OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 15 September 2022 (1)

Case C 695/20

Fenix International Limited
v
Commissioners for Her Majesty's Revenue and Customs

(Request for a preliminary ruling from the First-tier Tribunal (Tax Chamber) (United Kingdom))

(Reference for a preliminary ruling – Article 291(2) TFEU – Implementing power of the Council of the European Union – Directive 2006/112/EC – Common system of value added tax (VAT) – Articles 28 and 397 – Taxable person, acting in his or her own name but on behalf of another person, who takes part in a supply of services – Implementing Regulation (EU) No 282/2011 – Article 9a – Services supplied electronically via a telecommunications network, an interface or a portal – Presumptions relating to the identification of the supplier of services – Whether or not the taxable person can rebut those presumptions – Validity)

I. Introduction

1. This request for a preliminary ruling concerns the validity of Article 9a of Implementing Regulation (EU) No 282/2011, (2) as inserted into that implementing regulation by Implementing Regulation (EU) No 1042/2013 (3) ('Article 9a'). The request has been made in the context of proceedings between the company Fenix International Limited ('Fenix'), which operates an online platform, and the Commissioners for Her Majesty's Revenue and Customs (United Kingdom) ('the tax authority') concerning the value added tax (VAT) payable by that company for the period from July 2017 to January 2020 and for the month of April 2020.

2. The First-tier Tribunal (Tax Chamber) (United Kingdom), the referring court, wishes to ascertain whether the Council of the European Union, in adopting Article 9a, went beyond the implementing power conferred on it by Article 291(2) TFEU and Article 397 of Directive 2006/112/EC (4) with regard to Article 28 of that directive.

3. This case stands at the crossroads between, on the one hand, the institutional law of the Union, involving examination of the concept of 'implementing power' enjoyed by the Council under the FEU Treaty, and, on the other hand, VAT law in relation to a taxable person who, acting in his or her own name but on behalf of another person, takes part in a supply of services. Specifically, this case raises the question

of the discretion enjoyed by the Council with a view to implementing the VAT Directive. That question is of particular significance given the growing influence of online platforms in the economy and the role played by such platforms in the collection of VAT, which raises a good many considerations. (5)

4. On completion of my analysis, I will conclude that Article 9a is valid since it complies with the essential general aims pursued by Article 28 of the VAT Directive, is necessary or appropriate for the implementation of that article, and provides further detail in relation to the provision without supplementing or amending it.

II. Legal context

A. VAT Directive

5. The VAT Directive is based on Article 93 EC (now Article 113 TFEU). Under recitals 61 and 62 of that directive:

‘(61) It is essential to ensure uniform application of the VAT system. Implementing measures are appropriate to realise that aim.

(62) Those measures should, in particular, address the problem of double taxation of cross-border transactions which can occur as the result of divergences between Member States in the application of the rules governing the place where taxable transactions are carried out.’

6. Article 28 of the directive, which comes under Title IV thereof, entitled ‘Taxable transactions’, and Chapter 3 of that title, which concerns supplies of services, states:

‘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.’

7. Article 397 of the same directive provides:

‘The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive.’

B. Implementing Regulation No 282/2011

8. Implementing Regulation No 282/2011 is based on Article 397 of the VAT Directive. Under recitals 2, 4 and 5 of that implementing regulation:

‘(2) [The VAT Directive] contains rules on [VAT] which, in some cases, are subject to interpretation by the Member States. The adoption of common provisions implementing [the VAT Directive] should ensure that application of the VAT system complies more fully with the objective of the internal market, in cases where divergences in application have arisen or may arise which are incompatible with the proper functioning of such internal market. These implementing measures are legally binding only from the date of the entry into force of this Regulation and are without prejudice to the validity of the legislation and interpretation previously adopted by the Member States.

…

(4) The objective of this Regulation is to ensure uniform application of the current VAT system by laying down rules implementing [the VAT Directive], in particular in respect of taxable persons, the supply of goods and services, and the place of taxable transactions. In accordance with the principle of proportionality as set out in Article 5(4) [TEU], this Regulation does not go beyond what is necessary in order to achieve this objective. Since it is binding and directly applicable in all Member States, uniformity of application will be best assured by a Regulation.

(5) These implementing provisions contain specific rules in response to selective questions of application and are designed to bring uniform treatment throughout the Union to those specific circumstances only. They are therefore not conclusive for other cases and, in view of their formulation, are to be applied restrictively.'

9. Article 1 of the implementing regulation provides:

'This Regulation lays down measures for the implementation of certain provisions of Titles I to V, and VII to XII of [the VAT Directive].'

10. The same implementing regulation was amended by Implementing Regulation No 1042/2013, which is likewise based on Article 397 of the VAT Directive. Recital 4 of the latter implementing regulation reads as follows:

'It is necessary to specify who is the supplier for [VAT] purposes where electronically supplied services, or telephone services provided through the internet, are supplied to a customer through telecommunications networks or via an interface or a portal.'

11. Article 1(1)(c) of Implementing Regulation No 1042/2013 inserted Article 9a into Implementing Regulation No 282/2011; Article 9a states:

'1. 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 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.

In order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, the following conditions shall be met:

(a) the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof;

(b) the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

For the purposes of this paragraph, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.

2. Paragraph 1 shall also apply where telephone services provided through the internet, including voice over internet Protocol (VoIP), are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications and are supplied under the same conditions as set out in that paragraph.

3. This Article shall not apply to a taxable person who only provides for processing of payments in respect of electronically supplied services or of telephone services provided through the internet, including voice over internet Protocol (VoIP), and who does not take part in the supply of those electronically supplied services or telephone services.'

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

12. Fenix, which is registered for VAT purposes in the United Kingdom, operates the social media online platform known as 'Only Fans' ('the platform') and has exclusive control over that platform. The platform is offered to 'users' from around the world, who are divided into 'creators' and 'fans'.

13. Creators, who have 'profiles', upload and post content such as photographs and videos to their respective profiles. They can also stream live videos and send private messages to their fans. Fans can access uploaded content by making ad hoc payments or paying a monthly subscription in respect of each creator whose content they wish to view and/or with whom they wish to interact. Fans can also pay tips or donations for which no content is supplied in return. Creators determine the amount of the monthly subscription to their profile, whilst Fenix sets the minimum amount both for subscriptions and for tips.

14. Fenix is responsible for collecting and distributing the payments made by fans, using a third-party payment service provider. It also sets the general terms and conditions for use of the platform, which were amended on several occasions over the relevant period. Fenix charges the creators an amount of 20% of the sums paid by their fans by way of a deduction ('the 20% deduction'). Both the payments from a fan and the payments to a creator appear on the relevant user's bank statement as a payment made to or from Fenix. Throughout the relevant period, Fenix charged and accounted for VAT at a rate of 20% on a tax base formed by the 20% deduction.

15. On 22 April 2020, the tax authority sent Fenix assessments for the VAT due for the period from July 2017 to January 2020 and for the month of April 2020 ('the assessments at issue'), taking the view that that company had to be deemed to be acting in its own name pursuant to Article 9a. Thus, according to that authority, Fenix should have paid VAT on the basis not of the 20% deduction but of all the sums paid by fans.

16. On 27 July 2020, Fenix filed an appeal before the referring court, disputing the legal basis for the assessments at issue, namely section 47(4) and (5) of the Value Added Tax Act 1994, in the version thereof in force at the time of the facts in the main proceedings, which transposed Article 9a into United Kingdom law, and the respective amounts of those assessments. It argued that Article 9a was invalid and that, in addition, it fell outside the scope of that article.

17. The referring court explains that the tax authority has not made any decision as to, as a matter of English law, the capacity in which Fenix acted in respect of the platform, that is, as agent or as principal. That authority adopted the assessments at issue by reference to Article 9a only, without examining the application of Article 28 of the VAT Directive as such.

18. That court states that it has doubts as to the validity of Article 9a. If that article is meant to implement Article 28 of the VAT Directive, it is arguable that it goes beyond the implementing power conferred on the Council. In that regard, the court, referring to the judgment of 15 October 2014, *Parliament* v *Commission* (C 65/13, EU:C:2014:2289), points out that a provision to implement a legislative act is lawful only if it complies with the essential general aims pursued by that act, is necessary or appropriate for the implementation of the act and may neither amend nor supplement that same act, even as to its non-essential elements.

