JUDGMENT OF THE COURT

15 October 2002 *

In Case C-427/98,

Commission of the European Communities,, represented initially by E. Traversa and A. Buschmann, then by E. Traversa and K. Gross, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

defendant,

* Language of the case: German.

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by J.E. Collins, acting as Agent, and subsequently by R. Magrill, acting as Agent, and R. Anderson, Barrister, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that, by not adopting provisions allowing adjustment of the taxable amount where money-off coupons are reimbursed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), in the version contained in Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J-P. Puissochet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, V. Skouris (Rapporteur), F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 May 2001, at which the Commission was represented by E. Traversa and K. Gross, the Federal Republic of Germany by W.-D. Plessing and the United Kingdom by J.E. Collins and K. Parker QC,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 26 November 1998 the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting provisions allowing adjustment of the taxable amount where money-off coupons are redeemed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977

L 145, p. 1), in the version contained in Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them (OJ 1995 L 102, p. 18, hereinafter 'the Sixth Directive').

2 By order of the President of the Court of 22 June 1999 the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the form of order sought by the Federal Republic of Germany.

Legislative framework

Community legislation

3 Article 11(A)(1)(a) and (3)(b) of the Sixth Directive provides:

'*A. Within the territory of the country*

1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which 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;

...

3. The taxable amount shall not include:

...

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply.'

4 Under the first subparagraph of Article 11(C)(1) of the Sixth Directive:

'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.'

5 Article 17(2)(a) of the Sixth Directive provides:

'In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid in respect of goods or services supplied or to be supplied to him by another taxable person.'

6 Under Article 20(1)(b) of the Sixth Directive:

'The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

...

(b) where after the return is made some change occurs in the factors used to determine the amount to be deducted, in particular where... price reductions are obtained;...'

7 Under Article 21(1)(c) of the Sixth Directive:

'The following shall be liable to pay value added tax:

1. under the internal system:

...

(c) any person who mentions the value added tax on an invoice or other document serving as an invoice.'

National legislation

8 Under the first three sentences of Paragraph 10(1) of the Umsatzsteuergesetz (German VAT law), in the version in force from 1 January 1993 (BGBl. 1993 I, p. 365), as rectified on 25 June 1993 (BGBl. 1993 I, p. 1160) ('the UStG'), the basis of assessment for VAT purposes is calculated as follows:

'Turnover shall be calculated in accordance with the remuneration received for supplies, other services (first sentence of Paragraph 1(1)(1)) and intracommunity

acquisitions (Paragraph 1(1)(5)). Remuneration shall comprise the recipient's total outlay (net of turnover tax) for the purpose of obtaining the supply. Remuneration shall also include items received in respect of the service by the supplier from a person other than the recipient of the service.'

9 Paragraph 17(1) of the UStG provides:

'When the basis of assessment of a taxable transaction for the purposes of Paragraph 1(1)(1) to (3) has changed,

1. the trader who made the supply shall adjust correspondingly the amount of tax payable and

2. the trader who received the supply shall adjust correspondingly the amount of input tax deductible in that regard;

that shall apply by analogy in the case of Paragraph 1(1)(5). Adjustment of the deduction of input tax may be waived where a third-party trader pays to the tax authority the amount of the tax corresponding to the reduction in remuneration; in that case the third-party trader is liable to pay the tax. The adjustments referred to in the first sentence must be made in respect of the taxable period within which adjustment of the basis for calculating the tax took place.'

Pre-litigation procedure

10 In a letter dated 31 July 1992 sent to each of the Member States the Commission asked whether, in the Member State concerned, a manufacturer issuing vouchers in connection with his products was entitled to reduce his taxable amount accordingly when reimbursing the amount stated on the voucher to the retailer for a price reduction granted to the final consumer in exchange for that voucher.

11 In its reply of 10 November 1992 the German Government provided, *inter alia*, the following explanation:

'The condition governing adjustment of tax and of input tax, under Paragraph 17(1) of the UStG is... that there has been a change in the basis for calculating the supplier's turnover in relation to his immediate customer. Accordingly, it applies only to price rebates (reducing the remuneration) owing to the fact that the trader returns the remuneration to the person who paid it. Reimbursement by the manufacturer in favour not of the recipient of the supply but of another person in the distribution chain does not entail a reduction in remuneration for the manufacturer. If the manufacturer issues a voucher which the final consumer may redeem directly or through the intermediary of a trader, or if he reimburses to the final consumer an amount of money, there is no reduction in the basis of the calculation for the purposes of Paragraph 17(1) of the UStG.'

