed through the proper interpretation of the Directive as the recipient of a leapfrog payment would be required to adjust its input tax claim, describing the failure to do so as amounting to fraud.<sup>29</sup>

41. Germany was also concerned that the consequence of *Elida* might result in a loss of tax unless the retailer was required to account for output tax on the full value received by it including, as relevant, the value of a money off coupon reimbursed to it. That was an outcome Germany considered to arise in consequence of the application of previous CJEU jurisprudence on coupons/vouchers, including *Argos*. The AG distinguished *Argos* (and the other cases referenced) as limited to discounts provided by way of coupon but assessable under what is

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<sup>27</sup> Paragraph 83

<sup>28</sup> Paragraphs 86 - 87

<sup>29</sup> Paragraphs 89 - 93

now Article 78. As previously noted in a leapfrog situation where the payment is made from manufacturer to retailer, the payment represents part of the retailer's taxable amount.

42. In his final considerations the AG again reiterated that the interpretation of Article 90 set out in *Elida* ensures that "the total amount of VAT levied on the whole chain of supply should be proportional to the amount actually paid by the final consumer."<sup>30</sup> Despite the practical collection concerns considered to have been validly raised by Germany "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)" was the important point of principle which outweighed any structural difficulties.<sup>31</sup>

#### *Court's judgment*

43. The Court recognised that the focus of the Commission's concern with the operation of the German legislation centred on a failure to adequately provide for leapfrog payments made in connection with money off coupons, as illustrated by the AG's examples. Reviewing the conclusion of the Court in *Elida* the Court observed that "the principle underlying the VAT system, which is that it is intended to tax only the final consumer and is completely neutral as regards the taxable persons involved in the production and distribution process" and that "the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer."<sup>32</sup> The Court then addressed the concerns raised by the Germany and the UK.

44. The Court rejected the arguments as to the practical difficulties in the administration of the VAT system, confirming that on the correct interpretation of Article 90 where a leapfrog payment is made there is no requirement to adjust the VAT accounting down the chain. The invoices issued were and remained correct. What was required was an adjustment to the manufacturer's output tax in respect of the post supply reduction in price that had been given to the final consumer at the expense of the manufacturer. By adjusting only the manufacturer's output tax each of the participants in the supply chain were appropriately accounting for the net VAT on the value added at that stage in the supply chain.<sup>33</sup>

45. The Court then addressed the contention that the leapfrog payment represented third party consideration paid by the manufacturer on behalf of the final consumer. The Court considered that whilst in the hands of the retailer it is third party consideration and therefore assessable to VAT in the retailers' hands, as the payment "entails a corresponding reduction in the amount finally received as consideration for the supply by [the manufacturer]" it was the net sum received after payment of the leapfrog payment on which the manufacturer then was assessable to VAT.<sup>34</sup> On the basis that the retailer accounted for VAT on the full price received (including the reimbursed money off coupon) if that sum were not adjusted by the manufacturer the same element of consideration would be taxed twice.<sup>35</sup>

46. Applying an analogy to *Argos* and the associated case law on treatment of coupons the Court observed a coherent approach: each party in a chain of transactions was assessed by

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<sup>30</sup> Paragraph 108

<sup>31</sup> Paragraph 110

<sup>32</sup> Paragraph 29

<sup>33</sup> Paragraphs 41 - 43

<sup>34</sup> Paragraphs 44 - 46

<sup>35</sup> Paragraphs 47 - 53

reference to the value added by it and thereby by reference to the proportion of the final price paid by the consumer retained by it.<sup>36</sup>

47. The Court then dealt with the perceived loss of tax revenue in respect of cross border and intra-Community exempt transactions. The Court confirmed that the system and mechanics provided for under the Directive precluded a breach of neutrality where leapfrog payments are made. Specifically, in the case of cross border transactions and/or exempt supplies no adjustment was permissible because “the value stated on the money-off coupon is not chargeable to tax ... [and] ... no price invoiced at that stage of the distribution chain, or at a later stage includes VAT, which means that a reduction or a partial reduction of that price cannot in turn include a VAT element capable of giving rise to a reduction of the tax paid by the manufacturer”.<sup>37</sup> Similarly, for exempt supplies any attempt by a manufacturer to reduce the output tax charged by it in respect of “a fictitious amount of VAT” would be precluded under Article 90 and by checks on the manufacturer’s accounting records.<sup>38</sup>

48. For taxable persons at the end of the supply chain the Court stated that the recipient of the leapfrog payment would be required to adjust its own input tax in respect of the VAT element of the payment received in accordance with the provisions of the Directive<sup>39</sup>.

#### ***Yorkshire Co-operatives Ltd v CCE***<sup>40</sup>

49. In this reference Yorkshire Co-operatives sought to exclude from its taxable amount the value received from manufacturers who reimbursed to them money off coupons accepted from final consumers. The Court applied and confirmed the position in *Commission v Germany* concluding that the retailer’s taxable amount was to include the leapfrog payment as it represented consideration received on the supply of goods to the final consumer.

#### ***Town & County Factors Ltd v HMRC***<sup>41</sup>

50. The question to be resolved on this reference arose in the context of a spot the ball competition and concerned whether entry fees represented consideration for a supply in circumstances where the competition rules were “binding in honour only”. The taxpayer contended, following the judgment of the CJEU in *Glawe*<sup>42</sup> that the taxable amount on the supplies made by it should be calculated as the portion of the entry fee retained after payment of the prizes. The Court confirmed that the nature of the relationship required for there to be reciprocal performance was present in the circumstances of competition which, although not a contract under English law, was nevertheless a relationship of the type envisaged in *Tolsma*<sup>43</sup>. The Court went on to hold that the entry fee represented the consideration for the service provided by Town & County Factors. It noted that these fees were received “in full and [enabled] [the taxpayer] to cover the costs of [its] activity.” In doing so the situation in *Glawe*

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<sup>36</sup> Paragraphs 54 - 59

<sup>37</sup> Paragraph 64

<sup>38</sup> Paragraph 65

<sup>39</sup> Paragraphs 66-67

<sup>40</sup> C-398/99

<sup>41</sup> C-498/99

<sup>42</sup> *Glawe (H J) Spiel-und Unterhaltungsgerate Aufstellungsgesellschaft GmbH & Co KG v Finanzamt Hamburg-Barmbek-Uhlenhorst*: C-38/93 – this case concerned gaming machines. Such machines are set to pay out a fixed proportion of stakes as winnings known as the amount returned to players (RTP) i.e. prizes represent 4% of stakes collected. The Court determined that the taxable amount of supplies made in these circumstances was the amount of the stake adjusted for the proportion fixed as the RTP, in the 4% RTP example the taxable amount is 96p for each £1 staked.

<sup>43</sup> Paragraphs 20 - 24

was distinguished as in that case the proportion of stakes retained and returned to players was fixed and ringfenced to be paid out in prizes.<sup>44</sup>

***Total UK Ltd v HMRC*<sup>45</sup>(Total)**

51. This case concerned the sale of road fuels and a promotion scheme pursuant to which customers collected points when they purchased fuel. Points could then be redeemed for gift vouchers. Total sought to adjust the taxable amount of supplies of fuel when the points were redeemed for gift vouchers contending that the provision of the voucher represented a post supply price rebate.

52. On appeal to the High Court, it was determined that where an amount is paid away as part of a promotional scheme to the final customer the party making that payment is entitled to reduce the taxable amount of its supplies. The Court of Appeal however considered that whilst regard must be had to the economic reality rather than the formal contractual position, the detailed facts needed to be examined carefully. On the facts in *Total*, Total was not offering a retrospective price discount on the fuel supplied. Rather the customers paid for the fuel they received at the time they received it; in addition, the customer received the points which once redeemed entitled them to a gift voucher. The cost of the gift vouchers did not represent a discount at the time the fuel was provided or subsequently. The provision of points and their redemption represented a separate and distinct economic transaction from the supply of fuel. The cost of purchasing the redemption vouchers thereby amounted to an independent cost akin the cost to the furniture retailer in *Primback* of the supply of credit by the credit provider.

***Le Rayon d’Or SARL v Ministre de l’Économie et des Finances*<sup>46</sup> (Rayon d’Or)**

53. This case concerned Article 73 and whether the payment of a lump sum from the national sickness insurance fund to residential care homes represented consideration for a supply made to the residents of the homes. In particular, whether the sum paid was a subsidy directly linked to the price of healthcare provided to the residents of the home. Under French social care provisions residence in care homes for the elderly is provided free of charge to those who need it. The lump sum was not calculated to cover the costs of care provided. The French tax authorities contended that the sum was consideration for a supply of healthcare services, the taxpayer contended that the payment was outside the scope of VAT.

