



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 July 2023¹

Case C-288/22

TP

v

Administration de l'Enregistrement, des Domaines et de la TVA

(Request for a preliminary ruling from the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg))

(Reference for a preliminary ruling – Value added tax – Directive 2006/112/EU – Taxable transactions – Taxable person – Concept of an independent economic activity – Typological approach – Activities of a member of a board of directors of a legal person – Principle of neutrality of legal form)

I. Introduction

1. This request for a preliminary ruling raises the question, which has been answered quite differently in the Member States of the European Union,² as to whether the remuneration of a member of a board of directors of a company for its activity *as part of a body of a legal person* constitutes remuneration for an independent economic activity in accordance with the VAT Directive. While the majority of Member States do not consider that remuneration to be remuneration for an independent economic activity, this is the case in six Member States under certain conditions and is usually the case in one Member State (Luxembourg), although only since 2016.³ Thus, in Luxembourg, the member of the body must pay VAT and charge it to the legal person of which body he or she is a member.

¹ Original language: German.

² Many States make the income (remuneration) of a body of a company subject to income tax only and therefore do not assume that any independent economic activity has taken place. Of the 13 Member States which also have legislation or case-law on the VAT assessment of such remuneration of a body of another taxable person, 6 Member States generally do not assume that it constitutes an economic activity covered by VAT, while 6 assume that an independent economic activity is carried out under certain circumstances. Only Luxembourg usually always assumes that the activity of those bodies or members of those bodies constitutes an independent economic activity.

³ See Valérie Bidoul, *Réflexions sur le traitement TVA des dirigeants d'entreprise*, ACE Comptabilité, fiscalité, audit, droit des affaires au Luxembourg 2016/5, p. 3 et seq.

2. In that regard, first, the question arises once again⁴ as to whether an activity of a body of a company for remuneration is to be regarded as an independent economic activity. In previous cases, this question was answered only for a member of a supervisory board and a managing director (in which cases the response was negative), but not for a member of a board of directors.

3. Secondly, the question arises as to the scope of the principle of neutrality of legal form in VAT law. The person concerned receives the remuneration only because he or she has acted as part of a body of the legal person (another taxable person). For many legal forms, such bodies are prescribed by law. Taxable persons who do not require such a body are not liable for VAT in that regard.

4. In that respect, the VAT payable by an undertaking varies according to the legal form chosen. In principle, the taxable person (in this case the legal person) may be relieved of the burden of VAT by way of input tax deduction. However, not every taxable person is entitled to the full deduction of input tax. This question is therefore particularly relevant for taxable persons who (also) carry out exempt output transactions. In this case, the fact that the activity of a member of a body of that taxable person is subject to tax entails an additional and definitive cost burden.

II. Legal framework

A. *European Union law*

5. The EU legal framework is formed by Directive 2006/112/EC on the common system of value added tax ('the VAT Directive').⁵

6. Article 9(1) of the VAT Directive defines 'taxable persons' as follows:

“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.’

7. Article 10 of the VAT Directive concerns 'employed and other persons' and reads:

“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.’

⁴ The Court has already dealt with the question of the status of a supervisory board as a taxable person in its judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490). The judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615) concerned an employed director who was also the sole shareholder.

⁵ Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the version applicable to the year at issue (2019); in that respect as last amended by Council Directive (EU) 2018/2057 of 20 December 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold (OJ 2018 L 329, p. 3).

B. Luxembourg law

8. Luxembourg transposed the VAT Directive by the Loi du 12 février 1979 concernant la taxe sur la valeur ajoutée (Law of 12 February 1979 on Value Added Tax). Article 4(1) of that law provides that taxable person is to mean any person who, independently and on a regular basis, in the course of a general economic activity, carries out transactions, whatever the purpose, results or place of that activity.

III. Facts and preliminary ruling procedure

9. TP, a lawyer, is a member of the board of directors of several public limited companies incorporated under Luxembourg law.⁶ 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.

10. The day-to-day management of two of the 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.

11. According to TP, 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 member of the board of directors can be personally liable only where that member manifestly exceeds the limits of acceptable conduct such that the wrongful act is severable from his or her related function.