12 In a letter of formal notice sent to the German Government on 18 January 1994 the Commission claimed that the German legislation was in breach of the principles of value added tax (hereinafter 'VAT'), in particular Article 11 of the Sixth Directive, inasmuch as it denies a wholesaler the right to a reduction of its

basis of assessment and a corresponding adjustment of its turnover tax where, upon presentation of a voucher, it reimburses a part of the price to a retailer with which it is not directly connected in the distribution chain.

13 By letter dated 11 April 1994 the German Government replied that the situations envisaged in the abovementioned letter differed from those mentioned by the Commission in its letter of 31 July 1992 in so far as in the former the Commission assumed that the manufacturer undertook to reimburse the amount of the voucher to the retailer and that that reimbursement occurred through the intermediary of the wholesaler.

14 In a supplementary letter of formal notice of 14 June 1995 the Commission stated its view that no distinction ought to be drawn according to whether the taxable person reimbursing the voucher was or was not directly connected with the taxable person who accepted that voucher as a means of payment or according to whether the voucher was reimbursed to the final consumer directly by the taxable person who had undertaken to do so or through the intermediary of another taxable person.

15 In its reply of 4 September 1995 the German Government maintained its view that the issuer of a voucher may reduce its taxable amount only when it is directly linked in the distribution chain to the person to whom it reimburses the value of the voucher. It proposed in any event that the proceedings be stayed pending a ruling by the Court on the questions referred to it in the cases in which it gave judgment on 24 October 1996 (Case C-317/94 *Elida Gibbs* [1996] ECR I-5339 and Case C-288/94 *Argos Distributors* [1996] ECR I-5311), which on the date of its letter were still pending before the Court. Thus, initially, the Commission did not pursue the procedure for failure to fulfil obligations.

16 By a letter dated 5 March 1997 the Commission drew the attention of the German Government to the fact that in the *Elida Gibbs* judgment the Court had fully endorsed its view of the matter. It therefore requested the German Government to inform it of the legal provisions which it had adopted in order to comply with that judgment.

17 In its reply of 26 May 1997 the German Government requested the Commission to extend the stay of proceedings because it was still considering the *Elida Gibbs* judgment and the consequences for German law to be drawn therefrom.

18 Since the Federal Republic of Germany had still not adopted any measures to bring its legislation into line with the judgment in *Elida Gibbs*, the Commission addressed a reasoned opinion to it on 23 March 1998.

19 In a letter to the Commission of 26 August 1998 the German Government reaffirmed its view, though acknowledging that the substance of the *Elida Gibbs* judgment ran counter to its own interpretation. In particular it referred to an administrative circular from the Federal Ministry of Finance dated 15 April 1998 and entitled 'Assessment of the taxable amount in regard to turnover tax on the issue of vouchers offered with products' (*Bundessteuerblatt* 1998 I, p. 627).

20 As is apparent from that circular, under German law, the manufacturer's taxable amount may be reduced by the amount indicated on a voucher only if the manufacturer reimburses that amount to a trader to whom he previously supplied the goods directly and on condition that the manufacturer establishes a corrected invoice resulting in a corresponding adjustment by the trader of the input tax deducted by him.

21 Under those circumstances the Commission decided to bring these proceedings.

Substance

22 The issue of money-off coupons (vouchers) is a system used by manufacturers to promote sales of their products whereby retailers grant to final consumers a price reduction in exchange for vouchers issued by the manufacturer from whom they subsequently obtain reimbursement of their face value.

23 It should also be stated that the Commission's application concerns the situation illustrated by the worked examples in paragraphs 29 to 39 of the Advocate General's Opinion in which one or more wholesalers intervene in the distribution chain between the manufacturer and the retailers and vouchers are reimbursed directly by the manufacturer to the retailers without any intervention by the wholesalers.

24 It is common ground that in that situation the German legislation does not allow deduction from the manufacturer's taxable amount of the amount indicated on the vouchers. Under that legislation such a reduction is allowed only if the manufacturer delivered the product directly to the retailer who presents the voucher to him, for in that situation the reimbursement made by the manufacturer may be construed as the return of part of the sale price to his immediate customer.