54. The Court articulated that a payment represents consideration only where “there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.” Further, that the taxable amount of a supply is “everything which makes up the consideration” for the service. As such, the lump sum paid by the national sickness insurance fund represented consideration for the supply of healthcare to the residents; the taxpayer was obliged to provide the services to residents where it received the payment, and it did not matter that the sum was paid by a third party. The fact that the payment did not fund the supply to any particular resident did not detract from that conclusion.<sup>47 48</sup>

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<sup>44</sup> Paragraph 30

<sup>45</sup> [2007] EWCA Civ 987

<sup>46</sup> C-151/13

<sup>47</sup> Paragraphs 33 – 37.

<sup>48</sup> During the hearing we referred the parties to the UT judgment in *Colchester Institute Corporation v HMRC* [2020] UKUT 368 (TCC) (*Colchester*) in which Judge Raghavan was involved, and which considered the scope

***International Bingo Technology SA v Tribunal Económico-Administrativo Regional de Cataluña*<sup>49</sup> (International Bingo)**

55. Neither party referred to this case in argument, and it was not included in the bundle of authorities. However, it is referenced in *Finanzamt Bingen-Alzey v Boehringer Ingelheim GmbH & Co. KG*<sup>50</sup> (***Boehringer (I)***) and *Novo Nordisk AS v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*<sup>51</sup> (***Novo***) and we consider it relevant so that we set it out here.

56. The factual context of the referral concerned the calculation of the recoverable proportion of input tax incurred. However, the referral sought the Court’s guidance on how to determine the taxable amount of the exempt bingo transactions. That analysis called for the application of the principles derived from *Glawe* as applied in *Town & County* in circumstances where a fixed and predetermined percentage of the sales of bingo cards was required, under law, to be paid out in winnings. The Court determined that where the consideration received on the supply of the bingo cards was subject to a mandatory requirement to pay out a fixed proportion of that sum it was the net receipt which represented, for what is now Article 73 purposes, the consideration actually received. The Court acknowledged the difference between the circumstances in *International Bingo* and *Town & County*.

***Finanzamt Düsseldorf-Mitte v Ibero Tours GmbH*<sup>52</sup> (Ibero)**

57. Ibero was a travel agent. It acted as an intermediary introducing customers to tour operators. It was not a party in the supply chain for the services of the tour operator. However, it was paid a commission by the tour operator for introducing the customers. Ibero chose to subsidise holiday purchases by customers using a proportion of the commission earned from the tour operator. As such, the tour operator received the full value of the holiday, the customer paid a reduced price and Ibero funded the difference. The net financial situation as perceived by Ibero was that it received reduced commission in respect of the introductions made. Ibero sought to adjust the output tax charged on its commission, by the sums contributed to the final consumer’s holidays.

58. A principal focus of the dispute centred on identifying the relevant supply chain in which the discount had been given. The German Government (supported by the UK Government as an intervening State) considered that the principles in *Elida* could not apply where there were two supply chains, albeit with common parties. Ibero and the Commission considered that the correct focus was on the sums left in the hands of Ibero having contributed to the supply in which it intermediated.

59. AG Wathelet considered that the price reduction offered by Ibero translated “de facto and in economic terms” to a reduction in the commission such that the taxable amount of the

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of *Rayon d’Or*. Neither party considered it to be relevant to our determination. However, we note that in that case the UT considered that the supplies to which the healthcare lump sum were directly linked were supplies of healthcare provided year on year to residents at the home “whoever they may be from time to time, on a rolling basis”. This was on the basis, as noted in the judgment that the payment was for the care provided established by reference to a tariff with a formula derived from the number and dependency need of the residents. Thus, there was a direct link to the supply of healthcare to the residents even though the sum was not paid as a contribution for any particular resident.

<sup>49</sup> C-377/11

<sup>50</sup> C-462/16

<sup>51</sup> C -248/23

<sup>52</sup> C-300/12

consideration should be adjusted. This was said to be on the basis that the VAT borne by the final consumer was limited to the price paid by it.

60. The Court did not follow the AG on the principal question. The Court confirmed that the concept of consideration required an assessment of the value received by the supplier (from the customer or a third party) directly linked to the supply. Here, the tour operator had received the full price for the holiday provided to the customer. That amount had been in part funded by the customer and in part by Ibero. Ibero did not discount its commission for services to the tour operator. Rather it chose to pay third party consideration for the supply of the holiday using its commission. The case was contrasted with *Elida*. Firstly, on the basis that the tour operator contracted directly with each of the customer and Ibero. There was a supply of a holiday to the customer by the tour operator with Ibero's involvement limited to intermediary services (it did not buy in and sell on the holiday). The consideration received by the tour operator for that supply was the full price of the holiday. There was then a second but separate supply of intermediary services between Ibero and the tour operator in respect of which, again, the full price was paid. Although not addressed explicitly, the economic effect of the global position of Ibero did not justify a conclusion that Ibero had discounted its supply to the tour operator.

### ***Boehringer (1)***

61. In respect of healthcare provision in Germany, which is funded by either public or private insurers, the public insurers contract with healthcare providers to provide healthcare to insured parties as "services in kind". In connection with pharmaceutical products the public insurer also contracts with pharmaceutical companies to provide pharmaceuticals to pharmacies. Under the relevant German statutory provisions, the pharmaceutical companies are required to discount supplies made to the pharmacies. The German tax authorities accepted that discounts provided under these requirements had the effect of reducing the taxable amount for supplies of pharmaceutical products to publicly insured patients.

62. The arrangements for the supply of pharmaceuticals to those insured privately were different. The pharmaceutical companies supplied pharmacies in return for payment. Privately insured patients then paid for any pharmaceuticals required and were reimbursed by the insurer. Pharmaceutical companies were required to provide discounts/rebates to the private insurers in respect of pharmaceuticals supplied to privately insured patients who were reimbursed by the private insurer. Because of those differing supply chain arrangements the German tax authorities disagreed *Boehringer* could adjust its taxable amount in respect of the rebate.

63. *Boehringer* challenged the refusal. It contended that as with the assessment of the taxable amount of income from gaming machines the statutory obligation to pay the rebate reduced the consideration received by it on the supply of pharmaceuticals to privately insured patients. It also invoked the provisions of Article 90. Germany defended the proceedings contending that the final consumer in the chain of supply was the patient who paid for the pharmaceuticals themselves and only later being reimbursed the cost. As such, a payment to the private insurer was outside the relevant supply chain. *Ibero* was prayed in aid.

### ***Advocate General's opinion***

64. AG Tanchev considered *Elida* as authority for the proposition that a supplier's taxable amount could be adjusted in respect of price rebates granted without the need for there to be a contractual relationship between the supplier and the recipient of the rebate. Further, an Article 90 adjustment did not require the recipient to be within the supply chain beginning with the taxable person providing the discount. *Ibero* was distinguished on the basis that it involved a

series of bilateral relationships. The AG noted that the requirement to make the rebate was a statutory one. That led him to consider, by reference to the CJEU judgment in *International Bingo Technology*,<sup>53</sup> that Boehringer had not had “freely at its disposal the full amount” of the price received on the supply by it of the pharmaceuticals in question.<sup>54</sup>

65. He explained that “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”<sup>55</sup>. He considered, drawing on the economic reality, that in a situation in which it is known that the privately insured person will be reimbursed for the pharmaceuticals they receive and pays pursuant to a statutory regime which then provides for a rebate to the party meeting the direct cost of the supply the private insurer could “be viewed as the final consumer” in the supply chain. Relying on *Rayon d’Or* the AG was satisfied that there was a direct link between the reimbursement payment made by the private insurer and the supply of goods to the patient.<sup>56</sup>

66. Providing for adjustment under Article 90 ensured, in the AG’s opinion, that the fundamental principles of VAT were adhered to. Specifically referenced is the requirement that the basis of assessment is the consideration actually received. He subsequently noted that:

“49. ... 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’. ... ‘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. ...” (quoting from *Commission v Germany* AGO paragraph 110 – see paragraph [42] above).

#### *Court judgment*

67. In giving its judgment, the Court reiterated the requirement under Article 73 that the taxable amount represents everything which constitutes the consideration received. Thus, Article 90 provides for adjustment where, after the time of supply, some or all of the consideration has not been received. The principle of equal treatment is also set out. It summarises the rebate scheme applicable to private insurers as requiring the pharmaceutical company:

“34. ... 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.”

68. The Court considered that in such circumstances Boehringer could dispose only of the net of rebate consideration received with the consequence that to treat a sum greater than that as the taxable amount of the supplies would breach the principles of VAT and equal treatment.

