



No VAT for members of supervisory boards

1 Facts

The plaintiff is a member of the supervisory board of a foundation established in the Netherlands. The supervisory board has the following tasks: to supervise the management, decide on the composition of the board of directors and the supervisory board and to adopt the annual financial statements. The board of directors is responsible for the legal representation of the foundation. Only in limited exceptional cases may members of the supervisory board represent the foundation by themselves, for example, if the entire management board is vacant or to resolve conflicts of interest. The plaintiff receives a fixed remuneration for carrying out his duties. It is not tied to the performance of certain activities, such as attending meetings. A dismissal for negligence is only possible by means of a $\frac{3}{4}$ majority vote of the supervisory board.

The Dutch tax office communicated its intention to tax the plaintiff's remuneration with VAT, which the plaintiff opposed. He argued that he was subordinate to the supervisory board with regard to working conditions and remuneration and thus did not act independently. After the plaintiff's first instance claim was dismissed, the court of appeal referred the case to the ECJ for a preliminary judgment.

2 ECJ's decision

In its judgment of 13.06.2019 (C-420/18), the ECJ ruled that the plaintiff did not independently carry out his economic activities within the scope of his supervisory board mandate. Therefore, it followed that he did not provide any services subject to VAT. The ECJ justified its finding by reason of the fact that the plaintiff did not act in his own name nor on his own account or responsibility. Moreover, he did not bear any economic risk in terms of his activity. The purpose of the foundation, namely providing permanent housing for persons in need, did not play a role in the ECJ's reasoning. The ECJ



Dr. Thomas Streit, LL.M. Eur.
Lawyer

+49 (0) 89 217 50 12-75
thomas.streit@kmlz.de

found that the plaintiff carried out a sustainable economic activity for remuneration. In this respect, the ECJ considered it irrelevant that this remuneration was not calculated on the basis of individual performance. In addition, the assessment was not dependent on the total number of duties performed. Finally, the ECJ explained that a sustainable activity does not generally require that active steps be taken to generate income.

However, according to the ECJ, the plaintiff did not carry out his activity independently and was rather in a subordinate position to the foundation itself. Nevertheless, the ECJ rejected the idea that the plaintiff was an employee. In particular, it stated that the function of the supervisory board to supervise the management was not compatible with a working relationship subject to instructions.

Instead, the ECJ derived its view of the subordinate position from the fact that the supervisory board's members did not exercise their powers individually. Apart from in exceptional cases, they only acted for the account of and under the responsibility of the entire supervisory board. In addition, they were not liable for damages caused to third parties in the performance of their duties. Moreover, in the opinion of the ECJ, the activities of the members of the supervisory board did not entail any economic risk. In contrast to an entrepreneur, the members had no influence over their income or expenditures. They received a fixed remuneration, which was not dependent on their participation in meetings or on the hours actually worked. Possible dismissal for negligent breach of duty did not impact this assessment. For a dismissal, a special procedure was required. Therefore, misconduct only indirectly caused the loss of remuneration connected with the dismissal. This was found not to be sufficient to constitute an economic risk.

3 Consequences for the practice

In Germany, the remuneration of supervisory board members, regardless of the legal form of the company, has, to date, generally been subject to VAT. The tax authorities normally assume that the members are acting independently. They do not give consideration to the question of whether the members may be in a subordinate position to the supervisory board. The individual powers of the members of the supervisory board of a German stock corporation or cooperative are already limited by law to a similar extent as discussed in the ECJ case. The articles of association of a foundation may also provide for similar restrictions. After the ECJ's judgment, it therefore makes sense to scrutinise more closely whether the members of supervisory bodies of German companies are actually acting independently.

The ECJ considers the concrete extent of individually usable powers of the members and their economic risk to be decisive. Particularly with regard to the economic risk, however, there are many questions, which the ECJ was not required to address, namely: Can an economic risk alone lead to independence if the individually usable powers are restricted? Would an economic risk leading to independence arise if the supervisory board was to participate in the company's profits? What effect does a personal liability for a breach of duty have? Would the personal liability be irrelevant in any case if a company-financed D&O insurance policy existed?

The ECJ's judgment leaves much room for argument. In the future, this could enable companies to arrange for a conscious decision for or against independence of their supervisory boards members for VAT purposes. A non-taxation for the past and a corresponding VAT refund are also conceivable if they are still enforceable under procedural law. However, due to the explicit regulation of Sec. 2.2 para. 2 sentence 7 of the VAT circular, it should also be possible to grant protection of legitimate expectations for the past. This would be particularly important for the associated deduction of the input VAT arising from purchases.