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VAT liability of online platforms

The CJEU confirmed the lawfulness of the liability of online platforms to collect VAT on total amounts due on electronic services in the recent Fenix case (C-695/20, 28 February 2023).

Background

The CJEU considered the VAT position of Fenix International Ltd, a UK online platform operating a social media platform. Content creators upload photos or videos and occasionally perform livestreams accessible by subscribers subject to the payment of a subscription fee on the platform. Fenix collects the payments from the subscribers and distributes the relevant portion to the content creators. For its services, Fenix retains 20% of the remuneration paid by the subscribers and applies VAT to the sum retained.

HMRC challenged Fenix's approach, taking the view that the full payment received from the subscribers should be subject to VAT on the grounds that Article 28 of the VAT Directive, read in conjunction with Article 9a paragraph 1 of the VAT Implementing Regulation No 282/2011, shifts the VAT liability to the online platform, provided it is used for the provision of electronically supplied services. On this basis, where the online platform operator is acting in its own name but on behalf of the provider, the provider is deemed to be supplying services to the online platform operator and the latter is deemed to further supply those services to the final consumer. The question referred to the CJEU concerned the legal validity of Article 9a paragraph 1 of the VAT Implementing Regulation.

CJEU judgment

The CJEU ruled that the provisions of Article 9a paragraph 1 of the VAT Implementing Regulation are in line with EU law and did not challenge the application of the deemed supply theory (commissionaire principle). This approach may have a substantial impact on online platform operators, given the increasing use of online platforms for the provision of electronic services. In fact, where the online platform operator authorises the supply of a specific service, charges fees for it or determines the general terms and conditions of the supply, it is deemed to be acting in its own name but on behalf of the provider. Consequently, the online platform operator, being empowered to define essential elements of the supply, is viewed as the supplier of the services at stake.

Practical impact for online platforms

This decision may have significant consequences for online platform operators in terms of VAT compliance obligations applicable to electronic services supplied to private consumers, for which the supplier must charge VAT of the country where the consumer is resident. However, a case by case analysis will be necessary to determine whether the services provided through the platform amount to electronically

supplied services and meet the requirements of the deemed supply theory. Online platforms should therefore carefully assess their current transactions and the related contractual documentation.

If you have any questions about how this decision affects your business, please contact our VAT experts.

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