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<sup>53</sup> C-377/11

<sup>54</sup> Paragraphs 34 - 43

<sup>55</sup> Paragraph 44

<sup>56</sup> Paragraph 45

In explaining that conclusion the Court noted that the principles derived from *Elida* permitted an adjustment for a price reduction allowed to a non-contractual party. The Court considered that an adjustment was required because, relying on *Rayon d'Or*, the payments made by the private insurers were directly linked to the supply of pharmaceuticals<sup>57</sup> as the receipt of the pharmaceuticals by the patient did not break the direct link between the pharmaceuticals and the payment made by the insurer.<sup>58</sup>

69. Adopting paragraphs [44] and [45] of the AG Opinion (see paragraph [65] above) the Court accepted that the private insurers were to be regarded as the final consumer in the chain of supply of the pharmaceuticals starting with Boehringer. As a consumer in the supply chain of the pharmaceuticals the rebate payment to the private insurers made under the German health legislation thereby represented a leapfrog payment within the supply chain requiring adjustment under Article 90.<sup>59</sup>

70. The Court also held that as the discount is fixed by law Boehringer was in a similar position to a gaming company (which must pay away a certain proportion of the income as winnings). Neither Boehringer nor such companies being able to “freely to dispose of the full amount of the price received”. As a consequence the statutorily fixed rebate did not form part of the consideration originally received.

***Boehringer Ingelheim RCV GmbH & Co. KG Magyarországi Fióktelepe v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*<sup>60</sup> (Boehringer (2))**

71. This case and those which follow were all decided after 31 December 2020.

72. This case concerned a supply chain of pharmaceutical products with Boehringer at the top of the supply chain in Hungary. Pharmaceuticals were sold from Boehringer to wholesalers, and then to retail pharmacies and on to patients. When purchasing such products the price to the consumer was subsidised by the national health insurance fund known as the NEAK. Where subsidised pharmaceuticals were dispensed/supplied to patients the patient paid only the subsidised amount and the NEAK paid the subsidy directly to the dispensing pharmacy. The Court expressly noted that the consideration paid for subsidised pharmaceuticals comprised two parts: the part paid by the patient and the part paid by the NEAK.<sup>61</sup>

73. In order to be able to market and sell subsidised pharmaceuticals, Boehringer entered into a funding volume agreement with the NEAK. Pursuant to that agreement Boehringer made payments to the NEAK of “an amount fixed ... to reflect sales of those medicinal products marketed by Boehringer ... by deducting part of the revenue obtained from the sale of the products.”<sup>62</sup> The sum was calculated as a percentage of the gross funding paid by the NEAK for each packaged unit of product. In certain cases, the funding payment represented 100% of the subsidy paid by the NEAK to the pharmacies.

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<sup>57</sup> The official report in English references a supply of services, the parties are agreed that this is an error in translation as the French text of the judgment (French being the original text and the principal language of the court) references a supply of goods.

<sup>58</sup> Paragraph 40

<sup>59</sup> Paragraphs 41 and 42

<sup>60</sup> C-717/19

<sup>61</sup> Paragraph 17

<sup>62</sup> Paragraph 19

74. The question referred relevant to the issue we have to determine sought to understand the correct application of Article 90 where the volume funding agreement was voluntary.

75. In its response to that question the Court reiterated:

“39. ... the basic principle of the VAT system is that VAT is intended to tax only the final consumer and to be completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved.

40. Under Article 73 of the VAT Directive, the taxable amount is to include, in respect of the supply of goods or services, 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.

41. It is apparent from 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, that the Member States are required 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.”

76. Summarising *Boehringer (1)* the Court noted that the factual circumstances in that case involved the reimbursement of the purchase price by the private insurer.<sup>63</sup> It proceeded to observe of the facts in *Boehringer (2)* that through the volume funding agreement Boehringer contributes to the subsidy paid by the NEAK. As that contribution is funded from the consideration received by Boehringer from its sales of the same goods to the wholesalers the Court considered that it resulted in a reduction in the consideration received for those supplies.<sup>64</sup> That the patient, as one of the paying parties, consumes the pharmaceuticals was not considered to break the direct link between the payment made by the NEAK and the supply of those goods.<sup>65</sup>

77. The Court then stated:

“46. In so far as the pharmacy must pay VAT on the amount paid by the patient and on the amount paid to it by the [NEAK] for the subsidised medicinal products, the [NEAK] 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.

47. Given that part of the consideration obtained from the sale of the medicinal products by the pharmaceutical company has not been received by the latter because of the contribution it pays to the [NEAK], which refunds part of the price of those medicinal products to the pharmacy, it must be found that there has been a reduction in the price of the medicinal products after the supply

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<sup>63</sup> Paragraph 42

<sup>64</sup> Paragraph 43

<sup>65</sup> Paragraph 45

took place within the meaning of Article 90(1) of the VAT Directive.”  
(emphasis added)

78. When evaluating challenges from the Hungarian Government as to the voluntary nature and basis of calculation of the volume payment the Court focused on the relationship between that payment and the consideration received from the wholesalers observing that Boehringer was not able to dispose of the full price received on the sale of the product to the wholesalers because of the payment made to the NEAK.<sup>66</sup>

***Firma Z v Finanzamt Y*<sup>67</sup> (Firma Z)**

79. The case also concerned the supply of pharmaceuticals in the context of the German healthcare system involving private insurers. Firma Z supplied products to patients in Germany from the Netherlands. It provided a “compensation” payment to such patients who completed a health questionnaire. Where supplies were made under the statutory insurance scheme referred to in paragraph [61] above it treated its supplies as exempt from VAT (with a right to recover) expecting the German statutory insurer to account for VAT as an acquisition. It nevertheless sought to treat the compensation payment made to the patient as reducing the taxable amount of supplies made to patients under the private insurance scheme.

80. The referring court sought the Court’s guidance on the concept of a chain of transactions in order to identify to what, if any supply, the compensation payment was attributed. The Court determined that as the supplies made under the statutory scheme were exempt from VAT as an intracommunity transfer of goods there could be no adjustment to an amount of VAT which has not been charged.<sup>68</sup>

***Novo***

81. This matter again concerned the supply of pharmaceuticals, this time in Hungary.

82. As identified above in connection with *Boehringer (2)* the state subsidised the supply of prescription drugs through the NEAK. The consideration received by the pharmacies for such pharmaceuticals comprised payment in part from the patient and payment in part from the NEAK. Like Boehringer, Novo entered into a price volume agreement. However, and in addition to the sums rebated to the NEAK through that agreement, Novo was obliged to make additional payments by way of a social security subsidy based on the sales of subsidised pharmaceuticals. The subsidy was calculated as a fixed percentage of each subsidised medicinal product supplied, subject to adjustment in respect of the price volume adjustment made and a deduction for research and development. The payments made were ringfenced and passed “immediately” by law to the NEAK. Novo considered that the additional payment also represented a price rebate entitling it to adjust the taxable amount of supplies made to wholesalers of the subsidised goods ultimately dispensed to patients. The adjustment was refused on the basis that the additional payment represented a contribution to the social security scheme and not a price rebate.

83. The AG examined whether the subsidy payment represented a payment to the NEAK as final consumer of the products it subsidised or a payment made and passed immediately to the NEAK as a public health insurance fund and thereby by way of a contribution to the state budget for healthcare. She determined that the payment did not have the characteristics of a

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<sup>66</sup> Paragraphs 50 – 53.

<sup>67</sup> C-802/19

<sup>68</sup> Paragraphs 42 - 47

contribution to the state budget and therefore should more properly be treated as a price rebate, particularly as it was calculated and determined on that basis.

84. As with the cases referred to above the Court restated the basic principle of the VAT system that VAT is intended to tax only the final customer and be completely neutral as regards the taxable persons involved in the production and distribution process prior to the stage of final taxation. The Court observed that the subsidy payment was paid to the NEAK “through the tax authority”, and used by the NEAK to subsidise the supply of pharmaceutical products.<sup>69</sup> On this basis the Court considered that the payment, which was fixed in advance and mandatory, limited the consideration received by Novo and the supplies it made akin to the prize element of a gaming transaction.<sup>70</sup> The Court considered, in substance, that the subsidy payment and the price volume adjustment performed the same function both in terms of reducing the consideration received by Novo and directly funding the subsidised supply of medicinal products.<sup>71</sup> In each case the payment reduced the taxable amount received by Novo and, because the pharmacy accounted for VAT on the full amount received by it (from the patient and the NEAK), VAT was correctly collected across the supply chain on the price paid by the final consumers (patient and NEAK).<sup>72</sup>

### ***Irish Revenue Commissioners v Novartis Ireland*<sup>73</sup> (Novartis)**

85. This is a case determined by the High Court in the Republic of Ireland. It is therefore not binding on us it is, however, persuasive. It represents another example of a court grappling with the determination of the correct VAT liability of price adjustments in the pharmaceutical sector.

