FENIX CASE: VAT LIABILITY OF ONLINE PLATFORMS FOR UNDERLYING SERVICES – BUSINESS AS USUAL

(Case, C-695/20)

I. Introduction

The European Court of Justice ("ECJ") has just issued its long-awaited decision in *Fenix* case, concerning Fenix International Ltd that owns and operates a content sharing platform, i.e. "Only Fans".

Although the question at issue was of a purely technical nature, i.e. the compliance of article 9a of Council Implementing Regulation No 282/2011 ("Implementing Regulation") with the EU law, the importance of this case lies in the fact that the ECJ has been granted the opportunity for the first time to remove any ambiguity as to the extent of the VAT liability of online platforms that facilitate electronically supplied services ("ESS").

For illustration purposes, article 28 of the Council Directive 2006/112/EC ("VAT Directive") stipulates that a taxable person who, in the context of a supply of services, acts as an intermediary *in his own name but on behalf of another person*, is presumed to be the supplier of those services.

Furthermore, article 9a of the Implementing Regulation, which seeks to implement article 28 of the VAT Directive, provides that where ESS are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, these online platforms shall in principle be presumed to be acting in their own name but on behalf of the provider of those services. Therefore, in practice these online platforms are liable to account for VAT on the full amount charged to the customers rather than solely on the commission charged by them to the principal service provider.

Nevertheless, the same article also sets out certain situations where this presumption is not applicable, i.e. when the principal service provider is explicitly indicated as the supplier by these platforms and this is reflected in the contractual arrangements.

Under all circumstances, this presumption becomes irrebuttable where the online platforms authorize the charge to the customers or the delivery of those services or set the general terms and conditions of that supply.

In this newsletter, we give you an insight into the factual background of this case and the ECJ's findings.

II. Facts of the case

Fenix is a company established and registered for VAT purposes in the UK. It operates and has the exclusive control of Only Fans which is offered to "Users" worldwide. The latter are divided into "Creators" and "Fans".

In this context, Creators upload and post digital content (e.g. photographs, videos) to their individual profiles as well as they can stream live videos and send private messages to their Fans.

Fans can access the content by making ad hoc payments or paying a monthly subscription fee in respect of each Creator whose content they wish to view and/or with whom they wish to interact. They can also pay tips or donations for which no content is supplied in return.

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Although it is the Creators who determine the monthly subscription fee to their profile, Fenix sets the minimum amount for both subscriptions and tips.

In addition, Fenix sets the general terms and conditions for the use of the platform and is responsible for collecting and distributing the payments made by Fans, charging Creators an amount of 20% of the sums paid by their Fans by way of a deduction.

During the period at issue, Fenix did charge and account for VAT on a tax base constituted by the 20% deduction. Nevertheless, the UK tax authorities took the view that Fenix was an intermediary acting in its own name but on behalf of another person and therefore VAT should be paid on all the sums paid by Fans, not just the 20% deduction.

Fenix appealed and the UK tax tribunal referred the case to the ECJ asking in essence whether article 9a of the Implementing Regulation is valid or went beyond the "implementing power" that the Council has under the EU law.

It is worth mentioning that at the time of the referral (i.e. 22/12/2020), the UK was still considered as an EU Member State for VAT purposes and applied the EU VAT rules. This is the last referral of the UK to the ECJ concerning a VAT matter.

III. Judgment of the Court

The ECJ stated from the outset that an implementing provision adopted by the Council is lawful based on the EU legislation when it i) complies with the essential general aims pursued by the legislative act which such provision is expected to clarify and ii) is necessary or appropriate for the uniform implementation of that act without supplementing or amending it, even as to its non-essential elements.

In this respect, the ECJ found that article 9a of the Implementing Regulation is intended to ensure the uniform application of the presumption laid down in article 28 of the VAT Directive by clarifying who the supplier for VAT purposes is in relation to ESS provided through platforms.

Furthermore, since this article enables the tax authorities of the different EU Member States to determine with certainty who the supplier is in complex supply chains where online platforms are involved and, thus, to avoid any double taxation/non-taxation issues, it shall be considered as appropriate, or even necessary, for the uniform implementation of article 28 of the VAT Directive.

