

Case C-288/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

29 April 2022

Referring court:

Tribunal d'arrondissement (District Court, Luxembourg)

Date of the decision to refer:

26 April 2022

Applicant:

TP

Defendant:

Administration de l'enregistrement, des domaines et de la TVA

1. Subject matter and facts of the dispute:

- 1 TP, a lawyer, is a member of the board of directors of a number of public limited companies incorporated under Luxembourg law, namely a bank established in Luxembourg, a holding company belonging to a logistics group listed on the Frankfurt stock exchange, and two holding companies belonging to a pharmaceuticals group listed on the Paris stock exchange. As a member of those boards, he takes part in decisions concerning the accounts, risk management policy and the strategy to be followed by the group in question, and in developing proposals to be put to shareholders' meetings. The day-to-day management of the first two companies is carried out by an executive committee made up of the chief executive officers or executive directors. The business activities of the other two companies do not require an executive committee.
- 2 On 28 July 2020, the administration de l'enregistrement, des domaines et de la TVA (Registration Duties, VAT and Estates Authority, Luxembourg; 'the VAT Authority'), acting on its own initiative, subjected the director's percentage fees received by TP in 2019 to VAT. By decision of 23 December 2020, the imposition of tax on the initiative of the VAT Authority was confirmed on the ground that a

company director independently carries out an economic activity and thus does not escape VAT.

- 3 TP disputes that his director's percentage fees are properly subject to VAT. On 26 January 2021, he brought an application to annul the decision to impose tax on the initiative of the VAT Authority before the referring court.

2. Provisions at issue:

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

- 4 Title III, 'Taxable Persons', provides:

'Article 9

1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

...

Article 10

The condition in Article 9(1) that the economic activity be conducted "independently" shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.'

3. The parties' positions:

TP

- 5 TP submits that a member of a board of directors does not carry out his or her activity independently, but as a member of a collective organ which represents the legal person.
- 6 In order to determine whether an activity is carried out independently, 'it is necessary to check whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he

bears the economic risk associated with carrying out those activities' (judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* C-420/18, EU:C:2019:490, paragraph 39).

- 7 The economic risk associated with the activity of the members of the board is borne by the company, and it is the company that bears responsibility to third parties. TP submits that the arguments advanced by the VAT Authority regarding the potential liability of directors are misconceived. He argues that the principle set out in Article 441-8 of the loi concernant les sociétés commerciales (Law on commercial companies) is that 'no personal obligation arises on the part of the directors in relation to the commitments of the company'. A director can be personally liable only where he or she manifestly exceeds the limits of acceptable conduct such that the wrongful act is severable from the function of director. That is the position, according to the case-law of the French Cour de cassation (Court of Cassation), where the director 'intentionally commits a wrongful act of particular seriousness which is incompatible with the normal performance of his or her functions within the company'.
- 8 Furthermore, it is important not to conflate decision-making powers with powers of representation. The issue of representation of a company has no bearing on whether a member of a collective management organ is individually providing management services which are subject to VAT.
- 9 As to the implementation of decisions taken by the company, TP observes that this is generally entrusted to employees of the company, and not to individual directors. Where the directors perform individual tasks outside the scope of the activity of the collegiate organ, and are remunerated for those specific activities, they are acting in a capacity other than that of a member of the collegiate organ. Thus, he submits, if an executive director is given responsibility for implementing decisions of the board of directors, the remuneration for the day-to-day management is treated for tax purposes as salary, and the Court of Justice was very clear on that point in its judgment of 18 October 2007, *van der Steen*, C-355/06, EU:C:2007:615.
- 10 According to TP, the only question to be considered is whether the contribution to the management of a company provided by a director within a collective organ could be described as a service provided independently. He submits that the Court of Justice's analysis leads to the conclusion that the 'service' is provided by the collective organ, and not by its individual members. The board of directors collectively discusses the possible options and takes decisions, and the position of an individual member may be diametrically opposed to that of the collective organ.
- 11 TP submits that the board of directors, viewed as a collective management organ, is the legal representative of the company, such that the management service it collectively provides is deemed to be provided by the company itself.

- 12 Lastly, TP suggests that a reference should be made to the Court of Justice for a preliminary ruling on a question worded in essentially the same terms as the first question which this court will go on to refer.