86. As in *Boehringer (1)*, the case concerned volume-based discounts paid by a pharmaceutical manufacturer (Novartis) to private health insurers. The chain ran Novartis to wholesaler to hospitals; insurers reimbursed hospitals for insured patients up to policy limits. Novartis paid the volume discount directly to insurers and also granted separate discounts to hospitals on the same drug. Novartis argued the volume discount qualified for an Article 90 adjustment on the *Elida/Boehringer (1)* line of authority; the Irish Revenue relied on *Ibero Tours*, contending no adjustment was available and distinguishing *Boehringer (1)* on the basis that hospitals used the drug in exempt healthcare, so insurers could not be the final consumers.

87. The High Court having reviewed the authorities held that *Boehringer (1)* transposed to the facts. On the question of who the final consumer was, the Court noted the insurer was invoiced by the hospital and the medicines were itemised (it did not state whether VAT was charged on those items). It concluded (being not critical to the outcome but consistent with *Boehringer (1)*) that the insurer was the final consumer of the drugs, so the rebate to the insurer reduced Novartis’s taxable amount. On the exempt/zero-rated issue, the judgment did not consider *Commission v Germany*; its analysis proceeded from whether Novartis had the sums “freely” at its disposal, rather than testing the VAT-element constraint that arose when the final supply bears no VAT.

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<sup>69</sup> Paragraphs 33 and 44

<sup>70</sup> Paragraph 37

<sup>71</sup> Paragraph 48

<sup>72</sup> Paragraphs 50 – 53 and 56 - 57

<sup>73</sup> [2022] IEHC 642

## FTT DECISION

88. Before the FTT there was no material dispute of fact. The parties produced a statement of agreed facts, supplemented by three witness statements with oral evidence under cross-examination and a 1,315 page hearing bundle. Benjamin Moynihan (Finance and Administration Director BIL) gave evidence for the Appellant. Ben Day (NHS England Strategic Finance and Planning) and Stephen Hennigan (DHSC Medicines Pricing Team) gave evidence for HMRC. The Tribunal found all the witnesses to be credible and accepted their evidence as to the facts. On the basis of the agreed facts, the witness evidence and the documents, the Tribunal made the following findings of fact:

(1) BIL is established and VAT-registered in the UK. It supplied the Medicines to HSPs and Pharmacies, either directly or via Wholesalers; the vast majority of its supplies were to Wholesalers, and most product ultimately went to the NHS. Those supplies were standard-rated. Some products were supplied for direct export (Ireland, Gibraltar, Malta). BIL was not required to make the Payments in respect of the supply of such products. A small proportion of UK-wholesaled product was later exported by Wholesalers (circa 1–2%). These too were excluded from the Voluntary Schemes. In an unidentified proportion, final patient supplies by the NHS were zero-rated under Item 1, Group 12, Schedule 8 VATA.

(2) As a member of the Voluntary Schemes, BIL reviewed its net sales line-by-line, submitted returns to the DHSC, and made Payments calculated in accordance with the Voluntary Schemes on a UK-wide basis. The Payments were made on an estimated quarterly basis and then trued up by way of an annual return. BIL bore responsibility for the accuracy of returns; its data was independently audited annually. Any underpayment over the year yielded a lump-sum balancing payment by BIL; any overpayment was refunded to BIL.

(3) BIL accounted for the Payments as a discount against the “sales” line in its accounts. Accruals were made monthly at an average rate reflecting the known scheme rates, with adjustments aligned to the quarterly return cycle.

(4) Scheme payments were made to the DHSC, not to HSPs directly. Receipts entered the DHSC’s overall budget. The DHSC made payments to the devolved administrations for their share of the Payments; NHS England’s share was delivered through the government’s mandate. The majority of the DHSC’s budget was transferred to NHS England (e.g., £121bn of a £138bn total in 2019/20).

(5) The expectation, per Mr Day, was that DHSC income attributable to England in the relevant financial year would be allocated to NHS England, though scheme income was not ring-fenced nor separately identified in Financial Directions to NHS England.

(6) Between 1 April 2014 and 30 September 2020, BIL charged and accounted for VAT at the standard rate on its supplies and made the Payments. From June 2018 to December 2020, it submitted error correction notices seeking repayment of output tax on the footing that Article 90(1) PVD applied because the Payments reduced the price of its supplies for VAT purposes.

89. The FTT considered the CJEU and domestic jurisprudence we have set out above and derived 17 principles which we set out in paragraph [115] below.

90. Applying those principles the FTT approached Article 90(1) on its terms. It considered that the operative question was whether the price of BIL's supplies was reduced after those supplies took place. As Parliament has not set relevant domestic conditions that would curtail Article 90(1), so the analysis focussed on whether the Payments reduced the consideration received by BIL.

91. The FTT rejected HMRC's submission that DHSC was not a final consumer because there was no direct link between DHSC's funding of the NHS and specific supplies of BIL's products, as contrary to economic reality. The DHSC's budgetary function and the role of the Payments meant the DHSC "bore the cost" of the Medicines in substance. Applying the reasoning in *Boehringer (1)* and *(2)*, the FTT considered that entities that bear the economic burden of products can be final consumers even absent contractual privity or direct receipt of the goods. The FTT therefore treated the DHSC as a final consumer of the Medicines for these purposes.

92. As to the required "link", the FTT noted there is no requirement for a rebate to map to identified Medicines or for there to be consumer-specific matching. What Article 90(1) requires is that the supplier has not received, or cannot freely dispose of, part of the consideration for its supplies. Four features satisfied that criterion. First, under section 261 NHS Act, one purpose of the Voluntary Schemes is to limit prices charged for Medicines. Secondly, prices are effectively limited by requiring manufacturers to pay the DHSC amounts calculated by reference to their sales of in-scope Medicines. Thirdly, BIL operationalised this via quarterly UK-wide sales returns and payments. Fourthly, BIL itself booked those payments as sales discounts in its accounts. Each element evidenced a reduction in consideration received by BIL for its taxable supplies.

93. The argument that Article 90 cannot apply where downstream supplies are zero-rated was also rejected. The FTT held that the principle in *Commission v Germany* paragraph 64 did not preclude adjustment merely because a later supply in the domestic chain is zero-rated. What matters is that the manufacturer's own supplies were taxable and included VAT at that stage. The FTT considered that there was no breach of fiscal neutrality in these circumstances because VAT was paid on the sum retained by the manufacturer. The FTT took the view *Commission v Germany* concerned situations where the manufacturer's own supply was not taxed (exports/intra-Community supplies), which is not the case here.

94. The submission that the Payments were akin to a tax or levy and therefore fell outside VAT analysis was also dismissed. The FTT considered that the payments were not consideration for any supply by the DHSC; that supported their character as rebates linked to BIL's own supplies rather than payments for separate services. Treating them as rebates was considered to align with the CJEU's articulation in *Boehringer (2)* and *Novo* that price reductions encompass amounts the supplier does not receive or cannot freely dispose of, whether arising voluntarily or by legal obligation.

## **PARTIES' SUBMISSIONS**

### **HMRC's submissions**

95. HMRC's primary case is that the Payments made under the Voluntary Schemes fall outside the scope of Article 90 PVD. Their position is that the Payments are not reductions in the "taxable amount" of any supply made by BIL because they are not linked to any identifiable supply of Medicines within a relevant economic chain. Rather, the Payments operate as levies

on overall revenue, akin to a profit-regulatory mechanism, and are not a “price reduction” within the meaning of Article 90.

96. Emphasising that the Payments are calculated as a percentage of aggregate net sales of in-scope Medicines, paid to the DHSC, and absorbed into its general health budget without any ring-fencing or allocation to particular prescriptions or to NHS entities making downstream purchases, HMRC submits that such a payment cannot constitute a reduction in the “consideration obtained” for any particular supply of goods.

97. On the proper test for identifying a “final consumer”, HMRC argues that the FTT erred in treating the DHSC as such on the basis that it “bore the cost” of Medicines. Citing *Tolsma*, *Rayon d’Or*, *Boehringer (1)*, *Boehringer (2)* and *Novo*, HMRC submits that the final consumer must be the person who provides reciprocal performance directly linked to the supply of goods. DHSC neither reimburses the cost of specific Medicines nor receives them; it simply provides general funding to NHS England. There is therefore no direct link between any DHSC payment and the supply of Medicines into final consumption.