12. In addition, the implementation of decisions taken by the company is generally entrusted to employees of the company, and not to individual members of the board of directors. Where the directors perform individual tasks outside the scope of the activity of the collegiate body, and are remunerated for those specific activities, they are acting in a capacity other than that of a member of the collegiate body. However, the board of directors collectively discusses possible options and takes decisions, and the position of an individual member may be diametrically opposed to that of the collegiate body.

13. TP takes the view that his remuneration as a member of the board of directors is not subject to VAT. He submits that his activity is not carried out independently, but as a member of a collegiate body. The latter represents the legal person and therefore the service provided collectively is deemed to be provided by the company itself.

14. On 28 July 2020, the Administration de l'Enregistrement, des Domaines et de la TVA (Registration Duties, VAT and Estates Authority, Luxembourg; 'the tax authority') subjected the directors' fees received by TP in 2019 to VAT. By decision of 23 December 2020, the taxation was confirmed on the ground that a member of the board of directors of a company carries out an economic activity independently since it is permanent and gives rise to remuneration in return for the activity carried out.

⁶ More specifically, 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.

15. According to the tax authority, the permanent nature of the activity results from the fact that members of the board of directors are appointed for a term of up to six years. TP receives remuneration decided upon by the general meeting of shareholders on a proposal of the board of directors. The remuneration, some of which was probably also paid in the form of percentage fees, means that the members of the board of directors, even if they are not shareholders, have an interest in the success of the activities of the company. 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.

16. On 26 January 2021, TP brought an action against the tax notice requesting that it be annulled. The competent court (District Court, Luxembourg) states that, in the absence of any detail as to the companies and the remuneration paid, it 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 member of the board of directors and that those percentage fees were awarded to him by resolution of the general meeting of shareholders. It stayed the proceedings and referred the following two questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

- (1) 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 the VAT Directive and more specifically, are percentage fees received by that person to be regarded as remuneration paid in return for services provided to that company?
- (2) 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 the VAT Directive?

17. In the procedure before the Court, TP, the Grand Duchy of Luxembourg, the Czech Republic and the European Commission submitted written observations and, with the exception of the Czech Republic, also took part in the hearing held on 17 May 2023.

IV. Legal assessment

A. The questions referred and the course of the investigation

18. The two questions referred for a preliminary ruling, which it is appropriate to examine together, raise the question whether the remuneration of a board of directors for its activity as part of a body of a legal person constitutes remuneration for an independent economic activity in accordance with Article 9 of the VAT Directive.

19. Thus, the question again arises⁷ as to when a paid activity of a body of a legal person is to be considered an economic activity and when that activity is carried out independently. Both have the consequence that the person acting in that capacity must be regarded as a taxable person who must collect and pay VAT (see Section B).

20. When examining this question, account must be taken of the fact that legal persons can act only through their bodies. Should acting as a body be sufficient for a legal person to assume an independent economic activity, then legal persons not entitled to deduct input tax are subject to additional VAT which they have to bear only because of that legal form. This concerns, in particular, undertakings that carry out exempt output transactions (such as hospitals, housing rental companies, banks and insurance companies).

21. An undertaking with a legal form which is not required to have such a body is not required to bear that VAT or to pass it on to end customers. Thus, the answer to the question raised above also concerns the principle of neutrality of legal form in VAT law (see Section C).

B. Member of a board of directors as a taxable person

1. Typological approach to determine the taxable person

22. A member of a board of directors may be regarded as a taxable person within the meaning of Article 9 of the VAT Directive only if, by that activity, in the context of his membership, he or she 'carries out in any place any economic activity, whatever the purpose or results of that activity', in accordance with the first subparagraph of Article 9(1). The second subparagraph of Article 9(1) of the VAT Directive specifies when an activity is to be regarded as an 'economic activity'. If the requirements of Article 9(1) of the VAT Directive are met, the person concerned is a taxable person.

