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The Contents of Highlights & Insights on European Taxation

Highlights & Insights on European Taxation

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Article 28 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (hereinafter: the ‘VAT Directive’) stipulates that where a taxable person acting in his own name but on behalf of another person takes part in the supply of services, he shall be

deemed to have received and supplied those services himself. This means that by legal fiction, two identical supplies of services are provided consecutively (CJ 14 July 2011, C-464/10 *Henfling*, ECLI:EU:C:2011:489, paragraph 35). Article 9a of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast) (hereinafter: the 'VAT Implementing Regulation') has been applicable since 1 January 2015. This provision states that for the application of Article 28 of the VAT Directive, 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 its own name but on behalf of the provider of those services. This provision thus creates a rebuttable presumption that the taxable person operating the telecommunications network, interface or portal is acting in its own name and on behalf of the underlying provider of the service. The provision can be rebutted if the underlying supplier is explicitly indicated as the supplier by the taxable person operating the telecommunications network, interface or portal. To do this, both the invoice issued or made available by each taxable person taking part in the supply and the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier of those services. A person that authorizes the charge to the customer or the delivery of the services or sets the general terms and conditions of the supply is not permitted to rebut the presumption. A person only processing payments is not caught by the provision. The provision of Article 9a of the VAT Implementing Regulation is further explained in non-legally binding explanatory notes issued by the EU Commission (Explanatory notes on VAT e-commerce rules, published September 2020, which can be consulted on https://taxation-customs.ec.europa.eu/commission-guidelines_en). The dispute in the present case is whether Article 9a of the VAT Implementing Regulation is valid or whether the EU Council has exceeded its implementing powers.

Implementing powers under Article 397 of the VAT Directive

The legal basis for the VAT implementing Regulation can be found in Article 397 of the VAT Directive. This provision states that the EU Council acting unanimously on a proposal from the EU Commission shall adopt the measures necessary to implement the VAT Directive. A legislative act such as the VAT Directive can delegate to the EU Commission or the EU Council powers to adopt delegated (Article 290 TFEU) or implementing acts (Article 291 TFEU).

Implementing powers can be granted where uniform conditions for implementing legally binding Union acts are necessary. Unlike delegated acts, implementing acts cannot amend the legislative act (in this case, the VAT Directive). Delegated acts can also not amend essential elements of the legislative acts. Non-essential elements can be amended. According to the CJ, ascertaining which elements of a matter must be categorized as essential is not for the assessment of the EU legislature alone, but must be based on objective factors amenable to judicial review (CJ 5 September 2010, C-355/10 *European Parliament v Council of the European Union*, ECLI:EU:C:2012:516, paragraph 67). All these considerations are also reflected in the CJ's judgment in the present case and mean that Article 9a of the VAT Implementing Regulation should respect the essential general objectives of the VAT Directive, is necessary or appropriate for the uniform implementation of Article 28 of the VAT Directive, and does not supplement or amend Article 28 of the VAT Directive in any way.

Respecting the essential objectives

In my view, the CJ rightfully concluded that Article 9a of the VAT Implementing Regulation

respects the essential objectives of the VAT Directive and Article 28 of the VAT Directive in particular. Article 9a of the VAT implementing regulation only contains a presumption about when an operator acts in its own name and on behalf of the underlying supplier. It further took into account the fact that the operator must take part in the supply, and, in addition, the presumption is also rebuttable. This allows for taking into account the actual facts: the economic reality. What the CJ did not address is the extension of the provision that stems from the explanatory notes. These non-legally binding explanatory notes indicate that even determining the general conditions of use of the platform (e.g., an app store) already results in the presumption no longer being rebuttable (explanatory notes, p. 34). As a result, Article 9a of the VAT Implementing Regulation effectively takes the form of a deeming provision, comparable to the one applying within e-commerce (Article 14a of the VAT Directive), because rebuttal will be practically impossible for platforms. After all, they will want to set the general conditions of use of the platform at all times. In my opinion, this part of the explanatory notes should be disregarded because, otherwise, the provision will, in my view, not respect the essential objective of Article 28 of the VAT Directive, which clearly makes a distinction between intermediaries acting in their own name and those acting in the name of their principal.

Necessary or appropriate

I also agree with the CJ's ruling that the provision of Article 9a of the VAT Implementing Regulation is necessary and appropriate, although the reasoning is very short and only based on the justification put forward in the explanatory memorandum of the proposal with which Article 9a of the VAT Implementing Regulation was implemented in the VAT Implementing Regulation (Proposal for a Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services COM/2012/0763 final). It is a known fact that, in practice, it will be difficult to establish whether a taxable person is acting in its own name or in the name of its principal and, therefore, difficult to identify the supplier of a service to the customer. Regarding electronically supplied services, what complicates the matter is that multiple parties can be involved, such as an app store and aggregator, and supply chains can be cross-border (explanatory notes, p. 22). Contracts concluded between parties involved are not always illuminating when it comes to the VAT implications, simply because those contracts are not written with the VAT implications in mind. The objective of Article 9a of the VAT Implementing Regulation to provide legal certainty and avoid double taxation and non-taxation because of divergent approaches, therefore, makes the provision necessary and appropriate.