98. As regards *Boehringer (1)*, *Boehringer (2)* and *Novo* HMRC say those are not on point. In those cases, the private insurer or NEAK paid identifiable, transaction-specific subsidies or reimbursements which explicitly corresponded to the supply of medicines to patients. By contrast, the Payments here do not track any individual supply nor reimburse any specific cost; nor are they paid to any entity in the chain of contractual supply.

99. HMRC further submits that the Payments are not price controls. While other parts of the Voluntary Schemes address pricing, the Payments themselves represent a portfolio-wide profit adjustment unrelated to the price charged for individual units. They therefore fall outside the category of “reductions in price” contemplated by Article 90.

100. HMRC’s alternative case is that even if Article 90 were engaged, the FTT erred in law by holding that reductions could apply notwithstanding that many downstream supplies of Medicines are zero-rated under VATA. HMRC relies on *Commission v Germany* to submit that an Article 90 adjustment is impermissible where the final supply contains no VAT element to be reduced. If BIL were permitted to adjust its output tax liability at the head of the chain while final patient supplies bore no VAT, the VAT chain would become net negative, creating a fiscal imbalance contrary to neutrality.

101. HMRC notes that the CJEU’s reasoning in *Commission v Germany* is directed specifically to cases where the price borne at final consumption includes **no VAT**, in which case a manufacturer’s rebate cannot include a VAT component. Accordingly, HMRC submits that BIL’s claims must fail to the extent they relate to Medicines later dispensed on **zero-rated prescriptions**.

### **BILs submissions**

102. BIL supports the FTT’s reasoning and submits that the Payments represent post-supply price reductions within Article 90. BIL argues that the FTT made clear and unchallenged findings of fact demonstrating that the Payments were calculated precisely by reference to BIL’s audited net sales of identified Medicines and thus were directly linked to the supplies for which VAT had been accounted.

103. Relying on *Elida*, *Boehringer (1)*, *Boehringer (2)* and *Novo*, BIL submits that Article 90 does not require a contractual relationship between the supplier and the recipient of the rebate.

In those cases, rebates paid to insurers or statutory funders, who were not contractual purchasers, nevertheless reduced the taxable amount because they were the parties who, in economic terms, funded the purchase. BIL contends the same is true of DHSC, which funds NHS England and thereby the purchase of Medicines used in the health service.

104. BIL also rejects HMRC's reliance on *Tolsma*. It argues that *Tolsma* is confined to identifying whether there is a taxable supply for consideration under Article 2 and does not govern Article 90 rebates. Once a taxable supply exists, the correct inquiry is whether part of the consideration originally received has been paid away. BIL submits that the Payments clearly represent such a post-supply reduction.

105. BIL contends that HMRC's focus on whether the Payments are linked to specific batches or individual prescriptions is misplaced. CJEU jurisprudence, including *Rayon d'Or*, *Commission v Germany*, *Boehringer (2)*, and *Novo*, recognises that aggregation mechanisms do not prevent a finding of a direct link where the payment is calculated by reference to objectively identifiable supplies. The FTT accepted evidence that the Medicines were fully identifiable and that the Payments were calculated from product-level audited sales data.

106. BIL argues that the Voluntary Schemes are designed to control the affordability of branded Medicines to the NHS. While policy purpose is not central to Article 90, the scheme's mechanics show that the Payments have the economic effect of reducing the value retained by BIL from its sales of Medicines. This aligns with the principle that the taxable amount cannot exceed the value actually received and retained by the supplier.

107. On the zero-rating issue, BIL submits that *Commission v Germany* concerned exports and intra-EU supplies where no VAT was charged by the manufacturer. That context differs fundamentally from domestic supplies of Medicines, where BIL's own supplies were standard-rated. BIL notes that in *Boehringer (1)* and *Boehringer (2)*, some downstream supplies were free of charge or outside the scope of VAT, yet the CJEU still applied Article 90 to reduce the manufacturer's taxable amount. Downstream zero-rating should not affect the ability of a supplier to adjust its own standard-rated supply.

108. Finally, BIL submits that HMRC's interpretation would lead to arbitrary and distortive outcomes, making the ability to reduce taxable amount depend on factors wholly outside the supplier's control. Article 90 requires the taxable amount to be aligned with the subjective value actually retained, and the FTT was correct to conclude that the Payments reduced that value in this case.

## ANALYSIS

### Core Principles

109. In our view the CJEU has repeatedly emphasised that the key foundational principle underpinning the VAT system is that it is a tax on final consumption collected on the value added across the supply chain such that only the final consumer is taxed and it is neutral as to taxable persons in the supply chain. The taxable amount is the "subjective value" as the CJEU has referred to it. That is to say the value actually received by the supplier from the customer or a third party on behalf of the customer. A reduction under Article 90(1) arises when the consideration payable by the final consumer is reduced such that the amount of VAT paid at the point of final consumption is also reduced. The concomitant reduction in taxable amount accrues to the participant in the supply chain responsible for financing the reduced price paid by the final consumer.

110. We consider it helpful to take the approach AG Jacobs did in *Commission v Germany* and to illustrate the operation of these principles with an example supply chain with manufacturer, wholesaler, retailer, and final consumer (and for simplicity a VAT rate of 10%). Assuming a supply from manufacturer to wholesaler is 100 plus 10 VAT<sup>74</sup>; wholesaler to retailer 120 plus 12 VAT; retailer to consumer 160 plus 16 VAT. VAT of 16 is collected across the supply chain as follows:

Participant	Output tax	Input tax	Net VAT collected
Manufacturer	10		10
Wholesaler	12	10	2
Retailer	16	12	4
Total tax collected			16

111. If, in the above example, the manufacturer gave a price rebate to the final consumer of 11 including 1 of VAT, the VAT paid by the final consumer would be 15. Fiscal neutrality requires that the total tax collected across the supply chain equals 15 with each supply chain participant accounting for VAT on the proportion of the final consideration received by them. The above table would be modified as follows:

Participant	Output tax	Input tax	Rebate	Net VAT collected
Manufacturer	10		(1)	$10 - 1 = 9$
Wholesaler	12	10		2
Retailer	16	12		4
Total tax collected				15

112. There is no requirement for the wholesaler or retailer to adjust their VAT accounting because, in each case, they paid, to the immediately preceding participant in the supply chain, the VAT on which they claimed input tax and they accounted for VAT on the amount received by them from the succeeding participant in the chain.

113. Critical to the integrity of the VAT system is the identification of the VAT paid at final consumption. The total VAT collected must equal the VAT at final consumption. Each party in the chain of supply must pay the amount of VAT which reflects the proportion of the VAT

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<sup>74</sup> And assuming there is no input tax incurred by the manufacturer.

paid at final consumption as is reflected by the proportion of that final consideration actually received by that participant.

114. What constitutes consideration is an EU law concept and, as established in the CJEU jurisprudence evaluated above, requires there to be a direct link between the subjective reciprocal value passing between the supplier and the customer, such value capable of being expressed in monetary terms. It is clear, contrary to BIL's critique of HMRC's reliance on the need for a *Tolsma* type direct link: firstly that the requisite legal relationship does not necessarily need to be contractual; and, secondly, that requirements for a direct link do exist outside simple bilateral situations. The need for a direct link and reciprocity is, in our view, inherent in the nature of what constitutes consideration whether that arises in a simple bilateral situation, or in a third party consideration context. It also exists, as we set out below, in the context of reductions in consideration.

115. Having established those core principles, we address the 17 propositions the FTT derived from the case law at paragraph [98] of the FTT decision. With the further elaboration provided in relation to (6), (7) and (14) and the exception of (12), we agree with those and we did not understand the parties to take issue with them either:

(1) "the taxable amount for supplies of goods and services is everything which constitutes consideration for the supply obtained or to be obtained by the supplier from the customer/purchaser or a third party. (Article 73 PVD)"

(2) "the taxable amount includes taxes, duties, levies, and charges but not the VAT chargeable on the supply. (Article 78(a) PVD)"

(3) "there must be a direct link between the supply and the consideration received. (*Boehringer (1)* paragraph 40, *Boehringer (2)* paragraph 45 and *Novo* paragraph 35)"

(4) "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. (*Elida* paragraph 27 and *Commission v Germany* paragraph 30)"

(5) "the taxable amount serving as the basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer. (*Elida* paragraph 19 and *Commission v Germany* paragraph 29)"

(6) In principle, we agree that "the taxable amount used to calculate the VAT chargeable cannot exceed the sum finally received by the taxable person (*Elida* paragraph 28, *Commission v Germany* paragraph 30, *Boehringer (1)* paragraph 32 and *Boehringer (2)* paragraph 41)"; however, we do not consider it is a stand-alone concept. We consider that it is the direct corollary of proposition (5).