23. In that respect, Article 10 of the VAT Directive merely clarifies that employed persons are not to be regarded simultaneously as taxable persons. That declaratory effect – the Commission uses the term 'clarification' in its written observations – follows from the wording, according to which the fact that the economic activity within the meaning of Article 9(1) of the VAT Directive is carried out independently excludes such persons from the tax. Consequently, the question of law to be resolved is limited to whether the requirements of Article 9(1) are met. The relationship of employer and employee referred to in Article 10 of the VAT Directive is therefore only one criterion which must be examined when assessing whether an independent economic activity in accordance with Article 9(1) of the VAT Directive exists.

24. Under the second subparagraph of Article 9(1) of the VAT Directive, the concept of 'economic activities', which must be carried out independently, includes any activity of producers, traders or persons supplying services including mining and agricultural activities and activities of the professions. It is apparent from the Court's case-law that that definition shows

⁷ The Court has already dealt with the question of the status of a supervisory board as a taxable person in its judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490). The judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615) concerned an employed director who was also the sole shareholder.

that the scope of the concept of 'economic activity' is very wide and that the term is objective in character, in the sense that the activity is considered per se and without regard to its purpose or results.⁸

25. Furthermore, it follows from the Court's case-law that, in order to determine whether a service is supplied in return for remuneration, such that the activity in question is to be classified as an economic activity, *all the circumstances* in which it is supplied have to be examined.⁹ This is confirmed by the wording of Article 9(1) of the VAT Directive. It delineates the economic activity that leads to a person being considered as a taxable person, listing various specific jobs and 'the professions' whose activities are regarded as an economic activity.

26. Given the difficulty of precisely defining an independent economic activity of a taxable person, the description of the necessary economic activity with typical occupational images ('producers, traders or persons supplying services' or 'mining and agricultural activities and activities of the professions') outlines the concept of a taxable person and the economic activity necessary to qualify as such. In contrast to an abstract definition, a typological description is more open.¹⁰ Whether a particular thing belongs to the type does not have to be determined by logical/abstract subsumption, but can be determined according to the degree of similarity to the prototype (pattern). That assignment demands a view of the overall picture in each individual case, taking into account the generally accepted standards.

27. In the meantime, the Court has expressly confirmed that typological approach in its most recent case-law. In that case-law it states in connection with Article 9(1) of the VAT Directive that all the circumstances in which the activity is supplied have to be examined. In that regard, an assessment must be made on a case-by-case basis, referring to the typical conduct of an active entrepreneur in the field concerned.¹¹

28. The Court had already adopted a comparable typological approach in its judgment in *Gemeente Borsele*¹² and before that to some extent in the judgment in *Enkler*.¹³ Thus, according to previous case-law, the status of taxable person had to depend on whether the remuneration is determined on the basis of criteria which ensure that it is sufficient to cover the operating costs of the provider of the service.¹⁴ This also applies to the amount of earnings and other factors, such as

⁸ Judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 47); similarly judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)* (C-604/19, EU:C:2021:132, paragraph 69); along similar lines, see also judgment of 16 September 2020, *Valstybinė mokesčių inspekcija (Joint activity agreement)* (C-312/19, EU:C:2020:711, paragraph 39).

⁹ Judgments of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 48), and of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 29). See, to that effect, judgments of 19 July 2012, *Rėdlihs* (C-263/11, EU:C:2012:497, paragraph 34), and of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 27).

¹⁰ For greater detail, see my Opinion in *Posnania Investment* (C-36/16, EU:C:2017:134, point 25).

¹¹ Judgments of 30 March 2023, *Gmina L.* (C-616/21, EU:C:2023:280, paragraph 43), and of 30 March 2023, *Gmina O.* (C-612/21, EU:C:2023:279, paragraph 35).

¹² Judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 29 et seq.). The background to that case was the lack of typical market participation by the municipality – see my Opinion in that case (C-520/14, EU:C:2015:855, point 62 et seq.).

¹³ Judgment of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 28 – 'comparing the circumstances'), and, building on that, judgment of 19 July 2012, *Rėdlihs* (C-263/11, EU:C:2012:497, paragraphs 35 and 36).