19. In the same vein, the European Commission considers that, in order to determine whether a measure 'supplements' the basic instrument, the EU legislature should assess whether that measure specifically adds new non-essential rules which change the framework of that instrument, leaving a margin of discretion to the Commission, whereas, conversely, measures intended only to give effect to the existing rules of the basic instrument should not be deemed to be supplementary measures. (6)

20. The referring court observes that Article 9a, as adopted, is radically different and far more extensive than the proposal for a Regulation presented by the Commission amending Implementing Regulation No 282/2011. (7) While Article 28 of the VAT Directive referred to a taxable person acting in his or her own name, the introduction of the presumption contained in Article 9a means, according to the VAT

Committee, (8) that that presumption should as a rule be valid for all taxable persons taking part in the supply of services.

21. In addition, the referring court also makes reference to the report (9) that supported the proposal for a Directive presented by the Commission on 1 December 2016, (10) according to which the objective of Article 9a, which is to shift liability to pay VAT to the intermediary, appears to be desirable and there is a need for further clarification and a common and binding interpretation by Member States. In that court's view, it is arguable that that shift of liability is not merely a technical measure but a change to the status quo rather than a clarification.

22. The referring court also notes that, in the judgment of 14 July 2011, *Henfling and Others* (C 464/10, EU:C:2011:489, paragraph 42; 'the judgment in *Henfling and Others*'), the Court held that, as regards the condition that the taxable person must act in his or her own name but on behalf of another, contained in Article 6(4) of Directive 77/388/EEC, (11) the national court must carry out a specific check so as to establish whether the taxable person is in fact acting in his or her own name. In addition, in the referring court's view, the presumption laid down in Article 9a removes the requirement to consider the economic and commercial position of the taxable person.

23. Accordingly, there are good reasons for taking the view, first, that that presumption is not a technical measure but a radical change and that, second, the legal framework resulting from Article 28 of the VAT Directive was changed significantly by the introduction of the presumption laid down in the third subparagraph of Article 9a(1). By any analytical standard, the Council thus committed a manifest error of assessment by adopting Article 9a.

24. It is in those circumstances that the First-tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is [Article 9a] invalid on the basis that it goes beyond the implementing power or duty on the Council established by Article 397 of [the VAT Directive] in so far as it supplements and/or amends Article 28 of [that directive]?'

25. The United Kingdom of Great Britain and Northern Ireland left the European Union on 31 January 2020. However, the Court continues to have jurisdiction to rule on this request for a preliminary ruling. (12)

26. Written observations were lodged by Fenix, the Italian Government, the Government of the United Kingdom, the Council and the Commission. Those parties also presented oral argument at the hearing held on 3 May 2022.

IV. Analysis

27. By its question referred for a preliminary ruling, the referring court asks whether Article 9a is invalid in so far as the Council went beyond the implementing power conferred on it. The Italian Government, the Government of the United Kingdom, the Council and the Commission propose that that question be answered to the effect that Article 9a is valid. Conversely, Fenix claims that it should be answered to the effect that that article is invalid.

28. In this Opinion, I will examine the concept of 'implementing powers' within the meaning of Article 291(2) TFEU (Section A) and then the implementation of Article 28 of the VAT Directive by Article 9a (Section B).

A. The concept of 'implementing powers' within the meaning of Article 291(2) TFEU

29. The Treaty of Lisbon established the distinction between ‘delegated powers’ and ‘implementing powers’, respectively under Articles 290 and 291 TFEU. (13) The Court has ruled on that distinction and its scope on several occasions in relation to the Commission.

1. Case-law of the Court

30. According to the case-law of the Court, the EU legislature has discretion when it decides to confer on the Commission a delegated power pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU. However, that discretion must be exercised in compliance with the conditions laid down in Articles 290 and 291 TFEU. (14)

31. In that regard, as regards the grant of a delegated power, it is clear from Article 290(1) TFEU that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general scope which supplement or amend certain non-essential elements of the legislative act. In accordance with the second subparagraph of that provision, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting such a delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act. (15)

32. As for the grant of an implementing power, Article 291(1) TFEU states that Member States are to adopt all measures of national law necessary to implement legally binding Union acts. However, as paragraph 2 of that article provides, where uniform conditions for implementing legally binding EU acts are needed, those acts are to confer implementing powers on the Commission, or, in duly justified specific cases and within the framework of the common foreign and security policy (CFSP), on the Council. (16)

33. Although Article 291 TFEU does not provide a definition of the concept of an ‘implementing act’, (17) the Court has observed that the concept of ‘implementation’ comprises both the drawing-up of implementing rules and the application of rules to specific cases by means of acts of individual application. (18) With regard to the interpretation of that article, the Court has made reference to settled case-law pre-dating the Treaty of Lisbon, according to which, within the framework of its implementing power, the limits of which must be determined by reference amongst other things to the essential general aims of the legislative act in question, the Commission is authorised to adopt all the implementing measures which are necessary or appropriate for the implementation of that act, *provided that they are not contrary to it*. (19)

34. It also follows from the case-law of the Court that, in the exercise of the implementing power conferred on it, the institution concerned must *provide further detail* in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all the Member States. (20) In that regard, the Commission provides further detail in relation to the legislative act if the provisions of the implementing measure adopted by it, first, comply with the essential general aims pursued by the legislative act and, second, are necessary or appropriate for the implementation of that act, *without supplementing or amending it, even as to its non-essential elements*. (21)

35. The case-law set out above concerns the delegated powers and implementing powers of *the Commission*. (22) In the present case, it was *the Council* which adopted the VAT Directive, on the basis of Article 93 EC (now Article 113 TFEU). It also adopted Article 9a, contained in Implementing Regulation No 1042/2013, which is based on Article 397 of that directive. In that regard, should a distinction be made, in the exercise of the implementing power within the meaning of Article 291(2) TFEU, depending on whether the institution adopting the implementing act is the Commission or the Council?

36. I do not believe so.

37. First, it follows from the wording of Article 291(2) TFEU that the Council also has an implementing power, unlike the delegated power under Article 290 TFEU, which is reserved to the Commission. It is true, as the Court has noted, that only exceptionally may the power to adopt implementing acts be reserved

to the Council in 'duly specified cases' and in cases expressly specified in that provision, which relate solely to the CFSP. (23) The Council must thus state in detail the grounds for the decision to reserve the implementing powers to itself. (24) Here, Article 397 of the VAT Directive provides that the Council, acting unanimously on a proposal from the Commission, is to adopt the measures necessary to implement that directive. (25) The adoption of Implementing Regulation No 282/2011 by the Council, and in particular Article 9a, is therefore founded on a legal basis specific to VAT, with a view to implementing the VAT Directive. The adoption of that implementing regulation thus constitutes, in my view, a duly justified specific case, in accordance with Article 291(2) TFEU. (26)

38. Second, the fact that the Council exercises an implementing power in respect of an act that it itself has adopted does not appear to me capable of calling into question that interpretation. The Council could, admittedly, have amended Article 28 of the VAT Directive as such with a view to explaining the content of that provision. In its written observations, Fenix thus observed that, on 1 December 2016, the Commission presented a proposal for a Directive (27) to amend the wording of Article 28 of the VAT Directive; that proposal was ultimately not included in Directive (EU) 2017/2455. (28) However, the Council is also entitled to adopt an implementing act under the conditions referred to in Article 291(2) TFEU. In that regard, it should be observed that the amendment of the VAT Directive on the basis of Article 113 TFEU requires, inter alia, that the European Parliament and the Economic and Social Committee are consulted; no such provision is made for the adoption of an implementing regulation under Article 397 of the VAT Directive. The procedure for amendment of that directive is therefore more complex and takes longer than the adoption of an act to implement the directive, even though the conditions laid down in Article 291(2) TFEU can be met in the present case.

