

ATOZ ALERT

Opinion of the CJEU Advocate General regarding the VAT treatment of director fees

18 July 2023

On 13 July 2023, the Advocate General (“AG”) Kokott of the Court of Justice of the European Union (“CJEU”) issued her opinion in the case C-288/22 *TP* (the “TP Case”) on the VAT status of independent directors.

The main question in the TP Case is whether TP, a natural person serving as an independent member of the board of directors of a limited liability company (“**Independent Director**”), should be considered as performing an independent ‘economic activity’ from a VAT perspective. In other words, should the services rendered by an Independent Director fall within the scope of VAT and be subject to VAT?

In her opinion, AG Kokott took the position that the VAT status of an Independent Director should ultimately be assessed on a case-by-case basis considering all the features of the activity performed. The decisive factor in the assessment should be, according to AG Kokott, whether the person concerned personally bears an economic risk and takes their own economic initiative in the context of their activity.

In the TP Case and considering the facts at stake, AG Kokott sustains that TP should not be considered as performing his activity independently and, as such, he should not qualify as a “taxable person” for VAT purposes. Therefore, according to AG Kokott, the services rendered by TP as an Independent Director should fall out of the scope of VAT.

When assessing the existence of a personal economic risk and own economic initiative for TP, AG Kokott found that a typical taxable person bears a personal risk of loss and profit in respect of their activity linked to their own economic initiative. In TP’s case, the features of the activity performed by TP as an Independent Director lead AG Kokott to conclude that he does not seem to bear any economic risk nor to assume any own economic initiative for his directorship functions. These features are the following:

- TP does not assume any personal liability in relation to the commitments of the company whose management board he is part of (except for the case of personal wrongdoing);

- TP is part of a collective organ (the management board) of various companies and his statutory directorship activity is governed by the corporate law, implying specific rights but also obligations towards the companies where he sits as a board member. Besides, TP cannot propose his directorship services in a free manner to other companies on the market;
- The remuneration is determined by effect of a unilateral decision of the company whose management board TP is part of, and not by effect of a negotiation between TP and the company;
- TP does not bear any economic risk of the company whose management board he is a member of and the fact that his remuneration may be variable is not relevant.

This AG opinion will be followed by a judgment of the CJEU in the coming months. There is sometimes room for surprises but, generally, CJEU judges follow the AG opinion. Should it be the case, the current VAT landscape for independent director services would be significantly impacted. This is still to be analysed on a case-by-case basis but the potential consequences of the judgement for the Luxembourg industry can be summarised as follows:

- VAT would no longer be applicable to independent director services. As a consequence, Luxembourg VAT would no longer be invoiced by Luxembourg based independent directors nor declared as due under the reverse charge mechanism when independent directors are established outside of Luxembourg;
- Independent directors registered for VAT purposes would be required to de-register for VAT;
- Potential regularisations of the past VAT returns filed should be considered. This is notably the case for companies with no or limited VAT deduction rights for which VAT on independent director fees was constitutive of a leakage.

Should the AG opinion be followed by the CJEU, this should be positive news for:

- Companies with no or limited VAT deduction rights. VAT on independent director fees will no longer be constitutive of a VAT leakage for them;
- Independent directors relieved from the obligation to charge VAT and/or determine if the VAT exemption for fund management services applies to part or all of the services they provide.

Our VAT team will publish comments on the judgement when it is available. It cannot be excluded that the VAT Authorities will release guidelines (FAQ or a circular letter) to help taxpayers to take actions if needs be. In any case, we are available for any questions you may have or should you need assistance with handling the above-mentioned VAT aspects.

Do you have further questions?



THIBAUT BOULANGÉ
Partner, Head of Indirect Tax
thibaut.boulangé@atoz.lu
T +352 26 940 270



SILVIN LEIBENGUT
Principal, Indirect Tax
silvin.leibengut@atoz.lu
T +352 26 940 534