¹⁴ Judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 49). See, to that effect, judgment of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.* (C-182/17, EU:C:2018:91, paragraph 38 and the case-law cited).

the number of customers.¹⁵ It was also significant if the contributions paid by the recipients of the services concerned were intended to cover only a small part of the total operating costs incurred by the provider of the service.¹⁶

29. Even though, to date, the Court has focused mainly on the existence of an economic activity, there is no reason not to also extend that approach to the criterion of independence. Finally, the first subparagraph of Article 9(1) of the VAT Directive mentions an economic activity that is carried out independently and then refers (second subparagraph) to professions which are typically conducted independently (for example, the liberal professions). Lastly, Article 10 of the VAT Directive gives examples (employed and other persons in a relationship of employer and employee) where this is not the case.

30. On closer examination, such a typological approach also underpinned the abovementioned decision of the Court regarding the independent economic activity of a member of a supervisory board of an incorporated company who received remuneration for his work. In conclusion, the Court compared that activity with that of a typical taxable person and, due to the particular features of the case (remuneration which was not dependent on participation in meetings or workload, no economic risk, small and fixed lump sum), stated that it could not be considered to be economic activity.¹⁷

31. If that approach is applied, the typical activity of an independent taxable person is characterised by the fact that, as the Court has already made clear,¹⁸ he or she assumes his or her own economic risk. A typical taxable person – on whom Article 9(1) of the VAT Directive is based – bears a risk of loss and profit personally in that respect. Typically, it is he or she, and not another person, who decides on the scope of his or her activity. He or she is responsible for his or her success or failure and to that extent he or she uses his or her own economic initiative. He or she decides which risks he or she wants to take and how much time he or she wants to invest in one project or another. That expenditure of time and the quality of the activity are, as a general rule, also reflected in the amount of his remuneration. This is not the case, for example, with an employee since only the employer bears the economic risk and takes the economic initiative.

32. In the present case, it therefore appears doubtful – as the Czech Republic also points out in its written observations – that it must be assumed that TP carries out an independent economic activity as a member of a body of a legal person. However, this is ultimately a matter for the referring court to determine in the context of the overall assessment which must be made.

33. First, TP receives his remuneration not for his own activities (for example as a mandated lawyer who then also assumes corresponding liability if his advice was incorrect), but as part of a collective body. Consequently, it is not he who is personally liable, but initially only the body to which he belongs.¹⁹ It is also in that sense that the principle set out in Article 441-8 of the Law on

¹⁵ Judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 49). See, to that effect, judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 31); of 19 July 2012, *Rėdlihs* (C-263/11, EU:C:2012:497, paragraph 38); and of 26 September 1996, *Enkler* (C-230/94, EU:C:1996:352, paragraph 29).

¹⁶ Judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën* (C-520/14, EU:C:2016:334, paragraph 33), and of 29 October 2009, *Commission v Finland* (C-246/08, EU:C:2009:671, paragraph 50). This is also emphasised in the judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA* (C-846/19, EU:C:2021:277, paragraph 52).

¹⁷ Judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490, paragraph 44).

¹⁸ Judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)* (C-420/18, EU:C:2019:490, paragraph 41 (own behalf) and paragraph 42 (economic risk)).

¹⁹ See also, in that regard, judgment of 29 September 2015, *Gmina Wrocław* (C-276/14, EU:C:2015:635, paragraphs 34 and 37).

commercial companies should be understood. According to that provision, no personal obligation arises on the part of members of the board of directors in relation to the commitments of the company. An independent assumption of risk therefore appears to be excluded.

34. Liability in tort, which also covers a member of a body, cannot be decisive in that regard, for that liability can, in principle, affect any person. The fact that an employee is also liable in tort towards his employer therefore provides no indication as to the existence of an independent economic activity. Nor does the fact that a body may be liable for the company's tax debts change this, contrary to what Luxembourg maintained in its observations and at the hearing. As TP also stated at the hearing, such liability relates to the body and applies in the same way to boards of directors and employed directors.²⁰ That liability on the part of a body consequently provides no indication as to whether it or its members are engaged in an independent economic activity.

35. Secondly, the activities as part of a body cannot be carried out on the free market to other third parties, depending on the decision by TP. On the contrary, they can only benefit the company for which he was appointed as part of the body. I cannot see that TP has acted on his own economic initiative in that regard. His activity is limited by company law which confers on the collegiate body or its members certain rights and obligations in relation to the company. It appears that the level of remuneration was also not dictated by the workload involved.

