Provisional text

JUDGMENT OF THE COURT (Third Chamber)

21 December 2023 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 9 – Taxable persons – Economic activity carried out independently – Concept of ‘economic activity’ – Concept of ‘independent exercise of the activity’ – Activity as a member of the board of directors of a public limited company)

In Case C?288/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal d’arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg), made by decision of 26 April 2022, received at the Court on 29 April 2022, in the proceedings

TP

v

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

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, N. Piçarra, M. Safjan (Rapporteur), N. Jääskinen and M. Gavalec, Judges,

Advocate General: J. Kokott,

Registrar: K. Hötzel, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2023,

after considering the observations submitted on behalf of:

– TP, by E. Adam, N. Le Gouellec and K. Veranneman, avocates,

– the Luxembourg Government, by A. Germeaux and T. Schell, acting as Agents, and by F. Lerch, avocate,

– the Czech Government, by O. Serdula, M. Smolek and J. Vlá?il, acting as Agents,

– the European Commission, by A. Armenia, M. Björkland and C. Ehrbar, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 9 and 10 of

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; ‘the VAT Directive’).

2 The request has been made in proceedings between TP and the administration de l’enregistrement, des domaines et de la TVA (Registration Duties, VAT and Estates Authority, Luxembourg) concerning an *ex officio* tax assessment for the purposes of Value Added Tax (VAT), issued by that authority in connection with TP’s activity as a member of the board of directors of several public limited companies incorporated under Luxembourg law.

Legal context

European Union law

3 Article 2(1)(c) of the VAT Directive provides:

‘The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…’

4 Article 9(1) of that directive provides:

‘“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.’

5 Article 10 of that directive is worded as follows:

‘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.’

6 Article 24(1) of that directive provides:

‘“Supply of services” shall mean any transaction which does not constitute a supply of goods.’

7 Article 73 of the VAT Directive provides:

‘In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.’

Luxembourg law

8 Article 4(1) of the loi du 12 février 1979 concernant la taxe sur la valeur ajoutée (Law of 12

February 1979 on value added tax; ‘the Law on VAT’) provides:

‘A taxable person under Article 2 shall 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.

…’

9 Article 5 of the Law on VAT reads as follows:

‘Economic activity shall mean any activity aimed at generating income, and in particular activities of producers, traders or persons supplying services, including mining and agricultural activities, the activities of the professions and activities involving the use of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis.’

10 Article 441-1 of the loi du 10 août 1915 concernant les sociétés commerciales (the Law of 10 August 1915 on commercial companies; ‘the Law of 10 August 1915’) provides:

‘Public limited companies are administered in a timely manner by authorised representatives, both members and non-members, subject to dismissal, paid or unpaid.’

11 Article 441-2 of that law states:

‘The company directors must number at least three.

…

They are appointed for a fixed period by the general meeting of shareholders; they may however, initially, be appointed at the time of incorporation of the company …

Their term of office may not exceed six years; they may be dismissed at any time by the general meeting.

…’

12 Article 441-5 of that law is worded as follows:

‘The board of directors has the power to carry out all the acts necessary or appropriate to the attainment of the corporate purpose, with the exception of those reserved by law or the articles of association for the general meeting …

[The board of directors] represents the company as regards third parties and in legal proceedings, whether the company is bringing or defending an action. Actions in favour of or against the company are only valid when made in the name of the company.

The limitations imposed on the powers that the preceding paragraphs confer on the board of directors and which result from either the articles of association or a decision of the competent bodies, are unenforceable against third parties, even where they are disclosed.

However, the articles of association may confer standing to represent the company in carrying out its acts, either solely or jointly, to one or more company directors. That clause is enforceable against third parties in the circumstances provided for in Chapter Va of Part I of the loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises (Law of 19 December 2002 on the commercial register of companies and the accounting system and annual accounts of undertakings).

…'

13 Article 441-8 of that law provides:

'No personal obligation arises on the part of the company directors in relation to the commitments of the company.'