25 Furthermore, according to the German Government's analysis, the principle that the supplier's turnover tax must be concordant with the input tax paid by his

customer requires the reduction in the manufacturer's taxable amount to be accompanied by a corresponding adjustment in the deduction of input tax by his immediate customer and the other intermediate links in the distribution chain, and by the retailer presenting the voucher to him.

26 Conversely, the Commission contends that it is clear from the Sixth Directive, as interpreted by the Court in *Elida Gibbs*, that the taxable amount of a manufacturer who reimburses part of the price of one of his products must be reduced by the amount of that reimbursement after deduction of VAT without any distinction being made as to whether the person obtaining that reimbursement from the manufacturer is a taxable person or a final consumer or as to the number of persons comprising the distribution chain.

27 Furthermore, the Commission infers from the principles underlying the Sixth Directive, as established by the Court in *Elida Gibbs*, that the manufacturer's taxable amount may be reduced without affecting the amount of input tax which the retailer is entitled to deduct and that it is therefore not necessary to correct the taxable amount in regard to the intermediate transactions.

28 It should be borne in mind that *Elida Gibbs* concerned specifically the calculation of the taxable amount of a manufacturer who had issued money-off coupons giving rise, after purchase by the final consumer, to a reimbursement by that manufacturer to a retailer not directly connected to him in the distribution chain. The Court held that the manufacturer's taxable amount is equal to the selling price charged by the manufacturer, less the amount indicated on the voucher and refunded (*Elida Gibbs*, paragraph 34).

29 At paragraphs 19, 22 and 23 of *Elida Gibbs*, the Court recalled 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 prior to the stage of final taxation, regardless of the number of transactions involved. The Court inferred, at paragraph 24 of the judgment, 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.

30 It went on to observe that, under the Court's settled case-law, the concept of consideration in Article 11(A)(1)(a) of the Sixth Directive had to be interpreted as the 'subjective' value, that is to say, the value actually received in each specific case, and not a value estimated according to objective criteria. The Court concluded that it would not be in conformity with that directive for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him. Were that the case, the principle of neutrality of VAT *vis-à-vis* taxable persons, of whom the manufacturer is one, would not be complied with (*Elida Gibbs*, paragraphs 26 to 28).

31 Accordingly, the Court held that the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons. That interpretation, it added, was borne out by Article 11(C)(1) of the Sixth Directive, which seeks to ensure the neutrality of the taxable person's position (*Elida Gibbs*, paragraphs 29 to 31).

32 Moreover, at paragraph 32 of the judgment in *Elida Gibbs* the Court expressly rejected the arguments advanced in particular by the German and United Kingdom Governments to the effect that deduction from the taxable amount of reductions granted directly, or of refunds made directly, to the consumer by the initial supplier after delivery to a wholesaler or retailer would upset the

functioning of the VAT machinery and render the system unworkable because it would require each wholesaler or retailer in the chain retroactively to adjust the price and, consequently, the amount of VAT they had paid to their own supplier and would require the latter to issue amended invoices.

33 In particular, the Court held that the VAT system is not disturbed as a result of such deduction since there is no need to readjust the taxable amount for the intermediate transactions. It stated that, for those transactions, observance of the principle of neutrality of VAT is ensured by application of the conditions for deduction set out in Title XI of the Sixth Directive (*Elida Gibbs*, paragraph 33).

34 None the less, the German Government maintains that the approach adopted by the Court in *Elida Gibbs* in regard to the fiscal treatment of money-off coupons is incompatible with the principles on which the VAT system is based. It goes on to explain that this is why it has not brought its applicable legislation into line with it.

35 The United Kingdom Government states that it has brought its legislation into line with the *Elida Gibbs* judgment but that the interpretation adopted by the Court in that judgment must be reviewed because it is irreconcilable with the very nature of the VAT system.

36 In fact those two governments consider that, where the manufacturer and the ultimate beneficiary of the reimbursement of the voucher are not in a direct contractual relationship, any reduction in the manufacturer's taxable amount runs counter to the principle of VAT neutrality. They argue that that principle is

also infringed if no formal adjustment of the manufacturer's taxable amount also affecting deductions by the retailer is required because only a system under which the supplier's liability to tax corresponds to the amount of the deductions by the customer enables taxable persons not to bear the burden of the VAT.

