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ECJ: Online platforms and VAT collection

In a current judgement the European Court of Justice (ECJ) held that the Council of the European Union did not exceed the limits of its implementation powers in specifying that the operator of a platform is presumed to be the supplier of the services provided.

Case in dispute

The plaintiff, who is a registered company for VAT purposes in the United Kingdom (the company), operates the social media online platform and has exclusive control over that platform. The company is responsible for collecting and distributing payments made by users via a third-party payment service provider. It also sets the general terms and conditions for use of the platform and charges one specific group of users an amount of 20% of the sums paid by their fans by way of a deduction ('the 20% deduction'). Throughout the relevant period of dispute, the company charged and accounted for VAT at a rate of 20% on a tax base whereby taking into account the 20% deduction.

The UK tax authority took the view that that company had to be deemed to be acting in its own name. Accordingly, it should have paid VAT not on the basis of the 20% deduction but of all the sums paid by users. Specifically, the company contested the provision of an implementation regulation of the Council of the European Union seeking to clarify the VAT Directive by inserting **Article 9a** into Implementation Regulation No 282/2011.

Article 9a which must be viewed in conjunction with Article 28 of the VAT Directive provides that „*For the application of Article 28, 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*".

By its request for a preliminary ruling, the referring court asked the ECJ, in essence, to ascertain whether Article 9a(1) of Implementation Regulation No 282/2011 is invalid in so far as the Council supplemented or amended Article 28 of the VAT Directive, thus exceeding the implementation powers conferred on it by Article 397 of that directive, pursuant to Article 291(2) TFEU.

Decision

In its decision, the ECJ holds that, by adopting the contested provision of the implementation regulation, the Council merely clarified the VAT Directive, without supplementing or amending it. Examination of the question referred has therefore disclosed no factor of such a kind as to affect the validity of the contested provision of the implementing regulation.

The ECJ went on to say that, where a taxable person, who takes part in the supply of a service by electronic means, by operating, for example, an online social network platform, 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, namely 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, it is correct that the taxable person must be regarded as being the supplier of services, pursuant to the VAT Directive.

More details on the ECJ judgement in the *case C-695/20* to be found **here**.

Schlagwörter

digital platform operators