14 Article 441-9 of the Law of 10 August 1915 provides:

'The company directors, members of the management committee and the general director are responsible to the company, in accordance with the ordinary law, for carrying out the mandate received by them and any wrongful acts committed in their management.

The company directors and the members of the management committee are jointly liable, either to the company or any third parties, for any loss stemming from the infringement of provisions of the present Law or the articles of association.

The company directors and members of the management committee will be released from that liability, for infringements in which they did not take part, only where no wrongdoing is attributable to them and they have reported those infringements, with respect to the members of the board of directors, at the next available general meeting and, concerning the members of the management committee, at the first meeting of the board of directors after they have become aware of it.'

15 Article 441-10 of that law provides:

'The day-to-day management of the activities of the company and the representation of the company, regarding its management, may be delegated to one or more company directors, managers, and other agents, members or not members, acting alone or jointly.

Their appointment, dismissal and responsibilities are regulated by the articles of association or by a decision of the competent bodies without, however, the restrictions imposed on their powers of representation for the needs of the day-to-day management being enforceable against third parties, even where they are disclosed.

The clause, under which the day-to-day management is delegated to one or more persons acting either solely or jointly, is enforceable against third parties in the circumstances provided for in Chapter Va of Part I of the loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises (Law of 19 December 2002 on the commercial register of companies and the accounting system and annual accounts of undertakings).

Delegation to a member of the board of directors requires the board to account to the ordinary general meeting on an annual basis for any salaries, allowances or benefits awarded or delegated.

The responsibility of the directors arising from that day-to-day management is assessed in accordance with the general rules of the mandate.

…’

16 Article 441-11 of that law provides:

‘The articles of association may authorise the board of directors to delegate its managerial powers to a management committee or managing director, without that delegation having a bearing on the general policy of the company or the acts reserved for the board of directors under other provisions of the Law. Where a management committee is established or a managing director appointed, the board of directors shall be responsible for its supervision.

The management committee shall consist of several persons, whether they are company directors or not.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 TP is a member of the board of directors of several public limited companies incorporated under Luxembourg law and carries out many assignments in that regard.

18 It is apparent from the decision to refer that, according to TP’s explanations, his activity includes receiving the reports of the senior managers or representatives of the companies concerned, discussing strategic proposals, the choice of operational managers, questions related to the accounts of those companies and their subsidiaries as well as the risks that they face. In some cases, he takes part in the decision-making incumbent on the representatives of the companies in question at the level of the board of directors of the subsidiaries of those companies. He also takes part in the decision-making regarding the accounts of the companies concerned and the proposals to be submitted to shareholder meetings, risk policy as well as decisions as to the strategy to be followed by those companies. In accordance with Articles 441-10 and 441-11 of the Law of 10 August 1915, the day-to-day management of those companies is carried out by a management committee comprising chief executive officers or executive directors or, where the operational activity does not require a management committee, by the permanent representatives of the board of directors or by the members of that board.

19 On account of those activities, TP had received, in his capacity as a member of the board of directors the companies concerned, by decision of the general meetings of shareholders of those companies, fees as a percentage of the profits achieved by those companies.

20 By reason of those activities, TP received an *ex officio* tax assessment for the purposes of VAT for 2019, issued on 28 July 2020 by the administration de l’enregistrement, des domaines et de la TVA (Registration Duties, VAT and Estates Authority, Luxembourg).

21 By a letter of 2 October 2020, TP lodged a claim with that tax authority against that tax assessment, arguing that the activity of a member of the board of directors of a public company incorporated under Luxembourg law was not an economic activity within the meaning of Article 4 of the law on VAT transposing Article 9 of the VAT Directive, and did not confer the status of a taxable person on such a member.

22 By a decision of 23 December 2020, the director of that tax authority rejected TP’s claim on the ground that the members of the board of directors of a public company incorporated under

Luxembourg law, such as TP, carried out an independent economic activity and that, accordingly, the percentage fees that they received in that regard did not escape the application of VAT.