37 In support of their view, the German and United Kingdom Governments rely on arguments seeking to point up the ways in which the VAT system is likely to be undermined by the Court's approach in *Elida Gibbs*. According to those governments, the principal problems occasioned by that approach are threefold: first, practical difficulties in the administration of the VAT system, secondly, the loss of tax revenue and, thirdly, breach of the requirement that VAT be neutral as regards competition.

Practical difficulties in the administration of the VAT system

38 The German Government argues, first, that if under the approach advocated by the Commission formal adjustment of the manufacturer's taxable amount also affecting the deductions by the retailer were not required, the manufacturer would remain liable for the full amount of the tax stated on the invoice, under Article 21(1)(c) of the Sixth Directive.

39 Moreover, Article 11(C)(1) of the Sixth Directive, which concerns cases in which the price is reduced after the supply takes place, makes reduction in the taxable amount subject to 'conditions which shall be determined by the Member States'. It infers therefrom that, when the manufacturer reimburses the amount stated on the voucher after the goods have gone through the distribution chain, that

provision allows the Member States to require, as a condition for reducing the manufacturer's taxable amount, a corresponding adjustment of input tax and output tax in regard to the intermediate links in that distribution chain.

40 Those arguments cannot be upheld.

41 As regards, first, Article 21(1)(c) of the Sixth Directive, it should be recalled that that provision seeks to prevent the risk of losses of tax revenue as a result of incorrect or fictitious invoices. However, since reimbursement by the manufacturer to the retailer of the value of money-off coupons does not affect the other transactions in the distribution chain, the invoice issued by the manufacturer to his immediate customer cannot be regarded as either incorrect or fictitious. Under those circumstances, the provision does not preclude the approach adopted by the Court in *Elida Gibbs*.

42 Next, it should be emphasised that observance of the principle of neutrality is ensured since the conditions for deduction set out in Title XI of the Sixth Directive allow the intermediate links in the distribution chain to deduct from their own taxable amount the sums paid by each to his own supplier in respect of VAT on the corresponding transaction and thus to pass on to the tax authorities the part of the VAT representing the difference between the price paid by each to his supplier and the price at which he supplied the goods to his purchaser (*Elida Gibbs*, paragraph 33).

43 In those circumstances, reduction of the manufacturer's taxable amount cannot be made to depend on the subsequent alteration of the transactions effected by

the intermediate links in the distribution chain which are in no way concerned by the price reduction or the reimbursement of the value of the voucher or the invoices relating thereto. Accordingly, Article 11(C)(1) of the Sixth Directive cannot be interpreted as precluding the approach adopted by the Court in *Elida Gibbs*.

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44 Secondly, the German and United Kingdom Governments maintain that the reimbursement of the voucher by the manufacturer to a retailer to whom he did not directly supply the goods constitutes consideration paid by a third party in the context of a transaction between the retailer and the final consumer. Accordingly, there is no reason to consider that the consideration received at the time of the initial supply by the manufacturer should be modified following such reimbursement.

45 In that regard it is sufficient to state, first, that although the manufacturer may in fact be regarded as a third party as regards the transaction between the retailer who receives reimbursement of the value of the voucher and the final consumer, that reimbursement entails a corresponding reduction in the amount finally received as consideration for the supply by him and that consideration constitutes, pursuant to the principle of VAT neutrality, the basis for calculating the tax for which he is liable (see, in that connection, *Elida Gibbs*, paragraph 28).

46 As regards, secondly, the supply by the retailer who receives the reimbursement, it is important to note that the fact that a portion of the consideration received for that supply was not actually paid by the final consumer himself but was made available on behalf of the final consumer by a third party not connected with that transaction is immaterial for the purposes of determining that retailer's taxable amount (see, in that connection, Case C-18/92 *Bally* [1993] ECR I-2871, paragraph 17).

47 Accordingly, that argument must also be rejected.

The loss of tax revenue

48 The German Government maintains that the approach advocated by the Commission concerning the reduction of the manufacturer's taxable amount entails a loss of revenue for the tax authorities inasmuch as it involves a twofold reduction in the taxable amount corresponding to the net value of the voucher. The argument is based on the premiss that the net value of the voucher must be subtracted from the retailer's taxable amount on the ground that it is not consideration moving from the final consumer within the meaning of Article 11(A)(1)(a) of the Sixth Directive.

