EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Indirect Taxation and Tax administration
Value added tax

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VALUE ADDED TAX COMMITTEE
(ARTICLE 398 OF DIRECTIVE 2006/112/EC)
WORKING PAPER NO 1053

QUESTION
CONCERNING THE APPLICATION OF EU VAT PROVISIONS

ORIGIN:	**Lithuania**
REFERENCES:	**Articles 73 and 90(1)**
SUBJECT:	**Application of VAT on medicinal products sold by pharmaceutical companies**

1. INTRODUCTION

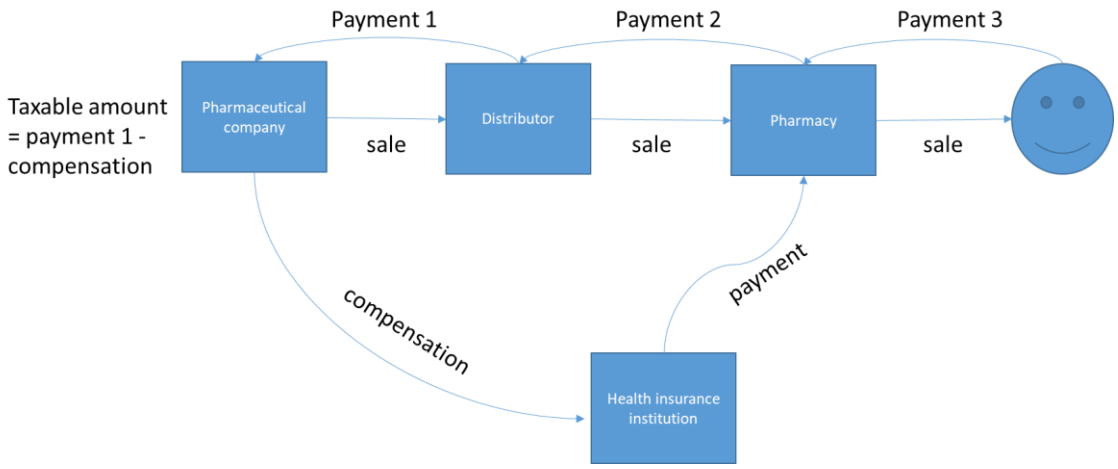
Lithuania wishes to consult the VAT Committee on the possibilities of refund of VAT incurred by a pharmaceutical company established in one Member State on a compensation paid for medicinal products to the health insurance institution in another Member State.

The question and analysis submitted by Lithuania are attached in annex.

2. SUBJECT MATTER

The Court of Justice of the European Union (CJEU) has ruled in Cases C-717/19 *Boehringer Ingelheim*[1] and C-462/16 *Boehringer Ingelheim Pharma*[2] that, in a supply chain where the manufacturer (pharmaceutical company) > wholesaler (distributor) > retailer (pharmacy) > end-user (patient) are all located in one Member State and the pharmaceutical company reimburses the health insurance institution part of the cost of the medicinal products provided under a contract concluded with the health insurance institution, this compensation paid by the pharmaceutical company to the health insurance institution is intended to cover the price (or part of it) of the medicines purchased by the end user (patient).