23 On 26 January 2021, TP brought an action for annulment against that decision before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg), which is the referring court.

24 The referring court states that, for the purpose of resolving the dispute in the main proceedings, it must determine, in the first place, whether a natural person, a member of the board of directors of public limited companies under Luxembourg law, carries out an economic activity within the meaning of Article 9 of the VAT Directive.

25 From that perspective, the referring court asks whether, in the light of the case-law of the Court relating to the concept of 'economic activity' referred to by that provision, the percentage fees received by such a natural person constitute the value actually given in return for the service supplied to the recipient and whether there exists a direct link between the service provided and the consideration received.

26 In the second place, the referring court, while stating that a natural person such as TP, as a member of the board of directors of public limited companies, is not, under Luxembourg law, bound to an employer by a contract of employment or by any other legal ties within the meaning of Article 10 of the VAT Directive, wishes to obtain clarifications from the Court as to whether such a person is carrying out their activity independently within the meaning of Article 9 of the VAT Directive.

27 In those circumstances, the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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]?'

Consideration of the questions referred

The first question

28 By its first question, the referring court asks, in essence, whether Article 9(1) of the VAT Directive must be interpreted as meaning that a member of the board of directors of a public limited company under Luxembourg law is carrying out an economic activity, within the meaning of that provision.

29 In the first place, it should be noted that the first subparagraph of Article 9(1) of the VAT Directive provides that the term ‘taxable person’ means any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The concept of ‘economic activity’ is defined in the second subparagraph of Article 9(1) of the VAT Directive as covering any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions.

30 The Court has stated that an activity can be regarded as an economic activity, within the meaning of Article 9(1) of the VAT Directive, only where the activity corresponds to one of the chargeable events defined in Article 2(1) of that directive (see, to that effect, judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 32 and the case-law cited). Among those referred to in Article 2(1)(c) of the VAT Directive are services supplied for consideration within the territory of a Member State by a taxable person acting as such.

31 While it falls to the referring court to apply the national provisions that transposed Article 9(1) of the VAT Directive to the circumstances of the dispute in the main proceedings and to carry out the factual assessments and legal classifications necessary in that regard, the Court, when giving a preliminary ruling, may, provide clarification designed to give the national court guidance in its interpretation (judgment of 22 November 2017, *Cussens and Others*, C?251/16, EU:C:2017:881, paragraph 59 and the case-law cited).

32 In the present case, although it appears from the evidence in the file before the Court, in particular the tasks conferred on TP, as pointed out in paragraph 18 of this judgment, that TP supplied services within the meaning of Article 2(1)(c) of the VAT Directive, the referring court asks whether that supply of services effected for consideration and, more specifically, the question of whether the percentage fees received by a member of the board of directors of several public limited companies may be regarded as a remuneration obtained in consideration of the services provided to those companies.

33 In that regard, it should be borne in mind that classifying a supply of services as a transaction ‘for consideration’, within the meaning of the abovementioned provision requires only that there be a direct link between that supply and the consideration actually received by the taxable person. Such a direct link is established 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 actual consideration for the service supplied to the recipient (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 36 and the case-law cited).

34 On that last point, it should be noted that, in order to be regarded as the value actually given in return for the service supplied, the remuneration must remain reasonable in relation to the service supplied in that it must not remunerate only part of the services supplied or to be supplied to the point of breaking the direct link between the services supplied and the consideration (see, to that effect, judgment of 2 June 2016, *Lajvér*, C?263/15, EU:C:2016:392, paragraph 49). That being said, the fact that the price paid for an economic transaction is higher or lower than the cost price and, therefore, a price higher or lower than the open market value, is irrelevant for the purpose of establishing whether it was a transaction effected ‘for consideration’. That circumstance is not such as to affect the direct link between the services supplied or to be supplied and the consideration received or to be received, the amount of which is determined in advance and according to well-established criteria (see, to that effect, judgments of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 26 and the case-law cited, and of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*

, C?846/19, EU:C:2021:277, paragraph 43).