49 In particular, the German Government submits that the argument that the retailer's taxable amount for the sale to the final consumer should include the face value of the money-off coupon runs counter to the judgment in Case C-126/88 *Boots Company* [1990] ECR I-1235 and to the judgment in *Argos Distributors*, cited above. In the *Boots Company* judgment the Court held that the retailer's taxable amount is made up of the price of the goods less the face value of the coupon. In *Argos Distributors* the Court similarly held that the retailer's taxable amount comprises solely the actual cash amount received by the retailer. It follows that the vouchers presented at the time of purchase of a product may not be regarded as cash or as an expense on the part of the purchaser, so that they cannot constitute a portion of the consideration obtained by the retailer.

50 The German Government submits that if on the other hand the value of the vouchers were incorporated into the retailer's taxable amount, that could only constitute consideration from a third party, namely the manufacturer. In that case the payment by the manufacturer cannot be regarded as a reimbursement in favour of the retailer in the context of a rebate. That payment cannot therefore give rise to a reduction in the manufacturer's taxable amount.

51 The United Kingdom Government supports the German Government's analysis. It adds that, under Article 17 of the Sixth Directive, the taxable person is entitled to deduct from the VAT which he is required to pay on the supply by him the VAT on the goods supplied to him and that, consequently, the tax which he may deduct must correspond to that for which his supplier is liable. Yet the Commission's view of the matter would necessarily upset the balance between input tax and output tax, since it would mean that the manufacturer is entitled to reduce his taxable amount when he reimburses the value of the voucher to a retailer who is not his immediate customer even if the amount paid by the manufacturer's immediate customer is in no way affected by that reimbursement.

52 In that regard it should be noted that, as the Commission has rightly stressed, there is no contradiction between, on the one hand, inclusion of the value of the money-off coupon in the consideration paid by the final consumer to the retailer and, on the other, the reduction in the manufacturer's taxable amount. On the contrary, inclusion of the amount stated on the voucher in the retailer's taxable amount entails a corresponding reduction of the manufacturer's taxable amount in order to ensure that the amount represented by the voucher is subject to VAT only once, namely at the stage of the supply made by the retailer.

53 Moreover, the rule that the tax paid by the final consumer should accord with that imposed on the transactions at each stage of the distribution chain requires each trader to be liable to the tax authorities for the tax relating to the value

added by him. However, since the reduction in the manufacturer's taxable amount does not alter the value added by the retailer, it cannot affect the amount of VAT payable by the retailer. Conversely, if the reimbursement received from the manufacturer by the retailer were not included in the latter's taxable amount, the principle of VAT neutrality would be likely to be infringed.

54 These findings are in no way invalidated by the judgments cited above in *Boots Company* and *Argos Distributors*, which, moreover, are not relevant to the present case since they concern transactions involving only retail selling companies and their immediate customers.

55 More specifically, it should be recalled that the case which led to the judgment in *Boots Company*, cited above, concerned money-off coupons which were offered free of charge by a company to its customers when they purchased certain items and formed part of a promotion the costs of which were borne by the company. Consequently, the Court ruled that since such a price reduction formed part of the 'price discounts and rebates allowed to the customer' within the meaning of Article 11(A)(3)(b) of the Sixth Directive, the face value of the coupons was not to be included in that company's taxable amount (*Boots Company*, paragraphs 13, 21 and 22).

56 In the case which led to the judgment in *Argos Distributors*, the vouchers were issued and sold by a company at their face value or with a rebate and were later used on the basis of their face value as means of payment in that company's stores by purchasers other than the acquirers of those vouchers. In that judgment the Court held that in order to calculate the VAT payable by Argos Distributors Ltd on the revenue from sales of goods paid for by those vouchers, the subjective

consideration actually received by that company was constituted by the face value of the vouchers less any rebates actually granted (*Argos Distributors*, paragraphs 18 and 20).

57 It is clear from the judgments in *Boots Company* and *Argos Distributors*, first, that assessment of the money-off coupons for the purpose of calculating VAT is determined by their legal and financial characteristics and, secondly, that the taxable amount of the trader who accepts them may not be less than the sum of money which he actually receives for the supply by him (see *Boots Company*, paragraphs 21 and 22, and *Argos Distributors*, paragraphs 19 to 23).