39. Third, more generally, while it is arguable that the Council, in adopting an implementing act for one of its own legislative acts, must enjoy a greater power than the Commission when the latter adopts measures to implement a legislative act of another institution of the European Union (an analysis with which I do not agree), I see no reason why the Council should be treated differently from the Commission as regards the implementing power under Article 291(2) TFEU. The Council may be required to provide further detail in relation to the content of a legislative act. This may be the case in the field of taxation, in particular where there are new technologies (here: e-commerce, which can result in long chains of transactions in relation to supplies of services) to be taken into account in order to implement the existing legislative acts. In that situation, an implementing regulation, in accordance with Article 288 TFEU, has general application, is binding in its entirety and is directly applicable in all Member States, even if the legislative act is a directive, as is the case here.

40. It should be added that, according to the case-law of the Court, the adoption of the *essential rules* of a matter is reserved to the EU legislature, and those rules must be laid down in the basic legislation, and that it follows that the provisions laying down the essential elements of the basic legislation, the adoption of which requires *political choices* falling within the responsibilities of the EU legislature, cannot be delegated or appear in implementing acts. (29)

41. In conclusion, it follows from the case-law of the Court that Article 9a, in the light of Article 291(2) TFEU and Article 397 of the VAT Directive, is valid if, first, it complies with the essential general aims pursued by Article 28 of that directive and if, second, it is necessary or appropriate for the implementation of Article 28 of the directive without supplementing or amending it, even as to its non-essential elements.

2. The distinction between 'providing further detail in relation to' and 'supplementing or amending' a legislative act

42. The difference between delegated powers and implementing powers stems from the very wording of Articles 290 and 291 TFEU and means that, in the case of delegated powers, the institution concerned may *supplement or amend* certain non-essential elements of the legislative act and that, in the case of implementing powers, the institution is called upon to *provide further detail* in relation to the normative content of a legislative act. However, the distinction between 'supplementing or amending' and 'providing further detail in relation to' a legislative act is not self-evident. (30)

43. As Advocate General Cruz Villalón noted, the difference of principle between the powers exercised in the case of a delegation by legislative act and the powers conferred in the case of implementation lies in the fact that the legislature delegates to the institution concerned the ability to decide issues that, in principle, it should itself have decided, whereas implementation operates in relation to provisions the content of which has, as regards the substance, been defined by the legislature. According to the Advocate General, on account of that difference, Article 291(2) TFEU relates only to the exercise of implementing powers, which excludes anything that is not necessary for the specific application of a fully formed and defined measure, whilst Article 290 TFEU provides that the objectives to be pursued by the delegation must be defined, as must its content and scope, which clearly indicates that the Commission is expected to do something more than merely implement a provision in which all these elements are given. This requires some room for 'creativity' in the rule-making domain that is not possible in the case of mere implementation. (31)

44. In the context of that distinction, I consider it useful to make a comparison with the concept of 'interpretative law', which is akin to that of an implementing act. The Cour de cassation (Court of Cassation, France), amongst others, has observed, in that regard, that a law can be regarded as interpretative only if it is confined to recognising, without engaging in any innovation, a pre-existing right that an imperfect definition has rendered contentious. (32) That view can be found in other legal orders, including the Greek legal order. Thus, an interpretative law (and an implementing act) clarify the meaning of an earlier law, without adding new provisions. At the same time, implementation constitutes a normative activity, that is to say, an activity consisting in the adoption of legally binding acts, and it is therefore very difficult to envisage an implementing act which does not add something to the normative framework defined by the legislative act and, consequently, which does not supplement the latter in some way. (33) Therefore, an implementing act cannot be understood as being, by definition, devoid of any legislative force. In that regard, the Court has adopted a broad interpretation of the concept of 'implementation'. (34)

45. In my view, the institution concerned can exercise its implementing powers where the legislative act is open to several interpretations, with the result that the Member States might apply that act differently. In that context, the implementing act will adopt one of those interpretations with a view to ensuring that the implementation of that legislative act is uniform. In other words, the interpretation adopted is already encompassed within the legislative act, potentially as one of other possible interpretations of it. Accordingly, the institution with the implementing power does not engage in innovation but opts to give preference to one interpretation which, in accordance with the Court's case-law, is necessary or appropriate to ensure the implementation of the legislative act uniformly in all Member States. The implementing act therefore simply *clarifies and fleshes out* the legislative act, without supplementing that act by adding (non-essential) elements or amending it. (35)

B. The implementation of Article 28 of the VAT Directive by Article 9a

46. It should be observed, first, that Fenix argued before the referring court that it fell outside the scope of Article 9a and, at the hearing, that nor did it fall within the scope of Article 28 of the VAT Directive because it was not acting in its own name but on behalf of another person, as it simply facilitated the supply of services between creators and fans. Second, the referring court stated that the tax authority adopted the assessments with reference to Article 9a alone, without examining the application of Article 28 of the VAT Directive as such.

47. According to settled case-law of the Court, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that national court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (36)

48. In the present case, it is not obvious from the documents before the Court that the situation here corresponds to one of those scenarios. The main action has its origin in the tax authority's decision that Fenix had to be regarded as acting in its own name pursuant to Article 9a. It is apparent from the order for reference that, in the context of that action, Fenix argued that that article was invalid. Since Article 9a was adopted as an act to implement Article 28 of the VAT Directive, examination of the validity of that article requires examination of the relationship between those two articles, which is the subject of the question referred for a preliminary ruling. That question therefore appears admissible. It is important to add that, in view of the wording of that question, the referring court starts from the premiss that, in this case, Fenix is acting in its own name but on behalf of the creators.

49. Accordingly, it is necessary to analyse the meaning of Article 28 of the VAT Directive and then the scope of Article 9a in order to ascertain whether the latter article does indeed constitute an implementing act, within the meaning of Article 291(2) TFEU, of Article 28 of that directive.

1. Article 28 of the VAT Directive

50. Article 28 of the VAT Directive states that, where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she is to be deemed to have received and supplied those services himself or herself. (37)

51. That article, which has an independent scope specific to EU law, establishes a *presumption* ('he shall be deemed'). According to the case-law of the Court, the article creates the legal fiction of two identical supplies of services provided consecutively. Under that fiction, the operator, who takes part in the supply of services and who constitutes the commission agent, is considered to have, first, received the services in question from the operator on behalf of whom it acts, who constitutes the principal, before providing, second, those services to the client himself or herself. (38) It follows that, as regards the legal relationship between the principal and the commission agent, their respective roles of service provider and payer are notionally inversed for the purposes of VAT. (39) The same reasoning applies as regards the acquisition of goods pursuant to a contract under which commission is payable on purchase, under Article 14(2)(c) of the VAT Directive, which also comes under Title IV of that directive. (40)

52. It follows that two conditions must be satisfied in order for Article 28 of the VAT Directive to be applicable: first, there is an agency in performance of which the commission agent acts, on behalf of the principal, in the supply of services and, second, the supplies of services acquired by the commission agent and the supplies of services transferred to the principal are identical. (41) That second condition implies that there is, where applicable, a transfer of the corresponding right of ownership. (42)

53. The Court has added that Article 28 of the VAT Directive is in Title IV of that directive, entitled 'Taxable transactions', and is couched in general terms, without containing restrictions as to its scope or its extent. (43) Thus, supplies of services provided consecutively are subject to VAT and it follows that, if the supply of services in which a commission agent takes part is subject to VAT, the legal relationship between that commission agent and the principal is also subject to VAT. (44)

54. Article 28 of the VAT Directive relates to an intermediary classified in legal literature as 'opaque', (45) as the taxable person acts in his or her own name but on behalf of another person, unlike a 'transparent' intermediary, who takes part in the name and on behalf of another person, (46) as referred to inter alia in Article 46 of the VAT Directive, which concerns supplies of services by intermediaries. (47) In that regard, as the Court has observed, the VAT Directive itself lays down specific rules for services supplied by a commission agent, acting in his or her own name but on behalf of another, which differ from those governing services supplied by an agent, acting in the name of and on behalf of another. (48) The present case concerns those specific rules applicable to opaque intermediaries.

2. Article 9a

55. The interpretation and the scope of Article 9a have generated interest in legal literature. (49) In the context of the present case, as set out in point 41 of this Opinion, it is necessary to ascertain whether Article 9a, first, complies with the essential general aims pursued by Article 28 of the VAT Directive and, second, is necessary or appropriate for the implementation of the latter article without supplementing or amending it, even as to its non-essential elements.