36. Nor was the remuneration determined by negotiation with the recipient of the service, as would be the case for a typical undertaking. Rather – and this is at least the basis of the reference for a preliminary ruling – it was determined unilaterally by the general meeting, that is to say another body of the company. However, as the Court has already pointed out, the fact that a natural person is dependent on the company to determine his or her remuneration is an indicator that he or she does not carry out an independent economic activity.²¹ Even if TP does not receive a fixed remuneration, but a variable one, or if the remuneration is based on the company's performance, this does not change the above finding. As a result, he ultimately participates only in the same way as a shareholder in the success of the company, that is to say in its economic risk.

37. Participation in another's (profit) risk, however, cannot be equated with bearing one's own (profit and loss) risk. Even an employee who, in addition to his or her fixed salary, receives variable remuneration based on the employer's performance does not, by virtue of that fact alone, carry out an independent economic activity. His or her employer continues to bear the economic risk, in which the employee participates in the event of success, but which he or she does not bear it him or herself.

38. The same seems to be true for TP, in so far as he should receive performance-related remuneration. At the hearing, only a flat-rate remuneration was confirmed. First, the success of the company depends on many other components. TP is only part of a collegiate body, which as a rule is also not the only body of a company, but exists alongside other bodies of the taxable person. Secondly, in the worst case, his remuneration as a member of the board of directors is reduced to zero (or a fixed amount which may have been promised). However, he does not have to fear losses or other risks, unlike a typical business/taxable person. It would be more relevant to

²⁰ In that regard, the Court has already declined an independent economic activity: judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615, operative part).

²¹ Judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615, paragraph 22) – that was the finding of the Court even in respect of a director who was also the only shareholder of the company. The latter can be ruled out in the present case.

ascertain whether TP also receives his remuneration if, for example, he is temporarily unable to carry on his activities due to illness, as then he also does not bear the economic risk entailed in his activity.²² Ultimately, this is for the referring court to verify.

39. Admittedly, the case of TP certainly does not involve the classic employee-employer relationship in accordance with Article 10 of the VAT Directive, as the Grand Duchy of Luxembourg rightly points out. However, that is also not necessary. What matters is not whether Article 10 of the VAT Directive is applicable, but whether the conditions of Article 9(1) of the VAT Directive are met.

40. In the necessary typological assessment, TP, as a member of a collegiate body of another taxable person – even if variable remuneration existed – probably cannot be compared to a taxable person who typically carries out an economic activity independently in accordance with Article 9(1) of the VAT Directive. Ultimately, however, this is a matter for the referring court.

2. *Does the existing status of a taxable person due to the activity as a lawyer affect the assessment of the board of directors' activity?*

41. It is questionable, however, whether the outcome is different because, in the present case, TP is already carrying out an independent economic activity as a lawyer. To that extent, TP already carries out the activity of a taxable person. This case concerns the classification of other activities which are not part of the actual main activity of a taxable person.

42. The Court has already ruled on the classification for the purposes of VAT of such 'ancillary activities'. In the case of a self-employed bailiff, Article 9(1) of the VAT Directive must be interpreted as meaning that a natural person who is already a taxable person for value added tax purposes in respect of his activities as a self-employed bailiff must be regarded as a 'taxable person' in respect of any other economic activity carried out occasionally, provided that that activity constitutes an activity within the meaning of Article 9(1).²³

43. In that case, the bailiff had made use of his business opportunities under a contract of agency for consideration and had bought certain plots of land at auction for a third party. Consequently, such ancillary economic activities which are still clearly linked to the main (economic) activity share the same treatment.

44. The Court has also emphasised that approach in its more recent decision in *Fluvius Antwerpen*. The supply of electricity by an electricity distribution network operator as a result of electricity theft, when it constitutes a typical commercial risk of that other economic activity, also constitutes an independent economic activity.²⁴ In this respect, a typical business risk arises at the time of that supply. It therefore shares the VAT treatment of the main economic activity.

