

EU VAT rules for platform operators facilitating digital services are valid

On February 28, 2023 the Court of Justice of the European Union ('CJEU') published its judgment in the Fenix case (C-695/20). The CJEU ruled that the EU's VAT rules for platform operators facilitating digital services are valid.

1. Background

Fenix operates an online social media platform. Creators using the platform can upload content such as photos, videos, and messages. Fans using the platform can access this content by making ad-hoc payments or by paying a monthly fee. Fenix collects payments made by fans and remits those payments (less its commission) to the creators, using a third-party payment service provider. Fenix also sets the general terms and conditions for the use of the platform.

The EU VAT Implementing Regulation (in conjunction with the EU VAT Directive) contains a deeming provision for platform operators facilitating digital services. Where the conditions of this deeming provision are satisfied, the platform operator is deemed to buy the digital services from the service providers (Creators) and deemed to resell such services to the service recipients (Fans). Fenix challenged the validity of this deeming provision laid down in the EU VAT Implementing Regulation.

2. CJEU judgment

According to the CJEU, the EU VAT Implementing Regulation laying down the deeming provision for platform operators facilitating digital services does not supplement or amend the EU VAT Directive.

Where a platform operator authorizes the charge to the customer, authorizes the delivery of services, or sets the general terms and conditions of the supply, it cannot rebut the presumption that the deeming provision applies. The CJEU ruled that this reflects economic and commercial reality in the context of digital services, because the platform operator can unilaterally define essential elements of such supplies in these circumstances, e.g. the provision of that service, the time of supply, the payment conditions, and the legal framework for such services. The fact that the name and identity of the underlying service provider (Creator) may be known to the service recipient (Fan) does not impact the outcome in the context of digital services. Therefore, the deeming provision for platform operators facilitating digital services laid down in the EU VAT Implementing Regulation is valid.

3. Observations and practical implications

The CJEU has now made clear that the deeming provision for platform operators facilitating digital services is valid. Nonetheless, platform operators must still assess whether they can rebut the presumption that this deeming provision applies – by reference to authorizing the charge to the customer, authorizing the delivery of services and/or setting the general terms and conditions of the supply. While this may be

challenging in practice, given the typical involvement of platform operators in these elements, in our view there should still be scope to rebut the presumption.

In our view, the CJEU's judgment in the Fenix case should be considered in the context of digital services only. The deeming provision for platforms facilitating certain e-commerce sales of goods and the new deeming provision for platform operators facilitating short-term accommodation and passenger transport included in the European Commission's VAT in the Digital Age (ViDA) proposal are based on separate provisions in the EU VAT Directive. Therefore, we would not expect similar discussions here. That said, we wonder if the CJEU's judgment in the Fenix case will trigger more discussions on the general deeming provision for undisclosed agents ('commissionaires') in other situations where platform operators facilitate sales.

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