(a) Compliance of Article 9a with the essential general aims pursued by Article 28 of the VAT Directive

56. The purpose of Article 28 of the VAT Directive is to determine in which circumstances a commission agent is deemed to be the supplier of services within the common system of VAT. That provision essentially dates back to 1977, (50) that is to say, to a period when e-commerce did not yet exist.

57. As is clear from recital 4 of Implementing Regulation No 282/2011, the objective of that regulation is to ensure uniform application of the current VAT system by laying down rules implementing the VAT Directive, in particular in respect of supplies of services. Recital 5 of that implementing regulation adds that those implementing provisions contain specific rules in response to selective questions of application and are designed to bring uniform treatment throughout the Union to those specific circumstances only. Furthermore, recital 4 of Implementing Regulation No 1042/2013 states that it is necessary to specify who is the supplier for VAT purposes where electronically supplied services, or telephone services provided through the internet, are supplied to a customer through telecommunications networks, or via an interface or a portal.

58. In that regard, Article 9a, which is one of the various provisions of Implementing Regulation No 282/2011, establishes how, 'for the application of Article 28 of [the VAT Directive]', Article 28 of that directive is to be interpreted where electronically supplied services are supplied through a telecommunications network, an interface or a portal such as a marketplace for applications.

59. However, first, Article 28 of the VAT Directive is *couched in general term*s, without containing restrictions as to its scope or its extent. (51) Accordingly, no category of services is excluded from the substantive scope of that article. Second, Article 9a concerns the specific issue of when an intermediary is liable to pay VAT where electronically supplied services are supplied through, inter alia, an online platform. It seems clear to me that that question comes within the context of Article 28 of the VAT Directive. I am therefore of the view that Article 9a complies with the essential general aims pursued by Article 28 of that directive.

(b) Whether Article 9a is necessary or appropriate for the implementation of Article 28 of the VAT Directive

60. It follows from the Court's case-law that, having regard to the discretion of the EU legislature when it decides to confer a delegated power or an implementing power, judicial review is limited to manifest errors of assessment as to whether the legislature could reasonably have taken the view, first, that, in order to be implemented, the legal framework which it laid down in Article 28 of the VAT Directive needs only the addition of further detail, without its non-essential elements having to be amended or supplemented, and, secondly, that the provisions of that article require uniform conditions for implementation. (52)

61. Before the adoption of Article 9a, the position of commission agents in relation to VAT prompted debate within the VAT Committee, which led to the adoption of guidelines at its 93rd meeting of 1 July 2011. (53) That committee was of the 'almost unanimous' view that, in order to establish the place of supplies of electronic services which a final consumer receives, online or via other telecommunications networks, from an electronic service provider through an intermediary or a third party intervening in the supply, there is a need to determine who the supplier of the electronic service is. That committee was also of the 'almost unanimous' view that, where an electronic service is supplied to the final consumer, the intermediary or third party intervening in the supply is deemed to have acted in his or her own name

unless, in relation to the final consumer, the electronic service provider himself or herself is explicitly indicated as the supplier of the electronic service.

62. Following the adoption of Article 9a, the Commission produced explanatory notes on, inter alia, that provision. (54) According to the disclaimer contained therein, those notes are not legally binding. Accordingly, the validity of Article 9a cannot be judged on the basis of the notes as such, particularly since they were drawn up by the Commission and not by the Council. Nevertheless, the notes are a document which, in my view, can be taken into account with a view to shedding light on the Council's aims when it adopted that article. For instance, those same notes state that, 'where telecommunications services and electronic services are supplied to a final consumer (B2C), it is the supplier of the services who is liable to pay the VAT to the tax authorities. It is therefore essential to identify with certainty who is the supplier of the services provided, in particular when these are not supplied directly to the final customer but via intermediaries'. (55) The Commission added that 'supply chains are often long and can stretch across borders. Where that is the case, it can be difficult to know when the services are finally supplied to a final consumer, and who is responsible for the VAT on that supply. To provide legal certainty for all parties involved and to ensure collection of the tax, it is necessary to define who in the chain must be seen as the supplier of the service to the final consumer'. (56)

63. It follows from the foregoing that Article 9a has a *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 and the place of the taxable transactions. (57) As the Commission stated in the Explanatory Notes, such clarification has a dual purpose, namely to provide legal certainty for the different parties involved in the chain of transactions and to ensure the correct collection of VAT in relation to the various supplies of services. Without such clarification, the problem of the double taxation of cross-border transactions, as mentioned in recital 62 of the VAT Directive, can arise or, conversely, that of non-taxation in a chain that involves inter alia an online platform. In addition, according to the Court's case-law, the correct application of the VAT Directive makes it possible to avoid double taxation and to ensure fiscal neutrality. (58) Moreover, without a provision establishing the uniform application of the current system of VAT in such matters, each of the service providers could be individually liable to pay that tax, which would entail identifying each of them in the different States concerned, making it almost impossible to collect the tax. In this regard, it should be added that VAT is an own resource of the European Union.

64. In those circumstances, I am of the view that the Council could reasonably have taken the view that it had the power to provide further detail in relation to the normative content of Article 28 of the VAT Directive vis-à-vis electronically supplied services, in accordance with Article 291(2) TFEU, and that conferring an implementing power on that institution can be considered reasonable for the purposes of ensuring uniform conditions for implementation of Article 28 of that directive in relation to those services. To that end, Article 9a appears necessary or appropriate for the implementation of Article 28 of the directive.

(c) Whether Article 9a provides further detail in relation to Article 28 of the VAT Directive without supplementing or amending it

65. At this point, it is necessary to give detailed consideration to the wording of Article 9a in order to ascertain whether that article does actually provide further detail in relation to Article 28 of the VAT Directive without supplementing or amending it. Article 9a consists of three paragraphs, the first of which has three subparagraphs; the considerations of the referring court and Fenix's observations in support of the invalidity of the article relate to those subparagraphs.

66. The first subparagraph of Article 9a(1) ('the first subparagraph') 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 is to be presumed to be acting in his or her 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.

67. The second subparagraph of Article 9a(1) ('the second subparagraph') provides that, in order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person, two cumulative conditions must be met: first, the invoice issued or made available by each taxable person taking part in the supply of the electronically supplied services must identify such services and the supplier thereof and, second, the bill or receipt issued or made available to the customer must identify the electronically supplied services and the supplier thereof.

68. The third subparagraph of Article 9a(1) ('the third subparagraph') states that, for the purposes of paragraph 1, a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, is not to be permitted to explicitly indicate another person as the supplier of those services.

69. With regard to the first subparagraph, it should be borne in mind that Article 28 of the VAT Directive covers the situation of a taxable person 'acting in his own name but on behalf of another person', without defining *when* a taxable person is deemed to be acting as such. Under the first subparagraph, in the case of electronically supplied services supplied inter alia via an online platform, a taxable person taking part in that supply is *presumed* to be acting in his or her own name but on behalf of the provider of those services. If that presumption applies, it follows from Article 28 of the VAT Directive that that taxable person is then deemed to have received and supplied those services himself or herself, with the result that he or she is liable to pay VAT as the commission agent.

70. As Fenix rightly observes, the presumption contained in the first subparagraph, which is intended to provide further detail as to *when* an intermediary acts in his or her own name but on behalf of another person, is not mentioned in Article 28 of the VAT Directive. That company infers from that fact that it is a supplement or an amendment to that article that goes beyond mere implementation. The words 'act in his own name' contained in that article do not require an implementing act and have been assessed, in accordance with the case-law of the Court, in the light of the contractual relationship between the parties. However, the presumption established in the first subparagraph applies regardless of the contractual and commercial realities, in disregard of that case-law. In addition, that presumption provides that commission agents are regarded as providing and receiving a supply, even if the agency is manifest and the identity of the principal is known, which alters the approach that commission agents are liable under Article 28 of the VAT Directive.

71. I do not agree with that interpretation.

72. First, Fenix argues that the EU legislature did not intend to govern, in Article 28 of the VAT Directive, the question of *when* an intermediary, who takes part in a supply of services, is acting in his or her own name. However, the concept of a 'taxable person acting in his own name but on behalf of another person', which is an autonomous concept of EU law, does appear in that article. In that context, the first subparagraph provides further detail in relation to (and does not supplement) the meaning of that concept, by laying down a presumption. That subparagraph thus clarifies and fleshes out Article 28 of the VAT Directive, which is couched in general terms, as regards the specific situation of electronically supplied services, with a view to ensuring that that article is implemented uniformly in all Member States.

