

# CJEU JUDGES THAT DIRECTORS' FEES MIGHT BE OUTSIDE THE SCOPE OF VAT

## BACKGROUND

The Court of Justice of the European Union (CJEU) has delivered its judgment in case C-288/22 TP (TP Case) on the Value Added Tax (VAT) status of independent directors on 21 December 2023.

The TP Case addresses the question of whether an individual, in his/her capacity of independent director, should be considered as carrying out an economic activity for VAT purposes, giving rise to the status of a taxable person for VAT purposes.

As a reminder, the Luxembourg Circular N° 781 of 30 September 2016 specifically recognized the activity of independent directors as being subject to VAT.

## QUESTIONS RAISED TO THE CJEU

1. The first question was whether the remuneration of members of a board of directors for their activity as part of a body of a legal person constitutes remuneration for an independent economic activity within the meaning of Article 9 of the VAT Directive.
2. The second question was whether an individual, who is a member of the board of directors of a public limited company, carries out his or her activity "independently", within the meaning of Articles 9 and 10 of the VAT Directive.

## JUDGMENT AND NEXT STEPS

The CJEU gave its judgment on 21 December 2023.

The CJEU refers to the independence criterion in its judgment, reminding that this is one of the conditions to qualify as a taxable person for VAT purposes (Article 9 of the VAT Directive, i.e. taxable person shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity). The question on whether or not a director can be considered as independent is thus the key point in the decision of this case.

With respect to the first question, the CJEU ruled that the member of a board of directors of a public limited company governed by Luxembourg law is considered as carrying out an economic activity for VAT purposes within the meaning of Article 9 of the VAT Directive, to the extent he/she provides services for consideration to a company, for which he/she receives a remuneration that can be calculated based on predictable methods and provided that the activity is performed on a permanent basis.

On the second question, the CJEU ruled that the activity of a member of a board of directors of a public limited company governed by Luxembourg law is not exercised independently, despite the fact that such member freely organizes the modalities of execution of his/her work, perceives the earnings that constitute his/her income, acts in his/her own name and is not subject to hierarchical subordination. He/she does not act on his/her own behalf or under his/her own responsibility and does not bear the economic risk linked to his/her activity.

This decision has made clear that the main factor to assess whether a director should be considered as independent or not, hence should be considered as VAT taxable person, is the bearing of the economic risk and the acting on self-responsibility.

## TAX ADMINISTRATION'S RESPONSE TO THE CJEU DECISION

The Administration de l'Enregistrement, des Domaines et de la TVA (AEDT) published Circular N° 781-1 on 22 December 2023, which suspends Circular N° 781 of 30 September 2016 with immediate effect. The latter had clarified that the activity carried out by a member of the board of directors of a Luxembourg company entailed a supply of services within the meaning of the Luxembourg VAT law. Therefore, the cancellation of this Circular as a preliminary step is in line with the judgment in the TP case.

Furthermore, the AEDT issued a newsletter on 15 January 2024 confirming that directors concerned by the CJEU judgment should issue corrective invoices and receive the reimbursement by the State. On the other hand, a special regularization process (régularisation non-bureaucratique) will be available in the coming months on myGuichet. The VAT refund procedure will be possible from year 2018 onwards.

A new Circular will be issued as soon as the Luxembourg Tribunal (Tribunal d'arrondissement) that requested the preliminary ruling from the CJEU renders its judgment. This will provide further guidance on areas of doubt and on the special regularization.



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### WHAT THIS MEANS

While each case needs to be assessed individually, the CJEU's judgment will, in principle, have the following consequences:

- ▶ There might no longer be any VAT implications in relation to the services provided by independent directors.
- ▶ Independent directors registered for VAT in Luxembourg may be required to deregister.
- ▶ Companies may be able to apply for the regularization of past VAT returns (taking into account the statutes of limitation) in order to reclaim non-deductible VAT incurred on directors' services.

### HOW CAN EY HELP?

- ▶ At EY, we can review the VAT status of independent directors.
- ▶ Where applicable we can assist with deregistration process and the associated post filing VAT requirements, as well as ensuring that the deregistration file and the remaining VAT returns are submitted on time to ensure a smooth process and to answer any questions the VAT Administration may have.
- ▶ We can also assist with the regularization of past VAT returns and liaise with the Luxembourg VAT Authorities, with a view to recovering any VAT previously incurred on director services.

### OUR TEAM



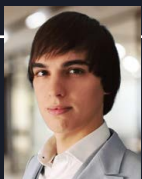
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