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CJEU Strips it Down for OnlyFans (C-695/20 *Fenix International v HMRC)*

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On 28 February 2023, the Grand Chamber of the Court of Justice delivered its judgment in Case C-695/20 *Fenix International Ltd v Commissioners for Her Majesty's Revenue and Customs (HMRC)* regarding the possible breach of the Council's implementing powers afforded under Article 397 of Council Directive 2006/112 (VAT Directive) and the validity of Article 9a of Implementing Regulation No. 282/2011. It held that Article 9a was both necessary and appropriate to implement the VAT Directive, and that the Council did not abuse its powers by supplementing or adding to the general aims and normative content set out in Article 28 of the VAT Directive. As alluded to in the title of this post, the Court of Justice returned to the foundations of this area of law, referring to the rationale for uniform taxation and the reason behind Article 9a's implementation, in turn, disproving Fenix International's claims, and providing a judgment that should be referenced in many tax cases to come.

Facts

Fenix International operates 'OnlyFans', a site in which creators can post content, stream live videos, and chat with fans. In return, users provide consideration by either paying monthly subscriptions or ad hoc payments. There is an additional option for users to 'tip' creators, but users will receive nothing in return for these payments. Creators have the power to set the amount for monthly subscriptions, but Fenix establishes a minimum. Furthermore, Fenix provides digital financial software to enable transactions and controls the collection and distribution of payments. Fenix also sets the terms and conditions for

the platform. Acting as an intermediary, Fenix takes 20% of creators' earnings, and payments on creators' bank statements will show as having been made to Fenix.

The dispute at issue began back in 2020 when a series of VAT assessments were sent to Fenix by the HMRC (the UK tax authority). It transpired that Fenix had only been paying VAT at a rate of 20% on the 20% levied from creators, as opposed to 20% on the full revenue. The first assessment was sent on 22 April 2020, which assessed the period from July 2017 to January 2020, and a second assessment was then sent on 15 July 2020 for the month of April 2020.

In response to this, Fenix International filed an appeal disputing the legal basis for these assessments before the referring court in the UK. They challenged the validity of the Council's implementing powers afforded to the Council under Article 397 of the VAT Directive, which allows the Council to "adopt the measures necessary to implement [the VAT] Directive". The rationale behind these powers is to clarify the Directive, ensuring that application is uniform across Member States to avoid double taxation or adverse impacts on Member States' budgets. Specifically, Fenix International challenged Article 9a of the Implementing Regulation No. 282/2011 (which is such an implementing measure as provided under Article 397 of the VAT Directive).

As background to the applicable law, Article 9a was implemented to clarify Article 28 of the VAT Directive. The *Fenix International* case only regards subsection 1 of the Article, which provides direction on which types of online businesses Article 28 applies to. Article 9a(1) further provides direction on the conditions to be met to be regarded as a provider, namely, that the supplier must be identified on the invoice, and that the bill or receipt must identify the supplier and their electronic service (see Judgment, para 75). Finally, it specifies that if a taxable person supplies the services, sets the general terms and conditions, and authorities payments then they cannot appoint another person as the supplier (and as such the taxable person).

Issue

The Court of Justice structured its judgment along the following three main claims brought forward by Fenix International and referred by the UK court:

1. Article 9a of the Implementing Regulation does not comply with the general aims of Article 28 of the VAT Directive.

Article 28 specifies that: *"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."* Essentially, where someone acts in their own name as an

intermediary, they will be treated as a supplier of services for the purposes of VAT. Article 9a clarifies Article 28, adding examples of specific conditions to be met and further explaining its purpose. Clarification is important to a common VAT system as all terms must be interpreted the same to maintain uniformity, fairness, and avoid situations of double taxation (see also C-276/14 *Gmina Wroclaw v Minister Finansow*, paras 25-26).

2. Article 9a is neither necessary nor appropriate for the uniform implementation of Article 28.

The principle that any provision introduced must be 'necessary and appropriate' for uniform implementation was set out under Article 291(2) TFEU as a limitation on the extent of the Council's implementing powers.

3. The Council has gone beyond its implementing powers by supplementing and amending the content originally set out in Article 28 rather than simply clarifying it.

