



# KMLZ VAT NEWSLETTER

## ECJ broadens the term “body governed by public law“

The ECJ has ruled that legal persons governed by private law may be deemed as being bodies governed by public law. This comes as something of a surprise, as the Federal Fiscal Court has previously held a different view on this matter. The new case law is especially important to so-called “entrusted“ taxable persons. The national regulation sec. 2 para. 3 German VAT Act and sec. 2b German VAT Act must now therefore be interpreted in conformity with the directive.

## Limited company = public body?

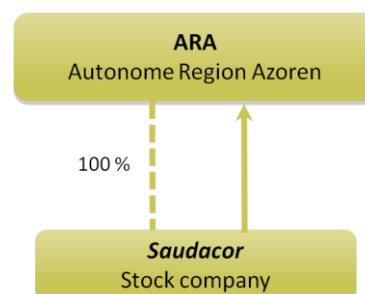
### 1. Problem

According to the VAT Directive, bodies governed by public law enjoy a special position: According to Art. 13 Directive 2006/112/EU, these bodies are not regarded as taxable persons if they engage as public authorities and if there is no risk of significant distortion of competition.

This special position has, to date, been refused to so-called entrusted taxable persons, i.e. taxable persons organized in accordance with private law, which have been assigned tasks of public authority. They were not regarded as bodies governed by public law. Now, the ECJ has had to deal with the question of whether a legal person governed by private law may also be regarded as such a body.

### 2. Facts

The plaintiff *Saudacor* is a stock company. 100% of the share capital was owned by a public body, here: Autonomie Region Azoren (“ARA”). Not only did the shareholder have supervisory powers but was also able to issue guidelines as a result of contractual agreements. According to Portuguese law, the plaintiff had public authority. Therefore, only *Saudacor* was able to render services to the shareholder ARA.





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### 3. ECJ, judgment of 29 October 2015, C-174/14 *Saudacor*

According to the ECJ, a legal person governed by private law needs to cumulatively meet two conditions in order to be regarded as a body governed by public law:

- It has to be a public body which has to
- engage as a public authority.

A *body will be governed by public law* if the person is integrated into the organization of the public administration. The ECJ specified the indications that evidence such integration in the case *Saudacor*:

- 100% of *Saudacor's* shares were owned by the shareholder.
- The shareholder had supervisory powers vis-a-vis *Saudacor* as a result of contractual agreements.
- Services were rendered only by *Saudacor* by law.

With regard to the second condition of *acting as public authority*, the ECJ referred to its previous case law. Public authority is exercised if the respective body acts within the framework of its own legal regulations, therefore not under the same legal regulations like private economic operators. Public authority is also ruled out if there is a risk of significant distortion of competition.

### 4. Practical tips

When applied to German law, this case law has the consequence for future so-called “entrusted ones” that they might expect to enjoy the special VAT law applicable to public bodies. Entrusted taxable persons are persons who are assigned tasks of public authority. This entrustment may only take place pursuant to law. However, this entrustment alone will not be sufficient for an entrusted taxable person to benefit from this special law. It is also necessary that the entrusted company be integrated into the organization of the entrusted body. The ECJ has now specified the requirements (such as 100% of the shares etc.). If these requirements are met, the legal person governed by private law will become, at least for VAT purposes, a legal person governed by public law.

Once this hurdle is overcome, there are numerous advantages available to entrusted taxable persons which remain closed to normal legal persons. Bodies governed by public law may now not only enter tax exempt co-operations, following the enactment of the new regulation sec 2b para. 3 German VAT Act, but there are also advantages available due to certain tax exemption regulations which offer less strenuous conditions for bodies governed by public law.