58 It follows that, in situations such as that in the present case, the subjective consideration within the meaning of Article 11(A)(1)(a) of the Sixth Directive received by the retailer comprises the whole of the price of the goods, which is paid in part by the final consumer and in part by the manufacturer. In fact, the coupons substantiate the retailer's right to receive from the manufacturer a reimbursement in the amount of the reduction granted to the final consumer. It follows that the sum represented by the face value of those vouchers constitutes for the retailer an asset item realised on their reimbursement and that they must be treated, to the extent of that value, as a means of payment.

59 Consequently, it must be accepted that the retailer's taxable amount for the sale to the final consumer is the full retail price, namely the price paid by the final consumer plus the amount reimbursed to the retailer by the manufacturer.

60 Accordingly, the argument that the net value of the money-off coupon cannot be included in the retailer's taxable amount must be rejected.

61 The German and United Kingdom Governments further maintain that the reduction in tax paid by the manufacturer without any corresponding adjustment in the deduction of input tax by its immediate customer and other intermediate transactions involves systematic loss of tax revenue on the crossborder use of money-off coupons and in the context of transactions in favour of taxable persons who are final consumers.

62 In particular, those two governments mention the situation in which the supply by the retailer to the final consumer is an exempt export or a likewise exempt intracommunity supply, and the case where the final consumer buying the goods from the retailer is a trader using them for transactions subject to tax and having a right to deduct the tax charged by the retailer. According to those governments, inclusion of the money-off coupon in the retailer's taxable amount in those situations leads to over-deduction to the detriment of the tax authorities in the amount of the VAT element of the face value of the coupon.

63 It should be noted that in the situations described in the preceding paragraph reduction of the manufacturer's taxable amount with no corresponding adjustment of the deductions of the traders in the distribution chain does not inevitably give rise to an imbalance between input tax and output tax, thereby undermining the VAT system. In fact, in all those situations concordance between input tax and output tax may be maintained by use of the measures provided for in the Sixth Directive.

64 In particular, as regards normal intracommunity transactions the reason why the manufacturer using sales promotion schemes such as those at issue in the main proceedings is authorised subsequently to reduce his taxable amount is that the price paid by the final consumer includes VAT, and accordingly any reduction in that price likewise includes a VAT element. Conversely, where, owing to an exemption, the value stated on the money-off coupon is not chargeable to tax in the Member State from which the goods are despatched, 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.

65 Thus, as regards exempt supplies in export or intracommunity transactions, the tax authorities are able, by availing themselves of the possibilities afforded them under Article 11(C)(1) of the Sixth Directive, to prevent the manufacturer from deducting from his output tax what would be a fictitious amount of VAT. Over-deduction of VAT may be avoided by means of checks of the manufacturer's accounting records.

66 Moreover, where the final consumer is a trader authorised to make deductions who uses the goods in his business, any over-deduction resulting from subsequent reimbursement of a voucher may be avoided by adjusting the deduction of input tax effected in respect of that final consumer in accordance with Article 20(1)(b) of the Sixth Directive, which provides for the adjustment of deductions made initially in the case of a change in the matters taken into account in determining the amount of deductions occurring after the declaration has been made. Compliance with the duty to adjust deductions may be ensured in that case as well by accounting checks in respect of both the final consumer and the manufacturer.

67 Accordingly, it must be concluded that, in situations which may give rise to over-deduction of input tax, such as those mentioned by the German and United Kingdom Governments, the Sixth Directive allows adequate measures to be taken to prevent any claim for deduction which is unjustified and thus any loss of tax revenue.

Infringement of the competitive neutrality of VAT

68 The German Government further maintains that the approach adopted by the Commission under which the manufacturer is at all events entitled to reduce his taxable amount in the amount of the voucher reimbursed by him infringes the principle of VAT neutrality as regards competition. Such reduction leads to distortion of competition inasmuch as the tax treatment of the money-off scheme would then be more favourable than that of other promotional schemes.

69 In that regard the German Government observes that a sales promotion scheme based on money-off coupons is decided upon by the manufacturer alone, who determines its scale and bears the attendant costs. However, the reduction in the financial burden on the manufacturer to the extent of the VAT included in the face value of the coupons in fact helps to finance sales promotion expenditure and is, therefore, likely to give rise to discrimination against other kinds of promotional schemes, such as advertising campaigns or free gift schemes.