(7) As with proposition (6), we consider that whilst "the tax authorities may not collect an amount of VAT exceeding the tax which the taxable person received. (*Boehringer (1)* paragraph 32, *Boehringer (2)* paragraph 41 and *Novo* paragraph 30)", that proposition is constrained by proposition (5) such that the tax authorities may not collect an amount of VAT exceeding the share of VAT paid by the final consumer received by the taxable person.

(8) “VAT is intended to tax only the final consumer. (*Elida* paragraphs 19, 22 and 23, *Commission v Germany* paragraph 29, *Boehringer (2)* paragraph 39 and *Novo* paragraph 32)”

(9) “as VAT is intended to tax only the final consumer, it follows that the taxable amount for VAT purposes may not exceed the amount paid by the final consumer. (*Elida* paragraph 31, *Boehringer (1)* paragraph 42, *Boehringer (2)* paragraph 46 and *Novo* paragraph 50)”

(10) “the final consumer does not have to be a participant in the contractual chain of supply (*Boehringer (1)* paragraph 39)”

(11) “the final consumer may be a person other than the purchaser or direct beneficiary of the supply. (*Boehringer (1)* paragraphs 40 and 41, *Boehringer (2)* paragraphs 45 and 46 and *Novo* paragraphs 49 and 50)”

(12) For the reason we set out in paragraphs [119] – [122] below we disagree that “the final consumer is the person who, in economic reality, bears the cost of the supply at the stage of final taxation. (*Boehringer (1)* paragraph 41 and *Boehringer (2)* paragraph 46)”

(13) “the position of taxable persons involved in the production and distribution process prior to the stage of final taxation should be neutral, regardless of the number of transactions involved. (*Elida* paragraph 31)”

(14) As with propositions (6) and (7) we consider that a conclusion that “whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person, the taxable amount and, consequently, the amount of VAT payable by the taxable person must be reduced (Article 90(1), *Boehringer (1)* paragraphs 32 and 39, *Boehringer (2)* paragraph 41 and *Novo* paragraph 30)” has at least the potential to be an incomplete reflection of the correct proposition. In a bilateral situation the proposition is usually correct as the payment made by the supplier to the customer will represent a reduction in the consideration received. In a multi-party situation, the focus of attention will be on whether there has been a true reduction in the consideration received rather than a payment made from the resources represented by that consideration.

(15) “a price reduction need not be voluntary but can result from an obligation imposed by law. (*Novo* paragraphs 46 – 48 and 50 - 52)”.

(16) “The taxable amount of a supply is not reduced where the supplier makes a payment to another person that is not linked to that supply”. (*Ibero*)

(17) “The taxable amount of a supply and, consequently, the amount of VAT payable by the taxable person is not reduced where the price invoiced at that stage of the distribution chain, or at a later stage, does not include VAT as any reduction or partial reduction of that price cannot in turn include a VAT element.” (*Commission v Germany* paragraph 64)

116. The FTT concluded at paragraph 99 that “although not expressly stated in any of the cases considered above, ... as there must be a direct link between the supply and the consideration received, it follows that there must also be a direct link between any price reduction and the consideration given for the supply”. We agree with this proposition. As we see it, a rebate is simply negative consideration. Thus, unless the payment which is claimed to

be a rebate arises as a reduction in the value given as reciprocal performance for a supply, it does not meet the conditions of Article 90 and will not give rise to an adjustment to the taxable amount of the supply.

### **HMRC's primary case – there is no right to an Article 90 adjustment**

#### ***Correct test for identifying whether DHSC is to be treated as a final consumer?***

117. The FTT determined the DHSC was a final consumer in connection with the supply of Medicines on the basis that DHSC “bore the cost” of such Medicines. That conclusion was reached in consequence of a focus on the economic position of BIL after the Payments had been made. In doing so the FTT relied on *Boehringer (1)* and (2).

118. On the basis of our analysis of those cases and in the context of the wider jurisprudence of the CJEU and domestic Courts as we have interpreted it above, we can see no justification for a conclusion that the party who bears the cost of a supply, in a general sense, is the final consumer of it. We do not consider that was the conclusion in *Boehringer (1)* or (2) or *Novo*. Rather, as *Tolsma*, *Rayon d’Or*, *Boehringer (1)*, *Boehringer (2)* and *Novo* make clear a “final consumer” must be identified by reference to a relationship of reciprocal performance: a party who pays value **in return** for the goods, even if the goods are physically supplied to a third party.

119. In *Boehringer (1)* the pharmaceuticals were provided to patients in circumstances in which the direct costs of the pharmaceuticals would be reimbursed in whole or in part to the patient by the private insurer. In the context of a healthcare system funded through insurance (public or private) the AG specifically observed<sup>75</sup> that when it is known that the direct cost of pharmaceuticals will be reimbursed by the private insurer, viewing the economic consumer of the pharmaceuticals as the final consumer is a “legal fiction” because the VAT paid by them is paid back to them by the insurer. The Court approves this analysis<sup>76</sup> concluding that the insured patient acts as a third party in the economic chain of supply because it is known that the insurer will reimburse the payment made. There is thereby a relationship of reciprocal performance between the pharmacy, the insured party, and the insurer pursuant to which the sum reimbursed is treated as first party consideration paid by the insurer on a supply of pharmaceuticals provided to a third party patient. It is not simply that in that case the private insurer “bore the cost”. They paid for a particular supply to a particular insured person of particular drugs. In that context and applying *Tolsma* and *Rayon d’Or* the private insurer was to be treated as a final consumer despite not physically receiving the pharmaceuticals.

120. In *Boehringer (2)* and *Novo* the relationship of reciprocal performance of the supply into consumption was the same in each case and, in our view, clearer than in *Boehringer (1)* as the NEAK paid the pharmacies directly for the proportion of the consideration payable for the pharmaceuticals as was represented by the subsidies. The subsidy payment represented the whole or part of the full price of the pharmaceuticals physically supplied to the patient. In *Boehringer (2)* and *Novo* there were two economic customers, the NEAK, and the patient. As such, NEAK and the patient were each in a bipartite relationship of reciprocal performance for the supply of identified medicines for which they paid consideration directly and immediately linked to the supply. Neither simply “bore the cost” of the pharmaceuticals.

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<sup>75</sup> Paragraph 44

<sup>76</sup> Paragraph 41

121. Thus, we do not accept that economic funding alone suffices to replicate the ‘reciprocal performance’ or transaction-specific contribution required by the authorities. As explained in *Boehringer (1)* and *Boehringer (2)*, what mattered was the insurer’s payment *for* the individual medicinal product, not its broader fiscal role. DHSC’s general budgetary function is too remote to establish the necessary link. Similarly, any persuasive value of *Novartis* is limited because of its different facts. The insurers there were invoiced for the medicines in issue and the drug costs were separately itemised such that the insurer’s reimbursement was a specific contribution to the price of the identified supplies.

122. It is, in our view, clear that the correct test requires there to be identified a relationship of reciprocal performance where value is provided/payment is made by one party in return for the supply of goods or services by that other, though the goods and services need not be provided physically to the party giving value. This is not a test of some asserted economic reality whether found as a fact, or otherwise. What is required is for there to be a careful assessment of who does what for whom and in return for what value. As the FTT applied a different test we agree with HMRC that it erred in law in that regard.

***Correct test for identifying whether the Payments are directly linked to a supply into final consumption***

123. As indicated in paragraph [116] above we agree with the FTT that there must be a direct link between a price reduction and consideration given for the supply. The FTT thereby applied the right test when seeking to identify a direct link between the Payments and the consideration paid by the final consumer. However, for the reasons identified in paragraphs [115(6), (7), (12), and (14)], and [117] – [122] above it applied the wrong test when identifying that DHSC was a final consumer. Having made that error, it necessarily follows that the FTT erred in its conclusion that there was a direct link between the Payments and BIL’s supplies at the head of the chain.

124. Both errors were plainly material to the outcome of the FTT’s decision meaning the FTT Decision must, in our judgment, be set aside.

**Remaking the decision**

***Is there a direct link between the DHSC funding and supplies into final consumption?***

125. The parties were agreed that should we set aside the FTT decision we should remake it on the facts found and not remit it to the FTT for a further decision. We agree. We have the relevant findings of fact and/or access to the relevant evidence to enable us to remake the decision.

126. On the facts in this case as articulated to us, we understand that there are three categories of supplies into final consumption.

(1) The first is from BIL/Wholesaler/Pharmacy to the HSPs for use in an inpatient hospital setting. The supply to the HSPs is a taxable supply. The HSP has no entitlement to deduct the VAT paid as input tax as the Medicines are used in free at point of end use healthcare and is thereby treated as a supply into final consumption.

