

# ECJ Advocate General Opines that Member of Board of Directors Does Not Qualify as Taxable Person if Personal Economic Risk Is Not Present and Does Not Act on Own Initiative, *Administration de l'Enregistrement, des Domaines and de la TVA (TVA – Membre d'un conseil d'administration, Case C-288/22 (VAT))* – Details

29 September 2023

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On 13 July 2023, Advocate General (AG) Juliane Kokott of the Court of Justice of the European Union (ECJ) opined that a member of the board of directors does not qualify as a taxable person if he does not bear any economic risk personally and does not act on his own initiative. In the case of *TP v. Administration de l'Enregistrement, des Domaines et de la TVA* (Case C-288/22), the AG Kokott considered

whether a member of the board of directors qualifies as a taxable person with regard to the activities carried out in this capacity. Details of the opinion are summarized below.

(a) Facts. TP is a lawyer and is a member of the board of directors for several companies established in Luxembourg. The tax authorities of Luxembourg took the view that in his capacity as a member of the board of directors, TP acted as a taxable person for VAT purposes and therefore should have accounted for VAT on the remuneration he received from the companies concerned. The tax authorities argued that TP's activity had a permanent nature as he was appointed for a term of six years and that he had an active interest in the performance of those companies as his remuneration was a percentage fee paid out of the profits of the companies. On the other hand, TP argued that he held no actual risk relating to this activity, as personal liability for the board of directors only applied if they exceeded the limits of acceptable conduct. Essentially, TP did not consider his activity as a member of the board to be independent in nature.

(b) Issue. The District Court of Luxembourg decided to stay the proceedings, seeking clarity on whether the remuneration of a board of directors for his activity as part of the board constitutes a remuneration for an independent economic activity, and therefore would render him a taxable person for VAT purposes.

(c) Advocate General's Opinion. The AG started her reasoning by referring to the conditions laid down in article 9(1) of the [VAT Directive \(2006/112\)](#) concerning the taxable person status. The AG clarified the fact that taxable persons should carry out their economic activities independently, which excludes the activities performed as an employee. The AG also recalled that when evaluating the conditions laid down in article 9(1) of the [VAT Directive \(2006/112\)](#) all the relevant circumstances of the case need to be taken into account.

The AG highlighted that based on the case law of the ECJ, when determining whether an activity is performed for consideration, it needs to be evaluated whether the remuneration ensures that the operating costs of the supplier are covered (taking into account the amount in question, but also the number of customers). In earlier judgements, the ECJ regarded the following factors relevant to consider an activity as a non-economic activity: (i) the board member received it irrespective of whether he attended meetings; (ii) the board member held no economic risk for the companies, and (iii) the remuneration was a small and fixed lump sum.

Following from the above, an independent taxable person would be characterized as such when assuming his own economic risk and when deciding on the scope of his activities. In the current case, TP did not appear to have any personal liability and was receiving his fees with regard to his activities as part of a collective body, instead of his own (individual) activities.

The AG also pointed out that activities as part of a collective body cannot be carried out on the free market, and the fee was not determined as a result of a negotiation. According to the AG, the fact that the fee was dependent on the performance of the company is not relevant, as this is not comparable to bearing one's own profit and loss risk. Many employees receive a variable compensation based on their personal performance but also based on the business as a whole.

Lastly, the AG reflected on the fact that TP already operated as a taxable person lawyer and whether his activity as a member of the board would qualify as an ancillary activity to that. However, in this regard it is important to determine whether the ancillary activities are clearly linked to the main economic activity. For TP, the activities carried out as lawyer and as board of directors member of several companies are separate, the former falling within the scope of VAT, the latter not.

Based on the above, the AG proposed to answer the referred questions as follows:

"1. Article 9(1) of Directive 2006/112/EC on the common system of value added tax, read in conjunction with Article 10 thereof, must be interpreted as meaning that the existence of an independent economic activity must be determined by means of a typological comparison. The decisive factor in that regard is whether, in the context of the necessary overall assessment, the person concerned, as a typical taxable person does, bears an economic risk personally and acts on his own economic initiative, which it is for the referring court to ascertain.

2. In that regard, it follows from the principle of neutrality of legal form that a natural person who is a member of a body of a company which is required by law and who receives remuneration for that activity as a member of that body cannot in this respect be regarded as carrying out an independent economic activity."