70 The German Government argues that a manufacturer wishing to promote the sale of his goods has an incentive to forgo the services of advertising agencies since his

operating costs will be lower if he uses money-off coupons. As a result the reduction in the manufacturer's tax debt in the amount of the VAT included in the face value of the coupons deprives possible service providers of potential contracts.

71 The German Government maintains that a reduction in the manufacturer's taxable amount corresponding to the net value of the coupons also gives rise to distortion of competition against promotional schemes taking the form of free gifts, such as that which formed the subject-matter of Case C-48/97 *Kuwait Petroleum* [1999] ECR I-2323. In that judgment the Court held that the offer of free gifts to the final consumer must be subject to turnover tax under Article 5(6) of the Sixth Directive since the gift does not constitute a rebate on the product promoted.

72 Comparing the free-gift scheme with that of money-off coupons, the German Government claims that under the former the manufacturer must account for VAT on the free gift but is none the less entitled to deduct a corresponding amount in respect of the purchase of the gift. Conversely, if the manufacturer chose to replace that gift with a voucher having a face value corresponding to the net purchase price of the gift, he could reduce his operating costs in the amount of the VAT included in that face value. The result is that the tax treatment of free-gift schemes operated by the manufacturer is neutral whereas the issue of money-off coupons is more attractive from a VAT point of view.

73 In that regard the Court would observe, first, that because VAT is neutral it does not, in principle, constitute a cost factor and cannot affect the choice of method adopted by manufacturers to promote sales of their products. In the present case the German Government has been unable to demonstrate the existence of tax treatment favouring the scheme of money-off coupons in relation to other methods of sales promotion and thus the existence of a distortion of competition.

74 The German Government has not explained what the alleged distortion of competitive conditions to the detriment of advertising agencies consists of. There is no reason to suppose that if a manufacturer engaged an advertising agency to promote sales of his products he would necessarily be led to incur greater expenditure than that which he would incur by offering vouchers to final consumers, since the service by that agency would confer entitlement to deduction on the manufacturer and his tax burden would thus be reduced.

75 Secondly, it should be recalled that the case which led to the judgment in *Kuwait Petroleum,* cited above, concerned vouchers offered by a petrol company to consumers with the purchase of a certain quantity of fuel which could be exchanged free of charge for gifts chosen from a special catalogue. The Court held that the offer of such gifts could not be regarded as constituting a rebate or discount under Article 11(A)(3)(b) of the Sixth Directive but was to be deemed to be a supply for valuable consideration and thus a taxable transaction under Article 5(6) of the Sixth Directive (*Kuwait Petroleum*, paragraphs 16, 17 and 31). Under that provision, the application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge, where the value added tax on the goods in question was wholly or partly deductible, are to be treated as supplies made for consideration.

76 However, the Court has also stated that a taxable person offering such gifts is authorised to deduct, in accordance with Article 17(2)(a) of the Sixth Directive, the amount of input VAT paid for the purchase of those goods (*Kuwait Petroleum*, paragraph 19).

77 It therefore appears that, although the two types of promotional scheme, namely the issue of money-off coupons and the offer of advertising gifts, come under two

distinct sets of rules, that difference in tax treatment is inherent in the structure of the Sixth Directive and cannot cause distortion of competition such as that alleged by the German Government.

78 It follows that the argument of infringement of the competitive neutrality of VAT must likewise be rejected.

79 In light of all the foregoing considerations it must be held that, by not adopting the measures necessary to allow adjustment of the taxable amount of the taxable person who has effected reimbursement where money-off coupons are reimbursed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of the Sixth Directive.

Costs

80 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission sought an order for costs against the Federal Republic of Germany and the latter has been unsuccessful, it must be ordered to pay the costs.

81 Under Article 69(4) of the Rules of Procedure, the United Kingdom is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Declares that by not adopting the measures necessary to allow adjustment of the taxable amount of the taxable person who has effected reimbursement where money-off coupons are reimbursed, the Federal Republic of Germany has failed to fulfil its obligations under Article 11 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, in the version contained in Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax — scope of certain exemptions and practical arrangements for implementing them;

2. Orders the Federal Republic of Germany to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Rodríguez Iglesias Puissochet Schintgen

Timmermans Gulmann Edward

Skouris Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 15 October 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President