(2) The second is from Pharmacies to patients in outpatient care and/or on the high street in each case for home use.

(3) The third concerns supplies of Medicines, in particular vaccines, made directly to DHSC who, we were told, distribute them directly.

127. We are satisfied that as regards the third category DHSC is the final consumer. There is a direct supply of Medicines paid for by DHSC. Applying *Boehringer (1)* and proposition 115(10) it does not matter that the ultimate recipient of the Medicine is a third party.

128. As is apparent from *Boehringer (1)*, (2) and *Novo* the DHSC could be treated as a final consumer in relation to either or both of the other two categories if, on the facts, the payment that it made represented value paid by way of reciprocal performance for and thereby directly linked to the provision of the Medicines. Before the FTT it was for BIL to lead evidence sufficient to establish on the balance of probabilities that such a link existed.

129. The statement of agreed facts accepted by the FTT establishes: (1) The Secretary of State is under an obligation to ensure that the NHS is adequately funded. (2) The DHSC is established to assist the Secretary of State in managing and delivering a comprehensive health and social care service. (3) The majority of the DHSC's budget is transferred to NHS England.

130. The FTT also accepted the witness statements of each of the witnesses. We have reviewed the witness statements and the exhibits to them and identify the following evidence relevant to establishing whether there is a direct link between the payments made by the DHSC to HSPs and Pharmacies and the supply of Medicines into final consumption:

(1) DHSC is responsible for allocating its budget to NHS England (and the devolved equivalents). This is done through the NHS mandate and associated financial directions which are set by reference to the agreed core budget set by the Government, usually in the spending review. The budget so allocated also takes account of the anticipated income from the Voluntary Schemes and the statutory scheme. The budget calculation will include an amount expected to be spent on Medicines, but the budget is not formally ringfenced to be so spent. There is no direct connection between the anticipated income under the Voluntary Schemes and the amount allocated through the mandate.

(2) The hearing bundle indicated that the copy of the mandate exhibited to Mr Hennigan's statement was in the authorities bundle but it was not. It was, however, available through open sources. It demonstrates that the budget allocation is split between revenue and capital only. The financial directions to which we were provided access (though a link in Mr Day's witness statement) provide further specification on the manner in which the budget is to be spent by NHS England but do not reference spending on Medicines or unbranded pharmaceuticals specifically. The only reference to Medicines in the financial directions confirmed that income from the Voluntary Schemes was part of non-ringfenced revenue.

(3) NHS England is responsible for allocating that budget to local commissioners of health services.<sup>77</sup> That budget allocation process uses a statistical formula to produce a target allocation of the national budget to each local area on an assessment of factors including demography, morbidity, and deprivation. Target allocation is compared to the current budget of the commissioning body with the intention of moving actual allocated budget to target in a way which does not destabilise local health economies.

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<sup>77</sup> Over the period covered by the claims these commissioning bodies have had different guises such as Care Commissioning Groups.

(4) The commissioning bodies, in turn commission the provision of services and the associated supply of goods, including Medicines, from NHS Trusts and other bodies including Pharmacies. Payments for Medicines dispensed by Pharmacies are paid directly by the commissioning bodies but are administered by a separate arm's length body. Medicines provided in secondary care settings are purchased by the relevant HSP and reimbursed by the commissioning body in accordance with prices set under identified payment schemes.

(5) The National Audit Office annual review of DHSC confirms that health and social care is "funded" by the DHSC. NHS England is described, with others, as an arm's length body responsible for setting the framework for commissioning healthcare services. Commissioning bodies are shown as independent from but accountable to NHS England. Funding is shown as provided from DHSC to NHS England and on to both commissioning bodies and primary care providers, including Pharmacies. Information is provided on how money has been spent (rather than how the budget was calculated) and for 2017/18 demonstrates that £1.9bn was spent directly by NHS England and £8.5bn by commissioning bodies on "prescribing and pharma" which we understand to include Medicines and non-branded pharmaceuticals.

(6) The HM Treasury Public Expenditure Statistical Analysis for 2019 demonstrates a spending review revenue budget allocation to NHS England from DHSC in each year as a single sum.

(7) Annual accounts are produced for DHSC on a consolidated basis including NHS England which is noted as an "Executive Non-Departmental Public Body established by primary legislation with its own statutory function rather than functions delegated by DHSC". The annual review confirms that DHSC works through a number of arm's length bodies including NHS England. It also states: "We secure funds for health and care services and remain accountable for this funding which is allocated to the most appropriate local level...". The section of the report dealing with medicines and pharmacy demonstrates that DHSC together with NHS England have a focus on the efficient use of the medicines budget. It references the Voluntary Schemes and the contribution made by them to controlling medicines spend by health services. The report confirms that the budget allocated to NHS England funds healthcare services generally.

(8) A House of Commons Briefing Paper (CBP 07206 – The structure of the NHS in England) provides an overview which corroborates and supports the other evidence summarised above. It describes the funding flow for healthcare as follows:

"Funding for health services comes from the total budget for the [DHSC].  
...The majority of this budget was transferred to NHS England ...

NHS England's budget is used to deliver its mandate from the DHSC. NHS England is responsible for allocating resources to local commissioners of health services ...

(9) The Briefing Paper notes that most hospital, community, and mental health care is provided by self-governing bodies which are financially and operationally independent NHS Foundation Trusts and NHS Trusts. Other primary care providers, including Pharmacies, are identified as independent entities contracted with the NHS. Although healthcare is provided through this chain of bodies legally separate from the DHSC the Secretary of State has powers to intervene if NHS England or any other NHS body fails to discharge its functions.

131. On the basis of this evidence, we agree that at the broadest economic level the DHSC “funds” the NHS and the purchase of Medicines; however, we consider that the budget allocation made by the DHSC is too remote to have a direct link to any particular supply of Medicines or to the supply of Medicines generally into final consumption. Payments of this nature determined annually by reference to the overall objectives of ensuring a properly funded health and social care system are not similar to either the specific and identifiable reimbursement of the cost of pharmaceuticals by the German private insurance companies or the NEAK. BIL highlighted how the various NHS bodies operate within a single governance system and with consolidated accounts by way of support for a submission that the separate purchasing roles of other NHS bodies could in effect be looked through with the DHSC treated as the effective funder of the medicines. However, in agreement with HMRC, whatever the overarching governance structure or accounting practice, it cannot be overlooked that the NHS bodies act as distinct statutory entities which contract, purchase and account for Medicines in their own right. DHSC provides only general, non-ring-fenced budgetary funding and does not reimburse or pay for specific supplies. Against that backdrop, the NHS architecture cannot be collapsed into a single consumer, and DHSC cannot be treated as part of the supply chain for the purposes of Articles 73 or 90.

132. We also consider payments of this nature too far removed to represent consideration of the type arising in *Rayon d’Or*. In this regard, we agree with the analysis of that case in *Colchester* as referenced in footnote 48. In *Rayon d’Or*, the facts drove a conclusion that the lump sum payment was made on the contractual basis that healthcare services would be provided to residents from time to time of the homes receiving the payment. Here the funding is paid in a much more generalised way to NHS England in order to meet its general obligations under its mandate. That funding is then assigned to a further level through various arm’s length bodies. In an overall sense the final consumption of Medicines is funded by the DHSC, but the payment of that funding is at best indirectly linked to the supply of such Medicines. It is not, in our view, value paid by DHSC by way of reciprocal performance to the Wholesalers or Pharmacies for the supply of Medicines. The payments made by way of reciprocal performance for such supplies are made by the commissioning bodies or NHS England defraying the funding it has received from DHSC without specific allocation or constraint that it be used to purchase Medicines.

133. Accordingly, we conclude that DHSC is not a final consumer and cannot be treated as a final consumer in respect of the supply into final consumption of Medicines in either of the circumstances identified in paragraph 126(1) and (2) above.

***Absent such a direct link can the Payments represent a rebate?***

*Where DHSC is a final consumer*

134. We answer this question firstly in respect of the category of supplies of Medicines made directly to DHSC and paid for by DHSC and then distributed.

135. Where Medicines are supplied directly to and paid for by DHSC, we consider that insofar as part of the Payment is referable to the supplies of those Medicines there is a direct link between the Payment and the supply. We do so because in this scenario there is no complexity. DHSC has paid BIL and subsequently BIL pays DHSC an amount referable to the extent to which growth in sales of those identified Medicines exceed the expected rate. We consider that the basis of the calculation of the payment in *Novo* represents an appropriate analogy to that in the present case. Applying the propositions, as reformulated in paragraphs [115(6), (7), (12),

and (14)], the amount of VAT paid at final consumption has been reduced. BIL has received a lower amount for the supplies of these Medicines, having made the relevant part of the Payment that relates to those Medicines to DHSC, and it is entitled to adjust its output tax.