35 In addition, the remuneration may be fixed as the person supplying the services in question deploys his or her activities, provided that the procedures for fixing that amount are foreseeable and capable of ensuring that the person supplying services receives, in principle, payment for the services that he or she provides (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 44).

36 Furthermore, the direct link between the supply of services and the consideration is broken when the remuneration is awarded in a voluntary and uncertain way so that its amount is practically impossible to determine (see, to that effect, judgment of 3 March 1994, *Tolsma*, C?16/93, EU:C:1994:80, paragraph 19) or where its amount is difficult to quantify or the circumstances relating to its calculation are uncertain (see, to that effect, judgment of 10 November 2016, *Baštová*, C?432/15, EU:C:2016:855, paragraph 35).

37 In the present case, even in the absence of a written agreement relating to the remuneration of TP, concluded between TP and the public limited companies of which he is a member of the board of directors, it is apparent from the evidence in the file before the Court that TP received, in return for his activity as a member of boards of directors, a remuneration which seems to have taken the form either of percentage fees awarded to him by the general meetings of shareholders depending on the profits achieved by the public limited companies concerned or, as TP stated at the hearing before the Court, of a lump sum.

38 In that regard, a direct link between the remuneration and the activity appears to be established where remuneration in the form of a lump sum is determined in advance. The fact that compensation is determined not on the basis of individualised services, but at a flat rate and annually would not in itself be such as to affect the direct link between the supply of services made and the consideration received (judgments of 22 February 2018, *Nagyszénás Településszolgáltatási Nonprofit Kft.*, C?182/17, EU:C:2018:91, paragraph 37, and of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board*), C?420/18, EU:C:2019:490, point 25).

39 In the situation where TP's remuneration took the form of percentage fees, the referring court will have to ascertain whether, in the light of the case-law cited in paragraphs 33 to 36 of the present judgment, where the public limited company concerned does not achieve a profit or achieves only a small amount of profit, the general meeting of shareholders of that company may nevertheless award TP, based on other factors, a percentage fee amount that may be regarded as being objectively in line with the service provided by TP.

40 Furthermore, as for the fact that the percentage fees are awarded by the general meeting of shareholders of the company concerned and even assuming that, under Luxembourg law, such a meeting may be regarded not as a body of that company, but as a third-party body or a separate entity distinct from that company, it must be borne in mind that it is not necessary for a supply of services to be deemed to be 'for consideration' within the meaning of the VAT Directive that the consideration for that supply be obtained directly from the recipient thereof, since it may be obtained from a third party, as is clearly apparent from the wording of Article 73 of that directive (see, to that effect, judgment of 15 April 2021, *Administration de l'Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 40 and the case-law cited).

41 In the second place, it is apparent from the case-law of the Court that, the existence of such a supply of services is not sufficient to establish the existence of an economic activity within the meaning of Article 9(1) of the VAT Directive (judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 28), but that other criteria

must also be fulfilled.

42 The definition of the concept ‘economic activity’, as recalled in paragraph 29 of the present judgment, shows that the scope of that concept 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. Thus, an activity is generally classified 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 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 47 and the case-law cited), which implies that the remuneration itself must be regarded as having a continuing basis (see, to that effect, judgments of 13 December 2007, *Götz*, C?408/06, EU:C:2007:789, paragraph 18 and the case-law cited; of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board)*, C?420/18, EU:C:2019:490, paragraph 27 and the case-law cited; and of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 55).

43 In order to determine whether a service is supplied in return for remuneration, so 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 (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 48 and the case-law cited).