45. In the present case, however, there are two separate activities, since one is an independent economic activity and the other is not an independent economic activity. One activity falls within the scope of VAT, the other does not. If the EU legislature had in fact intended that one activity would be 'infected' by the other, it would have expressed this in the wording of the VAT

²² See also, to that effect, judgment of 18 October 2007, *van der Steen* (C-355/06, EU:C:2007:615, paragraph 24). Also, the judgment of 25 July 1991, *Ayuntamiento de Sevilla* (C-202/90, EU:C:1991:332, paragraph 13) highlights the link between profit and own expenses.

²³ Judgment of 13 June 2013, *Kostov* (C-62/12, EU:C:2013:391, paragraph 31 and operative part).

²⁴ Judgment of 27 April 2023, *Fluvius Antwerpen* (C-677/21, EU:C:2023:348, paragraph 47).

Directive. As it did not do so, ancillary activities which are separate from the independent economic activity do not become an independent economic activity simply because the necessary – in the present case, legal – knowledge for the independent activity is also helpful for the activity which is not carried out independently.

46. However, this does not preclude the company or possibly the body of the company also instructing TP as a lawyer. Remuneration for the exercise of that mandate would then constitute remuneration for an independent economic activity as a lawyer. However, more precise information would be needed in that regard, which is a matter for the referring court to determine. The mere fact that a lawyer has been appointed as a member of several bodies of companies is not sufficient in that regard.

C. Taxation of the activities of a body of a taxable person (principle of neutrality of legal form)

47. The principle of neutrality of legal form in VAT law – which the Court regularly emphasises²⁵ – also militates against taxing the activity of a body of a taxable person where that body is a legal requirement for the taxable person. That might be the case here, which is ultimately a matter for the referring court to determine.

48. According to that principle – which may also be based on Article 20 of the Charter – the legal form by means of which the manufacturer or the provider of the service exercise their activities is irrelevant to the question of whether goods or services are comparable.²⁶ The principle of fiscal neutrality precludes economic operators who effect the same transactions being treated differently in respect of the levying of VAT.

49. The assumption that the activity of a member of a body of another taxable person is itself an activity of a taxable person would have the consequence that that member of the body must pay VAT on remuneration received. Since, from a substantive point of view, the aim of VAT as a general tax on consumption is to tax not the taxable person supplying the service but the recipient of the supply, if and because the latter uses money to procure a consumable benefit,²⁷ according to the scheme of the legislation, each company is liable for VAT as the recipient of the supply.

50. If the company is a taxable person with a full right of deduction, this is not a problem. That taxable person is supported by the principle of neutrality. That principle is a fundamental principle²⁸ of VAT and provides, inter alia, that the trader, as tax collector on behalf of the State,

²⁵ See only in the field of tax exemptions: judgments of 28 June 2007, *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* (C-363/05, EU:C:2007:391, paragraph 26); of 4 May 2006, *Abbey National* (C-169/04, EU:C:2006:289, paragraph 53); of 3 April 2003, *Hoffmann* (C-144/00, EU:C:2003:192, paragraph 24); of 10 September 2002, *Kügler* (C-141/00, EU:C:2002:473, paragraph 30); and of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20).

²⁶ Judgment of 15 April 2021, *Finanzamt für Körperschaften Berlin* (C-868/19, EU:C:2021:285, paragraph 65). See, to that effect, judgments of 17 February 2005, *Linneweber and Akritidis* (C-453/02 and C-462/02, EU:C:2005:92, paragraph 25), and of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 31).

²⁷ See, to that effect: judgments of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 62); of 3 May 2012, *Lebara* (C-520/10, EU:C:2012:264, paragraphs 23 and 24); of 11 October 2007, *KÖGÁZ and Others* (C-283/06 and C-312/06, EU:C:2007:598, paragraph 37); and of 18 December 1997, *Landboden-Agrardienste* (C-384/95, EU:C:1997:627, paragraphs 20 and 23).

²⁸ The Court refers in its judgment of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 43) to the principle of interpretation.

is to be relieved of the final VAT burden,²⁹ inasmuch as the purpose of the economic activity itself is to achieve sales revenue that is subject to tax.³⁰ This is achieved through the deduction of VAT under Article 168 of the VAT Directive.