No supplementing or amending Article 28 VAT Directive

The most interesting part of the CJ's judgment is, in my view, the answer to the question of whether Article 9a of the VAT Implementing Regulation does not supplement or amend Article 28 of the VAT Directive. The CJ reviewed all subparagraphs of Article 9a(1) of the VAT Implementing Regulation separately and concluded that this is not the case.

First subparagraph – presumption to act in its own name and on behalf of the underlying supplier

The first subparagraph of Article 9a(1) of the VAT Implementing Regulation determines that the taxable person operating the telecommunications network, interface or portal taking part in the supply is to be regarded as acting in its own name, unless the underlying supplier is explicitly indicated as the supplier of the service, therefore triggering the application of Article 28 of the

VAT Directive. This subparagraph provides for the actual presumption, and I agree with the CJ that it clarifies the provision of Article 28 of the VAT Directive, by creating the rebuttable presumption that such a person is acting in her own name. That person also has the opportunity to rebut the presumption taking into account the factual situation/economic reality. Rebuttal should be possible by both the taxpayer and the tax authority. However, the explanatory notes seem to suggest differently. On p. 38 they for example refer to a situation where an intermediary cannot or *does not want to* rebut the presumption (underscore MM). If Article 9a of the VAT Implement Regulation is a non-rebuttable presumption for the authorities Article 28 of the VAT Directive is amended by Article 9a of the VAT Implementing Regulation, because a taxpayer can decide to apply the provision even when it is not acting in its own name.

Second subparagraph – conditions for indicating the underlying supplier as the supplier of the service

The second subparagraph of Article 9a(1) of the VAT Implementing Regulation provides the conditions to indicate the underlying supplier as the service supplier. These two conditions are that both the service provided and the supplier are indicated, both on the invoice issued by all parties taking part in the supply and on the bill or receipt issued to the customer of that supply. From the explanatory notes (p. 24), it becomes clear that the invoice is an invoice provided by the operator of the telecommunications network, portal or interface to its principal. The bill or receipt is provided by the supplier that is indicated as the supplier of the electronically supplied service to the customer or on its behalf by one of the other suppliers in the chain. This, in my view, reflects the economic and commercial reality. If a person acts in the name of its principal, it will provide an intermediary service for which it will invoice the principal with VAT. Likewise, the principal will invoice the customer. On this point, I, therefore, endorse the CJ's considerations that Article 9a(1), second subparagraph, of the VAT Implementing Regulation does not supplement or amend Article 28 of the VAT Directive. I do wonder whether the requirement that the supplier and the underlying supply are indicated on the invoice from the operator to the underlying supplier is in line with commercial and economic reality. This will be the case if the platform charges a fee per service sold, because it must be possible to trace which services have been sold for what amount and what percentage is due to the platform. If a fixed fee, however, is paid for the use of the platform by the underlying supplier, this will likely not be the case. Still, in my opinion, this does not mean that the platform is acting in its own name in that situation. A wide explanation of the requirement that includes the situation where it is specified on the invoice that a fee is charged for intermediation services provided over a certain period should also suffice. The fact that this should all be reflected in the contractual arrangements (part of the first subparagraph of Article 9a(1) of the VAT Implementing Regulation) also does not, in my view, supplement or amend the provision as long as the actual situation can be taken into account if it deviates from the contractual arrangements. This includes other circumstances than just the invoices. If only the invoices are decisive, the application of Article 9a VAT Implementing Regulation can be manipulated by the involved parties themselves. Typically contractual arrangements would reflect the economic reality, but, if this is different, the economic reality should be taken into account (CJ 20 June 2013, C-653/11 *Newey*, ECLI:EU:C:2013:409).

Third subparagraph – three activities that cannot be performed

The third subparagraph states that if one of three explicitly indicated activities is carried out by the telecommunications network operator, interface or portal, the presumption cannot be rebutted. According to the CJ, if one of these activities is carried out, the operator can unilaterally define the

elements related to the supply and must be regarded as the supplier of the service pursuant to Article 28 of the VAT Directive. The CJ thus stated that if one of the three activities is carried out, the operator is acting in its own name and on behalf of the underlying supplier. This would also mean that if other services are provided via a platform, Article 28 of the VAT Directive will apply if one of these activities is carried out. Therefore, the present case has wider implications than only for electronically supplied services, such as broadcasting or entertainment services provided via a platform.

Unfortunately, the previous CJ's case law does not provide much clarity about when the provision of Article 28 VAT Directive applies. In *ITH Comercial Timi?oara SRL* (CJ 12 November 2020, C-734/19 *ITH Comercial Timi?oara SRL*, ECLI:EU:C:2020:919), the CJ ruled that two conditions should be met: 1) there is an agency in performance of which the commission agent acts on behalf of the principal in the supply of goods and/or services, and 2) the supplies of goods and/or services acquired by the commission agent and the supplies of goods and/or services sold or transferred to the principal are identical.

