Reprinted from
British Tax Review
Issue 2, 2023

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

SWEET & MAXWELL

Fenix International Ltd v HMRC: VAT on services rendered on social media platforms

Introduction

Fenix International Ltd v HMRC (*Fenix International*)[1] concerns a request for a preliminary ruling on the validity of article 9a of Implementing Regulation 282/2011.[2] This rule implements article 28 of Council Directive 2006/112.[3] That article creates the legal fiction of two identical supplies of services provided consecutively under which the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, first, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, secondly, those services to the client himself or herself. Especially regarding the digital economy, this rule may cause severe VAT problems for all involved parties.

The European Court of Justice (ECJ) was asked whether article 9a of Implementing Regulation 282/2011 is invalid on the basis that it supplements and/or amends article 28 of Council Directive 2006/112. Its decision will have a tremendous impact not only for taxing social media platforms and content creators. It might also affect future EU legislative procedures.

Background facts

Fenix, a company registered for VAT purposes in the UK, operates the social media platform Only Fans. That platform is offered to "users" throughout the world, who are divided into "(content) creators" and "fans". Each creator has a "profile" to which they upload and publish content, such as photos, videos and messages. Fans can access content uploaded by the creators

[1] *Fenix International Ltd v HMRC* (*Fenix International*) (C-695/20) EU:C:2023:127; [2023] S.T.C. 482.
[2] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax [2011] OJ L77/1.
[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

they wish to follow or with whom they wish to interact, by making ad hoc payments or by paying a monthly subscription. Fans can also pay "tips" or donations, which result in them receiving content. Each creator determines the amount of the monthly subscription, although Fenix sets the minimum amount payable both for subscriptions and for tips. Fenix provides both the Only Fans platform and also the device enabling financial transactions to be carried out. Fenix is responsible for collecting and distributing the payments made by fans, using a third-party entity which supplies payment services. Fenix also sets the general terms and conditions for use of the Only Fans platform. Fenix levies 20 per cent on any sum paid to a creator, to whom it charges the corresponding amount. On the sum which it levies in this way, Fenix applies VAT at a rate of 20 per cent, which appears on the invoices which it issues. All payments appear on the relevant fan's bank statement as payments made to Fenix. In 2020, HMRC sent Fenix VAT assessments for the period July 2017 to January and April 2020, on the basis that Fenix had to be deemed to be acting in its own name pursuant to article 9a(1) of Implementing Regulation 282/2011. On that basis Fenix was liable for VAT on all of the sum received from a fan, not only the 20 per cent of that sum which it levied by way of remuneration. Fenix appealed to the First-tier Tribunal (FTT) (Tax Chamber) challenging the validity of the legal basis for the tax assessments, namely article 9a of Implementing Regulation 282/2011, and their respective amounts.[4]

Relevant law

Article 28 of Directive 2006/112 provides:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

Article 397 of Directive 2006/112 provides:

> "The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive."

Article 9a of Implementing Regulation 282/2011 provides:

> "1) For the application of Article 28 of [Directive 2006/112], where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications, a taxable person taking part in that supply shall be presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties.
>
> In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

[4] *Fenix International* (C-695/20) EU:C:2023:127 at [19]–[26].

(a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;

(b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.

2) Paragraph 1 shall also apply where telephone services provided through the internet, including voice over internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.

3) This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the internet, including voice over internet Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services."

The reference

The FTT had doubts regarding the validity of article 9a of Implementing Regulation 282/2011. So it referred the following question to the ECJ:

> "Is Article 9a of Implementing Regulation No 282/2011 invalid on the basis that it goes beyond the implementing power or duty on the Council established by Article 397 of Directive 2006/112/EC in so far as it supplements and/or amends Article 28 of Directive 2006/112/EC?"[5]

It noted that a provision to implement a legislative act is lawful only if that provision:

1) complies with the essential general aims pursued by that act;
2) is necessary or appropriate for its implementation; and
3) does not amend or supplement it, even as to its non-essential elements.