Fenix attempted to claim that Article 9a deprived parties of their contractual autonomy and neglected to take into account commercial and economic realities. Moreover, it argued that the Council changed the liability of agents who have to pay VAT by transferring the tax burden to internet platforms because it is nearly impossible to rebut subparagraph 3 of Article 9a(1). Thus, by adding these provisions Article 9a the Council had allegedly gone beyond its implementing powers under Article 397 of the VAT Directive.

Judgment

As explained above, first, Fenix had argued that Article 9a of the Implementing Regulation did not comply with the general aims of Article 28 of the VAT Directive. The Court rebutted this presumption, arguing that it was necessary for the Council to clarify who the supplier is in cases of services provided through a "telecommunications network, an interface or a portal", to ensure uniform application (para 17). The Court recognised that Article 28 was largely written in general terms, leaving a lot of room for interpretation and Member State discretion. Having spoken of the importance of a uniform tax system, the Court went onto state that it was important for the Council to provide more directive instruction. From this, it follows that Article 9a(1) did not detract from the aims of Article 28 of the VAT Directive, but rather strengthened them by providing detail. Thereby, the Court confirmed that Article 9a(1) of the Implementing Regulation complies with the essential aims of Article 28 of the VAT Directive.

Regarding the second issue, the Court confirmed that it was appropriate, or even necessary for the Council to implement Article 9a, to maintain legal certainty and avoid issues of double taxation, following the changes in the VAT Directive in 2015 concerning the place of taxation of certain supplies of services, including telecommunications and electronic services (paras 61-62).

Finally, the Court spoke of the allegation that the Council had supplemented or amended Article 28. The Court's first argument surrounded the additional examples, such as "a marketplace for applications" included in subparagraph 1 of Article 9a(1). They stated that simply because more specific examples are given in subparagraph 1, it does not mean that the Implementing Regulation is doing anything more than clarifying Article 28 of the VAT Directive (para 67). In short, it held that all the content of subparagraph 1 Article 9a(1) merely provides a more concrete expression of Article 28, and in no way adds anything to it (para 68).

Speaking more extensively of Fenix's allegation that subparagraph 1 of Article 9a(1) did not reflect contractual autonomy, the Court of Justice turned to the part of the provision reading: *'unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties'.* The Court of Justice stated that Article 9a classified the contracts of the parties as a factor that must be taken into consideration, thereby proving an acknowledgment of commercial and economic realities (paras 71-72).

The second subparagraph of Article 9a(1) speaks of the invoice and bill for these services. Fenix had argued that by adding these more specific conditions the content of Article 28 had been supplemented. The Court was quick to rebut this, stating that it merely set out the conditions needed to make a specific VAT assessment, adding that it thereby also better takes into account the commercial realities (para 78). These conditions can therefore also not be seen to be supplementing or amending Article 28 (para 79).

Finally, turning to subparagraph 3 of Article 9a(1), it is true that if one of the three situations set out in that subsection is satisfied then Article 9a(1) becomes impossible to rebut. This means that a taxable person who acts within that supply will be treated as acting in their name as a provider and hence will be treated as the supplier. The Court asserted that in the implementation of this subsection, the Council had taken into account the realities of commerce and that this was used to avoid persons evading payment by simply designating someone else to bear the burden (para 84). Contractual terms need to be taken into account when identifying the supplier and receiving parties (see also Case C-605/20 *Suzlon Wind Energy Portugal*). Further, the fact that subparagraph 3 adds conditions upon which a taxable supplier loses his right to indicate another person as a supplier, not mentioned in Article 28, does not mean that the Council supplemented or

amended Article 28 but merely provided more concrete direction as to the use of Article 28 (paras 84-85). It follows that the Council did not abuse its powers, and instead merely clarified the normative content of Article 28.

To conclude, the overriding argument, in this case, was that the content of Article 9a is in line with and maintains the nature of Article 28 of the VAT Directive. It simply provides a clearer and more robust explanation of the way in which it should be used. The Court's interpretation, thereby, rebuts Fenix's arguments and leaves the company liable for a hefty amount of tax debt (to be confirmed by the national court).

Commentary

As the final VAT case from the UK to go to the CJEU before the end of the transition period, this case provides an exciting opportunity to delve into EU law for the last time (at least, for UK courts). Upon a surface-level reading of these provisions, it is easy to see why Fenix made such an error in its judgment. However, the Court's judgment provides a solid foundation of understanding behind both the Council's implementing powers and, more specifically, the purpose and necessity of Article 9a of the Implementing Regulation.