136. HMRC contend that the Payments are not price controls and, as such, even if DHSC is a final consumer there cannot be an adjustment. For the reasons we set out below we agree that the Payments are not price controls but we do not consider that they need to be. What is required is that the Payments are directly linked to the supply and the consideration originally paid at the point of final consumption. If the Payments have the effect of reducing the value provided by way of reciprocal performance, which simultaneously reduces the price paid inclusive of VAT by the final consumer and reduces the amount actually received by the supplier, the supplier is entitled to an Article 90 adjustment. That is what *Novo* determined.

*Where DHSC is not the final consumer*

137. The answer to this question requires us to determine whether the principles derived from *Elida* can be applied in respect of a payment which is made to a party who is not in the chain of supply leading to final consumption. We consider that the answer, derived from the CJEU jurisprudence, is that it plainly cannot, because the VAT incurred by the final consumer has not been reduced by the Payments.

138. Where DHSC has only provided the budget cascaded through NHS England, the commissioning bodies, and down to the HSPs and Pharmacies, the price paid by the HSPs and patients has not been altered. As such there has been no rebate of the price into final consumption. Rather, it is our view that the Payments are made by BIL from income received on the supplies made by it at the head of the chain, but the payment is not, in substance, a reduction in the price paid by the final consumer. In that sense therefore they are akin to the payments made by Ibero to the tour operator, the amounts set off by the finance company when paying Primback, payments by Total for the purchase of the gift vouchers, and by Town and County when paying out prizes. Like those cases, the Payments were not reductions in the taxable amount, but payments made outside the supply chain not reducing the consideration given for any individual supply.

139. We do not consider that the analogy applied in *Boehringer (1)* (by implication in *Boehringer (2)*) given the direct application of *Boehringer (1)* and *Novo* to *International Bingo* applies in the present case. In *Boehringer (1)* a price rebate was paid per transaction which had been reimbursed by the insurer which was treated as a final consumer. Whilst the rebate occurred post supply it was known in advance that, if a particular pharmaceutical item was dispensed to an individual insured with the insurer, *Boehringer* would be required to make the repayment. As such, pending the sale into final consumption, *Boehringer* was not free to dispose of the consideration paid to it at the top of the chain. Similarly, in *Boehringer (2)* the predetermined contribution to the subsidy was required wherever a particular item of pharmaceutical product was supplied to the patient and the NEAK. In *Novo*, the levy type payment compared favourably to the legislative requirement to pay out winnings.

140. In contrast, the Payments here are predetermined only in the sense that there is a formula by which ex post facto the amount of the Payment is determined. However, the Payments arise only where growth in sales of the products exceed the accepted amount. It cannot therefore be said that the supplies made by BIL are subject to a similar restriction to those arising in *Boehringer (1)*, (2) or *Novo*. BIL may, in the end, be required to pay away a proportion of its turnover where the accepted growth rate is exceeded but, in our view, that is more analogous

to the payment of the spot the ball prize in *Town and County* and, as such, has no bearing on the consideration received in connection with supplies made in the situation in which DHSC is not a final consumer.

### ***Were the Payments price controls***

141. We do not consider that whether or not the Payments are best described as a price control makes a difference to our decision in each of the scenarios above for the reasons stated. However, as the parties requested us to express our view on each of the disputed points, we consider that the Payments were not price controls.

142. We reach this view because:

(1) The Voluntary Schemes taken as a whole comprise a range of tools by which the cost of Medicines provided to the NHS is constrained. We must consider the nature of the Payments as prescribed and therefore a single component of the Voluntary Schemes.

(2) It is at least implicit that the Payments were authorised under section 261(b) because under the terms of the VPAS the Payments are described as remaining “a portfolio-wide profit control scheme”. However, even if the Payments are a mechanism authorised under section 261(c) NHS Act such a mechanism permits payments calculated by reference to sales rather than price.

(3) In a free market there is a relationship between price and demand. This is so even in an economic imperfect market. Thus, where prices are controlled, growth in demand is to be expected. The Payments are described as an affordability mechanism which has the objective of capping sales growth. The Payments are calculated at a fixed percentage of sales of Medicines which exceed anticipated and permitted rates of growth which are inherent in the pricing controls imposed through other features of the Voluntary Schemes more widely.

(4) The Payments can be contrasted with sections 5 and 7 PPRS and section 5 VPAS which both explicitly limit the price which can be charged for Medicines.

### ***Decision***

143. For the reasons stated we remake the decision, as requested, in principle as follows:

(1) To the limited extent that the Payments related to excess sales growth in respect of vaccines and other Medicines supplied directly to DHSC, BIL is entitled to adjust the VAT accounted for on the sales made by it of those particular Medicines.

(2) Otherwise, there was no right to adjust the taxable amount of supplies to Wholesalers/Pharmacies, and the claims were correctly rejected by HMRC.

### **HMRC’s alternative case – there is no entitlement to adjust where the supplies into final consumption are zero rated**

144. Whilst this was an alternative argument, we determine it, at least in principle, because of our conclusion that to the limited extent that supplies were made by BIL directly to DHSC and part of the Payments related to the pharmaceuticals so supplied, BIL is entitled to adjust. However, we note that it is our understanding that any such supplies will not be zero rated at

the point of consumption because, in this scenario DHSC will have received a standard rated supply of Medicines from BIL which it uses itself, for instance in national vaccination programmes, and made no further supply for VAT purposes.

145. The FTT sets out its analysis of *Commission v Germany* at paragraphs [42] – [47] of the FTT decision and determines, at paragraph [49], that it was authority for a proposition only that no adjustment to the manufacturer’s taxable amount is permissible where the supply by the manufacturer is itself zero rated or exempt. The FTT considered that where the manufacturer had charged VAT on its supply:

“... It would be contrary to the principle of fiscal neutrality, as explained by the [CJEU], if the manufacturer were unable to reduce the value of its supply because another supply further down the chain was exempt or zero rated. Such a result would mean that the manufacturer was required to account for VAT on more than it had ultimately received and retained for the supply.”

146. As will be apparent from our analysis of *Commission v Germany* in paragraphs [25] – [48] above we disagree with the FTT’s interpretation of the conclusions in that case. We consider it plain that when considering exempt exports (akin to zero rated transactions), exempt supplies, and rebates to taxable persons, the AG and Court were looking at the final link in the supply chain. In each instance the AG and the Court concluded that the mechanics of the VAT regime ensured that the correctly identified risk of a tax loss could be managed in an economic and systemic sense and did not undermine the principle expressed in *Elida*. This was because given that the recipient of an exempt export or exempt supply had not paid or borne VAT on the consideration the manufacturer had no right to adjust its output tax despite having accounted for output tax at the top of the chain. In the case of a business customer the manufacturer could adjust but there was a concomitant requirement that the recipient of the rebate adjusted their input tax. Claiming an amount of input tax exceeding the amount of VAT actually paid represented fraud.

147. We consider, for the reasons explained by the AG and endorsed by the Court, an output tax adjustment by the manufacturer where no VAT is paid at the point of final consumption breaches fiscal neutrality and would result in an absolute tax loss. We consider that our analysis of *Commission v Germany* is also supported by *Firma Z* ([79] – [80] above).

148. To demonstrate this we extend the simple example used in paragraphs [110] – [111] above to assume that the supply into final consumption is zero rated - firstly assuming no adjustment:

Participant	Output tax	Input tax	Rebate	Net VAT collected
Manufacturer	10			10
Wholesaler	12	10		2
Retailer	0	12		(12)
Total tax collected				0

149. And then assuming an adjustment to the manufacturer's taxable amount is permitted:

Participant	Output tax	Input tax	Rebate	Net VAT collected
Manufacturer	10		(1)	$10 - 1 = 9$
Wholesaler	12	10		2
Retailer	0	12		(12)
Total tax collected				(1)

150. Thus were the supplies made by BIL to DHSC to have been used by DHSC in making a zero rated supply any adjustment would result in an absolute and impermissible tax loss.

151. For these reasons to the extent that BIL is entitled to make an Article 90 adjustment, or in the event we are wrong in our view and an Article 90 adjustment is *prima facie* available, such an adjustment would be precluded insofar as the Payments related to supplies of Medicines which were zero-rated at the point of final consumption. However, we do not anticipate that many, if any, of the supplies directly from BIL to DHSC were used by DHSC in making a zero-rated supply.

**JUDGE SWAMI RAGHAVAN  
JUDGE AMANDA BROWN KC**

**Release date: 26 March 2026**