BACKGROUND

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

The TP Case addresses the question of whether a natural person, in his/her position of independent director, should be considered as performing an economic activity for VAT purposes and thus for this activity to result in a VATable transaction.

Parties to this case were TP (a lawyer and member of the board of directors of several Luxembourg public limited companies) and the AEDT (Luxembourg VAT Authorities).

The decision on this case will shed new light on the treatment of independent director services, considering that Member States are currently treating directors’ fees differently. In Luxembourg, Circular 781 of 30 September 2016 specifically recognizes the activity of independent directors as being subject to VAT.

OPINION OF ADVOCATE GENERAL KOKOTT

According to AG Kokott, the key factor in assessing the VAT treatment of this type of activity is whether the independent director personally bears an economic risk and acts at his/her own economic initiative.

AG Kokott found it doubtful that TP could be regarded as carrying out an independent economic activity for the following reasons:

- The absence of personal liability. Tort liability can affect any person, including an employee. Therefore, such liability does not indicate the existence of an independent economic activity.
- TP’s working conditions prevented him from carrying out his activities on the free market in relation to other third parties and thus he could only benefit the company for which he was appointed. It follows that TP did not act on his own economic initiative in this regard.
- TP’s remuneration was determined neither by workload nor negotiation, as would be the case in a typical undertaking. On the contrary, the remuneration was determined unilaterally by the company. The fact that a natural person is dependent on the company for the determination of his remuneration is generally considered as an indicator that no independent economic activity is being carried out.

Finally, AG Kokott argued that the principle of legal form neutrality supports the view that directors’ fees should not be subject to VAT in order to avoid distortions of competition between companies, as some companies are required by law to operate through a board of directors while others are not, which means that VAT could result in a burden for companies with limited deduction rights.

POSSIBLE CONSEQUENCES

The CJEU’s decision will follow in the coming months and while the VAT treatment will still need to be assessed on a case-by-case basis, should the CJEU’s decision be in line with the AG’s opinion, the potential consequences would be as follows:

- Independent director services would no longer be subject to Luxembourg VAT (either domestic or self-assessed under the reverse charge mechanism).
- Independent directors registered for VAT in Luxembourg would be required to de-register.
- Companies would be able to apply for regularization of past VAT returns (taking into account the statute of limitations) for non-deductible VAT related to director services.

For additional information with respect to this Alert, please contact the following:

Olivier Lambert
Partner
+352 42 124 7361
Olivier.Lambert@lu.ey.com

Jacques Verschaffel
Partner
+352 42 124 7219
Jacques.Verschaffel@lu.ey.com

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