The VAT Authority

- 13 The VAT Authority maintains that TP's activity as a director is economic in nature in that it is permanent and remuneration is paid in return for carrying it out.
- 14 The permanent nature of the activity is written in to the Law on commercial companies, which provides that directors are to be appointed for a renewable term not exceeding 6 years.
- 15 The services provided by TP also give rise to remuneration, in that he receives percentage fees which are approved by a vote of the general meeting of shareholders on a proposal from the board of directors. The services provided by TP to the companies of which he is a director are thus provided for the purposes of obtaining income therefrom.
- 16 In order for the transaction to be subject to VAT, there must be a direct link between the remuneration received by TP, or in other words his percentage fees, and the services he provides to the companies of which he is a director.
- 17 The VAT Authority considers that there is such a link in the present case. TP is a lawyer of many years' standing and has a wealth of experience which enables him to provide a very high quality of service, in carrying out his mandate as a director, to the companies which have appointed him. In exchange for the expertise of an eminent specialist, the companies must offer TP a quid pro quo which takes account of the quality as well as the quantity of the service he provides to them. The remuneration received by TP thus arises from the functions performed by him in his capacity as a director.
- 18 The VAT Authority adds that remuneration paid in the form of percentage fees has the advantage of giving the directors, if they are not shareholders, a stake in the success of the activities of the companies, and incentivising them to devote their utmost attention to it, so as to generate healthy profits for them.
- 19 It rejects the idea that the payment of percentage fees is dependent both on an autonomous decision of the general meeting and on the availability of distributable profits, such that there is no direct link between the percentage fees and the services of the director. First, in Luxembourg law, the payment of percentage fees is not dependent on the availability of distributable profits. The law does not require percentage fees to be paid out of profits realised by the company. Second, the resolution of the general meeting of shareholders to pay a higher or lower amount in percentage fees is intimately bound up with the importance of the services provided by the directors in the course of the previous financial year.

- 20 The VAT Authority observes that where an executive is replaced, the general meeting often decides to allocate the percentage fees pro rata, based on the time served in the role by each individual.
- 21 Thus there is clearly a legal relationship between the service provided by TP and the value received in exchange, in the form of percentage fees.
- 22 As to the condition of independence, the VAT Authority submits that Article 10 of the VAT Directive states that the condition of independence is intended to exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee.
- 23 The VAT Authority observes first of all that the scope of the judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C-420/18, EU:C:2019:490, which is relied on by TP, is limited to the activity of a member of a supervisory board of a foundation established under Dutch law in the context described by the court which made the reference in that case, and is not transposable to the present case.
- 24 More generally, it submits that for the Court of Justice, legal ties creating the relationship of employer and employee are characterised by dependence on the company as regards working conditions and remuneration, the absence of any individual liability to third parties for the consequences of the activity, and the consequent absence of any economic risk borne by the service provider in relation to the activity. It is necessary therefore to examine whether those conditions are met in the present case.
- 25 As regards the working conditions of a director, the VAT Authority submits that an indication that an economic activity is carried out independently is that the operators themselves procure and organise independently, within the limits laid down by the law, the staff and the equipment and materials necessary for them to carry out their activities. It submits that that is the position with regard to a director under Luxembourg law. Furthermore, a director may be dismissed *ad nutum*, and his or her working conditions thus differ from those of persons dependent on an employer, who generally enjoy protection from dismissal.
- 26 The remuneration of a director depends, at least in part, on the success of the business, and thus on the economic risk attaching to the company, which is never borne by an employee.
- 27 As regards the liability of an executive to third parties and the risk borne by that executive in connection with his or her activity, the VAT Authority submits that executives have civil liability for acts done in the course of managing the company. Such liability exists both vis-à-vis the company and vis-à-vis third parties. In contrast, an employee is generally immune from liability for wrongful acts committed in the course of his or her work – which is not the case in relation to a director, who can be sued by third parties.