The Court's judgment notably focuses on commercial realities, as it is an issue that seems to be constantly rearing its head in relation to international tax law. Indeed, it comes into play at different stages of this judgment. As Fenix had alleged that commercial realities were not taken into account, a clear rebuttal was necessary from the Court. As confirmed by the Court of Justice, considering commercial realities is essential to providing a workable tax framework that does not distort competition. The importance of this was referenced in Case C-464/10 *Belgian State v Pierre Henfling and Others* where a similar issue was raised surrounding the taxation of 'buralistes' (bet collectors) under VAT, and it was held that the activities of the parties should have been interpreted with reference to their contractual relationship (para 42). The Court's analysis in *Fenix International* strikes a reasonable balance between taking into account the contractual realities of the parties (paras 71-74) and recognising the Council's attempt to implement measures that will prevent tax avoidance or burden shifting in the future (see paras 84-85). It seems apparent that subparagraph 3 of Article 9a(1) is good law, just not a preferred solution for intermediary online platforms whom it will target.

Both the Grand Chamber and Advocate General Rantos took the view that Article 9a was necessary and appropriate for the implementation of Article 28. However, they took slightly different approaches to reach this conclusion. Arguably, the Court's analysis of this issue was brief, and, as such, is less compelling than it could have been. The Advocate General's Opinion on this matter is more convincing. He referred to the Commission's

Explanatory Notes on Article 9a, which it produced after the adoption of the Implementing Regulation. In these Notes, the Commission explained the need for Article 9a after its adoption (see section 3.3): to clarify the VAT Direction, including the complexities of online businesses, cross-border trade, and the role that clarification can have on legal certainty. The Advocate General recognised that whilst these Notes are not legally binding, and are drafted by the Commission and not the Council, they can provide interesting insight and reasoning for the rationale behind the implementation of Article 9a (Opinion, para 62). By looking at the rationale behind Article 9(a), the Advocate General established a strong foundation upon which to assess its necessity. The Advocate General bolstered his point by further exploring the implications of a lack of clarification of how to apply this Directive and recognises the possibilities of double taxation and attacks on tax neutrality (para 63). He contends that the divergences of approaches by Member States can easily lead to either double or non-taxation, especially in the case of cross-border transactions (para 63). Tax uniformity is essential in a digital age (para 64), as with companies able to have no fixed location avoiding taxation has become easier. Whilst these impacts were mentioned by the Court of Justice (see Judgment, para 61), a more in-depth analysis of the implications of a non-uniform application would have been welcomed and made for a more persuasive argument.

This commentary does not disagree with the outcome of this case. In fact, it is a useful clarification of EU VAT law, especially in a growing digital world. The VAT Directive, and specifically Article 28, were adopted before the introduction of e-commerce and its implementation is now having to be adapted to an online commercial world. The implications of this decision in *Fenix International*, whilst maybe not far-reaching in the United Kingdom due to their exit from the European Union, will have notable impacts in the EU. This is particularly relevant for subparagraph 3 of Article 9a(1), which prevents shifting tax burdens by nominating another taxable person, as it will mean that businesses have to re-examine the way in which they are conducting their businesses and more recognition will have to be given to this Article to avoid the fate of Fenix International.

This case highlights the complex nature of taxation in a digital world and a move away from traditional forms of taxation. As widely discussed by academics such as Young Ran Kim, the traditional form of corporate taxation is no longer workable in a digital world. Due to the lack of fixed location of many digital businesses, the permanent establishment-based model of taxation, which requires physical location in the country of taxation, is no longer appropriate. These outdated rules have left loopholes for multinational companies to avoid large amounts of taxation. This issue has warranted the clarification, and even reform, of many existing tax treaties. Providing a clear taxation system has been a challenge, and one recognised by various authorities across the globe, including, for example, the OECD. The *Fenix International* judgment has done well to support the

progress of the EU, and specifically the Council here, in its attempt for a uniform and appropriate form of taxation. However, issues such as this will continue to arise, and the Court of Justice should be prepared for many more cases of this nature in the future.