According to the FTT, it could be argued that article 9a(1) of Implementing Regulation 282/2011 is a supplement or an amendment to article 28 of Directive 2006/112 that goes beyond mere implementation. The presumption contained in the implementing rule, which is intended to provide further detail as to *when* an intermediary acts in his or her own name but on behalf of another person, is not mentioned in article 28 of Directive 2006/112. Therefore, it is not a technical measure but a radical change to the legal framework established by article 28 of Directive 2006/112. In addition, the presumption in article 9a(1) of that implementing regulation,

[5] *Fenix International* (C-695/20) EU:C:2023:127 at [31].

specifically the third subparagraph of that provision, appears to remove the obligation to examine the economic and commercial position of the taxable person.

Analysis by the ECJ

First, the ECJ reflected on its jurisdiction. Post-Brexit, due to article 86(2) of the Withdrawal Agreement,[6] the ECJ remains competent to give a preliminary ruling on references from the UK that were made before the end of 2020.[7] Since the *Fenix International* case was registered by the Court Registry on 22 December 2020, this might be the very last ruling of the ECJ on UK-interpreted VAT law.

Then the ECJ restated the circumstances when implementing acts may be enacted by the Council. Especially, it requires a detailed statement of the reasons why that institution is entrusted with the adoption of measures implementing a legally binding act of the EU.[8] With regard to Directive 2006/112 the EU legislature considered that it was necessary for measures implementing that directive to be uniform, in particular in order to address the problem of double taxation of cross-border transactions. Furthermore, it was appropriate to reserve to the Council the right to adopt such implementing measures on account of the impact, sometimes significant, that such measures could have on the budgets of Member States.[9] However, regarding a legally binding EU act such as Directive 2006/112, the Council only has the power to adopt implementing measures. It cannot adopt essential rules on the matter, since those rules must be adopted in compliance with the applicable legislative procedure, namely the special procedure established in article 113 of the Treaty on the Functioning of the European Union (TFEU).[10]

In terms of content, the ECJ determined the compliance of article 9a of Implementing Regulation 282/2011 in the same way as the referring tribunal. Nevertheless, it reached a different outcome. Article 9a of Implementing Regulation 282/2011 is intended to ensure the uniform application of the presumption established in article 28 Directive 2006/112. It follows that these provisions comply with the essential general aims of Directive 2006/112 and, in particular, those of article 28 thereof.[11] The implementing rule aims to avoid double taxation or non-taxation which would have resulted from divergent implementation arrangements between Member States regarding the application of article 28 of Directive 2006/112. In those circumstances, it was necessary to consider if article 9a(1) of Implementing Regulation 282/2011 is appropriate, or even necessary, for the uniform implementation of article 28 of Directive 2006/112.[12] Finally, the ECJ examined whether the contested provision complies with the prohibition on supplementing

[6] The Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7. The latest consolidated text is available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02020W%2FTXT-20201218* [Accessed 30 March 2023].
[7] *Fenix International* (C-695/20) EU:C:2023:127 at [31].
[8] *Fenix International* (C-695/20) EU:C:2023:127 at [37] citing *National Iranian Oil C v Council of the European Union* (C-440/14 P) EU:C:2016:128 at [49] and [50] and the case law cited there.
[9] *Fenix International* (C-695/20) EU:C:2023:127 at [39].
[10] *Fenix International* (C-695/20) EU:C:2023:127 at [43]; Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.
[11] *Fenix International* (C-695/20) EU:C:2023:127 at [59]–[60].
[12] *Fenix International* (C-695/20) EU:C:2023:127 at [61]–[62].

or amending the content of article 28 of Directive 2006/112. In that regard, it found that there was no indication that the legislature of the EU has waived the right to ensure, by conferring implementing powers on the Council under that directive, a uniform application of the conditions referred to in article 28. In particular the taxable person must be acting in his own name, in order to be regarded as being the supplier of a service.[13] More specifically, the contested provision cannot be regarded as supplementing or amending the content of article 28 of Directive 2006/112, and in particular the presumption laid down in that article. Instead it is merely a clarification of that content, in the specific context of services supplied by electronic means via a telecommunications network, interface or portal, such as a download platform for applications. In particular, this provision takes full account of the economic and commercial reality of the transactions as a fundamental criterion for the application of the common system of VAT.[14]