- 28 The actual economic risk borne by directors in the exercise of their activity is far from being purely hypothetical. Personal claims against directors are becoming more and more frequent in Luxembourg in relation to arrears of tax – and especially VAT – owed by the company managed by them. Moreover, Article 495 of the Code de commerce (Commercial Code) permits the liquidation of a company to be extended to its de jure and de facto directors, where there has been serious misconduct, by declaring them bankrupt.
- 29 Consequently, the employment relationship characterised by dependence of the employee on the employer is absent from the mandate structure governing relations between directors and the company. TP's argument that the legal status of company organ dictates the legal status of agent is irrelevant, because of the principle of autonomy of VAT. The VAT Authority submits that the purpose of the corporate organ principle is to compensate for certain lacunae in the law governing the mandate. The power of a director to represent the company has no bearing on the status of the director vis-à-vis the company he or she represents.
- 30 Lastly, the VAT Authority returns to the judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C-420/18, EU:C:2019:490, paragraph 42, where the Court of Justice observed in particular that 'the position of a member of a Supervisory Board, such as the applicant in the main proceedings, unlike that of an entrepreneur, is characterised by the absence of any economic risk arising from the activity carried out. According to the referring court, that member receives a fixed remuneration which is not dependent on his participation in meetings or hours actually worked. Thus, unlike an entrepreneur, he does not have a significant influence over his revenue or his expenditure In addition, it appears that negligence on the part of the member of that Supervisory Board, in the performance of his duties, is not likely to have a direct effect on that member's remuneration, since, in accordance with the articles of association of the foundation concerned, such negligence may lead to the removal of that member only after a specific procedure has been followed'.
- 31 Those factors are not present in this case, given that the remuneration of the director depends, at least in part, on the success of the business and thus the economic risk attaching to the undertaking, and given also that the rules governing the liability of a director in Luxembourg law differ from the rules governing the liability of a member of a supervisory board which were at issue in that judgment.

4. Assessment of the referring court:

- 32 The referring court would observe first of all that it does not have all the material necessary to establish the circumstances in which the mandates at issue are exercised, in particular the resolutions of the general meetings which are said to have determined TP's remuneration. Since it does not have the constitutions of the companies of which TP is a director, it will apply the general rules of company law.

- 33 The dispute between the parties relates essentially to the meaning of the terms 'economic activity' carried out 'independently' in Article 9(1) of the VAT Directive.

Economic activity

- 34 Under the case-law of the Court, 'an activity is thus, as a general rule, categorised as economic where it is permanent and is carried out in return for remuneration which is received by the person carrying out the activity' (judgment of 29 October 2009, *Commission v Finland*, C-246/08, EU:C:2009:671, paragraph 37). 'It follows from that, according to the Court's case-law, that a supply of services is effected "for consideration" within the meaning of Article 2(1) of the Sixth Directive only if 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 ...'. Consequently, according to the case-law of the Court, a supply of services for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes a direct link between the service provided and the consideration received ...' (judgment of 29 October 2009, *Commission v Finland*, C-246/08, EU:C:2009:671, paragraphs 44 and 45).
- 35 It must therefore be determined whether the percentage fees received by a member of the board of directors of a public limited company incorporated under Luxembourg law constitute 'the value actually given in return for the service supplied to the recipient' and whether there is 'a direct link between the service provided and the consideration received'.
- 36 TP submits that the 'service' is not provided by the individual members of the board of directors, but by the collective organ. The remuneration of a member of the board of directors of a public limited company incorporated under Luxembourg law is not, he submits, remuneration agreed between a service provider and a client but compensation granted by the general meeting of shareholders.
- 37 The VAT Authority submits, for the reasons set out in paragraph 17, that TP's remuneration is referable to the functions performed in the exercise of his director's mandate. It adds that the resolution of the general meeting of shareholders to pay a higher or lower amount in percentage fees is intimately bound up with the importance of the services provided by the directors in the course of the previous financial year. It submits that there is a direct link between the service provided by TP and the value received in exchange, or in other words the percentage fees.
- 38 In the absence of any detail as to the companies and the remuneration paid, the referring court proceeds on the basis that TP's percentage fees were paid out of the profits realised by the public limited companies incorporated under

Luxembourg law of which he is a director, and that those percentage fees were awarded to him by resolution of the general meeting of shareholders.

39 The two parties to the dispute ask the court to refer a question to the Court of Justice as to whether percentage fees received by a natural person, a member of a board of directors of a public limited company incorporated under Luxembourg law, are to be regarded as remuneration paid in return for services provided to that company. As far as the referring court is aware, that question has not previously been considered by the Court of Justice.

40 The first question set out below will accordingly be referred for a preliminary ruling.

Independence

41 Article 10 of the VAT Directive excludes employed and other persons from VAT in so far as they are bound to an employer by legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability.

42 As regards working conditions, the Court of Justice has held that 'there is no relationship of employer and employee [where those concerned] themselves procure and organise independently, within the limits laid down by the law, the staff and the equipment and materials necessary for them to carry out their activities (judgment of 25 July 1991, *Ayuntamiento de Sevilla*, C-202/90, EU:C:1991:332, paragraph 11).

43 The members of the board of directors of a public limited company incorporated under Luxembourg law are not subject to obligations as regards their working hours or place of work, and have freedom with respect to the organisation and performance of their work. There is thus no relationship of employer and employee discernable from the working conditions or otherwise, for the purposes of Article 10 of the VAT Directive. 'Consequently, secondly, the question whether an activity such as that at issue in the main proceedings must be regarded as being carried out independently must be assessed in the light of Article 9 of that directive' (judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C-420/18, EU:C:2019:490, paragraph 37).