Example 1

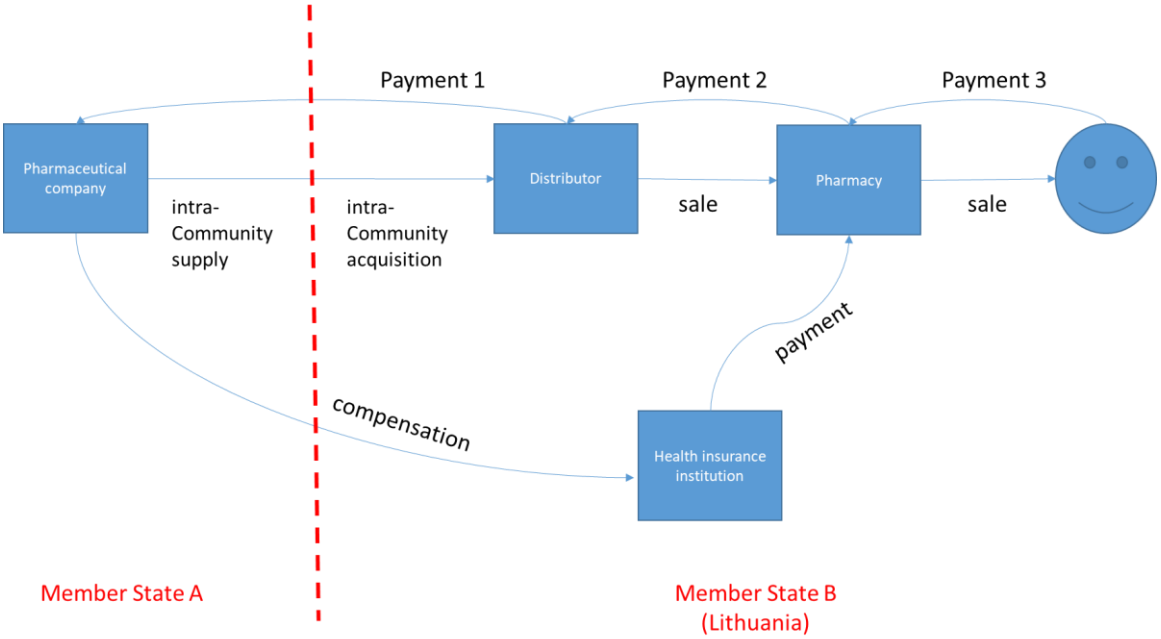


According to the CJEU, manufacturers of medicinal products (pharmaceutical companies) may reduce the taxable amount of the medicinal products they supply by the amount of compensation paid to a health insurance institution, even without a VAT credit note being issued for such a reduction. In this case, for the purposes of VAT, it is considered that the manufacturer of the medicinal product granted a discount for the previously supplied medicinal product and that that discount was granted at the final stage of the supply chain of the medicinal product.

1 CJEU, judgment of 6 October 2021, *Boehringer Ingelheim*, C-717/19, EU:C:2021:818.
2 CJEU, judgment of 20 December 2017, *Boehringer Ingelheim Pharma*, C-462/16, EU:C:2017:1006.

The case of a supply chain where the pharmaceutical company is established in a different Member State than that of the other actors in the chain is presented to the VAT Committee. For example: company (pharmaceutical company) in a Member State A > Lithuanian company wholesaler (distributor) > Lithuanian company retailer (pharmacy) > Lithuanian end user (patient).

Example 2



The pharmaceutical company in Member State A reimburses the Lithuanian health insurance institution part of the price of medicines (this part is calculated from the price of medicines with VAT included).

The pharmaceutical company in Member State A is not registered as a VAT payer in Lithuania, it does not carry out economic activities there and cannot submit a VAT return. In this example, the question is whether the compensation paid to the health insurance institution can reduce the tax base in accordance with the scheme described above.

3. THE COMMISSION SERVICES' OPINION

In the example being examined (example 2), the pharmaceutical company carries out exempt intra-Community supplies in Member State A[3]. Those supplies open a deduction right to the pharmaceutical company[4]. The corresponding intra-Community acquisitions are taxable in Lithuania[5] and the person liable for VAT is the recipient of the medicines[6].

The question raised is whether a reduction of the tax base in a cross-border situation can be applied as in *Boehringer Ingelheim* and *Boehringer Ingelheim Pharma* where the scenarios were purely domestic.

3 Article 138(1) of the VAT Directive.
4 Article 169b of the VAT Directive.
5 Article 41 of the VAT Directive.
6 Article 200 of the VAT Directive.

3.1. Reduction of the tax base in a domestic case

In *Boehringer Ingelheim* and *Boehringer Ingelheim Pharma*, a reduction of the tax base was granted to the pharmaceutical company for the compensation paid to the health insurance institution. The reasoning supporting this reduction was based on Articles 73 and 90(1) of the VAT Directive[7].