From *Henfling* (CJ 14 July 2011, C-464/10 *Henfling*, ECLI:EU:C:2011:489), it becomes clear that in the assessment of whether an agent acts in its own name, several circumstances are important. Particularly relevant in respect of the present case is the circumstance mentioned that it should be established whether the regulations of the agent or the principal must be accepted by the customer. This is listed as one of the relevant circumstances. It is, therefore, unclear to what extent this circumstance is considered decisive by the CJ. The CJ has held, concerning the service provided by an intermediary in relation to the negotiation of credit, that an intermediary is doing all that is necessary for two parties to enter into a contract, without the intermediary having any interest of his own in the terms of the contract (CJ 13 December 2001, C-235/00 *CSC*,ECLI:EU:C:2001:696). Furthermore, it should be borne in mind that the operator could provide additional services, such as processing payments, subsequent to intermediary services. These services can be separate supplies or part of a composite supply where one of the elements can be ancillary to the other or where the supply constitutes a single supply from an economic perspective which should not be artificially split (CJ 18 January 2018, C-463/16 *Stadion Amsterdam*, ECLI:EU:C:2018:22, paragraphs 22 and 23).

Where a person taking part in the supply sets the general terms and conditions of this supply, he must, in my view, be regarded as acting in its own name. Setting the terms and conditions under which the supply takes place is difficult to reconcile with a situation where intermediation services are provided (and the principal determines what conditions apply), nor can it be seen as a situation where another service is provided in addition to the intermediation. In my opinion, the fact that Article 9a(1) of the VAT Implementing Regulation provides that rebuttal is not possible in the case the terms and conditions are set by the operator does not amend Article 28 of the VAT Directive. 'Setting' in this respect should be explained as determining the terms and conditions. Simply communicating the terms and conditions should not suffice, because those could be determined by the principal. Setting the terms and conditions cannot be interpreted as setting the terms and conditions as regards the use of the platform (mentioned on p. 34 of the explanatory notes). These are the terms and conditions of the platform for providing its own services. Obviously, it will want to set the terms and conditions for that. This does not put it in a position different from an agent providing intermediary services, because it does not determine any conditions under which the supply it facilitates is made. Likewise, the agent providing intermediary services will set the terms and conditions of its intermediary services.

I am, however, not fully convinced about the other two situations (authorizing the charge and authorizing the delivery) to be regarded as a situation where the operator is always acting in its own name. Pursuant to paragraph 83 of the present judgment, authorizing the delivery means that the operator defines essential elements relating to the provision of the service and the time at which it takes place. Authorizing the charge means defining the conditions under which the consideration will be payable. The explanatory notes, however, have a much wider interpretation. According to the explanatory notes, authorizing the delivery means influencing whether, at what time, or under what preconditions the delivery is made. Authorizing the charge, according to the explanatory notes, means influencing whether, at what time, or under what preconditions the customer pays (Explanatory notes, p. 34). In my view, it is important to distinguish between conditions regarding payment and delivery that are normally part of the contract between the supplier and the operator and conditions that are normally part of the supply between the customer and supplier. Only if the operator determines the latter conditions should the provisions of Article 9a of the VAT Implementing Regulation and Article 28 of the VAT Directive apply, and the rebuttable presumption cannot be rebutted. If a supplier uses payment services of an app store or any other payment service provider, it will be subject to, e.g., the payment methods provided by that app store or payment service provider. This, however, is part of the contract between the supplier and the app store or payment service provider. However, if the app store engages in, e.g., the setting of payment terms of the supply (such as payment in instalments or whether payment should take place upfront or afterwards), the situation is different. In that situation, the app store determines the terms and conditions of the contract between the supplier and the customer and it cannot be regarded as acting merely as an intermediary or person providing payment services. Therefore, when interpreted narrowly in the sense that authorizing the charge or authorizing the delivery means that the operator defines parts of the conditions of the supply and the payment that commonly are agreed upon between the supplier and customer, the third subparagraph of Article 9a(1) of the VAT Implementing Regulation can be regarded as not supplementing or amending Article 28 of the VAT Directive. However, under the explanatory notes, a much broader interpretation is used. In practice, therefore, Article 9a of the VAT Implementing regulation will likely be applied more extensively than Article 28 of the VAT Directive would allow. This itself however does not render Article 9a(1) of the VAT Implementing Regulation invalid. If applied too widely, the CJ might be asked to explain whether the wider interpretation of Article 9a(1) of the VAT Implementing Regulation is allowed under Article 28 of the VAT Directive.

Conclusion

In view of the above, my conclusion is that the CJ was right to hold that the provision of Article 9a of the VAT Implementing Regulation is valid. This does require a strict interpretation of the conditions under which this provision applies and, on the contrary, a lenient interpretation of the conditions under which this provision does not apply. An approach that the explanatory notes do not take. As these are not legally binding, this wider interpretation does not imply that Article 9a of the VAT Implementing Regulation is invalid. Therefore, I expect that the last has not yet been said about Article 9a of the VAT Implementing Regulation by the CJ. If EU Member States' tax administrations follow the wide interpretation of the explanatory notes, taxpayers can contest them in their national courts and before the CJ.

Prof. Madeleine Merkx

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