73. Second, as is clear from settled case-law of the Court, the Council may adopt all implementing measures necessary or appropriate for the implementation of Article 28 of the VAT Directive, provided that they are not contrary to that article. (59) The presumption established in the first subparagraph is not contrary to the wording of that article. In other words, the interpretation adopted by the Council in the first subparagraph is therefore already encompassed within the legislative act, potentially as one of other possible interpretations of it. (60)

74. Third, the presumption established in the first subparagraph is rebuttable. According to that subparagraph, that presumption is rebutted where the provider is explicitly indicated as the supplier by the taxable person who takes part in the supply and that is reflected in the contractual arrangements between the parties. The subparagraph therefore takes into account the contractual and commercial reality of the relationships between the persons involved in the chain of transactions. Those persons can thus agree that the taxable person who takes part in the supply is not deemed to be the supplier of the services and, in that case, that person is not liable to pay VAT.

75. Fourth, as the Commission points out in its written observations, even before the adoption of Article 9a, Article 28 of the VAT Directive sought to transfer liability to pay VAT as regards supplies of services in which an intermediary acting in his or her own name but on behalf of another person takes part. That article itself, by virtue of the legal fiction mentioned in paragraph 35 of the judgment in *Henfling and Others*, sets out that that intermediary is to be deemed to have supplied those services himself or herself and, on that basis, is liable to pay VAT. Under the first subparagraph, the provider of the services and the commission agent remain free to decide that that provider is the supplier of the services, in accordance with their contractual arrangements. There is therefore no amendment to the approach that commission agents are liable under Article 28 of the VAT Directive. In the light of the foregoing, it is my view that the first subparagraph *provides further detail* in relation to Article 28 of the VAT Directive, without amending or supplementing it.

76. As regards the second subparagraph, Fenix claims that that provision establishes strict and limited criteria to rebut the presumption laid down in the first subparagraph, criteria which do not appear in Article 28 of the VAT Directive, adding a further two mandatory and cumulative criteria. In that regard, it must be recalled that the second subparagraph is directly connected to, and follows the same logic of, the first subparagraph in that it sets out, in greater detail, the conditions under which, in the case of electronically supplied services, the service provider is explicitly indicated by the commission agent as the supplier of those services. Those conditions relate to the information that must appear on the invoice, a document which is, in principle, issued by an undertaking registered for VAT which carries out supplies of services. This is thus a question of proof vis-à-vis the rebuttal of the presumption that the intermediary taking part in the supply acts in his or her own name but on behalf of the provider of the services, the assessment of which is a matter for the national courts. Since, in my view, the first subparagraph is valid in that it comes under the implementing power of the Council, the second subparagraph, which is consistent with the same context, also appears valid.

77. As for the third subparagraph, it states that the taxable person who authorises the charge to the customer or the delivery of the services, or who sets the general terms and conditions of the supply, is not to be permitted to indicate explicitly another person as the supplier of those services. It follows from this subparagraph that, where those conditions are met, the presumption cannot be rebutted and therefore becomes irrebuttable.

78. Fenix argues that the conditions are not laid down in Article 28 of the VAT Directive. It follows from the third subparagraph that it is extremely difficult for an online platform to evade the application of that article in favour of the situation in which the contractual, commercial and economic realities take precedence. Like the referring court, Fenix makes reference, first, to Working Paper No 885, (61) which states that the intended effect of Article 9a is that it applies as broadly as possible and, second, to the report (62) that supported the proposal for a Directive presented by the Commission on 1 December 2016, (63) from which it is apparent that that article is intended not to apply Article 28 of the VAT Directive but to transfer liability to pay VAT to the intermediary. It is thus an amendment to the framework of Article 28 of that directive which goes beyond the implementing power conferred on the Council.

79. In addition, the Explanatory Notes adopt an interpretation of Article 9a that makes it impossible to rebut the presumption in the case of an online platform. As regards the setting of the general terms and conditions of the supply, within the meaning of the third subparagraph, those notes state that those terms and conditions are, for example, the general terms and conditions set by marketplaces or similar platforms which ask users to agree to the general terms and conditions for use of that website or platform. However,

in Fenix's view, the conditions of use of an online platform are not general terms and conditions of the supply, within the meaning of the third subparagraph. If that were the case, all online platforms would fall within the scope of Article 28 of the VAT Directive, regardless of the contractual terms and conditions related to the agency and of the economic and commercial realities, unless they do not have conditions of use for their website, which would be commercially imprudent. Fenix adds that, as far as concerns the authorisation of the charge to the customer or the delivery of the services, the Explanatory Notes state that the situations covered are those in which the taxable person can 'influence' inter alia the preconditions for the delivery. That broad interpretation further amends the application of Article 28 of the VAT Directive.

80. The third subparagraph lies at the heart of the present case, as was observed by the interveners at the hearing, and the validity of the irrebuttable presumption established in that subparagraph is cast into doubt by certain authors in relation to Article 28 of the VAT Directive. (64) It appears to me that the arguments put forward by Fenix in support of the invalidity of the third subparagraph can be grouped into four categories.

81. The first category of arguments concerns the objective of the third subparagraph, which is to transfer the liability to pay VAT to the intermediary, unlike Article 28 of the VAT Directive. However, as I have made clear in point 75 of this Opinion, the objective of Article 28 of the VAT Directive and, before it, of Article 6(4) of the Sixth Directive was to transfer liability in VAT matters to the commission agent. Article 9a and its third subparagraph operate in furtherance of that goal, *providing further detail* of the detailed rules governing that transfer as regards services supplied electronically.

82. The second category of arguments refers to the Commission's analysis of Article 9a contained in the Explanatory Notes. However, as I have observed in point 62 of this Opinion, those notes are not legally binding and the validity of that article cannot be judged on the basis of those notes as such. The question of whether the Council went beyond its implementing power must therefore be examined solely on the basis of the wording of that article. In any event, Fenix's argument that it would be 'commercially imprudent' for online platforms not to set conditions for the use of their website appears to be irrelevant in the present case. Indeed, this is a choice made by the platforms concerned, which may be commercially essential, but which has tax consequences, even if those tax consequences are not desired by the platforms.

83. The third category of arguments refers to the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT. (65) Thus, in paragraph 42 of the judgment in *Henfling and Others*, the Court stated that, as regards the activity of the 'buralistes' at issue in that case, although the condition that the taxable person must act in his or her own name but on behalf of another, in Article 6(4) of the Sixth Directive, must be interpreted on the basis of the contractual relationship at issue, the proper working of the common VAT system established by that directive nonetheless requires the referring court to check specifically so as to establish whether, in the light of all the facts in that case, those 'buralistes' were in fact acting, when collecting bets, in their own name. The Court went on to state, in paragraph 43 of that judgment, the factors which had, in particular, to be taken into consideration in determining whether or not the 'buralistes' acted in their own name.

84. However, it must be noted that the situation at issue in the main proceedings differs in significant respects from the case that gave rise to the judgment in *Henfling and Others*. In the context of the application of Article 28 of the VAT Directive, Article 9a provided further details, which did not exist when that judgment was given, as to the situation of commission agents, stating to what extent the taxable person taking part in the supply of electronic services is presumed to be acting in his or her own name but on behalf of another person. (66)

85. In addition, under the first subparagraph, the taxable person taking part in the supply of services is to be presumed to be acting in his or her own name but on behalf of the provider of those services. In that regard, the third subparagraph lays down three conditions subject to which the presumption becomes irrebuttable, namely when the taxable person authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply. Where just one of those conditions is met,

that taxable person cannot explicitly indicate another person as the supplier of those services. Although Article 28 of the VAT Directive does not specify the conditions in which a taxable person should be regarded as 'taking part' in a supply of services, it appears that, in the three situations mentioned in the third subparagraph, the intermediary does actually take part (67) in the supply, with the result that he or she is irrefutably presumed to be acting in his or her own name but on behalf of the supplier of the services. (68)

86. Specifically, when an online platform 'sets the general terms and conditions of the supply' of services, it unilaterally determines those conditions, which must be met by the final consumer before the supply of services is made. (69) In such a situation, it seems clear to me that, having made the choice to do so, that platform takes part in the supply of services, and must be regarded as the supplier of those services, with the consequences as regards VAT that follow from that choice. There is a clear difference with the situation covered by Article 9a(3), under which that article does not apply to a taxable person who *only provides for* processing of payments in respect of electronically supplied services or of telephone services provided through the internet and who *does not take part in the supply of those services*. In such a case, the taxable person does not take part in the supply of services. In other words, in my view, the third subparagraph takes into account the economic and commercial realities, rather than just the contractual relationships. (70) Accordingly, having regard to the case-law of the Court on Article 28 of the VAT Directive, and to that concerning Article 14(2)(c) of that directive, which is also based on the economic reality, (71) the Council did not go beyond its implementing power by adopting the third subparagraph.