Article 73 of the VAT Directive states that the taxable amount, in respect of supplies of goods and services, is everything that constitutes the value of the consideration that has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies.

Article 90(1) of the VAT Directive, on the other hand, requires the Member States to reduce the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person.

On this basis, the CJEU ruled that the taxable amount used to calculate the VAT to be remitted by the pharmaceutical company had to be made up of the amount corresponding to the price at which it sold the medicines, reduced by the compensation paid to the health insurance institution[8]. In view of the principle of neutrality, this reduction ensured that the taxable amount did not exceed the sum, VAT excluded, finally received by the pharmaceutical company[9].

3.2. Reduction of the tax base in a cross-border case

In the situation where the pharmaceutical company is located in a different Member State than its client, the pharmacy or the distributor, and also of the health insurance institution and the patient, the opportunity to grant a reduction of the tax base is questioned.

Indeed, while one can consider that a price reduction has happened after the time when the transaction took place within the meaning of Article 90(1) of the VAT Directive, one may wonder:

- whether the pharmaceutical company established in Member State A is in a similar situation as that established in Member State B and if that situation in fact calls for a reduction of the tax base in application of the principle of equal treatment;

- if the reduction were to be granted to the pharmaceutical company in Member State A, whether it would achieve the aim of Article 90(1) of the VAT Directive and;

- whether the CJEU has already had occasion to express its views on a reduction of the tax base in a cross-border situation.

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7 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

8 *Boehringer Ingelheim*, paragraphs 44 and 47 and *Boehringer Ingelheim Pharm*, paragraph 46.

9 *Boehringer Ingelheim*, paragraph 44 and *Boehringer Ingelheim Pharma*, paragraph 35. See also CJEU, judgment of 24 October 1996, *Elida Gibbs*, C-317/94, EU:C:1996:400, paragraph 28.

Regarding the first question

The question whether the pharmaceutical company established in Member State A is in a similar situation as that established in Member State B is raised to determine the applicability of the principle of equal treatment[10].

The similarity of situations requires a factual assessment. In its case law, the CJEU gave an example: "[…] *a situation where traders are all holders of VAT credits, seek to obtain repayment from the tax authorities and find that their claims for a refund are treated differently*"[11].

The pharmaceutical company established in Member State B invoices and collects VAT, the pharmaceutical company established in Member State A does not. The situation of the pharmaceutical company established in Member State A is different from that of the pharmaceutical company established in Member State B. Therefore, the principle of equal treatment does not apply in such a circumstance.

It must be concluded that making a distinction between the pharmaceutical companies based on their place of establishment when considering the opportunity to reduce the tax base does not infringe the principle of equal treatment.

Regarding the second question

It is here questioned whether in a cross-border scenario the imputation of the compensation paid by the pharmaceutical company to the health insurance institution on the price at which the medicines are sold by said pharmaceutical company achieves the aim of Article 90(1) of the VAT Directive.

The aim of Article 90(1) of the VAT Directive is that the tax base equals the consideration actually received. The corollary of this is that the tax authorities may not collect an amount of VAT exceeding the VAT which the taxable person receives[12].

The sales made by the pharmaceutical company are intra-Community supplies exempt from VAT in Member State A[13]. The corresponding intra-Community acquisitions are taxable in Member State B[14] and the VAT is self-assessed by the recipient of the medicines[15].

As in Member State A the intra-Community supplies are exempt, the reduction of the tax base of the pharmaceutical company would not impact the VAT collected by the tax authorities.

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10 The CJEU indicated that infringement of the general principle of equal treatment may be established by discrimination affecting traders in a similar situation. See CJEU, judgments of 10 April 2008, *Marks & Spencer*, C-309/06, EU:C:2008:211, paragraph 49, and of 25 April 2013, *Commission v Sweden*, C-480/10, EU:C:2013:263, paragraph 17.

11 *Marks & Spencer*, paragraph 50.

12 CJEU, judgment of 11 November 2021, *ELVOSPOL*, EU:C:2021:911, C-398/20, paragraph 25; order of 3 March 2021, *FGSZ*, C-507/20, EU:C:2021:157, paragraph 18.