The ECJ then examined the second and third subparagraph of article 9a(1) of Implementing Regulation 282/2011. In order to regard the provider of electronically supplied services (here: the content creator) as being explicitly indicated as the supplier of those services by the taxable person (here: Fenix as social network platform operator) two conditions must be satisfied:

1) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof; and
2) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

That information is part of the elements that fall within the commercial and contractual relationships between the different parties, which are supposed to reflect the economic and commercial reality of the transactions at issue. It makes it possible to assess the relationship between the various operators involved in the supply of electronically supplied services. Therefore, it is in line with article 28 of Directive 2006/112.[15]

Regarding the third subparagraph of article 9a(1) of Implementing Regulation 282/2011, the ECJ has no legal doubts. When a social network platform as taxable person has the power to authorise the supply of that service, or to charge for it, or to lay down the general terms and conditions of such a supply, that taxable person may unilaterally define essential elements relating to the supply. These are the provision of that service and the time at which it will take place, or the conditions under which the consideration will be payable, or the rules forming the general framework of that service. In such circumstances, and with regard to the economic and commercial reality reflected by them, the taxable person must be conclusively (not rebuttably) presumed to be the supplier of services, pursuant to article 28 of Directive 2006/112.[16] Thereby it is completely irrelevant if the final customer is aware of the existence of the agreement between the principal (here: the content creator) and the agent (here: Fenix as social network platform operator) and the identity of that principal.[17]

[13] *Fenix International* (C-695/20) EU:C:2023:127 at [66].
[14] *Fenix International* (C-695/20) EU:C:2023:127 at [69]–[72].
[15] *Fenix International* (C-695/20) EU:C:2023:127 at [75]–[79].
[16] *Fenix International* (C-695/20) EU:C:2023:127 at [81]–[85].
[17] *Fenix International* (C-695/20) EU:C:2023:127 at [87].

The ECJ therefore concluded that, by adopting the contested provision, in order to ensure the implementation of article 28 of Directive 2006/112 under uniform conditions throughout the EU, the Council did not exceed the implementing powers conferred on it by Directive 2006/112, pursuant to article 291(2) TFEU.

Comment

As sad as Brexit is from a VAT perspective, the UK at least says goodbye with a smile at the ECJ. The ECJ's ruling is not surprising at all. For good reasons, national courts already very rarely declare legal acts incompatible with higher-ranking law. Naturally, the ECJ then also tends to hold back.

"Clarifying" v "Amending"

The case shows that there is a paper-thin line between (permitted) "clarifying" and (prohibited) "amending". Of course, an implementing regulation always adds further details to the pre-conditions for the application of a basic legal act. In this respect one would rather expect detailed technical questions or regulations in peripheral areas of the basic legal act, like e.g. a de minimis exemption. If, however, the core area of the basic legal act is "clarified", this can hardly be distinguished from an "amendment". When the basic legal act reads: "[i]llegal immigrants may be checked by the police" and the implementing regulation reads: "[a]ir travellers are (rebuttable) considered illegal immigrants", this would probably be a clarification according to the present ruling. Nevertheless, one could easily empathise with the anger of air travellers and the interpretation of the implementing regulation as an "amendment".

Before article 9a of Implementing Regulation 282/2011 came into force in 2015, in the writer's view, the present case would have been resolved differently. Merely setting up general terms and conditions and processing payments used to be insufficient for an internet platform to be considered a service provider. Article 28 of Directive 2006/112 was not applicable. The content creator would have had to pay B2C VAT on all payments made by the fans/viewers. For Fenix's commission, the platform would have had to charge B2B VAT to the content creator. If the content creator was based outside the UK, they would also be liable for this VAT because of the reverse charge principle. In Germany, this pre-2015-view was confirmed by a decision of a local tax court for the platform "justanswer.com".[18]

It remains to be seen whether the decision will have a positive effect on the formal aspects in Europe. In the future, the Member States, through their MEPs in the EU Parliament, will think carefully about how detailed a directive should actually be. Otherwise, there is a risk that the Council will simply "clarify" the legal act later. This can have serious economic consequences: the UK Government estimates that the additional amount of VAT paid in the UK between 2015 and 2020 because of applying article 9a of Implementing Regulation 282/201 adds up to more than €3 billion.[19]

[18] Tax court of Thuringia (22 October 2019 - 3 K 309/19).
[19] Opinion of Advocate General Rantos in *Fenix International* (C-695/20) EU:C:2022:685 at [96].