51. However, if the company is a taxable person who is not entitled to deduct VAT or to do so only in part, the tax liability of *the activities of the body which is required by law* results in a definitive cost burden. That cost burden extends to all legal forms which, by operation of law, are dependent on the actions of bodies. The latter is usually the case for artificial legal forms (for example legal persons) since these must necessarily act through bodies provided for by law. Whether that is also true in the present case is for the referring court to determine. If so, then, since there are also taxable persons for whom such a body is not necessary (for example a traditional sole trader), that situation would result in a disadvantage of specific legal forms, which are in competition with the other forms if and because they provide identical services.

52. However, VAT must be neutral for competitors. Therefore, the principle of neutrality also precludes economic operators who effect the same transactions being treated differently in respect of the levying of VAT.³¹ Consequently – as the Court has expressly held – that principle would be frustrated if the taxation was dependent on the legal form in which the taxable person carried on his activity.³²

53. Here, however, a taxable person with the same (exempt) output transactions would receive unfavourable treatment if it paid remuneration to the members of its bodies acting on its behalf. This is because the taxable person who, for example as a sole trader, pays himself that 'remuneration' as a 'salary' (or takes it out of the business assets by way of withdrawal) would not have to bear that VAT burden.

54. Interestingly, there is a statement in the minutes of a Council meeting on Article 4 of the Sixth Directive 77/388/EEC (the predecessor of the VAT Directive) which states that the Member States may 'consider ... as not liable to value added tax ... the managing-directors, auditors, [members of the supervisory board] of companies in their relations with the companies to the extent that they form a part of such companies'.³³ Admittedly, the legal status of that statement³⁴ is doubtful since such an option does not appear to follow from the VAT Directive. However, it highlights the concerns that already existed at that time in the European Union with regard to taxing the activities of bodies of companies. Rightly, the principle of neutrality of legal form requires non-taxation in any case where the activity of the mandatory bodies of a company is concerned. This is the only way to ensure the neutrality of VAT from the point of view of competition for competing undertakings in different legal forms.

²⁹ Judgments of 13 March 2008, *Securenta* (C-437/06, EU:C:2008:166, paragraph 25), and of 1 April 2004, *Bockemühl* (C-90/02, EU:C:2004:206, paragraph 39).

³⁰ Judgments of 13 March 2014, *Malburg* (C-204/13, EU:C:2014:147, paragraph 41); of 15 December 2005, *Centralan Property* (C-63/04, EU:C:2005:773, paragraph 51); of 21 April 2005, *HE* (C-25/03, EU:C:2005:241, paragraph 57); and my Opinion in *Centralan Property* (C-63/04, EU:C:2005:185, point 25).

³¹ Judgments of 16 October 2008, *Canterbury Hockey Club and Canterbury Ladies Hockey Club* (C-253/07, EU:C:2008:571, paragraph 30), and of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276, paragraph 22).

³² See to that effect judgment of 7 September 1999, *Gregg* (C-216/97, EU:C:1999:390, paragraph 20).

³³ According to the Commission's pleadings, the Council document dates from 23 March 1997 and has the reference number R/716/77 (FIN 151). The German translation of that statement to be written into the minutes of the Council meeting of 17 May 1977 on the Sixth VAT Directive is reproduced in the commentary on turnover tax 'Rau/Dürrwächter, *UStG*' in Vol. VIII, texts, 'EG-Richtlinien', concerning Article 4 of the Sixth VAT Directive (Update 112 – November 2002).

³⁴ On the limited legal significance, see judgments of 17 December 2020, *WEG Tevesstraße* (C-449/19, EU:C:2020:1038, paragraph 44); of 22 October 2009, *Swiss Re Germany Holding* (C-242/08, EU:C:2009:647, paragraph 62); and of 8 June 2000, *Epson Europe* (C-375/98, EU:C:2000:302, paragraph 26).

55. The principle of neutrality of legal form therefore also supports the view that the remuneration paid by a taxable person for the activities of the body of a company which is required by law is not in turn subject to VAT and thus distorts competition between taxable persons.

V. Conclusion

56. I therefore propose that the Court answer the questions referred by the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg) as follows:

(1) Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 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 or her 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.