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Advocate General's Opinion C-695/20 | *Fenix International*

According to Advocate General Rantos, the provision of the regulation implementing the VAT Directive providing that an online intermediary platform is, in principle, liable to pay VAT is valid

That provision respects the essential general aims of the VAT Directive, is necessary or appropriate for its implementation and merely provides further detail without supplementing or amending it

Fenix, which is registered for VAT purposes in the United Kingdom, operates the online platform 'Only Fans', which is offered to 'users' from around the world, who are divided into 'creators' and 'fans'. Creators post content such as photographs and videos to their respective profiles and can also stream live videos to their fans or send private messages to them. Fans can access that content by making payments, while also having the possibility to pay tips or donations to the creators without consideration.

Fenix 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. In respect of the payments involved in this case, Fenix charged and accounted for VAT on a tax base constituted by the 20% deduction.

Taking the view that Fenix should have paid VAT on the basis not of the 20% deduction but of all the sums paid by fans, the United Kingdom tax authorities sent it, in April 2020, assessments for the VAT due.

Fenix filed an appeal before the First-tier Tribunal (Tax Chamber) (United Kingdom) against the decision of the tax authorities, disputing the validity of the legal basis for the assessments at issue. That United Kingdom tribunal asks the Court of Justice whether the provision of the regulation implementing that directive which provides that an online intermediary linking service providers with their customers is, in principle, liable to pay VAT is valid in the light of the concept of 'implementing power' enjoyed by the Council under the FEU Treaty and the VAT Directive.¹

In his Opinion delivered today, Advocate General Athanasios Rantos recalls that an implementing act must comply with the essential general aims of the basic legislative act. Moreover, an implementing act must be necessary or appropriate for the implementation of the basic legislative act in that it provides further detail in relation to its content without supplementing or amending it, even as to its non-essential elements.

In that regard, the Advocate General notes that the relevant provision of the VAT Directive does not contain any restrictions as to its scope or its extent. Accordingly, no category of services is excluded from the substantive scope of that provision. It follows that the provision of the implementing regulation at issue, which deals with the specific issue of when an intermediary is liable to pay VAT where electronically supplied services are supplied through, inter

¹ The Court has jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transitional period defined by the Agreement on the withdrawal of the United Kingdom from the European Union, namely 31 December 2020.

alia, an online platform, respects the essential general aims pursued by the VAT Directive.

The Advocate General is also of the opinion that that provision has a purely technical nature, that is to say, it clarifies the situation of commission agents operating in the area of e-commerce, by laying down criteria **to identify the supplier of services in order to determine who is liable to pay VAT**. Without such clarification, the problem of the double taxation of cross-border transactions can arise or, conversely, that of non-taxation in a chain that involves inter alia an online platform. Therefore, the Advocate General considers that **the Council was right to take the view that it was entitled to provide further detail in relation to the VAT Directive vis-à-vis electronically supplied services for the purposes of ensuring uniform conditions for implementation**. For the same reasons, the provision in question of the implementing regulation appears **necessary or appropriate** for the implementation of the relevant provision of the VAT Directive.

The Advocate General also points out that the concept of a 'taxable person acting in his own name but on behalf of another person', in relation to which the provision in question of the implementing regulation seeks to provide further detail by laying down a presumption, which in principle is rebuttable, that an online intermediary is liable to pay VAT, appears in the VAT Directive itself. Thus, **that provision cannot be regarded as amending or supplementing that directive**.

As to Fenix's argument that that provision transfers the liability for payment of VAT to the intermediary, in breach of the VAT Directive, the Advocate General observes that **it is precisely that directive which effected such a transfer**, the detailed rules of which are merely determined by the provision in question as regards services supplied electronically. Moreover, according to the Advocate General, by providing for situations in which the abovementioned presumption cannot be rebutted in any event, that provision **takes account of the economic and commercial realities of a given transaction** rather than just the contractual relationships relating to it. In addition, in the context of a chain of transactions relating to supplies of services in the area of e-commerce, the commission agent is, in principle, an opaque intermediary. The mere fact that, in a particular, specific situation, the agency is manifest and the identity of the principal is known does not appear to be sufficient to consider the abovementioned provision, as such, to be invalid.

Accordingly, the Advocate General **proposes that the Court confirm the validity of the relevant provision of the implementing regulation**.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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