44 In that regard, it should be borne in mind that comparing the circumstances in which the person concerned supplies the services in question with the circumstances in which that type of service is usually provided may be one way of ascertaining whether the activity concerned is an economic activity (judgment of 12 May 2016, *Gemeente Borsele and Staatssecretaris van Financiën*, C?520/14, EU:C:2016:334, paragraph 30 and the case-law cited). The question whether the amount of the compensation was determined on the basis of criteria which ensured that it was sufficient to cover the operating costs of the provider of the service may also be a relevant factor (judgment of 15 April 2021, *Administration de l’Enregistrement, des Domaines et de la TVA*, C?846/19, EU:C:2021:277, paragraph 49 and the case-law cited).

45 In view of that case-law, it should be considered that the appointment of a natural person, such as TP, as a member of the board of directors of a public limited company under Luxembourg law for a renewable term of office of a maximum of six years means that TP’s activity must be regarded as having a continuing basis. The fact that such a term of office may be summarily terminated at any time and without reason, and that its holder may also withdraw from the agreement at any time, cannot, in itself, deprive that activity of its continuing basis where a maximum duration of six years is, ab initio, attached to that term of office.

46 In view of that six year duration of the term of office, it can be considered that that remuneration in the form of percentage fees is received on a continuing basis (see, to that effect, judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board*), C?420/18, EU:C:2019:490, paragraph 27 and the case-law cited). However, for that continuing basis to subsist, it is important that, where the percentage fees are paid on the basis of the profits achieved by the company concerned, percentage fees may also be paid to members of the board of directors for business years in which the company did not achieve a profit.

47 In the light of the foregoing, the answer to the first question is that Article 9(1) of the VAT Directive must be interpreted as meaning that a member of the board of directors of a public limited company under Luxembourg law carries out an economic activity, within the meaning of that provision, where he or she supplies services to that company for consideration, provided that that activity is effected on a continuing basis and for a remuneration for which the procedures for fixing that amount are foreseeable.

The second question

48 By its second question, the referring court asks, in essence, whether the first subparagraph of Article 9(1) of the VAT Directive must be interpreted as meaning that the activity of a member of the board of directors of a public limited company under Luxembourg law is carried out independently, within the meaning of that provision.

49 As a preliminary point, it must be stated that it is apparent from the evidence in the file before the Court that TP did not have a casting vote within the boards of directors of the public limited companies of which he was a member, that he was not responsible for the representation or the day-to-day management of the business of those companies within the meaning of Article 441-10 of the Law of 10 August 1915, nor did he comprise part of the management committee referred to in Article 441-11 of that law. It is therefore in the light of those circumstances that the Court will examine the issue of the independent nature or not of an activity such as that carried out by TP.

50 It must also be observed that, in accordance with the findings made by the referring court and notwithstanding the wording of the second question by that court, it is in the light of Article 9 of the VAT Directive only, and not of Article 10 thereof, that it is necessary to assess that question. As noted, in essence, by Advocate General Kokott in points 23 and 39 of her Opinion, the relationship of employer and employee referred to in Article 10 of that directive is only one relevant criteria for the purpose of assessing the point whether an economic activity is conducted independently, within the meaning of Article 9(1) of that directive.

51 In the light of those preliminary clarifications, it is apparent from the case-law of the Court on Article 9 of the VAT Directive that, in order to establish whether a person independently carries out an economic activity, it is necessary to ascertain whether there is an employer-employee relationship in the pursuit of that activity (judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board*), C?420/18, EU:C:2019:490, paragraph 38 and the case-law cited).

52 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 the 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 and the case-law cited).

53 In the present case, it is for the referring court to ascertain whether TP arranged freely how he performs his work and that he himself received the emoluments which make up his income.

54 As for the question of the employer-employee relationship, the fact that, in his activity of advising and decision-making on a board of directors, the member is free to submit to that board the proposals and advice that he wishes and to vote within it as he sees fit is an indication of the absence of such a relationship. That is also true even if that member must comply with the decisions of that board, since the tasks entrusted to him, such as those recalled in paragraph 18 of the present judgment, consist essentially not in applying or implementing the decisions of those same boards but rather in providing proposals and advice as well as setting out and adopting, together with other members of the boards concerned, the decisions of the latter.