87. In the same vein, the VAT Committee agreed 'unanimously' in its guidelines (72) that a supplier in the chain cannot, contrary to the facts and relevant legal requirements, be entitled to decide that he or she is not taking part in the supply and that therefore he or she is not covered by Article 9a. Here, it is on the basis of the facts concerning the actual position of the intermediary in the chain of transactions that the third subparagraph adopts an irrebuttable presumption, with a view to taking the economic reality into account. Thus, where a taxable person takes part in the supply of services, contractual terms and conditions which provide that he or she is not the supplier of services cannot apply.

88. The fourth category of arguments, already mentioned by Fenix in relation to the first subparagraph, concerns the fact that, by virtue of the presumption established in the third subparagraph, the intermediary is deemed to be acting in his or her own name but on behalf of another person, even if the agency is manifest and the identity of the principal is known. Fenix claims that, in such a situation, the intermediary should not be treated as if he or she were making or receiving a supply of services.

89. In that regard, it should be recalled that, in accordance with the case-law of the Court, since it is specified in Article 28 of the VAT Directive that the taxable person must act 'on behalf of another person', there must be an agreement between the commission agent and the principal for the purpose of granting the agency in performance of which the commission agent acts, on behalf of the principal, in the supply of services. (73) As the Commission noted, supply chains are often long and can stretch across borders. (74) In those circumstances, the view should be taken that, 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, as Fenix claims in relation to the case in the main proceedings, appears to me to be insufficient to consider the third subparagraph, as such, to be invalid.

(d) Further considerations

90. According to the referring court, Article 9a is far more extensive than the proposal for a Regulation presented by the Commission, (75) which stated, in relation to Article 9a, that where the broadcasting or electronic services of a service provider are supplied through the telecommunications network, an interface or a portal such as a marketplace for applications belonging to an intermediary or a third party intervening in the supply, the intermediary or the third party is, for the application of Article 28 of the VAT Directive, to be presumed to be acting in their own name but on behalf of the service provider 'unless, in relation to

the final consumer, the service provider is explicitly indicated as the supplier'. It follows from that proposal that the presumption should apply 'unless otherwise stated', unlike Article 9a as it was adopted.

91. That court works on the assumption that the proposal constitutes an act to implement Article 28 of the VAT Directive, for the purposes of Article 291(2) TFEU. However, first, I would point out that the same proposal establishes, just like Article 9a itself, the *presumption* that, in relation to the services concerned, the intermediary acts in his or her own name but on behalf of a service provider. Accordingly, Article 9a is consistent with the proposal for a Regulation presented by the Commission. Second, under that proposal, that presumption is rebutted where the service provider is explicitly indicated as the supplier. Article 9a is based on the same logic and details the circumstances in which the presumption may be rebutted. Thus, in my view, there is no fundamental difference in approach between the text of the proposal for a Regulation and Article 9a as it was adopted.

92. The referring court also makes reference to the proposal for a Directive presented by the Commission on 1 December 2016, (76) intended to amend the wording of Article 28 of the VAT Directive, which allegedly supports the argument that the validity of Article 9a is open to debate. In that regard, it is important to note that the Commission proposed to amend Article 28 of that directive as follows: 'Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, *including cases where a telecommunications network, an interface or a portal is used for that purpose*, he shall be deemed to have received and supplied those services himself.' (77) As the Council pointed out in its written observations, that proposal was deemed superfluous because Article 28 of the directive is a general provision that applies to all types of services, including electronic services. In any case, I fail to see how the proposal could be regarded as supporting the invalidity of Article 9a.

93. In conclusion, I am of the view that that article is of a technical nature and that its adoption did not require political choices falling within the responsibilities particular to the EU legislature. The article provides further detail in the area of e-commerce in relation to the application of Article 28 of the VAT Directive, without supplementing or amending it, even as to its non-essential elements.

94. In the alternative, the Government of the United Kingdom argues that, if the Court were to consider that Article 9a(1) is invalid, the temporal effects of the forthcoming judgment should be limited. I would like to make the following comments in that regard.

95. According to settled case-law, where it is justified by overriding considerations of legal certainty, the second paragraph of Article 264 TFEU, which is also applicable by analogy to a reference under Article 267 TFEU for a preliminary ruling on the validity of acts of the European Union, confers on the Court a discretion to decide, in each particular case, which specific effects of the act in question must be regarded as definitive. (78) Thus, the Court has exercised the possibility of limiting the temporal effect of a declaration that an EU measure is invalid in the case where overriding considerations of legal certainty involving all the interests, public as well as private, at stake in the cases concerned precluded the calling into question of the charging or payment of sums of money effected on the basis of that measure in respect of the period prior to the date of the judgment. (79)

96. In the present case, the Government of the United Kingdom contends that overriding considerations of legal certainty justify maintaining all the legal effects of Article 9a, which has been applicable in the European Union since 1 January 2015, until the date of the forthcoming judgment. A declaration that that article is invalid would be likely to have serious economic repercussions given, in particular, the significant number of online transactions made between the undertakings and the final consumers, even though the VAT was declared, paid and collected in good faith on the basis of that article, which was regarded as being legitimately in force. That government considers that the tax surpluses declared or paid between 2015 and 2020 liable to be the subject of reimbursements could reach a sum of 2.7 thousand million pounds sterling (GBP) (approximately EUR 3.215 thousand million) in the United Kingdom. Moreover, that government states that limiting the temporal effects of the forthcoming judgment is justified on the ground of invalidity, that is, the error committed vis-à-vis the legal basis of the contested act. In its view, that limitation must apply to all persons and for all purposes, and an exception must not be made in favour of Fenix or any

other person who has lodged an appeal by raising the invalidity of Article 9a before the date of the Court's judgment.

97. In the light of the arguments put forward by the Government of the United Kingdom and in view of the serious repercussions on the significant number of legal relationships liable to occur, if the Court holds that Article 9a is invalid, the temporal effects of the forthcoming judgment should, in my view, be limited. Furthermore, it is for the Court, where it makes use of the possibility of limiting the effect on past events of a declaration in preliminary ruling proceedings that an EU act is invalid, to decide whether an exception to that temporal limitation of the effect of its judgment may be made in favour of the party to the main proceedings which brought the action before the national court against the national measures implementing the EU act, or whether, conversely, a declaration of invalidity of the EU act applicable only to the future is an adequate remedy even for that party. (80) Here, since Fenix raised the invalidity of Article 9a before the referring court, I am of the view that, in respect of that company, the temporal effects of the fortchoming judgment should not be limited. (81)

98. Having regard to all that has been set out in this Opinion, it is my view that, in adopting Article 9a, the Council did not go beyond the implementing power conferred on it by Article 291(2) TFEU and Article 397 of the VAT Directive, in relation to Article 28 of that directive, and that, therefore, Article 9a is valid.

V. Conclusion

99. In the light of the foregoing considerations, I propose that the Court answer the question referred by the First-tier Tribunal (Tax Chamber) (United Kingdom) for a preliminary ruling as follows:

Examination of the question referred for a preliminary ruling has revealed nothing capable of affecting the validity of 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, as inserted by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 amending Implementing Regulation No 282/2011.

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1 Original language: French.

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2 Council Implementing Regulation of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1).