Finally, contrary to what Fenix argued, article 9a of the Implementing Regulation does not supplement or amend the presumption of article 28 of the VAT Directive, but merely clarifies the application of that provision in the specific context of services supplied electronically through platforms.

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In particular, the ECJ found that this article, having regard to the economic and commercial reality of such transactions, sets out the specific elements that should be assessed in order to determine whether a provider of ESS shall be presumed as the principal supplier of these services.

The fact that 9a of the Implementing Regulation specifically sets out an irrebuttable presumption for online platforms, which authorize the charge to the customer or the delivery of those services or sets the general terms and conditions of that supply, is not contrary to article 28 of the VAT Directive.

As in these cases the online platforms can unilaterally define essential elements of the supplies, they shall be considered themselves as the suppliers of the underlying services. Any other interpretation would imply that contractual arrangements which do not reflect the economic and commercial reality can be tolerated.

In light of the above, the ECJ confirmed that article 9a of the Implementing Regulation is valid and compliant with the EU law.

IV. Comments

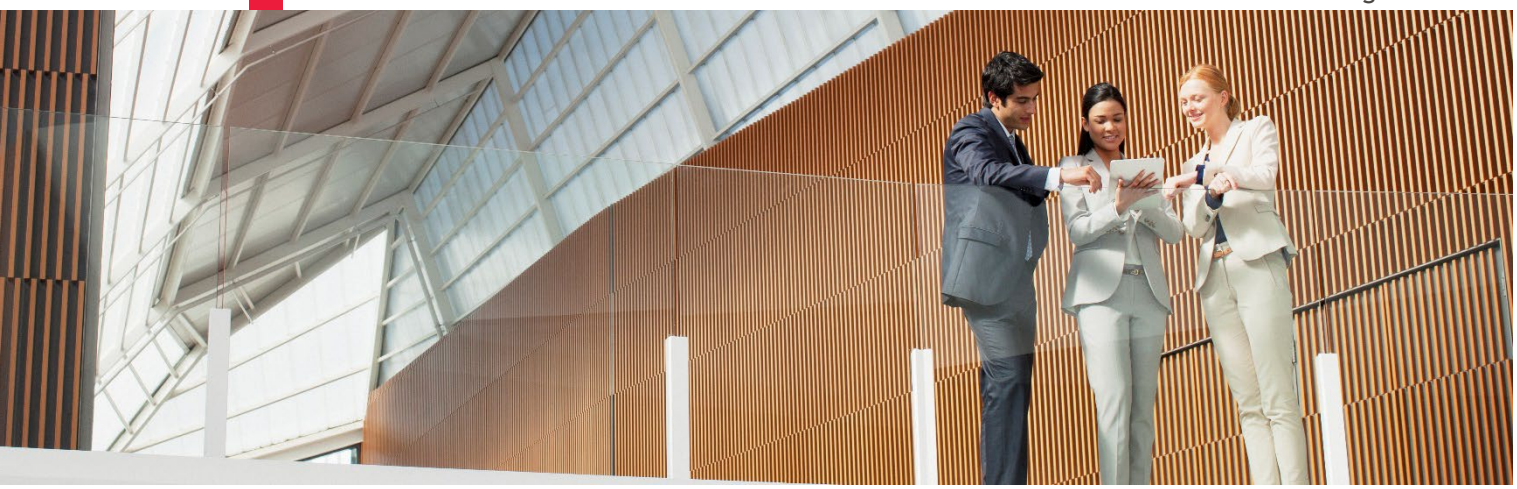
This ruling comes as no surprise, given that it confirms the validity of the applicable VAT provisions and reflects the current commercial practice.

Considering also the growing presence of online platforms in the economy, it is important that it increases the legal certainty regarding the VAT treatment applicable to these transactions.

Online platforms whose approach has not been in line with these VAT provisions should carefully assess this ruling and take informed decisions for the next actions.

V. How could BDO help you ?

Should you have any questions on the above, or need assistance with applying the correct VAT treatment to ESS provided through platforms, please feel free to contact our VAT experts.



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