13 Article 138(1) of the VAT Directive.

14 Article 40 of the VAT Directive.

15 Article 200 of the VAT Directive.

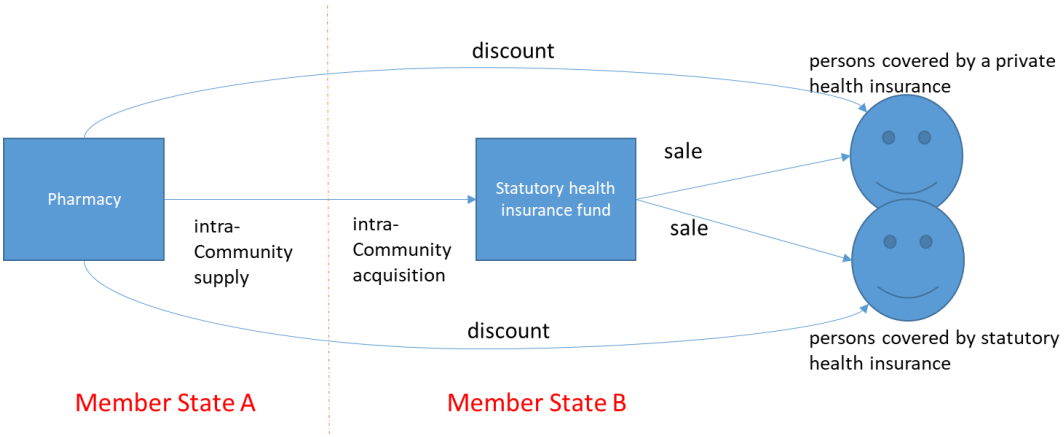
It must be concluded that in such a cross-border situation, the aim of Article 90(1) of the VAT Directive cannot be achieved via the imputation of the compensation paid by the pharmaceutical company to the health insurance company on the price at which the medicines are sold by said pharmaceutical company.

Regarding the third question

The CJEU decisions mentioned above on the VAT treatment of price reductions in the context of a chain of transactions revolved around domestic scenarios.

However, the CJEU also delivered a judgment concerning a discount granted in relation to an exempt intra-Community supply in the healthcare sector in the case *Firma Z*[16].

In that case, a pharmacy established in one Member State was carrying out exempt intra-Community supplies to a health insurance fund established in another Member State and granting discounts to end consumers covered by that insurance. The health insurance fund was self-assessing the VAT on the acquisitions and on-charging free of VAT[17] the medicines to insured end consumers.



It was questioned whether the pharmacy could reduce its tax base by the amount of the discounts.

The CJEU considered that in so far as the pharmacy did not have a taxable amount capable of being adjusted, it had to be held that the conditions for applying Article 90(1) of the VAT Directive were not fulfilled so that the tax base could not be reduced by the discount.

This conclusion can be applied to the case at hand insofar as in both *Firma Z* and the case before us, the claimant performs an intra-Community supply exempt of VAT and as such does not have a taxable amount.

That leads the Commission services to conclude that the pharmaceutical company should not be able to reduce the taxable amount of its intra-Community supplies based on *Boehringer Ingelheim* and *Boehringer Ingelheim Pharm*.

16 CJEU, judgment of 11 March 2021, *Firma Z*, C-802/19, EU:C:2021:195.
17 These supplies did not fall within the scope of VAT as per Article 2(1)(a) of the VAT Directive.

One question remains to be raised. The factual circumstances of *Firma Z* and of the case before us are different. First, it must be observed that in the latter only the discounts reduce the cost of the taxable acquisitions by the health insurance company. Secondly, the chain of transactions is different. In *Firma Z,* the supplies of medicines transit via the health insurance fund and are out of the scope of VAT when they reach the end users. In the case before us, the supplies of medicines do not transit via the health insurance institution and are in the scope of VAT even at the last stage up to the end user. Further to these observations, one may wonder whether in the case at hand, there could be scope for the reduction to be computed at the level of the intra-Community acquisitions.