55 As for the question of whether such a member of a board of directors acted in his own name, on his own account and under his own responsibility, it is necessary in particular to take into account the national legal rules governing the allocation of responsibilities between the members of the board of directors and the company concerned. In that regard, as Advocate General Kokott stated in essence in points 33 and 34 of her Opinion, the fact that such an allocation of responsibilities is found to be similar or equivalent in the relationship binding an employee to his or her employer is likely to indicate that such members do not act under their own responsibility. The same also applies if their liability in tort is only ancilliary to the liability of the company or of the board of directors as a body thereof.

56 Where, following those investigations it appeared that the member of the board of directors does not act under his or her own responsibility, it is also necessary to conclude that, although that person appears to act in his or her own name when presenting advice or proposals to the board of directors and when voting, he or she acts first for that board and, more generally, for the company of which the board is a body, in that that advice, those proposals and those votes, which are primarily capable of triggering the liability of the company, must be set out in the interests of and for that company.

57 As for the question of whether the member of the board of directors of a public limited company under Luxembourg law bears the economic risk of his or her activity, it must be stated that, as is apparent from paragraph 43 of the judgment of 13 June 2019, *IO (VAT – Activities of a member of a supervisory board*) (C?420/18, EU:C:2019:490), and the case-law cited in that paragraph, the economic risk referred to by the Court in its case-law relates always to the economic risk incurred directly by the person for whom the independent nature of the economic activity must be assessed. Accordingly, the economic risk incurred by such a company by reason of the decisions of the board of directors of which such a person is a member is irrelevant.

58 Further to that clarification, it should be noted that where a person such as TP brings his expertise and know-how to the board of directors of a company and votes in that board, he does not appear to bear the economic risk linked to his own activity since, as Advocate General Kokott stated in essence in points 33 and 36 to 38 of her Opinion, it is the company itself that will have to confront the negative consequences of the decisions adopted by the board of directors and that will accordingly bear the economic risk resulting from the activity of the members of that board.

59 That conclusion applies in particular where, as in the main proceedings, it is apparent from the national legal context that the members of a board of directors do not assume any personal obligations concerning the debts of the company. It applies even where the amount of the remuneration received by the member of the board of directors in the form of percentage fees depends on the profits achieved by the company. That member does not bear, in any event, a risk of loss arising from his activity as a member of the board of directors, in so far as sharing in the profits of the company cannot be equated with assuming a personal risk of a profit or loss. The abovementioned conclusion applies all the more so where the percentage fees are awarded by the general meeting of shareholders in the form of a lump sum payment that is paid even where the company suffers losses or is being wound up.

60 In the light of the foregoing, the answer to the second question is that the first subparagraph of Article 9(1) of the VAT Directive must be interpreted as meaning that the activity of a member of the board of directors of a public limited company under Luxembourg law is not carried out independently, within the meaning of that provision, where – despite the fact that that member is free to arrange how he or she performs their work, receives the emoluments making up his or her income, acts in his or her own name and is not subject to an employer-employee relationship – he or she does not act on their own behalf or under their own responsibility and does not bear the

economic risk linked to their activity.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 9(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

must be interpreted as meaning that the member of the board of directors of a public limited company under Luxembourg law carries out an economic activity, within the meaning of that provision, where he or she supplies services to that company for consideration provided that that activity is effected on a continuing basis and for a remuneration for which the procedures for fixing that amount are foreseeable.

2. The first subparagraph of Article 9(1) of Directive 2006/112

must be interpreted as meaning that the activity of a member of the board of directors of a public limited company under Luxembourg law is not carried out independently, within the meaning of that provision, where – despite the fact that that member is free to arrange how he or she performs their work, receives the emoluments making up his or her income, acts in his or her own name and is not subject to an employer-employee relationship – he or she does not act on their own behalf or under their own responsibility and does not bear the economic risk linked to their activity.

[Signatures]

* Language of the case: French.