44 In order to establish whether a person independently carries out economic activities within the meaning of Article 9 of the VAT Directive, it is necessary to ascertain whether, in the pursuit of those activities, he or she is in an employer-employee relationship vis-à-vis the person by whom he or she was appointed (judgment of 29 September 2015, *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraph 33).

45 In the present case, it must therefore be determined whether there is an employer-employee relationship between a director and the public limited company which

appointed him. 'In order to assess whether that employer-employee relationship exists, it is necessary to check whether the person concerned performs his activities in his own name, on his own behalf and under his own responsibility, and whether he bears the economic risk associated with carrying out those activities. In order to find that the activities at issue are independent, the Court has thus taken into account the complete absence of any employer-employee relationship, as well as the fact that person concerned acts on his own account and under his own responsibility, is free to arrange how he performs his work and himself receives the emoluments which make up his income' (judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C-420/18, EU:C:2019:490, paragraph 39).

- 46 In the present case, TP submits that the economic risk referred to by the Court of Justice is, in reality, the economic risk to which the legal person is directly exposed by reason of the decisions of the board of directors. The economic risk associated with the activity of the members within the board of directors can be seen, on close inspection, to be borne by the company, and it is the company that bears responsibility to third parties. TP also submits that, in Case C-420/18, the Court of Justice did not take account of the fact that a board of directors, regarded as a collective management organ, is the legal representative of the company, such that the management service it collectively provides is deemed to be provided by the company itself. That case concerned a collective supervisory organ, and not a collective management or collective administrative organ.
- 47 The VAT Authority submits that rather than determining whether or not the corporate organ principle is applicable in VAT cases, it is more pertinent to consider whether or not the director fulfils the requirements of independence identified by the Court of Justice.
- 48 Both parties ask the court to refer a question to the Court of Justice as to whether a director of a public limited company incorporated under Luxembourg law carries out his or her activities independently.
- 49 As far as the referring court is aware, that question has not previously been considered by the Court of Justice. As TP rightly observes, while the position of a member of a management organ is similar to that of a member of a supervisory organ, it also differs in a number of respects. Thus the judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C-420/18, EU:C:2019:490 cannot simply be transposed as it stands to the present dispute.
- 50 The second question set out below will accordingly be referred for a preliminary ruling.
- 51 The referring court will give further detail as to the circumstances in which a director may be liable, under Luxembourg law, either to the company (in contract) or to third parties (in tort).

- 52 Vis-à-vis the company, liability may arise on the part of a director if he or she engages in ‘irregular’ conduct (infringement of the law or the company constitution). In such a case, the other directors are jointly liable. Liability may also arise on the part of a director vis-à-vis the company if he or she engages in conduct constituting mismanagement. In such a case, it is necessary to determine whether any other ordinarily careful and diligent person would, in the same circumstances, have taken the same decision as the director. Liability arising on this basis is individual unless the directors engaged in the wrongful conduct jointly, in which case they are jointly liable.
- 53 Vis-à-vis third parties, a distinction must again be drawn between ‘irregular’ conduct and mismanagement.
- 54 The liability of directors to third parties in respect of ‘irregular’ conduct arises under subparagraph 2 of Article 441-9 of the Law on commercial companies.
- 55 As regards directors’ liability to third parties for mismanagement, the corporate organ principle, relied on by TP, is applicable. As the director is indeed a distinct person, in the eyes of the law, from the legal person he or she represents, the acts done by him or her on behalf of the legal person are acts of the legal person and not the director. Since the act, and therefore the fault, is attributable to the company, the organ is not liable to third parties.
- 56 If the director commits a wrongful act which is severable from his or her functions, however, he or she will be solely liable for the damage caused. In order to be severable from his or her functions, the wrongful act must, in essence, be especially serious and must be intentional.

5. Questions referred:

- 57 The referring court seeks a preliminary ruling from the Court of Justice on the following questions:

‘Is a natural person who is a member of the board of directors of a public limited company incorporated under Luxembourg law carrying out an “economic” activity within the meaning of Article 9 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, and more specifically, are percentage fees received by that person to be regarded as remuneration paid in return for services provided to that company?’

and

‘Is a natural person who is a member of the board of directors of a public limited company incorporated under Luxembourg law carrying out his or her activity “independently”, within the meaning of Articles 9 and 10 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax?’