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3 Council Implementing Regulation of 7 October 2013 amending Implementing Regulation No 282/2011 (OJ 2013 L 284, p. 1).

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4 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), as amended by Council Directive (EU) 2017/2455 of 5 December 2017 (OJ 2017 L 348, p. 7; 'the VAT Directive').

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5 See, inter alia, the document produced by the Organisation for Economic Co-operation and Development (OECD) entitled *The role of digital platforms in the collection of VAT/GST on online sales*, presented for consideration at the fifth meeting of the Global Forum on VAT, March 2009, which can be consulted at the following address: https://www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf.

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6 The referring court makes reference to the Communication from the Commission to the European Parliament and the Council of 9 December 2009 – Implementation of Article 290 TFEU (COM(2009) 673 final), p. 4.

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7 Proposal for a Council Regulation amending Implementing Regulation (EU) No 282/2011 as regards the place of supply of services of 18 December 2012 (COM(2012) 763 final), p. 14.

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8 The referring court refers in this regard to VAT Committee Working Paper No 885, taxud.c.1(2015)4659331, 9 October 2015, p. 4. This document can be consulted at the following address: https://circabc.europa.eu/sd/a/ab683366-67b5-4fee-b0a8-9c3eab0e713d/885%20-%20VAT%202015%20-%20Harmonised%20application%20of%20the%20presumption.pdf. The VAT Committee is an advisory committee established by Article 398 of the VAT Directive, whose guidelines, while not binding, nevertheless constitute an aid in interpreting that directive (see judgment of 15 April 2021, *SK Telecom*, C 593/19, EU:C:2021:281, paragraph 48 and the case-law cited).

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9 This report, produced by the company Deloitte, consisted of three lots, Lot 3 of which, dated November 2016, was entitled 'Assessment of the implementation of the 2015 place of supply rules and the Mini-One Stop Shop' and can be consulted, in English, at the following address: https://ec.europa.eu/taxation_customs/system/files/2016-12/vat_aspects_cross-border_e-commerce_final_report_lot3.pdf.

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10 Proposal for a Council Directive amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods (COM(2016) 757 final).

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11 Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'). This directive was repealed and replaced by the VAT Directive. The provisions of Article 28 of the VAT Directive are identical to those of Article 6(4) of the Sixth Directive. The latter article appeared in the initial version of the Sixth Directive and was never amended.

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12 Article 86 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2019 C 384 I, p. 1) provides, in paragraph 2 thereof, that the Court is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period. Under Article 126 of that agreement, that period ended on 31 December 2020. In addition, it also follows from Article 86(3) of the Agreement that a request for a preliminary ruling is to be considered as having been made, within the meaning of paragraph 2 of that article, on the date on which the document initiating the proceedings has been registered by the Registry of the Court of Justice. In the present case, the request for a preliminary ruling was registered by the Registry of the Court on 22 December 2020, that is, before the end of the transition period.

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13 See, in this regard, judgment of 18 March 2014, *Commission* v *Parliament and Council* (C 427/12, EU:C:2014:170, paragraph 36). On the distinction between delegated powers and implementing powers in the context of the Treaty of Lisbon, see, inter alia, Craig, P., 'Delegated Acts, Implementing Acts and the New Comitology Regulation', *European Law Review*, Vol. 36, No 5, 2011, pp. 671 to 687; Chamon, M., 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty', *Common Market Law Review*, Vol. 53, No 6, 2016, pp. 1501 to 1543.

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14 Judgment of 16 July 2015, *Commission* v *Parliament and Council* (C 88/14, EU:C:2015:499, paragraph 28 and the case-law cited).

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15 Judgment of 17 March 2016, *Parliament* v *Commission* (C 286/14, EU:C:2016:183, paragraph 30 and the case-law cited).

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16 Judgment of 20 December 2017, *Spain* v *Council* (C 521/15, EU:C:2017:982, paragraph 42). As Advocate General Cruz Villalón observed in his Opinion in *Commission* v *Parliament and Council* (C 427/12, EU:C:2013:871, point 50), unlike the case of Article 290 TFEU, the empowering provided for in Article 291(2) TFEU is not triggered merely by a decision of the legislature but by an objective cause: the need for uniform conditions for implementing legally binding EU acts.

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17 Judgment of 18 March 2014, *Commission* v *Parliament and Council* (C 427/12, EU:C:2014:170, paragraph 33).

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18 Judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C 440/14 P, EU:C:2016:128, paragraph 36 and the case-law cited).

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19 Judgments of 15 October 2014, *Parliament* v *Commission* (C 65/13, EU:C:2014:2289, paragraph 44 and the case-law cited), and of 9 June 2016, *Pesce and Others* (C 78/16 and C 79/16, EU:C:2016:428, paragraph 46).

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20 Judgment of 16 July 2015, *Commission* v *Parliament and Council* (C 88/14, EU:C:2015:499, paragraph 30 and the case-law cited).

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21 See judgment of 15 October 2014, *Parliament* v *Commission* (C 65/13, EU:C:2014:2289, paragraphs 45 and 46).

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22 Pursuant to Article 291(3) TFEU, the Commission's implementing powers are subject to the control of the Member States by means of the procedure provided for in Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

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23 Judgment of 1 December 2015, *Parliament and Commission* v *Council* (C 124/13 and C 125/13, EU:C:2015:790, paragraph 53 and the case-law cited).

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24 See, to that effect, judgment of 1 March 2016, *National Iranian Oil Company* v *Council* (C 440/14 P, EU:C:2016:128, paragraph 49 and the case-law cited).

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25 Article 397 of the VAT Directive is worded identically to Article 29a of the Sixth Directive, as inserted into that directive by Council Directive 2004/7/EC of 20 January 2004 amending Directive 77/388 (OJ 2004 L 27, p. 44). Recitals 7 and 8 of the latter directive state that, in the absence of any mechanism for the adoption of binding measures to govern the implementation of the Sixth Directive, the application of rules laid down in

that directive varies from one Member State to another, and that, in order to improve the functioning of the internal market, it is essential to ensure more uniform application of the current VAT system. The introduction of a procedure for the adoption of measures to ensure the correct implementation of existing rules would represent a major step forward in that respect. Recital 61 of the VAT Directive is based on the same considerations.

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26 The Council stated, in recitals 11 and 12 of Directive 2004/7, that the impact of implementing measures on the budgets of the Member States justifies it reserving the right to exercise powers for the implementation of the Sixth Directive to itself. Those points are reproduced in recital 63 of the VAT Directive.

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27 See footnote 10 to this Opinion.

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28 Council Directive of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods (OJ 2017 L 348, p. 7).

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29 See judgment of 10 September 2015, *Parliament* v *Council* (C 363/14, EU:C:2015:579, paragraph 46 and the case-law cited).

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30 See, to that effect, Opinion of Advocate General Jääskinen in *United Kingdom* v *Parliament and Council* (C 270/12, EU:C:2013:562, point 78). See also Englisch, J., '"Detailing" EU Legislation through Implementing Acts', *Yearbook of European Law*, 2021, Vol. 40, No 1, pp. 111 to 145.

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31 Opinion in *Commission* v *Parliament and Council* (C 427/12, EU:C:2013:871, points 62 and 63).

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32 See, inter alia, judgments of the Social Chamber of 23 February 2000, No 98-15.598, and of the Third Civil Chamber of 27 February 2002, No 00-17.902.

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33 See Ritleng, D., 'The Dividing Line between Delegated and Implementing Acts: The Court of Justice Sidesteps the Difficulty in *Commission* v *Parliament and Council (Biocides)*', *Common Market Law Review*, Vol. 52, No 1, 2015, pp. 243 to 257, in particular p. 251.

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34 See Lenaerts, K., and Van Nuffel, P., *EU Constitutional Law*, Oxford University Press, Oxford, 2021, No 18.013.

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35 In the judgment of 17 March 2016, *Parliament* v *Commission* (C 286/14, EU:C:2016:183, paragraph 41), the Court stated that, in the context of Article 290(1) TFEU, the delegation of a power to 'supplement' a legislative act is meant only to authorise the Commission to flesh out that act and that, where the Commission exercises such a power, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified. In that regard, I note, first, that that case-law was established in the context of 'delegated powers' within the meaning of Article 290(1) TFEU and not 'implementing powers', as referred to in Article 291(2) TFEU. Second, in my view, the approach adopted could be regarded as being too restrictive to the extent that it may render effectively meaningless the concept of 'providing further detail' in relation to the legislative act under Article 291(2) TFEU.