Creator v social network

In terms of substantive VAT law, the decision inevitably leads to one winner and one loser for content creators and social network platforms: whoever is responsible for VAT must first and foremost take care of the registration and payment of VAT in the EU. It seems legally justifiable to assign this role to the social network platforms. And this result is also convincing from an economic point of view, since the platforms profit predominantly from the business model. For the tax authorities, the decision is advantageous anyway. Instead of a multitude of content creators, only one platform has to be taxed. The Commission is expanding this concept of taxing online platforms. Their proposals are part of the reforms "VAT in the digital age" (VIDA).[20] From 2025, "short-term accommodation rental" (*lex* Airbnb) and "passenger transport" (*lex* Uber) shall also to be taxed in this way. The ECJ's decision is thus more convincing in its outcome than in its reasoning.

After the ECJ's decision, it should be clear that Fenix owes the entire VAT. The FTT probably has no leeway here. So the content creator must bill to Fenix. However, the obviously preferred handling would be Fenix invoicing via credit note. This is also the approach taken by, e.g. YouTube. Nevertheless, there will still be contentious cases in practice that are not so clear-cut. For example, the question arises whether "donations" from fans/viewers to content creators should also be subject to article 9a of Implementing Regulation 282/2011 if they are made directly via, e.g. PayPal, without any influence from the platform. This often happens in livestreams. A local tax court in Germany recently denied the application of article 28 of Directive 2006/112 in such a case in connection with the Twitch platform.[21] So far, this has also been beneficial for the content creator. That is because the streaming service falls under article 54 of Directive 2006/112, not article 58.[22] The content creators therefore only have to account for VAT in their home country, not at the location of the viewers. However, article 54 of Directive 2006/112 will be amended (and not just clarified) from 2025 onwards, so:

> "Where the services and ancillary services relate to activities which are streamed or otherwise made virtually available, the place of supply shall, however, be the place where the non-taxable person is established, has his permanent address or usually resides."[23]

This could constitute a problem for content creators, because neither article 9a of Implementing Regulation 282/2011 nor the threshold under article 59c of Directive 2006/112 apply to such streaming services under article 54. In such a case, the streamer must declare VAT where the viewer is located. At least they can use VAT One Stop Shop (OSS) for this. Above all, however, they must determine what is a streaming service under article 54 of Directive 2006/112 and what is an electronic service under article 58. This is—to put it mildly—not easy.[24]

[20] European Commission, Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age COM(2022) 701 final.
[21] Tax court of Düsseldorf (4 March 2022 - 1 K 2812/19 U), *http://www.justiz.nrw.de/nrwe/fgs/duesseldorf/j2022/1_K_2812_19_U_Urteil_20220304.html* [Accessed 29 March 2023].
[22] European Commission, Value Added Tax Committee (2021) Working Paper No.1013.
[23] Council Directive 2022/542/EU of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax [2022] OJ L107/1.
[24] Giorgio Beretta (ed.), "Virtual Activities: EU VAT's Effort to Recompose the Broken 'Unity of Action, Time and Place' — Part II" (5 January 2022) *Wolters Kluwer International Tax Blog*, *https://kluwertaxblog.com/2022/01/05*

The present decision will therefore only be the prelude to further developments in which the, sometimes traditional, VAT law must be brought together with new phenomena of the digital economy.

Matthias Trinks[*]

/virtual-activities-eu-vats-effort-to-recompose-the-broken-unity-of-action-time-and-place-part-ii/ [Accessed 29 March 2023].

[*] Lecturer in Tax Law, University of Applied Sciences, Dortmund, Germany.