4. DELEGATIONS' OPINION

Delegations are invited to give their opinion on the question and to indicate whether they agree with the analysis of the Commission services.

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ANNEX

QUESTION FROM LITHUANIA

Lithuania has been applying Cases C-717/19 Boehringer Ingelheim and C-462/16 Boehringer Ingelheim Pharma of the Court of Justice of the European Union (hereinafter – CJEU) and encountered some issues of practical application in special situations on which we would like to obtain the opinion of the European Commission.

Aforementioned cases of CJEU dealt with the situations where, in the supply chain of a medicinal product: the manufacturer (pharmaceutical company) > wholesaler (distributor) > retailer (pharmacy) > end-user (patient) is located in one Member State and the manufacturer of the medicinal product reimburses the health insurance institution part of the cost of the medicinal products provided under a contract concluded with the health insurance institution. This compensation paid by the pharmaceutical companies to the health insurance institution is intended to cover the price (or part of it) of the medicines purchased by the end user (patient). According to CJEU, manufacturers of medicinal products (pharmaceutical companies) may reduce the taxable amount of the medicinal products they supply by the amount of compensation paid to the health insurance institution, even if no such VAT credit note is issued for such a reduction. In this case, for the purposes of VAT, it is considered that the manufacturer of the medicinal product granted a discount for the previously supplied medicinal product and that that discount was granted at the final stage of the supply chain of the medicinal product.

In line with this practice, we are of the opinion that in a supply chain where a pharmaceutical manufacturer (pharmaceutical company) > wholesaler (distributor) > retailer (pharmacy) > end-user (patient) is located in the territory of the same country (Lithuania), pharmaceutical manufacturers (pharmaceutical companies) can reduce the taxable amount of their supplied medicinal products in the VAT return by the amount of funds paid to the health insurance institution by deducting the VAT amount from this amount, and also reduce the sales VAT amount in the VAT return, which is calculated on the reduced taxable amount, applying the VAT rate that was applied to the sale of medicinal products to the end user. In this case, no VAT credit notes are issued, i. e. in the supply chain the pharmaceutical manufacturer (pharmaceutical company) > wholesaler (distributor) > retailer (pharmacy), the taxable amount and the amount of VAT calculated from it are not reduced, as a result of which the wholesaler (distributor) deducts a higher amount of VAT equal to the amount of sales VAT paid to pharmaceutical manufacturer (pharmaceutical company).

However while applying this case law in practise the question arises as to whether the case law of the CJEU in question can be applied where, in the mentioned case of the supply chain, the pharmaceutical manufacturer (pharmaceutical company) is established in another Member State. For example, in the case of a supply chain: company in a Member State A (pharmaceutical company) > Lithuanian company wholesaler (distributor) > Lithuanian company retailer (pharmacy) > Lithuanian end user (patient), company in a Member State A reimburses the Lithuanian health insurance institution part of the prices of medicines (this part is calculated from the price of medicines with VAT). Company in a Member State A is not registered as a VAT payer in Lithuania, it does not carry out economic activities in Lithuania and cannot submit a VAT return and recover the amount

of VAT calculated from the compensation paid to the health insurance institution in accordance with the scheme described above. However, the company is asking to find other ways and refund the amount of VAT.

From our point of view two scenarios are possible. In the first scenario, in the aforementioned case when the first seller (pharmaceutical manufacturer (pharmaceutical company)) is located in another Member State, the aforementioned case law should not be applied and VAT that was compensated to the health insurance institution should not be refunded taking into account that this seller does not charge any sales VAT when selling the product to another Member State (exemption according to article 138 of VAT Directive is applied), therefore there is no VAT amount from which a part of VAT that was compensated to the health insurance institution could be refunded in Lithuania.

In the second scenario, taking into account the principle of equal treatment under European Union law, the aforementioned case law should be applied in the situation when the first seller (pharmaceutical manufacturer (pharmaceutical company)) is located in another Member State regardless that there were no sales VAT applied and the Member State where the last transaction happened should find a way to refund the amount of VAT that was compensated to the health insurance institution through its national measures.