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36 Judgment of 2 June 2022, *SR (Translation costs in civil proceedings)* (C 196/21, EU:C:2022:427, paragraph 25 and the case-law cited).

37 See, in relation to this article, Terra, B., and Kajus, J., '10.4.5 Undisclosed agent', *A Guide to the European VAT Directives 2022: Introduction to European VAT*, Vol. 1, IBFD, Amsterdam, 2022.

38 Judgments in *Henfling and Others*, paragraph 35, and of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraph 49).

39 Judgment in *Henfling and Others*, paragraph 35.

40 See judgment of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraph 50). Under Article 14(2)(c) of the VAT Directive, the transfer of goods pursuant to a contract under which commission is payable on purchase or sale is to be regarded as a supply of goods.

41 See, to that effect, judgment of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraph 51).

42 See, to that effect, judgment of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraph 54).

43 See judgments in *Henfling and Others*, paragraph 36, and of 17 January 2013, *BGŻ Leasing* (C 224/11, EU:C:2013:15, paragraph 64).

44 See judgments of 4 May 2017, *Commission* v *Luxembourg* (C 274/15, EU:C:2017:333, paragraph 87), and of 21 January 2021, *UCMR – ADA* (C 501/19, EU:C:2021:50, paragraph 49). Conversely, if the supply of services in which the commission agent takes part is exempt from VAT, that exemption applies likewise to the legal relationship between the principal and the commission agent (see judgment in *Henfling and Others*, paragraph 36).

45 See, inter alia, Berlin, D., *Directive TVA 2006/112: commentaire article par article*, Bruylant, Brussels, 2020, commentary on Article 28 of the VAT Directive, p. 228. Since the case-law of the Court refers to a 'commission agent', I will use that term to designate the intermediary in the chain of transactions.

46 This means that the client does not know the identity of the principal.

47 Under Article 46 of the VAT Directive, as amended by Council Directive 2008/8/EC of 12 February 2008 (OJ 2008 L 44, p. 11), 'the place of supply of services rendered to a non-taxable person by an intermediary acting in the name and on behalf of another person shall be the place where the underlying transaction is supplied in accordance with this Directive'.

48 Judgment in *Henfling and Others*, paragraph 38.

49 See, inter alia, Claessens, S., and Corbett, T., 'Intermediated Delivery and Third-Party Billing: Implications for the Operation of VAT Systems around the World', in Lang, M., and Lejeune, I., *VAT/GST in a Global Digital Economy*, Wolters Kluwer, Alphen on the Rhine, 2015, pp. 59 to 78. See also, in the same work, Nguyen, D., 'Comments on the Discussion of Article 9a of Implementing Regulation 1042/2013', pp. 79 to 82.

50 See footnote 11 to this Opinion.

51 See point 53 of this Opinion.

52 See, to that effect, judgment of 18 March 2014, *Commission* v *Parliament and Council* (C 427/12, EU:C:2014:170, paragraph 40).

53 Document C – taxud.c.1(2012)1410604 – 709, which can be consulted at the following address: https://ec.europa.eu/taxation_customs/system/files/2022-04/guidelines-vat-committee-meetings_en.pdf, p. 155.

54 See document entitled 'Explanatory notes on the EU VAT changes to the place of supply of telecommunications, broadcasting and electronic services that enter into force in 2015 (Council Implementing Regulation (EU) No 1042/2013)' ('the Explanatory Notes'), published on 3 April 2014 and which can be consulted at the following address: https://ec.europa.eu/taxation_customs/business/vat/telecommunications-broadcasting-electronic-services/sites/default/files/explanatory_notes_2015_en_0.pdf.

55 Point 3.2 of the Explanatory Notes.

56 Point 3.3 of the Explanatory Notes.

57 As recital 1 of Implementing Regulation No 1042/2013 states, '[the VAT Directive] provides that as from 1 January 2015, all telecommunications, radio and television broadcasting and electronically supplied services supplied to a non-taxable person are to be taxed in the Member State in which the customer is established, has his permanent address or usually resides, regardless of where the taxable person supplying those services is established. Most other services supplied to a non-taxable person continue to be taxed in the Member State in which the supplier is established'.

58 See judgment of 18 June 2020, *KrakVet Marek Batko* (C 276/18, EU:C:2020:485, paragraph 50).

59 See point 33 of this Opinion.

60 See point 45 of this Opinion.

61 See footnote 8 to this Opinion.

62 See footnote 9 to this Opinion.

63 See footnote 10 to this Opinion.

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64 See, inter alia, Weidmann, M., 'The New EU VAT Rules on the Place of Supply of B2C E-Services: Practical Consequences The German Example', *EC Tax Review*, Vol. 24, No 2, 2015, pp. 105 to 118, in particular p. 113; Henkow, O., 'Acting in One's Own Name on Someone Else's Behalf: A Changing Concept?', in Egholm Elgaard, K.K., Ramsdahl Jensen, D., and Stensgaard, H. (eds), *Momsloven 50 år – festskrift i anledning af 50 års jubilæet for Danmarks første momslov*, Ex Tuto Publishing A/S, Copenhagen, 2017, pp. 241 to 254.

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65 See, inter alia, judgment of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraph 48 and the case-law cited).

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66 In its written observations, the Commission stated that the judgment in *Henfling and Others* demonstrated the need to adopt a uniform rule to clarify the situation in which an intermediary acts in its own name; this was achieved by the adoption of Article 9a.

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67 According to the definition in the *Le Petit Robert* dictionary, 2011, 'taking part' can be defined as intervening as between two or more people with a view to bringing them together, in order to facilitate the conclusion of matters of interest to them.

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68 According to O. Henkow (p. 251 of his article, see footnote 64 to this Opinion), the taxable person's authorisation of the charge to the customer, without taking any further action, seems to go further than what the Court set out in paragraph 43 of the judgment in *Henfling and Others*. However, first of all, that judgment does state the factors that must be taken into account 'in particular', meaning that they are not the only factors. Next, when that judgment was given, there was no implementing regulation intended to provide further detail as to the application of Article 28 of the VAT Directive. Finally, the EU legislature must be afforded some discretion with a view to providing further detail in relation to the content of that article.

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69 Contrary to Fenix's claim, I take the view, inter alia, that the general terms and conditions of the supply, within the meaning of the third subparagraph, cover the general terms and conditions for use of an online platform, as established by that company.

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70 See also, in this regard, judgment of 20 June 2013, *Newey* (C 653/11, EU:C:2013:409, paragraphs 42 to 46).

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71 See, inter alia, judgment of 3 September 2015, *Fast Bunkering Klaipėda* (C 526/13, EU:C:2015:536).

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72 Guidelines resulting from the 106th meeting of 14 March 2016, Document A -taxud.c.1(2016)3604550 – 904, p. 217, which can be consulted at the following address: https://taxation-customs.ec.europa.eu/system/files/2022-04/guidelines-vat-committee-meetings_en.pdf.

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73 See judgment of 12 November 2020, *ITH Comercial Timişoara* (C 734/19, EU:C:2020:919, paragraphs 51 and 52).

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74 Seer point 62 of this Opinion.

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75 See point 20 of this Opinion.

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76 See footnote 10 to this Opinion.

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77 Emphasis added.

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78 Judgment of 9 February 2017, *Raffinerie Tirlemontoise* (C 585/15, EU:C:2017:105, paragraph 37 and the case-law cited).

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79 Judgment of 9 February 2017, *Raffinerie Tirlemontoise* (C 585/15, EU:C:2017:105, paragraph 38 and the case-law cited).

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80 See judgment of 28 April 2016, *Borealis Polyolefine and Others* (C 191/14, C 192/14, C 295/14, C 389/14 and C 391/14 to C 393/14, EU:C:2016:311, paragraph 108 and the case-law cited).

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81 See, to that effect, judgment of 26 April 1994, *Roquette Frères* (C 228/92, EU:C:1994:168, paragraph 28).